The Burger Court Opinion Writing Database

Erznoznik v. Jacksonville

422 U.S. 205 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: JUN 18 1975

Recirculated: _____

Re: 73-1942 - Erznoznik v. City of Jacksonville

MR. CHIEF JUSTICE BURGER, dissenting.

Although the Court pays lip service to the proposition that "each case ultimately must depend on its own facts," ante, at 4, it strikes down Jacksonville City Code § 330.313 by a mechanical application of "general principles" distilled from cases having little to do with either this case or each other. Because I can accept neither that approach nor its result, I dissent.

The Court's analysis begins and ends with the broad proposition that, regardless of the circumstances, government may not regulate any form of "communicative" activity on the basis of its content. Absent certain "special circumstances," we are told, the burden falls upon the public to ignore offensive materials rather than upon their purveyor to take steps to shield them from view. Jacksonville's ordinance is of the general type proscribed by the first of these pronouncements and not one of the few permitted by the latter; the Court therefore strikes it down.

stylistic changes throughout.
See pp. 1, 3-6.

To: Mr. Justice [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. Justice [illegible]

From: The Chief Justice

Circulated: _____

2nd DRAFT Recirculated: JUN 18 1975

SUPREME COURT OF THE UNITED STATES

No. 73-1942

Richard Erznoznik, etc., Appellant, *v.* City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

[June —, 1975]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Although the Court pays lip service to the proposition that "each case ultimately must depend on its own facts," *ante,* at 4, it strikes down Jacksonville City Code § 330.313 by a mechanical application of "general principles" distilled from cases having little to do with either this case or each other. Because I can accept neither that approach nor its result, I dissent.

The Court's analysis seems to begin and end with the sweeping proposition that, regardless of the circumstances, government may not regulate any form of "communicative" activity on the basis of its content. Absent certain "special circumstances," we are told, the burden falls upon the public to ignore offensive materials rather than upon their purveyor to take steps to shield them from public view. In four short sentences, *ante,* at 6–7, the Court concludes that Jacksonville's ordinance does not pass muster under its tests, and therefore strikes it down.

None of the cases upon which the Court relies remotely implies that the Court ever intended to establish inexorable limitations upon state power in this area. Many cases upheld the regulation of communicative activity and did not purport to define the limits of the power to

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 22, 1975

Dear Lewis:

Please join me in 73-1942,
ERZNOZNIK v. JACKSONVILLE.

WOD/ep

WILLIAM O. DOUGLAS

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Douglas

SUPREME COURT OF THE UNITED STATES

Circulated: 5-23

No. 73-1942

Recirculated:

Richard Erznoznik, etc., Appellant, *v.* City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

[May —, 1975]

MR. JUSTICE DOUGLAS, concurring.

I join wholeheartedly in the Court's view that the ordinance in issue here is fatally overinclusive in some respects and fatally underinclusive in others. I do not doubt that under proper circumstances, a narrowly drawn ordinance could be utilized within constitutional boundaries to protect the interests of captive audiences [1] or to promote highway safety. In these days of heavy traffic, it is reasonable to attempt to remove all distractions that might increase accidents. These legitimate interests cannot, however, justify attempts to discriminate among movies on the basis of their content—a "pure" movie is apt to be just as distracting to drivers as an "impure" one, and to be just as intrusive upon the privacy of an unwilling but captive audience. Any ordinance which regulates movies on the basis of content, whether by an obscenity standard [2] or by some other criterion, impermissibly intrudes upon the free speech rights guaranteed by the First and Fourteenth Amendments.

[1] See *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 305 (1974) (DOUGLAS, J., concurring in judgment); *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 467 (1952) (DOUGLAS, J., dissenting).

[2] I adhere to my view that any state or federal regulation of obscenity is prohibited by the Constitution. *Roth* v. *United States*, 354 U. S. 476, 508–514 (1957); *Miller* v. *California*, 413 U. S. 15, 42–47 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70–73 (1973).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 3, 1975

RE: No. 73-1942 Erznoznik v. City of Jacksonville

Dear Chief:

This is to confirm that I have assigned the opinion in the above to Lewis.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 2, 1975

RE: No. 73-1942 Erznoznik, etc. v. City of Jacksonville

Dear Lewis:

I am happy to join your very fine opinion in the above.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 2, 1975

No. 73-1942 - Erznoznik v. Jacksonville

Dear Lewis,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 6-17-75

Recirculated: _____

No. 73-1942

Richard Erznoznik, etc., Appellant, v. City of Jacksonville.) On Appeal from the District Court of Appeal of Florida for the First District.

Mr. Justice White, dissenting.

The Court asserts that the State may shield the public from selected types of speech and allegedly expressive conduct, such as nudity, only when the speaker or actor invades the privacy of the home or where the degree of captivity of an unwilling listener is such that it is impractical for him to avoid the exposure by averting his eyes. The Court concludes: "that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content." Ante, p. ____. If this broadside is to be taken literally, the State may not forbid "expressive" nudity on the public streets, in the public parks or any other public place since other persons in those places at that time have a "limited privacy interest" and may merely look the other way.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 2, 1975

Re: No. 73-1942 -- Richard Erznoznik v. City of Jacksonville

Dear Lewis:

Please join me.

Sincerely,

T. M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 11, 1975

Re: No. 73-1942 - Erznoznik v. City of Jacksonville

Dear Lewis:

Please join me.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 1, 1975

149-5

No. 73-1942 Erznoznik v. Jacksonville

Dear Chief:

As indicated at the Conference on yesterday, I was prepared to vote - and did vote tentatively - to sustain the Jacksonville ordinance. The discussion at Conference prompted me to reexamine my position. I will now vote to reverse.

This is not an obscenity case. I had viewed it as a "time-and-place" type of regulation of drive-in theaters, a type ordinance which would be entirely valid if properly drawn. The difficulty with the Jacksonville ordinance, as I now view it, is that its purpose is ambiguous.

If designed to prevent the "nuisance" of traffic delay and accidents, the prohibition would not have been limited to exposures of the human body. Persons (and especially teenagers) using public streets and sidewalks would be equally diverted by some of the horror and crime scenes regularly portrayed on the movie screens. Similarly, if the purpose of the ordinance was to protect privacy, it would not have been limited to visibility from public streets or public places. The evidence includes a complaint by a private family because the screen was visible from their residence. Cinecom Theatres v. Fort Wayne, 473 F.2d 1297, 1307 (CA7 1973) is directly in point on the privacy issue.

As the ordinance is neither protective of privacy nor rationally tailored to promote traffic safety, its real purpose seems to be directed only at the exhibition - in public view - of all scenes in which the described areas of the human body may be visible. This, I am now persuaded,

is an impermissible form of censorship, going beyond the obscenity standards applicable to minors as articulated in our cases.

Also, the ordinance has elements of vagueness. The operator of a drive-in theater would have a difficult time deciding how much of a "human female bare breast" could be exposed in a film without subjecting himself to criminal penalty. Conversely, a wide range of discretion would be vested in the prosecutorial authorities.

As I reread the miserable briefs filed by appellant and appellee in this case, and recalled the low quality of the oral argument, I was reminded of the appropriateness of your comments in Chicago last week as to the shockingly low level of advocacy to which we are frequently subjected.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: APR 2 1975

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1942

Richard Erznoznik, etc., Appellant, *v.* City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

[April —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents a challenge to the facial validity of a Jacksonville, Florida, ordinance that prohibits showing films containing nudity by a drive-in movie theater when its screen is visible from a public street or place.

I

Appellant, Richard Erznoznik, is the manager of the University Drive-In Theatre in Jacksonville. On March 13, 1972, he was charged with violating § 330.313 of the municipal code for exhibiting a motion picture, visible from public streets, in which "female buttocks and bare breasts were shown." [1] The ordinance, adopted January 14, 1972, provides:

> "330.313 *Drive-In Theaters, Films Visible From Public Streets or Public Places.* It shall be unlawful

[1] The movie, "Class of '74," had been rated "R" by the Motion Picture Association of America. An "R" rating indicates that youths may be admitted only when accompanied by a parent or guardian. See generally Friedman, The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry, 73 Col. L. Rev. 185 (1973). Although there is nothing in the record

Changes 7, 12

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

2nd DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 73–1942

Recirculated: APR 9 1975

Richard Erznoznik, etc., Appellant, *v.* City of Jacksonville.	On Appeal from the District Court of Appeal of Florida for the First District.

[April —, 1975]

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated:

Recirculated: APR 14 1975

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1942

Richard Erznoznik, etc., Appellant, v. City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

[April —, 1975]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 18, 1975

Case Held for No. 73-1942 Erznoznik v. Jacksonville

MEMORANDUM TO THE CONFERENCE:

No. 73-1176 106, Forsyth Corp. v. Bishop

This petition was held for Erznoznik because petitioner had challenged, inter alia, a city ordinance prohibiting an adult movie theatre from locating within 200 yards of a church. Although petitioner pressed this point in district court, it apparently did not raise it on appeal and does not present it in the petition. Accordingly Erznoznik has no bearing on the petition.

The two issues that petitioner does raise pertain to an ordinance vaguely similar to the licensing revocation statute challenged in No. 73-296 Huffman v. Pursue. Petitioner claims that the ordinance effects an unconstitutional prior restraint, and that its procedures are constitutionally inadequate. In view of the fact that petitioner filed the instant complaint in federal court, his state licensing revocation hearing has been stayed. As a result it is not clear whether, if indeed the license is eventually revoked, it will be on the basis of the zoning provision concerning adult theatres or on the basis of the previous showing of obscene movies. Nor is it clear from the petition what procedures will be used to process the case at the administrative hearing and on judicial review.

With the case in this tentative and very confused posture, I will vote to deny.

L.F.P.

L.F.P., Jr.

SS

Wm. Douglas
OCT 74

✓

See pp. 6-7

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: _____

Recirculated: JUN 1 0 1975

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–1942

Richard Erznoznik, etc., Appellant, *v.* City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

[April —, 1975]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 16, 1975

Re: No. 73-1942 - Erzonznik v. City of Jacksonville

Dear Chief:

Please join me in your dissent in this case.

Sincerely,

WHR

The Chief Justice

Copies to the Conference