

The Burger Court Opinion Writing Database

Pinkus v. United States

436 U.S. 293 (1978)

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



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

From: The Chief Justice

Circulated: **MAY 5 1978**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-39

William Pinkus, dba "Rosslyn News
Company" and "Kamera,"
Petitioner,
v.
United States.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[April —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to decide whether the court's instructions in a trial for mailing obscene materials prior to 1973, and therefore tried under the *Roth-Memoirs* standards, could properly include children and sensitive persons within the definition of the community by whose standards obscenity is to be judged. We are also asked to determine whether the evidence supported a charge that members of deviant sexual groups may be considered in determining whether the materials appealed to prurient interest in sex; whether a charge of pandering was proper in light of the evidence; and whether comparison evidence proffered by petitioner should have been admitted on the issue of contemporary community standards.

Petitioner was convicted after a jury trial in United States District Court on 11 counts, charging that he had mailed obscene materials and advertising brochures for obscene materials in violation of 18 U. S. C. § 1461.¹ On appeal, his conviction

¹ 18 U. S. C. § 1461 (as amended) declares, in essence, that obscene materials are nonmailable and the postal service may not be used to convey them. It provides for fines and imprisonment upon conviction for its violation.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
THE CHIEF JUSTICE

May 9, 1978

Dear Byron, Harry, Lewis and Bill:

Re: 77-39 Pinkus v. United States

At the suggestion of Bill Rehnquist, and in the hope of persuading Lewis to join the opinion, I have thought to change the basis upon which we reverse in this case to our supervisory power. This would standardize the practice in the federal courts and simultaneously signal the state courts that it would be wiser to avoid "children" instruction in similar cases. But we would not have unnecessarily "constitutionalized" the instruction. If Byron and Harry would agree and perhaps Lewis could see his way to join, I would be prepared to use the following on page 4 in place of the last sentence of the first full paragraph:

"Since this is a federal prosecution under an Act of Congress, we elect to take this occasion to make clear that children are not to be included for these purposes as part of the 'community' as that term relates to the 'obscene materials' proscribed by 18 U.S.C. § 1461. Cf., Cupp v. Naughten, 414 U.S. 141, 146 (1973)."

While I am writing, I propose the following two unrelated changes to the opinion:

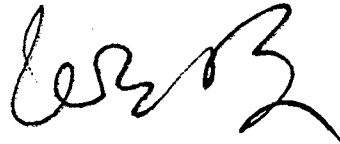
- (a) Last line of text on page 4: substitute
"average" for "common denominator."

I believe "average" more appropriately conveys our meaning.

(b) Delete Footnote 7.

A recitation of this instruction is not necessary to our disposition of the pandering argument.

Regards,

A handwritten signature in dark ink, appearing to be 'WRB' or similar, written in a cursive style.

Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

CHANGES AS MARKED:

4,5,10

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

From: The Chief Justice

Circulated: _____

Recirculated: MAY 15 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-39

William Pinkus, dba "Rosslyn News Company" and "Kamera," Petitioner, v. United States.	} On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
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[April —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to decide whether the court's instructions in a trial for mailing obscene materials prior to 1973, and therefore tried under the *Roth-Memoirs* standards, could properly include children and sensitive persons within the definition of the community by whose standards obscenity is to be judged. We are also asked to determine whether the evidence supported a charge that members of deviant sexual groups may be considered in determining whether the materials appealed to prurient interest in sex; whether a charge of pandering was proper in light of the evidence; and whether comparison evidence proffered by petitioner should have been admitted on the issue of contemporary community standards.

Petitioner was convicted after a jury trial in United States District Court on 11 counts, charging that he had mailed obscene materials and advertising brochures for obscene materials in violation of 18 U. S. C. § 1461.¹ On appeal, his conviction

¹ 18 U. S. C. § 1461 (as amended) declares, in essence, that obscene materials are nonmailable and the postal service may not be used to convey them. It provides for fines and imprisonment upon conviction for its violation.

W B
Please see me
in your dissent
M

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

From: Mr. Justice Brennan

Circulated: 10/26/77

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

William Pinkus v. United States

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

No. 77-39. Decided November , 1977

MR. JUSTICE BRENNAN, dissenting.

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 11 counts of mailing obscene material, in violation of 18 U.S.C. 1461. The Court of Appeals for the Ninth Circuit affirmed, 551 F.2d 1155.

I would reverse. I adhere to the view that this statute is "clearly overbroad and unconstitutional on its face," see e.g., Millican v. United States, 418 U.S. 947, 948 (1974), quoting United States v. Orito, 413 U.S. 139, 148 (1973) (BRENNAN, J., dissenting). I therefore would grant certiorari and reverse.

COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: Mr. Justice Brennan

Circulated: 8 MAY 1978

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-39

William Pinkus, dba "Rosslyn)	
News Company" and Kamara,")	On Writ of Certiorari
Petitioner,)	to the United States
)	Court of Appeals for
v.)	the Ninth Circuit
)	
United States)	

MR. JUSTICE BRENNAN.

I concur in the judgment reversing petitioner's conviction. However, because I adhere to the view that this statute is "clearly overbroad and unconstitutional on its face," see e.g., Millican v. United States, 418 U.S. 947, 948 (1974) (BRENNAN, J., dissenting), quoting United States v. Orito, 413 U.S. 139, 148 (1973) (BRENNAN, J., dissenting), I would not remand for further consideration but rather with direction to dismiss the indictment.

~~WJB~~
WJB
Please join me
JMM

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Roberts
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 5/9/78

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-39

William Pinkus, dba "Rosslyn News
Company" and "Kamera,"
Petitioner,
v.
United States.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[May —, 1978]

MR JUSTICE BRENNAN.

I concur in the judgment reversing petitioner's conviction. However, because I adhere to the view that this statute is "clearly overbroad and unconstitutional on its face," see, *e. g.*, *Millican v. United States*, 418 U. S. 947, 948 (1974) (BRENNAN, J., dissenting), quoting *United States v. Orito*, 413 U. S. 139, 148 (1973) (BRENNAN, J., dissenting), I would not remand for further consideration but rather with direction to dismiss the indictment.

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 11 MAY 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-39

William Pinkus, dba "Rosslyn News
Company" and "Kamera,"
Petitioner,
v.
United States.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[May —, 1978]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART
and MR. JUSTICE MARSHALL join.

I concur in the judgment reversing petitioner's conviction.
However, because I adhere to the view that this statute is
"clearly overbroad and unconstitutional on its face," see,
e. g., *Millican v. United States*, 418 U. S. 947, 948 (1974)
(BRENNAN, J., dissenting), quoting *United States v. Orito*,
413 U. S. 139, 148 (1973) (BRENNAN, J., dissenting), I would
not remand for further consideration but rather with direction
to dismiss the indictment.

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

CHAMBERS OF
JUSTICE POTTER STEWART

October 26, 1977

77-39 - Pinkus v. United States

Dear Bill,

Please add my name to your dissenting
opinion.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 8, 1978

No. 77-39 -- Pinkus v. U. S.

Dear Chief,

I would appreciate your adding the following at the foot of your opinion in this case:

MR. JUSTICE STEWART concurs in the judgment reversing the petitioner's conviction.

Sincerely yours,

P.S.
✓

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 11, 1978

Re: No. 77-39, Pinkus v. United States

Dear Bill,

Please add my name to your separate
opinion in this case.

Sincerely yours,

P.S.
/

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 11, 1978

Re: No. 77-39, Pinkus v. United States

Dear Chief,

Having joined Bill Brennan's separate opinion in this case, may I ask you please to disregard my note of May 8?

Sincerely yours,

P.S.
/

The Chief Justice

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

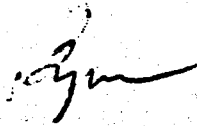
May 8, 1978

Re: 77-39 - Pinkus v. United States

Dear Chief:

I agree.

Sincerely yours,



The Chief Justice

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 26, 1977

Re: No. 77-39, William Pinkus v. United States

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 10, 1978

Re: No. 77-39 - Pinkus v. United States

Dear Bill:

Please join me.

Sincerely,

TM
T.M.

Mr. Justice Brennan

cc: The Conference

RECEIVED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 8, 1978

Re: No. 77-39 - Pinkus v. United States

Dear Chief:

Please join me.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

H.A. 3

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 10, 1978

Re: No. 77-39 - Pinkus v. United States

Dear Chief:

What you suggest in your letter of May 9 is all right
with me.

Sincerely,

HAB.

The Chief Justice

cc: Mr. Justice White
Mr. Justice Powell
Mr. Justice Rehnquist

March 9, 1978

No. 77-39 Pinkus v. United States

Dear Bill:

As in Agosto, I think you and I are the only dissenters in this miserable obscenity case.

I think I would be content simply to say, with respect to the claims in the indictment that do not involve the film, that the instructions read as a whole are consistent with our precedents. I have no motivation to write a stirring dissent.

Perhaps we can wait until the Court opinion is circulated and then confer as to what we should do.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 6, 1978

No. 77-39 Pinkus v. United States

Dear Chief:

Please add at the end of your opinion:

Mr. Justice Powell, believing the error identified by the Court was harmless beyond any reasonable doubt, would affirm the judgment below.

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

From: Mr. Justice Powell

Circulated: 15 MAY 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-39

William Pinkus, dba "Rosslyn News
Company" and "Kamera,"
Petitioner,
v.
United States.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[May —, 1978]

MR. JUSTICE POWELL, dissenting.

Although I agree with the Court that in a federal prosecution the instruction as to children should not have been given, on the facts of this case I view the error as harmless beyond a reasonable doubt. I therefore would affirm the judgment of the Court of Appeals.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



March 10, 1978

Re: No. 77-39 - Pinkus v. United States

Dear Lewis:

The suggestion contained in your letter of March 9th, that we confine our dissent to a short "statement" at the end of the Court's opinion, sounds find to me. I will await further suggestions from you after the Court's opinion is circulated.

Sincerely,

Mr. Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



May 10, 1978

Re: No. 77-39 - Pinkus v. United States

Dear Chief:

If your opinion in this case were revised in accordance with the language contained in your letter of May 9th, I would be happy to join it.

Sincerely,

The Chief Justice

Copies to Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

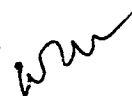
May 16, 1978

Re: No. 77-39 - Pinkus v. United States

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to 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

From: Mr. Justice Stevens

Circulated: MAY 16 1978

Recirculated: _____

77-39 - Pinkus v. United States

MR. JUSTICE STEVENS, concurring.

If the Court were prepared to re-examine this area of the law, I would vote to reverse this conviction with instructions to dismiss the indictment. See Marks v. United States, 430 U.S. 188, 198 (STEVENS, J., concurring and dissenting); Smith v. United States, 431 U.S. 291, 311 (STEVENS, J., dissenting); Splawn v. California, 431 U.S. 595, 602 (STEVENS, J., dissenting); Ward v. Illinois, 431 U.S. 767, 777 (STEVENS, J., dissenting). But my views are not now the law. The opinion that the Chief Justice has written is faithful to the cases on which it relies. For that reason, and because a fifth vote is necessary to dispose of this case, I join his opinion.

✓
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

From: Mr. Justice Stevens

Circulated: _____

Re-circulated: MAY 17 1978

Printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-39

William Pinkus, dba "Rosslyn News
Company" and "Kamera,"
Petitioner,
v.
United States.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[May —, 1978]

MR. JUSTICE STEVENS, concurring.

If the Court were prepared to re-examine this area of the law, I would vote to reverse this conviction with instructions to dismiss the indictment. See *Marks v. United States*, 430 U. S. 188, 198 (STEVENS, J., concurring and dissenting); *Smith v. United States*, 431 U. S. 291, 311 (STEVENS, J., dissenting); *Splawn v. California*, 431 U. S. 595, 602 (STEVENS, J., dissenting); *Ward v. Illinois*, 431 U. S. 767, 777 (STEVENS, J., dissenting). But my views are not now the law. The opinion that THE CHIEF JUSTICE has written is faithful to the cases on which it relies. For that reason, and because a fifth vote is necessary to dispose of this case, I join his opinion.

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