

The Burger Court Opinion Writing Database

Flynt v. Ohio

451 U.S. 619 (1981)

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



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

CHAMBERS OF
THE CHIEF JUSTICE

April 6, 1981

Re: 80-420 - Flynt v. Ohio

Dear Potter:

You are entirely correct. I will reassign.

Regards,

A handwritten signature in cursive script, appearing to read 'W. B. Stewart', is written over the typed word 'Regards,'.

Justice Stewart

Copies to the Conference

M

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

CHAMBERS OF
THE CHIEF JUSTICE

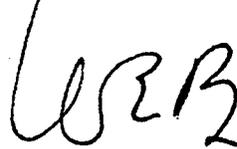
April 6, 1981

Re: 80-420 - Flynt v. Ohio

Dear Byron:

Will you undertake a Per Curiam dismissing this case for want of a final judgment? In making the assignment, I erroneously attributed your position, which has six votes, to Potter.

Regards,



Justice White

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

April 16, 1981

Re: 80-420 - Flynt v. Ohio

Dear Byron:

I join.

Regards,



Justice White

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 6, 1981

Re: No. 80-420, Flynt v. Ohio

Dear Chief,

This case was mistakenly assigned to me for a per curiam. I do not believe that the Court should dismiss this case for want of a final judgment. On the contrary, I believe that the trial court was correct in dismissing the indictment (although for the wrong reasons), and would, accordingly, reverse.

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

April 16, 1981

Re: No. 80-420, Flynt v. Ohio

Dear Bill,

Enclosed herewith is a copy of a short
dissenting opinion I have sent to the printer.

Sincerely yours,

P.S.
/

Justice Brennan

o Brennan & C

Re: No. 80-420, Flynt v. Ohio

Justice Stewart, dissenting.

I believe that a criminal trial of the petitioner under this Ohio obscenity law will violate the Constitution of the United States. See e.g., Wood v. Georgia, ___ U.S. ___, ___, ___ (separate opinion of Justice Brennan) (separate opinion of Justice Stewart); Sewell v. Georgia, 435 U.S. 982, 988 (dissenting opinion); Splawn v. California, 431 U.S. 595, 602 (dissenting opinion). It is clear to me, therefore, that "identifiable . . . constitutional policy" will be "undermined by the continuation of the litigation in the state courts." ante p. ___.

Accordingly, I think that under the very criteria discussed in the opinion of the Court, the judgment before us is "final for jurisdictional purposes." ante p. ___. Believing that the Ohio trial court acted

attached to PS 4/10/81 to WB

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

From: Mr. Justice Stewart

Circulated: 17 APR 1981

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-420

Larry C. Flynt, Jimmy R. Flynt
and Althea Leasure Flynt,
Petitioners,
v.
State of Ohio.

On Writ of Certiorari to
the Supreme Court of
Ohio.

[April —, 1981]

JUSTICE STEWART, with whom JUSTICE BRENNAN joins,
dissenting.

I believe that a criminal trial of the petitioner under this Ohio obscenity law will violate the Constitution of the United States. See, e. g., *Wood v. Georgia*, — U. S. —, —, — (separate opinion of JUSTICE BRENNAN) (separate opinion of JUSTICE STEWART); *Sewell v. Georgia*, 435 U. S. 982, 988 (dissenting opinion); *Splawn v. California*, 431 U. S. 595, 602 (dissenting opinion). It is clear to me, therefore, that “identifiable . . . constitutional policy” will be “undermined by the continuation of the litigation in the state courts.” *Ante*, p. —.

Accordingly, I think that under the very criteria discussed in the opinion of the Court, the judgment before us is “final for jurisdictional purposes.” *Ante*, p. —. Believing that the Ohio trial court acted correctly in dismissing the complaints, and that the state appellate courts were in error in overturning that dismissal, I would reverse the judgment.

PS
Please join me in
your dissent
AS

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

From: Mr. Justice Stewart

2nd DRAFT

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SUPREME COURT OF THE UNITED STATES

No. 80-420

Larry C. Flynt, Jimmy R. Flynt
and Althea Leasure Flynt,
Petitioners,
v.
State of Ohio.

On Writ of Certiorari to
the Supreme Court of
Ohio.

[April —, 1981]

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

I believe that a criminal trial of the petitioner under this Ohio obscenity law will violate the Constitution of the United States. See, e. g., *Wood v. Georgia*, — U. S. —, —, — (separate opinion of JUSTICE BRENNAN) (separate opinion of JUSTICE STEWART); *Sewell v. Georgia*, 435 U. S. 982, 988 (dissenting opinion); *Splawn v. California*, 431 U. S. 595, 602 (dissenting opinion). It is clear to me, therefore, that “identifiable . . . constitutional policy” will be “undermined by the continuation of the litigation in the state courts.” *Ante*, p. —.

Accordingly, I think that under the very criteria discussed in the opinion of the Court, the judgment before us is “final for jurisdictional purposes.” *Ante*, p. —. Believing that the Ohio trial court acted correctly in dismissing the complaints, and that the state appellate courts were in error in overturning that dismissal, I would reverse the judgment.

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

From: Mr. Justice White

Circulated: 15 APR 1981

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 80-420

Larry C. Flynt, Jimmy R. Flynt and Althea Leasure Flynt, Petitioners, <i>v.</i> State of Ohio.	}	On Writ of Certiorari to the Supreme Court of Ohio.
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[April —, 1981]

PER CURIAM.

On July 14, 1976, criminal complaints were issued against petitioners charging them with disseminating obscenity in violation of Ohio Rev. Code Ann. § 2907.32. The Municipal Court granted petitioners' motions to dismiss the complaints on the ground that petitioners had been subjected to selective and discriminatory prosecution in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court of Appeals of Ohio reversed, finding the evidence insufficient to support petitioners' allegations of selective and discriminatory prosecution. The case was remanded for trial. The Ohio Supreme Court affirmed. We granted certiorari. — U. S. — (1980). Because the decision of the Ohio Supreme Court was not a final judgment within the meaning of 28 U. S. C. § 1257, we dismiss the writ for want of jurisdiction.

Beginning with the Judiciary Act of 1789, "Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a '[f]inal judgment or decree.' Title 28 U. S. C. § 1257." *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 476-477 (1975). In general, the final-judgment rule has been interpreted "to preclude review-

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

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: |

From: Mr. Justice White

Circulated: _____

3rd DRAFT

Recirculated: 13 MAY 1981

SUPREME COURT OF THE UNITED STATES

No. 80-420

Larry C. Flynt, Jimmy R. Flynt and Althea Leasure Flynt, Petitioners, v. State of Ohio.	} On Writ of Certiorari to the Supreme Court of Ohio.
---	---

[April —, 1981]

PER CURIAM.

On July 14, 1976, criminal complaints were issued against petitioners charging them with disseminating obscenity in violation of Ohio Rev. Code Ann. § 2907.32. The Municipal Court granted petitioners' motions to dismiss the complaints on the ground that petitioners had been subjected to selective and discriminatory prosecution in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court of Appeals of Ohio reversed, finding the evidence insufficient to support petitioners' allegations of selective and discriminatory prosecution. The case was remanded for trial. The Ohio Supreme Court affirmed. We granted certiorari. — U. S. — (1980). Because the decision of the Ohio Supreme Court was not a final judgment within the meaning of 28 U. S. C. § 1257, we dismiss the writ for want of jurisdiction.

Consistent with the relevant jurisdictional statute, Title 28 U. S. C. § 1257, the Court's jurisdiction to review a state court decision is generally limited to a final judgment rendered by the highest court of the state in which decision may be had. *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 476-477 (1975). In general, the final-judgment rule has been interpreted "to preclude reviewability . . . where anything further

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 20, 1981

Re: No. 80-420 - Flynt v. Ohio

Dear Potter:

Please join me in your dissent.

Sincerely,

JM.

T.M.

Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 15, 1981

Re: No. 80-420 - Flynt v. Ohio

Dear Byron:

Please join me in your per curiam.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 15, 1981

80-420 Flynt v. Ohio

Dear Byron:

I agree with your Per Curiam.

Sincerely,



Mr. Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 15, 1981

Re: No. 80-420 Flynt v. Ohio

Dear Byron:

Please join me in your Per Curiam.

Sincerely,



Mr. Justice White

Copies to the Conference

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

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

80-420 - Flynt v. State of Ohio

From: Mr. Justice Stevens

Circulated: APR 30 '81

Recirculated: _____

JUSTICE STEVENS, dissenting.

The decision of a federal question by the highest court of the State is final within the meaning of 28 U.S.C § 1257 "if a refusal immediately to review the State court decision might seriously erode federal policy." Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 483. In the Court's view, this ground does not support reviewability in this case because the Court can discern "no identifiable federal policy that will suffer if the State criminal proceeding goes forward." Ante, at 3. In my opinion, the interest in protecting magazine publishers from being prosecuted criminally because State officials or their constituents are offended by the content of an admittedly nonobscene political cartoon is not merely "an identifiable federal policy"; it is the kind of interest that motivated the adoption of the First Amendment to the United States Constitution.

Petitioner Flynt is the publisher of Hustler, a national magazine. The trial court dismissed the criminal complaint

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Mr. 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: _____

Recirculated: MAY 1 '81

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-420

Larry C. Flynt, Jimmy R. Flynt
and Althea Leasure Flynt,
Petitioners,
v.
State of Ohio.

On Writ of Certiorari to
the Supreme Court of
Ohio.

[May —, 1981]

JUSTICE STEVENS, dissenting.

The decision of a federal question by the highest court of the State is final within the meaning of 28 U. S. C. § 1257 "if a refusal immediately to review the State court decision might seriously erode federal policy." *Cox Broadcasting Co. v. Cohn*, 420 U. S. 469, 483. In the Court's view, this ground does not support reviewability in this case because the Court can discern "no identifiable federal policy that will suffer if the State criminal proceeding goes forward." *Ante*, at 3. In my opinion, the interest in protecting magazine publishers from being prosecuted criminally because State officials or their constituents are offended by the content of an admittedly nonobscene political cartoon is not merely "an identifiable federal policy"; it is the kind of interest that motivated the adoption of the First Amendment to the United States Constitution.

Petitioner Flynt is the publisher of *Hustler*, a national magazine. The trial court dismissed the criminal complaint against him after hearing evidence tending to establish that Ohio's decision to bring this prosecution was motivated by hostility to a political cartoon that is constitutionally indistinguishable from the rather trite depiction held to be protected by the First Amendment in *Papish v. University of Missouri Curators*, 410 U. S. 667. The Ohio Court of Appeals