

The Burger Court Opinion Writing Database

Hoffman Estates v. Flipside, Hoffman Estates, Inc.

455 U.S. 489 (1982)

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



4

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

CHAMBERS OF
THE CHIEF JUSTICE

February 22, 1982

Re: No. 80-1681 - Village of Hoffman Estates v. Flipside,
Hoffman Estates, Inc.

Dear Thurgood:

I join.

Regards,

WRB

Justice Marshall

Copies to the Conference

①

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 16, 1982

RE: No. 80-1681 Village of Hoffman Estates v.
Flipside, Hoffman Estates, Inc.

Dear Thurgood:

I agree.

Sincerely,



Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 17, 1982

Re: 80-1681 - Village of Hoffman Estates
v. Flipside, Hoffman Estates, Inc.

Dear Thurgood,

Having just written you in UNAC, I hesitate to say that I also have problems with your circulating draft in this case.

As the case comes here, I had thought that it did not present an overbreadth issue. The Court of Appeals held the ordinance to be void for vagueness; it did not discuss any problem of overbreadth. I agree that the judgment should be reversed because it erred with respect to vagueness, but I would leave overbreadth aside.

Overbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on non-commercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others who are not presently before the court. Broadrick v. Oklahoma, 413 U.S. 601, 612-615 (1973). Whether a party may make use of the overbreadth doctrine depends on whether or not there is a colorable claim that the ordinance infringes on the First Amendment rights of others. Here, appellees claim that the ordinance has such an effect, but that argument is tenuous at best and I would leave it to the lower courts for an initial determination. Of course, we have often entertained alternative grounds presented by an appellee for sustaining a judgment of a court of appeals. But we need not do so, particularly when it is not at all clear that the alternative ground was presented to the lower courts.

I agree with you that a facial vagueness challenge to an economic regulation must demonstrate that "the enactment is impermissibly vague in all of its applications." You find that the "marketed for use" standard in the ordinance is "transparently clear". I have no trouble with that, and if this is the case, the ordinance survives a facial challenge on vagueness grounds. I would rather not, however, go on and consider the possible ambiguities in the "designed for use" standard.

Sincerely yours,



Justice Marshall

Copies to the Conference

cpm

To: The Chief Justice
 Justice Brennan
~~Justice Marshall~~
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice White

Circulated: 2/25/82

Recirculated: _____

No. 80-1681, Village of Hoffman Estates v. Flipside

Justice White, concurring in the judgment.

I agree that the judgment of the Court of Appeals must be reversed. I do not, however, believe it necessary to discuss the overbreadth problem in order to reach this result. The Court of Appeals held the ordinance to be void for vagueness; it did not discuss any problem of overbreadth. That opinion should be reversed simply because it erred in its analysis of the vagueness problem presented by the ordinance.

I agree with the majority that a facial vagueness challenge to an economic regulation must demonstrate that "the enactment is impermissibly vague in all of its applications." Infra, at 5. I also agree with the majority's statement that the "marketed for use" standard in the ordinance is "sufficiently clear." There is, in my view, no need to go any further: If it is "transparently clear" that some particular conduct is restricted

To: The Chief Justice
Justice Brennan
~~Justice Marshall~~
Justice Blackmun
Justice Powell

Assistant

Revised: _____
Circulated: _____
Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1681

VILLAGE OF HOFFMAN ESTATES, ET AL., APPELLANTS, *v.* FLIPSIDE, HOFFMAN ESTATES, INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February —, 1982]

JUSTICE WHITE, concurring in the judgment.

I agree that the judgment of the Court of Appeals must be reversed. I do not, however, believe it necessary to discuss the overbreadth problem in order to reach this result. The Court of Appeals held the ordinance to be void for vagueness; it did not discuss any problem of overbreadth. That opinion should be reversed simply because it erred in its analysis of the vagueness problem presented by the ordinance.

I agree with the majority that a facial vagueness challenge to an economic regulation must demonstrate that "the enactment is impermissibly vague in all of its applications." *Infra*, at 5. I also agree with the majority's statement that the "marketed for use" standard in the ordinance is "sufficiently clear." There is, in my view, no need to go any further: If it is "transparently clear" that some particular conduct is restricted by the ordinance, the ordinance survives a facial challenge on vagueness grounds.

Technically, overbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others, not presently before the Court. *Broadrick v. Oklahoma*, 413 U. S. 601, 612-615 (1973). Whether the appellees may make use of the overbreadth doc-

FEB 11 1982

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1681

VILLAGE OF HOFFMAN ESTATES, ET AL., APPELLANTS, *v.* FLIPSIDE, HOFFMAN ESTATES, INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February —, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents a pre-enforcement facial challenge to a drug paraphernalia ordinance on the ground that it is unconstitutionally vague and overbroad. The ordinance in question requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Village of Hoffman Estates Ordinance No. 969-1978. The United States Court of Appeals for the Seventh Circuit held that the ordinance is vague on its face. 639 F. 2d 373 (1980). We noted probable jurisdiction, — U. S. —, and now reverse.

I

For more than three years prior to May 1, 1978, appellee The Flipside, Hoffman Estates, Inc. (Flipside) sold a variety of merchandise, including phonographic records, smoking accessories, novelty devices and jewelry, in its store located in the village of Hoffman Estates, Illinois (the village).¹ On Feb-

¹ More specifically, the District Court found:

"[Flipside] sold literature that included 'A Child's Garden of Grass,' 'Marijuana Grower's Guide,' and magazines such as 'National Lampoon,' 'Rolling Stone,' and 'High Times.' The novelty devices and tobacco-related items plaintiff sold in its store ranged from small commodities such as clamps,

7, 9

To: The Chief Justice
Justice Brennan

STYLISTIC CHANGES THROUGHOUT.

2nd
1st DRAFT

FEB 12 1982

SUPREME COURT OF THE UNITED STATES

No. 80-1681

VILLAGE OF HOFFMAN ESTATES, ET AL., APPELLANTS, *v.* FLIPSIDE, HOFFMAN ESTATES, INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February —, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents a pre-enforcement facial challenge to a drug paraphernalia ordinance on the ground that it is unconstitutionally vague and overbroad. The ordinance in question requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Village of Hoffman Estates Ordinance No. 969-1978. The United States Court of Appeals for the Seventh Circuit held that the ordinance is vague on its face. 639 F. 2d 373 (1980). We noted probable jurisdiction, — U. S. —, and now reverse.

I

For more than three years prior to May 1, 1978, appellee The Flipside, Hoffman Estates, Inc. (Flipside) sold a variety of merchandise, including phonographic records, smoking accessories, novelty devices and jewelry, in its store located in the village of Hoffman Estates, Illinois (the village).¹ On

¹More specifically, the District Court found:
"[Flipside] sold literature that included 'A Child's Garden of Grass,' 'Marijuana Grower's Guide,' and magazines such as 'National Lampoon,' 'Rolling Stone,' and 'High Times.' The novelty devices and tobacco-related items plaintiff sold in its store ranged from small commodities such as clamps,

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 18, 1982

Re: No. 80-1681 - Village of Hoffman Estates v.
Flipside, Hoffman Estates, Inc.

Dear Byron:

I am happy to explain why the draft opinion in this case includes discussion of overbreadth and of the "designed for use" standard. With respect to the First Amendment and overbreadth, the issues were raised in the District Court and addressed in that court's opinion. 485 F. Supp. 400, 407-409. They were also raised in the Court of Appeals, although that court did not address them. Finally, they were briefed by both parties in this Court.

I believe it is appropriate to address these issues to provide guidance to lower courts which encounter facial challenges to drug paraphernalia laws. A court should ordinarily first examine the First Amendment issues. If the First Amendment claim is significant, the court should investigate whether First Amendment rights of third parties are affected; also, an unusually strict test of vagueness will apply. Conversely, if no First Amendment conduct is implicated, the court should proceed to address the facial vagueness of the law, determining whether the law is vague in all of its applications.

For similar reasons, I think it is appropriate to review the "designed for use" standard as well as the "marketed for use" standard. Lower courts have struggled with variations of the former standard, and the draft opinion attempts to underscore that the existence of some ambiguity does not necessarily render such language facially vague.

Sincerely,

J.M.

T.M.

Justice White

cc: The Conference

Pp. 4, 5, 15

FEB 26 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1681

VILLAGE OF HOFFMAN ESTATES, ET AL., APPELLANTS, *v.* FLIPSIDE, HOFFMAN ESTATES, INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February —, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents a pre-enforcement facial challenge to a drug paraphernalia ordinance on the ground that it is unconstitutionally vague and overbroad. The ordinance in question requires a business to obtain a license if it sells any items that are “designed or marketed for use with illegal cannabis or drugs.” Village of Hoffman Estates Ordinance No. 969-1978. The United States Court of Appeals for the Seventh Circuit held that the ordinance is vague on its face. 639 F. 2d 373 (1980). We noted probable jurisdiction, — U. S. —, and now reverse.

I

For more than three years prior to May 1, 1978, appellee The Flipside, Hoffman Estates, Inc. (Flipside) sold a variety of merchandise, including phonographic records, smoking accessories, novelty devices and jewelry, in its store located in the village of Hoffman Estates, Illinois (the village).¹ On

¹ More specifically, the District Court found:

“[Flipside] sold literature that included ‘A Child’s Garden of Grass,’ ‘Marijuana Grower’s Guide,’ and magazines such as ‘National Lampoon,’ ‘Rolling Stone,’ and ‘High Times.’ The novelty devices and tobacco-related items plaintiff sold in its store ranged from small commodities such as clamps,

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 3, 1982

Re: Cases being held for 80-1681 - Village of
Hoffman Estates v. Flipside, Hoffman Estates

MEMORANDUM TO THE CONFERENCE

For the reasons that follow, I recommend denying certiorari in both of these held cases.

No. 81-415, Casbah, Inc. v. Thone

In this case, the Eighth Circuit upheld a Nebraska statute based on the Model Drug Paraphernalia Act drafted by the Federal Drug Enforcement Administration. The law defines paraphernalia as items "which are used, intended for use, or designed for use" in manufacturing or ingesting controlled substances. It is a criminal violation for "any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know," that the item will be used to manufacture or ingest an illegal drug. In a pre-enforcement facial challenge by wholesale distributors and retail merchants, the Court of Appeals ruled that the law is not impermissibly vague, in part because, as interpreted by the court, it requires that the person subject to enforcement harbor an unlawful intent. (The court gives an interpretation of "designed" that is somewhat different from this Court's interpretation in Village of Hoffman Estates, but the statutory schemes are also different in many respects.)

I do not recommend that the Court grant, vacate, and remand. I think it is extremely unlikely that the Court of Appeals would reach a different result based on the decision of this Court. Although the lower court did not determine

Reproduced 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

February 26, 1982

Re: No. 80-1681- Village of Hoffman Estates v.
Flipside, Hoffman Estates, Inc.

Dear Thurgood:

Please join me.

Sincerely,

Handwritten signature of H.A.B. (Harry A. Blackmun) in cursive script.

Justice Marshall

cc: The Conference



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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 17, 1982

80-1681 Village of Hoffman Estates v. Flipside

Dear Thurgood:

Please join me in your opinion.

I add, however, that I agree with Byron that it is unnecessary to address the overbreadth issue, and would be entirely content if it were omitted.

Sincerely,

Justice Marshall

lfp/ss

cc: The Conference

3

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 17, 1982

Re: No. 80-1681 Village of Hoffman Estates v. Flipside

Dear Thurgood:

Please join me in your opinion for the Court.

Sincerely,
WHR

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 16, 1982

Re: 80-1681 - Village of Hoffman Estates v.
Flipside, Hoffman Estates

Dear Thurgood:

Please indicate that I took no part in the
consideration or decision of this case.

Respectfully,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

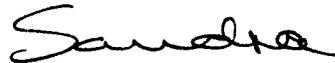
February 12, 1982

No. 80-1681 Village of Hoffman Estates
v. Flipside, Hoffman Estates

Dear Thurgood,

You have handled the opinion in this case in a way which should be helpful to all courts in analyzing issues relating to vagueness and overbreadth of statutes. I have only one request. Would you consider omitting the reference to abortions on page 9, and the citation of the Colautti case in the accompanying footnote 15?

Sincerely,



Justice Marshall



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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 16, 1982

No. 80-1681 Village of Hoffman Estates v.
Flipside, Hoffman Estates, Inc.

Dear Thurgood,

Please join me in the second draft of your
opinion in the referenced case.

Sincerely,

Justice Marshall

Copies to the Conference