

The Burger Court Opinion Writing Database

Brockett v. Spokane Arcades, Inc.

472 U.S. 491 (1985)

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

June 6, 1985

Re: No. 84-28 - Brockett v. Spokane Arcades
No. 84-143 - Eikenberry v. J-R Distributors

Dear Sandra:

Please show me as joining your opinion.

Regards,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1985

Re: 84-28 (- Brockett v. Spokane Arcades, Incorporated
84-143 (- Eikenberry, Attorney General of Washington ..
J-R Distributors, Incorporated

MEMORANDUM TO THE CONFERENCE:

I had joined Sandra in this case in her second draft. Her third draft joins portions of Byron's draft which Sandra had not previously joined. Today's schedule does not give me time to consider it, so I would like the case not to come down on Tuesday.

Regards,



copies to: Henry Lind
Al Stevas
Roland Goldstraw

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

From: **Justice Brennan**

Circulated: JUN 1985

Recirculated: 1

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84-28 AND 84-143

84-28 DONALD C. BROCKETT, APPELLANT
v.
SPOKANE ARCADES, INC., ET AL.

84-143 KENNETH EIKENBERRY, ATTORNEY GENERAL OF
WASHINGTON, ET AL., APPELLANTS
v.
J-R DISTRIBUTORS, INC., ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[June —, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,
dissenting.

We granted certiorari to consider the holding of the United States Court of Appeals for the Ninth Circuit that the Washington state obscenity law, Wash. Rev. Code §7.48A.010-7.48A.900, is substantially overbroad and therefore invalid on its face under the First Amendment because it defines "prurient" in such a way as to reach constitutionally protected material that stimulates no more than a healthy interest in sex. This statute is, in my view, unconstitutionally overbroad and therefore invalid on its face for the reasons given in my dissent in *Paris Adult Theaters I v. Slaton*, 413 U. S. 49, 73 (1973). I would therefore affirm the judgment of the Court of Appeals.

?
original
15
illegible
"6 11?"

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

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

From: Justice White

Circulated: May 14, 1985

Recirculated: _____

May 14, 85

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84-28 AND 84-143

84-28 DONALD C. BROCKETT, APPELLANT
v.
SPOKANE ARCADES, INC. ET AL.

84-143 KENNETH EIKENBERRY, ATTORNEY GENERAL OF
WASHINGTON, ET AL., APPELLANTS
v.
J-R DISTRIBUTORS, INC., ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[May —, 1985]

JUSTICE WHITE delivered the opinion of the Court.

The question in this case is whether the Court of Appeals for the Ninth Circuit erred in invalidating in its entirety a Washington statute aimed at preventing and punishing the publication of obscene materials.

I

On April 1, 1982, the Washington state moral nuisance law became effective. Wash. Rev. Code § 7.48A.010—7.48A.900 (West Supp. 1985).¹ It sets forth a comprehensive scheme establishing criminal and civil penalties for those who deal in obscenity or prostitution. The statute declares to be a “moral nuisance” any place “where lewd films are publicly exhibited as a regular course of business” and any place of busi-

¹An earlier moral nuisance law, Wash. Rev. Code § 7.48.052 *et seq.* (West Supp. 1985), adopted as an initiative measure in 1977, was struck down as an impermissible prior restraint. See *Spokane Arcades, Inc. v. Brockett*, 631 F. 2d 135 (CA9 1980), *aff'd*, 454 U. S. 1022 (1981).

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

From: Justice White

Circulated: _____

Recirculated: MAY 17 1985

- Stylistic; pp. 4, 16;
- footnotes renumbered.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84-28 AND 84-143

84-28 DONALD C. BROCKETT, APPELLANT
v.
SPOKANE ARCADES, INC., ET AL.

84-143 KENNETH EIKENBERRY, ATTORNEY GENERAL OF
WASHINGTON, ET AL., APPELLANTS
v.
J-R DISTRIBUTORS, INC., ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[May —, 1985]

JUSTICE WHITE delivered the opinion of the Court.

The question in this case is whether the Court of Appeals for the Ninth Circuit erred in invalidating in its entirety a Washington statute aimed at preventing and punishing the publication of obscene materials.

I

On April 1, 1982, the Washington state moral nuisance law became effective. Wash. Rev. Code § 7.48A.010—7.48A.900 (West Supp. 1985).¹ It sets forth a comprehensive scheme establishing criminal and civil penalties for those who deal in obscenity or prostitution. The statute declares to be a “moral nuisance” any place “where lewd films are publicly exhibited as a regular course of business” and any place of busi-

¹An earlier moral nuisance law, Wash. Rev. Code § 7.48.052 *et seq.* (West Supp. 1985), adopted as an initiative measure in 1977, was struck down as an impermissible prior restraint. See *Spokane Arcades, Inc. v. Brockett*, 631 F. 2d 135 (CA9 1980), *aff'd*, 454 U. S. 1022 (1981).

NOT REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: **Justice White**

pp. 12, 13;
footnotes renumbered

Circulated: _____
JUN 5 1985
Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84-28 AND 84-143

84-28 DONALD C. BROCKETT, APPELLANT
v.
SPOKANE ARCADES, INC., ET AL.

84-143 KENNETH EIKENBERRY, ATTORNEY GENERAL OF
WASHINGTON, ET AL., APPELLANTS
v.
J-R DISTRIBUTORS, INC., ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[June —, 1985]

JUSTICE WHITE delivered the opinion of the Court.

The question in this case is whether the Court of Appeals for the Ninth Circuit erred in invalidating in its entirety a Washington statute aimed at preventing and punishing the publication of obscene materials.

I

On April 1, 1982, the Washington state moral nuisance law became effective. Wash. Rev. Code § 7.48A.010—7.48A.900 (West Supp. 1985).¹ It sets forth a comprehensive scheme establishing criminal and civil penalties for those who deal in obscenity or prostitution. The statute declares to be a “moral nuisance” any place “where lewd films are publicly exhibited as a regular course of business” and any place of busi-

¹An earlier moral nuisance law, Wash. Rev. Code § 7.48.052 *et seq.* (West Supp. 1985), adopted as an initiative measure in 1977, was struck down as an impermissible prior restraint. See *Spokane Arcades, Inc. v. Brockett*, 631 F. 2d 135 (CA9 1980), *aff'd*, 454 U. S. 1022 (1981).



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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 16, 1985

Re: No. 84-28) Brockett v. Spokane Arcades
No. 84-143) Eikenberry v. J-R Distributors

Dear Byron:

Please join me.

Sincerely,

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 15, 1985

84-28 Brockett v. Spokane Arcades

Dear Byron:

Please add the end of the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,



Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1985

Re: No. 84-28) Brockett v. Spokane Arcades
84-143) Eikenberry v. J-R Distributors

Dear Sandra,

Please join me in your opinion concurring in part and concurring in the judgment.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

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

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1985

Re: No. 84-28) Brockett v. Spokane Arcades
84-143) Eikenberry v. J-R Distributors

Dear Byron,

Please join me in Parts I and III of your opinion.

Sincerely,

Wm

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 4, 1985

Re: No. 84-28) Brockett v. Spokane Arcades, Inc.
84-143) Eikenberry v. J-R Distributors, Inc.

Dear Byron,

Upon reflection, I see no reason why, consistent with my joining Sandra's concurrence, I cannot join Part II as well as Parts I and III of your opinion, and I hereby do so.

Sincerely,



Justice White

cc: The Conference

17
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 4, 1985

Re: 84-28 - Brockett v. Spokane Arcades
84-143 - Eikenberry v. J-R
Distributors

Dear Byron:

Please join me.

Respectfully,



Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

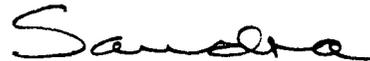
May 16, 1985

No. 84-28 Brockett v. Spokane Arcades
No. 84-143 Eikenberry v. J-R Distributors

Dear Byron,

My preference as expressed at conference was to express the view that the Federal District Court should have abstained in the first instance and allowed the Washington state court to interpret the statute. The majority has decided otherwise. I intend to join most of your opinion, but will write a brief concurrence as promptly as I can.

Sincerely,



Justice White

Copies to the Conference

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

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

From: Justice O'Connor

Circulated: 28

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84-28 AND 84-143

84-28 DONALD C. BROCKETT, APPELLANT
v.
SPOKANE ARCADES, INC., ET AL.

84-143 KENNETH EIKENBERRY, ATTORNEY GENERAL OF
WASHINGTON, ET AL., APPELLANTS
v.
J-R DISTRIBUTORS, INC., ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[May —, 1985]

JUSTICE O'CONNOR, concurring in part and concurring in
the judgment.

Only days after the State of Washington adopted the moral
nuisance law at issue here, appellees launched a constitu-
tional attack in Federal District Court. Although the statu-
te has never been enforced or authoritatively interpreted by
a state court, appellees allege that it applies to constitution-
ally protected expression and is facially invalid. Because I
believe that the federal courts should have abstained and al-
lowed the Washington courts an opportunity to construe the
state law in the first instance, I think the proper disposition
of this case would be to vacate the judgment of the Court of
Appeals on that ground. The Court, however, rejects that
course and reaches the merits of the controversy. Accord-
ingly, I join Parts I and III of the opinion of the Court be-
cause I agree that the Court of Appeals erred in declaring the
statute invalid on its face.

Although federal courts generally have a duty to adjudi-
cate federal questions properly before them, this Court has

May 28, 85

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

Statistical Changes Throughout + p. 1

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

From: Justice O'Connor

Circulated: _____

Recirculated: _____

Jun 3, 85

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84-28 AND 84-143

84-28 DONALD C. BROCKETT, APPELLANT
v.
SPOKANE ARCADES, INC., ET AL.

84-143 KENNETH EIKENBERRY, ATTORNEY GENERAL OF
WASHINGTON, ET AL., APPELLANTS
v.
J-R DISTRIBUTORS, INC., ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[June —, 1985]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, concurring in part and concurring in the judgment.

Only days after the State of Washington adopted the moral nuisance law at issue here, appellees launched a constitutional attack in Federal District Court. Although the statute has never been enforced or authoritatively interpreted by a state court, appellees allege that it applies to constitutionally protected expression and is facially invalid. Because I believe that the federal courts should have abstained and allowed the Washington courts an opportunity to construe the state law in the first instance, I think the proper disposition of this case would be to vacate the judgment of the Court of Appeals on that ground. The Court, however, rejects that course and reaches the merits of the controversy. Accordingly, I join Parts I and III of the opinion of the Court because I agree that the Court of Appeals erred in declaring the statute invalid on its face.

Although federal courts generally have a duty to adjudicate federal questions properly before them, this Court has

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

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: _____

Jun 6, 85

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84-28 AND 84-143

84-28 DONALD C. BROCKETT, APPELLANT

v.

SPOKANE ARCADES, INC., ET AL.

84-143 KENNETH EIKENBERRY, ATTORNEY GENERAL OF
WASHINGTON, ET AL., APPELLANTS

v.

J-R DISTRIBUTORS, INC., ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[June —, 1985]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST
joins, concurring.

Only days after the State of Washington adopted the moral nuisance law at issue here, appellees launched a constitutional attack in Federal District Court. Although the statute has never been enforced or authoritatively interpreted by a state court, appellees allege that it applies to constitutionally protected expression and is facially invalid. Because I believe that the federal courts should have abstained and allowed the Washington courts an opportunity to construe the state law in the first instance, I think the proper disposition of this case would be to vacate the judgment of the Court of Appeals on that ground. The Court, however, rejects that course and reaches the merits of the controversy. I join the opinion of the Court because I agree that the Court of Appeals erred in declaring the statute invalid on its face.

Although federal courts generally have a duty to adjudicate federal questions properly before them, this Court has long recognized that concerns for comity and federalism may

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

From: Justice O'Connor

Circulated: _____

Recirculated: _____

Jun 7 85

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84-28 AND 84-143

84-28 DONALD C. BROCKETT, APPELLANT
v.
SPOKANE ARCADES, INC., ET AL.

84-143 KENNETH EIKENBERRY, ATTORNEY GENERAL OF
WASHINGTON, ET AL., APPELLANTS
v.
J-R DISTRIBUTORS, INC., ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[June 11, 1985]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and
JUSTICE REHNQUIST join, concurring.

Only days after the State of Washington adopted the moral
nuisance law at issue here, appellees launched a constitu-
tional attack in Federal District Court. Although the statu-
te has never been enforced or authoritatively interpreted by
a state court, appellees allege that it applies to constitution-
ally protected expression and is facially invalid. Because I
believe that the federal courts should have abstained and al-
lowed the Washington courts an opportunity to construe the
state law in the first instance, I think the proper disposition
of this case would be to vacate the judgment of the Court of
Appeals on that ground. The Court, however, rejects that
course and reaches the merits of the controversy. I join the
opinion of the Court because I agree that the Court of Ap-
peals erred in declaring the statute invalid on its face.

Although federal courts generally have a duty to adjudi-
cate federal questions properly before them, this Court has
long recognized that concerns for comity and federalism may