

The Burger Court Opinion Writing Database

New York v. P.J. Video, Inc.

475 U.S. 868 (1986)

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





CHAMBERS OF
THE CHIEF JUSTICE

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

April 7, 1986

85-363 - New York v. P.J. Video, dba Network Video, et al.

Dear Bill:

I join.

Regards,

Justice William Rehnquist

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 11, 1986

No. 85-363

New York v. P.J. Video

Dear Thurgood and John,

We three are in dissent in the
above. Would you, Thurgood, be willing
to try it?

Sincerely,



Justice Marshall

Justice Stevens

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 26, 1986

No. 85-363

New York v. P.J. Video

Dear Bill,

I shall await the dissent in the
above.

Sincerely,



Justice Rehnquist

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 9, 1986

No. 85-363

New York v. P.J. Video, Inc

Dear Thurgood,

Please join me.

Sincerely,



Justice Marshall

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 27, 1986

85-363 - New York v. P. J. Video, Inc.

Dear Bill,

I agree.

Sincerely yours,



Justice Rehnquist

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MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 26, 1986

Re: No. 85-363 - New York v. P. J. Video

Dear Bill:

In due course I will be circulating a
dissent in this one.

Sincerely,



T.M.

Justice Rehnquist

cc: The Conference

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

From: **Justice Marshall**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-363

NEW YORK, PETITIONER *v.* P. J. VIDEO, INC.,
DBA NETWORK VIDEO, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF NEW YORK

[April —, 1986]

JUSTICE MARSHALL, dissenting.

Under New York law, a film depicting specified sexual acts in a patently offensive manner is obscene if "the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex," and if "considered as a whole, it lacks serious literary, artistic, political, and scientific value." N. Y. Penal Law § 235.00(1)(a), (c). The question before this Court is whether three New York state courts erred in holding that the affidavits at issue in this case failed to establish probable cause that those standards were met.¹ The determination of what the standards of § 235.00(1) mean and how they should be applied in individual cases, of course, is in the first instance a matter of state law and the rightful province of the state courts. While the majority describes it as "clear beyond peradventure," *ante*, at 8, that the affidavits set out the requisite probable cause, I do not find that result "clear" at all, and I would not overturn the state courts' contrary judgment.

¹The New York Court of Appeals held that the third branch of the statute, providing that a film, to be obscene, must depict specified sexual acts "in a patently offensive manner, actual or simulated," § 235.00(1)(b), was satisfied by the descriptions in the affidavits in this case. 65 N. Y. 2d 566, 570, n. 1 (1985).

STYLISTIC CHANGES THROUGHOUT

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

From: Justice Marshall

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-363

NEW YORK, PETITIONER *v.* P. J. VIDEO, INC.,
DBA NETWORK VIDEO, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF NEW YORK

[April —, 1986]

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

STYLISTIC CHANGES THROUGHOUT

+ P. 5

From: Justice Marshall

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-363

NEW YORK, PETITIONER *v.* P. J. VIDEO, INC.,
DBA NETWORK VIDEO, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF NEW YORK

[April —, 1986]

JUSTICE MARSHALL, dissenting.

Under New York law, a film depicting specified sexual acts in a patently offensive manner is obscene if “the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex,” and if “considered as a whole, it lacks serious literary, artistic, political, and scientific value.” N. Y. Penal Law §§ 235.00(1)(a), (c) (McKinney 1980). The question before this Court is whether three New York state courts erred in holding that the affidavits at issue in this case failed to establish probable cause that those standards were met.¹ The determination of what the standards of § 235.00(1) mean and how they should be applied in individual cases, of course, is in the first instance a matter of state law and the rightful province of the state courts. While the majority describes it as “clear beyond peradventure,” *ante*, at 8, that the affidavits set out the requisite probable cause, I do not find that result “clear” at all, and I would not overturn the state courts’ contrary judgment.

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P.5

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

From: **Justice Marshall**

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-363

NEW YORK, PETITIONER *v.* P. J. VIDEO, INC.,
DBA NETWORK VIDEO, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF NEW YORK

[April 22, 1986]

JUSTICE MARSHALL, dissenting.

Under New York law, a film depicting specified sexual acts in a patently offensive manner is obscene if "the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex," and if "considered as a whole, it lacks serious literary, artistic, political, and scientific value." N. Y. Penal Law §§ 235.00(1)(a), (c) (McKinney 1980). The question before this Court is whether three New York state courts erred in holding that the affidavits at issue in this case failed to establish probable cause that those standards were met.¹ The determination of what the standards of § 235.00(1) mean and how they should be applied in individual cases, of course, is in the first instance a matter of state law and the rightful province of the state courts. While the majority describes it as "clear beyond peradventure," *ante*, at 8, that the affidavits set out the requisite probable cause, I do not find that result "clear" at all, and I would not overturn the state courts' contrary judgment.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 3, 1986

Re: No. 85-363, New York v. P.J. Video

Dear Bill:

Please join me.

Sincerely,

H. A. B.

Justice Rehnquist

cc: The Conference

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 1, 1986

85-363 New York v. P.J. Video, Inc.

Dear Bill:

Please join me.

Sincerely,

Lewis

Justice Rehnquist

lfp/ss

cc: The Conference

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

From: Justice Rehnquist

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-363

NEW YORK, PETITIONER *v.* P. J. VIDEO, INC.,
DBA NETWORK VIDEO, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF NEW YORK

[March —, 1986]

JUSTICE REHNQUIST delivered the opinion of the Court.

This case concerns the proper standard for issuance of a warrant authorizing the seizure of materials presumptively protected by the First Amendment. Respondents P. J. Video, Inc., and James Erhardt were charged in the Village of Depew, New York, Justice Court with six counts of obscenity in the third degree under Section 235.05(1) of the New York Penal Law.¹ Respondents moved to suppress

¹Section 235.05(1) provides:

A person is guilty of obscenity in the third degree when, knowing its intent and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; . . .

Obscenity in the third degree is a class A misdemeanor.

The statutory definition of "obscenity," which is derived from *Miller v. California*, 413 U. S. 15 (1973), appears at Section 235.00(1):

Any material or performance is "obscene" if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of

P. 8, n.6

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

From: **Justice Rehnquist**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-363

NEW YORK, PETITIONER *v.* P. J. VIDEO, INC.,
DBA NETWORK VIDEO, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF NEW YORK

[April —, 1986]

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STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Justice Brennan
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Justice O'Connor

From: Justice Rehnquist

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-363

NEW YORK, PETITIONER *v.* P. J. VIDEO, INC.,
DBA NETWORK VIDEO, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF NEW YORK

[April —, 1986]

JUSTICE REHNQUIST delivered the opinion of the Court.

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¹Section 235.05(1) (McKinney Supp. 1986) provides:

"A person is guilty of obscenity in the third degree when, knowing its content and character, he:

"1. Promotes, or possesses with intent to promote, any obscene material"

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 27, 1986

Re: 85-363 - New York v. P.J. Video

Dear Bill:

I shall await Thurgood's dissent.

Respectfully,



Justice Rehnquist

Copies to the Conference

MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 7, 1986

Re: 85-363 - New York v. P.J. Video

Dear Thurgood:

Please join me.

Respectfully,



Justice Marshall

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 31, 1986

No. 85-363 New York v. P.J. Video

Dear Bill,

Please join me.

Sincerely,

Justice Rehnquist

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