

# The Burger Court Opinion Writing Database

*Arcara v. Cloud Books, Inc.*

478 U.S. 697 (1986)

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



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

From: **The Chief Justice**

Circulated: MAY 24 1986

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 85-437

**RICHARD ARCARA, DISTRICT ATTORNEY OF ERIE  
COUNTY, PETITIONER *v.* CLOUD BOOKS, INC.,  
ETC., ET AL.**

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

[May —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment bars enforcement of a statute authorizing closure of a premises found to be used as a place for prostitution and lewdness because the premises are also used as an adult bookstore.

I

A

Respondents own and operate the "Village Books and News Store" in Kenmore, New York. The establishment characterizes itself as an "adult" bookstore and sells sexually explicit books and magazines with booths available for the viewing of sexually explicit movies. No issue is presented with respect to whether the movies or other materials available at respondents' store are obscene pornographic materials.

During September and October of 1982, the Erie County Sheriff's Department conducted an undercover investigation into reported illicit sexual activities occurring on respondents' premises. A deputy sheriff personally observed instances of masturbation, fondling, and fellatio by patrons on the premises of the store, all within the observation of the

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

From: **The Chief Justice**

STENOGRAPHIC CHANGES ONLY

Circulated: MAY 27 1986

Recirculated: \_\_\_\_\_

12<sup>th</sup>

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 85-437

RICHARD ARCARA, DISTRICT ATTORNEY OF ERIE  
COUNTY, PETITIONER *v.* CLOUD BOOKS, INC.,  
ETC., ET AL.

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

[May —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the  
Court.

We granted certiorari to decide whether the First Amend-  
ment bars enforcement of a statute authorizing closure of a  
premises found to be used as a place for prostitution and  
lewdness because the premises are also used as an adult  
bookstore.

I  
A

Respondents own and operate the "Village Books and  
News Store" in Kenmore, New York. The establishment  
characterizes itself as an "adult" bookstore and sells sexually  
explicit books and magazines with booths available for the  
viewing of sexually explicit movies. No issue is presented  
with respect to whether the movies or other materials avail-  
able at respondents' store are obscene pornographic  
materials.

During September and October of 1982, the Erie County  
Sheriff's Department conducted an undercover investigation  
into reported illicit sexual activities occurring on respond-  
ents' premises. A deputy sheriff personally observed in-  
stances of masturbation, fondling, and fellatio by patrons on  
the premises of the store, all within the observation of the

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

From: **The Chief Justice**

Circulated: MAY 30 1986

Recirculated: \_\_\_\_\_

3, 8, 9, 10

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 85-437

**RICHARD ARCARA, DISTRICT ATTORNEY OF ERIE  
COUNTY, PETITIONER *v.* CLOUD BOOKS, INC.,  
ETC., ET AL.**

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

[June —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment bars enforcement of a statute authorizing closure of a premises found to be used as a place for prostitution and lewdness because the premises are also used as an adult bookstore.

I

A

Respondents own and operate the "Village Books and News Store" in Kenmore, New York. The establishment characterizes itself as an "adult" bookstore and sells sexually explicit books and magazines with booths available for the viewing of sexually explicit movies. No issue is presented with respect to whether the movies or other materials available at respondents' store are obscene pornographic materials.

During September and October of 1982, the Erie County Sheriff's Department conducted an undercover investigation into reported illicit sexual activities occurring on respondents' premises. A deputy sheriff personally observed instances of masturbation, fondling, and fellatio by patrons on the premises of the store, all within the observation of the

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

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

From: **The Chief Justice**

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 85-437

RICHARD ARCARA, DISTRICT ATTORNEY OF ERIE  
COUNTY, PETITIONER *v.* CLOUD BOOKS, INC.,  
ETC., ET AL.

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

[June —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the  
Court.

We granted certiorari to decide whether the First Amend-  
ment bars enforcement of a statute authorizing closure of a  
premises found to be used as a place for prostitution and  
lewdness because the premises are also used as an adult  
bookstore.

I

A

Respondents own and operate the "Village Books and  
News Store" in Kenmore, New York. The establishment  
characterizes itself as an "adult" bookstore and sells sexually  
explicit books and magazines with booths available for the  
viewing of sexually explicit movies. No issue is presented  
with respect to whether the movies or other materials  
available at respondents' store are obscene pornographic  
materials.

During September and October 1982, the Erie County  
Sheriff's Department conducted an undercover investigation  
into reported illicit sexual activities occurring on respon-  
dents' premises. A Deputy Sheriff personally observed in-  
stances of masturbation, fondling, and fellatio by patrons on  
the premises of the store, all within the observation of the

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

From: The Chief Justice

JUL 1 1986

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

9, 10

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-437

RICHARD ARCARA, DISTRICT ATTORNEY OF ERIE  
COUNTY, PETITIONER *v.* CLOUD BOOKS, INC.,  
ETC., ET AL.

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

[June —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the  
Court.

We granted certiorari to decide whether the First Amend-  
ment bars enforcement of a statute authorizing closure of a  
premises found to be used as a place for prostitution and  
lewdness because the premises are also used as an adult  
bookstore.

I

A

Respondents own and operate the "Village Books and  
News Store" in Kenmore, New York. The establishment  
characterizes itself as an "adult" bookstore and sells sexually  
explicit books and magazines with booths available for the  
viewing of sexually explicit movies. No issue is presented  
with respect to whether the movies or other materials  
available at respondents' store are obscene pornographic  
materials.

During September and October 1982, the Erie County  
Sheriff's Department conducted an undercover investigation  
into reported illicit sexual activities occurring on respond-  
ents' premises. A Deputy Sheriff personally observed in-  
stances of masturbation, fondling, and fellatio by patrons on  
the premises of the store, all within the observation of the

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

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

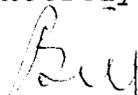
CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 5, 1986

Dear Thurgood and Harry,

We three are in dissent in No. 85-437, Arcara v. Cloud Books. Will you, Harry, attempt the dissent in this one?

Sincerely,



Justice Marshall

Justice Blackmun

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

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 30, 1986

No. 85-437

Arcara v. Cloud Books, Inc.

Dear Harry,

Please join me.

Sincerely,



Justice Blackmun

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 26, 1986

85-437 - Arcara v. Cloud Books, Inc.

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Copies to 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 BYRON R. WHITE

June 2, 1986

85-434 - United States v. James

Dear Lewis,

Please join me.

Sincerely yours,



Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 28, 1986

Re: No. 85-437 - Richard Arcara, District Attorney of  
Erie County v. Cloud Books, Inc.

Dear Chief:

I await the dissent.

Sincerely,

*JM.*

T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 30, 1986

Re: No. 85-437 - Arcara v. Cloud Books, Inc.

Dear Harry:

Please join me in your dissent.

Sincerely,

  
T.M.

Justice Blackmun

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 6, 1986

Dear Bill:

I shall be glad to attempt the dissent in No. 85-437,  
Arcara v. Cloud Books.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal flourish underneath.

Justice Brennan

cc: Justice Marshall

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 27, 1986

Re: No. 85-437, Arcara v. Cloud Books

Dear Chief:

In due course, I shall undertake a dissent in this case.

Sincerely,  


The Chief Justice  
cc: The Conference

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

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

From: Justice Blackmun

Circulated: JUN 27 1986

Recirculated: \_\_\_\_\_

*HAS*  
*RE*  
*...*

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-437

RICHARD ARCARA, DISTRICT ATTORNEY OF ERIE  
COUNTY, PETITIONER *v.* CLOUD BOOKS, INC.,  
ETC., ET AL.

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

[June —, 1986]

JUSTICE BLACKMUN, dissenting.

Respondent Cloud Books, Inc., has a bookstore that sells sexually explicit, but not allegedly obscene, publications. See 65 N. Y. 2d 324, 326, 480 N. E. 2d 1089, 1091 (1985); see also *ante*, at 1. The store was shut down for one year as a nuisance after it was found to be a place "in or upon which any lewdness, assignation, or prostitution . . . exists," in violation of New York's Public Health Law §§ 2320 and 2329 (McKinney) (1985). Despite the obvious role that commercial bookstores play in facilitating free expression, see, *e. g.*, *Smith v. California*, 361 U. S. 147, 150 (1959), the Court today concludes that the closure order raises no First Amendment concerns, apparently because it was triggered, not by respondents' sale of books, but by the nonexpressive conduct of patrons. See *ante*, at — and —, n. 2 (slip op. 1-2 and 8, n. 2). But the First Amendment, made applicable to the States by the Fourteenth Amendment, protects against all laws "abridging the freedom of speech"—not just those specifically directed at expressive activity. Until today, this Court has never suggested that a State may suppress speech as much as it likes, without justification, so long as it does so through generally applicable regulations that have "nothing to do with any expressive conduct." See *ante*, at —, n. 2 (slip op. 9, n. 2).

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

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

From: **Justice Blackmun**

Circulated: \_\_\_\_\_

Recirculated: JUL 01 1986

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 85-437

RICHARD ARCARA, DISTRICT ATTORNEY OF ERIE  
COUNTY, PETITIONER *v.* CLOUD BOOKS, INC.,  
ETC., ET AL.

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

[July —, 1986]

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

Respondent Cloud Books, Inc., has a bookstore that sells sexually explicit, but not allegedly obscene, publications. See 65 N. Y. 2d 324, 326, 480 N. E. 2d 1089, 1091 (1985); see also *ante*, at 1. The Court holds that the store can be shut down for one year as a nuisance if it is found to be a place "in or upon which any lewdness, assignation, or prostitution . . . exists," in violation of New York's Public Health Law §§ 2320 and 2329 (McKinney) (1985). Despite the obvious role that commercial bookstores play in facilitating free expression, see, *e. g.*, *Smith v. California*, 361 U. S. 147, 150 (1959), the Court today concludes that a closure order would raise no First Amendment concerns, apparently because it would be triggered, not by respondents' sale of books, but by the non-expressive conduct of patrons. See *ante*, at — and —, n. 2 (slip op. 1-2 and 8, n. 2). But the First Amendment, made applicable to the States by the Fourteenth Amendment, protects against all laws "abridging the freedom of speech"—not just those specifically directed at expressive activity. Until today, this Court has never suggested that a State may suppress speech as much as it likes, without justification, so long as it does so through generally applicable

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

50.1

P. 3

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

From: Justice Blackmun

Circulated: \_\_\_\_\_

Recirculated: JUL 1 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-437

RICHARD ARCARA, DISTRICT ATTORNEY OF ERIE  
COUNTY, PETITIONER *v.* CLOUD BOOKS, INC.,  
ETC., ET AL.

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

[July —, 1986]

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

Respondent Cloud Books, Inc., has a bookstore that sells sexually explicit, but not allegedly obscene, publications. See 65 N. Y. 2d 324, 326, 480 N. E. 2d 1089, 1091 (1985); see also *ante*, at 1. The Court holds that the store can be shut down for one year as a nuisance if it is found to be a place "in or upon which any lewdness, assignation, or prostitution . . . exists," in violation of New York's Public Health Law §§ 2320 and 2329 (McKinney) (1985). Despite the obvious role that commercial bookstores play in facilitating free expression, see, *e. g.*, *Smith v. California*, 361 U. S. 147, 150 (1959), the Court today concludes that a closure order would raise no First Amendment concerns, apparently because it would be triggered, not by respondents' sale of books, but by the non-expressive conduct of patrons. See *ante*, at — and —, n. 2 (slip op. 1-2 and 8, n. 2). But the First Amendment, made applicable to the States by the Fourteenth Amendment, protects against all laws "abridging the freedom of speech"—not just those specifically directed at expressive activity. Until today, this Court has never suggested that a State may suppress speech as much as it likes, without justification, so long as it does so through generally applicable

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

W

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 26, 1986

85-437 Arcara v. Cloud Book, Inc.

Dear Chief:

Please join me.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

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

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 28, 1986

Re: 85-437 - Arcara v. Cloud Books

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

cc: The Conference

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

  
CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 30, 1986

Re: 85-437 - Arcara v. Cloud Books, Inc.

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to 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 JOHN PAUL STEVENS

June 17, 1986

Re: 85-437 - Arcara v. Cloud Books, Inc.,  
et al.

Dear Sandra:

Please join me in your separate concurrence.

Respectfully,



Justice O'Connor

Copies to the Conference



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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 27, 1986

No. 85-437 Arcara v. Cloud Books, Inc.

Dear Chief,

Please join me.

Sincerely,

The Chief Justice

Copies to 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 SANDRA DAY O'CONNOR

May 30, 1986

No. 85-437 Arcara v. Cloud Books

Dear Chief,

Please join me.

Sincerely,

*Sandra*

The Chief Justice

Copies to the Conference

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: JUN 2 1986

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 85-437

RICHARD ARCARA, DISTRICT ATTORNEY OF ERIE  
COUNTY, PETITIONER *v.* CLOUD BOOKS, INC.,  
ETC., ET AL.

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

[June —, 1986]

JUSTICE O'CONNOR, concurring.

I agree that the Court of Appeals erred in applying a First Amendment standard of review where, as here, the government is regulating neither speech nor an incidental, non-expressive effect of speech. Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment. If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review. Because there is no suggestion in the record or opinion below of such pretextual use of the New York nuisance provision in this case, I concur in the Court's opinion and judgment.

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 19 1986**

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 85-437

**RICHARD ARCARA, DISTRICT ATTORNEY OF ERIE  
COUNTY, PETITIONER *v.* CLOUD BOOKS, INC.,  
ETC., ET AL.**

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

[June —, 1986]

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

I agree that the Court of Appeals erred in applying a First Amendment standard of review where, as here, the government is regulating neither speech nor an incidental, non-expressive effect of speech. Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment. If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review. Because there is no suggestion in the record or opinion below of such pretextual use of the New York nuisance provision in this case, I concur in the Court's opinion and judgment.

*Went to  
HAY*

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