OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-28 & 84-143

TITLE DONALD C. BROCKETT, Appellant V. SPOKANE ARCADES, INC., ET AL.; and KENNETH EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL., Appellants V. J-R DISTRIBUTORS, INC., ET AL.

PLACE Washington, D. C.

DATE February 20, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

DONALD C. BROCKETT, Appellant		
v.		No. 84-28
SPOKANE ARCADES, INC., ET AL.; and KENNETH EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL., Appellants		
v.		No. 84-143
J-R DISTRIBUTORS, INC., ET AL.		

Washington, D.C.

Wednesday, February 20, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 o'clock a.m.

APPEARANCES:

MS. CHRISTINE O. GREGOIRE, Depty Attorney General of Washington, Olympia, Washington; on behalf of the Appellant

JOHN H. WESTON, Beverly Hills, California; on behalf of the Appellees

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Brockett against Spokane Arcades and the companion case.

Ms. Gregoire, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHRISTINE O. GREGOIRE, ESQ.

ON BEHALF OF THE APPELLANT

MS. GREGOIRE: Mr. Chief Justice, may it please the Court:

With these consolidated cases, this Court has the opportunity to assure state legislatures that they can and should rely on the law of this Court. The Washington State Moral Nuisance Statute tracks this Court's three-pronged definition of obscenity and for that reason Appellants request this Court to declare it facially constitutional.

The judicial meaning of the term "prurient" at issue herein was established in Roth, affirmed in Miller, and remains unchanged today. Prurient in the Washington statute means what this Court said it meant in Roth and nothing more. Thus, the Appellate Court should be reversed for holding unconstitutional that which this Court set forth in Roth, Footnote 20.

The case before the Court today involves a challenge to the definition of one term in one element of a four-element prong which comprises only one of a three-pronged test in the definition of obscenity. There

is no question that the Washington State statute contains all three prongs, defining the term "obscenity," as was contained in Miller. There is no question that prong one of the Washington State statute contains all four elements that were present in Roth, affirmed in Miller.

The only issue is as to the definiton of one term in one element, that of prurient. Prurient in the Washington statute is defined as that which incites lasciviousness or lust.

Appellees contend and Appellants deny that the term "lust" has a fixed meaning, that of healthy or wholesome. Lust in the Washington statute means what it did in Roth, Footnote 20. Therein this Court ascribed to the term "prurient" like it has to the term "obscenity," a judicial meaning. This Court said that prurient was material having a tendency to excite lustful thoughts.

We, therefore, contend, as the Solicitor General concluded, that this Court said that prurient meant lustful.

We also believe, however, that as a result of Footnote 20, this Court went on to approve a number of adjectives which can be used to define the term "prurient", all of which convey the same basic theme.

By Footnote 20 in Roth, we clearly know what is not prurient. It is not a healthy, wholesome interest in sex as contended by Appellees herein.

QUESTION: May I ask -- May I interrupt just for a second?

MS. GREGOIRE: Yes, sir.

QUESTION: I wasn't sure that your briefs were entirely consistent all the way through and what you said the word "lust" meant. In the blue brief -- I guess this is filed by your co-counsel, not by you. On page five you said, we urge that the prurient part of Miller's three-part test as required only that the expression in some significant way be erotic. Is that a correct statement of your position?

MS. GREGOIRE: Yes. May I explain, Your Honor? What we meant by that -- What co-counsel meant by that is the purpose of the prurient element as contained in prong one is to separate out that which is sexually stimulating from that which is intellectually stimulating, separating out protected and unprotected speech.

QUESTION: Your view is that any time the material is sexually stimulating, then it satisfies the lust aspect of your statute?

MS. GREGOIRE: It may satisfy prurient, Your Honor, but not prong one, because when one looks further at prong one and in specific contemporary community standards element, one becomes very clear that the measure that we have there is to measure that which offends.

That which offends, thus, can mean lustful, lascivious, lewd, all the adjectives that are contained in Footnote 20, so long as it is clear that it is not healthy, wholesome, or something similar of that nature.

QUESTION: Are you suggesting that something that is erotic is or is not healthy? I am not quite clear.

MS. GREGOIRE: If a juror, for example, was to find that something was healthy just because it is sexually stimulated, that would not meet prong one. The juror must find that there is some sort of unhealthy, unwholesome, lewd, lascivious type --

QUESTION: Then in your view there is a requirement that it be something more than sexually stimulating?

MS. GREGOIRE: That is correct, Your Honor.

QUESTION: Do you think that is consistent with what the brief says? Of course, it doesn't matter. That is your position.

MS. GREGOIRE: It is, Your Honor. I believe it is consistent with --

QUESTION: Does it go as far as to require that it be morbid and the other language?

MS. GREGOIRE: What our contention is is that Roth Footnote 20 did not give a fixed definition to the term "prurient." There were a number of adjectives --

QUESTION: Well, I am just asking what you think your statute means, not what Roth, Footnote 20 means.

MS. GREGOIRE: Your Honor, our statute means what Roth, Footnote 20 means. The authors of the statute literally took the language from Roth, Footnote 20. The first definition contained in the Footnote is lustful thoughts. The authors of the statute in Washington, we submit to you, clearly -- virtually just lifted it out of that Footnote as they lifted the three-prong definition out of Miller. Therefore, the definition is what this Court said it is in Roth, Footnote 20.

QUESTION: In other words, we should look to that Footnote and not to the intent of your legislature?

MS. GREGOIRE: They are one in the same is our contention, Your Honor.

QUESTION: Counsel, I am glad for your elucidation here because I share Justice Stevens' concern. I felt that your position had changed in the paper submitted here. I guess what we are interested in is what your present position is.

MS. GREGOIRE: I apologize if we in some way have mislead you. That was not our intention. We were trying to distinguish what the purpose of prurient element is, i.e., to separate out that which is sexual stimulation

from intellectual stimulation, but that in and of itself cannot meet prong one. There must be something more. It must be as this Court said in Footnote 20, lustful, lascivious, what-have-you, clearly not healthy, wholesome interest in sex.

QUESTION: Is that what you argued in the Court of Appeals?

MS. GREGOIRE: It is, Your Honor. In the trial court and in the Court of Appeals we have always maintained that --

QUESTION: I surely didn't get that impression I must say.

MS. GREGOIRE: Your Honor, our briefs will bear that out; that we did argue that in both the trial court and in the Ninth Circuit. Simple, healthy, wholesome interest sex was insufficient to met prong one.

The Washington statute itself means by the term "prurient," as I submit to Justice Stevens, that which the Court meant in Roth, Footnote 20. Should there be any question as to how a juror, as Appellees suggest, might understand that definition, we submit that that is properly conveyed to those jurors by means of a jury instruction. Surely by jury instruction can a trial court judge convey to the juror the judicial meaning

of the term "prurient." It is unreasonable to assume that a trial court would charge a jury but refuse to instruct on the judicial meaning in light of this Court's decisions in Roth and Miller and a state court decision which we referred to in our brief.

It is reasonable to assume that when this Court rules in this case that the Washington courts will follow the rule of this Court as well.

It is clearly not intended, we submit, by Roth, Footnote 20, that prurient should convey a healthy, wholesome interest in sex. Roth, Footnote 26, provides the case law upon which the court relied in formulating what is now prong one of the three-prong test. Some of those cases we have submitted in our brief make clear what the court had in mind when it developed prong one and the definition of prurient. And those cases, we submit, make clear that it cannot be a healthy, wholesome interest in sex.

The case law is clear on that subject in Footnote 26 of Roth. Further, the patently offensive prong, prong two of the Miller test, was not present in 1957 at the time that Roth was decided. It came some five years later in 1962. Thus, prong one was what the law court looked to and in so doing if it was to have interpreted prong one, in specific prurient, to have meant simply

healthy or wholesome, then it would not have served its intended purpose to separate out protected and unprotected speech.

QUESTION: May I ask one other question because I did have difficulty with this. You then do not agree with Professor Showers' view of what the first prong is all about?

MS. GREGOIRE: Your Honor, if that is Professor Showers' view, that it can contain healthy, wholesome, no, we do not.

QUESTION: I see. You quoted him in your Footnote 7 of your reply brief. That is what I thought was your position but I guess it is not.

MS. GREGOIRE: Well, I understand him, Your Honor, to have said that that was the purpose of prurient but not the meaning of prong one.

QUESTION: He just said it was material that turned you on. That is the way he describes it.

MS. GREGOIRE: That is correct, Your Honor.

QUESTION: A simplied, shorthand approach to it. You disagree with that? It is something more than that.

MS. GREGOIRE: Yes, Your Honor.

QUESTION: That is what he says in so many words.

MS. GREGOIRE: Yes, Your Honor.

QUESTION: You disagree with that?

MS. GREGOIRE: That is correct.

Subjecting only that material which excites or appeals to sex as Roth said is only the beginning of the inquiry for a juror with reference to prong one. Contemporary community standards then must measure that which offends. The adjectives contained in Footnote 20 make that clear, lewd, lascivious, lustful appeal. That is then to be measured by the average person considering the work as a whole.

Prurient, as I said earlier, in the Washington statute means what this Court said it meant in Roth. Assuming that as Appellees content, there are some unconstitutional applications of the statute based on prurient alone. Such applications, we submit, would be few, if any, once one applied the remaining elements of the element in prongs one, as well as having applied all of prongs two and prongs three.

The Appellate Court, we submit, erred, holding specifically that it was unnecessary to find substantial overbreadth.

Appellants contend in this, a facial challenge, there must be a showing of substantial overbreadth as found in Ferber and cannot be found here when one looks

at the statute as a whole, all four elements of prong one, coupled with prongs two and prongs three of Miller.

One other aspect of the case before this Court is that it deals with the respective roles of state and federal courts. While Appellants herein respectfully request this Court to hold the statute facially constitutional, if it is unclear in the minds of this Court as to the meaning to be ascribed to the term "lust" by the Washington court, we respectfully request that the state courts be allowed to construed in this, a facial challenge to a state statute. This, we submit, is a proper course of action for three reasons.

First, the Washington State moral nuisance law before this Court literally tracks Roth and Miller. It contains all three prongs and all four elements of prong one.

Two, we submit one must presume that the state legislature intended the statute to be constitutional and such is obvious when one looks to the statute as a whole and finds that it literally lifted the definition of "prurient" from Roth and the definition of "obscenity" from Miller.

QUESTION: May I ask one other question?

MS. GREGOIRE: Yes, sir.

QUESTION: I was just reading the first question

presented in your jurisdictional statement. It is "May a United States Court of Appeals compel state anit-obscenity laws to define 'prurient' with words that mean a morbid or depraved interest" and so forth. You are saying that is the right definition.

MS. GREGOIRE: We are not --

QUESTION: You are saying they forced you to adopt the definition you now say is the correct definition.

MS. GREGOIRE: Sir, we are not saying that the only definition is morbid or shameful. What we are submitting to this court is that in Roth, Footnote 20, the Court used a number of adjectives, possibly a continuum, if you will, that accepts shameful and morbid as well --

QUESTION: Surely it would violate the statute if it met that test. But, what I am really asking is would it also violate the statute if it did not meet that test but merely was normal and healthy interest in sex? Would that violate the first prong?

MS. GREGOIRE: It is our contention it would, Your Honor.

QUESTION: Oh, so you now agree that the first prong does not require proof of the morbid interest in sex.

MS. GREGOIRE: We --

QUESTION: I really don't know your position.

MS. GREGOIRE: Let me attempt to be responsive to your question, Your Honor.

What we are contending here is that the Court did not fix a definition of "prurient" as shameful or morbid. It is one of the acceptable definitions of the term "prurient" in Roth, Footnote 20. It can also be described or defined by lustful, lascivious, lewd, itching, longing, all the terms contained there, so that it is clear that the theme is conveyed to the juror that it is something clearly not healthy, not wholesome.

QUESTION: Well, does it or does it not require a morbid interest in sex.

MS. GREGOIRE: It may.

QUESTION: I really think the question you have presented -- You say the Court of Appeals forces you to take an interpretation of the statute which you said is correct all along.

MS. GREGOIRE: The Court of Appeals said that the only definition of "prurient" was shameful or morbid. We submit that is not the only --

QUESTION: Were they correct in saying that a healthy interest in sex is also a permissible definition of lust within the meaning of your statute?

MS. GREGOIRE: No.

QUESTION: Is there something in between a morbid

interest and a healthy interest?

MS. GREGOIRE: Yes, Your Honor, there is.

QUESTION: Would you explain it to me?

MS. GREGOIRE: What we submit the contemporary community standards element of prong one is intended to convey to the average juror is that they must find by the prurient element that which offends. It is not that specifically articulated what is the specific words that one would use to define prurient. Roth, Footnote 20, uses a number of adjectives, but Roth footnote also makes clear they have to convey a basic theme and that theme cannot be healthy, wholesome. It must be something else. But at no time has this Court said that there is only one acceptable definition of prurient as Appellees contend and the Appellate Court found, namely, shameful, morbid.

We submit it can be as the Washington statute found, lust, lasciviousness, or it could be some of the other adjectives that are used in Footnote 20, but this Court has not said it is only shameful or morbid. That was the finding of the Ninth Circuit Court of Appeals and Appellees' contention herein.

The third reason why we submit that if there is any question before this Court as to the definition of lust before the Washington State courts would be

appropriate is that the highest state court in Washington has already held a predecessor statute to be required to be construed consistent with this Court's decisions in both Roth and Miller.

If allowed, we submit, it is reasonable to assume that the state court in Washington would construe constitutionally the definition of the term "lust."

I have three points I would like to convey to the Court by way of conclusion. First, it is the request of the Appellants herein that the Washington State statute be declared facially constitutional because it tracks Roth and Miller in the definition of obscenity. The definition of prurient in the Washington statute means what this Court meant by its use of lust and lascivious in Roth. Clearly it does not mean healthy, wholesome, nor has this Court ever said that the term "prurient" can have only one definition, shameful, morbid.

By Roth, Footnote 20, there are a number of alternative adjectives that can be used and the Washington State statute took the first, if you will, the definition out of Roth, that which incites lustful thoughts.

QUESTION: Ms. Gregoire, may I inquire whether in your view in addition to the requirement that the matter appeal to the prurient interest the statute also requires that in any event to be covered the matter has

to depict or describe the specific listed act in the statute.

MS. GREGOIRE: That is correct, Your Honor. It is Appellant's contention herein that even if prong one were to include or to be over-inclusive that that over-inclusiveness possibility is virtually eliminated when one applies prong two, the patently offensive test, and eliminated when one applies prong three, the serious literary, scientific, artistic prong.

The Ninth Circuit Court of Appeals found that there was overbreadth and that was the basis on which they relied to overturn the Washington State statute.

We submit overbreadth simply cannot be substantial in this case when one looks at prongs two and prongs three as well as the other elements contained in prong one.

QUESTION: I don't know what you mean by prongs one, two, and three. But, with reference to the statute itself, you mean the portions of it that describes specific acts.

MS. GREGOIRE: Yes, I do, Your Honor. I am sorry. When I referred to prong two I meant the patently offensive test. When I referred to prong three I meant the serious literary, artistic, scientific test. The statute contains those elements and, therefore, any

overbreadth would be resolved by virture of those two other aspects of the statute.

QUESTION: Counsel, I want to be sure. Are you still under an injunction?

MS. GREGOIRE: Yes, we are, Your Honor.

The Washington State Legislature relied on this Court's decision and such reliance, we submit, must be held proper and must be inherent in our system of federalism.

Secondly, should this Court be concerned about Appellees' suggestion of overbreadth and the Ninth Circuit Court of Appeals' finding of the same, it is apparent there is no substantial overbreadth when one looks at the statute as a whole and not under a microscope looking at but one term in all of the entire statute.

Thirdly, while we request that this Court hold facially constitutional the Washington State statute, by way of alternative, we submit, that if this Court is unclear as to the definition to be ascribed to the term "lust" by the Washington Court, that that clarification be left to the state court in this, a facial challenge, to a state statute.

Thank you, Your Honors.

CHIEF JUSTICE BURGER: Mr. Weston?

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ORAL ARGUMENT OF JOHN H. WESTON, ESQ.

ON BEHALF OF THE APPELLEES

MR. WESTON: Mr. Chief Justice, and may it please the Court:

By defining prurient exclusively in terms of lust or lasciviousness, instead of the required shameful and morbid interest in sex, the Washington legislature impermissibly expanded the scope of its obscenity statute rendering it invalid in every application.

Appellants have claimed in this Court and modified their earlier position substantially in their reply brief which was just recently submitted basically to concede that prurient must mean a shameful or morbid interest in sex, but that in some fashion not quite made clear that lust and lasciviousness necessarily mean the same as shameful and morbid.

In response to the Court's questions this morning, Appellants have suggested that a trier of fact will necessarily be instructed to imply lust or lasciviousness, somehow necessarily add to that determination the terms "shameful" and "morbid" while other terms conveying a necessary unhealthy or pathological or diseased treatment or interest in sex.

It seems to me that Appellants' suggestion that the application of contemporary standards separates

from any definition whatsoever, from anything to which the contemporary standards apply. In other words, anything that contemporary standards will be measuring except for the terms "lust" and "lascivious" which we have --

QUESTION: Mr. Weston, what about the rest of the statute that lists various specific acts and matters which have to be depicted? Doesn't that qualify the statute regardless of what definition you give of prurient?

MR. WESTON: Not in any significant sense, Justice O'Connor, because --

QUESTION: I can't imagine how you could be more significant or more explicit than in that statute.

MR. WESTON: The --

QUESTION: I mean, you have to look at it as a whole which is what the state is arguing and that makes some sense, doesn't it?

MR. WESTON: It makes sense, Your Honor, except in the context of the many, many years that obscenity definitions which have pointed out that each of the tests, each of the three tests in the familiar tripartite definition of obscenity is separate and all three of the tests must be met, must coalesce, in order for there to be a constitutional finding of unprotectedness.

QUESTION: And you are urging that we may not then look at the statute as a whole to see what the jury

has to find to convict someone under this statute?

MR. WESTON: The statute -- If any of the three elements of the obscenity statute is constitutionally deficient by definition then, the statute cannot be constitutional in that since each of the three tests is independent, since each of the three tests must be met in order for material to be obscene, the statute then must fall because of --

QUESTION: Nothing in the case is required quite that microscopic on examination, I don't think.

MR. WESTON: Mr. Justice Rehnquist, if I may suggest, the case most on all fours with this would be Marks versus United States, a case which involved this Court's reversal of a federal obscenity prosecution where the conduct had occurred under the more liberal standard of Roth, Memoirs prior to this Court's construction in Miller and in Hamling.

QUESTION: There we were construing a federal statute. Here you have simply taken away from the state courts which might have given a limited construction of the statute and said we have to analyze the statute up here or in the Ninth Circuit rather than in the Washington case.

MR. WESTON: But, if I may continue, the reason I cited Marks was not because a federal court can construe

a federal statute as opposed to a federal court being not permitted to construe a state statute. The point I was making vis a vis Marks was to respond to Justice O'Connor's question as to why an invalidity in one of the three prongs renders the statute unconstitutional. The Marks application was critical because Marks was tried -- Marks' conduct occurred during the Roth, Memoirs formulation. At that time the standard for judging value was whether the material was utterly without redeeming social value. The indictment was tried under a much narrower -- or broader from the prosecution's point of view, jury instruction, that material lack serious literary, artistic, political or scientific value.

The court held without reviewing the material in question that because one of the three prongs that was used, one of the three tests for obscenity in the tripartite test, because that was constitutionally deficient, the matter had to be reversed as well as any other cases which had been tried under the similiarly deficient standard.

QUESTION: If there is this much argument about what the statute means, why shouldn't it have been submitted to the Washington court?

MR. WESTON: With all due respect, Your Honor, the only argument that we have heard as to what the statute

means comes now for the first time from Appellant in this Court. The District Court who rendered the decision in complete favor of Appellants had no question as to what the statute meant. The Court of Appeals, both the majority judges and dissenting Judge Wallace, had absolutely no question understanding exactly what the statute meant.

In their opening brief in this Court, both Appellants had absolutely no question as to what the statute meant. There was on all fours agreement the statute meant exactly what the Washington legislature said.

QUESTION: We have heard several different versions just this morning of what the statute means.

MR. WESTON: But, Your Honor, with all due respect --

QUESTION: Haven't we heard several different versions this morning of what the statute means?

MR. WESTON: I think that is true simply because counsel is unaware of what the legislature has said the statute means and I say this with all due respect because counsel --

QUESTION: When we have a counsel for a state arguing here and telling us -- Am I holding you up, is that why you looked at your watch?

MR. WESTON: Forgive me, Justice Rehnquist, I was just trying to gauge my available time.

QUESTION: I see. When we are having a counsel here from a state taking a position as to what the state legislature meant, ordinarily we give considerable deference to the state attorney's view as to what the state legislature meant.

MR. WESTON: Justice Rehnquist, let us assume for the moment that this statute provided a penalty provision for a mandatory death sentence in the case of somebody convicted of violating the obscenity law and we challenged that statute on a number of grounds, one, because perhaps it imposed an impermissible chilling effect and perhaps under Solon versus Helmet rendered it somewhat violative of the Eighth Amendment. Would the Court seriously entertain, and I ask this rhetorically with all due respect, the representations of the state representatives to say that the legislature did not really mean what they said and that the case should go back to the state court for come clarification of an ambiguity which appeared nowhere else except in the minds of the state lawyers? I think not, Your Honor.

This is a statute which clearly and unambiguously states two words. It defines prurient exclusively in those two words, neither of which is particularly arcane

or unusual such as the word "prurient," which I think we would all agree appears nowhere else in the English language except for the opinions of this Court and obscenity litigation and legislation.

Rather, this legislature ignored all of those other potential definitions which has permeated this Court's opinions and the state statutes of most states, certainly up to the time of the 1973 Miller decisions. It is significant to note that in seven of the eight cases which formed the basis of the Miller quintet, Capitol versus California, Miller versus California, Paris versus Slaton, Oreto 12-200 Foot Reels, Heller versus New York, and Alexander versus Virginia. Seven of those eight cases involve statutory definitions of prurient defined as shameful or morbid and the federal cases have been going to trial, they all have gone to trial on the basis of shameful and morbid because those were the federal jury instructions.

Subsequently, the next cases to reach this Court, Hamling and Jenkins, both of which -- Hamling by jury instructions, Jenkins again because of the Georgia statute which simply defines prurient as shameful and morbid.

With all due respect, that term has acquired a judicial meaning as a term of art and for the state

legislature of Washington to abandon opinion after opinion, guidance after guidance from this Court and other courts around the country and federal legislatures, to adopt an over-inclusive standard renders the entire statute in every application void. It is simply unenforceable because it reaches too far, because the statute in every sense, whether it be viewed by an author, a screenwriter, a theater owner, a playwright, an impresario, any civilian who has to gauge his or her conduct by the statute will read that statute and be forced to engage in self-censorship because of the over-inclusive nature of this.

I ask the Court simply to remember that this is not some small, isolated, minimal conduct statute. This is the most punitive anti-obscenity statute in the history of the United States. It is a felony. It carries a five- year jail sentence, a $50,000 criminal fine, a $5,000 minimum mandatory and an unlimited civil penalty. This is not a small gamble for somebody to take whose conduct is arguably implicated by the statute.

The Appellants in this case have somehow suggested that what was at stake here was some sort of substantial overbreadth claim and invoking erroneously and I think confusingly in their briefs some Broadrick sort of standard. With all due respect, I would like to deal with that in a very brief manner simply to note

that throughout this litigation Appellees have raised and asserted their own rights to this statute. They have asserted that their conduct was being chilled, that they were going to be the targets of enforcement prodecures and that the statute is to them was unconstitutional and, as in Munson, Maryland versus Munson, the statute was unconstitutional and void in any application. This is not a statute -- This is not a case in any significant sense, in any sense whatsoever, where any third party, hypothetical non-party rights are being asserted as in the Broadrick or Ferber type situation.

Obviously in Ferber -- Ferber was stemmed that the statute -- that his conduct could be prescribed but as to somebody else the statute could not be validly applied. We are not saying that.

Appellees rather in this case have maintained throughout that it was their rights being violated and their conduct. So, the substantial overbreadth requirement sought by Appellants would be on no relevance in this case.

Instead, and what has been the position when we get right down to it, Appellants have asserted throughout this litiation without in any way making a claim until their reply brief in this Court that there was the slightest vagueness or ambiguity or uncertainty as

to the meaning of that statute. They have somehow argued that they were entitled to an unprecedented abstention application to give their state court the first opportunity, the first look doctrine, to construe their state statute. In essence, judicially to rewrite that statute for no basis which is articulable in the abstention decisions of this Court.

Obviously, Younger versus Harris has no application since there are no pending cases. The only possible basis would be some application of the judge-made Pullman abstention doctrine. Let us quickly take a look at that to see if it applies. I think essentially it does not. Most recently this Court through Justice O'Connor dealt in the Hawaii Housing Authority case with a challenge to a Hawaiian legislation where not only did the parties but the dissenting judge in the Court of Appeals suggest that this was a case that was somehow susceptible to judiciail rewriting and ought to be sent to the state court in the first instance.

Unequivocally, this Court noted that Pullman abstention was a limited doctrine to be applied only in limited circumstances and that the term "criteria," which must be met before Pullman abstention could be utilized were, one, uncertainty, ambiguity in the meaning of the statute and the possibilty of some readily available,

narrowing construction.

Manifestly, the inquiry in this case stops because there is no ambiguity or question as to the meaning of the statute. The only ambiguity which exists in this statute is whether the Washington Courts would engage in the kind of wholesale judicial rewriting of a statute in the face of a clear legislative expression to the contrary. That, I acknowledge, is ambiguity, but it is certainly not the kind of ambiguity which this Court has considered in acknowledging and fashioning the exception to federal intent in terms of creating the federal forum with -- for proper plaintiffs which underlies the judge-made exception to the vindication of federal jurisdiction found in Pullman type abstention. It simply is not present in this case.

QUESTION: Mr. Weston --

MR. WESTON: Yes.

QUESTION: Are you going to respond to Judge Wallace's position? Assume you are correct on the reading of the statute and that Professor Shower's view and Judge Wallace's interpretation of the statute is that lust just means something normal -- normal interest in sex. Why is it necessarily unconstitutional if that is the case?

MR. WESTON: It would seem, Your Honor, for

a variety of reasons aside from the fact that it really appears to be a departure from the term of art. It would seem historically and certainly in recent years obscenity was banned -- Let me rephrase that. The Constitution has permitted the banning of obscenity for a variety of reasons, but most consistently and perhaps as recently expressed by Justice Rehnquist in Hamling because it imparted a debasing or an obnoxious portrayal of sex.

QUESTION: No. The part of the argument is that the other two prongs are relevant to that, sufficiently offensive to satisfy the second prong and totally without artistic value.

MR. WESTON: We can try to discuss that but it would seem to me that merely valueless material, material which is written by a bad author or somebody -- or a painting painted by an unartistic artist will not in any sense guarantee or even suggest that a work should be offensive. It is just without talent.

As to the "B" prong, the "B" prong under the Miller formulation as noted quite clearly by the Chief Justice in Miller was basically for a notice provision. Firstly, the material is not taken in its entirety. It is very clear that the taken-as-a-whole requirement is present only with respect to the first prong, the prurient prong, and also the last prong. That is the

material lacks serious literary, artistic, political and scientific value.

As to the rest, it is simply candor, whether for notice purposes there appears in the work -- whether the work depicts or describes what has been characterized as a patently offensive manner explicit descriptions of sex. But, patently offensive in this format simply refers under the new Miller formulation to degree of candor. That is all it can mean. To the extent that there is to be gauged social attitudes, community values or attitudes, it required, once the Hicklin test was rejected as discussed in our brief, that that determination of unhealthy or rejection by the community in terms of its attitude be applied to the work taken in its entirety and not to some isolated section. Therefore, the only portion of the obscenity test which considers the work taken as a whole and which can measure community value has to be the prurient prong.

We have had a candid statement in this Court from Appellants that they concede that the lust or lascivious portion simply refers in and of itself to a normal, healthy interest in sex, but somehow in some other somewhat unexplained fashion that a trier of facts or an artist who is trying to interpret the statute or in the language of Justice O'Connor in Pohlander a police

officer, a prosecutor and a juror and a judge who have to enforce the statute will somehow know that although the legislature has rejected all these other terms and substituted the exclusive words "lustful" or "lascivious" which we now know mean a normal, healthy interest in sex, that somehow they are to read something else into this, that it really means a shameful or perverted or pathological interest in sex.

QUESTION: Well, Mr. Weston, all they have to do is look at Part B and then they know.

MR. WESTON: Justice O'Connor, again -- Firstly, Part B manifestly does not deal with the work taken as a whole. There is no question as to that. All it focuses on is isolated --

QUESTION: But it is a requirement for state counsel agreement, but to convict someone under the statute it has to meet the specific acts listed in Part B.

MR. WESTON: That is correct, Your Honor, but it has been a long hallmark of --

QUESTION: I think the policeman on the beat can figure that out having read Part B.

MR. WESTON: That is exactly true, Your Honor. What the policeman on the beat is able to tell is that a movie or a book contains a sexual act. Starting in Roth and in an unbroken series of decisions this Court

held that any work in order to be rendered obscene had to be judged not by isolated excerpts or parts taken out of it, but rather in its entirety and according to the whole. The "B" prong specifically does not include the requirement that it be taken as a whole. It only is whether the material contains an act. To meet the "B" prong, a 150-page book would satisfy that prong if it had one paragraph of a sexually explicit description. Manifestly that would be insufficient to satisfy the three-part test because of the first prong's requirement that it be taken as a whole. But, because the "B" prong can be satisfied by an isolated example, the "A" prong must measure something in order to guarantee that the material is not suppressed simply because of an isolated, potentially offending passages. And, it is the "A" prong, the prurient prong, taken as a whole which must measure not whether something appeals merely to a healthy or normal interest in sex, but rather something which is unhealthy, morbid or pathological to justify the community interest in suppressing it, because absent that all that remains is candid material, sexually graphic material, which may have been assembled or put together by somebody who wasn't very talented which, in the words of Professor Showers, turned somebody on.

But, the community in which this determination

is being made may well -- and we submit that most communities in America would determine that today there is nothing wrong, nothing shameful, nothing sick or preverted about something which merely turns somebody on, raises the sexual excitement or incites normal, healthy sexual arousement. That is what this statute does. This statute takes the tripartite test, stands it on its ear, and in the most retrograde of fashions requires conscientious jurors to suppress material which do no more than appeal or incite a normal sexual response regardless of whether the community finds that sexual response to be perfectly acceptable, perfectly tolerable, and well within the range of acceptance of that community and that renders the whole statute invalid just as -- Justice O'Connor, if I may try it a slightly different way, suppose instead of defining prurient in this impermissible way, the State of Washington used shameful and morbid, but provided that the relevant community would include minors, thereby dramatically expanding the statute as the Chief Justice noted extensively in U.S. versus Pincus, a 1977 or 1978 case.

Now, the same argument, Justice O'Connor, that you are making with respect to that, to this case, would be made I assume with respect to that, that what difference does it make if the "A" prong, the prurient prong, has

been unconstitutionally expanded way beyond what the Constitution permits, because the "B" prong satisfies whatever the concern is.

And, with all due respect, I must stress as strenuously as I can that each prong is independent. The proff of each must stand on its own. If material appeals to a prurient interest, it if contains patently offensive depictions of open sexual acts, but it doesn't lack serious value, the material may not be found obscene. Similarly, if the material appeals to a prurient interest, if it lacks serious value, but it doesn't contain patently offensive depictions, it may not be found to be obscene regardless of the other two prongs being satisfied. And, in this sense, if material contains patently offensive depictions or descriptions of sex, of ultimate sex acts, and if it lacks serious artistic, political and scientific value but it does not appeal to a shameful or morbid or pathological interest in sex, then it may not be suppressed, it may not be constitutionally found to be obscene or that is what this Court's decision said and that is what the constitutional determination of obscenity stands for.

The tests are totally independent. All three must be met and invalidity in one renders the entire scheme void.

In conclusion, we would respectfully submit that the judgment of the Ninth Circuit Court of Appeals was manifestly correct as to the substantive issues and with respect to --

QUESTION: May we have just one last question?

MR. WESTON: Of course, Your Honor.

QUESTION: In the footnote in your opponent's reply brief they suggested it might be appropriate if we are not sure what the statute means to certify the questions of the State Supreme Court. What is your view about the desirability of doing that?

MR. WESTON: Initially, Your Honor, the District Court in its initial opinion discussed certification with respect to not this section, provision before us, but another provision of this multi-sectioned bill. The District Court noted that Washington does have a certification provision. Number two, however, that that certification provision is really for uncertainty or ambiguity, the kind of thing, as we read it, that really means the same as Pullman abstention, and, therefore, unless -- In a federal court, unless the same standards would apply in a Pullman abstention situation -- Excuse me, apply for certification as in a Pullman abstention situation, all of the arguments which we would make and have been made by persons more eloquent than we as to

why a Pullman abstention is inappropriate in a First Amendment case absent true vagueness or true unclarity with respect to --

QUESTION: Well, if it is all that clear, isn't it pretty sure that if we did certify it they would come back and say it means exactly what Mr. Weston said it did? How would that hurt you?

MR. WESTON: The principal issue, with all respect, is once again Pullman abstention, delay, and --

QUESTION: How does the delay hurt you? You have got an injunction.

MR. WESTON: But, there is no guarantee as I understand it that the injunction would remain. There is no necessary guarantee of that.

I would point out that in Baggett versus the Farm Labors Union the injunction existed initially. This Court concluded that it was improper to reach it because of some Pullman abstention concerns vacated the injunction and then at the very --

QUESTION: But, in any event, your reason for not wanting to do it is just delay? I am really trying to find out what your position is.

MR. WESTON: I think the position is that for all the reasons that we would oppose Pullman abstention is because there is no uncertainty and no ambiguity in

this statute except as I have suggested as to whether the Washington judiciary would rewrite the statute; that certification as already determined by the District Court would not be helpful in this case. There would be no basis for it. That was raised at least with respect to another provision. The district judge --

QUESTION: Apparently now which was not true then the chief law enforcement officer of the state said we would not prosecute in cases you are most concerned about if she means what she told us. Maybe it isn't different. I am just interested in your views. You would not want to certify it.

MR. WESTON: Except to the extent that Pullman abstention would be appropriate and satisfied and except to the extent that there was necessary injunctive protection coextensive to what we would be entitled to under Harris versus NAACP or Metro Media versus California.

The problem is that there is no necessary guarantee of that. It would further build in delay. And, I would note that with respect to certification or the express desire to obtain some narrowing construction, this case has gone on for almost three years. At any time in the course of this litigation Appellants, presumably familiar with Dombrowski, had the opportunity to go into their state court and ask plaintiffs, seek as the Dombrowski

state entities were counseled to do by this Court, and seek to obtain whatever limiting construction was available to them or judicial rewriting. They have not availed themselves of that opportunity for almost three years, despite the fact that as the Attorney General they would have been able to get a rapid response usually barred to most litigants in this situation.

And, the point that Dombrowski makes is that in a situation where a federal court deals with a state piece of legislation, that the state judicial construction or rewritings are binding and that those constructions may be utilized at any time before judgment, during judgment, or after judgment to then come before the federal tribunal and say this is no longer the law, please consider modifying it. I would suggest that in the nearly three years of litigation Appellants have not done so. My watch tells me with the time difference there is plenty of time left in Washington for them to initiate such procedure and they may do it tomorrow or any time in the future and then seek to modify whatever equitable order is here.

They haven't done that and I submit that at this late date, given that opportunity that has been available to them, we ought not to explore any procedures which would further delay finalization of this litigation.

With all respect, the judgment of the Ninth

Circuit should be affirmed and there should be no additional expansion, an unjustified expansion, of any sort of judge-made Pullman abstention doctrine in this case.

I close simply by noting that Broadrick over-breadth is not present in this case.

I thank the Court for its attention.

CHIEF JUSTICE BURGER: Do you have anything further?

ORAL ARGUMENT OF CHRISTINE O. GREGOIRE

ON BEHALF OF APPELLANT -- REBUTTAL

MS. GREGOIRE: Mr. Chief Justice, and may it please the Court:

Just a couple of brief comments if you will. Contrary to the assertion of Appellees before this Court this morning, this Court has never said that prurient is defined only by use of the terms "shameful" or "morbid." In truth and in fact, in Roth, Footnote 20, this Court clearly defined it as meaning lustful thoughts. The Washington State statute means what this Court meant in Roth, Footnote 20.

Again, I submit that rather than taking the view of Appellees that we dissect the statute not only by element but we dissect it by virtue of the application of the three prongs. It is clear that when one looks at obscenity law one does so by looking at the entire

statute, that any over-inclusiveness that one might find by virtue of the first element, prurient element, of four elements in prong one are readily met unlike that contention of Appellees by applying prong two, the patently offensive prong, and prong three, the serious literary, scientific --

QUESTION: How do you respond on that argument to his point that one paragraph out of a 200-page book would satisfy prong two but not prong one?

MS. GREGOIRE: Your Honor, I submit to you that I am totally unaware of any such hypothetical.

QUESTION: It is true, is it not, that the taken-as-a-whole language appears only in Part A of your statute.

MS. GREGOIRE: It appears in Part A and C, Your Honor. It does not appear in Part --

QUESTION: It does not appear in Part B?

MS. GREGOIRE: That is correct and that is consistent with Miller.

QUESTION: I understand, but then isn't it true then that the Part B is satisfied by a short paragraph in a long book?

MS. GREGOIRE: I don't believe that that would comply with Part Two or Prong B as Appellees suggest. I don't believe that that necessarily would, Your Honor,

and let's assume that for the moment that it did, again, Appellees' wish to dissect and separate all three prongs of the definition of obscenity and look only to prong two or prong "B", irrelevant of prong one and irrelevant on prong three.

QUESTION: Well, don't you agree there are three independent tests that must be met?

MS. GREGOIRE: The three must be met and taken as a whole.

QUESTION: That each must be met?

MS. GREGOIRE: Yes.

QUESTION: If you have to look at the work as a whole, Part B can't satisfy the first prong, isn't that right?

MS. GREGOIRE: Part B does not have to be taken as a whole language, that is correct.

QUESTION: So that cannot satisfy the taken-as-a-whole element with the first prong?

MS. GREGOIRE: That is correct, Your Honor.

But, again, we submit that if this Court was to look at the statute as a whole and the fact that the Washington State legislature literally lifted the language contained in Miller and literally lifted the language contained in Roth, and what the Washington State legislature did is follow the dictates of this Court and it seems

to us that under federalism such actions by a state legislature ought to be sanctioned, ought to be approved by the highest Court in this land.

We request and respectfully submit that the Washington State statute is facially constitutional and we request that this Court so find.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

We will hear arguments next in Board of Trustees against McCreary.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)

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34-28 & 84-143 - DONALD C. BROCKETT, Appellant V. SPOKANE ARCADES, INC., ET AL.; and

34-143 - KENNETH EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL.,

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BY Paul A. Richardson

(REPORTER)