ORDERS FROM JUNE 21 THROUGH JULY 25, 1974

JUNE 21, 1974

Dismissal Under Rule 60

No. 73–1755. NEW YORK TYPOGRAPHICAL UNION No. 6 ET AL. *v.* NEW YORK TIMES CO. Ct. App. N. Y. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

Miscellaneous Order

No. A–1204. RAPIDES PARISH POLICE JURY ET AL. *v.* JOHN BRADAS ET AL. Application for stay of judgment of the United States District Court for the Western District of Louisiana pending appeal to the United States Court of Appeals for the Fifth Circuit, presented to MR. JUSTICE POWELL and by him referred to the Court, denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

JUNE 24, 1974

Affirmed on Appeal

No. 73–499. DILLENBURG *v.* KRAMER, SECRETARY OF STATE OF WASHINGTON, ET AL. Affirmed on appeal from D. C. W. D. Wash. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 73–521. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* BEATY. Appeal from C. A. 5th Cir. Motion of appellee for leave to proceed *in forma*

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pauperis granted. Judgment affirmed. MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 478 F. 2d 300.

Vacated and Remanded on Appeal

No. 73–5598. NORTON, A MINOR, BY CHILES *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. Appeal from D. C. Md. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment vacated, and case remanded for further consideration in light of *Jimenez* v. *Weinberger,* 417 U. S. 628 (1974). Reported below: 352 F. Supp. 596.

Certiorari Granted—Vacated and Remanded

No. 73–289. MICHELMAN, TRUSTEE IN BANKRUPTCY *v.* KINGSWOOD ET UX. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kokoszka* v. *Belford,* 417 U. S. 642 (1974). Reported below: 470 F. 2d 996.

No. 73–877. LOCAL 2150, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641,* 417 U. S. 790 (1974). Reported below: 486 F. 2d 602.

No. 73–1209. UNITED STATES BOARD OF PAROLE *v.* AMAYA. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Warden* v. *Marrero,* 417 U. S. 653 (1974). MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN would grant certiorari and affirm the judgment for

the reasons stated in MR. JUSTICE BLACKMUN's dissenting opinion in *Warden* v. *Marrero,* 417 U. S. 653, 664 (1974). Reported below: 486 F. 2d 940.

No. 73–1404. MCLAUGHLIN, WARDEN, ET AL. *v.* PRIETO ET AL. C. A. 4th Cir. Motion of respondent Prieto for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for consideration in light of *Warden* v. *Marrero,* 417 U. S. 653 (1974). MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN would grant certiorari and affirm the judgment for the reasons stated in MR. JUSTICE BLACKMUN's dissenting opinion in *Warden* v. *Marrero,* 417 U. S. 653, 664 (1974). Reported below: 486 F. 2d 541.

Miscellaneous Orders

No. A–1190. SCATA *v.* UNITED STATES. Application for stay of mandate of the United States Court of Appeals for the Fifth Circuit presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 492 F. 2d 1100.

No. 48, Orig. MISSISSIPPI *v.* ARKANSAS, 415 U. S. 289. It is ordered that the State of Arkansas file a response to the request of the State of Mississippi for more specific boundary line descriptions on or before July 24, 1974. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this matter.

No. 73–235. DEFUNIS ET AL. *v.* ODEGAARD ET AL., 416 U. S. 312. Motion of respondents to retax costs granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 73–822. FRY ET AL. *v.* UNITED STATES. Temp. Emerg. Ct. App. [Certiorari granted, 415 U. S. 912.] Consideration of motion to dismiss writ of certiorari deferred to hearing of case on the merits.

No. 73–1210. INTERSTATE COMMERCE COMMISSION *v.* OREGON PACIFIC INDUSTRIES, INC., ET AL. Appeal from D. C. Ore. [Probable jurisdiction noted, 416 U. S. 968.] Motion of Western Railroad Traffic Assn. for leave to file a brief as *amicus curiae* granted.

No. 73–1766. UNITED STATES *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL. [Certiorari granted, 417 U. S. 927]; and

No. 73–1834. NIXON, PRESIDENT OF THE UNITED STATES *v.* UNITED STATES. Petition for certiorari before judgment by C. A. D. C. Cir. [Certiorari granted, 417 U. S. 960.] Consideration of motion of counsel for the President for disclosure and transmittal of grand jury matters deferred to hearing of cases on the merits. MR. JUSTICE REHNQUIST took no part in the consideration of this matter.

Probable Jurisdiction Postponed

No. 73–1346. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL. *v.* DECHAMPLAIN. Appeal from D. C. D. C. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 367 F. Supp. 1291.

Certiorari Denied

No. 73–324. CLASS OF COUNTY CLERKS AND REGISTRARS OF VOTERS OF CALIFORNIA *v.* RAMIREZ ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 9 Cal. 3d 199, 507 P. 2d 1345.

No. 73–549. BELL SUPERVISORS PROTECTIVE ASSN. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C.

Cir. Certiorari denied. Reported below: 159 U. S. App. D. C. 242 and 272, 487 F. 2d 1113 and 1143.

No. 73–1024. California Newspapers, Inc., dba San Rafael Independent Journal *v.* San Francisco Typographical Union No. 21, International Typographical Union, AFL–CIO; and

No. 73–1199. National Labor Relations Board *v.* San Francisco Typographical Union No. 21, International Typographical Union, AFL–CIO, et al. C. A. 9th Cir. Certiorari denied. Reported below: 486 F. 2d 1347.

No. 73–1397. California *v.* Welton. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 73–5860. Arias *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 484 F. 2d 577.

No. 73–6179. Cameron *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 284 N. C. 165, 200 S. E. 2d 186.

No. 73–6617. Toporoff *v.* Justices of the Supreme Court of New York, First Judicial District, et al. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 1406.

No. 73–5547. Huguez *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied. Mr. Justice Douglas and Mr. Justice Blackmun would grant certiorari.

No. 73–6319. Meeks *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 11 Ill. App. 3d 973, 297 N. E. 2d 705.

JUNE 25, 1974

Miscellaneous Order

No. A–1220. CALLEY *v.* CALLAWAY, SECRETARY OF THE ARMY, ET AL. C. A. 5th Cir. Application to recall and stay mandate of the United States Court of Appeals for the Fifth Circuit pending applicant's petition for rehearing en banc in that court, presented to MR. JUSTICE POWELL and by him referred to the Court, denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 496 F. 2d 701.

JULY 5, 1974

Dismissal Under Rule 60

No. 73–6840. ELLISON *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 493 F. 2d 1404.

JULY 8, 1974

Affirmed on Appeal

No. 70–102. CAHN, DISTRICT ATTORNEY OF NASSAU COUNTY, ET AL. *v.* LONG ISLAND VIETNAM MORATORIUM COMMITTEE ET AL. Affirmed on appeal from C. A. 2d Cir. MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST dissent and would reverse judgment for the reasons stated in MR. JUSTICE REHNQUIST's dissenting opinion in *Spence* v. *Washington, ante,* p. 416. Reported below: 437 F. 2d 344. [See also No. 70–102, *Gwathmey* v. *Town of East Hampton, infra.*]

No. 73–1222. TIDEWATER OIL CO. *v.* UNITED STATES ET AL.; and

No. 73–1224. PHILLIPS PETROLEUM CO. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. C. D. Cal. Reported below: 367 F. Supp. 1226.

Appeals Dismissed

No. 72–1439. VAN SLYKE *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 489 S. W. 2d 590.

No. 73–1366. WESTON *v.* ARKANSAS. Appeal from Sup. Ct. Ark. dismissed for want of jurisdiction. MR. JUSTICE DOUGLAS would reverse on the basis of his dissenting opinion in *Gertz* v. *Robert Welch, Inc., ante,* p. 355. Reported below: 255 Ark. 567, 501 S. W. 2d 622.

Vacated and Remanded on Appeal

No. 70–102. GWATHMEY *v.* TOWN OF EAST HAMPTON. Appeal from C. A. 2d Cir. Judgment vacated and case remanded for further consideration in light of *Younger* v. *Harris,* 401 U. S. 37 (1971), and *Samuels* v. *Mackell,* 401 U. S. 66 (1971). MR. JUSTICE DOUGLAS would affirm the judgment for the reasons stated in his dissenting opinion in *Younger* v. *Harris,* 401 U. S. 37, 58 (1971). Reported below: 437 F. 2d 351. [See also No. 70–102, *Cahn* v. *Long Island Vietnam Moratorium Committee, supra.*]

No. 73–380. SUTHERLAND ET AL. *v.* ILLINOIS. Appeal from App. Ct. Ill., 3d Dist. Judgment vacated and case remanded for further consideration in light of *Spence* v. *Washington, ante,* p. 405, and *Smith* v. *Goguen,* 415 U. S. 566 (1974). THE CHIEF JUSTICE, MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST dissent and, without further briefing and oral argument, would affirm the judgment. Reported below: 9 Ill. App. 3d 824, 292 N. E. 2d 746.

No. 73–574. FARRELL *v.* IOWA. Appeal from Sup. Ct. Iowa. Judgment vacated and case remanded for further consideration in light of *Spence* v. *Washington, ante,* p. 405. THE CHIEF JUSTICE, MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST dissent and, without further briefing and oral argument,

would affirm the judgment. Reported below: 209 N. W. 2d 103.

Certiorari Granted—Vacated and Remanded

No. 72–1359. HEFFERNAN *v.* THOMS. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Spence* v. *Washington, ante,* p. 405, and *Steffel* v. *Thompson,* 415 U. S. 452 (1974). MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST dissent and, without further briefing and oral argument, would reverse the judgment for the reasons stated in Part I of MR. JUSTICE WHITE's dissenting opinion in *Smith* v. *Goguen,* 415 U. S. 566, 591 (1974), and in MR. JUSTICE REHNQUIST's dissenting opinion in *Spence* v. *Washington, ante,* p. 416. Reported below: 473 F. 2d 478.

No. 72–1509. PORTER *v.* GUAM PUBLICATIONS, INC., ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gertz* v. *Robert Welch, Inc., ante,* p. 323. MR. JUSTICE WHITE would affirm the judgment on the ground that the publication was privileged under the laws of Guam. Reported below: 475 F. 2d 744.

No. 73–787. GROSSMAN *v.* STRIEPEKE, SHERIFF. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Taylor* v. *Hayes, ante,* p. 488.

No. 73–1247. BAXTER ET AL. *v.* PALMIGIANO. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wolff* v. *McDonnell, ante,* p. 539. Reported below: 487 F. 2d 1280.

No. 73–1335. TRAVISONO, CORRECTIONS DIRECTOR, ET AL. *v.* GOMES ET AL. C. A. 1st Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wolff* v. *McDonnell, ante,* p. 539. Reported below: 490 F. 2d 1209.

No. 73–1533. UNITED STATES *v.* HOPKINS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Dorszynski* v. *United States, ante,* p. 424. Reported below: 491 F. 2d 1127 and 1133.

Miscellaneous Order

No. 73–1766. UNITED STATES *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL.; and

No. 73–1834. NIXON, PRESIDENT OF THE UNITED STATES v. UNITED STATES. Petitions for certiorari before judgment to C. A. D. C. Cir. [Certiorari granted, 417 U. S. 927 and 960.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* in No. 73–1766 granted. Motion of respondent Strachan in No. 73–1766 for leave to participate in oral argument denied.

Probable Jurisdiction Noted

No. 73–1309. BIGELOW *v.* VIRGINIA. Appeal from Sup. Ct. Va. Probable jurisdiction noted. Reported below: 214 Va. 341, 200 S. E. 2d 680.

Certiorari Granted

No. 73–5520. CANTRELL ET AL. *v.* FOREST CITY PUBLISHING CO. ET AL. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 484 F. 2d 150.

Certiorari Denied

No. 73–1052. BUCKLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 10 Cal. 3d 237, 514 P. 2d 1201.

No. 73–6374. FERGUSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 73–6470. GOMES ET AL. *v.* TRAVISONO, CORRECTIONS DIRECTOR, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 490 F. 2d 1209.

No. 73–1584. BENSINGER, CORRECTIONS DIRECTOR, ET AL. *v.* BACH. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

JULY 9, 1974

Miscellaneous Orders

No. A–1146. WARM SPRINGS DAM TASK FORCE ET AL. *v.* GRIBBLE ET AL. D. C. N. D. Cal. Motion of Sonoma County Water Agency et al. to vacate stay heretofore granted by MR. JUSTICE DOUGLAS on June 17, 1974, denied.

No. A–1212. WEAVER, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* WILSON ET AL. C. A. 7th Cir. Motion of respondent to vacate stay heretofore granted by MR. JUSTICE REHNQUIST on June 20, 1974, denied. Reported below: 499 F. 2d 155.

No. A–1250 (73–1413). STAATS, COMPTROLLER GENERAL, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION, INC., ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, 417 U. S. 944.] Application for stay of order of the United States District Court for the District of Columbia pending final disposition of this case, presented to THE CHIEF JUSTICE and by him referred to the Court, granted.

No. A–1272. MINNESOTA ET AL. *v.* RESERVE MINING CO. ET AL. Application to vacate stay order of United States Court of Appeals for the Eighth Circuit, presented to MR. JUSTICE BLACKMUN and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the application. Reported below: See 498 F. 2d 1073.

JULY 11, 1974

Dismissal Under Rule 60

No. 73–6770. TERRY *v.* UNITED STATES. C. A. 9th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

JULY 22, 1974

Dismissals Under Rule 60

No. 73–467. BERRY *v.* NATIONAL BROADCASTING CO., INC. C. A. 8th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 480 F. 2d 428.

No. 73–6879. CARTER *v.* KERN, SHERIFF. C. A. 5th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

No. 73–6919. CARTER *v.* COURT OF CRIMINAL APPEALS OF TEXAS. Motion for leave to file petition for writ of mandamus and/or prohibition dismissed under Rule 60 of the Rules of this Court.

JULY 25, 1974

Appeals Dismissed

No. 73–1280. WATKINS *v.* SOUTH CAROLINA. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First

Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would note jurisdiction and reverse the judgment. Reported below: 262 S. C. 178, 203 S. E. 2d 429.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Appellant was convicted after a jury trial in the Fourth Judicial Circuit of South Carolina (Darlington County) on charges of feloniously exhibiting an obscene motion picture film in violation of the Code of Laws of South Carolina § 16–414.2 (Supp. 1973), which provides:

> "It shall be unlawful for any person knowingly to send or cause to be sent, or to bring or cause to be brought into South Carolina for sale or distribution, or to prepare, publish, print, exhibit, distribute, or to offer to distribute in the State, or to have in his possession with intent to distribute, or to exhibit or to offer to distribute, any obscene matter."

As used in that section,

> "(a) *'Obscene'* means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest among which is a shameful or morbid interest in nudity, sex or excretion, and which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is to be distributed to minors under sixteen years of age, predominant appeal shall be judged with reference to such class of minors.
>
> "(b) *'Matter'* means any book, magazine, newspaper or other printed or written material or any pic-

ture, drawing, photograph, motion picture or other pictorial representation or any statute [*sic*] or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other article, equipment, machine or material.

"(c) '*Distribute*' means to transfer possession of, whether with or without consideration.

"(d) The word '*knowingly*' as used herein means having knowledge of the contents of the subject matter or failing after reasonable opportunity to exercise reasonable inspection which would have disclosed the character of such subject matter." S. C. Code Ann. § 16–414.1 (Supp. 1973).

The Supreme Court of South Carolina affirmed, 259 S. C. 185, 191 S. E. 2d 135 (1972). On appeal to this Court, the judgment of the Supreme Court of South Carolina was vacated and the case remanded for reconsideration in light of *Miller* v. *California,* 413 U. S. 15 (1973). 413 U. S. 905. On remand, the Supreme Court of South Carolina again affirmed the conviction. 262 S. C. 178, 203 S. E. 2d 429.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). Since it is clear that, when tested by that constitutional standard, the word "obscene" in §§ 16–414.1 and 16–414.2 is constitutionally overbroad and therefore facially invalid, I disagree with the holding that the appeal does not present a substantial federal question, and therefore dissent from the Court's dismissal of the appeal.

For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), and because the judgment of the Supreme Court of South Carolina was rendered after *Miller,* I would reverse. In that circumstance, I have no occasion to consider whether the other questions presented plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its dismissal is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the appellant did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins.* Appellant has thus never been provided the independent judicial review to which the Court held him entitled in *Jenkins.* At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the jurisdictional statement and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, appellant must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether appellant

should be afforded a new trial under local community standards.

No. 73–1508. MILLER *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Orange, dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would note jurisdiction and reverse the judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Appellant was convicted in the Orange County, California, Superior Court of distributing obscene matter in violation of California Penal Code § 311.2 (1970), which provides in pertinent part as follows:

> "Every person who knowingly sends or . . . possesses . . . with intent to distribute or to exhibit to others, . . . any obscene matter is guilty of a misdemeanor."

"Obscene matter" is defined in § 311 (a), which provides in pertinent part as follows:

> " 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance."

The Appellate Department of the Superior Court affirmed, and this Court vacated the judgment of that court and remanded the case for reconsideration in light of this Court's opinion. 413 U. S. 15 (1973). The Appellate Department again affirmed.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). Since it is clear that, when tested by that constitutional standard, the term "obscene matter" in § 311.2, as defined in § 311 (a) is unconstitutionally overbroad and therefore facially invalid, I disagree with the holding that the appeal does not present a substantial federal question, and therefore dissent from the Court's dismissal of the appeal.

For the reasons stated in my dissent in this case, 413 U. S., at 47, and because the second judgment of the Appellate Department of the California Superior Court was, of course, rendered thereafter, I would reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the jurisdictional statement and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, appellant must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction

has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether appellant should be afforded a new trial under local community standards.

Certiorari Granted—Vacated and Remanded

No. 73–844. TRINKLER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hamling* v. *United States, ante,* p. 87, and *Jenkins* v. *Georgia, ante,* p. 153. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 50 Ala. App. 735, 282 So. 2d 344.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the Circuit Court of Montgomery County, Alabama, of selling allegedly obscene matter in violation of Title 14, § 374 (4), Code of Alabama (Supp. 1973), which provides in pertinent part as follows:

> "Every person who, with knowledge of its contents, . . . sells . . . any obscene printed or written matter . . . shall be guilty of a misdemeanor. . . ."

"Obscene," for purposes of § 374 (4), is defined in § 374 (3) as meaning "lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest." The Alabama Court of Criminal Appeals affirmed the conviction. 50 Ala. App. 735, 282 So. 2d 344.

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 374 (4), as it incorporates the definition of "obscene" in § 374 (3), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissenting opinion in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Alabama Court of Criminal Appeals, and remand for further proceedings not inconsistent with my *Paris Adult Theatre I* dissent.* In that circumstance, I have no occasion to consider at this time whether the other questions presented in the petition merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 73–1430. BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL. *v.* NEWBURG AREA COUNCIL, INC., ET AL.;

No. 73–1431. BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, ET AL. *v.* HAYCRAFT ET AL.; and

No. 73–1445. BOARD OF EDUCATION OF ANCHORAGE, KENTUCKY, ET AL. *v.* HAYCRAFT ET AL. C. A. 6th Cir. Petitions for writs of certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Milliken* v. *Bradley*, *ante*, p. 717. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE WHITE,

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

and MR. JUSTICE MARSHALL would grant certiorari and, without further briefing or oral argument, would affirm the judgments. Reported below: 489 F. 2d 925.

Miscellaneous Orders

No. A–1265 (73–2014). MISSOURI PORTLAND CEMENT CO. *v.* CARGILL, INC. C. A. 2d Cir. Motion of respondent to vacate stay heretofore entered by MR. JUSTICE DOUGLAS on July 12, 1974, granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion. Reported below: 498 F. 2d 851.

MR. JUSTICE DOUGLAS, dissenting.

Cargill, desirous of acquiring control of petitioner, made a cash offer for all of petitioner's common stock. Petitioner thereupon filed this suit in the United States District Court for the Southern District of New York to enjoin that tender offer, alleging that acquisition of control of petitioner would violate § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18. That court issued the injunction stating in a detailed opinion its view that the acquisition of stock control by Cargill raises serious antitrust issues.

The sole question here is whether Cargill's attempts to take over Missouri Portland will be enjoined, pending the outcome of a trial on the merits of Missouri Portland's claim that a merger of these two companies would violate the antitrust laws. The District Court granted such an injunction, 375 F. Supp. 249, but the Court of Appeals reversed. 498 F. 2d 851. Missouri Portland sought and received a stay of the Court of Appeals' mandate, thus reinstituting the injunction issued by the District Court. Today the Court vacates that stay.

The Court treats the case as if we were in the sensitive First Amendment field where relatively minor restraints may have a "chilling" effect on an important constitu-

tional right. But as I read the Constitution and Bill of Rights, a corporation has no constitutional right to merge, consolidate, or acquire the assets of another company. The old Court in the days of "substantive due process" built an expansive corporate Bill of Rights by reading "liberty" in the Due Process Clause of the Fifth Amendment as including the "liberty" to exploit people, our resources, and our environment. The Court trifles with the antitrust laws when it vacates a stay that only requires Cargill to wait until there is a ruling on the merits before it swallows up Missouri Portland. What the Court does today is a shocking example of the disregard of law to please the management of huge conglomerates. Denial of a stay means a decision on the merits. For once the companies and their personnel are mixed, the momentum to complete the acquisition is almost irresistible. By careless neglect we actually decide that what appears to be a monstrous violation of the law may go on unremedied.

I

The Court of Appeals did not hold that the findings of the District Court were "clearly erroneous." The Court of Appeals considered the issue on the merits to be frivolous and only required Cargill to agree to hold the assets of Missouri Portland in a separate corporation or division so that it can be divested under any subsequent decree of the Court. But that misses the whole point, as I will make clear.

II

Missouri Portland is the Nation's 20th largest producer of Portland cement with 2% of the national capacity and 8% in the 11-state region it serves. The District Court defined the relevant markets here as four

metropolitan areas in which Missouri Portland ranks either first or second in market share. In all of these markets the top four firms have at least 88% of the market.[1]

Cargill is a huge, privately held conglomerate with headquarters in Minneapolis. In fiscal 1973 it had sales of $5.3 billion. Cargill specializes in commodities and thus has special skills in the transportation of heavy, bulk products and in the sale of fungible products. Cement is a heavy, bulky, fungible product, but Cargill is not involved in the cement industry.

Substantial antitrust issues are raised by the proposed takeover of Missouri Portland by Cargill. The District Court found that Cargill is the most likely potential entrant into the cement industry and concluded that a significant anticompetitive effect would result from Cargill's entry via a takeover of an already dominant firm rather than by *de novo* entry or by "toehold" acquisition. Furthermore, the District Court found that the addition of Cargill's huge financial resources to Missouri Portland's already substantial assets will raise significant barriers to entry of others in the relevant markets and will tend to increase the dominance of Missouri Portland in markets which are already heavily concentrated. Finally, the District Court noted that the challenged acquisition would eliminate a potential competitor from the fringe of the market, thereby possibly resulting in an additional anticompetitive effect.

The Court of Appeals disputed all of these conclusions by the District Court. Yet the very fact that disagreement exists between the two lower courts on these points indicates the likely existence of a substantial question. If the District Court's version of the facts is the correct

[1] The four metropolitan markets are St. Louis, Kansas City, Memphis, and Omaha.

one, it seems that the takeover would violate the Clayton Act. See *United States* v. *Falstaff Brewing Corp.*, 410 U. S. 526 (1973); *Ford Motor Co.* v. *United States*, 405 U. S. 562 (1972); *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568 (1967); *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158 (1964); *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964).

III

The issues raised by the petition for certiorari present a substantial question that involves a conflict between the decisions below and another Court of Appeals. In *Kennecott Copper Corp.* v. *FTC*, 467 F. 2d 67 (CA10 1972), the court held that anticompetitive effect could occur even though the acquiring and acquired corporations did not produce related products but did have related skills.[2] The court below was confronted with facts strikingly similar to those of *Kennecott* as regards the lack of related products but the presence of related skills. That court, however, candidly admitted that it was declining to follow the *Kennecott* decision. 498 F. 2d, at 860 n. 14. In our decision in *United States* v. *Falstaff Brewing Corp., supra,* at 537, we left open the extent to which potential anticompetitive effect will be considered determinative in "conglomerate mergers" such as this one where entry could have been *de novo* or via "toehold" ac-

[2] In addition, the opinion of the court below conflicts with decisions of other Courts of Appeals on the significance of the acquiring corporation's "deep pocket." According to the court below, the facts that the acquiring corporation has great financial resources and that it intends to use these resources are not enough to show potential anticompetitive effect. But see *General Foods Corp.* v. *FTC*, 386 F. 2d 936 (CA3 1967); *United States Steel Corp.* v. *FTC*, 426 F. 2d 592 (CA6 1970); *Ecko Products Co.* v. *FTC*, 347 F. 2d 745 (CA7 1965); *Kennecott Copper Co.* v. *FTC*, 467 F. 2d 67 (CA10 1972).

quisition. Given the conflict between the Circuits on this matter, the present case presents a good vehicle in which we should consider this problem.

IV

Cargill had acquired 18% of the common stock of Missouri Portland before the injunction issued. Now that the injunction has been lifted by the Court of Appeals and this Court, Cargill is free to acquire the controlling interest in Missouri Portland. That means that it can dictate what its subsidiary will do. We are foolhardy to assume that the litigation will then go on. Cargill in control of its subsidiary will make the subsidiary toe the line and be obedient to Cargill's wishes. The substantial antitrust issue apparent in the conflict between the Courts of Appeals will now not likely be resolved. The internal segregation of assets of the two companies is only an idle gesture.

If we fail to live under a rule of law and instead leave the field open to the uncontrolled machinations of conglomerates, Cargill will follow the infamous pattern of IT&T, uncontrolled and uncontrollable. Behind this motion to vacate the stay are very large questions of law and public policy. What is the place of antitrust law in the conglomerate field? Are conglomerates immune as some suggest? If not, what controls over them exist under present antitrust laws? These are questions that are substantial and pressing. The Circuits are in conflict; and the Court goes pellmell for an escape for this conglomerate from a real test under existing antitrust law.

I repeat, there is no constitutional right to take over other companies. Cargill should be required to accept delay as one of the risks it incurred by seeking to gain control of so dominant a firm in the cement industry

rather than being content with a "toehold" acquisition or *de novo* entry.

I would continue the stay in force until the merits of the case have been adjudicated.

No. 73–1162. UNITED STATES *v.* WILSON ET AL. C. A. 2d Cir. [Certiorari granted, 416 U. S. 981.] It is ordered that John S. Martin, Jr., Esquire, of New York, New York, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent Bryan in this case.

Certiorari Denied

No. 73–528. CARLSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted in the United States District Court for the Central District of California of mailing allegedly obscene matter in violation of 18 U. S. C. § 1461, which provides in pertinent part as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . .
>
> . . . . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be

> nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years . . . ."

The Court of Appeals for the Ninth Circuit affirmed the convictions.

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1461, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.,* at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Ninth Circuit was rendered after *Orito,* reverse.*

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioners did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins.* Petitioners have thus never been

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

provided the independent judicial review to which the Court held them entitled in *Jenkins*. At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause of the Fifth Amendment, petitioners must be given an opportunity to have their case decided on, and introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 73–584. SIANS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 481 F. 2d 1406.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the United States District Court for the Northern District of Illinois on charges of using a common carrier for carriage of allegedly obscene matter in violation of 18 U. S. C. § 1462, which provides in pertinent part as follows:

> "Whoever . . . knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . .
>
> . . . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

The Court of Appeals for the Seventh Circuit affirmed the conviction. 481 F. 2d 1406.

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.,* at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Seventh Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to the

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–788. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the United States District Court for the Eastern District of Virginia of transporting allegedly obscene materials by common carrier in violation of 18 U. S. C. § 1462, which provides in pertinent part as follows:

> "Whoever . . . knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . .
>
> . . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

The Court of Appeals for the Fourth Circuit affirmed in an unreported opinion. This Court vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *Miller* v. *California,* 413

U. S. 15 (1973), and companion cases. 413 U. S. 912. The Court of Appeals again affirmed the conviction.

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.*, at 147–148. For the reasons stated in my dissent in *Miller* v. *California*, *supra*, at 47, I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Fourth Circuit was rendered after *Orito*, reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia*, *ante*, p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioner did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins*. Petitioner has thus never been pro-

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

vided the independent judicial review to which the Court held him entitled in *Jenkins*. At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–1060. VILLAGE BOOKS, INC., ET AL. *v.* MARSHALL, STATE'S ATTORNEY FOR PRINCE GEORGES COUNTY. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment below. Reported below: See 263 Md. 76, 282 A. 2d 126.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were enjoined by the Circuit Court for Prince Georges County, Maryland, from selling a group of allegedly obscene books, on the authority of Art. 27, §§ 418 and 418A, of the Annotated Code of Maryland. Section 418A grants jurisdiction to the circuit courts to enjoin the sale or distribution of any publication which is "obscene" within the meaning of § 418. Section 418

provides in pertinent part as follows: "Every person who knowingly sends or causes to be sent . . . into this State . . . or . . . distributes . . . any obscene matter is guilty of a misdemeanor." As respondent concedes, the Maryland courts have defined the term "obscenity" in this section by adopting the test set forth in *Roth* v. *United States,* 354 U. S. 476 (1957). See *Wagonheim* v. *Maryland State Board of Censors,* 255 Md. 297, 304–305, 258 A. 2d 240, 243–244 (1969). The Court of Appeals affirmed, 263 Md. 76, 282 A. 2d 126, and this Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case for reconsideration in light of *Miller* v. *California,* 413 U. S. 15 (1973). 413 U. S. 911. That court again affirmed in an unreported opinion.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 418A, as it incorporates the term "obscene" in § 418, is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, I would therefore grant certiorari, and, since the judgment of the Maryland Court of Appeals was rendered after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioners did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins.* Petitioners have thus never been provided the independent judicial review to which the Court held them entitled in *Jenkins.* At a minimum, the Court should vacate the judgment below and remand for such a review.

No. 73–1075. THEVIS *v.* UNITED STATES; and

No. 73–1091. PEACHTREE NEWS CO., INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 484 F. 2d 1149.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted in the United States District Court for the Middle District of Florida on charges of using a common carrier for carriage of allegedly obscene

matter in violation of 18 U. S. C. § 1462, which provides in pertinent part as follows:

> "Whoever . . . knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . .
>
> . . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

The Court of Appeals for the Fifth Circuit affirmed the convictions on six counts. 484 F. 2d 1149.

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.,* at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Fifth Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denials of certiorari are

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the cases be decided on the merits.

improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioners did not certify the allegedly obscene materials involved in these cases. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins*. Petitioners have thus never been provided the independent judicial review to which the Court held them entitled in *Jenkins*. At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their cases decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for determinations whether petitioners should be afforded new trials under local community standards.

No. 73–1076. CANGIANO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123, 130 (1973)

(DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 491 F. 2d 905.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted in the United States District Court for the Eastern District of New York of transporting allegedly obscene materials in interstate commerce for the purpose of sale in violation of 18 U. S. C. § 1465, which provides in pertinent part as follows:

> "Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, case, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The Court of Appeals for the Second Circuit affirmed the convictions, 464 F. 2d 320 (1973). This Court vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973), and companion cases. 413 U. S. 913. The Court of Appeals again affirmed the convictions. 491 F. 2d 905.

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1465, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.,*

at 147–148. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Second Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioners did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins.* Petitioners have thus never been provided the independent judicial review to which the Court held them entitled in *Jenkins.* At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141,

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their case decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 73–1136. ENSKAT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 33 Cal. App. 3d 900, 109 Cal. Rptr. 433.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the Superior Court of California, County of Los Angeles, of exhibiting an allegedly obscene motion picture in violation of California Penal Code § 311.2 (1970), which provides in pertinent part as follows:

> "Every person who knowingly sends or . . . possesses . . . with intent to distribute or to exhibit to others, . . . any obscene matter is guilty of a misdemeanor."

"Obscene matter" is defined in § 311 (a), which provides in pertinent part as follows:

> " 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity,

> sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance."

Petitioner's appeal was certified by the Appellate Department of the Superior Court to the Court of Appeal which, after rehearing, affirmed. 33 Cal. App. 3d 900, 109 Cal. Rptr. 433. The California Supreme Court denied certiorari.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 311.2, as it incorporates the definition of "obscene matter" of § 311 (a), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the California Court of Appeal was rendered after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

of this Court, which provides that the record in a case need not be certified to this Court, the petitioner did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins*. Petitioner has thus never been provided the independent judicial review to which the Court held him entitled in *Jenkins*. At a minimum, the Court should vacate the judgment and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause of the Fourteenth Amendment, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–1161. PARIS ADULT THEATRE I ET AL. *v.* SLATON, DISTRICT ATTORNEY, ET AL. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certi-

orari and reverse the judgment below. Reported below: 231 Ga. 312, 201 S. E. 2d 456.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Respondents, the local state district attorney and solicitor for the local state trial court, filed civil complaints seeking to enjoin petitioners, Atlanta, Georgia, movie theaters and their owners and managers, from exhibiting two allegedly obscene films, in violation of Georgia Code Ann. § 26–2101 (1972). That section provides, in relevant part:

> "(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do . . . .
>
> "(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. . . .
>
> . . . . .
>
> "(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both."

The trial judge dismissed respondents' complaints, but the Georgia Supreme Court reversed. 228 Ga. 343, 185

S. E. 2d 768 (1971). This Court vacated the State Supreme Court's judgment and remanded the case for further proceedings. 413 U. S. 49 (1973). On remand, the Georgia Supreme Court affirmed its original decision reversing the trial court and directing the trial court to enter an order enjoining the exhibition of the films.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Id.,* at 113 (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 26–2101 is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Georgia Supreme Court was rendered after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioners did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test.

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

Petitioners have thus not been provided the independent judicial review to which the Court held them entitled in *Jenkins*.

Finally, it does not appear from the petition that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their case decided on, and to introduce evidence relevant to, the legal standard upon which the injunction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 73–1260. KAPLAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 311 A. 2d 506.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the District of Columbia Court of General Sessions of presenting an obscene film in violation of D. C. Code § 22–2001 (a)(1)(B) (1973), which provides in pertinent part: "It shall be unlawful in the District of Columbia for a person knowingly . . . to present . . . any obscene, indecent, or filthy play, dance, motion picture, or other performance." The District of Columbia Court of Appeals affirmed, 277 A. 2d 477, and this Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of

Miller v. *California,* 413 U. S. 15 (1973), and companion cases. 413 U. S. 913. The Court of Appeals again affirmed. 311 A. 2d 506.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 22–2001 (a)(1)(B) is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, I would therefore grant certiorari, and, since the judgment of the District of Columbia Court of Appeals was rendered after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioner did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be as-

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

sumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins*. Petitioner has thus never been provided the independent judicial review to which the Court held him entitled in *Jenkins*. At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–1605. BUCKLEY ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 33 N. Y. 2d 314, 307 N. E. 2d 805.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted in the Criminal Court of the City of New York of promotion of obscene material in violation of New York Penal Law § 235.05 (Supp. 1973–1974), which provides in pertinent part:

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

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

. . . . . .

"Obscenity in the second degree is a class A misdemeanor."

"Obscene" is defined in § 235.00 (1967), which provides:

"Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

The Appellate Term affirmed the convictions, and the New York Court of Appeals affirmed by a divided court. 33 N. Y. 2d 314, 307 N. E. 2d 805.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 235.05 is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the New York Court of Appeals was rendered

after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Supreme Court Rule 21 (1), which provides that the record in a case need not be certified to this Court, the petitioners did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins.* Petitioners have thus never been provided the independent judicial review to which the Court held them entitled in *Jenkins.* At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their case decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 73–5927. MILLICAN, DBA HIP MAGAZINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 487 F. 2d 331.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the United States District Court for the Northern District of Georgia of using the mails to distribute allegedly obscene materials in violation of 18 U. S. C. § 1461, which provides in pertinent part as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . .
>
> . . . . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be nonmailable, . . . shall be fined not more than $5,000 or imprisoned not more than five years . . . ."

The Court of Appeals for the Fifth Circuit affirmed. 487 F. 2d 331.

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1461, I expressed the view that "[w]hatever the extent of the Federal Govern-

ment's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.*, at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Fifth Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioner did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below fully performed such a review, since that responsibility was not made clear until *Jenkins.* Petitioner has thus never been provided the independent judicial review to which the Court held him entitled in *Jenkins.* At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials

*Although four of us would grant certiorari and reverse the judgments, the Justices who join this opinion do not insist that the case be decided on the merits.

was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–937. J–R DISTRIBUTORS, INC., ET AL. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 82 Wash. 2d 584, 512 P. 2d 1049.

MR. JUSTICE WHITE.

In this case and in 13 other cases involving issues dealing with obscenity, MR. JUSTICE BRENNAN complains that by denying certiorari or dismissing an appeal, the Court has failed to pass independently on the obscenity of the materials involved. This is a task which he has insisted, see *Jacobellis* v. *Ohio,* 378 U. S. 184, 187–190 (1964), the Court must perform under the approach to obscenity which he espoused and explicated for the Court in *Roth* v. *United States,* 354 U. S. 476 (1957); which he refined for himself and others in *Jacobellis* v. *Ohio, supra; Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966); *Ginzburg* v. *United States,* 383 U. S. 463 (1966); *Mishkin* v. *New York,* 383 U. S. 502 (1966); and *Ginsberg* v. *New York,* 390 U. S. 629 (1968); but which he has now repudiated.

Brother BRENNAN's complaints are wide of the mark. Obscenity cases, like others, are not immune from the standards generally governing the exercise of our appellate jurisdiction. The Court has never indicated that plenary review is mandatory in every case dealing with the issue of obscenity.

In five of these cases,[1] the issue whether the materials involved are obscene was not presented to this Court and the publications themselves were not lodged here. Rule 23 (1)(c) of this Court's Rules provides that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." Rule 15 (1)(c) with respect to appeals is to the identical effect. I suggest that we are entitled to follow our own Rules. See R. Stern & E. Gressman, Supreme Court Practice § 6.37, pp. 297–299 (4th ed. 1969).

In six other cases,[2] the issue of obscenity *vel non* is among the questions presented here, but the materials themselves have not been filed with this Court. While our Rules permit parties to dispense with filing the entire record at the petition for certiorari stage, a petitioner is completely free at that time to file all or any part of the record he deems necessary or desirable to present clearly the issues he wants reviewed. Indeed, our Rule 23 (4) states that "[t]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." Had the petitioner in any of

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[1] *Carlson* v. *United States, supra; Village Books, Inc.* v. *Marshall, supra; Cangiano* v. *United States, supra; Kaplan* v. *United States, supra;* and *Watkins* v. *South Carolina, supra.*

[2] *Brown* v. *United States, supra; Thevis* v. *United States, supra; Peachtree News Co., Inc.* v. *United States, supra; Enskat* v. *California, supra; Paris Adult Theatre I* v. *Slaton, supra;* and *Millican* v. *United States, supra.*

these cases desired that serious attention be given to the materials themselves, he could have filed them here. Moreover, in each instance either the Court of Appeals or the state appellate court expressly addressed the issue of obscenity and found the materials obscene under proper standards. Under these circumstances, denying certiorari is wholly consistent with our practice.

Finally, I join in denying petitions for certiorari in this case and two other cases, *Buckley* v. *New York, supra,* and *Sians* v. *United States, supra.* In *Buckley,* the materials in question have been lodged with the Court, and the issue of their obscenity is raised in the petition for certiorari. They were examined and described by the Court of Appeals for the State of New York and were held to be obscene under both *Miller* and pre-*Miller* standards. Examination of the materials has not persuaded me that certiorari should be granted. The same is true of *Sians.* The materials, an unremitting series of explicit photographs of a wide spectrum of sexual conduct, including homosexual acts, anal intercourse, fellatio, cunnilingus, and group orgies, were held obscene under any standard by the Court of Appeals. I would not review that judgment.

In *J–R Distributors, Inc.,* the case in which this opinion is filed, the issue of the obscenity of the materials involved was raised in the petition for certiorari, and part, but not all, of them was lodged with this Court. I join in denying the petition for certiorari. Although some of the materials have not been filed here and are therefore not before us, the Washington Supreme Court found all of them obscene under both *Roth* and *Miller* standards. As for the materials on file, it is sufficiently clear to me that they fall within the category of hard-core pornography unprotected by the First Amendment that plenary review is not required. One of the publications involved is Sex Between Humans and Animals. MR.

JUSTICE BRENNAN would apparently hold that the First Amendment prohibits government from denying consenting adults access to such material, but I do not construe the First Amendment as preventing the States from prohibiting the distribution of a publication whose dominant theme is represented by repeated photographs of men and women performing sex acts with a variety of animals.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted for violations of Revised Code of Washington § 9.68.010 (Supp. 1972), which provides:

> "Every person who—
>
> "(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or
>
> "(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;
>
> "Shall be guilty of a gross misdemeanor.
>
> "The provisions of this section shall not apply to acts done in the scope of his employment by a motion picture operator or projectionist employed by the owner or manager of a theatre or other place for the showing of motion pictures, unless the motion picture operator or projectionist has a financial in-

terest in such theatre or place wherein he is so employed or unless he caused to be performed or exhibited such performance or motion picture without the knowledge and consent of the manager or owner of the theatre or other place of showing."

The Supreme Court of Washington affirmed the convictions, 82 Wash. 2d 584, 512 P. 2d 1049, and subsequently denied a petition for rehearing.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 9.68.010 is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Washington Supreme Court was rendered after *Miller,* reverse.[1] In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, certain of these petitioners did not certify the allegedly obscene materials involved

[1] Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

in this case.[2] It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins*. Those petitioners have thus never been provided the independent judicial review to which the Court held them entitled in *Jenkins*. At a minimum, the Court should vacate the judgment below and remand for such a review.

No. 73–908. COTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 470 F. 2d 755.

No. 73–1241. ADULT FILM ASSOCIATION OF AMERICA ET AL. *v.* LUCAS, U. S. DISTRICT JUDGE (SAXBE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft Reels of Film,* 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment below.

No. 73–1339. BOYD *v.* OHIO. Ct. App. Ohio, Allen County. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is pro-

[2] Petitioners Samuel Kravitz, Albert T. Duane, and James M. Tidyman were convicted of exhibiting allegedly obscene films, none of which has been certified to this Court.

hibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 35 Ohio App. 2d 147, 300 N. E. 2d 752.

No. 73–2001. MITCHELL ET AL. *v.* SIRICA, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Motion to expedite granted. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion and petition. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

Rehearing Denied

No. 73–1650. KERNER *v.* UNITED STATES, 417 U. S. 976. Motion to expedite granted. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit during the period beginning November 25, 1974, and ending November 29, 1974, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States District Court for the Southern District of New York during the period beginning December 2, 1974, and ending December 24, 1974, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 955 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.