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05-18-1981 Justice Stevens, Dissenting

John Paul Stevens
US Supreme Court Justice

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SUPREME COURT OF THE UNITED STATES

No. 80-420

Larry C. Flynt, Jimmy R. Flynt
and Althea Leasure Flynt,
Petitioners,
v.
State of Ohio.

On Writ of Certiorari to
the Supreme Court of
Ohio.

[May 18, 1981]

JUSTICE STEVENS, dissenting.

The decision of a federal question by the highest court of the State is final within the meaning of 28 U. S. C. § 1257 "if a refusal immediately to review the State court decision might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 483. In the Court's view, this ground does not support reviewability in this case because the Court can discern "no identifiable federal policy that will suffer if the State criminal proceeding goes forward." *Ante*, at 3. In my opinion, the interest in protecting magazine publishers from being prosecuted criminally because State officials or their constituents are offended by the content of an admittedly nonobscene political cartoon is not merely "an identifiable federal policy": it is the kind of interest that motivated the adoption of the First Amendment to the United States Constitution.

Petitioner Flynt is the publisher of *Hustler*, a national magazine. The trial court dismissed the criminal complaint against him after hearing evidence tending to establish that Ohio's decision to bring this prosecution was motivated by hostility to a political cartoon that is constitutionally indistinguishable from the rather trite depiction held to be protected by the First Amendment in *Papish v. University of Missouri Curators*, 410 U. S. 667. The Ohio Court of Appeals

reversed, and that court's decision was affirmed by the Supreme Court of Ohio over the dissent of Justice Brown.

Because the Court has decided today to dismiss the writ of certiorari for want of jurisdiction, I will not comment on the merits beyond indicating that they concern the standards that a court must apply in determining whether an exercise of prosecutorial discretion has been based on an impermissible criterion such as race, religion, or the exercise of First Amendment rights. Because I place a high value on the federal interest in preventing such prosecutions and because the reinstatement of this criminal complaint may seriously erode that federal interest, I respectfully dissent.