No. 98-1161

IN THE SUPREME COURT OF THE UNITED STATES

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES N. THOMPSON, all in their official capacities,
Petitioners,

v.

PAP'S A.M., T/D/B/A "KANDYLAND,"
Respondent,

BRIEF AND APPENDIX OF THE FIRST AMENDMENT LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

Filed September 30, 1999

OF COUNSEL:

Steven H. Swander
250 Wells Fargo Building
505 Main Street
Fort Worth, Texas 76102
817/338-4634

Richard L. Wilson
3610 Dubsdrad Circle
Orlando, Florida 32804-3052
407/649-9225

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF AMICUS

Amicus Curiae First Amendment Lawyers Association [1] is an Illinois not-for-profit corporation with some 172 members throughout the United States. Its membership consists of attorneys whose legal practices consist in large measure of the defense of First Amendment rights against governmental intrusion. The interest of amicus is that amicus takes the position that the fragmented decision of this Court in *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991), has created substantial confusion in lower courts throughout the United States as to the permissible extent of government regulation of constitutionally protected speech. Amicus curiae urges this Court to adopt the position that, to the extent that concerns of "order and morality" are a permissible basis for regulation of otherwise constitutionally protected speech, that regulation should be limited to prohibiting the legally obscene pursuant to *Miller v. California*, 413 U.S. 15 (1973) or regulating speech forced upon a captive audience. Moreover, amicus takes the

1 Counsel for neither party authored the present amicus brief in whole or in part. Richard W. Jacobson of Cannon Falls, Minnesota, has made a financial contribution toward the preparation of the present brief. This disclosure is being made pursuant (6) of the Rules of the Supreme Court of the United States. Both parties have consented to the filing of this brief. See Appendix at A.75 - A.77.

position that to the extent that the doctrine of "secondary effects" can be used to restrict constitutionally protected speech, such doctrine cannot theoretically nor factually support the regulation at issue in the instant case.

SUMMARY OF ARGUMENT

Because the ordinance in the instant case is directed at expression, it is not governed by the plurality opinion in *Barnes v. Glen Theatre, Inc.*, supra, 501 U.S. 560 (1991). To the contrary, any interest in morality cannot justify the suppression of speech unless said speech is obscene under *Miller v. California*, supra, 413 U.S. 15 (1973), or imposed upon a captive audience. To the extent that the Justice Souter's concurring opinion in *Barnes* relies upon a "secondary effects" doctrine to ban nude dancing, such reliance is unjustified, both theoretically under the "secondary effects" decisions of this Court, and factually. As a result, the Supreme Court of Pennsylvania correctly concluded that the restriction at issue in the instant case was an impermissible content-based restriction upon speech and such decision should be affirmed.

ARGUMENT

I. AS A RESTRICTION PLAINLY DIRECTED AT EXPRESSION, THE ORDINANCE IN QUESTION CANNOT BE JUSTIFIED UNDER THE "ORDER AND MORALITY" THESIS OF THE

PLURALITY OPINION AND SCALIA CONCURRENCE IN *BARNES.*

To be sure, in both the plurality opinion of Chief Justice Rehnquist and the concurring opinion of Justice Scalia in *Barnes*, an Indiana Public Nudity Statute nominally similar to the ordinance at issue in the instant case was upheld, premised upon the governmental interest in order and morality.[2] However, both the plurality opinion of Chief Justice Rehnquist and the Scalia concurrence specifically conditioned upholding the Indiana statute in *Barnes* upon the fact that the regulation in question was a prohibition of public nudity in general, and not a prohibition specifically aimed at expressive conduct such as nude dancing. In his plurality opinion, Chief Justice Rehnquist specifically wrote:

> "Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board. Id. at 566.

Concerning the legislative history of the Indiana Statute, Justice Rehnquist wrote:

2See plurality opinion:, "[T]he public indecency statute furthers a substantial government interest in protecting order and morality. " 501 U.S. at 569. See also concurring opinion of Justice Scalia, justifying the ordinance because public nudity is 'contra bons mores,' i.e., immoral." Id. at 575, Scalia, J., concurring.

> "This public indecency statute follows a long line of earlier Indiana statutes banning all public nudity. The history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition." Id. at 568.

From the history and language of the statute, Justice Rehnquist concluded:

> "The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the state still seeks to prevent it. Public nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity." Id. at 571.

Likewise, in his concurring opinion, Justice Scalia examined the same statutory language and legislative history and concluded that the statute was not aimed at expressive conduct, but intimated that even if it were selectively applied only to expressive conduct, the First Amendment would be violated. Justice Scalia stated:

> "Indiana's first public nudity statute, [Citation omitted.], predated by many years the appearance of nude barroom dancing. It was general in scope, directed at all public nudity, and not just at public nude expression; and all of the succeeding statutes, down to the present one

> have been the same. Were it the case that Indiana in practice (emphasis by Justice Scalia) targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools [Citation omitted.], it might be said that what posed as a regulation of conduct in general was in reality a regulation of only expressive conduct. Respondents have adduced no evidence of that. Indiana officials have brought many public indecency prosecutions for activities having no communicative element. [Citations omitted.]" Id. 573-574, Scalia, J., concurring.

By contrast, the record in the instant case is indisputable that, far from being a general prohibition of nudity which long predated nude dance entertainment, the express justification of the ordinance in the instant case, on its face, is suppression of nude dance expression. The ordinance specifically repealed a long-standing prohibition on public indecency and immorality, and set forth the following justification for the ordinance:

> "Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana, which was approved by the U.S. Supreme Court in *Barnes v. Glen Theatre, Inc., et al,* 111 Sup. Ct. (sic) 2456 (1991) for the purpose of limiting a recent increase in nude live entertainment within the city (emphasis supplied), which activity adversely impacts and threatens to impact the

> public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects." Appendix to Petition for Writ of Certiorari, at 7a.

Moreover, the legislative history as reflected in transcription of the videotape of the Erie City Council, plainly supports the proposition that content-based censorship of expression was the genesis of this particular ordinance. For example, Council Member Thomson, in describing nude dance entertainment, states, "It is live pornography. It is not acceptable in this city, has never been and never will be." Joint Appendix at 40. Council Member Brabender, in support of the ordinance asserted that 18-year old persons were "not allowed to drink at 18 years of age, but they can frequent some of these clubs along with them. I don't know if that's a real wholesome atmosphere." Id. at 42. Council Member Brzezinski plainly asserted that the issue was not about public nudity, but of closing down nude dance establishments, asserting:

> "But we're not talking about nudity, we're not talking about people's choices, we're talking about three clubs, two of which - or three, all three, will be shut down in one form or another until they figure out another way to get around it and do it again." Id. at 45.

Because the record plainly indicates that the ordinance in the instant case was not adopted as a general prohibition against nudity, but rather, on its face, plainly targeted protected expression, it is clear that neither the "order and morality" analyses of the plurality opinion nor the Scalia concurrence is applicable. Quite to the contrary, this Court has repeatedly held that moral objections cannot be the basis for restricting otherwise constitutionally protected expression. As this Court noted in *Texas v. Johnson*, 491 U.S. 397, 414 (1989) "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[3]

The only exceptions this Court has made in this regard are for legal obscenity, under *Miller v. California*, supra, 413 U.S. 15 (1973), and for captive audiences. Neither exception is applicable here.

The ordinance plainly goes far beyond the prohibition of *Miller* obscenity, in that the ordinance is plainly not limited to specifically defined sexual conduct found to be patently offensive to the average person applying contemporary community standards, no requirement that the work taken as a

---

3In this regard, see also *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988).

whole appeal to a prurient interest in sex, and contains no exception for performances of serious literary, artistic, political or scientific value.

Moreover, as far as a captive audience is concerned, this Court has repeatedly held that if an audience can avoid viewing, seeing or reading material it deems to be morally offensive, it is not "captive" for First Amendment purposes. See *Cohen v. California*, 403 U.S. 15 (1971); *Spence v. Washington*, 402 U.S. 405, 412 (1972); and *Erznoznik v. City of Jacksonville*, 422 U..S. 205 (1975). In *Erznoznik*, this Court specifically rejected a "captive audience" theory in a case involving the public display of nudity in drive-in motion picture theaters, this Court stating that anyone offended "can readily avert his eyes." Id. at 211.

Obviously, there is clearly no issue of a captive audience in this case. The only way a customer can view nude dance performance in Respondent's establishment is to pay admission to enter voluntarily. The audience is not even arguably "captive," as this Court has defined the term.

As a result, since the ordinance is facially directed at expression, and since the ordinance is not restricted to performances which are legally obscene or forced upon a captive audience, any attempt to justify the ordinance on the

basis of order or morality would render the ordinance unconstitutionally overbroad under the First Amendment. See *Erznoznik*, supra.[4]

II. THE ORDINANCE IN QUESTION CANNOT BE JUSTIFIED UNDER A "SECONDARY EFFECTS" THEORY.

A. THE "SECONDARY EFFECTS" THEORY OF JUSTICE SOUTER IS INCONSISTENT WITH THIS COURT'S HISTORICAL TREATMENT OF THE "SECONDARY EFFECTS" EXCEPTION TO THE PROHIBITION OF CONTENT-BASED DISCRIMINATION.

The use by Justice Souter of a "secondary effects" justification to support the requirement of furthering a substantial governmental interest in *Barnes*, has fostered wholesale confusion in the Circuit Courts as to the requisite

---

4In this regard, it should be noted that in *Barnes*, there was no facial overbreadth issue, since the Seventh Circuit had held the facial overbreadth issue to have been resolved in a prior state court proceeding. See 501 U.S. at 564, n.1. See also the concurring opinion of Justice Souter, Id. at 585, n.2 in which Justice Souter specifically notes that there was no facial overbreadth challenge before the Court in *Barnes* and strongly suggests that a facial overbreadth challenge might be sustained to legislation similar to the Indiana statute. Indeed, numerous courts have persuasively sustained overbreadth challenges to ordinances indistinguishable from the ordinance in the instant case, based upon facial overbreadth. See for example, *Triplett Grille, Inc. v. City of Akron*, 40 F. 3d 129 (6th Cir. 1994); *Lounge Management, Ltd. v. Town of Trenton*, 219 Wis. 2d 13, 580 N.W. 2d 156 (1998), cert. denied, ___U.S.___, 119 S. Ct. 511 (1998); and *Schultz v. City of Cumberland*, 26 F. Supp. 2d 1128 (W.D. Wis. 1998).

proof and application of "secondary effects." Prior to Souter's concurrence in *Barnes*, secondary effects were seen as harmful effects to the surrounding neighborhood of certain adult businesses, which effects justified the dispersal of those businesses from residential neighborhoods and other protected uses. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). Restricting a location of an adult business based on secondary effects does not deny access to protected expression such as nude dancing, because the venues to view the entertainment are still allowed, such restrictions only remove adult uses from the proximity to protected uses and even to other adult businesses.

The "secondary effects" doctrine is properly applied in the context of a time, place, or manner regulation which does not ban or deny access to expression. Because reasonable restrictions on the location of adult expression do not target the message for suppression, this Court has treated such restrictions as content neutral for consideration under the First Amendment. Similarly, identical restrictions on expression which is not the target of a governmental regulation are analyzed by the Court under the four-part formula of *United States v. O'Brien*, 391 U.S. 369 (1968).

The conceptual difficulty arises when *Renton's*

"secondary effects" justification is taken out of the time, place, and manner zoning context, and applied to prohibit conduct protected as expression. In that case, it is obvious that the particular "secondary effects" must shift from the concerns of protected uses to problems which occur where the expressive conduct is taking place. The effects on a particular neighborhood use are no longer relevant because the prohibition will prevent the use anywhere in the jurisdiction imposing the ban. Justice Souter's concurrence in *Barnes* indicates that what he means by secondary effects include prostitution, sexual assault, and associated crimes. *Barnes*, supra, 501 U.S. at 584. Souter J. concurring. Justice Souter's choice of examples refer to crime inside a nude dance and massage business. *U.S. v. Doerr*, 886 F. 2d 947, 949-950 (7th Cir. 1989); *U.S. Marron*, 890 F. 2d 924, 926 (7th cir. 1989). The fact that prostitution occurred at nightclubs that featured nude dancing was sufficient for him to uphold a ban on public nudity as applied to nude dancing. Candidly, Justice Souter recognized that the "secondary effects" he identified were not likely to be present at mainstream theater presentations which also featured nude performance. *Barnes*, supra 505 U.S. at 584, Souter, J. concurring.

The easy criticism of Justice Souter's use of "secondary

effects" to justify a ban encompassing nude performances is that when the concept of secondary effects changes from neighborhood impacts to violations occurring inside the business premise, the proof that most or many businesses that feature nude dancing have prostitution is never documented. No police or planning study is offered to show that what occurred in the nightclub examples Justice Souter cited are widespread, so that prostitution is linked to nude dance performances that regularly occur in "Renton type" nightclubs across the country. Justice Souter is making the unproven leap that, for example, because an adult bookstore had prostitution on the premises as in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), many or all adult bookstores have prostitution on the premises because they sell adult movies.[5] The occurrence of prostitution at a few adult bookstores to justify a ban on businesses that sell adult videos is clearly the same as using "secondary effects" to prohibit the retail marketing of adult motion pictures. Expression is to be denied at properly run adult businesses because a few violators allow criminal activities. With Justice Souter's use of secondary effects, protected expression is suppressed although law enforcement, licensing

---

5As will be pointed out in the following section of the brief, the factual premises of Justice Souter's concurrence are not empirically justified.

and manner restrictions would no doubt alleviate the identified internal effects. "At least in *Renton* there was a plausible argument that the secondary effects sought to be regulated - the social decay of neighborhoods - could not be directly regulated in the way that congestion, visual clutter, or violence can be." *Boos v. Barry*, 485 U.S. 312, 337 (1988), Brennan, J. concurring. Justice Souter's "secondary effects" can be directly regulated and do not justify suppressing expression.

Indeed, to the extent that Justice Souter concludes that secondary effects can theoretically justify, not only locational restriction on nude dancing, but a total ban on nude dancing, it is directly contrary to the decision of this court in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), when this Court reached exactly the opposite conclusion on the identical issue.

The Circuit Courts, in light of Justice Souter's concurrence in *Barnes* have repeatedly confused the nature and scope of a secondary effects, and, as alarmingly, the evidence required to be compiled by the legislative body to employ a secondary effects justification. In *Triplette Grille, Inc. v. City of Akron*, supra, 40 F. 3d 129, 135 (6th Cir. 1994), the Court of Appeals for the Sixth Circuit reversed a District court's determination based on Justice Souter's requirement that a ban on nudity as applied to nude dancing must be based on a

secondary effects justification. "By requiring affirmative evidence of a secondary effects motivation, the District Court imposed a burden on the city that Justice Souter's opinion seems designed to avoid." See also *D.L.S. Inc. v City of Chattanooga*, 107 F. 3d 403, 410-411 (6th Cir. 1997). In response to the nightclub's argument that the legislature, under prior Sixth Circuit authority, must show that the llegisltature actually relied on evidence of secondary effects, the Court of Appeals replied that the precedent had been altered by controlling Supreme Court precedent, that is, Justice Souter's concurrence in *Barnes*. See also, *Farkas v. Miller*, 151 F. 3d 900 (8th Cir. 1998).

By contrast, the Fifth Circuit has adhered to *Renton's* requirement of evidence which reasonably (objectively) supports a legislative finding that a nude dance encompassing ban is justified through focus on secondary effects. *J&B Entertainment, Inc. v. City of Jackson, Miss.*, 152 F. 3d 362 (5th Cir. 1998).

However, the Fifth Circuit in *J&B Entertainment* followed the Third Circuit in requiring only that a legislative record be compiled or that the governing body introduce evidence of a secondary effect concen in defense of an ordinance challenge. See *Phillips v. Borough of Keyport*, 107

F. 3d 164, 174-175 (3d Cir. 1997). The Fifth Circuit precedent prior to *J&B* did not allow the after-the-fact secondary effects proof. *SDJ, Inc. v. City of Houston*, 831 F. 2d 1268, 1274 (5th Cir. 1988). The change by allowing the defense to an ordinance challenge to articulate the "secondary effects" justification stems from Justice Souter's obviating the need for a legislative record to find a secondary effects jsutification as a current governmental interest. (*Barnes*, supra, 501 U.S. at 582, Souter, J. concurring). The flaw in the after-the-fact governmental justification is that pretext can be masked by evidence that does not change the fact that a legislative body was predominantly concerned with suppressing message or the content of expression at the time a regulation was enacted. This is the same problem that occurs when a discriminatory firing is sought to be justified by evidence later discovered that would have justified the otherwise illegal termination. Compare *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). What has been lost through the extension of a "secondary effects" justification from the zoning context to the indirect prohibition of nude dance expression is any mechanism to prevent governmental bodies from concocting a record, even though the true governmental purpose is to ban erotic dance due to societal distaste for this form of entertainment. What is

to prevent the government from using biased studies to suggest a governmental justification that was not remotely considered by the legislative body? Would the courts not be unable to question the "studies showing secondary effects" because the truth of the studies is not for the courts?

Indeed, in a total perversion of a "secondary effects" doctrine, the Seventh Circuit has now held that "objective truth" is irrelevant and that regulations may be imposed upon adult entertianment establishments, even when the undisputed evidence before the Court indicates that such establishment causes no adverse secondary effects. See the unpublished opinion in *DiMa Corp. v. Town of Hallie*, 185 F. 3d 823 (7th Cir. 1999), 1999 U.S. App. LEXIS 20301.[6]

B. THE "SECONDARY EFFECTS JUSTIFICATION IS NOT FACTUALLY JUSTIFIED.

1. AVAILABLE EVIDENCE DOES NOT JUSTIFY ANY FINDING THAT NUDE DANCE ENTERTAINMENT CAUSES ADVERSE SECONDARY EFFECTS.

6The Supreme Court of South Carolina has reached a similar amazing result, holding adult entertainment businesses to be subject to regulations closing them down at existing locations, notwithstanding an undisputed record of no secondary effects having been caused. See *Restaurant Row Associates v. Horry County*, 516 S.E. 2d 442 (S.C. May 17, 1999), petition for cert. pending.

In advancing the "secondary effects justification for Indiana's proscription of public nudity in *Barnes*, Justice Souter admittedly did so without any evidence in the record suggesting that nude dancing per se causes such adverse secondary effects, nor even that the Indiana legislature in fact relied on such a "secondary effects" justification in enacting the statute.[7] In justification of that position, Justice Souter stated:

> "The type of entertainment Respondents seek to provide is plainly of the same character as that at issue in *Renton*, [*Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976)], and [*California v. LaRue*, 409 U.S. 109 (1972)]. It is therefore no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying 'specified anatomical areas' at issue in *Renton*. Other reported cases from the Circuit in which this litigation arose confirm the conclusion. See, e.g., *United States v. Marron*, 890 F. 2d 924, 926 (7th Cir. 1989) (prostitution associated with nude dancing establishment); *United States v. Doerr*, 886 F. 2d 944, 949 (7th Cir. 1989) (same). In light of *Renton's* recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of a type offered at the Kitty Kat Lounge and the Glen Theatres 'bookstore' furthers its interest in preventing prostitution, sexual assault and associated crime." 501 U.S. at 584, Souter J., concurring.

To begin with, both of the reported Seventh Circuit cases relied upon by Justice Souter, to-wit: *United States v. Marron*, supra, 890 F. 2d 924 (7th Cir. 1989), and *United States v. Doerr*, supra, 886 F. 2d 944 (7th Cir. 1989), involved an F.B.I. sting operation known as "operation safe bet," in which the F.B.I. operated a credit card service and investigated various businesses offering prostitution service on credit cards, three of which involved nude dance clubs. However, the fact that prostitution was found to have occurred at three nude dance clubs, subject to a sting operation no more implies that nude dance clubs are loci of prostitution any more than the fact that prostitution arrests occur at any of a number of locations including a Ford Motor Company plant, a convenience store, motels, school parking lots and numerous private residences in

---

7See 501 U.S. at 582, Souter J. concurring, stating that the Court's appropriate focus was "not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." This is clearly contrary to the position adopted subsequently by this Court in *United States v. Virginia*, 518 U.S. 515, 533 (1996), in which it stated that governmental justifications "must genuine, not hypothesized or invented post hoc in response to litigation."

all kinds of neighborhoods.[8]

Moreover, Justice Souter's opinion, in essence amounts to the Court taking judicial notice of the supposed "fact" that nude dance entertainment necessarily results in adverse secondary effects. There are essentially two problems with such use of judicial notice. First of all, judicial notice should only be applied to adjudicative facts, not legislative facts. See Fed. R. Evid. 201(a). More significantly, Fed. R. Evid. 201(b) specifically provides as follows:

> "A judicially noticed fact must be one not subject to reasonable dispute that is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The notion that nude dance entertainment causes adverse secondary effects satisfies neither of the foregoing tests of judicial notice. See the paper prepared by Dr. Daniel Linz of the University of California Santa Barbara, set forth in the Appendix at A.1-A.58. In that paper Dr. Linz specifically reviews the major so-called "studies" which purport to link

8Set forth in the Appendix at A.72-A.74 is a compendium of published reports of various loci of prostitution, setting forth all of the foregoing as places in which prostitution has occurred.

adult entertainment an adverse secondary effects, such as an increase in crime and a decline in property values. As noted by Dr. Linz absolutely none of the studies that purport to find such a connection have been conducted with methodology sound enough even to satisfy the minimal requirements of reliability for admission into evidence, pursuant to this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. Ltd., v. Charmichael,* ___U.S.___, 119 S. Ct. 1167 (May 23, 1999). Deficiencies in these studies include the use of subjective survey data when more reliable empirical evidence is available; failure to follow methodologically sound practices in selecting control areas; and use of survey techniques designed to distort and bias the surveys findings.[9]

Perhaps even more significantly, available evidence plainly suggests that where studies of the relationship between adult entertainment and secondary effects have been done in a scientifically sound manner, no relationship has been found to exist. See for example, the discussion of the April, 1978 study in St. Paul, Minnesota, in which the presence of "adult entertainment" and secondary effects, such as a decline in

9See appendix at A.14 - A.27. See also Table 2 at A.58.

property values, and an increase in criminal activity, were compared for various census tracts throughout the city in 1970 and 1976. While the study found a positive relationship between the presence of "adult entertainment" and the above-mentioned adverse secondary effects, the study took pains to note that the term "adult entertainment" had been defined to include both sexually oriented businesses and alcohol-serving businesses. However, when sexually oriented businesses were studied, no relationship existed, either in 1970 or 1976, between the presence of sexually oriented businesses and an increase in crime or a decline in property values. See Appendix at A.13-A.14.[10]

Finally, Dr. Linz notes that even those studies frequently

10See also the study conducted by the police department in Fulton County, Georgia, excerpts of which are set forth in the Appendix at A.59-A.71, in which the county, in a deliberate attempt to justify restrictions on nudity in establishments licensed to sell alcohol, directed its police department to compare crime statistics between alcohol-serving establishments with or without nude dance entertainment. Much to the chagrin of the County Board, the police department reported back that not only did alcohol-serving establishments with nude dance activity not have more police calls and more reports of criminal activity, they had substantially fewer such reports. The Fulton County police reluctantly concluded that "there is no statistical correlation that shows an increase in crime at adult entertainment establishments that serve alcoholic beverages. However, there is a statistical correlation that would indicate there is a greater instances (sic) of calls for service and reported crime at non-adult entertainment establishments that serve alcoholic beverages." Appendix at A.71.

cited as proof for the connection between adult entertainment businesses and adverse secondary effects in fact demonstrate exactly the opposite conclusion, in those portions of the studies done in compliance with the principals mandated by this Court in *Daubert* and *Kumho Tires*. For example, in the Los Angeles study of property values, at least two study areas (areas containing adult businesses) had property values decline at a lesser rate or increase at a greater rate than comparable areas without adult entertainment businesses. This led the researchers to conclude that there is "insufficient evidence to support the contention that concentration of sex oriented businesses have been the primary cause of these patterns of changes in assessed evaluations between 1970 and 1976." Appendix at. A.16. Similarly, in the Indianapolis study again frequently cited as demonstrating a relationship between adult entertainment businesses and crime, the sub-area analysis, involving crime rates within 1,000 feet of adult entertainment businesses, as compared to those within a 1,000 foot radius of a random centroid in the control areas, revealed a greater rate of increase in crime in the control areas than in the areas around the adult entertainment business. Id. at A.23-A.24.

In the early years of this millennium, we all knew that the sun revolved around the earth, and that if one sailed to the

horizon, one would fall off the edge of planet. We changed our mind about those positions when we examined the facts, which disproved our earlier determination.

This Court has had the identical experience. Last century, this Court knew that separate but equal was in full compliance with the United States Constitution. *Plessy v. Ferguson*, 163 U.S. 537 (1896). This Court changed its mind when it objectively looked at that facts and realized that its earlier determination was based upon a flawed view of the facts. See *Brown v. Board of Education*, 347 U.S. 483 (1954). This case presents the identical situation. The Souter concurrence in *Barnes* suggests that we "know" that adult entertainment causes adverse secondary effects. As the appendices to this brief indicate, objectively verifiable facts do not support this clearly erroneous position, and this Court must be willing to reevaluate the issue and render a decision based upon facts, not fantasy.[11]

2. EVEN ASSUMING THE EVIDENCE SUPPORTED THE PROPOSITION THAT ADULT BUSINESSES CAUSE ADVERSE SECONDARY EFFECTS, THERE IS NO EVIDENCE PROHIBITIONS OF PUBLIC NUDITY WOULD SIGNIFICANTLY ADVANCE THE GOVERNMENT'S INTEREST IN CURBING SUCH EFFECTS.

In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), this Court applied a test for regulating commercial speech, a test extremely similar to the test for regulating conduct containing a speech component or a time, place, and manner regulation of speech.[12] In that case, this Court noted:

> "In *Edenfield [v. Fane*, 507 U.S. 761 (1993)], we decided that the Government carries the burden of showing that the challenged regulation advances the government's interest 'in a direct and a material way' [Citation omitted.] That burden 'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain such a restriction commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' [Citation omitted.] We caution that this requirement was critical; otherwise 'a State could with ease restrict commercial speech in the service of other objectives that could not

11 The only alternative is to adopt the clearly absurd position of the Seventh Circuit that "objective truth" is irrelevant, a position clearly contrary to this Court's holding in *U.S. v. Carolene Products, Co.*, 304 U.S. 144 (1938).

12 Compare the tests for regulating commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980), the test for incidental regulation of speech under *O'Brien*, supra, 391 U.S. 367 (1968), and the test for time, place and manner regulation of speech contained in *Renton*, supra, 475 U.S. 41, and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), plainly indicates the test to be extremely similar. Indeed, in *Clark v. Community for Creative Non-Violence*, 458 U.S. 288 (1984), this Court indicated that the *O'Brien* test is "in the last analysis, little, if any, different from the standard applied to time, place or manner restrictions."

themselves justify a burden on commercial expression.'[13]

Neither the record in this case nor any stretch of logic can conceivably yield the conclusion that the prescribed remedy in this ordinance, to-wit: the requirement of pasties and G-strings or some other measure of clothing, will advance the state's interest in preventing criminal activity or a decline in property values at all, much less ameliorate those secondary effects "in a direct and material way," as this Court's decisions have plainly mandated. Several courts which have attempted a serious analysis of this Court's opinion in *Barnes* have clearly reached this unavoidable conclusion. In *Nakotomi Investments, Inc. v. City of Schenectady,* 949 F. Supp. 988 (N.D.N.Y. 1997), in discussing the furtherance of the governmental interest, the court in that case noted:

> "Moreover, to pass constitutional muster under *O'Brien,* which Justice Souter acknowledges articulates the appropriate test, Indiana's statute, requiring that erotic dancers wear pasties and G-strings, must somehow further Indiana's interest in reducing prostitution and drug use (emphasis by the court). To-wit:

13More recently, in *44 Liquormart v. Rhode Island,* 517 U.S. 484 (1996), both the plurality opinion and the plurality opinion of Justice O'Connor emphasized the exacting scrutiny to which the remedy of a restriction on commercial speech would be placed.

> Indiana must demonstrate that its regulatory scheme, at minimum, makes sense based on the objectives to be obtained. This is not to say that a governmental entity must isolate the precise causes of the correlation between the regulated activity and the detrimental secondary effect. However, where government is seeking to restrain the free expression of its citizens, the Supreme Court has invariably held that the burden falls on the government to justify the infringement. [Citations omitted.]
>
> Recognizing this important requirement, the plurality in *Barnes* was careful to note that Indiana's interest in order and morality was furthered by directly banning the 'evil' itself: nudity. [Emphasis by the court, citation omitted.] In comparison, the 'evil' that Justice Souter addresses is 'prostitution, sexual assault, and other criminal activity.' [Citation omitted.] Clearly, the government has the power to ban prostitution, drug use, and sexual assault. Indeed, better enforcement of existing laws against prostitution and drug use will undoubtedly further the government's interest in reducing these activities. However, if the government seeks to indirectly address these same evils by requiring that dancers engaged in expressive First Amendment activity wear pasties and G-strings, the Constitution requires that there be some connection between the restriction and the evil sought to be eradicated (emphasis by the court)." Id. at 996-997.

The court then concludes:

> "In Justice Souter's concurring opinion in *Barnes*, there is simply no mention of how Indiana's indecency statute, requiring that erotic dancers partially cover their breasts and buttocks, will reduce the incidents of prostitution, drug use, and sexual assault. This oversight is most likely due to the fact, that this Court has found here, that no logical relationship exists between the percent of a woman's breast that is visible (in *Barnes* Indiana simply required the covering of the nipple) and the number of prostitutes operating outside an adult establishment." Id. at 997-998.[14]

Most recently, in *Diva's, Inc. v. City of Bangor*, 21 F. Supp. 2d 60 (D. Me. 1998), the court issued both a preliminary and permanent injunction against the enforcement of a municipal ordinance prohibiting the owner of a commercial establishment offering nude dancing from also operating an escort service, dating service, or booking agency within the county. The court enjoined enforcement of the ordinance, inter alia because of the absence of any showing that the goal of reducing crime and prostitution would be at all furthered by

---

14Several other courts have precisively reached the same conclusion. See for example, *Steverson v. City of Vicksburg*, 900 F. Supp. 1, 12-13 (S.D. Miss. 1994), and *Books, Inc. v. Pottawattamie County, Ia.*, 978 F. Supp. 1247 (S.D. Ia. 1997).

prohibiting the owner of nude dancing establishments from also operating booking agencies. The court noted:

> "The City claims that it is entitled to rely on studies from other cities to support its action, and points to the legislative record which contains studies conducted in Texas, New York, Minnesota and other states. The Court agrees that the City may base its action, at least in part, on evidence from other communities [Citation omitted.] The studies relied upon by the city here, however, do not address the connection between co-ownership of a booking agency and a nude dancing establishment and prostitution. Rather, these studies support no more than the proposition that nude dancing establishments alone may be associated with certain crimes, including prostitution. Furthermore, these studies focus only on the efficacy of land use and zoning schemes in reducing crime. None documents, or even mentions, the efficacy of an ordinance of the type enacted by the City of Bangor in reducing prostitution or any other crime." Id. at 65.

Consequently, even assuming the reliability of the studies set forth in the Linz paper, at best those studies would support locational zoning restrictions on adult entertainment establishments. Nothing in those studies, none of which were apparently relied upon by the City of Erie in enacting the present ordinance, even remotely suggests that the incidence of prostitution and drug use in adult entertainment establishments

would be even remotely affected by the percentage of a dancer's breast and buttocks subject to covering.

CONCLUSION

Because the ordinance in the instant case was not enacted as a general ban on nudity, but rather was expressly enacted for the purpose of curtailing nude dancing, recognized by this Court to be within the perimeters of the First Amendment, it cannot be justified on the statute's interest in "order and morality." Because secondary effects have only been used to justify time, place, and manner regulations of protected speech and not a total ban on such speech, because the evidence supporting such secondary effects is either unreliable or does not support the proposition that adult entertainment causes adverse secondary effects, and because there has been no showing that the chosen remedy, a prohibition on nude dancing, will advance the government's interest in preventing secondary effects in a direct and material way, it is clear that the Supreme Court of Pennsylvania was absolutely correct when it declared:

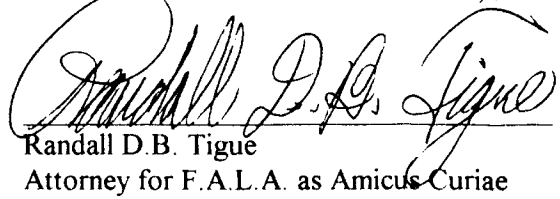
> "[T]he Ordinance is inextricably linked with the content motivation to suppress the expressive nature of nude dancing." *Pap's A.M. v. City of Erie*, 719 A. 2d 273, 279 (Pa. 1988).

Because neither Petitioner nor the amici in support of reversal have offered any compelling evidence to support a

content-based restriction which this ordinance plainly is, the decision of the Pennsylvania Supreme Court should be affirmed.

Respectfully submitted,

RANDALL TIGUE LAW OFFICE, P.A.



Randall D.B. Tigue
Attorney for F.A.L.A. as Amicus Curiae
Karmel Square Bldg., Elroy St. Entrance
2940 Pillsbury Avenue South
Minneapolis, MN 55408
612/825-0936

Dated: 9/29/99