No. 98-1161

In The

Supreme Court of the United States

CITY OF ERIE,

Petitioner,

v.

PAP'S A.M.,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Pennsylvania

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMERICAN LIBERTIES INSTITUTE, SEMINOLE COUNTY, FLORIDA, and CALNO IN SUPPORT OF PETITIONER

FREDERICK H. NELSON, ESQ.*
American Liberties Institute
(*Counsel of Record*)
Post Office Box 547503
Orlando, Florida 32854-7503
(407) 786-7007

LONNIE N. GROOT, ESQ.*
Deputy County Attorney
Seminole County, Florida
1101 East First Street
Sanford, Florida 32771
(407) 665-7254

DONNA MCINTOSH, ESQ.
STENSTROM, MCINTOSH, JULIAN COLBERT, WIGHAM & SIMMONS
Counsel for CALNO
Post Office Box 4848
Sanford, Florida 32771
(407) 322-2171

ANTHONY A. GARGANESE, ESQ.*
AMARI & THERIAC, P.A.
Counsel for CALNO
Mariner Square,
Suite 302
Post Office Box 1807
Cocoa, Florida 32923-1807
(407) 639-1320

Counsel for Amici Curiae

*Admitted to the Bar of the United States Supreme Court

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE AMICI BRIEF

The Amici Brief of American Liberties Institute, Seminole County, Florida, and CALNO in Support of Petitioner is filed with permission of the Petitioner and a copy of the letter of consent is filed herewith. The Respondent has objected to the filing of this brief in support of the Petitioner. This Motion for Leave to file this *amici curiae* brief is submitted praying for this Honorable Court's leave to file this *amici curiae* brief in support of the Petitioner.

INTEREST OF AMICI

American Liberties Institute, Seminole County, Florida, and CALNO (Council of Local Governments) file this *amici curiae* brief in support of the Petitioner to assist this Court in rendering a decision regarding the *Barnes* test. American Liberties Institute currently represents Seminole County, Florida, in litigation which presents issues that are similar to that which is pending before this Court in this case. Seminole County, Florida, and CALNO – an organization of municipal and local governments in the central Florida area – are involved in litigation which is similar to the issues pending in this case. American Liberties Institute, Seminole County, Florida, and CALNO submit this *amici curiae* brief in support of Petitioner, City of Erie, in order to safeguard the interests of Seminole County, Florida, and CALNO in their local ordinances regulating nudity and adult entertainment which are similar to the ordinance at issue in this case.

American Liberties Institute is a non-profit civil liberties education and legal defense organization created to

defend and protect constitutional liberties. American Liberties Institute's activities include educating the public regarding civil liberties and the interaction between law and individual freedoms. As part of advancing American Liberties Institute's purpose, education is provided through interaction with attorneys and members of the academic community, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amici curiae* briefs on a variety of issues.

CONCLUSION

Amici Curiae respectfully request this Honorable Court to grant leave to file this *amici curiae* brief in support of the Petitioner.

Respectfully submitted,

FREDERICK H. NELSON, ESQ.*
American Liberties Institute
(*Counsel of Record*)
Post Office Box 547503
Orlando, Florida 32854-7503
(407) 786-7007

LONNIE N. GROOT, ESQ.*
Deputy County Attorney
Seminole County, Florida
1101 East First Street
Sanford, Florida 32771
(407) 665-7254

DONNA MCINTOSH, ESQ.
STENSTROM, MCINTOSH, JULIAN COLBERT, WIGHAM & SIMMONS
Counsel for CALNO
Post Office Box 4848
Sanford, Florida 32771
(407) 322-2171

ANTHONY A. GARGANESE, ESQ.*
AMARI & THERIAC, P.A.
Counsel for CALNO
Mariner Square,
Suite 302
Post Office Box 1807
Cocoa, Florida 32923-1807
(407) 639-1320

Counsel for Amici Curiae

*Admitted to the Bar of the United States Supreme Court

August 16, 1999

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICI[1]

American Liberties Institute, Seminole County, Florida, and CALNO (Council of Local Governments) file this *amici curiae* brief in support of the Petitioner to assist this Court in rendering a decision regarding the *Barnes* test. American Liberties Institute currently represents Seminole County, Florida, in litigation which presents issues that are similar to that which is pending before this Court in this case. Seminole County, Florida, and CALNO – an organization of municipal and local governments in the central Florida area – are involved in litigation which is similar to the issues pending in this case. American Liberties Institute, Seminole County, Florida, and CALNO submit this *amici curiae* brief in support of Petitioner, City of Erie, in order to safeguard the interests of Seminole County, Florida, and CALNO in their local ordinances regulating nudity and adult entertainment which are similar to the ordinance at issue in this case.

American Liberties Institute is a non-profit civil liberties education and legal defense organization created to defend and protect constitutional liberties. American Liberties Institute's activities include educating the public regarding civil liberties and the interaction between law and individual freedoms. As part of advancing American Liberties Institute's purpose, education is provided through interaction with attorneys and members of the

---

[1] This brief is authored solely by counsel for *Amici Curiae*. This brief is filed with permission of the Petitioner and a copy of the letter of consent is filed herewith. The Respondent has objected to the filing of this brief in support of the Petitioner. A Motion requesting leave to file this brief is submitted herewith.

academic community, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amici curiae* briefs on a variety of issues.

SUMMARY OF THE ARGUMENT

The Supreme Court of Pennsylvania erred in *Pap's A.M. v. City of Erie* when the court failed to recognize this Court's decision in *Barnes v. Glen Theatre, Inc.*, as binding precedent. This Court's decision in *Barnes* is "good law" in that it satisfied the requirements of the *United States v. O'Brien* test. Based on *O'Brien*, five justices in *Barnes* agreed that the Indiana statute was content neutral, therefore, strict scrutiny did *not* apply. The City of Erie's ordinance was substantially similar to Indiana's statute reviewed in *Barnes*. The Supreme Court of Pennsylvania in *Pap's* erred because it found the City of Erie's ordinance content-based and applied strict scrutiny. In doing this, the Supreme Court of Pennsylvania adopted the position of the dissent in *Barnes* in direct contravention of this Court. Accordingly, the Supreme Court of Pennsylvania should be reversed.

As a subset of the plurality opinion in *Barnes*, Justice Souter's concurring opinion is the standard by which courts should look in analyzing similar public indecency or adult entertainment regulations. Justice Souter's concurring opinion is the opinion decided on the narrowest of grounds and is the "holding" of this Court. The Supreme Court of Pennsylvania committed reversible error and, therefore, should be reversed.

ARGUMENT

I.

THE SUPREME COURT OF PENNSYLVANIA ERRED WHEN IT ABANDONED BINDING UNITED STATES SUPREME COURT PRECEDENT IN *BARNES V. GLEN THEATRE, INC.*, IN FAVOR OF ITS OWN ANALYSIS.

A. Applicable Constitutional Standards

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. In 1925, this Court extended the First Amendment's protection by binding the states through the application of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Whether the speech is under the purview of the First Amendment and what is the scope of that protection are questions that have plagued First Amendment jurisprudence for many years. The fundamental inquiry is whether the "speech" is entitled to protection at all. This Court has held that certain forms of expressive conduct, as well as the spoken word, have the potential to communicate ideas and, therefore, deserve First Amendment protection. *Texas v. Johnson*, 491 U.S. 397, 405-406 (1989).

In fact, expressive conduct such as flag burning, *United States v. Eichman*, 496 U.S. 310, 315 (1990), peace symbols attached to flags, *Spence v. Washington*, 418 U.S. 405, 409-410 (1974), the wearing of black arm bands as a protest to war, *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505 (1969), public sit-ins protesting racial segregation, *Brown v. Louisiana*, 383 U.S. 131, 142 (1966), picketing by striking union members, *Thornhill v.*

Alabama, 310 U.S. 88 (1940), and displaying of a red flag, *Stromberg v. California*, 283 U.S. 359, 368 (1931), are all under the First Amendment's protection. Conduct is left unprotected if it is deemed non-expressive. *See South Florida Beaches, Inc. v. City of Miami*, 734 F.2d 608, 609 (11th Cir. 1984).

In addition to the above expressive conduct, this Court has recognized that live non-obscene sexual performances are entitled to some form of First Amendment protection. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *California v. LaRue*, 409 U.S. 109, 118 (1972). This Court, however, never directly addressed the exact level of First Amendment protection afforded to adult entertainment.

To ascertain how much protection "speech" is entitled to, this Court analyzes an ordinance challenge by first determining the purpose of the regulation. *See Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). If the regulation's purpose is the silencing or singling out of constitutionally protected speech because the speaker's message carries an unwanted communicative impact, the regulation must pass strict scrutiny. *See Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983). This type of regulation, known as a content-based regulation, is upheld if the regulation is necessary to serve a compelling state interest and is narrowly tailored to serve that interest. *Id.* at 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455 (1980)). If, however, the regulation's purpose focuses on reasons detached from the speech's content, the government has more liberty in regulating the speech. *See Mosley*, 408 U.S. at 95-96. This type of

regulation, one that only touches upon the speech's time, place or manner, is considered content-neutral. A valid content-neutral regulation is: (1) unrelated to the suppression of ideas; (2) narrowly tailored to serve a significant governmental interest; and (3) leaves open adequate alternative avenues of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515-16 (1981); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

Traditionally, the time, place, and manner test was framed to apply only to speech or expressive conduct that took place in public forums. *See Ward*, 491 U.S. at 791. This Court, however, has applied the time, place, and manner test in a number of cases involving the regulation of private adult entertainment establishments. In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), the City of Detroit amended its "Anti-Skid Row Ordinance" to impose zoning limitations on adult businesses by prohibiting them from being located within 1,000 feet of any two existing adult businesses or within 500 feet of any residential area. *Id* at 52-54. The City of Detroit argued that adult entertainment establishments had a "deleterious effect on the adjacent areas" and could "contribute to the blighting or downgrading of the surrounding neighborhood" when condensed into a confined area. *Id.* at 54 n.6. After noting that the ordinance treated adult theaters differently, this Court stated that the ordinance constituted an acceptable content-neutral time, place, and manner

regulation because the ordinance's purpose was not to stifle protected speech but was to curb the secondary effects which the adult businesses had on surrounding uses. *Id.* at 62-63, 71 n.34. Justice Stevens noted that "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Id.* at 71-73 (Steven, J. concurring).

Five years later, this Court again applied the time, place, and manner test to the issue of nude dancing in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). There, operators of an adult bookstore featuring nude dancing were convicted of violating a zoning ordinance that banned all adult theaters from commercial zones. *Id.* at 63-64. The ordinance was deemed unconstitutional because the government failed to present evidence of a substantial governmental interest and of available alternative avenues of communication. *Id.* at 73-74. The *Young* holding was deemed not controlling because in that case "[t]he restriction did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them." *Id.* at 71.

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43 (1986), this Court upheld a zoning ordinance that restricted the location of adult motion picture theaters. Although this Court recognized the regulation's burden on speech as a result of a content-based distinction, it upheld the ordinance as a proper time, place, and manner regulation nonetheless because it did not ban adult theaters altogether. *Id.* at 47, 52-54. This Court noted that in addition to alternative areas of the city open for the protected communication, the zoning ordinance was aimed at eradicating the secondary effects caused by the presence of

adult theaters, not the communication of "offensive" speech and was, therefore, constitutional. *Id.* at 54.

Aside from the time, place, and manner test described above, this Court has enunciated a slightly different test for determining the validity of content-neutral regulations on symbolic speech. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). This Court, however, has viewed the *O'Brien* "symbolic speech" test and the time, place, and manner test as essentially the same. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984). In *O'Brien*, the defendant burned his draft card in protest of the Vietnam War and was consequently convicted of violating a federal law forbidding the destruction of draft cards. O'Brien challenged his conviction on the basis that the law unconstitutionally abridged his freedom of speech. Presuming that the First Amendment protected the communicative component of O'Brien's conduct, this Court wrote:

> [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.
>
> . . .
>
> [W]e think it clear that a government regulation is sufficiently justified if the governmental regulation is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no

> greater than is essential to the furtherance of that interest.

Id. at 376-77, 382.

In applying this four-prong test, the *O'Brien* Court rejected the idea that symbolic speech is entitled to the highest level of First Amendment protection and adopted an intermediate level of review. This Court refused O'Brien's First Amendment challenge, holding that Congress's purpose in forbidding draft card destruction was merely to foster an efficient administration of the draft. *Id.* at 378-82. This Court reasoned that the government's important interest in draft administration justified any incidental restriction on expression. *See id.* at 378-80.

Thus, it is clear from this Court's jurisprudence that adult entertainment, including nude dancing, is entitled to some form of First Amendment protection as expressive conduct. It is apparent, however, that public indecency and entertainment regulations will be upheld if they are content-neutral time, place, and manner restrictions.

B. This Court's Decision In *Barnes v. Glen Theatre, Inc.*, Satisfied The *O'Brien* Test And, Therefore, Is Binding Precedent.

Because this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), fulfilled the requirements of the *O'Brien* four-part test discussed above, it is binding precedent and, therefore, courts are obliged to adhere to its ruling. Thus, in content neutral ordinances regulating public indecency or adult entertainment, the *Barnes* test is applicable.

Declining to adopt the "traditional" time, place, and manner test in favor of the *O'Brien* test, this Court sought to define the scope of First Amendment protection for nude dancing subject to a public indecency statute in *Barnes*. There, two adult entertainment establishments separately brought suit in District Court seeking to enjoin an Indiana public indecency statute prohibiting nudity in all public places. The statute effectively required nude dancers to wear, at a minimum, pasties and a G-string. The District Court rejected plaintiffs' arguments in holding that the nude dancing involved was not expressive conduct. *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F. Supp. 414, 419 (N.D. Ind. 1988). The Court of Appeals reversed and concluded that "non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment." *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1084 (7th Cir. 1990). This Court granted certiorari to address the issue of whether the Indiana public indecency statute impermissibly infringed on an expressive activity protected by the First Amendment. *Barnes*, 501 U.S. at 565.

The *Barnes* Court reversed in a 5-4 decision stating that the statute was "justified despite its incidental limitations on some expressive activity." *Id.* at 567. Chief Justice Rehnquist, writing for the plurality and joined by Justices O'Connor and Kennedy, began by acknowledging that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Id.* at 566. He noted, however, that there was still need to define the degree of protection afforded to adult entertainment. *Id.* The plurality chose to apply the

O'Brien symbolic speech test in analyzing the First Amendment issue because the "time, place, or manner" test "has been interpreted to embody much the same standards as those set forth in *United States v. O'Brien*". *Id.*

The plurality found that the Indiana public indecency statute fulfilled the first prong of the *O'Brien* test because it was "clearly within the constitutional power of the State." *Id.* at 567. The statute also met second prong of the test because it furthered a substantial governmental interest in safeguarding order and morality. *Id.* at 567-68. Chief Justice Rehnquist noted that the state's police power traditionally included the "authority to provide for public health, safety, and morals," and that regulations have been upheld for such bases. *Id.* at 568. Further, the safeguarding of order and morality was found to be "unrelated to the suppression of free expression," thus satisfying the third element, because "it was not the dancing that was prohibited, but simply its being done in the nude." *Id.* at 569. Just by "donning" pasties and a G-string, the plurality reasoned, dancers could convey their message without transgressing the statute. *Id.* at 571. Finally, this Court held that the *O'Brien* test had been satisfied with the fulfillment of the fourth prong: "It is without cavil that the public indecency statute is 'narrowly tailored;' Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose." *Id.* at 572.

Justice Scalia, concurring in the result, denied that nude dancing was even entitled to First Amendment

protection because the statute was a "general law regulating conduct and not specifically directed at expression." *Id.* (Scalia, J., concurring). He argued that expressive conduct restrictions should be subjected to the test in *Employment Div., Dept. Of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). *Id.* at 579. Justice Scalia stated that this Court in *Smith* "held that general laws not specifically targeted at religious practices did not require heightened First Amendment scrutiny even though they diminished some people's ability to practice their religion." *Id.* Likewise, Justice Scalia stated, only regulations that are directed at protected expression should be closely scrutinized under a First Amendment analysis. *Id.* at 579-80.

Although Justice Souter agreed that adult entertainment/nude dancing was entitled to some First Amendment protection and was, therefore, subject to *O'Brien*, he disagreed with the plurality's assessment of what constituted a substantial governmental interest. *Id.* at 581-82. Justice Souter argued that Indiana was justified in regulating public indecency and thereby restricting nude dancing based on the "State's substantial interest in combating the secondary effects of adult entertainment establishments . . . " rather than "protecting societal order and morality." *Id.* at 582. Justice Souter noted that "preventing prostitution, sexual assault, and other criminal activity, . . . " clearly "falls within the constitutional power of the State," and sufficiently justifies the enforcement of the statute against adult entertainment establishments, thus satisfying the first prong of the *O'Brien* test. *Id.* at 583.

In analyzing the second prong of *O'Brien*, Justice Souter relied on this Court's decision in *Renton v. Playtime*

Theaters, Inc., 475 U.S. 41 (1986). There, this Court, concluded that Renton was not required to produce its own studies on secondary effects and upheld a zoning ordinance designed to combat the adverse effects of adult businesses. *Id.* at 51. In light of *Renton*, Justice Souter noted that "Indiana could reasonably conclude that forbidding nude entertainment . . . furthers its interest in preventing prostitution, sexual assault, and associated crimes." *Barnes*, 501 U.S. at 584.

Continuing with the *O'Brien* analysis, Justice Souter argued that the interest in combating the related secondary effects was not related to the suppression of expression, thereby fulfilling the third condition. *Id.* at 585. Again turning to *Renton*, Justice Souter noted that this Court upheld the ordinance as content neutral because the government had an interest in regulating adult entertainment establishments because their presence correlated with adverse secondary effects. *Id.* at 586. Justice Souter disagreed with the dissent's contention that the "regulation of expressive conduct because of the fear that the expression will prove persuasive is inherently related to the suppression of free expression." *Id.* at 585. Justice Souter argued that the State's interest in banning nude dancing resulted not "from a relationship between other evils and the expressive component of the dancing" but rather "from a simple correlation of such dancing with other evils," and, therefore, the interest was unrelated to suppressing expression. *Id.* at 586.

Notably, this Court has suggested that the "adverse secondary effects doctrine" may extend to other forms of speech, not just public indecency and other low value expression. Justice O'Connor, in a plurality opinion, in

Boos v. Barry, 485 U.S. 312 (1988), reasoned that content neutral regulatory laws involving "high value political speech" would be constitutional if it focused on the secondary effects of picket signs, including congestion, interference with ingress or egress, or visual clutter. Further, "visual clutter and traffic safety" are considered valid secondary effects in the content neutral regulation of commercial billboards. *See Metromedia v. City of San Diego*, 453 U.S. 490 (1981).

Applying the last prong of the *O'Brien* test, Justice Souter in *Barnes* found that the restriction on expression was no greater than essential to further the governmental interest. *Id.* at 587. He acknowledged that pasties and a G-string might "moderate the expression to some degree," but concluded that the limitation was minimal in light of the alternative avenues the dancers had "to express the erotic message." *Id.* Accordingly, Justice Souter argued that the Indiana statute satisfied the *O'Brien* four-part test and was, therefore, constitutional.

Although Barnes may appear "splintered", when analyzed closely, it is actually a very solid decision. Eight of the Justices agreed with Indiana that public indecency and adult entertainment could be subjected to a reasonable time, place, and manner restriction. Those same eight justices, however, merely differed on what constituted a substantial governmental interest. Four Justices believed that protecting the order and morality of society was the basis for the regulation. A fifth Justice believed that suppressing the adverse effects stemming from such establishments was the basis of the regulation, also seen as a subset of "protecting societal order and morality."

The Indiana public indecency statute satisfied the *O'Brien* test under the plurality's analysis, as well Justice Souter's, and was therefore, deemed constitutional. Under both analyses, government has the authority to regulate public indecency or adult entertainment in order to protect societal order and morality and to limit the adverse secondary effects of such conduct. *O'Brien* detailed the standard for courts to follow in analyzing similar symbolic conduct regulations. Because the *Barnes* Court followed *O'Brien*, it is "good law" and is binding precedent on the courts. Thus, content neutral public indecency or adult entertainment regulations are properly analyzed under the *Barnes* test.

C. The Supreme Court Of Pennsylvania Erred By Failing To Adhere To This Court's Binding Precedent in *Barnes*.

The Supreme Court of Pennsylvania erred in *Pap's A.M. v. City of Erie*, 719 A.2d 273 (1998), and should be reversed, because it failed to follow binding United States Supreme Court precedent. Five (5) justices in *Barnes* agreed that the Indiana statute was content neutral and, therefore, strict scrutiny did not apply. The City of Erie's ordinance was substantially similar to Indiana's public indecency statute in *Barnes*. Yet the *Pap's* court blatantly erred by finding that the Erie ordinance was content-based and thus subject to strict scrutiny. The majority of the *Pap's* court, in a great display of judicial activism, ruled that since there was "no point on which a majority of the *Barnes* Court agreed" . . . "there is [therefore] no United States Supreme Court precedent which is squarely

on point" so "we turn to our own independent examination of the Ordinance. . . . " *Id.* at 278. Instead, the Supreme Court of Pennsylvania adopted Justice White's opinion in the *Barnes'* dissent ruling the Indiana statute content-based and, therefore, subject to strict scrutiny. *Id.* at 279. In circumventing United States Supreme Court precedent, the Supreme Court of Pennsylvania has "strain[ed] to find discord in *Barnes* where none exists." *Id.* at 282 (Castille, J., concurring). The Supreme Court of Pennsylvania still found *Barnes* unsettling in spite of five Justices voting to uphold the statute as unrelated to the suppression of protected expression (content neutral) and, therefore, not subject to a strict scrutiny analysis. *Id.* at 569, 575 (Scalia, J., concurring), 586 (Souter, J., concurring). The fact that five Justices voted to uphold the statute should have been enough for the Supreme Court of Pennsylvania to adhere to this Court's decision in *Barnes*. Justice Castille chastised the majority in *Pap's A.M.* and stated that:

> [t]he majority herein overlooks this fact, deems the Barnes Court "hopelessly fragmented" and discerns no binding common ground in Barnes. Consequently, the majority adopts the position of the Barnes dissenters, finds the ordinance at issue a content-based ordinance which aimed at the suppression of protected expression and applies the strict scrutiny test. By applying the First Amendment strict scrutiny test in spite of Barnes, the majority here defies binding precedent.

Pap's A.M., 719 A.2d at 283 (Castille, J., concurring).

This Court has stated that if a precedent has direct application in a case, a lower court must not take on its

own authority to renounce precedent of this Court. *Rodriguez v. Shearson/American Exp. Inc.*, 490 U.S. 477, 484 (1989). The lower court must "follow the case which directly controls, leaving to [the United States Supreme Court] the prerogative of overruling its own decisions." *Id.* Not only was *Barnes* applicable, but it was directly on point: "The Court in *Barnes* analyzed an Indiana statute, which is strikingly similar to the ordinance we are examining." *Pap's A.M.*, 719 A.2d at 277. Even if this Court finds that its holding in *Barnes* is "hopelessly fragmented" beyond precedential value, the Supreme Court of Pennsylvania was still obligated to adhere to this Court's decision to uphold the *Barnes* ordinance.

In *D'Angio v. Borough of Nescopec*, 34 F. Supp. 2d 256 (U.S. M.D. Pa. 1999) the court found the Rehnquist plurality in *Barnes* controlling and binding precedent in the plaintiff's First Amendment challenge of Nescopec's public indecency ordinance. The proper test to apply in analyzing content neutral public indecency or adult entertainment regulations is that seen in *Barnes*. The Supreme Court of Pennsylvania in *Pap's* found fault where none existed in *Barnes* and refused to follow its holding. Therefore, the Supreme Court of Pennsylvania erred in its ruling that *Barnes* was not binding precedent and should be reversed.

D. This Court's Decision In *Barnes*, Specifically Justice Souter's Concurrence, Is Binding Precedent On The Supreme Court Of Pennsylvania.

Justice Souter's concurrence in *Barnes*, often seen as a subset of Justice Rehnquist's plurality opinion, is the

standard by which lower courts must analyze all public indecency or adult entertainment regulations. Therefore, the Supreme Court of Pennsylvania erred when it refused to recognize Justice Souter's concurrence as the "holding" in *Barnes*, and should be reversed.

This Court detailed the standard for discerning a plurality opinion when it stated that where "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

The Sixth Circuit addressed the issue of the *Barnes* holding in *Triplett Grille, Inc,. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994). In applying the *Marks* rule the Court of Appeals looked to the analysis of the District Court and concluded that Justice Souter's opinion was the standard. The District Court stated:

> Justice Scalia very broadly denies all First Amendment protection to nude dancing. The plurality dramatically expands the scope of the *O'Brien* test by allowing morality concerns to justify local legislation. Justice Souter, in contrast, bases his application of the *O'Brien* test on assumptions previously upheld in *Renton*.

Triplett Grille, Inc. v. City of Akron, 816 F. Supp. 1249, 1254 (N.D. Ohio 1993).

The court explained that Justice Souter's opinion was a "subset of the principles articulated in the plurality

opinion." That is, "as a logical consequence of their approval of morality justifications", the plurality all but agreed with Justice Souter's argument that endeavors to curb the adverse secondary effects is a valid substantial governmental interest in regulating public indecency and adult entertainment. The court cited the plurality's opinion as follows:

> This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation. Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.

Id. (quoting *Barnes*, 501 U.S. at 569 (citations omitted)).

In *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 409 (6th Cir. 1997), the Sixth Circuit affirmed its earlier holding in *Triplett Grille, Inc.*, that Justice Souter's concurrence was the rule of law by which public indecency and adult entertainment regulations would be analyzed. It further noted that although it may be cumbersome to follow a line of reasoning that seems internally inconsistent, courts "[n]evertheless, [ ] do not have the freedom to pick and choose which premises and conclusions [they] will follow, but instead, with respect to particular issue, must follow the reasoning of the concurring opinion with the narrowest line of reasoning on that issue." *Id.* The Supreme Court of Pennsylvania, by adopting the *Barnes* dissent, "picked and chose" which holding it wished to follow.

At least four circuits, including the Fifth, Sixth, Eighth, and Eleventh circuits, have followed Justice Souter's concurring opinion for its precedential value. *See, e.g., J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998); *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998) (finding that Justice Souter's opinion in *Barnes* illustrated the narrowest solution of the issues); *International Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157, 1160-61 (11th Cir. 1991) (holding that a statute regulating nude dancing will be upheld, following *Barnes*, if the statute meets the *Renton* secondary effects test), *cert. denied*, 503 U.S. 920 (1992).

Even though it may seem awkward "in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered, it is the usual practice when that is the determinative opinion." *Blum v. Whitco Chem. Corp.*, 888 F.2d 975, 981 (3rd Cir. 1989).

Accordingly, because Justice Souter's concurring opinion articulates the common underlying approach in analyzing public indecency or adult entertainment regulations on the "narrowest grounds", the Supreme Court of Pennsylvania erred by denouncing its precedential value and, therefore, should be reversed.

E. Preserving The Integrity Of The Judicial Process Compels This Court To Affirm Justice Souter's Opinion As Binding Precedent.

Preserving the integrity of the judicial process compels this Court to adhere to Justice Souter's opinion. The alternative is to allow lower courts to denounce binding United States Supreme Court decisions in favor of their

"own independent analysis" thereby undermining both the integrity and the authority of this Court.

This Court has stated that *stare decisis* is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). This Court has been reluctant to follow precedent just for *stare decisis'* sake in deciding constitutional issues. Nevertheless, "[e]ven in constitutional cases, the doctrine carries such a persuasive force that we have always required a departure from precedent to be supported by some 'special justification.' " *Id.* at 842 (Souter, J., concurring) (quoting *Arizona v. Ramsey*, 467 U.S. 203, 212 (1984)). What matters most is that the "applicable rule be settled than to be settled right." *Burnet v. Coronado Oil & Gas, Co.*, 285 U.S. 293 (1932).

As discussed above, at least four circuits are applying Justice Souter's concurrence in *Barnes* to ordinances which regulate public indecency or adult entertainment. To rule that Justice Souter's opinion is not binding precedent in effect would leave many state and local government's bare, with no weapon in which to combat the negative effects of public indecency or "adult" establishments. Additionally, allowing lower courts to essentially overrule this Court's holdings presents a dangerous standard for other courts to follow in the future. In this case there is no special justification to depart from this Court's holding in *Barnes*. In fact, there is compelling justification to adhere to the *Barnes* decision and to affirm that Justice Souter's analysis is the standard under which all public

indecency or adult entertainment regulations will be scrutinized. Predictability is essential in guiding courts through the decision making process. Without it, each individual judge can determine how he/she feels like that day and make their rulings accordingly.

Because *stare decisis* is the preferred course of action, absent any compelling justification to the contrary, this Court should reverse the Pennsylvania Supreme Court's ruling in *Pap's A.M. v. City of Erie*, uphold the *Barnes* decision and affirm that Justice Souter's opinion is the "rule" to which lower courts should look in analyzing public indecency or adult entertainment regulations.

CONCLUSION

Amici Curiae respectfully requests this Court to reverse the Supreme Court of Pennsylvania's decision in *Pap's A.M. v. City of Erie* and reinstate the District Court's ruling adopting *Barnes* as binding precedent.

Respectfully submitted,

FREDERICK H. NELSON, ESQ.*
AMERICAN LIBERTIES INSTITUTE
(*Counsel of Record*)
Post Office Box 547503
Orlando, Florida 32854-7503
(407) 786-7007

LONNIE N. GROOT, ESQ.*
Deputy County Attorney
Seminole County, Florida
1101 East First Street
Sanford, Florida 32771
(407) 665-7254

DONNA MCINTOSH, ESQ.
STENSTROM, MCINTOSH, JULIAN COLBERT, WIGHAM & SIMMONS
Counsel for CALNO
Post Office Box 4848
Sanford, Florida 32771
(407) 322-2171

ANTHONY A. GARGANESE, ESQ.*
AMARI & THERIAC, P.A.
Counsel for CALNO
Mariner Square, Suite 302
Post Office Box 1807
Cocoa, Florida 32923-1807
(407) 639-1320

Counsel for Amici Curiae

*Admitted to the Bar of the United States Supreme Court

August 16, 1999