No. 98-1161

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF ERIE, PENNSYLVANIA, et al.,

Petitioners,

v.

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

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* STATES OF KANSAS, OHIO, IDAHO, LOUISIANA, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH AND THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICI

Kansas, Ohio and 12 other *Amici* States respectfully submit this brief in support of the Petitioner in this case, the City of Erie, Pennsylvania. The specific issue is whether a local ordinance banning public nudity, a form of conduct the city sought to prohibit pursuant to general police powers, is constitutional when applied to nude barroom dancing. The issue this case presents has arisen in many States and implicates numerous State statutes and local ordinances prohibiting or regulating public nudity. Indeed, as this Court observed in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), public indecency laws "are of ancient origin and presently existing in at least 47 States." *Id.* at 568. In *Barnes*, this Court upheld a local ordinance virtually identical to the Erie ordinance as constitutional. Nonetheless, the Pennsylvania Supreme Court struck down the Erie ordinance.

The larger issue in this case involves the extent to which States and local governments will be permitted to exercise their traditional police powers to promote the public health, safety and morals of their citizens by regulating undesirable conduct without being found to have violated the First Amendment. The States—the primary repositories of traditional police powers—have a fundamental interest in regulating behavior that adversely affects the health, safety and morals of their citizens, even if that behavior may also sometimes contain an expressive element. Thus, the issues raised in this case implicate more than just nude dancing, and are of critical importance to the States' ability to vindicate and protect the morals of their citizens.

SUMMARY OF THE ARGUMENT

In *Barnes*, this Court upheld, against a First Amendment free speech challenge, a local ordinance that generally prohibited nudity and required nude dancers in

commercial establishments to wear pasties and G-strings at all times. In doing so, the plurality applied the test for regulations restricting expressive conduct first articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), a case in which the United States had criminally prosecuted a young man for burning his draft card as part of a Vietnam War protest. In contrast, Justice Scalia, in a concurring opinion in *Barnes*, relied instead on a rational basis standard of review, arguing that the ordinance prohibiting public nudity was a general regulation of conduct that only incidentally affected expressive activities. *See Barnes*, 501 U.S. at 572-81 (Scalia, J., concurring). With all due respect, the *Amici* States urge the Court to expressly adopt the rational basis level of scrutiny for general state laws that regulate conduct with only an incidental affect on expressive activities.

1. A rational basis standard in this context is particularly appropriate for at least two reasons. First, on its face, the First Amendment protects freedom of "speech," not "conduct" or "expressive conduct." U.S. Const. Amend. I; *Barnes*, 501 U.S. at 576 (Scalia, J., concurring). Importantly, the Court has expressly clarified that, although "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, . . . we view it as only marginally so." *Barnes*, 501 U.S. at 566; *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (nude dancing qualifies as "the barest minimum of protected expression."); *California v. LaRue*, 409 U.S. 109, 188 (1972) (to same effect). Even some form of so-called "intermediate" scrutiny is inappropriate when addressing a general state law that regulates conduct and at most incidentally affects marginally expressive activities.

The Erie ordinance at issue here satisfies even "intermediate" scrutiny, but it should not be required to do so in order to pass First Amendment muster. Unlike the flag burning cases, for example, the Erie ordinance in no sense

"targets" the message conveyed by nude dancing; it does not even target nude dancing. Rather, like the ordinance this Court upheld in *Barnes*, the Erie ordinance is a general law that regulates conduct—public nudity—pursuant to the city's general police powers. Any affect on expressive activity, to the extent expression is implicated at all, is purely incidental. Thus, the real question is whether Erie has properly exercised its police powers, a rational basis inquiry, and not whether the First Amendment is violated here. "[V]irtually every law restricts conduct, and virtually any prohibited conduct can be performed with an expressive purpose." *Barnes*, 501 U.S. at 576 (Scalia, J., concurring). This is not a First Amendment case.

Obviously, if a law is not truly a general law that regulates conduct but, instead, is a thinly disguised effort to target constitutionally protected activities, it will not be immune from attack. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (ordinance prohibiting ritual sacrifice of animals is unconstitutional when directed solely at a particular religious sect); *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning); *Texas v. Johnson*, 491 U.S. 397 (1989) (same). On the other hand, applying heightened scrutiny to general state laws that regulate only conduct deprives the States of their traditional police powers and is repugnant to their dignity as sovereigns and guardians of their citizens' mores.

2. Second, in their role as primary regulators and guardians of public morality, the States and localities deserve substantial latitude in regulating conduct such as public nudity. Unlike Congress, which has only its Article I enumerated powers and is bound directly and explicitly by the strictures of the First Amendment, the States exercise traditional police powers explicitly reserved to them by the Tenth Amendment and subject only to the Fourteenth Amendment's requirements. Thus, the *O'Brien* test, which

the Court adopted in the context of a federal criminal prosecution arising from expressive activities, is not appropriate when dealing with traditional exercises of the States' and localities' fundamental police powers. *Buckley v. Valeo*, 424 U.S. 1, 290-92 (1976) (Rehnquist, J., concurring in part, dissenting in part); *Roth v. United States*, 354 U.S. 476, 504 (1957) (Harlan, J., concurring and dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 287 (1952) (Jackson, J., dissenting); William Van Alstyne, *A Graphic Review Of The Free Speech Clause*, 70 Cal. L. Rev. 107, 146 (1982).[1]

Indeed, in this setting, the States' governmental authority is considerably broader than that of Congress, and the constitutional bases for restricting the States' exercise of that authority considerably more limited than the constitutional constraints applicable to Congress. For those reasons, the constitutionality of each sovereign's laws may, at least in the circumstances presented here, require different scrutiny by the courts. The level of scrutiny may well depend in part on (1) whether the sovereign regulating the conduct has primary responsibility for governing with respect to such conduct, and (2) whether the "expression" at issue is

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[1] For example, the Court currently is considering whether a provision of the 1996 Communications Decency Act, a federal law that regulates "indecent" programming on cable television, violates the First Amendment. *See United States v. Playboy Entertainment Group, Inc.*, probable jurisdiction noted, 119 S. Ct. 2365 (June 21, 1999) (No. 98-1682). Even if this Court finds the statute in that case unconstitutional, that decision would not control here. First, cable programming is speech, not conduct and, in any event, Congress deserves less latitude than the States when prohibiting indecency. There is simply a much greater danger for the suppression of expression when Congress legislates on a national level, as it always does, than when individual States act.

"core" speech, such as political debate, or "marginal" expression, such as nude barroom dancing. Particularly when a regulation is not targeting speech and does not involve "core" speech interests, such as political expression, the States and localities should be given significant discretion under the Fourteenth Amendment to express and protect the morals of their citizens, just as they are in the context of regulating obscenity. *See, e.g., Miller v. California*, 413 U.S. 15, 30 (1973) (adopting "community standards" approach to regulation of obscenity, rather than a "fixed, uniform, national standard"); *cf. United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (recognizing the value of having States experiment with forms of social regulation and invoking Justice Brandeis' "laboratory" metaphor); *Alden v. Maine*, 119 S. Ct. 2240, 2247 (1999) (same point).

The Erie ordinance joins a long line of state and local laws prohibiting public nudity. These laws have always been enacted pursuant to the States' traditional police powers and, until recent years, would never have been thought even potentially violative of the Constitution. Subjecting such general state laws that regulate public morality to heightened scrutiny whenever free expression claims are raised would improperly and unnecessarily intrude on an area of traditional state sovereignty.

ARGUMENT

The *Amici* States urge the Court to expressly adopt rational basis review as the standard for evaluating challenges to the application of general state laws that regulate conduct and only incidentally affect expressive activities. Doing so is supported by the text of the First Amendment, as well as history and tradition, and is consistent with this Court's existing First Amendment jurisprudence.

I. Rational Basis Review Applies When A General State Law Regulates Conduct And Only Incidentally Affects Expression.

A. Laws That Neither Regulate "Speech" Nor Target Conduct Because Of An Expressive Component Do Not Implicate The First Amendment.

The First Amendment, applied to the States by virtue of this Court's Fourteenth Amendment decisions, prohibits Congress from "abridging the freedom of speech." U.S. Const. Amend. I. The Amendment's text, however, does not mention conduct, nor does it explicitly protect expressive conduct, other than speech. *Barnes*, 501 U.S. at 576 (Scalia, J., concurring). Nonetheless, this Court has held that, because some conduct contains an expressive component, conduct in some instances is deserving of First Amendment protection. *See, e.g., Stromberg v. California*, 283 U.S. 359 (1931) (flying a red flag); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (saluting a flag); *Texas v. Johnson*, 491 U.S. 397 (1989) (burning a flag). But merely acknowledging that proposition begs the question in this case: Is a general state law that regulates conduct, that does not target expression, and that has at most an incidental affect on expressive activity, subject to heightened scrutiny under the First Amendment?

With all due respect, the answer to that question is "No." Rather, general laws enacted pursuant to traditional state police powers and regulating conduct irrespective of potential expressive components are subject only to rational basis review under the Due Process Clause of the Fourteenth Amendment. On its face, the Erie ordinance at issue in this case is directed only at conduct—public nudity—and does not target expression. The ordinance does not even purport

to regulate oral or written speech. Rather, the Erie ordinance makes public nudity—a form of conduct—unlawful, irrespective of an individual's motives or purposes for engaging in such conduct. Thus, under the Erie ordinance, it matters not whether the individual is attempting to convey a message of eroticism, *Barnes*, 501 U.S. at 581 (Souter, J., concurring), anti-eroticism, *Florida Free Beaches, Inc. v. Miami*, 734 F.2d 608 (11th Cir. 1984) (message that nudity is not indecent) or no message at all. *Barnes*, 501 U.S. at 581 (Souter, J., concurring) ("the choice to go nude . . . will often yield nothing: a person may choose nudity, for example, for maximum sunbathing").

The Erie ordinance simply is not directed at any expressive element that might (or might not) be present in the conduct being regulated. Instead, the Erie ordinance is a general law that regulates conduct for reasons related to the police power concerns arising from citizens engaging in that conduct.[2] No fundamental constitutional rights nor liberty interests of Erie's citizens are being restricted by an ordinance that simply prohibits public nudity. In short, this is not a First Amendment case.[3] Thus, there is no basis for any level of scrutiny higher than rational basis review.

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[2] "A law is 'general' for the present purposes if it regulates conduct without regard to whether that conduct is expressive." *Barnes*, 501 at 575 n. 3 (Scalia, J., concurring.)

[3] "Moral opposition to nudity supplies a rational basis for its prohibition, and since the First Amendment has no application to this case no more than that is needed." *Barnes*, 501 U.S. at 580 (Scalia, J., concurring).

B. Applying Rational Basis Review To General Laws That Regulate Conduct Is Consistent With Existing First Amendment Principles.

Applying rational basis review to general laws that regulate conduct with at most an incidental affect on expressive activity is fully consistent with this Court's First Amendment jurisprudence. Laws that directly regulate speech and laws that target conduct because of its expressive component are necessarily subject to rigorous scrutiny under the First Amendment.

Thus, laws that directly affect pure speech, "even for a purpose that has nothing to do with the suppression of expression, . . . [are subject to] the high, First Amendment standard of justification." *Barnes*, 501 U.S. at 576 (Scalia, J., concurring). For example, laws that restrict noise and regulate election campaigns, *e.g.*, *Saia v. New York*, 334 U.S. 558 (1948) (noise); *Buckley v. Valeo*, 424 U.S. 1 (1976) (election campaigns), have been subjected to rigorous scrutiny because such laws directly regulate speech activities. The Court applied such scrutiny even though the laws at issue were enacted for purposes unrelated to the content or viewpoint of the speech being restricted.

Similarly, when a law targets conduct precisely because of its expressive component, or purports to be a general regulation of conduct when in fact the purpose of the law is to restrict protected activity, this Court has applied heightened scrutiny under the First Amendment. *See, e.g.*, *Hialeah*, 508 U.S. 520 (1993) (ordinance prohibiting ritual sacrifice of animals is unconstitutional when directed solely at a particular religious sect); *Eichman*, 496 U.S. 310 (1990) (flag burning); *Texas v. Johnson*, 491 U.S. 397 (same); *Spence v. Washington*, 418 U.S. 405 (1974) (defacing the flag); *Tinker v. Des Moines Indep. Comm. School Dist.*, 359

U.S. 503 (1969) (wearing black armbands); *Brown v. Louisiana*, 383 U.S. 131 (1966) (sit-ins); *Stromberg v. California*, 283 U.S. 359 (1931) (flying a red flag). In such cases, the suppression of constitutionality protected activity or expression was the primary purpose of the law.

The Court has always applied less exacting review, however, when the primary purpose of a law is to regulate conduct, not expression, and the law at most incidentally affects expressive conduct. The Court articulated a four-part test for evaluating such laws in *O'Brien*, and it is clear that the *O'Brien* standard is considerably less rigorous than the standard applied to cases involving direct regulation of pure speech, as this Court's decisions make plain. *See, e.g., FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411 (1990) (antitrust law can be applied to conduct that involves expressive component); *United States v. Albertini*, 472 U.S. 675 (1985) (rule against entering military bases upheld as applied to war protestors); *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) (rule against sleeping in parks upheld as applied to activists seeking to publicize plight of the homeless).

A plurality of the Court applied the *O'Brien* "intermediate" scrutiny in *Barnes* and easily concluded that the ordinance at issue there—requiring nude barroom dancers to wear pasties and a G-string—was constitutional as applied. Moreover, as the plurality's application of the *O'Brien* standard in *Barnes* demonstrates, there may not be a great difference between "intermediate" scrutiny and rational basis review, at least in the context of laws regulating public indecency. *See Barnes*, 501 U.S. at 579 (Scalia, J., concurring) (recognizing congruence of rational basis review and the plurality's application of *O'Brien* in the *Barnes* case). And contrary to the Pennsylvania Supreme Court's decision in this case, the Erie ordinance passes muster even under the *Barnes* plurality/*O'Brien* standard.

Nonetheless, there remain compelling reasons for expressly adopting rational basis review in this context. The constitutional reasons for rejecting a higher level of scrutiny are addressed in the next section of the brief. But there are also practical considerations that compel rational basis review. Subjecting general state laws that regulate conduct to heightened scrutiny simply because those laws may incidentally affect expressive activity results in virtually all state and local laws being potentially subject to such scrutiny because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street, or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *see also Barnes*, 501 U.S. at 576 (Scalia, J., concurring) ("virtually every law restricts conduct, and virtually any prohibited conduct can be performed with an expressive purpose").[4] Reserving heightened scrutiny for laws that regulate speech itself, or target conduct precisely because of its expressive component, while applying rational basis review to general laws that regulate conduct pursuant to traditional police powers, affords citizens with the appropriate level of

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[4] Adopting rational basis review in this context also would harmonize this Court's First Amendment free expression doctrine with its free exercise jurisprudence as articulated in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Creating a different standard for free exercise and freedom of expression claims raises the specter that an ordinance, such as the Erie ordinance in this case, could be constitutional as applied to religious activity (supposing public nudity were a tenet of a particular religion), but not if applied to barroom dancing. *Cf. Barnes*, 501 U.S. at 579 (Scalia, J., concurring) (noting the incongruency).

constitutional protection while also respecting the sovereignty of the States, particularly in matters involving the health, safety and morals of their citizens.[5]

The crucial point here is that the government should be able to pursue its legitimate interests in regulating socially pernicious conduct. If such legitimate regulation, not adopted for the purpose of suppressing expression, happens to interfere with an individual's personal expression, then the First Amendment fully permits that individual to find a way to communicate the message without engaging in the socially pernicious conduct. Requiring a person to find alternative means of communication other than socially pernicious conduct—which the government has chosen generally to prohibit as such—is a reasonable and constitutionally permissible accommodation between the value of free speech and the value of protecting society from pernicious conduct.

This principle, moreover, fully applies in this context. Nudity in public venues—places open to the public—is socially harmful behavior, as public indecency laws long have recognized. Thus, the government may generally prohibit public nudity, and anyone who wishes to communicate a message through public nudity simply must find a different means of doing so.

[5] "Such a regime ensures that the government does not act to suppress communication, without requiring that all conduct-restricting regulation (which means in effect all regulation) survive an enhanced level of scrutiny." *Barnes*, 501 U.S. at 578-79 (Scalia, J., concurring).

II. Principles Of Federalism Require Deference To General State Laws That Regulate Conduct Pursuant to Traditional Police Powers.

A. The States And Localities Are The Primary Regulators And Guardians Of Public Morality.

This Court previously has recognized that public indecency laws, such as the Erie ordinance at issue here, are "designed to protect morals and public order." *Barnes*, 501 U.S. at 569. Indeed, there is no question that the Erie ordinance is one in a long line of state, county and city laws that regulates public indecency pursuant to traditional police powers explicitly reserved to the States by the Tenth Amendment. "The traditional police power of the States is defined as the authority to provide for the public health, safety and morals, and [this Court] ha[s] upheld such a basis for [public indecency] legislation." *Id. See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973) (upholding regulation of obscenity and recognizing "the interest of the public in the quality of life and the total community environment"); *Roth v. United States*, 354 U.S. 476, 485 (1957).

The States' regulation of public indecency has extensive historical roots. Prohibitions of public nudity date back more than 300 years in the common law. *See, e.g., LeRoy v. Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (K.B. 1664) (cited in *Barnes*, 501 U.S. at 568); *see also Winters v. New York*, 333 U.S. 507, 515 (1948) (discussing common law roots of the criminal offense of "gross and open indecency"). This Court has declared that public indecency laws "are of ancient origin and presently exist in at least 47 States." *Barnes*, 501 U.S. at 568; *see also Lewdness, Indecency, and Obscenity*, 50 Am. Jr. 2d 449, 472-74 (1970); Annot., *Criminal Offense Predicated On Indecent Exposure*, 93

A.L.R. 996, 997-98 (1934). Virtually all of the States, and hundreds (if not thousands) of municipalities, have laws that make public nudity illegal. (See Appendix for state laws.) These laws regulate or prohibit public nudity generally, and do not single out nude dancing or nudity involving an expressive component.

As history demonstrates, and the Tenth Amendment recognizes, the States and local governments have long been considered the primary guardians of public morality, particularly in the public indecency context. Indeed, the States "bear direct responsibility for the protection of the local moral fabric." *Roth*, 354 U.S. at 504-05 (Harlan, J., concurring and dissenting). Although communities are free, for example, to tolerate nude beaches or bars featuring nude dancing, the Constitution should not require them to do so. Similarly, if a community's citizens prefer not to tolerate such activities, the Constitution should not prevent them from expressing that community judgment in the form of a law banning or regulating public indecency.

There is no fundamental constitutional right to engage in public nudity, and no need for a single, uniform federal rule regarding public indecency. Rather, the regulation (or lack thereof) of public indecency falls squarely within the traditional police powers that the Tenth Amendment reserves to the States, and with good reason. Principles of federalism suggest that States and local governments should be free to calibrate their public indecency laws to the moral judgments and values of their citizens.

B. At Least In The Context Of Public Indecency, The States Are Entitled To More Deference Than Congress When Regulating Pursuant To Traditional Police Powers.

When exercising their traditional police powers to regulate matters that do not implicate fundamental constitutional rights or other federal interests, the States are entitled to considerable latitude. It is a fundamental aspect of our constitutional system of government, recognized in both Article I, section 8 and the Tenth Amendment, that there is a difference "between the areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government." *Roth*, 354 U.S. at 503 (1957) (Harlan, J., concurring and dissenting). The regulation of public indecency falls clearly within traditional State sovereignty.

In *Roth*, the Court acknowledged but did not have to resolve the potential difference between federal and state power to regulate obscenity. Importantly, *Roth* actually involved two obscenity cases. In one case, the defendant was convicted of violating a California obscenity law, while in the other, the defendant was convicted of violating a federal obscenity statute. A majority of the Court affirmed both convictions, finding that no issue was "presented in either case concerning the obscenity of the material involved." 354 U.S. at 481 n. 8. Thus, the dispositive question was whether, as a matter of law, the Constitution protects obscenity at all. The Court expressly held that obscenity receives no constitutional protection. *Id.* at 485.[6] For that reason, the

[6] The Court has in subsequent cases reaffirmed that obscenity is a category of expression that the First Amendment does not protect. *See, e.g., Alexander v. United States*, 509 U.S. 544 (1993); *Paris Adult Theater I*; *Miller*.

Court affirmed both convictions and found no reason to explore whether Congress's power to regulate expression might differ from the States' power to do so. *Id.* at 492 n. 31.

Justice Harlan, however, dissented from the affirmance of the federal conviction, precisely because he found a distinction between federal and state power in this context. *Id.* at 496-508. The two differences in federal and state authority in this context are (1) *textual* —that the First Amendment directly restrains Congress, while the States need only satisfy the Fourteenth Amendment's requirements, *see, e.g., Beauharnais*, 343 U.S. at 287 (1952) (Jackson, J., dissenting), and (2) *structural*—that the States have general police powers while Congress has only its enumerated powers under Article I. Relying on those differences, and addressing the federal conviction, Justice Harlan observed that

> To me, this question is of quite a different order than one where we are dealing with state legislation under the Fourteenth Amendment. I do not think it follows that state and federal powers in this area are the same, and that just because the State may suppress a particular utterance, it is automatically permissible for the Federal Government to do the same.

Roth, 354 U.S. at 503. Recognizing that the "substantive powers of the two governments, in many instances, are distinct," *id.*, Justice Harlan argued that

> [I]n every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two

> are not necessarily equivalent, the balancing process must needs often produce different results.

Id. at 504. Justice Harlan emphasized that "Congress has no substantive power over sexual morality," unlike the States, "which bear direct responsibility for the protection of the local moral fabric." *Id.*[7] Thus, even apart from any differences between the First and Fourteenth Amendments, the Constitution's *structure* recognizes differences between state and federal regulatory power.

The Court later held that the Constitution does permit at least some diversity among the States in the area of public morality, even in the face of First Amendment free expression claims. Thus, in *Miller*, the Court adopted a "community standards" approach to the problem of defining "obscenity" for constitutional purposes. *Id.*, 413 U.S. at 30 (what is "obscene"—and therefore unprotected by the First Amendment under *Roth*—is not resolvable by reference to a "fixed, uniform national standard"). Rather, the Court properly recognized that "[o]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists." *Id.* Furthermore, the Court explicitly recognized that "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of

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[7] Similarly, the Chief Justice has in the past expressed support for Justice Harlan's view that, at least in some instances, the freedom of expression principles applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment may differ from the First Amendment principles that directly govern Congress. *See, e.g., Buckley*, 424 U.S. at 290-92 (1976) (Rehnquist, J., concurring in part, dissenting in part).

imposed uniformity." *Id.* at 33. Although the Erie ordinance is not an effort to prohibit or punish the distribution or promotion of obscenity, this Court's reasons for adopting a "community standards" definition of obscenity apply with equal force in the public indecency context.

The recognition of a difference between Congress's power to regulate expression, explicitly constrained by the First Amendment, and state power to regulate, constrained instead by the Fourteenth Amendment, is sound, at least in the circumstances presented in this case. When dealing with public nudity, moral judgments cannot be avoided (since the Constitution does not altogether prohibit the State and its citizens from making such judgments), and thus State laws regulating such conduct deserve considerable deference. That proposition holds even if the same level of deference might not be given to congressional efforts to regulate such conduct at a national level pursuant to Article I powers. "Since the domain of sexual morality is pre-eminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality." *Roth*, 354 U.S. at 502 (Harlan, J., concurring and dissenting).[8]

It would be virtually impossible, as well as undesirable, to formulate a single, national public indecency standard. Some States, counties and cities may be willing to tolerate many forms of public nudity, while others tolerate some forms of public nudity but not others, and yet others may prefer to prohibit all forms of public nudity. Any effort

[8] This Court also has recognized that the States' concern, and consequently their authority, is heightened in the context of regulating live, physical conduct such as public nudity. *See, e.g., Miller*, 413 U.S. at 26 n. 8 ("the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior").

to constitutionalize and federalize the choices available to thousands of local governments would undermine a fundamental value of federalism.[9]

Recognizing a distinction between federal and state authority to regulate in the context of public indecency presents no threat to First Amendment values, and indeed in some ways could enhance the promotion of those values. "[T]he virtue of a differential first amendment/fourteenth amendment regime might be to read the first amendment for all that it is worth, confining Congress very tightly. Somewhat more (albeit not too much more) play may be left in applying the fourteenth amendment to the processes of state and of local government." William Van Alstyne, *A Graphic Review Of The Free Speech Clause*, 70 Cal. L. Rev. 107, 145 (1982).

[9] One of the Nation's leading First Amendment scholars has observed that

> The prerogative of federalism from this perspective is at bottom a prerogative of diversity among state regimes of law and of culture, beyond the veto of others whom it may affront and beyond congressional command for uniformity of behavior or of law. The extent of that prerogative, moreover, has nothing to do with the separate limitations thrown onto Congress by the Bill of Rights. Indeed, it antedates the Bill of Rights and in several respects grants greater space than does the Bill of Rights.

William Van Alstyne, *Federalism, Congress, The States And The Tenth Amendment: Adrift In The Cellophone Sea*, 1987 Duke L.J. 769, 772.

The States and local governments should be free to find their own solutions to the social problems presented by public indecency. Principles of federalism demand the opportunity for local, community-based efforts to address such social issues. A national standard derived from the First Amendment's restrictions on Congress runs counter to those principles and the Tenth Amendment by intruding on a fundamental aspect of the States' traditional police power to act for the protection of the health, safety and morals of their citizens.

CONCLUSION

For the foregoing reasons, the *Amici* States urge the Court to adopt rational basis review for general state and local laws that regulate conduct pursuant to traditional police powers and that have at most an incidental affect on expressive conduct.

Respectfully submitted,

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