No. 98-1161

IN THE SUPREME COURT OF THE UNITED STATES

THE CITY OF ERIE, PENNSYLVANIA, *et al.*,
Petitioners,

v.

PAP'S A.M.,
Respondent,

BRIEF OF AMICUS CURIAE FEMINISTS FOR FREE EXPRESSION IN SUPPORT OF RESPONDENT

Filed September 30, 1999

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MISCELLANEOUS

INTEREST OF THE AMICUS[1]

Feminists for Free Expression (FFE) is a nonprofit organization of diverse feminist women who share a commitment both to gender equality and to preserving the individual's right to read, view, and produce and enjoy media materials and performances, free from government intervention "for our own good." In support of both those goals, FFE has become active in a variety of litigation, lobbying, and educational efforts to forestall censorship initiatives in artistic venues, in the workplace and elsewhere – censorial measures which, however well-intended, are ultimately counter-productive to the goal of equality for women.

Founded in 1992, FFE quickly grew into a national organization which has filed amicus briefs in several cases before this Court, conducted legislative activities at the federal, state and local level, and defended artists from censorship both in this country and abroad. FFE's Advisory Board has included Betty Friedan, Nadine Strossen (President of the ACLU), Karen DeCrow (past President of NOW), and authors Erica Jong, Nora Ephron, Nancy Friday, Susan Issacs, Blanche Wiesen-Cook, Barbara Ehrenreich, and Dorothy Allison.

Originally organized in January 1992 in response to the then-pending Pornography Victims Compensation

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[1] The parties have consented to the filing of this brief.

No person or entity, other than the *Amicus Curiae*, its members, or its counsel have authored this brief or made a monetary contribution to the preparation and submission of this brief.

Act (S1521), FFE gained national recognition for its role in defeating that proposed legislation. More than 230 prominent women authors, activists, attorneys and scholars signed FFE's letter to the Senate Judiciary Committee protesting the bill's threatened censorial effects. The signatories included Betty Friedan, Adrienne Rich, Nadine Strossen, Erica Jong, Nora Ephron, Jamaica Kincaid, and Judy Blume. Many of the signatories were women artists and writers who have felt the sting of censorship in recent years: Judy Blume, whose insightful and compassionate books for adolescents have won wide acclaim but have also spawned such controversy that she has been deemed "the most censored author in America;" Erica Jong, whose frank treatment of women's sexuality in her best-selling novels has similarly drawn fire; and Karen Finley and Holly Hughes, feminist playwrights and actresses whose NEA grants became the subject of protracted political and legal controversy.

Since its role in the defeat of S. 1521, FFE has undertaken numerous other projects in defense of free speech rights. FFE has filed numerous amicus briefs, including briefs with this Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), *Alexander v. United States*, 509 U.S. 544 (1993), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). FFE's brief in *Harris* received a great deal of favorable attention in the press, for its position that regulations designed to curb discriminatory harassment in the workplace do not truly benefit women until they are reconciled with free speech concerns.[2]

[2] *See, e.g.*, Rosen, *Reasonable Women*, The New Republic (November 1, 1993) at 12-13.

FFE's concern with these issues stems from a conviction that the rights of free expression are critically important to women and to feminists, and indivisible – in the sense that they cannot be eroded in one context, such as the present campaign to censor live nude performance, and still retain their vitality in our social life generally. As many of FFE's artistic and literary members can attest, feminist expression is inherently controversial and the frequent target of censorship initiatives. Just as some would scapegoat erotic expression for a wide variety of social ills, feminist ideas have increasingly been blamed for social problems ranging from male unemployment to teenage pregnancy and the "decline of family values." Indeed, any written or visual work or performance which deals frankly with women's lives and sexuality is at risk in a climate of pervasive censorship.[3] Because the freedom to put forth controversial feminist ideas and to combat ignorance regarding sexuality and reproduction is so essential to women's rights and well-being, FFE believes that it is particularly incumbent upon women to oppose censorship.

[3] Works which have been officially or unofficially censored over the past few years include *The Diary of Anne Frank*, *Our Bodies, Ourselves*, Orwell's *1984*, Desmond Morris' *The Naked Ape*, Alice Walker's *The Color Purple*, and films such as *Romeo and Juliet*, *Victor/Victoria*, and *A Passage to India*. *See* Marcia Pally, *Sense and Censorship: The Vanity of Bonfires* at 5-8 (1991). *See also, generally*, Margaret Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741 (1992).

FEE believes, in short, that the goal of equality is inextricably linked with the values enshrined in our Constitution's free speech clause, and progress towards gender equality can only proceed in an atmosphere of tolerance and candor with regard to matters of sexuality. In this spirit, and with the written consent of both parties to this action, FFE submits this brief in support of the Respondent.

SUMMARY OF ARGUMENT

The City of Erie's anti-nudity ordinance sweepingly proscribes even the simulated appearance of nudity, making no exception for artistic or theatrical nude performance. Moreover, when they enacted this measure, its authors announced forthrightly that they intended it solely as a vehicle for suppressing nude entertainment of the "exotic dance" variety.

In contrast with the generally applicable public indecency statute this Court upheld in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the ordinance now challenged thus unequivocally targets officially disfavored expression for censorship. Its sponsors made no pretense of "content-neutrality;" indeed they have precluded any such interpretation of the ordinance. Both this legislative history of censorial intent, and the inherent toll that a ban on nudity exacts on the content of expression, firmly establish this ordinance as a content-based restriction as applied to protected, nonobscene expression.

Further, the Pennsylvania courts have not provided any limiting construction to cure this law's substantial

overbreadth as it applies to all manner of nude performance. The city council's assurances that they intend to exempt "serious" and "tasteful" nude performance cannot save this ordinance from facial invalidation for overbreadth; on the contrary, these empty assurances merely underscore the content-discriminatory nature of this prohibition.

Consistent with decades of this Court's First Amendment jurisprudence, the challenged law must fail the strict scrutiny analysis applicable to content-based prohibitions, and must fall also as a facially overbroad restriction on protected expression. In addition, this law is viewpoint discriminatory, because it favors a religiously-based ideological viewpoint that nudity and sexuality are shameful, while effectively thwarting the viewpoint that the nude human figure should be celebrated as beautiful and natural. With even simulated nudity banned, a proponent of the latter view is limited to the sterile advocacy of a viewpoint inherently contradicted by the City's requirement of clothing.

Now a common feature of dance, theater and other live performance, nudity often conveys a distinct dramatic or social message and content which would be drastically altered by its censorship. For government to so alter the meaning and impact of artistic expression is anathema to the First Amendment.

Freedom of expression in such regards has always been and remains vital to those at the cutting edge of the worlds of art and ideas. Like universities and the press, art provides alternative perspectives on the world, often

challenging the status quo. In particular, expressive freedom is vital to advocates of radical ideas regarding sexuality, gender roles, and even politics, more strictly speaking. Feminist and other progressive ideas cannot be heard, much less thrive, in an atmosphere in which government dictates artistic choices, and defines what constitutes art, in these realms of constitutionally protected expression.

The City asks this Court to scotch its well-established First Amendment standards of strict scrutiny in this case, in favor of a "morality" exception, or uncritical assumptions of content neutrality no matter how patently censorial the law. If this Court were to do so, it would place all controversial, erotic, irreligious and radical expression in peril of official suppression.

ARGUMENT

I. Freedom to Address Themes of Sexuality and to Celebrate the Human Form is Vital to Artistic Freedom, and to Feminist Art and Polemic in Particular.

In *Roth v. United States*, 354 U.S. 476, 484 (1957), Justice Brennan for the majority noted that "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." In part for those very reasons, sex and nudity are perennial subjects of controversy: "Of all the types of speech historically deemed 'controversial' or 'offensive' in American society, speech about sex has frequently been at or near the top of the

list." Marjorie Heins, *Viewpoint Discrimination*, 24 Hastings Const. L.Q. 99, 122 (1996).

Moreover, "the political significance of sexual expression is revealed every day. Sexuality and its expression have become heated political issues in virtually every arena, from local school board disputes over sex education, to state anti-gay legislative efforts, . . . to attacks on artists who use sexual themes in their work." David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. Pa. L. Rev. 111, 122-123 (1994). And for no one is the political significance greater than for women and for feminists in particular. *See generally* Nadine Strossen, Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights (1995).

Feminist art and polemic are often at the cutting edge of social issues and at the center of public controversy for their sexual content and use of nude and other sexual images. Whenever they stray beyond conventional bounds they are vulnerable to censorship, as even Andrea Dworkin learned when her works were seized at the Canadian border under the very same censorial standards she had advocated. Feminist expression, along with artistic and intellectual freedom generally, require "breathing room" and thus meaningful protection of sexual content in order to escape the censor's wrath.

History teaches that gender equality flourishes in societies such as the Scandinavian countries characterized by openness in sexual matters, and flounders in sexually repressive countries such as Saudi Arabia which are sexually repressive. *See generally* Marcia Pally, Sex and Sensibility: Relections on Forbidden Mirrors and the Will to

Censor 122-136 (1994). In the United States, campaigns against sexual expression have been strongly linked with an agenda of curtailing women's freedom generally. As Marjorie Heins and many other feminist scholars have noted, "The United States' first comprehensive federal obscenity law, the Comstock Act of 1873, targeted not only sex and nudity as subjects but also the ideas of contraception, nonprocreative sex, free love, and anarchism." Heins, *Viewpoint Discrimination*, *supra*, at 130 (1996); *see also*, Margaret Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741 (1992); Marjorie Heins, Sex, Sin, and Blasphemy: A Guide to America's Censorship Wars (1993); Nadine Strossen, Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights, *supra*, at 225-228.

Women will never be truly free and equal until they are free to express ideas and emotions with regard to issues of sexuality, free of puritanical shame and guilt. Advocacy of that ideal becomes immeasurably more difficult, if not impossible, under a regime of censorship banning all nudity in expressive performances. The issue in this case is therefore one of great ideological and political importance, to women, to feminists, and to all Americans concerned to promote a culture of tolerance and intellectual and artistic freedom.

II. The Anti-Nudity Ordinance Challenged in This Case, Targeting a Particular Form of Expression, Impermissibly Censors Protected Speech on the Basis of Content and Viewpoint.

For two reasons, the City's newly enacted prohibition of nude expression must be analyzed as a content-based

restriction on speech. First, its sponsors have unabashedly announced that they intend it to suppress specific types of nude performances of which they disapprove, and indeed to "shut down" nude dancing establishments. Second, regardless of censorial intent, a prohibition of nudity inherently impinges on the content of and messages conveyed by artistic performances and entertainment which would otherwise incorporate nudity.

A. The legislative history makes abundantly clear that this ordinance targets officially disfavored expression.

It is rare that a case presents this Court with such a smoking gun of censorial intent as the City of Erie has left at the scene. As Respondent has demonstrated, the City enacted this law for the express purpose of censoring live nude entertainment of which it disapproves.

In its opinion invalidating this ordinance, the Pennsylvania Supreme Court noted, that the laws preamble candidly confesses the City's "purpose of limiting a recent increase in nude live entertainment." 719 A.2d at 279 (*see also* Jt. App. at 42a). As if this were not a clear enough statement of censorial intent, each of the City Council members who voted in favor of the ordinance announced for the record (and undoubtedly for the media and public consumption) that its primary target was nude dancing establishments. *See* Jt. App. at 38-48. Council members expressly mentioned "three clubs, . . . of which- . . . all three will be shut down." Jt. App. at 45. Indeed, Council members specified that they were *not* prohibiting

nudity in general, but rather "nudity when it is used in a lewd and immoral fashion." Jt. App. at 39.

Given this brazen legislative history, the City has clearly forfeited any pretense to the content neutrality of this law. This factor alone decisively distinguishes this case from *Barnes* and from other cases in which this Court has upheld generally applicable laws having an "incidental" impact on expression.

In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986), Justices O'Connor and Stevens in their crucial concurrence distinguished the bona fide generally applicable public nuisance law upheld under the *O'Brien* standard from any such law used as a pretext for censorship:

> "If . . . a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having such a purveyor of books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review."

Only because the record contained no evidence of such pretextual use did Justices O'Connor and Stevens concur in the *Arcara* opinion applying the more indulgent *O'Brien* standard to uphold the bookstore closure.

In this case, the City has not even bothered with pretext but has rather openly proclaimed its censorial intent. As applied to nude performance, therefore, the ordinance cannot be analyzed under the more deferential standards for content-neutral laws. This law therefore triggers the strictest scrutiny of its facially overbroad, content-based prohibition of nudity.

B. In its sweeping prohibition of even simulated nudity, the ordinance both censors protected speech on the basis of its content, and discriminates against the viewpoint that sexuality and nudity are not shameful.

In *Barnes*, the State had at least a colorable argument that its ban on nudity was a generally applicable law. In this case, in contrast, the City of Erie has been almost at pains to proclaim its censorial intent. On this basis alone, this ordinance requires strict scrutiny as a forthright attempt to censor protected, nonobscene speech.

This Court's decisions creating an exception to First Amendment protection for obscenity were designed to protect all other controversial expression containing elements of nudity and sexuality. This Court has steadfastly reasserted that nonobscene sexual speech is protected by the First Amendment, *see, e.g., Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989), and in particular that nonobscene nudity is protected. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Jenkins v. Georgia*, 418 U.S. 153 (1974).

The faulty linchpin of the City's argument is that its total ban on nudity (extending even to simulated nudity) is only an "incidental burden" on the "manner" of speech. This premise flies in the face of our modern understanding of cognition and perception, including the fundamental insight that "the medium is the message." For government to limit "stylistic" choices in art and entertainment is in fact to censor the message, as this Court has recognized.

Some jurists including the plurality in *Barnes* have suggested that a prohibition of nudity is merely "incidental" in its effect on the content of a performance which would incorporate elements of nudity. In *Barnes*, the plurality maintained that the State's requirement that erotic dancers wear "a scant amount of clothing . . . does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." 501 U.S. at 571. Some other courts have concluded that proscriptions of expressive nudity are permissible because "nudity does not convey any specific message; at most it is a medium by which a variety of messages may be conveyed." *Craft v. Hodel*, 683 F. Supp. 289, 292 (D. Mass. 1988).

This premise does not bear scrutiny, on either philosophical or doctrinal grounds. This Court's own First Amendment jurisprudence has recognized that style and content are indivisible, in cases prominently including *Cohen v. California*, 404 U.S. 15 (1971), and *Hess v. Indiana*, 414 U.S. 105 (1973). In *Cohen*, this Court held that government could not, as guardian of the public morality, "excise scurrilous epithet[s] from the public discourse." 404 U.S. at 22. Justice Harlan for the Court emphasized the First Amendment value that "one man's vulgarity is another's lyric. Indeed, it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25.

Stressing that all communication consists of indivisible cognitive and emotive elements, *id.* at 26, the *Cohen* Court essentially recognized that to censor one is to censor the other. Cohen could not be required to express his

message "slightly less graphically," to reduce his slogan to the paler statement, "I oppose the draft."

In any event, regardless of one's understanding of the relationship between style and content, such restrictions on sexual speech are not merely content-based, they are viewpoint-discriminatory as well, as feminist legal scholars have convincingly argued. *See, e.g.*, Heins, *Viewpoint Discrimination*, *supra* at 122-136. They discriminate in favor of the often religion-based viewpoint that sexuality and nudity are shameful, that sexuality must be confined within certain conventional, and indeed patriarchal, bounds.[4] Justice Brennan recognized this viewpoint bias in *City of Renton v. Playtime Theaters*, 475 U.S. 41, 56 n.1 (1986) (dissenting opinion), noting that restrictions on sexual speech "have a potent viewpoint-differential impact," because such speech "will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores."

The City's prohibition against all nudity – at once very broadly defined and yet laden with a very specific censorial intent – provides a striking case in point with regard to viewpoint discrimination. Proscribing even simulated nudity, the ordinance utterly stifles effective expression of the viewpoint that the human form and erotic sensuality are shameless. Almost uniquely, requiring that a dancer or other performer wear some state-prescribed covering contradicts that intended message

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[4] Interestingly, as is often the case, the Council members who enacted this measure were men, whereas the performers at the three targeted clubs were women.

and viewpoint. Unlike a general prohibition against murder or drug consumption, which can be simulated for theatrical purposes, for example, the prohibition of nudity completely thwarts a message that the nude human figure is not an object of shame.

Professor Baude analyzed this problem trenchantly in his brief to this Court for petitioners in *Barnes*: "nudity has a meaning in our society quite different from the meaning of the State's sanctioned costume for erotic dancing." Patrick Baude, Brief for Petitioner Darlene Miller at 10. An anti-nudity law, he noted, has as its fundamental purpose the promotion of "a particular point of view about shame and acknowledgment of sensuality." *Id.* at 15.

> The key to the State's argument . . . is the contention that a dancer can portray an " 'erotic message' just as effectively in scanty apparel as in total nudity." . . . What cannot be conveyed just as effectively is the message that the dancer is not ashamed of what she is doing. . . . This is a powerful message and a legitimately controversial one."

Id. at 15-16. Not only does a ban on nudity suppress the message of guiltless sensuality which can really be expressed no other way; it affirmatively supports the counter-viewpoint that nudity is shameful, a morality rationale that the courts have at times explicitly linked with religious ideology. *See id.* at 13-15.[5]

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[5] Conservative scholars also perceive in the regulation of sexual speech a religious-based ideological viewpoint. *See, e.g.*, Daniel O. Conkle, *Harm, Morality, and Feminist Religion: Canada's New – But Not So New – Approach to Obscenity*, Const. Commentary (1993), interpreting Catharine MacKinnon's "new" rationales for suppressing sexual speech as essentially grounded in religious morality.

Outside the narrow categorical exceptions this Court has carved out for unprotected speech such as obscenity, it has consistently analyzed content-based restrictions under the glare of strict scrutiny. Whether analyzed as content discrimination or as a facially overbroad restriction on protected expression, this ban on nude expression must fall under the First Amendment as this Court has interpreted it to date.

III. Unlike the Statute Upheld in *Barnes v. Glen Theatre*, This Ordinance Prohibits Nudity Regardless of Artistic Context, and Is Facially Overbroad.

In *Barnes*, Justice Souter, whose vote was essential to the judgment, specifically reserved the question of an anti-nudity prohibition challenged for facial overbreadth. 501 U.S. 585 n.2. This case squarely presents the overbreadth issue, because the Pennsylvania courts have given this ordinance no narrowing construction, and its facial terms prohibit all nudity, even simulated nudity, in expressive contexts.

As should be readily apparent, this ban on nudity applies to censor the artistic choices of a wide variety of performances including ballet and other dance, theater, and "performance art." It operates to censor innumerable performances that no one can plausibly argue are "worthless" or unprotected by the First Amendment.

The City Council members' eager assurances that the ordinance would not be applied against "serious" dance or theatrical performances, *see* Jt. App. at 84, 87-89, are neither binding on law enforcement authorities, nor any answer to a challenge on facial overbreadth grounds. Such "serious" artistic venues are sufficiently concerned that they are participating as amici in this litigation. The City Council's frank confessions of their intent merely underscore the free-wheeling discretion any such overbroad law affords law enforcement.

A ban on expressive nudity is unconstitutional as a content-based restriction with regard to *any* performance protected by the First Amendment. Its dramatic overbreadth, which could be cured by a simple exemption for nudity in the context of protected expression, is simply an additional reason it cannot survive under the First Amendment.

IV. A "Morality" Exception Would Swallow the First Amendment Whole.

Nonobscene nude expression in performances before willing audiences is unquestionably within the scope of First Amendment protection as defined by this Court's free speech decisions to date. In order to uphold the ordinance challenged here, which prohibits all such nude expression and specifically targets exotic dance establishments for censorship, this Court would necessarily create yet another categorical exception for nudity as unprotected speech, and would open the door wide for the suppression of speech on grounds of "morality."

In essence, the City asks this Court to abandon its well established First Amendment standard of strict scrutiny of content-based laws, and to ignore this law's patent overbreadth. Instead, the City would have the Court accept post hoc, pretextual justifications for such laws with a wink and a nod, to trivialize official prescriptions of style and content as "incidental," and to view considerations of "morality" as a countervailing interest sufficient to defeat free speech claims.

The recent, quietly provocative film *Pleasantville* includes a trenchant parable in this regard. The denizens of small-town Pleasantville, the setting of a 1950s-style world television sitcom, enjoy the tranquility of a life defined by predictability. Their world is shaken when color begins to invade their black-and-white world. They are outraged when the local soda-shop proprietor, who has traditionally painted holiday scenes on his glass storefront at Christmas, paints a Matisse-like nude portrait of a Pleasantville matron, in living color. Exclaiming that it is offensive and immoral, indignant citizens hurl stones and furniture, destroying the painting.

When calm returns, the mayor convenes a town meeting at which he and other civic leaders announce the new rules they have promulgated in an attempt to restore the status quo ante. Along with rules curtailing the recorded music one may play, these rules prescribe that paintings must be rendered exclusively in tones of black, white, and gray. Later prosecuted for continuing to paint in color, Pleasantville's fledgling artist pleads for official permission to paint in a limited range of colors, suggesting that perhaps the town fathers could approve the color scheme in advance.

And why not, the City of Erie would have us conclude. The image would remain the same, merely "incidentally burdened" by this regulation of the "manner" of painting, and all in the interest of public order and morality.

If this Court were to acquiesce in essence to a "morality" exception to First Amendment protection, such would be precisely the fate of avante garde artistic expression. At least in the Pleasantvilles across this country, artists and performers would soon be hat-in-hand, begging for official indulgence. The cultural landscape would be much diminished, without Mapplethorpe and Karen Finley, without controversy and without color.

CONCLUSION

For all the foregoing reasons, Amicus Curiae Feminists for Free Expression repectfully urges this Court to affirm the judgment below.

DATED: September 30, 1999

Respectfully submitted,

FEMINISTS FOR FREE EXPRESSION

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