No. 98-1161

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

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

BRIEF OF *AMICI CURIAE* DÉJÀ VU CONSULTING, INC. AND DÉJÀ VU OF NASHVILLE, INC., IN SUPPORT OF RESPONDENT

Filed September 30, 1999

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INTEREST OF THE *AMICI CURIAE*[1]

Deja Vu Consulting, Inc. is a Michigan corporation that provides consulting services to exotic dance clubs throughout the United States and Canada, and licenses to those facilities the use of certain federally registered copyrights, trademarks, and service marks, including the trade name "Deja Vu." Currently, there are forty-five such businesses across the United States and Canada operating under such names as "Deja Vu," "Dreamgirls," and "Little Darlings." Although utilizing various trade names, *amici* will simply refer to these establishments as "Deja Vu" clubs. Located from the eastern seaboard in Miami Beach to the western reaches of the United States in Hawaii, Deja Vu clubs represent the largest associated group of such businesses in North America. *Amicus* Deja Vu Consulting, Inc. is included here as a representative for all of these facilities. These businesses, and particularly the type of entertainment that they provide, will be significantly affected by the ultimate decision in this case.

Deja Vu of Nashville, Inc. owns and operates one such Deja Vu club. Located in Nashville, Tennessee, this facility has presented nude performance dance entertainment to the consenting adult public since 1989. In 1994, the Tennessee legislature passed a "public indecency" statute (generally referred to as "Ch. 542"), that would arguably preclude the form of entertainment presented at this establishment. While the enforcement of Ch. 542 had been enjoined by the Sixth Circuit for much of the time

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[1] Pursuant to Sup. Ct. Rule 37.6, counsel for *amici curiae* discloses that he authored this brief in whole. Funding for the preparation and submission of this brief was provided exclusively by *amicus* Deja Vu Consulting, Inc. Attorneys for Petitioners and Respondent have consented to the filing of this *amicus curiae* brief. Copies of the written consents are filed contemporaneously herewith.

since its enactment, that court ultimately upheld the constitutionality of the statute on the basis that it complied with Justice Souter's concurring opinion in *Barnes*. Deja Vu of Nashville, Inc. is now a petitioner in this Court in the case of *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, et al.*, No. 98-1935, requesting review of that ruling. The decision here will therefore materially affect Deja Vu of Nashville, Inc. and control any further review of the constitutionality of Ch. 542.

"DEJA VU" AND THE ADULT CABARET INDUSTRY

> "Americans now spend more money at strip clubs than at Broadway, off-Broadway, regional, and non-profit theaters; at the opera, the ballet and jazz and classical music performances – ***combined***."

U.S. News & Report, Feb. 10, 1997, at p. 44 (emphasis added).

These "strip clubs," or "adult cabarets" as they are normally referred to by municipalities in the regulations thereof, generally exist in one of three formats. First, are establishments licensed to serve alcoholic beverages which usually, as a result of state and local laws governing the distribution of intoxicants, only present "topless" dancing. Second, are the businesses that present fully nude performance dance entertainment, but which only serve soft drinks and the like. These non-alcohol establishments are generally referred to in the industry as "juice bars." Third, are the "BYOB" facilities which while not licensed to sell or furnish liquor, permit patrons to bring in their own alcoholic beverages. These are generally referred to as "bottle clubs." Pap's *Kandyland* was such an establishment. *Pap's A.M. v. City of Erie*, 674 A.2d 338, 341 n.2 (Pa. Commw. Ct. 1998).

Primarily, although not exclusively, Deja Vu clubs are non-alcohol facilities that present live fully-nude performance dance entertainment to the consenting adult public. Minors are not allowed in these establishments.

While the Deja Vu clubs represent the largest association of adult cabarets throughout the country, they are merely a small fraction of the overall industry. U.S. News & World Report reported in 1997 that there were then approximately 2,500 of the "major" type of facilities in the country. *U.S. News & World Report*, Feb. 10, 1997, at p. 48. Exotic Dancer Directory, an international directory of adult cabarets (published by E.D. Publications, Inc.; the organization being found at www.exotic-dancer.com), lists over 2,100 such clubs in its 1998-99 directory alone. Scores of talent agencies exist that do nothing but place exotic dancers at clubs around the United States.

Shortly after this Court's opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), *USA Today* reported that the exotic dance club industry generated yearly figures of ten million patrons, three billion dollars spent in the upper-end type of facilities, and two billion dollars earned by entertainers. August 12, 1991, at p. B5; March 10, 1992, at p. B8.

The industry holds a national convention every year in Las Vegas hosted by E.D. Publications, Inc., which is known as the Exotic Dancer Expo. This year, the convention – sponsored by Associated Underwriters, Inc., a national insurance underwriter, and Budweiser – was held at Caesar's Palace, and comprised of a trade show with 159 vendors (consisting of such industry suppliers as costuming, club lighting, sound systems, furniture, beverage dispensing equipment, commercial kitchen supplies, business organization software, insurance, talent

agents, and the like); an awards banquet hosted by comedian/movie actor Pauly Shore; and the "finals" of various talent competitions for "exotic dancer of the year."

This industry has moved from the fringes of society to the mainstream of popular entertainment.

SUMMARY OF ARGUMENT

Justice Souter's concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), adopting a "secondary effects" analysis in order to determine the constitutionality of anti-nudity regulations, neither represents the constitutional "holding" of that decision (in that it is not the position taken by those Justices who concurred on the "narrowest grounds" pursuant to *Marks v. United States*, 430 U.S. 188 (1977)), nor should it be adopted by this Court as an analytical framework in which to evaluate First Amendment freedoms. Such an approach fails to comport with the limitations of the secondary effects doctrine as set forth in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and with the evidentiary obligations of the government pursuant to the intermediate scrutiny test as articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). Specifically, Justice Souter's concurrence fails to comply with the precedent of this Court in regard to content-neutrality analysis; it absolves the government of the evidentiary burden to establish that the law will further an important or substantial governmental interest in a direct and effective way; it attempts to create a delineation between legal and illegal forms of nude performance dance entertainment that not only fails to comport with the prior precedent of this Court but which is unworkable in application; and it fundamentally ignores the basic tenet of the secondary effects doctrine – that

being that the regulated expression may still be presented.

In addition, reversal of the decision of the Pennsylvania Supreme Court will have unintended consequences that well-exemplify that true and substantial governmental interests will not be furthered by permitting the government to ban nude and semi-nude performance dance entertainment performed before a consenting adult audience.

Finally, the ultimate conclusion of the Pennsylvania Supreme Court was correct. The Erie ordinance does not pass constitutional muster under the First Amendment jurisprudence of this Court. It fails to further governmental interests, and it is not narrowly tailored under either the *Barnes* plurality opinion or under Justice Souter's concurrence. The decision of the Pennsylvania Supreme Court should therefore be affirmed.

ARGUMENT

I. JUSTICE SOUTER'S CONCURRING OPINION IN *BARNES* SHOULD NOT BE UTILIZED TO EVALUATE THE CONSTITUTIONALITY OF THE CITY OF ERIE ORDINANCE.

In its briefing to this Court, the City of Erie acknowledges the confusion in the inferior courts as to which opinion represents the constitutional "holding" of *Barnes* (Brief, p. 12), asserts that its ordinance would pass constitutional muster under either the plurality opinion authored by the Chief Justice or under the "secondary effects" concurring opinion of Justice Souter (pp. 17-18), but never ultimately takes a position as to which of the three opinions concurring in the *Barnes* judgment represents the appropriate framework in which to adjudicate these constitutional issues. Rather, the city contends that reversal is mandated by the mere fact that five Justices

concurred that the Indiana statute at issue in *Barnes* was constitutional (pp. 11-12).

Such logic does little, however, to reduce the turmoil in the lower courts – created by the fractured nature of *Barnes* – regarding the appropriate legal analysis that should be used to adjudicate the constitutionality of such laws. The widely conflicting – and in some cases diametrically opposed – decisions in this jurisprudential arena warrant this Court in expounding on its decision in *Barnes* and establishing a clear standard for courts to utilize in evaluating these constitutional issues. In furtherance of that endeavor, *amici curiae* assert that Justice Souter's "secondary effects" concurrence in *Barnes* neither represents the constitutional holding of that decision, nor provides an appropriate constitutional framework in which to evaluate First Amendment rights.

A. JUSTICE SOUTER'S CONCURRENCE IN *BARNES* DOES NOT REPRESENT THE HOLDING OF THAT DECISION.

In *Marks v. United States*, 430 U.S. 188 (1977), this Court held that:

> "When 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. . . . ' "

Id. at 193, *quoting Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Justice Souter's concurrence in *Barnes* cannot constitute the "narrowest grounds" of the decision because his approach is inapposite to both the plurality opinion authored by the Chief Justice and to Justice Scalia's concurring opinion.

Justice Souter's analysis specifically targets only nudity that he concedes is integrated into expressive conduct; erotic dance performed strictly in "adult" establishments. 501 U.S. 583 (Souter, J., concurring). His contemplated constitutional regulation would neither then apply to, for example, an individual standing naked on a crowded street corner, nor, apparently, to nudity or even nude dancing in certain "theatrical" performances. 501 U.S. 585 n.2 (Souter, J., concurring).

The opinion authored by the Chief Justice and joined in by Justices O'Connor and Kennedy clearly would not permit, however, such targeting. Rather, the plurality rested its decision on the general applicability of the Indiana statute. "Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity ***across the board***." *Barnes*, 501 U.S. at 566 (emphasis added). As the plurality observed:

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

Id. at 571 (emphasis added). Because of this "content-neutrality," the plurality concluded that the statute was then properly analyzed as a "time, place, or manner" regulation. *Id.* at 566-67.

Justice Souter's concurring opinion also fails to comport with the legitimate *justification* for such a regulation as articulated by the *Barnes* plurality: The protection of societal order and morality. *Barnes*, 501 U.S. at 568-569. As the plurality opinion concludes:

> " . . . [T]he governmental interest served by the text of the prohibition is societal disapproval of

nudity in public places and among strangers. ***The statutory prohibition is not a means to some greater end, but an end in itself.***"

Barnes, 501 U.S. at 571-72 (emphasis added). The "end in itself" is the assurance that public nudity will not occur – anywhere. An "across the board" prohibition as contemplated by the plurality arguably furthers such a moral goal, while a regulation in conformity with Justice Souter's concurrence would permit broad exceptions to the prohibitions, contrary to the very underpinning of the opinion authored by the Chief Justice.[2]

Nor does Justice Souter's concurrence comport with the opinion of Justice Scalia, which also eschewed the targeting of "expressive nudity." *Barnes*, 501 U.S. at 574, 576 (Scalia, J., concurring). Justice Scalia observed that a regulation will be determined to be unconstitutional where the government "prohibits conduct *precisely because of its communicative attributes.*" *Id.* at 577 (emphasis added). In addition, Justice Scalia would not appear to endorse Justice Souter's delineation between permissible and criminal nude dancing. *Id.*, at 574 n.2.

In that Justice Souter's analysis specifically *requires* the targeting of expressive conduct and distinguishing between different forms of expression, his position is then directly contrary to the opinions of all of other Justices concurring in the judgment. Accordingly, his secondary effects analysis cannot represent, under *Marks*, the constitutional holding of this Court in *Barnes*.

[2] Allowing adults, and even minors, to view the productions of, for example, "Hair" or "Equus" (as would apparently be permitted pursuant to Justice Souter's approach – *Barnes*, 501 U.S. at 585 n.2), while precluding consenting adults from viewing nude performance dance entertainment at Pap's, establishes any alleged moral basis for the law to be illusory, and otherwise renders such a regulation unconstitutional. *See, e.g., City of LaDue v. Gilleo*, 512 U.S. 43, 52 (1994) ("exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place"); and *The Florida Star v. B.J.F.*, 491 U.S. 524, 540-542 (1989) (a law banning First Amendment activity by some but not by others "cannot be defended on the ground that partial prohibitions may effect partial relief"). *See also, Church of Lukumi v. Hialeah*, 508 U.S. 520, 546-47 (1993) (where government "restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling" and the law "cannot be regarded as protecting an interest 'of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited' ").

B. JUSTICE SOUTER'S SECONDARY EFFECTS APPROACH AS SET FORTH IN HIS *BARNES* CONCURRENCE SHOULD NOT BE UTILIZED BY THIS COURT AS AN ANALYTICAL FRAMEWORK IN WHICH TO EVALUATE THE CONSTITUTIONALITY OF ANTI-NUDITY OR OTHER NON-ZONING REGULATIONS.

Even though Justice Souter's "secondary effects" analysis cannot represent the holding of *Barnes*, it should not be adopted as the analytical framework for evaluating the constitutionality of anti-nudity and other non-zoning regulations, in that it has the ultimate effect of overturning both the constitutional parameters of the secondary effects doctrine as established in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and the evidentiary obligations of the government pursuant

to the intermediate scrutiny test as articulated in *United States v. O'Brien*, 391 U.S. 367 (1968).[3]

First, Justice Souter's opinion fails to adhere to the limitations of "content-neutrality" analysis as set forth in *Renton*. There, this Court noted that although the ordinance treated theaters that specialized in adult films "differently from other kinds of theaters," it was not "aimed [ ] at the *content* of the films shown." *Renton*, 475 U.S. at 47 (emphasis in original). However, the four member dissent in *Barnes* concluded that "[t]he nudity is itself an expressive component of the dance, not merely incidental 'conduct'," 501 U.S. at 592 (White, J., dissenting), and on this particular point, Justice Souter agreed:

> " . . . When nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a striptease, are ***integrated into the dance and its expressive function***."

501 U.S. at 581 (Souter, J., concurring) (emphasis added). Therefore, a regulation that is directed at nudity as a component of expression – which would be the case in regard to a law enacted under Justice Souter's approach – is directed at the *content* of the entertainment, and therefore violates the *Renton* concept of content-neutrality.

Nor can Justice Souter's analysis in *Barnes* be reconciled with other decisions of this Court in regard to content-neutrality. Subsequent to both *Barnes* and *Renton*,

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[3] *Amici* do not mean to imply that they concede that such regulations should be evaluated pursuant to intermediate scrutiny. Rather, *amici* are in full agreement with the analysis undertaken by the Pennsylvania Supreme Court, and make these arguments here only to the extent that this Court continues to analyze the constitutionality of such regulations pursuant to the *O'Brien* test.

this Court observed that when analyzing whether regulations impermissibly infringe upon protected expression, courts must not accept at face value the supposed legislative motivation for enacting such laws. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645 (1994) (regulation neutral on its face may be nevertheless content-based if its "manifest purpose" is to regulate speech because of the message it conveys).

Discriminatory treatment of expression is suspect under the First Amendment, even when the legislature may not necessarily facially intend to suppress certain ideas. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993), *citing Simon & Schuster v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991). As long as there is facial discrimination of speech and/or expression, the law is then "content-based." *Id.* Thus, differential treatment of expressive nudity, which appears to be required under Justice Souter's approach, renders such a targeted regulation "content-based" by "any common sense understanding of the term. . . . " *Discovery Network*, 507 U.S. at 429. *See also, Metromedia, Inc. v. San Diego*, 453 U.S. 490, 516-17 (1991) (the Court noting that an ordinance that distinguishes in several ways between permissible and impermissible signs at a particular location by reference to their content takes "the regulation out of the domain of time, place, and manner restrictions"); *Church of Lukumi*, 508 U.S. at 536-537 (a "pattern of exemptions" can establish the targeting of First Amendment rights).

In addition, Justice Souter's approach cannot be reconciled with the fundamental limitation of the secondary effects doctrine as expressed by the majority in *Renton*; that being that "adult" entertainment will be permitted to continue, albeit in limited geographic areas. This Court concluded in *Renton* that the First Amendment precluded the municipality from "effectively denying respondents a

reasonable opportunity to open and operate an ***adult*** theater within the city. . . . " 475 U.S. at 54 (emphasis added). Yet, Justice Souter's extension of the secondary effects doctrine would eviscerate this restriction by granting government the right to preclude these types of "adult" businesses by requiring the content of the dance expression to be modified so that it is no longer "adult." *See, e.g.*, 501 U.S. at 586 (Souter, J., concurring) (noting the state's interest in "banning nude dancing").

And, there is nothing in his opinion that would preclude the extension of his secondary effects approach to films, books, and magazines. Government could prohibit nudity in such materials in an effort to ameliorate secondary effects. Yet, if a regulation had the effect of banning "adult" materials altogether, it would certainly otherwise violate the content-neutrality analysis in *Renton*, it would be subject to strict constitutional scrutiny, and it would then be presumed to be unconstitutional. Accordingly, Justice Souter's concurrence in *Barnes* cannot be reconciled with the secondary effects doctrine as annunciated by a majority of this Court in *Renton*.

Second, Justice Souter's extension of the secondary effects doctrine is inconsistent with the evidentiary burdens placed on the government, in intermediate scrutiny analysis, to establish the validity of the regulation. Although he determines that the appropriate criteria to utilize in determining the constitutional protections of nude performance dance entertainment are those contained in the four-part test of *O'Brien* (*Barnes*, 501 U.S. at 582), his subsequent analysis fails to adhere to that standard.

When utilizing intermediate scrutiny, this Court has clearly held that the government bears the burden of establishing that the regulation "furthers" an important or substantial interest, and that the restriction on First

Amendment freedom is "no greater than is ***essential*** to the furtherance of that interest." *Renton*, 475 U.S. at 46-47 (emphasis added); *O'Brien*, 391 U.S. at 377. In order to be able to evaluate these second and fourth prongs of the *O'Brien* test, a court must be presented with a sufficient legislative record which contains evidence "as to how effective or ineffective" the regulation is or might prove to be. *Denver Area Educ. Tel. v. F.C.C.*, 518 U.S. 727, 760 (1996). Simply put, the challenged regulation must be proven to advance the governmental interest "in a direct and effective way. . . . " *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). This burden is not satisfied by "mere speculation or conjecture," and the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Courts are to carefully analyze these issues rather than merely deferring to the legislature. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 508-514, 528-532 (1996) (eight Justices in two opinions rejecting the deference conferred in intermediate scrutiny cases to the legislative branch as expressed in *Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 344-47 (1986)).

Justice Souter's analysis fails to adhere to these longstanding requirements in numerous regards. Initially, his position fails to take into account the effectiveness of the type of regulation at issue in *Renton* – zoning restrictions – to ameliorate secondary effects. He does not, therefore, require evaluation of whether further legislation (such as the anti-nudity regulation in *Barnes*) is needed or more importantly – in the words of *O'Brien* – is either "necessary" or "essential."

And, Justice Souter's approach is inconsistent with the evidentiary obligations of the government as further clarified in *Renton*. As this Court noted in *Renton*, a

municipality need not conduct new secondary effects studies before enacting legislation "so long as whatever ***evidence*** the City ***relies upon*** is ***reasonably believed to be relevant*** to the problem that the City addresses." 475 U.S. at 51-52 (emphasis added). However, in determining that the Indiana statute at issue in *Barnes* fulfilled the second prong of *O'Brien* by furthering the substantial governmental interest in limiting secondary effects, Justice Souter concluded that he did "not believe that a State is required affirmatively to undertake to litigate ***this issue*** repeatedly in every case." 501 U.S. at 584-85 (emphasis added).

What Justice Souter seems to mean by the phrase "this issue" is simply the connection of secondary effects to "adult" establishments; whatever their kind. Thus, as long as some "studies" might have, at some point, substantiated some type of secondary effects being associated with some type of "adult" business, the government need not establish either that the regulation ***furthers*** an important or substantial governmental interest, or that the infringement on First Amendment freedom is no greater than is ***essential*** to the furtherance of that interest. *O'Brien*, 391 U.S. at 377. Under Justice Souter's opinion, there is therefore under *Renton* no longer a requirement of either "***evidence***" or "reliance" thereon (whether reasonable or not) in order to fulfill the second and fourth prongs of *O'Brien*.

The failure of this approach to adhere to the constitutional principles articulated in *Renton* is highlighted by the fact that Justice Souter does not explain how he believes that requiring dancers to wear pasties and G-strings will eradicate secondary effects.[4] In fact, his

[4] *Cf., Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988, 997-98 (N.D.N.Y. 1997) (in concluding that Justice Souter's concurrence could not be the constitutional holding of *Barnes*, the district court observed that there was no "logical relationship" which existed between the percentage of clothing worn by an entertainer and the occurrence of secondary effects). *Accord, Steverson v. City of Vicksburg*, 900 F. Supp. 1, 12 (S.D. Miss. 1994); and *Pap's A.M. v. City of Erie*, 719 A.2d 273, 280 (Pa. 1998).

opinion does not even express a position as to why or how adult businesses supposedly cause these problems:

> "To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation actually are. It is possible, for example, that the higher incidents of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities, or from the simple viewing of nude bodies regardless of whether those bodies are engaged in expression or not."

Barnes, 501 U.S. at 585-86 (Souter, J., concurring).

Yet, this statement exemplifies the lack of a causal nexus between mandating entertainers to wear pasties and G-strings and the amelioration of secondary effects. Requiring entertainers to "cover up" would not logically have an effect of dispersing "crowds of men predisposed" to acts of prostitution and sexual assault. Similarly, if this limited clothing does not modify the content or the force of the expression (501 U.S. at 571 (plurality); 501 U.S. at 587 (Souter, J., concurring)), it is not then apparent why

clothing would cause any secondary effects to be diminished. And, more importantly, if these problems are associated with the "simple *viewing* of nude bodies," the effect is primary, and not secondary. In such a circumstance, an entirely different constitutional analysis would be necessary.

In *Boos v. Barry*, 485 U.S. 312 (1988), this Court considered the constitutionality of a District of Columbia law prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tended to bring that government into "public odium" or "public disrepute." *Id.* at 315. The government argued that, analogous to *Renton*, the law was content-neutral in that it was directed to remedy a secondary effect; namely, "our international law obligation to shield diplomats from speech that offends their dignity." *Id.* at 320. The Court disagreed, finding that such an analysis "misreads *Renton*." *Id.*

> "We spoke in that decision only of *secondary* effects of speech, referring to regulations that apply to a particular category of speech because the ***regulatory targets*** happen to be associated with that type of speech. So long as the justifications for regulation have nothing to do with content, ***i.e., the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters***, we concluded that the regulation was properly analyzed as content-neutral.
>
> ***Regulations that focus on the direct impact of speech on its audience present a different situation. Listener's reactions to speech are not the type of 'secondary effects' we referred to in Renton***. To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to ***prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.***"

Id. at 320-21 (emphasis in original and added). *See also, Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Because the "emotive impact of speech on its audience is not a 'secondary effect'," and because the code provision there regulated speech due to its "primary impact," it was content-based and therefore subject to strict scrutiny. *Boos*, 485 U.S. at 321.

If the government seeks to suppress expression out of a concern for its "likely communicative impact," such a restriction cannot be "justified without regard to the content of the regulated speech," and is, consequently, not content-neutral. *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Texas v. Johnson*, 491 U.S. 397, 410-13 (1989). That a secondary effects analysis is therefore inappropriate here, is illustrated by the following statement of this Court in *Boos:*

> "But while the regulation in *Renton* applied only to a particular category of speech, its justification had nothing to do with that speech. The ***content*** of the films being shown inside the theaters was ***irrelevant and was not the target of the regulation***. . . . In short, the ordinance in *Renton* did not ***aim*** at the suppression of free expression."

Id. at 320 (emphasis added).

A regulation under Justice Souter's analysis certainly targets "content." It is the dance performance itself which is changed. This is the antithesis of the ordinance in *Renton* which did not proscribe, alter, modify or affect, in any way, shape or form, any aspect of the entertainment at issue.

Third, Justice Souter's analysis impermissibly establishes a delineation between protected and non-protected nude performance dance entertainment. Basically, he holds that the type of nude dancing at issue here and in *Barnes* can be precluded, while "legitimate" nude theatrical dancing cannot. *Barnes*, 501 U.S. at 585 n.2 (Souter, J., concurring). Justice Souter does not, however, specifically articulate how such a distinction is to be made; this approach appears to be incongruous with long-standing precedent of this Court; and actual experience of courts post-*Barnes* establishes that attempts to delineate between protected and unprotected expression in such a fashion are unworkable.

This Court has long-held that it is improper for the government – let alone courts – to attempt to make distinctions as to the value of "speech." In the context of "expression," this concern may have been first addressed by this Court in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), where it was asked to analyze the application of a certain copyright law that only applied to "illustrations or works connected with the *fine arts*." *Id.* at 250 (emphasis added). Confronted then with the question of what constituted the "fine arts,"[5] Justice Holmes, writing for the Court, stated that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations. . . . " *Id.* at 251. Noting that some new forms of expression might be found repulsive and thus denied protection, the Court observed that legal protections:

> " . . . would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value, – it would be bold to say that they have not an aesthetic and educational value, – ***and the taste of any public is not to be treated with contempt.***[6] ***It is an ultimate fact for the moment, whatever may be our hopes for a change.***"

Id. at 251-252 (emphasis added).

Similarly, in *Winters v. New York*, 333 U.S. 507 (1948), when dealing with a regulation that prohibited the "massing of stories of bloodshed and lust in such a way to incite to crime against the person," *id.* at 514, this Court held that "though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.* at 510. *See also, Cohen v. California*, 403 U.S. 15 (1971), where Mr. Justice Harlan, writing on behalf of the Court, observed that while the vulgar expression in question was "more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is larger because governmental officials cannot make principled distinctions in this area that the Constitution leaves matter of taste and style so largely to the individual." *Id.* at 25. And, in regard to the expression at issue here, this Court noted in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), that an entertainment program could not be prohibited "solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Id.* at 66.

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[5] At issue were pictures of ballet dancers and other performers at a circus (ironically, at that time, ballet was considered a low culture form of popular entertainment).

[6] This comment should be placed in context with the reference, *supra*, that Americans now spend more money at adult cabarets than at all of the supposed "fine [performance] arts" combined.

The targeting of only one form (or aspect) of nude performance dance entertainment does not then pass constitutional muster under the First Amendment. The State may enact reasonable time, place, and manner regulations applicable to "all speech irrespective of content." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). "But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Id.*

Actual experience by courts in attempting to apply Justice Souter's demarcation of performances at an "adult cabaret" – which may have all of the physical and entertainment attributes of a "legitimate theater" (whatever that phrase may mean) – from permissible nude "theatrical" dancing, has proven the wisdom of the words of this Court referenced above, and illustrates that his secondary effects approach is an unworkable doctrine by which to evaluate the constitutionality of these types of regulations.

Farkas v. Miller, 151 F.3d 900 (8th Cir. 1998), was the Eighth Circuit's foray into *Barnes*. There, the court was confronted with an Iowa statutory amendment that precluded certain forms of nudity not just in alcohol establishments as had been the case in the past, but in all businesses "required to obtain a sales tax permit."[7] *Id.* at 901-02. The Eighth Circuit concluded that the statute passed muster under Justice Souter's concurrence in

[7] The Eighth Circuit never explains how businesses required to obtain a sales tax permit are associated with secondary effects.

Barnes, *id.* at 904-06, and rejected the plaintiffs' overbreadth challenge because it found that a statutory "theatrical performances" exception[8] "appropriately limits the reach of the restrictions ***to the type of adult entertainment that is associated with harmful secondary effects.***" *Id.* at 905 (emphasis added).

After the decision of the district court (which had also upheld the constitutionality of the statute) but before the circuit court had ruled, Mr. Farkas continued to permit nude dancing at his "adult" establishment and was prosecuted for violating the Iowa statute, as was a gentlemen by the name of Jeffery Marshall. In pre-trial motions, the court ruled in both cases that it was the government's burden to establish that the defendants did ***not*** fall within the "theatrical performances" exception. App. 4-5, 11; 15-16, 19.

Mr. Marshall was acquitted in a bench trial when the court held that the evidence failed to rise to a level from which a rational trier-of-fact could conclude that the adult entertainment establishment at issue there was not a "theater" as that term was used in the statute. App. 20-28. The state then moved to dismiss the charges against Mr. Farkas predicated upon its belief that an acquittal of Mr. Farkas was preordained. App. 29-31. The state court agreed. App. 32.

Thus, even though the Eighth Circuit concluded that the statute was not overbroad because it was limited to Mr. Farkas' type of adult entertainment establishment, the state trial court had already concluded that Mr.

[8] "The provisions of this section shall not apply to a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances. . . ." 151 F.3d at 902.

Farkas' business did not, in fact, fall within the purview of the statutory prohibitions. This experience illustrates the impropriety, as recognized by this Court, of attempting to distinguish between various forms of otherwise protected expression,[9] and exemplifies why Justice Souter's secondary effects approach should not be embraced by this Court.

II. THE ULTIMATE CONCLUSION OF THE PENNSYLVANIA SUPREME COURT WAS CORRECT.

The conduct of the City of Erie in deciding not to enforce the challenged ordinance against "theatrical productions" illustrates why the protection of morality, as discussed in the plurality opinion in *Barnes*, is an improper basis for criminalizing expressive activities. Exempting out "legitimate theater" from the prohibitions of these types of regulations well-illustrates the impermissible targeting of this form of entertainment.

In Pennsylvania, there is already an existing state statute similar to the law of general applicability described in the *Barnes* plurality opinion. 18 Pa. Cons. Stat. §5901 (1973), provides that it is a misdemeanor for an individual to commit any lewd act – of which nudity is included – if he or she knows that it is "likely to be observed by others who would be affronted or alarmed."

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[9] *See also, Commonwealth v. Sees*, 373 N.E.2d 1151, 1155 (Mass. 1978) (the Supreme Judicial Court of Massachusetts observing that requiring the government to distinguish between nudity as it occurs in a work of "artistic and socially redeeming significance" as opposed to "the customary 'bar room' type of nude dancing," would be to make the police and courts "artistic constables" with the job of "evaluating the artistic worth and tasteful quality of the performance in its total context").

This statute applies to exactly the type of conduct discussed in the plurality opinion, as well as the "activities having no communicative element" mentioned in the concurrence of Justice Scalia (*Barnes*, 501 U.S. at 574). Conduct prosecuted under this statute has included masturbation in public (*Commonwealth v. Heinbaugh*, 354 A.2d 244 (1976)), and a nude man who strolled into a public pizza parlor (*Commonwealth v. Anzulewicz*, 42 Pa. D. & C.2d 484 (Q.S. Mont. Cnty. 1967)).

The application of that statute to expressive activity was clarified, however, in *Commonwealth v. Allsup*, 392 A.2d 1309 (Penn. 1978), where the defendant had performed fully nude on a stage. The Pennsylvania Supreme Court unanimously concluded that the statute comes into play "only when the lewd conduct of the defendant occurs in a place and at a time when it is likely to be observed by persons who have not consented to its occurrence, or who have not specially positioned themselves in such a manner as to be able to observe it, and who are likely to be affronted by such conduct or to find such conduct alarming." *Id.* at 1311. Because adult patrons in the bar at issue had paid an admission fee and seemed to regard the performance as "entertainment," this conduct, the court concluded, did not meet the requirements of the statute. *Id.* at 1312.

Accordingly, the Erie ordinance is not narrowly tailored in that its restrictions on First Amendment freedoms (the dancing at Pap's) are greater than ***essential*** to the furtherance of "societal order and morality." The provisions of 18 Pa. Cons. Stat. §5901 (1973) further these substantial governmental concerns, yet cause no damage to constitutionally protected expression being presented before a consenting adult audience. A broader regulation, such as the Erie ordinance, fails "narrow-tailoring." *Ward*,

491 U.S. 799; *Denver Area Educ. Tel.*, 518 U.S. at 755-756. In addition, any contention that the protection of morality constitutes a justifiable basis under the *Barnes* plurality for enacting this ordinance is illusory, in that the City asserts that it currently has no intention of enforcing the regulation against "theatrical productions."

III. THE UNINTENDED CONSEQUENCES OF REVERSAL ESTABLISH THE LACK OF IMPORTANT OR SUBSTANTIAL INTERESTS TO SUSTAIN THE ORDINANCE.

Unlike the zoning decision in *Renton* and the licensing ruling in *FW/PBS*, a reversal here will have the unmistakable effect of changing the nature (and *amici* would argue "content") of the entertainment presented at many facilities across the United States. Entertainers can, and in various areas will, be required to wear at least "pasties and G-strings," and if past precedent has been any indicator, they may be required to adorn far more than that. *See, e.g., Cafe 207 v. St. Johns County*, 856 F. Supp. 641, 646 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996) ("it does not seem to me from a constitutional standpoint that a modest increase in the amount of body covering required by the law [over and above the clothing mandated in *Barnes*] really adds any significant, incremental burden on the expressive component of the dance"); *Bright Lights, Inc. v. City of Newport*, 830 F. Supp. 378, 381 (E.D. Ky. 1993) (upholding an ordinance that required entertainers to wear bathing suits). A reversal in this action will then have both the legal and practical result of transforming what the law currently now considers to be (and regulates as) "adult" cabarets into non-adult businesses. This will have at least three profound consequent effects.

First, the zoning of "adult" businesses (including cabarets) is now firmly entrenched in the jurisprudence of this Nation. These regulations tend to parrot the ordinance at issue in *Renton*, which applied only to theaters that presented films depicting "specified sexual activities" or "specified anatomical areas." *Renton*, 475 U.S. at 44. These "specified anatomical areas" are those which are banned by an anti-nudity ordinance such as the one at issue here. A reversal will mean that for those municipalities with anti-nudity regulations, any "adult cabarets" within its borders would no longer be subject to adult use zoning restrictions, since they would no longer present "adult" entertainment.[10] It cannot further an important or substantial interest to render these zoning regulations, which now exist in virtually every jurisdiction, unenforceable against cabarets.

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[10] The question would then be whether the zoning laws that apply to "adult" entertainment facilities could be rewritten to constitutionally apply to "bikini clubs." This raises an interesting analytical dilemma, particularly if this Court is inclined to adopt Justice Souter's "secondary effects" *Barnes* concurrence as the constitutional framework in which to evaluate anti-nudity regulations. To pass muster under the second and fourth prongs of *O'Brien*, the government would have to establish that requiring dancers to "don pasties and G-strings" would reduce secondary effects in a direct and effective way. *Ward*, 491 U.S. at 800. If it does, there is then a proper justification for the law. And, of course, if it does ameliorate perceived secondary effects, there would then be no basis to extend these laws to regulate "bikini clubs." On the other hand, if requiring dancers to "cover up" does not eliminate secondary effects – which would have to be the conclusion as a justification for further regulation of "bikini clubs" (whether by way of zoning, licensing or other means) – there was then no legal basis for the anti-nudity regulation in the first place and it fails to pass muster under *O'Brien*.

Second, the industry, and particularly the "juice bars" (such as most of the Deja Vu clubs) which neither sell nor permit the consumption of alcoholic beverages on the premises, will have to adjust the operation of their businesses in consideration of market forces. With the way that the laws are generally structured today, juice bars can economically exist in competition with alcohol establishments because they can offer a form of entertainment that the liquor facilities cannot legally provide; they can present fully nude entertainment, whereas the alcohol clubs can generally only present topless dancing.

A reversal here will place all three different types of cabarets (alcohol establishments, juice bars, and bottle clubs) on an equal footing in regard to the type of entertainment that they can present. Accordingly, the juice bars will be at a significant economic disadvantage, in that patrons, when confronted with the choice of going to two different establishments to see the same type of entertainment – one that serves alcohol and one that does not – will generally choose the alcohol establishment. This unquestionable reality will require the vast number of juice bars around the country to obtain liquor licenses simply as a matter of economic preservation.

Such a consequent result would seem to be antithetical to the important governmental interests as expressed in prior decisions of this Court, and as understood by way of "common sense" in regard to the general evils of intoxicants. This Court and others have long referred to the negative effect by the combination of alcohol and erotic dancing. *See, e.g., New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) (in upholding a regulation that banned topless dancing in establishments that were licensed to serve alcoholic beverages, the Court cited to the New York State Legislative Annual 150 (1977),

which stated that "[c]ommon sense indicates that any form of ***nudity coupled with alcohol in a public place begets undesirable behavior***") (emphasis added); *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 96 (1986) (the city commission in the preamble to an ordinance prohibiting nude or nearly nude activity on premises licensed to sell alcoholic beverages had determined that "***nude dancing in establishments serving liquor was 'injurious to the citizens' of the city***") (emphasis added); *Jott, Inc. v. Charter Township of Clinton*, 569 N.W.2d 841, 854-55 (Mich. App. 1997) (regulation banning nudity in establishments that sold alcoholic beverages was constitutional as a measure to "eradicate the effects of 'undesirable behavior' stemming from a ***combination of alcohol and nudity***") (emphasis added); *Lounge Management, Ltd. v. Trenton*, 580 N.W.2d 156, 161-62 (Wis. 1998), *cert. denied*, 119 S.Ct. 511 (1998) (ordinance which prohibited all depictions of nudity – whether live or pictorial – in all business establishments was unconstitutionally overbroad because the regulation had "no connection to the ***potential harmful secondary effects arising from nude dancing in liquor licensed establishments***") (emphasis added). *See, also, California v. La Rue*, 409 U.S. 109, 114, 118 (1972); and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975).

In addition, the general concerns relating to alcoholic beverages alone – drunk driving, unruly customers, illness, and the like – are self-apparent, and have contributed to a large part of this industry voluntarily choosing not to engage in the distribution of intoxicants. These concerns of limiting the distribution of alcohol are, indeed, legitimate, substantial, and important governmental interests. Yet, by reversing the Pennsylvania Supreme Court decision here, this Court would be pushing a large segment of the exotic dance club industry

directly in the opposite direction to a position where they would either have to obtain liquor licenses to ensure economic survival or close their doors because of a lack of customers. Drastically expanding the number of entertainment establishments that sell alcoholic beverages cannot be considered under any analysis, however, to further important governmental concerns.

Under the precedent discussed above, the government has ample authority to regulate problems attendant to the combination of alcohol and exotic dancing. Accordingly, if this Court determines that modification of the decision of the Pennsylvania Supreme Court is warranted, it should merely clarify that states and municipalities are still free to prohibit the presentation of either fully nude or even topless dancing in establishments that dispense intoxicating beverages. By limiting the right of the State to prohibit such entertainment in only establishments that sell alcohol, this Court would serve the governmental interests noted in the decisions previously referenced, and particularly in *La Rue*, while at the same time providing weight and force to its eight Member conclusion in *Barnes* that the type of entertainment at issue here falls within the protections of the First Amendment. Such a limitation is warranted because, after all, this Court in *La Rue* rested its decision (that nude and semi-nude entertainment could be constitutionally prohibited in places that serve intoxicating beverages) on the "***critical fact***" that the State had "***not*** proscribed such performances ***across the board***." *La Rue*, 409 U.S. at 118 (emphasis added).

Third, also entrenched in the jurisprudence of this Nation are statutes in most every state which preclude minors from being given access to live entertainment performances that contain nudity or semi-nudity (topless

females).[11] It is these statutes which preclude minors from gaining access to adult cabarets. The protections as contained in these statutes would be rendered meaningless by a reversal here. Once entertainers can be required to wear the type of clothing that takes their performances out of the purview of the statutes, minors will no longer then be legally precluded from either entering these facilities as patrons or viewing therein the "bikini dancing" that can be permissibly conducted. In addition, without any form of (statutorily defined) "adult" entertainment being displayed, laws that prohibit minors from performing as entertainers in such facilities[12] would be

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[11] Some statutes merely preclude minors in places where nude or semi-nude entertainment is displayed. *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3556(A) (West 1989); and Del. Code Ann. tit. 24, §1629(a) (1997), and the definitions of "adult entertainment establishment" as found in §1602(2) and "specified sexual activities" as found in §1602(17)(d). Other statutes involving the display of matter obscene to minors (also and usually defined as being "harmful to minors") require, as a predicate, the presentation of certain forms of nudity. *See, e.g.*, Kan. Stat. Ann. §21-4301c(a)(3) (1995), and the underlying definitions of "harmful to minors" and "nudity" as found in §21-4301c(d)(2) and (5); N.J. Stat. Ann. §2C:34-3(b) (West 1995), and the definitions of "obscene material" and "specified anatomical area" as set forth in §2C:34-3(a)(1) and (3); Ohio Rev. Code Ann. §2907.31(A)(1)-(3) (Anderson 1996), and the definitions of "harmful to juveniles" and "nudity" as set forth in §2907.01(E) and (H); and Vt. Stat. Ann. tit. 13, §2802(b)(1)-(3) (1998), and the definitions of "nudity" and "harmful to minors" as set forth in §2801(2) and (6). Yet, other statutes specifically define an "obscene" or "harmful" performance as to minors simply as one that contains nudity. *See, e.g.*, Or. Rev. Stat. §167.075(1) (1990), and the definitions of an "obscene performance" and of "nudity" as set forth in §167.060(5) and (6).

[12] It is criminal in many jurisdictions for minors to perform as exotic entertainers by exposing genitals and other specifically

unenforceable in regard to clubs required to comply with an anti-nudity regulation. Certainly, no substantial governmental interest would be furthered by these results.

CONCLUSION

For the reasons as set forth herein, the decision of the Pennsylvania Supreme Court should be affirmed.

Respectfully Submitted,

BRADLEY J. SHAFER, MI P36604
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906-2110
517-886-6560 – Telephone
Counsel of Record

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defined sexual body parts. *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3552(A)(2); Ga. Code Ann. §16-12-100(b)(3), and the underlying definition of "sexually explicit conduct" to include the exhibition of the genitals or pubic area as set forth in §16-12-100(a)(4)(D); and Utah Code Ann. §76-5a-3(1)(a) (1995), and the definition of "nude or partially nude" as set forth in §76-5a-2(5). Numerous other states (and the District of Columbia) have similar laws.