No. 98-1161

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

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

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Did the Supreme Court of Pennsylvania, the court of last resort of the Commonwealth of Pennsylvania, improperly strike an ordinance of the City of Erie which fully comports with the principles articulated in *Barnes v. Glen Theatre, Inc.*, thereby willfully disregarding binding precedent in violation of the Supremacy Clause at Article VI, Clause 2 of the Constitution of the United States?

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OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of the Commonwealth of Pennsylvania and concurring opinion are reported at 553 Pa. 348, 719 A.2d 273 2 (1998) and are reproduced at Appendix F to the petition for writ of certiorari.

The opinions and orders of the Court of Common Pleas of Erie County, Pennsylvania and of the Commonwealth Court of Pennsylvania are reproduced at Appendices B through D to the petition for writ of certiorari. The order of the Supreme Court of Pennsylvania granting limited review of the decision of the Commonwealth Court is reproduced at Appendix E to the petition.

JURISDICTION

The Supreme Court of Pennsylvania, the highest court of the Commonwealth, rendered its opinion and order on October 21, 1998. A petition for writ of certiorari was timely filed and was granted on May 17, 1999.

Jurisdiction is vested in the United States Supreme Court by 28 U.S.C. § 1257(a) (1994), as the validity of a municipal enactment is questioned as repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America, which provides that

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Supremacy Clause of the Constitution of the United States of America, which provides that

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

STATEMENT OF THE CASE

This action was initiated by Complaint in Equity and Petition for Preliminary Injunction before the Court of Common Pleas of Erie County, Pennsylvania, filed October 14, 1994. The complaint named as defendants the City of Erie, Pennsylvania, its mayor Joyce A. Savocchio, and five members then seated on the City Council. Plaintiff below Pap's A.M. identified itself as a Pennsylvania corporation maintaining a place of business within the City of Erie, and described its business as "an establishment which provides nude dancing." [Pet. App. A at 1a, 3a].

Pap's asked the court below to enjoin enforcement of City of Erie Ordinance 75-1994, to declare the ordinance

invalid and unenforceable, and to enjoin the City of Erie from enacting similar legislation in the future. In a second count Pap's sought damages, counsel fees and costs of litigation. [Pet. App. A at 4a-5a].

The challenged ordinance was enacted by a majority vote of City Council on September 28, 1994 and was signed into law by Mayor Savocchio on September 30, 1994. The ordinance repealed an 1866 version of Article 711 of the Codified Ordinances of the City of Erie, titled *Indecency and Immorality*, and replaced it with a new article titled *Public Indecency*.[1] The text of Ordinance 75-1994 was closely modeled on the text of the ordinance reviewed and upheld by this Honorable Court in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

Pap's complaint challenged the ordinance on federal and state constitutional grounds. Pap's averred that the ordinance violates the freedoms of speech and expression guaranteed by the First and Fourteenth Amendments to the United States Constitution and by Article I, § 7 of the

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[1] The new Article 711 provides that a person commits a summary offense by performing any of four enumerated acts knowingly and intentionally in a public place:

a. engaging in sexual intercourse
b. engaging in deviate sexual intercourse as defined by the Pennsylvania Crimes Code
c. appearing in a state of nudity
d. fondling his/her own genitals or the genitals of another person

"Nudity" and "public place" are defined terms. Children under ten years of age and women breastfeeding infants are excepted from the scope of the ordinance. [Ordinance 75-1994, appended to the Complaint, Pet. App. A at 8a-9a].

Constitution of the Commonwealth of Pennsylvania. The ordinance was also challenged as overbroad. [Pet. App. A at 3a].[2] The Court of Common Pleas denied Pap's petition for preliminary injunction by Order issued October 21, 1994. [Pet. App. B at 19a].

A permanent injunction was granted following a hearing on December 21, 1994. The trial court declared Ordinance 75-1994 unconstitutional and barred its enforcement. [Pet. App. C at 20a-40a].

The City took an appeal as of right to the Commonwealth Court of Pennsylvania, the appropriate intermediate appellate court. The City challenged the lower court's declaration of constitutional invalidity and challenged Pap's standing to bring a claim under the First Amendment.[3] Pap's cross-appealed seeking counsel fees which had been denied by the lower court.

The Commonwealth Court's opinion and order issued on March 27, 1996. That court analyzed the *Barnes* decision under the framework set forth in *Marks v. United States*, 430 U.S. 188 (1977), and concluded that Justice Souter's opinion articulates the holding of *Barnes*. *Pap's A.M. v. City of Erie*, 674 A.2d 338, 343 (Pa. Commw. 1996)

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[2] Pap's further averred that enforcement of the ordinance constitutes a taking; that the ordinance violates Pap's right to the equal protection of the laws; and that the ordinance is preempted by Pennsylvania obscenity law. [Pet. App. A at 3a-4a]. Those issues were not addressed by the Pennsylvania Supreme Court.

[3] The City also took issue with the lower court's failure to place a limiting construction on the ordinance and failure to rule on immunity issues.

[citations omitted]. The Commonwealth Court reasoned that an ordinance regulating speech will stand if it satisfies the test in *United States v. O'Brien*, 391 U.S. 367 (1968), and is designed to prevent secondary effects associated with adult entertainment. 674 A.2d at 343. The intermediate court held that the ordinance does not violate rights guaranteed by the First Amendment notwithstanding infrequent, incidental limits on some expression. *Id.* at 344. The Commonwealth Court further noted the obligation of a state court to construe a statute to avoid constitutional problems where possible. The court expressly limited the ordinance to ban public nudity and not expression. *Id.* at 346.

The Supreme Court of Pennsylvania granted review limited to two issues: whether Ordinance 75-1994 violates the rights to free speech and expression guaranteed by the Constitutions of the United States and of Pennsylvania, and whether the ordinance is fatally overbroad. *Pap's A.M. v. City of Erie*, 688 A.2d 168 (Pa. 1997). The court heard argument on September 16, 1997 and rendered its opinion on October 21, 1998.[4]

The Pennsylvania court acknowledged the majority ruling in *Barnes* extending the protection of the First Amendment to nude dancing. *Pap's A.M. v. City of Erie*, 719 A.2d 273, 276 (Pa. 1998). The court declined to find any further guidance in *Barnes*. *Id.* at 278.

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[4] At the time of argument the Pennsylvania court had only six justices seated. Madame Justice Newman did not participate in this decision. Of the five justices who decided the appeal, three justices joined in the opinion of the court. Two justices joined in a concurring opinion.

In its independent analysis of Ordinance 75-1994, the Pennsylvania court rejected the argument that the ordinance is content-neutral. Overlooking the limiting construction, the court analyzed the ordinance under strict scrutiny and found that it impermissibly burdens expression protected by the First Amendment. The Pennsylvania court struck the definition of nudity and the prohibition of public nudity from the ordinance. 719 A.2d at 279-281.[5]

SUMMARY OF ARGUMENT

The City petitioned for certiorari averring manifest reversible error. The Pennsylvania court, as a lower court bound by the decisions of the United States Supreme Court, is not empowered to decide a federal question in a manner contrary to a directly relevant decision of this Court. Even if the Pennsylvania court could not find a rule of law in the *Barnes* decision, it was bound by the result.

The First Amendment's protection is not limited to the spoken or written word. Expressive conduct has long been recognized as a means of communication. There has been a great deal of debate over whether totally nude, barroom-type "exotic" dance is expressive conduct or simply conduct. The controversy was settled by this Court in *Barnes*. The *Barnes* Court ruled that nude dancing is expressive conduct, such that restrictions on nude

[5] The Pennsylvania court did not reach the overbreadth issue.

dancing must satisfy the requirements of the First Amendment. Despite differences in reasoning a majority of the Court voted to uphold Indiana's public indecency statute.

The Indiana statute reviewed in *Barnes* prohibited the same conduct as does Ordinance 75-1994. The Pennsylvania court found that Erie's ordinance is a content-based restriction targeting protected expression. From that faulty premise the Pennsylvania court went on to apply strict scrutiny and strike the portions of the ordinance prohibiting public nudity as violative of the First Amendment.

The court made no effort to distinguish the case before it from the case in *Barnes*. The three-member majority professed itself unable to glean a rule of law from the *Barnes* decision, and from there rejected both the reasoning and the result in *Barnes*.

Lower courts interpreting the *Barnes* decision have worked to reconcile the various opinions and state a rule of law. The precedential value of the reasoning in *Barnes* may be the subject of debate. However, there is no question as to its result. The Pennsylvania court has no power to interpret the Constitution of the United States in a fashion contrary to a directly relevant decision of the United States Supreme Court. The Pennsylvania court's decision must be reversed.

ARGUMENT

The government's power to restrain free speech is to be exercised sparingly and with the utmost discretion. In enacting its public indecency ordinance, the City of Erie honored that obligation. A governmental entity may sometimes burden speech or expression to advance a significant and legitimate state interest. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 786 (1984), citing *Schenck v. United States*, 249 U.S. 47 (1919). Erie's public indecency ordinance imposes a minimal burden on speech to advance significant and legitimate interests. The incidental impact on some expression does not violate the First Amendment.

In *Barnes*, Indiana's public indecency statute was challenged by the operators of two establishments which featured totally nude dance and by two of the dancers. The Court of Appeals in *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986), outlined an already lengthy procedural history. The statute was overturned at the trial court level in the Indiana court system, but upheld by the Indiana Supreme Court in *State v. Baysinger*, 397 N.E.2d 580 (1979). Appeals to the United States Supreme Court from the *Baysinger* decision were dismissed for want of a substantial federal question.

The statute was then unsuccessfully challenged in the federal courts on an overbreadth theory. The Seventh Circuit in *Glen Theatre v. Pearson* held that the prior litigation compelled a finding that the statute as limited by the Indiana Supreme Court in *Baysinger* was not unconstitutionally overbroad. The circuit court left open the issue of whether the statute as applied violated rights guaranteed

to the plaintiffs by the First Amendment, and remanded to the District Court. 802 F.2d at 291.

The District Court concluded that the dancing presented was simply conduct and not protected by the First Amendment. The Seventh Circuit reversed, finding that the dance was expressive conduct and that the public indecency statute was impermissibly content-based, with the purpose of suppressing the message conveyed by the dance. The issue reached the United States Supreme Court in *Barnes v. Glen Theatre.*

The plurality opinion in *Barnes* noted the prior cases tentatively extending the protection of the First Amendment to nude dancing as expressive conduct. The *Barnes* Court took the next step and decided the issue in the affirmative. From there, the remaining analysis is familiar. The Justices deciding *Barnes* simply disagreed as to whether the Indiana statute needed to or could survive the *O'Brien* test.

I. THE CITY OF ERIE CORRECTLY RELIED ON THE *BARNES* DECISION.

The cases leading up to *Barnes* show a disinclination on the part of the Court to extend the protection of the First Amendment to all nude dance performed in any setting. Speech is evaluated both by content and context. The court looks both to the words and to the circumstances in which the words are used. *Schenck v. United States*. This Court's decisions in *California v. LaRue*, 409 U.S. 109 (1972), *Doran v. Salem Inn*, 422 U.S. 922 (1975), and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), acknowledged the possibility that some nude dance may

have sufficient communicative intent as to implicate the First Amendment. In *Doran v. Salem Inn* the Court noted the limited communicative value of the performances at issue. 422 U.S. at 932 (barroom-type nude dancing could be protected expression under some circumstances). A majority of the *Barnes* Court decided that nude dance is expressive conduct. As will be shown later, that decision necessarily compels regulations of nude dance to be examined under the test enunciated in *O'Brien*.

The City of Erie's Ordinance 75-1994 was drafted and adopted in reliance on the *Barnes* decision. The ordinance explicitly incorporates "the concept of public indecency prohibited by the laws of the State of Indiana, which was approved by the U.S. Supreme Court in *Barnes v. Glen Theatre, Inc., et al.*" [Pet. App. A at 7a]. The ordinance prohibits the same conduct. It defines nudity in the same way. [*Id.* at 8a]. The Indiana court limited the reach of the Indiana statute by limiting the definition of public place. Erie's ordinance includes a fairly expansive definition so as to include a wide range of conduct. [*Id.* at 9a].

In response to constitutional concerns the Commonwealth Court subjected the ordinance to a limiting construction. As the ordinance reached the Pennsylvania Supreme Court, the prohibition of public nudity was enforceable in such contexts as could reasonably be expected to contribute to undesirable secondary effects. That limiting construction reflected a valid interpretation of the requirements of *Barnes*.

The Pennsylvania Supreme Court did not identify any feature of Erie's ordinance which distinguishes it from the Indiana statute in *Barnes*. It characterized the

case before it as "very similar" to the case in *Barnes*. 719 A.2d at 277. The Pennsylvania court decided that the sole controlling principle to be drawn from *Barnes* is that non-obscene nude dancing is properly considered expressive conduct. *Id.* at 276. On that basis the court opined that "no clear precedent arises out of *Barnes*" for the interpretation of Erie's ordinance. The Pennsylvania Supreme Court declined to follow any of the previous interpretations of the *Barnes* decision. Instead the court concluded that the plurality and concurring opinions in *Barnes* are irreconcilable and that the *Barnes* decision is not relevant precedent. *Id.* at 278.

A. The result in *Barnes* is binding on lower courts.

In constitutional matters, the lower courts are bound both by the reasoning and the result of cases decided by this Honorable Court. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., dissenting). The Third Circuit Court of Appeals' opinion in *Planned Parenthood v. Casey*, 947 F.2d 682 (1991), stressed the importance of precedent in the legal system.

> Decisions of the Supreme Court regarding federal law and the Constitution are binding on the lower courts. There is no room in our system for departure from this principle, for if it were otherwise, the law of the land would quickly lose its coherence.

947 F.2d at 691.

It is undisputed that a state supreme court's interpretation of the state's constitution is dispositive. The

Pennsylvania court did not base its decision on the Pennsylvania constitution. Rather, the court decided that Erie's ordinance is invalid under the federal Constitution, disregarding the holding in *Barnes*. The Pennsylvania court is simply not permitted to make that determination.

The Supreme Court of the United States is the "final arbiter of whether the Federal Constitution necessitate[s] the invalidation of a state law." *New York v. Ferber*, 485 U.S. 747, 767 (1982). Erie's public indecency ordinance is concededly nearly identical to Indiana's statute. Because Indiana's statute was upheld by a majority of the Justices deciding the *Barnes* case, the result in *Barnes* is controlling precedent here. The Pennsylvania court's difficulty in fashioning a rule of law from the *Barnes* decision does not relieve it of its obligation to follow the result.

B. The opinions comprising the *Barnes* decision can be reduced to a controlling rationale.

Three distinct schools of thought are represented in the differing opinions in *Barnes*. There is disagreement at the threshold determination of whether nude dancing is speech in the form of expressive conduct or simply conduct. There is disagreement at the crucial determination of whether the Indiana public indecency statute prohibiting public nudity incidentally burdens expression or is intended to suppress expression. There is disagreement among the lower courts over the rule of law to be derived from *Barnes*.

The plurality and concurring opinions in *Barnes* rest on different reasoning. Lower courts have therefore turned to the mechanism for drawing a rule from the

opinion of a divided Court provided in *Marks v. United States*. The *Marks* rule instructs that "[w]hen 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.' " 430 U.S. at 193, quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

The objective of the *Marks* rule is to promote predictability in the law and provide guidance for lower courts. The rule should be formulated to produce a result with which a majority of the Justices deciding the previous case would agree, but can be drawn from the opinion of a single Justice. *Planned Parenthood v. Casey*, 947 F.2d at 693.

The Court of Appeals for the Third Circuit has written extensively on the analysis of plurality opinions. The circuit court went on in *Planned Parenthood* to stress the importance of that analysis, stating that a "binding opinion from a splintered decision is as authoritative for lower courts" as a unanimous opinion. 947 F.2d at 694. An erroneous analysis has the same effect, in the Third Circuit's view, as a rejection of a majority opinion of the Court. *Id.* The Pennsylvania court's erroneous analysis of the *Barnes* decision pointedly demonstrates the accuracy of the Third Circuit's opinion.

The differing opinions in *Barnes* must be examined in light of prior cases reaching the Supreme Court. The Court in *LaRue* acknowledged that the First Amendment might reach to protect nude public performances in some contexts, but that the police power was clearly sufficient

to bar the "bacchanalian revelries" there. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996) [citations omitted]. The decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), established that zoning ordinances may limit the location of adult entertainment establishments as a means of preserving surrounding neighborhoods. Justice Souter's concurrence in the *Barnes* case utilizes that established justification for regulations of adult entertainment.

The District Court for the Northern District of Ohio viewed the *Barnes* decision as a "true plurality," one where the plurality and concurring decisions turn on different reasoning. *Triplett Grille, Inc. v. City of Akron*, 816 F. Supp. 1249 (1993) ("*Triplett I*"). The *Triplett I* court determined that Justice Souter's concurrence, relying on a governmental interest already accepted in *Renton*, ruled on the narrowest grounds. The court further noted that the Eleventh Circuit's decision in *International Eateries, Inc. v. Broward County*, 941 F.2d 1157 (1991), decided shortly after *Barnes*, concluded that Justice Souter's concurrence states the rule of law in *Barnes*. 816 F. Supp. at 1254.

The *Triplett I* court rejected the reasoning of the plurality in *Barnes* as "dramatically expand[ing] the scope of the *O'Brien* test" by accepting morality as a sufficient justification for local legislation. 816 F. Supp. at 1254. The *Barnes* plurality opinion uses the phrases "morals and public order" and "order and morality." 501 U.S. at 568, 569. Those phrases can be read as a short-form reference to the states' general police power, described as "the authority to provide for the public health, safety, and

morals." *Id.* Contrary to the opinion of the court in *Triplett I*, it takes no dramatic expansion of the *O'Brien* test t accept the States' traditional police power as sufficien justification for an ordinance prohibiting public inde cency.

The District Court found Akron's ordinance invali because the record before it did not establish that th legislative intent of Akron's ordinance was to addres secondary effects attributable to nude dancing establish ments. 816 F. Supp. at 1249. The City of Akron took a appeal to the Sixth Circuit. The circuit court thoroughl examined the *Marks* rule and the opinions in *Barnes*. Th court agreed that Justice Souter's concurrence resolve the issue on the narrowest grounds and therefore state the rule of law in *Barnes*. *Triplett Grille, Inc. v. City o Akron*, 40 F.3d 130 (1994) ("*Triplett II*").[6]

The Sixth Circuit reasoned that the *Barnes* plurality opinion finds the statute sufficiently justified as an exer cise of the state's police power. The police power is broa enough to encompass the prevention of undesirable sec ondary effects. Because the secondary effects rationale i a "coherent subset of the principles articulated in th plurality opinion," the plurality and Justice Souter shar a "common underlying approach." Justice Souter's con currence therefore decides the question on the narrowes grounds. 40 F.3d at 134. *See also, Farkas v. Miller*, 151 F.3

[6] The Sixth Circuit found the ordinance constitutional a applied to Triplett Grille. 40 F.3d at 135. As a federal court, th Sixth Circuit was not permitted to supply a limitin construction. The court therefore reluctantly affirmed th District Court's finding of overbreadth. *Id.* at 136.

900 (8th Cir. 1998) (plurality opinion broad enough to encompass secondary effects).

The opinion of the District Court for the Northern District of New York in *Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (1997), traces the development of the First Amendment doctrine regarding nude dancing and sexually explicit expression, culminating in an analysis of *Barnes*. The District Court viewed the governmental interest in combating secondary effects as too far removed from the general police power to represent a narrow holding with which the plurality would necessarily agree. 949 F. Supp. at 995. For that reason, the court determined that the plurality opinion states the rule of law in *Barnes*. *Id.* at 998.

The Commonwealth Court of Pennsylvania revisited the nude dancing issue in 1998 in *Purple Orchid, Inc. v. Pennsylvania State Police*, 721 A.2d 84. The Commonwealth Court observed that most federal courts have upheld bans on nude dancing.[7] The court's survey of cases regulating adult establishments showed that most

[7] The court cited *J & B Entertainment v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998); *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998); *Sammy's of Mobile v. City of Mobile*, 140 F.3d 1993 (11th Cir. 1998); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997); *Café 207 v. St. Johns County*, 989 F.2d 1136 (11th Cir. 1993); and *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991). 721 A.2d at 90 n.11. The Commonwealth Court further observed, not without rancor, that "after [the Supreme Court's decision in] *Pap's*, the rule is that anyone can engage in nude dancing anywhere other than in licensed liquor establishments, unless the prohibition meets the strict scrutiny test." *Id.* at 92.

courts have relied on the plurality's reasoning in *Barnes* and a significant number on Justice Souter's. *Id.* at 90 n.11. Different choices by lower courts between the plurality's reasoning and Justice Souter's reasoning leave the state of the law somewhat unsettled and lacking uniformity. Erie's ordinance does not force a choice. It draws its justification from both views.

In a different case, the Third Circuit noted the difficulty in some instances in framing an appropriate rule. The circuit court concluded that the plurality and concurring opinions in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), share no common ground. Where no rule can fairly be stated that would encompass the views of a majority of the Court, there may be no rule of law to carry forward. *Rappa v. New Castle County*, 18 F.3d 1043 (1994).

The Pennsylvania court treated *Barnes* as an opinion from which no governing standard can be drawn. The majority opinion there misstates the *Marks* rule as requiring a majority of the Court to agree on a rule of law. The Third Circuit's formulation of the *Marks* rule is more accurate. The rule of law in a plurality opinion is the rule which necessarily produces a result agreeable to the majority of the Justices deciding the case. 947 F.2d at 693. The Sixth Circuit in *Triplett II* remarked that the *Marks* rule does not adequately address a case where no one opinion states a position supported by at least five Justices who concurred in the judgment. 40 F.3d at 134. Similarly, the Third Circuit observed that "there is some awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered," but recognized that "it is the usual

practice when that is the determinative opinion." *Blum v. Witco Chemical Corp.*, 888 F.2d 975, 981 (1989).

The majority opinion of the Pennsylvania court "strain[ed] to find discord in *Barnes* where none exists." *Pap's A.M. v. City of Erie*, 719 A.2d at 282 (Castille, J., concurring in the result). While the Pennsylvania court is clearly in the minority of courts interpreting *Barnes*, its rejection of a governing standard is not ultimately at issue. The *Rappa* court did not refuse to recognize any precedential value in a case where no controlling rationale can be derived. To the contrary, the result in such a case is binding notwithstanding any differences in reasoning. The court in *Rappa* recognized that it was bound to either distinguish the ordinance then before it from the San Diego ordinance in *Metromedia*, or to follow the result in *Metromedia* and strike down the ordinance. 18 F.3d at 1060-61.

The approaches of the Justices deciding *Barnes* are not so radically different as to defy reduction to a controlling principle. The difficulty in cases following *Barnes* results from surplus language. The *Triplett Grille* formulation, requiring that a regulation of nude dancing survive the *O'Brien* test and be aimed at secondary effects, is too limiting. A regulation survives the *O'Brien* test because it is aimed at a governmental interest unrelated to the suppression of speech. The Court in *Barnes* advanced two legitimate governmental interests, both the traditional police power and the secondary effects rationale. The City of Erie's public indecency ordinance is sufficiently justified by either interest and encompasses both.

C. The secondary effects rationale sufficiently justifies Erie's public indecency ordinance.

This Court has previously noted the difficulty in drawing a principled distinction between traditional and controversial means of expression. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Courts interpreting *Barnes* have attempted to provide a means for making a principled distinction.

The secondary effects of adult motion picture theatres were described in *Young v. American Mini-Theatres*, 427 U.S. 50 (1976), as deterioration of the surrounding neighborhood and increased crime. 427 U.S. at 71 n.4 (plurality opinion). In *American Mini-Theatres* the City of Detroit's "Anti-Skid Row Ordinance" was challenged as vague, as a prior restraint on communication and on an equal protection theory. Owners of adult motion picture theatres complained that the ordinance placed restrictions on their establishments solely on the basis of the films' content. The plurality in *American Mini-Theatres* concluded that the city's interest in preserving the character of its neighborhoods provided a sufficient justification for the classification. 427 U.S. at 71.

Justice Powell concurred, suggesting that the *O'Brien* test provided the appropriate means of analysis. 427 U.S. at 79. Because the governmental interest in the stability of its residential and commercial areas sufficiently justified the incidental encroachment upon protected expression, Justice Powell voted to uphold the ordinance. *Id.* at 84.

A similar ordinance was upheld in *City of Renton v. Playtime Theatres*. The Renton zoning ordinance, like Detroit's, required a minimum distance of one thousand

feet between any adult motion picture theater and residential zones, churches, parks, and schools. The *Renton* Court explicitly recognized the governmental interest in preserving the quality of urban life as not only important and substantial, but vital. *Id.* at 50.

The Eleventh Circuit Court of Appeals handed down its decision in *International Eateries* in 1991, not long after the *Barnes* decision. *International Eateries* involved a challenge to a Broward County zoning ordinance regulating the location of "adult nightclubs." The parties stipulated that International Eateries' business featured non-obscene nude dancing and was thus within the class of uses subject to the ordinance. 941 F.2d at 1158.

The Eleventh Circuit began its analysis with an examination of the status of nude dancing under the First Amendment. The court noted previous decisions which had assumed without deciding that non-obscene nude dancing is protected expression and cited previous decisions of lower federal courts which applied the secondary effects rationale to the regulation of nude dancing. 941 F.2d at 1159. The court then turned to the *Barnes* decision. Following a thoughtful discussion the Eleventh Circuit concluded that the *Barnes* decision did not displace the secondary effects requirement. Because Justice Souter's concurrence in *Barnes* relied on the secondary effects rationale, the circuit court concluded that a statute regulating nude dancing is still required to rely on secondary effects. *Id.* at 1161.

The Eleventh Circuit's analysis of *Barnes* was not dispositive in its case. Nonetheless, it is instructive. The circuit court characterized the ordinance in *Barnes* as a

general prohibition of public nudity, making no distinction between expressive and non-expressive conduct. 941 F.2d at 1161. Unlike the Broward County zoning ordinance regulating only designated uses, Erie's public indecency ordinance prohibits a broad range of conduct in public places.

Critics of the secondary effects doctrine have suggested that use of secondary effects as a justification for limiting speech be limited to circumstances where the secondary effects are not amenable to direct regulation. *Boos v. Barry*, 485 U.S. 312, 338 (1988) (Brennan, J., dissenting). Erie's public indecency ordinance falls within that suggested limitation. The same devaluation of the surrounding areas attributed to adult motion picture theatres can be attributed to establishments featuring live nude entertainment. The government's vital interest in protecting and preserving the desirability of its residential neighborhoods and business districts is a sufficient justification for the ordinance's incidental encroachment on protected expression.

D. The states' traditional police power sufficiently justifies Erie's public indecency ordinance.

The plurality opinion in *Barnes* straightforwardly faces an issue central to the debate over governmental regulation of public nudity. The opponents of regulation contend that any restriction of public nudity is of necessity content-based and invoke the specter of official censorship of expression. The plurality opinion recognizes that not all public nudity is expressive conduct. That public nudity which is expressive is well protected by the

O'Brien test. The third step of the *O'Brien* analysis requires that the governmental interest furthered by the regulation be unrelated to the suppression of expression. The fourth step requires that the restriction on expression be both incidental, or subordinate, to the primary legitimate purpose, and no greater than essential. 391 U.S. at 377.

The ordinance in *Barnes* and Erie's ordinance are legitimate exercises of the states' authority to legislate for the promotion of the public health, safety and morals. The plurality opinion dispatches the general arguments against "legislating morality" with reason, observing that the law is essentially based on morality. 501 U.S. at 569 (plurality opinion), quoting *Bowers v. Hardwick*, 478 U.S. 186 (1986).

The individual's right of free expression cannot be given free reign at all times, but must sometimes be subordinated to the general welfare. The minimal subordination engendered by Erie's public indecency ordinance is well within the limits tolerated by the First Amendment.

II. THE DECISION IN *BARNES* PROVIDES THE PROPER FRAMEWORK FOR THE EVALUATION OF RESTRICTIONS OF NUDE DANCING.

A. Because nude dance is expressive conduct, regulations of nude dance are reviewed under intermediate scrutiny.

The Court in *Barnes* ended the controversy over First Amendment protection of nude dancing. By deciding that nude dancing is expressive conduct, the Court also

decided the method for analysis of restrictions on nude dancing.

A message may be delivered by conduct that is meant to be communicative and would, within the totality of the circumstances, reasonably be understood by the viewer to be communicative. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) [citations omitted]. The Court in *Clark* utilized a burden-shifting analysis. The burden is on the proponent of the conduct to show sufficient communicative elements to bring it within the ambit of the First Amendment. The burden then shifts to the government to justify the burden on expression. 468 U.S. 288, 293 at n.5.

Viewing the conduct in the context in which it took place, the court first must determine whether the conduct has sufficient communicative elements to implicate the First Amendment. That determination requires a two-part inquiry. The court determines whether there was an intent to convey a particularized message, and whether there was a great likelihood that those present would understand the message. The intent to convey a message can be inferred from the circumstances. *Spence v. Washington*, 418 U.S. 405 (1974).

Expressive conduct is thus broken down into two elements: the message and the means of expression. The message may not be suppressed. The means of expression, in a proper case, may be regulated. The Fourth Circuit's articulation of the *O'Brien* inquiry clearly places the focus on the means of expression. That court posed the issue as "the degree to which the First Amendment protects normally regulated conduct which has been

turned from its ordinary course to be performed for a communicative purpose." The court there reasoned that the use of conduct as a means of expression will not invalidate an otherwise constitutional restriction on the conduct. *D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140, 144 (1991).

If the First Amendment is implicated, the court then decides whether the regulation under review furthers a governmental interest that is not related to the suppression of free expression. If it does, then the standard of *United States v. O'Brien* applies. *Texas v. Johnson*, 491 U.S. 397 (1989).

The expressive conduct doctrine developed through a line of cases involving political speech. *See generally Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (black armbands worn by students as a political protest); *Brown v. Louisiana*, 383 U.S. 131 (1966) (sit-in by black students protesting segregation); *Stromberg v. California*, 283 U.S. 359 (1931) (flying red flag); *Cohen v. California*, 403 U.S. 15 (1971) (political slogan on jacket). In such instances the communicative intent is evident. The actor seeks to persuade others to accept his or her point of view on an issue, and perhaps to take action in support of that viewpoint. The hard cases arise where the communicative intent of the conduct is not evident.

The plaintiff in *O'Brien* argued that any conduct intended to be communicative should be constitutionally protected. The *O'Brien* Court disagreed but did not limit the types of conduct which can be communicative. 391 U.S. at 376. The *Barnes* Court decided that nude dancing

is sufficiently communicative as to fall within the periphery of First Amendment protection. By so deciding, the Court also decided that the intermediate scrutiny standard of *O'Brien* will be used in examining restrictions on nude dancing.

B. The intermediate scrutiny standard is well established.

The *O'Brien* analysis of a regulation restricting expressive conduct is "in the last analysis little, if any, different from the standard applied to time, place and manner restrictions." *Clark*, 468 U.S. at 298. Time, place and manner restrictions are valid if they are justified without reference to content, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. 468 U.S. at 293 [citations omitted].

Similarly, under the *O'Brien* test a regulation is sufficiently justified if it is within the constitutional power of the government and furthers an important or substantial governmental interest. The governmental interest must be unrelated to the suppression of free expression and the incidental restriction on alleged First Amendment freedoms no greater than is essential to further the interest. 391 U.S. at 377. Both tests recognize that the First Amendment tolerates a balancing of interests. The third prong of the *O'Brien* analysis places the government's interests first. The interests of the speaker and audience can be burdened where the burden is incidental to a legitimate interest. The interest in free expression is protected by the

requirement that the restriction be no more extensive than necessary.

In *Clark*, demonstrators wished to camp in a national park to express a message of support for homeless persons. Their request was denied because camping in the park was normally restricted to designated camping areas. While not discounting the communicative value of the symbolic campout, the majority in *Clark* found that the communicative value was outweighed by the legitimate governmental interest in maintaining the condition of the park property. 468 U.S. at 298.

The plaintiff in *O'Brien* argued that the act of burning his draft card symbolized his opposition to war. Assuming without deciding that the conduct had sufficient communicative elements to trigger First Amendment scrutiny, the Court observed that a sufficiently important governmental interest can justify a regulation of conduct which incidentally limits speech. 391 U.S. at 376.

The Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), made it abundantly clear that the fourth prong of *O'Brien* is not functionally equivalent to the least-restrictive-means prong of strict scrutiny analysis. The requirement is satisfied if the regulation is not substantially broader than necessary to achieve the legitimate interest. 491 U.S. at 798.[8] A least-restrictive-alternative requirement engrafted into mid-level scrutiny blurs the

[8] The *Albertini* test referenced in *Ward* seems to require only that the regulation be effective. The *Ward* Court used "direct and effective." 491 U.S. at 800.

distinction between mid-level and strict scrutiny and is therefore not used. *Id.* at n.6.

A similar distinction was made by the Court in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). Like the *O'Brien* test, the test for restrictions on commercial speech is closely analogous to the general time, place and manner formulation.[9] Where commercial speech is regulated, the government bears the burden of establishing a reasonable fit between the legitimate interest and the prohibition. 492 U.S. at 480. The Court in *Fox* declined to import the least-restrictive-means standard into intermediate scrutiny. *Id.* at 478.

The *Barnes* decision thus utilized a well-established analytical framework to determine whether Indiana's statute is a permissible limitation on expressive conduct. In *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993

[9] Speech is commercial speech if it proposes a commercial transaction. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) states the threshold determination for commercial speech. To come within the protection of the First Amendment, commercial speech must (a) concern a lawful activity and (b) not be misleading. If that threshold is passed, then the government must show (a) that the asserted interest is substantial; (b) that the regulation at issue directly advances that interest; and (c) that the regulation is not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 566. The last step was refined in *Fox* to the "reasonable fit" standard. 492 U.S. at 480.

The viability of the *Central Hudson* test was recently reaffirmed in *Greater New Orleans Broadcasting Ass'n., Inc. v. United States*, ___ U.S. ___, 119 S. Ct. 1923 (1999).

(1998), the Eleventh Circuit upheld Mobile's prohibition of nude dancing only in establishments with liquor licenses. The court determined that Mobile's ordinance is valid as restricting "only the place or manner of nude dancing without regulating any particular message it might convey." The Eleventh Circuit then concluded that Mobile's ordinance withstands intermediate scrutiny, which it described as the "*Barnes-O'Brien* test." 140 F.3d at 996.

It is clear that the courts have developed a unified approach to the analysis of content-neutral restrictions on speech and expression.[10] Restrictions on speech are considered content-neutral if they are justified without reference to the content of the speech. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Erie's public indecency ordinance is a legitimate exercise of the traditional police power, intended to promote the public health and order and prevent the deterioration of neighborhoods. The ordinance is justified without reference to a message communicated through nude erotic dance. It should therefore be analyzed under intermediate scrutiny. The Pennsylvania court instead looked beyond the plain language of the ordinance to find an intent to suppress expression, and subjected the ordinance to strict scrutiny. 719 A.2d at 279.

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[10] But see, *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999) (observing that the choice of test may occasionally determine outcome).

III. ERIE'S PUBLIC INDECENCY ORDINANCE WITHSTANDS INTERMEDIATE SCRUTINY.

Ordinance 75-1994 generally prohibits public nudity within the City of Erie. This general prohibition has the incidental effect of burdening expressive nudity along with non-expressive nudity. The preamble to the ordinance references an increase in the number of establishments featuring live nude entertainment. Live nude entertainment is considered undesirable for many reasons. A municipality only remains viable when it offers its residents the type of neighborhoods and living conditions they desire. Citizens of Erie, not unlike any other citizens, want safe and attractive neighborhoods and pleasant shopping areas. They are concerned about the public health consequences of unsafe sexual practices and unsanitary conditions which are commonplace in adult entertainment establishments. Many of them do find sexually oriented entertainment offensive and contrary to their moral and religious values. All of these reasons motivated the City Council to enact the ordinance and the mayor to sign it into law. For all of these reasons, the ordinance should be upheld.

The Pennsylvania court acknowledged a legitimate motivation for the enactment of Ordinance 75-1994. In addition, however, the court found an "unmentioned purpose" to suppress free expression. The court focused on the dissent in *Barnes*, which posited that the same dance performed by a fully nude dancer has a different impact on a spectator than when performed by a clothed or partially clothed dancer. 719 A.2d at 279, citing *Barnes* at 592 (White, J., dissenting).

The *Barnes* dissent equates impact on a viewer with communication of a message, and concludes that this difference in impact is the basis for the prohibition of fully nude erotic dance. The Pennsylvania court found the stated purpose of Erie's ordinance overshadowed by this perceived unstated purpose. The Pennsylvania court therefore found Erie's ordinance content-based, aimed at a distinctive expressive component present in fully nude dance but absent where a brief costume is worn. 719 A.2d at 279.

The Court in *O'Brien* stated that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." 391 U.S. at 383. The Court there cautioned against inquiry into legislative motive as "a hazardous matter." *Id.* A regulation is considered content-neutral if it serves purposes unrelated to the suppression of expression, even if it affects some speakers or messages but not others. *Ward*, 491 U.S. at 791. The *Barnes* dissent and the Pennsylvania court overlook the incidental nature of the burden placed on expression by an ordinance prohibiting public indecency and instead would permit no legislative consideration of the content of the burdened expression.

In *City of Renton*, the District Court and Court of Appeals had split over the extent to which the enacting body may consider content. The District Court used a "predominate concern" standard. The Court of Appeals concluded, however, that if content was a motivating factor in the enactment of the ordinance, the ordinance is impermissibly content-based. The *Renton* Court upheld the District Court, stating that a predominate intent to

regulate the effects on the surrounding community provides a substantial justification for the ordinance. 475 U.S. at 47.

The *Renton* Court looked to the terms of the ordinance and not to the motives of individual legislators. 475 U.S. at 48, quoting *O'Brien*. The Pennsylvania court did not distinguish between the legislative intent of the ordinance and any personal reasons motivating a legislator's support for the ordinance. It is not necessary for an ordinance regulating nude dancing to be justified entirely without reference to the content of the expression. It is only necessary that the ordinance be constitutional on its face. *O'Brien*, 391 U.S. at 384.

An ordinance restricting nude dancing reached the Sixth Circuit again in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (1997). The reach of Chattanooga's ordinance was limited to adult-oriented entertainment, citing the risks to the public health and the promotion of prostitution and crime as the justification for the ordinance. The ordinance banned not only nudity but contact between performers and audience and required a buffer zone between the performance area and the audience. The Sixth Circuit followed its prior decision in *Triplett Grille* finding Justice Souter's concurrence to be the rule of *Barnes* but sought to limit *Barnes* to its facts. The circuit court read that opinion to leave open the possibility that not all nude dance is expressive conduct. 107 F.3d at 409.

The Sixth Circuit found the ordinance's seeming discrimination among types of nude performance probative of content-neutrality. The court there reasoned that since all expressive nudity was not banned, it was reasonable

to infer that the target of the ordinance was not expressive nudity but was indeed the secondary effects of adult establishments. 107 F.2d at 410-11.

The Fourth Circuit in *D.G. Restaurant Corporation v. City of Myrtle Beach* upheld an ordinance containing a statement of purpose similar to that of Erie's ordinance. The Fourth Circuit noted that testimony before the District Court centered on concern for the quality of life of Myrtle Beach's residents and the incompatibility of adult entertainment with the image Myrtle Beach wished to promote as a tourism destination. Because the plain language of the Myrtle Beach ordinance was sufficient to establish the legislative intent, the Fourth Circuit ordered dissolution of the injunction barring its enforcement. 953 F.2d at 147.

The plain language of Erie's ordinance evidences substantial regard for the necessary balancing of interests. The preamble states that restrictions on speech and expression are to be "carefully drafted and enforced so that speech and expression are not curtailed beyond the point at which it is essential to further the City's interest in public health, safety and welfare." [Pet. App. A at 7a]. The statement of purpose is explicit. The ordinance was adopted

> for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

[*Id.*]. Each and every element required to satisfy intermediate scrutiny is present within the language of the ordinance. There is no need to look beyond the ordinance itself to interpret its provisions. As applied to the act of dancing fully nude in public, the ordinance is within the constitutional power of the government as a valid exercise of the police power. It furthers important and substantial interests which are unrelated to the suppression of free expression. To the extent that expression is affected, the ordinance is no more restrictive than necessary to further the interest.

Therefore, Erie's ordinance passes the *O'Brien* test. Non-expressive public nudity is prohibited throughout the City of Erie. Expressive public nudity is incidentally burdened where the burden is justified by legitimate governmental interests. Those interests are clearly identified within the language of the ordinance.

The Pennsylvania court's finding of illicit legislative intent runs directly counter to the teaching of *O'Brien*. Legislators' statements are used only to interpret ambiguous enactments. The *O'Brien* Court would not

> void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the

> same or another legislator made a "wiser" speech about it.

391 U.S. at 384.

The Borough of Nescopeck, located in Luzerne County, Pennsylvania, enacted a public indecency ordinance on May 11, 1998. Nescopeck's ordinance was concededly identical to the ordinance in *Barnes*. The District Court for the Middle District of Pennsylvania was thus constrained to distinguish its case from Erie's case before the Pennsylvania Supreme Court. The court noted that Erie's ordinance differed from the *Barnes* ordinance merely by the inclusion of language seemingly targeting nude dancing, and observed that that language formed an insubstantial basis for the Pennsylvania court's characterization of Erie's ordinance as impermissibly content-based. *D'Angio v. Borough of Nescopeck*, 34 F. Supp. 2d 256 (M.D. Pa. 1999).

CONCLUSION

In *Barnes v. Glen Theatre*, a majority of this Honorable Court decided that nude dance performances fall within the First Amendment's guarantee of freedom of speech and expression. That guarantee tolerates a balancing of the interests of speaker and audience and legitimate governmental interests. Both the traditional police power and a municipality's vital interest in preserving attractive and desirable neighborhoods provide sufficient justification for a minimal burden on the expressive element of fully-nude dance.

Despite differences in reasoning, five members of the *Barnes* Court voted to uphold Indiana's public indecency statute. The Pennsylvania Supreme Court nonetheless struck the portions of the City of Erie's public indecency ordinance which prohibited the same conduct as Indiana's statute.

Justice Castille's concurring opinion in *Pap's A.M.* properly looks for the common ground in the *Barnes* decision. He therefore disagrees with the Pennsylvania court's majority, which found no controlling principle in *Barnes*. The majority in *Barnes* found Indiana's statute content-neutral. The Pennsylvania court, in the view of the concurring Justices, defied binding precedent by applying strict scrutiny to Erie's ordinance. 719 A.2d at 283 (Castille, J., concurring).

The First Amendment's guarantee of free speech and expression does not permit the government to regulate what individuals may say. It does tolerate limits on the means by which ideas are communicated. Erie's public indecency ordinance does not aim to suppress expression. The minimal encroachment on expression is subordinate to the ordinance's primary, legitimate purpose.

Therefore, the decision of the Pennsylvania court should be reversed.

Respectfully submitted,

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