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,

RESPONDENT'S BRIEF

Filed September 30, 1999

QUESTION PRESENTED

1. Does the Supremacy Clause of the United States Constitution require a reversal of the judgment of the Pennsylvania Supreme Court under the compulsion of *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)?

OPTIONAL QUESTION PRESENTED*

2. Does the First Amendment compel affirmance of the judgment of the Pennsylvania Supreme Court?

   a. Is Erie's anti-nudity law facially invalid to the extent it applies to expressive performances before willing adult audiences because it imposes a direct, total and significant prohibition on the content of expression which applies at all times, in all places, and regardless of the manner in which such performances may be presented?

   b. Is Erie's anti-nudity law (to the extent it applies to expressive performances before willing adult audiences) an invalid content-based restraint upon expression as *construed and applied* by municipal officials?

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* The sole question presented in the certiorari petition is based exclusively upon the Supremacy Clause and not upon the First Amendment. Respondent does not wish to inject any additional questions presented into this case, nor does it request the Court to do so. However, if this Court should choose to address the merits of the First Amendment issues potentially in this case *sua sponte*, Respondent submits that resolution of the following additional First Amendment issues would independently support the judgment of the Pennsylvania Supreme Court.

QUESTION PRESENTED – Continued

c. Does the ordinance violate the First Amendment by failing to require proof that a given performance violates the three part test for obscenity set forth in *Miller v. California*, 413 U.S. 15 (1973)?

d. Is the Erie Ordinance facially invalid (to the extent it applies to expressive performances before willing audiences) due to the impact of its substantial overbreadth on parties not before the Court?

e. As construed and applied by Erie officials, does the Erie Ordinance violate the First Amendment by establishing a discretionary system of prior restraint whereby municipal officials act as a local censorship board applying unwritten, subjective, and arbitrary standards to determine which nude performances are constitutionally protected and which are not?

f. Even if the ordinance is found to have only a *de minimis* or incidental impact on the content of expression, does the ordinance nonetheless fail under the intermediate scrutiny of this Court's *O'Brien* test?

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STATEMENT OF THE CASE

On September 28, 1994 the Erie City Council enacted Ordinance No. 75-1994 by a four-two vote. (Cert. App. 6a-10a.)[1] The entire meeting leading to adoption of the ordinance was recorded and made part of the trial record. Each voting council member stated the reasons for his or her vote. (Jt. App. 36-48.) All members voting in favor of the ordinance indicated that they intended the ordinance to target live nude dancing, to which they were opposed. *Id.* The preamble to the ordinance candidly states that it was enacted to limit nude live entertainment. (Cert. App. 42a.)

On October 14, 1994, Respondent filed a complaint with the Court of Common Pleas of Erie County seeking injunctive and declaratory relief. (Cert. App. 1a-10a.) Respondent challenged the ordinance, *inter alia*, as being a violation of freedom of expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution, both as applied to Respondent and in terms of its substantial overbreadth as applied to others not before the court.

On December 21, 1994 a hearing was held before the Court of Common Pleas of Erie County, Pennsylvania. Counsel for two Erie theatrical companies, The Erie Playhouse and the Roadhouse Theatre, spoke in support of Respondent's position. He advised the court that those theaters had presented productions containing "nudity and strong adult content" (Jt. App. 87), the Playhouse having performed "productions like *Hair* and *Bent*" and the Roadhouse having recently performed '*Equus*'. (Jt. App. 87.) He further stated:

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[1] The Council meeting transcript of September 28, 1994 appears in the joint appendix. (Jt. App. 36-48). The transcript lacks the subsequent vote count. The vote count, as certified by the City of Erie Clerk, is attached as Appendix A of this brief. Pursuant to F.R.E. 201(b)(2) the vote count of the City Council is judicially noticeable because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Moreover, under Rule 201(f), judicial notice may be taken at any stage of a proceeding.

> "The Playhouse should not be forced into the position of defending any production that it presents. They should not be forced to adopt contingency plans in the event that a government official tries to close a play or arrest a member of a cast or director. That act alone stops the production, damages the organization and forces the expenditure of scarce funds to defend against the government action. As long as these possibilities exist, they chill my clients' freedom of speech and expression. The presentation and subjective interpretation of a play is a guaranteed constitutional right.
>
> "The possible enforcement of this ordinance gives the government the power to affect the essence of our constitutional liberties, to free speech expression and presentation of thoughts and ideas. Any infringement on that right by the government, however slight or however well intentioned, cannot be tolerated by a free society." (Jt. App. 87-88)

The City's attorney advised the court that it was not the City's intention "to infringe on constitutional rights to the extent Playhouse is doing productions . . . which content or which conduct can be construed as a protected performance. Certainly, we don't think this ordinance applies, it's been our . . . position that it doesn't apply." (Jt. App. 88-89.) He stated that "the arts" are a "higher protected form of expression." (Jt. App. 107.) The City then stipulated that

> "the play, '*Equus*' features frontal nudity and was performed for several weeks in October/November 1994 at the Roadhouse Theatre in downtown Erie with no efforts to enforce the nudity prohibition which became effective during the run of the play." (Jt. App. 84)

* * *

On June 3, 1999, following this Court's grant of certiorari, Respondent filed a motion to dismiss as moot based upon its counsel's just having learned that the premises in

question had ceased operating as a nude dancing establishment and that Respondent had no remaining interest in either those premises or any other nude dancing establishment in Erie or elsewhere. Following full briefing by both sides, this Court denied the motion to dismiss on June 24, 1999.

SUMMARY OF ARGUMENT

The sole question presented herein is whether the judgment of the Pennsylvania Supreme Court violates the Supremacy Clause because the court did not find controlling this Court's opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). This question does not seek review of the underlying merits of the First Amendment issues, absent a Supremacy Clause violation.

Although the Pennsylvania Supreme Court's opinion may have failed to articulate why *Barnes* did not require a reversal, its *judgment* nonetheless complies with the Supremacy Clause because there are numerous factual and legal distinctions between this case and *Barnes*. For example, the statute in *Barnes* was truly content-neutral, having its roots in the Nineteenth Century as a broad public nudity prohibition. In contrast, the preamble of Erie's ordinance expressly states the City's intent specifically to limit live nude entertainment and has been construed and applied exclusively to prohibit nudity in the context of expressive performances. Because Justice Scalia's concurrence in *Barnes* was based entirely on the content-*neutrality* of the Indiana statute, the content-*based* nature of Erie's ordinance removes it from any controlling impact under Justice Scalia's opinion.

Likewise, Justice Souter, whose vote was also critical in *Barnes*, expressly stated that *Barnes* presented no substantial overbreadth challenge and that his opinion might be different in a case presenting such a challenge. This case presents such a challenge.

Accordingly, for both of these reasons, this case is sufficiently different from *Barnes* that the Supremacy Clause did not compel the Pennsylvania Supreme Court to apply *Barnes* as controlling.

Should this Court agree that the Supremacy Clause did not compel the Pennsylvania Supreme Court to follow *Barnes*, this Court's own rules and precedent place the underlying merits of the constitutionality of Erie's ordinance beyond the scope of the grant of certiorari. However, should this Court nonetheless choose to address such issues – a course which Respondent does not request – it should affirm the Pennsylvania Supreme Court under any of a variety of possible First Amendment rationales hereinafter discussed.

ARGUMENT

I

WHILE THE PENNSYLVANIA SUPREME COURT'S REASONING MAY CONFLICT WITH THE SUPREMACY CLAUSE, ITS *JUDGMENT* CLEARLY DOES NOT

The first paragraph of the City's certiorari petition expressly requests that this Court issue a writ of certiorari "to review the *judgment* of the Supreme Court of Pennsylvania." The City's sole question presented asks this Court to examine the Pennsylvania Supreme Court's judgment exclusively under the Supremacy Clause; it does not ask this Court to examine whether the Pennsylvania Supreme Court's judgment, absent a Supremacy Clause violation, comports with the First Amendment.

Respondent acknowledges that in failing to distinguish this case from *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the court below may have improperly analyzed the potential Supremacy Clause impact of *Barnes*; however its *judgment* did not violate the Supremacy Clause. This is because there were numerous distinctions between this case and *Barnes* not discussed by the Pennsylvania Supreme Court, but which nonetheless appear in the record, freeing that court to strike the City's ordinance without violating the Supremacy Clause.

A. The Doctrine of *Marks v. United States* is Inapplicable Here.

In *Marks v. United States*, 430 U.S. 188 (1977), this Court articulated how to discern its holding where no single opinion obtains a majority vote, but where there is an opinion concurring in the judgment on sufficiently narrow grounds that it would necessarily be endorsed by at least five Justices. While the *Marks* rule is useful in determining the holding of this Court in a great many cases, there are a variety of other cases where it is not. This is such a case.

Specifically, as Erie has correctly noted, there is significant confusion among the lower courts regarding whether any opinion rendered in *Barnes* necessarily constitutes the "holding" of the Court:

> "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." Petitioner's Brief at 17.
>
> * * *
>
> "[M]ost courts have relied on the plurality's reasoning in *Barnes* and a significant number on Justice Souter's." Petitioner's Brief at 16-17.

One might also argue that Justice Scalia's concurrence in *Barnes* is the narrowest opinion, as he articulated a narrow position suggesting that such a law might not be upheld if it were not enforced evenly against *all* forms of public nudity. Conceivably, an anti-nudity law aimed primarily at expression could meet the tests of the plurality and Justice Souter's concurrence, but fall under the narrower test articulated (or at least strongly suggested) by Justice Scalia.

Respondent agrees with Erie that the correct statement of law is that articulated in *Rappa v. New Castle County*, 18 F.3d 1043, 1057-1060 (3rd Cir. 1994), where the court acknowledged that there are cases where no rule can fairly be stated that would encompass the views of a majority of the Court, making the *Marks* rule inapplicable. Of course, that conclusion does not end the inquiry.

As *Rappa* indicated, a lower court is not free to disregard a *judgment* of this Court involving a seemingly identical and indistinguishable factual or legal issue. *Id.* at 1061. As noted by Erie, the *Rappa* court was faced with the question of whether it was bound to follow any of the splintered opinions in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), by virtue of the *Marks* rule. It concluded that it was not, but that it was bound to follow this Court's *judgment* in *Metromedia* unless it presented one or more grounds of potentially meaningful distinction between the two cases. *Id.* That approach seems applicable here.

B. Although The Pennsylvania Supreme Court Did Not Utilize a *Rappa*-type Analysis, its Judgment Should Nonetheless be Affirmed.

Given the apparent similarities between the *Barnes* statute and the Erie ordinance, the Pennsylvania Supreme Court should have distinguished this case from *Barnes* before reaching its own conclusions under the First Amendment. Because it failed to articulate such distinctions fully,[2] its *opinion* did not give sufficient deference to *Barnes*.

However, the record before the Pennsylvania Supreme Court provided *substantial* bases for distinguishing this case from *Barnes* and, as a result, its *judgment* is consistent with the Supremacy Clause and should not be reversed. It is, of course, a separate matter whether its opinion correctly applies the First Amendment, but that issue is not raised in either the Questions Presented or the Petition for Writ of Certiorari.

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[2] The Pennsylvania Supreme Court *did* articulate one important distinction between this case and *Barnes*; it expressly noted that the ordinance, on its face, stated that it was adopted "for the purpose of limiting a recent increase in nude live entertainment." 719 A.2d at 279. If this, rather than Justice White's dissent in *Barnes*, were the basis for its conclusion that the ordinance was content-based and that strict scrutiny applied, then its *reasoning*, as well as its *judgment*, would be consistent with the Supremacy Clause.

C. There Are Numerous Factual and Legal Distinctions Between This Case and *Barnes* Compelling the Conclusion That the *Judgment* Below Did Not Violate the Supremacy Clause.

The Supremacy Clause does not control here unless both the facts and legal issues presented in this case are substantially indistinguishable from those in *Barnes*, at least to the extent that such issues were treated as significant in any of the three separate opinions supporting the judgment in *Barnes*. The analysis below will readily demonstrate that *Barnes* does not preordain the constitutionality of the present ordinance.

1. *Barnes* did not involve an anti-nudity restriction aimed primarily, if not exclusively, at expressive performances.

Justice Scalia's concurring opinion in *Barnes* (which supplied an indispensable fifth vote in support of the judgment) did not state how he would rule if there were substantial evidence in the record that an anti-nudity law was targeted specifically at expressive activity, but it strongly suggested that he *would* find such a law unconstitutional. Indeed, the entire thrust of Justice Scalia's opinion in *Barnes* was his observation that Indiana's anti-nudity statute was a general ban against public nudity in any form and under any circumstances. To support his contention that the law was not particularly aimed at expression, he offered numerous published state court opinions to show that it was *frequently* enforced in non-expressive contexts. 501 U.S. at 574.

It therefore stands to reason that the judgment of the court below did not violate the Supremacy Clause because the record here, unlike that in *Barnes*, is replete with indicia of a content-based purpose and a content-based enforcement pattern. As shown *infra*, this evidence ranged from the facial language of the ordinance, to legislative statements by all of

the council members who voted for the ordinance, to statements by counsel representing the City in all the court proceedings to date, to the actual enforcement pattern of the ordinance.

a. The ordinance, on its face, articulates a purpose aimed directly, if not exclusively, at expressive activities.

As the Pennsylvania Supreme Court noted, the preamble to the ordinance candidly acknowledges that it was adopted "for the purpose of limiting a recent increase in nude live entertainment." 719 A.2d at 279. (Jt. App. 42a.)

While the motivation for the *Barnes* statute was a condemnation of the general concept of public nudity (a concept having nothing to do with entertainment *per se*), Erie's ordinance, on its face, indicates that its purpose was content-based and aimed exclusively at expressive activities.

b. All of the council members who voted for this ordinance affirmatively stated their intent to use it to eliminate nude dancing in clubs and *not* to use it as a general anti-public nudity law.

As noted *supra*, the Erie City Council enacted its anti-nudity ordinance by a 4 – 2 vote. Immediately prior to the vote, all four members who voted in favor of the ordinance[3] made explanatory statements in the record about their imminent votes, indicating either that their primary target was expressive businesses or that they did not intend the ordinance to be enforced as a general and broad proscription of public nudity.[4]

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[3] I.e., Councilmembers Thompson, Brabender, Bagnoni and Maras.

[4] Councilmember Thompson's remarks appear at Jt. App. 38-41. He first clarified that the ordinance was not intended to be used to prohibit public nudity occurring in either "theatre or art" (Jt. App. 39), and then stated: "we're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." *Id.* Continuing, he states: "it is live pornography. It is not acceptable in this city." *Id.* at 40.

Councilmember Brabender's remarks appear at Jt. App. 41-42. To emphasize his point that the ordinance was not aimed at public nudity per se, he mentioned with approval a previous practice in an Erie high school where male students would always participate in swimming classes in the nude. *Id.* at 41. In contrast, to show where the intended enforcement of the ordinance would be placed, he condemned nudity occurring in clubs serving alcohol. *Id.* at 42.

Councilmember Bagnoni's remarks appear at Jt. App. 42-44. He made very clear that the focus of the ordinance was on nude dancing establishments, stating that "the girls can wear thongs or a g-string and little pasties that are smaller than a diamond." *Id.* at 43.

Councilmember Maras' remarks appear at Jt. App. 46-48. His sole focus was on the impact of the ordinance on exotic dancing establishments.

Finally, the primary intent to use this ordinance against nude dancing establishments was shown most clearly by Councilmember Brzezinski who, in voting *against* the ordinance, stated: "[W]e're not talking about nudity, we're not talking about people's choices, we're talking about three clubs, two of which – or three, all three, will be shut down in one form or another." Jt. App. at 45.

Based on the foregoing, the legislative record provides additional clarification that the primary purpose of this ordinance was to use it in an expressive context.

c. The City's attorneys have repeatedly stated that they would not apply this ordinance to all public nudity, but would only apply it to businesses such as Respondent's.

Erie's counsel have uniformly asserted below that the ordinance's intended enforcement target is primarily, if not exclusively, a particular type of expressive activity. For example, the following colloquy occurred at the interim injunction hearing of October 19, 1994 between Judge Levin of the Court of Common Pleas, and Mr. Karle, counsel for the City:

"THE COURT: . . . what effect would this ordinance have on theater – theater productions such as Equus, Hair, O Calcutta? Under your ordinance would these things be prevented, Mr. Karle?

"MR. KARLE: No, they wouldn't, your Honor.

"THE COURT: Why not?

"MR. KARLE: To the extent that the expressive activity that is contained in those productions rises to a higher level of protected expression, they would not be." Jt. App. 53.

Similarly, in the Pennsylvania Supreme Court, the City expressly asserted the intended "non-applicability of the ordinance to plays, ballets or other performances expressing messages beyond mere commercial eroticism." *See* page 1 of City's Brief For Appellees filed in the Pennsylvania Supreme Court. Having made such a statement, the City cannot now assert that either the purpose or the intended enforcement of this ordinance is content-neutral.

Again, the foregoing discussion does not resolve the ultimate First Amendment question of whether an ordinance so aimed is constitutionally sustainable; it only answers the question raised in the certiorari petition, whether there is a sufficient distinction between the present case and *Barnes* such that the Pennsylvania Supreme Court's decision did not violate the Supremacy Clause.

d. Pennsylvania's state indecency statute already prohibited most forms of non-expressive public nudity; the only additional conduct proscribed by the ordinance was expressive nudity.

In sharp contrast to the state ban on public nudity in *Barnes* (where Indiana legitimately argued that the statute served a content-neutral purpose of prohibiting all public nudity), Erie's ordinance was adopted in the face of a preexisting state statute which *already* prohibited public indecency (defined to mean any type of exposure of one's genitals

to the general unconsenting public). *See* Title 18 Pa. Cons. Stat. Ann. § 3127 which, when this ordinance was enacted, stated:

"A person commits a misdemeanor of the second degree if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm."[5]

Given the existence of this preexisting statutory scheme, virtually the only "real life" circumstances where the City's anti-nudity ordinance would provide any significant additional coverage would be expressive performances before willing adult audiences. Again, this provides additional support for the conclusion that this is a content-based ordinance.

e. The City allowed 'Equus' to go unprosecuted just two months after passing this ordinance.

The record clearly establishes that the City has *already* employed content-based discretion in determining whether to enforce this ordinance. Specifically, the City stipulated that it permitted a run of the play 'Equus' to go unprosecuted after the ordinance was in effect (Jt. App. 84), and the City's counsel made clear that this was deliberate city policy. (Jt. App. 53.) The City has repeatedly acknowledged that the sole reason it tolerated public nudity in 'Equus' was its belief that 'Equus' was constitutionally protected expression. This is a paradigm of content-based enforcement under an overbroad law.

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[5] After the enactment of the ordinance at bar, this statute was amended slightly in March of 1995 to clarify that it applied regardless of the sex of the potential offender and to create a heightened offense for exposure to a person under 16 years of age.

f. Unlike the Indiana statute in *Barnes*, this ordinance additionally reveals a speech-directed purpose by its unique prohibition of *simulated* nudity.

Further proof that this ordinance, unlike the statute in *Barnes*, had a primarily speech-directed purpose, is its novel prohibition of *simulated* nudity. Specifically, it prohibits performances by persons who wear: (1) any "costume or covering which gives the appearance of or simulates," *inter alia*, the "natal cleft;" or (2) any cover over the female breast which "simulates and gives the realistic appearance of nipples and/or areola." Cert. Petition, 12a-13a. Body stockings, for example, simulate the "natal cleft" and are therefore prohibited by the ordinance.

The obvious and exclusive purpose of this ban on *simulated* nudity is to prohibit the appearance of nudity solely in the context of expressive performances. Whether simulated nudity is more common in "legitimate" theater[6] or in so-called "barroom" dancing contexts, either way, such simulations occur almost uniquely in the context of *expressive performances*, again demonstrating that a speech-directed purpose underlies this ordinance.

g. Conclusion.

Because Justice Scalia carefully distinguished *Barnes* from a case like this one where either the enforcement or enactment of a restriction on nudity was focused primarily on expressive activities, *Barnes* does not control under the Supremacy Clause.

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[6] Such apparel is used frequently in the mainstream arts, including numerous ballets and opera, at least to the extent such performances do not *in fact* involve actual nudity. For example, in the 1986 production of Salome at the Los Angeles Opera company, Salome's famous dance of the Seven Veils was performed *au naturel* by the internationally acclaimed soprano Maria Ewing (consistent with the requirements of Strauss' original libretto). Moreover, as shown by Respondent's supporting amici, actual nudity is also not uncommon in modern dance.

2. *Barnes* did not address a facial challenge to an anti-nudity statute based upon its substantial overbreadth.

As Justice Souter made clear in his concurring opinion in *Barnes*:

> "[T]here is no overbreadth challenge before us [nor] are . . . [we] called upon to decide whether the application of the statute would be valid in other contexts. It is enough, then, to say that the secondary effects rationale on which I rely here *would be open to question* if the state were to seek to enforce the statute by barring expressive nudity in classes of productions [such as] . . . 'Hair' or 'Equus'." 501 U.S. at 585, n.2. (Emphasis added.)

Erie's ordinance, on its face, prohibits all nudity in productions such as 'Hair' or 'Equus' (as well as a wide variety of other live productions – *see, e.g.*, amicus brief filed by the Thomas Jefferson Center). The record dramatically demonstrates the chilling effect which this ordinance has on such productions notwithstanding the City's discretionary non-enforcement of the ordinance against *one* of these named productions.[7]

Based on this demonstrated chilling effect and the incredibly broad facial language of the ordinance, Respondent has consistently asserted that the present ordinance is substantially overbroad and therefore may not be enforced against anyone, regardless of whether a narrower ordinance could properly prohibit its own performances.

Because Justice Souter (whose vote was critical to the judgment in *Barnes*) expressly stated that his own rationale

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[7] At the trial court hearing on permanent injunction and declaratory judgment on December 21, 1994, counsel for two of the City's "legitimate" theaters, the Erie Playhouse and the Roadhouse, described for the court the impact the ordinance was having on such theaters. These remarks appear at Jt.App. 86-89 and give a classic "flesh and blood" [*New York v. Ferber*, 458 U.S. 747, 768 (1982)] example of the real-life chilling effect which inheres in the overbreadth of this ordinance.

"would be open to question" in a case presenting a substantial overbreadth challenge of this type, the judgment of the Pennsylvania Supreme Court could not violate the Supremacy Clause because such a challenge was never considered in *Barnes*.

Again, this is not to say how Justice Souter or any other member of this Court might decide the First Amendment merits of a substantial overbreadth challenge. Rather, the sole question raised by Erie is whether the Supremacy Clause mandates a reversal of the judgment of the Pennsylvania Supreme Court for its failure to follow *Barnes*. Clearly, it does not.

3. *Barnes* did not involve evidence of a discriminatory content-based enforcement pattern the operation and effect of which is a *de facto* standardless prior restraint.

Yet another important distinction between this case and *Barnes* is that even though the ordinance *facially* bans all forms of public nudity, the facts show a discriminatory enforcement pattern and a clearly expressed intent to apply this ordinance in a content-based manner under which City enforcement officials act as a *de facto* censorship board, allowing the exhibition of those nude performances which they subjectively believe to be "constitutionally protected" while threatening full enforcement of the law against any which they, pursuant to unwritten, unreviewable and wholly discretionary criteria, deem to be "unprotected." It is not at all clear that such a scheme would have been upheld under the "public morals" rationale offered by the opinion of the Chief Justice speaking for a three Justice plurality in *Barnes*.

Specifically, the *Barnes* plurality opinion, while reaffirming that nude "barroom" dancing is constitutionally protected speech (as did eight members of this Court), nonetheless upheld an outright ban on that speech based upon the Indiana Legislature's presumed content-neutral intention to protect public morals by banning *all* public nudity.

For example, after noting that "[t]he history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition" (501 U.S. at 568), the plurality noted that "the public indecency statute furthers a substantial government interest in protecting order and morality" (*id.* at 569), and concluded that this "interest is unrelated to the suppression of free expression." *Id.* Here, in contrast, as City officials have construed and applied it, the ordinance is very much related to the suppression of expression. Both the enacting City Council and the City's lawyers have repeatedly clarified that the City intends to make its own determination of which nude performances are "constitutionally protected" and to enforce the ordinance only against those performances which *it* finds lacking in sufficient value. This is the essence of a content-based restraint.

Because the plurality opinion did not address an anti-nudity law which, on its face, banned *all* public nudity, but, as construed and applied, was used as a tool for local censorship, it is not at all clear that each of the Justices signing the plurality opinion in *Barnes* would necessarily consider this the same case such that the rule of *Barnes* would control under the Supremacy Clause.

II

SHOULD THIS COURT REACH THE MERITS OF THE FIRST AMENDMENT ISSUES IN THIS CASE *SUA SPONTE*, THE JUDGMENT OF THE PENNSYLVANIA SUPREME COURT SHOULD NONETHELESS BE AFFIRMED

A. Respondent Does Not Seek Review Of The First Amendment Issues But Has Briefed Those Issues For This Court Should It Consider Them *Sua Sponte*.

The sole question presented in Erie's certiorari petition is whether the judgment below violated the Supremacy Clause by assertedly being inconsistent with *Barnes*. Respondent

agrees that this is the only issue properly before the Court and believes that it should prevail on that point.[8]

Nonetheless, aware that several of Erie's amici have urged this Court to reach the underlying First Amendment issues, and fearful that it might be deprived of any meaningful input should this Court choose that course, Respondent requests that *if* this Court, against Respondent's wishes, decides to adjudicate the constitutionality of Erie's ordinance, *sua sponte*, under the First Amendment, it consider all of the First Amendment arguments below. This Court has held that a respondent may raise issues in this Court even where not raised below, and even where not set out as questions presented in the Brief in Opposition.[9]

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[8] Even if this Court found a Supremacy Clause violation and were to vacate and remand to require the lower court to articulate why *Barnes* is distinguishable, Respondent believes it would prevail on such a remand.

[9] In *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the sole question presented concerned whether the judgment below correctly concluded that 28 U.S.C. § 2252 was constitutional. After narrowing § 2252 (and on that basis finding it constitutional), this Court noted that the respondents also wanted the lower court's judgment sustained on the alternative ground that a *different* federal statute (28 U.S.C. § 2256) was unconstitutional (even though there had been no mention of that statute in the Questions Presented of *either* party). The Court held:

> "These claims were not encompassed in the question on which this Court granted certiorari, but a prevailing party, without cross-petitioning, is 'entitled under our precedents to urge any grounds which would lend support to the judgment below.' " *Id.* at 78.

This Court then reached and rejected this alternative and newly raised ground. Although not spelled out in the opinion, the issue of the constitutionality of § 2256 was *also* not raised as a question presented in the *Respondent's* Brief in Opposition. (True copies of the Questions Presented from both the certiorari petition and the Brief in Opposition in *X-Citement Video* are attached hereto in Appendix B to this Brief.)

B. Erie's Ban On Public Nudity Is Facially Invalid To The Extent It Applies To Any Type Of Non-obscene Expressive Performances Before Willing Adult Audiences, Because It Is An Outright And Significant *Prohibition*, Rather Than A Mere *Regulation*, of A Particular Type of Expression At All Times, At All Places, and In Whatever Manner, Throughout An Entire City.

As set forth in Point I, the Erie ordinance, although facially content neutral, is clearly content based as construed and applied by City officials. Nonetheless, even if it had been enacted as a content-neutral general prohibition of public nudity, because its *effect* is a total and significant prohibition on the *content* of expression, it should be upheld only if it survives strict judicial scrutiny. For this reason, it should not be reviewed under the intermediate scrutiny of *United States v. O'Brien*, 391 U.S. 367 (1968).

Concurring with statements in numerous prior decisions of this Court,[10] eight members of this Court decisively held in *Barnes* that nude dancing, *including* even nude "barroom"[11] dancing, is protected by the First Amendment.[12] However, a

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[10] E.g, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *California v. LaRue*, 409 U.S. 109, 118 (1972) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

[11] The term "barroom dancing" is a partial misnomer here as the ordinance prohibits nude dancing regardless of the presence of alcohol.

[12] Although some Justices stated their belief that such dancing was at the outermost limit of First Amendment protection, at least eight Justices agreed such activity *was* protected by the First Amendment. *See*, e.g., 501 U.S. at 581 (concurring opinion of J. Souter); 501 U.S. at 566 (plurality opinion); and the four dissenters (*id.* at 587, *et seq.*). Indeed, Erie so concedes. *See*, e.g., Brief For Petitioner at 6-7 and 22-23. Of course, if such a performance were "obscene," no members of this Court would find it protected.

significant minority of this Court[13] analyzed the Indiana statute under the test of *United States v. O'Brien*, a test originally applied only to "symbolic expression" and subsequently found applicable "where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases."[14] The Chief Justice's plurality opinion suggests that the rationale for applying *O'Brien* was his perception that "the requirement that the dancers don pasties and g-strings does not deprive the dance of whatever erotic message it conveys." 501 U.S. at 571. Likewise, Justice Souter's opinion, while expressly concurring that an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection (501 U.S. at 581), nonetheless analyzed the Indiana statute under the *O'Brien* test, although without expressly articulating why it was applicable. Presumably, Justice Souter perceived the requirement to "don pasties and g-strings" as a *de minimis* and incidental burden on expression rather than a significant restriction of content.

While neither the plurality opinion nor Justice Souter's opinion presented a detailed explanation of why the *O'Brien* test was the appropriate method of analysis, *O'Brien* was in fact an inappropriate test, inconsistent with substantial precedent of this Court, and, more importantly, with underlying fundamental First Amendment principles.

The problem with applying *O'Brien* to a prohibition of performance nudity is that the *O'Brien* test was never intended to analyze total *prohibitions* of expression; its appropriate use was, as this Court noted in *Schad*, "where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases." 452 U.S. at 69, n.7. On its face, Erie's ordinance bans *all* nude expressive performances, regardless of the time, place or manner of the performance. Since this Court nearly unanimously ruled that

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[13] I.e., Justices Rehnquist, Kennedy, O'Connor and Souter.

[14] *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 69, n.7 (1981).

even nude "barroom" dancing is constitutionally protected expression, a complete *prohibition* of such expression (as distinct from a mere restriction or regulation of such expression), is the type of *direct* restraint on speech that has always been evaluated exclusively under a test of strict scrutiny.

O'Brien's chief flaw as a tool for analyzing such restrictions is that, contrary to certain equivocal suggestions appearing in three prior cases,[15] it is, on closer examination, *not* the equivalent of this Court's time, place and manner test, because the latter test contains one very important safeguard that is missing from the *O'Brien* test. Specifically, the third part of the time, place and manner test rejects even content-*neutral* restrictions on expression if they fail to allow "ample alternative channels"[16] for the regulated expression, i.e., the ability to convey the exact desired expression at some time, in some place, or in some manner.

Because a total prohibition of constitutionally protected nude dancing does not leave any alternative forum where such expression may occur, such a prohibition must fail under the time, place and manner test, regardless of whether it might otherwise survive scrutiny under *O'Brien* alone. The reason *O'Brien* does not have a requirement similar to the time, place and manner test's requirement of requiring "ample alternative channels of communication" is because, by its very design, the *O'Brien* test was never intended to apply in situations where ample alternatives for protected expression were foreclosed. In other words, as stated in *Schad*, *O'Brien* only applies in situations where a content-neutral statute only affects speech "incidentally or in a small number of cases."

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[15] *See*, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989); and *Barnes v. Glen Theatre, Inc.*, 501 U.S. at 566 (plurality opinion).

[16] *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

Yet, a total prohibition on constitutionally protected nude dancing is much more than an "incidental" restriction because it prohibits such expression in every single case where it might occur. It is simply a *total prohibition*.

Neither can there be any doubt that a total ban on nudity in expressive performances *significantly* alters the content of expression. As demonstrated in many of the amicus briefs supporting Respondent, nudity is a significant communicative element in a wide variety of expressive performances, whether in opera, ballet, "legitimate" theater, or the context of a theater or nightclub which primarily features such performances. Indeed, in the context of the very type of performances presented in Respondent's establishment, the progression of a striptease dance to the ultimate point of nudity was a key part of the communication, and was certainly so perceived by the audience (and, obviously, by the Erie City Council). Any assertion that the nudity is merely "incidental" to the communication would be utterly without factual or logical support.

The notion that restrictions on the amount or nature of a performer's clothing are not inherently restrictions of content is easily refuted. In several Islamic countries women are not permitted to expose even their *faces* or *ankles* in public. To do so is considered highly immoral. Suppose, for example, that a predominantly Moslem community in the United States enacted a law prohibiting the public exposure of women's faces or ankles. The rationale there, as here, would be the local governing body's perception of morality. As applied to directly prohibit constitutionally protected expression, such a law would be invalid in the absence of proof that it was necessary for the promotion of a compelling government interest. The same problem affects anti-nudity ordinances applied in the context of prohibiting nude performances before willing adult audiences. Anti-nudity laws such as Erie's are constitutionally indistinguishable from the hypothetical laws of such Moslem lawmakers who truly believe that a moral offense is committed when a woman exposes her

face or ankles in public. The First Amendment must require greater protection than uncritical deference to legislative determinations of morality where protected expression is at issue.

While a prohibition of the exposure of a woman's face or ankles in public is probably at the "outermost limits" of modesty-type legislation, the principle derived from the foregoing analysis is equally applicable to *any* governmental restriction on the clothing required of a performer. In other times in our own country, it was considered immoral for women to expose even their shins or shoulders in public. While rational basis review might apply to the analysis of such restrictions where First Amendment rights are not affected,[17] this Court has always imposed strict scrutiny where government relies on "morality" or "value" justifications as the sole bases for restrictions on communicative expression.[18]

To take another example, suppose that, as a revenue raising measure, a city required all performers to pay a

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[17] *See*, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (sodomy prohibition held not to implicate fundamental rights and upheld under rational basis test); and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (rational basis test used to uphold ban on "obscene" expression, held to be outside protection of the First Amendment). While the plurality opinion in *Barnes* cited these two cases in support of its assertion that restrictions on expression may be based exclusively on a governmental interest in protecting morality, Justice Scalia pointed out that this Court refused to find the existence of fundamental rights in either case and consequently the laws were simply upheld under a mere test of rational basis scrutiny. 501 U.S. at 580.

[18] For example, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) this Court held:

> "The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *Id.* at 382 (citations omitted).

license fee and, in order to facilitate enforcement, required all performers to wear a 4"x3" laminated copy of their municipal license on their right shoulder. This content-neutral restriction would be a direct and significant interference with the content of expression because it would interfere with the very message being communicated. If the requirement were enforced against the Metropolitan Opera company performing the opera Turandot, the incongruity of a Princess Turandot compelled to wear an identification card would surely not escape the attention of the First Amendment.

The point is simply that *any* interference with the costuming choices of an expressive performer (performing before a willing audience) is, by definition, an interference with the *content* of expression, even if the purposes for the restriction are themselves content-neutral. It forcibly substitutes government's choice of the content of expression for that of the playwright, choreographer, director or performer, and as such, it is anathema to our Constitution. Accordingly, it is critical that such restrictions be analyzed either under a direct compelling interest test or, alternatively, under the test for time, place and manner restrictions with the safeguard of ensuring ample alternative channels for the communication. In the context of the hypothetical requirement to wear a "performer permit" or of the requirement not to expose the female face in a performance, it is clear that there are *no* ample alternative channels for such communications, because the desired First Amendment performance (i.e., one where the performer's face is visible or where the performer's appearance is not altered by a governmentally-required permit) is prohibited at all times, in all places, and in all contexts. It is the same with the City's outright prohibition of all performance nudity in Erie.

Finally, this Court has already articulated a two-part test for determining whether a law is a significant restraint on the *content* of expression (again, regardless of whether the *purposes* for the law are content-neutral). In *Spence v. Washington*, 418 U.S. 405, 410-11 (1974), this Court determined that

conduct is expressive when the following two factors are present: (1) intent to convey a particularized message; and (2) a substantial likelihood that the message will be understood by those receiving it. Nude performances easily meet these two tests. Whatever else one may say about it, the actual nudity at the conclusion of a striptease dance communicates an image or message that is simply not the same if the striptease does not proceed to its ultimate conclusion.[19] Likewise, it is quite certain that any audience would fully understand and appreciate the difference. No nightclub featuring erotic dancers with g-strings and pasties could stay in business long if its otherwise indistinguishable competitors offered performances which culminated in nudity. As shown in the study attached to the amicus brief of Bill Conte, *et al.* (at App. 15, *et seq.*), significantly different messages are in fact communicated to audiences depending on whether dancers performing virtually identical dances dance either nude or wearing the equivalent of pasties and g-strings.

In short, whether measured from the test of *Spence*, or simply from the common sense notion that restrictions on the costuming choices of expressive performers and/or directors are *inherently* restrictions of content, it is clear that Erie's ordinance is a *direct* prohibition, rather than an incidental or insignificant one, and it leaves *no* alternatives (ample or otherwise) for the same communication. As such, *O'Brien* is inapplicable and the ordinance likewise cannot be sustained as a time, place and manner restriction. Accordingly, Erie's ordinance may only survive, if at all, pursuant to application of a compelling interest test.

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[19] As stated by Justice Souter in his concurrence in *Barnes*:

"[W]hen 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.

C. As Construed And Applied By City Officials, Erie's Ban On Public Nudity Is Also Invalid Because It Was Enacted For Demonstrably Content-Based Purposes.

The prior point assumed, *arguendo*, the content-neutrality of the legislative purposes underlying this ordinance, but asserted its invalidity because it is a direct restraint on the content of expression and is neither incidental, nor a legitimate time, place and manner restriction.

In contrast, this point will demonstrate that even the asserted "justifications" for the ordinance are not content-neutral. Accordingly, for this reason as well, the Erie ordinance is subject to strict scrutiny and not reviewable under the *O'Brien* test. As this Court stated in *Texas v. Johnson*, 491 U.S. 397, 403 (1989):

> "If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of non-communicative conduct controls. . . . If it is, then we are outside of *O'Brien's* test."

The opinions of both Justice Scalia and the plurality in *Barnes* made clear that truly content-neutral purposes motivated Indiana to enact its broad ban on public nudity in the Nineteenth Century. However, that is certainly not the case here. Erie's ordinance is not supported by a general content-neutral rejection of the concept of public nudity[20] but, instead, was enacted for the clear and conceded purpose of prohibiting public nudity only in the context of particular types of expressive performances disfavored by four Erie Council members. Although the ordinance appears *facially* content-neutral (at least in its prohibitory sections as distinct from the statements of purpose in its "Whereas" clauses), both the members of the City Council who voted for it and the City's attorneys have consistently indicated their intention to

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[20] Indeed, the City allowed public nudity in performances of Equus at the Roadhouse Theater (Jt. App. 84 and 53) and did so deliberately (Jt. App. 53).

exempt from enforcement those performances which *they* deem to be of greater value, i.e., to be sufficiently significant to merit constitutional protection. This record reflects only that they deemed 'Equus' to merit constitutional protection but not the erotic dancing performances at Respondent's former nightclub. It is not clear how the City would apply the ordinance to a wide variety of other constitutionally protected conduct involving performance nudity (numerous examples of which are provided in the supporting amicus brief of the Thomas Jefferson Center).

Where a governmental entity enacts a restriction on expression for an assertedly content-neutral purpose, this Court has required that the content-neutral justifications for the ordinance affirmatively appear in the legislative record *prior* to enactment. *See*, e.g., *Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180, 195, 211 (1997)[21]. This

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[21] In *Turner II*, this Court applied "intermediate First Amendment scrutiny under *United States v. O'Brien*" (520 U.S. at 185) in analyzing the asserted content-neutral justifications offered by the Government in support of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act. The parties challenging that act had asserted that "the must-carry law is not necessary to assure the economic viability of the broadcast system as a whole." 520 U.S. at 211. This Court rejected that contention, stating that it was irrelevant whether Congress was in fact *correct* in determining the necessity for the Act, so long as it *in fact* considered substantial evidence from which it could reasonably conclude the need for the Act:

> "This assertion misapprehends the relevant inquiry. The question is not whether Congress, as an objective matter, was correct to determine must-carry is necessary. . . . Rather, the question is whether the legislative conclusion was [1] reasonable and [2] supported by *substantial evidence in the record before Congress*." 520 U.S. at 211 (emphasis added.)

While both *Turner Broadcasting System v. F.C.C. (Turner I)*, 512 U.S. 622 (1994) and *Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180 (1997), clarified that post-hoc evidence is permissible for determining whether a content-neutral law is "narrowly tailored," the cases stand for the proposition that before one even examines a law for narrow tailoring, the

requirement of pre-enactment consideration of an ostensibly content-neutral justification by the legislative body, provides at least a *minimal* degree of protection against blatantly content-based restraints masquerading under the pretext of content-neutrality. As Justice O'Connor noted in her concurring opinion in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986), this Court must continually be on the alert for the *pretextual* assertion of content-neutral secondary effects where the real motivation is one of censoring that which is inconsistent with the moral values of the enacting body. Indeed, as Justice O'Connor stated subsequently in her concurrence in *City of Ladue, supra*: "content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others." 512 U.S. at 60.

Here, Erie has done precisely what Justice O'Connor warned against; it has established a facially content-neutral blanket restriction, but then arbitrarily decides which nude performances it wishes to prohibit.[22] In short, it is valuing "some forms of speech over others." *Id.* at 60.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), this Court made the following analogous point:

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initial determination of whether the law is in fact *content-neutral* must be established by virtue of evidence *in fact* considered by the enacting body.

This is not inconsistent with this Court's statement in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) where it ruled that cities need not re-invent the wheel by producing their own evidence, but must, nonetheless, rely upon evidence which "is reasonably believed to be relevant to the problem that the City addresses." *Id.* at 51-52. *Cf. United States v. Virginia*, 518 U.S. 515 (1996) where, in another case involving an "intermediate" level of scrutiny (i.e., less demanding than strict scrutiny but more rigorous than rational basis scrutiny) this Court, in the context of an asserted gender-based equal protection violation, stated:

> "The justification must be genuine, not hypothesized or invented *post-hoc* in response to litigation." *Id.* at 533.

[22] This is in sharp contrast to the content-neutral enforcement policy found controlling by Justice Scalia in *Barnes*. 501 U.S. at 574.

> "Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384 (emphasis in original).

Similarly here, assuming that the City could permissibly enact a broad content-neutral ban on public nudity, absent a compelling interest it could not make the further content discrimination of arbitrarily proscribing only certain nude performances but not others. Because such a restriction raises the likelihood of content-based discrimination, any asserted justifications for such a content-based restriction must be carefully examined under strict scrutiny.

For all the reasons above, the ordinance is not only impermissible because it is a direct, significant, and total prohibition of the content of constitutionally protected expression, but also because the record demonstrates no adequate content-neutral justification. While the presence of such evidence in the record would not necessarily guarantee that the ordinance had in fact been enacted for truly content-neutral purposes, the absence of such evidence virtually assures that it was not.

D. The City Has No Compelling Interest Which Would Justify A Direct Content-Based Restraint Upon Expression.

No member of this Court has *ever* suggested that prohibiting nudity in performances before adult audiences is necessary for furtherance of a *compelling* governmental purpose, nor is any such purpose identified in the legislative record.

E. To The Extent It Applies To Expressive Performances Involving Nudity Before Willing Adult Audiences, Erie's Public Nudity Ban Also Violates The First Amendment For Failure To Require Proof Of Obscenity Under The Test Provided In *Miller v. California*, 413 U.S. 15 (1973).

Precisely because of the inherent dangers to expression where local legislators are allowed to control the content of

expression, a majority of this Court, after struggling for decades, agreed on a test for obscenity. *Miller v. California*, 413 U.S. 15 (1973). In defining "obscenity," this test provides significant safeguards against unrestrained government censorship of protected expression. For example, it ensures that before any particular performance is found to be a criminal or punishable act, it must not only lack serious literary, artistic, political or scientific value, but it must also exceed contemporary community standards, a test which applies on a work-by-work basis. The yardstick of contemporary community standards in the obscenity test is critical if sufficient "breathing space" for protected expression is to survive in this country because it ensures that individual legislators cannot condemn that which the community generally tolerates.[23]

Pennsylvania has recognized the appropriateness of using the *Miller* test as the basis for determining whether a live performance violates commonly accepted community values. Pennsylvania's state obscenity statute, 18 Pa. Cons. Stat. Ann. § 5903 (a)(5) (as amended, 1990) proscribes nudity in performances, but *only* when such performances are in fact "obscene." This is consistent with Justice Souter's observation in *New York v. Ferber*, 458 U.S. 747, 778 (1982), that:

> "[t]he question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context."

Neither the Constitution, nor contemporary community standards, are blind to the significant distinction between the nudity of a "flasher" on a public street and the nudity of a dancer or actor performing before a willing adult audience.

[23] Indeed, the genesis of the concept of "contemporary community standards" derives from Justice Harlan's opinion for the Court in *Smith v. California*, 361 U.S. 147, 171 (1959), where he stated: "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." This is a critical and fundamental constitutional principle which this Court has observed for nearly half a century, and which is in direct variance to the anti-nudity ordinance at issue here.

Application of this Court's obscenity test will ensure that only those live performances which in fact exceed community standards will be prohibited.

F. To The Extent It Applies To All Types Of Expressive Performances Before Adult Audiences, The Erie Ordinance Is Also Facially Invalid Due To Its Substantial Overbreadth On Parties Not Before The Court.

Notwithstanding the assurances of Erie officials that they will exert great discretion in the enforcement of their anti-nudity ordinance, it facially bans *all* nude performances in Erie and, because of the lack of any precise guidelines to restrict the discretion of City officials, has an enormous chilling effect on parties not before the Court.

The record reflects that when the ordinance was passed, there were three nightclubs in Erie presenting nude dancing,[24] and also two "legitimate" theaters (the Erie Playhouse and the Roadhouse Theater) which desired to stage dramatic performances which included nudity. At the request of the trial judge, an attorney representing these two local theaters described the ordinance's chilling effect on these theaters. Jt. App. 86-89. After noting that the Erie Playhouse had "performed productions like 'Hair' and 'Bent' " and that the Roadhouse Theater had "recently performed 'Equus'," he observed the following:

> "Each [of the performances noted above] has nudity and strong adult content. The decision regarding nudity in each performance was up to the director's and actor's interpretation. The decision was not affected by a government imposed standard that is subject to varying interpretations by government officials who do not share the same opinion regarding the artistic, literary, social content or importance of the production as the members of the public, the cast and the production staff. Should an

[24] *See* Jt. App. 45, remarks of Council member Brzezinski.

important production be stopped or not presented because one or two members of a government organization with the power to enforce the laws believes it lacks serious artistic, literary or social content?" *Id.* at 87.

Continuing, he noted:

"The Playhouse should not be forced into the position of defending any production that it presents. They should not be forced to adopt contingency plans in the event that a government official tries to close a play or arrest a member of a cast or director. That act alone stops the production, damages the organization and forces the expenditure of scarce funds to defend against the government action. As long as these possibilities exist, they chill my clients' freedom of speech and expression. The presentation and subjective interpretation of a play is a guaranteed constitutional right." Jt. App. at 87-88.

The chilling effect of an ordinance such as this one is indeed severe because much of "legitimate" theater operates on a very thin margin and cannot afford to risk undertaking productions which the City might close. Because there are no precise guidelines governing the discretion of City officials, the Erie Playhouse and the Roadhouse Theater must err on the side of caution, as it is impossible to know how the City will apply the ordinance in any particular circumstance.

Moreover, as indicated in the amicus briefs filed by the Thomas Jefferson Center and Bill Conte, *et al.*, the scope of "traditional" arts performances which include nudity is indeed quite substantial. Neither are the most notable examples limited to older productions such as 'Hair,' 'Equus,' 'O Calcutta,' or the 'Ballet Africains'. As indicated in the record, the Erie Playhouse had previously performed 'Bent,' and one of the most popular productions on Broadway in the past year has been 'The Blue Room,' made nationally famous by Nicole Kidman's nude performance. Beyond this, nudity is *extremely* common in lesser-known theatrical productions and contemporary ballet. Moreover, as noted previously herein, actual

nudity occurs occasionally even in opera. *See* n.6, *supra*. Unquestionably, the ordinance prohibits considerable serious theatrical, dance, and musical expression.

Respondent may assert the rights of others not before the Court in bringing a facial challenge to an overly broad law. *See*, e.g., *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 956-958 (1984); *Thornhill v. State of Alabama*, 310 U.S. 88, 97 (1940); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Bigelow v. Virginia*, 421 U.S. 809, 815-816 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-380 (1977); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633-635 (1980); and *American Booksellers Association, Inc. v. Virginia*, 484 U.S. 383, 397 (1988).

As described in *Joseph H. Munson Company, Inc., supra*:

"Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society – to prevent the statute from chilling the First Amendment rights of other parties not before the court." 467 U.S. at 958.

In *New York v. Ferber*, 458 U.S. 747 (1982), following the guidelines of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), this Court emphasized that the overbreadth of the statute must be "substantial" before a party will be allowed to challenge it facially by asserting the rights of others not before the Court. Consistent with *Ferber*, the record and briefing herein reflect that the overbreadth is indeed substantial, particularly given the voluminous "flesh-and-blood" (458 U.S. at 768) examples provided in the amicus brief filed by the Thomas Jefferson Center, as well as the record statements by counsel for the two Erie dramatic theaters. Indeed, given the fact that only one of the original three nude dancing establishments continues to exist in Erie, the number of theaters on whose behalf this "substantial overbreadth" is asserted indeed *exceeds* the number of presently operating businesses which the City would assert are legitimately reached by the statute. In short, there is ample standing to bring a substantial

overbreadth attack in this case. Moreover, this point was raised at every stage of the appellate record below.

For all the reasons above, even if this Court were to reject all of Respondent's other challenges to Erie's ordinance, it should still find it facially invalid because of its substantial overbreadth in its censorial impact on others not before the Court.

G. As Construed And Applied By Erie Officials, The Ordinance Violates The First Amendment By Establishing A *De Facto* Local Censorship Board Which Administers A Discretionary System Of Prior Restraint.

The combination of the ordinance and the City's intentionally discriminatory enforcement scheme establishes a system of impermissible prior restraint analogous to the standardless licensing laws which this Court has consistently condemned.[25] In essence, City officials created a broad statutory net (prohibiting *all* performance nudity) but then exercise their unfettered discretion by employing content-based criteria to selectively enforce the ordinance only against those performances of which they disapprove.[26] The City has

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[25] *See*, e.g., *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), and numerous cases cited therein.

[26] Compare *Kolender v. Lawson*, 461 U.S. 352 (1983) where this Court struck down, on vagueness grounds, a statute requiring vagrants to provide "credible and reliable" identification, condemning it because it failed to " 'establish minimal guidelines to govern law enforcement.' " *Id.* at 358, quoting from *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Because the statutory net is so broad, it allows " 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Id.* at 358, quoting from *Smith*, 415 U.S. at 575.

Likewise, as this Court noted in *City of Houston v. Hill*, 482 U.S. 451, 466-467 (1987), quoting from *United States v. Reese*, 92 U.S. (2 Otto) 214, 221 (1876):

> "[I]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained."
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> "Houston's ordinance criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily . . . , yet only some individuals – those chosen by the police in their unguided discretion – are arrested." *Id.* at 466-467.

proclaimed that it will exercise its own value judgments in picking and choosing between those nude performances which will and will not be prosecuted and will do so based on *its* perception of which performances are constitutionally protected (even though this Court has said that even nude barroom dancing is constitutionally protected). *See*, e.g., Jt. App. 53 where the City's attorney candidly informed the trial court that productions such as 'Equus,' 'Hair,' and 'O Calcutta' will not be prosecuted "[t]o the extent that the expressive activity that is contained in those productions rises to a higher level of protected expression. . . . " *Id. This is precisely what the First Amendment forbids!*

The ordinance's failure to provide guidelines by which City censors may determine whether a particular work does or does not attain this "higher level of protected expression" violates a host of this Court's decisions striking vague schemes of censorship. In *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610, 617 (1976), this Court held that a municipal ordinance violated the First Amendment because it vested "in municipal officials the undefined power to determine what messages residents will hear." Just as discretionary licensing schemes have been routinely condemned by this Court as impermissible prior restraints (*see* n.25, *supra*), Erie's system is similarly flawed. Its ordinance flatly prohibits all expression of a certain type, but its municipal

officials then decide which otherwise-prohibited performances will be allowed. This combination acts as a classic example of prior restraint. In essence, all speech is prohibited until municipal officials, applying unwritten and subjective standards, decide which speech will be allowed.

Similarly, in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968), this Court struck down an ordinance banning the exhibition of films deemed "not suitable for young persons." *Id.* at 680. The defect in that case was the ordinance's failure to provide clear standards for determining which films would be prohibited and which would be permissible. Consequently, it allowed local officials to play the role of unbridled censors, just as the Erie ordinance does here through the City's selective enforcement policy.[27]

Likewise here, Erie has cast a broad net proscribing all nude performances, but then informally, and subject to unwritten and arbitrary standards, establishes content-based exemptions. As this Court stated in *Ladue v. Gilleo*, 512 U.S. 43 (1994):

> "[T]hrough the combined operation of a general speech restriction and its exemptions, the government might seek to select the 'permissible subjects for public debate' and thereby to 'control . . . the search for . . . truth.' " *Id.* at 2043.

Nor is there anything to guarantee that all City officials will apply the ordinance consistently, nor that subsequent City administrations will do so either. In short, this is the ultimate example of a standardless, discretionary prior restraint.

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[27] This Court noted that its holding in *Interstate Circuit* was consistent with numerous prior cases prohibiting censorship schemes based upon vague concepts of protecting public morals. 390 U.S. at 682-683.

H. Even If The Ordinance Did Not Directly Prohibit A Unique Type Of Protected Expression, It Could Not Be Sustained Under *O'Brien*'s Intermediate Scrutiny Test.

Even if Erie's anti-nudity ordinance did not directly prohibit the content of protected non-obscene expression, it would still fail under the intermediate scrutiny test of *United States v. O'Brien*. In *Barnes*, four members of this Court concluded that an Indiana public anti-nudity statute of truly general application could withstand scrutiny under *O'Brien*. For at least three distinct reasons, the present ordinance cannot survive such scrutiny.

1. Contrary to the Indiana statute in *Barnes*, the Erie Ordinance cannot survive under *O'Brien* because its enactment was not unrelated to the suppression of free expression.

The Indiana statute in *Barnes* represented what is likely to be a very rare circumstance; an anti-nudity statute of truly general application which was enacted with no thought of suppressing any type of expressive performances. As such, the four members of this Court who considered *O'Brien* applicable in *Barnes* concluded that the Indiana statute met the *O'Brien* requirement that the law be "unrelated to the suppression of free expression." 391 U.S. at 377. In sharp contrast, the Erie ordinance announces that it was enacted "for the purpose of limiting a recent increase in nude live entertainment within the City." Cert. App. 42a. Since eight members of this Court decisively ruled in *Barnes* that live nude entertainment was in fact within the protection of the First Amendment, Erie's ordinance proclaims a specific purpose to limit or suppress protected expression.

Likewise, the comments of each of the four City Council members who voted for this ordinance indicated their intention to use it primarily, if not exclusively, against live nude entertainment establishments. Jt. App. 36-48. Also, given that Pennsylvania already had a public indecency statute which

effectively prohibited all non-consensual public nudity, the Erie ordinance could have served little purpose *other than* the prohibition of nudity in consensual expressive performances. As if this were not enough, the City's own attorneys have affirmed that the City intends to discriminate between those nude performances it favors and those it disfavors (even though all of them are, under the holding in *Barnes*, within the protection of the First Amendment). This is the clearest possible evidence that this ordinance is not unrelated to the suppression of free expression.

For all of these reasons, the Erie ordinance clearly fails *O'Brien*'s requirement that the governmental interest be unrelated to the suppression of free expression.

2. The Erie Ordinance also fails *O'Brien*'s requirement that it further "an important or substantial governmental interest."

Even apart from its failure to meet *O'Brien*'s requirement that it be unrelated to the suppression of expression, Erie's ordinance also fails because of an inadequate demonstration that it furthers any "important or substantial governmental interest." *O'Brien*, 391 U.S. at 377.

In *Barnes*, four Justices, applying two differing rationales, expressed their belief that Indiana's broad and generally applicable anti-public nudity statute furthered a sufficiently substantial governmental interest to satisfy *O'Brien*. However, neither the reasoning of the plurality nor Justice Souter's concurring opinion in *Barnes* should be applied to sustain the ordinance challenged *here*.

a. The Erie Ordinance cannot be upheld by the mere assertion of a governmental interest in promoting public morality.

The Chief Justice's opinion for the plurality in *Barnes* concluded that the Indiana statute satisfied *O'Brien*'s requirement that it further an important or substantial governmental

interest based upon the assertion of "a substantial government interest in protecting order and morality." 501 U.S. at 569. No other members of the Court agreed that such a purpose was a permissible one for a restriction on protected expression, and at least five Justices clearly rejected that approach.[28] Accordingly, *Barnes* itself is precedent for the conclusion that a majority of this Court has rejected the notion that a societal interest in protecting order and morality can, alone, justify the application of an anti-nudity ordinance in the context of expressive performances before willing adults.

More significantly, it is not at all clear that all of the Justices comprising the *Barnes* plurality would find Erie's governmental interests identical to Indiana's, because there is direct evidence that *Erie* did not consider *all* public nudity to be inherently immoral (having declared that public nudity in performances such as 'Equus' and 'Hair' would be allowed). Such concessions undermine the credibility of Erie's assertion that the interests underlying its ordinance are substantial or important.[29] Stripped to its essentials, Erie is really saying that it has a moral interest in banning those nude performances it dislikes, but not those it favors. Unlike Indiana, it does not assert an interest in preventing *all* public nudity or even *all* nude performances. Accordingly, this Court need not

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[28] Justice Souter (who concurred in the judgment) expressly rejected the assertion that promotion of public order and morality was a sufficiently substantial governmental interest under *O'Brien* to justify a restriction on expression. The four dissenters, of course, necessarily rejected the "public morality" position of the plurality opinion.

[29] *See*, e.g., *Ladue v. Gilleo* where this Court stated:

> "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. *See*, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-426 (1993)." *Id.* at 52-53.

even reject the plurality's reasoning in *Barnes* to reject its application in the present case.

Beyond that, the position taken by the plurality in *Barnes* is inherently dangerous because it places the protection of expression on a precariously slippery slope. What is considered "immoral" or "immodest" is inherently subjective and arbitrary. One municipality's city council may have a totally different concept of what is "immoral" or "immodest" than either its own successors or predecessors or the legislative body of a neighboring township. In the earlier hypothetical, a small community with an Islamic majority on its City Council could, in good faith, prohibit women from showing their faces in public. If an interest in "protecting order and morality" were sufficient, *per se*, for a restraint on expression, such an ordinance would be permissible and, as in *Barnes*, would be unrelated to expression (according to the rationale of the plurality opinion) because it would apply to persons walking on public sidewalks as well as those engaging in expression.

Between the extremes of Erie's anti-nudity ordinance and an anti-facial exposure ordinance are innumerable "morality-based" clothing requirements that could be imposed by local governments, varying with the tastes, preferences or values of those few persons constituting a majority of the local legislative body. In short, morality alone is the most dangerous of all principles upon which to base the validity of speech-affecting legislation. The First Amendment requires much more to uphold a restriction on content than that the enacting body asserts a genuinely held belief that it is necessary for "protecting order and morality." 501 U.S. at 569.

This Court long ago resolved whether morality concerns alone could justify the suppression of constitutionally protected expression. *See*, e.g., *Kingsley International Pictures Corp. v. Regents of the University of The State of New York*, 360 U.S. 684 (1959), involving a film licensing statute which facially prohibited the licensing of "immoral" films but which, as narrowly construed by the New York Court of Appeals, only prohibited a motion picture "which approvingly

portrays an adulterous relationship." *Id.* at 688. As a result of the narrowing construction, this Court did not address the statute's potential vagueness but, instead, squarely addressed the question of whether morality concerns alone may form a permissible basis for a restraint on expression. This Court flatly rejected the concept that, absent obscenity, a state may ban speech solely because it "is contrary to the moral standards [or] the religious precepts . . . of its citizenry." *Id.* at 688.

Likewise, in the absence of proven obscenity, this Court has repeatedly held that expression may not be prohibited simply because it may be perceived as lewd, immoral, or indecent[30] nor may nudity alone form the basis for a prohibition of expression. *See*, e.g., *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) ("nudity alone is not enough to make material legally obscene"); and *New York v. Ferber*, 458 U.S. 747, 765-766, n.18 (1982) ("nudity, without more, is protected expression"); and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (*accord*).

b. The ordinance cannot be upheld based upon Erie's assertion of a governmental purpose in preventing "secondary effects."

There are two compelling reasons why this Court should not adopt the position which Justice Souter articulated in *Barnes*. First, it would represent a significant departure from this Court's precedent, allowing for the first time essentially rational basis scrutiny for a restriction on expression. Second, it would allow use of "secondary effects" as a basis for meeting the *O'Brien* test, even though the statute upheld in *O'Brien* was concerned exclusively with the *direct* effects of its violation and only because of that did this Court uphold

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[30] *See*, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997); *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989); and *Miller v. California*, 413 U.S. 15 (1973).

the statute without examining the record for proof of content-neutrality.

(1) This Court should not adopt rational basis scrutiny for *any* restriction of constitutionally protected expression.

One of the difficulties with Justice Souter's analysis of the statute in *Barnes*, is that it permits content-neutrality to be determined by *post-hoc* assertions of "secondary effects," even if such effects were never actually considered by the enacting legislature.[31] This, is not even "intermediate" scrutiny but, instead, is the distinguishing characteristic of mere "rational basis" scrutiny whereby any *post-hoc* justification may sustain legislation. Because of the ease with which "*post-hoc* rationales" may be hypothesized to support virtually any pretextual legislation, such justifications have never been tolerated in expression cases where the dangers of censorship masquerading under the guise of content-neutral legislation are so severe.

The only case cited in Justice Souter's *Barnes* concurrence in support of this method of *post-hoc* analysis is *McGowan v. Maryland*, 366 U.S. 420 (1961). However, *McGowan* is inapposite because the use of rational basis scrutiny there did not involve any expressive interest or other recognized fundamental constitutional right. Specifically, in *McGowan*, this Court upheld a Sunday closing law requirement against the challenge of "seven employees of a large discount department store." 366 U.S. at 422. This Court concluded that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426. However, the fact that *McGowan* did not

[31] "Our appropriate focus is not an empirical enquiry into the *actual* intent of the enacting legislature, but rather the existence or not of a *current* governmental interest in the service of which the challenged application of the statute may be constitutional." 501 U.S. at 582. (Souter, J., concurring, emphasis added.)

involve infringement of any fundamental rights is evidenced by this Court's observation there that the defendants who challenged the Sunday closing law "allege only economic injury to themselves; they do not allege any infringement of their . . . religious freedoms. . . . In fact, the record is silent as to what appellants' religious beliefs are." Accordingly, the use of rational basis scrutiny to uphold a law based solely on *post-hoc* justifications was unremarkable in *McGowan* because this Court did not recognize the presence of any threat to First Amendment rights in that case.

Moreover, Justice Souter's concurrence in *Barnes* now conflicts with a recent square holding of this Court in *Turner II* that in intermediate scrutiny cases using the *O'Brien* test, the content-neutrality of a statute must be affirmatively demonstrated by evidence in the original legislative record (520 U.S. at 185, 195, 211[32]), rather than by *post-hoc* (and therefore more likely pretextual) justifications. *Cf. United States v. Virginia*, *supra*, 518 U.S. at 533 ("[t]he justification must be genuine, not hypothesized or invented *post-hoc* in response to litigation").

(2) *O'Brien* itself did not authorize upholding a law based on so-called "secondary effects."

O'Brien is also quite distinguishable in that the statute was not justified on the basis of any asserted "secondary" effects, but rather because of the *direct* harm caused by the prohibited act itself, i.e., the destruction of the draft card. Where a prohibited act itself directly causes injury, there is no

[32] This Court stated that, under *O'Brien*'s test of intermediate scrutiny (520 U.S. at 185), its "sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences *based on substantial evidence*' " (*id.* at 195) (quoting from *Turner I*, 512 U.S. at 666, emp. added), and that a content-neutral purpose must be "supported by substantial evidence *in the record before Congress*." (*id.* at 211, emp. added).

need for a documented legislative record to demonstrate the content-neutrality of the government's purposes; such purposes are obvious from the harm which is directly prohibited. In contrast, where the only rationale offered for a speech restriction is prevention of asserted "secondary" effects, the potential for pretextual legislation is far greater and compels, as held in *Turner II* and *U.S. v. Virginia*, rejection of proposed *post-hoc* justifications.

3. This Court has consistently rejected the notion of a secondary level of protection for any type of non-commercial expression, including sexually oriented expression.

While this Court has developed a very limited number of categories of expression which are deemed to lack First Amendment protection (e.g., obscenity, child pornography, libel, and speech posing a "clear and present danger"), a majority of this Court has consistently *rejected* the proposition that the amount of protection for non-commercial[33] protected expression could vary according to the value attributed to it by any five members of this Court.[34] *See*, e.g., Judge Kozinski's opinion in *United States v. United States District Court (Kantor)*, 858 F.2d 534, 541-542 (9th Cir. 1988), summarizing this Court's initial explorations of this issue and this Court's rejection of the contention (which originated with a plurality opinion in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 70-71 (1976)), that sexually oriented expression

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[33] I.e., speech which does no more than propose a commercial transaction.

[34] *See*, e.g., *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 762-763 (1978), where Justice Brennan's dissenting opinion noted:

> "For the second time in two years . . . , the Court refuses to embrace the notion, completely antithetical to basic First Amendment values, that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of the Court."

is entitled to a lesser amount of constitutional protection than other protected expression. A majority of this Court clearly rejected that proposition in both *Young* and *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 761-62, n.4 (1978), and concurring opinion of Justice Powell, *id.* at 762-763.

More recently, a majority of this Court implicitly, but decisively, again rejected the notion that sexually oriented expression is entitled to a lesser degree of protection than other expression in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). In *FW/PBS*, the Fifth Circuit Court of Appeals had expressly refused to apply this Court's prior restraint doctrine to Dallas' adult business licensing ordinance on the asserted ground that sexually oriented businesses are entitled to less First Amendment protection than other types of protected expression. *FW/PBS, Inc. v. City of Dallas*.[35] However, this Court disagreed and accorded full prior restraint scrutiny to Dallas' licensing scheme, even though the only expression involved was sexually oriented.

Consistent with the foregoing, this Court has repeatedly reaffirmed the constitutionally-protected status of non-obscene sexually oriented expression not involving minors and has not qualified that protection in any way. *See*, e.g., *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989)[36]; and *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994)[37].

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[35] After first conceding that prior restraint standards apply fully to the licensing of *religious* activity, the Fifth Circuit stated:

> "[T]he First Amendment protection required for religious activity . . . is a different order than the protection due sexually oriented businesses.
>
> "We find that the Dallas ordinance, like the ordinance before the Court in *Renton*, regulates only the secondary effects of sexually oriented businesses. For this reason, the Ordinance need only meet the standards applicable to time, place, and manner restrictions." *Id.* 837 F.2d 1298, 1302-1303 (5th Cir. 1988).

[36] "Sexual expression which is indecent but not obscene is protected by the First Amendment; and the federal parties do not submit that the sale

Finally, *Barnes* is not to the contrary. Other than Justice Scalia, every member of this Court held that even sexually oriented expression involving live nude performances is protected by the First Amendment. No Justice suggested that material even at the outermost limits of First Amendment protection is somehow subject to a lesser level of protection than other expression or that some necessarily arbitrary "sliding scale" of protectedness should be created for expression. In short, this Court's precedents establish that material either *is* or *is not* constitutionally protected and the relevant standards and protections for speech do not and should not vary depending upon its subject matter.

4. The ordinance is not narrowly tailored to establish a reasonable fit between its purposes and its scope.

a. Because there is no *pre-hoc* evidence of either direct or secondary harms in this record, the Court should not even *reach* the "narrow tailoring" issue.

As noted above, the Erie City Council had before it no evidence of any direct *or* secondary harms caused by nude entertainment. Accordingly, under the test of *Turner II*, the ordinance cannot be deemed content-neutral and, consequently, this Court should not even *reach* the issue of narrow tailoring. *Turner II* holds that where intermediate scrutiny

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of such material to adults could be criminalized solely because they are indecent. The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Id.* at 126.

[37] "[N]onobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment. [Citations omitted.] In the light of these decisions, one would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults." *Id.* at 72-73.

applies under the *O'Brien* test, *post-hoc* justifications are impermissible, at least for proving content-neutrality.[38]

b. Even if *post-hoc* evidence of secondary effects could properly be considered to demonstrate content-neutrality, this record contains no such evidence.

Notwithstanding *Turner II* and *U.S. v. Virginia*, if this Court were nonetheless inclined to allow content neutrality to be proven by *post-hoc* evidence, Erie would still be unable to demonstrate content-neutrality because it did not even place any *post-hoc* evidence in the record to demonstrate any actual need for the ordinance.

c. Even if this Court were inclined to *assume* content-neutrality, *Turner II* requires evidence to show *narrow tailoring*, and there is no such evidence here.

While *Turner II* holds that *post-hoc* evidence is not admissible to demonstrate content-neutrality, such evidence *is* admissible, assuming the existence of a proven content-neutral ordinance, to determine whether the ordinance is

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[38] *Compare Turner II* (applying intermediate scrutiny and requiring proof of evidence of content-neutrality in the record before Congress, 520 U.S. at 211), and *U.S. v. Virginia*, *supra*, with *Renton*, *supra*. While *Renton* allowed cities to rely on evidence "already generated by other cities," 475 U.S. at 51, it nonetheless required that they in fact *actually relied* on some such evidence. *See* 475 U.S. at 51; a content-neutral zoning ordinance will be found to be narrowly tailored "so long as whatever evidence the city *relies upon* is reasonably believed to be relevant to the problem that the city addresses." (Emphasis added.) Since Erie *considered* no evidence of secondary effects, it cannot assert that it *relied* on such. Accordingly, Erie's failure to consider any evidence of secondary effects is fatal to its entitlement to prevail under a test of intermediate scrutiny.

"narrowly tailored."[39] However, even if this Court were to depart from *Turner II* and simply *assume* the *content-neutrality* of Erie's ordinance, such an assumption would not relieve Erie of its failure to demonstrate affirmatively whether this ordinance is *narrowly tailored*.

A narrow tailoring analysis under *O'Brien* requires a comparison of the evidence demonstrating the *need* for a regulation with its *scope*. (*Compare Turner II*.) Absent such evidence, any analysis of narrow tailoring is meaningless. Because the City has not placed in the record even any *post-hoc* evidence of need for the ordinance, it cannot demonstrate that its ordinance is narrowly tailored.

d. Even if this Court were to allow unsupported assertions of need to be used in a narrow-tailoring analysis, the ordinance would still fail to be narrowly tailored.

(1) Respondent is entitled to use the "reasonable fit" test from commercial speech cases in analysis of the "narrow tailoring" issue.

The final *O'Brien* test commands that any "incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of that interest." 391 U.S. at 377. While literally a "least restrictive means" test, *O'Brien* was clarified in *Ward v. Rock Against Racism*, 491 U.S. 781, 796-799 (1989), to require only "narrow tailoring" such that a law may be sustained even if it restricts First Amendment freedoms to a *greater* extent than is "essential to the furtherance" of the governmental interest.

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[39] *See Turner I* which, after first finding sufficient evidence before Congress to demonstrate content-neutrality, remanded for additional evidence on the issue of whether the "must-carry" statute was narrowly tailored (thus necessitating *Turner II*).

In *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 430 (1993), this Court held that the *Ward* test is applicable to commercial speech restrictions and that no more rigorous tests should be used to determine the validity of commercial speech than time, place and manner restrictions:

> "The *Ward* holding is applicable here, for we have observed that the validity of time, place or manner restrictions is determined under standards very similar to those applicable in the commercial speech context and that it would be incompatible with the subordinate position of commercial speech in the scale of First Amendment values to apply a more rigid standard to commercial speech than is applied to fully protected speech."

Since this Court has now modified *O'Brien*'s original "least restrictive means" test, equating it instead to time, place and manner "narrow tailoring," then, under *Edge Broadcasting*, it should, at the very least, allow Respondent to utilize the "reasonable fit"/"narrow tailoring" test routinely utilized in commercial speech cases, as *Edge* holds that the tests for commercial speech cases may not be *more* rigorous than the tests used in time, place and manner cases.

Respondent respectfully submits that the "reasonable fit" requirement for commercial speech cases is far more favorable to it than the "narrow tailoring" tests employed in this Court's time, place and manner decisions. Specifically, beginning with *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989), this Court has repeatedly held that "narrow tailoring" in the context of commercial speech cases requires that there be a "reasonable fit" between the asserted governmental justifications for a law and its scope. *See*, e.g., *Fox*, 492 U.S. at 480; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 414 (1993); *Edge Broadcasting*, 509 U.S. at 429; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 507 (1996) (plurality opinion); and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-487 (1995). The Court has been quite clear

in articulating the precise analysis that applies to this "reasonable fit" requirement. For example, in *Edenfield v. Fane*, 507 U.S. 761 (1993), this Court stated:

> "[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction *will in fact alleviate them to a material degree*." *Id.* at 770-771.[40] (Emphasis added.)
>
> "[A] regulation may not be sustained if it provides *only ineffective or remote support* for the government's purpose."[41] *Id.* at 770. (Emphasis added.)

(2) There is no reasonable fit between the City's unsupported asserted purposes and the scope of the ordinance.

Utilizing the narrow tailoring test applicable to commercial speech, a type of expression this Court has already found "subordinate," it is clear that Erie's anti-nudity ban is not narrowly tailored, because it provides, at best, "only ineffective or remote support for the government's purpose" and does not advance its interests "to a material degree."

Assuming, *arguendo*, that Erie may use the unproven and self-proclaimed purposes listed in the ordinance's preamble to support its assertedly "incidental" restriction on the content of expression (an assumption rejected by Respondent), there is still no reasonable fit between such stated purposes and the scope of the ordinance. The preamble to the ordinance candidly declares that the City's purpose is to prohibit nude live entertainment on the hypothesis that such "activity adversely impacts and threatens to impact the public health, safety and

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[40] *Accord*: *Rubin v. Coors Brewing Co.*, 514 U.S. at 486-487; and *44 Liquormart*, 517 U.S. at 505 (per Justices Stevens, Kennedy, Souter and Ginsburg).

[41] *Accord*: *44 Liquormart*, 517 U.S. at 505 (per Justices Stevens, Kennedy, Souter and Ginsburg).

welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects." (Cert. App. 42a).

Nowhere does the City explain why placing pasties and g-strings on an erotic dancer or other performer will have a significant impact in reducing any of the asserted problems described in the ordinance's preamble. There are existing criminal laws which prohibit violence, public intoxication and prostitution and civil laws which address sexual harassment. Indeed, there are many other far less restrictive alternatives to deal with the asserted problems besides a total prohibition on the content of expression. Moreover, if a particular business is found to be a source of prostitution offenses, the State has an extremely effective remedy against such businesses under existing public nuisance laws. *See*, e.g., *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Given these effective sanctions, it is the unusual business owner who would not self-regulate in order to prevent such draconian consequences.

Most importantly, Respondent reiterates that there is simply no reason to believe that the placing of pasties and g-strings on a dancer or other performer will have any type of significant impact on any of the concerns articulated in the preamble. In short, there is simply not a material fit between the scope of the regulation and the purposes it assertedly furthers.

CONCLUSION

For all the reasons above, the judgment of the Pennsylvania Supreme Court did not violate the Supremacy Clause, even if its reasoning may have improperly analyzed the Supremacy Clause issues. Accordingly, the judgment of the Pennsylvania Supreme Court should be affirmed on that basis and the Court should not proceed to address any issues not raised in the Questions Presented.

Alternatively, should the Court address the First Amendment issues in this case *sua sponte*, for each of the numerous foregoing reasons, the judgment of the Pennsylvania Supreme Court should be affirmed.

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Respectfully submitted,

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