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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

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF ARGUMENT

Respondent Pap's A.M. seeks to minimize the significance of the Pennsylvania court's error by characterizing the opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), as that court did. If the *Barnes* opinion is so fragmented as to defy reduction to a controlling principle, then the Pennsylvania court's disregard of the Supremacy Clause and the principles of *stare decisis* loses some of its impact.

The *Barnes* decision is not, however, so unworkable as Pap's A.M. and the Pennsylvania court represent. The lower courts interpreting *Barnes* have had little difficulty with its basic tenets: (1) nude erotic dance is expressive conduct, and (2) restrictions on nude erotic dance are to be evaluated under the framework set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). The plurality and concurring opinions in *Barnes*, though different, are not irreconcilable.

Pap's A.M.'s belated support for the decision of the Pennsylvania Supreme Court is unpersuasive. Pap's relies heavily on the public remarks of members of Erie's City Council as evidence that the ordinance is impermissibly content-based. These unsworn public expressions of personal support do not constitute irrefutable evidence of improper, illicit legislative motive. The personal reasons motivating a legislator to support an ordinance are not germane to the discussion of its validity.

Despite its protests to the contrary, Pap's A.M. attempts to draw the discussion far away from the only issue properly before the Court. It is not necessary for the resolution of the issue presented to re-litigate *Barnes* or revisit *O'Brien.*

ARGUMENT

I. PAP'S A.M.'S EXTRAJUDICIAL SUPPORT FOR THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS UNPERSUASIVE.

A. Pap's A.M. overstates the difficulty of interpreting and applying *Barnes*.

The *Barnes* opinion is made up of a plurality opinion, two concurrences, and a dissent. Neither concurrence is so distant in its analysis from the plurality or the other concurrence as to render *Barnes* impenetrable.

The plurality and Justice Souter agree that the Indiana statute reviewed in *Barnes* withstands scrutiny under the *O'Brien* test. 501 U.S. at 572 (plurality opinion), 587 (Souter, J., concurring). Justice Scalia's concurring opinion does not reject public order and morality as an appropriate governmental interest unrelated to the suppression of expression. 501 U.S. at 575. Neither does it reject the *O'Brien* analysis where a regulation of conduct incidentally burdens expression. *Id.* at 577. Justice Scalia differs only by finding no burden on expression sufficient to trigger the protection of the First Amendment in the statute then under review. *Id.* at 580.

The *Barnes* opinion has proved nowhere nearly so troublesome to lower courts as, for instance, the opinion in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air ("Delaware Valley I")*, 478 U.S. 546 (1986). Before *Delaware Valley I*, there was a split in the circuit courts over the availability of contingency fee multipliers under federal fee-shifting statutes. *Delaware Valley I* failed to resolve the issue. On rehearing the Court issued a divided opinion, *Pennsylvania*

v. Delaware Valley Citizens' Council for Clean Air ("Delaware Valley II"), 483 U.S. 711 (1987). That opinion again split the circuits. *See*, Kyle R. Kravitz, Note, *Denying the Devil His Due: Contingency Fee Multipliers After City of Burlington v. Dague*, 38 VILL. L. REV. 1661 (1993).

In the Third Circuit alone, the *Delaware Valley II* opinion sent the same case from the Court of Appeals back to the District Court, and back again to the Court of Appeals with acerbic commentary from the District Court. *Blum v. Witco Chemical Corporation ("Blum II")*, 888 F.2d 975 (3d Cir. 1989). The debate over the availability of contingency fee multipliers was finally put to rest by a third opinion of this Court, *City of Burlington v. Dague*, 505 U.S. 557 (1992).

Similar difficulties plagued the opinion in *Baldasar v. United States*, 446 U.S. 222 (1980). *See*, Kerry R. Northrup, Note, *Nichols v. United States: Using Prior, Uncounseled Misdemeanor Convictions to Enhance Sentences - A Dispute Resolved*, 40 VILL. L. REV. 475 (1995). There is far less confusion among the lower courts in the application of *Barnes*. Some attempts at *Barnes*-style ordinances have not survived scrutiny. The level of scrutiny and the analysis employed, however, have been consistent. The Pennsylvania Supreme Court stands alone in its rejection of *Barnes* as a case devoid of precedential reasoning.

Pap's A.M. cannot downplay the significance of the Pennsylvania court's disregard of the result in *Barnes*. Lower courts interpreting federal law are unavoidably bound by the "result *stare decisis*" doctrine "mandat[ing] that any specific result espoused by a clear majority of the Court should be controlling in substantially identical cases." Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*,

80 COLUM. L. REV. 756, 779 (1980). Because Erie's ordinance is substantially indistinguishable from the statute in *Barnes*, the Pennsylvania court was constrained to uphold it.

B. Pap's A.M.'s attempts to distinguish Ordinance 75-1994 from the statute in *Barnes* are unconvincing.

The various arguments advanced by Pap's A.M. to distinguish Erie's ordinance from the statute in *Barnes* state and restate the proposition that Erie's ordinance is content-based and narrowly targeted only at nude erotic dancing. The arguments focus on one phrase in the preamble. [Respondent's Brief at 8].

Excluded from Respondent's argument are two more prominent statements of intention. The preamble also states

> Council is fully aware of and fully respects the fundamental constitutional guarantees of free speech and free expression and realizes that restrictions of such freedoms must be carefully drafted and enforced so that speech and expression are not curtailed beyond the point at which it is essential to further the City's interest in public health, safety and welfare.

[Pet. App. A at 7a]. In addition, the ordinance at Section 1, paragraph 6 provides

> CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this ordinance.

[Pet. App. A at 9a].

The Court of Appeals for the Ninth Circuit has adopted a useful analysis for evaluation of enactments burdening speech. The circuit court examines the full record for objective indications of intent set out in *City of Las Vegas v. Foley*, 747 F.2d 1294 (1984). The factors considered include the face of the statute, the effect of the statute, comparison to prior law, facts surrounding the enactment, the stated purpose, and the record of the proceedings. *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998), quoting *Las Vegas v. Foley*.

Erie's public indecency ordinance, on its face and in its effect, is intended to replace provisions more than a century old with "new language consistent with current state and federal law." The ordinance is explicitly tied to the concept of public indecency embodied in the Indiana statute reviewed in *Barnes*. [Pet. App. A at 7a].

The circuit court in *Colacurcio* reviewed the subjective views of the legislators for "objective manifestations of an illicit purpose." 163 F.3d at 552. Absent such indicia as extraordinary procedural measures, procedural lapses, or hasty changes in City policy, the *Colacurcio* court did not find illicit purpose. *Id.* In *D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140 (1991), the Court of Appeals for the Fourth Circuit recognized that Myrtle Beach enacted its ordinance in response to D.G. Restaurant's application for a

building permit. D.G. Restaurant's plan was treated by the circuit court simply as a triggering event. The court there found no improper motivation. *Id.* at 146.

The Ninth Circuit has adopted a predominant intent standard, following *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The circuit court acknowledged the difficulty in distinguishing between a motivating factor which does not invalidate an ordinance and predominant intent, which does. *Colacurcio* at 551. The Court of Appeals for the Eleventh Circuit has observed that reference to content is not equivalent to suppression of content. *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (1998).

Respondent would establish intent to suppress only one form of expression by emphasizing one phrase in the ordinance and isolated statements of Council members. The ordinance taken as a whole does not evidence illicit legislative motive. Nor do the unsworn public statements of the Council members supporting the ordinance show a predominant intent to suppress expression. The record as a whole clearly shows paramount concern for the protection of free expression. Only incidental encroachment on expression, where such encroachment is essential to promote the public health, safety and welfare, is tolerated under Erie's public indecency ordinance.

II. RESPONDENT'S OPTIONAL QUESTION PRESENTED IS NEITHER SET OUT IN NOR FAIRLY INCLUDED IN THE QUESTION PRESENTED.

This Court's Rule 14.1(a) states the scope of the issues before the Court in this matter. The Court will consider only

questions set out in the petition for certiorari or fairly included therein. An issue is fairly included in the question presented "when the issue must be resolved in order to answer the question." *Missouri v. Jenkins*, 515 U.S. 70, 145 (1995) (Souter, J., dissenting)(citations omitted).

Respondent's Optional Question Presented is tangential to the only question raised by the petition for certiorari but entirely unnecessary for the disposition of the question. An affirmative response to Pap's A.M.'s question would undo both *Barnes* and *O'Brien*. The City has not raised any question requiring relitigation of *Barnes*. The City's question takes the *Barnes* decision as a settled statement of law and asks only whether the Pennsylvania court was required to do the same.

Rule 14.1(a) does not limit the Court's power to decide questions not raised by the parties. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). But where an issue has not been raised by the petitioner and is not necessary to the disposition of the petitioner's issue, the rule raises a strong presumption against consideration of a question newly raised after certiorari has been granted. *Yee v. City of Escondido, California*, 505 U.S. 519 (1992). In a different case the various First Amendment issues raised by Pap's A.M. could stand side-by-side with the issue raised by the City. *See Yee* at 537 (both questions could be subsidiary to a third question, but neither is encompassed by the other). This case is not, however, the "most exceptional case" warranting a departure from Rule 14.1(a). *Izumi Seimitsu v. U.S. Philips Corp.*, 510 U. S. 29, 32 (1993) (citations omitted).

Respondent Pap's A.M. candidly admits that its Optional Question Presented is extraneous to the City of Erie's issue, and purportedly agrees that its First Amendment arguments are not

properly before the Court. [Respondent's Brief at 15-16]. Respondent then cites to *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), which in turn quotes *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), for the proposition that a prevailing party may make new arguments in support of the judgment below. The arguments made here by Pap's A.M., however, go well beyond the argument allowed by the Court in *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995). In *Lebron*, the resolution of the disputed issue was a prerequisite for the resolution of the question raised by the petition for certiorari. Respondent Pap's A.M. here presents a distinct and unrelated question.

Neither does Pap's A.M. present an issue "not pressed or passed upon." Pap's alternate argument, that Erie's ordinance is fatally overbroad, was raised before the Pennsylvania Supreme Court. The Pennsylvania court granted review of the issue [Pet. App. E at 69a] but did not decide it. The Court in *Illinois v. Gates*, 462 U.S. 213 (1983), noted particular concerns with addressing a question not decided by the state's highest court in a case originating in the state courts. There is some question as to whether the Court's certiorari jurisdiction under 28 U.S.C.S. § 1257 encompasses a question not decided by the state court. *Gates* at 219 (citations omitted).

The *Gates* Court also cited compelling prudential considerations underlying the "not pressed or passed on below" rule. 462 U.S. at 224. The First Amendment issues Pap's A.M. raises by its Optional Question Presented are difficult and important, just as the exclusionary rule issue in *Gates* was. Scrupulous adherence to customary limits on the Court's discretion will serve in this case, as it did in *Gates*, to promote respect for the adjudicatory process and the stability of the Court's decisions. *Id.*, quoting *Mapp v. Ohio*, 367 U.S. 643 (1961).

CONCLUSION

The debate which brought the parties here to this Honorable Court will likely continue after the decision in this case is handed down. Freedom of speech and expression are fundamental to this nation's identity. There will always be those who resist any slight restriction on expression, fearing the proverbial "slippery slope." There will always be those who would seek to suppress a disfavored message.

The City of Erie's public indecency ordinance places no impermissible restriction on expression. The ordinance reflects this Court's determination that conduct, even when engaged in for expressive purposes, can be regulated. Where the regulation is sufficiently justified by an interest unrelated to the suppresion of expression, the incidental burden on expression can be tolerated. The Indiana public indecency statute in *Barnes* did not impermissibly restrict expression. Neither does the ordinance under review here. The decision of the Pennsylvania court must be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

CITY OF ERIE, et al.,

Petitioners,

v.

PAP'S A.M., t/d/b/a KANDYLAND,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER CITY OF ERIE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER CITY OF ERIE OF THE ERIE COUNTY CITIZENS COALITION AGAINST VIOLENT PORNOGRAPHY

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QUESTION PRESENTED

Whether the judgement of the Pennsylvania Supreme Court in *City of Erie, et al. v. PAP's AM t/d/b/a Kandyland, et al.*, should be reversed.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER CITY OF ERIE

Amicus Curiae Erie County Citizen's Coalition Against Violent Pornography has sought the consent of the parties to participate in this matter by filing of the enclosed brief. A consent letter from the Petitioner, the City of Erie, is on file with the Clerk in accordance with Rule 37.3. However, at least one of the opposing parties, the Respondent, PAP'S A.M., t/d/b/a/ Kandyland, has withheld consent, necessitating this motion.

This motion and the enclosed brief are filed in support of the City of Erie, to inform the Court of the interests of the residents of the local community to maintain their ability to regulate public nudity on the grounds that the residents have made a moral decision to disallow public nudity in their community and on the basis of preventing the secondary effects that are associated with adult entertainment. Further, Amicus seeks to show how the decision in *Barnes v. Glen Theatre, Inc., et al.*, 501 U.S. 560 (1991) was incorrectly decided and should be overturned. Finally, if *Barnes* remains intact, it has been ignored by the Pennsylvania Supreme Court to reach a decision that is inconsistent with this Court's prior decisions. Moreover, with the Pennsylvania Supreme Court's decision, there is now disagreement between lower courts interpreting this Court's holding in *Barnes*.

As set forth more fully in the "Interest of the Amicus Curiae" section of the attached brief, the Erie County Citizen's Coalition Against Violent Pornography is a group comprised of residents of Erie County, Pennsylvania. The Coalition is opposed to all forms of pornography

and public nudity, including nude dancing at business establishments like Kandyland. Under the ordinance passed by the City of Erie, dancers at establishments like Kandyland were not permitted to dance totally nude. The dancers were required to wear "pasties" and "G-strings" to avoid being nude under the ordinance. While the Coalition would have preferred to not have the dancing establishment in existence at all, the Coalition has recognized the complexities of the law and regarded the ordinance as a satisfactory regulation of pornography and public nudity. However, since the Pennsylvania Supreme Court's ruling that overturned the statute, the dancers at the club have been dancing in full nudity.

The experience of the Amicus Curiae of dealing with the nude dancing establishment both before and after the ordinance was enacted offers an important practical aspect and analytical perspective on the issues presented by this case. In the instant case, the Amicus Curiae has experience with the nude dancing establishment's secondary effects that the ordinance would help prevent if enforced. The issue for the Amicus Curiae involves the fundamental judgment of whether or not public nudity can be regulated by a local governing body on the basis of moral concerns of the community and the interest of preventing the harmful secondary effects that accompany such establishments.

Amicus Curiae thus has a direct and important interest in the review of this case by this Court, and has a valuable perspective to offer concerning the legal issues presented therein. Amicus Curiae therefore respectfully

urges that the Court grant this Motion For Leave To File Brief *Amicus Curiae*.

Respectfully submitted,

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STATUTE

INTEREST OF AMICUS CURIAE*

Amicus curiae, the Erie County Citizens Coalition Against Violent Pornography is a non-profit organization domiciled in the Commonwealth of Pennsylvania, and located in Erie County, Pennsylvania. The Coalition is opposed to all forms of pornography, including public nudity such as the type that is the subject of the instant case. The Coalition seeks to educate citizens in the legal and peaceful means available to them to oppose the spread of establishment of pornography in their communities.

The City of Erie attempted to regulate the public nudity at Kandyland by enacting an ordinance that required the dancers to wear modest coverings over parts of the female anatomy, commonly known as "pasties" and "G-strings." The City's ordinance was virtually identical to the Indiana statute this Court declared constitutional in *Barnes v. Glen Theatre, Inc., et al.*, 501 U.S. 560 (1991), as not unduly restricting a dancer's First Amendment right to freedom of expression. Some of the dancers and the owner of Kandyland challenged the ordinance, and eventually succeeded in having the statute overturned by the Pennsylvania Supreme Court.

The members of the Coalition live in the vicinity of the nude dancing establishment operated by the Respondent in the instant case. Kandyland is located in a

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* No person other than Counsel for Amicus Curiae authored this brief in whole or in part. No person or entity other than Amicus Curiae has made a monetary contribution to the preparation or submission of this brief.

residential area, and as such has an impact on the residents that live in the community near Kandyland. Moreover, residents of the community near Kandyland have asked the members of the Coalition for assistance in dealing with the existence of Kandyland in their neighborhood, as well as with dealing with the secondary effects that have accompanied Kandyland's operations. Thus, the resolution of the instant case will have a direct impact on the members of the Coalition and on their community at large as well.

Because the City's ordinance has been overturned by the Pennsylvania Supreme Court, the dancers at Kandyland, and other dancers at nearby clubs, have returned to dancing without any clothing in full public nudity. Thus, where the city's residents spoke through their council members to enact an ordinance restricting public nudity to a constitutionally permissible extent, the Pennsylvania Supreme Court has interjected an incorrect and untenable decision that ignores this Court's precedent to overturn the decision of the city council members. Amicus Curiae urges this Court to reverse the decision of the Pennsylvania Supreme Court.

SUMMARY OF ARGUMENT

Nude dancing is not deserving of First Amendment protection, and therefore *Barnes v. Glen Theatre, Inc., et al.*, 501 U.S. 560 (1991), was wrongly decided and should be overturned. The First Amendment does not protect nude dancing from regulation as a matter of course. Prior to this Court's decision in *Barnes*, nude dancing was not

necessarily regarded as expressive activity deserving of First Amendment protection, and therefore any regulation of nude dancing was not required to meet the four-part analysis of *United States v. O'Brien*, 391 U.S. 367 (1968), or any other level of scrutiny under the First Amendment.

Prior to this Court's decision in *Barnes*, nude dancing was not considered to be deserving of First Amendment protection. This Court's own decisions never held that nude dancing was protected by the First Amendment, although a few decisions noted that there may be circumstances where nude dancing was protected. Nevertheless, prior to *Barnes*, nude dancing was not deemed deserving of First Amendment protection.

Even if the nude dancing at issue is found to be expressive conduct and entitled to some degree of protection from regulation, it cannot be said that it cannot be regulated at all. In the case where expressive conduct is regulated, the rationale of the *O'Brien* test applies, and the ordinance must be examined to see if it unconstitutionally regulates the conduct. In this case, the ordinance clearly passes the *O'Brien* test and should be upheld.

Society has regulated conduct for centuries based on moral judgements and values, and the present case is no different. Morality provides a more than adequate basis in this case to uphold the City of Erie ordinance. Moreover, the desire to prevent the secondary effects of nude dancing further buttresses the ordinance's constitutionality.

Amicus curiae will make two broad points in this brief: First, that nude dancing is not deserving of First

Amendment protection and that the Court should overturn the decision of *Barnes v. Glen Theatre, Inc., et al.* Secondly, if nude dancing is found worthy of protection under the First Amendment, the statutory scheme endorsed by *Barnes* and used in the instant case is a valid regulation of nude dancing, and therefore the decision of the Pennsylvania Supreme Court should be reversed.

ARGUMENT

I. NUDE DANCING IS NOT DESERVING OF FIRST AMENDMENT PROTECTION FROM GOVERNMENT REGULATION

The act of being nude in public in and of itself is not protected activity under the First Amendment. This Court noted itself in *Winters v. New York*, 333 U.S. 507, 515 (1948) that public nudity was a criminal offense at common law.[1] Public indecency statutes remain commonplace in today's society, expressing the moral judgment of society on public nudity. This moral judgment by society has long been recognized as a valid exercise of a government's power to protect societal interests in decency and morality.

The fact that nudity is combined with dancing in this case does not transform the respondent's conduct into protected activity because the ordinance at issue seeks to regulate nudity, not dancing. The act of the dance is not regulated, manipulated, monitored, or otherwise

[1] *LeRoy v. Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (K.B. 1664).

impacted by the ordinance. Therefore, there is no basis for arguing that nude dancing is somehow deserving of First Amendment protection.

A. Public Nudity is Not Protected by the First Amendment.

Public nudity in and of itself is not protected by the First Amendment. The act of being nude has long been regulated by governments, including the several states of the United States through the State's attendant police power. Where a society, through its government, determines that nudity in public is not acceptable pursuant to the government's police power, then no court should create a right where one has been denied by society at large.

It is clear from the language of the First Amendment that the act of being in the nude in public is not a fundamental right.[2] However, this Court has held that where conduct and speech converge in a single activity, the protections of the First Amendment may apply. This however, is not the case where a person seeks solely to be nude in public.

The act of being nude in public was considered an act malum in se at common law. Nothing has changed in

[2] The First Amendment to the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances." U.S. Const., First Amend.

today's society that would alter the legal landscape to warrant an expansion of the First Amendment to protect the act of being nude. In fact, the First Amendment was drafted by the framers of the Constitution with the full knowledge and understanding that a government would be able to use its inherent police power to protect the moral judgments of the citizenry.

This Court has recognized the ability of a government to regulate public nudity via its police power on several occasions. In *Barnes*, the Court traced the history of police power regulation of public nudity back to the common law and through the history of the anti-obscenity statutes passed in Indiana over the years. This case does not present any new arguments that lead to the conclusion that public nudity should be a protected Constitutional freedom. Therefore, this Court should reject any claims in this case that nudity alone is somehow expressive and therefore speech under the Constitution.

B. Nude Dancing is Not an Expressive Activity Protected by the First Amendment.

In order to qualify for First Amendment protection, an activity must become "speech" as defined by this Court's decisions. This Court has consistently held that nonverbal conduct can become speech when there is an intent to convey a reasonably perceivable, particularized message.[3] However, the Court's decisions tend to be

[3] *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Spence v. Washington*, 418 U.S. 405 (1974) (flag with peace symbols affixed); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (wearing black armbands); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft card); and *Stromberg v. California*, 283 U.S. 359 (1931) (display of a red flag as opposition to government).

limited to political messages where the proponent is attempting to convey a sincerely held belief, idea, or thought. Nude dancing, by its very nature, cannot rise to that level, and is therefore not an expressive activity.

This Court's prior decisions have held that determining whether conduct is speech requires an analysis of the "communicative elements" of the conduct to determine if it is within the parameters of the Free Speech Clause of the First Amendment. In order for conduct to implicate the Free Speech Clause, there must be (1) an intent to convey, (2) a particularized message, and (3) a great likelihood that the message will be understood by viewers. *Texas v. Johnson*, *supra*, and *Spence v. Washington*, 418 U.S. 405, 410 (1974).

Dancers do not necessarily have an intent to convey a message simply because they perform a dance. For instance, in *Dallas v. Stanglin*, 490 U.S. 19 (1989), this Court held that ballroom dancing was not within the parameters of the First Amendment. Dance is regularly associated with an intent to convey a message, but an intent to convey a message cannot be assumed. When the Court of Appeals in *Barnes* held that the nude dancing at issue was protected by the First Amendment, it noted a definition of "dance" from an encyclopedia.[4] But even that definition noted that dance is sometimes "simply to

[4] The court cited 16 The New Encyclopedia Brittanica 935 (1989).

delight in the movement itself." Therefore, by definition alone, it cannot be assumed that every dance contains an intent to convey a message.

Nude dancing is particularly suspect to the analysis of whether a message is intended by the dancer. The message must be related to the dance, and not simply the act of being nude, because as noted *ante* in this brief, the act of being nude is not in and of itself conduct worthy of constitutional protection. Nudity after all, is a state of existence, not an act or particular conduct. So, if nude dancing is to be considered speech and within the First Amendment, the intent to convey a message must be related to the dance, and not the nudity. Here is where nude dancing fails to meet the requirements of *Texas v. Johnson, supra,* and *Spence v. Washington, supra*: a dancer must intend a message in the dance itself, and not in the act of being nude and dancing while nude. There is simply nothing in the record of this case that indicates that a dancer intended a message in the dance itself.

Further, even if there is an intent to convey a particular message, there must be a great likelihood that the message will be understood. While it is hard to imagine a message, assuming arguendo that there is a message intended, the likelihood that the recipient will understand the message is slim to none. It is not disputed that patrons of nude dancing establishments watch the dancers because they are nude. The patrons of such establishments watch the dancers to find gratification for their desires, not to receive a message from the dance itself. This is precisely why nudity has historically been regulated as criminal conduct and continues to be today. Nudity appeals to base human sexual desires, and society

has deemed that nudity should therefore remain outside of the public view and remain in the private lives of the citizenry. Thus, the avowed purpose of nude dancing is not to convey a message, it is to appeal to the desires of the viewer, and the viewer watches the dance because of the nudity, not the particulars of the dance.

Without the required intent, message, and likelihood of the recipient's understanding the message, nude dancing cannot be considered expressive activity.

C. *Barnes v. Glen Theatre, Inc., et al.* Was Wrongly Decided And Should be Overturned.

Barnes v. Glen Theatre, Inc., et al., supra, was wrongly decided and should be overturned. Prior to this Court's decision in *Barnes*, nude dancing was not regarded as necessarily worthy of First Amendment protection.

The *Barnes* decision was inherently flawed because the Court did not closely examine the nude dancing at issue in accordance with the test enunciated in *Texas v. Johnson, supra*. The *Barnes* decision cobbled together an array of prior cases that never directly held that nude dancing was constitutionally protected activity.

In *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) and *California v. Larue*, 409 U.S. 109 (1972), the Court mentioned that nude dancing might, under the right circumstances, be entitled to First Amendment protection. However, the Court did not express exactly what those circumstances might be. Similarly in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), the Court noted that nude dancing was not without First Amendment protection,

but did not directly hold that it, in fact, was so entitled. These cases were the sum of the Court's reliance to find that the nude dancing in *Barnes* was protected activity.

Further, in *Barnes*, the record was clear that the plaintiffs failed to meet the requirements of intent, message, and recipient as required by *Texas v. Johnson, supra*. Plaintiff Miller had stated that she danced to get customers to buy drinks, and Plaintiff Sutro said she had a message, but could not articulate what the message was in particular. Thus, the record from *Barnes* shows that nude dancing is not entitled to First Amendment protection, and therefore the decision should be overturned, with the Court's holding being that nude dancing is not entitled to constitutional protection.

II. EVEN IF NUDE DANCING IS FOUND TO BE DESERVING OF FIRST AMENDMENT PROTECTION, THE ERIE ORDINANCE IS CONSTITUTIONAL

The seminal case on constitutional analysis where a government seeks to regulate protected conduct is *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Court announced a four-part test: (1) whether the statute or regulation is within the constitutional power of the government to regulate; (2) whether it furthers an important or substantial governmental interest; (3) whether the governmental interest is related or unrelated to the suppression of free expression; (4) whether the incidental restriction on alleged First Amendment freedoms is no greater than is essential for the furtherance of the governmental interest. *O'Brien* at 376-77.

The Erie ordinance only seeks to regulate public nudity, not dancing. The ordinance does not restrict a person's ability to dance, the ability to dance in a certain time or place, or the audience of the dance. The ordinance simply restricts the act of being nude in public. Therefore, because the ordinance only regulates nudity, it is well within the police power of a government to regulate.

That an important governmental interest is present in this case is not in doubt. The Ordinance itself points out the interest at stake:

> WHEREAS, Council specifically wishes to adopt the concept of public indecency prohibited by the laws of the State of Indiana, which was approved by the Supreme Court in Barnes v. Glen Theatre, Inc., for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

City of Erie Ordinance 75-1994.

The Ordinance clearly has as its purpose therefore the prevention of harmful secondary effects associated with nude dancing clubs. The Ordinance's purpose tracks squarely with the Court's decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), where the Court held that government attempts at controlling or preventing secondary effects associated with adult entertainment serve the government's substantial interest in promoting

the health, safety, and welfare of the people. Thus, the Erie ordinance passes the first *O'Brien* prong of requiring that the restriction be within the constitutional power of the government to regulate.

The second prong of *O'Brien* requires that the restriction actually further the governmental interest. In *City of Renton, supra,* the Court held that a government was not required to provide specific data to demonstrate that the perceived harmful effects correlate to the adult establishments. As restated in another case, "[t]he First Amendment does not require a city before enacting such an ordinance to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware,* 10 F.3d 123, 133 (3d Cir. 1993). Thus, in this case, where the City of Erie relied upon this Court's decision in *Barnes* and the State of Indiana's experience, the second prong of *O'Brien* is met.

A second justification for the furtherance of a governmental interest in this case rests on the moral judgment of the City of Erie's elected representatives that nude dancing is not morally acceptable. The record below illustrates that many of the City Council members considered the issue of regulating nude dancing a moral issue, and they voted in favor of the ordinance to protect the morals of the citizens of Erie. This moral judgment is a valid governmental interest because as the Chief Justice wrote in *Barnes,* " . . . public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the

authority to provide for the public health, safety, and morals. . . . " *Barnes* at 569.[5] Therefore, the ordinance at issue in this case is well within the Court's prior decisions and is a constitutional exercise of the state's police power.

Third, the *O'Brien* test requires that the government interest be unrelated to the suppression of free expression. In this case, as it was in *Barnes,* the ordinance seeks to regulate public nudity, not dance. Thus, as Chief Justice Rehnquist found in *Barnes,* the ban on public nudity is unrelated to the freedom of expression because the perceived evil is public nudity, whether or not it is combined with expressive activity. *Barnes* at 570-71. Because the Erie ordinance is almost identical to the one at issue in *Barnes,* it too must be unrelated to the suppression of expression.

Finally, the restriction must be the least restrictive means to further the governmental interest. In this case, the governmental interest is to prevent public nudity, and the statute clearly covers the bare minimum necessary to further that governmental interest. The statute only requires that the dancer's wear pasties and G-strings, the most minimal clothing imaginable that still covers the parts of the relevant parts of human anatomy. In this case then, the final prong of *O'Brien* is met because the

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[5] Chief Justice Rehnquist went on to note that the Court has upheld regulation based on protection of societal moral concerns in *Bowers v. Hardwick,* 478 U.S. 186 (1986), *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973), and *Roth v. United States,* 354 U.S. 476 (1957).

restrictions on expression, if any at all, are the minimal amount necessary to further the governmental interest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The judgment of the Pennsylvania Supreme Court should be reversed.

Respectfully submitted,

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