

No. 98-1161

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF ERIE,
Petitioner,

v.

PAP'S A.M.,
Respondent,

**MOTION FOR LEAVE TO FILE
AMICI CURIAE BRIEF
AND
BRIEF OF AMICI CURIAE BILL CONTE,
ON BEHALF OF *THE DANTE PROJECT: INFERNO*
AND THE NATIONAL CAMPAIGN FOR FREEDOM
OF EXPRESSION, IN SUPPORT OF PAP'S A.M.**

Filed September 30, 1999

This is a replacement cover page for the above referenced brief filed at the
U.S. Supreme Court. Original cover could not be legibly photocopied

MOTION FOR LEAVE TO FILE AMICI BRIEF

Bill Conte, on behalf of *The Dante Project: Inferno*, and The National Campaign for Freedom of Expression seek leave of this Honorable Court to file an *amicus curiae* brief in support of Pap's A.M. The *Amici* brief in support of PAP'S A.M. is filed with permission of the Respondent. The Petitioner has not consented to the filing of the brief.

INTEREST OF AMICI CURIAE

Bill Conte is the Translator/Director of a theatrical production entitled *The Dante Project: Inferno*, which is based on the *Inferno* of 14th-century poet, Dante Alighieri.

Universally regarded as one of the greatest artistic achievements of the millennium, Dante's *Inferno* has been an inexhaustible source of inspiration for artists working in every field, especially in sculpture and painting. In translating the work faithfully from its original poetic source to these other media, painters and sculptors traditionally and invariably depict the damned as being naked. This is based on the graphic descriptions in the poem. To emphasize the brutishness, vulnerability, and humiliation of the damned souls in hell, Dante pointedly refers to their being completely exposed to the elements, the torment of demons, and the scrutiny of himself and Virgil, his guide.

The Dante Project: Inferno plans to open off-Broadway in New York City in the fall of 2000. There will be eight performances per week, with matinees on Wednesdays and Sundays and, with the success of the production,

tours nationally and internationally. *Amicus* Conte intends to present *The Dante Project: Inferno*, to the widest possible audience in a manner that makes Dante's words spring to life. The outcome of this case will have an impact on the production.

As with every other image and theatrical effect in the production, the source is Dante himself. As described in the poem, the damned souls are in constant motion. This movement must be choreographed in accordance with the poetic descriptions of Dante. Under any construction, the actors will be "[appearing] in a state of nudity," as proscribed by Erie Ordinance No. 75-1994.

If the "damned" are not allowed to appear "naked," the audience will be deprived of an integral component of Dante's vision. Bereft of this expressive element, shorn of any hint of eroticism, the production will fail to capture the depth and complexity of Dante's thoughts, thereby doing disservice both to the Poet, as well as the theater-going public, which expect no less than thought-for-thought fidelity in any work of art purporting to be a legitimate theatrical translation of Dante's *Inferno*.

The National Campaign for Freedom of Expression is an educational and advocacy network of artists, arts organizations, audience members and concerned citizens formed to protect and extend freedom of artistic expression and fight censorship throughout the United States. The Campaign's work reflects the understanding that true democracy is dependent on the right to free expression for all. The National Campaign for Freedom of Expression is the only nationwide organization exclusively dedicated to challenging the erosion of First

Amendment rights as applied to the support, presentation and creation of the arts in our culture today.

Nudity has been an appreciated and legitimized subject of artistic expression for thousands of years. All of the classical civilizations represented naked male and female bodies in their art works. From the great ancient art of Asia, Africa and South America through the classical works of the European masters to contemporary North American and other global artists, nudity has been a constant. The law governing artistic expression acknowledges the important and historical role of nudity.

If the Erie Ordinance is upheld, it will create precedent for similar legislation throughout the country that will result in the censorship of serious artistic theatrical productions.

CONCLUSION

Amici respectfully request this Honorable Court to grant them leave to file this *amicus curiae* brief in support of Pap's A.M.

Respectfully submitted,

JACK R. BURNS, WSBA #01590
Counsel for *Amici Curiae*

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INTEREST OF AMICI CURIAE¹

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Universally regarded as one of the greatest artistic achievements of the millennium, Dante's *Inferno* has been an inexhaustible source of inspiration for artists working in every field, especially in sculpture and painting. In translating the work faithfully from its original poetic source to these other media, painters and sculptors traditionally and invariably depict the damned as being naked. This is based on the graphic descriptions in the poem. To emphasize the brutishness, vulnerability, and humiliation of the damned souls in hell, Dante pointedly refers to their being completely exposed to the elements, the torment of demons, and the scrutiny of himself and Virgil, his guide.

¹ Pursuant to Sup. Ct. Rule 37.6, counsel for *Amici* discloses that he authored this brief with the assistance of Judith Lynne Hanna, Ph.D. Dr. Hanna is a cultural anthropologist; Senior Research Scholar, Department of Dance, University of Maryland; and educator. She has authored five substantial books on dance and over eighty-seven (87) articles on dance in peer reviewed scholarly journals. Funding for the preparation and submission of this brief was provided by Consolidated Bookkeeping & Management Services, Inc., Seattle, Washington.

² Amicus Conte is a freelance actor, director, playwright and lecturer in the Department of English, Speech and World Literature at the College of Staten Island (CUNY) and in the Department of Humanities at St. John's University.

The Dante Project: Inferno plans to open off-Broadway in New York City in the fall of 2000. There will be eight performances per week, with matinees on Wednesdays and Sundays and, with the success of the production, tours nationally and internationally. *Amicus* Conte intends to present *The Dante Project: Inferno*, to the widest possible audience in a manner that makes Dante's words spring to life. The outcome of this case will have an impact on the production.

As with every other image and theatrical effect in the production, the source is Dante himself. As described in the poem, the damned souls are in constant motion. This movement must be choreographed in accordance with the poetic descriptions of Dante. Under any construction, the actors will be "[appearing] in a state of nudity," as prescribed by Erie Ordinance No. 75-1994. If the "damned" are not allowed to appear "naked," the audience will be deprived of an integral component of Dante's vision. Bereft of this expressive element, shorn of any hint of eroticism, the production will fail to capture the depth and complexity of Dante's thoughts, thereby doing disservice both to the Poet, as well as the theater-going public in New York, which expect no less than thought-for-thought fidelity in any work of art purporting to be a legitimate theatrical translation of Dante's *Inferno*.

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true democracy is dependent on the right to free expression for all. The National Campaign for Freedom of Expression is the only nationwide organization exclusively dedicated to challenging the erosion of First Amendment rights as applied to the support, presentation and creation of the arts in our culture today.

Nudity has been an appreciated and legitimized subject of artistic expression for thousands of years. All of the classical civilizations represented naked male and female bodies in their art works. From the great ancient art of Asia, Africa and South America through the classical works of the European masters to contemporary North American and other global artists, nudity has been a constant. The law governing artistic expression acknowledges the important and historical role of nudity.

If the Erie Ordinance is upheld, it will create precedent for similar legislation throughout the country that will result in the censorship of serious artistic theatrical productions. Amici urge this Court to affirm the decision of the Pennsylvania Supreme Court. Any other decision will vest government officials with the unfettered power to censor non-obscene productions containing nudity, no matter how important that nudity is to the messages of the production.

SUMMARY OF ARGUMENT

Nudity has a long history in the performing arts in this country. Early concerns focused on exposure of the ankle, loose fitting clothing, the length of skirts and exposure of the female leg. With the coming of the 20th

century, full nudity began to be used in mainstream theater dance. In the first three decades of the 20th century, the famous American modern dancer Isadora Duncan established nudity, or near-nudity, as important to her art. In addition, moving nude dancers appeared in Florenz Ziegfeld's popular revues in New York City. Topless dancers were on the scene by 1945.

Contemporary exotic dance is an outgrowth of these important 20th century developments in theater.

Dance is purposeful, rhythmical and culturally influenced sequences of nonverbal body movements. As an art form, dance requires learned skill, imagination, and communication. "Exotic dance," the expressive conduct targeted by Ordinance No. 75-1994, is a form of dance and a form of art with its own style and aesthetic.

An exotic dancer attempts to communicate to patrons through the senses of body movement, proximity and verbalization, an illusion of intimacy, spontaneity and emotion. By creating an illusion of concern and availability for a patron, the exotic dancer seeks, theatrically, to effect a transformation in the patron's feelings. The predominant characteristic distinguishing exotic dance from other forms of dance is the use of nudity to deliver the messages of the dance.

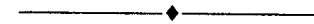
Recent research demonstrates that nudity significantly enhances the intended messages of exotic dance. Without nudity, the messages of the dance are substantially changed. The research reveals that men judge a nude dancer to be communicating a different message than a clothed dancer.

The "overbreadth doctrine" prohibits a statute from making innocent or constitutionally protected conduct criminal. The harm from an overbroad statute is its chilling effect on constitutionally protected or otherwise lawful conduct.

Section 1(c) of Ordinance No. 75-1994 prohibits any nudity in the performing arts, including exotic dance. In addition, it prohibits certain costumes intended to convey representational messages. Because the Erie ordinance prohibits nudity, and the representation of nudity, in all live performances, including those with serious literary, artistic, or political value, it is unconstitutionally overbroad.

The overbreadth of the regulation here is both real and substantial. Erie's ban on nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes; i.e., nudity used as a communicative medium in operas, ballet, plays, musicals and other serious artistic performances. The potential impermissible applications of Section 1(c) dwarf whatever the legitimate reach of the regulation may be.

Because the State courts have refused to render a narrowing construction, and it is not within the power of this Court to do so, the decision of the Pennsylvania Supreme Court should be **AFFIRMED**.



ARGUMENT

1. Nudity, A Medium For Communicating Various Messages, Has A Long History In The Performing Arts.

"Nudity" has a long history in the performing arts in this country, both as to its use and its meaning.

In the 1820's, public debates over nudity focused on the length of ballet dancers' costumes. At that time, a leg was called a limb, and it was covered, even for sunbathing and swimming.

In 1827 citizens railed against the French ballet dancer, Madame Francisque Hutin, for the "public exposure of a naked female."³ She wore a long silk skirt covering loose trousers fastened at the ankle. A glimpse of a loose trouser-clad thigh when the dancer pirouetted and her skirt flew up was equated with total nudity – yet not an inch of skin beneath the waist showed.⁴

It was not until the 1840's that the social status of ballet dancers was elevated. Ballet dancers' skirt lengths had been shortening, but coming from France, dancer Fanny Elssler anticipated American conservatism and lengthened her costume by a full foot. Her successful debut in the U.S. marked the acceptance by upper-class audiences of ballet as "art."⁵ This helped expand the boundaries for the use of the partially-revealed female

³ Robert Clyde Allen, *Horrible Prettiness: Burlesque and American Culture*. Chapel Hill: University of North Carolina, 1991, pp. 88-89.

⁴ *Id.*

⁵ *Id.*, 90-91.

form in the performing arts and provided a rationalization for pleasure in viewing ballet.

The 1865 stage spectacle, "The Black Crook," popularized ballet. It had a large number of female legs, that is, "undressed" dancers with close-fitting pantaloons stopping at mid thigh, sleeveless bodices and short skirts, all considered "nudities."⁶

The 1893 Chicago World's Columbian Exposition revealed even more female anatomy. "Streets of Cairo" and Algerian and Persian village exhibits featured, for the first time in public, the dance called *danse du ventre*, cootch, hootchy-kootchy, and "belly dance" – a forerunner of contemporary exotic dance. While American women wore corsets under long dresses, the performers wore baggy trousers and midriff-length tops over an uncorsetted body.⁷

Full nudity first appeared in the 1840's theatrical *tableaux vivants*. Performers posed as "classical nudes" on revolving turntable stages that allowed "more revealing" views.⁸ The "living statues" slightly changed positions.

Moving nude dancers in popular art appeared from 1912-1929 in Florenz Ziegfeld's revues in New York City.

⁶ *Id.*, 108-111.

⁷ *Id.*, 225-226.

⁸ Timothy Gilfoyle, *City of Eros: New York City, Prostitution, and the Commercialization of Sex, 1790-1920*. New York: W.W. Norton & Co., 1992, p. 127.

Flirting with naughtiness, many of the revues presented feminine nudity veiled.⁹

While unembellished nudity was still taboo during the early part of this century, dancers used gimmicks to give the illusion of nudity, such as a g-string with glued pubic hair, or they delivered quick intimate glimpses of body parts in flashes. For example, in the 1930s, Sally Rand covered and fleetingly exposed her nudity with two huge ostrich fans.¹⁰

Topless dancers were on the scene by 1945. Famous strippers included Lili St. Cry, Blaze Starr, Tempest Storm, and Gypsy Rose Lee.¹¹

The 20th century saw the fully nude body used in mainstream theatrical dance.¹² In the first three decades of the 20th century, the famous American modern dancer Isadora Duncan established nudity, or near-nudity, as important to her art. "Modern dance" rebelled against the unnaturalness of ballet with its specific codified positions, movements and fitted costumes. Compressing internal organs, women's tightly corseted bodies of the

⁹ Allen, *supra*, 246; *see also*, Lucinda Jarrett, *Stripping in Time: A History of Erotic Dancing*. London: Pandora, 1997, pp. 108-110.

¹⁰ Ann Corio, *This was Burlesque*. New York: Grossett & Dunlap, 1968, p. 98; Jarrett, *supra*, p. 150.

¹¹ Allen, *supra*; Jarrett, *supra*.

¹² Judith Lynne Hanna, *Dance, Sex and Gender: Signs of Identity, Dominance, Defiance, and Desire*. Chicago: University of Chicago Press, 1988.

19th century were seen as chastisement, pain, and symbolic of oppression.¹³

More recent landmarks in mainstream theater provide a context for nudity in dance today. Yvonne Rainer's "Trio A," performed in 1966 in New York City, showed nude dancers with American flags hanging from their necks in protest against repression and censorship. In Anna Halprin's New York City debut of "Parades and Changes," in April, 1967, modern dancers disrobed. "Hair," a rock musical that opened October 29, 1967, brought nudity, including a glance at pubic hair, to a New York City Broadway theater. The 1969 musical "Oh! Calcutta!" showed female and male frontal nudity and group body contact. The 1970 classical ballet "Mutations," by Glen Tetley and Hans van Manen, showed a nude man dance a slow celebratory solo and a nude couple perform an entwining duet while three nude henchmen moved about. American choreographer Mark Morris presented "Striptease," with its "down to the buff" commentary on hypocrisy in society. Bill T. Jones's modern dance "Last Supper at Uncle Tom's Cabin/The Promised Land," first performed in 1990, featured nudity among an assemblage of up to 50 company and community members – tall and short, fat and thin, black and white, old and young – all devoid of disguise, vulnerable, and unashamed, pulling together against the disparate strains of conflict over race, sexual orientation, gender, poverty and age. The nudity of the all-male modern Creach/Koester Dance Company in its 1998 "Study for a Resurrection," in St. Mark's Church, in New York City, "affirmed the body's

¹³ *Id.*

beauty and vulnerability."¹⁴ "Naked Boys Singing," a 1999 musical review presented at the Actor's Playhouse in Greenwich Village, New York City, poked fun at social behavior.

Contemporary exotic dance is an outgrowth of these important 20th century developments in theater.

2. What Is Exotic Dance?

Dance is purposeful, rhythmical and culturally influenced sequences of nonverbal body movements.¹⁵ As an art form, dance requires learned skill, imagination and communication.¹⁶ "Exotic dance," also called nude, semi-nude, erotic, striptease or barroom dance, is dance and a performing art with its own style and aesthetic.¹⁷ The roots of contemporary exotic dance are in traditions of middle east dance and burlesque.

In contemporary exotic dance, a dancer initially appears clothed, signifying the social norm. Transgressing this norm, she commonly strips to nudity in the course of her performance.

¹⁴ Jack Anderson, "Reverently Naked for Rites in Church," *New York Times*, October 7, 1997, p. B3.

¹⁵ Judith Lynne Hanna, *To Dance Is Human: A Theory of Nonverbal Communication*. Chicago: University of Chicago Press, 1987.

¹⁶ *Webster's Ninth New Collegiate Dictionary*, Springfield, MA: Merriam-Webster Inc., 1987, p. 105.

¹⁷ The term "exotic dance" comes from the 1893 Chicago World's Columbian Exposition which featured the "exotic," meaning "the unusual other."

As an actor, an exotic dancer attempts to communicate to patrons through the senses of body movement, proximity and verbalization, an illusion of intimacy, spontaneity and emotion. By creating an illusion of concern and availability for a patron, the exotic dancer seeks, theatrically, to effect a transformation in the patron's feelings.¹⁸

Notions of artistic merit in exotic dance center on theatricality; i.e., the performer's sensuality, costume and physical disclosure, beauty, personality, friendliness, musicality, creativity, and variety and quality of movement repertoire. Evaluation of a performance is also based on how well it fulfills its communicative purpose.¹⁹

Exotic dance is usually performed in cabarets generally referred to by municipalities as "adult cabarets." These cabarets have all the indicia of a dinner theater. Similar to dinner theaters, "adult cabarets" have entrance fees, a raised stage on which entertainers perform, table seating surrounding the stage, special lighting and sound

¹⁸ Judith Lynne Hanna, "Undressing the First Amendment and Corsetting the Striptease Dancer," *The Drama Review* 42, 2(T158):38-69, Summer 1998; Judith Lynne Hanna, "Toying with the Striptease Dancer and the First Amendment," Stuart Reifel, ed. *Play & Culture Studies*, Vol. 2: *Play Contexts Revisited*, Stamford, CT: Ablex Publishing Corporation, 1999, pp. 37-56.

¹⁹ The claim that dance performed in exotic dance clubs is not dance as performed at mainstream theaters is a difference of degree or quality, not a difference of kind. While today, ballet, with its many years of demanding training, may be deemed "high art" by mainstream dance critics, in the 19th century, ballet was commonly considered a disreputable low art. Hanna, "Undressing . . .," 1998, *supra*, pp. 48-50.

systems, a separate dressing area and "ushers" to seat the members of the audience and maintain proper decorum. Some "adult cabarets" serve food and drink and have reserved seating areas for patrons paying a premium.

3. Without Nudity, The Intended Messages Of Exotic Dance Are Substantially Changed.

Recognizing that nudity is a key component of exotic dance, it is important to explore the value of nudity as part of the communicative messages of the dance.

In the context of theatrical productions, ballet and modern dance, nudity is used for many different expressive purposes. While, "it is impossible to reduce to a single organizing factor the multitude of associations the naked human body stirs . . . ," "nakedness is a time honored way of showing the body's grace and beauty . . ." ²⁰

Further, nudity, as an integral and expressive component of dance, may incorporate some or all of the following messages: – natural beauty, eroticism, sensuality, sexuality, fantasy, pretense of sexual availability, emotional and physical intimacy, unbounded and uncomplicated continuous desire, acceptance, tenderness, the jewel of femininity or masculinity, longing, and harmony of sex and gender.²¹

²⁰ Richard Schechner, *Environmental Theater*. New York: Applause, 1994, pp. 89-90.

²¹ For example, see Rebecca Schneider, *The Explicit Body in Performance*. New York: Routledge, 1997; Francis Sparshott, *A Measured Pace: Toward a Philosophical Understanding of the Arts of*

Additionally, the nude body may be seen as a "portable art gallery constantly on display, subject not only to . . . [one's] own reactions but also to those of others."²²

Nudity in theater can bear on the historical tension between how the body was revealed in the past and how it is revealed now or how it challenges the status quo.²³ Nudity may also serve as a vehicle to challenge and mock some religious and moral tenets.

Nudity is often used to express something other than eroticism. If the message intended to be conveyed by the use of nudity is the naturalness or beauty of the naked human form, such a message is defeated by covering the body in such a way as to suggest that nudity is not natural or beautiful. If the message signifies defenselessness, vulnerability, or Eden-like innocence, "only complete nudity could make the point; the retention of even a loin cloth would not weaken the effect, but change it into something quite different."²⁴

Nudity in exotic dance has a special meaning. Exotic dance reflects the culture of its time and by definition must be "naughty" and go beyond what is seen in public

Dance. Toronto: University of Toronto Press, 1995; Karl Toepfer, "Nudity and Textuality in Postmodern Performance." *Performing Arts Journal*. No. 54:76-91, September 1, 1996.

²² Mary Ellen Roach and Joanne Bubloz, eds. *Dress, Adornment, and the Social Order*. New York: Wiley, 1965, p. 13.

²³ Hanna, "Undressing . . . ," 1998, supra; Meiling Chen, "Les Demoiselles d/L.A.: Sacred Naked Nature Girls' Untitled Flesh," *The Drama Review* 42, 2(T158):70-97, Summer 1998.

²⁴ Francis Sparshott, "Some Aspects of Nudity in Theater Dance." *Dance Chronicle* 18(2), p. 307.

places.²⁵ The exotic dancer's creation of erotic fantasy through her moving body draws upon nudity as a natural element of theatrical artistry. Nudity theatrically speaks, like an emblem, uniform, or other symbol and emotion.

Given the fact that nudity is regularly used in the performing arts to communicate a particular message, a central question in the evaluation of any regulation banning performance nudity is whether the message conveyed by the nudity, i.e., the content of the performance, is substantially altered. Put another way, does it make a difference to the patron in the sending and receiving of erotic messages, for example, if a performer or exotic dancer is clothed or nude? Recent research demonstrates that nudity significantly enhances the intended messages of exotic dance.

Psychologist Edward I. Donnerstein's study of exotic dance²⁶ disproves the conclusion in *Barnes v. Glen Theatre, Inc.* that "the requirement that the dancers don pasties and a g-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic."²⁷ The research demonstrates that nudity, as a component of exotic dance, is essential to the

²⁵ Hanna, "Undressing . . . ," 1998, *supra*; Hanna, "Toying . . . ," 1999 *supra*.

²⁶ A 1996 declaration by Dr. Donnerstein describes his research methodology and conclusions. A copy of that declaration is included in the appendix to this brief along with the study report. In addition, it can be found in the records of this court in the Appendix to the Petition for Writ of Certiorari filed by Deja Vu of Nashville, Inc. in Case No. 98-1935.

²⁷ 501 U.S. 560, 571 (1991).

messages conveyed by such dance. Without it, the intended messages are substantially changed.

The study reveals that men judge nude dancers to be communicating different messages than clothed dancers. Ultimately, the study concludes that a dancer donning pasties and a G-string conveys a significantly different message compared to when she is nude.

4. Because The City of Erie Ordinance Bans All Expressive Nudity, It Is Unconstitutionally Overbroad.

Given the historical perspective of nudity in the performing arts set out above, this Court is asked to review a regulation that bans all performance nudity. The scope of expressive conduct regulated by section 1(c) of Ordinance No. 75-1994 goes far beyond the type of dance thought to produce adverse secondary effects; it prohibits nudity in mainstream artistic productions as well. Because the regulation sweeps too broadly, it must be found unconstitutional.

A. The Ordinance.

The challenge in this case is directed at Section 1(c) of Ordinance 75-1994. Section 1 provides:

1. A person who knowingly or intentionally *in a public place*:
 - a. engages in sexual intercourse;
 - b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code;

- c. *appears in a state of nudity, or*
- d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense. (Emphasis added)

“Nudity” and “public place” are separately defined. In addition to its ordinary meaning, nudity is defined in Section 2 to include:

. . . the exposure of any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as cover over the nipples and/or areola of the female breast, which device simulates and give the realistic appearance of nipples and/or areola.

Section 4 defines the term “Public Place” to include all buildings owned by or open to the general public, specifically including *places of entertainment and theaters*. (Emphasis added)

On its face, the regulation prohibits any nudity in the performing arts. In addition, it prohibits certain costumes intended to convey a representational message²⁸ and it

²⁸ Under any interpretation of the ordinance, a performer wearing a black body stocking that has material attached to it to realistically simulate the nipple and areola would be “appearing in a state of nudity” and, thus, guilty of a summary offense. Even if a simulation is not realistic, a performer is guilty of a summary offense if their costume gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region. Justice Souter concurred in the judgment in *Barnes*, in part, because nothing short of the

prohibits entertainers from touching themselves in the genital area, even if fully clothed.²⁹ Because of the excessive sweep of the regulation, it is unconstitutionally overbroad.

B. The Overbreadth Doctrine.

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1963). The “overbreadth doctrine” prohibits a statute from making innocent or constitutionally protected conduct criminal. *Id.* at 613; *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

The harm from an overbroad statute is its chilling effect on constitutionally protected or otherwise lawful conduct. The loss or substantial impairment of precious

obscenity laws prohibited a dancer “from expressing an erotic message by articulate speech or representational means.” 501 U.S. at 587. Here, even the attempt to represent the state of nudity is prohibited.

²⁹ While Section 1(d) was not challenged below, it clearly regulates expressive conduct protected by the First Amendment that does not involve nudity. For example, this section would prohibit Michael Jackson’s performance in “Thriller,” where he grabs his crotch or the routines of many comedians mimicking the antics of professional baseball players adjusting themselves.

First Amendment rights may be critical, since those persons covered by the statutes are bound to limit their behavior to that which is unquestionably safe. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Under the overbreadth doctrine, "an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.'" *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)).

While the overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort," *Broadrick v. Oklahoma*, 413 U.S. 601, 613, a plaintiff may prevail on a facial attack by demonstrating that there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . ." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

In the First Amendment context, criminal statutes, such as the one here, must be scrutinized with particular care. "[T]hose that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Houston v. Hill*, 482 U.S. 451, 459 (1987).

C. Application Of The Overbreadth Doctrine

The Erie ordinance prohibits nudity in all live performances, including those with "serious" literary, artistic, or political value. The ordinance contains no limiting provisions and makes no attempt to regulate only those expressive activities that are alleged to cause purportedly harmful secondary effects.³⁰

The threshold inquiry for purposes of First Amendment analysis is whether the purpose of the Ordinance is to suppress communication. The preambles to the ordinance plainly state that it was adopted

for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on 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.

The stated purpose of the ordinance focuses on the negative secondary effects of "nude live entertainment," not the evils, in general, of nudity in the performing arts or

³⁰ There is absolutely no evidence in this record linking expressive nudity of the kind portrayed in performances of "Hair," "Bent" and "Equus" with the purported harmful secondary effects of "providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases, and other deleterious effects" targeted by the regulation.

nudity in public places.³¹ The ordinance states no moral or practical objection to nudity in and of itself.

Given this explicitly stated purpose, Ordinance No. 75-1994 is not a law of general applicability that only indirectly affects speech. *See, Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991), Scalia, J. concurring. The perceived evil that Erie seeks to address is live adult entertainment. The ordinance specifically targets live nude entertainment because of the perceived "secondary effects" associated with that type of expressive conduct.³²

³¹ While there is a general "moral disapproval of people appearing in the nude among strangers in public places", this societal disapproval does not apply when the nudity is part of an artistic representation or presentation. As stated by Chief Judge Richard Posner, "the nudity of a flasher and the nudity of an artistic performer are not the same thing . . . the difference, which is independent of the quality of the artistic performance, is [John Stuart] Mill's difference between self-regarding and other-regarding conduct. The flasher thrusts his nudity on an unwilling stranger; the artistic performer sells nudity to willing customers." Posner, Richard A., *Sex and Reason*, pp. 379-380 (Harvard University Press, 1992).

³² Were the regulation targeted at the persuasive effect of the speech, as seems likely here, it would surely be unconstitutional. In *Boos v. Berry*, 485 U.S. 312, 321 (1988), the court said:

Regulations that focus on the direct impact of speech on its audience present a different situation. Listener's reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate.

Insofar as the ordinance attempts to prohibit, in any kind of performance, costuming that simulates nudity, it is not nudity that is prohibited; rather, it is the idea and representation of nudity that is suppressed. This prohibition is clearly content-based.

Because the purpose of the regulation is to suppress expressive conduct in order to ameliorate the alleged secondary effects caused by live nude entertainment, the regulation must survive an enhanced level of scrutiny which requires the Court to determine whether there is a substantial justification for the proscription. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 578-79 (1991), Scalia, J., concurring.

The Pennsylvania Supreme Court describes the entertainment offered by Pap's A.M. as "nude erotic dancing," 674 A.2d 338, 340 (1996) and as "the same exact variety as the restricted entertainment in *Barnes*." *Id.*, at 344. Presumably, the City intended to include only the kind of live nude entertainment described in *Barnes* since the preambles to the ordinance reflect that it relied upon *Barnes* in passing the ordinance.

Whatever the intent, the sweep of the regulation here goes far beyond the kind of dance described in *Barnes*. The regulation reaches all performance nudity, including that which has not been shown to cause adverse secondary effects. Neither the ordinance itself nor the state

The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

courts have limited the application of the ordinance so that it does not apply to the performing arts.

The City of Erie bears the burden of demonstrating a substantial governmental interest justifying the ban on theatrical nudity. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-51 (1986). There is no evidence in the record here that nudity in productions performed in mainstream theatres can be causally connected to the presumed evils targeted by Erie, whether by mere correlation or by the persuasive effect of the nudity. *See, Barnes*, 501 U.S. at 585-86, Souter, J., concurring. Absent such evidence, the regulation impermissibly burdens a substantial amount of protected speech.

Throughout this litigation, Pap's A.M. has challenged Section 1(c) of ordinance No. 75-1994 as being unconstitutionally overbroad.³³ Had a similar challenge been raised in *Barnes*, it is clear that five (5) members of the Court would have found the statute there unconstitutional. Justice Souter, noting that there was no overbreadth challenge before the court, indicated that the secondary effects rationale on which he relied would be open to question if the statute could be used to bar expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

It is difficult to see, for example, how the enforcement of Indiana's statute against nudity

³³ Pet. App. A at 3a.

in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of Renton-type adult entertainment was correlated with such secondary effects.

Barnes, 501 U.S. at 585 n. 2. The productions Justice Souter would have been loathe to prohibit in *Barnes* fall squarely within the prohibitions of Section 1(c) of Ordinance No. 75-1994.

While a statute is overbroad if it sweeps constitutionally protected expression within its prohibitions, the Court has indicated that "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 770 (1982). *Amici* respectfully submit that the overbreadth of the regulation here is not hypothetical; rather, it is both real and substantial.

Erie's ban on performance nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes; i.e., nudity used as a communicative medium in operas, ballet, plays, musicals and other serious artistic performances. Here, the potential impermissible applications of Section 1(c) dwarf the assertedly legitimate reach of the regulation.

In addition to banning nudity, the regulation prohibits costumes that simulate specified anatomical parts of the human body. Whatever evidence may exist to

demonstrate a correlation between live nude entertainment and adverse secondary effects does not support the conclusion that there is a link between artistic productions which have no nudity, but use costumes that simulate the nude condition, and secondary effects.

From its analysis, it is abundantly clear that the Pennsylvania Supreme Court, like the trial court, found the regulation at issue unconstitutionally overbroad because it reached far more speech than was essential to accomplish the expressed governmental interest in eliminating alleged secondary effects associated with live nude entertainment. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968) (the incidental restriction on alleged First Amendment freedoms can be no greater than is "essential"). Consequently, the court severed the portion of the ordinance that brought the performing arts within its regulatory sweep. In doing so, the Court refused to rewrite the ordinance to permit nudity in performances other than "live nude entertainment."³⁴

³⁴ Throughout this litigation the City has asked the courts to rewrite the ordinance in order to remove its unconstitutional overbreadth. Failing this, the City argues that, in the exercise of its prosecutorial discretion, it would never prosecute mainstream theatrical productions. Joint Appendix 88-89. The City essentially asks this Court to rely on its good judgment that it will not enforce the ordinance against nude entertainment that might appear in the context of a theatrical performance or "serious" dance. The mere existence of discretion is the evil that the overbreadth doctrine seeks to cure. *Forsyth County, GA v. Nationalist Movement*, 505 U.S. 123 (1992); see also, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769

Because the Erie ordinance reaches a substantial amount of protected expression and the State courts have refused to render a narrowing construction, it is unconstitutionally overbroad.

CONCLUSION

Section 1(c) of Ordinance No. 75-1994 prohibits nudity in the performing arts, thus effecting the messages and content of "serious" artistic presentations. Because the regulation is targeted at expressive nudity and sweeps a substantial amount of protected expression within its prohibitions, its overbreadth is both real and substantial. As a consequence, the decision of the Pennsylvania Supreme Court should be **AFFIRMED**.

Respectfully submitted,

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(1988) (the face of the ordinance contained no explicit limits on the mayor's discretion). In *Forsyth County*, the Court stated:

. . . the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decision maker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so. 505 U.S. at 133, n.10.