No. 98-1161

IN THE

Supreme Court of The United States

OCTOBER TERM, 1998

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, ALL IN THEIR OFFICIAL CAPACITIES,

PETITIONERS,

V.

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

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF BREVARD COUNTY, FLORIDA, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITIONERS

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BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN SUPPORT OF THE PETITIONERS

Amicus Curiae, Brevard County, Florida, respectfully files its Brief in Support of the Petitioners in this case as follows:

QUESTION PRESENTED

Did the Pennsylvania Supreme Court improperly strike the ordinance of Erie, Pennsylvania, thereby willfully disregarding binding precedent in violation of the supremacy clause?

INTEREST OF THE *AMICUS CURIAE*

The County Attorney for the *Amicus Curiae*, Brevard County Board of County Commissioners ("Brevard County"), submits this brief pursuant to Supreme Court Rule 37.4, on behalf of Brevard County, Florida, and its political subdivisions, to bring to the Court's attention the adverse impact on Brevard County and other local governments by the Pennsylvania Supreme Court's interpretation of *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed. 2d 504 (1991). Brevard County submits this brief in support of the position taken by Petitioners, City of Erie, et al., and urges this Court to reverse the decision of the court below.

Brevard County, like the City of Erie, has enacted an indecency ordinance that is virtually the same as the Indiana statute upheld in *Barnes*. Brevard County has attempted to balance First Amendment concerns with the need to provide for the morality, health and welfare of its citizens and prevent the secondary effects associated with public nudity. Brevard County seeks clear direction from this Supreme Court on how legislative and judicial bodies should interpret this decision to

avoid wasting taxpayers' money; judicial time and resources; and most important, violating the Constitution.

SUMMARY OF THE ARGUMENT

The Pennsylvania Supreme Court violated the supremacy clause by not accepting the plurality opinion of *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed. 2d 504 (1991), as binding precedent. *Stare decisis* and uniformity requires that the same regulation upheld by the United States Supreme Court for the benefit of the State of Indiana must be upheld for other jurisdictions as well.

Brevard County also urges the Court to clarify the *Barnes* decision by first applying the test articulated by *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). In determining whether conduct is protected "speech" a fact determination must be made that the "speaker" is (1) intending to convey; (2) a particularized message: (3) with a great likelihood that the message will be understood. Only if the barroom dancer proves to a jury that her nude dance is protected speech, should the burden shift to the government to prove that the restrictions of an indecency ordinance as applied to the dance comport with the requirements of the test enunciated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

ARGUMENT

I. SUPREMACY CLAUSE

The Pennsylvania Supreme Court has determined, that although the City of Erie's ordinance ("Erie Ordinance") was "strikingly similar" to the Indiana statute upheld by this Court in *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed. 2d 504 (1991), the Erie Ordinance must be stricken as unconstitutional. *Pap's A.M. v. City of Erie*, 719 A.2d 273, 278-279 (Pa. 1998). The Pennsylvania Supreme Court brazenly states that a plurality opinion does not bind the lower courts to its holding. *Id.*

To support its ruling, the court stated, ". . . aside from the agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." *Id.* The Pennsylvania Supreme Court has overlooked the most obvious point of agreement by the majority of the *Barnes* Court: the Indiana statute was held to be constitutional. Although the five justice majority voted to uphold the Indiana's indecency statute on different grounds, they all agreed that the Indiana statute was constitutional. *Barnes*, 501 U.S. 560.

States and local governments like Brevard County have enacted laws similar to the Indiana statute, so that their citizens may enjoy the same protections as Indiana's citizens. The *Barnes* court gave these governments very little guidance in drafting indecency laws. However, the governments relied on the fact that the Indiana statute was constitutional and modeled their laws after the Indiana statute. If the *Barnes* decision is not binding, then each of these governments must defend its law in its own state or federal courts. This result, of course, frustrates the concepts of *stare decisis* and uniformity.

Brevard County urges this Court to declare that the plurality holding of *Barnes* is binding on lower courts. Additionally, Brevard County implores this Court to give legislative bodies more guidance than the holding in *Barnes*.

II. *BARNES* SHOULD BE CLARIFIED

All nine justices of the *Barnes* court agreed that the government had a right to protect non-consenting observers from displays of public nudity (*e.g.*, public beaches), and Brevard County requests the Court to reaffirm that position as

an incident to deciding this case. However, a severe split arose as to whether the government has the right to prevent public nudity in places of public accommodations, where all observers are consenting viewers (*i.e.*, adult entertainment bars). In the lead opinion, Justice Rehnquist stated that nude dancing "might be entitled to First and Fourteenth Amendment protection under some circumstances.", *Barnes*, 501 U.S. at 565, then applied the four-prong test set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) and upheld the Indiana statute as being (1) within the constitutional power of the government; (2) furthering an important or substantial government interest; (3) a governmental interest unrelated to the suppression of free expression; and (4) an incidental restriction on any alleged First Amendment freedoms that is no greater than is essential to the furtherance of that governmental interest.

While four justices adhered to the holding Indiana could prohibit public nudity in adult entertainment establishments, the plurality opinion did not address Justice Souter's secondary effects analysis nor the dissent of the four justices who would appear to have decided that Indiana cannot prohibit nudity in this context. Nor does the plurality opinion address the sticky distinction between nude barroom dancing and bona fide nude theater productions such as "Hair" and "Equus", as was alluded to by both Justice Souter, *Barnes*, 501 U.S. at 585, fn. 2 (Souter, J., concurring), and the dissent. *Barnes*, 501 U.S. at 594 (White, J., dissenting). The adoption of the rationale outlined below would enable the Court to overcome the legal difficulties intrinsic in making such fine distinctions.

Since this case involves an indecency ordinance that purports to prohibit nude dancing in adult entertainment establishments, Brevard County advances Justice Rehnquist's recognition of *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed. 342 (1972), for the proposition that speech is not necessarily present in every case involving nude "barroom" dancing, a notion that suggests the need for a "speech" analysis

prior to the application of the *O'Brien* test. In such cases the County would argue for the adoption of a legal process that requires a preliminary determination as to whether a particular nude barroom dance constitutes protected speech at all under the test set forth in *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) before the *O'Brien* test is applied. Brevard County urges that this Court establish a process whereby a jury, as the trier of fact, first apply the *Johnson* standard and determine, based on the evidence, whether a nude dancer's conduct is intended to convey a particularized message with a great likelihood that the message will be understood. Only if a determination that protected "speech" is present under that standard, should it be necessary to apply the *O'Brien* analysis to determine the validity of the government's attempt to regulate such protected speech.

Such a two-step approach would diffuse the *Barnes* dissent which criticizes the plurality opinion which would allow a nude ballet performed at Lincoln Center as protected while prohibiting substantially the same dance when performed in a bar. *Barnes*, 501 U.S. at 594 (White, J., dissenting). The authors of the *Barnes* dissent see no difference in the two dances. However, there may be a true distinction in the dances when the *Johnson* test is applied to the evidence by a jury. Upon review of the evidence adduced at a trial, the jury may view the Dance of the Seven Veils performed by a nude barroom Salome differently from the same nude dance performed by a ballerina Salome as part of a ballet. The evidence may show that the typical barroom Salome had no intent to convey a particularized message with a great likelihood that the message would be understood by her audience, as does the evidence in the case at bar where the barroom dancer testified that she danced to induce monetary rewards from her audience. Just as the biblical Salome danced to seduce Herod into executing John the Baptist, today's barroom Salome seeks tips and beer sales. Both dances involve conduct, but a jury could easily conclude from the evidence that neither involves protected speech.

In contrast, a ballet or theatrical production must viewed as a whole. *Southeastern Promotions, Ltd., v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed. 2d 448 (1975). When viewed as part of entire production, the Dance of the Seven Veils is likely to be understood by the audience, and a jury, as the dramatic and defining moment in the biblical story of John the Baptist's death.

Notably, the assessment of nude dance as protected "speech" or unprotected conduct under the *Johnson* test (as the first step in the two-step process proposed by the County) is essentially the same process that was adopted by this Court in commissioning juries to apply the community standards test in obscenity cases. *Miller v. California*, 413 U.S. 881, 94 S.Ct. 26, 37 L.Ed. 419 (1973). Under both processes, the trier of fact determines if the subject matter of the litigation is protected or unprotected under the First Amendment. Only if the trier of fact makes a finding that the nude dance is protected "speech" under the *Johnson* standard would the *O'Brien* test be invoked and applied.

The importance of resorting to *O'Brien* as the *second* step in testing the validity of the indecency regulations is illustrated by an interesting irony. The fourth part of the *O'Brien* test requires that the questioned regulation impose only an incidental restriction on "speech" that is no greater than is essential to the furtherance of the governmental interest. *O'Brien*, 391 U.S. 367. In *Barnes*, the requirement of the scant amount of clothing was viewed as incidental to whatever erotic message the "barroom" dancers where trying to convey. *Barnes* at 501 U.S. at 571. However, that same "clothing" limitation applied to Salome's ballet or to a production of "Hair" may actually destroy the literary, artistic or political message the author and actors are intending to convey.

The simplest way way to eliminate the possibility of an unintended consequence of *O'Brien* as applied to governmental

restrictions on nude dancing is to first turn to a jury for a determination as to whether a particular dance taken in context is protected speech or unprotected conduct under the *Johnson* test. Under the County's proposal, where a barroom dancer is cited for violating the indecency ordinance by performing the Dance of the Seven Veils in the nude, it becomes the barroom Salome's burden to convince a jury that she intended to convey a message and that there was a great likelihood that the message would be understood by her audience. *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 3069, 82 L.Ed. 2d 221 (1984). Only if she was successful in doing so, would the burden shift to the government to prove, as a mixed question of law and fact, *see, City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, ____U.S. ____, 119 S.Ct. 1624, ____L.Ed.2d ____ (1999), that its indecency regulations pass constitutional muster under the four prong *O'Brien* test.

The Court's alternative to this process is to recede from *California v. La Rue* and treat all nude dance as protected speech under the First Amendment. If this Court determines that barroom nude dancing is always protected speech, Brevard County urges this Court to adopt the view in the *Barnes* lead opinion that the government's important and substantial interest in protecting societal order and morality justifies its incidental minimal covering restrictions on nude dancing. *Barnes,* 501 U.S. at 568. Although lower courts have followed Justice Souter's attempts to spare bona fide artistic productions such as "Hair" and "Oh Calcutta" by treating nude dance as protected speech while applying his secondary effects analysis as the narrowest opinion in the *Barnes* plurality decision, Justice Rehnquist points out that the *Barnes* record did not include any intent of the Indiana Legislature to prevent such harmful secondary effects. *Barnes*, 501 U.S. at 568. But, this Court need not look to secondary effects analysis as the justification for allowing restricted government regulation of nude literary, artistic or political expression. In the adult entertainment context, the Court should sanction a factual determination as to

whether protected speech is involved at all as a threshold issue. Only if it is determined that protected speech is involved will it become necessary to apply secondary effects analysis or the *O'Brien* test to determine whether the prohibition is an incidental restriction on protected speech.

CONCLUSION

This Court should reverse the decision of the Pennsylvania Supreme Court as a violation of the supremacy clause. The Court should also take this opportunity to clarify the *Barnes* decision by holding that in cases involving nude barroom dancing, lower courts must first apply the *Johnson* test to determine whether speech is involved before proceeding to an application of the *O'Brien* test.

Respectfully submitted,

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