No. 98-1161

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 THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF PENNSYLVANIA AS *AMICI CURIAE SUPPORTING RESPONDENT*

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Pennsylvania is one of its statewide affiliates. Since its founding in 1920, the ACLU has vigorously defended the free speech principles of the First Amendment and has appeared before this Court on numerous occasions, both as a party and as *amicus curiae, in cases challenging governmental actions that threaten First Amendment rights. Because this case addresses important First Amendment questions, its proper resolution is a matter of substantial concern to the ACLU and its members.*

STATEMENT OF THE CASE

On September 28, 1994, the City Council for the City of Erie ("Erie" or "City") enacted Ordinance 75-1994 ("Ordinance") making it a crime to appear "in a state of nudity" in public. Pet. App. 8a.[2] As explicitly stated in the Ordinance's preamble, the Ordinance was enacted

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

Id. at 7a (emphasis added). In enacting the Ordinance, the City Council repealed and replaced the City's 128-year-old "Indecency and Immorality" law, which prohibited persons from engaging in "indecent" sexual conduct in public but did not outlaw public nudity. At the time the Ordinance was enacted, city law already regulated the location of adult entertainment establishments within the City of Erie. See J.A. at 42-43 (statement of Councilman Bagnoni). Nevertheless, the City deemed it necessary to adopt the Ordinance to ensure that nude dancing did not occur at all within the City limits. See id. at 37-43 (statements of Council members Robison, Thompson, and Bagnoni).

Shortly after the Ordinance went into effect, Respondent Pap's A.M. ("Pap's"), the owner of a nude dancing establishment in Erie operating under the name "Kandyland," brought an action in state court for declaratory and injunctive relief, alleging, among other things, that the Ordinance violated the First Amendment of the United States Constitution. On January 18, 1995, the trial court permanently enjoined enforcement of the Ordinance, concluding that the law was constitutionally overbroad. *Pap's A.M. v. City of Erie, No. 60059-1994, 1995 WL 610276 (Pa. Common Pleas Jan. 18, 1995). The state appellate court reversed. Pap's A.M. v. City of Erie, 674 A.2d 338 (Pa. Commw. Ct. 1996). Adopting Justice Souter's concurring opinion in Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581-87 (1991) (Souter, J., concurring), the Commonwealth Court concluded that the Ordinance furthered a governmental purpose - combating the so-called "secondary effects" of nude dancing - that was unrelated to the suppression of speech, and, therefore, the Ordinance survived intermediate First Amendment scrutiny. Pap's A.M., 674 A.2d at 344. The Supreme Court of Pennsylvania reversed the appellate court. Pap's A.M. v. City of Erie, 719 A.2d 273 (Pa. 1998). Unable to find a guiding opinion in Barnes, the Pennsylvania Supreme Court concluded that the Ordinance was enacted for the purpose of restricting "the erotic message of the dance." Id. at 279. The Pennsylvania Supreme Court thus applied strict scrutiny and held the Ordinance unconstitutional. Id. at 280. This Court granted the City's Petition for a Writ of Certiorari on May 17, 1999.*

SUMMARY OF ARGUMENT

1. Petitioners concede that the Erie Ordinance, like the statute at issue in *Barnes, must receive heightened scrutiny under the First Amendment. As a majority of this Court recognized in Barnes, laws that have the effect of burdening expressive activities must be subjected to heightened scrutiny, even if those laws also apply to nonexpressive activities. See 501 U.S. at 567 (plurality opinion); id. at 582 (Souter, J., concurring). To withstand respondent's First Amendment challenge, therefore, petitioners must show, at the least, that the Ordinance furthers a substantial government interest unrelated to the suppression of expression, and that the resulting burden on nude dancing is "no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968).*

The need for heightened scrutiny is especially clear where, as here, a law explicitly states that it is regulating conduct *for the purpose of prohibiting a category of speech. Thus, this Court has recognized the importance of applying heightened scrutiny even to generally applicable laws if those laws were enacted in order to burden First Amendment rights. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). Indeed, the Ordinance's explicit targeting of a particular form of expressive conduct - a content-based legislative distinction - probably warrants strict scrutiny. Nevertheless, the Court need not reach that question because the Ordinance also fails under the intermediate scrutiny test applied by the plurality and Justice Souter in Barnes.*

2. The "secondary effects" rationale applied by Justice Souter in his concurring opinion in *Barnes, and adopted by petitioners in this case, cannot justify Erie's total ban on nude dancing. Petitioners attempt to fit this case within the analysis established by the Court in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), for evaluating laws that regulate the time, place, and manner in which "adult entertainment" can occur within a community. But the Renton rationale cannot be stretched so far. Renton held that a community may restrict the location of adult movie theaters based on the "secondary effects" associated with such theaters, without being deemed to have engaged in impermissible content-discrimination based on the films themselves. Here, the "secondary effects" rationale is not used to justify a zoning restriction (which previously existed) but a total ban on nude dancing. Under Renton, as under other forms of intermediate scrutiny, the government must offer some evidence that the means it has chosen will further its stated ends. In this context, that means that petitioners must show that "secondary effects" will result from the (prohibited) nude dancing but not from the (permitted) partially-clad dancing. That assertion, however, is not only unsupported in the record, it is inherently implausible. In addition, this justification necessarily relates to the primary effect of nude dancing on its viewers - an effect that the Court has consistently rejected as a permissible reason to restrict expression.*

3. The view that restrictions on First Amendment rights may be justified by the government's interest in "morality" did not command a majority in *Barnes and represents a significant departure from constitutional jurisprudence. The Court has never held that "morality," without more, is sufficient to justify restrictions on a fundamental constitutional right. Indeed, the decision to apply intermediate scrutiny - as the Barnes plurality did - involves a recognition that fundamental First Amendment rights are implicated by laws that impose incidental burdens on speech. If intermediate scrutiny is to have any force, therefore, the government must point to something more than an interest in "morality" to justify a burden on the right to freedom of expression.*

ARGUMENT

Five members of this Court in *Barnes applied a variety of inconsistent rationales to uphold a public nudity law as applied to ban nude dancing. This case, we submit, illustrates some of the problems and pitfalls created by that ruling. As indicated above, we believe that Barnes can be distinguished on the ground that this case involves a law directly targeted at expressive activity. But to the extent that this Court concludes otherwise, amici respectfully submit that Barnes should be reconsidered.*

I. THE ERIE ORDINANCE REQUIRES HEIGHTENED FIRST AMENDMENT SCRUTINY.

Petitioners concede, as they must, that nude dancing is expressive conduct protected by the First Amendment. Pet. Br. at 6-7; *see Barnes, 501 U.S. at 565-66 (plurality opinion); id. at 581 (Souter, J., concurring); id. at 587 (White, J., dissenting); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981); Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975); see also California v. LaRue, 409 U.S. 109, 116-18 (1972). They also concede that the Ordinance is subject to at least intermediate scrutiny under the First Amendment. Pet. Br. at 25-29.*

The latter concession is plainly appropriate. Like the statute at issue in *Barnes, Erie's Ordinance prohibits all nude dancing from occurring anywhere within the city. As a majority of the Court recognized in Barnes, laws (such as the Erie Ordinance) that have the effect of restricting expressive activity must be subjected to heightened scrutiny under the First Amendment. 501 U.S. at 566-67 (plurality opinion); id. at 582 (Souter, J., concurring); id. at 592-93 (White, J., dissenting). This is true regardless of whether the Ordinance's prohibitions also apply to nonexpressive acts of public nudity; the First Amendment requires that laws which incidentally burden expressive conduct be closely examined to ensure they are not used*

impermissibly to suppress expression. See, e.g., id. at 567 (plurality opinion); id. at 582 (Souter, J., concurring); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984); O'Brien, 391 U.S. at 376.

Thus, as eight Justices ruled in *Barnes, Erie's Ordinance must at a minimum satisfy the test set forth in O'Brien. Specifically, the Court must determine whether the law serves a governmental interest that is "important or substantial," whether that interest is "unrelated to the suppression of free expression," and whether the incidental burden on expression is "no greater than is essential to the furtherance of that interest." O'Brien, 391 U.S. at 377.*

Unlike petitioners, the attorneys general of several states, as *amici, urge this Court not to apply any form of heightened First Amendment scrutiny. See Br. States of Kansas at 7. Adopting the rationale of Justice Scalia in his concurring opinion in Barnes, amici argue that because the Erie Ordinance applies to public nudity in general, its merely incidental effect on expressive nude dancing does not warrant anything more than an inquiry into whether there is a rational basis for the law. Id. at 6-7, 10-11.*

This case, however, provides an inappropriate context for even considering such a substantial change in First Amendment jurisprudence. Unlike the statute at issue in *Barnes, Erie's Ordinance explicitly targets expressive activity on its face. Although the Ordinance's substantive provisions purport to apply to public nudity in general, the law's preamble states that the Ordinance was passed in order to suppress nude dancing performances. And, unlike Barnes, this is not a case in which a general anti-nudity law "predates barroom nude dancing and was enacted as a general prohibition." 501 U.S. at 568 (plurality opinion); see also Young v. American Mini Theatres, Inc., 427 U.S. 50, 80-81 (1976) (Powell, J., concurring). To the contrary, the events giving rise to the Ordinance's enactment and the Ordinance itself show that the law was adopted not in order to prohibit nudity, but in order to prohibit nude dancing. As one Erie City Council member confirmed when describing the Council's purpose in adopting the Ordinance, "[w]e're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." J.A. at 39 (statement of Councilman Thompson) (emphasis added). At the time of the Ordinance's enactment, the City of Erie apparently had at least two zoning ordinances addressing the permissible locations for "adult entertainment" establishments. See id. at 42-43 (statement of Councilman Bagnoni). The transcripts of the City Council meeting concerning the Ordinance show that the Council members were frustrated with the failure of these laws to prevent nude dancing from occurring within the City. See id. ("Back in 1977 we introduced an ordinance, and then again we come back in 1985 with an ordinance. If that ordinance would have been supported and enforced, two [nude dancing establishments] wouldn't be in business today . . . .").*[3]

The plain language and background of the Ordinance thus demonstrate that the law, though cloaked in terms of a general prohibition on public nudity, has as its direct purpose the restriction of a form of expressive conduct.[4] For that reason, it would blink reality to immunize the Ordinance from heightened constitutional scrutiny on the theory that it is a generally applicable law aimed at nonexpressive conduct that just happens to affect speech incidentally.[5]

Indeed, both the *amici attorneys general and Justice Scalia's opinion in Barnes acknowledge that where the explicit purpose of a purportedly general law is to restrict free expression, that law must be subject to evaluation under the First Amendment. 501 U.S. at 577; Br. States of Kansas at 8. Cf. Employment Division, Dep't of Human Resources v. Smith, 494 U.S. 872, 882 (1990) (applying categorical approach to Oregon's generally applicable drug laws where there was "no contention that Oregon's drug law represents an attempt to regulate religious beliefs") (emphasis added). That rule is a necessary correlate of any rule immunizing "generally applicable" laws from heightened constitutional scrutiny - because of the ease with which those who would restrict constitutional rights can do so through laws that appear on their face to be neutral regulations of conduct. See Lukumi, 508 U.S. at 531-32.*

O'Brien, by contrast, teaches that subjective motivations are irrelevant. 391 U.S. at 383-84. That kind of approach - eschewing efforts to ascertain the actual motives of legislators - can only be maintained if, as O'Brien also directed, laws "incidentally" burdening expressive conduct are subjected to heightened scrutiny, regardless of what the court surmises about the reasons why the laws were passed. Amici are of the view that this type of approach is far more sensible. But the more important point, for present purposes, is that the choice between the two approaches makes no difference in this case. Both approaches would mandate heightened scrutiny here - either because the Erie Ordinance "incidentally" burdens expression or because its purpose was to do so.

That the Ordinance *explicitly targets a form of expressive conduct ordinarily would require "the most exacting scrutiny." Boos v. Barry, 485 U.S. 312, 321 (1988); Texas v. Johnson, 491 U.S. 397, 411-12 (1989). Indeed, amici believe that, in light of the plain language and history of the Ordinance, strict scrutiny is warranted. Nonetheless, because the Court applied intermediate scrutiny to a similar (albeit distinguishable) law in Barnes, and because the Ordinance fails even intermediate scrutiny, this brief will be confined to a discussion of the Ordinance's constitutional infirmities under the O'Brien test.*

II. THE ERIE ORDINANCE FAILS INTERMEDIATE SCRUTINY.

In *O'Brien, the Court held that a purportedly neutral law that burdens expressive activity may withstand First Amendment analysis:*

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. There is apparently no dispute about the proposition that the City of Erie has the power to enact an ordinance of this general type. The key inquiries thus relate to the remaining three parts of the test, which focus on the governmental interest asserted as a justification - whether it is substantial and actually furthered by the law, whether the interest is unrelated to suppressing speech, and whether there are less restrictive methods of achieving the Government's objectives.

Petitioners advance two alternative interests to support the Ordinance. First, the City argues - and the Ordinance explicitly states - that the law serves the purpose of restricting live nude dancing because of the alleged "secondary effects" associated with this type of expressive conduct. *See Pet. Br. at 18. Second, Petitioners contend in the alternative that the law is justified by the City's interest in promoting morality by prohibiting "live nude entertainment." See id. at 21. Neither rationale is sufficient to uphold the law under O'Brien.*

A. The City's "Secondary Effects" Rationale Is Insufficient to Withstand Intermediate Scrutiny.

Petitioners principally rely on the "secondary effects" rationale. Following the language of the preamble, petitioners argue that allowing the conduct banned by the Ordinance "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." Pet. App. 7a. They further argue that such interests are sufficient to satisfy *O'Brien. That argument was accepted by one Justice in Barnes, see 501 U.S. at 582-87 (Souter, J., concurring), but it does not work.*

In pointing to "secondary effects," petitioners attempt to fit this case within the ruling in *Renton, where the Court upheld a zoning ordinance restricting the location of "adult motion picture theaters" to certain areas within a city, reasoning that the zoning law "is aimed not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters on the surrounding community." Renton, 475 U.S. at 47 (emphasis added). Drawing on the holding in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), that "zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations," Renton, 475 U.S. at 49, the Court in Renton held that the zoning law reasonably regulated the dispersion of those theaters while leaving open sufficient locations in the City for the theaters to present their films, id. at 51-53.*

But this case is different from *Renton in ways that are critical to the application of the O'Brien test. The law at issue here does not target the location of establishments offering erotic entertainment. It seeks instead to impose a particular limitation on the forms of erotic entertainment available in all existing or future establishments, regardless of where located - permitting "live entertainment" in which dancers are partially nude, but proscribing otherwise similar entertainment when performed totally in the nude. Such a law cannot be defended as furthering a substantial interest in reducing "secondary effects."*

Furthering a Substantial Governmental Interest Unrelated to the Suppression of Free Expression. The differences between the *Renton law and the Ordinance at issue here mean there is a serious question whether the Ordinance actually "furthers" a substantial governmental interest "unrelated to the suppression of free expression." There is no doubt that the City's interest in reducing violence, prostitution, disease and the other so-called "secondary effects" it has identified is substantial and legitimate in the abstract, but when one considers how the law is designed and how it is supposed to achieve its express objectives, the secondary effects rationale cannot serve to justify what the City has done.*

Petitioners essentially ask the Court to indulge in one of two assumptions, neither of which is supported by evidence or common sense. The first is the assumption that, as a purely commercial matter, total nudity is so critical to the operation of "adult" establishments that merely by requiring the tiniest amount of covering of the body, the Ordinance will cause such establishments to go out of business, thus reducing the "secondary effects" they allegedly cause. But that rationale is highly

questionable both in principle - since it amounts to an explanation that the law was covertly designed to exclude an entire broad category of protected expression - and in practice - since it is undeniable that there are many "adult" establishments that operate with live entertainers who are only partially clad.

The second possible assumption would be that the establishments at issue would indeed continue to operate, but that the scant attire required by the Ordinance would, *by itself, reduce the amount of violence, prostitution, harassment and sexually transmitted disease in the City of Erie. Here again, there are problems both in principle and in practice.*

To the extent petitioners are claiming that nudity in a dancer's act so stimulates the *audience that it causes members of the audience to engage in violence, hire prostitutes or transmit diseases, it is not appropriate to describe these effects as "secondary." To the contrary, a law seeking to regulate speech in order to suppress the anticipated reactions of the audience is plainly content-based and thus, unlike the law at issue in Renton, cannot be said to be targeting the "secondary effects" of speech or any other interest unrelated to the suppression of free expression. In Renton, the Court held that municipalities may constitutionally restrict the location of "adult" establishments, without being deemed to have targeted the content of the entertainment provided in those businesses. See Boos, 485 U.S. at 320 (O'Connor, J., joined by Stevens & Scalia, JJ.) (explaining that in Renton, "[t]he content of the films being shown inside the theaters was irrelevant and was not the target of the regulation. Instead, the ordinance was aimed at the 'secondary effects of such theaters in the surrounding community' . . . .") (quoting Renton, 475 U.S. at 47). In other words, "[s]o long as the justifications for regulation have nothing to do with content, i.e., the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters . . . the regulation [is] properly analyzed as content neutral." Id.*

By permitting expressive activity that conveys a less sexually charged message, but banning the same form of expression when it is at its most erotic - on the ground that the latter type of expressive conduct creates a certain negative "atmosphere" that the former kind of dancing does not - the City of Erie has crossed an important constitutional line that applies to sexual speech but is not limited to it. As the Court has consistently recognized, the First Amendment forbids governmental restrictions on speech because of the provocative or persuasive effect of that speech on its audience. *See Boos, 485 U.S. at 321 (O'Connor, J., joined by Stevens & Scalia, JJ.); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992); Texas v. Johnson, 491 U.S. at 408-09. "The emotive impact of speech on its audience is not a 'secondary effect.'" Boos, 485 U.S. at 321 (O'Connor, J., joined by Stevens & Scalia, JJ.). Rather, the interest in protecting against viewer reaction aims at the primary effect of nude dancing. See Reno v. ACLU, 521 U.S. 844, 868 (1997) ("[T]he purpose of the CDA is to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech."); R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992); Boos, 485 U.S. at 321 (O'Connor, J., joined by Stevens & Scalia, JJ.). A law that targets nude dancing because of its alleged effect on the audience is thus undeniably content-based. See Forsyth, 505 U.S. at 134 ("Listeners' reaction to speech is not a content-neutral basis for regulation."); see also Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 802 (1996) (Kennedy, J., concurring in part and dissenting in part) ("The provisions here are content-based discriminations in the strong sense of suppressing a certain form of expression that the Government dislikes or otherwise wishes to exclude on account of its effects, and there is no justification for anything but strict scrutiny here.") (emphasis added).*

In any event, it is implausible to suppose that the addition of small amounts of covering to the acts of the live entertainers in Erie's adult establishments will in fact have a significant impact on the problems supposedly associated with adult establishments. Heightened scrutiny demands more than rank speculation, especially when it is so counterintuitive. If nude dancing gives rise to harmful "secondary effects," logic dictates that dancing with "a scant amount of clothing," *Barnes, 501 U.S. at 571 (plurality opinion), which also conveys an erotic message (albeit somewhat muted in comparison to totally nude dancing), would result in similar effects. The necessary fit between means and (asserted) ends is simply missing in this case.*

Showing that the Burden on Speech is No Greater than is Essential to Further the Government's Objective. Even if petitioners could show that the Ordinance would reduce the so-called "secondary effects" identified by the City in a legitimate content-neutral manner, the law would still run afoul of the final part of the *O'Brien test. According to the terms of the Ordinance, totally nude dancing may not occur anywhere within the City limits. The Ordinance thus completely bans a particular category of expressive conduct. Such a broad restriction places a greater burden on speech than is essential to attack the problems posited by the City.*[6]

Here again, *Renton, along with this Court's earlier decision in Young, is instructive. Although the Court in Renton and Young approved laws designed to disperse adult movie theaters within a community, it did not suggest that the same rationale would justify a total ban. Indeed, the Court cautioned that "[t]he situation would be quite different" if the zoning ordinances at issue "had the effect of suppressing, or greatly restricting access to, lawful speech." Young, 427 U.S. at 71 n.35 (plurality opinion). As the Court explained in Renton, "the First Amendment requires only that [a city] refrain from*

effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement." 475 U.S. at 54.

Other decisions of this Court also emphasize that nude dancing may not be totally banned to achieve the government's objective. Thus, in *Schad v. Borough of Mount Ephraim, 452 U.S. 61, 71 (1981), the Court struck down a zoning ordinance prohibiting any form of "live entertainment" within the Borough. The Court rejected the Borough's argument that the case was controlled by Young, stating that in Young, "[t]he Court did not imply that a municipality could ban all adult theaters - much less all live entertainment or all nude dancing - from its commercial districts citywide." Schad, 452 U.S. at 71 (emphasis added); see also LaRue, 409 U.S. at 118 ("While we agree that at least some of the [nude] performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board.") (emphasis added). Indeed, the Court has expressed doubt "that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech." R.A.V., 505 U.S. at 394; see also Reno v. ACLU, 521 U.S. at 868 (statute banning all "indecent" and "patently offensive" speech on the Internet is "a content-based blanket restriction on speech" that does not satisfy the Renton test).*[7]

By completely prohibiting nude dancing - rather than regulating the time, place, and manner in which it can be performed - the Ordinance is not sufficiently tailored to serve any substantial government interest. Leaving aside zoning measures, there are several other ways in which the City could address problematic "secondary effects" without banning all nude dancing. Among other things, the City could more vigorously enforce laws criminalizing "prostitution and obscene behavior," *Barnes, 501 U.S. at 594 (White, J., dissenting), and could substantially increase the penalties for those crimes. "Furthermore, if nude dancing in barrooms, as compared with other establishments, is the most worrisome problem," it could impose "appropriate regulation" of nude dancing in that particular setting. Id.*

In sum, a "secondary effects" rationale is ultimately very ill-suited to the task of justifying the particular Ordinance at issue here.[8]

B. The City's Purported Interest in Promoting Morality Is Also Insufficient.

Petitioners also argue, at least in passing, that the Erie Ordinance is justified by the City's interest in "promot[ing] . . . public . . . morals." Pet. Br. at 22. To serve that interest, petitioners reason, "[t]he individual's right of free expression cannot be given free reign at all times, but must sometimes be subordinated to the general welfare." *Id. In other words, petitioners assert that the total suppression of nude dancing is justified because of the City's moral objection to such dancing. That line of reasoning, however, is precisely what the First Amendment prohibits.*

Petitioners' argument appears to be based on the plurality's rationale in *Barnes. In Barnes, the plurality concluded that the burden placed on nude dancing by Indiana's anti-nudity statute was justified because the state's moral disapproval of public nudity was unrelated to the expressive component of nude dancing. 501 U.S. at 570-71 (plurality opinion). Noting that " [p]ublic indecency statutes of this sort are of ancient origin," the Court reasoned that such statutes "reflect moral disapproval of people appearing in the nude among strangers in public places." Id. at 568. Because, according to the plurality, moral opposition to the physical fact of appearing nude in public was the target of the statute, the government's interest was unrelated to the suppression of expression for purposes of the O'Brien test. Id. ("[W]hile the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.").*[9]

The Court should firmly reject the *Barnes plurality's view that "morality," without more, can justify a law used to ban a form of expressive conduct. In reaching this conclusion, the plurality relied upon Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), and Bowers v. Hardwick, 478 U.S. 186 (1986); but, as Justice Scalia pointed out in his concurring opinion, in those two cases the Court concluded that the asserted right was not entitled to any special constitutional protection and, therefore, the regulation required only a rational basis. Barnes, 501 U.S. at 580 (Scalia, J., concurring). Indeed, the Court has never been willing to restrict a fundamental constitutional right on the basis of a bare assertion of "morality." To the contrary, resistance to allowing the state's moral judgments to override an individual's liberty must be especially strong when First Amendment rights are implicated. See Smith, 494 U.S. at 902 (O'Connor, J., dissenting) ("[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.").*[10]

The central purpose of the Free Speech Clause of the First Amendment (and of the religion clauses as well) is to deprive the government, whether acting through raw authoritarian power or as a voice of the majority, of the power to dictate what is

"right" in matters of thought or religion.[11] That is why, in applying the *O'Brien test, the Government is required to show that a regulation of conduct that incidentally burdens expression furthers a substantial interest unrelated to free expression. In applying that test, the Government should be required to offer something more concrete than a mere assertion that the conduct at issue is deemed by the Government to be "immoral." It should be required to show that restricting the conduct will further some other interest, such as protecting people from harm caused by the conduct. A "pure" moral judgment, not based on some more concrete state interest, may be sufficient to justify a regulation of non-expressive conduct. But if O'Brien is to retain any meaning whatsoever as a form of heightened scrutiny, that same judgment cannot be used to justify applying the law to burden expressive conduct. After all, any regulation of conduct could be so justified, and there would therefore be no case in which intermediate scrutiny ever provided any protection of expressive conduct.*

CONCLUSION

For the foregoing reasons, the judgment of the Pennsylvania Supreme Court holding the Ordinance unconstitutional should be affirmed.

Respectfully submitted,

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September 30, 1999

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1/ The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici, their members, or counsel contributed money or services to the preparation or submission of this brief.*

2/ According to the Ordinance, "'[n]udity' means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; [and] the showing of the female breast with less than a fully opaque covering of any part of the nipple." *Id. The Ordinance also prohibits people from wearing a "costume" that "simulates" the proscribed body parts. Id.*

3/ *See also id. at 37-38 (statement of Councilwoman Robison) ("My concern is that [the Ordinance] will become just another piece of yellowed paper languishing in an ordinance book like the article it's replacing); id. at 40 (statement of Councilman Thompson) (discussing a prior ordinance addressing "lewd entertainment" and the need to "redefine[]" the law to address the City's problem with such entertainment).*

4/ Although the illicit motive of some members of a legislative body is not a sufficient basis upon which to invalidate an otherwise constitutional law, *see O'Brien, 391 U.S. at 383, legislative history is certainly pertinent to the determination of*

whether a law has as its purpose an unconstitutional goal, see, e.g., Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 645-49 (1994) (examining statute's text, legislative history, and operation to determine whether the "manifest purpose" of statute is to regulate speech based on its message); Lukumi, 508 U.S. at 540 (Kennedy, J., joined by Stevens, J.).

5/ In light of the history of the Ordinance's enactment, the only "incidental" effect of the Ordinance is its burden on *nonexpressive nudity.*

6/ In *Barnes, certain members of the Court concluded that the Indiana statute was not overly restrictive because it permitted some erotic dancing to take place. See 501 U.S. at 571-72 (plurality opinion); id. at 587 (Souter, J., concurring). Although it is true that this Ordinance, like the Indiana statute, does not ban all forms of erotic dancing, both laws completely ban one form of erotic dancing æ dancing performed in the nude. Cf. City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994).*

7/ Further, the Court has suggested that particularly restrictive zoning, and certainly a total ban on a type of expressive conduct, may give rise to the presumption that the government is attempting to restrict expression on the basis of content. *See Renton, 475 U.S. at 48 ("As Justice Powell observed in American Mini Theatres, '[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.'") (quoting Young, 427 U.S. at 82 n.4 (Powell, J., concurring)); Young, 427 U.S. at 84 (Powell, J., concurring) ("[C]ourts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression.") (emphasis added).*

8/ For similar reasons, we respectfully disagree with the rationale of Justice Souter's concurring opinion in *Barnes.*

9/ Without question, even under the plurality's reasoning in *Barnes, the government cannot directly regulate speech based on a moral disapproval of that speech. See 501 U.S. at 569-70 (plurality opinion). This would effectively immunize all laws arising from the majority's "moral" objection to a particular type of speech. But this certainly cannot be the case: the Court has consistently invalidated laws restricting kinds of speech that many would deem "immoral." See Reno v. ACLU, 521 U.S. at 874-75 ("indecent" and "patently offensive" speech on the internet); R.A.V., 505 U.S. at 396 ("hate speech" and cross-burning); United States v. Eichman, 496 U.S. 310, 318 (1990) (flag burning); Texas v. Johnson, 491 U.S. at 418-19 (same).*

10/ *Cf. Texas v. Johnson, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) ("'The fact that society may find speech offensive is not a sufficient reason for suppressing it.'") (quoting FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978)).*

11/ *See West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").*