

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CITY OF ERIE, ET AL., Petitioners v. PAP'S A.M., tdba
"KANDYLAND"

CASE NO: 98-1161 C.1

PLACE: Washington, D.C.

DATE: Wednesday, November 10, 1999

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Supreme Court U.S.

IN THE SUPREME COURT OF THE UNITED STATES

Petitioners :

v. : No. 98-1161

PAP'S A.M., tdba "KANDYLAND" :

Washington, D.C.

Wednesday, November 10, 1999

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:02 a.m.

13 APPEARANCES:

14 GREGORY A. KARLE, ESQ., City Solicitor, Erie,

Pennsylvania; on behalf of the Petitioners.

16 JOHN H. WESTON, ESQ., Los Angeles, California; on behalf
17 of the Respondent.

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PROCEEDINGS

(11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 98-1161, City of Erie v. Pap's A.M., doing
5 business as Kandyland.

6 Mr. -- spectators are admonished, don't talk
7 until you get out of the courtroom. The Court is still in
8 session.

9 Mr. Karle. Am I pronouncing your name
10 correctly?

11 MR. KARLE: Karle.

12 CHIEF JUSTICE REHNQUIST: Karle?

13 MR. KARLE: Karle.

14 CHIEF JUSTICE REHNQUIST: Karle, okay.

15 ORAL ARGUMENT OF GREGORY A. KARLE
16 ON BEHALF OF THE PETITIONERS

19 In 1994, the City of Erie enacted a content-
20 neutral blanket prohibition against public nudity. That
21 ordinance was patterned after a similar ordinance which
22 was passed on by this Court in 1991 styled Barnes v. Glen
23 Theatre.

24 QUESTION: Maybe you should lower the -- I think
25 the trouble is, it's too high. Crank it down, and I think

1 we might hear you -- the other side.

2 MR. KARLE: Okay.

3 QUESTION: Now try it and speak up, if you --

4 MR. KARLE: Our ordinance was challenged. It
5 went through our intermediate trial level and intermediate
6 appellate system, and was passed on by our State supreme
7 court. On review, the Pennsylvania supreme court
8 acknowledged that First Amendment protection was extended
9 to nude barroom dancing, as was found in Barnes v. Glen
10 Theatre. It declined to find any other guidance in
11 Barnes.

12 Our State supreme court engaged in its own
13 independent analysis in rejecting our contention that the
14 ordinance was content-neutral.

15 The city challenged the ordinance --

16 QUESTION: On content neutrality, the ordinance
17 at issue in Barnes, as I recall, prohibited public nudity
18 in general.

19 MR. KARLE: That's correct.

20 QUESTION: Now, in this Erie ordinance, the
21 preamble to the ordinance notes that it was enacted for
22 the purpose of limiting a recent increase in nude live
23 entertainment.

24 MR. KARLE: That's correct.

25 QUESTION: Does that distinguish this Erie

1 ordinance from Barnes?

2 MR. KARLE: Justice O'Connor --

3 QUESTION: -- seems to have been addressed to a
4 specific problem, making it perhaps not content-neutral.

5 MR. KARLE: Well, first of all, Your Honor, our
6 position is, reference to content does not make the
7 ordinance content-specific, or content-based. The
8 intention of that preamble was to acknowledge the prior
9 holdings of this specific Court, which granted certain
10 limitations to this type of expressive conduct. The whole
11 text of the ordinance is an ordinance of general
12 application. It applies --

13 QUESTION: Before we get too much into the
14 merits of this case, there's a contention that the case
15 may be moot. Can you talk about mootness?

16 MR. KARLE: I --

17 QUESTION: Is the -- is this business still in
18 operation, Pap's?

19 MR. KARLE: As I understand it, the location
20 where it operated initially in 1994 no longer exists.

21 QUESTION: But he's in business somewhere else?
22 As I understood it, he's out of business. He's 70 years
23 old, and --

24 MR. KARLE: I -- in an affidavit presented by
25 the respondent, he claims to be out of business.

1 QUESTION: Well, do you claim he's not out of
2 business?

3 MR. KARLE: I filed a response -- they still
4 keep their corporation in an active status, so --

5 QUESTION: Is that enough? I mean --

6 MR. KARLE: It's enough that he could get back
7 into business --

8 QUESTION: Well, anybody could get back into
9 business, but then there's no such thing as mootness. I
10 mean, if a person stops the business and has no intention,
11 expresses no intention of going back into it --

12 MR. KARLE: We've also --

13 QUESTION: He sold the place. He doesn't even
14 have the property any more, is that right, and the only
15 reason you think the case is still alive is because the
16 corporation is still in existence?

17 MR. KARLE: That was one reason we asserted in
18 our petition in response to mootness.

19 QUESTION: What else?

20 MR. KARLE: We also cited a number of reasons.

21 If I can --

22 QUESTION: What about the line of cases that
23 says voluntary cessation doesn't moot a case?

24 MR. KARLE: We cited those in our response to --

25 QUESTION: Unfortunately, those cases involve

1 voluntary cessation by the defendant.

2 QUESTION: Right.

3 MR. KARLE: That's correct.

4 QUESTION: Not voluntary cessation by the
5 plaintiff. This is the plaintiff who says, you know, I
6 was really mad at the city for closing me down, but now, I
7 don't really care. I'm going to Florida.

8 (Laughter.)

9 QUESTION: I couldn't care if they close me
10 down or not. I've made mine and I'm leaving Erie,
11 Pennsylvania. I'm getting out of the rust belt. I'm
12 going to Florida.

13 (Laughter.)

14 MR. KARLE: Justice Scalia, we also indicated
15 that there is a reasonable expectation that the same
16 controversy will occur between the same parties.

17 QUESTION: Well now, what -- and what's the
18 basis for that statement? The -- I mean, is there some
19 evidence that this corporation is likely to resume the
20 sort of business it had?

21 MR. KARLE: Chief Justice Rehnquist, we don't
22 know. There's no evidence before us which suggests that
23 he couldn't do it. The man hasn't died.

24 QUESTION: So it's just kind of up in the air?
25 He's quit the business, and -- but you're saying he might

1 resume it?

2 MR. KARLE: Yes.

3 QUESTION: But there's no evidence one way or
4 the other on the subject?

5 MR. KARLE: In our mind, what this case --

6 QUESTION: Well, there is evidence. He's said
7 he isn't going to. He's finished. He's out of there.

8 MR. KARLE: There is an affidavit, that's
9 correct.

10 QUESTION: Right, and you don't have anything in
11 opposition to that, except you say, well, he could change
12 his mind.

13 MR. KARLE: That's correct.

14 QUESTION: What about closing the business?
15 Isn't that evidence, too? I mean, physically he closed
16 something, it's gone, he sold the property?

17 MR. KARLE: Yes, the property was sold.

18 QUESTION: All right. So he has no property, he
19 says he's not going to do it any more, and you in response
20 to that say, what? You say nothing. All right.

21 MR. KARLE: If I may, the corporate records of
22 this entity indicate a number of shareholders. Mr. Panels
23 wasn't the only one. I don't believe there was an
24 affidavit submitted by those individuals.

25 QUESTION: Perhaps we've explored that as much

1 as we need to. Why don't you return to the merits?

2 QUESTION: Mr. Karle --

3 QUESTION: May I ask just one further question
4 on it? I was surprised that you weren't content with
5 saying, in response to the mootness suggestion, well,
6 fine, then we must wipe out the Pennsylvania supreme
7 court's decision, because you didn't get your crack at
8 appealing it.

9 How can the plaintiff say, I won this wonderful
10 victory, and now I'm going to go out of business, but I'm
11 going to preserve, immune from any further review, this
12 decision?

13 MR. KARLE: I would be content if this Court
14 could order that this matter be remitted back to the State
15 supreme court and the order vacated. It was not my
16 understanding that --

17 QUESTION: Are you sure we have the power to do
18 that?

19 MR. KARLE: It was not my understanding that it
20 was -- this Court could do that, but --

21 QUESTION: I'm not, either.

22 MR. KARLE: But if in its wisdom it could, I
23 would invite it to do so.

24 QUESTION: But that would change your mind --
25 (Laughter.)

1 QUESTION: That would change your mind on the
2 likelihood of the conduct recurring?

3 QUESTION: Quickly.

4 (Laughter.)

5 QUESTION: Mr. Karle, going back to the issue
6 that Justice O'Connor raised on whether this is content-
7 based, she asked you, as I recall, whether it was content-
8 based because it seems to be directed to the particular
9 category of nude dancing, not nudity generally. As you
10 answer that, I wonder if you would consider a variation on
11 that question, which is what was the nub of what was
12 bothering me here as a seeming distinction from the
13 situation in Glen.

14 The statute by its -- the ordinance, rather, by
15 its terms seems to cover all nudity. The reference to it
16 is, appears in the state of nudity, to describe what is
17 proscribed, but there is at the same time the preamble
18 that says, what we're really concerned with here is nude
19 dancing, and there is a representation in the record -- it
20 may have been from you. I forget now -- to the effect
21 that the statute is not going to be enforced against
22 legitimate theater productions like Equitus, Equus and Oh
23 Calcutta and so on.

24 And so my variation on the question is this. It
25 sounds as though perhaps facially you could say it covers

1 all nudity, but as applied it certainly is not covering
2 all nudity and distinctions are being made, insofar as I
3 can tell they are being made on the basis of content, on
4 the basis of the artistic quality of the production in
5 which the nudity occurs. Equus is left alone. The
6 barroom dancing is not left alone.

7 So on either Justice O'Connor's theory or my
8 theory, isn't a content-based distinction being made here?

9 MR. KARLE: I would say no, Justice Souter. The
10 preamble purely acknowledges the restrictions on nude
11 barroom dancing as enunciated by this Court in 1991. It
12 sets the parameters of the ordinance, which this Court
13 held were constitutional.

14 QUESTION: No, but the Barnes ordinance, the
15 assumption of our decision, or our decisions, I guess, of
16 those of us who would -- did uphold the Barnes ordinance,
17 the assumption was that it applied across the board, and
18 that, in fact, hadn't been challenged.

19 And I think -- I did not go back and reread my
20 opinion, but I read excerpts from it in the brief, and my
21 recollection is that I said, you know, if it turns out
22 that either an overbreadth challenge or some kind of a
23 challenge to the effect that it is not being enforced
24 across the board were made, that might be a different
25 case, and it sounds to me as though this is that different

1 case.

2 MR. KARLE: And if I can address two points,
3 Justice, the first is, you pointed to some references in
4 the record which attribute statements to me which suggests
5 that, or state that this will not be enforced against
6 plays such as Hair, or Equus, or other theater
7 productions.

8 As I stand here now, before this Court, we are
9 standing on the face of this ordinance and it would be and
10 it could be applied to those types of productions. The
11 reasons for those statements were concerns of the trial
12 court, and we tried to --

13 QUESTION: Yes, but they were concerns about
14 constitutionality, and I didn't remember whether it was
15 you or somebody, whoever was representing the city said --

16 MR. KARLE: No, that was me.

17 QUESTION: -- this is in fact the way we're
18 going to enforce it.

19 QUESTION: Wasn't that the --

20 QUESTION: Was that indeed the reason you would
21 allow Equus, because you think the Constitution requires
22 it?

23 MR. KARLE: Absolutely not, no.

24 QUESTION: Well, if the Constitution did require
25 it, would you allow nudity in Equus?

1 MR. KARLE: If the Constitution required it, the
2 plaintiff --

3 QUESTION: And would that be unlawful subject
4 matter discrimination, if it's required by the
5 Constitution?

6 MR. KARLE: Pardon me, Justice?

7 QUESTION: Would that be unlawful subject matter
8 discrimination if it's required by the Constitution?

9 MR. KARLE: Absolutely not, not --

10 QUESTION: Of course not.

11 MR. KARLE: -- no.

12 QUESTION: So what you're saying is, you will
13 enforce this ordinance -- even if you said you would do
14 it, not enforce it for Equus, you're saying you will
15 enforce it to the extent the -- you will enforce it by its
16 terms to the extent the Constitution permits enforcement
17 by its terms.

18 MR. KARLE: That's absolutely correct, Justice
19 Scalia.

20 QUESTION: Well, but wait a minute --

21 QUESTION: I don't follow that --

22 QUESTION: -- just a minute here. May I ask
23 this question, please, counsel? You made a solemn
24 representation in open court to the judge, and you're
25 saying that -- you do not stand by that representation?

1 I'm not asking you why you made it.

2 MR. KARLE: No.

3 QUESTION: But it seems to me you did make a
4 representation on the record that this ordinance would not
5 be enforced against those two -- in those two situations.

6 MR. KARLE: Your Honor --

7 QUESTION: Is that correct?

8 MR. KARLE: That's -- that's correct.

9 QUESTION: Well, why should we not therefore
10 assume that you -- that the city will do exactly what you
11 said the city would do in the open court proceedings that
12 are part of this record?

13 MR. KARLE: Well, first of all, judge, anything
14 I did was evidenced in the record, and the intent was to
15 try to get the trial court to give the statute a limiting
16 construction. He seemed to be troubled by that. I don't
17 think I'm able to --

18 QUESTION: I don't really care what the -- I
19 don't really care what your intent was, it was strategic,
20 tactical, or what, but you did make a representation as to
21 the city's policy in enforcing this ordinance.

22 MR. KARLE: And that would be beyond my
23 abilities as the City Solicitor --

24 QUESTION: I think your answer is getting worse.
25 (Laughter.)

1 QUESTION: You said, you know, I said this to
2 the trial court so I could win in the trial court, but I'm
3 not going to say it here so I'm going to win here. That's
4 what I'm hearing. That's --

5 MR. KARLE: No, no, no. I -- that's not to mean
6 I was making a misstatement to the trial court. He didn't
7 understand my position. That's my point.

8 QUESTION: Do I understand that Equus in fact
9 played?

10 MR. KARLE: Yes, it did.

11 QUESTION: And you didn't make any effort to
12 stop it?

13 MR. KARLE: No.

14 QUESTION: And you didn't say the reason you did
15 because you --

16 MR. KARLE: And --

17 QUESTION: You thought the constitution required
18 it?

19 MR. KARLE: No. The respondents portrayed that
20 situation as a conscious, deliberate effort on our part to
21 withhold --

22 QUESTION: But you knew that Equus was playing
23 in town?

24 MR. KARLE: Right, and the trial court made a
25 finding on that in the cert petition at page 27a, 14, the

1 trial court said the play Equus, which featured frontal
2 nudity, did appear in the City of Erie in October and
3 November 1994, after passage of the ordinance.

4 And I know there was discussion in the
5 respondent's brief that this was a conscious, deliberate
6 effort, but all we acknowledge is, the play was here, and
7 it wasn't enforced, and if I can go outside the record,
8 the reason is, no one complained.

9 QUESTION: Yes, we do have some matters in our
10 obscenity law jurisprudence about redeeming artistic or
11 social value, don't we, and some people might think Equus
12 has that.

13 MR. KARLE: It may, yes.

14 QUESTION: Yes.

15 MR. KARLE: But certainly we were not trying
16 to --

17 QUESTION: I can understand there may be some
18 reason to think that lap-dancing is a little different
19 from Equus as far as the Constitution is concerned.

20 QUESTION: This case does not involve lap-
21 dancing, does it?

22 QUESTION: Ah, well --

23 (Laughter.)

24 QUESTION: This case does not involve lap-
25 dancing, does it?

1 MR. KARLE: There was lap-dancing in these -- in
2 the bar, yes.

3 QUESTION: So what am I supposed to do if --

4 QUESTION: Does the record show that?

5 QUESTION: -- there are some -- if I think that
6 some forms of this might involve no more than selling a
7 sexual favor, like prostitution, no expression, no
8 nothing, but other forms of this might be simply a low-
9 brow kind of art, in which case you're starting to
10 distinguish among kinds of art, so all would depend on
11 what it is, a matter which the record is totally silent
12 about? What am I supposed to do?

13 MR. KARLE: Justice Breyer --

14 QUESTION: I'm not saying I do think that. I'm
15 saying that hypothetically.

16 MR. KARLE: Justice Breyer, if I can address
17 that, I believe that that issue was already addressed
18 squarely in the Barnes case, and it put limitations on
19 regulation of nude barroom dancing, and we took the
20 almost -- almost identical language of Barnes,
21 incorporated it in our ordinance, and are applying the law
22 as it was stated in 1991 in that case. We aren't making
23 any judgments as to --

24 QUESTION: Except the preamble is different,
25 right?

1 MR. KARLE: The preamble simply to acknowledge
2 your prior holding in 1991. The respondents would have
3 us -- have the Court believe that by the city
4 acknowledging a precedential case, that somehow vitiates
5 the ordinance and makes it content-neutral.

6 QUESTION: It's not that. It says the intent is
7 to focus and prohibit nude live entertainment. I mean,
8 that's what it says.

9 MR. KARLE: But Justice Connor, that's not what
10 the whole ordinance said.

11 QUESTION: O'Connor.

12 MR. KARLE: O'Connor. But that's not what the
13 whole ordinance says. The whole ordinance speaks to
14 regulation of public nudity in all places.

15 QUESTION: I suppose if you had people who had
16 been walking down Main Street in the buff, the prologue
17 might have said, we've had a lot of people walking down
18 Main Street in the buff, and so we think there's a need
19 for a statute against public nudity, and that statute
20 would be generally applicable, I assume.

21 MR. KARLE: I --

22 QUESTION: Just because it was prompted by one
23 particular incident, or series of incidents, doesn't
24 render it any less generally applicable, does it?

25 MR. KARLE: I agree, Justice Scalia.

1 QUESTION: I thought you would.

2 MR. KARLE: All we would --

3 (Laughter.)

4 MR. KARLE: All legislation makes mention of
5 content. That may be the triggering point for an
6 ordinance or a statute, but just to mention it, or mention
7 the content and acknowledging a trigger in point doesn't
8 make it content-specific.

9 QUESTION: Mr. Karle, what about the

10 Pennsylvania supreme court, that interpreted its law? It
11 seemed to read that preamble almost as a substitute
12 provision of the statute. The Pennsylvania supreme court
13 thought that that preamble counted, and in determining
14 whether it does or not, don't we owe some respect to the
15 way the -- Pennsylvania's highest court construes
16 Pennsylvania law?

17 MR. KARLE: I disagree. I believe the court
18 failed to make any distinction in the two ordinances in
19 Barnes. I believe -- that's our Supremacy Clause
20 argument.

21 What the court did was simply apply the minority
22 view in Barnes and gave our ordinance --

23 QUESTION: Well, it said something about the
24 preamble, and that's what I'd like you to address, not its
25 treatment of Barnes, but whether the preamble counted in

1 determining the validity of this legislation.

2 MR. KARLE: The State supreme court, although it
3 found that our ordinance had a purpose grounded in
4 secondary effects, it said, stated that it was
5 overshadowed by an unstated motive, so it really doesn't
6 go on to tell us the distinguishing features.

7 QUESTION: Well, the part that I remember, and
8 correct me if I'm wrong, is, it referred to something that
9 was stated, the very words that Justice O'Connor quoted to
10 you from the preamble. That wasn't something unstated.

11 MR. KARLE: No, it was not. That was definitely
12 in the preamble.

13 QUESTION: And the Pennsylvania supreme court
14 thought that that preamble counted.

15 MR. KARLE: I believe that the respondents have
16 conceded that point. If you refer to their brief at
17 footnote 2, it says the Pennsylvania supreme court did
18 articulate one important -- distinguished between the case
19 and Barnes. It expressly noted that the ordinance on its
20 face stated that it was adopted for the purpose of
21 limiting a recent increase in nude live entertainment.

22 This, rather than Justice White's dissent in
23 Barnes were the basis -- if this were the basis rather
24 than Justice White's dissent, then their reasoning would
25 square with the judgment, so relying even on what our

1 opponents are saying, they didn't make that square
2 distinction to hinge the decision.

3 QUESTION: But I'm asking you about the
4 relationship between two high courts, Pennsylvania's
5 highest court and this Court, and doesn't this Court owe
6 some respect to the way the Pennsylvania supreme court
7 construed that statute?

8 MR. KARLE: I -- it could accord it. Our
9 position is they didn't -- they found the -- they found
10 Barnes and they found the Erie ordinance strikingly
11 similar. They did not go along and distinguish the
12 ordinance. If they did --

13 QUESTION: How could anybody --

14 MR. KARLE: If they did -- if they did, we
15 wouldn't be here --

16 QUESTION: How could anybody construe it that
17 way? I mean, if the supreme court said, you know, black
18 is white, would we not think that maybe they misspoke? By
19 its terms, the ordinance applies to all nudity, does it
20 not?

21 MR. KARLE: That's correct, Justice Scalia.

22 QUESTION: And the prologue says what prompted
23 this ordinance, but it doesn't say that that's all the
24 ordinance applies to.

25 MR. KARLE: That's correct.

1 QUESTION: How can the Pennsylvania supreme
2 court possibly have said that the ordinance only applies
3 to nude -- did it ever say that it applies only to nude
4 dancing?

5 MR. KARLE: No, it didn't.

6 QUESTION: Of course, you told it it didn't
7 apply to theater productions of nudity, so it probably
8 relied on that in assuming that maybe --

9 MR. KARLE: That certainly --

10 QUESTION: -- it didn't quite might mean what it
11 said.

12 MR. KARLE: Justice Stevens, that certainly
13 wasn't in the opinion or the rationale in the
14 Pennsylvania --

15 QUESTION: Did you make any representation to
16 the supreme court of Pennsylvania as to the application of
17 the statute?

18 MR. KARLE: No.

19 QUESTION: Yes, but if the supreme court of
20 Pennsylvania wants to take a kind of strict original
21 intent approach to its statutes and say, despite the
22 generality of the language it only applies to the occasion
23 for its enactment, I -- would you say that we should
24 override Pennsylvania's -- the Pennsylvania supreme
25 court's construction?

1 MR. KARLE: I think you're mandated to.

2 QUESTION: Absolutely. The republican form of
3 Government provision. We haven't applied it before,
4 right?

5 (Laughter.)

6 QUESTION: Is that what this -- are you -- did
7 the Pennsylvania supreme court say that it doesn't apply
8 to people walking down the street without any clothes on?
9 Is that what they said?

10 MR. KARLE: That's the ultimate effect, because
11 they struck those provisions in the ordinance, walking
12 nude, walking around nude. They struck them.

13 QUESTION: They said they struck them because
14 they thought they were unconstitutional. If they had been
15 constitutional, would they say as a matter of statutory
16 interpretation they don't apply except to clubs?

17 MR. KARLE: Perhaps, Justice Breyer.

18 QUESTION: Perhaps.

19 QUESTION: As I read the Pennsylvania supreme
20 court's opinion, they do seem to assume what has been
21 brought up in the discussion here, that the immediate
22 motivation for this statute was the appearance of a lot of
23 nude dancing establishments, and they acknowledge that.

24 And then they go on and seem to indicate that
25 that motivation for it is enough to vitiate it under the

1 Constitution, but I don't see that they anywhere say that
2 it only applies to nude dancing establishments. They seem
3 to regard the fact that it was prompted by the appearance
4 of the nude dancing establishments as enough to render it
5 not content-neutral, which is quite different from what's
6 being suggested. And you agree with that, too, I think.

7 (Laughter.)

8 MR. KARLE: We provided a number of analyses
9 that the supreme court could have utilized in order to
10 reconcile the various opinions in Barnes such that it
11 could construe our ordinance.

12 In a nutshell, what we are saying is, the State
13 supreme court ruled as it did because it couldn't
14 reconcile either the plurality or the concurring opinions
15 of the Barnes case. I suggest that, just looking at
16 Barnes, there aren't five votes to mandate a strict
17 scrutiny standard of review, so therefore the court was in
18 clear error in utilizing a strict scrutiny standard of
19 review in applying that review to the city's ordinance.

20 We believe our ordinance withstands intermediate
21 scrutiny. The Pennsylvania court acknowledged a purpose
22 in the ordinance. They termed it secondary effects.
23 Absent Pennsylvania supreme court's reliance on the
24 unstated motive for finding the ordinance
25 unconstitutional, which was drawn from the Barnes dissent,

1 the regulation passed was unrelated to expression.

2 We utilized the same criteria, the O'Brien
3 criteria, in the form of regulating the type of nudity and
4 to -- what we're saying is, to the extent the expression
5 is affected, the ordinance is no more restrictive than
6 necessary. In other words pasties and G-strings
7 requirement in Barnes are the same in ours, therefore the
8 court should have found our ordinance constitutional on
9 strict scrutiny.

10 Because Erie's ordinance is substantially
11 indistinguishable from the statute in Barnes, the
12 Pennsylvania court was constrained to uphold it.

13 Mr. Chief Justice, may I reserve?

14 QUESTION: Yes, you may, Mr. Karle.

15 Mr. Weston, we'll hear from you.

16 ORAL ARGUMENT OF JOHN H. WESTON

17 ON BEHALF OF THE RESPONDENT

18 MR. WESTON: Mr. Chief Justice, and may it
19 please the Court:

20 As is made clear throughout these proceedings
21 and by the remarks today, Erie's only concern in
22 considering, adopting, passing, and enforcing this
23 ordinance was the notion of nude entertainment. The
24 language that Justice O'Connor quoted was accurate and
25 illustrative of exactly what Erie's purposes were.

1 What makes this case so unusual was that Erie
2 was unusually candid in terms of exactly what their true
3 content-based motivations were in connection --

4 QUESTION: Well, Mr. Weston, you talk about
5 motivation, but if the ordinance on its face applies
6 across the board, does motivation really make any
7 difference?

8 MR. WESTON: Yes, it does, Your Honor, for a
9 number --

10 QUESTION: What's the authority for that?

11 MR. WESTON: Well, in some sense Barnes itself
12 is authority for that, Mr. Chief Justice, because if the
13 only issue that was relevant in this kind of analysis was
14 what is the literal language of the legislation, Barnes
15 would have been a very brief series of opinions in
16 connection with the evaluation of the constitutionality of
17 that legislation.

18 But in fact there were three, as this Court
19 knows well, full opinions, each of which traced the
20 history of the statute, analyzed it, its impact, what
21 motivated the Framers, what didn't motivate, how it was
22 being enforced, and so forth.

23 Where we deal, as we do here, with a piece of
24 legislation which has the ability to dramatically impact
25 substantial amounts of --

1 QUESTION: All right, except the --
2 Pennsylvania's highest court has said that at least one
3 purpose of this ordinance was to prevent secondary effects
4 of an unfortunate kind, sex crimes and that kind of thing,
5 and I guess we accept that as a purpose of this statute,
6 to curtail the secondary effects created by live, nude
7 entertainment.

8 MR. WESTON: I beg your pardon, Justice
9 O'Connor, I've heard you but I'm not quite sure I
10 understand the --

11 QUESTION: Well, I think that the Pennsylvania
12 supreme court did go further and say that a purpose of the
13 enactment of this ordinance was to prevent unfortunate
14 secondary effects such as an increase in sex crimes, am I
15 right?

16 MR. WESTON: It certainly stated what was in the
17 preamble of the ordinance.

18 Interestingly, however, in that preamble the
19 preamble noted that it was concerned, if the City of Erie
20 was concerned about creating an atmosphere conducive to
21 the possible creation of these so-called secondary
22 effects, as opposed -- and I don't mean to be splitting
23 hairs here, but I think it's important in terms of the
24 whole secondary effect, content-based, pretextual
25 analysis -- that all that the city was concerned about was

1 the notion, well, that maybe something might be created in
2 which something else might happen somewhere, some place,
3 not terribly unlike some of the comments that are made
4 about television.

5 But I think with respect to the ultimate
6 analysis of even though there may be in the face of the
7 preamble some suggestion that secondary effects played a
8 role, number 1, there's certainly no evidence whatsoever
9 in the record to support the notion that either there were
10 secondary effects or --

11 QUESTION: Well, we held in City of Renton v.
12 Washington, whatever it was, that the legislature didn't
13 have to make a study of individual situations. It could
14 rely on what other legislatures had done.

15 MR. WESTON: Absolutely, Mr. Chief Justice, and
16 keeping that in mind, we are not suggesting that Erie was
17 required to do its own studies, but the point is that Erie
18 had no evidence, unlike Renton, which interestingly, as
19 the Chief Justice points out, didn't do its own studies,
20 but simply relied on studies that had been done by
21 neighboring Seattle some years before, Erie not only
22 didn't do its own studies, but did not rely on any
23 studies.

24 The only thing in the legislative record
25 reflective of any cerebration or consideration about this

1 piece of legislation was the unanimous statements --

2 QUESTION: Well, maybe they read the City of
3 Renton opinion.

4 MR. WESTON: Well, perhaps they did, but if they
5 did, then they were obligated to at least --

6 QUESTION: I don't think so. I don't think the
7 City of Renton says that you're obligated to make your --
8 to consider your own evidence.

9 MR. WESTON: Oh, but that's not what I'm saying,
10 Mr. Chief Justice. What I'm saying is that the enacting
11 legislature -- excuse me. The enacting legislature is
12 obligated to consider substantial evidence in connection
13 with its evaluation and decisionmaking with respect to it.
14 It doesn't have to do its own.

15 When the Chief Justice says, well, perhaps they
16 read the Renton case, but if they read the Renton case,
17 then, like Renton, what their obligation was to do was to
18 assert that they read the Renton case --

19 QUESTION: Well, but that --

20 MR. WESTON: -- and followed it and it was an
21 influence of that --

22 QUESTION: That was probably what the City of
23 Renton did, but eventually if enough cities do that, can't
24 it be simply treated as datum that these kind of things do
25 bring bad secondary effects?

1 MR. WESTON: Well, I suppose it depends on what
2 the state of the evidence is over what period of time and
3 so forth, and what particular businesses, but this Court,
4 not terribly long ago in Turner II, made it very clear
5 that in consideration with the must-carry provisions in
6 Congress that in order to evaluate content neutrality it
7 was necessary for there to be substantial evidence in the
8 record before Congress which Congress considered in
9 connection with --

10 QUESTION: But again, that was an enactment for
11 the first time. Does the Congress have to do it every
12 time once it's made this line? That's --

13 MR. WESTON: Well, I suppose -- excuse me.

14 QUESTION: In this case the question is whether
15 or not these kinds of established -- create secondary
16 effects.

17 MR. WESTON: Well --

18 QUESTION: And there having been some
19 determination on that, including the Supreme Court
20 opinions, can't cities rely on that?

21 MR. WESTON: I don't think so, Justice Kennedy,
22 particularly because the potential for pretextual
23 enforcement and pretextual legislation is simply too
24 great, and in connection with legislation which has the
25 potential and the reality of restricting vast quantities

1 of protected expression in order to minimize that
2 pretextual burden, it is -- the pretextual potential --
3 it's not a very great burden from a First Amendment
4 potential to require an enacting legislature simply to
5 articulate the legitimate concerns that it has, what is
6 motivating it, and the basis on which it is passing --

7 QUESTION: Mr. Weston, would the City of Erie
8 have had to do that if, instead of saying there shall be
9 no totally nude dancing, it said, there shall be no
10 totally nude dancing establishments within a certain
11 distance from each other?

12 MR. WESTON: Well, in that sense, Justice
13 Ginsburg, it would have been operating in more familiar
14 territory in the sense of adopting some sort of adult
15 zoning legislation which, interestingly, Erie of course
16 had in existence.

17 QUESTION: Mr. Weston, I gather you now think
18 this case is moot?

19 MR. WESTON: Your Honor --

20 QUESTION: Is that a hard question?

21 MR. WESTON: It's a difficult analysis, Justice
22 Scalia.

23 QUESTION: Well, I didn't get this notion from
24 nowhere. I thought you asserted it was moot.

25 (Laughter.)

1 MR. WESTON: The reason it's a difficult
2 analysis is because prior counsel responsibly brought to
3 the Court's attention the circumstances of the ownership,
4 lack of ownership, sale of the property and so forth, at
5 the earliest possible moment, when he learned about it.

6 The motion was properly made to the Court, and
7 the Court denied the motion. When I say it's a hard
8 question, I stand here before you having spent the last
9 3 months following this Court's dismissal of the -- or
10 denial of the motion to dismiss, and so I suppose I'm
11 personally somewhat conflicted in connection with the
12 efforts that we put forward with respect to this.

13 QUESTION: What is the state of affairs? The
14 corporation is still in existence?

15 MR. WESTON: Yes. The corporation is
16 technically still extant. To the best of my knowledge,
17 however, Justice Scalia, nothing differs from what the
18 motion to dismiss said, which is to say that the owner of
19 the corporation sold the property. There is no adult
20 business on the premises. The owner of the property has
21 no other involvement in any other adult business in Erie
22 or anywhere else, and has no intention to resume such
23 activity.

24 QUESTION: Then why isn't the proper result that
25 the Pennsylvania supreme court decision should be vacated?

1 MR. WESTON: Well, probably because at least as
2 far as the Pennsylvania supreme court's consideration of
3 the case, the matter is concluded. In other words, there
4 was a petition for rehearing that was filed before the
5 Pennsylvania supreme court, which the Pennsylvania supreme
6 court denied, and as far as the Pennsylvania supreme court
7 is concerned, there was a full, litigated hearing --

8 QUESTION: But they were interpreting the
9 Federal Constitution deliberately, not the State
10 constitution.

11 MR. WESTON: Yes.

12 QUESTION: And the City of Erie successfully
13 persuaded this Court to hear the question.

14 MR. WESTON: Of course that's true, Justice
15 Ginsburg.

16 QUESTION: So at that point, why isn't it fair
17 to say, all right, it's out of business, but you can't ask
18 for a voluntary dismissal without prejudice this late in
19 the game, which is essentially what you're asking for?
20 You're saying, yeah, we won in the supreme court, we want
21 to carry on that victory, but the case is moot, so it's
22 essentially a voluntary dismissal that you're asking for.

23 MR. WESTON: If I may make it in the simplest
24 possible terms, at this juncture the motion has been --
25 and I don't really know else how to say it this way. The

1 motion was made, it was responsibly brought to the
2 attention of the Court, the Court denied it. We've
3 prepared for the hearing on the merits, and we're here to
4 proceed as the Court wishes.

5 The opinion of the Pennsylvania supreme court
6 appears to be final as far as the Pennsylvania supreme
7 court is concerned, but with respect to it, I'm not sure
8 that the circumstances would have been terribly different
9 with respect to the Pennsylvania supreme court if the
10 relevant individual had died as opposed to simply going
11 out of business and no longer --

12 QUESTION: Yes, but I take you say, you made the
13 motion, it was denied, that's the end of the matter. But
14 I'm asking you to consider, suppose the motion were held
15 in abeyance, and you say, we went out of business, we want
16 to withdraw from the field. Wouldn't the proper answer
17 be, okay, but the judgment of the Pennsylvania supreme
18 court is vacated?

19 MR. WESTON: Again, as I've tried to suggest, it
20 seems to me, in terms of the litigation and the litigants,
21 that the matter was fully briefed, fully litigated, and
22 fully decided in an adversarial proceeding at the
23 Pennsylvania supreme court, and it was final as to that
24 court.

25 To the extent that the plaintiff no longer has a

1 further interest in the matter, it would appear that to
2 the extent that this Court deems it appropriate to moot
3 the action, that that would leave the situation as the
4 status quo ante in the Pennsylvania supreme court.

5 QUESTION: I suppose it might depend on whether
6 the supreme court of Pennsylvania regards itself as being
7 bound in the same way we do about not deciding moot cases.
8 In a couple of cases that we've heard here, we have --
9 Duremas, for example -- we have simply dismissed an
10 appeal, feeling that we don't have the authority to vacate
11 a State court judgment the way we would a Federal court
12 judgment.

13 MR. WESTON: Yes, and I think -- but conversely,
14 Mr. Chief Justice, I thought that the reasoning that you
15 expressed in your concurring opinion in the Honig case
16 about, from the perspective of mootness, that once a case
17 had reached this Court and had been accepted for
18 jurisdiction, that perhaps the traditional mooting
19 criteria should drop off.

20 QUESTION: I was alone in the Honig case.

21 (Laughter.)

22 MR. WESTON: I have never noted any temerity on
23 the part of the Chief Justice to be alone in that or any
24 other circumstances.

25 QUESTION: May I go back to secondary effects

1 for a minute, now that we're through with discussing
2 mootness?

3 Do you agree that if there were secondary
4 effects here, such as Justice Souter described in his
5 opinion, that that would justify a total prohibition on
6 the activity, or that -- did that doctrine merely apply to
7 the location where the activity may take place? Do you
8 think there's a distinction there, or not?

9 MR. WESTON: Absolutely, Justice Stevens.
10 The -- this Court has never utilized secondary effects as
11 a justification for a total ban on protected activity.
12 Obviously, I have a familiarity with when secondary
13 effects first entered the lexicon in *Young v. American*
14 *Mini Theaters* and, of course, it was utilized then in the
15 analyses with which you and I are familiar.

16 QUESTION: Let me just suggest that perhaps
17 Justice Souter's opinion in *Barnes* is inconsistent with
18 that submission.

19 MR. WESTON: Just -- yes, exactly yes to the
20 question. Justice Souter's opinion sought, it seemed to
21 me, to utilize the notion of secondary effects which have
22 traditionally been applied solely for the purpose of
23 limiting a particular location, perhaps in a time, place,
24 and manner context, to the much more draconian and speech-
25 burdening concept of totally banning everywhere in a

1 jurisdiction vast quantities of presumptively protected --

2 QUESTION: I think the point was -- whether it
3 was a wise or an unwise point I'll leave for the judgment
4 of my peers, but I think the point was that the O'Brien
5 case itself was a secondary effects case. I didn't reread
6 O'Brien before this, but my recollection is that the
7 concern with the burning of the draft card was that the
8 destruction of draft cards would make it difficult to
9 administer the draft laws. It was not a sort of
10 talismanic injury to the draft card itself.

11 So that in fact the occasion for the O'Brien
12 holding was to look ahead to what this kind of act is
13 going to threaten for the future throughout a system, and
14 it may or may not be wise to extend the kind of sexual
15 secondary effects into the O'Brien rationale. I thought
16 it was, but I'm willing to hear argument on it, certainly,
17 from those who disagree.

18 But I think that Brien was a kind of secondary
19 effects case -- O'Brien.

20 MR. WESTON: Justice Souter, I think that in
21 fact, with all respect, O'Brien was absolutely not a
22 secondary effects case, because the nature of the harm
23 asserted by the Government in the face of the challenge to
24 the antidraft card destruction statute on the basis of its
25 expressive impact was that the destruction of the draft

1 card in and of itself, and the deprivation of the draft
2 card, was the very thing that Congress had targeted with
3 the specific new legislation.

4 The Chief Justice was very, very clear at the
5 time that -- and Your Honor, Justice Souter, you may
6 recall that in O'Brien there had been new legislation
7 adopted which is what had been, what had triggered the
8 prosecution's --

9 QUESTION: I didn't reread O'Brien before this
10 argument, so I'll take your word with --

11 MR. WESTON: But the prior legislation had
12 required that all registrants maintain in their possession
13 their draft card and their classification certificate.
14 The new legislation banned the destruction of the card and
15 the certificate, and the expression of the Court in
16 upholding the legislation was simply that it was very
17 important to the selective service that everybody maintain
18 in their possession a draft card and the classification,
19 so that what was at issue in O'Brien was not secondary at
20 all, but absolutely and primary effect, and --

21 QUESTION: Assuming the distinction is to be -- I
22 know -- maybe I shouldn't pursue this, because I don't
23 think this case turns on it, but I'll -- one last
24 question. I promise you it's my last question.

25 MR. WESTON: Please.

1 QUESTION: Assuming that the primary-secondary
2 distinction can be made here on viewing O'Brien as you've
3 just described it, why should that make a difference? It
4 may make a difference in proof of effect, in proof of
5 harm, but why should that make a difference in principle?

6 MR. WESTON: Well, the primary reason is, is
7 that to the extent that there is an assertion that some
8 secondary or tertiary or far distant activity is what is
9 the source of concern to Government, and that on that
10 basis there's going to be a dramatic restriction or
11 banning, total banning of expression, it simply is too far
12 removed from the nature of the expression which is
13 protected, or which we seek to protect under the First
14 Amendment and our general approaches to it.

15 QUESTION: So that a secondary effect, almost by
16 definition, is something that does not rise to the level
17 of importance to justify it. That --

18 MR. WESTON: Yes. I think yes. I think that
19 would be exactly the point, whether because it simply
20 isn't important enough, whether it simply isn't linked
21 enough to justify terminating or banning expression, or
22 whether it simply doesn't give us enough of an opportunity
23 to evaluate the potential pretextual application of an
24 asserted justification for silencing unpopular expression.

25 And that's really what makes these cases

1 difficult, because with respect to adult entertainment the
2 businesses are enormously unpopular with city government,
3 or county government. Government is terribly hostile with
4 respect to these businesses, and what seems to happen,
5 unfortunately, really much like what Erie did.

6 Erie had a specific target in mind. It was only
7 nude dancing. It was only nude entertainment. But what
8 Erie did, instead of passing direct legislation which
9 implicated what their sole concern was and then allowing
10 that legislation to be challenged in the crucible of
11 strict scrutiny, where there could be a fair evaluation of
12 really what was going on in the situation, Erie wrapped
13 its limited and specific concern inside a piece of
14 legislation of seemingly general applicability.

15 QUESTION: Of seeming -- do you really think
16 that if someone would walk nude down the Main Street in
17 Erie he would not be arrested under this ordinance?

18 MR. WESTON: Justice Scalia --

19 QUESTION: Do you really think this ordinance
20 only is going to be applied to nude dancing
21 establishments?

22 MR. WESTON: Justice Scalia, there was already a
23 State statute in Pennsylvania which would have prohibited
24 exactly the conduct to which Your Honor refers.

25 QUESTION: But not nude dancing?

1 MR. WESTON: The State -- I beg your pardon?

2 QUESTION: But not nude dancing?

3 MR. WESTON: Not nude dancing in private, in a
4 private circumstance where there was no affront, where
5 nobody was going to be offended, where there was no
6 possibility for juveniles.

7 The only remaining gap in the State and city
8 legislation was nude entertainment, which is specifically
9 what Erie targeted, as they were candid enough to say in
10 their preamble, as their legislators were candid enough --

11 QUESTION: Well, the sort of thing you're
12 talking about happens all the time, it seems to me. It
13 happened in the Fourteenth Amendment. The concern of the
14 Congress was the newly freed slaves, and yet they wrote a
15 provision much, much more broadly than that.

16 Frequently, a particular incident will cause
17 legislation to be passed and the legislation is broadly
18 framed. I've never thought there was any objection to
19 that.

20 MR. WESTON: Well, Mr. Chief Justice, the
21 problem, the objection in this setting is that we are all
22 being asked to participate in some sort of charade. Erie
23 had --

24 QUESTION: Why is it -- it's only a charade if
25 the ordinance is in fact -- is going to be enforced only

1 against nude dancing places, and really, as Justice Scalia
2 says, someone walking down the Main Street of Erie in the
3 nude will not be prosecuted, but I don't get any
4 suggestion of that here.

5 MR. WESTON: Well, I suggest that it's a charade
6 in this sense. If Erie were to have passed its ordinance
7 specifically targeting the only interest it had in passing
8 the legislation, it would be viewed as a direct and
9 specific restraint on expression --

10 QUESTION: Well, so they had a good lawyer.

11 MR. WESTON: But that's what the charade is, and
12 it seems to me that where we deal with expression, and
13 where there's legislation that either inevitably is going
14 to affect vast quantities of expression, or where on its
15 face, or where it will, just simply by virtue of its
16 passage, affect enormous amounts of recognized expression,
17 we ought not to countenance the notion of true judicial
18 strict --

19 QUESTION: I find it difficult to figure out how
20 to administer that principle. I mean, I am familiar
21 with -- I have some sympathy to it, but I don't see how it
22 works. That is, the -- because legislatures don't
23 normally say always what their actual motive is, so if
24 they pass legislation dealing with importing fish, but
25 their real objective is to, you know, hurt somebody

1 individually, are we supposed to start looking into that?

2 MR. WESTON: Well, I think the difference is,
3 Justice Breyer, that in this case and in these cases we
4 deal with expression, we deal with the most elevated
5 aspect of our society.

6 QUESTION: I see that. The other question I
7 have -- I see where you're going on that, but the other
8 question I have, which is --

9 MR. WESTON: And --

10 QUESTION: All right, finish that if you'd like,
11 because if you're going to say a special --

12 MR. WESTON: Thank you. I just want to say that
13 in the ordinary course the fish statute with respect to
14 trying to hurt somebody individually tends not to be the
15 kind of thing which is likely going to happen. It will be
16 an unusual setting, something that will be fairly easy to
17 prove, and be something that will be palpable.

18 With respect to the expression setting, we do
19 not permit Government simply to have the easy ability to
20 interfere with expression absent demonstrable
21 justifications, whether they -- of a content-neutral
22 nature in order to establish the justification, whether it
23 be compelling need or otherwise, to interfere with what
24 otherwise in our society is presumptively protected, and
25 it makes it worse in this case, because at least on the

1 basis of Barnes we had eight justices, all of whom noted
2 and held that this kind of expression, this kind of
3 entertainment was protected.

4 Now -- and I know I interrupted your question.

5 Forgive me, please, if --

6 QUESTION: No, it's a different question, which
7 is, I don't see quite how to proceed. The first
8 assumption would be -- it's an assumption that there are
9 some kinds of nude dancing that are not expressive at all,
10 rather, they're forms, let's say, of prostitution, or
11 sexual behavior, and second, that maybe that's what
12 they're going after here, and third, if it's so, how would
13 I know? There's no record. What do I do?

14 MR. WESTON: Well, firstly, with respect to the
15 notion that there might be nude dancing which involves
16 prostitution, or --

17 QUESTION: I don't mean it involves
18 prostitution. I mean, it is no more related to expression
19 than turning a mouse loose in a house with an intent to
20 frighten someone. You're intending to get a reaction, and
21 that doesn't have to do with aesthetics, and it doesn't
22 have to do with expression.

23 MR. WESTON: Of course. Of course.

24 QUESTION: And I take it your predecessor here
25 refused to make any stipulation that it had anything to do

1 with expression here, i.e., expression as we normally mean
2 it in a political or language or aesthetic sense, i.e.,
3 not to do with that, and I take it there was no -- you
4 know, they wanted to stipulate there was some kind of
5 expression, and you said no. Your side said no. Do you
6 see what I'm saying?

7 And you might disagree with it. You might say
8 there is no such kind of nude dancing; all nude dancing
9 is, in fact, aesthetic. Is that your view?

10 Or, it could be, no, there is some, but it's
11 mixed up with other. What is your view?

12 MR. WESTON: Our view is that under this
13 ordinance and on this record, because we are making a
14 facial challenge to this, this ordinance does not regulate
15 touching, prostitution, or whatever. The legislation that
16 we challenge, and the only legislation that we challenge,
17 interdicts and prohibits only nude dancing.

18 To the extent that there is other nude dancing
19 about which Government is concerned, there are certainly
20 State prostitution statutes in Pennsylvania, the point
21 being that from our perspective the nature of the dance,
22 and dance itself, is a recognized form of expression.

23 QUESTION: Suppose it is, and so is burning a
24 flag, I suppose, and with burning a flag we would
25 certainly say that if there were a general law against

1 burning anything in the public streets and you happened to
2 burn a flag, although it is a form of expression, the
3 State has rendered that particular form of expression
4 unlawful for reasons unconnected with the expression
5 itself, and therefore the statute is constitutional.

6 Why shouldn't we say the same thing about nude
7 dancing? It may well be a form of expression, but for
8 reasons that have nothing to do with what is being
9 expressed, but which have to do simply with the nudity,
10 that particular form of expression has been rendered
11 unlawful. Express the thought in some other way, just as
12 you must express the thought in some other way than
13 burning a flag in the public streets.

14 MR. WESTON: If there were going to be that
15 assertion made and that conclusion drawn, Justice Scalia,
16 it ought to be done under a standard of strict scrutiny to
17 be able to evaluate the relationship between the asserted
18 prohibition and the impact on speech in a meaningful way
19 that is protective of expression --

20 QUESTION: I accept it, that it's strict
21 scrutiny. It certainly is strict scrutiny in the flag-
22 burning case, but I have no doubt that our decision in
23 Johnson, which said that the law specifically directed
24 against burning flags was unconstitutional, would have
25 come out the other way if it were a general municipal

1 ordinance against burning matter in the street, leaves,
2 flags, rags, anything else. That surely would -- if he
3 was prosecuted for that, he surely would have been
4 convicted.

5 MR. WESTON: But this ordinance, although
6 seemingly one of general application, unlike the
7 antiburning legislation to which you referred in the
8 streets, inevitably has an impact on a recognized form of
9 vast quantities of expression.

10 QUESTION: Gee, but so does prohibiting the
11 burning of a flag. In fact, it's to my mind a much more
12 cognizable communication of an idea than dancing is, nude
13 or otherwise.

14 MR. WESTON: It may well be, but in terms of --
15 and it's -- and in terms of the number of examples of
16 which flag-burning -- I'm sorry, I'm saying this poorly.

17 The amount of speech that is potentially
18 interdicted by the anti-leaf-burning legislation in Texas
19 to which you refer is minimal compared to the impact on
20 speech of a piece of legislation that specifically bans
21 all nudity at all times in 1999, when nude entertainment
22 has become a significant staple of the American cultural
23 scene, which means that there are vast numbers of not only
24 nude dancers --

25 QUESTION: It depends where in America you are,

1 Mr. Weston.

2 MR. WESTON: Well, I'm not sure that's correct,
3 Justice Scalia.

4 QUESTION: You come from Beverly Hills, and it
5 may well be out there, but I'm not sure that I would say
6 that throughout America.

7 MR. WESTON: Our office is no longer there, but
8 my -- our --

9 (Laughter.)

10 MR. WESTON: As the amicus briefs made clear,
11 there are something like 3,000 adult clubs throughout the
12 United States, that there was more income generated from
13 those establishments than from all theaters, plays, drama
14 groups throughout the United States combined.

15 The point is that in the nude -- in the leaf-
16 burning situation, the potential impact on expression was
17 minimal. In this circumstance, both on -- particularly on
18 this record, where the absolute basis for passing it was
19 limited exclusively to expression, it is inappropriate to
20 use the deferential standard, whether of rational basis,
21 which you, Justice Scalia, employed in Barnes, or even
22 O'Brien itself, O'Brien not having been designed for that
23 kind of circumstance and that kind of situation, either
24 because there was no showing of a content-neutral basis
25 for the legislation, number 1, or because simply of the

1 application of the legislation.

2 QUESTION: Thank you, Mr. Weston.

3 MR. WESTON: Thank you, Mr. Chief Justice.

4 QUESTION: Mr. Karle, you have 2 minutes

5 remaining.

6 REBUTTAL ARGUMENT OF GREGORY A. KARLE

7 ON BEHALF OF THE PETITIONERS

8 MR. KARLE: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 I'd like to make a couple of points. The
11 statute in Barnes, which we utilized as the pattern for
12 our ordinance, simply is to accord the same amount of
13 protection and the same regulation as in Barnes. That's
14 the limitation, notwithstanding the argument that it makes
15 it content-specific.

16 My opponent also pointed to, in his argument, a
17 State statute regulating something in the nature of sex
18 crimes. That is in our crimes code, and that requires an
19 intent element.

20 Our ordinance does not require an intent. It's
21 a conduct ordinance, being in a state of nudity --

22 QUESTION: But would the State statute cover
23 walking down the street in the nude?

24 MR. KARLE: It would cover walking down the
25 street in the nude if -- a person commits a misdemeanor in

1 the second degree if the person for the purpose of
2 arousing or gratifying sexual desire of himself or any
3 person, other than his spouse --

4 QUESTION: So that in Pennsylvania it is
5 perfectly -- every place except Erie, it's perfectly all
6 right for a citizen to walk down the street in the nude if
7 he just wants to get a lot of sunshine.

8 MR. KARLE: Well, no --

9 (Laughter.)

10 MR. KARLE: Well, no, it's a crime in
11 Pennsylvania if the intent is --

12 QUESTION: No, he doesn't have -- his intent is
13 to sunbathe as much as possible. Is that a crime in
14 Pennsylvania or not?

15 MR. KARLE: Gratifying sexual desire is the
16 crime.

17 QUESTION: So that in Pennsylvania, for the
18 purpose I described, you may walk around nude.

19 MR. KARLE: Under our ordinance, not, because --

20 QUESTION: Not in downtown Erie, but in the rest
21 of the State?

22 MR. KARLE: I can't speak to Upper Macungie
23 township, or --

24 QUESTION: No, no, no, but as a matter of State
25 law it's perfectly okay.

1 MR. KARLE: Yes. Yes.

2 QUESTION: That's a pretty good answer to his
3 argument.

4 MR. KARLE: But at any rate, Justice Stevens, it
5 requires an intent element.

6 QUESTION: Mr. Karle, the Pennsylvania supreme
7 court did, in its list of 14 facts that it considered
8 important, say the play Equus, which featured frontal
9 nudity, did appear in the city of Erie.

10 Isn't the matter of enforcement a part of the
11 case, at least that the Pennsylvania supreme court thought
12 it was dealing with?

13 MR. KARLE: I'm unfamiliar with that provision.

14 QUESTION: It's on page 27a of the petition for
15 writ of certiorari. It's the Pennsylvania supreme court's
16 decision that you're challenging.

17 MR. KARLE: That's the trial court's --

18 QUESTION: Oh, the trial court decision.

19 MR. KARLE: Yes. That's just the trial court --

20 QUESTION: Did -- I don't recall, then, did the
21 Pennsylvania supreme court mention that?

22 MR. KARLE: No, they didn't --

23 QUESTION: They didn't.

24 MR. KARLE: -- I don't believe.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Karle.

1 MR. KARLE: Thank you.
2 CHIEF JUSTICE REHNQUIST: The case is submitted.
3 (Whereupon, at 12:02 p.m., the case in the
4 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that
the attached pages represents an accurate transcription of electronic
sound recording of the oral argument before the Supreme Court of
The United States in the Matter of:

CITY OF ERIE, ET AL., Petitioners v. PAP'S A.M., tdba "KANDYLAND"
CASE NO: 98-1161

and that these attached pages constitutes the original transcript of
the proceedings for the records of the court.

BY Jeanne M. Federle -----

(REPORTER)