

CITY OF ERIE, ET AL. v. PAP'S A. M., TDBA "KANDYLAND"

No. 98-1161

SUPREME COURT OF THE UNITED STATES

529 U.S. 277; 120 S. Ct. 1382; 2000 U.S. LEXIS 2347; 146 L. Ed. 2d 265

November 10, 1999, Argued

March 29, 2000, Decided

**PRIOR HISTORY:** On Writ of Certiorari to the Supreme Court of Pennsylvania, Western District.

**DISPOSITION:** 553 Pa. 348, 719 A. 2d 273, reversed and remanded.

**SYLLABUS:** Erie, Pennsylvania, enacted an ordinance making it a summary offense to knowingly or intentionally appear in public in a "state of nudity." Respondent Pap's A. M. (hereinafter Pap's), a Pennsylvania corporation, operated "Kandyland," an Erie establishment featuring totally nude erotic dancing by women. To comply with the ordinance, these dancers had to wear, at a minimum, "pasties" and a "G-string." Pap's filed suit against Erie and city officials, seeking declaratory relief and a permanent injunction against the ordinance's enforcement. The Court of Common Pleas struck down the ordinance as unconstitutional, but the Commonwealth Court reversed. The Pennsylvania Supreme Court in turn reversed, finding that the ordinance's public nudity sections violated Pap's right to freedom of expression as protected by the First and Fourteenth Amendments. The Pennsylvania court held that nude dancing is expressive conduct entitled to some quantum of protection under the First Amendment, a view that the court noted was endorsed by eight Members of this Court in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456. The Pennsylvania court explained that, although one stated purpose of the ordinance was to combat negative secondary effects, there was also an unmentioned purpose to "impact negatively on the erotic message of the dance." Accordingly, the Pennsylvania court concluded that the ordinance was related to the suppression of expression. Because the ordinance was not content neutral, it was subject to strict scrutiny. The court held that the ordinance failed the narrow tailoring requirement of strict scrutiny. After this Court granted certiorari, Pap's filed a motion to dismiss the case as moot, noting that Kandyland no longer operated as a nude dancing club, and that Pap's did not operate such a club at any other location. This Court denied the motion.

**Held:** The judgment is reversed, and the case is remanded.

JUSTICE O'CONNOR, delivered the opinion of the Court with respect to Parts I and II, concluding that the case is not moot. A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379. Simply closing Kandyland is not sufficient to moot the case because Pap's is still incorporated under Pennsylvania law, and

could again decide to operate a nude dancing establishment in Erie. Moreover, Pap's failed, despite its obligation to the Court, to mention the potential mootness issue in its brief in opposition, which was filed after Kandyland was closed and the property sold. See *Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240, 83 L. Ed. 2d 618, 105 S. Ct. 685. In any event, this is not a run of the mill voluntary cessation case. Here it is the plaintiff who, having prevailed below, seeks to have the case declared moot. And it is the defendant city that seeks to invoke the federal judicial power to obtain this Court's review of the decision. Cf. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-618, 104 L. Ed. 2d 696, 109 S. Ct. 2037. The city has an ongoing injury because it is barred from enforcing the ordinance's public nudity provisions. If the ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot. See *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13, 121 L. Ed. 2d 313, 113 S. Ct. 447. And Pap's still has a concrete stake in the case's outcome because, to the extent it has an interest in resuming operations, it has an interest in preserving the judgment below. This Court's interest in preventing litigants from attempting to manipulate its jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness. See, e.g., *United States v. W. T. Grant Co.*, 345 U.S. 629, 632. Pp. 5-7, 97 L. Ed. 1303, 73 S. Ct. 894.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER, concluded in Parts III and IV that:

1. Government restrictions on public nudity such as Erie's ordinance should be evaluated under the framework set forth in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673, for content-neutral restrictions on symbolic speech. Although being "in a state of nudity" is not an inherently expressive condition, nude dancing of the type at issue here is expressive conduct that falls within the outer ambit of the First Amendment's protection. See, e.g., *Barnes*, 501 U.S. at 565-566 (plurality opinion). What level of scrutiny applies is determined by whether the ordinance is related to the suppression of expression. E.g., *Texas v. Johnson*, 491 U.S. 397, 403, 105 L. Ed. 2d 342, 109 S. Ct. 2533. If the governmental purpose in enacting the ordinance is unrelated to such suppression, the ordinance need only satisfy the "less stringent," intermediate O'Brien standard. E.g., *Johnson*, supra, at 403. If the governmental interest is related to the expression's content, however, the ordinance falls outside O'Brien and must be justified under the more demanding, strict scrutiny standard. *Johnson*, supra, at 403. An almost identical public nudity ban was held not to violate the First Amendment in *Barnes*, although no five Members of the Court agreed on a single rationale for that conclusion. The ordinance here, like the statute in *Barnes*, is on its face a general prohibition on public nudity. By its terms, it regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. Although Pap's contends that the ordinance is related to the suppression of expression because its preamble suggests that its actual purpose is to prohibit erotic dancing of the type performed at Kandyland, that is not how the Pennsylvania Supreme Court interpreted that language. Rather, the Pennsylvania Supreme Court construed the preamble to mean that one purpose of the ordinance was to combat negative secondary effects. That is, the ordinance is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing. See 391 U.S. at 382; see also *Boos v. Barry*, 485 U.S. 312, 321, 99 L. Ed. 2d 333,

108 S. Ct. 1157. The Pennsylvania Supreme Court's ultimate conclusion that the ordinance was nevertheless content based relied on Justice White's position in dissent in *Barnes* that a ban of this type necessarily has the purpose of suppressing the erotic message of the dance. That view was rejected by a majority of the Court in *Barnes*, and is here rejected again. Pap's argument that the ordinance is "aimed" at suppressing expression through a ban on nude dancing is really an argument that Erie also had an illicit motive in enacting the ordinance. However, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive. *O'Brien*, *supra*, 391 U.S. at 382-383. Even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is therefore *de minimis*. If States are to be able to regulate secondary effects, then such *de minimis* intrusions on expression cannot be sufficient to render the ordinance content based. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299, 82 L. Ed. 2d 2211, 104 S. Ct. 3065. Thus, Erie's ordinance is valid if it satisfies the *O'Brien* test. Pp. 7-15.

2. Erie's ordinance satisfies *O'Brien*'s four-factor test. First, the ordinance is within Erie's constitutional power to enact because the city's efforts to protect public health and safety are clearly within its police powers. Second, the ordinance furthers the important government interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing. In terms of demonstrating that such secondary effects pose a threat, the city need not conduct new studies or produce evidence independent of that already generated by other cities, so long as the evidence relied on is reasonably believed to be relevant to the problem addressed. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 89 L. Ed. 2d 29, 106 S. Ct. 925. Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440, to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton*, *supra*, at 51-52. In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres*. The evidentiary standard described in *Renton* controls here, and Erie meets that standard. In any event, the ordinance's preamble also relies on the city council's express findings that "certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare . . ." The council members, familiar with commercial downtown Erie, are the individuals who would likely have had first-hand knowledge of what took place at and around nude dancing establishments there, and can make particularized, expert judgments about the resulting harmful secondary effects. Cf., e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 56 L. Ed. 2d 697, 98 S. Ct. 2096. The fact that this sort of leeway is appropriate in this case, which involves a content-neutral restriction that regulates conduct, says nothing whatsoever about its appropriateness in a case involving actual regulation of First Amendment expression. Also, although requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, *O'Brien* requires only that the regulation further the interest in combating such effects. The ordinance also satisfies *O'Brien*'s third factor, that the government interest is unrelated to the suppression of free expression, as discussed *supra*. The fourth *O'Brien* factor -- that the restriction is no greater than is essential to the furtherance of the government interest -- is

satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is de minimis. The pasties and G-string requirement is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message. See, e.g., *Barnes*, 501 U.S. at 572. Pp. 15-21.

JUSTICE SCALIA, joined by JUSTICE THOMAS, agreed that the Pennsylvania Supreme Court's decision must be reversed, but disagreed with the mode of analysis that should be applied. Erie self-consciously modeled its ordinance on the public nudity statute upheld in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456, calculating (one would have supposed reasonably) that the Pennsylvania courts would consider themselves bound by this Court's judgment on a question of federal constitutional law. That statute was constitutional not because it survived some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it was not subject to First Amendment scrutiny at all. *Id.*, at 572 (SCALIA, J., concurring in judgment). Erie's ordinance, too, by its terms prohibits not merely nude dancing, but the act – irrespective of whether it is engaged in for expressive purposes -- of going nude in public. The facts that the preamble explains the ordinance's purpose, in part, as limiting a recent increase in nude live entertainment, that city councilmembers in supporting the ordinance commented to that effect, and that the ordinance includes in the definition of nudity the exposure of devices simulating that condition, neither make the law any less general in its reach nor demonstrate that what the municipal authorities really find objectionable is expression rather than public nakedness. That the city made no effort to enforce the ordinance against a production of *Equus* [\*\*12] involving nudity that was being staged in Erie at the time the ordinance became effective does not render the ordinance discriminatory on its face. The assertion of the city's counsel in the trial court that the ordinance would not cover theatrical productions to the extent their expressive activity rose to a higher level of protected expression simply meant that the ordinance would not be enforceable against such productions if the Constitution forbade it. That limitation does not cause the ordinance to be not generally applicable, in the relevant sense of being targeted against expressive conduct. Moreover, even if it could be concluded that Erie specifically singled out the activity of nude dancing, the ordinance still would not violate the First Amendment unless it could be proved (as on this record it could not) that it was the communicative character of nude dancing that prompted the ban. See *id.*, at 577. There is no need to identify "secondary effects" associated with nude dancing that Erie could properly seek to eliminate. The traditional power of government to foster good morals, and the acceptability of the traditional judgment that nude public dancing itself is immoral, have not been repealed by the First Amendment. Pp. 6-10.

JUDGES: O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which REHNQUIST, C. J., and KENNEDY, SOUTER, and BREYER, JJ., joined, and an opinion with respect to Parts III and IV, in which REHNQUIST, C. J., and KENNEDY, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined. SOUTER, J., filed an opinion concurring in part and dissenting in part. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined.