In the

Supreme Court of the United States

SOUTHEASTERN PROMOTIONS, LTD.,

Petitioner,

v.

STEVE CONRAD, ET AL.,

Respondents.

No. 73-1004

Washington, D. C.
October 17, 1974

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v.	:	No. 73-1004
STEVE CONRAD, ET AL., Respondents.	:	

Washington, D. C.

Thursday, October 17, 1974

The above-entitled matter came on for argument at 10:58 a.m.

BEFORE:

WILLIAM E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

HENRY PAUL MONAGHAN, ESQ., 10 Post Office Square, Boston, Massachusetts, for the Petitioner.

RANDALL L. NELSON, ESQ., 400 Pioneer Bank Building, Chattanooga, Tennessee 37402, for the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 73-1004, Southeastern Promotions against Conrad.

Mr. Monaghan, you may proceed whenever you are ready.

ORAL ARGUMENT OF HENRY PAUL MONAGHAN

ON BEHALF OF THE PETITIONER

MR. MONAGHAN: Thank you, Mr. Chief Justice, and may it please the Court: This case is here on a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. It arises out of petitioner's unsuccessful efforts to gain access to the Chattanooga, Tennessee, Municipal Auditorium in order to exhibit the rock musical HAIR. HAIR is a rock musical which describes the life styles of many young people in the late 1960's and early 1970's and their attitudes on such matters as war, the Vietnam war, racism, drugs, et cetera. In 1967 HAIR opened in New York. Since then it has performed in 140 cities in the United States and 14 cities throughout the rest of the world. It has received widespread critical acclaim.

When petitioner began to produce HAIR in the smaller communities in the Southeastern and the Southwestern part of the United States, it ran into considerable difficulties. In these smaller communities the municipal auditorium frequently holds a strategic position. It is the only or the best

available facility for the production of a major play. And in these communities many municipal officials were hostile to HAIR's exhibition. In their brief respondents put the matter as follows: They say:

Many local officials in tune with the standards of their communities and particularly those in the so-called Bible belt resisted the presentation of this notorious production. (End of the quote.)

In claiming unlimited censorship rights to determine what should or what should not be shown in the municipal theater, these municipal officials refused HAIR access to local auditoriums. Federal district courts enjoined that conduct, and those courts which did not do so were reversed upon appeal.

This case began in such a fashion. HAIR applied for use of the municipal facility in Chattanooga and these respondents refused HAIR access because they testified exhibition of HAIR would not be, and I quote,"in the best interest of the community, nor would it be a play which they could characterize," and I quote, "as clean, healthful, and culturally uplifting."

QUESTION: In any of these other cases that you mentioned involving this production, were the proceedings brought after it had been one or more performances?

MR. MONAGHAN: All before, your Honor.

QUESTION: All of them were excluded.

MR. MONAGHAN: They are all exclusion cases, and we went into the appropriate U.S. district courts and obtained orders.

Petitioner thereupon in this case filed a complaint in the District Court for the Eastern District of Tennessee taking the position that respondents' refusal to permit access to the theater should be enjoined. The district court held an evidentiary hearing which focused essentially on the question of obscenity. The district judge agreed with the finding of an advisory jury that HAIR was obscene. His findings are important. The judge expressly conceded that taken as a whole, HAIR was not utterly without redeeming social value, applying the pre-Miller standard. But he held that a play must be divided into three categories; first, speech; second, symbolic speech; and third, conduct. Under the judge's view this last category "conduct" is not within the freedom of speech protected by the Federal Constitution and that category, "conduct", apparently includes virtually all the nonverbal aspects of the play.

Then the judge focused on HAIR's conduct and he concluded that it was obscene under State law. The Sixth Circuit affirmed over the dissenting opinion of Judge McCree. Writing for the panel, Judge O'Sullivan expressly approved the speech-conduct reasoning of the district court and in

MR. MONAGHAN: That's the position he took, and that's obviously the position which I intend to address myself to at oral argument and have addressed myself to --

QUESTION: And that concept is different from an obscenity concept, isn't it?

MR. MONAGHAN: Well, the reason that the judge refers to obscenity, his opinion in fact is quite confused on this point. In the district court he first finds by making this dichotomy between speech and conduct, he finds that the conduct is not affected by the free-speech guarantee of the first amendment; it's no different from conduct which had occurred on a public street.

Now, from that analytical framework what he does is he says, Does this conduct violate any State law? And he finds two State laws which the conduct violates. One is an obscenity statute; the second is public nudity. And those are the two State statutes he refers to.

But in order to do that he has to first make his separation and to take a unitary production and divide it into its constituent parts.

QUESTION: And I gather on the viewed-as-a-whole element of the obscenity test, which I gather still survives --

MR. MONAGHAN: It doesn't survive in his opinion. It certainly survives Miller.

QUESTION: It survives Miller. You're going to argue that, no, you can't break the play up this way.

MR. MONAGHAN: Right.

QUESTION: It's to be viewed as a whole and it has to be viewed as a whole.

MR. MONAGHAN: That's right, your Honor.

QUESTION: Conduct, and everything else that may be involved.

MR. MONAGHAN: I'm going to address myself essentially to two points. One is the court was in error in considering this to be an obscenity case to start with.

QUESTION: That's all right as to the obscenity. What about the public nudity aspect?

MR. MONAGHAN: And with respect to public nudity, I'm going to argue that that criteria standing alone would be constitutionally insufficient under four decisions of this Court squarely holding it, unless I seriously misread it.

QUESTION: Mr. Monaghan, is this case the same for you as if Chattanooga had a city ordinance that it tried to enforce against your showing the thing in a private theater which it agreed to lease it to you?

MR. MONAGHAN: No, it is not the same case.

QUESTION: Let me ask this, then, sir. Could the city of Chattanooga if it wanted to have an auditorium which it said it was going to reserve for performances which were

suitable for the entire family, including minors?

MR. MONAGHAN: No. That's the first point. My answer to that, your Honor, is perhaps so, perhaps so. That's not this case quite clearly. But, secondly, I have grave doubts about that under the decision of this Court in Butler v. Michigan. You have to bear in mind -- certainly, if there is no alternative forum available. Certainly if there is no alternative forum available, which is often the case in the Southwestern and Southeastern parts of the United States, I don't think it's at all clear that you can reduce the viewing status of the public to the level of children.

QUESTION: But Butler was not a municipally owned bookstore.

MR. MONAGHAN: It was not a municipally owned bookstore, but it certainly is very indicative in this case, and it seems to me when you use a standard like something which is suitable for -- I would make three responses. The third response I would make is I am not sure that the standard is impermissibly vague. It invites an awful lot of content discrimination on the basis of the criteria suitable for the entire family.

QUESTION: Well, then, your answer is in effect, no, the city couldn't do what I --

MR. MONAGHAN: It could not, if that were the criteria used.

The first point I make in the brief --

QUESTION: Do you think the city could have an ordinance forbidding minors or forbidding the producer to permit minors to enter the showing of HAIR?

MR. MONAGHAN: The showing of HAIR. No, I do not, because I think that even with respect to minors --

QUESTION: Let's say under 16.

MR. MONAGHAN: Under 16. No, I do not, although it is not necessary for me to defend that position here.

QUESTION: What if the answer was that the city could.

MR. MONAGHAN: It wouldn't impair the strength of this case.

QUESTION: Why wouldn't it if the city said, well, as Mr. Justice Rehnquist asked, the city said, Well, we just reserve our municipal facilities for events to which all the people may come and all the families?

MR. MONAGHAN: Because the standard -- first of all -- I would make several responses. First, that was not the standard that was used in this case.

QUESTION: I understand that.

MR. MONAGHAN: The second response I would make is that minors have constitutional rights to freedom of speech also. That's established in Tinker v. DesMoines.

QUESTION: I know, but that answer then goes back

to saying that the city couldn't keep minors out of the production of HAIR.

MR. MONAGHAN: In my judgment --

QUESTION: And then I said let's assume that it could.

MR. MONAGHAN: I'm sorry. Let's assume it could.

QUESTION: Assume that it could.

MR. MONAGHAN: Yes, your Honor. Then that would not, it seems to me, impair our case in any way.

QUESTION: Well, that just goes to saying that the city cannot reserve its auditorium for events to which all the people may go.

MR. MONAGHAN: I would think so, your Honor. I would take that position.

QUESTION: If you are wrong on that, then you may be in trouble.

MR. MONAGHAN: I don't think I am in trouble in this case because those aren't the facts of this case. And I would say, your Honor, that it's important to understand that's not a criterion. It seems to me that that standard would invite an intolerable level of content discrimination.

I don't doubt for a second, Mr. Justice Rehnquist, that the city can formulate content-free standards, some of which would exclude HAIR, if that were the only point. For example, it could take the position that we are not going to let our auditorium be used for any Broadway production, but

only to encourage local theater enterprises to gain access to the theater. But I do think that the free speech guarantee of the first amendment is badly abused if vague and indefinite standards can be used as a guide to engage in impermissible content discrimination.

QUESTION: What if the city of New York owned the Museum of Modern Art and they say we will open it to private showings but it's limited to modern art, we are not going to show exhibitors of Rembrandt and that sort of thing? Is that a permissible --

MR. MONAGHAN: I think it is.

QUESTION: Why, because it doesn't involve content discrimination? It does involve content discrimination.

MR. MONAGHAN: It doesn't involve -- it's a question of how much -- it involves a line being drawn which one cannot say a priori will result in a lot of suppression of different views, it seems to me. I would be prepared to accept a line like that. I could argue that the line is invalid, it's invalid content discrimination. I happen to find that case acceptable.

QUESTION: But you are suppressing a tremendous amount there a priori. You are suppressing all art but modern art.

MR. MONAGHAN: I think that the point is not suppression. I think the point is the basis upon which the

decision is made. And you do not want to permit municipal officials to make decisions which involve a heavy amount of content discrimination because they do not like these particular ideas being advocated. And any criteria which foster that, it seems to me is bad under the decisions of this Court. In fact, I know of no case to the contrary in this Court.

QUESTION: What if an art gallery, to pursue Mr. Justice Rehnquist's thesis a moment, what if an art gallery, a public gallery, had a fixed rule that no living artist could be exhibited.

MR. MONAGHAN: I think the rule is valid, your Honor. I would vote to sustain it, because I don't see built into that the perpetual suppression of ideas, nor do I see that it works a --

QUESTION: Well, it suppresses contemporary expression, does it not, contemporary artistic expression.

MR. MONAGHAN: But those ideas may be reflected in older proceedings also. I think there is a big difference or a substantial difference between both of those cases, both lines of which I find acceptable. And the criteria used here which was simply the best interest of the city and clear, culturally uplifting and healthful, I think under those standards a great deal of content discrimination would occur. I would assume, for example, if the play Jesus Christ,

Superstar were turned down under these criteria, the impermissibility of the standard would be plain. You could make an argument that Jesus Christ, Superstar is not clean, healthful, and culturally uplifting because it involved potentially an attack upon orthodox interpretations of Christianity. I think these standards are fatally defective.

Now, as I understand it --

QUESTION: Are children allowed under your plan?

MR. MONAGHAN: I would take the position that children have to be allowed to see HAIR, but it's unclear from this record what the situation was with respect to --

QUESTION: Why do children have to see HAIR, be permitted to see HAIR?

MR. MONAGHAN: Why should they be permitted? Because it's not obscene with respect to children under the definitions that were sustained in Ginsburg v. New York. I have been to several performances and I have seen a great many children there.

QUESTION: But you don't take it that any play could be shown?

MR. MONAGHAN: I think there are some plays which adults could see but children could not.

QUESTION: That's what I wanted to get.

MR. MONAGHAN: Yes, your Honor.

Now, as I understand --

QUESTION: If you prevail here, you are going to show --

MR. MONAGHAN: We certainly are going to show it, your Honor. We are certainly going to show it in Chattanooga.

Now, the response that's made to essentially the standards argument is a twofold one. The first response is that the respondents now take a position that it did not take in the district court. They take the position here that the standards must be adequate for constitutional purposes, but they assert that the standards are adequate. But it's interesting that the standards that they refer to are public nudity and obscenity.

Now, I would suggest to the Court that those standards are insufficient for two reasons. First of all, neither nudity nor obscenity was the criterion actually used. There is only a single passing reference to nudity and there is none whatsoever to obscenity. Pages 16 and 17 of our brief, we print the relevant testimony. The criterion actually employed was something quite different.

Now, as to the single reference to nudity, not only was it not used, if it were used, it would be a constitutionally insufficient basis. The decisions of this Court, not one of which is discussed by my brothers, are very clear. They are cited on page 30 of the brief, particularly Jenkins v. Georgia, the recent obscenity opinion, California v.

LaRue, where this Court recognized that there is a great deal of difference between nudity which occurs in a barroom or a public street and nudity occurring in a play. In my judgment nudity relevant to a dramatic performance cannot constitute a per se basis for prohibition, and it's far too late in the day to argue otherwise.

Now, we think that what we have said entitles us to a judgment directing that the respondents make the Municipal Auditorium available for the production of HAIR, but it's possible that on remand this Court might conclude that the respondents' use of improper standards does not now foreclose them from using proper standards, such as obscenity. Respondents' counsel certainly insists upon that position and takes the position that he cannot enter into any kind of a contract with respect to a "obscene" play, and the new Tennessee obscenity legislation quoted in his brief would support him.

So it would appear that the question of obscenity is not avoided even if the Court agrees with petitioner that the standards used were ultimately bad. Since on remand the respondents are going to press obscenity as the basis for denying access to HAIR and the lower courts are going to sustain that position, we therefore urge this Court to address itself to the question of the appropriate standards, not only to prevent a waste of resources and judicial economy,

but because of widespread public interest in resolving this issue. There are very few plays that can afford the expense of litigation all the way to this Court.

QUESTION: Do you, Mr. Monaghan, attack the constitutional validity of the criminal law, or the Chattanooga City Code, section 25-28 which makes it criminal for any person in the city to appear in a public place in a state of nudity?

MR. MONAGHAN: We attack it as applied, yes, we do. Our position as stated in the brief, Mr. Justice Stewart, is that the only criterion you can use with respect to a play is obscenity, and if this -- I guess you are raising two points really. Under State law we would think the statute plainly inapplicable. We are not in a public street.

QUESTION: You are in a public place.

MR. MONAGHAN: We are not in a public place .. the statute. If we are in a public place, then the statute is bad as applied if it purports to dispense with any showing of obscenity. And the decisions of this Court already make it clear, the decisions quoted in our brief on page 30 indicate that nudity per se can't be treated as the equivalent of obscenity, and we take the position here that no standard other than obscenity can be used.

QUESTION: What if one of the actors stole money from another actor on the stage, would the larseny statute be

unconstitutional as applied?

MR. MONAGHAN: Actually stole it?

QUESTION: Yes, actually stole it.

MR. MCNAGHAN: No. And I think we can distinguish that case, your Honor. I was going to address myself to that question when I got to the issue of obscenity. It's distinguishable for two reasons. First of all, the actual stealing of money has no communicative aspect to it. It is not expressive conduct, as I understand the meaning of the term. And, secondly, if it were expressive conduct and therefore aruably within the protection of the first amendment, there would be a compelling State interest to justify the repression of that conduct.

The position we take with respect to nudity is that if it has dramatic significance, then the only basis upon which it can be repressed is upon a showing of obscenity.

QUESTION: In other words, the same people who might be nude for purposes of the play and when the play itself -- if they went out in the street nude, could be prosecuted under this ordinance, but not for the nudity on the stage itself.

MR. MONAGHAN: Precisely, your Honor.

QUESTION: Why wouldn't a person's choice to walk around without any clothes on also be a first amendment right?

MR. MONAGHAN: Because it has never been thought, your Honor --

QUESTION: Just like the kind of clothes, the kind of necktie a person might wear if he chose to wear clothes.

MR. MONAGHAN: That's right.

QUESTION: Or wore his hair long or short, why isn't that protected by the first amendment under your view on the public streets?

MR. MONAGHAN: Because -- there is no difference between the clothes case and the non-clothes cases, as your Honor points out, because it's never been treated to be expressive conduct.

QUESTION: Hair styles have been treated by many courts to be expressive conduct.

MR. MONAGHAN: Well, the circuit courts are evenly divided on that.

QUESTION: Yes, and it's been treated many, many times repeatedly in many lawsuits.

MR. MONAGHAN: By several courts of appeals, but sometimes the case gets put on invasions of privacy, as the First Circuit case did by Judge Coffin.

Maybe I ought to address myself directly to your point right now. I did have one other minor point to make, and that is that this case is not rendered moot by the new Tennessee obscenity legislation which was passed after the writ of certiorari was granted in this Court, because in our judgment the difficulty in the case is not with the

Tennessee statute, but with the interpretation to the Constitution sustained by the lower Federal courts. Put differently, all the Tennessee statute does is that it embodies the Miller criteria of what can be suppressed, and we now have an authoritative ruling from the lower Federal court that this can be suppressed under Miller.

QUESTION: Can?

MR. MONAGHAN: Can be. Because the rehearing petition en banc was denied.

QUESTION: After our decision in Miller?

MR. MONAGHAN: After your decision in Miller a petition for rehearing filed with the U.S. Court of Appeals for the Sixth Circuit --

QUESTION: In this case?

MR. MONAGHAN: And the petition was denied. Yes, in this case, your Honor.

QUESTION: What was the presentation in that petition?

MR. MONAGHAN: We argued Miller. We argued among other things that the decision was wrong and we argued that it was even clearly wrong under Miller and the petition was denied, petition for rehearing en banc was denied, two judges dissenting, and then the panel denied a rehearing. So the Sixth Circuit has expressed itself in the context of the Miller case.

QUESTION: What about the members of the audience disrobing in the theater?

MR. MONAGHAN: Not protected. It has no dramatic relevance and it's not expressive conduct.

QUESTION: Aren't there some plays in which part of the play performance is audience participation?

MR. MONAGHAN: I've never seen any, at that level.

QUESTION: Aren't there?

MR. MONAGHAN: There may be. And if there are --

QUESTION: Hell's a-Poppin.

QUESTION: That's before your time.

(Laughter.)

QUESTION: And before Justice Rehnquist's time, too.

QUESTION: That's a very common thing, quite common in the world of drama.

MR. MONAGHAN: It's beyond me. I must say I haven't seen it. I would like to try and address the issue of --

QUESTION: What about it?

MR. MONAGHAN: I would like to try to address that issue which I think is at the core of Mr. Justice Stewart's question. And the way I would do it is as follows: The judge found that the play was obscene because he was able, he thought, to separate a play into three parts -- speech, by which he meant no more than the dialogue; symbolic speech, which he said was speech illustrative of the dialogue; and

conduct. And now there is considerable confusion in that categorization, but if I understand him correctly, all the nonverbal aspects of the play are conduct. He set up this dichotomy and then he began to hold HAIR's conduct was obscene.

Now, put differently, the judge treats a play as though it were little more than a combination of a book and some conduct. The book, that is to say the libretto was protected speech under the first amendment, but the conduct is not, it's wholly outside the area of the first amendment. This permits the judge to view the conduct in isolation, he doesn't have to address himself to the dramatic relevance of the conduct; he simply says this conduct, whether it occurs on the stage or whether it occurs out in a public street is the same conduct. We concede nudity in the public street is not protected.

QUESTION: To take a more direct approach to the case rather than arguing what you argue is to say, which I assume you say, is that the conduct itself isn't obscene.

MR. MONAGHAN: That's right, your Honor. That's an evidentiary point we take the position that the conduct itself is not obscene. And in the last point of the brief we argue that --

QUESTION: I know your time is running, but may I just ask, Do you think there can be a determination of obscenity accepting your basic proposition unless you see the

play?

MR. MONAGHAN: Do I think you can? No. I think you can make a determination that it's not obscene without seeing the play.

QUESTION: None of these judges ever saw it, did they?

MR. MONAGHAN: None of the judges except Judge McCree.

QUESTION: Who voted dissent.

QUESTION: Do you think any of the so-called conduct in the play falls within the area of obscenity described in the Miller and the Paris Adult cases?

MR. MONAGHAN: I do not.

QUESTION: Not hard core.

MR. MONAGHAN: It is not hard-core pornography.

QUESTION: You think the courts were just wrong on that score?

MR. MONAGHAN: I think the basic error made was the judge simply misunderstood the appropriate criteria and it led him into all sorts of errors. He equated conduct which occurs in a theater that has dramatic relevance, which -- as I understand it, the classic form of expressive conduct is a play. This Court has struggled over and over with the attempts at which conduct is going to be characterized by speech and then brought into the protection of the first

amendment. I put it to the Court that theater is the classic form of expressive conduct, and it seems to me that there is no -

QUESTION: Can any theater presentation be obscene?

MR. MONAGHAN: Yes, it can, your Honor.

QUESTION: How could it if --

MR. MONAGHAN: If it doesn't satisfy the criteria set down in the Miller case.

The point that we're making is that you treat the play as a unitary production first. This doesn't mean that what occurs in a play is beyond regulation. A sufficiently compelling governmental interest would permit regulation of the conduct aspects of a play.

QUESTION: Is there any difference between motion pictures and plays?

MR. MONAGHAN: I don't think there's a great deal. I mean, there is no reason to treat them as though they were totally distinct.

But where the governmental interest is morality and the State regulation focuses on either nudity or simulated sex, it seems to us the obscenity criteria must be satisfied.

Now, I had expected to deal with the question of whether or not I would be forced to take the position that this means that actual sex has to take place on the stage. Fortunately that's not this case, and I don't find myself the best advocate for it, but I think that you can make principal

distinctions between actual and simulated, and all this case, apart from its nudity, involves is simulated sex. And I would suggest to the Court two differences. I am not sure that they are sound in the end, but they seem to me to be very significantly different.

First, there is no case in this Court so far as I know which holds that nudity, I mean, actual sex is protected expressive conduct under the first amendment. It does seem to me too late in the day to take the position that no simulated sex is protected. And at least the line becomes clear. What is actual sex is considerably clearer than what is simulated sex, and once the concession is made that some simulated sex is protected, it seems to me that --

QUESTION: What's this, simulated sex may be deemed obscene?

MR. MONAGHAN: Some simulated sex may be put down if it gets to the stage of being hard core pornography.

QUESTION: It doesn't really say it quite the way you said it. Doesn't it say that the State may proscribe scenes of sexual conduct, actual or simulated?

MR. MONAGHAN: No, it does not, your Honor, because it --

QUESTION: That's a precise quotation from Miller.

MR. MONAGHAN: What that does is say that this kind of material can be denominated patently offensive, errotic

material. But you are still left with the serious redeeming social value test.

QUESTION: Yes. Where is that test now?

MR. MONAGHAN: That test I think is alive and well. It is specifically retained in your opinions. And if that weren't the case, it would seem to me that the first amendment would be virtually wiped out in the area of nonverbal descriptions of sex. I think it's very important to make clear that the serious social value test --

QUESTION: Of course, it's rephrased as serious artistic, et cetera. It is not socially redeeming value, utterly without.

MR. MONAGHAN: No, it's not utterly.

The last point I would say is that simulated sex is necessarily expressive conduct. It's hard to see that actual sex really is. Ordinarily the simulation would take care of everything which the actual sex would --

QUESTION: As you correctly say, the theater is one of the very first forums of expression. But the common quality of plays and/or moving pictures is basically that it is all stimulated, isn't it?

MR. MONAGHAN: Yes, your Honor.

QUESTION: I mean, when Othello strangles Desdemona, you don't actually -- that isn't a murder, in fact, that's a simulated murder.

MR. MONAGHAN: That's right, your Honor.

QUESTION: That's the characteristic of plays and movies. But this was not simulated nudity, this was --

MR. MONAGHAN: Actual nudity.

QUESTION: -- actual nudity. And it did run afoul -- you say it perhaps didn't because the theater wasn't a public place. But putting that to one side and assuming the theater was a public place, it directly violated an ordinance of the city of Chattanooga, not having to do with obscenity as such, but having to do with indecent exposure as it is called.

MR. MONAGHAN: Well, it seems to me that the response I would make is twofold. You have accepted essentially the argument we have made with respect to simulated sex, and with respect to nudity, the only standard that can be used is obscenity, the only standard that can be used --

QUESTION: Then are you saying that this ordinance is constitutionally invalid?

MR. MONAGHAN: I am saying it is constitutionally invalid in the context of a dramatic performance, and I would cite to your Honor the case that is cited on page 30 of our brief, four decisions of this Court.

QUESTION: Why doesn't the individual walking in the street have as much right to make dramatic expression as somebody on the stage?

MR. MONAGHAN: Because it's never been understood --

some line has to be drawn, some line derived from common sense, Mr. Justice Rehnquist, has to be applied with respect to the point at which you are going to stop labeling conduct speech.

QUESTION: I agree with you.

MR. MONAGHAN: And I would suggest to you that it seems to me that the fact is that we have never treated expressive conduct -- we have never treated walking around nude -- there is no decision from this Court which would suggest that conduct like that is understood to communicate anything. Whereas in a play it's different, it's a common, comprehensible form of communication in the context of a dramatic performance.

QUESTION: I think it was Mr. Campbell, wasn't it, who said performed in the street it might scare the horses.

MR. MONAGHAN: And a different State interest, yes.

QUESTION: How about Lady Godiva? It didn't scare any horse.

MR. MONAGHAN: I don't know that anybody understood what she was doing, Mr. Justice Rehnquist.

MR. CHIEF JUSTICE BURDGER: Mr. Nelson, you may proceed whenever you are ready.

ORAL ARGUMENT OF RANDALL L. NELSON ON

BEHALF OF THE RESPONDENTS

MR. NELSON: Mr. Chief Justice, and may it please the Court: My brother started off by saying that the city of Chattanooga has asserted essentially an unlimited right of

censorship. We would say that this is simply not true in this case. The standard form lease which the petitioner sought in the action specifically contains a clause which says that all lessees must agree to abide by the laws of the State of Tennessee, the United States, and the ordinances of the city of Chattanooga. One of those ordinances, as has been pointed out, specifically prohibits public nudity. It prohibits obscene acts. On top of that there is a Tennessee common law criminal violation of indecent exposure or gross lewdness, all of which are violated.

QUESTION: Did the petitioner refuse to sign this contract?

MR. NELSON: No, sir. What happened before the action was actually brought was never brought into the record in this case, but there has never at any time been any question but what this nudity would take place. In fact --

QUESTION: Not if he signed the contract, I suppose, and you never gave him an opportunity to do it, did you?

MR. NELSON: He was denied -- his application was denied at the time that it was made because (inaudible).

QUESTION: Well, the show never took place in this auditorium, so you don't know, but you never gave them an opportunity, youjust assumed in advance that he would break his promise, is that it?

MR. NELSON: Your Honor, it was stipulated in the

proceedings.

QUESTION: Later lawsuit, wasn't it?

MR. NELSON: Yes, your Honor.

QUESTION: He stipulated that had he signed this agreement, he would have violated it.

MR. NELSON: It was stipulated that the same conduct would occur in this play as has occurred in all the other plays. It was not denied by the petitioner at any time that this public nudity took place.

QUESTION: It didn't take place in Chattanooga.

MR. NELSON: No, sir, but it would. They have agreed with that all down through the line. This was never in issue between parties.

QUESTION: I don't see how you can rely on this contractual language if you never gave him an opportunity to sign the contract. Had he signed it and violated the contract, you would have had maybe a different kind of action.

MR. NELSON: Then we get into, as you say, a different kind of action.

QUESTION: I thought Mr. Monaghan seemed to say today that, yes, if this Court decided in his favor the play would be put on in Chattanooga, and he made no reservation with respect to its being put on in any different way from what the stipulation suggested.

MR. NELSON: That is correct, your Honor, and that

has been their position all along. Even in the preliminary hearing which was held two days after the complaint was filed, it was admitted by the petitioner before the desired dates that public nudity would occur on the stage. This has never been an issue between the parties.

Now, at any rate, as I say, the lease form does set forth the criteria which the auditorium board uses, whether or not any ordinances or laws of the State of Tennessee are violated.

As the judge found, the play opens -- and I would beg the pardon of the Court to use some of the language as to what happens in the play -- with one of the main characters coming out on stage throwing his trousers to the audience and then leaping down into the audience and going down and straddling a seat among the front rows in front of a female patron and looking down at her and shouting at the top of his lungs, "I'll bet you're scared shitless."

Now, we do get some audience participation, as your Honors have found, or as the courts below have found.

Further, the question over here about the conduct in Miller, whether or not the conduct in here would violate the standards of Miller.

QUESTION: Is it your view that that opening line of the play that you just quoted violates any statute or ordinance?

MR. NELSON: No, your Honor, that is not our view. Our view is that the standards in Miller as well as the obscenity law were violated in other portions of the play, but there was a question about audience interaction and I was directing it to that.

QUESTION: I see.

MR. NELSON: Now, the Court in its finding of fact found on page 41 of the petition for certiorari, specifically found that the overwhelming evidence reflects that simulated acts of anal intercourse, frontal intercourse, heterosexual intercourse, homosexual intercourse, and group intercourse are committed throughout the play, often without any reference to any dialogue, song, or story lying in the play. At one point the character Berger performs a full and complete simulation of masturbation while using a red microphone placed in his crotch to simulate his genitals. Now, this falls directly within the language of the Miller case.

My brother has taken the position that obscenity must be tolerated if it is a part of the same vehicle whereby first amendment rights are allegedly being exercised. We would respectfully submit that this position fails to recognize that obscenity can manifest itself in conduct as well as in the pictorial representation of conduct or in the written or oral description of conduct. The district court herein and the court of appeals both recognized this difference and applied it.

Subsequently to the district judges' finding in this case and ruling, this Court in Kaplan v. California also distinguished between the different forms of obscenity, i.e. that could occur in conduct.

Now, I think we all must recognize that the theatrical differs from other medium of entertainment, from movies, from books. It is differentiated by the fact that live conduct does occur on the stage. This is the whole difference in the theatrical and other forms of entertainment.

QUESTION: Generally simulated conduct, in other words, it is human beings walking around and speaking.

MR. NELSON: Yes, your Honor.

QUESTION: But the conduct is generally simulated conduct. The murders are not real murders; the larsenies are not real larsenies; that's the whole --

MR. NELSON: That is true, your Honor.

QUESTION: --quality of drama.

MR. NELSON: I think the difference here is that when you look at the nature of the crime, we know that a murder when simulated on the stage accomplishes no evil, but when an obscene act occurs on stage, that act does accomplish the evil against which the prohibition is aimed.

QUESTION: Why is simulated acts of that kind any worse than a simulated murder, which is a very serious offense in every State in the Union?

MR. NELSON: I would go to the concurring --

QUESTION: Much more serious, much heavier penalties for murder than there are for the conduct you are talking about.

MR. NELSON: I would refer your Honor to the opinion, concurring opinion of Mr. Justice Harlan in the original Roth case wherein he says that the State has a very real interest in preventing repeated acts of sexual obscenity from occurring, that over a period of time this can erode the moral fabric of the society. And, of course, if this is permitted to go forward, then this would be just one more erosion, and it's the simulated act itself which is causing this erosion. It is a sexual act by itself.

QUESTION: Why is this any more true of simulated fornication or adultery, which are in most States offenses, but not nearly such serious offenses as murder, why is the simulated act of that kind any more demoralizing? Wouldn't it be less demoralizing than a simulated first degree murder on the stage?

MR. NELSON: I think if we had a simulated, fully simulated act of adultery on the stage that it would embody the same sexual conduct that we are talking about, and it should be forbidden, your Honor.

QUESTION: Then Othello should be forbidden, shouldn't it, because that was first degree murder.

MR. NELSON: No, your Honor, because the murder is not actually accomplished.

QUESTION: Nor is sexual, simulated.

MR. NELSON: A sexual act is not accomplished in the terms as Judge Wilson put it of a pregnancy being consummated or something of that nature, but a sexual act is actually done on the stage where two actors or actresses embrace each other in a copulation position, making all of the thrusting movements that are generally associated therewith, that is a sexual act.

QUESTION: Didn't the Miller case say actual or simulated?

MR. NELSON: Yes, your Honor.

QUESTION: Doesn't that take it out of the Othello strangulation?

MR. NELSON: Yes, your Honor, it did, and our new Tennessee statute which has been enacted and appended to our brief --

QUESTION: But you weren't applying Miller in this case.

MR. NELSON: That's correct, but I think we can look at the fact that there is no reason to remand because the same acts which Miller later came along and defined were found by the district judge in this case, and there would be no prejudice whatsoever to the petitioners in this case.

QUESTION: Even assuming -- is it your argument, even assuming the case might have to be reversed under pre-Miller and related cases, it doesn't have to be remanded because of the intervening decision.

MR. NELSON: That would be a secondary position. First of all, we would take the position because this conduct did occur, the public nudity, and so forth, it is directed at conduct and not at more obscenity standards or any other obscenity standards relating to first amendment freedom that the case shouldn't be remanded at all. It shouldn't even be considered --

QUESTION: In other words you are standing first on the violation of the public nudity that Justice Stewart alluded to earlier.

MR. NELSON: Yes, your Honor, that is true.

QUESTION: Mr. Nelson, do you think your case is any better by virtue of the fact that the petitioner sought a least from a municipally owned theater than if it were simply a question of him having obtained a lease in a private theater and the city seeking to ban the production?

MR. NELSON: Yes, your Honor, I do. I think that a municipality, particularly where they have done this by regulation, has the duty to set an example for its constituents, and certainly if we permit obscene acts to go forward on public property, it tends to degrade the standards

that the municipality might apply to other institutions.

Now, I think also that there may be a difference where a municipality comes forward and actually arrests somebody or confiscates some material. Here they have not done anything of that nature. We have simply refused to enter into what we consider an illegal contract which my brother has already said maybe if your Honors find that the play was obscene would be an illegal contract.

QUESTION: Mr. Nelson, are there any other theaters in Chattanooga?

MR. NELSON: Yes, your Honor. In the preliminary hearing one of the questions which I addressed to Commissioner Conrad,who is the Commissioner of Public Utilities, Grounds, and Buildings within the city, was directed specifically at that and he testified that there were several other places where it could have played on the private market. Also, the University of Tennessee at Chattanooga maintains an auditorium or gymnasium where the play could have gone.

QUESTION: But that wouldn't be private, would it?

MR. NELSON: No, your Honor, but there were private institutions which could have been rented.

QUESTION: You mean private theaters?

MR. NELSON: Yes, your Honor.

QUESTION: And would a local license have been required to show the --

MR. NELSON: No, your Honor, we have no licensing whatsoever. We have no censorship ordinance in Tennessee.

QUESTION: Under Tennessee law would the so-called private theaters be considered public places for the purposes of the statute?

MR. NELSON: I believe so, your Honor, though I could not cite you to a Supreme Court decision or anything of that nature. It would be my understanding that that would be --

QUESTION: Public in the sense that anyone can get in who has got $3 or $6 or $7, whatever the price is.

MR. NELSON: That's correct, your Honor. It is open to the general public. It is not a private type of club.

Now, Judge Wilson in his original decision did not find that the play as a whole was obscene. This was simply because he emphasized in his opinion because he did not find the play to be "utterly without redeeming social value," it was within the test. Excuse me?

QUESTION: He didn't see the play.

MR. NELSON: No, your Honor, he did not see the play.

QUESTION: How could he find it to be obscene or not obscene if he had never seen it?

MR. NELSON: The method by which the case was brought before the court was that the libretto was introduced, witnesses were introduced who read the libretto, described the action which occurred during the various scenes of the libretto. I

think there were a total of eight different witnesses, some six of whom had seen the play, and every witness who had seen the play testified that the acts which Judge Wilson found in his opinion and which I have alleged took place, did actually take place. There is no question but what those acts did take place.

Also, I think, particularly with respect to public nudity, Judge Wilson found that many of these acts occurred outside of the scene or play line of the play. For instance, the act involving --

QUESTION: That's pretty much up to the playwright isn't it?

MR. NELSON: Yes and no, your Honor. I think in some cases the playwright might know what he means --

QUESTION: Or the director or the actors.

MR. NELSON: But in this case the playwright didn't even write the nude scene in. It is not in the libretto. It is not in the script, and yet it occurs time after time after time. That is the point that they attempted to commercialize the nudity in order to attract the people to see it. And it is this commercialized obscenity which gives the State one of its primary reasons to enforce the public morality in this case.

QUESTION: Somewhere in one of the briefs there was a reference to, or effort to describe the theme of the play.

As you recall, was that in your brief or Mr. Monaghan's?

MR. NELSON: I think it was in Mr. Monaghan's brief where he was attempting to categorize it, your Honor.

Now, we would respectfully submit that the O'Brien case which your Honors have decided is in point in this case. To our knowledge it has never been asserted that first amendment freedoms permit nudity in public places and other phases of sexual misconduct, much less require that responsible public officials be mandated to allow them in the public's auditorium. In O'Brien, if your Honors will recall, a fellow burned his draft card alleging that this was freedom of speech. And this Court enunciated a four-part test which Judge Wilson found applied to this particular play. He found that the State and local governments do have an interest under their respective police powers to make regulations concerning public morals. He held, as did this Court later in the Paris Adult Theater case that there is a long recognized legitimate State interest involved, i.e., stemming the tide of commercialized obscenity. He further held that the city ordinance on public nudity and obscene acts in the Tennessee common law or indecent exposure are not regulations governing communication and are unrelated to freedom of expression. And he further found that the incidental restriction was no greater than was essential to the furtherance of the State interest.

In this regard I would point out that the city had

no other means available to keep illicit conduct from occurring on stage.

Now, my brother has taken the position that before a law involving the public morals can be relied upon, it must meet obscenity standards. We would respectfully dissent from this view. This is because such laws as laws directed at morals are not directed at speech activities. They are therefore not within the ambit of the first amendment out of which all of the standards for obscenity have emanated. Thus there can be no obscenity requirement.

The first amendment simply provides that Congress, and through the fourteenth amendment the municipalities and the States, shall make no laws abridging freedom of speech. Now, the law governing public nudity is not a law governing freedom of speech. Public nudity is not speech; it is conduct and subject to the police power of the State.

My brother has suggested that we must draw a line somewhere, and I would suggest that that line be drawn when you cross the line from speech to conduct, as we have here done, rather than breaking it off on this type of conduct as good and this type of conduct as bad.

QUESTION: Essentially you are arguing now that a city or a State may prevent any performances in a private theater if nudity is part of the performance?

MR. NELSON: I think they may enact laws against

public nudity which we have.

QUESTION: All right. You say they may apply it to a performance in any private theater.

MR. NELSON: Yes, your Honor. I don't think we could go in without --

QUESTION: What you are saying is that wouldn't be obscene under any definitions of obscenity, this nudity, but you are saying public nudity gives the State or the city another shot at prohibition. You wouldn't suggest that this nudity in a motion picture is obscene under the definition of --

MR. NELSON: No, your Honor. It has been specifically found in Jenkins v. Georgia that it is not.

QUESTION: That's right. So wouldn't we have the same rule in a private theater?

MR. NELSON: Yes, your Honor.

QUESTION: So that nudity on the stage in a private theater is not obscene. Is it or not?

MR. NELSON: No. I mean, yes, it is, excuse me.

QUESTION: Well, why --

MR. NELSON: Because as we move from the screen to the stage, we move from the depiction of conduct to the actual conduct itself.

QUESTION: So you are saying that nudity on the stage in a private theater can be held -- is obscene and may be forbidden by a State law.

MR. NELSON: I didn't say that it is obscene. I said that it is --

QUESTION: But a State may prohibit it.

MR. NELSON: A State may prohibit it.

QUESTION: Because it is nudity.

MR. NELSON: Because it is public nudity.

QUESTION: And so it may not be obscene, it may not be preventable as obscenity, but it is preventable as public nudity.

MR. NELSON: That's correct. Just as you could regulate a rape or something like this --

QUESTION: Are you saying Jenkins v. Georgia might have been differently decided had Georgia -- I've forgotten the city involved -- had an ordinance such as you have in Chattanooga?

MR. NELSON: I think as we move from the stage to the screen that the powers of the State are correspondingly increased, because --

QUESTION: Well, the act didn't take place in Jenkins v. Georgia, it didn't take place in Georgia. The act took place in Hollywood, California.

MR. NELSON: That is correct, your Honor.

QUESTION: And there wasn't an offense, assuming Georgia had the same law or ordinance, it didn't take place within that jurisdiction.

MR. NELSON: That's correct.

QUESTION: So if your ordinance in Chattanooga read actual or simulated, then what?

MR. NELSON: Well, the State law in Tennessee now does read actual or simulated.

QUESTION: So that then in Jenkins v. Georgia.

MR. NELSON: How do you simulate movies? When we are speaking specifically in terms of nudity, it's sort of like being pregnant, either you are or you aren't.

QUESTION: Uh-huh.

QUESTION: Mr. Nelson, does Tennessee law proscribe lewdness as well as nudity?

MR. NELSON: Yes, your Honor. I would refer you to the case of Ryall v. State of Tennessee in our brief.

QUESTION: Does the statute use the term lewdness in addition to nudity?

MR. NELSON: No.

QUESTION: Well, yes, 25-28 uses the word "lewd".

MR. NELSON: That's the city ordinance. I think he was --

QUESTION: It has to be a lewd act in a public place.

MR. NELSON: The city ordinance uses obscene, indecent, or lewd act in a public place.

QUESTION: You consider lewdness to be the precise equivalent of nudity and vice versa?

MR. NELSON: No, your Honor, particularly when you are dealing with the screen. I think that lewdness is a broader category than would be nudity.

QUESTION: Is exception made in the law for the exhibition of nude in your public museums?

MR. NELSON: No, your Honor. We don't find a person on display in a museum.

QUESTION: It doesn't apply to the portrayal of a person.

MR. NELSON: No, your Honor.

QUESTION: You think there may be a distinction between lewdness and just plain simple nudity.

MR. NELSON: I think lewdness is a much broader category.

QUESTION: Is there any Tennessee law on that point?

MR. NELSON: No, your Honor.

I would refer your Honor to the case of Ryall v. State of Tennessee mentioned in our brief.

QUESTION: In your brief.

MR. NELSON: Which I didn't go into the facts in that case, but the case involved a situation where a man called a woman on the street and upon her turning and looking, he exposed himself, just standing there and without making any indecent expressions to her, much as occurred on the stage in this play. And the Tennessee Supreme Court in that case said

that upon exposure of one's genitals, all that is necessary is the intent to expose and not the intent to do so for an immoral purpose and they affirmed the conviction, based on gross indecency and lewdness.

QUESTION: Some of the criminal law in Tennessee is common law, isn't it?

MR. NELSON: Yes, sir, this is common law in the case that I am speaking of right now.

QUESTION: Right.

QUESTION: Would this case have been the same if HAIR was not produced on the stage but shown in a movie?

MR. NELSON: No, your Honor, because once again our obscenity law -- well, it might be now under the post-Miller decision. I don't really know how far that will go as it applies to the movies as opposed to stage plays. But here we have crossed the lines from literature and movies and so forth into actual conduct which I believe your Honor referred to in the Roth case.

QUESTION: At the onset of your argument you referred, I think, to an opening scene, or at least an early scene in the play where the man actually leaped off the stage and performed certain acts. Under Tennessee law would that conduct come under the definition of lewd conduct?

MR. NELSON: Yes. I would believe so, your Honor. Although once again I cannot cite you to a definitive decision

on that. But coming down off the stage and wearing only briefs with some beads hanging down in front of him as this man did and standing, or seating himself facing a young lady and saying, "I'll bet you're scared shitless," and then proceeding back towards the stage using his beads to simulate his genitals and going through what would amount to a masturbation I think that under the post-Miller law that has been adopted, that that could constitute lewdness under Tennessee law.

In conclusion --

QUESTION: I take it it would follow from that that if the same act were performed out in a local park in front of the theater or across the street, that your answer would be that that would be clearly subject to prosecution.

MR. NELSON: It would be a simulated masturbation which would be clearly subject to prosecution as indecent or obscene act.

QUESTION: With beads?

QUESTION: Of the earlier act you described is what we were referring to. You were describing the act that occurred when he came off of the stage. If performed outside on the sidewalk in public you would say that would be lewd under the Tennessee statute.

MR. NELSON: The case has never been decided, but it would be my opinion.

QUESTION: What act are we talking about?

MR. NELSON: I would think that it would be as he was saying coming down off the stage --

QUESTION: How can you come down off the stage when you're on a public sidewalk?

MR. NELSON: Going up and confronting a young lady out in the public and spreading your legs wearing only a brief pair of shorts and looking down at her and saying, "I'll bet you're scared shitless."

QUESTION: And what would that violate?

MR. NELSON: I think that would constitute a lewd act, your Honor.

QUESTION: Would be what?

MR. NELSON: A lewd act, an act of gross indecency, disrobing at least partially or all the way down to jockey shorts or whatever you call them and confronting a young lady in such a situation.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 12 noon, the oral argument in the above-entitled matter was concluded.]