In the

Supreme Court of the United States

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Appellant,

v.

CITY OF JACKSONVILLE,

Appellee.

No. 73-1942

Washington, D. C.
February 26, 1975

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v.	:	
CITY OF JACKSONVILLE, Appellee.	:	

Washington, D. C.

Wednesday, February 26, 1975

The above-entitled matter came on for argument at 10:27 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

WILLIAM H. MANESS, Esq., 603 Florida Theatre Building, Jacksonville, Florida 32202 for the Appellant.

WILLIAM LEE ALLEN, ESQ., 1300 City Hall, Jacksonville, Florida 32202 for the Appellee.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-1942, Erznoznik against City of Jacksonville.

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

ORAL ARGUMENT OF WILLIAM H. MANESS

ON BEHALF OF THE APPELLANT

MR. MANESS: Mr. Chief Justice, and may it please the Court: This is an appeal from a judgment of the highest court of the State of Florida in which a decision could be had, which decision upheld the constitutionality of a Jacksonville city ordinance which makes it unlawful and provides it is hereby declared a public nuisance to exhibit -- for certain persons to exhibit -- any motion picture in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown if such motion picture is visible from any public street or public place.

My client Richard Erznoznik is the manager of the University Drive-In Theatre. In 1972, shortly after the passage of this ordinance, he was charged with knowingly exhibiting a motion picture in which the human female buttocks and bare breasts were shown, said scenes being visible from a public street or a public place. And he was summoned to appear in court April 6, 1972. He appeared and by stipulation the prosecution was stayed in order that we might test the constitutionality of this ordinance by an action for a

declaratory judgment in the Circuit Court of Duval County, which is the highest trial court.

We filed that complaint. We had our trial. The trial court upheld the constitutionality of the statute. The district court of appeals affirmed it, relying upon the Chemline case from the Fifth Circuit Court of Appeals. And the Supreme Court of Florida denied certiorari by a 4-3 vote.

Now, little more need be said than has been said in my brief and the brief of amicus Motion Picture Association of America. What I would like to emphasize is the total failure of those who drafted this ordinance and the Florida courts that have construed it to sharpen its focus and confine its proscription so as not to censure or punish protected speech. We do not question the basic constitutional power of the States and the cities to enact laws which punish or inhibit unprotected speech or which protects unwilling persons against obtrusive public displays of explicit sexual material which are both grossly offensive and unavoidable.

But we do contend that such laws must be carefully drawn or authoritatively construed so that they are not susceptible to application to speech protected by the first and the fourteenth amendments.

QUESTION: If this film had been shown in a closed theater, you wouldn't be here, would you?

MR. MANESS: I would not. This was an R rated film,

"Class of '74".

QUESTION: Yes. I was wondering whether this isn't a time and place issue rather than a first amendment one.

MR. MANESS: Well, the reason we don't think it's a time and place issue--we did plead that in our suit for declaratory decree -- is because basically it gets down to whether or not the City Council has the power to declare whatever it pleases a public nuisance. And in this instance they have chosen to declare the mere showing of these anatomical parts a nuisance. So that it seems to me --

QUESTION: Public showing of them a nuisance.

MR. MANESS: Showing on an outdoor movie screen visible from a public place.

QUESTION: What if the ordinance merely provided that it would be an offense to exhibit any movie of any kind that was visible from any public street or public place, would that be more objectionable constitutionally or less so?

MR. MANESS: I would say it would be equally objectionable because that seeks to -- assuming it is declared a public nuisance also?

QUESTION: Yes. The same ordinance as what you have except it just says any movie of any kind.

MR. MANESS: I would say it's an unlawful infringement on protected speech, visual portrayals, because --

QUESTION: Why wouldn't it be a perfectly good

ordinance regulating traffic safety? You don't want people driving down the street looking at movies.

MR. MANESS: Well, if it were related to traffic safety, then -- well, it wouldn't be unless it was so construed. If by its very language it just says, "It shall be unlawful to exhibit on an outdoor screen visible from a public place a movie."

QUESTION: Yes; visible from any public street, any movie.

MR. MANESS: Well, I think you would have to show that there is some relationship between --

QUESTION: Wouldn't there be a rational relationship?

MR. MANESS: I don't think so. Unless you said where the exhibition is visible from a traveled highway and there is a showing --

QUESTION: Generally public streets are traveled, aren't they?

MR. MANESS: Well --

QUESTION: More or less.

MR. MANESS: I would say there is no relationship. The social benefit to be derived from prohibiting any movie visible from any public place, it seems to me is not outweighed in the traffic sense, does not outweigh the first amendment --

QUESTION: Isn't that a question for the legislature

to make initially as to which social benefit weighs most heavily, if it's acting rationally?

MR. MANESS: Well, yes, if it's acting rationally.

QUESTION: And this ordinance could not be applied if the motion picture, for example, that was exhibited at the time was Snow White, could it?

MR. MANESS: No, it could not.

QUESTION: So to that extent there is a distinction drawn which suggests that the purpose of this ordinance was not traffic safety.

MR. MANESS: Correct. I was answering a speculative question. But the purpose of this ordinance is definitely not traffic safety.

QUESTION: So this ordinance, you say, is more objectionable under the first and fourteenth amendments than my hypothetical ordinance would be.

MR. MANESS: Much more. As I will, if I get that far --

QUESTION: Let me ask you another question. How can you be that positive it's not traffic safety? Isn't it permissible for the Jacksonville City Council to say that bare breasts and bare buttocks may be more distracting to drivers along the highway than the picture of Snow White?

MR.MANESS: Yes, if they had said that, or if the court had construed that into it, maybe.

QUESTION: But why does the legislature have to say all the reasons behind it? If an argument can now be advanced that supports the rationale, what more does this Court need?

MR. MANESS: Well, the same rationale that we have been talking about in the "fighting word" cases, that is, that while you may construe that that way and uphold its validity, it may not be applied that way by the police officer or the prosecutor who makes the charge. He may bring the prosecution simply because he's opposed to nudity in any form in any time in any place.

QUESTION: What difference does the motive --

QUESTION: What does his motive --

MR. MANESS: Well, as I understand the protection we afford speech in this country, we are concerned about the motives of the persons who seek to inhibit it by some means other than an ordinance or a law that is narrowly drawn or authoritatively construed to get at only unprotected speech or unprotected conduct.

Now, if you can put a law on the books that can be construed in a half a dozen ways, then we violate that principle. If that principle is to be violated, then this Court can say so. But it seems to me if you compare this to the "fighting words" cases, you have to say if the City of Jacksonville wants to do that, they have got to draw this ordinance more carefully or it's got to be authoritatively construed not to infringe on

otherwise protected speech.

QUESTION: Would you say that the City of Jacksonville could go beyond what has been called obscene by this Court and make a broader proscription than just obscenity when you are talking about projecting it beyond the theater walls to the public?

MR. MANESS: Yes, I think they probably could, something more obscene than mere nudity.

QUESTION: Well, something less obscene than what this Court has said can be prohibited by the State within the walls of a theater where everybody has consented to see it.

MR. MANESS: Well, that's a very difficult question to answer because I have tried to figure out how this ordinance could have been authoritatively construed in the Florida courts to achieve a purpose that does not entrench upon protected speech, and I don't see how it can. I don't see how you can draw such an ordinance.

QUESTION: What is protected speech as you are using it? Is it anything that's not obscene?

MR. MANESS: No. It's anything that this Court has held unprotected, such as lewd and obscene, profane, libelous, insulting and fighting words, words or portrayals or pictures that tend to incite immediate breach of the peace or something of that sort.

QUESTION: Then you are saying that Jacksonville

can't prohibit in an outdoor movie that's projected beyond the walls of the theater anything that it couldn't prohibit in an indoor movie.

MR. MANESS: No, I'm not really saying that. I don't intend to say that. What I intend to say is that if they relate it to something that is in fact a nuisance, they can prohibit images on a screen that would create dangers to the citizens.

QUESTION: Don't you think, Mr. Maness, for example, that there are circumstances in which a State might say as to an open air movie, that even an exhibition of a picture in which the actor simply recites the first amendment --

MR. MANESS: They could prohibit it, just like they could prohibit outdoor theaters.

QUESTION: In the interest of safety.

MR. MANESS: I suppose they could. But until they decide to prohibit outdoor theaters --

QUESTION: Can we be so very sure that isn't what they are talking about here?

MR. MANESS: Well, I think so.

QUESTION: What about nude performances in the public park? Say there's a summer play in a public park where -- and it's a municipal -- it's in the park, but there's a law that says as long as you are showing it in open air and people can come and go and it's public, no nudity, no nudes in these

summer plays in the park. Is that bad?

MR. MANESS: Well, I think it's a question of -- I think the city fathers could decide that question, like they decided it on some of the beaches. Down in Florida they even had a vote as to whether or not --

QUESTION: You would say that's acceptable.

MR. MANESS: Acceptable with --

QUESTION: Like saying if you are going to walk down the street, wear some clothes.

MR. MANESS: Yes, at this point in history I think it probably is.

QUESTION: Do you think the city could have an ordinance prohibiting sound trucks from operating during hours, let us say, after 10 o'clock at night?

MR. MANESS: Yes, I think so.

QUESTION: Or at any time that the sound level was over a certain decibel level?

MR. MANESS: I think so.

QUESTION: What if the candidate running for public office wants to make a speech? That's one of the highest forms of first amendment rights, isn't it?

MR. MANESS: It is, but, you know, it's a question of who is making the judgment.

QUESTION: But you concede that if it's loud enough so that rationally it can be said that this annoys a lot of

people and maybe affects their hearing that then it can be prohibited?

MR. MANESS: Mr. Chief Justice, I'm under the impression that under the rules laid down by this Court, that such an ordinance could be narrowly drawn or authoritatively construed and upheld, even though it does entrench strongly on first amendment rights.

But I don't really see the parallel between that and mere nudity on an outdoor movie screen if you are going to have any films of any kind.

QUESTION: What if the city fathers say, "Well, your screen is so located that anybody who wants to travel that street can stop and watch the entire movie, and the fact is that at this corner the children gather and watch the movies, and if you want your screen in that location, just don't show X rated movies if you are going to let the kids gather outside and watch it. If you want it, just clean up your movies a little."

MR. MANESS: Well, if they pass an ordinance such as you are speaking of and related it specifically to traffic, traffic problems --

QUESTION: I'm not talking about traffic; I'm talking about children.

MR. MANESS: All right, if they related the ordinance to children, I think they might very well come up with an

ordinance that could stand constitutional muster. This ordinance isnot related to any of those things.

QUESTION: There is evidence in the case that says who is watching these movies.

MR. MANESS: Yes, but the children would be outside watching movies if it was Mary Poppins.

QUESTION: I know and nobody objects to that, say. The city ordinance doesn't object to that. The only thing is that the parents in town object to this screen showing X rated movies to their children.

MR. MANESS: Well, we are not talking about X rated movies, we are talking about one R movie, "Class of '74". This is not a --

QUESTION: I know, but your position covers X rated movies or any other rated movie.

MR. MANESS: Right.

QUESTION: So let's don't --

QUESTION: Isn't an R rated movie up to the parent to decide whether the child goes or not?

MR. MANESS: Yes. Yes, under 17.

QUESTION: Well, the parent has no jurisdiction as to whether a child who stands on the corner will see it.

MR. MANESS: Well, you know, we have other laws such as laws against trespass and littering and other ways of permitting those who are inside the theater to see what they

want to see without interference from those outside the theater.

QUESTION: But this is restricted to the outside.

MR. MANESS: This ordinance is restricted, so restricted.

QUESTION: And it merely says you shouldn't show this picture to children without the parents' consent.

MR. MANESS: Mr. Justice Marshall, it doesn't mention children.

QUESTION: I know it doesn't, but that's what happens.

MR. MANESS: Well, I doubt that's what --

QUESTION: You don't think children are interested in watching R rated movies?

MR. MANESS: I think the children go in that want to see it, you know, they get their parents' permission, they get in a car and they go in. But that's beside the point.

QUESTION: It is beside the point, because I mean where the parents say, "Don't go to that theater," and then the child says, "I won't go to the theater to see it," and he just goes to the corner and looks for free.

MR. MANESS: Well --

QUESTION: Right?

MR. MANESS: That happens.

QUESTION: And that's part of what this ordinance is aimed at.

MR. MANESS: But if he was looking --

QUESTION: Isn't this part of what this ordinance is aimed at?

MR. MANESS: Yes. And if he were looking at a travelogue of foreign lands or art museums or a health picture or even a newsreel, he might also see a bare female breast or a bare male or female buttocks and that would be the end of the movie. So the point is can the movie be suppressed simply and solely because it has scenes of these anatomical parts in it, regardless of the context? And it seems to me that this case falls right in with the whole line of cases --

QUESTION: To get back to my brother Rehnquist's point, I mean, the average person driving down the street if he sees a bare buttocks on the wall over there, he's going to look at it.

MR. MANESS: Well, if he recognizes it as such.

QUESTION: Well, I would assume that the average person can recognize it.

MR. MANESS: Well, I have driven by movie screens, and I'm only speaking from my own experience, and I have seen figures on the screen and not really known what they were. I just didn't give that much of attention to it. You see movements, you see flashes, you see color.

QUESTION: You are suggesting that in order to sustain one statute, it must be demonstrated that its reach is perfect and that either that or in combination with other

statutes all such conduct is completely proscribed and prohibited. Well, there is no such doctrine of law as that, is there?

MR. MANESS: No, not that broad.

QUESTION: Statutes against murder survive even though murders continue at a very great rate.

MR. MANESS: And we define the degrees of murder -- first, second, third, manslaughter, justifiable or excusable homicide. But we don't define the degrees of offense that we commit when one scene of nudity comes on this screen.

QUESTION: Mr. Maness, what is the consequence under this ordinance if the establishment is declared a nuisance? Is it just that he is convicted of maintaining a public nuisance? Is it a misdemeanor?

MR. MANESS: It's a low-grade misdemeanor. It's not a matter of establishing the theater as being a nuisance, it's simply the projectionist or the manager or ticket-taker, subjecting those to a criminal penalty.

QUESTION: So the word "nuisance" in there is sort of surplusage in the sense the ordinance could have said whoever shows on a screen visible to the public street commits a misdemeanor.

MR. MANESS: I would say that's pretty much correct.

QUESTION: I mean, it doesn't have the consequence, ordinary consequence of nuisance of being able to shut it down.

MR. MANESS: No.

QUESTION: It doesn't permit the city to shut down the --

MR. MANESS: No. It says it's unlawful and hereby declared a public nuisance to do this. But the public nuisance doctrine, I think, is the justification for inhibiting it.

QUESTION: Usually you abate the nuisance.

MR. MANESS: Right, they usually do.

QUESTION: The only thing that's a nuisance is that single showing, whatever it is.

MR. MANESS: The only thing -- that's not even a nuisance. That's just the basis on which they justify making it a penalty.

QUESTION: OK.

MR. MANESS: Well, I started to say, but we do contend that such laws must be carefully drawn or authoritatively construed. And I want to point out some of the reach of this ordinance. It manifests no particular concern for persons in the privacy of their homes and yards, only persons in public streets or places. It does not deal with captive audiences who cannot escape looking or being bombarded or who cannot escape being forced to confront a situation. It manifests no concern for highway safety or traffic hazards. It is not concerned with public displays of things depicting

explicit sexual activity, and is not related to obscenity or pornography. It does not deal with material so grossly offensive or emotionally disturbing to an unwilling audience as to be the proper subject of criminal proscription. It takes no account of the duration or the context of such nudity, whether the scenes are from a travelogue, et cetera. And the ordinance clashes violently, I think, with the long line of cases in this Court which have drawn a distinction between protected and unprotected speech, the "fighting word" cases.

What has been said by this Court in the majority and the dissenting opinions in those cases from Cohen v. California to Collin v. City of Cincinnati, I think apply to this case and condemns this ordinance.

For example, the Court said in Cohen v. California, "The ability of Government to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." This ordinance has not been so construed.

Now, even the dissent by Mr. Justice Powell with whom the Chief Justice and Mr. Justice Blackmun joined in Rosenfeld v. New Jersey, if you take those principles and apply them to this case, this ordinance cannot stand constitutional muster because it does nothing and says nothing

to inhibit the traditionally unprotected speech. And on the other hand, where movies are concerned, it can never be said that the cheap and the shoddy are no essential part of exposition of ideas or that such expositions have so slight social value as to be a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Though perhaps implied in the city's brief, in truth the ordinance in question does not even concern itself with children, littering, or trespassing. And at least the Florida courts have not so construed it, and this Court must take it on its face.

I will save the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Maness.

Mr. Allen.

ORAL ARGUMENT OF WILLIAM LEE ALLEN

ON BEHALF OF THE APPELLEE

MR. ALLEN: Mr. Chief Justice, and may it please the Court: Sitting with me at the counsel table is Harry Shorstein, the general counselof the city. I am assistant counsel.

Most of the cases set forth in the Appellant's brief and the argument made here today would suggest that what we are dealing with is obscenity. Our position is this particular ordinance deals solely with a public nuisance which has been long recognized to be the power and the duty

of municipalities at common law to abate.

Now, there has been some discussion that the ordinance doesn't deal specifically with children; it doesn't deal specifically with traffic. Normally ordinances are not written in a whereas, whereas, whereas form like a resolution. I think courts know and this Court knows what everyone else knows, and that is as one drives along the highway one can see drive-in screens raised up in the air, and if we see something that catches our eye, we tend to look at it and it could distract us and cause problems. I think we know as the trial judge did in this case that children make up a percentage, a growing percentage, of the population in this country. Certainly the ordinance does not purport to regulate obscenity, only nudity, and I certainly would suggest traffic. The willful and intentional exposure of one's private parts has been a crime at common law. One of the cases cited in our brief dealt with some swimmers in a national forest who had been swimming in the nude and they then decided they wanted to get them some watermelons and they were lying up on the river bank in the nude eating watermelons. Their conviction was upheld by the Tenth Circuit, and I think properly so.

Certainly if you cannot prohibit this at a drive-in, you cannot prohibit it at the Hollywood Bowl or any place out in the public. You could not prohibit people walking around in the nude on public streets --

QUESTION: Well, this ordinance says -- it's perhaps not important, but it doesn't apply only to people in the nude; it applies to the same kind of dress people wear on bathing beaches, some of it.

MR. ALLEN: Mr. Justice Stewart, I suggest that people don't walk around on bathing beaches most places with bare female breasts or with bare buttocks showing or with the pubic areas showing.

QUESTION: No, but they do with some of this other language. But I don't really think it is very important.

MR. ALLEN: Yes. Some of the bathing suits that are seen we may reach that point almost, but not quite.

QUESTION: Well, some bathing suits reach the point covered by some of this language.

MR. ALLEN: Yes.

Now, from the Bloss case, which is --

QUESTION: If there were displayed copies of the friezes around this room, would it run afoul of the ordinance?

MR. ALLEN: Well, your Honor, Mr. Maness -- there may be some --

QUESTION: There is an unclothed figure. There is one back there.

MR. ALLEN: Well, this probably would, sir. Mr. Maness has put some pictures in the brief that he submitted to the Court showing on the wall of the Duval County Court House,

Justice and a male along with her, and of course, they have drapes across the pubic areas and there are no bare buttocks. Bare breasts are showing and some of these would run afoul. But normally small children, I would submit, your Honor, are not present in this --

QUESTION: Oh, no?

MR. ALLEN: Sir?

QUESTION: Look again.

MR. ALLEN: Your Honor, I see a few.

(Laughter.)

QUESTION: May I ask how your ordinance protects children standing in an adjacent private yard, adjacent to the movie theater complex?

MR. ALLEN: I think that's our intent, Mr. Justice Blackmun. As the evidence shows and the record shows, there are several private streets with private residences, and there was one lady testifying in the case that she could sit out on her front porch and actually watch the movies. There are pictures in there before this Court showing the screen.

QUESTION: Yes, but they are not in a public place.

MR. ALLEN: Well, streets have been held to be public places, your Honor.

QUESTION: But if she's in a -- it says "visible from any public street or public place." Suppose the back yard adjoins the parking place for the theater.

MR. ALLEN: I would submit, sir, that the back yard would not be a public place.

QUESTION: And the youngsters are all lined up there along the fence. Your ordinance doesn't protect them in any way.

MR. ALLEN: No, sir.

And the Bloss case cited in my brief gave some idea of the size screen there, I think, to help us realize what we are talking about. 35 feet by 70 feet and 54 feet above the ground. So if we have a nude breast or bare buttocks or pubic area, they are magnified considerably. I think the example used in our brief was that of a streaker, which fad has fizzled out to some extent, but you have a king-size streaker streaking across the air. If you can't prohibit this, as we again indicate, you could put home movies out in your back yard. Suppose you and your family belong to a nudist camp. You took some films at this nudist camp. You wanted to show those and they would be visible from the street. You've got it set up in the front yard. I submit this would be clearly violative.

We cite the Hoffman case where a go-go dancer was nude, dancing and displaying her private parts. This Court dismissed the appeal. There again this was a matter of nudity, which I submit municipalities certainly have not only the right, but the obligation to maintain.

Certainly speaking of drawing an ordinance narrowly to protect juveniles, it isn't like prior censorship or books that can be bought at bookstores or films that can be bought. There is no way -- Mr. Maness spoke of this, and he's a former state circuit judge -- there is no way you could draw an ordinance spelling all this out. I submit it would be so long and involved and contradictory in terms, there would just be no way it could be done.

Now, I might touch on what this Court has said from time to time about these matters. In the Burston? case in which the Court first held freedom of speech applies to movie theaters, the Court said at page 502, "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places." That's what we have here. The Redrup case spoke about protecting juveniles. In Stanley v. Georgia this Court spoke of the danger of juveniles finding things.

Now, the appellant in his brief says, well, most parents if they are honest will admit that they don't know what is proper. Well, that is something that a parent cannot abdicate his responsibility. We have conflicting testimony from various child experts, Dr. Spock and others, and possibly some of the permissiveness that does emerge creates part of the problem. But it is the parents' right, I think -- we are speaking of constitutional rights -- it's his duty to see what

his children see and don't see.

I would like to talk about the Rabe case decided most recently by this Court, which I think deals with what we are talking about, and it's the only opinion of this Court that I could find dealing with drive-in theaters. The question there was the sexual scenes, but the statute did not make it clear that there would be punishment for showing it at a drive-in, whereas you would be permitted at the closed type theater. But as said by the Chief Justice, joined by Mr. Rehnquist in separate concurring opinions, "Public display of explicit material such as are described in this record are not significantly different from any noxious public nuisance traditionally within the power of the States to regulate and prohibit, and in my view involve no significant countervailing first amendment considerations." An offensive nuisance.

Certainly it's something that has to be considered, the weighing of the interest of the public as against the right of the man showing the movie. They are not prohibited from showing nude movies, they are not prohibited from having consenting adults or others coming in; the only prohibition of the ordinance is if you are going to show the movie which is visible from a public street or a public place, then you have to not show a movie which has bare breasts, bare buttocks, or the bare pubic areas.

Thank you.

QUESTION: That would include the picture of a fairly newly born baby being given a bath in a bathinette.

MR. ALLEN: Well, Mr. Justice Blackmun, this would be a horror story Mr. Maness raised in his brief, the little girl that was always seen in the Coppertone sunshine advertisement where the dog is pulling her swimming trunks down.

QUESTION: No, this is a baby now. This is the subject of family affection. And I just think we are talking about older breasts here primarily.

MR. ALLEN: I would suggest that I just cannot conceive of anyone being prosecuted if they showed a baby's bare buttocks that someone was powdering.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Maness?

REBUTTAL ORAL ARGUMENT OF WILLIAM H. MANESS

ON BEHALF OF THE APPELLANT

MR. MANESS: Thank you, Mr. Chief Justice, and may it please the Court: I would like to just add this argument. I realize that we can go to legal .. about this whereas and the wherefors, and I particularly like Mr. Chief Justice' language in Rabe v. Washington where he said, "I for one would be unwilling to hold that the first amendment prevents a State from prohibiting such a public display of scenes depicting explicit sexual activities if the State

undertook to do so under a statute narrowly drawn to protect the public from such potential exposure."

I don't think we are quarreling with that language ourselves. What I am saying is the city claims the power to declare and abate nuisances and that its determination is conclusive and binding on the courts and if such be so, which we deny, it is a short step from declaring mere nudity a public nuisance when exhibited on outdoor movie screens visible from a public place regardless of its context, of its presentation, and from there declaring movies with unpopular scenes or ideas without nudity a public nuisance. To delete one scene from any movie without regard to its relation to the rest of the movie because the City Council brands that scene a public nuisance is to give the Council the unbridled power of censorship of ideas and the power to suppress perhaps the one idea that just might help society solve some of the hang-ups that inhibit so many people in relationship with others, particularly between the sexes and among the sexes, and for that matter rapists. The City Council does not speak for me when it determines that a bare human female breast on an outdoor movie screen is a public nuisance, and it smacks of the male chauvinism that I think it is. Women and men can be beautiful, ugly, good, bad, angels or devils, dressed or undressed, and the full range of human emotions may be stirred, calmed, excited, inspired by a variety of events, in all stages of dress and

undress. People are humans, different, funny, sad, good, and depicting life in movies is and can be educational and entertaining and even inspirational. One who denies the beauty of the human species or its potential for beauty simply because its form is not draped in clothing we have devised for our own creature comforts and to impress others denies God's handiwork and has never strolled the beaches on a hot summer day. Do clothes make the woman or does the woman make the clothes?

Just as we are free to choose our dress or undress on the beach, so movie makers and exhibitors on outdoor screens should not be denied the full range of their creativity simply because someone may look without paying or be offended without understanding. The public nuisance doctrine is inappropriate. The ordinance is overbroad and not carefully drawn or authoritatively construed and is not limited to unprotected speech.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Maness.

Thank you,gentlemen.

The case is submitted.

(Whereupon, at 11:05 a.m., the oral argument in the above-entitled matter was concluded.)