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In the

Supreme Court of the United States

FRANK DORAN, ETC.,
Appellant

v.

SALEM INN, INC, ET AL

No. 74-337

Washington, D. C.
April 21, 1975
April 22, 1975

Pages 1 thru 52

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IN THE SUPREME COURT OF THE UNITED STATES

FRANK DORAN, ETC.,	:	
Appellant	:	
v.	:	No. 74-337
SALEM INN, INC, ET AL	:	

Washington, D. C.

Monday, April 21, 1975
Tuesday, April 22, 1975

The above-entitled matter came on for argument at 2:28 o'clock p.m. on Monday April 21, 1975 and, at 2:59 o'clock p.m., was continued on for hearing the following day at 10:04 o'clock 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:

JOSEPH H. DARAGO, ESQ., 220 Plandome Road, Manhasset, New York For Appellant

HERBERT S. KASSNER, ESQ., 122 East 42nd Street, New York City, N.Y. 10017 For Appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-337, Doran against Salem Inn.

Mr. Darago, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JOSEPH H. DARAGO, ESQ.

ON BEHALF OF APPELLANT

MR. DARAGO: Thank you, Mr. Chief Justice.

May it please the Court:

The Appellant, Francis F. Doran, sued herein as Frank Doran, is the town attorney of the town of North Hempstead. He is the chief legal officer of the town and the chief advisor to its legislature, the town board, made up of four town councilmen and a supervisor.

The Town of North Hempstead is located in Northwest Nassau County and borders on the City of New York, Queens County.

It has a total population of 242,000 plus or minus and is made up of incorporated villages and unincorporated areas over which the town board exercises its jurisdiction.

The Appellees in this case are owners and operators of certain establishments that sell liquor -- bars, as we would commonly call them -- and they provide a form of entertainment which we refer to in everyday life as "topless dancing."

On July 10th, 1973, the town board of the Town of North Hempstead undertook to enact a piece of legislation known as Local Law Number 1 of 1973.

Local Law Number 1 of 1973 became effective by filing with the Secretary of State of New York on July 17th, 1973 and simply stated it prohibited topless dancing.

On August 9th, the Appellees in this case commenced an action in the Federal District Court for the Eastern District of New York charging Local Law Number 1 as being unconstitutional.

On September 26th, 1973, by a decision of the HOnorable John R. Bartels of the District Court, the statute in question was held unconstitutional.

The Appellant appealed to the Circuit Court of Appeals of the United States for the Second Circuit and the decision of Judge Bartels was affirmed by a two-to-one decision on June 26th, 1974.

Basically, the challenge to the ordinance and the decision of each court below was based on the doctrine that in cases where First Amendment rights are concerned, an examination of a statute on its face and a determination after that examination that the statute is overbroad will make that statute fall.

We submit that in this case, that doctrine of overbreadth should not have been applied.

The statute itself, the text of which is set forth in the brief on page -- beginning on page 3 -- provides in Section 1.0 that the town board undertook to regulate and control the operations of public places used as cabarets, bars or lounges, dancehalls and discotheques and other public places in general.

It defined public place in the second section. It defines cabaret, bars, lounges and discotheques and dancehalls and it defines the person. It then makes it unlawful to appear with ones breasts uncovered if you are a female, one's lower torso if you are a male and both the breasts and the lower torso if you are a female, in this next section.

It also makes it unlawful to promote the same. That is, to present it as a bar owner.

Traditionally, the police powers of the community have been recognized by this Court in the operation of local governments such as the town of North Hempstead.

Just recently, in the village of -- in Boraas against the Village of Belle Terre, this Court upheld a zoning provision allowing a locality such as the Town of North Hempstead -- in that case, the Village of Belle Terre, to define and enforce the definition of family for the purposes of occupancy of dwellings.

It is under these police powers that the Town of North Hempstead undertook to cut off at the source the basic

and originating problem of certain complaints that it had received concerning the operation of Appellee's establishment and establishments which are owned and operated by people not parties to this action.

QUESTION: Mr. Darago --

MR. DARAGO: Yes.

QUESTION: -- do each of the Appellees in this case serve alcoholic beverages on the premises?

MR. DARAGO: Mr. Justice Rehnquist, that is correct. All of the Appellees serve alcoholic beverages.

QUESTION: The ordinance by its terms, though, would have covered people who did not.

MR. DARAGO: It is possible that the ordinance could be read that if no alcoholic beverages were served in a cabaret, which is most unlikely, I would think, that it would cover a cabaret, yes, sir, or a dance hall or a discotheque or an establishment of that nature, yes, sir.

QUESTION: I assume that the state liquor license people haven't taken any position on this?

MR. DARAGO: Mr. Justice Marshall, no. They have been in contact with us but they have not --

QUESTION: They have jurisdiction.

MR. DARAGO: Well, they would have jurisdiction over the licensing of bars. Yes, that is correct, yes, sir. And they have taken no action, to my knowledge.

The public record -- or the public hearing held will demonstrate the types of complaints that the town board received. Similarly, the Town of North Hempstead town board recognized that one or more of these establishments were within 100 feet of residential areas, that people who owned the residence within 100 feet of these areas had made specific complaints about conduct of patrons, litter, noise and things similarly important to the town in enforcing and keeping this suburban community, the Town of North Hempstead, a nice suburban community.

This concern, we submit, is the basis of at least some compelling governmental interest. This compelling governmental interest is a relative term. What is compelling to the United States as a whole may be a separate and distinct item as to what is the concern of a local community of 242,000 people.

One compared to the other, one may look very great and the other de minimus.

Within a town such as ours which faces the everyday problems of living, noise, litter, patrons' conduct around bars and , incidentally, I might say that the record would justify the statement that on bars that didn't provide topless dancing, none of these complaints were ever voiced before the town board.

That the town board acted in the manner in which it

thought would best remedy the problems arisen.

Unfortunately, after the enactment, Judge Bartels found that the statute -- and he used the words from Thornhill against Alabama -- by its wording swept into areas of otherwise protected expression. We debate that.

Topless dancing is conduct. It has been recognized by this Court as containing a minimal of expression and even assuming, if any expression is there, it still constitutes conduct.

One of the most striking facts about this Court's First Amendment opinions is their absolute consistency that, under a challenge to the First Amendment, the doctrine of overbreadth will be reserved to spoken words, freedom of expression, freedom to communicate one's ideas, freedom to gather and assemble peaceably to do just that, express and communicate one's ideas.

Secondly, important in this case, is the Appellees here assert the rights of others and not of their own. In this case, the Appellees -- and I am referring at this moment to the Appendix, page 9, beginning with paragraph 16 of the complaint -- "The law deprives the patrons of the plaintiff bars of the right to view constitutionally-protected expression. The law on its face and as applied to the exercise of First Amendment rights is so discretionary and vague and overbroad, devoid of objective guidelines, as to restrain and chill the

exercise of such rights. It bears no relation to a governmental purpose. It violates the First and 14th Amendments."

It is interesting that the Plaintiffs have not brought up the subject of their right to present this type of entertainment but of their right of their patrons to view the same.

If this has any element of expression, this topless dancing, it is further reduced by the fact that what the Plaintiffs really are doing are commercially exploiting nudity. They haven't got a topless dancer, or a naked dancer as they have now, on the stage to express an idea.

They've got a naked dancer on the stage to draw a patron into their establishment and to sell him drinks.

As a matter of fact, their complaint, although it has the magic words in it, "chill, freedom of expression," belies the fact because they claim irreparable damage because when they don't have naked dancing, they lose money.

The ultimate facts that they have pled speak otherwise than to their claim that what they do is protected by the First Amendment.

We submit that so minimal -- if there is any expression -- in topless dancing is this expression that it constitutes conduct validly regulatable by the state, public nudity. Public nudity, nudity in public was a crime at common law.

This is something that the state has the power to regulate. Certainly, the state can make a law preventing nudity on the streets. Under the police powers, they can make this law and enforce it.

Similarly, in a public place, for the good of the community, they can prevent exactly what we have going on in North Hempstead now, topless dancing.

In California against LaRue, this Court recognized the minimal amount of expression in topless dancing.

Eight or nine jurisdictions in this United States have reduced that expressive content even further under this commercial exploitation of nudity idea.

Inasmuch as topless dancing is conduct and not spoken words of pure speech, the doctrine of overbreadth does not apply.

Similarly, the Appellees' contention that it would prevent a theatrical performance cannot be raised. In California against La Rue, this Court clearly indicated that it would be unwise or do a disservice to the ballet to compare a ballet dancer to that of a topless dancer in a bar.

Similarly, the likelihood that any Appellee here would have, in their establishments -- which are small, local, community bars -- the desire or even the facility to put on a theatrical performance such as "Hair" or the ballet just can't be conceived.

I am sure the legislature of the town board considered the likelihood and the possibility of this.

Similarly, it may well be that should the Appellees undertake to place a production such as "Hair" on in their bar, they might be violating some other zoning ordinance.

Basically, it comes down to the rationale of this Court in its recent case of Broadrick against Oklahoma.

This statute, with a fair reading of the words, clearly shows that it applies to the Appellees here. They are within that hard-core conduct which this statute was meant to prevent, topless dancing.

They vicariously assert the rights of others to perform the ballet and to put on "Hair." This vicarious assertion of rights, even if it were in the area of political freedom, the right to participate in politics, has been held by this Court to be no basis for declaring a statute over-broad.

We submit to you that topless dancing has been properly excluded and the courts below erred in approaching these topless dancers in this statute as if it barred free speech, as if it barred communication, as if it barred the right to express your ideas.

QUESTION: Well, was this ordinance declared unconstitutional?

MR. DARAGO: Yes, it was, Justice White. It was

declared unconstitutional.

QUESTION: In the District Court?

MR. DARAGO: In the District Court by John --

QUESTION: Well, how about in the Court of Appeals?

MR. DARAGO: Similarly, in the Court of Appeals, it was held unconstitutionally overbroad.

QUESTION: Now, where did --

MR. DARAGO: Its enforcement was enjoined.

QUESTION: Well, this was -- there has only been a preliminary injunction issued.

MR. DARAGO: That is true, Mr. Justice White. However --

QUESTION: Isn't there some rule in the federal courts that you don't make a declaration of unconstitutionality in that issuing of preliminary injunction?

MR. DARAGO: I am not familiar with the rule, Mr. Justice White.

QUESTION: But you think the --

MR. DARAGO: The judgment is -- the injunction is as permanent as can be.

QUESTION: I understand the preliminary injunction was affirmed but that could have been merely on the chances of prevailing on the merits plus irreparable injury and I know the District Court said the statute was unconstitutional.

Do you think the Court of Appeals said the statute

was unconstitutional?

MR. DARAGO: I believe it did.

QUESTION: Or the ordinance.

MR. DARAGO: I believe it did.

QUESTION: I know it affirmed a judgment.

MR. DARAGO: It did affirm the judgment.

QUESTION: Which means --

MR. DARAGO: But in effect --

QUESTION: -- you're not leaving the preliminary injunction in effect.

MR. DARAGO: May I give the Court's attention to the second ordinance that the town tried to pass. After rendering a similar decision, Judge Bartels, upon a motion for summary judgment, converted it to a final judgment and for all intents and purposes, this preliminary injunction could be rendered final by the sweep of a pen or Judge Bartels' order. There was no further --

QUESTION: Was the dissenting opinion of Judge Lombard here in the Court of Appeals directed entirely at the proposition that the state court should have had a chance to construe this first because they might have come down with a narrowing construction limiting it to the framework of the La Rue case. That is, to this kind of conduct in a place where liquor was sold.

Isn't that the thrust of Judge Lombard's dissent?

MR. DARAGO: That was the thrust of Judge Lombard's dissent in the Circuit Court of Appeals.

QUESTION: So it is perfectly clear that the majority of the Court of Appeals and the district judge, unlike the first district judge who dealt with it, all said it was unconstitutional.

MR. DARAGO: I believe so, Mr. Chief Justice. That is correct.

QUESTION: On its face.

MR. DARAGO: On its face, facially overbroad under Thornhill against Alabama, that it could sweep into another area. For example, the specific example they use being theatrical performances and the ballet.

I think also that this case as a hybrid, had not the district court determined the existence of possible overbreadth, they may well have abstained after not determining or finding that this was conduct under which decisions of this Court do not render the overbreadth doctrine applicable.

I think that the federal court ignored Carmody, which would be their respect for the lower state courts to do justice to constitutional claims and I think, more importantly below, they ignored equity.

QUESTION: When you say Carmody, are you talking about just abstention for a construction of the state law or are you talking about Younger against Harris and Steffel

and those cases? Or are you talking about both of them?

MR. DARAGO: I am talking about both of them, Mr. Justice Rehnquist. That is what I meant by this case being a hybrid. I think that Carmody is something that the federal court misread in the decision of Steffel that the federal courts are a powerful defender of constitutional rights and the rush to the courthouse rule created by the United States Court of Appeals overlooks that the state courts in which we all practice every day, are just as capable to handle a constitutional claim as are the federal courts and had they not determined -- and I submit, erroneously, that this was a free speech or a spoken word case or an overbreadth case, they probably would have abstained and sent it back for prosecutions.

And, incidentally, the prosecutions were called on the calendar of the local district court prior to any decision by Judge Bartels and therefore, these people had been arraigned and were ready for trial.

We were ready for trial before any preliminary injunction was issued.

Similarly, I think that the equity of one of the plaintiffs here intentionally violating the statute, is something that you, Mr. Justice Rehnquist, pointed out in your concurring opinion in Steffel against Thompson, that even though a federal court decides to hear this case and render

its decision, it does not protect the plaintiff from intentional violations of the ordinance without threatening the loss of his federal case for dismissal.

I think Younger against Harris made that clear as well, that at any time, if the facts warranted, this Court or the federal court could remand these cases to state prosecutions. I think this is an important idea and I think this is the very case that Steffel contemplated and that Younger contemplated.

There is nothing novel about what we call "post facto abstention" where equity warrants the same and in this case, we have one of the plaintiffs who admittedly did not violate it, but one of the plaintiffs did and there was a kind of a privity between the plaintiffs here -- if not a de jurae privity, or in fact -- a factual privity that these people are all together. They are common owners. They watch each other's store, so to speak, when one is out and one is in, and the privity is so close that all the issues of this case --

QUESTION: What do you mean by privity in that? Are you speaking about it in an sense recognized in the law? That is, that there are common owners of these three people?

MR. DARAGO: No, Mr. Justice Rehnquist, what I am saying is that there was a factual privity.

QUESTION: Well, what do you mean?

MR. DARAGO: These three people got together to

challenge this ordinance. They brought one action under the civil rights law. And as such when one of them undertook to violate the ordinance, the district court should have examined that closely and said, well, you made your own bed now. Back to the state court, which can remedy your constitutional claims as well as we can.

QUESTION: Well, certainly there is nothing unusual in a bunch of cafe owners or bar owners getting together to consult about an ordinance that affects all of them.

MR. DARAGO: I don't suggest that that is -- that there is anything unusual about it.

QUESTION: Did you raise this in the district court?

MR. DARAGO: Yes, Mr. Justice Marshall.

QUESTION: The Younger and Harris point?

MR. DARAGO: Yes, Mr. Justice Marshall. As a matter of fact, I raised the footnote which is number four -- footnote number four. I can't recall the page on which it is which almost clearly outlines the very same thing that this Court held in Younger and Harris.

QUESTION: You said footnote. Footnote to what?

MR. DARAGO: There was a footnote in Younger against Harris explaining the applicability of overbreadth.

QUESTION: Oh. And you raised it.

MR. DARAGO: I raised it, yes.

QUESTION: And preserved it.

MR. DARAGO: I'm sorry?

QUESTION: And preserved it in the Court of Appeals, I assume, since Judge Lombard went on it.

MR. DARAGO: Yes, your Honor, I did.

QUESTION: Now, the chronology in this case was what? These three plaintiffs brought this action --

MR. DARAGO: They brought an action under the Federal Civil Rights Act.

QUESTION: In the United States District Court.

MR. DARAGO: In the United States District Court.

QUESTION: And then what?

MR. DARAGO: They brought it on the ninth day of August, 1973, Mr. Justice Stewart.

QUESTION: Did they ask for TRO?

MR. DARAGO: They asked for a temporary restraining order and the same was denied by Judge Dooley.

QUESTION: Right.

MR. DARAGO: The day after he denied that, one plaintiff, M&L Rest, began to violate the ordinance and on the 10th --

QUESTION: Began to violate the ordinance by doing what?

MR. DARAGO: Presenting topless dancing. They had complied -- the bar owners had complied with the ordinance between the 17th when it became effective and the 9th, when

they brought this federal action.

On the 10th, after the TRO was denied and after this action -- after the action was commenced, in fact, M&L Rest began to present topless dancing. The police came down, issued summonses to dancers, owners and a prosecution was, in fact, begun.

QUESTION: On what day?

MR. DARAGO: On the 10th of August, 1973.

QUESTION: That is when the arrests were made. That is when the --

MR. DARAGO: The arrests were made, right. The following day they were arraigned. Informations were filled out. We have an information system, a uniform system of simplified criminal complaints.

QUESTION: Well, if you are right, then that civil proceeding, I gather, was the day after the federal suit was started, wasn't it?

MR. DARAGO: That is correct, Mr. Justice Rehnquist.

QUESTION: By assuming, even in that circumstance, that the Younger rules apply, that wouldn't be true as to Salem Inn and Tim-Rob Bar, would it?

MR. DARAGO: No, that is not --

QUESTION: You said there were no --

MR. DARAGO: They were not being prosecuted.

QUESTION: Or even being threatened to, because I

gather they came into compliance, didn't they?

MR. DARAGO: They did comply.

QUESTION: Yes.

MR. DARAGO: And, incidentally, they complied right through Judge --

QUESTION: Now, if that is so, I gather -- was it wrong, then, of the federal court to reach these questions in those two cases?

MR. DARAGO: I think it was, Mr. Justice Brennan.

QUESTION: Why?

MR. DARAGO: I think that in this case, this factual privity of which I spoke before, rendered each of them -- the issues that they claim --

QUESTION: Was this because they were all in the same business and they were all bothered with the problem?

MR. DARAGO: With the ordinance and they all had the same attorney and, Mr. Justice Brennan, had they waited, they would have had the issues disposed of in our local district court, which is our lowest court of criminal jurisdiction, by the time Judge Bartels had rendered his decision.

QUESTION: And they might have been in jail, too.

MR. DARAGO: Well, no arrrests were made. They had been issued summonses, Mr. Justice White.

QUESTION: But if Tim-Rob -- if M&L Rest -- Restaurant, if that is the name of it, lost out in the district

court, they still wanted to go ahead.

MR. DARAGO: But then they would have the opportunity to go through our appellate system or --

QUESTION: They would? How would they? If M&L wasn't interested in appealing in your appellate system, what could they do about it?

MR. DARAGO: I think that once there was no appeal taken, the law of this situation would have been decided. We would have a narrowing court decision of this ordinance or this local law which would give the proper federal jurisdiction review.

QUESTION: You don't have a conviction of -- what is your local court? What is it?

MR. DARAGO: The District Court of Nassau County.

QUESTION: I mean, what is the equivalent? Is that a -- would you say a local magistrate?

MR. DARAGO: No, it is higher than a local magistrate court but not quite as high as a court of original civil jurisdiction, like our Supreme Court.

I would say that once that case had been interpreted by the court in the case of M&L Rest, then the other plaintiffs would have something to bring to federal court because there would be a narrowing construction to review.

QUESTION: Well, why, if they were in compliance, why would they have standing at all?

MR. DARAGO: Well, once again, we assume that their constitutional objection under the First Amendment will be reviewed by the district court. They --

QUESTION: Well, I suppose they are under a threat of enforcement anyway, weren't they?

MR. DARAGO: No more a threat than under the enforcement that if I speed, I am going to get a ticket, Mr. Justice Brennan.

QUESTION: I know, but it is much as Steffel was, and the Steffel case and the criminal prosecution was pending against someone else, not against him.

MR. DARAGO: Absolutely and he had absolute right. But, once again, in Steffel, he was handbilling. He was expressing ideas. He was communicating.

QUESTION: Well, he wasn't when the suit was brought.

MR. DARAGO: No, he had stopped, because he showed an imminent threat of arrest under what he termed to be an overbroad statute. But once again --

QUESTION: Well, are these two bars in any different position than he was?

MR. DARAGO: I think so, under the decisions of this Court, inasmuch as there was any topless dancing, which is conduct, and not some form of communication like Mr. Steffel or Mr. --

QUESTION: Well, Steffel wasn't handbilling, either.

He went within the federal court and said I am entitled to handbill but I am not going to because I don't want to be prosecuted as I have been threatened.

MR. DARAGO: Absolutely and I think --

QUESTION: The instant people said, I am in federal court because we want to attack that ordinance. Meanwhile, we are going to come into compliance.

MR. DARAGO: As overbroad, is what they said.

QUESTION: Well, whatever they did, that is why they came into compliance.

MR. DARAGO: Absolutely.

QUESTION: I don't see how that is different from Steffel.

QUESTION: Well, I take it your point is that in the Steffel case there was an explicit First Amendment claim and here you say there is no basis whatever for a First Amendment claim.

MR. DARAGO: And absolutely a proper case for which this Court's decision on overbreadth would be applied, a right to pass out literature, to express onds self.

QUESTION: Because there is an explicit First Amendment claim in the complaint in this case.

MR. DARAGO: That is true. That is true.

QUESTION: You think it is just not valid.

MR. DARAGO: I don't think that the First Amendment

claim is valid in that this conduct of topless dancing contains such minimal amount of express, under U.S. against O'Brien and cases of that sort. We properly, as the Town of North Hempstead, prohibited this kind of activity within the town boundaries.

I would like to reserve a couple of minutes for rebuttal, if possible.

MR. CHIEF JUSTICE BURGER: Counsel, I will not ask you to divide your argument. There is only about a minute and a half left. We'll let you begin fresh at 10:00 o'clock tomorrow morning.

[Whereupon, at 2:59 o'clock p.m., the Honorable Court was adjourned until 10:00 o'clock a.m. the following morning.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Doran against Salem Inn.

Mr. Kassner.

ORAL ARGUMENT OF HERBERT S. KASSNER, ESQ.

ON BEHALF OF APPELLEES

MR. KASSNER: Thank you, Mr. Chief Justice, and may it please the Court:

I think that, initially, I should review the facts which were scantily reviewed yesterday because there seems to be some misapprehension as to what actually took place.

Appellees herein were owners and operators of premises in which food and liquor were served, one for a period of eight years, one for a period of about five years and one for a period of about two years.

At the time the Town of North Hempstead passed its ordinance, during that period, they had offered their patrons topless dancing entertainment.

The ordinance forbade the appearance in any public place -- and I underline any public place -- of a person with breasts uncovered or with the lower part of the torso uncovered.

This was the broadest imaginable prohibition. It covered every place in the Town of North Hempstead and it specifically covered any scene, sketch, act or entertainment.

In that regard, it was clearly affecting the theatricla performance presumptively protected by the First Amendment. Now, to --

QUESTION: How about a poster?

MR. KASSNER: It wasn't covering anything but live people.

QUESTION: Okay. Thank you.

MR. KASSNER: The Appellees did not offer entertainment by way of topless waitresses. They did not offer topless bartenders. What they had was, a real stage, segregated from the patrons, on which professional dancers were employed throughout the day to offer dancing entertainment.

These professional dancers were hired through theatrical agencies. Some of them were employed in ballet work in the City of New York. They did this to earn extra money. This wasn't a situation which was alluded to in La Rue, I believe, to bacchanalian revelries in a place that served liquor.

Now, the Appellants herein maintain in page 12 of their brief the method exercised by the legislative body to insure the health, safety and well-being of the community is not a proper subject for review by this Court.

I don't know whether they are serious or not serious in that contention, but it would seem that the statute was

enacted, the ordinance was enacted under this theory. It seems as if they deny the existence of a supremacy clause.

They claim that they could undercut the evils -- there is nuisance evils at the source -- by passing this type of an overbroad speech-inhibiting ordinance.

QUESTION: Mr. Kassner, am I right in thinking that your claim is basically one of overbreadth? That is, that New York could have prohibited these particular performances in institutions serving liquor had it drawn an ordinance to that effect.

MR. KASSNER: Had the State Liquor Authority in the State of New York drawn an ordinance as sanctioned under La Rue involving the sale of liquor on premises where this type of activity went on, yes, they could have done so, your Honor.

QUESTION: Well, you say the State Liquor Authority, but you went into federal court to challenge this provision. We don't know whether New York -- we know that New York has this power under the 21st Amendment. We don't know whether it resides in the State Liquor Authority or whether it is delegated to the Town of Hempstead.

I think you pretty well have waived that by failing to litigate that in the state courts.

MR. KASSNER: Well, I -- your Honor, I haven't litigated that here. I don't think I need it. I'll stick

with my overbreadth and I am just mentioning as an aside that the Town of North Hempstead wouldn't have had the power to legislate the type of La Rue ordinance which is permissible, but that is not necessary to the purpose we --

QUESTION: Why not?

MR. KASSNER: Because --

QUESTION: It isn't regulating liquor. It is just saying there won't be any nude dancing in bars.

MR. KASSNER: That is not what they have said in this ordinance, your Honor.

QUESTION: I know, but let's assume that they did, they had a local ordinance that said, there shall be no nude dancing any place where liquor is sold.

You say that is not within the power of the municipality?

MR. KASSNER: Yes, your Honor. Not within the power of the Town of North Hempstead.

QUESTION: That is what you are saying.

MR. KASSNER: Yes, your Honor.

QUESTION: Is that issue before us?

MR. KASSNER: No, your Honor. But that is -- you asked if that is what I am saying. Yes, that is what I am saying, but that is not at issue before you.

They didn't say, no topless dancing in the Town of North Hempstead. They didn't say, no topless dancing where

liquor is sold in the Town of North Hempstead.

They said, no exposure of the breasts or the lower part of the torso in the Town of North Hempstead in any public place, whether it be part of a sketch, scene, act or entertainment or otherwise. So I am willing to deal with what they did say rather than what they didn't say and I am not depending upon the fact that they couldn't have passed a La Rue-type statute.

There is a contention by Mr. Darago made yesterday that the overbreadth adjudication is limited to the spoken word and all I need say is that overbreadth adjudication is limited to expression protected by the First Amendment and -- or presumptively protected by the First Amendment or expression which could be protected by the First Amendment and that includes a great deal more than the spoken word.

He claims that the ordinance was aimed at the elimination of litter, noise, traffic congestion and unspecified conduct of patrons adjacent to Appellees' premises by a cutting-off at the source.

It should be noted that there are ample laws in the State of New York to cover those evils of litter, noise, traffic congestion and whatever unspecified conduct of patrons they may be referring to, that if there weren't adequate laws in the State of New York or the Town of North Hempstead, these evils could have been coped with but a more

narrowly-drawn, specifically-directed piece of legislation rather than what is referred to as a cutting-off at the source.

It would be just as appropriate for a town to forbid sporting events because of the traffic congestion into a stadium or to forbid political rallies because of the congestion incident to the area where they take place, as it is to pass this type of ordinance to cope with traffic congestion or noise or litter.

There is no doubt of what the intention of the Town of North Hempstead was. What I am arguing here today under the doctrine of overbreadth is that the law which they passed was far too broad to be permitted under the First Amendment.

QUESTION: Are you going to get to the question, Mr. Kassner, of whether, in any event, the district court should have proceeded with this suit in light of the pendency before its judgment of the criminal prosecution against one of these three bars?

MR. KASSNER: If you want me to move to that, Mr. Justice Brennan, I'll move to that.

QUESTION: That question is here.

MR. KASSNER: Yes, your Honor, I was going --

QUESTION: You may be right on everything but it would be immaterial, I take it, if the district court shouldn't have proceeded with the suit.

MR. KASSNER: On the issue of abstention, we have

here two plaintiffs.

QUESTION: Is this abstention? How do you --

MR. KASSNER: Well, I am using abstention in the Younger versus Harris sense.

QUESTION: Is that abstention?

MR. KASSNER: Well, your Honor --

QUESTION: All right. I don't blame you. I don't know that any of us knows.

MR. KASSNER: I have read your decision in Steffel and I have read your decision in Dombrowski. All I can say is, I am willing to assume that the Younger doctrine is classified as abstention, despite the fact that the Pullman doctrine was classified as abstention and they are two different facets of an abstention issue.

If you don't want me to use the word "abstention," I'll use Carmody and --

QUESTION: This is the Younger doctrine.

MR. KASSNER: The Younger doctrine, yes.

As far as I can tell from my reading of Younger, the holding in Younger was that, where, at the time of the filing of a federal suit, the federal plaintiff was then at that time a defendant in a pending criminal proceeding, in a single pending criminal proceeding, the federal court would not take the case and send it back for adjudication in the state criminal proceedings.

QUESTION: No, it would dismiss.

MR. KASSNER: Yes, your Honor.

QUESTION: They wouldn't send it back anywhere.

MR. KASSNER: It would dismiss.

Now, we have two plaintiffs here who were never involved in a pending state criminal prosecution, either before or after the commencement of the federal action.

Now, as to them, it appears clear that Younger does not apply. Now, I will get to this argument of privity later but under your decisions in Roe versus -- I think -- Wade -- Roe versus Wade, you have an identical situation of one man who was involved in a state criminal prosecution and one man who wasn't. It was dismissed as to the one who was.

The court took jurisdiction and determined the question as to the one who wasn't. So I don't think this is a novel issue in this case.

I think that the only issue truly in this case, substantive or procedural, is how do you treat M&L? I don't think there is any question as to the other two plaintiffs on the substantive or procedural issues.

But if you want me to go to how do you treat M&L? And why do you treat M&L that way, I will and attack the heart of what I believe is the only problem left in this case after your decision in Southeastern Productions.

Now, M&L, after the commencement of the federal case,

violated the statute and was subjected to immediate prosecution. I will get back to the fact that they were subjected to eight criminal prosecutions in a period of four or five days later and bring that back under the Younger doctrine.

Right now, I'll assume that they had been subjectad to a single criminal prosecution in the state court after the commencement and the federal action by the filing of the federal complaint.

QUESTION: Do I understand that the criminal prosecution followed by a day the filing of the federal complaint?

MR. KASSNER: Yes. The first criminal prosecution followed [by] a day the filing of the federal complaint because they started violating the ordinance the day after the federal complaint was filed and the motion for the temporary restraining order was denied.

That particular plaintiff, M&L, did not have the staying power of the other two. It was a question of economics. They were being destroyed and they couldn't accept this destruction of their business in the interim period that it would take to determine, either the federal or the state action.

They, therefore, determined to go ahead and do it on the theory that what they were doing would be vindicated in the end. The question is, who should vindicate what they

were doing, the state court or the federal court?

Now, Judge Oakes, in his decision below, wrote approximately a page and a half on this on the considerations of treating M&L differently or the same as the other two plaintiffs and, frankly, I can't improve on either his words or his reasoning and it would be foolish for me to try.

He specified certain considerations which dictated that M&L should be treated the same as the other two plaintiffs.

Now, with the other two plaintiffs he had no problem. He just said that this is not a Younger case and he passed on from that.

QUESTION: Neither of the other two plaintiffs ever was prosecuted in the state courts during any of the pendency of the federal litigation?

MR. KASSNER: Never, your Honor. Yes, never.

QUESTION: Right.

QUESTION: But that is because, I gather, they complied with the ordinance, didn't they?

MR. KASSNER: Yes, your Honor, that is correct.

They have the staying power to be able to do so.

QUESTION: Well, with M&L, have they still -- what have they done now?

MR. KASSNER: M&L is still doing topless dancing.

QUESTION: And where is the state prosecution, as of

right now?

MR. KASSNER: Waiting for this Court's determination.

QUESTION: So you represent them in the state court proceeding?

MR. KASSNER: I do, your Honor.

QUESTION: So you have a case going in the state court and the federal court all together?

MR. KASSNER: Well, the state court has not proceeded at all. It is remaining right where it was the date that they were arrested.

QUESTION: That is what you were driving for, is to get the state court to move.

MR. KASSNER: Well, I wasn't driving to get the state -- excuse me --

QUESTION: Well, why did you violate the law?

MR. KASSNER: They violated the law --

QUESTION: That the state brought the move.

MR. KASSNER: They violated a law which they believed was unconstitutional because they believed they would be out of business before either court adjudicated the issue, your Honor.

QUESTION: Well, you do want it in one of the other courts. Is that right?

MR. KASSNER: Well, if the issue was adjudicated in the federal court --

QUESTION: Do you want it in one or the other or not?

MR. KASSNER: Yes, your Honor.

QUESTION: You want it in one or the other.

MR. KASSNER: Yes, your Honor.

QUESTION: Or both.

MR. KASSNER: No, one or the other, preferably the federal court because that is quicker.

QUESTION: Aren't you running right into Younger?

MR. KASSNER: I don't believe I am running right into Younger.

QUESTION: It is right there.

MR. KASSNER: If M&L were the only --

QUESTION: You have two court proceedings going at the same time --

MR. KASSNER: Well --

QUESTION: -- on the same point.

MR. KASSNER: The question becomes, who initiated the second court proceedings?

QUESTION: You did, by violating the law.

MR. KASSNER: At the time of the filing of the federal complaint, the local authorities were put on notice that there is a substantial federal question involved in the ordinance.

QUESTION: But the temporary restraining order was

MR. KASSNER: The criminal proceeding, for all intents and purposes, was stopped as soon as it was initiated.

QUESTION: You mean, the state didn't proceed?

MR. KASSNER: The state did not proceed with it. There was no intent to --

QUESTION: Well, anyway, now they can't without violating the --

MR. KASSNER: Now they can't without violating the federal injunction.

QUESTION: What were the terms of the injunction? This was a preliminary injunction, was it not?

MR. KASSNER: Yes, your Honor. The terms of the injunction were that the state was in -- the defendants were enjoined in enforcing the ordinance.

QUESTION: Against anybody.

MR. KASSNER: Against these three plaintiffs.

QUESTION: Against anybody or not?

MR. KASSNER: As far as I know, against these three plaintiffs.

QUESTION: Well, didn't they hold it then as unconstitutional?

QUESTION: As far as you know, haven't you got the injunction? Where is the injunction?

Is it in the Appendix?

MR. KASSNER: Yes, it is in the jurisdictional

statement.

QUESTION: It is at page 23A of the jurisdictional statement.

MR. KASSNER: Page 23A of the jurisdictional statement.

Just the plaintiffs.

QUESTION: But it is -- but the ordinance was finally declared by the district court and affirmed by the Court of Appeals, was declared unconstitutional by the state, was it not?

MR. KASSNER: The Court of Appeals said that there was a likelihood of success. They did not declare it unconstitutional, as they couldn't, because it was merely a preliminary injunction.

QUESTION: Well, what is at the top of page 23A?

MR. KASSNER: Well, 23A is the district court. I am talking about the circuit court now.

QUESTION: Right.

MR. KASSNER: In Appendix 4A of the jurisdiction -- page 4A, Judge Oakes decision says, "Initially, in answer to the question of the propriety of the injunctive relief granted here, we agree with the district court as to the probability of success on the merits."

QUESTION: Now, go down about 16, 17 lines, just before the citation of Byrne, what about that sentence?

"As such, the ordinance would have to fall." It describes the ordinance and says, "As such, that ordinance would have to fall."

MR. KASSNER: Yes, but I don't think he meant to make the final determination in the preliminary injunction motion.

QUESTION: And, well, certainly, the district court -- at the top of page 23A says, "In conclusion, we find that local law number 1-97 of the Town of Hempstead is on its face violative of Plaintiff's First Amendment rights."

That is no suggestion that they may very well succeed. That is a flat statement.

MR. KASSNER: That is correct. But I don't think you can attribute that to Judge Oakes' decision. That is here, but Judge Oakes' decision is not that clear. He seems to say, probability of success and use those words in the proper context for the proper --

QUESTION: In other words, you are suggesting that the affirmance did not include what Mr. Justice Rehnquist just read to you? Is that it?

MR. KASSNER: Yes, your Honor.

QUESTION: But what Judge Oakes says is, we agree with the district court as to the probability of success on the merits.

MR. KASSNER: It construed that this --

QUESTION: Which is zero.

MR. KASSNER: Well, it construed the district court's opinion as being one of probability of success. That is what it amounts to, which is zero.

QUESTION: But I take it you are not out of business even if the district court and the Court of Appeals made an error in finally declaring the ordinance unconstitutional in its face. You are not seriously damaged, are you?

MR. KASSNER: No, your Honor.

QUESTION: I mean, as long as --

MR. KASSNER: I don't think anybody is damaged.

QUESTION: As long as you are right on the probability -- on a probability of success.

MR. KASSNER: Yes, your Honor.

QUESTION: A high probability of success.

MR. KASSNER: I don't think anybody is damaged by that.

QUESTION: Well, the state is pretty well damaged if -- if it understood that it could not enforce this ordinance against anybody because of the declaration of unconstitutionality -- which that is precisely what Mayo against Canning Company in this Court was designed to prevent.

MR. KASSNER: But I don't -- those aren't the words he used in his declaration on page 23.

QUESTION: It is what they used. He declared it

unconstitutional on its face. He didn't enter an injunction against total enforcement. He declared it unconstitutional on its face and most local prosecutors, until it is finally settled in the federal court, don't enforce the ordinance against anybody. They aren't enforcing it against anybody in this town now, are they?

MR. KASSNER: Well, I think at that time these are the only three that were doing the activity in the town.

QUESTION: Well, they --

MR. KASSNER: The activity of topless dancing.

So they had all the parties before them. That is my impression. These are all the people that could have been covered by it. These all three came into court together.

There was no class action because you had everybody to start out with.

QUESTION: What more remained to be done before Judge Bartels, after his order of September 6th?

MR. KASSNER: Well, I think something was done -- well, no, an appeal was taken.

QUESTION: But I mean, he says, "Therefore, pending the final determination of this action." But what more remained to be done after they had found the ordinance unconstitutional on its face?

MR. KASSNER: Well, I guess they would have to file an answer and I would have to make a motion for summary

judgment.

QUESTION: But that was all pro forma, after this determination, wasn't it?

MR. KASSNER: Well, if you take his words to mean that this was not he found a probability of success sufficient to warrant an injunction -- if you assume that that is not what he meant when he said what he said -- then he would undoubtedly follow his prior determination on the motion for summary judgment. But it certainly did not end the case.

You had to do something. There would have to be a motion for summary judgment after a joinder of issue. There would have to be a permanent injunction entered and there could have been new facts brought out.

QUESTION: What if nobody did anything after the order of September 6th? Then it simply remains in statu quo, I take it.

MR. KASSNER: Well, somebody had to file an answer, didn't they? Somebody had to make a motion for summary judgment in order to bring it to an end. If there wouldn't have been an appeal, the circuit court under preliminary injunction --

QUESTION: Well, but if nothing is done, Judge Bartels' temporary injunction remains in effect, the town is enjoined and it can go on that way, I take it, for 20 years.

MR. KASSNER: Yes, if nothing is done, that would be the effect of any preliminary injunction. It wouldn't be unusual.

QUESTION: I gather you are suggesting, Mr. Kassner, that Judge Oakes, at least, was conscious of the problem raised by Mayo, wasn't he?

MR. KASSNER: Yes, your Honor.

QUESTION: He didn't cite it.

MR. KASSNER: He didn't cite it but Judge Oakes is a good judge and he knew what he was doing when he wrote "probability of success."

QUESTION: If he did, why did he write,"as such, the ordinance would have to fall?"

That is a little inconsistent, isn't it?

MR. KASSNER: Sometimes you --

QUESTION: Well, at least the issue would be clearer if he had not used that sentence, would it not?

MR. KASSNER: Yes, it would. But I don't think that that should be made to override the words, "probability of success" which are absolutely incorrect.

QUESTION: Well, as Mr. Justice Rehnquist said, the district court said the probability of success is zero. You aren't going to succeed. I've decided it and the Court of Appeals says, we agree with him about probability of success.

MR. KASSNER: Well, if you want to construe --

QUESTION: If you want to construe the probability of success is 100 percent.

MR. KASSNER: Well, if you want to construe Judge Oakes as meaning that, I don't construe it as meaning that because he wasn't asked -- called on to rule on that and he was called on to rule on probability of success. He used the words "probability of success."

He meant that the statute was overbroad in his mind at that point. There was a probability of success because of the apparent overbreadth of the statute and by not sticking in the word "apparent" or -- I don't know whether you can make his opinion the final determination on a motion for preliminary injunction.

QUESTION: Well, at any rate, Mr. Kassner, are you going to get now to the question of whether because you got into the federal court first that takes care of the Younger problem, even in the MTM case or whatever it is?

MR. KASSNER: M&L.

QUESTION: M&L, rather.

MR. KASSNER: Yes. All -- as I said before, on this point all I am going to do is merely restate what Judge Oakes said because I can't improve on it. He spoke about equity principles, granting relief to two people in the same shoes as a third person with respect to --

QUESTION: Well, I know that is in respect to your

case, but suppose we didn't have the other two parties, what we had was M&L?

MR. KASSNER: I'd be in trouble.

QUESTION: You would?

MR. KASSNER: Yes, I would.

QUESTION: Why?

MR. KASSNER: Because -- I don't think I should be, but I know that I would be.

QUESTION: You don't think --

MR. KASSNER: I don't think I should be, you know.

QUESTION: You have run the race to the courthouse door by getting into federal court first?

MR. KASSNER: I think that should determine it because I think that that is the only reasonable fixed way to determine jurisdiction. The state courts are no more entitled to adjudicate First Amendment rights in the federal courts.

I could make an excellent argument for the fact that the federal court is the prime court for the adjudication of constitutional rights and --

QUESTION: Well, you'd lose -- you'd lose that argument, wouldn't you?

MR. KASSNER: I don't know whether I'd lose it.

QUESTION: Under Younger you would lose it if there was a -- I mean, you ought to win that if there was a criminal

proceedings pending?

MR. KASSNER: No, and Younger gives me an exception to that. Younger is an exception to that because of the doctrine of CArmody, but there is no Carmody involved to remove federal court jurisdiction once the Younger problem itself does not arise and the Younger problem is a pending criminal prosecution of the federal plaintiff at the time of the filing of the federal complaint.

That is what Younger says.

Now, I was disturbed by Younger but Younger is the law and that is the law. I am willing to live with Younger but I don't want to see Younger expanded to --

QUESTION: And using Younger, you won the race to the courthouse?

MR. KASSNER: Excuse me, your Honor?

QUESTION: Looking at Younger, you won the race.

MR. KASSNER: Yes, I did.

QUESTION: You first told your clients you had better bide by this ordinance.

MR. KASSNER: I did.

QUESTION: And then you ran into the federal courts.

MR. KASSNER: I continue to tell them --

QUESTION: Wait a minute. And then you said, now, I'll get it in the state court too, so you go violate the law now, we'll get it in the state court.

MR. KASSNER: I --

QUESTION: And if there had been an admiralty court around, you'd have gone in there someway.

[Laughter.]

MR. KASSNER: Now, Judge Marshall, you know I didn't do that. You know I didn't do that.

QUESTION: There was only one court in Hempstead.

MR. KASSNER: Why did I want to create another cause of action?

QUESTION: You didn't go to the admiralty court, I agree.

MR. KASSNER: I advised all three of my clients to obey the ordinance, at least pending the preliminary injunction determination. Two of my clients followed my instructions. The third client said he couldn't take it.

QUESTION: I think you left out a fact. The third client did that after the TRO was refused.

MR. KASSNER: Well, the denial of a TRO is not an adjudication of anything on the merits, sir.

QUESTION: Well, if he had gotten the TRO, he would have been in very good shape, wouldn't he?

MR. KASSNER: I know that. Then all three would have violated the ordinance as it was written. But I didn't and I told them not to violate the ordinance and two obeyed and one didn't and the one didn't because of economic contingencies

He couldn't stay in business with the cut in business and that is why he had to go about it.

Now, as long as we are talking Younger, why don't we talk about eight prosecutions in a period of three or four days?

Now, Younger clearly held, there is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected.

Now, I don't think Younger applies if he would have been subjected to these eight prosecutions before he filed his federal complaint. I don't think this is a Younger case, anyway.

QUESTION: That is a harassment exception.

MR. KASSNER: Yes, your Honor. I mean, Younger is clear on that point. They served three summonses. Then they had five arrests and they closed the premises on four separate occasions.

QUESTION: Do you think that is -- do you think that is true even though a TRO is denied and even though there is a substantial issue about a preliminary injunction?

MR. KASSNER: Well, the --

QUESTION: What is a state supposed to do? Any time you rush to the federal court, quit enforcing its criminal laws?

MR. KASSNER: They had this going on for eight years before. They could have waited 10 or 20 days.

QUESTION: That isn't my question. My question is, what is the state prosecutor supposed to do?

MR. KASSNER: Stay its hand until the judge determines the issue in the --

QUESTION: Any time you file federal complaint, he is supposed to quit enforcing the law. Is that it?

MR. KASSNER: It depends on what law you are talking about, your Honor.

QUESTION: I am talking about this one.

MR. KASSNER: Oh, if I were the local prosecutor and I saw that there was a substantial federal question involved in the ordinance, I might wait the 10 or 15 days that it would take the federal district judge to adjudicate the issue and not create the abrasion that they themselves are complaining about.

QUESTION: Uh huh. Well, now, I understand you -- understand that is your point of view. But what about your client? Why shouldn't he wait until the federal court decided?

MR. KASSNER: My client should have waited.

QUESTION: Well, and what would he have done if the preliminary injunction had been denied?

MR. KASSNER: He would have been in more trouble

than he was --

QUESTION: When the injunction was granted.

MR. KASSNER: What would he have done?

QUESTION: Yes.

MR. KASSNER: He might have continued. He might have stopped.

QUESTION: Umn hmn. Well, what was the prosecutor supposed to do then?

MR. KASSNER: The prosecutor --

QUESTION: Wait till final adjudication?

MR. KASSNER: No, your Honor. After a determination of preliminary injunction hearing -- on hearings and on briefs -- if it was determined that that should not be granted, then I don't think the prosecutor is bound to wait any additional time. But I think that he could have waited the 10 or 15 days that it would have taken to avoid this abrasion that he complains about himself.

But I don't justify my client's conduct.

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

Thank you, gentlemen, the case is submitted.

[Whereupon, at 10:34 o'clock a.m., the case was submitted.]