

In the

# Supreme Court of the United States

JAMES F. SCHAD ET AL.,

APPELLANTS,

v.

BOROUGH OF MOUNT EPHRAIM

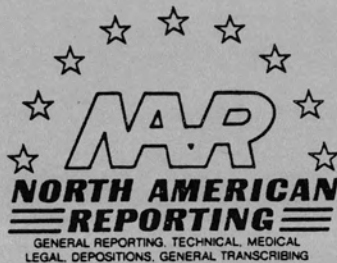
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No. 79-1640

Washington, D. C.  
February 25, 1981

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# ORIGINAL



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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES F. SCHAD ET AL.,	:	
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Appellants,	:	
	:	No. 79-1640
v.	:	
	:	
BOROUGH OF MOUNT EPHRAIM	:	
	:	
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Washington, D. C.

Wednesday, February 25, 1981

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

APPEARANCES:

ROBERT E. LEVY, ESQ., Levy and Robertson, 1319 Memorial Drive, P.O. Box 150, Asbury Park, New Jersey 07712; on behalf of the Appellants.

ARNOLD N. FISHMAN, ESQ., 501 Cooper Street, Camden, New Jersey 08102; on behalf of the Appellee.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

ROBERT E. LEVY, ESQ.,  
on behalf of the Appellants

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ARNOLD N. FISHMAN, ESQ.,  
on behalf of the Appellee

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1  P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We will hear arguments  
3 next in Schad v. Borough of Mount Ephraim.

4 Mr. Levy, I think you may proceed whenever you are  
5 ready.

6 ORAL ARGUMENT OF ROBERT E. LEVY, ESQ.,

7 ON BEHALF OF THE APPELLANTS

8 MR. LEVY: Mr. Chief Justice, and may it please  
9 the Court:

10 The appellant in this matter is a business enter-  
11 prise that commenced its business in the Borough of Mount  
12 Ephraim in 1973. At that time there was a zoning ordinance  
13 that was in effect. The business of the appellant was that  
14 it sold at retail books, magazines, and films, and at the  
15 same time it operated an enterprise that is referred to as  
16 a peepshow operation. These are booths which are individual  
17 booths which have a projector and a screen upon which images  
18 can be seen.

19 QUESTION: Is this what is euphemistically called  
20 an adult bookstore?

21 MR. LEVY: Euphemistically, realistically, and  
22 directly, sir, it's called an adult bookstore.

23 In 1976, some three years after it began this  
24 operation, it attempted to expand that operation by having  
25 the equivalent of film, or in the same location as the film,



1 in these peepshow booths --

2 QUESTION: Mr. Levy, I should know, but is Mount  
3 Ephraim in Burlington?

4 MR. LEVY: Pardon, sir?

5 QUESTION: What county is Mount Ephraim in? I  
6 should know --

7 MR. LEVY: This is in Camden County, Judge.

8 QUESTION: Oh, is it in Camden?

9 MR. LEVY: It's in Camden County, sir.

10 QUESTION: Where? South of the city?

11 MR. LEVY: It is to the south, and, I believe, to  
12 the east of the city.

13 QUESTION: Small?

14 MR. LEVY: It's on the Black Horse Pike on the way  
15 to Atlantic City from the Camden-Philadelphia area.

16 QUESTION: And a very small borough, isn't it?

17 MR. LEVY: It's a small borough. It's about 17  
18 miles, I would estimate, from the city of Camden and from the  
19 river which divides Pennsylvania from New Jersey.

20 QUESTION: Would you tell us a little more about  
21 Mount Ephraim? How's it zoned and so on?

22 MR. LEVY: It's zoned, if I understand, sir, in  
23 two zones. It has a residential zone and it provides for  
24 both multifamily and single family in a residential zone,  
25 and then it has a commercial zone. The Black Horse Pike,

1 which is the main artery between Camden and Atlantic City,  
2 cuts right through the borough. For 250 feet on each side  
3 of the Black Horse Pike you have a commercial zone, and then  
4 the balance of the community is residential, either multi-  
5 or single-family. It does not have any zone that provides  
6 for industrial use. It's solely commercial.

7 QUESTION: Commercial or, and residential?

8 MR. LEVY: And/or residential.

9 QUESTION: And what's its population?

10 MR. LEVY: May I call on my --

11 MR. FISHMAN: Less than 5,000 people, Your Honor.

12 QUESTION: And do the residents live and work --  
13 they're living there, of course. Do they work in the commu-  
14 nity, or more particularly, do they commute to Camden and  
15 Philadelphia?

16 MR. LEVY: I think that they would have to go  
17 beyond the borough of Mount Ephraim in order to provide  
18 sufficient occupations for the --

19 QUESTION: Except, of course, for your client and  
20 others similarly situated, who run commercial establishments  
21 in the community?

22 MR. LEVY: That's right. There are, along the  
23 entire length of the Black Horse Pike, on both sides, it is  
24 commercially occupied and active. But there would not be  
25 sufficient opportunity for all the inhabitants to work.

1 QUESTION: Employment, there; yes. Is it a farming  
2 community?

3 MR. LEVY: I would think not. I think that maybe  
4 at some time it might have been. It is certainly, I think --

5 QUESTION: But not now?

6 MR. LEVY: -- more suburban than it is urban.

7 QUESTION: What sort of commercial establishments  
8 are permitted? Are there motion picture theaters and -- ?

9 MR. LEVY: There is a motion picture theater.  
10 There are restaurants. There are car showrooms, used car  
11 showrooms. There are basically supermarket-type as well as  
12 discount-type stores that can be found within the community.

13 QUESTION: And taverns?

14 MR. LEVY: Taverns? Yes.

15 QUESTION: Restaurants?

16 MR. LEVY: There are taverns, there are restaurants  
17 with liquor licenses, and within some of those there is the  
18 live entertainment about which we had some colloquy in the  
19 lower courts.

20 At the time that we went ahead and we put in the  
21 peepshow operation we did it on the strength of the content  
22 of the zoning ordinance. That's the zoning ordinance that  
23 said that there was no objection at all to what has now been  
24 determined to be other than live entertainment. And we were  
25 then confronted with the fact that live entertainment is not



1 a permitted use but is prohibited. And as one looks at the  
2 zoning ordinance it becomes terribly difficult to be able  
3 to find out how it is that there has been a determination  
4 of such a distinction since entertainment is not addressed  
5 in that ordinance at all. It does not appear. Since we  
6 are in a commercial zone, we are concerned ourselves pri-  
7 marily with the commercial aspect of that zoning ordinance,  
8 but there is nothing even in the residential parts of this  
9 ordinance that in any way relate to entertainment.

10 Now, an ad hoc determination has obviously been  
11 made that commercial live entertainment across the board is  
12 not a permitted use, but somehow or other commercial non-live  
13 entertainment, which includes the motion picture theater,  
14 which includes the fact that we have been providing in the  
15 peepshow booths a nonlive type of operation.

16 Now, to carry on the anomaly of this, if we were to  
17 go along with what has been proposed to us, it is not possible  
18 for me to show a young lady dancing alive, nude or otherwise,  
19 but that I could have taken a videotape of that earlier in  
20 the morning and I could present the exact same performance on  
21 videotape in the same booth.

22 Now, the question became, and I think it's a  
23 threshold question, do we have a First Amendment situation  
24 here? Is there communicative quality of what it is that  
25 we are proposing specifically, and with respect to all other

1 entertainment that's banned? Do we have a First Amendment  
2 situation? Because if we do, then the fact that there is a  
3 power on the part of the municipality to enact zoning, would  
4 not in and of itself immediately then set forth that there  
5 is no First Amendment issue?

6 What we have here is a zoning issue, but it's a  
7 zoning issue where in the very terms of that zoning ordi-  
8 nance, we have a burden, a restraint, an impingement, and  
9 finally a total prohibition of a form of communication.

10 QUESTION: The ordinance in question is the one that  
11 appears on page 3 of your brief, is it?

12 MR. LEVY: Yes, sir, at 99-15B, I believe, is its  
13 designation.

14 QUESTION: All right. Then it's 99-15B, -B(1).  
15 And then follows by saying "all uses not expressly permitted  
16 are prohibited."

17 MR. LEVY: Yes.

18 QUESTION: And I suppose "diners" means "diners,"  
19 doesn't it? I suppose that these restaurants can serve  
20 breakfast and lunch. But, for example -- well, let's see.  
21 I don't see flower stores, for example. Are they prohibited?

22 MR. LEVY: If that is to be interpreted as it's  
23 presently being interpreted, I would imagine that if you had  
24 dead flowers they would be permitted, but live ones, because  
25 they are live entertainment --

1 QUESTION: Well, nurseries is here. Nurseries, but  
2 not florists.

3 QUESTION: But on the sixth line it refers to  
4 "flowers." I suppose that would cover florists.

5 QUESTION: Moving picture theaters? Are they here?

6 MR. LEVY: No, sir.

7 QUESTION: Is there one in the city?

8 MR. LEVY: There is one. It's right on the Black  
9 Horse Pike and would be just somewhat to the east of our  
10 location.

11 QUESTION: Are newsstands here?

12 MR. LEVY: I do not see them here.

13 QUESTION: Bookstores? Yes, books are.

14 MR. LEVY: Books are allowed to be sold -- between  
15 gifts and stationery.

16 QUESTION: Yes.

17 QUESTION: What is your contention that is defec-  
18 tive in this zoning ordinance or in this conviction of your  
19 client?

20 MR. LEVY: I've had the problem from the outset,  
21 Mr. Justice Rehnquist, I cannot literally come here and say  
22 to you that this ordinance is defective as it's written.  
23 As it's written, there doesn't seem to be a defect. As it  
24 is being interpreted and applied, there seems to be an  
25 infringement on First Amendment rights by setting forth



1 that everything that's not expressly permitted here, they  
2 are literally then coming forth and saying, that bookstores  
3 or means of live communication offerings are not permitted.  
4 Therefore I am in a quandary because I can't say to you that  
5 this is defective and therefore has to be declared invalid,  
6 but I must say that if this is the springboard for the posi-  
7 tion they've taken, that there has to be a curbing on the  
8 interpretation that is being placed. The ad hoc determina-  
9 tion I stress, because the building inspector, who may be  
10 the source of our original complaints, changes. From time  
11 to time officials do change and the next one may come along  
12 and read it even more severely and now say, from this text,  
13 even nonlive entertainment is going to be prohibited.

14 QUESTION: Well, the courts of New Jersey have  
15 interpreted this ordinance to forbid what you want to do.

16 MR. LEVY: Exactly.

17 QUESTION: So it's been officially interpreted and  
18 applied to you, your client.

19 MR. LEVY: If the lack of any issue ever reaching  
20 a court with respect to what we do in this location is the  
21 equivalent of having approved what we're doing, it may well  
22 be that if they're sustained with this ordinance on the basis  
23 of live, that they can come back tomorrow and on the basis  
24 of this ordinance now attack nonlive.

25 QUESTION: Are you attacking this ordinance on its

1 face, or as applied to you?

2 MR. LEVY: As applied to us, and as applied  
3 across the board. I feel that we do have standing just as a  
4 citizen with respect to any ordinance that either as written  
5 or applied would have any sort of effect of restraint on  
6 First Amendment rights.

7 QUESTION: Well, it's been applied to you because  
8 you're wanting to show what the courts of New Jersey have  
9 held to be live entertainment, and that is banned by this  
10 ordinance.

11 MR. LEVY: That's correct.

12 QUESTION: And so, as applied to you, you're  
13 claiming that the ordinance is unconstitutional.

14 MR. LEVY: There is no question that we are arguing  
15 about its application to us.

16 QUESTION: And then you also say, I suppose, that  
17 you're entitled because it's a First Amendment case to say  
18 that because it also bans bookstores, that the ordinance is  
19 invalid?

20 MR. LEVY: No, it doesn't ban bookstores.

21 QUESTION: Well, I mean -- well, you mean as  
22 applied?

23 MR. LEVY: As applied, as we look at this ordinance,  
24 the fair warning that we would normally be entitled to when  
25 we are beginning to use our enterprise, I look at this

1 ordinance and I realize that for three years I've been  
2 allowed to offer --

3 QUESTION: How do you know it doesn't ban book-  
4 stores?

5 MR. LEVY: Because it specifically sets forth that  
6 as a permitted use there are books. On page 3.

7 QUESTION: I see. All right.

8 QUESTION: Well, do you contend that a town such  
9 as Mount Ephraim could not totally ban any commercial enter-  
10 prise?

11 MR. LEVY: No. What happens is this: were we to  
12 have an ordinance before us that deals with the desire to  
13 form a noncommercial entity, I would have some difficulty  
14 setting forth that there has been an infringement upon our  
15 rights. The moment the door is open to commercial enter-  
16 prise, then I think the burden is on the community to justify  
17 the elimination of some and the propagation or fostering of  
18 others. And we do have some rules that will set that forth.  
19 One is, can they do it? Yes, they are empowered to enact  
20 zoning ordinances. Secondly, that it must be a purpose other  
21 than that which is the regulation of freedom of speech.  
22 And therefore this is an omnibus-type zoning ordinance. The  
23 concept is to develop the community, and therefore it is not  
24 directed toward the regulation of freedom of speech. The

25 The third aspect, however, the moment they open



1 that unit to commercial enterprises, is there a substantial,  
2 compelling reason that's being advanced by the enactment of  
3 this ordinance and is there any other way in which that could  
4 have been accomplished, the furthering of that purpose,  
5 other than by the total ban? And actually, in this instance,  
6 when we look around the entire country and we realize that  
7 live entertainment is basically the rule, not the exception,  
8 it is obvious that in the light of regulation there are less  
9 stringent methods of coping and curbing live entertainment,  
10 not its total ban.

11           And if we get into the question again where  
12 a community wants to restrict something and allow others,  
13 into time, place, and manner, I submit that there must be  
14 the existence of that which is going to be regulated, and if  
15 it doesn't exist then there can't be any implication of time,  
16 place, or manner.

17           QUESTION: Well, you can say it's a time, place,  
18 and manner provision in the sense that it permits entertain-  
19 ment in certain ways, but it doesn't permit live entertain-  
20 ment.

21           MR. LEVY: All right. Let's submit that if it were  
22 to set forth that, if they had given us the benefit of an  
23 enactment, where time, place, and manner sets forth, no live,  
24 at least under those circumstances we could begin to question  
25 why there is the restriction on live as opposed to

1 nonrestriction of anything else.

2 QUESTION: I don't know why you aren't in a posi-  
3 tion to make that argument now, because that's why your  
4 operation is in trouble on account of the ordinance, because  
5 it is live entertainment according to the authorities.

6 MR. LEVY: According to their reading of it. They  
7 claim that there is a restriction on live entertainment.  
8 We have set it forth, we have set forth in our due process  
9 an equal protection of the law argument here that there is  
10 no rational distinction that has been set forth and if there  
11 be the ability to rationally distinguish between live and  
12 nonlive entertainment, we must note the compelling force  
13 that led to that distinction to see if it's furthered. What  
14 is more inimical to the purposes of zoning than if we can  
15 show the same performance on film and can't show it alive?

16 Now, if we get into the questions that arose in  
17 something like California v. LaRue, where there at least  
18 were hearings and there was a full setting forth of what it  
19 is that was the concern of the community and what they wanted  
20 to eliminate --

21 QUESTION: That wasn't a First Amendment case,  
22 really, was it?

23 QUESTION: That was the 21st Amendment.

24 MR. LEVY: Yes, but isn't -- well, it was First  
25 Amendment, but then it was also --

1 QUESTION: No, it --

2 MR. LEVY: -- one that dealt with the 21st Amend-  
3 ment.

4 QUESTION: The 21st Amendment was what controlled  
5 LaRue.

6 MR. LEVY: Well, what happened is that it originally  
7 got up before the court, I think it started, at least the  
8 people who were affected basically by LaRue -- were talking  
9 in terms of First Amendment -- and we found now that there  
10 was an interplay between the First and the 21st Amendment.  
11 And then we found out --

12 QUESTION: I would think that LaRue reflects the  
13 idea that a state may prohibit the sale of salted peanuts or  
14 potato chips in a bar if it wants to.

15 MR. LEVY: All right. I have no problem with that,  
16 but I think before we get to that point, Mr. Chief Justice,  
17 we have a situation as to whether or not the reasoning that  
18 was utilized in LaRue is the type of reasoning that would be  
19 required, necessary, and essential in the event that a  
20 distinction was going to be drawn between the live enter-  
21 tainment and the nonlive entertainment. What are the conse-  
22 quences, what is it that is trying to be avoided by drawing  
23 that distinction? Is it going to be a question of traffic?  
24 All communities have a problem with traffic. In fact we  
25 couldn't possibly generate the traffic of a supermarket.



1           That's why we have traffic rules, that's why we  
2 have policemen, and we don't come along and ban all super-  
3 markets because it creates a problem. It's possible no matter  
4 where that there could be unruliness. We don't ban every  
5 type of activity where unruliness may follow. What we do is  
6 that we form other means of curbing, the less restrictive  
7 manner of achieving the purpose that's involved in the enact-  
8 ment and the doctrine of any zoning ordinance.

9           And this is implicit where there is a First Amend-  
10 ment or a fundamental right, that these must be adhered to;  
11 they must be within the contemplation of the community.  
12 Here, through four courts, we have yet to hear any substan-  
13 tial, compelling, or any other type of interest to be fur-  
14 thered by the restriction on live entertainment.

15           And therefore I submit that time, place, and manner  
16 has not been able to be brought into this matter because  
17 there is no item that's recognized as being worthy, or the  
18 object of regulation. Unless we have live entertainment,  
19 then we can't begin to talk about its regulation in time,  
20 place, and manner.

21           QUESTION: I gather, Mr. Levy, that what, the key  
22 to Judge Deighan's opinion is that one sentence, is it, at  
23 page 12a: "Live entertainment is simply not a permitted  
24 use in any establishment, regardless to whether there is a  
25 relationship to nude entertainment." This is the key to it,

1 isn't it?

2 MR. LEVY: Yes, and what he did is, he --

3 QUESTION: Just across the board barred any live  
4 entertainment, clothed or unclothed.

5 MR. LEVY: As a consequence of a zoning ordinance,  
6 both of the judges did that.

7 QUESTION: And I gather, at least we've had cases  
8 that indicate that live entertainment often has communicative  
9 aspects that are protected by the First Amendment. The  
10 play "Hair" -- I've forgotten the name of the case --

11 MR. LEVY: They do. What it also means is that  
12 across the board live entertainment is not deemed to be non-  
13 protected under the First Amendment. We have in the Doran v.  
14 Salem Inn cases the fact that under certain circumstances it  
15 may well be, but we haven't even been given the opportunity  
16 of determining whether in our situation, are we entitled to  
17 that protection? And is there anything at all that we do  
18 that may thereafter take from us that protection? We have  
19 been told across the board, from the very outset, no way;  
20 you can't do it. Because we have the power to enact zoning  
21 and it is given a presumption of validity; that's it.

22 And throughout all of the documents submitted  
23 throughout all of the courts including this one, we have  
24 emphasized that this is not a First Amendment case; it's a  
25 zoning case. But I submit that it's a combination of the two.

1 It's a zoning case which does impinge upon First Amendment  
2 freedoms and therefore the community now has the burden of  
3 establishing the necessity for banning totally and would  
4 equally have had the problem had it not been a total ban, to  
5 set forth how much of a ban it could justify in terms of some  
6 sort of interest which it was attempting to further and --

7 QUESTION: Mr. Levy?

8 MR. LEVY: -- without infringing beyond that which  
9 would become necessary --

10 QUESTION: May I ask you a question, Mr. Levy,  
11 please?

12 MR. LEVY: Yes, sir, Justice Stevens.

13 QUESTION: If the ordinance had totally banned  
14 motion pictures, which I thought it did, but you told us  
15 there is in fact a motion picture theater on this street,  
16 but that's a protected form of communication, would you say  
17 such an ordinance would be unconstitutional?

18 MR. LEVY: I would say that --

19 QUESTION: It seems perfectly clear, so there's  
20 no vagueness problem.

21 MR. LEVY: I would say that, again, we would have  
22 the problem of putting the community to the test. A community  
23 can enact and there's nothing I can do to prevent it from  
24 enacting, but the moment it enacts and my toes are stepped  
25 upon, I have the right to go in and set forth that this is a



1 prior restraint. I have the right to be able to challenge  
2 the validity of what you've enacted and you must now justify  
3 for me --

4 QUESTION: You have the right to do that as a de-  
5 fense to a criminal prosecution?

6 MR. LEVY: What I do is, I attempt to challenge  
7 the validity of the statute in the criminal prosecution, and  
8 therefore contain it within that. I have made my --

9 QUESTION: So then in a criminal trial the prose-  
10 cutor has the burden of setting forth the factual justifica-  
11 tion for the ordinance?

12 MR. LEVY: He has that burden. I challenge the  
13 validity of the statute and I feel that, presumptively, the  
14 moment that there is a challenge and that I can show the Court  
15 that there is a First Amendment right involved, that it now  
16 becomes the obligation on the burden of proof of the community  
17 to justify that cutting back on what would be a presumptive,  
18 protected right.

19 QUESTION: The issue would be the same if it were a  
20 motion picture theater or if it's a place where they have  
21 live entertainment?

22 MR. LEVY: I would say it's exactly the same wher-  
23 ever there's a First Amendment issue involved. The community  
24 must support and substantiate its cutting back, its restraint.

25 QUESTION: But didn't you agree that a community

1 could zone out entirely commercial uses and make it entirely  
2 residential?

3 MR. LEVY: I have said that, and if that were part  
4 of the unspoken part of Mr. Justice Stevens' question, then  
5 I would have answered it the same way. I understood his  
6 question to say that they were going to only rule out motion  
7 picture theaters. I believe, Mr. Justice Rehnquist, that a  
8 community can set forth that it will be totally residential,  
9 and I think it might meet all of the O'Brien problems. I  
10 think it has the right to make that sort of an enactment.  
11 I think there's a purpose that would be served. I think you  
12 could set forth that that purpose would be furthered by the  
13 fact that we eliminate all commerce. We don't want trucks  
14 who are delivering, we don't want any of those things, and  
15 that it possibly is the most least restrictive method of  
16 coping with that.

17 But the moment they open the door to discount stores  
18 and gasoline stations -- by the way, if you look at this  
19 ordinance, it's strange; it doesn't even allow gasoline  
20 stations as a permitted use.

21 QUESTION: How about newspapers?

22 MR. LEVY: It's not listed here, unless it's an  
23 accessory use to books or stationery, which are both allowed.  
24 But then you'd have to make a quality judgment of accessory  
25 use. But I submit that if they wanted to eliminate all

1 commerce, that that would be then necessary that they elimi-  
2 nate all commerce. And then we have the problem of, if a  
3 doctor or dentist has his office within the town, have they  
4 really strictly kept it to all commerce?

5 QUESTION: But if they did strictly keep it to all  
6 commerce, they could exclude people who wanted to purvey  
7 books, movies or anything else, so long as they just made it  
8 an absolute flat ban.

9 MR. LEVY: I would have some problem being able to  
10 speak as forcibly about that situation as I do about this  
11 situation. I would have some difficulty with some of the  
12 prongs of what I call the O'Brien test. There's no question  
13 that two of those are satisfied immediately. They have  
14 complied. They have the power, and it is not addressed to  
15 First Amendment rights directly. There are other purposes  
16 which are being furthered. Whether or not they will --  
17 that purpose will be furthered by the total ban may well be  
18 something that we have to think about in terms of that which  
19 preceded the enactment and then further, whether or not there's any  
20 other less restrictive manner in which that type of purpose  
21 can be served. And therefore I think there would have to be  
22 some enlargement of the proposition to include whatever fac-  
23 tual situation there was, what is it that they're trying to  
24 undo or prevent happening? But at least if they would follow  
25 the same possible course and road, and meet all of these



1 problems that are their obligation and their burden, it may  
2 well be the courts would decide that you could have a  
3 totally residential and noncommercial unit. But once the  
4 door is opened and a distinction is made with respect to  
5 any commerce, then I think you have to treat it as if it's a  
6 community with commerce and then under what guise or right  
7 could they prevent us from bringing in our form of commerce?

8 Now, there have been some other suggestions as to  
9 what it is that we might be able to do here. You have to  
10 understand that at the time that we became aware of the in-  
11 terpretation of this ordinance, it was as a consequence of  
12 being served with criminal process, so we were already in  
13 the courts. A suggestion that we go ahead and get a variance  
14 I think would violate both Freedman and Blount. There is  
15 just no way at all that we can get a speedy determination  
16 and the burden of proof is not cast upon the community.

17 In a variance we take on all of the burdens of  
18 showing that we will not in any way transgress what it is is  
19 the purpose of the enactment of the zoning ordinance and that  
20 we won't be violating health, welfare, morals, and the rest.  
21 There is a further suggestion in the documents that have been  
22 presented to you, that we have a right to go into chancery  
23 and that we can get a restraining order. And what happens  
24 is that that rule in chancery deals with civil cases and we  
25 were already in a criminal case. The question as to whether

1 or not courts will begin to in any way enjoin pending crimi-  
2 nal proceedings, Donbrowski v. Pfister being one of the cases  
3 that specifically sets forth. That is a rare, rare excep-  
4 tion. It is not the rule.

5 And then lastly, when we have the entire question  
6 of declaratory judgment. We were beyond declaratory judgment  
7 at that point on a civil basis. We were already in the crimi-  
8 nal courts, and declaratory judgment is that there may well  
9 be a controversy between individuals that can be resolved by  
10 means of this method. So that at the time that we were pre-  
11 sented with process, there was really nothing that we could  
12 do except go along with the process, fight it in the criminal  
13 court, raise all of the constitutional questions, and then  
14 discover that the local court said, if it's nude dancing  
15 -- not live entertainment, by the way -- if it's nude dancing,  
16 it's not protected speech at all.

17 Then we get into the county court, which is an  
18 appeal but called a trial de novo. There we find  
19 that the court says, well, there are First Amendment guaran-  
20 tees involved in dancing, but they don't apply in this case.  
21 And why not? We were never told why they don't apply here  
22 at all. And then we find that the appellate division affirms  
23 basically for the opinion of the judge in the county court,  
24 but without any elaboration or without any clarification.  
25 The Supreme Court refuses our petition for certification,

1 dismisses our appeal, and we never get a determination on the  
2 issue of First Amendment.

3 QUESTION: Let me go back to what you had said  
4 before. Do I understand you to say that the municipality  
5 could not ban all filling stations?

6 MR. LEVY: No, I didn't say that at all.

7 QUESTION: They could, couldn't they?

8 MR. LEVY: I say it could. I'm saying --

9 QUESTION: Then they could ban all grocery stores?

10 MR. LEVY: It could, but again subject to challenge  
11 as to the basis upon which there is this --

12 QUESTION: Just because they don't want any filling  
13 stations, they don't want any grocery stores.

14 MR. LEVY: And if they --

15 QUESTION: And they could ban all liquor establish-  
16 ments, couldn't they?

17 MR. LEVY: And if they did, sir --

18 QUESTION: But you say they can't ban a theater?

19 MR. LEVY: Nô, what I've said is that --

20 QUESTION: Of the kind you've got here?

21 MR. LEVY: My answer with respect to the theater  
22 was that if they, they cannot ban a theater if there are  
23 other commercial uses without being subject to a challenge.  
24 That could be a First Amendment challenge. I submit that  
25 there can be an attempt to ban other commercial enterprise



1 which is not protected by one of the first ten amendments.  
2 But that again, that type of banning would be subject to some  
3 form of review, and if there were an equivalent use in terms  
4 of whatever it be, traffic, congregation of people, litter-  
5 ing, whatever it is that may be their concern, if there is a  
6 comparable use that is being allowed, then there would have  
7 to be a question, either equal protection of the law, or  
8 any other aspect that would then allow them to make that  
9 distinction. A ration would have to come from them as to  
10 why there is that distinction, so that we don't have gasoline  
11 stations, but that we could have coalyards, and that I could  
12 go down and fill up my car with coal and take it home for my  
13 stove.

14           And I think that in each instance there is power,  
15 but that the power does not mean that there is then a neces-  
16 sity for an abdication of objection on the part of those who  
17 are affected by it.

18           And when we went into the question of a fundamental  
19 right where there is First Amendment, the requirement on the  
20 part of the state is not only brought to bear sooner but it's  
21 a deeper problem that they have. This Court has put it on  
22 the basis of careful scrutiny. And every time this Court  
23 has talked of careful scrutiny, it has basically set aside  
24 any presumptions of validity in terms of an enactment. It  
25 does not cloak it with the presumption of validity that

1 would be whether or not a fundamental right. And I think the  
2 two cases of the Village of Belle Terre and the East Cleveland  
3 case seems to set forth what the attitude of this Court has  
4 been in the past relative to the question of when there is a  
5 fundamental right and when there is not a fundamental right.

6 QUESTION: How do you see the Belle Terre case as  
7 aiding your argument?

8 MR. LEVY: Well, in Belle Terre what we have is,  
9 there was an attempt to pass an ordinance, or there was an  
10 ordinance passed, setting forth that there would be an  
11 allowance, or a disallowance of family and friends, but that  
12 would keep the basic family unit as one that could rent, but  
13 that there could be a prevention of anyone who was not a  
14 member of the family. And it was set forth that this isn't  
15 a social right. The family itself is basically something that  
16 is recognized by the courts as something that should be in  
17 some way or other advanced in all the methods possible.  
18 And therefore the statute itself -- shall I finish?

19 MR. CHIEF JUSTICE BURGER: Finish your sentence;  
20 yes.

21 MR. LEVY: In Belle Terre they did not sustain.  
22 They sustained the prohibition against renting in terms of  
23 other than family. The Court recognized as a fundamental  
24 right the preservation of the family and in East Cleveland,  
25 where there was a distinction drawn between members of the

1 family. They created degrees of family. It was then set  
2 forth that that would violate the recognized fundamental  
3 right and therefore there was no presumption of validity  
4 granted to the ordinance in East Cleveland, but rather with  
5 careful scrutiny the community was put to the test of having  
6 to prove what it is that was its purpose in distinguishing  
7 between cousins because of the consanguineous situation.

8 QUESTION: I think that answers my question that I  
9 put to you.

10 MR. LEVY: Thank you, sir.

11 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Levy.  
12 Mr. Fishman.

13 ORAL ARGUMENT OF ARNOLD N. FISHMAN, ESQ.,

14 ON BEHALF OF THE APPELLEE

15 MR. FISHMAN: Mr. Chief Justice, and may it please  
16 the Court:

17 What is being decided here today is the right and  
18 power of a small residential community, primarily residential  
19 community, to determine its character. In every residential  
20 community traffic patterns create major arteries. The land  
21 fronting on those arteries by virtue of the traffic patterns  
22 becomes unuseable for residential use and suitable for commer-  
23 cial purposes. At the same time the residents of those com-  
24 munities demand and desire that some of their commercial  
25 needs be met within the community.



1           In that context the Borough of Mount Ephraim has  
2 adopted a comprehensive zoning ordinance in an effort to  
3 accommodate all of these interests. There has been a sug-  
4 gession here that this ordinance regulates between live en-  
5 tertainment and nonlive entertainment. And yet if you will  
6 look at the ordinance itself entertainment is not addressed  
7 at all. What we have created here is a retail zone for the  
8 sale of retail products and services to the local inhabitants.

9           QUESTION: Of course, as my brother White earlier  
10 said, what we have before us is the ordinance as construed  
11 by the New Jersey courts.

12           MR. FISHMAN: That's correct, Your Honor.

13           QUESTION: And the ordinance doesn't even seem to  
14 allow moving picture theaters, but there is one in town,  
15 we've been told.

16           MR. FISHMAN: That moving picture theater, Your  
17 Honor, would be a nonconforming use --

18           QUESTION: But in any event, we've been told that  
19 whatever this ordinance may seem on its face to say, what it  
20 does do is permit moving pictures and an adult bookstore but  
21 not live entertainment. Isn't that correct?

22           MR. FISHMAN: That's correct. It is correct from --

23           QUESTION: And therefore that's the ordinance as it  
24 comes to us, just as though it were written in so many words,  
25 in the ordinance.

1 MR. FISHMAN: But it is correct on a basis, not  
2 that we distinguish between live entertainment and nonlive  
3 entertainment. It was felt, since the movies which are viewed  
4 are movies that sold by the appellant, certainly we can't  
5 regulate how these people sell their product. If they want  
6 to permit somebody to view the product -- in the same way  
7 that you can walk into a bookstore and leaf through the book  
8 to determine whether or not you want to buy it -- if they  
9 want to permit you to view the film prior to its purchase,  
10 certainly the borough cannot regulate how they sell their  
11 product. I can remember times when if you wanted to buy a  
12 phonograph record you went into a store and you took the  
13 record, you put it on a phonograph, and you listened to it.  
14 If you liked it, you bought it. If you didn't, you didn't.  
15 ~~There was~~ There was no move against the filmed entertainment  
16 because it was felt that the borough could not regulate the  
17 way in which these products were sold. And what this is is a  
18 zone for selling things to the consuming public of the Borough  
19 of Mount Ephraim. It is not --

20 QUESTION: I didn't understand that to be the rea-  
21 soning of Judge Deighan, which is the only full-dress opinion  
22 we seem to have in this case.

23 MR. FISHMAN: Judge Deighan's rationale as I under-  
24 stand it is, he found that appellants' live entertainment  
25 was First Amendment protected, but was nonetheless subject to

1 the reasonable exercise of the zoning power of the Borough  
2 of Mount Ephraim. You have to appreciate, Your Honor, that  
3 we're dealing here with a, well, Mr. Abrams indicated that  
4 perhaps there would be a community small enough and sleepy  
5 enough -- I think I represent that community. Mount Ephraim  
6 is less than one square mile, it has less than 5,000 people,  
7 it has less than 2,000 homes. It exists on the periphery of  
8 the Philadelphia market area. These uses are accommodated  
9 not only in Camden County but in Philadelphia County and in  
10 the surrounding areas. We have a true bedroom community here.  
11 It's got three zones, or one or two, basically, distinction,  
12 single-family, multi-family; and commercial. And we have  
13 defined that commercial zone by listing those uses which we  
14 permit. And in case there be any doubt about our attempting  
15 to establish a retail sales zone, the ordinance provides retail  
16 stores such as, but not limited to, and then it lists a lot  
17 of things.

18 So there is no -- when you talk about, can you have  
19 a flower shop? The answer is yes. Can you have a gift shop?  
20 Of course. Even if they're not in there. The answer is --

21 QUESTION: Well, flowers are mentioned, as was  
22 brought to my attention.

23 MR. FISHMAN: The answer is clearly yes. You can  
24 have all of those things.

25 QUESTION: Then it says, all uses not expressly



1 permitted are prohibited.

2 MR. FISHMAN: That's correct. That's a separate  
3 provision of the ordinance.

4 QUESTION: It' your point, let me just be sure I  
5 understand your point. Your point is that certain retail  
6 establishments, even if not expressly mentioned, would be  
7 permitted because these retails that are listed are illustra-  
8 tive of the total rather than -- ?

9 MR. FISHMAN: Absolutely. For example, there is  
10 nothing in the ordinance which gives the appellant the right  
11 specifically to sell films. But surely the Borough couldn't  
12 distinguish between selling records, selling books, selling  
13 films. This is a zone to sell things to the community. So  
14 we never moved against the sale of films, and we can't move,  
15 in my opinion, at least, against the way in which those  
16 films are sold. But this is not an entertainment zone.  
17 Entertainment is afforded through --

18 QUESTION: I was under the impression that when a  
19 customer viewed one of these films, he had to put a coin in  
20 the viewing --

21 MR. FISHMAN: That's correct.

22 QUESTION: Well, that's a little different from the  
23 record sales, or you're just doing it to see if you want to  
24 buy it.

25 MR. FISHMAN: I don't think the Borough could

1 prohibit the record shop from charging the customer a dime  
2 or a quarter to listen to the record even if he was going to  
3 buy it. I don't think that the Borough has a right to get  
4 behind the cash register and tell somebody how to run his  
5 business.

6 This matter arises in the context of a criminal  
7 prosecution where the burden is clearly on the state beyond  
8 a reasonable doubt, and we couldn't pick what we considered  
9 to be close situations.

10 QUESTION: But the peepshow is more a matter of  
11 consumption than being on consignment or return in ten days  
12 and you get your money back.

13 MR. FISHMAN: I don't think any of that is involved.  
14 What is involved is that if you view a film in a peepshow,  
15 you can then come down and purchase that film. And once you --

16 QUESTION: You don't get to view it for nothing,  
17 do you?

18 MR. FISHMAN: No. You pay money for that viewing.  
19 I don't see, however, where that makes any constitutional  
20 significance at all. Additionally, what I fail to appreciate  
21 about the appellants' argument, it seems as though everyone  
22 is willing to concede that in a residential zone the outlaw-  
23 ing or prohibition of any of the matters that we've been  
24 talking about now is permissible, and yet the appellant would  
25 have you believe that commercial is an all-or-nothing

1 proposition, and I don't really understand that argument.

2           Certainly, if some rational basis for distinguish-  
3 ing between commercial uses can be found, then a classifica-  
4 tion based upon this kind of commercial or that kind of  
5 commercial has got to be as constitutionally sound as a  
6 classification based upon residential -- .

7           QUESTION: But, you do agree, or don't you, that  
8 the ordinance bans all live entertainment?

9           MR. FISHMAN: I agree that the ordinance prohibits  
10 the utilization of land and structures in the commercial  
11 zone --

12           QUESTION: For any live entertainment?

13           MR. FISHMAN: -- for any live entertainment,  
14 Shakespeare --

15           QUESTION: And, of course, I take it that live en-  
16 tertainment is not permitted in any other zone -- ?

17           MR. FISHMAN: That's correct.

18           QUESTION: So there is no live entertainment in the  
19 Borough?

20           MR. FISHMAN: That's incorrect. If a person --  
21 a lot of examples have been raised as to whether or not you  
22 can have Christmas carols at the office Christmas party.  
23 The answer to that is yes.

24           QUESTION: But there is no commercial live enter-  
25 tainment?



1 MR. FISHMAN: That's correct.

2 QUESTION: In the city?

3 MR. FISHMAN: That's correct.

4 QUESTION: And so it would ban a play, any kind of  
5 a play, for example?

6 MR. FISHMAN: It would ban a theater. It would not  
7 necessarily ban a play.

8 QUESTION: Well, it would ban a commercial theater.

9 MR. FISHMAN: Correct.

10 QUESTION: Or a circus.

11 MR. FISHMAN: Correct.

12 QUESTION: And it would ban any kind of commercial  
13 live entertainment, any kind of live entertainment for which  
14 a fee is charged for profit, profit-making -- ?

15 MR. FISHMAN: At the point that the structure or  
16 land ceases to be an office or a home and becomes either a  
17 theater or an opera house or a concert hall or a sports  
18 arena or whatever, at that point it offends the zoning ordi-  
19 nance because this ordinance is created as a retail sales  
20 zone to satisfy the immediate needs --

21 QUESTION: Now, what's your justification for saying  
22 that the ordinance is valid even though it forbids any,  
23 although it forbids among other things a commercial theater  
24 with a live cast?

25 MR. FISHMAN: You're asking for a compelling

1 state interest?

2 QUESTION: Yes. What is your -- well, I'm asking  
3 your justification. I don't know whether you concede that  
4 you have to show a compelling interest.

5 MR. FISHMAN: I didn't think I do because I don't  
6 really think this is a First Amendment case, but I'll be  
7 privileged to respond to the question.

8 I think that a compelling state interest --

9 QUESTION: Well, you would agree that live enter-  
10 tainment in some forms, at least, is entitled to First  
11 Amendment protection?

12 MR. FISHMAN: Absolutely.

13 QUESTION: Like a theater?

14 MR. FISHMAN: Absolutely.

15 QUESTION: Would you also agree that the Borough of  
16 Mount Ephraim is entitled to prohibit, say, a rock concert  
17 that is apt to draw 50,000 people from Philadelphia and  
18 Atlantic City because of the congestion problems involved,  
19 even though it does involve live entertainment?

20 MR. FISHMAN: Certainly; and has. At least, and has  
21 if they're going to utilize the land or structures of the  
22 Borough of Mount Ephraim, it has.

23 QUESTION: But without all of that crowd, could you  
24 have live entertainment in the existing movie theater?

25 MR. FISHMAN: I don't think you could -- no, you

1 cannot, Your Honor, you cannot.

2 QUESTION: Even the high school play in the movie  
3 theater would be barred if they charged money to raise money  
4 to go to a football game or something?

5 MR. FISHMAN: The line may -- I'm sorry, sir.

6 QUESTION: Would it not be? The high school play --

7 MR. FISHMAN: At the moment that the structure in  
8 which it is being performed ceases to become a high school  
9 and becomes something other than that.

10 QUESTION: No, no, I asked about your existing  
11 motion picture theater. You answered my brother Marshall that  
12 it would bar a play in the motion picture theater.

13 MR. FISHMAN: Yes, it does --

14 QUESTION: It would bar the high school putting on  
15 its play in the -- ?

16 MR. FISHMAN: Perhaps not on a one-time basis, but --

17 QUESTION: Well, that is certainly not the way I  
18 read, and I gather that's as my brother Stewart suggested  
19 to you early, that's what we have to take as the reach of  
20 this ordinance, what Judge Deighan -- is that the way you pro-  
21 nounce it?

22 MR. FISHMAN: "Deegan."

23 QUESTION: The way, that sentence I read your col-  
24 league earlier, that it does not grant any kind of live  
25 entertainment.



1 QUESTION: And what is your -- you were going to  
2 suggest to me what the justification was for that.

3 MR. FISHMAN: Well, I think there are several  
4 justifications. One is that zoning in and of itself is a  
5 compelling state interest. I think that the combining of  
6 compatible uses into zones and the blending of compatible  
7 zones into a comprehensive zoning ordinance is as has been  
8 said by this Court the most essential function performed  
9 by local government because it's in that way that the quality  
10 of life in these communities can be preserved.

11 Officially, the devotion of the limited amount of  
12 commercial space that a town like the Borough of Mount  
13 Ephraim has to the satisfaction of immediate needs of the  
14 residents of a borough is certainly a compelling state  
15 interest. The avoidance of those problems inherent in the  
16 omitted uses of live entertainment, like traffic, crowds,  
17 parking, trash, demands for medical and police facilities,  
18 the avoidance of these things for a Borough like Mount  
19 Ephraim is a compelling state interest. So at each of these  
20 levels I think a compelling state interest has been shown.

21 QUESTION: Well, do you think that covers the situa-  
22 tion if the owner of the motion picture theater says, by the  
23 way, I would -- three nights a week are going to be movies  
24 and three nights a week are going to be plays?

25 MR. FISHMAN: You have to appreciate, Your Honor,

1 that that movie --

2 QUESTION: That, you would say, movies are all  
3 right and plays are not, or not?

4 MR. FISHMAN: You have to appreciate that that movie  
5 is a nonconforming use in our borough, Your Honor. It  
6 precedes anyone's memory, it precedes any zoning ordinance,  
7 and I don't think that that movie would be a permissible  
8 use were it to move into town today.

9 QUESTION: I suppose it also precedes the song,  
10 "New York Throughway's Closed, Man."

11 MR. FISHMAN: I'm at a loss, Your Honor.

12 QUESTION: Well, what about -- does the ordinance  
13 ban the showing in this store that we have here, this adult  
14 bookstore, of movies?

15 MR. FISHMAN: No, because that is -- at least,  
16 it could be argued and it probably would be argued that that  
17 is the method by which they choose to sell their movies.  
18 In that way it would become an accessory use to their sale  
19 of films, which is clearly permitted, even though not speci-  
20 fically mentioned, under the phrase, "Retail stores such as  
21 ...but not limited to..." Additionally, --

22 QUESTION: Mr. Fishman, let me ask one other ques-  
23 tion about the motion picture theater. You're saying this is  
24 a nonconforming use, meaning that it was in existence before  
25 the ordinance was passed --

1 MR. FISHMAN: Are we discussing the movie, sir?

2 QUESTION: The motion picture theater. Does that  
3 mean that --

4 MR. FISHMAN: This motion picture, or a movie?

5 QUESTION: No, no, I'm talking about the theater,  
6 the --

7 MR. FISHMAN: Yes, sir.

8 QUESTION: Does that mean that if someone else  
9 wanted to open a motion picture theater that would be pro-  
10 hibited by the ordinance?

11 MR. FISHMAN: I believe so, sir.

12 QUESTION: So that in a way this is like, the  
13 same case as if this is the second -- this is an application  
14 to -- I mean, it's not application, but if it were, to be a  
15 second place of entertainment within the area?

16 MR. FISHMAN: Yes, it could be so viewed. And  
17 the first place, of course, didn't get there because we just  
18 didn't close our eyes and permit it to come in in the face  
19 of the ordinance, it got there before the ordinance, and our  
20 ordinance has a saving nonconforming use provision across  
21 the board.

22 QUESTION: In other words, if they had had vaude-  
23 ville in that motion picture theater before the ordinance was  
24 passed, presumably they could continue to have it then?  
25 That would be an exception to the live entertainment?



1 MR. FISHMAN: I think so, although that's not pre-  
2 sent at all.

3 QUESTION: Well, we didn't even know about the  
4 motion picture theater until you told us about it. It's not  
5 even in the record.

6 MR. FISHMAN: I understand this, Your Honor, but  
7 it exists. I think Mr. Levy was questioned about that in  
8 appellants' exhibit.

9 QUESTION: Well, if a -- could there be a dinner  
10 theater that didn't have a live play but which showed movies  
11 in connection with their restaurant operation?

12 MR. FISHMAN: No, sir. No, sir. A movie in a  
13 dinner theater, I don't think would be an accessory use.  
14 There are only three --

15 QUESTION: You're really saying that since it's  
16 not permitted there's no entertainment of any kind permitted  
17 in the Borough commercially?

18 MR. FISHMAN: The land of the Borough --

19 QUESTION: Whether it's live or not live?

20 MR. FISHMAN: That's correct. The Borough of Mount  
21 Ephraim has created a commercial zone to satisfy the immediate  
22 needs of the residents. It's a bedroom community. If you  
23 come home at night and you forgot to buy your bread, your  
24 milk, your gift --

25 QUESTION: Do you think that's the way your

1 New Jersey courts construed this ordinance as banning all  
2 entertainment rather than just all live entertainment?

3 MR. FISHMAN: I think so, sir. We proceeded on the  
4 theory of live entertainment in the municipal court because  
5 we wanted as narrow an imposition as possible.

6 QUESTION: But I know, Mr. Fishman, but don't we  
7 have to -- the only opinion, as Justice Stewart reminded you  
8 earlier, is the county court opinion, isn't it?

9 MR. FISHMAN: That's correct.

10 QUESTION: And that's all we know about what the  
11 meaning of this ordinance that has been --

12 MR. FISHMAN: That is correct.

13 MR. CHIEF JUSTICE BURGER: We'll resume at 1 o'clock.  
14 You have some remaining time.

15 MR. FISHMAN: Thank you.

16 (Recess)

17 MR. CHIEF JUSTICE BURGER: Mr. Fishman, you may  
18 continue.

19 MR. FISHMAN: Mr. Chief Justice, and may it please  
20 the Court:

21 It is submitted by the Borough of Mount Ephraim  
22 that this ordinance passes every constitutional test developed  
23 under the First Amendment. We passed the O'Brien test, in  
24 that clearly the ordinance is within the power of government  
25 and clearly is unrelated to the suppression of expression.

1 These points are actually conceded by the appellant. The  
2 appellant, however, denies that we advance a significant  
3 governmental interest or that the ordinance is sufficiently  
4 narrow so as to not impinge upon the First Amendment any more  
5 than is necessary. We submit that we do advance a signifi-  
6 cant governmental interest, as I've said before, because  
7 zoning in and of itself is not just a significant governmental  
8 interest but perhaps the most essential governmental interest  
9 served by any local community.

10 In addition, what we have really striven to do in  
11 this matter is devote the limited amount of commercial land  
12 which fronts on this main highway through the Borough of  
13 Mount Ephraim to satisfy the immediate needs of the residents  
14 of the Borough of Mount Ephraim, and in so doing we contend  
15 that we advance a significant governmental interest.

16 QUESTION: Mr. Fishman, how many prosecutions under  
17 this ordinance have there been?

18 MR. FISHMAN: That I've handled, only one, and that's  
19 all I would know of, Your Honor.

20 QUESTION: This is the only one?

21 MR. FISHMAN: This is the only attempt at entertain-  
22 ment that has ever come into the town of Mount Ephraim that  
23 I am aware of, and I've been its prosecutor for a number of  
24 years, sir.

25 QUESTION: There have never any other noncon-  
forming uses?



1 MR. FISHMAN: There are three restaurants in the  
2 town that offer music with the meal. The municipal court  
3 found that that music with a meal is an accessory use and  
4 in addition to that a hearing was held on the issue of selec-  
5 tive enforcement, which was the only testimony ever taken  
6 in this matter, and at that hearing everyone testified that  
7 those uses predated any ordinance that anyone could remember.  
8 So that they would be the only live entertainment in the  
9 town, and they would be there by virtue of the nonconforming  
10 use, and also --

11 QUESTION: Or the only entertainment?

12 MR. FISHMAN: Or the only nonconforming enter-  
13 tainment; that is correct, Your Honor.

14 QUESTION: Or any entertainment, conforming or  
15 nonconforming.

16 MR. FISHMAN: Well, we don't ban entertainment.  
17 What we do is we regulate the use of buildings and structures  
18 within the town. If someone wanted, for example --

19 QUESTION: I know, but there can't be any commercial  
20 business in entertainment in a building?

21 MR. FISHMAN: That's correct. That is absolutely  
22 correct, Your Honor. This zone has been created in order to  
23 sell things and provide those --

24 QUESTION: You can't sell entertainment under the  
25 zoning ordinance?

1 MR. FISHMAN: That's correct. Entertainment is  
2 accommodated throughout the County of Camden; specifically,  
3 live nude entertainment is accommodated throughout the  
4 county of Camden, and it has to be remembered that the tradi-  
5 tional concepts of zoning -- one of the cases cited in my  
6 brief is Village of Valley View v. Proffett. And in that  
7 case the court said that traditional concepts of zoning  
8 envision a community as a self-contained unit containing  
9 its own -- or, a municipality as a self-contained unit, and  
10 containing its own residential, commercial, and industrial  
11 areas.

12 Mount Ephraim, like Valley View, is on the peri-  
13 phery of a huge metropolitan center and it is not a self-  
14 contained unit, it is, as they said in that case, merely an  
15 adventitious fragment of the social and economic whole,  
16 and as such what is really at issue here is whether the  
17 Borough of Mount Ephraim or any such small residential commu-  
18 nity has the right and the power to determine its character,  
19 what it's going to look like in the future.

20 We have a town in Mount Ephraim called Tavestock.  
21 According to the 1980 census figures, Tavestock has four homes  
22 and nine residents. Certainly an inappropriate town for  
23 entertainment. We have another town called Pine Valley  
24 Borough, has 24 residents and 14 homes, another town in which  
25 uses of this nature or entertainment in general just doesn't

1 make sense.

2           The county of Camden is comprised of 37 separate  
3 municipalities. Some of those municipalities are the type  
4 of municipalities where this use would properly be accommo-  
5 dated and in some of those municipalities it just really does-  
6 n't make sense. This Court in *Young v. American Mini Theatres*  
7 sustained a reasonable time, place, and manner restriction for  
8 the City of Detroit. Implicit in that decision is that the  
9 City of Detroit could prohibit these uses or any entertain-  
10 ment uses or any commercial uses or commercial speech uses  
11 from the residential areas of Detroit.

12           Well, the Borough of Mount Ephraim is absolutely  
13 indistinguishable from those residential areas of a large  
14 metropolitan area. The fact that we have 37 governing  
15 bodies instead of, let's say, a county-wide planning board  
16 -- if we had a county-wide planning board, it would be  
17 extremely rational to not permit Mount Ephraim to have an  
18 entertainment zone. It's just not that kind of a town.  
19 The entertainment zone would most probably be located in  
20 more of the downtown area. We're on the outskirts of a large  
21 market area. The Philadelphia market area encompasses five  
22 counties in Pennsylvania and three counties in New Jersey,  
23 and certainly every municipality encompassed within that  
24 sprawling megalopolis does not need to accommodate all commer-  
25 cial uses, be they constitutionally protected or not.



1 I maintained initially that this really -- I sub-  
2 mit that there are really no constitutional issues presented  
3 in this matter.

4 I say that because it would seem to me of neces-  
5 sity that before a content-neutral zoning ordinance, clearly  
6 valid on its face, can be held to implicate First Amendment  
7 principles, there must of necessity be some type of a con-  
8 stitutional showing that the use is not accommodated else-  
9 where in the community at large, and there should also be  
10 some obligation to establish that the proposed site of this  
11 use is at least reasonably suitable to accommodate the use.

12 There's been no showing; the record is barren with  
13 respect to that. This could, for example, and does, accord-  
14 ing to the strip-type commercial uses that have grown up in  
15 the town of Mount Ephraim, backs up on residences, on home  
16 upon home upon home. That's an inappropriate place to place  
17 this kind of a use. The Library of Congress, as wonderful  
18 an institution as that may be, just doesn't belong everywhere.  
19 There are some places where that is inappropriate.

20 And the real issue before this Court is, who is to  
21 decide where these uses are appropriate? Appellants' argument  
22 would have you graft on every such zoning ordinance, change  
23 the definition of every such zoning ordinance to include  
24 constitutionally permissible uses. And in so doing you are  
25 really being asked to homogenize zoning at the national level.

1           If there is anything that does not lend itself to  
2 homogenization at the national level, it's zoning. At the  
3 municipal level, where these zoning decisions are made, you  
4 have decisions like, let's not put the drainage ditch here  
5 because Mrs. Jones' septic tank backs up when it rains now.  
6 There is local expertise that goes into the creation of a  
7 comprehensive zoning ordinance at the local level which this  
8 Court should not interfere with. There is expertise that  
9 really must of necessity be deferred to.

10           QUESTION: What is the expertise that shows you  
11 that you couldn't have live entertainment? What is the ex-  
12 pertise there?

13           MR. FISHMAN: You phrase it negatively. I'd rather  
14 phrase it positively, if I may, to answer your question.  
15 We haven't decided not to have entertainment. What we have  
16 decided is to create a zone which is devoted to selling things  
17 that satisfy the immediate needs of the residents.

18           QUESTION: And you couldn't set up a newspaper  
19 there either, could you?

20           MR. FISHMAN: Yes, you can, sir. You can sell news-  
21 papers, you can sell almost --

22           QUESTION: I didn't say, I said, set up a newspaper,  
23 publish it or print it.

24           MR. FISHMAN: Oh, frankly, I --

25           QUESTION: Well, it's not included in that list.

1 MR. FISHMAN: I agree.

2 QUESTION: So that means you couldn't do it.

3 MR. FISHMAN: I think that's probably accurate.

4 What we're trying to achieve here is to create a commercial zone  
5 to satisfy the immediate needs of the residents of the Borough of  
6 Mount Ephraim and that's what we've done; or that's what we've  
7 striven to do, and to engraft upon that definition all  
8 constitutionally protected uses would bring about bizarre  
9 results.

10 The illustration that Justice Marshall just gave.  
11 Certainly newspapers are constitutionally protected, but  
12 that doesn't mean that you can put up the large newspaper  
13 factories that are necessary to create, the printing presses  
14 that are necessary to create a newspaper in any place. There  
15 are some places where that use is inappropriate. Now, if a  
16 newspaper could come to our courts -- our courts are sensi-  
17 tive to these problems.

18 In the Mt. Laurel decision which I'm sure you gentlemen  
19 are familiar with, from New Jersey -- I think it's been before  
20 this Court -- we found that a constitutional right was being  
21 denied, not just by one municipality but by zoning ordinances  
22 throughout Burlington County and Camden County as well.  
23 If a newspaper could come to -- it wouldn't have to get to  
24 this court, if it would come to our local courts -- and say,  
25 listen, we've looked at all of the zoning ordinances available



1 and the only place we can print our papers is west of the  
2 Mississippi River, a constitutional issue has clearly been  
3 presented. And if the proposed site is a site reasonably  
4 which would accommodate that use, I think our courts would  
5 be sensitive to that. But there is no showing here that  
6 this use is in any way denied access to the market, not just  
7 within the confines of this one square mile, but in the com-  
8 munity at large. And so long as it is accommodated in the  
9 community at large, then this ordinance becomes just a rea-  
10 sonable time, place, and manner restriction. Time is not  
11 implicated in any way, manner directs itself to the live en-  
12 tertainment, and place, in one sense, is no place in Mount  
13 Ephraim --

14 QUESTION: Could you have a commercial adult education  
15 establishment in Mount Ephraim along the strip there? You  
16 are teaching people how to be mechanics or how to vote, or  
17 things about citizenship? People are just, are willing to pay  
18 to learn something, so they --

19 MR. FISHMAN: On a commercial basis?

20 QUESTION: Yes.

21 MR. FISHMAN: A school?

22 QUESTION: Commercial school, proprietary school.

23 MR. FISHMAN: I don't think so, Your Honor. I don't  
24 think so. That would be my opinion. I would so urge a  
25 court, and I don't know whether the local courts would follow

1 my need, but I do believe that what we have striven to do  
2 was accommodate just the immediate needs of the Borough in  
3 terms of, have I forgotten something? I can send my kid to  
4 the store. He can buy those things which we're going to need.

5 Thank you.

6 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

7 The case is submitted.

8 (Whereupon, at 1:13 o'clock p.m., the case in the  
9 above-entitled matter was submitted.)

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1640

JAMES F. SCHAD ET AL.

V.

BOROUGH OF MOUNT EPHRAIM

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: William J. Wilson



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