OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: 90-26

CASE NO: MICHAEL BARNES, PROSECUTING ATTORNEY OF ST. JOSEPH COUNTY, INDIANA, ET AL., Petitioners V. GLEN THEATRE, INC., ET AL.

PLACE: Washington, D.C.

DATE: January 8, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL BARNES, PROSECUTING :

ATTORNEY OF ST. JOSEPH COUNTY, :

INDIANA, ET AL., :

Petitioners :

v. : No. 90-26

GLEN THEATRE, INC., ET AL. :

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Washington, D.C.

Tuesday, January 8, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

WAYNE E. UHL, ESQ., Deputy Attorney General of Indiana, Indianapolis, Indiana; on behalf of the Petitioners.

BRUCE J. ENNIS, JR., ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 90-26, Michael Barnes v. Glen Theatre, Inc.

Mr. Uhl.

ORAL ARGUMENT OF WAYNE E. UHL

ON BEHALF OF THE PETITIONER

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

In Indiana under Indiana code, Section 35-45-4-1, a person cannot leave his home naked and walk down the street. He cannot give a political speech in a park without --

QUESTION: Without being in trouble.

MR. UHL: That's correct.

(Laughter.)

MR. UHL: He would get in trouble, Your Honor, if he walked into a public place such as a bar or a bookstore without his clothes on. Once inside the bar, he could not walk naked up and down the aisles in the bar, nor could he sit down at a table without his clothes on, nor could he stand up on the bar or on a stage at the front of that public establishment without his clothes on.

QUESTION: He can evidently sing in an opera without his clothes one.

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MR. UHL: Well, our point, Your Honor, is that the plaintiffs say that if he starts dancing when he gets up on that stage or up on that bar, then he can do anything -- or anything that can be defined as dancing -- then he's privileged under the First Amendment to appear naked, notwithstanding Indiana's public indecency statute.

QUESTION: What about seeing an opera? Am I correct in my understanding of what Indiana law is? That there is an exception to the nudity law somehow for artistic performances, is that right?

MR. UHL: The Indiana Supreme Court, in order to avoid an overbreadth challenge, has held that the statute does not affect activity which cannot be restricted by the First Amendment. And the term that the court used in that case was "a larger form of expression." So --

QUESTION: Which includes opera but not go-go dancing?

MR. UHL: That's correct, Your Honor.

QUESTION: Is there -- where does that come from?

MR. UHL: Your Honor, the court looked at cases such as Southeastern Promotions where this Court in implied that the production of Hair, for example, needed to include nudity. And I think, drawing from that line of cases, presumed that the First Amendment --

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QUESTION: It is the good-taste clause of the Constitution? How does one draw that line between Salome and the Kitty Cat Lounge? I don't --

MR. UHL: The line is drawn the same way the line is drawn anytime conduct is involved, and that is whether or not the conduct communicates. If the conduct communicates, then the conduct is speech. If the conduct does not communicate, then the conduct is not speech.

QUESTION: Communicates what? An idea?

MR. UHL: Communicates a particularized message or an idea.

QUESTION: What about a particularized message and an idea of sensuality?

MR. UHL: That could be communicated. However, the plaintiffs in this case did not establish -- did not carry their burden of proving that that was the particularized message that they were sending by their dancing.

QUESTION: Because they were not good enough dancers?

MR. UHL: No, it didn't have anything to do with the quality of the dance, Your Honor. It had to do with --

QUESTION: Well, could a dance communicate that?

MR. UHL: Yes, a dance could communicate that.

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QUESTION: But this one didn't?

MR. UHL: These dances did not.

QUESTION: Because they were not good enough dancers?

MR. UHL: No, Your Honor, it wasn't the quality of the dancing. Go-go dancing can be good or bad, but it either instance it's speech.

QUESTION: Well, Mr. Uhl, are you conceding that if conduct does communicate, then it can't be regulated at all under the First Amendment?

MR. UHL: No, Your Honor, our second issue in the case is that even if this dance is speech, then it can be restricted under the First Amendment. And basically we've drawn on two lines of cases for that argument.

First, we've argued that our statute is a general criminal prohibition on public nudity that applies -- that is no directed at speech and is content neutral in the sense that it is irrelevant what message might be sent by the conduct. Under the case -- under last term's case of Employment Division v. Smith which involved drug use, this Court held that a general criminal prohibition such as that would be valid even as applied to native Americans who claimed that their use of peyote was a religious practice protected by the First Amendment.

QUESTION: But in light of the Baysinger and

other decisions of your State's courts it does seem that what's left is not content neutral in all respects.

MR. UHL: Your Honor, I think the respondents have over construed Baysinger when they say that Baysinger created some kind of a speech exception.

QUESTION: Well, but you said today that Indiana has held that the statute doesn't apply to certain performances.

MR. UHL: Indiana's held that only if that is required by the First Amendment.

QUESTION: Well, that seems to be the position that the court has taken, and in light of that, how can you take the position here that the statute is content neutral?

MR. UHL: The Indiana Supreme Court did not consider the possibility that this statute might be a reasonable restriction on speech. That question was not raised in the case -- in the Indiana Supreme Court case. So basically Baysinger is nothing more than a tautology. Baysinger simply said that the public nudity statute can prohibit public nudity to the extent allowed by the First Amendment. Our argument here is that under this Court's regulability cases, Employment Division v. Smith or the other line of cases, the reasonable time, place, and manner cases, that this activity can be restricted

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consistent with the First Amendment. And therefore, it does not -- the Baysinger decision does not stop this Court from holding that that is true under the First Amendment.

QUESTION: Suppose the dancers complied with the statute, and -- would you say that then the dancing is protected by the First Amendment?

MR. UHL: Well, our second argument assumes that the dancing is speech.

QUESTION: No, no. If they complied with the statute and still danced, they would not be dancing nude. In that event, would the dancing be protected? I would suppose you would say no.

MR. UHL: The protection of the dance doesn't depend on whether or not the clothing is worn for the purposes of our second argument.

QUESTION: How about the first argument?

MR. UHL: Well, the clothing doesn't change the nature of the dance either. That's correct. The clothing doesn't make the dance speech and doesn't protect it as speech. The dancing is either speech or not speech.

QUESTION: Well, Justice White's question puts this point. Could you prohibit this performance -- you don't want to call it a dance -- if the women were clothed?

MR. UHL: Not on the basis of --

QUESTION: Of the first -- I thought -- the dancing wouldn't -- clothed or unclothed --

MR. UHL: Oh.

QUESTION: -- it wouldn't -- the message would not change or the lack of it wouldn't change.

MR. UHL: No, our position is that the dancers would still have to show that if they took off their clothes that there's an extra message.

QUESTION: No, that's no -- suppose the dancers were clothed and suppose the State of Indiana or a police official attempted to prohibit that performance, a clothed performance, would the First Amendment protect the performer?

MR. UHL: No, not these performances in this case.

QUESTION: Then you're saying it would be permissible to pass a statute prohibiting tap dancing?

MR. UHL: Unless tap dancing were shown to be speech under the First Amendment, that's correct.

QUESTION: Well, but under your view it doesn't convey any particular message so you could prohibit it.

MR. UHL: That's correct, Your Honor.

QUESTION: Well, you might not be able to prohibit under some other provision in the Constitution.

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You just say it wouldn't be protected by the First Amendment.

MR. UHL: That's correct. Obviously due process and equal protection concerns would be --

QUESTION: Could the State prohibit rock music?

MR. UHL: Your Honor, this Court found in the Ward case that rock music is speech under the First Amendment, so no, it could not. But --

QUESTION: Well, how is it that music is protected but dance is not?

MR. UHL: Music is different --

QUESTION: Could you explain that?

MR. UHL: Music is different from dance in that the very nature of the medium is communicative. But by the definition of dance that's been submitted by the respondents --

QUESTION: Do you think some of the rock music played in the Ward case conveyed a message?

(Laughter.)

MR. UHL: An artistic message.

QUESTION: An artistic message?

MR. UHL: An artistic message. Yes, Your Honor. Whereas not all dance conveys an artistic message.

QUESTION: Well, I suggest not all music does either.

MR. UHL: That may be a case-by-case determination and this Court hasn't addressed that except in Ward to say that music in general is communicative and therefore is speech under the First Amendment.

QUESTION: Well, dance in general might be communicative under that test, might it not?

MR. UHL: We would resist that, Your Honor, because dance can be so broadly defined as to include perhaps what I'm doing here today. Dance can be any --

QUESTION: Song and dance.

(Laughter.)

MR. UHL: Well, not that kind of song and dance.

(Laughter.)

MR. UHL: The respondents have suggested that a production in which nudes simply stand nude on a stage would be dance or that if someone were to simply -- rhythm is not important to the definition of a dance. Improvisation can be dance according to the respondents. Any movement can be defined as dance. And if this Court were to hold that all dance as it's defined there is speech, then the First Amendment would be trivialized to include any kind of movement or motion that expresses some kind of emotion.

QUESTION: Why -- what are you arguing about dance for? Dance was not prohibited here, was it?

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MR. UHL: That's correct.

QUESTION: These people could have danced to their heart's content so long as they had clothes on or --

MR. UHL: That's correct. And our second argument assumes arguendo that the dance is speech and argues that even if it is speech that we can protect under the statute because that's correct. The statute doesn't ban dancing. It doesn't ban performances. It simply requires that anytime a person in Indiana appears in public that vital areas of the body be covered. And for that reason this is the type of general criminal prohibition that this Court -- such as the one in Employment Division v. Smith -- held can be applied consistent with the First Amendment, notwithstanding a claim that the conduct at issue is protected -- is speech or religious practice under the First Amendment.

QUESTION: Mr. Uhl, I'm interested in one of your answers to Justice Kennedy. Are we dealing with obscenity here?

MR. UHL: No, Your Honor. There has never been a contention in this case that the dancing at issue is obscene.

QUESTION: So the State stands by its concession that we are not dealing with obscenity?

MR. UHL: That's correct, Your Honor.

QUESTION: If we were to find that an emotional communication as opposed to a particularized message were protectable, what would you then say to the argument on the other side that they simply cannot communicate the message in any other way except by nude dancing? I think what they're saying in effect is that some kind of a medium-is-the-message argument.

MR. UHL: If the medium is the message, Your Honor, then it's our contention that the nudity is not an essential part of that particular medium. The dance can be communicated just as effectively, or almost as effectively, with pasties and g-strings covering the vital parts of the body that are at issue under the statute. And it's our contention that alternative means of communication are open to these plaintiffs and that the mere requirement of -- that the certain parts of the body be covered is not essential to their communication.

QUESTION: So you're saying they cannot define their activity by saying the medium and the message are identical and thereby evade the possibility of otherwise permissible First Amendment regulation?

MR. UHL: That's correct, Your Honor. In one sense their claim that nudity is an inherent part of their dance is no different than someone who might be putting on

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a play and decide that the use of marijuana during the play is also protected because it's connected with this protected play. I think the court would immediately reject that argument out of hand, that that kind of criminal conduct, even though it's in the context of a protected production, can be criminalized by a State.

QUESTION: I suppose -- you say that even if dancing nude might communicate a different message than complying with the statute, these particular dancers have never claimed or indicated that they were -- had any such message to deliver I gather.

MR. UHL: That's correct. One of the respondents in this case submitted an affidavit where she said that she intended to communicate and to entertain and then she stopped and didn't tell us what she intended to communicate or entertain. And that respondent, respondent Sutro, also failed to submit any other evidence of the type of dancing that she wanted to perform. She did not submit a videotape, as did some of the respondents, nor did she even just submit to the court a verbal or written description of the dancing that she wished to perform.

QUESTION: What -- would the case really be different if the dancer had a sign up at -- on the stage that said she was a member of a nudist colony and she believed it healthy for people to attend nudist colonies

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and some message with it and then said, I'll illustrate to you how nice it is to be nude or something like that? Would that be a different case?

MR. UHL: No, Your Honor, that would be no different than the case in Florida of the sunbathers who claimed that they wanted to bathe out on the beach, and show --

QUESTION: But it's different in the sense that you have a particularized message, and the dance is suppose to dramatize this message that she's also got a sign stating it.

MR. UHL: In terms of the particularized message, then it would be a different case. You could very well --

QUESTION: Then you'd say that one would be protected, but as long as they don't put such signs up, it's unprotected.

MR. UHL: It would be speech. And whether it would be protected then is the question of whether the State can regulate it, and it would be our position that under this statute we can still require her to wear the minimal covering because -- regardless of the fact that it's speech.

QUESTION: And why is that?

MR. UHL: Well, it's either because of the

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application of Employment Division v. Smith, because this is a general criminal statute, or it's by application of the reasonable time, place, and manner test that this Court has applied in other contexts.

QUESTION: Reasonable time, place, and manner being there's no reasonable time, place, or manner --

(Laughter.)

QUESTION: -- for this kind of dance.

MR. UHL: Your Honor, reasonable place in that the statute is limited to a public place.

QUESTION: Okay.

MR. UHL: And the Indiana courts have very carefully defined public place. Reasonable manner in that this is a restriction simply on the manner of appearing, that is that there are certain parts of the body that need to be covered, and it's our position that that is sufficient narrowly tailored, just as the clothing on the dancers is narrowly tailored, to accomplish the State's interests in prohibiting public nudity.

QUESTION: How about the O'Brien test?

MR. UHL: Well, this Court has found -- in the Clark case the Court indicated that the O'Brien test is really no different than the reasonable time, place, and manner test. We set them out separately in our brief, but basically it's the same test. You look for a substantial

government interest that is forwarded by the statute in a manner that leaves open alternative means of communication. And I may not have articulated O'Brien precisely, but I think the Court indicated in Clark that they're basically the same test.

QUESTION: Mr. Uhl, if there were a videotape of these performances, could the State ban outright the sale of the tape?

MR. UHL: No, Your Honor, because the videotape would not be live conduct, and the statute only goes to -- and our First Amendment argument only applies to live conduct as opposed to depictions.

QUESTION: Yes, I'm asking you whether a statute could withstand a First Amendment test if it tried to ban sale of the videotape of the performance.

MR. UHL: No, Your Honor, not unless the videotape were obscene.

QUESTION: And why is that? Why can you ban the real thing but not the videotape of it?

MR. UHL: This Court has always made a distinction between depictions of conduct and live conduct itself. And I think that's because live conduct is something that is traditionally subject to State regulation and is something that more vividly presents the concerns that are at interest when the State try --

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legislates in this particular area. The Court has always said that live conduct is to be treated differently.

QUESTION: Are you saying that this is sexually explicit conduct and that that's a category that we can use to sustain the law?

MR. UHL: We're not arguing that it's a special category that therefore is excluded from the First Amendment. However, I believe there is some support for the proposition that because this is sexually explicit speech that it may deserve a lesser level in a balancing test.

QUESTION: And you have the LaRue case? Anything else?

MR. UHL: Not off the top of my head, Your Honor.

There's another aspect of it that is also -- falls into that kind of category and that is the commercial nature of the speech. We've never argued here that because this is commercial-type speech that it therefore falls into the category of advertising. But that doesn't change the fact that at least one of the respondents said that the only reason that she dances nude is in order to make more money. And we think that in balancing the impact of the statute against the rights of these women to engage in this kind of conduct the court

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can take into account the fact that this is a speech that's done largely for a commercial purpose.

QUESTION: That's why Dickens wrote his books, too.

MR. UHL: Well, Your Honor, it's different. Dickens wrote his book largely because he needed income, not only because he needed income, and there's a distinction there to be made.

QUESTION: You're sure about that?

(Laughter.)

MR. UHL: I'm sure what Darlene Miller's intent was, Your Honor, and that was to make money.

QUESTION: Yes, but your supreme court distinguishes between the opera singer and this dancer and I suppose the opera singer wants to make money, too.

MR. UHL: That's true, although again the opera singer is in the position where that's not the only thing that she wants to do, but that the money is an important part of it. So we can't distinguish this just on the fact that she's making money.

QUESTION: And are all the -- how many performers are involved in this litigation?

MR. UHL: In this litigation I think there are three dancers who are actually a part --

QUESTION: And did all three of them say that

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was their only motive?

MR. UHL: No, Your Honor, only Darlene Miller did. We can infer, though, that Gayle Sutro who danced at the Chippewa Book Store had a commercial motive as well because there is evidence in the record that the reason she was dancing at the Chippewa Book Store was to promote a movie that was playing at the drive-in next door.

QUESTION: Yeah, but she may not have made the movie only to make money.

MR. UHL: That's true, Your Honor, and we didn't ban the movie. We were only banning her coming in and promoting it nude.

QUESTION: Are you really confident that we could make the distinction between dancing which is part of a greater form of artistic expression as opposed to dancing that is not artistic expression? Who's to do this? The legislature to do this? Are we to do it, or both -- kind of a joint venture?

MR. UHL: Your Honor, as in the case of obscenity where one of the issues is the artistic value of the work, trial judges and trial juries make the distinction
under -- in criminal prosecutions under this statute, just as in an obscenity case --

QUESTION: But we have no settled jurisprudence.

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We would be really striking out in a very new direction, would we not?

MR. UHL: Well, Your Honor, there's -- ever since Miller v. California, juries have been determining whether works that are charged to be obscene have artistic value. So we believe that it's simply application of the same kind of test in this context.

I'd like to go through the reasonable time, place, and manner test just to make sure that all three elements of that have been presented here. The -- as I've said, this is a place restriction because it is limited to public places. It is a manner restriction because it's a restriction on the manner of dancing, that is, nude or not nude. In that way it's just like the rock music situation in the Ward case, where this Court held that the volume restrictions on that rock music were a manner restriction on it.

I have no doubt that the rock musicians would have said that the full impact of their music was lessened by the restrictions on the volume there, and the dancers here may very well say that the full impact of their dancing is lessened by the requirement of clothes, but that does not change the fact that this is a manner restriction.

The three elements of a reasonable time, place,

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and manner restriction are met here. First, the statute is context neutral, that is, it is justified without reference to the content of the speech. In fact, this statute applies regardless of whether there is speech involved, whether this is simply someone walking through the park or whether it's someone who is giving a political speech.

The second -- the noncontent concerns here are very important. The most important is the traditional requirement in our society that certain body parts be covered in public. This goes back to the common law offense of public indecency and can be traced even further back in Western culture.

QUESTION: Excuse me, I should have jumped in earlier I guess. I wish we could clarify exactly what the supreme court has said about nude dancing in the course of the theatrical production, because that does bear upon whether it's content neutral. I mean, as I understand the law in Indiana, it isn't content neutral. You can dance nude but only in certain -- I don't know -- high-toned kinds of productions. Is that the test?

MR. UHL: As of now -- all the supreme court has done in Indiana is said that the statute isn't overbroad and the reason the statute is not overbroad is because we assume -- and I'm reading this in -- we assume that the

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First Amendment puts limits on our ability to ban nudity. And the way that assumption was stated in the Baysinger was we assumed that nudity must be tolerated in certain larger forms of expression.

QUESTION: Larger?

MR. UHL: Larger forms of expression.

QUESTION: Some larger forms of expression meriting protection.

MR. UHL: Meriting protection.

QUESTION: Would you defining the larger form of expression by particularized message?

MR. UHL: Yes, Your Honor.

QUESTION: So if the particularized message distinction is not upheld, then you have no way of drawing the line between the higher and lower form.

MR. UHL: That very well may be true. But if the Court holds that, then we still believe that this is a reasonable regulation upon the dancing.

Did I adequately explain the Baysinger decision, Your Honor, because I think that is important?

QUESTION: I gather you're saying that they don't really mean it. That they're just saying, we're imposing that limitation because we think the Constitution requires that limitation and if the Constitution doesn't, then there isn't even that limitation on the statute. Is

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that your interpretation of the case?

MR. UHL: That's correct, Your Honor.

The second element of the reasonable time, place, and manner restriction is whether the statute is sufficiently narrowly tailored. The statute's definition of nudity is extremely narrow and carefully defined. Furthermore, the Indiana courts have carefully defined the term public place. For example, a situation where a single viewer goes into a booth and views a single dancer through a glass plate and closes the door behind him to do so, the Indiana Supreme -- the Indiana courts have said that that is not a public place under the statute. However, what we have in this case in the Chippewa Book Store is a ring of booths around a stage where a multitude of customers can watch the same dancers at the same time.

QUESTION: What's the State interest in that distinction? If you have one customer, it's okay. If you have ten, it's bad.

MR. UHL: Well, the State interest, Your Honor, is that the more this becomes an audience participation kind of a situation that the State's interest in regulating that kind of conduct increases.

QUESTION: Why do they call this place a bookstore?

(Laughter.)

MR. UHL: As I understand it, Your Honor, it is also an adult bookstore, that is, it sells pornographic materials in addition to offering this kind of booth entertainment.

QUESTION: Mr. Uhl, I'm sorry to get out of sequence here, but I'd like to go back to a Baysinger point, lest I forget it. And it's a question about the significance of Baysinger in relation to what this Court may hold. If we do not sustain a distinction based on particularized message, so that we were to hold that the communication of some emotional content were sufficient to qualify for First Amendment scrutiny, would the effect of Baysinger be that this conduct would be allowed and that would be the end of the case?

MR. UHL: No, Your Honor, I think Baysinger would then very much be cut back, because if this Court were also to hold, as we've urged in our second argument, that we can still restrict this activity consistent with the First Amendment, then we can still do that. Baysinger --

QUESTION: So Baysinger would still be a tautology as you put it.

MR. UHL: That's correct. That's correct.

QUESTION: Okay.

MR. UHL: The plaintiffs -- back to narrowly

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tailored. The plaintiffs have argued that we're required to carve out an exception to this statute based on the presence of consenting adults. However, we've argued that that's not required. First of all, that would be basically imposing a least-restrictive means test, which this Court has never required. Second, consent is irrelevant, as in other public offenses such as prostitution or drug use. Third, the concerns that the State is after in this particular kind of statute are even more prevalent in this type of business than in other type of businesses.

Finally, the statute does leave open alternative forms of expression, as I've argued previously. The dancers have never asserted credibly that they -- that their message is substantially changed or inhibited by the requirement that they wear pasties and g-strings. Therefore, we would -- we are asking that the Seventh Circuit decision in this case invalidating the statute as applied be reversed.

I would like to reserve the balance of my time for rebuttal, Mr. Chief Justice.

QUESTION: Very well, Mr. Uhl.

Mr. Ennis, we'll hear from you.

ORAL ARGUMENT OF BRUCE J. ENNIS, JR.

ON BEHALF OF THE RESPONDENTS

MR. ENNIS: Mr. Chief Justice, and may it please the Court:

Nude dancing is sufficiently expressive to at least trigger First Amendment analysis for two independent reasons. First, nude dancing is expressive, because performance dance is inherently expressive of emotions and ideas, and second, because nude dancing communicates a particularized message of sensuality and eroticism.

First, performance dance, like music, is one of the oldest forms of human communication and is inherently expressive of emotions and ideas. In Ward, this Court found that music is expressive without bothering to determine whether the music at issue did or did not communicate a particularized message. A particularized message test applies only to conduct that is not ordinarily expressive, such as flag burning. Even that kind of conduct can be found expressive if in context it communicates a particularized message. But the Court has never used that test to determine whether marching or picketing or other traditionally considered expressive forms of activity are expressive or not.

The Court's decisions made clear that if expressive -- if conduct is otherwise expressive and protected by the First Amendment, the fact that the conduct involves nudity does not shed that protection.

For example, in --

QUESTION: Mr. Ennis, would you concede that a State ban on nudity on public thoroughfares and sidewalks is constitutional?

MR. ENNIS: Your Honor, I think it would trigger First Amendment analysis if it's intended to be expressive, but the State probably could regulate it because of the captive audience --

QUESTION: Well, supposing they regulate it by prohibiting it?

MR. ENNIS: They could probably prohibit it because of the captive audience problem or exposure to children, just as in Sable the Court said that although indecent speech is constitutionally protected, it can nevertheless be -- regulated.

QUESTION: So the vice in this statute as applied is that it takes it off the sidewalks and thoroughfares and regulates activity in a private --

MR. ENNIS: Well, it is effectively a private place. It's called a public place, but it's a private building on private property that is enclosed.

QUESTION: What if your client had decided to perform a dance -- this same dance -- in a public park in Indiana?

MR. ENNIS: I think the State could prohibit

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that, because of the concerns as in Sable of a captive audience being forced to see a message they do not want to see or the possibility of children being present. But what Sable makes clear is the State, in order to serve those interests, cannot categorically ban access to such speech by consenting adults, and that's all that is at issue in this case.

QUESTION: Well, were children barred from all these places?

MR. ENNIS: Absolutely. There's no dispute. That's stipulated that this was only consenting adults. ID's are checked at the door.

QUESTION: You began by using a term -- was it dance performance?

MR. ENNIS: Performance dance. By that I mean dance which is intended as a performance in front of an audience, to distinguish that from recreational dance or dancing at home in your own room.

QUESTION: Suppose someone wanted to increase business at the car wash or in a bar and they hired a woman and said, now, you sit in this glass case -- and this is an adults only carwash --

(Laughter.)

QUESTION: -- you sit in this glass case and attract the customers. Is that permitted?

MR. ENNIS: Your Honor, I think it would -- if it was intended as expressive activity, if it was performance dance.

QUESTION: No, it's just what I said. The employer says this is the job, you is up there.

MR. ENNIS: I think that that would trigger First Amendment analysis. Whether the State could ban it or not would depend on the State's justifications.

QUESTION: Well, suppose he said, I've heard the arguments in the Supreme Court and you have to dance. And she said, I can't dance. And he said, just wander around when the music starts to play.

(Laughter.)

MR. ENNIS: Well, Your Honor --

QUESTION: I mean, that's the point, isn't it? It's a question of what is performance dance. What is it?

MR. ENNIS: What is performance dance is a question in this case. The main way that that is answered, if you'll look at the material cited in the briefs, Encyclopedia Britannica and others, is where there is an intention to perform in front of an audience through dancing. That -- the district court found as a fact, and that was not disputed here, that all of these respondents did intend to dance as communication and as expression. That's a factual finding that's not at issue.

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QUESTION: Well, even objectively I suppose you would say that any fool would say that there was a performance dance here, because there was dancing in front of people.

MR. ENNIS: Yes, that's correct, Your Honor.

QUESTION: Whether they intended to or not.

MR. ENNIS: Well, I think that's probably correct, Your Honor, but they did intend to. Gayle Sutro's affidavit, for example, states that she is actually a professional dancer who has gone to a recognized dance academy, has a degree in both ballet and erotic dance.

QUESTION: Mr. Ennis, nobody is stopping her from dancing. Suppose you win this point: dancing is expression. They have not stopped her from dancing. They have stopped her from going about nude, whether dancing or doing anything else, just as I suppose they have murder laws in Indiana which prevent people from killing people, whether in the course of dancing or not.

Now, would one have to analyze the Indiana murder law as a -- as valid or invalid under First Amendment if the murder happens to be performed in the course of a public performance dance? Would we have to consider that a First Amendment case?

MR. ENNIS: Well, let me turn directly to that,

Justice Scalia. That depends on the State's justifications, assuming this is expressive activity. This statute cannot --

QUESTION: So your answer to my last question is yes, it does turn on the State's justifications.

MR. ENNIS: It does --

QUESTION: That's a First Amendment case, if you kill somebody in the course of dancing.

MR. ENNIS: If someone uses peyote or commits a murder for the purpose of committing -- communicating or expressive activity, that would trigger First Amendment analysis. But the State could nevertheless prohibit it. And here's why, Your Honor.

This statute is not content neutral for two independent reasons. First, the application of this statute to nude dancing is related to expression within the meaning O'Brien, and second, the statute as construed in Baysinger exempts other expressive activity precisely because of its artistic or expressive content or value and thus under Mosley and Raglan cannot be deemed a content-based statute. First.

QUESTION: The statute here, Mr. Ennis, isn't addressed to dancing at all. It's addressed to public nudity.

MR. ENNIS: The statute in O'Brien was not -- the statute in many of the cases, like the flag-burning cases, was not addressed to expressive activity on its face. It was expressed only to the conduct of burning or mutilating the flag.

QUESTION: But the equivalent here would be addressing it to dancing. In the flag-burning case, the equivalent to what happened here would be a statute that banned burning anything in the street, a flag or anything else. And then people would have come in and said, well, you know, it's a ban on expression, because what I wanted to burn was a flag, and I think we would have said in the flag case -- in fact I think we did say in dictum that if it was that kind of a statute it would be a totally different question. And it's that kind of a statute you have here.

MR. ENNIS: Justice Scalia --

QUESTION: It's not nude dancing. It's not dancing. It's nudity, period.

MR. ENNIS: Justice Scalia, the Court's opinion in O'Brien and all the flag-burning cases uses the same analysis. It says the State must justify the application of an otherwise content-neutral statute to expressive activity for reasons unrelated to expression. In this case, you can look at the State's briefs. The State has

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acknowledged its fear that nude dancing is, quote, "likely to inspire patriots to solicit sex from performers or contemplate rape or adultery." The State has admitted it has concerns about the effect of nude dancing on attitudes toward women and has argued that it should be free to ban nude dancing because it, quote, "encourages activities which break down family structure and advocates adultery, licentiousness, prostitution, and crime.

As Justice -- Justice O'Connor's opinion in the Boos v. Barry makes clear these justifications are related to expression because they focus on the direct impact of speech on its audience and they are concerned with listeners' reactions. Therefore, this cannot be considered a content-neutral statute, and that's why it is distinguished from the --

QUESTION: Well, what if the dancer wanted to do kind of an Annie Oakley dance in the course of which she fired off a revolver at various targets around the room --

MR. ENNIS: Yes.

QUESTION: -- and the State says that's a violation of our law. You can't fire a revolver without a permit. You can't do it in this kind of a place. And the dancer says, well, I can't really get across the Annie Oakley message without firing off the gun.

MR. ENNIS: But, Your Honor --

QUESTION: But the State then says, well, we have real fears that if you do it in a crowded adult bookstore you might hurt somebody. That's certainly is talking about the application right there to the bookstore.

MR. ENNIS: But it does not depend upon the listeners' reactions to the speech. That's like setting a fire, perhaps burning a flag in an enclosed public building might be bannable because of the State's independent interest in fire safety. It is unrelated to expression. The State, as in O'Brien, has an interest in applying that statute to this expressive activity that is completely unrelated to the expressive activity.

QUESTION: Well, why isn't the State's interest in banning public nudity unrelated to expressive activity? It doesn't care whether expression takes place or not.

MR. ENNIS: The State has told us that it does care.

QUESTION: Well --

MR. ENNIS: The State has told what its reasons --

QUESTION: Well, let's assume that the State has said hypothetically, we don't care what are the audiences' reactions. We just don't think public nudity anywhere is a good idea.

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MR. ENNIS: Well, Your Honor, that would be a different case. That is --

QUESTION: So the State didn't advance quite the right justification here?

MR. ENNIS: No.

QUESTION: Is that your position?

MR. ENNIS: No, that's not my position, Justice Rehnquist. There are two reasons why this is a content-based statute. The first is the State did advance reasons, and the reasons it advances are related to expression. The second though, is the Baysinger construction point. In Baysinger the Indiana Supreme Court construed this statute so that it would permit some nude dancing in public and prohibit other nude dancing in public based solely on the State's subjective determination of whether that nude dancing had sufficient expressive value or artistic content.

QUESTION: But before you get there, and this is an important point, but just on the last part about being related to expression, what about a noise statute?

MR. ENNIS: I think, Your Honor --

QUESTION: Is that related to expression?

MR. ENNIS: I think the noise point, for example, in your opinion for the Court in Ward, the Court found that controlling volume there was unrelated to the

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expression because it applied -- no matter who was expressing the message and regardless of the State's agreement or disagreement with the views or the listeners' reaction to that.

QUESTION: Well, why couldn't you say the same thing about nudity?

MR. ENNIS: You can't say that here certainly after the Baysinger construction, because the court in Baysinger makes clear that some nude dancing is permitted and others is prohibited based on the State's evaluation of its expressive value or artistic merit. That's exactly what the State has argued over and over again before this Court.

QUESTION: But there's no difference between that kind of dancing and the dancing in this case based on the effect on the audience, is there?

MR. ENNIS: I'm sorry, Justice White, I did not understand that question.

QUESTION: Well, awhile ago you were talking about the effect on the audience.

MR. ENNIS: Yes.

QUESTION: Do you think there's any difference between, say, opera and the dancing in this case, in terms of the effect on the audience?

MR. ENNIS: The State seems to feel there is.

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The State seems to feel --

QUESTION: I thought you were just talking about its idea of the artistic value rather than the effect on the audience.

MR. ENNIS: The State seems to feel that if nude dancing is artistic, it has one effect on the audience and does not incite the audience to prostitution, rape, or adultery, but that if nude dancing is not artistic, it does have that effect on the audience.

QUESTION: I suppose there are some things the State can prohibit even if -- just because it has an effect on the audience. What about shouting fire in a crowded room?

MR. ENNIS: Your Honor, I think that there are certainly some categorical exceptions to otherwise First Amendment protections that the State could argue here. They have not. That State's justifications here -- they've said over and over again in their briefs, and in fact in the oral argument --

QUESTION: Well, you just recited that the State thought that nude dancing would have some unsatisfactory on the audience and you say that's not permissible because that means it's really expressive.

MR. ENNIS: It means that it is a content-based statute.

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QUESTION: Well, what about fire? A fire in a theater?

MR. ENNIS: Fire in a theater has an effect regardless of whether the listeners agree or disagree with the message.

QUESTION: Well, it depends exactly on what you say.

MR. ENNIS: Pardon me, Your Honor.

QUESTION: It depends exactly on what you said. You said, fire, rather than no fire.

MR. ENNIS: Your Honor, I think that there are -- the distinction is that there what the State is concerned about is that the consenting adults in the audience will agree with this message, will follow what they take the message to be and will go out and have bad attitudes about women or commit prostitution, rape, or adultery. It depends upon the State -- the listeners' reactions of being persuaded by the message that the State wants to suppress. That is not true in the shouting-fire-in-the-theater context. It doesn't matter whether the people in the theater think there's really a fire or not. There's a stampede and people get hurt. That's a very different case. Now, I think that Mosley and Raglan, which were the type of cases -- the statutes discussed earlier make very clear that if a statute on its

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face or as construed exempts some expressive activity because of its content, then that statute must be deemed a content-based statute.

QUESTION: Mr. Ennis, what language -- I've been looking at Baysinger -- and I -- it really does seem to me that all the Indiana court is saying is responding to an overbreadth argument. The argument was that this statute would cover such things as the play, Hair, which can't constitutionally be covered and the Indiana Supreme Court just seemed to say, well, if it can't constitutionally be covered, it's not covered by the statute. And you read that as a discrimination by the State on the basis of subject matter? I -- unless there's more explicit language in that opinion that I don't see. That's all that I read into it.

MR. ENNIS: Your Honor, the opinion has the language you discussed and no more. The way the State has described Baysinger in the Seventh Circuit and also here is that what Baysinger did was to say that nude dancing that has artistic content is --

QUESTION: Oh, well.

MR. ENNIS: -- not within the statute and nude dancing without artistic content is.

QUESTION: Well, they shouldn't have described it that way.

QUESTION: Are we to accept --

MR. ENNIS: No, they should not, but that is the State's justification for the statute.

QUESTION: But we are dealing with an Indiana Supreme Court opinion, and I suppose the Indiana Supreme Court can speak for itself and it's not governed by what the attorney general recharacterizes it as.

MR. ENNIS: Well, certainly for purposes of this case the attorney general has represented what the State's interests are, whether accurately or inaccurately. Those are the State's interests for purposes of this case. And they -- if you look at pages 10, 24 through 25 of the State's brief, they say over and over again that what Baysinger means is that if the dancing is artistic it's not covered by the statute. If it's not artistic, it is prohibited by the statute. In its oral argument in the Seventh Circuit, the State repeated this point over and over again.

Now, that brings me to another point, and that is we've been talking about whether there are justifications for this statute or not. It is our position that the State has waived any right to attempt to justify application of this statute to respondents' dancing if this Court determines that that dancing is sufficiently expressive to trigger First Amendment

analysis.

All through the Seventh Circuit, in 5 years of litigation, two levels at the trial court and two levels in the supreme court, the State never once attempted to justify application of this statute on the ground that it's a neutral statute of general applicability or it's content neutral or Renton analysis -- none of those justifications whatsoever. In fact, in oral argument in the Seventh Circuit, Mr. Uhl stood up and said, we don't have to try to justify this statute and we're not going to, because our position if simply that this dancing doesn't even trigger First Amendment analysis. Even in its cert. petition to this Court, the Court -- this State does not squarely argue that this statute can be justified.

QUESTION: So we could leave -- if we agreed with you on your first argument, I suppose, we'd just leave those other issues open?

MR. ENNIS: I think that's correct, Your Honor. I think that this Court could rule that the respondents' dancing is sufficiently expressive to trigger First Amendment analysis and then rule that, as Judge Posner concurring and Judge Easterbrook dissenting, indicated that the State has waived any justification for applying that -- this statute to these respondents.

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QUESTION: Mr. Ennis, the second question presented in the petition for certiorari is if nude dancing is speech whether Indiana's general public indecent laws are unconstitutional as applied to such dancing. That surely brings -- raises the justification issues.

MR. ENNIS: Well --

QUESTION: Does it or does it not do you think?

MR. ENNIS: I think it's a close question, Your Honor, to be quite candid.

QUESTION: Do you think --

MR. ENNIS: If you look at their brief --

QUESTION: Well, I'm going to look at the question.

MR. ENNIS: The question seems -- it's ambiguous in my mind. It could be construed that way or could not. My main point is that all the way through the Seventh Circuit, the State didn't attempt to make such a justification, and they don't in the content of their brief.

QUESTION: Did you raise that point in your brief in opposition to certiorari?

MR. ENNIS: No, the reason it was not raised in opposition is that it was not our understanding that the State had raised that point, since the text of their brief

does not argue -- Renton does not argue. Clark --

QUESTION: Well, you didn't have the text of the brief before you at the time you filed the brief --

MR. ENNIS: Excuse me, I mean the text of the cert. petition. Excuse me, Your Honor.

But let me say this though that even if the State is deemed to have raised that issue for the first time in its question presented in the cert. petition, there is no dispute that the State never attempted to justify this statute below. It is the State's burden to justify application of a statute to expressive activity.

QUESTION: That might have been a consideration to be brought before us in considering the petition for certiorari, but you know our rule and in our Oklahoma City against Tuttle, anything that's nonjurisdictional that isn't brought up in the brief in opposition is waived by you.

MR. ENNIS: I know the rule, Your Honor, Rule 15 of this Court says that the Court has discretion to deem it waived if it is not raised in the brief in opposition to the petition. And Court -- of course the Court would have discretion to do that. It would also have discretion in the circumstances of this case to say the issue was too important to be decided on such a sketchy record as we have here.

QUESTION: Well, you don't think the opinions of the court of appeals are sketchy, do you?

MR. ENNIS: No, I don't think the opinions of the court of appeals are sketchy, but we didn't know until the State's main brief in this case what the State interests are to justify regulation of respondents' nude dancing. They've posited now their interests. They are content-based interests, because they depend upon the impact of the speech on the audience.

Let me turn for a minute to a point that the State did not raise in its oral argument but did raise in its main brief here: their argument that this statute can really be justified as a Renton-type statute, aimed only at secondary effects. I think that that argument is totally inapplicable here for two reasons.

First, the ordinance in Renton by its terms focused only on secondary effects of certain specified businesses and did not prohibit or criminalize any expressive activity whatsoever. This statute, by its terms, does not even mention secondary effects, has nothing to do with businesses of any type, and does criminalize and prohibit expressive activity.

Second, controlling secondary effects was the actual purpose in Renton. Here, as the State candidly acknowledges in its brief, it is only a quote, "possible

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hypothetical purpose." In Renton, it was clear that the Government was actually concerned with secondary effects and had reviewed studies and extensive evidence about that problem. Here the State does not claim that the legislature was actually concerned about secondary effects or reviewed any evidence, and in fact, it is highly implausible that the secondary effects associated with adult businesses was a problem or a concern when this statute was first enacted in 1881.

Furthermore, although the constitutionality of this statute has been before the Indiana Supreme Court on numerous occasions, the Indiana Supreme Court has never even hinted that the statute aims at secondary effects.

Finally, the State's briefs here make crystal clear that the interests the State is advancing focus on the impact of this speech on its audience, on the listeners' reactions. Accordingly, this is a primary effects case, not a secondary effects case.

One point I think is worth mentioning is that even if this decision is affirmed, the State of Indiana would be left with ample authority to regulate or perhaps prohibit nude dancing in a constitutional manner. The State could certainly prohibit all obscene dancing, whether in public or in private. It could -- the State could certainly prohibit all obscene nude dancing. That

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would not be affected by affirmance here. That State could certainly under the Twenty-first Amendment prohibit dancing where alcohol is served, whether the dancers are nude or clothed. The State could certainly regulate nude dancing under the Sable analysis in truly public places before unconsenting adults, captive audiences, or children.

And finally, if secondary effects were in fact a problem, the State under Renton could even zone, so long as it was a true zoning ordinance and was not a prohibition of a category of speech.

QUESTION: But subject to that time, place, and manner regulation, every community in Indiana would have to have some nude dancing, if an entrepreneur wanted to provide it. You'd have to set aside a part of the community for nude dancing.

MR. ENNIS: Yes, Your Honor, I think that's --

QUESTION: The Constitution requires this.

MR. ENNIS: I think that's what this -- that's what is implicit in the Court's decisions in Miller and Sable. Miller and Sable go to great, great careful links of attempting to decide what forms of sexual conduct the State can prohibit and what it cannot. This is in effect and end run around Miller and Sable, because the State has conceded that this nude dancing is not obscene. As

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Jenkins v. Georgia and other cases in this Court make clear, the mere fact of nudity does not equate with obscenity.

But here what the State is trying to do is without meeting the detailed requirements of the Miller test or the Sable test, nonetheless to categorically ban and eliminate an entire category of speech. This is very different. The artistic point here is very different from the artistic point in Miller. Miller --

QUESTION: Miller was not action. Miller was literature.

MR. ENNIS: Right, but the Court's opinion in Miller I think has been understood to apply to live conduct and performance as well as to literature. In Miller, the third prong of the test, of course, is an artistic prong test. But that judgment is only reached once the court has already found that the speech is patently offensive and appeals to a prurient interest in sex and is, therefore, otherwise unprotected by the First Amendment.

The artistic merit test in Miller comes into save and give protection to speech that is otherwise unprotected. Here, the State, as Justice Kennedy's question suggests, would be striking out on very new ground indeed. Here the State would be saying that speech

is only protected to begin with if it has artistic merit. As this Court said in Hanaghan unanimously, what to one man is trash may to others have fleeting or even enduring values and it is not business of the State to determine which is trash and which is valuable. The First Amendment leaves that judgment to the individual.

In fact as Justice Harlan wrote in Cohen v. California, one man's lyric is another's vulgarity. And as Justice Harlan said, it is precisely because governments cannot make principal decisions between those kinds of communications, that the First Amendment leaves judgments in matters of taste to the individual.

Thank you very much.

QUESTION: Thank you, Mr. Ennis.

Mr. Uhl, do you have rebuttal? You have 4 minutes remaining.

REBUTTAL ARGUMENT OF WAYNE E. UHL

ON BEHALF OF THE PETITIONER

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

We believe the second issue presented in the petition is properly before the Court for three reasons. First, as Chief Justice Rehnquist pointed out, the issue was clearly raised in our petition for certiorari and there was no suggestion of waiver in the respondents'

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briefs in opposition.

Second, the issue was fully decided by all of the judges of the Seventh Circuit below. Only one concurring judge, after addressing the merits, suggested that the issued may have been waived. But he, too, joined the majority opinion in which the court clearly applied but found lacking our statute under the reasonable, time, place, and manner test.

And finally, we believe the issue is fairly included within the first issue that's presented, that at -- resolution to the First Amendment issue in this case would be unsatisfactory if the Court simply stopped at a determination of whether this activity is speech without also determining whether or not it's regulable under this statute. So we believe the question is fairly before the Court.

QUESTION: May I ask you on that, Judge Posner said that both the State's highest court and the law enforcement officials concurred in interpreting the statute, not as a blanket prohibition of public nudity. Is that -- do you still think it is not a blanket prohibition of public nudity or do you now take the position it is a blanket prohibition?

MR. UHL: For the purposes of our first argument --

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QUESTION: No, you -- are going to have to give me alternative argument answers?

MR. UHL: Yes, Your Honor, we've made alternative arguments here. For the purpose --

QUESTION: Have you ever before argued that it's a blanket prohibition of public nudity, including operas and the like?

MR. UHL: No, Your Honor.

QUESTION: So, but you are making that argument now?

MR. UHL: Yes, Your Honor. And we believe the statute stands under that argument.

QUESTION: And you believe that your opponent reasonably should have anticipated that argument when he filed his brief in opposition to your cert. petition?

MR. UHL: Yes, Your Honor, because the Seventh Circuit clearly went ahead and addressed that issue and then in our second issue in the cert. petition we clearly raised that issue: whether or not this statute is a valid -- the public nudity statute -- is a valid --

QUESTION: You don't -- in your second question, you don't say a word about it being a blanket prohibition of public nudity.

MR. UHL: I don't remember the exact frame --

QUESTION: It certainly doesn't suggest it to

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me.

MR. UHL: -- but I believe it says that whether the statute is a valid regulation, and I believe the text of our cert petition clearly --

QUESTION: How should I interpret the statute as I face this case? As a blanket prohibition or as a partial prohibition?

MR. UHL: As a blanket prohibition, Your Honor.

As we suspected, the respondents have argued here today that basically any conduct anywhere that resembles dance is speech. The burden is then on the State to justify our regulation of that conduct even if it's in a window in carwash, such as Justice Kennedy suggested, or out in the public park. I don't think this Court has ever held that a State is required to come in with a common law crime that was in existence many, many years before the Constitution and the First Amendment were adopted and justify that statute as applied to live conduct.

There's been quite a bit of discussion during Mr. Ennis' argument of the State's interest in this case, and we'll confess a handicap here and that is that Indiana does not record legislative history. Therefore, to some extent when the Attorney General's office or even the Indiana Supreme Court suggests what the State's interests

are in upholding this statute, the legislative intent is simply inferred there. There is no clear record of legislative intent in this statute.

But again we go back to the fact that this is a common law offense that involves traditional notions in our culture of what constitutes public decency in a public place. And when it comes down to the fine tuning what we find is not that the defendant -- that the respondents have any problem with the statute or its goals, but simply they disagree with our definition of what is a public place. And that's a matter for the State courts and the legislature to determine and as long as that is a reasonable determination that is reasonably related to the goals of the statute, then the First Amendment does not prohibit the State of Indiana from enforcing this statute.

Therefore, again, we would ask that the Seventh Circuit's invalidating of the statute be reversed and that the district court be affirmed.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Uhl.

The case is submitted.

(Whereupon, at 1:57 p.m., the case in the above-entitled matter was submitted.)

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No. 90-26 - MICHAEL BARNES, PROSECUTING ATTORNEY OF ST. JOSEPH COUNTY, INDIANA, ET AL., Petitioners V. GLEN THEATRE INC., ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY _____

(REPORTER)