SUPREME COURT OF THE UNITED STATES

No. 98–1161

CITY OF ERIE, ET AL., PETITIONERS *v.* PAP'S A. M. TDBA "KANDYLAND"

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

[March 29, 2000]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I

In my view, the case before us here is moot. The Court concludes that it is not because respondent could resume its nude dancing operations in the future, and because petitioners have suffered an ongoing, redressable harm consisting of the state court's invalidation of their public nudity ordinance.

As to the first point: Petitioners do not dispute that Kandyland no longer exists; the building in which it was located has been sold to a real estate developer, and the premises are currently being used as a comedy club. We have a sworn affidavit from respondent's sole shareholder, Nick Panos, to the effect that Pap's "operates no active business," and is "a 'shell' corporation." More to the point, Panos swears that neither Pap's nor Panos "employ[s] any individuals involved in the nude dancing business," "main-tain[s] any contacts in the adult entertainment business," "has any current interest in any establishment providing nude dancing," or "has any intention to own or operate a

nude dancing establishment in the future."[1] App. to Reply to Brief in Opposition to Motion to Dismiss 7–8.

Petitioners do not contest these representations, but offer in response only that Pap's *could* very easily get back into the nude dancing business. The Court adopts petitioners' line, concluding that because respondent is still incorporated in Pennsylvania, it "could again decide to operate a nude dancing establishment in Erie." *Ante*, at 6. That plainly does not suffice under our cases. The test for mootness we have applied in voluntary-termination cases is not whether the action originally giving rise to the controversy could not *conceivably* reoccur, but whether it is "absolutely clear that the . . . behavior could not *reasonably be expected to recur.*" *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968) (emphasis added). Here I think that test is met. According to Panos' uncontested sworn affidavit, Pap's ceased doing business at Kandyland, and the premises were sold to an independent developer, in 1998– the year before the petition for certiorari in this case was filed. It strains credulity to suppose that the 72-year-old Mr. Panos shut down his going business *after* securing his victory in the Pennsylvania Supreme Court, and before the city's petition for certiorari was even filed, in order to increase his chances of preserving his judgment in the statistically

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[1] Curiously, the Court makes no mention of Panos' averment of no intention to operate a nude dancing establishment in the future, but discusses the issue as though the only factor suggesting mootness is the closing of Kandyland. *Ante*, at 6. I see no basis for ignoring this averment. The only fact mentioned by the Court to justify regarding it as perjurious is that respondent failed to raise mootness in its brief in opposition to the petition for certiorari. That may be good basis for censure, but it is scant basis for suspicion of perjury– particularly since respondent, far from seeking to "insulate a favorable decision from review," *ante*, at 7, asks us in light of the mootness to vacate the judgment below. Reply to Brief in Opposition to Motion to Dismiss 5.

unlikely event that a (not yet filed) petition might be granted. Given the timing of these events, given the fact that respondent has no existing interest in nude dancing (or in any other business), given Panos' sworn representation that he does not intend to invest– through Pap's or otherwise– in any nude dancing business, and given Panos' advanced age,[2] it seems to me that there is "no reasonable *expectation*," even if there remains a theoretical possibility, that Pap's will resume nude dancing operations in the future.[3]

The situation here is indistinguishable from that which obtained in *Arizonans for Official English* v. *Arizona*, 520 U. S. 43 (1997), where the plaintiff-respondent, a state

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[2] The Court asserts that "[s]everal Members of this Court can attest . . . that the 'advanced age'" of 72 "does not make it 'absolutely clear' that a life of quiet retirement is [one's] only reasonable expectation." *Ante*, at 6. That is *trés gallant*, but it misses the point. Now as heretofore, Justices in their seventies continue to do their work competently– indeed, perhaps better than their youthful colleagues because of the wisdom that age imparts. But to respond to my point what the Court requires is citation of an instance in which a Member of this Court (or of any other court, for that matter) resigned at the age of 72 to begin a new career– or more remarkable still (for this is what the Court suspects the young Mr. Panos is up to) resigned at the age of 72 to go judge on a different court, of no greater stature, and located in Erie, Pennsylvania rather than Palm Springs. I base my assessment of reasonable expectations not upon Mr. Panos' age alone, but upon that combined with his sale of the business and his assertion, under oath, that he does not intend to enter another.

[3] It is significant that none of the assertions of Panos' affidavit is contested. Those pertaining to the sale of Kandyland and the current noninvolvement of Pap's in any other nude dancing establishment would seem readily verifiable by petitioners. The statements regarding Pap's and Panos' intentions for the future are by their nature not verifiable, and it would be reasonable not to credit them if *either* petitioners asserted some reason to believe they were not true *or* they were not rendered highly plausible by Panos' age and his past actions. Neither condition exists here.

employee who had sued to enjoin enforcement of an amendment to the Arizona Constitution making English that State's official language, had resigned her public-sector employment. We held the case moot and, since the mootness was attributable to the "'unilateral action of the party who prevailed in the lower court,'" we followed our usual practice of vacating the favorable judgment respondent had obtained in the Court of Appeals. *Id.*, at 72 (quoting *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership,* 513 U. S. 18, 23 (1994)).

The rub here is that this case comes to us on writ of certiorari to a state court, so that our lack of jurisdiction over the case also entails, according to our recent jurisprudence, a lack of jurisdiction to direct a vacatur. See *ASARCO Inc.* v. *Kadish,* 490 U. S. 605, 621, n. 1 (1989). The consequences of that limitation on our power are in this case significant: A dismissal for mootness caused by respondent's unilateral action would leave petitioners subject to an ongoing legal disability, and a large one at that. Because the Pennsylvania Supreme Court severed the public nudity provision from the ordinance, thus rendering it inoperative, the city would be prevented from enforcing its public nudity prohibition not only against respondent, should it decide to resume operations in the future, and not only against other nude dancing establishments, but against anyone who appears nude in public, regardless of the "expressiveness" of his conduct or his purpose in engaging in it.

That is an unfortunate consequence (which could be avoided, of course, if the Pennsylvania Supreme Court chose to vacate its judgments in cases that become moot during appeal). But it is not a consequence that authorizes us to entertain a suit the Constitution places beyond our power. And leaving in effect erroneous state determinations regarding the Federal Constitution is, after all, not unusual. It would have occurred here, even without

the intervening mootness, if we had denied certiorari. And until the 1914 revision of the Judicial Code, it occurred *whenever* a state court erroneously sustained a federal constitutional challenge, since we did not even have *statutory* jurisdiction to entertain an appeal. Compare Judiciary Act of 1789, ch. 20, §25, 1 Stat. 85–87 with Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. In any event, the short of the matter is that we have no power to suspend the fundamental precepts that federal courts "are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties," *Richardson* v. *Ramirez*, 418 U. S. 24, 36 (1974), and that this limitation applies "at all stages of review," *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975) (quoting *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974) (internal quotation marks omitted)).

Which brings me to the Court's second reason for holding that this case is still alive: The Court concludes that because petitioners have an "ongoing injury" caused by the state court's invalidation of its duly enacted public nudity provision, our ability to hear the case and reverse the judgment below is itself "sufficient to prevent the case from being moot." *Ante*, at 7. Although the Court does not cite any authority for the proposition that the burden of an adverse decision below suffices to keep a case alive, it is evidently relying upon our decision in *ASARCO*, which held that Article III's standing requirements were satisfied on writ of certiorari to a state court even though there would have been no Article III standing for the action producing the state judgment on which certiorari was sought. We assumed jurisdiction in the case because we concluded that the party seeking to invoke the federal judicial power had standing to challenge the adverse judgment entered against them by the state court. Because that judgment, if left undisturbed, would "caus[e] direct, specific, and concrete injury to the parties who

petition for our review," *ASARCO*, 490 U. S., at 623–624, and because a decision by this Court to reverse the State Supreme Court would clearly redress that injury, we concluded that the original plaintiffs' lack of standing was not fatal to our jurisdiction. *Id.*, at 624.

I dissented on this point in *ASARCO*, see *id.*, at 634 (REHNQUIST, C. J., concurring in part and dissenting in part, joined by SCALIA, J.), and remain of the view that it was incorrectly decided. But *ASARCO* at least did not purport to hold that the constitutional standing requirements of injury, causation, and redressability may be satisfied *solely* by reference to the lower court's adverse judgment. It was careful to note– however illogical that might have been, see *id.*, at 635– that the parties "remain[ed] adverse," and that jurisdiction was proper only so long as the "requisites of a case or controversy are also met," *id.,* at 619, 624. Today the Court would appear to drop even this fig leaf.[4] In concluding that the injury to *Erie* is "sufficient" to keep this case alive, the Court performs the neat trick of identifying a "case or controversy" that has only one interested party.

II

For the reasons set forth above, I would dismiss this case for want of jurisdiction. Because the Court resolves the threshold mootness question differently and proceeds to address the merits, I will do so briefly as well. I agree that the decision of the Pennsylvania Supreme Court must

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[4] I say "appear" because although the Court states categorically that "the availability of . . . relief [from the judgment below] is sufficient to prevent the case from being moot," it follows this statement, in the next sentence, with the assertion that Pap's, the state court plaintiff, retains a "concrete stake in the outcome of this case." *Ante*, at 7. Of course, if the latter were true a classic case or controversy existed, and resort to the exotic theory of "standing by virtue of adverse judgment below" was entirely unnecessary.

be reversed, but disagree with the mode of analysis the Court has applied.

The city of Erie self-consciously modeled its ordinance on the public nudity statute we upheld against constitutional challenge in *Barnes* v. *Glen Theatre, Inc.,* 501 U. S 560 (1991), calculating (one would have supposed reasonably) that the courts of Pennsylvania would consider themselves bound by our judgment on a question of federal constitutional law. In *Barnes*, I voted to uphold the challenged Indiana statute "not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." *Id.,* at 572 (opinion concurring in judgment). Erie's ordinance, too, by its terms prohibits not merely nude dancing, but the act– irrespective of whether it is engaged in for expressive purposes– of going nude in public. The facts that a preamble to the ordinance explains that its purpose, in part, is to "limi[t] a recent increase in nude live entertainment," App. to Pet. for Cert. 42a, that city councilmembers in supporting the ordinance commented to that effect, see *post*, at 13-14, and n. 16 (STEVENS, J., dissenting), and that the ordinance includes in the definition of nudity the exposure of devices simulating that condition, see *post*, at 15, neither make the law any less general in its reach nor demonstrate that what the municipal authorities *really* find objectionable is expression rather than public nakedness. As far as appears (and as seems overwhelmingly likely), the preamble, the councilmembers' comments, and the chosen definition of the prohibited conduct simply reflect the fact that Erie had recently been having a public nudity problem not with streakers, sunbathers or hot-dog vendors, see *Barnes, supra,* at 574 (SCALIA, J., concurring in judgment), but with lap dancers.

There is no basis for the contention that the ordinance

does not apply to nudity in theatrical productions such as Equus or Hair. Its text contains no such limitation. It was stipulated in the trial court that no effort was made to enforce the ordinance against a production of Equus involving nudity that was being staged in Erie at the time the ordinance became effective. App. 84. Notwithstanding JUSTICE STEVENS' assertion to the contrary, however, see, *post*, at 12, neither in the stipulation, nor elsewhere in the record, does it appear that the city was aware of the nudity– and before this Court counsel for the city attributed nonenforcement not to a general exception for theatrical productions, but to the fact that no one had complained. Tr. of Oral Arg. 16. One instance of nonenforcement– against a play already in production that prosecutorial discretion might reasonably have "grandfathered"– does not render this ordinance discriminatory on its face. To be sure, in the trial court counsel for the city said that "[t]o the extent that the expressive activity that is contained in [such] productions rises to a higher level of protected expression, they would not be [covered]," App. 53– but he rested this assertion upon the provision in the preamble that expressed respect for "fundamental Constitutional guarantees of free speech and free expression," and the provision of Paragraph 6 of the ordinance that provided for severability of unconstitutional provisions, *id.*, at 53-54.[5] What he was saying there (in order to fend off the overbreadth challenge of respon-

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[5] This follow-up explanation rendered what JUSTICE STEVENS calls counsel's "categorical" assertion that such productions would be exempt, see *post*, at 12, n. 12, notably *un*categorical. Rather than accept counsel's explanation– in the trial court and here– that is compatible with the text of the ordinance, JUSTICE STEVENS rushes to assign the ordinance a meaning that its words cannot bear, on the basis of counsel's initial foot-fault. That is not what constitutional adjudication ought to be.

dent, who was in no doubt that the ordinance *did* cover theatrical productions, see *id.*, at 55) was essentially what he said at oral argument before this Court: that the ordinance would not be enforceable against theatrical productions if the Constitution forbade it. Tr. of Oral Arg. 13. Surely that limitation does not cause the ordinance to be not generally applicable, in the relevant sense of being *targeted* against expressive conduct.[6]

Moreover, even were I to conclude that the city of Erie had specifically singled out the activity of nude dancing, I still would not find that this regulation violated the First Amendment unless I could be persuaded (as on this record I cannot) that it was the communicative character of nude dancing that prompted the ban. When conduct other than speech itself is regulated, it is my view that the First Amendment is violated only "[w]here the government prohibits conduct precisely because of its communicative attributes." *Barnes, supra,* at 577 (emphasis deleted). Here, even if one hypothesizes that the city's object was to suppress only nude dancing, that would not establish an intent to suppress what (if anything) nude dancing communicates. I do not feel the need, as the Court does, to identify some "secondary effects" associated with nude

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[6] To correct JUSTICE STEVENS' characterization of my present point: I do not argue that Erie "carved out an exception" for Equus and Hair. *Post*, at 13, n. 14. Rather, it is my contention that the city attorney assured the trial court that the ordinance was susceptible of an interpretation that would carve out such exceptions to the extent the Constitution required them. Contrary to JUSTICE STEVENS' view, *post*, at 13, n. 14, I do not believe that a law directed against all public nudity ceases to be a "general law" (rather than one directed at expression) if it makes exceptions for nudity protected by decisions of this Court. To put it another way, I do not think a law contains the vice of being directed against expression if it bans all public nudity, except that public nudity which the Supreme Court has held cannot be banned because of its expressive content.

dancing that the city could properly seek to eliminate. (I am highly skeptical, to tell the truth, that the addition of pasties and g-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease.) The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.