STUDY OF THE EFFECTS OF THE CONCENTRATION OF ADULT ENTERTAINMENT ESTABLISHMENTS IN THE CITY OF LOS ANGELES

DEPARTMENT OF CITY PLANNING

CITY OF LOS ANGELES

JUNE 1977

CITY PLAN CASE NO. 26475
Council File No. 74-4521-S.3

STUDY OF THE EFFECTS OF THE CONCENTRATION OF ADULT ENTERTAINMENT ESTABLISHMENTS IN THE CITY OF LOS ANGELES

Prepared for:

Planning Committee of
the Los Angeles City Council

Prepared by:

Los Angeles City Planning Department

June, 1977

Exhibit D

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A. Types of Ordinances to Control "Adult Entertainment" Uses

Two methods of regulating adult entertainment business via land use regulations have developed in the United States. They are: 1) the concentration of such uses in a single area of the city as in Boston; and 2) the dispersal of such uses, as in the City of Detroit. The Detroit ordinance has been challenged and upheld by the U.S. Supreme Court (Young vs. American Mini-Theaters, 96 S. Ct. 771, 1976).

B. Effect of "Adult Entertainment" Businesses on the Community

There has been some indication that the concentration of "adult entertainment" uses results in increased crime and greater police enforcement problems. In the City of Los Angeles, the Los Angeles Police Department has found a link between the concentration of such businesses and increased crime in the Hollywood community. (The major portion of a Police Department report on this subject is herein contained.) While several major cities have adopted ordinances similar to the Detroit ordinance, no other major city has, to our knowledge, adopted a Boston-type ordinance.

Testimony received at two public meetings on this subject has revealed that there is serious public concern over the proliferation of adult entertainment businesses-particularly in the Hollywood area. Citizens have testified of being afraid to walk the streets; that some businesses have left the area or have modified their hours of operation; and that they are fearful of children being confronted by unsavory individuals or of being exposed to sexually explicit material. A representative of an adult theater chain testified in support of the manner in which this business was run and in support of the type of clientele which attend the theaters. The Planning Department staff is of the opinion that the degree of deleterious effects of adult entertainment businesses depend largely on the particular type of business and on how any such business is operated.

A mail survey questionnaire conducted by the Planning Department has tended to emphasize general public concern over the proliferation of sex-oriented businesses and has indicated further, that appraisers, realtors and representatives of lending institutions are generally of the opinion that concentration of adult entertainment businesses exerts a negative economic impact on both business and residential properties. They feel that the degree of negative impact depends upon the degree of concentration and on the specific type of adult entertainment business.

The 1970-76 change in the assessed value of residential and commercial properties containing concentrations of adult entertainment businesses was compared with other areas without such concentrations, and with the City as a whole. On the basis of this comparison, it cannot be concluded that properties containing concentrations of adult entertainment businesses have directly influenced the assessed valuations of such properties.

Data and analysis based on the U.S. Census of 1970 and certain trend data from the censuses of 1960 and 1970 as applied to areas of the City containing concentrations of adult entertainment businesses are included in the body of the report and in the Appendix.

C. Scope of the Ordinances Enacted by Other Jurisdictions

The scope of "adult entertainment" ordinances encompases a variety of adult activities. For example, the Los Angeles Study has considered "adult entertainment" establishments to include adult bookstores and theaters, massage parlors, nude modeling studios, adult motels, arcades, and certain similar businesses. Many other ordinances studied, however, are less broad in their coverage. The Detroit ordinance, for instance does not regulate massage parlors or adult motels, nor does it provide for the closing of any such businesses by amortization, which would be necessitated by the retroactive application of such an ordinance. Table I on page 11 indicates the ordinances reveiwed and the major categories of uses they regulate.

Effect of Ordinances Enacted by Other Jurisdictions: The U.S. Supreme Court in Young vs. American Mini-Theaters pointed out, as one of the bases for upholding the Detroit ordinance, that the regulation did not limit the number of "adult entertainment" businesses. Our study has indicated that the practical effect of literal adoption of "Detroit" language without modification in the City of Los Angeles would be to limit the potential locations for such businesses rather severely. Due to the predominance of commercial zoning in "strips" along major and secondary streets, an ordinance preventing "adult entertainment" business from locating within 500 feet of residentially zoned property would, in effect, limit such businesses to those areas of the City where there is commercial zoning of greater than 500 feet in depth. Areas with such commercial frontage would include downtown Los Angeles , a small part of Hollywood, Westwood, and Century City. A few industrial areas would also afford a separation of this distance from residential properties. The limitation of 1,000 feet between establishments (as provided in the Detroit ordinance) would likely be inappropriate in the City of Los Angeles inasmuch as commercial zoning is located in a strip pattern along most of the City's approximate 1,400 miles of major and secondary highways. (It is estimated that approximately 400 miles of such "strip" commercial zoning exists in the City.)

D. Recommendations

1. If the City Council should find it advisable in light of the findings of this report to recommend the preparation of an ordinance to control adult entertainment businesses, such an ordinance should be of a dispersal type rather than a concentration type. (To build a planning policy basis for such regulation, the Council may also wish the Planning Department to consider the development of appropriate policies for incorporation within the Citywide Plan.)

2. If a dispersal type ordinance is recommended by the City Council, the Planning Department is of the opinion that such an ordinance should be designed for specific application in the City of Los Angeles, rather than the direct adoption of the Detroit model. If such a dispersal type ordinance is recommended for enactment locally, it should consider:

   a. distance requirements between adult entertainment establishments. The Planning Department recommends that a separation between establishments greater than 1,000 feet is necessary and desirable.

   b. distance requirements separating adult entertainment establishments from churches, schools, parks, and the like. The Planning Department suggests that a separation of at least 500 feet is necessary. A similar distance separating adult entertainment uses from single-family residential development should also be considered.

   c. the possibility of enacting additional provisions to regulate signs and similar forms of advertising should also be considered.

3. If the City Council should find it advisable to recommend all of the types of "adult entertainment" businesses included in this study, it should consider whether all such uses should be in the same class and subject to the same regulations.

4. Should the City Council recommend the preparation of a zoning ordinance to regulate adult entertainment businesses, other sections of the Municipal Code relating to the subject, including police permit requirements, should also be amended in order to be consistent with the zoning regulations and to facilitate the administration and enforcement of such regulations.

5. The Planning De rtment recommends that i' he instructed to review existing zoning regulations applying to the C4 zone which currently prohibits "strip tease shows" and that the Zoning Administrator, through interpretation, consider expanding the list of prohibited uses in said zone to include additional adult entertainment uses as herein indentified.

6. To assist in the regulation of "adult entertainment" businesses, the City should continue to vigorously enforce all existing provisions of the Municipal Code relating to the subject, including Zoning regulations.

I.

FINDINGS

1. A Boston-type ordinance (concentration) to control adult entertainment businesses would not be acceptable nor desirable in the City of Los Angeles.

2. In the event legislation is enacted in the City of Los Angeles there is adequate basis for a Detroit-type ordinance (dispersion) which requires a distance of 1000 feet between establishments and 500 feet from residential zones.

   -- Existing locational patterns of adult entertainment businesses (in Hollywood, Studio City, North Hollywood) actually represent a concentration rather than a dispersion of establishments. (Such patterns are contrary to the Detroit concept and are due, in fact, to the City's strip commercial zoning pattern.)

3. If dispersion is desired in Los Angeles, an ordinance should be designed specifically for the City. (Direct application of the Detroit ordinance would not be desirable or appropriate in Los Angeles and would, in part, tend to result in a concentration of such businesses.)

4. Statistics provided by the Los Angeles Police Department (LAPD) indicate a proportionally larger increase in certain crimes in Hollywood from 1965-75, as compared with the City of Los Angeles as a whole. (Hollywood has the largest concentration of adult entertainment businesses in the City.)

5. Statistics provided by the LAPD indicate that there has been a large increase in adult entertainment enterprises since 1969, particularly in Hollywood. From December 1975 to December 1976, however, there has been a decrease in such establishments.

6. Testimony obtained at two public meetings on the Adult Entertainment study conducted on April 27 and 28, 1977 indicated that:

   - Many persons, including the elderly, are afraid to walk the streets in Hollywood.

   - Concern was expressed that children are being exposed to sexually explicit materials and unsavory persons.

   - Some businesses no longer remain open in the evenings and others have left the area allegedly directly or indirectly due to the establishment of adult entertainment businesses.

   - In Hollywood, some churches drive the elderly to services and others provide private guards in their parking lots.

   - Nearly all persons opposed the concentration of adult entertainment activities.

7. Responses to questionnaires of the City Planning Department have indicated that:

   - Appraisers, realtors, lenders, etc. believe that the concentration of adult entertainment establishments has had adverse economic effects on both businesses and residential property in respect to market value, rental value and rentability/saleability; that the adverse economic effects diminish with distance but that the effects extend even beyond a 1000-foot radius; and that the effects are related to the degree of concentration and to the specific type of adult entertainment business.

   - Businessmen, residents, etc. believe that the concentration of adult entertainment establishments has adverse effects on both the quality of life, and on business and property values. Among the adverse business effects cited are: difficulty in retaining and attracting customers to non- "adult entertainment" businesses; difficulty in recruiting employees; and difficulty in renting office space and keeping desirable tenants. Among the adverse effects on the quality of life cited are increased crime; the effects on children; neighborhood appearance, litter and graffiti.

8. A review of the percentage changes in the assessed value of commercial and residential property between 1970 and 1976 for the study areas containing concentrations of adult entertainment businesses have indicated that:

   - The three study areas in Hollywood containing such businesses have increased less than the Hollywood Community, and less than the City as a whole. Two of the three study areas in Hollywood have increased less than their corresponding "control areas"; however, one such study area increased by a greater amount than its corresponding control area.

   - The study area in Studio City has increased by a greater percentage than its corresponding "control area", by a slightly lower percentage than the Sherman Oaks-Studio City Community; and by a considerably greater percentage than the entire city.

   - The study area in North Hollywood has increased by a considerably lower percentage than its corresponding control area, the North Hollywood Community, and the City as a whole.

   - On the basis of the foregoing it cannot be concluded that adult entertainment businesses have directly influenced changes in the assessed value of commercial and residential properties in the areas analyzed.

9. There are various existing laws and regulations (other than zoning) available to effect proper regulation of adult entertainment businesses.

10. There is a high degree of turnover in individual adult entertainment businesses as evidenced on page 51 (Much of this change is probably due to Police enforcement.)

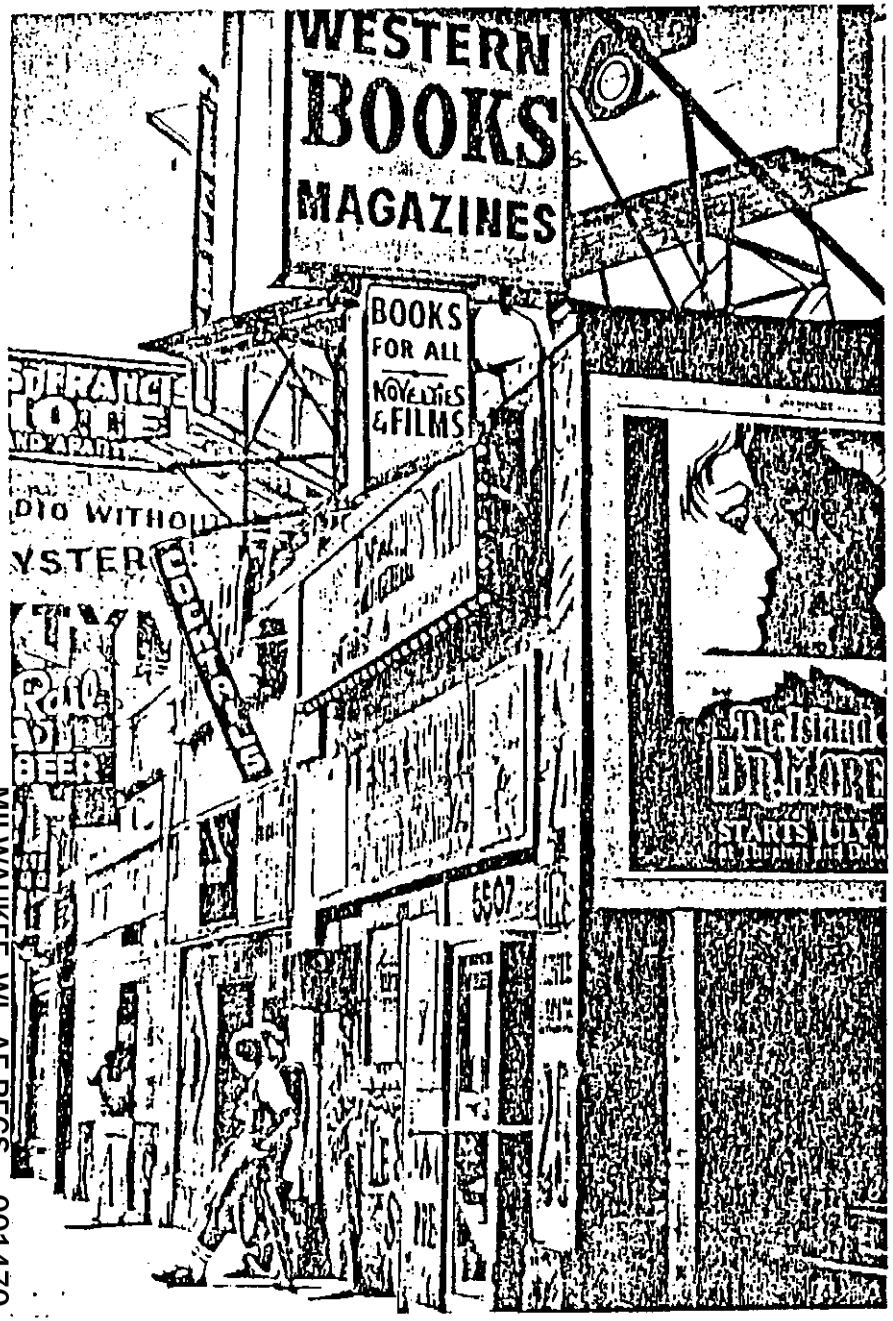
11. The Los Angeles City Council, both on its own initiative and at the urging of numerous citizens groups, has proposed a variety of approaches to limiting the possibly deleterious effects of "adult entertainment" business on neighborhoods.

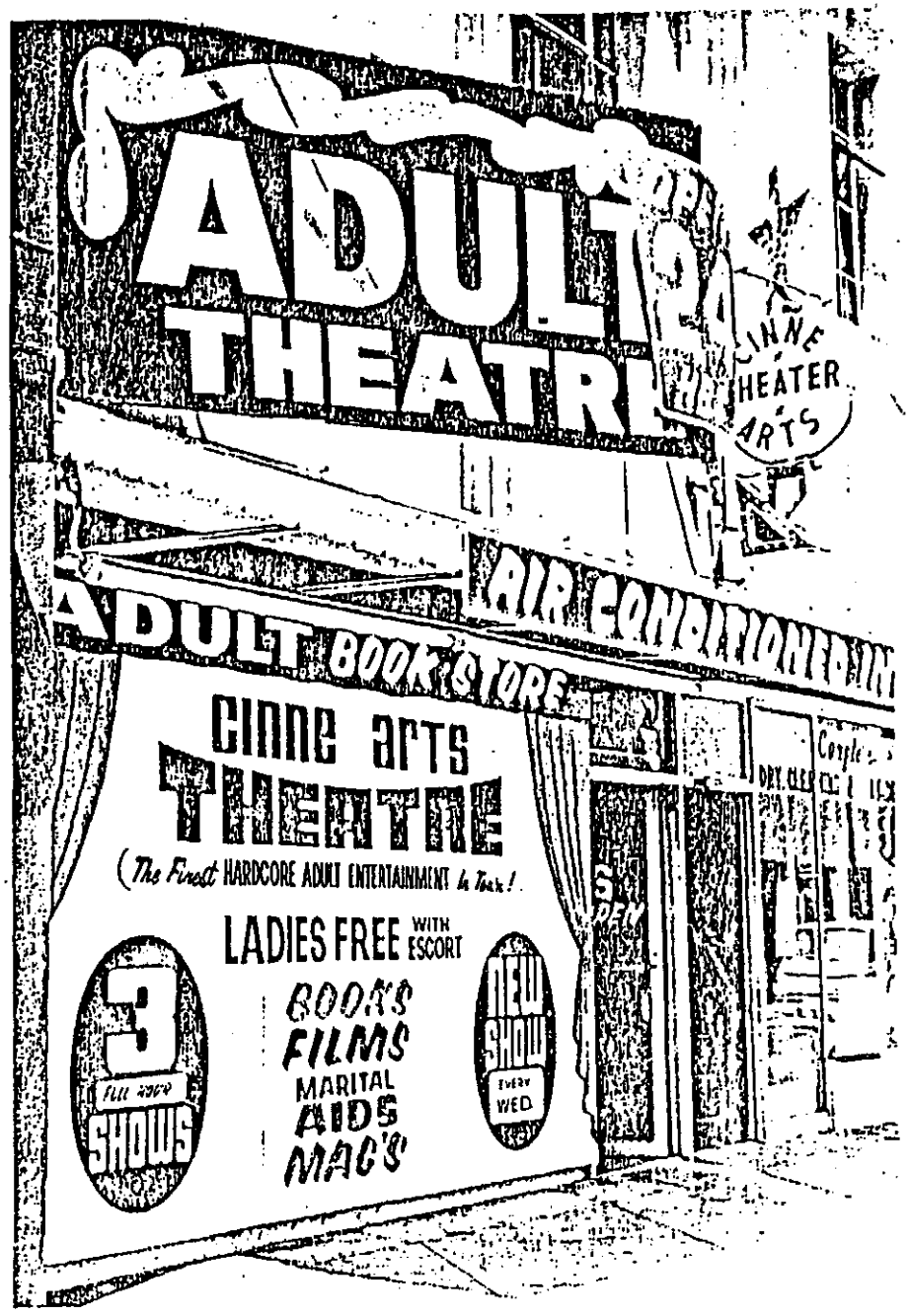
12. At least 10 cities have adopted ordinances similar to the Detroit dispersal ordinance. Several other cities have enacted other forms of regulations.

13. The Detroit ordinance does not regulate massage parlors. Of the cities with regulations, three have included massage parlors within the purview of their zoning ordinance.

14. None of the cities surveyed call out or regulate adult motels as a part of their "adult entertainment" ordinance.

15. The Detroit Ordinance is prospective in its application and therefore does not include an amortization provision, i.e. provide for a time period for the removal of existing businesses. Although other such ordinances have included such provisions, none had been validated by the courts at the time of this study.



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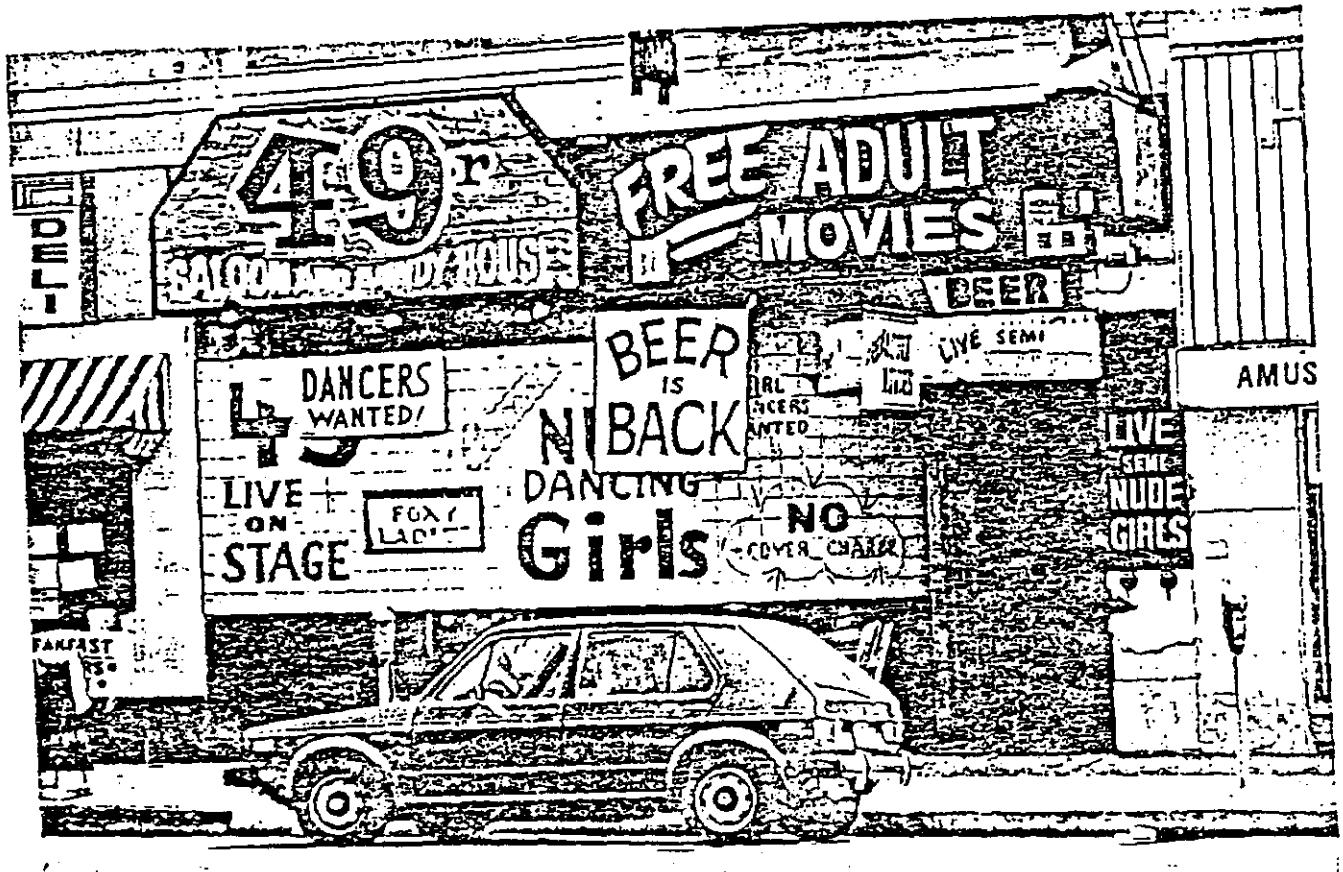
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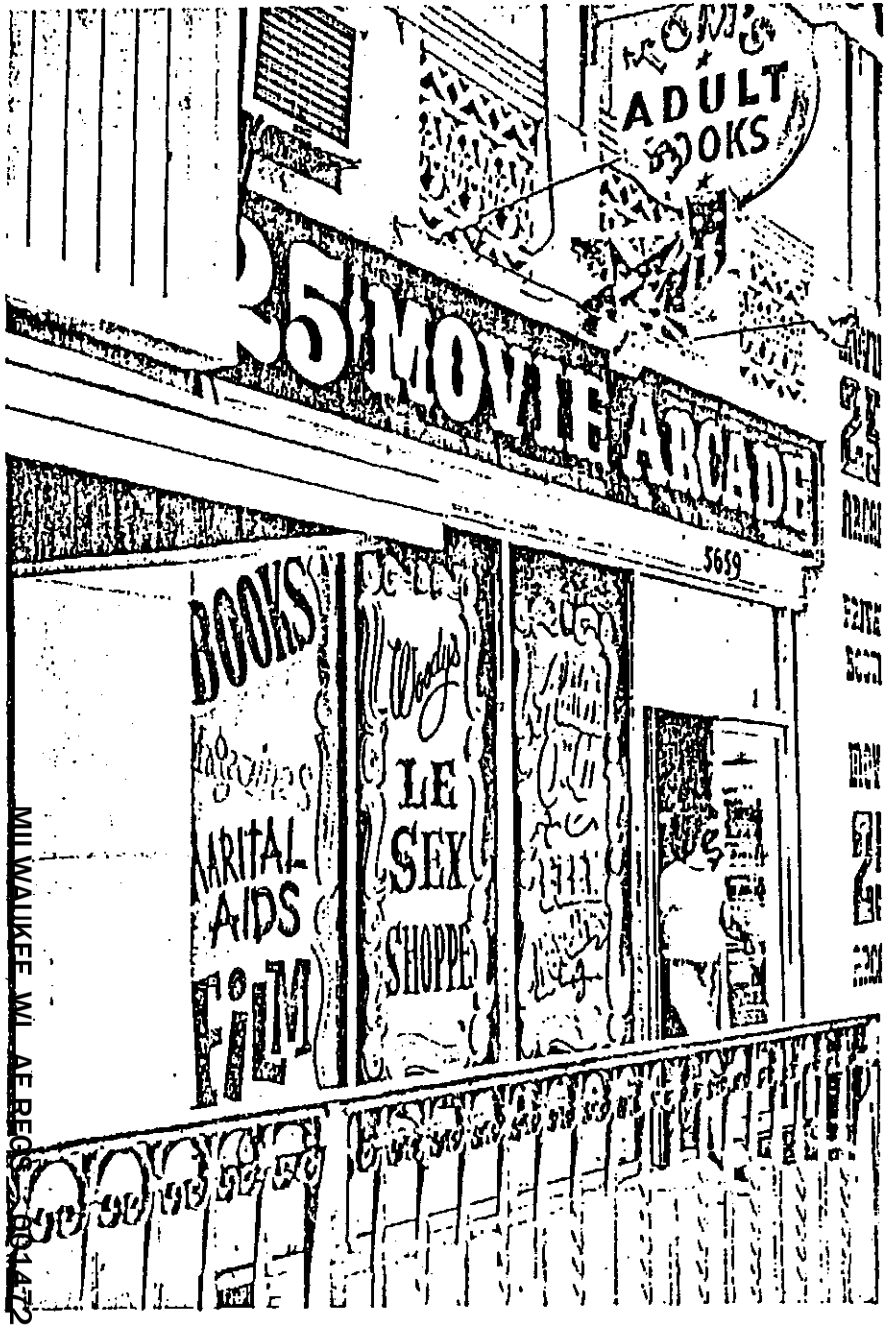
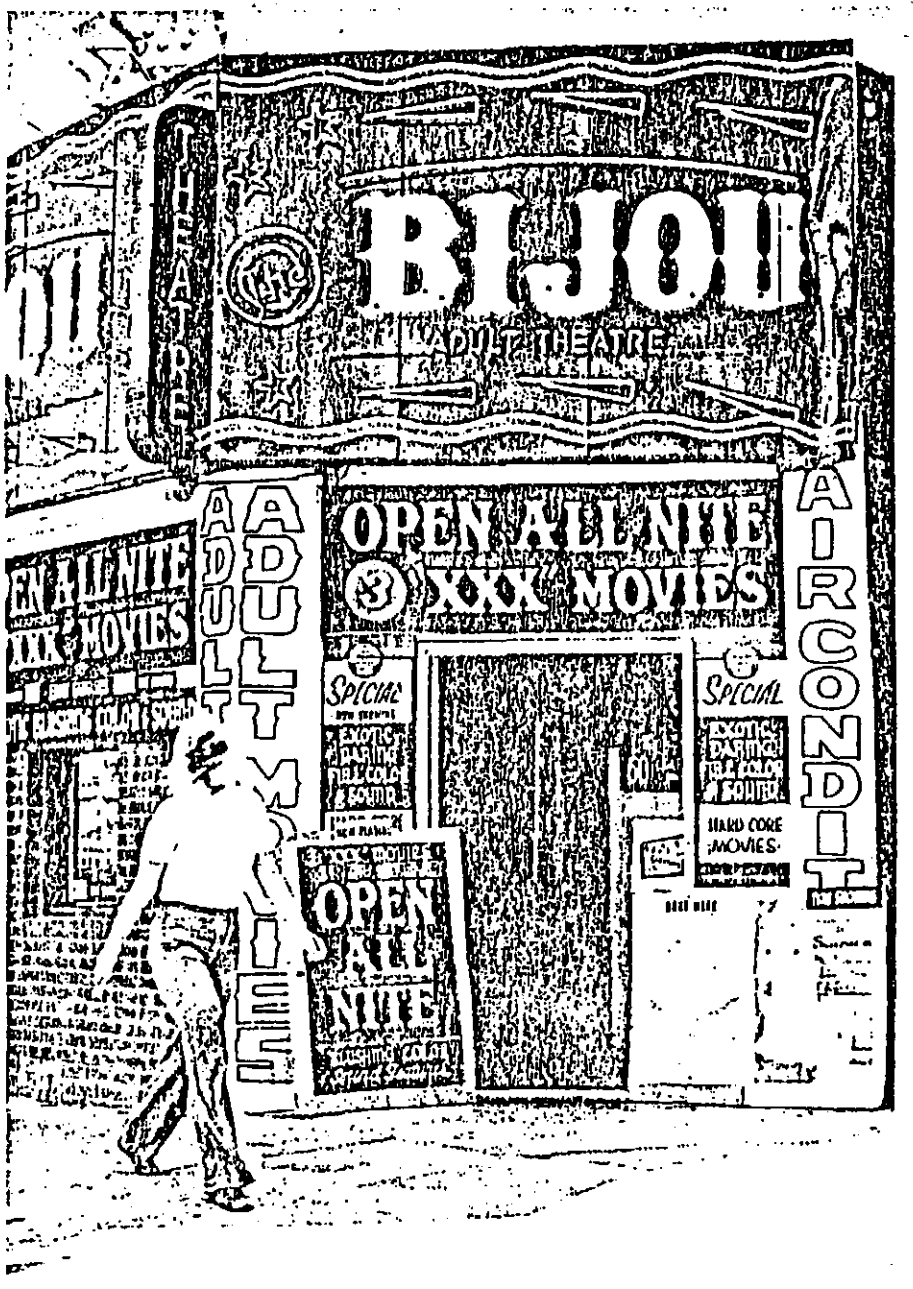
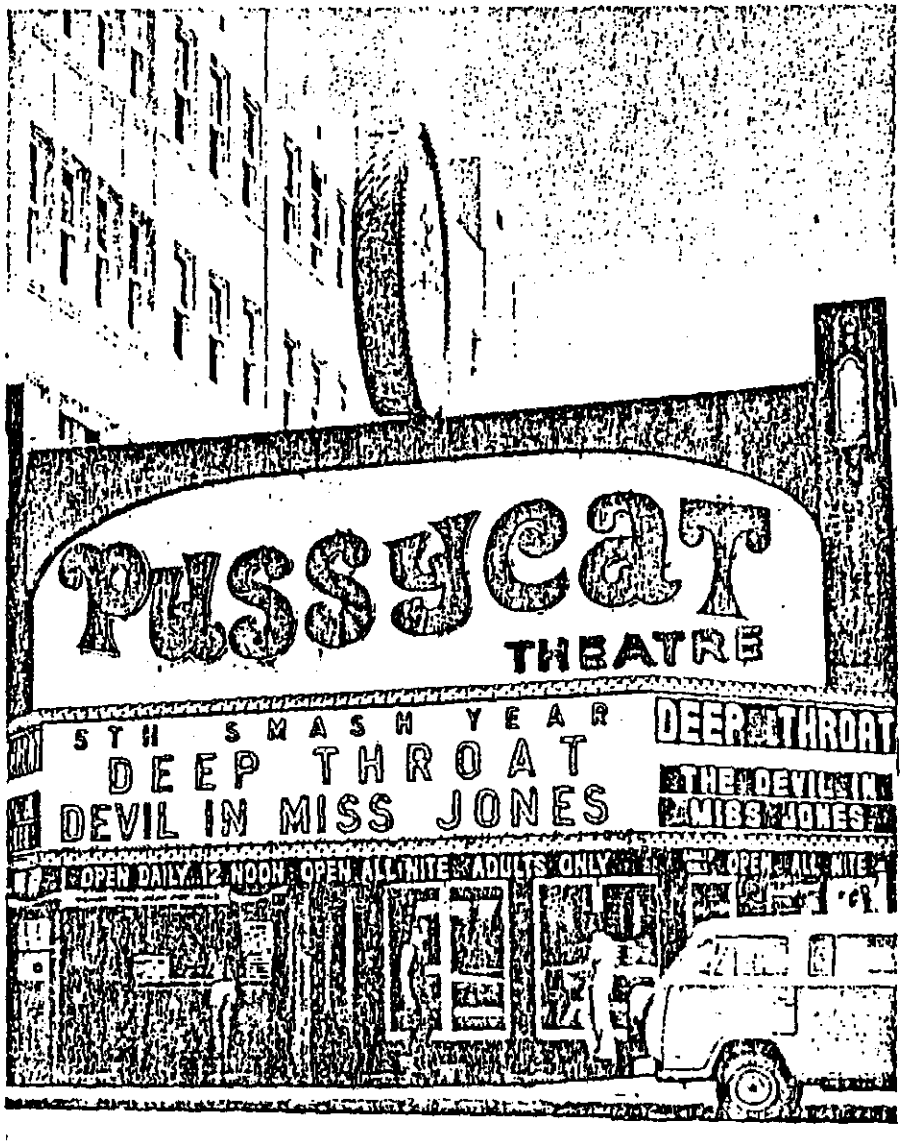
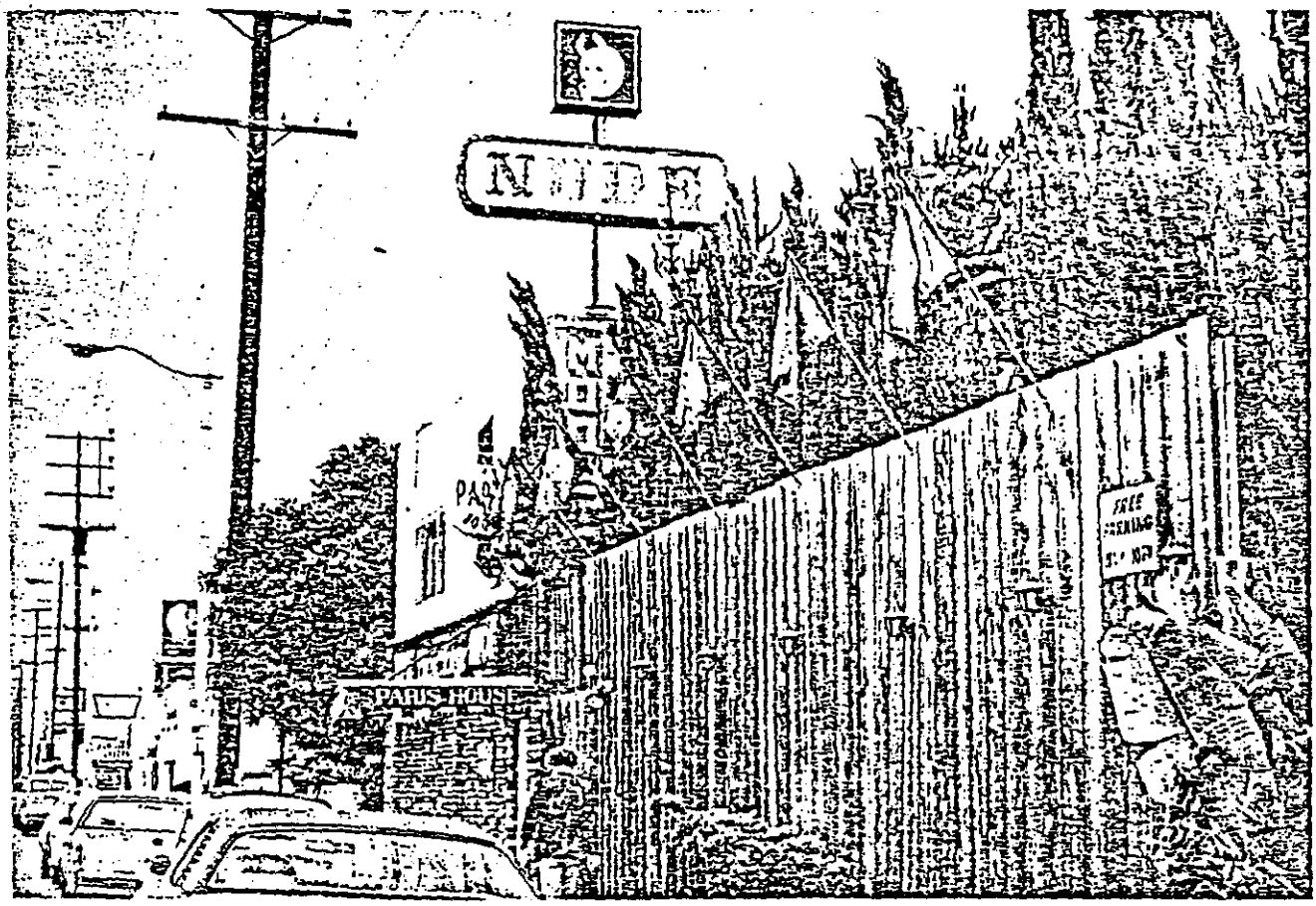
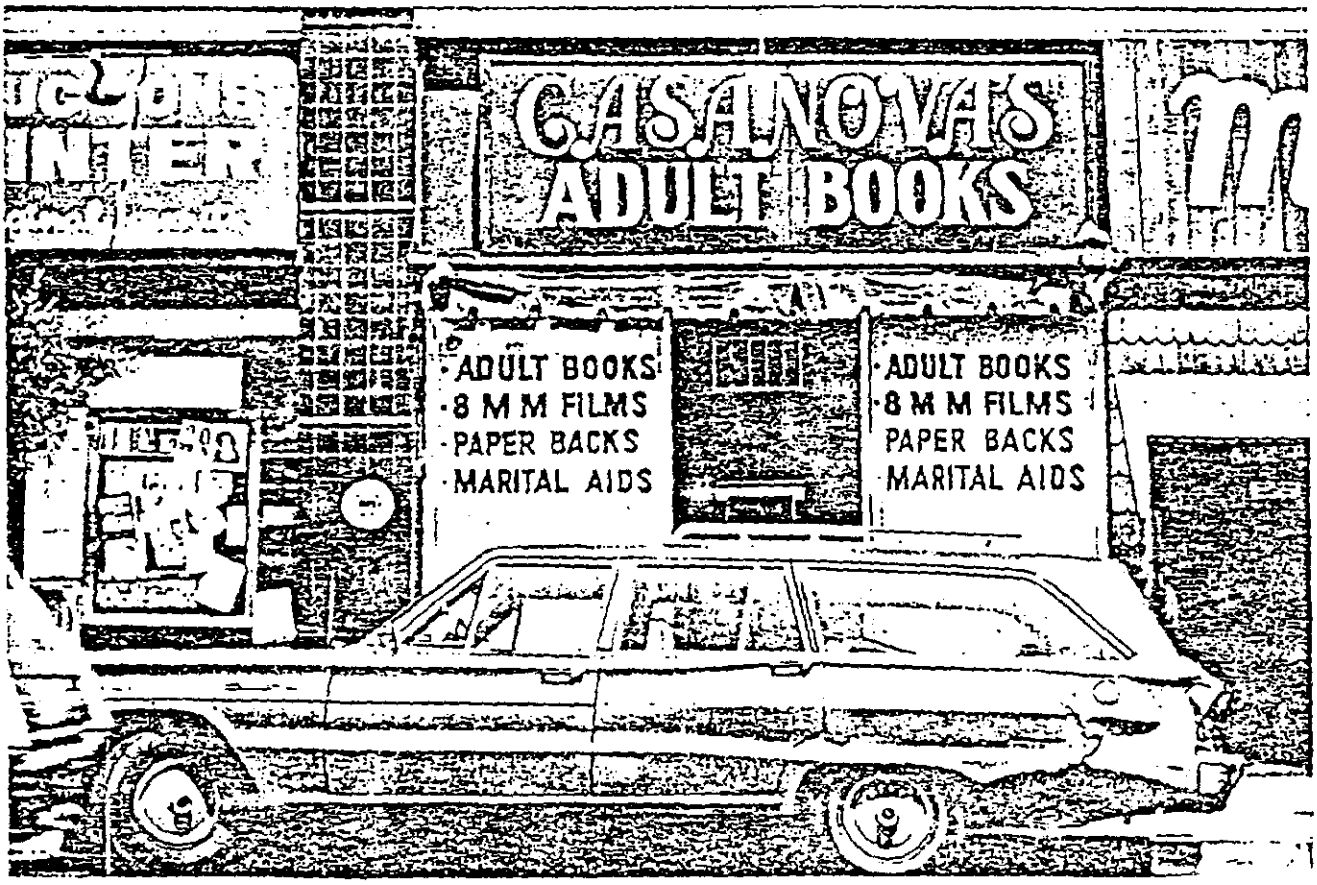







PARIS HOUSE


CASANOVAS
ADULT BOOKS
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·8 M M FILMS
·PAPER BACKS
·MARITAL AIDS
·ADULT BOOKS
·8 M M FILMS
PAPER BACKS
MARITAL AIDS

II.

PURPOSE AND SCOPE

On January 12, 1977, the Los Angeles City Council instructed this Department, with the assistance of other City agencies, to conduct a comprehensive study to determine whether the concentration of so-called "adult entertainment" establishments has a blighting or degrading effect on nearby properties and/or neighborhoods. The term "adult entertainment" is a general term utilized by the Planning staff to collectively refer to businesses which primarily engage in the sale of material depicting sex or in providing certain sexual services. These would include the following: adult bookstores; X-rated theaters; adult motels with X-rated entertainment; massage parlors; sexual therapy establishments (other than those operated by a licensed psychologist, psychiatrist, etc.); and nude, topless or bottomless bars and restaurants.

During the past few years, there has been increasing concern in Los Angeles over the proliferation of such sexually oriented businesses. The derivation of such concern is varied--religious, moral, sociological and economic. The positions advocated by the public range from a "laissez faire" attitude to outright moral indignation and demand for prohibition.

It should be noted at this time that the topic of newsracks, was not dealt with in this study. The primary reason for not considering newsracks is that, in addition to the absence of a specific Council request for this Department to deal with that subject, this matter has been and continues to be a topic of litigation in our state courts. Additionally, other public agencies, including the City Attorney, Bureau of Street Maintenance, and Building and Safety, are presently pursuing assignments regarding newsracks, and it is premature to determine whether newsracks could feasibly be studied as "adult entertainment" businesses, from a practical or constitutional standpoint.

In giving the Planning Department this assignment, the City Council essentially called for a fact-finding process to determine whether adult entertainment establishments, where they exist in concentration, cause blight and deterioration. When this question has been posed to the public, there have frequently been anguished retorts to the effect that "the answer is so obvious it is ridiculous to even ask the question," and "what is the City waiting for before it takes action to eliminate these scourges of society?"

On the other side of the spectrum, certain parties who are against the adoption of any regulations regarding "adult entertainment" question the legitimacy of the government's interest in the subject; and they have noted that magazines as "scurrilous" as those sold in adult bookstores are also available in the markets and drugstores where the likelihood of perusal by youngsters is obviously greater than within the confines of an adult bookstore (where no person under 18 years of age is allowed).

In completing this study, the Planning Department has made every effort to ensure a fair and unbiased analysis of "adult entertainment." The staff has been instructed to objectively review information of a factual nature; and, although the personal feelings of organized groups and the public at large were forcefully expressed at the two public meetings and in the study questionnaires, the staff has maintained independence from such strong emotions in evaluating the data gathered.

As noted above, the staff has specifically been given the charge to determine whether the concentration of "adult entertainment" establishments has any blighting or degrading effect on the neighborhoods in which they reside. We did not consider the specific nature or content of the materials or services rendered, advertised or promised, for this would have constituted a censor-like role for the Department which was neither desired nor requested by the Council.

This study has focused on the Hollywood community as well as portions of Studio City and North Hollywood as those areas of Los Angeles having the greatest concentration of "adult entertainment" establishments. In order to assess the effect of the concentration of "adult entertainment" establishments in these areas, the staff has analyzed such factors as changes in assessed property values, and reviewed various crime statistics as well as other demographic and related data as available from the U.S. Census. In addition, the Department has reviewed various established approaches to the regulation of "adult entertainment" business, including legislation already enacted by other jurisdictions, and earlier efforts of the City of Los Angeles to regulate such businesses.

By means of two public meetings on the subject conducted by representatives of the City Planning Commission, and through the use of a mail survey questionnaire, the Department has also attempted to provide additional documentation relative to the actual or perceived impact of adult entertainment businesses on the community. Current information on crime statistics has been provided in a separate report prepared by the Los Angeles Police Department, major portions of which are herein included.

III.

METHODS CURRENTLY USED TO REGULATE "ADULT ENTERTAINMENT" BUSINESSES

A. APPROACHES TO THE REGULATION OF ADULT ENTERTAINMENT BY LAND USE REGULATION

Two primary methods of regulating "adult entertainment" businesses via land use regulations have developed in the United States: the concentration approach, as evidenced by the "Combat Zone" in Boston, and the dispersal approach, initially developed by Detroit.

1. Boston Approach

In Boston the "Combat Zone" was officially established by designation of an overlay Adult Entertainment District in November of 1974. The purpose of the overlay district was to create an area in which additional special uses would be permitted in designated Commercial Zones which were not permitted in these zones on a citywide basis.

The "Combat Zone" had existed unofficially for many years in Boston, as the area in question contained a majority of the "adult entertainment" facilities in the City. The ordinance was adopted in response to concern over the spreading of such uses to neighborhoods where they were deemed to be inappropriate. Other considerations included facilitating the policing of such activities and allowing those persons who do not care to be subjected to such businesses to avoid them.

Under the Boston ordinance, adult bookstores and "commercial entertainment businesses" are considered conditional or forbidden uses except in the Business Entertainment District. Existing "adult entertainment" businesses are permitted to continue as non-conforming uses, but, if discontinued for a period of two years, may not be re-established. Establishment of uses in areas of the city other than the "Combat Zone" requires a public hearing before the Zoning Board of Appeals.

The effectiveness and appropriateness of the Boston approach is a subject of controversy. There has been some indication that it has resulted in an increase in crime within the district and that there is an increased vacancy rate in the surrounding office buildings. Due to complaints of serious criminal incidents, law enforcement activities have been increased and a number of liquor licenses in the area have been revoked. Since the "Combat Zone" and most of the surrounding area are part of various redevelopment projects, however, the change in character of the area cannot be attributed solely to the existence of "adult entertainment" businesses.

In Los Angeles, the Police Department has investigated the effect of "adult entertainment" businesses in Hollywood and found a link between the clustering of these establishments and an increase in crime. (See Section V, pages 51 to 55). For this reason, and due to the enforcement problems created by such concentrations, the Police Department is not in favor of a concentration approach in the City of Los Angeles. Public testimony at hearings and through Planning Department questionnaires has indicated an overwhelming public disapproval of this approach for the City of Los Angeles.

2. Detroit Approach

The City of Detroit has developed a contrasting approach to the control of "adult entertainment" businesses. The Detroit Ordinance attempts to disperse adult bookstores and theaters by providing that such uses cannot, without special permission, be located within 1000 feet of any other "regulated uses" or within 500 feet of a residentially zoned area.

This ordinance was an amendment to an existing anti-skid row ordinance which attempted to prevent further neighborhood deterioration by dispersing cabarets, motels, pawnshops, billiard halls, taxi dance halls and similar establishments rather than allowing them to concentrate.

The ordinance was immediately challenged and eventually was upheld by the United States Supreme Court. (Young vs American Mini Theaters 96 Supreme Ct. 771, 1976.)

In response to our request, data supplied by the City of Detroit Police Department indicates that the combination of the dispersal ordinance and a related ordinance prohibiting the promotion of pornography have been an effective tool in controlling adult businesses. To date, 18 adult bookstores and 6 adult theaters have been closed. There are 51 such businesses still in operation in Detroit and 38 pending court cases for various ordinance violations.

3. Variations Adopted by Other Cities

The success of the Detroit ordinance has spurred attempts by a number of other cities to adopt similar ordinances. The uses controlled and the types of controls established by these ordinances are summarized in Tables I and II, infra.

While the current study of the effect of "adult entertainment" businesses on neighborhoods in Los Angeles has encompassed all forms of "adult entertainment", the ordinances reviewed and the Detroit Ordinance specifically, are less encompassing in scope. Table I on the following page, lists and reviews a number of ordinances, which regulate various specified adult uses.

TABLE I

TABLE I

Number of Zoning Ordinances Regulating Specified Adult Entertainment Uses

(11 Ordinances Reviewed-1 not adopted)

USE	No. of Cities Regulating*
Adult Theaters	11
Adult Bookstores	9
Mini-theaters and coin operated facilities	5
Massage Parlors (includes "physical culture establishments)	
Modeling Studios/Body Painting	2
Pool/Billiard Halls	2
Topless Entertainment	2
Newsracks	1
Adult Motels	0

* (Numbers have incorporated-where appropriate-uses entitled "physical culture establishments" and "businesses to which persons under 18 could not be admitted".)

The Detroit dispersal ordinance does not regulate massage parlors, nor does it require any existing business to close by amortization. Many of the more recent ordinances include amortization provisions and several of these are currently in varying stages of litigation.

Perhaps the most comprehensive ordinance proposed to date (although not adopted) is that of New York City. The proposed ordinance creates five classes of controlled uses, one of which is entitled "physical culture establishments" and is defined as a general class including any establishment which offers massage or other physical contact by members of the opposite sex. The ordinance would also apply to clubs where the primary activity of such club constitutes one of the five defined classes of adult uses.

The ordinance also provides for a special permit exempting individual adult uses from amortization requirements when the Board of Standards and Appeals makes findings regarding:

1. The effect on adjacent property;

2. Distance to nearest residential district;

3. The concentration that may remain and its effect on the surrounding neighborhood;

4. That retention of the business will not interfere with any program of neighborhood preservation or renewal; or

5. In the case of an adult bookstore or motion picture theater, the Board finds that the harm created by the use is outweighed by its benefits.

Locally, the cities of Bellflower and Norwalk have enacted ordinances requiring adult bookstores and theaters to obtain a conditional use permit. As a part of their study, the City of Bellflower surveyed over 90 cities in Southern California to determine how other cities were controlling adult bookstores. Of the cities which responded to the Bellflower survey, 12 require a conditional use permit for new bookstores. The conditions for obtaining such a permit generally include dispersal and distance requirements based upon the Detroit model. Bellflower also includes parking requirements and the screening of windows to prevent a view of the interior; it prohibits the use of loudspeakers or sound epuipment which can be heard from public or semi-public areas.

Other cities impose such controls as design review, prohibition of obscene material on signs and required identification of the business as "adult". Such controls are a possible alternative or addition to regulation of adult uses by location.

Exterior controls affect the aspects of adult businesses which are most offensive to some citizens. The basis for such controls stems from the recognition of privacy as a constitutional right and the right to be "left alone" as a part of that right.[1] (See Paris Adult Theatre I v Slayton, 93 S.Ct. 2628 1973.)

Table II, following, provides a comparison and description of ordinances from various cities which are regulating "adult entertainment" businesses by dispersal.

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1 The theory that there should be no first amendment bar to sign controls is discussed by Charles Rembar, in "Obscenity--Forget It", Atlantic Monthly, May 1977, pgs. 37-41.

ORDINANCES REGULATING ADULT ENTERTAINMENT USES BY DISPERSAL

CITY	USES CONTROLLED	DISTANCE FROM RESIDENTIAL	DISTANCE FROM CHURCHES SCHOOLS	CONCEN-TRATION	AMORTI-ZATION	APPEALS PROCEDURE	OTHER CONTROLS
Seattle	Adult theaters				yes-90 days		Allow only in BM, CM, & CMT Zones; terminate such uses in all other zones
Denver	Entertainment to which persons under 18 could not be lawfully admitted	500'					
allas	Adult shows or theaters	1000'	1000'				
leveland	Adult bookstores, adult movies and mini-motion picture theaters, pool or billiard halls			1/1000'			
troit	Adult bookstores, adult motion picture theater, mini-motion picture theaters, cabarets, hotels, motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, taxi-dance halls	500'		2/1000'		Waiver by petition of 51% of persons owning/ residing or doing business within 500'	Ordinance prohibiting promotion of pornography

(cont'd.)

CITY	USES CONTROLLED	DISTANCE FROM RESIDENTIAL	DISTANCE FROM CHURCHES SCHOOLS	CONCEN-TRATION	AMORTI-ZATION	APPEALS PROCEDURE	OTHER CONTROLS
New York (not adopted)	Adult bookstores, motion picture theaters, "topless" entertainment facilities, coin-operated entertainment facilities, physical culture establishments	500'		2-3/ 1000'	1 year closest to R-zone first to go	Special permit exception must make findings	.Sign regulat .Applies to c .Adult use al a primary us
Oakland	Adult bookstores, adult movies, peep shows, massage parlors	1000'		1/1000'	1-3 yrs. if no use permit		All require C. permit
Kansas City	Adult bookstores and motion picture theaters, bath houses, massage shops, modeling studios, artists-body painting studios	1000'	1000'			Waiver, if petition of 51% of persons residing or owning property within 1000' of proposed use	Confined to ove lay C-X zone within C-2, 3,
Santa Barbara	Adult newsracks, bookstores, motion picture theaters		1000' (& from parks or recreation facilities)	1/500'			Public displa defined materia prohibited
ellflower	Adult bookstores, theaters or mini-theaters, massage parlors	1000'	1000' (& from parks or playgrounds)	1/1000'			By C.U. all bui ing openings, entries, windo covered or screened to pre vent view into the interior
	Model studios		500'				No loud speaker

CITY	USES CONTROLLED	DISTANCE FROM RESIDENTIAL	DISTANCE FROM CHURCHES SCHOOLS	CONCEN-TRATION	AMORTI-ZATION	APPEALS PROCEDURES	OTHER CONTROLS
Atlantic City	Adult motion picture theaters, mini-theater, adult bookstores	500'		2/1000'		Waiver of 500' from residential with petitions signed by 51% of parties within 500'	Requires public hearing prior to grant of permit Licensing of massage parlors; no treatment of a person of the opposite sex

B. ALTERNATE OR SUPPLEMENTARY FORMS OF REGULATION CURRENTLY AVAILABLE UNDER STATE AND MUNICIPAL LAW

1. Red Light Abatement Procedure

Red light abatement is a mechanism authorized by state law which allows local government to control criminal sexual behavior by controlling the places in which such behavior occurs.

Sec. 11225 of the California Penal Code generally provides that every building or place used for illegal gambling, lewdness, assignation, or prostitution, or where such acts occur, is a nuisance which shall be enjoined, abated, and prevented. There are three basic steps involved in the City's application of the Red Light Abatement Procedures:

(a) A complaint is filed by the City Attorney based upon the declarations of police officers of instances of prostitution taking place on the premises.

(b) The City attempts to obtain a preliminary injunction to shut down the business until completion of the scheduled trial. If the City succeeds, the premises may only be re-opened as a legitimate business until the time of the trial.

(c) At the trial, the burden is on the City to prove that prohibited acts occurred on the premises. The remedy may be closure of the premises for all purposes for one year, placing the building in the custody of the court, or an order preventing the use of the premises for prostitution forever.

Complaints may be filed by citizens, and Sec. 11228 of the Code provides that in Red Light Abatement Actions "evidence of the general reputation of a place is admissible for the purpose of proving the existence of a nuisance".

This method has been used successfully by the City to abate adult entertainment establishments in Hollywood along Western Avenue. Although Red Light Abatement is directed at regulating sites, a Red Light Abatement conviction can affect the ability of an owner or operator to obtain a permit for a similar business at another site (see permit requirements supra). Due to the requirement of a court proceeding, however, this method of control is both time consuming and expensive.

2. Police Permit Requirements

Section 103 of the Los Angeles Municipal Code provides for the regulation and control of a variety of businesses by permits issued by the Board of Police Commissioners. Permittees are subject to such additional requirements as may be imposed by law or by the rules and regulations of the Board.

Those businesses for which the City of Los Angeles requires a police permit and which may also be oriented towards adult entertainment include:

- Arcades (Sec. 103.101)
- Bath and Massage (103.205)
- Cafe Entertainment and Shows (103.102)
- Dancing Academies, Clubs, Halls (103.105, 106, 106.1)
- Motion Picture Shows (103.108)

In some cases, the specific regulations applied to a business, if enforced, preclude adult entertainment activities as a part of, the operation of the business, with revocation of the operating permit an available remedy for violation of the regulation.

The most detailed regulations are applied to cafe entertainment (Sec. 103.102 LAMC) and are summarized as follows:

a. Businesses Subject to the Regulations

Operation of cafe entertainment or show for profit, and the operation of public places where food or beverages are sold or given away and cafe entertainment, shows, still or motion pictures are furnished, allowed or shown. The regulation does not apply to bands or orchestras providing music for dancing.

b. Cafe Entertainment Defined

"Every form of live entertainment, music solo band or orchestra, act, play, burlesque show, revue, pantomime, scene, song or dance act". The presence of any waitress, hostess, female attendant or female patron or guest attired in a costume of clothing that exposes to public view any portion of either breast at or below the areola is included with the purview of the ordinance.

c. Summary of Activities Prohibited

Allowing any person for compensation or not, or while acting as an entertainer or participating in any live act or demonstration to:

(1) Expose his or her genitals, pubic hair, buttocks or any portion of the female breast at or below the areola.

(2) Wear, use, or employ, or permit, procure, counsel or assist another person to wear use or employ, any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum or any portion of the female breast at or below the areola.

The above provisions do not apply to a theatrical performance in a theater, concert hall or similar establishment which is primarily devoted to theatrical performances.

The permit may also be revoked for conviction of the permittee, his employee, agent or any person associated with permittee as partner, director, officer, stockholder, associate or manager of:

(1) An offense involving the presentation, exhibition or performance of an obscene production, motion picture or play;

(2) An offense involving lewd conduct;

(3) An offense involving use of force and violence upon the person or another;

(4) An offense involving misconduct with children;

(5) An offense involving maintenance of a nuisance in connection with the same or similar business operation; or, if the permittee has allowed or permitted acts of sexual misconduct to be committed within the licensed premise.

Massage businesses have traditionally been regulated by licensing. The latest changes in the massage regulations became effective in November of 1976. The application for a permit now requires:

(1) detailed information regarding the applicant;

(2) name, address of the owner and lessor of the property upon or in which the business is to be conducted, and a copy of the lease or rental agreement;

(3) requirement of a public hearing prior to issuance of a permit for the operation of a massage business.

Operating requirements for massage businesses include:

- a permit for each massage technician;
- regulation of the hours of operation;
- posted list of available services and their cost;
- a record of each treatment, the name and address of the patron, name of employee and type of treatment administered.

So-called "private" clubs or "consenting adult clubs" which have ostensibly been formed as an alternative to massage parlors had until recently been regulated via the requirement of a social club permit. In June 1977, however, the ordinance establishing such requirement was declared unconstitutional by a Los Angeles Muncipal Court due to unreasonable restrictions on the freedom of association. To date, it is unknown whether the City will appeal the ruling or amend the ordinance.

C. OTHER REGULATION OF ADULT ENTERTAINMENT BUSINESSES IN LOS ANGELES

Regulation of adult entertainment businesses has a long history in Los Angeles. In 1915 the "prevalence of sex evils arising out of massage parlors" caused the City Council then to enact Section 27.03 (L.A.M.C.) as "a safeguard against the deterioration of the social life of the community."[2] The ordinance provided:

> "(a) It shall be unlawful for any person to administer, for hire or reward, to any person of the opposite sex, any massage, any alcohol rub or similar treatment, any fomentation, any bath or electric or magnetic treatment, nor shall any person cause or permit in or about his place or business or in connection with his business, any agent, employee, or servant or any other person under his control or supervision, to administer any such treatment to any person of the opposite sex."[3].

This provision remained in the Code, in one form or another, until a similar Los Angeles County ordinance was declared invalid in 1972 due to the preemption of the criminal aspects of sexual activity by the State.[4]

In reaching its conclusion, the court referred to the discussion of the Los Angeles City ordinance in In Re Maki. This 1943 case upheld the constitutional validity of the ordinance, and, according to the court, established the primary purpose of such ordinance as the limiting of criminal sexual activity.

The late 1960's and early 1970's brought a proliferation of nude bars and sexual scam joints in the Los Angeles area. In 1969, the Cafe Entertainment regulations (Section 103.102 Los Angeles Business Code) was modified to include strict controls on nudity (see discussion infra).

A variety of Council motions were made to control other types of "adult entertainment" such as arcades, massage parlors, and newsracks. Many of these were initiated due to substantial citizen complaints, and some resulted in final ordinances. (See Table III pages 19a to 19d.)

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[2] In Re Maki 56 CA 2d. 635, 1943.

[3] Section 27.03.1 Los Angeles Municipal Code, 1938.

[4] Lancaster v Municipal Court 6 C 3d 805, 1972.

Beginning in 1974, several Council motions were made generally calling for an investigation and preparation of an ordinance regulating adult theaters and bookstores. The advice of the City Attorney was sought, and at the suggestion of that Office, action was delayed pending the Supreme Court decision regarding the Detroit Ordinance. That decision was handed down in June of 1976. On July 13, 1976, a Council motion was introduced by Councilman Wilkinson requesting a study of concentrations of adult entertainment similar to that of Detroit.

Table III provides a generalized summary of the major Council files and actions relating to adult entertainment.

While not part of this study, a recently enacted ordinance controlling on-site sale of alcoholic beverages should be recognized as an attempt to control another adult-type use. Effective March 1, 1977, the Los Angeles Muncipal Code was amended to require a conditional use permit for the on-site sale of alcoholic beverages. (Council File No. 70-200, City Plan Case No. 22878). Although aimed at the regulation of anti-social activities in all establishments serving alcoholic beverages, the subject ordinance would, of course, also have a "spillover" effect with regard to those businesses which have adult entertainment as well as alcoholic beverages.

Generally, the ordinance would, in all cases, require issuance of a conditional use permit for any business selling alcoholic beverages for on-site consumption, rather than the previous practice of permitting them as a matter of right in certain zones. The advantage of the new procedure is that as a prerequisite of approval of an individual application, there must be a public hearing to determine whether the proposed use will have a detrimental effect upon nearby properties and the neighborhood in which it is being proposed. In the long run, the ordinance may prove to be an effective device to regulate uses (dispensing alcoholic beverages) which tend to have a deteriorating effect on an area, some of which may, coincidentally, also be adult entertainment businesses.

TABLE III

CITY COUNCIL FILES RELATING TO ADULT ENTERTAINMENT

DATE	FILE NO.	SPONSORS	RECOMMENDATION	DISPOSITION
3/23/70		North Hollywood Chamber of Commerce	That topless and bottomless bars and pornographic film and literature be confined to the M-3 zone.	Disapproved by the Planning Commission.
3/71	C.F. 72-374	Councilman Snyder	Effort to control bath or massage parlors by modifying the definition of "physical therapy" in state law. And, City support for legislation that would make Physical Therapists, Chiropractors responsible for activities in their offices and prohibit treatment by unlicensed assistants unless the license holder is in the room.	Introduction of AB 823 modifying the definition of physical therapy - Died in Committee November 1972.
			Recommend modification of Board of Chiropractors Rules and Regulations.	State Board of Chiropractic Examiners adopted "Board Rule 316" which makes chiropractors responsible for the conduct of employee in their place of practice, and specifically prohibits sexual acts or erotic behavior involving patients patrons or customers.

TABLE III (cont'd.)

DATE	FILE NO.	SPONSORS	RECOMMENDATION	DISPOSITION
2/74	C.F. 72-374 'S-1 S-2	Stevenson and Wilkinson	Study of the need and feasibility of regulating hours of operation, minimum requirement for practitioners - and health and safety conditions in massage parlors.	1/9/75 Board of Police Commissioners approved ordinance and adopted agreement with County to provide inspection of massage parlors.

TABLE III (cont'd.)

DATE	FILE NO.	SPONSOR	RECOMMENDATION	DISPOSITION
10/18/74	C.F. 74-4521	Snyder, Robert Stevenson, Ferraro	Provide by Ordinance that permits may not be granted to operate motion picture theaters which show "adult" films or bookstores which sell printed material which may not be sold to minors at locations which are within 1,500 feet of the nearest school, playground or church.	Police and Fire and Civil Defense Committee referred prepared ordinance to Planning Committee.
/21/75	C.F. 74-1969		Police permit requirement for arcades becomes effective. Regulates 5 or more coin or slug operated machines. Revocation for non-compliance with health, zoning, fire requirements, obscenity convictions. Regulates hours of operation.	Regulation subsequently found unconstitutional by the Appellate Department of Superior Court, L.A. County.
/27/76		City Planning Commission	Planning Department report to City Planning Commission, at their request, regarding proposed regulation of massage parlors and adult bookstores in Los Angeles.	No action taken.
/9/76	C.F. 73-374 S-1A		Council adopts ordinance requiring permits to operate a massage business, act as a massage technician and gives a massage for compensation effective 4/17/76.	Ordinance now in effect.
'23/76	C.F. 74-4521 S-2	Wilkinson and Stevenson	Require public hearings prior to opening of an adult bookstore which has for sale sexually explicit material; limit the hours of operation.	Referred to Police, Fire and Civil Defense.

TABLE III (cont'd.)

DATE	FILE NO.	SPONSOR	RECOMMENDATION	DISPOSITION
6/25/76	C.F. 74-4521	Wilkinson, Gibson, Nowell, Braude, Russell, Wachs, Stevenson, Bernardi, Farrell, Lorenzen	Request City Attorney to draft an ordinance following Young vs. American Mini Theaters guidelines.	Referred to Police, Fire and Civil Defense Committees.
6/28/76	C.F. 74-4521	Stevenson, Wachs	Preparation of zoning ordinance to prohibit sexual scam joints, adult bookstores and theaters, nude live entertainment within 500' from a private dwelling, church, school, public building, park or recreation center, of within 1000' of each other, to be retroactive, priority to the oldest establishments.	Referred to Police, Fire and Civil Defense Committees.
7/13/76	C.F. 74-4521	Wilkinson	Instruct the City Planning Department to prepare a report to the City Council regarding the extent of any possible degradation of neighborhoods in Los Angeles due to concentration of adult entertainment establishments.	Consolidation of above cases. After approval of full Council assigned to Planning Department with the cooperation of other involved agencies.
3/15/77	C.F. 74-1969		Police, Fire and Civil Defense Committee recommendation to amend Sections 103.101, 103.101.1 of the Municipal Code - (A revised ordinance to regulate arcades).	Adopted by full Council.
/5/77	C.F. 77-860 S-49	File not available for review.	Support state legislation providing specific penalties for use of minors for pornography.	
/11/77	C.F. 77-1997	File not available for review.	Regarding prostitution enforcement laws.	

IV.

METHODOLOGY AND ANALYSIS

Methodology

In complying with the City Council's instructions, the Department has utilized various available data sources, including property assessment data, U. S. Census data, and obtained other information germane to the subject in an effort to determine, on an empirical basis, the effects (if any) of adult entertainment facilities on surrounding business and other properties. The Department also reviewed sales data of commercial and residential property in areas containing concentrations of adult entertainment businesses and in "control areas" containing no such concentrations. The staff also attempted to secure information on the sales volume of commmercial properties, but was unable to obtain this information.

It should be emphasized that, in conducting this study, every effort was made by the Department to preclude the introduction of subjective judgment or other bias, except where the opinions of other individuals or groups were specifically solicited.* It was the Department's intent to base any conclusions entirely on relevant data and other factual information which became available during the course of conducting the study.

The procedure employed by the Department in conducting this study involved the following areas of emphasis:

1. A measure of the change from 1970-76 in assessed "market value" of land and improvements for the property occupied by and within an appropriate radius of five known "clusters" (nodes) of "adult entertainment" businesses. An identical measure of four "control areas" without concentrations of adult entertainment businesses was also made to determine if a significant difference in the rate of change in assessment values occurred in such areas between 1970 and 1976. Comparisons were also made with the entire community in which the concentration nodes were located.

2. An analysis of responses received from a mail survey questionnaire conducted by the Planning Department;

* Expert opinions were requested from realtors, realty boards, appraisers and lenders through letters and questionnaires. The Department also sent letters to local members of the American Sociological Association requesting their assistance in this study. Their replies were limited in number and not significant in terms of this study.

3. Review of available data from the U.S. censuses of 1960 and 1970, including the results of a "cluster analysis" and description of Hollywood based on such analysis prepared by the City's Community Analysis Bureau;

4. An analysis of verbal and written testimony obtained at two public meetings on this subject conducted on April 27 and 28, 1977 by representatives of the City Planning Commission;

5. A review of various approaches to the regulation of "adult entertainment" businesses, including legislation enacted by other jurisdictions;

6. An analysis of alternate forms of control, including existing Municipal Code provisions relative to this general subject;

7. A discussion of earlier efforts of the City to control adult entertainment in Los Angeles; and

8. A presentation of the Los Angeles City Police Department's report dealing with crime statistics and their relation to "adult entertainment" businesses in Hollywood.

9. The actual "last sales price" of commercial and residential properties in areas containing concentrations of "adult entertainment" businesses were compared with the assessed values of property in such areas. The results were then compared with "control areas" containing no concentration of such businesses. (It was found that the actual sales prices tended to parallel assessed values and that in other cases the comparison was inconclusive. No further discussion of this aspect of the study is contained herein.)

10. In an attempt to determine any possible effects of "adult entertainment establishments" on business sales volume, the Department reviewed sales data from a Dun and Bradstreet computer tape file for the years 1970 and 1976. However, this source of date could not be used since it did not contain directly comparable information for the two years indicated. (A substantial change in the number of member firms listed apparently occurred after 1970.) In addition, the Department requested sales information from the City Clerk's Business License File. The City Clerk advised that the generation of the information requested would require 100 man-days of work; consequently their information could not be obtained within the time constraints for completion of the study.

Items 5, 6, and 7, above, are the subject of Section III of this report, entitled "Methods Currently Used to Regulate Adult Entertainment Business". The Police Department's report is discussed herein as Section V. The Planning Department's analysis of topics 1 through 4 is described in detail, below.

A. CHANGES IN ASSESSED VALUATION BETWEEN 1970-76 IN FIVE SEPARATE AREAS CONTAINING HIGH CONCENTRATIONS OF ADULT ENTERTAINMENT BUSINESSES

In order to determine if there has been a significant change in assessed property values which may have been influenced by the proliferation of "adult entertainment" businesses, the Department has calculated the change in the assessed value of land and improvements for properties occupied by, and located within, a 1,000 to 1,800 foot radius of known concentrations of adult entertainment businesses. Five such areas were selected for analysis, as described below. The year 1970 was selected as the base period because of the availability of data for that year, and since that point in time corresponds approximately with the beginning of the proliferation of adult entertainment businesses in Los Angeles. The percentage change in the assessed "market" value of land and improvements for commercial and residential properties was calculated for the 1970 base year and for 1976.

Similar calculations covering the same time period were also prepared for "control areas" (containing no concentration of adult entertainment businesses) but which were similar, in terms of zoning and land use, or which were located in geographical proximity to the study area nodes. Four such control areas were selected.

1. Study and Control Areas

On the basis of field invesigations and other available data, the Department determined that there are five different areas within the City suitable for analysis, each containing a relatively high concentration of adult entertainment establishments. As shown in Exhibits "A" and "B" on the following pages, three of these concentrations (or "nodes" of activity) are located in Hollywood; one is in Studio City; and one is in North Hollywood. In each case, the focal point of the area selected for analysis was the intersection of two major streets, with the adult entertainment businesses located along the commercially zoned frontage of one or both of the streets forming the intersection. In four of the five areas selected, residentially zoned and developed properties are situated not farther than one-half block from the commercially-zoned frontage. (One node in Hollywood is entirely surrounded by commercial properties.)

EXHIBIT A

ADULT ENTERTAINMENT STUDY
BY CENSUS TRACTS

HOLLYWOOD AREA

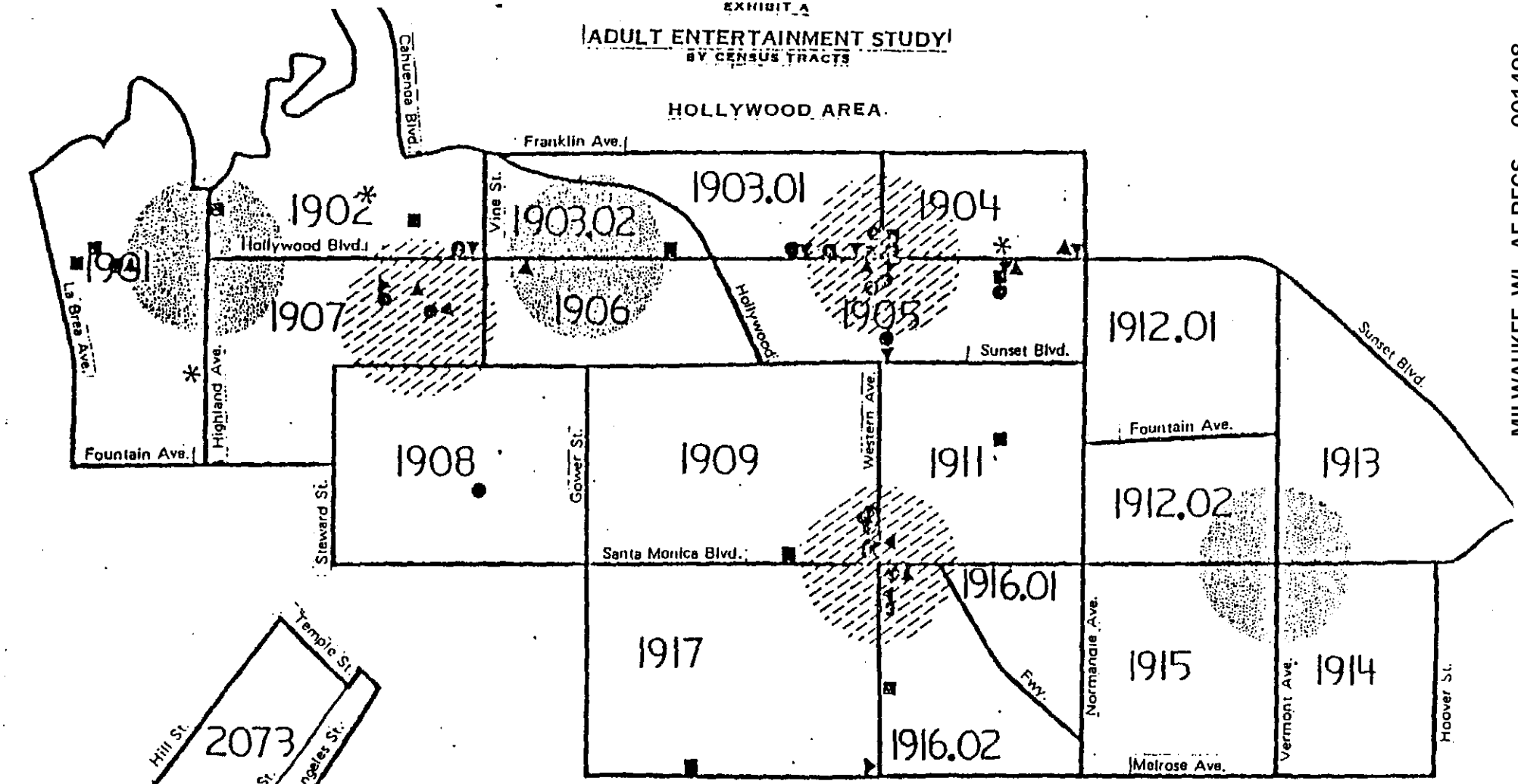
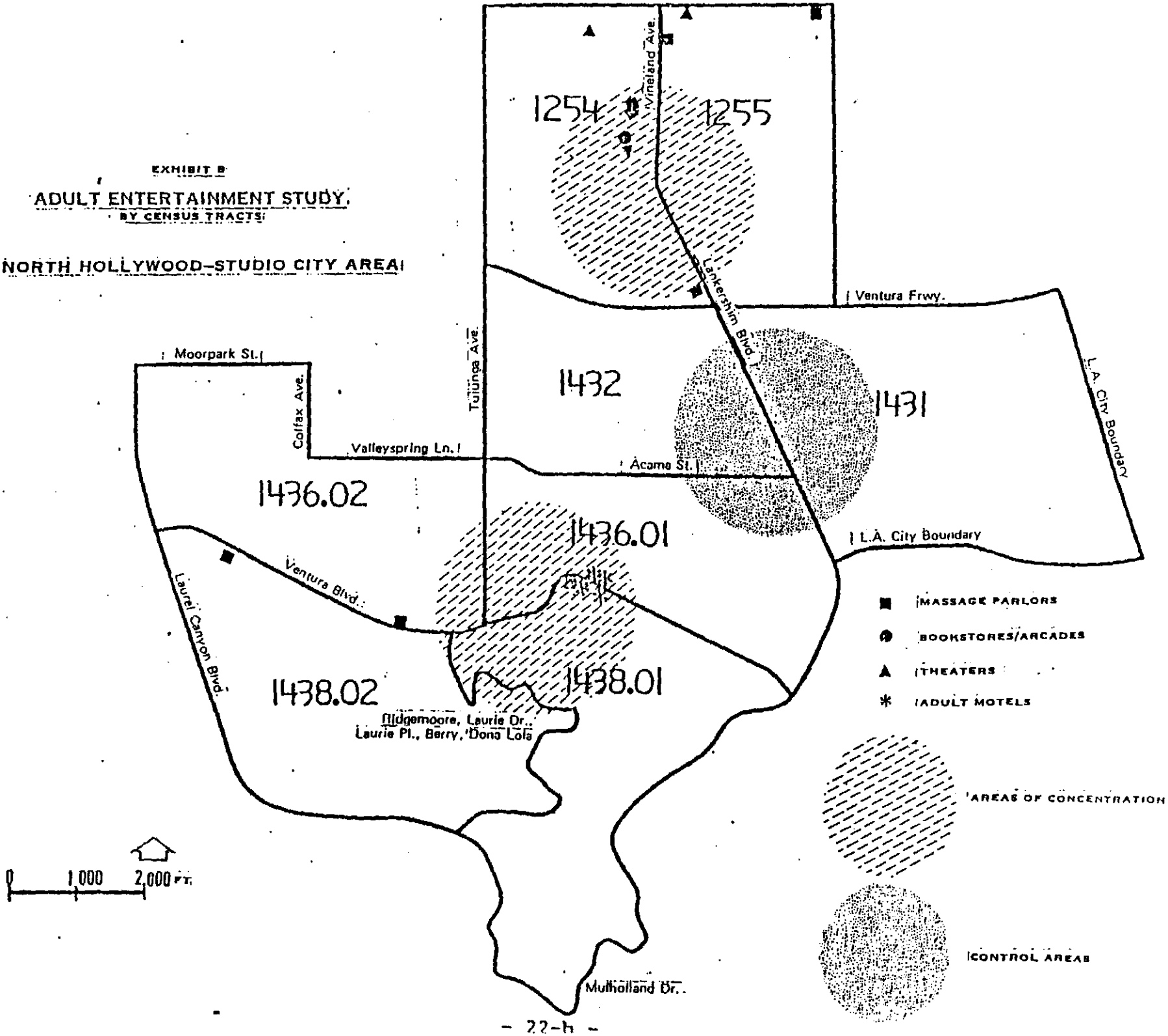


EXHIBIT B

ADULT ENTERTAINMENT STUDY

BY CENSUS TRACTS

NORTH HOLLYWOOD–STUDIO CITY AREA



Although Main Street in downtown Los Angeles contains a relatively high concentration of sex-oriented businesses (primarily theaters, arcades and bookstores), this area was not selected for analysis since no residential properties are located in proximity thereto. In addition, Main Street has traditionally contained burlesque theaters, arcades, bars and similar types of establishments, and there has been no significant change in this generalized pattern of land use during the past ten years.

In the Hollywood area, the focal points of concentration are at the following three intersections: Santa Monica Boulevard and Western Avenue (containing 12 such businesses); Hollywood Boulevard and Western Avenue (9 such businesses); and Selmna Avenue and Cahauenga Boulevard (containing 7 such businesses). In Studio City, the focal point is east of the main intersection of Tujunga Avenue and Vineland Avenue (at Eureka Drive) which contains six adult entertainment businesses; and in North Hollywood the focus of concentration is at Lankershim Boulevard and Vineland Avenue (containing 4 such businesses)

In the Hollywood area, property within an approximate 1,000-foot radius of the above named intesections was included for purposes of analysis. In Studio City it was appropriate to include those properties situated within an approximate 1,500 foot radius of the intersection of Eureka Drive; in North Hollywood, property within an approximate 1,500 foot radius of the intersection of Lankershim Boulevard and Vineland Avenue was selected for analysis.

As also shown in Exhibit "A", three separate "control areas" were established in Hollywood, each originating at the intersection of two major streets and also encompassing all property within an approximate 1,000-foot radius of the street intersection. Control areas were established at: Santa Monica Boulevard and Vermont Avenue; Hollywood Boulevard and Highland Avenue; and Hollywood Boulevard and Gower Street. In the San Fernando Valley, Exhibit "B" indicates one control area, centered at the intersection of Lankershim Boulevard and Whipple Street, and encompassing property within a radius of approximately 1,500 feet of that intesection, relates to the two nodes of concentration in Studio City and North Hollywood. None of the control areas has adult entertainment businesses within its boundaries, with the exception of the area surrounding the intersection of Hollywood Boulevard and Gower Street which contains one such business.

Table IV, indicates the percentage change in assessed land and improvement value from July 1970 to July 1976 for the commercial and residential property encompassed by the applicable radius surrounding each of the five nodes of concentration, together with their corresponding control areas. For purposes of comparison, the same data is shown for the entire City and for the Community within which the study areas are located. Since concentrations of adult entertainment businesses could have a particular effect on the value of other business properties in an area, a separate tabulation is also shown for only commercially zoned land within each study and control area. (Table IV-A.)

As indicated in Table IV, the 1970-76 percentage change in total assessed "market" valuation of commercially and residentially zoned property (land plus improvements) increased in all three areas in Hollywood containing concentrations of adult entertainment businesses. However, there was some variance in the magnitude of the increase. Changes in the three study area nodes were 2.79, 8.71, and 3.41 percent; compared with increases in the three corresponding control area of 12.53, 1.94, and 5.09 percent, respectively.

The study area node located at Santa Monica Boulevard and Western Avenue increased by 2.79 percent, compared with a substantially greater increase of 12.53 percent in the "control area" associated with that node. Total assessed value within the study area surrounding the intersection of Selma Avenue and Cahuenga Boulevard increased by 3.41 percent while the associated control area increased by the slightly greater amount of 5.09 percent. In direct contrast to this pattern, however, the Hollywood and Western node registered an 8.71 percent increase, while its corresponding control area increased by only 1.94 percent.

TABLE IV

1970-76 Changes in Assessed Valuation of Commercial and Residential Land and Improvements for Five Areas Containing Concentration of Adult Entertainment Businesses, as Compared With "Control" Areas, Surrounding Community, and City of Los Angeles.

Property Within Approximate 1,000 to 1,800 Foot Radius of Intersection of Streets Shown:	No. of Entertainment "Sites" 1969-70	June 1977	Percentage Change in Assessed Valuation 1970-76 Land	Improvements	Total
Santa Monica Boulevard and Western Avenue (Hollywood)	6	12	-0.22	5.81	2.79
Santa Monica Boulevard and Vermont Avenue (Hollywood Control Area)	N.A.	0	-4.84	32.66	12.53
Hollywood Boulevard and Western Avenue (Hollywood)	6	9	3.51	13.21	8.71
Hollywood Boulevard and Highland Avenue (Hollywood Control Area)	N.A.	0	19.32	-7.83	1.94
Selma Avenue and Cahuenga Boulevard (Hollywood)	4	7	21.12	-12.54	3.41
Hollywood Boulevard and Gower Street (Hollywood Control Area)	N.A.	1	17.76	-8.61	5.09
Hollywood Community	N.A.	31	21.20	32.72	27.00
City of Los Angeles	N.A.	N.A.	35.08	38.92	37.15
Tujunga Avenue and Ventura Boulevard (Studio City)	1	6	67.11	63.10	64.93
Lankershim Boulevard and Vineland Avenue (North Hollywood)	2	4	15.88	9.65	12.61

TABLE IV (cont'd.)

Property Within Approximate 1,000 to 1,800 Foot Radius of Intersection of Streets Shown:	No. of Entertainment "Sites" 1969-70	No. of Entertainment "Sites" June 1977	Percentage Change in Assessed Valuation 1970-76 Land	Improvements	Total
Lankershim Boulevard and Whipple Street (Valley Control Area)	N.A.	0	62.28	27.66	42.76
Sherman Oaks-Studio City Community	N.A.	10	69.25	60.44	64.33
North Hollywood Community	N.A.	5	28.59	33.15	31.07
City of Los Angeles	N.A.	212	35.08	38.92	37.15

TABLE IV-A

1970-76 Changes in Assessed Valuation of Commercially Zoned Land and Improvements for Five Areas Containing Concentration of Adult Entertainment Businesses as Compared With Commercially Zoned Land in "Control Areas", Surrounding Community, and City of Los Angeles.

Property Within Approximate 1,000 to 1,800 Foot Radius of Intersection of Streets Shown:	No. of Entertainment "Sites" 1969-70	June 1977	Percentage Change in Assessed Valuation 1970-76 Land	Improvements	Total
Santa Monica Boulevard and Western Avenue (Hollywood)	6	12	-0.47	8.53	3.4
Santa Monica Boulevard and Vermont Avenue (Hollywood Control Area)	N.A.	0	-12.53	4.13	-6.38
Hollywood Boulevard and Western Avenue (Hollywood)	6	9	-2.52	-0.45	-1.77
Hollywood Boulevard and Highland Avenue (Hollywood Control Area)	N.A.	0	25.01	-11.19	4.06
Selma Avenue and Cahuenga Boulevard (Hollywood)	4	7	21.93	-18.79	0.54
Hollywood Boulevard and Gower Street (Hollywood Control Area)	N.A.	0	17.07	-17.22	1.09
Hollywood Community	N.A.	31	13.43	-1.51	6.70
City of Los Angeles	N.A.	212	12.27	13.52	12.93
Tujunga Avenue and Ventura Boulevard (Studio City)	1	6	19.24	25.83	21.9
Lankershim Boulevard and Vineland Avenue (North Hollywood)	2	4	-0.76	3.91	1.92

TABLE IV-A (cont'd.)

Property Within Approximate 1,000 to 1,800 Foot Radius of Intersection of Streets Shown:	No. of Entertainment "Sites" 1969-70	No. of Entertainment "Sites" June 1977	Percentage Change in Assessed Valuation 1970-76 Land	Improvements	Total
Lankershim Boulevard and Whipple Street (Valley Control Area)	N.A.	0	82.28	-6.35	27.16
Studio City Community	N.A.	10	30.95	13.01	22.02
North Hollywood Community	N.A.	5	2.74	7.56	5.21
City of Los Angeles	N.A.	212	12.27	13.52	12.93

Sources/Notes - Tables IV and IV-A:

Actual assessment data from which percentage changes in Tables IV and IV-A were derived is shown in Appendix A. Assessment data was obtained from the City's Land Use Planning and Management System (LUPAMS) computer file. Data is as of July 1 for years shown. "Entertainment Site" means adult theatre, arcade, massage parlor, nude dancing establishment or similar use. Number of "entertainment sites" for 1969-70 was obtained from L. A. Police Department; for June 1977 from L. A. Police Department and L. A. City Planning Department. N.A. means not available. Property included within areas described is shown in Exhibits A and B.

The percentage increase in assessed values within the three study areas, as well as the control areas, was considerably less in each case than percentage gains registered by the Hollywood Community or the City as a whole.

In the case of the study area nodes located in the San Fernando Valley, the pattern appears to be somewhat more spurious. The study area node containing adult entertainment businesses located in Studio City (centered east of the intersection of Tujunga Avenue and Ventura Boulevard) increased by 64.93 percent--the largest increase of any of the areas analyzed. In direct contrast, the "adult entertainment node" located at Lankershim Boulevard and Vineland Avenue increased by only 12.61 percent. The one "control area" associated with these two San Fernando Valley nodes increased by 42.76 percent -- a substantially greater gain than the North Hollywood node, but 22 percent less than the Studio City node. (Whether the sharp percentage increase shown for the Studio City node was the direct result of a recent reassessment cannot be readily determined.)

The increase in assessed value within the Studio City study area was virtually the same as that of the entire Sherman Oaks-Studio City Community but almost twice the percentage gain for commercial and residential properties in the entire City. The North Hollywood study area increased by a considerably lower percentage than the North Hollywood Community and the City as a whole.

With regard to commercial properties considered separately, Table IV-A reveals that the percentage change in assessed values of land and improvements combined was generally lower in all study areas than in their corresponding control areas. One notable exception, however, is the Santa Monica Boulevard and Western Avenue node which increased by 3.4 percent, while its corresponding control area (Santa Monica and Vermont) decreased by 6.38 percent. In Hollywood the change in assessed values of all study and control areas was less than in the entire Hollywood Community. In the San Fernando Valley the two study areas both increased less than the entire communities within which they are situated.

2. Conclusion - Changes in Assessed Valuation

On the basis of the foregoing, there would seem to be some basis to conclude that the assessed valuation of property within the study areas containing concentrations of adult entertainment businesses have generally tended to increase to lesser degree than similar areas without such concentrations. However, in the staff's opinion, there would appear to be insufficient evidence to support the contention that concentrations of sex oriented businesses have been the primary cause of these patterns of change in

assessed valuations between 1970 and 1976. However, responses to the Department's mail questionnaires from real estate representatives and appraisers have indicated that in their opinion, concentrations of adult entertainment businesses have, in some cases, had a direct negative impact on property values.

B. PUBLIC MEETINGS

Two public meetings were conducted by representatives of the City Planning Commission in order to receive citizen input regarding the effects, if any, of contentrations of "adult entertainment" establishments on nearby properties and surrounding neighborhoods. Notice of the hearings was published in local newspapers, aired on radio, mailed to owners of commercial and multiple residential property within 500 ft. radius of the study areas and also to persons who had previously responded to the Department's questionnaire.

The first meeting was held in Hollywood on April 27, 1977 at Le Conte Junior High School. The second meeting was conducted in Northridge on April 28, 1977 at Northridge Junior High School. Both meetings were conducted by Planning Commission President Suzette Neiman and Planning Commissioner Daniel Garcia, with Deputy City Attorney Chris Funk also in attendance..

Questionnaires were available at the meetings for the convenience of those wishing to submit their comments in writing.

Attendance was approximately 200 persons at the Hollywood meeting and 300 persons at the Northridge meeting. A combined total of 60 persons addressed the Commission. The following is a summary of the comments received by the Commission. (Tape recordings of the hearings are available for review under City Plan Case Number 26475, in the Planning Commission Office, Room 561-K, Los Angeles, City Hall, telephone (213) 485-5071.)

The most prevalent type of comment at the Hollywood meeting was an expression of fear of walking in areas where "adult entertainment" and related business are concentrated. This concern was expressed both by parents, reluctant to allow their children to be exposed to offensive signs and wares, and by women and elderly persons who feared walking in the areas either in the day or evening, because of the incidence of crime in the area. Specific instances of solicitation and other crimes were recited. Some proprietors testified that they felt their businesses have suffered, due to fear on the part of their customers. Other common statements concerned:

- Physical or economic deterioration of the area resulting from the influx of adult businesses.
- An increase in street crime.
- Offensive signs and displays.
- A need to use existing enforcement tools, such as "red light abatement" to control "adult entertainment" businesses.

- Representatives of La Cienega art gallery proprietors expressed concern over the recent establishment of an adult theater in the area and its incompatibility with gallery use.

A representative of the "Pussycat Theaters" organization informed the Commission that a survey taken by the theater operators indicated that the majority of patrons were middle class, that most were registered voters, and that many were married and had college educations. It was stated that a large number of the patrons were found to reside within a few miles of their theaters. The representative of this theater chain expressed concern at the "lumping" of all adult entertainment businesses into one classification. He felt that in terms of aesthetics, clientele, and effect upon the neighborhood, the theaters were not in the same classification as some other types of adult businesses. (The Commission requested the written documentation of the survey; however, it has not been received to date.)

Several speakers at the Northridge meeting expressed concern that the City even felt it needed to request their opinion on such a subject. They felt that their displeasure over the distribution and display of pornographic materials should be obvious. Citizens also indicated how they had been responsible for the closing of certain establishments in the San Fernando Valley by picketing and other means. Some speakers indicated that they were disturbed by the availability and display of obscene material in drug stores and supermarkets.

The following is a summary listing of specific relevant comments from the two meetings:

Hollywood Meeting (April 27, 1977)

- It was alleged that organized crime is in the sex service business and that this is a $64 million local business.

- Hollywood and particularly Hollywood Boulevard was once a cultural center; now there is a different class of people. This is a degeneration of Hollywood and Hollywood Boulevard.

- In Hollywood, due to fear for safety, people walk around in groups, not alone or as couples.

- Zoning is not the ultimate response to obscenity: there are public nuisance laws, red light abatement statutes, etc.

- There was concern about the effects on children; parents in Hollywood indicated that they did not allow their children to walk unescorted: there are too many muggings and attacks.

- There are problems brought on by the changing population of the area: street fights, acts of mischief and minor property damages have resulted.

- A local minister indicated concern for the elderly, and that children from 4 to 7 years old cannot ride their bikes without being accosted; he also indicated there had been 23 arrests for prostitution near a local elementary school; he further stated that residents have to go to other areas to shop.

- A representative of a local synagogue stated that the elderly were afraid to walk to religious services and that car pooling had been established.

- A representative of the Hollywood Businessmen's Association advised that 50 percent of the sex crimes reported (in the City) were in the Hollywood area; that since the Police have closed some sex establishments crime has dropped; that adult entertainment businesses have contributed to a deteriorating condition in Hollywood; that there is a 100 percent turnover in school attendance; that the business license ordinance should be modified to require an environmental impact report and proper sign controls for new establishments and that notice should be given to persons within one-half mile; he also reiterated that traditional businesses were leaving the area.

- It was indicated that property values had gone down; Vine and Selma was valued at $12.50 per sq. ft. years ago, but recently it was worth only $8.50 per sq. ft.

Northridge Meeting (April 28, 1977)

- A representative of the North Hollywood Chamber of Commerce indicated that adult entertainment businesses were an economic and social blight; that the Police Commission was no help; that they had proposed the M3 Zone for these uses; that we need more police and should make greater use of red light abatement; that the Alcoholic Beverage Control Department should do more.

- Claims were made that the Pussycat Theater in North Hollywood was a dangerous environment to women and children; that in the recent past 2 teenage girls had been accosted and a woman had been attacked and had to jump from a car.

- A beauty shop owner near a Pussycat Theater indicated she no longer stayed open in the evening because her customers were afraid.

- Adult entertainment businesses should be required to rent space in "Class A" buildings.

- Various persons objected to newsracks, obscene material, problems of congestion and ingress and egress.

- The Miller vs. California court case was discussed: it was contended that this case established that "a community can set its own standards".

- Questions were posed as to whether economic and financial impact should be facts needed to develop an ordinance to control adult entertainment.

- Claims were made that adult entertainment business bring crimes and violence to the area.

- A speaker stated that both the Boston and the Detroit ordinances are unacceptable. "You cannot control pornography by zoning", and opposition to the zoning approach to obscenity was expressed.

- "California is the pornographic capital of the world."

- People are offended by pornographic material in department stores, drug stores, supermarkets, etc. The recent Los Angeles County newsrack ordinance was discussed.

- One person posed the question "why don't we have an Environmental Impact Report for pornographic businesses?"

- Church representatives and a teacher at the Christian School were concerned about their members and children being exposed to pornographic advertising displayed at the Lankershim Theater and Pussycat Theater. They are afraid to let their children out on the streets.

- It was stated that "we should use civil, public nuisance and red light abatement to control adult entertainment businesses."

Conclusion

In summary, the overwhelming majority of speakers felt that the concentration of "adult entertainment" businesses in their neighborhood was detrimental, either physically by creating blight or economically by decreasing patronage of traditional businesses; or socially by attracting crime. As a result of increased crime, nearby residents have become fearful and have been forced to constrain their customary living habits in the community.

Although the testimony obtained at the public hearings would from a subjective point of view, substantiate the conclusion that "adult entertainment" businesses have a deleterious effect on the surrounding community, the staff is of the opinion that legitimate questions may have been posed by the Pussycat Theater representative regarding a single classification for all "adult entertainment" uses. There would appear to be some basis to support the contention that certain types of such uses are more "objectionable" than others, and that negative effects of a particular type of business might be minimized, depending on how the business is operated and advertised.

C. SURVEY QUESTIONNAIRE CONDUCTED BY DEPARTMENT OF CITY PLANNING

1. Description of Survey

In order to determine additional factual data relating to the subject, and to seek the comments and opinions of property owners, businessmen, realtors, real estate boards, real estate appraisers, representatives of banks, Chambers of Commerce, and others, the Department conducted a mail survey. Two questionnaires were developed. One was designed primarily for businessmen and residential property owners and is hereinafter referred to as the General Questionnaire. The second was designed for realtors, real estate appraisers and lenders and is hereinafter referred to as the Appraiser Questionnaire. A copy of the two questionnaires is contained in the Appendix. The completed questionnaires, together with other letters relative to this subject, are on file in Room 510, Los Angeles City Hall.

The General Questionnaire was mailed to all property owners (of other than property in single-family use) within a 500-foot radius of each of the five study areas. The questionnaire was also distributed to various community groups (including local and area Chambers of Commerce) and at the public meeting in Hollywood and in Northridge.

The Appraiser Questionnaire was mailed to all members of the American Institute of Real Estate Appraisers having a Los Angeles City address and to members of the California Association of Realtors whose office is located in the vicinity of the study areas.

Each of the two questionnaires contained spaces for a respondent to check answers to a series of questions relating to the overall effect (if any) of adult entertainment establishments on nearby properties. It should be emphasized that the Department intentionally structured the "objective response" portion of the questionnaires so as to reduce "bias" and to solicit the maximum range of responses to any specific question. For example, a respondent could check "positive", "negative" or "no effect" in response to the question... "What overall effect do you feel that adult entertainment establishments have on a neighborhood?"

In addition to the direct response portion of the questionnaire, information of a more subjective nature was also solicited. For example, after each question, space was provided for a respondent to list any comments or examples which might pertain to a specific question. The beginning of each questionnaire also invited the respondent to write comments in the space provided or on a separate sheet.

Between February 10 and April 30, 1977, a total of approximately 4,000 questionnaires were mailed (with return envelopes provided) or otherwise distributed to businessmen, real estate appraisers, realtors, representatives of banks and savings and loan institutions, the owners of multiple-unit residential property, and others. Of this number, 694 questionnaires were completed and returned to the Department (an overall 17.4 percent rate of return).

In addition, the Department received 197 non-solicited, completed questionnaires from property owners in Studio City. These questionnaires were distributed in a private mailing by a private individual. The subject mailing included a replica of the Department's appraiser questionnaire, together with written material alleging City intent to create an adult entertainment zone in Studio City (copy included as Appendix D-2). According to the subject individual's testimony at the public hearing on April 27, 1977, 11,000 replica questionnaires were mailed. Due to the prejudicial nature of the mailing, these questionnaires are not included in the study. However, the staff did tabulate the subject responses and the tabulation and summary are included in Appendix D-3. All persons responding to the above mailing were sent a memo from the Department, correcting the misinformation (copy included in Appendix D-1).

2. Results of Survey Questionnaires

A tabulation of the responses to the specific questions solicited in the objective portion in each of the two types of questionnaries is presented below. A summary of the comments follows:

GENERAL QUESTIONNAIRE

- RESPONSES -

$$\frac{\text{Total no. of responses}}{\text{Total no. of questionnaires}} = \frac{581}{3600} = 16\% \text{ return}$$

Question	Positive	Negative	No effect
1. What overall effect do you feel that adult entertainment establishments have had on a neighborhood:			
Effect on the business condition (sales & profits) in the area:	43(7.4%)	492(84.7%)	36(6.2%)
Effect on homes (value & appearance) in the area immediately adjacent to adult entertainment businesses:	37(6.9%)	472(81.2%)	26(4.5%)

	Positive	Negative	No effect
Effect on homes (value & appearance) in the area located 500 feet or more from adult entertainment businesses?	35(6.0%)	446(76.8%)	19(3.3%)

2. Do you believe the establishment of adult entertainment facilities in the vicinity of your business has had any of the following effects? (Please check all those effects which you feel have occurred.)

26 (4.5%) no effect	305 (52.5%) decreased property values
206 (35.5%) lower rents	
275 (47.3%) vacant businesses	13 (2.2%) increased property values
288 (49.6%) tenants moving out	16 (2.8%) lower taxes
224 (38.6%) complaints from customers	98 (16.9%) higher taxes
3 (-) less crime	489 (84.2%) decreased business activity
370 (63.7%) more crime	
1 (-) improved neighborhood appearance	8 (1.4%) increased business
416 (71.6%) deteriorated neighborhood appearance	312 (53.7%) more litter
8 (1.4%) other (please specify)	

3. (Not applicable for tally.)

4. Have you seriously considered moving your business elsewhere because of nearby concentrations of adult entertainment businesses?

167 (28.7%) Yes 165 (28.4%) No

5. Would you consider expanding in your current location?

83 (14.3%) Yes 177 (30.5%) No

6. What types of adult entertainment establishments are there in your area (Please check appropriate boxes.)

410	(70.6%)	adult bookstores	179	(30.8%) nude or topless dancing
310	(53.4%)	massage parlors	389	(67.0%) adult theatres
190	(32.7%)	peep shows	240	(41.3%) adult motels
237	(40.8%)	bars with X-rated entertainment		
3		other sex shops		

How far from your business is the nearest adult entertainment establishment? (Not tabulated due to limited response.)

Responses to the foregoing questions reveal that adult entertainment businesses are perceived by the majority of respondents as exerting a negative impact on surrounding businesses and residential properties.

Whether or not such negative impacts have actually occurred, or only perceived to have occurred, cannot be readily determined, empirically, on the basis of this survey. However, in terms of the attitudes of the respondents toward such businesses, the conclusion must be drawn that the overall effect on surrounding properties is considered to be negative.

Among the adverse effects of adult entertainment establishments cited by businessmen are:

- Difficulty in renting office space
- Difficulty in keeping desirable tenants
- Difficulty in recruiting employees
- Limits hours of operation (evening hours)
- Deters patronage from women and families; general reduced patronage

Of those businessmen indicating that they have not seriously considered moving because of nearby concentrations of adult entertainment business, the most frequent response was that they had been in the area a great many years, and to establish elsewhere would be too risky and/or that their investment was too great to move. A few respondents indicated that it is the adult entertainment businesses that should move, not they.

The few businessmen commenting that they would not consider expanding in their current location indicated that their business did not warrant expansion.

Several businessmen indicated that their businesses are relatively unaffected by nearly adult entertainment establishments. Among the businesses cited are a commercial art studio; a building trades contractor; a mail order business; a telephone answering service and a wholesaler.

Among the few positive effects cited by businessmen is the increase in business for certain non-adult entertainment businesses such as tourist-serving businesses (e.g. car rental agencies). "The bad effect it might have is cancelled out by the business it does attract; x-rated theaters attract tourists."

Many respondents commented on the crimes associated with adult entertainment establishments: prostitution, dope, theft, robbery, etc. A high percentage of respondents report they do not feel safe in such areas.

A high percentage of respondents commented on their concern for the effects of adult entertainment environment on the morals and safety of children.

A high percentage of respondents commented on the aesthetics of adult entertainment establishments: garish, sleazy; shabby, blighted, tasteless, etc. Also, many commented on the increased incidence of litter and graffiti.

APPRAISER QUESTIONNAIRE

- RESPONSES -

Total no. of responses / Total no. of questionnaires = 81/400 = 20% return

Question	Response		
1. What effect does the concentration of adult entertainment establishments have on the market value of business property (land, structures, fixtures, etc.) located in the vicinity of such establishments?	increase in value	1	(-)
	decrease in value	71	(87.7%)
	no effect	5	(6.2%)
2. What effect does the concentration of adult entertainment establishments have on the rental value of business property located in the vicinity of such establishments?	increase in value	1	(-)
	decrease in value	55	(67.9%)
	no effect	4	(4.9%)
3. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of business property located in the vicinity (length of time required to rent or sell property; rate of lessee/buyer turnover; conditions of sale or lease, etc.)?	increase in rentability/saleability	3	(3.7%)
	decrease in rentability/saleability	48	(59.3%)
	no effect	3	(3.7%)
4. What effect does the concentration of adult entertainment establishments have on the annual income of businesses located in the vicinity of such establishments?	increased income	2	(2.5%)
	decreased income	59	(72.8%)
	no effect	7	(8.6%)
5. Have any business owners or proprietors considered relocating or not expanding their businesses because of the nearby concentration of adult entertainment establishments?	yes	23	(28.4%)
	no	4	(4.9%)
	not known	28	(34.6%)
6. In recent years, has the commercial vitality (sales, profits, etc.) of any area in the City of Los Angeles been affected in any way by the nearby concentration of adult entertainment establishments?	yes	45	(55.6%)
	no	29	(35.8%)
	not known	-	

7. What effect does the concentration of adult entertainment establishments have on the market value of private residences located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	2 (3.8%)	48 (90.6%)	3 (5.7%)	53
500 - 1000 feet	2 (3.6%)	51 (91.1%)	3 (5.4%)	56
More than 1000 feet	1 (3%)	29 (87.9%)	3 (9.1%)	33

8. What effect does the concentration of adult entertainment establishments have on the rental value of residential income property located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	2 (3.4%)	51 (87.9%)	5 (8.6%)	58
500 - 1000 feet	1 (2.6%)	33 (86.8%)	4 (10.5%)	38
More than 1000 feet	1 (2.8%)	27 (75%)	8 (22.2%)	36

9. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of residential property located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	1 (2.5%)	37 (92.5%)	2 (5%)	40
500 - 1000 feet	1 (2.6%)	35 (89.7%)	3 (7.7%)	39
More than 1000 feet	1 (2.8%)	28 (77.8%)	7 (19.1%)	36

10. In regard to the questions setforth above, please describe the effects which you believe the concentration of adult entertainment business has on each of the following:

Property values of surrounding:

	Decrease	Unknown	No effect	Increase
Commercial property	46 (56.8%)	32 (39.5%)	1	2 (2.5%)
Residential property	42 (51.9%)	38 (46.9%)	-	1
General	16 (19.8%)	65 (80.2%)	-	-

Rental values of surrounding:	Decrease	No response	No effect	Increase
Commercial property	39 (48.1%)	42 (51.9%)	-	-
Residential property	37 (45.7%)	44 (54.3%)	-	-
General	12 (14.8%)	69 (85.2%)	-	-
Vacancies				
Number	1	56 (69.1%)	1	23 (28.4%)
Length	1	72 (88.9%)	2 (2.5%)	6 (7.4%)
Rate of tenant turnover	-	49 (60.5%)	1	31 (38.3%)
Annual business income	24(29.6%)	53 (65.4%)	2 (2.5%)	2 (2.5%)
Complaints from customers and residents due to concentration Yes	24(29.6%)	57 (70.4%)		
Neighborhood appearance	24(29.6%)		3 (3.7%)	
Crime	1	1	-	48 (59.3%)
Litter	-	1	1	44 (54.3%)
Other (please specify)				

GENERAL QUESTIONNAIRE

- REALTOR RESPONSES -

Total no. of responses = 32

NOTE: Due to distribution, certain realtors received the General Questionnaire rather than the Appraiser Questionnaire. For analysis purposes, the subject responses were tabulated separately and analyzed together with the responses to the Appraiser Questionnaire.

Question

1. What overall effect do you feel that adult entertainment establishments have had on a neighborhood:

	Positive	Negative	No effect
Effect on the business condition (sales & profits) in the area:	-	31 (97%)	1
Effect on homes (value & appearance) in the area immediately adjacent to adult entertainment businesses:	-	31 (97%)	1
Effect on homes (value & appearance) in the area located 500 feet or more from adult entertainment businesses:	-	29 (91%)	2

2. Do you believe the establishment of adult entertainment facilities in the vicinity of your business has had any of the following effects? (Please check all those effects which you feel have occurred.)

1 (31.3%)	no effect	29 (91%)	decreased property values
23 (71.9%)	lower rents		
25 (70%)	vacant businesses	0	increased property values
25 (70%)	tenants moving out	3 (9.4%)	lower taxes
25 (70%)	complaints from customers	7 (21.9%)	higher taxes
0	less crime	23 (91%)	decreased business activity
26 (81.3%)	more crime	0	increased business

30 (94%) deteriorated 27 (84%) more litter neighborhood appearance

___ Other (please specify)

3. (Not applicable for tally.)

4. Have you seriously considered moving your business elsewhere because of nearby concentrations of adult entertainment businesses?

10 (31.3%) Yes 15 (46.9%) No

5. Would you consider expanding in your current location?

10 (31.3%) Yes 12 (37.5%) No

6. What types of adult entertainment establishments are there in your area? (Please check appropriate boxes.)

- 27 (84.4%) adult bookstores
- 17 (53.1%) massage parlors
- 15 (46.9%) peep shows
- 12 (37.5%) bars with X-rated entertainment
- 13 (40.6%) nude or topless dancing
- 24 (75%) adult theatres
- 15 (46.9%) adult motels

How far from your business is the nearest adult entertainment establishment? (Not tabulated due to limited response.)

D. U.S. CENSUS AND RELATED DATA

1. Cluster Analysis "Used by Community Analysis Bureau to Describe Various Parts of the City"

The last U.S. Decennial Census was conducted on April 1, 1970. With the proliferation of adult entertainment business it would seem appropriate to include as background information a description of the socio-economic and physical characteristics of the areas under study, as revealed by census data. Such a description may provide insight as to the underlying factors contributing to the concentration of sex-oriented business in the areas under study.

An excellent available source providing such a description is a 1974 report prepared by the City's Community Analysis Bureau (CAB) concerning the "State of the City".* In this document, the CAB has utilized a statistical technique known as "cluster analysis" to identify specific areas within the City which have common characteristics, as revealed by census data. In conducting this study, the CAB made use of 66 census data items (or variables) which were selected from the entire spectrum of socio-economic and physically descriptive data items available for all census tracts in the City.

The U.S. Census Bureau reports data on numerous geographical levels, the "census tract" being the smallest geographical area for which data is maintained and reported on a regular basis. There are 750 such census tract areas in the City, each containing a population of slightly fewer than 4,000 persons, on the average. The five study area nodes and four control areas under study herein are contained within portions of 25 census tracts.

The particular variables which most accurately describe a particular census tract were used by the Community Analysis Bureau in such a manner as to combine those areas which have the most similar characteristics. As a result of this procedure, thirty cluster groups were established throughout the City, each such cluster consisting of one or more census tracts, each census tract within a particular cluster being more similar to other parts of that cluster than to any other geographical section of the City.

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* The State of the City - A Cluster Analysis of Los Angeles - City of Los Angeles Community Analysis Bureau, June 1974.

Description of Hollywood Area

The three study areas in Hollywood containing concentrations of adult entertainment businesses are included within portions of 11 census tracts. Their three associated "control areas" are partially contained within nine census tracts. These 20 tracts are all included within a larger area identified in the CAB's report as "Cluster 15", entitled "The Apartment Dwellers", consisting of 34 tracts. A description of this area, as quoted from the previously cited CAB report, is set forth below. The fact that this description is based on data which is now seven years old may not be disadvantageous, for the purposes of this study, inasmuch as adult entertainment businesses began to flourish in the 1969-70 period.

> " Cluster 15 is a lower income, predominately old apartment area located west of the Civic Center..."
>
> "The cluster represents a total population of 174,000, 46% male and 54% female. The median age is 40. The area is mostly White, but does have an above average ethnic mix--19% Spanish-American, 3% Japanese, 2% Chinese, 3% Black. It is a cluster of workers and senior citizens. One in five residents is over 65. Female participation in the labor force is the highest of the 30 clusters. The population under 18 is small. Many of the families are headed by women..."
>
> "...Close to seven out of ten labor active residents are white collar employed. Most completed high school and 15% completed college. At $8,700, median family income is below the average for the City. This lower income does not translate into an abnormally high poverty distribution. One in ten families and a smaller proportion of unrelated individuals are welfare recipients..."
>
> "...Residents of the cluster are centrally located to both the Downtown and its commercial-financial strip extension, Wilshire Boulevard. Many public transit routes service the area. Close to 40% of the households have no automobile. The presence of two or more cars is not common. Of the older apartment complexes many have no garage facilities..."

"...Old apartments comprise 42% of the multiple units. One of the heaviest concentrations occurs east of Western Avenue and north of Olympic Boulevard. These are high density, closely packed, rectangular shaped, stucco units which line the streets approaching Wilshire Boulevard. South of Olympic Boulevard, the pattern remains one of multiple family units, but these are generally interspersed with homes or are the end product of converted two and three story frame houses. Hollywood is similar, but is has several single family residential areas and apartment encroachment appears to have more of an impact..."

"...Most of the cluster's 102,700 dwellings are renter occupied, including a majority of the homes. Median rent averages $108, but 17% of the multiple dwellings are available for less than $80..."

"...Single family residences are a small proportion of the total housing stock and like the area's apartments, many predate World War II. Few of the essentially single family residential neighborhoods have the kind of zoning protection which requires that new construction be single units. Replacement housing has tended to be large apartments. Homes averaged $26,000 in median value, which is more a factor of the land than the improvements. Much of the land west of Western Avenue adjoins the more expensive Hancock Park area..."

"...Cluster 15 has one of the highest population densities in the City, 19,080 persons per square mile, not exceptional for an apartment area. It also has the highest cluster average of elementary school transiency rates--46% for incoming students and 34% for students leaving. This mobility of the residents did not seem to affect the median sixth grade reading score. It was above the City average. The cluster has 8 park sites within its boundary and is also served by the more regional recreation areas of Echo Park, MacArthur Park and Griffith Park all of which are within access..."

"...The incidence of burglary per 100 improved parcels is high, a partial reflection of the large number of dwelling units per land parcel. One of the more disturbing aspects of the cluster is the suicide rate. Outside of Downtown, only three of the clusters had higher rates..."

2. Use of 1970 Census Data to Describe Studio City and North Hollywood Areas

There are four census tracts which comprise the Studio City study area; two such tracts in North Hollywood; and three census tracts representing the "control area" for the San Fernando Valley. (One of the "control area" tracts also forms part of the Studio City study area.)

The CAB's cluster analysis reveals that these eight different census tracts are all quite dissimilar, inasmuch as the seven tracts are contained within six different "clusters". A detailed description of each of these six clusters would not be practical for purposes of this study. However, a summary of certain key variables attributable to the two study areas in Studio City and North Hollywood, and the one corresponding control area might be instructive, and is therefore presented in Table V following. For purposes of comparison, the data is also shown for the City as a whole.

TABLE V
Comparison of 24 Variables from 1970 Census
Describing Studio City and North Hollywood Nodes
and Corresponding Control Area

VARIABLES	AREAS---------AND---------VALUES			
	Studio City (Tujunga & Ventura)	North Hollywood (Lankershim & Vineland)	Control (Lankershim & Whipple)	Entire City
Population				
Population per sq. mile	5,742	8,265	5,893	6,041
% Persons 0-17	18.4	18.2	16.7	30.2
% Persons 65+	10.6	17.9	15.2	10.1
% White (non-Spanish)	92.0	85.3	90.7	60.3
% Black	0	0	0	17.2
% Spanish-American	6.5	13.7	7.7	18.4
% Families w/female head	10.6	16.4	16.4	16.2
Education				
% High School dropouts, 25 & older	22.1	38.6	25.3	38.1
% 25+ who have finished 4+ years college	22.0	10.2	18.3	13.9
Economics				
Approximate median family income	$15,672	$ 9,471	$12,575	$10,535
% White collar employed	80.4	60.6	77.3	57.4
% unemployed	7.8	6.1	9.1	7.0
% families in poverty	3.7	10.0	6.6	9.9
% families receiving welfare	4.3	7.6	4.7	9.9
% 1-unit structures	50.6	48.9	34.2	51.7
Approximate median value, owner occupied units	$39,141	$25,335	$35,530	$26,700
Approximate median monthly rent, renter occupied units	$ 135	$ 123	$ 129	$ 107
% of owner occupied, 1 unit, structures built before 1940	24.1	52.4	52.2	28.5
% of renter occupied, 2+ unit structures built before 1940	10.9	13.9	21.8	30.7

TABLE V (cont'd)
Comparison of 24 Variables from 1970 Census
Describing Studio City and North Hollywood Nodes
and Corresponding Control Area

VARIABLES AREAS AND VALUES Crime Rates	Studio City (Tujunga & Ventura)	North Hollywood (Lankershim & Vineland)	Control (Lankershim & Whipple)	Entire City
Assaults per 100 population	.465	.374	.478	.857
Robberies per 100 population	.172	.267	.170	.454
Burglary per 100 improved parcels	13.86	10.94	13.5	14.96
Total Arrests per 100 population	4.23	4.26	4.10	8.26
Narcotic Arrests per 100 population aged 14-44	2.66	1.39	1.60	2.04

On the basis of the foregoing 1970 Census data, it is possible to develop a general description of the two study area modes containing adult entertainment businesses in the Valley. As indicated above, such a description must necessarily be based on data applying to entire census tracts, even through the study areas may encompass only portions of tracts.

Residents of the Studio City study area node in 1970 were predominantly an upper middle income group, with a relatively high percentage of college graduates. High school dropouts were considerably below the citywide norm. Eight out of ten employed persons were in "white collar" jobs. The percentage of families receiving welfare or in poverty status was considerably below the citywide percentage. The unemployment rate was slightly higher than that of the entire city.

The median value of owner occupied homes in the Studio City area was more than $12,400 higher than the City median. About one-half of the housing units were one-unit structures. Apartment rental rates were also higher than the city as a whole. The percentage of one-unit, owner occupied housing units built before 1940 (24.1 percent) approached the citywide median of 28.5 percent.

With regard to crime statistics (as of 1970), robberies per 100 population in the Studio City area were below the rate for the city as a whole (.172 and .454, respectively), although the number of burglaries per 100 improved parcels (13.86) was close to the citywide rate of 14.96. Total arrests per 100 population (4.23) were about one-half of the 8.26 rate which prevailed citywide.

The North Hollywood study area contrasts rather sharply with the above described Studio City area. In North Hollywood, median family income was $9,471 in 1970--lower than the citywide median of $10,535--and considerably lower than the $15,672 median income of residents in the Studio City study area. Sixty-one percent of employed persons were in "white collar" jobs in North Hollywood, compared with 80 percent in Studio City and 57 percent in the entire city. The percentage of families in a poverty status in North Hollywood was considerably higher than in Studio City (10.0 percent and 3.7 percent, respectively). The percent of families in North Hollywood receiving welfare was higher than in Studio City, but lower than in the entire city. Unemployment rates, however, were lower in North Hollywod than in Studio City and the entire City.

Housing values were considerably lower in North Hollywood than in Studio City, and slightly lower than average values throughout the entire city. Median montly rents were lower in North Hollywood than in Studio City but higher than in all of Los Angeles. Of all owner-occupied one-unit structures, 52.4 percent were built prior to 1940 in the North Hollywood study area, compared with only 28.5 percent in the entire city. Single-family homes in North Hollywood are older than in Studio City.

As revealed in Table V, 1970 crimes rates for the seven variables tabulated were lower in North Hollywood than in the city as a whole. Except for "robberies per 100 population" and "total arrests per 100 population" all other rates in North Hollywood were lower than in the Studio City study area.

Tabulation of U.S. Census Trends from 1960 to 1970

Time series (trend) data can often be of value in identifying underlying socio-economic or physical characteristics which may have contributed to the change in an area. During the course of this study, the staff prepared a tabulation of the 1960-70 change in selected socio-economic variables as reported in the U.S. Census, covering the five study areas, the four "control" areas, and the City as a whole. This was done in order to determine if changes in the study area nodes were significantly different than the "control areas", or from citywide norms.

A tabulation of this data is contained in Appendix E. A review of this data revealed that the 1960-70 trends in the variables selected (relating to population, economics and housing) were not significantly different for the study areas than for the "control areas". In general, numerical or percentage changes in the data were also similar to citywide trends and no firm conclusions of particular relevance to the study could be developed.

V.

POLICE DEPARTMENT STUDY OF HOLLYWOOD

This section of the report considers the number and percentages of adult entertainment businesses in the City, changes in these businesses since 1975, and more specifically, crime rates in the Hollywood area as compared to crime rates, citywide.

The following information was compiled by the Los Angeles Police Department and shows the incidence of certain adult entertainment establishments as of two different time periods-- November of 1975 and December 31, 1976. The statistics show a decrease in massage parlors, bookstores, arcades and theaters and a slight rise in adult motels. This was during the same period of time that there was stepped-up surveillance and deployment of officers in areas where concentrations of adult entertainment establishments existed. (The Hollywood community is within the West Bureau.)

This information and that which follows involving the incidence of crime in the Hollywood area provides what may be a positive correlation between crime and the presence of adult entertainment facilities.

TYPE OF ACTIVITY	Nov. 1975	Dec. 1976	Percent of Change
Adult Motels	37	38	+2%
Massage Parlors	147	80	-45%
Bookstores/Arcades	57	45	-21%
Theaters	47	44	-6%
TOTAL	288	207	-28%

DECEMBER 31, 1976
LOS ANGELES CITY POLICE DEPARTMENT
BUREAU OF ACTIVITY AND PERCENTAGE

TYPE OF ACTIVITY	CENTRAL BUREAU	SOUTH BUREAU	WEST BUREAU	VALLEY BUREAU
Adult Motels	5(13%)	23(60%)	5(13%)	5(13%)
Massage Parlors	6 (7%)	4 (5%)	42(53%)	28(35%)
Bookstores/Arcades	6(20%)	1 (2%)	24(53%)	11(24%)
Theaters	7(16%)	1 (2%)	28(64%)	8(18%)
TOTAL	27(23%)	29(14%)	99(48%)	52(25%)

The information in this section is an extract from a report to the Planning Department on "The Impact of Sex Oriented Businesses on the Police Problems in the City of Los Angeles*", prepared by the Los Angeles City Police Department. The City Council in instructing the Planning Department to conduct the Adult Entertainment study has also instructed other City agencies to cooperate with and contribute as necessary to the report process. In accordance with such instructions, the Police Department conducted an analysis of the relationship between the concentration of adult entertainment establishments and criminal activity in the Hollywood area as compared to the citywide crime rates for the period beginning 1969 and ending 1975. This period of comparison covers the years during which adult entertainment establishments appeared and proliferated in the Hollywood area.

Part I crimes are those criminal acts which most severely effect their victims; they include homicide, rape, aggravated assault, robbery, burglary, larceny, and vehicle theft. During the period of 1969 through 1975, reported incidents of Part I crimes in the Hollywood Area increased 7.6 percent while the City showed a 4.2 percent increase. Thus, Hollywood's Part I crimes increased at nearly twice the rate of the City's increase. In conformance to the overall trend, every Part I crime committed against a person, not against property, increased at a higher rate in Hollywood Area than in the citywide total. Street robberies and 484 Purse Snatches, wherein the victim was directly accosted by their assailant, increased by 93.7 percent and 51.4 percent, respectively; the citywide increase was 25.6 percent and 36.8 percent.

Suspects arrested for Part I criminal acts in Hollywood Area increased 16.2 percent while the City dropped by 5.3 percent. This reveals that Hollywood Area was 21.5 percent over the City's total in the apprehension of serious criminals during the seven year period.

Equally alarming as the increase in Part I arrests, is the increase in Part II arrests (described on Table VI, pages 53-54) in Hollywood Area as opposed to the rest of the City. Hollywood increased in this category by 45.5 percent while the City rose but 3.4 percent.

Prostitution arrests in Hollywood Area increased at a rate 15 times greater than the city average. While the City showed a 24.5 percent hike, Hollywood bounded to a 372.3 percent increase in prostitution arrests.

Similarly, pandering arrests in Hollywood Area increased by 475.0 percent, 3-1/2 times the city increase of 133.3 percent. (See note p. 54.)

*The complete report prepared by the Los Angeles City Police Department is available for review in the official files under City Plan Case No. 21475 in the Los Angeles City Planning Department.

Table VI

1969 THROUGH 1975 SURVEY PERIOD
REPORTED CRIMES AND ARRESTS

	Hollywood Area			Citywide		
Part I Offenses	1969	1975	% Change	1969	1975	% Change
Homicide	19	37	+94.7	377	574	+52.3
Rape	214	199	-7.0	2115	1794	-15.2
Agrav. Assault	605	886	+46.5	14798	14994	+1.3
Robbery	905	1591	+75.8	11909	14667	+23.2
Burglary	5695	5551	-2.5	65546	69489	+6.0
Larceny	7852	8396	+6.9	89862	93478	+4.0
Auto Theft	2621	2608	-0.5	32149	30861	-4.0
TOTAL	17911	19268	+7.6	216756	225857	+4.2
St. Robberies	381	738	+93.7	5321	6684	+25.6
484 Purse Snatches	185	280	+51.4	1951	2668	+36.8

ARRESTS

	Hollywood Area			Citywide		
Part I Offenses	1969	1975	% Change	1969	1975	% Change
Homicide	21	26	+23.8	475	573	+20.6
Rape	67	47	-29.9	858	552	-35.7
Agrav. Assault	239	348	+45.6	6250	3163	-49.4
Robbery	368	285	-22.6	4855	5132	+5.7
Burglary	864	514	-40.5	7823	6032	-22.9
Larceny	546	1371	+151.1	6877	11706	+70.2
Auto Theft	319	226	-29.2	4820	3121	-5.3
TOTAL	2424	2817	+16.2	31958	30279	-5.3

	Hollywood Area			Citywide		
*Part II Offenses	1969	1975	% Change	1969	1975	% Change
TOTAL	10660	15503	+45.4	179233	185417	+3.4

*(Part II arrests include: other assaults, forgery and counterfeiting, embezzlement and fraud, stolen property, prostitution, narcotics, liquor laws, gambling, and other miscellaneous misdemeanors.)

Prostitution Arrests	1969	1975	% Change
Hollywood Area	433	2045	+372.3
Citywide	2864	3564	+24.5

Table VI (cont'd)

Pandering Arrests	1969	1975	% Change
Hollywood Area	8	46	+475.0
Citywide	42	98	+133.3

NOTE: (The prostitution arrests made in Hollywood Area in 1975 represents 57.3 percent of all arrests for prostitution made in the city. The pandering arrests made in Hollywood Area in 1975 represents 46.9 percent of all pandering arrests made in Los Angeles during that year.)

DEPLOYMENT

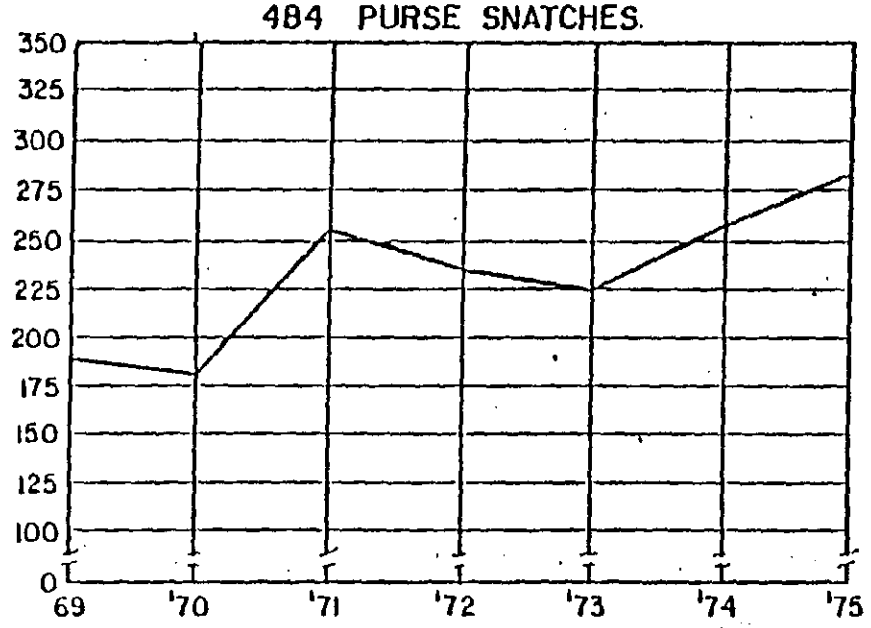
Hollywood Area	1969	1975	% Change
Patrol	197	255	+29.4
Investigators	45	61	+35.6
TOTAL	242	316	+30.6
Citywide	5194	7506	+21.1

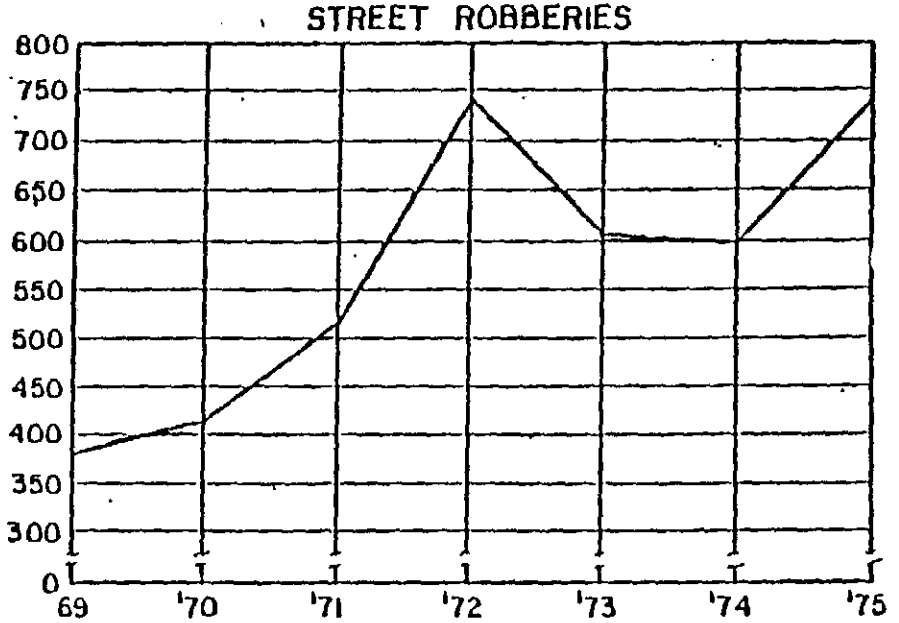
ADULT ENTERTAINMENT ESTABLISHMENTS
HOLLYWOOD AREA

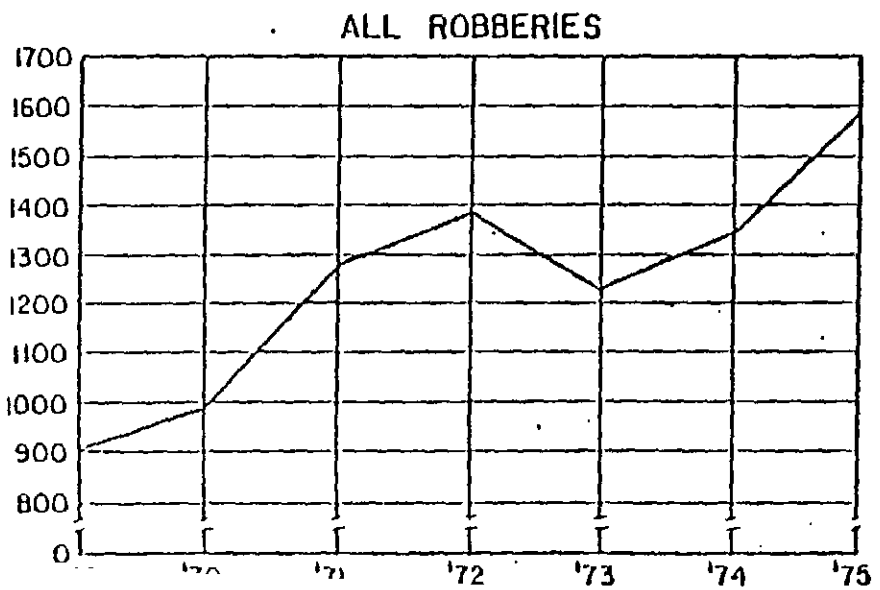
1969 through 1975

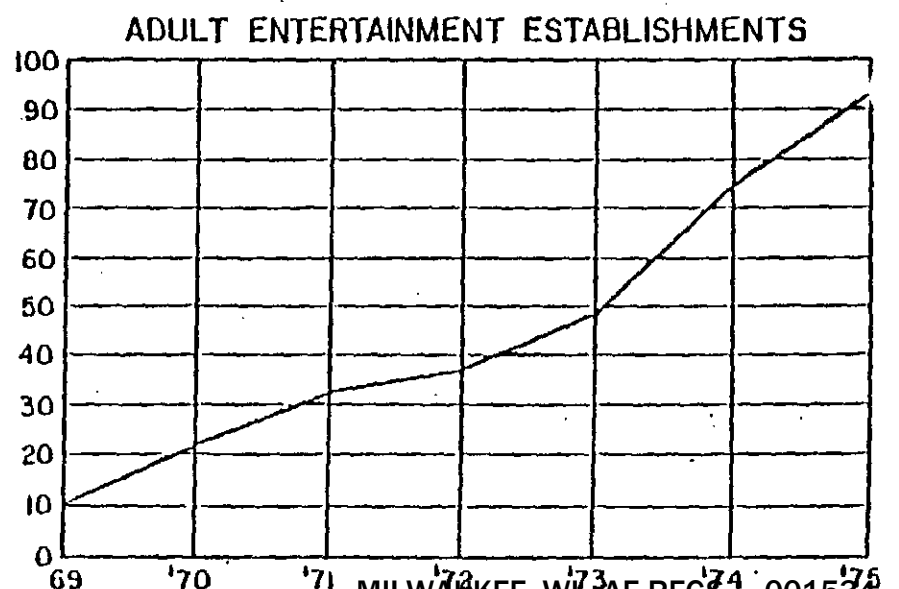
1969		1975	
1	Hard-core motel	3	Hard-core motels
2	Bookstores	18	Bookstores
7	Theaters	29	Theaters
1	Massage parlor/scam joint	38	Massage parlor/scam joints
11	Locations (Total)	88	Locations (Total)

HOLLYWOOD AREA









54-A

During the period included in this report, the Citywide deployment of police personnel rose by 21.2 percent. However, with the surge of crime in the Hollywood Area, deployment there increased by 30.6 percent, 9.4 percent higher than the rest of the City. Included in this figure is a 29.4 percent hike in uniformed officers and 35.6 percent rise in investigators to cope with the criminal elements.

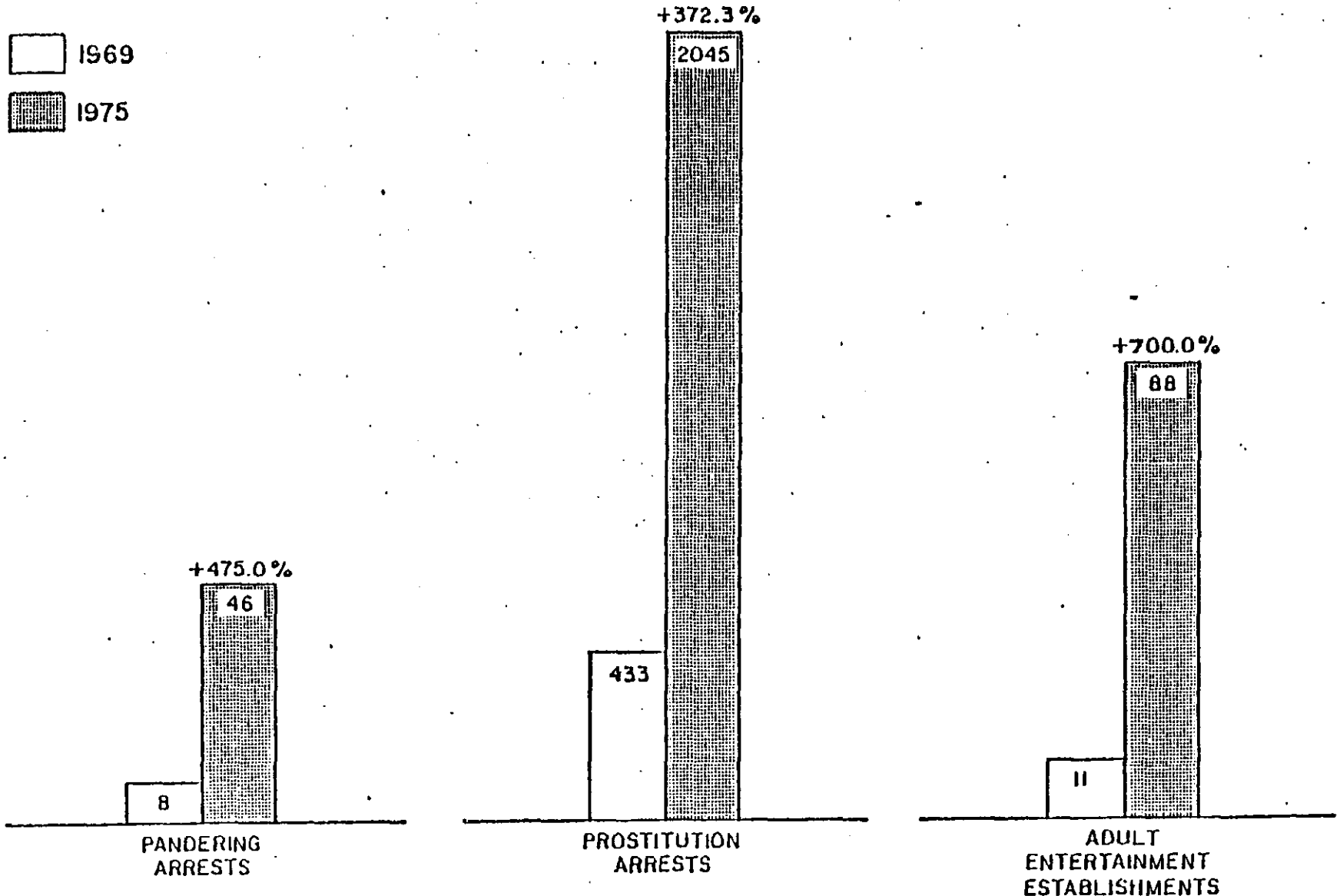
This survey reflects a seven-year span during which time the Adult Entertainment Establishment in the Hollywood Area proliferated from a mere 11 establishments to an astonishing, number of 88 such locations. The overall deleterious effect to the entire community is evident in the statistics provided. The overwhelming increase in prostitution, robberies, assaults, thefts, and the proportionate growth in police personnel deployed throughout Hollywood, are all representative of blighting results that the clustering of Adult Entertainment Establishments has on the entire community. These adverse social effects not only infect the environs immediately adjacent to the parlors but creates a malignant atmosphere in which crime spreads to epidemic proportions.

The remaining sections of the Police Department report are letters and signature petitions from concerned businessmen, clergy, merchants, citizens and police officers and are in the file and available for inspection upon request. The following paragraph summarizes this section of the Police Department report.

The police officer reports can be summarized as follows: all officers felt the sex-oriented businesses either contributed to or were directly responsible for the crime problems in the Hollywood area. The officers felt the sex shops were an open invitation to undesirables and thereby directly caused the deterioration of neighborhoods. Also, it was suggested that these businesses purposely cluster in order to establish a "strength in numbers" type effect, once they establish a foothold in a neighborhood they drive the legitimate businesses out.

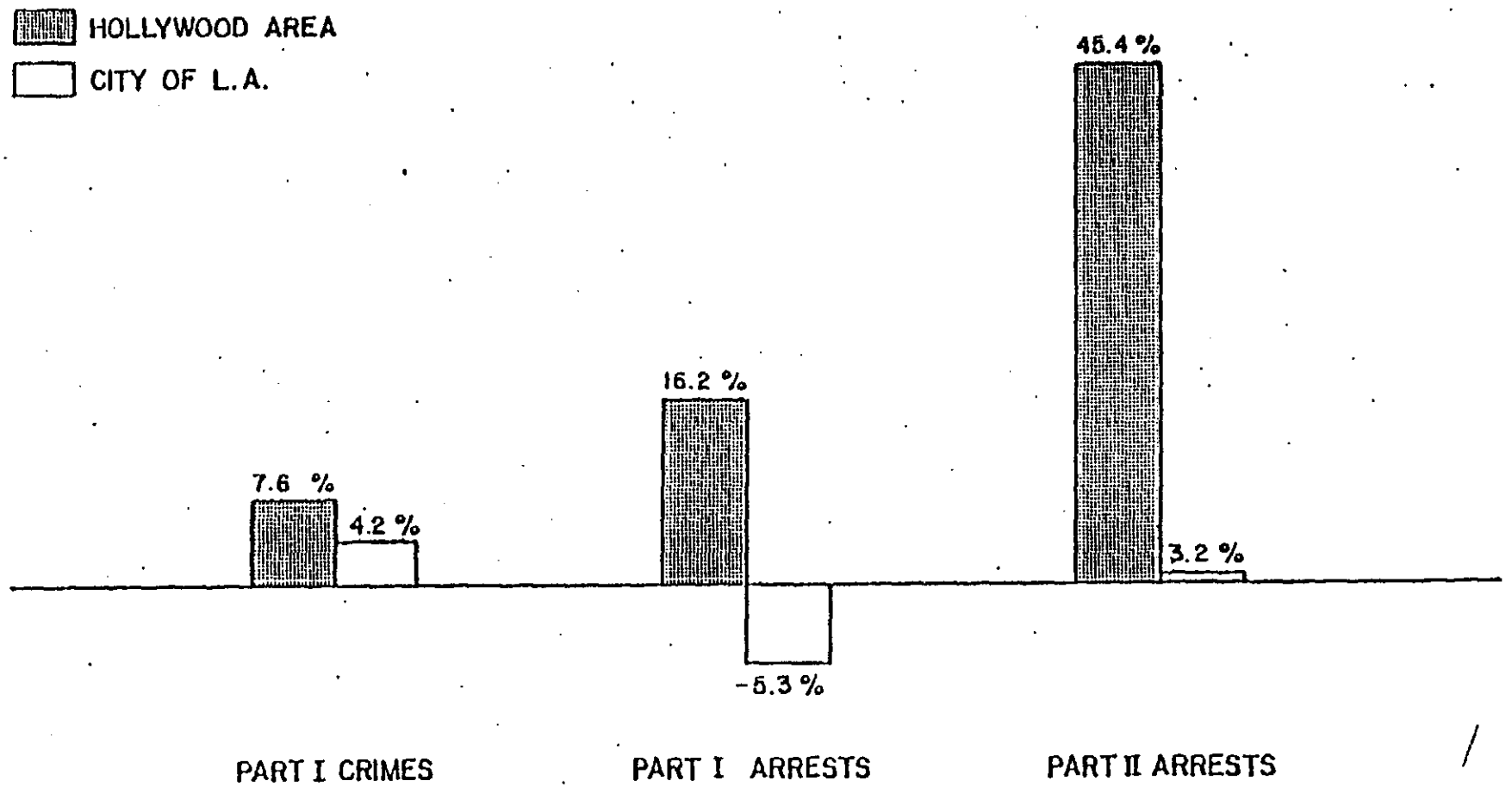
The letters from the businessmen, clubs, churches and concerned citizens were all in support of police efforts to close adult entertainment facilities. The letters all expressed the feeling that the sex shops attracted homosexuals, perverts, prostitutes and other undesirables and directly contributed to the decline of the Hollywood area.

HOLLYWOOD AREA



HOLLYWOOD AREA VS. CITY OF L.A.

RATE OF INCREASE 1969-1975



55-B

Los Angeles City Planning Department

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Glenn F. Blossom, City Planning Officer

Citywide Planning and Development Division

Glenn O. Johnson, Division Head

Code Studies Section

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Ronald Lewis, City Planning Associate (former project staff member)
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Audrey Jones, Typist
Mason Dooley, Photographer

APPENDICES.

APPENDIX A
(Sheet 1)

Changes in Assessed "Market" Value of Residential and Commercial Property 1970-76; Areas of Concentration of Adult Entertainment Businesses; Corresponding Control Areas, and City of Los Angeles

Areas of Concentration ("Nodes") and Control Areas	Assessed "Market" Values					
	Land		Improvements		Total	
	1970	1976	1970	1976	1970	1976
Santa Monica & Western	12,955,100	12,926,800	12,945,620	13,697,620	25,900,900	26,624,420
Control Area - Santa Monica and Vermont	11,549,300	10,990,500	9,971,400	13,227,900	21,520,700	24,218,400
Hollywood & Western	17,618,700	18,237,710	20,361,040	23,015,660	37,979,740	41,289,370
Control Area - Hollywood & Highland	21,956,500	26,197,880	39,051,920	35,992,140	61,008,420	62,190,020
Selma & Cahuenga	28,720,280	34,785,080	31,852,740	27,856,660	60,573,020	62,641,740
Control Area - Hollywood & Gower	14,502,880	17,078,900	13,411,880	12,256,520	27,914,760	29,335,420
Tujunga & Ventura (Studio City)	7,115,460	11,890,900	8,493,260	13,852,800	15,608,720	25,743,700
Lankershim & Vineland (North Hollywood)	13,789,200	15,979,300	15,287,340	16,763,160	29,076,540	32,742,460
Control Area - Lankershim & Whipple	11,168,200	18,169,000	14,744,280	18,823,200	25,912,480	36,992,200
	Land		Improvements		Total	
City of L.A.	8,303,456,720	11,216,558,900	9,692,014,680	13,464,660,940	17,995,471,400	24,681,219,84

CITY OF LOS ANGELES
CALIFORNIA

TOM BRADLEY
MAYOR

DEPARTMENT OF
CITY PLANNING
561 CITY HALL
LOS ANGELES, CALIF. 90012

CALVIN S. HAMILTON
DIRECTOR

FRANK P. LOMBARDI
EXECUTIVE OFFICER

APPENDIX B

March 14, 1977

REQUEST FOR YOUR ASSISTANCE IN OBTAINING INFORMATION REGARDING "ADULT ENTERTAINMENT ESTABLISHMENTS"

The Los Angeles City Council has recently requested the Department of City Planning, in cooperation with the Police Department and other City agencies, to conduct a study concerning "adult entertainment" businesses.

Because of your particular knowledge of the businesses in the vicinity of your adress, we are requesting that you answer the questions on the attached questionnaire. These questions relate to the effect of adult entertainment establishments on other businesses and neighborhoods in the surrounding area. The results of the questionnaire will be of great value to us in conducting this study.

Please return your completed questionnaire in the stamped envelope provided before April 1, 1977.

If you have any questions about the study or wish to discuss this matter with Planning Department staff members, please call 485-3508.

We greatly appreciate your cooperation in assisting us in this survey.

Original signed by Calvin S. Hamilton

CALVIN S. HAMILTON
Director of Planning

CSH:CSR:cd
0417B/0029A

ADULT ENTERTAINMENT QUESTIONNAIRE

Los Angeles City Planning Department

May 9, 1977

Please answer the seven questions below by checking the appropriate spaces. Feel free to write comments in the space provided or on a separate sheet.

For the purposes of this study, an adult entertainment establishment includes businesses such as: adult bookstores; nude or topless dancing establishments; massage parlors; adult theatres showing X-rated movies; "peep shows"; so-called adult motels, and bars with X-rated entertainment.

1. What overall effect do you feel that adult entertainment establishments have on a neighborhood:

   Effect on the businesses condition (sales & profits) in the area:

   positive _____ negative _____ no effect _____

   Comments/Examples:

   Effect on homes (value & appearance) in the area immediately adjacent to adult entertainment businesses:

   positive _____ negative _____ no effect _____

   Effect on homes (values & appearance) in the area located 500 feet or more from adult entertainment businesses:

   positive _____ negative _____ no effect _____

   Comments/Examples:

(OVER)

2. Do you feel the establishment of adult entertainment facilities in the vicinity of your business has had any of the following effects? (Please check all those effects which you feel have occurred.)

____ no effect	_____ decreased property values
____ lower rents	_____ increased property values
____ vacant businesses	_____ lower taxes
____ tenants moving out	_____ higher taxes
____ complaints from customers	_____ decreased business activity
____ less crime	_____ increased business
____ more crime	_____ more litter

____ improved neighborhood appearance
____ deteriorated neighborhood appearance
____ other (please specify) _____

Please list specific examples relating to any box checked, immediately above.

3. What are the hours of operation of your business? _____

4. Have you seriously considered moving your business elsewhere because of nearby concentrations of adult entertainment businesses?

_____ yes _____ no

Why?

5. Would you consider expanding in your current location?

_____ yes _____ no; if not, why?_____

_____

_____

_____

6. What types of adult entertainment establishments are there in your area? (Please check all appropriate boxes.)

_____ adult bookstores

_____ massage parlors

_____ peep shows

_____ bars with X-rated entertainment

_____ nude or topless dancing

_____ adult theatres

_____ adult motels

How far from your business is the nearest adult entertainment establishment?_____

Thank you for your cooperation. Please return this questionnaire to:

City of Los Angeles
Department of City Planning
200 North Spring Street
Room 513, City Hall
Los Angeles, CA 90012

Name_____

(Business)_____

Address_____

_____

CALIFORNIA

DEPARTMENT OF
CITY PLANNING
561 CITY HALL
LOS ANGELES, CALIF. 90012

CALVIN S. HAMILTON
DIRECTOR

FRANK P. LOMBARDI
EXECUTIVE OFFICER

APPENDIX C

March 14, 1977

REQUEST FOR YOUR ASSISTANCE IN OBTAINING INFORMATION REGARDING "ADULT ENTERTAINMENT" ESTABLISHMENTS

The Los Angeles City Council has recently requested the Department of City Planning, in cooperation with the Police Department and other City agencies, to conduct a study concerning "adult entertainment" businesses.

Because of your particular knowledge of the businesses in the vicinity of your address, we are requesting that you answer the questions on the attached questionnaire. These questions relate to the effect of adult entertainment establishments on other businesses and neighborhoods in the surrounding area. The results of the questionnaire will be of great value to us in conducting this study.

Please return your completed questionnaire in the stamped envelope provided before April 1, 1977.

If you have any questions about the study or wish to discuss this matter with Planning Department staff members, please call 485-3500.

We greatly appreciate your cooperation in assisting us in this survey.

CALVIN S. HAMILTON
Director of Planning

CSH:CSR:lmc

Los Angeles City Planning Department

March 14, 1977

Please give your opinion regarding questions set forth below by checking the appropriate spaces and providing comments in the space provided or on a separate sheet.

For the purposes of this study, "adult entertainment establishments" include businesses such as: adult bookstores, nude or topless dancing establishments; massage parlors; adult theatres showing X-rated movies; "peep shows"; so-called adult motels and bars with X-rated entertainment.

EFFECT ON SURROUNDING BUSINESSES

1. What effect does the concentration of adult entertainment establishments have on the market value of business property (land, structures, fixtures, etc.) located in the vicinity of such establishments?

   increase in value_____ decrease in value_____ no effect_____

   Comments/examples: (Please cite specific examples, including available data.)

2. What effect does the concentration of adult entertainment establishments have on the rental value of business property located in the vicinity of such establishments?

   increase in value_____ decrease in value_____ no effect_____

   Comments/examples: (Please cite specific examples, including available data.)

3. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of business property located in the vicinity (length of time required to rent or sell property; rate of lessee/buyer turnover; types of businesses of prospective lessees/buyers; conditions of sale or lease, etc.)?

   increase in rentability/saleability _____

   decrease in rentability/saleability _____

   no effect _____

   Comments/examples: (Please cite specific examples, including available data.)

4. What effect does the concentration of adult entertainment establishments have on the annual income of businesses located in the vicinity of such establishments?

increased income_____ decreased income_____ no effect_____

Comments/examples: (Please cite specific examples, including available data.)

5. Have any business owners or proprietors considered relocating or not expanding their businesses because of the nearby concentration of adult entertainment establishments?

Yes_____ No_____ Not known_____

If yes, please indicate the specific reason, if known.

6. In recent years, has the commercial vitality (sales, profits, etc.) of any area in the City of Los Angeles been affected in any way by the nearby concentration of adult entertainment establishments?

Yes_____ No_____ Not known_____

If yes, which areas?

Comments/examples: (Please cite effects and provide available data.)

EFFECT ON SURROUNDING RESIDENTIAL PROPERTIES

7. What effect does the concentration of adult entertainment establishments have on the market value of private residences located within the following distances from such establishments?

	Increase	Decrease	No Effect
Less than 500 feet	_____	_____	_____
500 - 1000 feet	_____	_____	_____
More than 1000 feet	_____	_____	_____

Comments/examples: (Please cite specific examples, including available (data.)

8. What effect does the concentration of adult entertainment establishments have on the rental value of residential income property located within the following distances from such establishments?

	Increase	Decrease	No Effect
Less than 500 feet	_____	_____	_____
500 - 1000 feet	_____	_____	_____
More than 1000 feet	_____	_____	_____

Comments/examples: (Please cite specific examples, including available data.)

9. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of residential property located within the following distances from such establishments?

	Increase	Decrease	No Effect
Less than 500 feet	_____	_____	_____
500 - 1000 feet	_____	_____	_____
More than 1000 feet	_____	_____	_____

Comments/examples: (Please cite specific examples, including available data.)

OVERALL EFFECTS

10. In regard to the questions set forth above, please describe the effects which you believe the concentration of adult entertainment businesses has on each of the following:

Property values of surrounding:

Commercial property _____

Residential property _____

Rental values of surrounding:

Commercial property _____

Residential property _____

Vacancies

Number _____

Length _____

Rate of tenant turnover _____

Annual business income _____

Complaints from customers and residents due to concentration _____

_____

Neighborhood appearance _____

Crime _____

Litter _____

Other (please specify _____

_____

Thank you for your cooperation. Please return this questionnaire to:

City of Los Angeles
Department of City Planning
200 North Spring Street
Room 516, City Hall
Los Angeles, CA 90012

Name _____

Organization _____

Address _____

_____

Do you wish to be notified of the public hearing on this matter?

Yes _____ No _____

APPENDIX D-1

May 3, 1977

Concerned Members of the Public

ADULT ENTERTAINMENT STUDY

We wish to thank you for your interest in the above matter. Recently, residents of the Studio City area have received erroneous information regarding the activities of this Department. Specifically, they have been informed that it is our intent to create an "adult entertainment zone" on Ventura Boulevard. This information is not correct.

In January of this year, the Los Angeles City Council instructed the Planning Department to conduct a study to determine whether so-called "adult entertainment" establishments, where they exist in concentration, tend to have a deteriorating or blighting effect on adjacent properties and areas. Since that time, the Department staff has been evaluating data from the public and governmental agencies to determine whether evidence of such effects exists.

Within the next two months, the analysis of the information gathered will be presented to the Los Angeles City Council which will make a decision as to whether adoption of regulations is appropriate.

We regret that you were sent alarming erroneous information; if you have any further questions, please call my staff at 485-3508 or 485-3368.

(Original signed by)

CALVIN S. HAMILTON
Director of Planning

CSH:RJ:mw

m the Desk of
MORT ALLEN

URGENT . . . . . .

Studio City (Ventura Blvd) has one of the largest concentr
of "ADULT ENTERTAINMENT MOTELS" in Los Angeles.

The attached Press Release and Questionaire was not, to our knowledge, published in ANY locally circulated newspaper.

The hearings will be held in Hollywood & Northridge - WHY not in the Studio City area? (need we say more)

We URGENTLY request that you and your neighbors attend BOTH meetings and ALSO call or send telegrams to our elected leaders:

Joel Wachs, City Councilman
Tom Bradley, Mayor
Burt Pines, City Attorney
John Van de Camp, District Attorney
Ted Goldberg, President of Studio City Chamber of Commerce

WE ALL HAVE TOO MUCH INVESTED IN OUR PROPERTIES TO ALLOW ANY "RED LIGHT DISTRICTS" ANYWHERE IN THE CITY OF LOS ANGELES, AND ESPECIALLY IN THE SAN FERNANDO VALLEY.

Mort Allen
Dori Phillips
Karen Misraje
Karen Rosen
Linda Tarlow

Talon Realty Inc

12516 VENTURA BLVD. • STUDIO CITY, CALIF. 91604
POPLAR 9-4444

CC opposes X-rated Ventura Blvd. zone

A proposal to designate certain areas of Ventura Boulevard as an "adult entertainment zone" shocked members of the Studio City Chamber of Commerce Board of Directors when announced at their Wednesday meeting.

Community activist Mort Allen read a notice from the Los Angeles City Planning Department announcing public meetings to be held on the proposal to create special districts for X-rated entertainment.

Howard Raphael, field deputy for Second District Councilman Joel Wachs, said Wachs would oppose designating a portion of Ventura Boulevard as an adult entertainment zone.

APPENDIX D-3

PRIVATELY DISTRIBUTED QUESTIONNAIRE
(Note: Not a portion of Planning Department Study)

- RESPONSES -

Total no. of responses = 197

Question	Response		
1. What effect does the concentration of adult entertainment establishments have on the market value of business property (land, structures, fixtures, etc.) located in the vicinity of such establishments?	increase in value	2	
	decrease in value	178	(90.4%)
	no effect	2	
2. What effect does the concentration of adult entertainment establishments have on the rental value of business property located in the vicinity of such establishments?	increase in value	2	
	decrease in value	169	(85.8%)
	no effect	3	
3. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of business property located in the vicinity (length of time required to rent or sell property; rate of lessees/buyer turnover; conditions of sale or lease, etc.)?	increase in rentability/saleability	2	
	decrease in rentability/saleability	161	(81.7%)
	no effect	3	
4. What effect does the concentration of adult entertainment establishments have on the annual income of businesses located in the vicinity of such establishments?	increased income	2	
	decreased income	149	(75.6%)
	no effect	5	
5. Have any business owners or proprietors considered relocating or not expanding their businesses because of the nearby concentration of adult entertainment establishments?	yes	71	(36.9%)
	no	4	(4.9%)
	not known	96	(48.7%)
6. In recent years, has the commercial vitality (sales, profits, etc.) of any area in the City of Los Angeles been affected in any way by the nearby concentration of adult entertainment establishments?	yes	100	(50.8%)
	no.	57	(28.9%)
	not known	___	(35.8%)

7. What effect does the concentration of adult entertainment establishments have on the market value of private residences located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	-	148 (100%)	-	148
500 - 1000 feet	-	145 (100%)	-	145
More than 1000 feet	-	142 (95.9%)	-	148

8. What effect does the concentration of adult entertainment establishments have on the rental value of residential income property located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	-	143 (99.3%)	1	144
500 - 1000 feet	-	138 (98.6%)	2 (1.4%)	140
More than 1000 feet	-	133 (95%)	7 (50%)	140

9. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of residential property located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	-	147 (100%)	-	147
500 - 1000 feet	-	141 (99.3%)	-	142
More than 1000 feet	-	141 (97.2%)	-	145

10. (Not tabulated)

In summary, the respondents felt that the subject businesses have a decidedly adverse impact on surrounding businesses and residential properties and the large majority believe that the adverse effect extends beyond the 1000-foot radius.

Comments indicate concern for:

1. personal safety, e.g. assaults
2. moral effect on children
3. safety of property, e.g. vandalism, robbery, etc.
4. neighborhood appearance. Adult entertainment establishments were described variously as tawdry, tacky, garish, seedy, messy, neglected, untidy, blighted, unkempt.
5. litter, e.g. cans, bottles, newpapers, etc., strewn about public and private property, especially heavy after Saturday night.
6. spillover parking into residential areas. On-site parking is often inadequate. Customers seeking anonymity park at a distance away from any given establishment, on residential streets.
7. graffiti on public and private property.

APPENDIX E

SANTA MONICA BOULEVARD & WESTERN AVENUE

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	18,484	19,033	2,479,015	2,811,801
Black	38	340	334,916	503,606
Percentage	0.2	1.8	13.5	17.9
Spanish	540	3,833	260,399	518,791
Percentage	3.7	20.1	10.5	18.5
Median Age	42.1	38.0	33.2	30.6
Persons 0-17	2,190	3,126	756,640	849,246
Percentage	11.8	16.4	30.5	30.2
Persons 65+	2,437	3,334	253,993	283,395
Percentage	13.1	17.5	10.2	10.1
No. of Husband & Wife Families	3,153	3,380	545,109	553,564
No. of Unrelated Individuals	3,833	6,190	329,977	421,701
Average Household Size	1.95	1.90	2.77	2.68
HOUSING				
Total Units	9,859	10,667	935,507	1,074,173
Singles	2,938	1,919	559,745	560,378
Percentage	30.0	18.0	59.0	52.0
Multiples	6,921	8,748	375,762	510,261
Percentage	70.0	82.0	40.0	47.4
Built Pre-1939	7,039	5,736	481,797	328,988
All Occupied Units	9,226	9,962	876,010	1,024,835
Owner	1,330	1,078	404,652	419,801
Percentage	14.0	11.0	50.0	39.0
Renter	7,896	8,986	471,358	607,573
Percentage	86.0	89.0	43.0	56.4
ECONOMICS				
Median Family Income	5,699	7,713	6,896	10,535
Median School Years Completed	12.1	12.3	12.1	12.4
Median Value Owner Occupied in $	16,450	25,825	17,300	26,700
Median Rent in $	77	105	78	114
Total Employed	9,370	9,113	126,276	1,150,796
Unemployed	900	912	6,914	86,802
Percentage	9.6	10.0	5.5	7.5

LANKERSHIM BOULEVARD & WHIPPLE STREET
(Valley Control Area)

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	5,497	5,897	2,479,015	2,811,801
Black	9	2	334,916	503,606
Percentage	0.0	.1	13.5	17.9
Spanish	100	439	260,399	518,791
Percentage	1.8	7.4	10.5	18.5
Median Age	42.1	41.6	33.2	30.6
Persons 0-17	1,106	1,091	756,640	849,246
Percentage	20.1	18.5	30.5	30.2
Persons 65+	729	1,076	253,993	283,395
Percentage	13.3	18.2	10.2	10.1
No. of Husband & Wife Families	1,371	1,301	545,109	553,564
No. of Unrelated Individuals	841	1,337	329,977	421,701
Average Household Size	2.36	2.11	2.77	2.68
HOUSING				
Total Units	2,520	2,865	935,507	1,074,173
Singles	1,289	1,082	559,745	560,378
Percentage	51.2	37.8	59.0	52.0
Multiples	1,231	1,783	375,762	510,261
Percentage	48.8	62.2	40.0	47.4
Built Pre-1939	898	813	481,797	328,988
All Occupied Units	2,328	2,790	876,010	1,024,835
Owner	1,076	989	404,652	419,801
Percentage	46.2	35.4	50.0	39.0
Renter	1,252	1,801	471,358	607,573
Percentage	53.8	64.6	43.0	56.4
ECONOMICS				
Median Family Income	8,086	13,154	6,896	10,535
Median School Years Completed	12.6	12.6	12.1	12.4
Median Value Owner Occupied in $	22,350	37,700	17,300	26,700
Median Rent in $	92	136	78	114
Total Employed	2,574	2,736	126,276	1,150,796
Unemployed	177	280	6,914	86,802
Percentage	6.9	10.2	5.5	7.5

HOLLYWOOD & WESTERN

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	6,860	8,438	2,479,015	2,811,801
Black	3	72	334,916	503,606
Percentage	-	.1	13.5	17.9
Spanish	183	909	260,399	518,791
Percentage	2.6	10.7	10.5	18.5
Median Age	43.9	41.3	33.2	30.6
Persons 0-17	576	803	756,640	849,246
Percentage	8.3	9.4	30.5	30.2
Persons 65+	1,158	1,644	253,993	283,395
Percentage	16.8	19.4	10.2	10.1
No. of Husband & Wife Families	1,306	1,408	545,109	553,564
No. of Unrelated Individuals	2,805	3,602	329,977	421,701
Average Household Size	1.76	1.62	2.77	2.68
HOUSING				
Total Units	6,773	8,044	935,507	1,074,173
Singles	764	702	559,745	560,378
Percentage	11.3	8.7	59.0	52.0
Multiples	5,818	7,559	375,762	510,261
Percentage	85.9	94.0	40.0	47.4
Built Pre-1939	3,731	3,037	481,797	328,988
All Occupied Units	5,996	7,506	876,010	1,024,835
Owner	394	420	404,652	419,801
Percentage	6.6	5.6	50.0	39.0
Renter	5,602	7,137	471,358	607,573
Percentage	93.4	94.4	43.0	56.4
ECONOMICS				
Median Family Income	6,429	8,537	6,896	10,535
Median School Years Completed	12.5	12.6	12.1	12.4
Median Value Owner Occupied in $	22,200	37,333	17,300	26,700
Median Rent in $	92	123	78	114
Total Employed	6,535	6,745	126,276	1,150,796
Unemployed	481	575	6,914	86,802
Percentage	7.4	8.5	5.5	7.5

SANTA MONICA BOULEVARD & VERMONT AVENUE

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	16,855	15,736	2,479,015	2,811,801
Black	510	1,287	334,916	503,606
Percentage	3.0	8.2	13.5	17.9
Spanish	869	3,936	260,399	518,791
Percentage	5.2	25.0	10.5	18.5
Median Age	38.8	34.2	33.2	30.6
Persons 0-17	2,482	2,751	756,640	849,246
Percentage	14.7	17.5	30.5	30.2
Persons 65+	2,830	2,432	253,993	283,395
Percentage	16.8	15.5	10.2	10.1
No. of Husband & Wife Families	3,343	2,720	545,109	553,564
No. of Unrelated Individuals	4,881	4,818	329,977	421,701
Average Household Size	2.04	2.01	2.77	2.68
HOUSING				
Total Units	8,866	7,982	935,507	1,074,173
Singles	2,655	1,913	559,745	560,378
Percentage	30.0	24.0	59.0	52.0
Multiples	5,531	6,081	375,762	510,261
Percentage	62.4	76.2	40.0	47.4
Built Pre-1939	6,589	4,093	481,797	328,988
All Occupied Units	8,274	7,636	876,010	1,024,835
Owner	1,404	896	404,652	419,801
Percentage	17.0	11.7	50.0	39.0
Renter	6,870	6,748	471,358	607,573
Percentage	83.0	88.4	43.0	56.4
ECONOMICS				
Median Family Income	5,901	8,142	6,896	10,535
Median School Years Completed	12.2	12.5	12.1	12.4
Median Value Owner Occupied in $	15,975	24,100	17,300	26,700
Median Rent in $	76	103	78	114
Total Employed	9,073	6,528	126,276	1,150,796
Unemployed	595	465	6,914	86,802
Percentage	6.6	7.1	5.5	7.5

SANTA MONICA BOULEVARD & VERMONT AVENUE

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	16,855	15,736	2,479,015	2,811,801
Black	510	1,287	334,916	503,606
Percentage	3.0	8.2	13.5	17.9
Spanish	869	3,936	260,399	518,791
Percentage	5.2	25.0	10.5	18.5
Median Age	38.8	34.2	33.2	30.6
Persons 0-17	2,482	2,751	756,640	849,246
Percentage	14.7	17.5	30.5	30.2
Persons 65+	2,830	2,432	253,993	283,395
Percentage	16.8	15.5	10.2	10.1
No. of Husband & Wife Families	3,343	2,720	545,109	553,564
No. of Unrelated Individuals	4,881	4,818	329,977	421,701
Average Household Size	2.04	2.01	2.77	2.68
HOUSING				
Total Units	8,866	7,982	935,507	1,074,173
Singles	2,655	1,913	559,745	560,378
Percentage	30.0	24.0	59.0	52.0
Multiples	5,531	6,081	375,762	510,261
Percentage	62.4	76.2	40.0	47.4
Built Pre-1939	6,589	4,093	481,797	328,988
All Occupied Units	8,274	7,636	876,010	1,024,835
Owner	1,404	896	404,652	419,801
Percentage	17.0	11.7	50.0	39.0
Renter	6,870	6,748	471,358	607,573
Percentage	83.0	88.4	43.0	56.4
ECONOMICS				
Median Family Income	5,901	8,142	6,896	10,535
Median School Years Completed	12.2	12.5	12.1	12.4
Median Value Owner Occupied in $	15,975	24,100	17,300	26,700
Median Rent in $	76	103	78	114
Total Employed	9,073	6,528	126,276	1,150,796
Unemployed	595	465	6,914	86,802
Percentage	6.6	7.1	5.5	7.5

SELMA AVENUE CAHUENGA BOULEVARD

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	14,886	13,827	2,479,015	2,811,801
Black	43	342	334,916	503,606
Percentage	.3	2.5	13.5	17.9
Spanish	840	1,822	260,399	518,791
Percentage	5.6	13.2	10.5	18.5
Median Age	43.3	39.8	33.2	30.6
Persons 0-17	1,309	1,248	756,640	849,246
Percentage	8.8	9.0	30.5	30.2
Persons 65+	2,896	2,712	253,993	283,395
Percentage	19.5	19.6	10.2	10.1
No. of Husband & Wife Families	2,406	1,876	545,109	553,564
No. of Unrelated Individuals	6,631	5,951	329,977	421,701
Average Household Size	1.68	1.60	2.77	2.68
HOUSING				
Total Units	10,022	9,680	935,507	1,074,173
Singles	1,714	1,140	559,745	560,378
Percentage	17.1	11.8	59.0	52.0
Multiples	8,110	8,533	375,762	510,261
Percentage	80.9	88.2	40.0	47.4
Built Pre-1939	7,197	5,161	481,797	328,988
All Occupied Units	8,958	8,658	876,010	1,024,835
Owner	812	683	404,652	419,801
Percentage	9.1	7.9	50.0	39.0
Renter	8,164	7,965	471,358	607,573
Percentage	91.1	92.1	43.0	56.4
ECONOMICS				
Median Family Income	5,535	7,584	6,896	10,535
Median School Years Completed	12.2	12.5	12.1	12.4
Median Value Owner Occupied in $	20,125	30,925	17,300	26,700
Median Rent in $	80	111	78	114
Total Employed	8,112	6,990	126,276	1,150,796
Unemployed	998	943	6,914	86,802
Percentage	12.3	13.5	5.5	7.5

TUJUNGA BOULEVARD & VENTURA BOULEVARD

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	17,544	11,599	2,479,015	2,811,801
Black	50	44	334,916	503,506
Percentage	.3	.4	13.5	17.9
Spanish	398	758	260,399	518,791
Percentage	2.3	6.5	10.5	18.5
Median Age	39.6	38.7	33.2	30.6
Persons 0-17	3,638	2,137	756,640	849,246
Percentage	20.7	18.4	30.5	30.2
Persons 55+	1,368	1,232	253,993	283,395
Percentage	7.8	10.6	10.2	10.1
No. of Husband & Wife Families	4,526	2,664	545,109	553,564
No. of Unrelated Individuals	3,100	2,832	329,977	421,701
Average Household Size	2.36	2.17	2.77	2.68
HOUSING				
Total Units	8,110	5,529	935,507	1,074,173
Singles	4,520	2,716	559,745	560,378
Percentage	55.7	49.1	59.0	52.0
Multiples	3,590	2,813	375,762	510,261
Percentage	44.3	50.9	40.0	47.4
Built Pre-1939	2,058	1,009	481,797	328,988
All Occupied Units	7,548	5,367	876,010	1,024,835
Owner	3,904	2,463	404,652	419,801
Percentage	51.4	45.9	50.0	39.0
Renter	3,644	2,904	471,358	607,573
Percentage	48.3	54.1	43.0	56.4
ECONOMICS				
Median Family Income	9,956	15,672	6,896	10,535
Median School Years Completed	12.6	12.9	12.1	12.4
Median Value Owner Occupied in $	23,700	39,650	17,300	26,700
Median Rent in $	98	142	78	114
Total Employed	8,800	5,965	126,276	1,150,796
Unemployed	584	504	6,914	86,802
Percentage	6.7	8.4	5.5	7.5

HOLLYWOOD BOULEVARD AND HIGHLAND AVENUE

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	11,438	12,016	2,479,015	2,811,801
Black	38	325	334,916	503,606
Percentage	.3	2.7	13.5	17.9
Spanish	357	1,509	260,399	518,791
Percentage	3.1	12.6	10.5	18.5
Median Age	44.5	41.0	33.2	30.6
Persons 0-17	832	970	756,640	849,246
Percentage	7.3	8.1	30.5	30.2
Persons 65+	2,281	2,379	253,993	283,395
Percentage	19.9	19.8	10.2	10.1
No. of Husband & Wife Families	1,718	1,606	545,109	553,564
No. of Unrelated Individuals	5,768	6,408	329,977	421,701
Average Household Size	1.57	1.56	2.77	2.68
HOUSING				
Total Units	8,261	8,835	935,507	1,074,173
Singles	1,169	858	559,745	560,378
Percentage	14.2	9.7	59.0	52.0
Multiples	7,067	7,958	375,762	510,261
Percentage	85.5	90.1	40.0	47.4
Built Pre-1939	5,768	4,344	481,797	328,988
All Occupied Units	7,322	7,756	876,010	1,024,835
Owner	559	559	404,652	419,801
Percentage	7.6	7.2	50.0	39.0
Renter	6,781	7,197	471,358	607,573
Percentage	92.4	92.8	43.0	56.4
ECONOMICS				
Median Family Income	5,792	7,510	6,896	10,535
Median School Years Completed	12.3	12.6	12.1	12.4
Median Value Owner Occupied in $	23,000	33,300	17,300	26,700
Median Rent in $	85	117	78	114
Total Employed	6,469	6,177	126,276	1,150,796
Unemployed	861	878	6,914	86,802
Percentage	13.3	14.2	5.5	7.5

HOLLYWOOD BOULEVARD AND GOWER STREET

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	7,067	2,342	2,479,015	2,811,801
Black	9	53	334,916	503,606
Percentage	.1	2.3	13.5	17.9
Spanish	292	311	260,399	518,791
Percentage	4.1	13.3	10.5	18.5
Median Age	45.2	37.3	33.2	30.6
Persons 0-17	567	227	756,640	849,246
Percentage	8.0	9.7	30.5	30.2
Persons 65+	1,445	325	253,993	283,395
Percentage	20.4	13.9	10.2	10.1
No. of Husband & Wife Families	1,316	336	545,109	553,564
No. of Unrelated Individuals	2,707	1,155	329,977	421,701
Average Household Size	1.74	1.64	2.77	2.68
HOUSING				
Total Units	4,334	1,571	935,507	1,074,173
Singles	669	226	559,745	560,378
Percentage	15.4	14.4	59.0	52.0
Multiples	3,463	1,365	375,762	510,261
Percentage	84.6	85.6	40.0	47.4
Built Pre-1939	2,778	726	481,797	328,988
All Occupied Units	3,924	1,446	876,010	1,024,835
Owner	345	93	404,652	419,801
Percentage	8.8	6.4	50.0	39.0
Renter	3,579	1,353	471,358	607,573
Percentage	91.2	93.6	43.0	56.4
ECONOMICS				
Median Family Income	6,102	8,515	6,896	10,535
Median School Years Completed	12.4	12.4	12.1	12.4
Median Value Owner Occupied in $	21,750	27,600	17,300	26,700
Median Rent in $	84	112	78	114
Total Employed	3,885	1,430	126,276	1,150,796
Unemployed	380	148	6,914	86,802
Percentage	9.8	10.3	5.5	7.5

LANKERSHIM BOULEVARD & VINLAND AVENUE

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	7,600	9,344	2,479,015	2,811,801
Black	1	0	334,916	503,606
Percentage	0	0	13.5	17.9
Spanish	263	146	260,399	518,791
Percentage	3.5	1.6	10.5	18.5
Median Age	41.9	38.7	33.2	30.6
Persons 0-17	1,551	1,697	756,640	849,246
Percentage	20.4	18.2	30.5	30.2
Persons 65+	1,268	1,674	253,993	283,395
Percentage	16.7	17.9	10.2	10.1
No. of Husband & Wife Families	1,833	1,963	545,109	553,564
No. of Unrelated Individuals	1,325	2,521	329,977	421,701
Average Household Size	2.35	1.70	2.77	2.68
HOUSING				
Total Units	3,558	4,897	935,507	1,074,173
Singles	1,705	1,359	559,745	560,378
Percentage	47.9	27.8	59.0	52.0
Multiples	1,853	3,538	375,762	510,261
Percentage	52.1	72.2	40.0	47.4
Built Pre-1939	1,501	1,369	481,797	328,988
All Occupied Units	2,711	4,677	876,010	1,024,835
Owner	1,213	1,143	404,652	419,801
Percentage	44.7	24.4	50.0	39.0
Renter	2,098	3,534	471,358	607,573
Percentage	55.3	75.6	43.0	56.4
ECONOMICS				
Median Family Income	6,690	9,471	6,896	10,535
Median School Years Completed	11.9	12.4	12.1	12.4
Median Value Owner Occupied in $	17,800	25,450	17,300	26,700
Median Rent in $	86	118	78	114
Total Employed	3,483	4,452	126,276	1,150,796
Unemployed	267	291	6,914	86,802
Percentage	7.7	6.5	5.5	7.5

STAFF REPORT
AMENDMENT TO ZONING REGULATIONS
ADULT BUSINESSES IN C-2 ZONE WITH CONDITIONAL USE PERMIT
CASE NO. 353.015
JANUARY 9, 1978

Since 1969, beginning on Whittier Boulevard, easterly of the 605 Freeway, the community has experienced a rapid growth of adult businesses. Beginning in the unincorporated County area with an adult bookstore, the uses have expanded to include a theater, massage parlors, and model studios, and now stretch to the central business district of Whittier. Fifteen adult businesses now exist, thirteen of which are located in the City of Whittier.

On June 21, 1977, the City Council adopted Ordinance 2116, as an urgency measure, defining and regulating certain adult businesses through the conditional use permit process. The Council in the adoption of said ordinance declared that such uses have operational characteristics which may have a deleterious effect on immediately adjacent residential and commercial areas. The purpose of the urgency measure was to attempt to keep the situation status quo so that the issue could be studied and appropriate regulations, if necessary, be adopted in order to protect such commercial and residential areas within the City from the possible blighting or downgrading effect of adult business. Ordinance 2116 was amended on December 7, 1977 by Ordinance 2128 which added two uses to those regulated.

The urgency ordinance was modeled after an ordinance of Detroit, Michigan, which was upheld by the U. S. Supreme Court in June of 1976. Said ordinance dispersed such uses by use of separation distances from one another and from residential districts. Extensive discussion of the Detroit Ordinance and others appears in the American Society of Planning Officials Report No. 327, "Regulating Sex Businesses,"

a copy of which is enclosed. (Copies furnished only to the City Council, Planning Commission, and the file. The file copy may be reviewed in the office of the Planning Department.)

EXISTING USES

Currently, there are adult businesses at the following locations:

Address	Type of Business
10529 Whittier Blvd.	Model studio
10555 Whittier Blvd.	Model studio
10619 Whittier Blvd.	Model studio
10703 Whittier Blvd.	Model studio
10705 Whittier Blvd.	Book store
10711 Whittier Blvd.	Model studio
10713 Whittier Blvd.	Massage parlor
10824 Whittier Blvd.	Massage parlor
11205 Whittier Blvd.	Massage parlor
11527 & 29 Whittier Blvd.	Model studio
11531 Whittier Blvd.	Book store
11729 Hadley	Massage parlor
7038 Greenleaf	Theater

The first of these, at 11729 Hadley Street, took out permits for partitions in January of 1969. The use of the building was stated as "physio-massage." Another massage parlor opened in 1976, at 11625 Hadley, but closed shortly thereafter. Several of the businesses have in these few years, changed hands and locations. At 10510 Dorland, a permit has been requested to convert an existing residence to a model studio, and is currently awaiting dedication of street right-of-way for issuance of permit.

STAFF STUDY

Since June 21, staff has been collecting and analyzing data

and reviewing testimonies and contacting other agencies in efforts to determine what effect adult businesses have on adjacent properties. The one major factor to keep in mind in reviewing the data, however, is that not all of it can be isolated as being directly related only to the presence of adult businesses because of the variety of the factors influencing the study areas over the last ten years.

The study compared two areas on Whittier Boulevard over a ten-year period. Said areas are shown on the attached map. Area One, between Redman Avenue and Norwalk Boulevard, contains the largest concentration of adult businesses, the other, Area Four, easterly of Painter Avenue, between Jacmar and Watson Avenues, had no commercial frontage on Whittier Boulevard, and was used as a control. Area Four was selected because of its similar street patterns, lot sizes, and number of homes, to those of the first, where the adult businesses were concentrated.

The ten years compared were 1968 through 1977 (including some 1967 date where 1968 was not available). The first adult business on Whittier Boulevard was licensed on November 29, 1971, but the first in the study area appeared in 1973, and by late 1974, more than half of the current businesses were in operation. Therefore, the end of 1973 was selected as the date to be used to compare before and after affects.

The following is a summary of the results of the study, and indicates the factors considered:

	Study Area One			Study Area Fou	
	Number	Per cent		Number	Per cen
1. Number of homes	160			175	
2. Number of businesses					
1967	17				
1976	19			0	
3. (a) Number of changes of occupant					
Homes	154	96		170	97
Business	37	205		0	
(b) Changes since 1973					
Homes	88	57		32	19
Business	17	46		0	
(Adult businesses)	(7)	(19)			
4. Number not changed					
Homes	67	41		79	45
Business	5	28		0	
5. Number of homes sold					
(a) At least once	46	28		79	45
(b) Since 1973	26	57		58	61
Average sale price					
1968 $19,100	7		$18,750	5	
1969 17,000	2		19,000	6	
1970 21,000	2		20,500	3	
1971 25,400	5		20,000	3	
1972 20,500	4		20,650	7	
1973 21,500	2		20,500	9	
1974 28,300	4		22,125	7	
1975 26,100	7		26,000	9	
1976 31,100	9		30,800	14	
1977* 36,500	8		37,227	18	
*Projected from 6 month data					
6. Median Home Value					
(1970) $18,214			$18,280		
7. Per cent owner occupied					
1970		64			82
1977		84			85
8. Ages of housing	39 years			27 years	

A further breakdown of the study area one, into the first and second blocks northerly of Whittier Boulevard reveals that the percentages in items 3,and 5 above, are slightly higher in the first blocks than in the second blocks by 5 to 15 per cent.

Item 3 (b), above, shows a major difference between study areas one and four of 36% (57 - 19) in number of changes in occupancy. Item 5 shows that the rate of sales of housing is about the same (57% - 61%), but item 7 shows that the owner occupancy rate has increased from 64% to 84% in study area one. This trend is supported by testimony at a recent public meeting, soliciting such information.

For business properties, the picture is more conclusive than for residential. Expanding items 3 and 4, above, in the business category, we find the following:

Number of changes in occupancy	since 1967	37
	since 1973	17
Number changing more than once	since 1967	12
	since 1973	4
Number not changing	since 1967	5
	since 1973	10
Number of changes to adult businesses		7

In addition to the above data, the annual vacancy rate dropped in 1976 to the level in 1966, having increased, to a peak of three and one-half times that level in 1972. It must be noted, however, that this apparent stability is due to the fact that adult businesses now occupy previously vacant buildings.

The Whittier Police Department has, during the last few years, been collecting evidence in efforts to eliminate alleged illegal activities from the adult businesses. As a result of these efforts,

seven of the existing businesses are presently the subject of "red light abatement" action. The initial investigation and evidence gathering documented that all of the nude model studios and three of the massage parlors were actively involved in prostitution. Other problems created by the presence of these businesses are in the form of assault and battery and aggravated assault incidents. There have also been several thefts reported by the customers (johns) who are victimized by the employees. These individuals usually do not file complaints on the incidents, however, fearing that their spouses will become aware of their activities. Therefore, these incidents always do not appear on the police logs.

For several years, the Police Department has received complaints of excessive noise, pornographic material left laying about and in some instances sexual offenders, such as exhibitionists, venting their sexual frustrations in the adjoining neighborhood. Another problem posed by the patrons of these adult businesses is the influx of drunk drivers and intoxicated persons. The majority of customers frequenting the business after 4:00 p.m., and until the early morning hours are males who have been drinking and are seeking sexual release. The Police Department has compiled from the daily logs for the two, four-year periods, 1970-1973 and 1974-1977, the number of incidents of 38 types of criminal activity and the data compared with the City as a whole.

This comparison revealed the following numbers of incidents in the given years:

1970	-	23	1974	-	57
1971	-	29	1975	-	73
1972	-	52	1976	-	90
1973	-	29	1977	-	49
1970-73	-	133	1974-77		269

The comparison of the totals of each four-year time period shows an increase of 102% in incidents of crime in the period 1974-77 over the period 1970-73, whereas, the City as a whole for the same period, experienced only an 8.3% increase in incidents of crime.

Some specific crimes increased in greater proportions as indicated in the following figures for selected crimes:

CRIME	1970-1973	1974-1977	% increase
All Assaults	8	39	387
Theft (Petty)	13	29	123
Robbery	8	13	63
Burglary (Residential)	15	23	53
Malicious Mischief	3	24	700
Prostitution	3	12	300
Grand Theft Auto	5	14	180
Theft (Grand)	4	9	125
Arson	0	5	
Displaying a Weapon	0	5	
Prowling	0	5	

Some crimes, on the other hand, decreased in frequency, such as felony narcotics, which decreased from 16 to 9, but due primarily to changes in narcotics laws. Eight other crimes decreased from one or two incidents in four years to zero to one incident in four years. Nineteen of the remaining types of crimes increased, while ten types were reported for the first time during the time period of 1974-1977.

At various public meetings, over the last several years, citizens have testified of being afraid to walk the streets, that some businesses have left the area or have modified their hours of operation, and that they are fearful of children being confronted by individuals of offensive character or of being exposed to sexually explicit material.

At a recent meeting, several of those who spoke, but lived some distance from the adult businesses, spoke on behalf of those who lived closer, but feared reprisals if they testified.

At one time, there was a general complaint from parents in the neighborhood that their minor children had been in possession of the negative portion of Polaroid film packs and although this image was not as clear as the positive portion, it clearly showed the lewd poses of the models working in the studios. Young males would rummage through the trash receptacles of the various businesses and pick up these items. It was noted during Police Department investigation of the alleged prostitution activities at these nude model studios, that they had become aware of the complaints and refused to allow Polaroid cameras in the businesses. This did not, however, stop the problem of adult newspapers obtained at the book store being left strewn in the parking areas and alleys adjacent to the businesses.

Rates and numbers of changes of occupancy of residences and increases in complaints to the Police Department are the only measurable indicators of the moral and emotional impact of adult businesses on the surrounding neighborhood. This impact is, however, the most difficult to assess and is probably the most significant as it relates to the mental and physical well-being of the neighborhood and the City as a whole.

The health, welfare, and general prosperity of the community are some of those things which facts and figures cannot adequately describe, but the protection and furtherance of which is part of the stated purpose for the development of land use regulations.

An indication of the intensity of the moral and emotional impact is the unity of the residents and their willingness, through organizations, such as Citizens for Decency Through Law, to work for improvement of their neighborhood. This organization has been successful in eliciting support of other organizations to help in said efforts.

Aesthetics are a matter of personal preference, but plays an important role in effecting peoples' attitudes. Regulations, such as the sign ordinance, may not control content or colors of buildings or signs. Typically, the adult businesses are painted in garish, high contrast colors, utilizing flashing or moving lights to attract attention to the businesses. This technique is not, however, unique to such businesses, but is quite common in marginal, strip commercial areas. It is noted that one other major strip commercial use, fast food restaurants, are beginning to change their images from the bright roofs, big signs and giant logos, to the softer, more contemporary, brick, wood, and tile, finding that their success does not depend entirely on their visibility. They have found that those who wish to avail themselves of the services offered will seek them out. The same philosophy could also be applied to adult businesses, allowing them to blend into other commercial neighborhoods.

Dispersion or Concentration

Two basic types of ordinances have been enacted by cities across the United States, dispersing or concentrating. In contrast to the Detroit ordinance, Boston created an "adult entertainment" district, concentrating adult businesses into what became known as the "combat zone." The purpose was to concentrate adult businesses into a single small area to prevent them from spreading into other areas of the City.

The Boston experience failed, however, because, according to Boston police and redevelopment spokesmen, "they (the property owners) killed the goose that laid the golden egg," by not policing themselves.

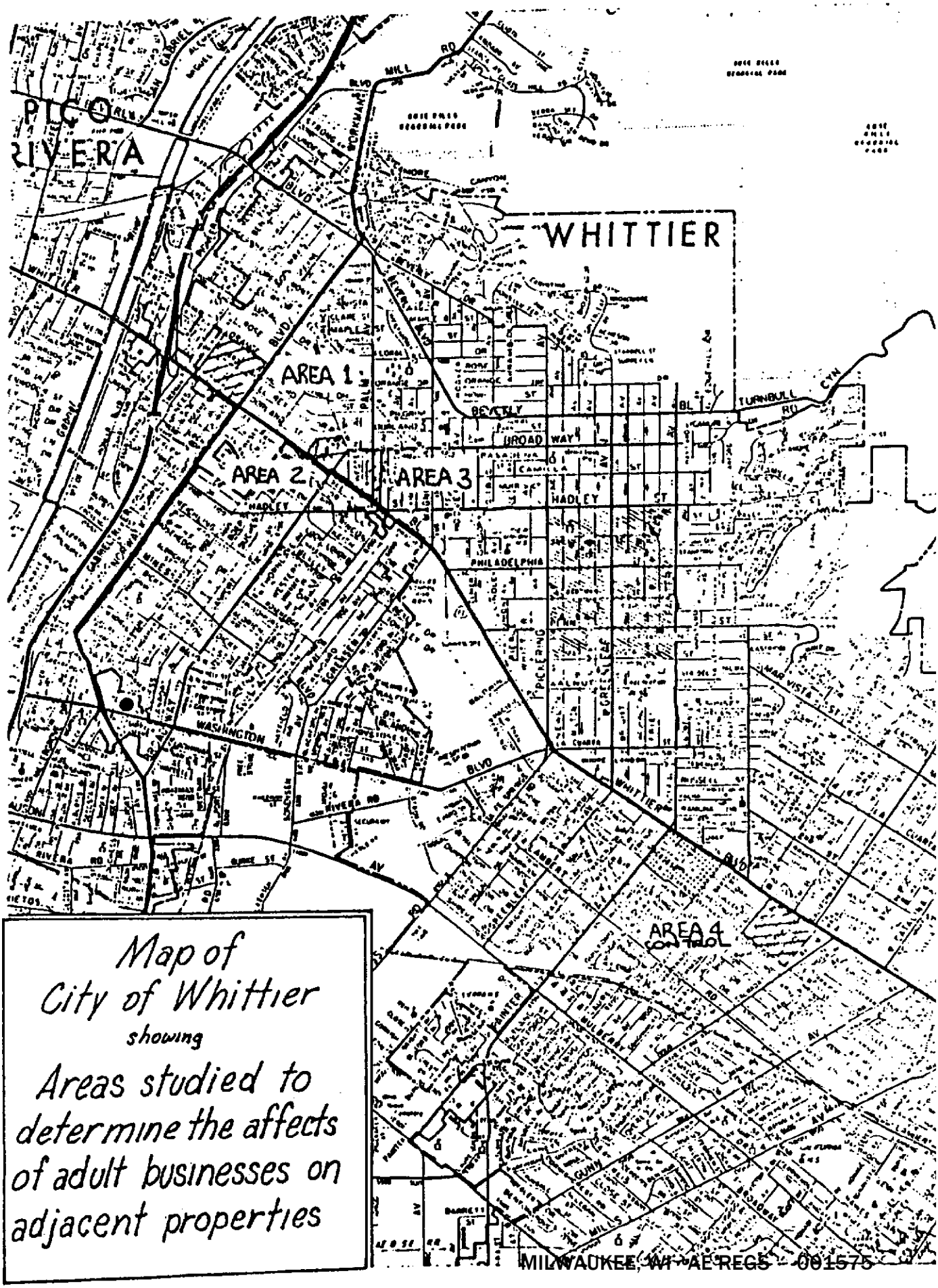
In Detroit, as in Boston, the problem was primarily in large downtown commercial districts and "skid rows." In these areas, adult entertainment businesses mingled with pawnshops, cheap hotels,

bars, strip joints, etc., as well as the "non-porno" businesses. Property owners, attracted by the high rents, willingly paid by the adult businesses, eventually forced many legimate businesses to close, move, or go broke by increasing rents.

In the Hollywood area, as reported in several articles appearing in the Los Angeles Times, owners have stated that they don't particularly care for the type of business, but like the rent that will be paid by these businesses. This could be a major factor in low rent commercial areas. In the Hollywood area, the influx of adult businesses appears to have been followed by a higher vacancy rate. In West Whittier, however, the commercial area between Redman Avenue and Norwalk Boulevard, suffered from a higher vacancy rate before the commencement of adult businesses than after, but largely because adult businesses occupy those buildings which were most frequently found vacant. It could be expected that an owner of a vacant building would accept the high offers for rent with a good chance that the building would stay rented.

For the purpose of determining impact of concentration of adult businesses, four areas were compared, using Polk directories from 1967 to 1977 (1966 thru 76 information), to determine the rate of change of occupancy in adjacent residential neighborhoods before and after the introduction of adult businesses. Three of the surveyed areas contained adult businesses, the fourth, the control area, used for the entire study, included no commercial. Area one has six adult businesses, area two has one, and area three has three. The following map shows the areas studied. The results are as follows:

	Changes Per Year Before A.B.'s	Changes Per Year After A.B.'s
Area 1	9.4	22 (1974+)
Area 2	.1	.1 (1972+)
Area 3	5.3	11 (1974+)
Area 4 (Control)	20	11 (1974+)



Map of
City of Whittier
showing
Areas studied to determine the affects of adult businesses on adjacent properties

Area 1, with a concentration of adult businesses by 1974, experienced a 134% increase in annual turnover rate, Area 2 experienced no measurable change, Area 3, with three businesses at one location, experienced a 107% increase. The control area, with no commercial and no adult businesses, experienced a 45% decrease in turnover rate for similar periods.

If dispersion is determined to be the most effective type of control (short of prohibition) to impose on such uses to protect adjacent properties, the question then becomes how much dispersion -- how much separation between related uses and from adjacent residential uses.

The Supreme Court in the Detroit case found no objection to the 1,000 ft. separation of "regulated businesses" and 500 feet from residential districts. As mentioned earlier, Detroit's ordinance was developed for a large downtown, with a skid row area. With the exception of Whittwood, the Quad, Uptown Whittier, and the industrial area, Whittier's commercial areas are strips of shallow commercial lots along Whittier Boulevard and intersections of major streets. Almost any separation between residential districts and adult businesses eliminates these businesses from the strip commercial areas, forcing them into Uptown or the shopping centers.

The issue of separation of adult businesses from schools, churches, parks, and similar public assembly areas, has also been raised and dealt with in ordinances of other municipalities. Currently, the closest adult businesses to any of these public uses is 470 ft. from a church, 300 ft. from a park, and 1,100 ft. from a school.

Any distance requirement must, however, be based on the relationship between distance and degree of impact. Brief discussion with the principal of Franklin School and a representative of Whittier

Presbyterian Church, revealed that neither had seen any evidence of direct impacts on their institution by the adult businesses. Both were very much aware of their presence, however, and the principal at Franklin School stated that several families who have moved from the area cited the presence of said businesses. One businessman who relocated to another area in the City, stated that the businesses were not a factor but that his clients now comment on the improvement.

The park referred to is McNees Park, at Whittier and Hadley, in the unincorporated County area. Whittier Police Department indicates that while the park is the scene of many arrests and source of many problems, no definite correlation can be made between the problems and its proximity to adult businesses.

Only one church is within the areas where the current urgency ordinance would allow adult businesses. Other churches are within 250 feet of the area uptown where such businesses could be located. Whittier High School is also within 250 ft. of allowable location in the M zoned area and St. Mary's parochial school is within 500 feet. Central Park (Bailey and Washington) is also within 250 feet of property eligible for the location of adult businesses.

Police records show that complaints of public drunkenness are more frequent in the areas around adult businesses where they are also in close proximity to bars and taverns which are not "bonafide eating places." There may, therefore, be reason to separate adult businesses from businesses with certain types of on-sale alcoholic beverage permits issued by the Alcoholic Beverage Control Board.

Churches, schools, and other public facilities are closed much of the time and do not present the opportunities which the parks do. The peak use hours of adult businesses are evenings, when schools, churches, and most public facilities are closed. Therefore, the

effect on these uses would naturally be less than on uses which were all day uses, such as parks, or which, like residences, have evening and weekend "peak use" or enjoyment times. For these reasons, it may be in the community interest to require separation between adult businesses and parks. Five hundred feet should be considered a minimum separation, as this distance can be easily walked in less than five minutes. A thousand feet would require an individual to purposely set out to walk whereas 500 feet or under can be "wandered into."

Based solely on the study of one adult business, located almost in the midst of a residential neighborhood (area 2), and its effect on that neighborhood, it would appear that a 500 ft. separation from residential areas is adequate so long as the adult businesses are separated from one another to avoid concentration.

Adequate separation between adult businesses would also lessen the visual or aesthetic impact of concentrations such as businesses caused by their usual garish colors and flashing signs.

In addition to adult businesses, the Detroit ordinance included, when originally adopted as a skid row ordinance in 1962, as "regulated uses," Group "D" cabaret, establishments for the sale of beer or intoxicating liquor for consumption on the premises, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls. Adult bookstores and adult theaters were added to this ordinance in 1972.

The Group "D" cabaret mentioned above is a topless or nude cabaret. Cabarets in the City of Whittier are currently regulated through a permit processed through the City Council. Other establishments for on-premise consumption of alcoholic beverages are currently regulated through the conditional use permit process. Pool or billiard halls, secondhand stores, and pawn shops, are permitted

uses in the C-2 zones and by themselves present no evidence of any deleterious effect on adjacent properties. Shoeshine parlors and taxi dance halls are more or less unique to the skid row areas of the large cities and do not exist in Whittier nor are they expected to.

None of these uses are inherently attracted to one another, but all seem to be common to skid row areas. The skid row aspect of the Detroit ordinance has no bearing on Whittier's situation and staff cannot substantiate the need for any further regulation of those uses which are not classified as adult businesses.

In some areas, adult only motels and hotels have been established, featuring closed circuit TV showing pornographic movies as well as providing other "services," similar to the adult businesses discussed above. Staff feels that the likelihood of this type of business occurring in Whittier is not too great as these are more prevalent in areas of high transient traffic. Rather than attempt to define such a use in anticipation of its occurring, the proposed definition of adult businesses should provide adequate control over such a use.

Definitions

Defining an "adult business" is difficult, particularly when trying to separate them from other uses with similar names. The current urgency ordinance uses as its base, the definitions which appear in the Detroit ordinance with minor modifications.

The key to the Detroit definitions is the "specified anatomical areas" and "sexual activities." However, such terminology is not immediately applicable to such uses as modeling studios, massage parlors, body painting studios, escort service, rap centers, and similar uses which utilize live humans for providing services. These uses differ from theaters and bookstores in that the latter uses reproductions of humans and the "specified anatomical areas" can be easily applied.

In defining individual adult businesses, the following have been used:

"Adult Book Store" shall mean an establishment having as a substantial or significant portion of its stock in trade, material which is distinguished or characterized by its emphasis on matter depicting, describing, or relating to specified sexual activity or specified anatomical areas, or an establishment with a segment or section thereof devoted to the sale or display of such material.

"Adult Business" shall mean and include an adult book store, adult theater, massage parlor, or modeling studio.

"Adult Theater" shall mean a theater which presents live entertainment or motion pictures or slide photographs, which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activity, or specified anatomical areas.

"Massage Parlor" shall mean an establishment or business which is required to be licensed pursuant to Section 6280 et seq of the Whittier Municipal Code.

"Material" shall mean, and include, but not be limited to, books, magazines, photographs, prints, drawings, or paintings, motion pictures, and pamphlets, or any combination thereof.

"Adult Modeling Studio" shall mean an establishment or business which provides the services of modeling for the purpose of reproducing the human body wholly or partially in the nude by means

of photography, painting, sketching, drawing, or otherwise.

"Specified Anatomical Areas" shall mean:

(a) less than completely and opaquely covered:

(i) human genitals, pubic region;
(ii) buttock, and
(iii) female breast below a point immediately above the top of the areola; and

(b) human male genitals in a discernibly turgid state,

even if completely and opaquely covered.

"Specified Sexual Activities" shall mean

(a) human genitals in a state of sexual stimulation or arousal; and/or

(b) acts of human masturbation, sexual stimulation or arousal; and/or

(c) fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.

In the Detroit case, the phrase "distinguished or characterized by an emphasis on matter depicting..." was attached as vague. But, since there was no question in the Detroit case as to whether the material was "distinguished or characterized by an emphasis on matter depicting," the court did not rule on the vagueness of such a definition. A similar vagueness is found in the definition of adult bookstore where the phrase reads, "an establishment with a segment or section devoted to the sale or display of such material." The City's urgency ordinance narrows the vagueness some by using the phrase, "substantial or significant portion of its stock in trade... depicting...." Such words as substantial, significant, distinguished by, segment and section usually require the courts to provide the narrowing.

A number of cities define adult businesses as:

"...any business which is conducted exclusively for the patronage of adults, from the premises of which minors are specifically excluded, either by law or by the operation of such business."

Such a definition will generally encompass any use which the City is attempting to regulate and gets around the touchy question of content of material, relying on existing State and local regulations. These regulations are briefly discussed below.

The Whittier Municipal Code, Section 6288, prohibits giving a massage to or admitting any person under 18 years of age into a massage parlor unless parent or guardian has consented thereto in writing.

Minors are currently excluded specifically from adult bookstores and adult theaters by Section 313.1 of the Penal Code of the State of California because of the "harmful" content of the material available.

Section 309 of the Penal Code prohibits admitting minors into places of prostitution, but the law does not prohibit admitting a minor to view the physical body and photograph it for his own use. In this case, the exclusion is imposed by the management of the business who is not required by law to do so but does so out of fear of the possibility of being found guilty of contributing to the delinquency of a minor pursuant to Section 272 of the Penal Code.

The difficulty at this point in time with a general definition is that litigation is still pending on one such ordinance whereas the court has sanctioned, though on a 5 - 4 vote, the definitions contained in the Detroit ordinance.

The two types of definitions can, however, be used together. The severability clause (Section 9105) of the zoning regulations would protect one definition if the other was ruled against by the court.

If the courts should rule in favor of the general definition, then the ordinance is that much stronger and accomplishes the overall goal of regulating existing and future adult business uses and eliminates the need for defining every possible business which might be conjured up.

Control

Assuming the dispersion approach is the most acceptable, two methods are available as alternatives to determining where adult businesses can be located. The first is to permit them by right in given zones, with the locational criteria. The second is to require approval through a permit process of some kind. The conditional use permit is the only tool available to the City for this type of control.

By allowing the use to be established by right, the City relinquishes control over the use other than through enforcement of criteria which might be established. Such regulation fails to take into account special circumstances relative to a specific location, on which adult businesses might have impact. The conditional use permit process allows staff and Planning Commission to review each request and requires the applicant to show that the use will not have an adverse impact on the area and that there is a demonstrated need for the use at that location.

The question remaining then is which zone is appropriate. Being a commercial use, an adult business would be limited to one of the C zones or the M zone. The C-0 zone is intended for offices and uses which service offices or employees of office type uses, such as beauty and barber shops. The C-0 zone, as well as the C-1 zone, act somewhat as transitional or buffer zones, often separating heavier C-2 zones from residential zones and allowing residential uses as

as well. Adult businesses in the C-0 and C-1 zones would not be able to meet any reasonable separation criteria. The C-2 zones, though often separated from residential districts by C-0 and C-1 zones are not ideal either because of their proximity to residential uses and the shallow depths of most C-2 zoning which makes meeting separation criteria difficult.

The courts have said that restrictions on a legal business cannot be such that the effect is elimination or prohibition of such uses. First permitting adult businesses in the C-2 zone would provide reasonable flexibility through the conditional use permit process for the approval of a limited number of adult businesses in several areas of the City.

Abatement of Nonconforming Uses

It is quite obvious that any requirement for separation from residential areas and between businesses will have the effect of making all of existing adult businesses, with the exception of the theater Uptown, nonconforming uses, subject to abatement.

The courts have held that reasonable time must be given in the amortization of nonconforming uses. Such time limits must commensurate with investment involved and based on the nature of the use.

The improvement made to structures in which existing adult businesses are located were basically partitioning and signs. The valuation listed on the permits ranged from (total of all permits on property) $1,000 to $12,450, averaging $3,185 per adult business. Three locations apparently had no modifications which required building permits. The permit fees amounted to a total of $572.95, averaging $47.75 per business. One case of high valuation and permits resulted from the repair to a structure after extensive

fire damage. These amounts are not, in staff's opinion, significant investments for the use, and on the high rate of return on adult business investments any costs should have been amortized several times.

The courts in 1974 upheld an 18-month amortization of a use declared a public nuisance, where users had no investment in any permanent improvements on the property and where users had adequate time to make plans to move and where there was substantial evidence that there was adequate properties favorably zoned in the county which could be used to locate the business.

A reasonable amortization should not be less than 18 months nor need be longer than two or three years. Where the conformity only requires a change in the stock in trade, such as books or a change in the material presented as in a theater, the amortization period can be shorter. The proposed ordinance would provide 90 days in this case.

Conclusion

The information obtained and reviewed during the conduct of this study has definitely shown that concentration of adult businesses in the City of Whittier have had an adverse impact on the adjacent neighborhoods. The increases in crime and residential occupancy turnover are two of the key indications of neighborhoods beginning to decline and deteriorate. The City's intent in regulating such businesses is to prevent them from causing deterioration in adjacent neighborhoods. Assuming that such regulation, now pending is timel· that is, not too late, some of the more physical evidences of deterioration are not blatantly evident. However, experiences of (municipalities and of individuals support the impact of prolonged concentration of such businesses.

Inasmuch as the courts have prevented the outright prohibition of adult businesses, regulation is the only control left to the cities. It is evident from the study that individual, isolated businesses do not have nearly as great an impact as concentrations.

Therefore, the dispersion of adult business in certain areas of the City is the most appropriate form of regulation, using the conditional use permit process to review each application.

The Supreme Court has upheld 1,000 foot and 500 foot separations in the Detroit case. These separations are adequate for Whittier's situation. In certain circumstances, lesser separation would accomplish the same end, but structuring an ordinance with specific areas complicates its enforcement.

The effect of such separation would make portions of the industrial areas and shopping centers eligible locations for adult businesses, subject to conditional use permit approval.

All of the existing locations of adult businesses would become nonconforming under the provision of the proposed ordinance and required to conform within the prescribed abatement periods.

Recommendation

Staff recommends that the Planning Commission recommend that the City Council find that the regulation of adult businesses is required for the preservation of the integrity of existing commercial area and residential areas in close proximity thereto and is in the public interest and would promote the general welfare of the community and that the attached draft ordinance regulating such businesses be adopted.

(Considered by Whittier City Planning Commission, January 9, 1978 and Whittier City Council January 24, 1978)

City of Oklahoma City
COMMUNITY DEVELOPMENT DEPARTMENT
Planning Division

ADULT ENTERTAINMENT BUSINESSES IN OKLAHOMA CITY

A SURVEY OF REAL ESTATE APPRAISERS

March 3, 1986

The City of Oklahoma City

Community Development
200 N Walker
Oklahoma City, Okla. 73102

February 3, 1986

Dear Oklahoma City Appraiser,

The City of Oklahoma City has recently adopted a new ordinance that will regulate the location of adult entertainment businesses.

Adult entertainment businesses are defined in our ordinance as those which emphasize acts or materials depicting or portraying sexual conduct. These businesses include "Adult Bookstores," clubs with nude dancers, theatres which show sexually explicit movies, etc.

In an effort to more completely analyze the impact of adult businesses on surrounding properties, Planning Division asks for your help in establishing a "best professional opinion" on the matter. As a real estate professional, the opinions you share with us on the enclosed survey forms would be very valuable to us in the development of a local data base for this sensitive land use issue.

Thank you very much for your assistance.

Sincerely,

Carl Friend

Carl Friend
Principal Planner

CF:SK:dar

cc: Pat Downes
H. D. Heiser

COMMUNITY DEVELOPMENT DEPARTMENT
Planning Division
CITY OF OKLAHOMA CITY

TO: Professional Real Estate Appraisers

Please help us in this brief Oklahoma City survey. The information provided will help us establish an important data base regarding adult entertainment businesses.

The first four questions relate to the hypothetical situation presented below. The last three questions refer to actual situations in Oklahoma City that you might be aware of.

> A middle income residential neighborhood borders an arterial street that contains various commercial activities serving the neighborhood. There is a building that was vacated by a hardware store and will open shortly as an adult bookstore. There are no other adult bookstores or similar activities in the area. There is no other vacant commercial space presently available in the neighborhood.

Please indicate your answers to questions 1 through 4 in the blanks provided, using the scale A through G.

SCALE:
- A Decrease 20% or more
- B Decrease more than 10% but less than 20%
- C Decrease from 0 to 10%
- D No change in value
- E Increase from 0 to 10%
- F Increase more than 10% but less than 20%
- G Increase 20% or more

1) How would you expect the average values of the RESIDENTIAL property within ONE block of the bookstore to be affected? _____

2) How would you expect the average values of the COMMERCIAL property within ONE block of the bookstore to be affected? _____

3) How would uou expect the average values of RESIDENTIAL property located THREE blocks from the bookstore to be affected? _____

4) How would you expect the average values of COMMERCIAL property located THREE blocks from the bookstore to be affected? _____

5) Are you aware of the existence of adult entertainment businesses in Oklahoma City? _____

6) What is your opinion as to the effect of these businesses on surrounding properties?

_____

_____

_____

7) Specifically, how do you think these businesses affect the surrounding property?

_____

_____

_____

_____

_____

Are you a member of:

MAI ____

ASA ____

SREA ____

other _____

Your name or agency _____

(If you prefer not to give your name, please check here ___)

Thank you for your cooperation. Please return this questionnaire in the postage paid envelope provided for your convenience.

METHODOLOGY

On February 7, 1986, 100 questionnaires were mailed. All real estate appraisers in Oklahoma City listed in the Yellow Pages were included in the survey. As of March 1, 1986, 34 (34%) of the questionnaires had been completed and returned. Real estate appraisers do not receive certification from the State of Oklahoma; however, 26 of the respondents (76%) belonged to a professional organization. The table below summarizes the objective part of the questionnaire. Subjective comments are discussed in a separate section of this report.

SCALE	QUESTIONS			
	1	2	3	4
A Decrease 20% or more	11 (32%)	7 (21%)	4 (12%)	4 (12%)
B Decrease 10% - 20%	8 (24%)	9 (26%)	3 (9%)	3 (9%)
C Decrease 0 - 10%	6 (18%)	10 (29%)	10 (29%)	7 (21%)
D No change in value	9 (26%)	8 (24%)	17 (50%)	20 (59%)

E,F, and G were positive values--not checked by anyone

OKLAHOMA CITY REAL ESTATE APPRAISER SURVEY RESULTS

The 100% survey of real estate appraisers in Oklahoma City produced results that were consistent in virtually all respects with the result of the national survey of appraisers carried out by the city of Indianapolis.

Respondents overwhelmingly (74%) indicated that an adult bookstore would have a negative effect on residential property values in the hypothetical neighborhood described if they were within one block of the premises. 32% felt that this depreciation would be in excess of 20%, wheras 42% foresaw a decrease in value of from 1% to 20%. (Comparative national figures are 78%, 19% and 59% respectively.)

Seventy-six percent (76%) saw a similar decrease in commercial property values within one block of the adult bookstore. As in the national survey, fewer (21%) felt that a devaluation of over 20% would occur. The majority, (55%) saw the depreciation as being in the 1% to 20% range. (Comparative national figures are 69%, 10% and 59% respectively.)

The negative impact fell off sharply when the distance was increased to three blocks. As in the national survey, there appears to be more of a residual effect on residential properties than on commercial properties.

50% of the appraisers felt that a negative impact on residential properties would still obtain at three blocks from the site. Only 12% felt that this impact would be in excess of 20%. The remaining 38% felt that depreciation would be somewhere in the 1% to 20% range. 50% saw no appreciable effect at all at three blocks. (Comparative national figures are 39%, 3% and 61%.)

Commercial property was judged to be negatively impacted at three blocks by 41% of the survey. 59% saw no change in value as a result of the bookstore. (Comparative national figures are 23% and 76% respectively.)

In summary:

- The great majority of appraisers (about 75%) who responded to this survey felt that there is a negative impact on residential and commercial property values within oneblock of an adult bookstore.
- This nagative impact dissipates as the distance from the site increases, so that at three blocks, half of the appraisers felt that there is a negative impact on residential property and less than half felt that there is a negative impact on commercial property.

RESULTS FROM SUBJECTIVE QUESTIONS

Oklahoma City real estate appraisers were also asked for their opinions as to the effect of adult entertainment businesses on surrounding properties. Most of the respondents discussed a variety of negative effects. Only five respondents (14%) said that adult entertainment business had very little effect on surrounding properties. Of these, three appraiser felt that these types of businesses located in commercial areas that were already blighted. All respondents indicated their awareness of the existence of adult entertainment businesses in Oklahoma City; many refered to the 10th and MacArthur location as a prime example of an undesirable cluster situation.

Opinions are summarized below:

Not good: attracts undesirables, threat to residents feeling of safety & security.
- acts as a deterent to home sales
Would you want your home or business next door?
-forces good businesses out
-tends to have a snowball effect
-an immediate transition begins, with the better quality businesses moving out and a lower class business moving in (pawn shops, bingo parlors)
-embarrassment to other businesses and cliental - late hours, parking-trash and debris - vandalism
-children in the area in danger of adverse influence or by actual molestation by perverted people drawn to such establishments
Typical shoppers and residents go elsewhere to shop, and, if they're able to live.
If there is a large concentration of this type of business, there can be a very large loss in property value.
-tends to prevent economic improvement in the area, effects the community as to attracting other businesses
-detrimimental impact on rental rates

REPORT ON THE SECONDARY EFFECTS OF THE CONCENTRATION OF ADULT USE ESTABLISHMENTS IN THE TIMES SQUARE AREA

April 1994

PREPARED BY INSIGHT ASSOCIATES

TIMES SQUARE
BUSINESS IMPROVEMENT DISTRICT

REPORT ON THE SECONDARY EFFECTS OF THE CONCENTRATION OF ADULT USE ESTABLISHMENTS IN THE TIMES SQUARE AREA

April 1994

1560 Broadway, Suite 800, New York, NY 10036
(212) 768-1560 Gretchen Dykstra, President

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EXECUTIVE SUMMARY

BACKGROUND

After a dramatic decline in the number of adult use businesses in Times Square from an all-time high of approximately 140 in the late 1970s to 36 in June, 1993, the business and adjacent residential communities view with concern the increase to 43 in the last few months. The area of concentration of these businesses has shrunk and shifted from Broadway and Seventh Avenue to Eighth Avenue and the western edge of 42nd Street block between Seventh and Eighth Avenues. This summer the City and State will begin condemnation procedures against the remaining private parcels on the northeast corner of 42nd Street and Eighth Avenue. This action will reduce the overall number but displacement onto Eighth Avenue is possible.

Times Square is one of the City's most eclectic and vibrant commercial areas, producing extraordinary economic fuel and firing the imaginations of millions worldwide as the international icon of vitality and vibrancy. Times Square is home to some of the City's major corporations with more than 30 million square feet of office space. The BID represents approximately 400 property owners and 5,000 businesses including giant entertainment companies, international security firms, large law firms, theatrical agents and publishers. Times Square has a daily pedestrian count of 1.5 million people.

It is the capital of legitimate theater for the nation with 37 Broadway theaters and a total of 25,000 seats. These theaters together sell some 8 million tickets annually, pumping $2.3 billion into the New York City economy annually.

Approximately 20 hotels with 12,500 hotel rooms (one-fifth of all hotel rooms in Manhattan) house some five million visitors a year and more than 200 restaurants, the largest concentration in any City neighborhood, serve them and local patrons. The Convention and Visitors' Bureau estimates 20 million tourists come to Times Square annually.

But Times Square is also home for thousands of residents who live within its heart or immediately adjacent to it. The BID alone has six churches within its boundaries. Among the 25,651 people who live in six census tracts which include 42nd to 54th from Sixth to Tenth Avenues, 15.4% are 62 years or older which is similar to Manhattan as a whole and to the two community districts (CB4 and CB5) in which Times Square exists. In 1990 nearly 2,000 children under the age of 14 lived in this area, too. Both old and young are generally circumscribed by their immediate community. The Census data also show that 48% of these residents work within less than half an hour from their homes and walk to work, spending both their

working and off-hours in the Times Square area. This percentage is higher than the percentage for the borough as a whole and is much higher than the percentage of those in the other four boroughs.

Crime has plummeted over the past several years in Times Square with an estimated reduction by 60% on West 42nd Street alone. This reduction came in part from the closing of many adult use establishments on 42nd Street between 7th and 8th Avenues and the close coordination between the NY Police Department and the Times Square BID. The BID with its 40 public safety officers has witnessed an overall reduction of street crime within its boundaries by 19%, comparing 1992 to 1993, including an impressive reduction of 38% in grand larceny from the person. BID statistics also reveal that three card monte games have been reduced by some 57% over the past year.

The most recent Mayor's Sanitation Scorecard rated the sidewalks of Times Square at an impressive 93% thanks in large measure to the BID's 45 sanitation workers. In addition, the BID's homeless outreach team has placed many needy people in shelters and services.

During 1993, the City Council introduced legislation that would restrict the locations of adult uses citywide. This proposed legislation, along with similar bills proposed and enacted in cities across the nation, including Detroit, can only be upheld constitutionally, if it can be supported by documentation of negative secondary effects as well as evidence that the establishments could locate somewhere accessible for their patrons.

The Times Square BID commissioned an objective, fact-finding study to determine the effect, if any, these adult use businesses have on one of the City's most commercially vital areas. In this study, as in other secondary effects studies, researchers combined analysis of available data on property values and incidence of crime together with a demographic and commercial profile of the area to show relationships, if any, between the concentration of adult use establishments and negative impacts on businesses and community life. The study also includes, as allowed by Courts, anecdotal evidence from property owners, businesses and community residents and activists of their perceptions of the impact adult establishments have on their area.

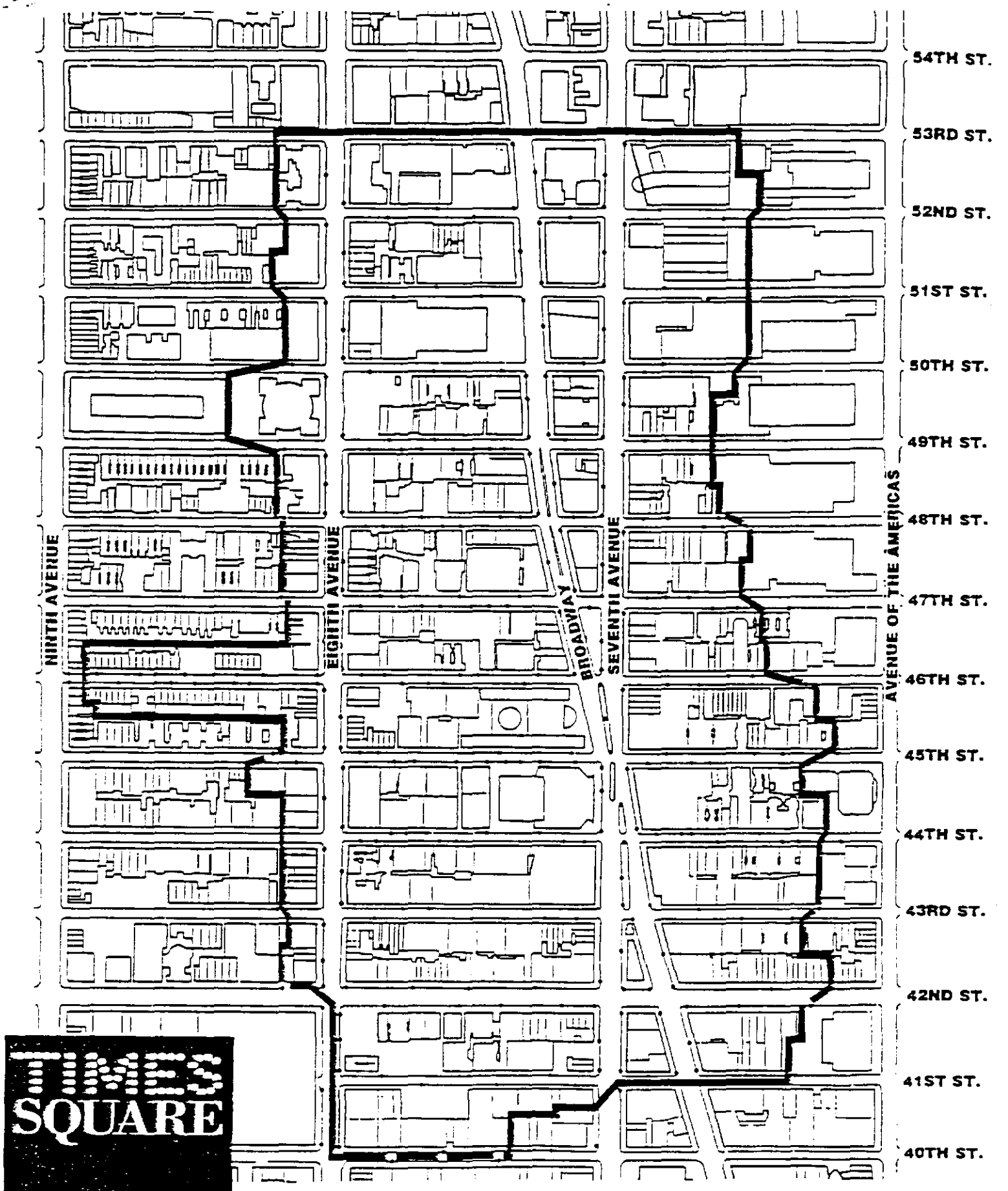
FINDINGS

- All survey respondents acknowledged the improvements in the area and voiced optimism about the future of Times Square even as they bemoaned the increase of adult establishments on Eighth Avenue. Many respondents felt that some adult establishments could exist in the area, but their growing number and their concentration on Eighth Avenue constitute a threat to the commercial prosperity and residential stability achieved in the past few years.

- Although the study was unable to obtain data from before the recent increase in adult establishments and, thus, unable to show if there's been an increase in actual complaints, there were, in fact, 118 complaints made on Eighth Avenue between 45th and 48th compared to 50 on the control blocks on Ninth Avenue between 45th and 48th Streets. In addition, the study reveals a reduction in criminal complaints the further one goes north on Eighth Avenue away from the major concentration of these establishments.

- The rate of increase of total assessed values of the Eighth Avenue study blocks increased by 65% between 1985 and 1993 compared to 91% for the control blocks during the same period. Furthermore, acknowledging the many factors that lead to a property's increased value, including greater rents paid by some adult establishments, an assessment of the study blocks reveal that the rates of increases in assessed value for properties with adult establishments is greater than the increase for properties on the same blockfront without adult establishments.

- Many property owners, businesses, experts and officials provided anecdotal evidence that proximity (defined in various degrees) to adult establishments hurts businesses and property values.



TIMES SQUARE

Business Improvement District

INTRODUCTION

After a dramatic decline in the number of adult use establishments in the Times Square area in the last eight years, Times Square, like other neighborhoods in the city, has experienced a sudden increase, especially along Eighth Avenue. This recent increase of adult businesses must be seen in the context of the current resurgence of Times Square as New York's premier tourist, entertainment, and commercial center. Member organizations of the BID and other concerned citizens have expressed particular concern about the impacts of a dense concentration of these businesses on the commercial life of the area. Thus, this study was commissioned by the Times Square Business Improvement District.

The Times Square Business Improvement District works to make Times Square clean, safe and friendly. The Times Square BID, working collaboratively with city agencies, community organizations and the many individuals and groups with a shared interest in the vitality of Times Square, provides supplemental security and sanitation services, homeless outreach efforts, tourism assistance and special events and marketing.

The BID extends from 40th to 53rd Streets, just west of Sixth Avenue to the west side of Eighth Avenue. Along 46th Street, it stretches to 9th Avenue. Its over four hundred members represent five thousand businesses and organizations in the Times Square area. Supported by mandatory assessments on local property owners, the BID has an annual budget of $4.6 million. It is an independent not-for-profit organization, with a 46-member Board of Directors representing large property owners, large and small commercial tenants, residential tenants, and social service agencies.

During 1993, legislation was introduced in the City Council that would restrict the placement of adult uses on a city-wide basis. This legislation was spurred in large part by residential neighborhoods that, for the first time, were becoming home to adult establishments.

In the summer of 1993 the BID hired Insight Associates to assess that proposed legislation and its possible impact on Times Square in order to help the BID understand its options and determine an appropriate reaction. That study called attention to wider national experience. Legislation regulating adult uses, in order to pass Constitutional muster and be upheld in the courts, must be backed by documented evidence of secondary effects of such businesses and their concentration.

The Times Square BID decided to initiate its own secondary effects study, to ensure that the Times Square experience is well-represented in any city-wide debate. The BID again hired Insight Associates, with Ethel Sheffer and Marcie Kesner as principal researchers, in September, 1993.

In the same month, the Mayor of the City of New York ordered the Department of City Planning to undertake a secondary-effects study for the entire city. That study has focused on six neighborhoods in the five boroughs, but not on Times Square. We have continued to exchange data and cooperate with City Planning in the course of our two parallel inquiries (See Appendix: The Department of City Planning Secondary Effects Study).

In addition, the Borough President of Manhattan has established a Task Force on which the BID serves. The Task Force, staffed by her office, has held public hearings and continues to gather information. It will be issuing its own recommendations in the Spring of 1994.

This study, then, seeks to obtain evidence and documentation on the secondary effects, if any, of these adult use businesses in the Times Square Business Improvement District, and of their dense concentrations, especially along 42nd Street and along Eighth Avenue. The BID instructed Insight Associates to follow the models offered by other secondary effects studies. The BID was not seeking an advocacy document, but rather an objective fact-finding study, that would add to the city-wide deliberations and to future attempts to find legal and effective ways to regulate these businesses.

Many people contributed a great deal of time and effort to this work. We want to thank particularly the staff of the Management Information Division of the Department of Finance and of the Crime Analysis Division of the New York Police Department, as well as staff of the Midtown South, Midtown North and Tenth Precincts and the Mayor's Office of Midtown Enforcement. We have not quoted any of our 54 interviewees who work and live in Times Square by name, but we thank them for taking the time from their very busy schedules to participate in our survey. We also are grateful to the many people in the real estate sector, the residents and community leaders in several neighborhoods, and the officials of municipal government in New York and other American cities, who were generous with their time in response to our inquiries.

SUMMARY OF LEGAL ISSUES AND THE EXPERIENCE ELSEWHERE

The concern about the presence of adult businesses in the midst of American cities dates at least from the decades following the Second World War when a recognition of their impact upon surrounding land values and a growing indignation about their effect on communities became widespread. By the early 1990's the regulation of adult use businesses and entertainment establishments had become a serious issue for communities across the United States. This is reflected in a number of studies and public testimony showing a relationship between adult use establishments on the one hand, and declining property values, crime and neighborhood deterioration on the other. It is these "secondary effects" which the Supreme Court and other federal and state courts take into account when ruling on the efforts of communities to regulate these businesses.

The present study is not a legal treatise--though it does review some legal precedents by way of background--but an analysis and documentation of the impacts of a concentration of adult use establishments on the Times Square area.

The major questions on this subject for a court are whether any limitation on adult uses is based on content, or whether it is based on the secondary effects of these uses on the surrounding community. There have been a number of instances in the last years in which federal courts have found adult use zoning restrictions to be acceptable, if they have been motivated by a desire to protect neighborhood quality, as contrasted with an impermissible desire to ban the message purveyed by the adult uses. It appears that courts will accept restrictions if they serve a "substantial government interest", if any statute is narrowly drawn to achieve that end, and if there are "reasonably available alternative avenues of communication". "Substantial government interest" has been defined to include reasonable attempts by municipalities to reduce urban blight and to preserve neighborhood character. "Alternative avenues of communication" requires that there be enough other places in the city for the relocation of these establishments. The availability of such places needs to be shown in court as a matter of fact.

Some cities have employed a variety of regulatory mechanisms. They have created special use zoning districts; they have required that adult uses be located at specified distances from residences, schools, churches, or business and commercial districts; and they have required operators of regulated establishments to obtain licenses or permits. Some illustrations are:

- **Detroit's** adoption of an "anti-skid row" zoning ordinance to disperse and/or bar from designated areas the establishment of a broad array of designated businesses, including adult uses. These restrictions were supported by studies of secondary effects.

• **Chicago's** requirement that owners or managing agents register and provide specific information related to the nature of their business. Chicago also regulates signs and displays by prohibiting the exterior display of sexual activity and nudity.

• **Renton,** a suburb of Seattle, restricted adult motion picture theatres from locating within 1,000 feet of a residentially zoned area or a house of worship, park, or school. The restrictions were upheld because it was found that approximately five per cent of the city's total land would still remain available for adult uses.

• **Boston's** creation of an Adult Entertainment District on the borders of its downtown center, and has thus concentrated rather than dispersed adult uses. This is a two-block area know as the "Combat Zone".

• **Islip, Long Island's** plan to restrict the location of adult uses to industrial districts, a plan that was upheld by the New York State Court of Appeals.

Zoning has been an especially frequent tool for cities regulating adult uses, since the Supreme Court has held that adult entertainment is a type of land use, like any other, that can be subject to rational scrutiny under equal protection.(Jules B. Gerard, Local Regulation of Adult Businesses, Deerfield, Illinois: Clark Boardman Callaghan, 1992, p.129).

Certain generalizations are seen in the variety of Court rulings in regard to zoning:

• Locational restrictions cannot be so severe as to preclude the present and/or future number of adult uses in a city.

• The more evident and rational the relationship of adult use restrictions to recognized zoning purposes, (e.g. the preservation of neighborhoods, the grouping of compatible uses), the greater the likelihood that the zoning restriction will be upheld.

• The greater the vagueness of a law the more likely it is to be struck down.

• If there is too much administrative discretion a law is likely to be struck down, since government may regulate only with narrow specificity.

Other Secondary Effects Studies

The court decisions supporting and upholding regulatory measures were supported by studies of secondary effects, some of which we summarize below:

Detroit: In Young v. American Mini-Theatres,(427 U.S.1976) the Supreme Court affirmed that cities may use zoning to restrict adult entertainment if adult entertainment is shown to have a harmful impact on neighborhoods. The City of Detroit adopted an anti-Skid Row zoning ordinance in 1962 prohibiting certain businesses, such as pool halls, pawn shops,and in an amended version in 1972, adult bookstores, motion picture theatres, and cabarets, from locating within 1,000 feet of any two other "regulated uses" or within 500 feet of a residentially zoned area. The ordinance sustained in Young was **based on studies by urban planning experts that showed the adverse environmental effects of permitting certain uses to be concentrated in any given area.**

Mt. Ephraim, New Jersey: In the next ten years, there were a number of Supreme Court cases which continued to define the limits of employing zoning as a tool for restricting adult entertainment. Although it was recognized that such restrictions were valid, it was also established in Schad v. Borough of Mt. Ephraim (452 U.S. 61, 1981) (though with a plurality decision because of varying interpretations among the justices) that municipalities may not use zoning to prohibit adult entertainment entirely. The deciding judges stated that the borough **had not offered sufficient evidence** to show the incompatibility of adult uses with other commercial businesses, and also had not provided adequate "alternative avenues of communication" for the location of such businesses.

Renton, Washington: In 1986, the U.S. Supreme Court upheld the Renton, Washington regulations (The City of Renton v. Playtime Theatres (475 U.S.41, 1986), although the city had based its prohibitions upon a study of the secondary effects of adult theatres conducted in neighboring Seattle and other nearby cities. The Supreme Court stated that municipalities could rely on the experiences of other cities. Furthermore, the Court stated that a city must be allowed to experiment with solutions to serious problems and it must be allowed to rely upon the experiences of other municipalities about the deteriorating and blighting effects of adult use establishments.

Los Angeles: In June, 1977, the Los Angeles City Planning Department conducted a study of the effects of adult entertainment establishments in several areas within the city. It found "a link between the concentration of such businesses and increased crime in the Hollywood community" (p.1.) The study also concluded, based on its analysis of percentage changes in the assessed value of commercial and residential property between 1970 and 1976, that there was no direct relationship between adult uses and property value changes. But in response to questionnaires, **it was shown that appraisers, realtors, bankers, businesspeople, and residents all believed that the concentration of adult entertainment establishments has an adverse**

economic effect on both businesses and residential property in respect to market value, rental value, and rentability/salability.

It was believed that these effects extend even beyond a 1,000 foot radius, and that they are related to the degree of concentration. In addition, there are adverse effects on the quality of life, including neighborhood appearance, littering, and graffiti.

Minneapolis-St. Paul: The Twin Cities have conducted a number of studies over a period of more than ten years. In a 1978 St. Paul study and a 1980 Minneapolis study, statistically significant correlations were seen between location of adult businesses and neighborhood deterioration. It was concluded that adult businesses tend to locate in somewhat deteriorated areas to begin with, but further deterioration follows the arrival of adult businesses.

In these early studies, significantly higher crime rates were associated with an area containing two adult businesses than in an area with only one such business. Significantly lower property value prevailed in an area with three such businesses than in an area with only one.

In 1983, St. Paul examined one neighborhood that had a particularly heavy concentration of adult entertainment establishments. The University-Dale neighborhood had many signs of deterioration and social distress. While these indicators could not be directly attributable to the presence of the adult establishments, it was stated that there was a relationship between the concentrations of certain types of adult entertainment and street prostitution, especially, as well as other crimes. (40-Acre Study, prepared by the St. Paul Department of Planning and Economic Development, p. 19.)

This perception of an unsafe and undesirable neighborhood was documented by a survey conducted by Western State Bank which found its efforts to attract employees and customers being frustrated by people's perceptions of the neighborhood. (Ibid., p.23.)

In a 1987 Memorandum of the St. Paul Planning Department, discussing issues raised during the public review of proposed zoning regulations of adult establishments, it was stated that there is a relationship of prostitution activity to adult entertainment establishments, making for a "sex for sale" image of the neighborhood. The variables affecting the incidence of street prostitution include the character of the neighborhood, the effect of the concentration of adult businesses, and the specific kind of adult businesses associated with other serious land use problems. (Ibid., p.53-54.)

While much of the public testimony and the expert analysis described the negative effects on residential areas, it was also stated that such uses should be prohibited from proximity to commercial areas as well, because the purposes are incompatible. (Ibid., p.60.) If such harmful uses do continue to exist in commercial areas, it was recommended in the study that there be sufficient spacing requirements,

so as to minimize the documented negative effects of clusters of establishments.

In the 1988 Supplement to the 40-Acre Study, the City Planning Staff asserted that there is considerable evidence that multifunctional adult entertainment complexes can be the equivalent of the concentration of many single adult businesses. (Supplement to the 1987 Zoning Study, p. 6.) These multi-uses not only create multiple negative impacts but may also increase the intensity of the negative impacts. (Ibid., p.7.)

In 1989, the Attorney General of Minnesota, Hubert Humphrey, III, issued a Report based upon the study by the state's Working Group on the Regulation of Sexually Oriented Businesses. It recommended a number of zoning and distancing regulations, as well as licensing regulations, while continuing to document the negative effects of such businesses on communities. It recommended that "Communities should document findings of adverse secondary effects of sexually oriented businesses prior to enacting zoning regulations to control these uses so that such regulations can be upheld if challenged in court. (Attorney General's Report, p. 5.)

Indianapolis, Indiana, and Phoenix, Arizona: The Minnesota Attorney General's Working Group summarized these two other studies. In 1983,Indianapolis researched the relationship between adult entertainment and property values at the national level. They took random samples of twenty percent of the national membership of the American Institute of Real Estate Appraisers. Eighty percent of the survey respondents felt that an adult bookstore located in a hypothetical neighborhood would have a negative impact on residential property values of premises located within one block of its site. Seventy-two percent of the respondents felt there would be a detrimental effect on commercial property values within the same one-block radius.

A Phoenix, Arizona Planning Department study, published in 1979, showed arrests for sexual crimes, and locations of adult businesses to be directly related. The study compared three adult use areas with three control areas with no adult use businesses.

Islip, New York: In 1980, the town of Islip, Long Island conducted a study of the impacts of adult bookstores on residential and commercial sections of the town. It focused on the impacts of the location of one particular bookstore, and it surveyed and inventoried the impacts of other adult use enterprises on nearby hamlets, including Bayshore and Brentwood in addition to Islip Terrace and Central Islip. This study also reviewed numerous newspaper articles and letters of complaint, in order to gauge public reaction. Further, it analyzed distances, travel time and other factors to support the town's regulations which confined such uses to industrial zones. This regulation was upheld by the New York State Court of Appeals in Town of Islip v. Caviglia, in 1989. The Court accepted the evidence in the Islip study that the ordinance was designed to reduce the injuries to the neighborhood and that ample space remained elsewhere for the adult uses after the re-zoning.

A BRIEF HISTORY OF ADULT ENTERTAINMENT IN TIMES SQUARE

Times Square has long been known as a place for popular amusements from movies and theatre to flea circuses and video arcades. It has always attracted people of all incomes and tastes. But its history as a place of concentrated sex-related businesses really begins in the late 1960s and 1970s.

The concentration of massage parlors, nude live entertainments, erotic bookstores, X-rated movies, and peep shows increased at that time to such an extent that Times Square began to be called "a sinkhole". (The Daily News, August 14, 1975.)

The resulting crimes, assaults, and other violence made Times Square the highest crime area in the city. The numbers of sex-related businesses in Times Square and its environs reached as high, by some estimates, as 140 in the late 1970s and early 1980s.

In the 1970s the commercial and residential communities united to combat this blight by staging demonstrations and rallies, by sponsoring legislation, and, perhaps most important, by organizing themselves into the Mayor's Midtown Citizens' Committee, and in helping to create the Office of Midtown Enforcement.

The negative image of Times Square created by the increasing concentration of adult entertainment uses, coupled with pessimistic economic indicators, all contributed to a sense of decline on 42nd Street and the surrounding blocks.

In 1977, the City Planning Commission attempted to reduce the existing concentration of adult use businesses and to prevent future concentrations. Stimulated in part by the situation in Times Square, the Commission passed new zoning amendments to disperse such concentrations and to regulate their proximity to residential districts. The adverse economic and social effects produced by these concentrations were documented by findings of higher tax arrears on 42nd Street compared to the rest of midtown, declining sales tax revenue, and increases in criminal activity in Times Square. This zoning attempt failed at the last minute at the Board of Estimate.

But in the early 80s, several factors converged to stimulate a dramatic reduction in adult use establishments on 42nd Street and throughout Times Square. The State declared 42nd Street a "blighted area", and announced its intention to condemn numerous properties, including pornography shops, in order to stage the Urban Development Corporation's 42nd Street Development Project. Although litigation slowed down the project, most of the street has now been condemned and emptied of all uses.

Meanwhile, there was increased police activity throughout the area and the Mayor's Office of Midtown Enforcement coordinated action against illegal businesses including massage parlors. The commencement of the AIDS epidemic had a sobering effect on live sex establishments and many disappeared. And private developers assembled Times Square parcels, removing existing adult uses.

In June 1993 when Insight Associates completed the review for the Times Square BID of City Council legislation there were 36 adult use establishments within the Times Square area, a dramatic decline from the all time high of 140 in the late 70s. In addition, the area of concentration had shrunk and shifted. No longer were sex shops lining Broadway and Seventh Avenue to the same degree, but rather they were beginning to cluster along Eighth Avenue. Now, nine months later, there are 43 adult establishments, with most of the new stores on 42nd Street lying outside of the UDC's project and along Eighth Avenue.

Amidst the refurbishing, upgrading and improvement of a once sorely deteriorated Times Square, there is now new concern about the recent sudden proliferation.

APPROACH AND METHODOLOGY

This study focuses on the Times Square Business Improvement District, but the study concentrates more closely on the areas of adult use business concentration, that is, 42nd Street from Seventh to Eighth Avenues, and Eighth Avenue from 42nd Street to 50th Streets, because more than half of all the District's adult use businesses are located on these blocks.

Following secondary effects studies in other cities, we combined available data on property values and incidence of crime, plus in-person and telephone interviews with a broad range of diverse business and real estate enterprises, including major corporations, smaller retail stores, restaurants, theatres and hotels, as well as with Community Boards, block associations, activists and advocates, churches, schools and social service agencies.

Gathering Data on Assessed Property Values

To measure the possible impact of adult use businesses and the concentration of such businesses in our study blocks, we sought data on the overall and specific changes in assessed valuation of property from the tax period 1985-1986 to the most recent 1993-1994 tax year. This, we felt, would give enough of a spread across real estate cycles. The 1985-1986 data were the earliest computerized data available to us from the Department of Finance records.

The Department of Finance, however, could not provide reliable data on market value, as opposed to assessed valuation. We were able to get, and have used, the actual, not the billable, assessed values. The data contained information on tax block and lot, building class, and street address. We aggregated the actual valuation figures by individual tax lots for Study and Control blockfronts for 1985 and 1986, and for 1993 and 1994. From this we derived the percentage of change between the two benchmark years.

For this part of the study, we narrowed our focus to four Study Blocks: three blocks along Eighth Avenue, from 45th to 48th Street, and the 42nd Street Block between Seventh and Eighth Avenues. As contrasting control blocks where no adult use establishments exist, we chose the equivalent three blocks along Ninth Avenue, and 42nd Street between Eighth and Ninth Avenues. We then compared both the Study and Control blocks' data to similar statistics for all of Manhattan, and for all of New York City, as well as for the BID and the wider Times Square area.

In choosing Control Blocks, we realized that there is no block like 42nd Street between Seventh and Eighth Avenues--our study block--anywhere. But we felt that by shifting our focus just one block to the west, we would have a block with no adult establishments but with similar uses and traffic patterns (though it does have the Port Authority Bus Terminal on its corner). As controls for our Eighth Avenue Study Blocks, we took the similar parallel blocks on Ninth Avenue, which, although residential, have comparable though not identical land uses and traffic patterns.

Tax arrears data were obtained for the years 1988, 1989, 1992 and 1993, the most recent year available through the New York City MISLAND system. We compared the data for our control and study blocks with aggregated data by census tracts that roughly approximated the boundaries of the Times Square Business Improvement District, and with Manhattan and New York City as a whole as well. No significant or consistent findings were obtained from this exercise.

Gathering Crime Data

Working closely with the Crime Analysis Division of the NYPD, we requested crime data for the Study Blocks of 42nd Street, Seventh to Eighth Avenues, and Eighth Avenue, from 45th through 48th Streets, for a period of one year. This amount of data proved too difficult for the Crime Analysis Division to obtain, and we were ultimately given these data for only a three month time period, from June through August, 1993. The same information was also supplied for our Control Blocks, which, for this subject, were slightly different: instead of the 42nd Street block between Eighth and Ninth Avenues which includes the Port Authority Bus Terminal, the next block west, between Ninth and Tenth Avenues was used.

Selecting the Interviewees

We initially obtained a listing of BID property owners for interview, by taking every fifth name on the BID's 404 owners' list. When an individual or corporation owned several properties, the name was used only once. We also eliminated the owners of adult use establishments (though later we did talk to one owner and operator of a number of such establishments in the area). We also deleted the many 42nd Street properties now owned by the State or City of New York or the New York State Urban Development Corporation. Similarly, we disregarded owners with telephone numbers outside the tri-state area, or those without listed telephone numbers. Banks and hotels were omitted from this first list.

This effort yielded a sample of 37 potential interviewees, of whom 20 were ultimately interviewed. The 20 included some of the largest developers and managers in Times Square and in New York City, with multiple holdings, as well as smaller residential and commercial property owners. It included as well the three major theatre-owning organizations, which control almost all the legitimate Broadway

houses, as well as a major nonprofit theatre. Two major communications companies were on this list.

This group of potential interviewees was then supplemented by selections from a listing of restaurants and hotels of different price levels. We interviewed seven restaurant owners or managers, representing eight restaurants in the Times Square area, including major chains, smaller coffee shops, and well known eateries. Two of these interviewees are also owners of the properties in which their operations stand. We interviewed four hotel owners or operators in three hotels along Eighth Avenue. Five retail establishment owners along Eighth Avenue were also interviewed.

Community group interviews included six churches, three social service agencies (plus one more informal interview with a fourth, serving the homeless), five block associations, the District Manager and Assistant District Manager of Community Boards Four and Five, respectively, and the Co-Chairs of each Board's Public Safety Committee. The principals of two public schools in the area were seen as well. In sum, 53 formal interviews were carried out, plus one less formal discussion with an owner and operator of several porn establishments.

For these interviews, we constructed a Survey Schedule questionnaire, which was modelled to some degree on the one being utilized by the City Planning Department's city-wide study of adult uses underway at the same time.

TIMES SQUARE: ITS PROMINENCE AND ITS PEOPLE

The Times Square and Clinton communities, which the Business Improvement District encompasses or abuts, are dynamic and diverse neighborhoods. The area is home to some of the city's major corporations and there are more than 30 million square feet of office space. The BID has more than four hundred property owners, representing five thousand businesses in its membership. More than 250,000 employees work at enterprises that range from giant recording companies to international security firms to one-person theatrical agencies. Among the major corporations now making their home in Times Square are Morgan Stanley, Bertelsmann, Viacom, and many more. And of course, Times Square contains the highest concentration of legitimate theatres anywhere in the world, thirty-seven theatres, with as many as 25,000 seats to be filled on each performance day.

Times Square has a daily pedestrian count of 1.5 million persons. There are approximately twenty hotels, with 12,500 hotel rooms, in the Times Square area, one-fifth of all hotel rooms in Manhattan. Twenty million tourists and five million overnight visitors arrive annually. There are more than two hundred restaurants in the Times Square area. It is indeed New York City's center for commerce and the performing arts, business and tourism.

But the area is also a home for thousands of residents who live adjacent to and in the midst of this vibrant midtown commercial core. The area is replete with churches, block associations, civic associations, business organizations and theatre related organizations. The Times Square BID knows--and works with--some 35 social service agencies in the greater Times Square area.

It also has the largest concentration of pornography establishments in the city. The number of such businesses reached a high of about 140 establishments in the 1970s and early 1980s, and declined thereafter to approximately forty. There is some indication that the number has increased somewhat in the Times Square area and on its periphery, particularly on Eighth Avenue, in the past months.

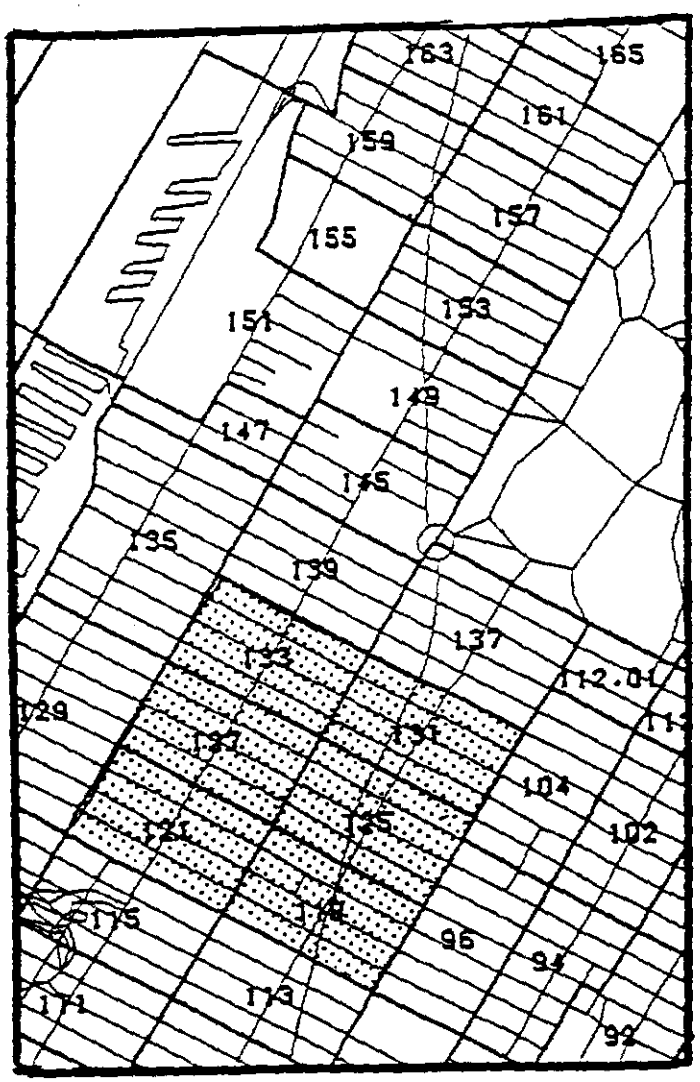
Demographics and Housing

In order to draw detailed demographic information from the 1990 Census, we aggregated data by the census tracts that most closely approximated the area of the Times Square BID. By using data from six census tracts that cover the area between Sixth and Tenth Avenues to the east and west, and 42nd and 54th Streets to the south and north, we have covered the entire BID, as well as additional blocks. Thus, data from these six tracts, which we will call the *Times Square Neighborhood* to avoid confusion with the Times Square BID, will reflect the demographics within the BID as well as the directly adjacent neighborhood. The map on the following page depicts the census tracts for this section of west midtown. As one can see, the Times Square BID falls within the boundaries of census tracts 119, 121, 125, 127, 131, and 133.

Broadly speaking, the eastern blocks of this area, particularly as one approaches Sixth Avenue, are commercial in character, with stores, restaurants, offices, and other commercial establishments. In comparison, the mid-blocks between Ninth and Tenth Avenues have a higher preponderance of housing; they constitute the eastern edge of the Clinton neighborhood.

Therefore, in reviewing the following census data, the reader must be aware that there will be a larger number of residents and housing units than those who actually reside within the official borders of the Times Square Business Improvement District. For example, our Census data show more than 25,000 residents in these tracts; the BID estimates 5,000 residents within its narrower boundaries. **However, these 20,000 residents are, in fact, part of the Times Square community and view themselves as being affected by the adult use establishments (those along Eighth Avenue in particular).**

TIMES SQUARE BID
CENSUS TRACTS



Source: New York City Department of City Planning, Computer Information Systems; U.S. Bureau of the Census

Total Population

In 1990, the total population for the Times Square Neighborhood was 25,651, which was slightly higher than the previous decade. The racial characteristics are depicted below. In general, over half of the population was White (higher than the Manhattan percentage); 11% was Black/Non-Hispanic, and 24% were Hispanic. During the decade from 1980 to 1990, the Hispanic population declined slightly, while the Asian (particularly the non-Chinese Asian) population increased to approximately the same as that of the borough of Manhattan, or 7%.

TABLE I
POPULATION CHARACTERISTICS, 1990
TIMES SQUARE NEIGHBORHOOD*

	1980 Number	1980 %	1990 Number	1990 %
White	14,251	57.9	14,807	57.7
Black, Non-Hispanic	2,252	9.2	2,785	10.9
Hispanic	6,793	27.6	6,099	23.8
Asian	1,117	4.5	1,761	6.9
Other	199	0.8	199	0.8
TOTAL	**24,612**	**100.0**	**25,651**	**100.0**

Source: U.S. Bureau of the Census, 1980 and 1990 Censuses of Population and Housing Characteristics, and Social and Economic Characteristics.

* Despite the image of Times Square as a solely commercial area, it is a place where many people raise their children. In 1990, there were 3,690 families with children under the age of 18 living in the six census tracts.

Housing Units

In 1990, there were over 18,000 housing units in the neighborhood, of which 75% were rental units and 49% were in large buildings of over 50 units. In a borough in which less than 10% of the units were vacant, 20.5% were vacant in Times Square.

The size of housing units within the six census tracts is smaller than elsewhere in the borough. While the median number of rooms per unit is 3 for Manhattan, it is 2.2 for the Times Square Neighborhood and 1 for the one census tract bounded by 42nd and 45th Streets, Sixth to Eighth Avenues.

In addition to these permanent housing units, there are also a considerable number of hotel rooms in Times Square. The Times Square BID estimates that over 12,500 hotel units are located within its boundaries. The large number of hotel rooms reflects Times Square's importance in the City's tourism industry. The number of tourists constitutes, from one point of view, a large group of potential customers for adult use establishments. **But from another standpoint, as documented in our surveys with hotel operators, restaurateurs, and theatre owners, the concentration of adult use establishments is seen to be offensive to this stream of visitors and travellers.**

Age

The population of the Times Square Neighborhood is similar in percentage of population age 62 and over to that of the borough or of the two Community Districts in which it falls: CD 4 and CD 5. In addition, in 1990 there were close to 2,000 children under the age of 14 living in the Times Square Neighborhood. **Both the elderly and young, whose lives are generally circumscribed by their immediate community, are impacted by the types of businesses and uses that occur in the Times Square area, including the adult use establishments.**

TABLE II
AGE CHARACTERISTICS, 1990
TIMES SQUARE NEIGHBORHOOD

	Time Square	CD4	CD5	Manhattan
TOTAL POP.	25,651	84,431	43,507	1,487,536
% UNDER 14	7.4	8.2	5.2	13.2
% OVER 62	15.4	15.9	15.3	15.9
MEDIAN AGE (years)	36.63	37.2	37.2	35.9

Source: U.S. Bureau of the Census, 1980 and 1990 Censuses of Population and Housing Characteristics, and Social and Economic Characteristics.

Employment Characteristics

Traditionally, a large percentage of Clinton residents have worked in the Times Square area, particularly in the theater and music industries as technicians, actors, and performers. This is borne out by the census data, which show a very high percentage of residents working within less than half an hour of their homes and walking to work. **The percentage of workers in the Times Square Neighborhood who walk to work is higher than the percentage for the borough as a whole and is much higher than the percentage of those in the other four boroughs.**

In 1990, approximately two-thirds of the population of the Times Square Neighborhood above the age of 16 were employed. The Bureau of the Census estimated that 95% of these workers worked in New York City and 88% worked in Manhattan. This is similar to Manhattan's residents in general, of whom 94% worked in the City and 84% in the borough. Compare this to, for example, the Queens workforce, of which only 40% work in their home borough.

Similarly, while the mean travel time to work for Manhattan residents was 29 minutes (and that of the other four boroughs was approximately 40 minutes), the mean travel time to work for residents in these six census tracts was 23.16 minutes. Of the Times Square residents who travelled to work, 48%, or almost half, walked. Compare this to 29% of the Manhattan workforce and less than 10% in the other boroughs. **Times Square, therefore, has a considerable segment of the population who spend both their working hours and off-time in the Times Square Neighborhood.**

TIMES SQUARE NEIGHBORHOOD: ITS ZONING AND ITS USES

Zoning

The Times Square neighborhood is zoned for General Central Commercial uses, reflecting the importance of Times Square as a central core for the City and region. These C6 zones vary: while Broadway, Sixth and Seventh Avenues are zoned C6-6 (15 FAR), the midblocks and Eighth Avenue are zoned C6-5 or C6-4, for a lower FAR of 10. Uses permitted in C6 districts typically include all residential uses as well as commercial and wholesale uses.

To the west of Eighth Avenue the predominant zoning is R8, with a C1-5 overlay along 9 Avenue for our control blocks. R8 permits general residential uses of a 4.8-6.0 FAR. C1-5 commercial districts permit local neighborhood commercial uses at an FAR of 2.0.

Special Districts

Special Midtown District

Times Square lies within one special zoning district and directly abuts another. In fact, the eastern boundary of one of these districts and the western boundary of the other meet in the center of Eighth Avenue.

Eighth Avenue can thus be viewed as the transition between two special districts: one encouraging commercial development and the other attempting to preserve a low-scale residential community. That duality is reflected in the opinions of residents and businesses about the status and future of the Eighth Avenue strip.

There are those who view Eighth Avenue as a development corridor, which began to be such with the building of Worldwide Plaza but which remains under-built, with a number of vacant buildings and parking lots. There are others who see the area as one that can and should continue to serve the economic development needs of the theatre and entertainment industries as well as other related needs of the city. Still others think it can and should be enhanced as a residential avenue. **Whatever their perspective, few see the concentration of adult use establishments as being beneficial to either the preservation or the development of the area.**

The area of the Times Square Business Improvement District lies almost entirely within the boundaries of the Special Midtown District (Sect. 81 of the NYC *Zoning Resolution*). Within that, a large proportion of the BID is included within the Theater

Sub-District, and the even more restrictive Theater Sub District Core, which extends from 43rd to 50th Streets, and from 100 feet east of Eighth Avenue to 200 feet west of Sixth Avenue.

In general, the goals of the Special Midtown District include the strengthening of Midtown's business core, while directing and encouraging development and preserving the "scale and character" of Times Square. Within the overall Special District, the purpose of the Theater Sub-District is to protect the cultural and theatrical and ancillary uses (i.e., shops and restaurants) in Times Square. This sub-district provides additional incentives and controls to encourage preservation of theaters, special development rights transfers, and separate requirements for ground floor uses.

Special Clinton District

Directly to the west of the Midtown Special District--and thus, of the Times Square area--is the Clinton Special District, whose purpose is the preservation of the residential character of the Clinton community (Sect. 96). The west side of Eighth Avenue falls within the Perimeter Area of the Special Clinton District. It is a transition between the tourism area of the Midtown District and the low-rise residential neighborhood immediately to the west, and the manufacturing district further west. Community residents characterize Eighth Avenue as "The Front Door to Clinton".

The Special Clinton District regulations contain provisions regarding demolition of residential buildings and relocation of tenants that are stringent and designed to preserve the neighborhood's residential character.

Our Ninth Avenue control block falls not within the Perimeter Area, but rather in the more restrictive Preservation Area; the one exception is the block on which Worldwide Plaza is located, which is excluded from the Special District. Within the Preservation Area, there are also tough provisions in regard to demolition and relocation of residents.

Land Uses: Control and Study Blocks

In general, the land uses in this neighborhood are diverse and eclectic. We provide a detailed picture of this diversity below.

42nd Street Study Block Land Uses

The present land uses along 42nd Street reflect the general commercial nature of the block. The north side of 42nd Street between Seventh and Eighth Avenues has a significant number of now vacant theaters, awaiting redevelopment through the 42nd Street Development Project. In addition there are clothing, sporting goods, tobacco, and camera stores, as well as delicatessens and a fast food establishment

on the corner at Eighth Avenue. As one approaches the northeastern corner of the intersection at Eighth Avenue, one can see a concentration of adult use establishments on the still privately owned portion of that block. (The State will soon begin condemnation of these buildings.)

Along the south side of the 42nd Street Study block there are also a number of now-vacant retail establishments and theaters, as well as the Candler office building. Retail establishments that are open along the south side of the Study block include electronics, novelties, sporting goods and shoe stores, as well as one first-run movie theater.

There are approximately six adult use establishments on the north side of the 42nd Street Study Block, and nine adult use establishments on the south side, for a total of 14. (Some of these stores are divided with more than one entrance and level).

42nd Street Control Block

The land uses along the north side of the 42nd Street Control Block between Eighth and Ninth Avenues include the following uses: a bar, two parking lots, a church and its rectory, office supply and gift stores, a deli, an entry to an apartment house, and the entrance to an adult use establishment whose main entrance is on Eighth Avenue.

The south side of the control block is most notable for the Port Authority Bus Terminal, which takes up approximately two-thirds of the blockfront. Additional uses to the west of the Bus Terminal include: a pizzeria, a parking lot, a hotel entry, an appliance servicing establishment, offices, and the US Post Office's Times Square Station.

Other than the side entry to the Eighth Avenue adult use establishment, there are no adult use establishments actually on the control block.

Eighth Avenue Study Block

The Eighth Avenue Study blockfront extends three blocks from 45th to 48th Streets. The mixture of uses is not reflective of the General Commercial Core aspect of the location. Instead, the uses are a mixture of local retail including novelty shops and souvenir stands, as well as delis, drugstores, and liquor stores, parking lots, vacant properties, and restaurants and other eating and drinking establishments. There are some uses which serve the theatre industry to the east; for example, the hardware store between 47th and 48th Street.

The study blocks are flanked by the Milford Plaza Hotel, between 44th and 45th Streets, the Days Inn between 48th and 49th Streets, and Worldwide Plaza between 49th and 50 Streets. Along this strip of three blocks there are eight adult use establishments: six movie theaters and two video stores.

Ninth Avenue Control Block

The building stock on Ninth Avenue resembles that on the Eighth Avenue study block: predominantly older, two to four-story buildings, often with apartments above the retail places. The uses on Ninth Avenue are more reflective of the area's zoning for local retail uses, with food markets, barbers, locksmiths, fast foods, and florists, for example. Also noteworthy are the numerous restaurants along Ninth Avenue serving primarily locals.

There are no adult use establishments along Ninth Avenue, either in our three-block control blockfront between 45th and 48th Streets, or for the entire stretch from 42nd Street up to 50th Street.

A map of all land uses as of March, 1994 along 42nd Street between Seventh and Ninth Avenue between 42nd and 50th Streets is attached at the end of this report.

ADULT USE ESTABLISHMENTS AND PROPERTY VALUES

Total Assessed Value

We attempted to compare total assessed value over time, and the rate of change, for our study and control blocks. We analyzed and compared the years 1985-1986 to 1993-1994. In addition, we compared our Study and Control blocks' assessed valuation to that of 1) the aggregated tax blocks falling within the boundaries of the Times Square Business Improvement District; 2) the entire Borough of Manhattan; and 3) the City as a whole. Our findings are summarized in Table III.

The Table shows that the rate of increase of the total actual assessed values of the Eighth Avenue Study Blocks was less than the rate of increase for the Control Blocks along Ninth Avenue on which no adult use establishments are or were located. To a lesser extent, the rate of increase of the actual total assessed value of the 42nd Street Study Block is less than that of the 42nd Street Control Block.

TABLE III
ACTUAL ASSESSED VALUES
CHANGES FROM 1985-1993 FOR SELECTED BLOCKFRONTS

BLOCKS	ACTUAL ASSESSED VALUE 1985-1986 (millions)	ACTUAL ASSESSED VALUE 1993-1994 (millions)	PERCENTAGE CHANGE 1985-1993
8TH AVE. STUDY BLOCKS (45-48 STS.)	11.22	18.55	65
9TH AVE. CONTROL BLOCKS (45-48 STS.)	4.52	8.65	91
42 ST. STUDY BLOCKS (7-8 AVES.)	34.89	51.63	48
42 ST. CONTROL BLOCKS (8-9 AVES.)	88.31	136.65	55
TSBID (ESTIMATED)*	2,034.7	3,252.3	60
MANHATTAN	29,462.7	47,229.4	61
CITYWIDE	53,589.8	81,714.6	52

Sources: NYC Department of Finance; Insight Associates

* The estimated BID total assessed value was determined by adding all 36 tax blocks that fall entirely or partially within the boundaries of the Times Square Business Improvement District.

Changes on Individual Properties

After determining that the rate of increase of the total actual assessed values of the Eighth Avenue Study Blocks was less than the rate of increase for the Control Blocks, we zeroed in to compare more closely the rates of change for the lots themselves. After detailing each block, property by property, an overall figure for the "social block" or the avenue considered with both its east and west sides, is noted.

The assessed values of the tax lots on the Eighth Avenue Control Blocks were analyzed in terms of proximity to the location of adult use establishments; the purpose of the exercise was to see if there were any patterns regarding the location of establishments and the rates of change.

The findings are shown below. In most cases, the rate of changes for other lots on the blocks were less than those with adult use establishments. Note that the tax lots which have adult use establishments are indicated by bold type.

When there is a decline in the assessed value, and the Department of Finance records indicate no change in the building class or size, we can assume that the property owner had at some point filed for and been granted a reduction in the property's assessed value though a certiorari proceeding.

There may be many reasons for a property's assessed value to have changed at a rate different than those of the rest of the block, or the general area. One cannot automatically assume any one reason, such as the proximity of adult use establishments. For example, the physical condition of the property may have deteriorated, or the property may be at a location undesirable from the point of view of potential retailers.

While it may well be that the concentration of adult use establishments has a generally depressive effect on the adjoining properties, as a statistical matter we do not have sufficient data to prove or disprove this thesis. It may also be that simply the presence of adult use establishments is subjectively viewed by assessors as a factor that necessarily reduces the value of an property. In short, assumptions may influence assessment.

Also included in the lists below are the actual uses--the types of stores or restaurants, for example--for each property along the Eighth Avenue Study blockfronts, from 45th through 48th Streets. We have tried to see if there is any pattern in which uses that one might consider to be more compatible with an adult use reveal a different rate of change in assessed value than other, less compatible uses.

TABLE IV
BLOCK BY BLOCK CHANGES IN ASSESSED VALUATION ALONG EIGHTH AVENUE STUDY BLOCKS

LOCATION (on Eighth Avenue)	BLOCK/LOT	ADDRESS	LAND USES	% CHANGE IN ASSESSED VALUE (1985/6-1993/4)
8 AVENUE: 45-46 STREET				
West	1036/36	731-727	Pizzeria Grocer/Deli Vacant Deli	50%
West	1036/33	725	Pawn Shop	9%
West	1036/29	712	Photo lab Army/Navy Hair/Nails Restaurant Restaurant	33%
East	1017/61	740	Hotel entrance Liquor Novelty Bar Novelty	136%
East	1017/63	738	Adult Use (Capri)	138%
East	1017/58		Parking lot	61%
East	1017/4	732	Adult Use (Eros I)	166%
East	1017/3	730	Bar	84%
East	1017/2	728	Adult Use (Venus)	94%
East	1017/101	726	Deli	43%
East	1017/1	724	Souvenir/ T-shirts	275%
Social Block Change: 61%				

In the 45th to 46th Street study block, the parcels across the avenue from a concentration of three adult theaters show a rate of increase much lower than the average for the entire blockfront. The parcels on the same (east) side of the street from the theaters tended to show lower rates of increase in assessed value, except for 1017/1, whose owner is listed by the Department of Finance as that of an adult use establishment located at 265 W. 47 St, and 1017/61, which is a mixed use property comprising a hotel with retail uses below.

TABLE IVa
BLOCK BY BLOCK CHANGES IN ASSESSED VALUATION ALONG EIGHTH AVENUE STUDY BLOCKS

LOCATION (on Eighth Avenue)	BLOCK/LOT	ADDRESS	LAND USES	% CHANGE IN ASSESSED VALUE (1985/6-1993/4)
8 AVENUE: 46-47 STREET				
West	1037/36	767	Restaurant Fast Food	55%
West	1037/35	765	Hotel Entrance	-26%
West	1037/34	763	Adult Video	395%
West	1037/33	741-743	Travel Agency (entrance) Bar Restaurant	199%
West	**1037/30**	**733-39**	Pastry shop (formerly adult video) Novelty/Gift Electronics Bar Grocery **Adult Video (Pleasure Palace)**	**125%**
East	1018/61	760	Liquor store Pharmacy Deli Restaurant Union office (entrance)	55%
East	1018/3	754	Parking lot	121%
East	1018/1	750	Souvenirs Deli Bar	123%
Social Block Change: 73%				

There are no readily defined patterns for the properties located on the west side of Eighth Avenue on Block 1018. The parcels at 754 and 750 generally appreciated by over 120%, while the remaining parcel increased only by half.

However, on the west side of Eighth Avenue, on which there are two X-rated videos, located at 763 and 739, the properties not owned by the owner of the video establishments evidenced a lower rate of increase. The assessed value of the property at 765, adjacent to the Adult Video, actually declined by over 25%.

TABLE IVb
BLOCK BY BLOCK CHANGES IN ASSESSED VALUATION ALONG EIGHTH AVENUE STUDY BLOCKS

LOCATION (on Eighth Avenue)	BLOCK/LOT	ADDRESS	LAND USES	% CHANGE IN ASSESSED VALUE (1985/6-1993/4)
8 AVENUE: 47-48 STREET				
West	1038/36	787	Coffee shop Pizzeria	30%
West	1038/35	785	Hardware store	51%
West	1038/34	783	Restaurant	180%
West	1038/33	781	Lighting store	162%
West	**1038/31**	**777**	**Adult Movie (Hollywood Twin)**	120%
West	1038/29	771	Restaurant	136%
East	1019/61	782	Firehouse	48%
East	**1019/63**	**780**	**Adult Use**	59%
East	1019/64	778	Souvenirs	59%
East	**1019/3**	**776**	**Adult Videos**	59%
East	1019/2	772	Vacant, sealed building	107%
East	1019/1	770	Frame store (entrance on 47 St.)	-4%
Social Block Change: 66%				

It is difficult to see a strong pattern on the west side of Eighth Avenue, although the assessed values of the two properties located at 787 and 785 increased by far less than the other four, including 777, which houses the Hollywood Twin, and 771, which is owned by an individual listed as owner of other adult use establishments in the area.

On the east side of Eighth Avenue, the two adult establishments and the property between them enjoy a common ownership; the three tax lots all increased in assessed value by precisely the same percentage--59%. On that block front there is also a NYC Fire House and an vacant and sealed building that is listed by the Department of Finance in 1993 as City-owned. The one remaining parcel on that block front--a framing store--experienced a decline in assessed valuation for the period.

A similar review of tax lots was not conducted for the other area of concentration, the 42nd St. Control Block. This was because it is felt that the many other trends and government actions along that strip, including public condemnation of the parcels and numerous lawsuits, would further complicate the analysis, and would prove fruitless.

Department of Finance Assumptions

In addition to the detailed analysis described above, we spoke to a high official in the Department of Finance to obtain his expert opinion on the relationships and effects, if any, of adult use establishments on neighboring properties. He stated that "there is no doubt in my mind that they [adult use establishments] adversely affect other properties." Their presence, he indicated, is factored into the locational aspect of the appraisal formula, though, he acknowledged that appraising is not itself an exact science. A commercial building may be obtaining a reasonable rate of return, but if that building were located near an adult use establishment, the assessor would tend to use a higher capitalization rate, which would therefore produce a lower value. The further away a property is from the adult uses, he explained, the lower the effect on its value.

ADULT USE ESTABLISHMENTS AND CRIMINAL ACTIVITY

General Crime Statistics

Over the past five years, according to the Office of Midtown Enforcement, police statistics show an estimated 54% decrease in crime in the Times Square area. This decrease parallels the decrease in adult use establishments, and although we cannot claim direct causality it is interesting to note that there is both the perception and the reality that Times Square is a safer place than it was years ago. While we were not able to collect crime statistics over a broad range of time, we were able to obtain information from the New York City Police Department for our Study and Control Blocks for a three-month period in 1993.

In addition, data on control blockfronts with no adult use establishments were requested for Ninth Avenue between 45th and 48th Streets, and for 42nd Street between Ninth and Tenth Avenues. The latter was selected as the control block for this purpose, rather than the block between Eighth Avenue and Ninth Avenue that had been used in analyzing property tax data, (see p. 25-30), because it was felt that encompassing the Port Authority Bus Terminal, with its unrelated associated crime statistics, would not provide a meaningful basis of comparison to the study block.

The crime data reports were prepared by the Precincts in which these blockfronts are located: Midtown South, Midtown North, and the Tenth Precinct. The reports generated by these precincts do not include complaints for prostitution or drugs (other than criminal possession of a controlled substance), as these crimes are reported in an incompatible format. (We did, however obtain some information on prostitution activity from other sources, which will be described below.) In addition, certain desired data, such as known locations for drug-dealing, are part of on-going investigations and prosecutions, and thus not available to us. The data we have used reflect the numbers of criminal complaints, not arrests, for known addresses or locations along the block fronts under study.

Actual complaints were listed for a wide range of crime categories, including Grand and Petit Larceny, Grand and Petit Larceny from an Auto; Criminal Possession of Controlled Substance; Criminal Harassment; Assault, Robbery, and Fraudulent Accosting. Each precinct used slightly different categories in preparing its reports for this study, but in general, the major categories were similar. Certain crimes were more prevalent in specific locations. For example, a larger number of complaints of Grand and Petit Larceny from an Auto were noted along Eighth Avenue between 45th and 48th Streets; this may reflect the presence there of parking lots.

Despite the many limitations on these data, there were certain significant patterns that did appear. In general, as seen in Table II, criminal complaints were higher for the 42nd Street study block than for the 42nd Street control block two blocks to the west. During the three month period of July through September, 1993, there were 45 criminal complaints on the Ninth to Tenth Avenue block of 42nd Street, and 88 on the Seventh to Eighth Avenue blockfront. Similarly, there were 118 criminal complaints on Eighth Avenue between 45th and 48th Streets, and only 50 for the same three blocks along Ninth Avenue.

One cannot assert that there is a direct correlation between these statistics and the concentration of adult use establishments on 42nd Street between Seventh and Eighth Avenue, or along Eighth Avenue between 45th and 48th Streets. But there is very definitely a pointed difference in the number of crime complaints between these study blocks and their controls.

It appears that there was a continuing reduction in crimes along Eighth Avenue the further away from 42nd Street, with its concentration of adult use establishments. While there were 135 complaints on Eighth Avenue between 42nd and 43rd Streets, there were only 80 on the block between 44th and 45th Streets. For the three blocks between 45th and 48th Streets, there were a total 118 complaints for the same period. These complaint statistics are summarized in Table V.

TABLE V
CRIMINAL COMPLAINTS FOR SELECTED BLOCKFRONTS
JUNE, JULY & AUGUST 1993

BLOCKFRONT	JUNE	JULY	AUGUST	TOTAL
8 Ave. between 42-43 Sts.	34	45	56	135
8 Ave. between 44-45 Sts.	38	21	21	80
8 Ave. between 45-48 Sts.	40	45	33	118
9 Ave. between 45-48 Sts.	16	13	21	50
42 St. between 7-8 Aves.	29	36	23	88
42 St. between 9-10 Aves.	16	16	13	45

Source: New York City Police Department; Insight Associates

Criminal Activities: Drugs and Prostitution Arrests

As can be seen in the responses to our survey, one of the most frequently made assertions is that adult use establishments attract criminal activities, particularly drug dealing and prostitution. Working closely with the NYPD Crime Analysis Unit, we attempted to obtain data concerning arrests or complaints for these two types of criminal activities, in order to enhance the criminal complaint data discussed above.

Prostitution and drug complaints are not collected by the precincts in the same way as other criminal complaint data. Drug complaints and drug arrests are not maintained on the precinct level and are considered confidential, due to on-going criminal investigations. Thus, we were not able to obtain data on this type of criminal activity. With the cooperation of the Crime Analysis Unit, however, we were able to obtain information concerning prostitution arrests along Eighth Avenue from 42nd Street to 48th Street.

In a three month period from July through September, 1993, in the Midtown South Precinct, there were 19 arrests made on Eighth Avenue between 42nd and 45th Streets, compared to no arrests on Ninth Avenue between 42nd and 45th Streets. Further north on Eighth Avenue, between 45th and 48th Streets, the Midtown North Precinct reported 9 arrests for prostitution, compared to 14 arrests along Ninth Avenue for the same three blocks during the same three month period. Thus, the heaviest incidence of prostitution arrests occurred in the three block study area of dense concentration of adult use establishments, during this time period. Those findings are summarized in Table VI.

TABLE VI
PROSTITUTION AND RELATED ARRESTS
FOR SELECTED BLOCKFRONTS
JUNE, JULY, & AUGUST 1993

BLOCKFRONT	JUNE	JULY	AUGUST	TOTAL
8 AVENUE (42-45 Streets)	7	7	5	19
9 AVENUE (42-45 Streets)	0	0	0	0
8 AVENUE (45-48 Streets)	7	1	1	9
9 AVENUE (45-48 Streets)	3	10	1*	14

Source: New York City Police Department; Insight Associates

* In addition, there were 7 arrests for Patronizing a Prostitute for this month.

In addition, we were able to obtain from the Midtown Community Court a list of locations for prostitution arrests appearing before that court for the period from October 12, 1993 through February 28, 1994. The Midtown Community Court sampled 60% of its prostitution arrests for this 4 1/2-month period, looking at the frequency of arrests on Eighth Avenue between 42nd and 48th Streets, as compared to those along Ninth Avenue between the same streets.

The number of prostitution arrests on Eighth Avenue was 20 for that period, compared to 5 for Ninth Avenue. However, higher than that was the number--24--for the area west of Ninth Avenue. This may reflect the well-known concentration of prostitution activity along the westernmost stretches of West Midtown, particularly along Tenth and Eleventh Avenues.

What is interesting, however, is that during this 4 1/2-month period, the location for the majority of prostitution arrests shifted dramatically eastward, from west of Ninth Avenue to Eighth Avenue itself. This change may have been a function of police activity and sweeps or may be related to other factors.

Nevertheless, the more recent level of prostitution activity, while higher in the west, dropped along Ninth Avenue, but increased again along Eighth Ave. This concentration of arrests along Eighth Avenue may be related to presence of adult use establishments along Eighth Avenue, but may also be related to traffic and pedestrian patterns, proximity to the Port Authority Bus Terminal, and proximity to Times Square itself. It should be noted that according to the Midtown Community Court's records, the most frequent locations for prostitution arrests in their sample were in the West 20s along Tenth and Eleventh Avenues and in the upper 50s on Sixth Avenue.

The findings are shown in the following table.

TABLE VIa
PROSTITUTION ARRESTS AT SELECTED LOCATIONS
MIDTOWN COMMUNITY COURT
(60% Sample)

LOCATIONS	10/12/93-12/31/93	1/1/94-2/28/94	TOTAL
8 AVENUE (42-48 Streets)	4	16	20
9 AVENUE (42-48 Streets)	3	2	5
WEST OF 9 AVENUE (42-48 Streets)	21	3	24

Source: Midtown Community Court, 3/4/94

The Office of Midtown Enforcement, although acknowledging the decline in criminal activity in the Times Square area, continues to deploy surveillance teams to monitor the level of prostitution activity in the area. (Office of Midtown Enforcement 1991-2 Fiscal Year Report).

INTERVIEW FINDINGS

Previous secondary effects studies have combined survey research and anecdotal reports from community and business interests. Our study did so as well. A total of 54 interviews were conducted between November, 1993, and March, 1994. Three different interview questionnaires were employed: one designed for property owners and business operators, a second intended for local organizations, churches, and schools, and the third for Community Board representatives.

In general, we sought to obtain information on perceptions and experience of the impact in the Times Square area of adult entertainment establishments. More specifically, we tried to elicit detailed observations of the effects of these enterprises on business and daily life. We also attempted to obtain information on the effects of these businesses in geographic terms, i.e., the proximity and distance of adult use establishments and the resulting intensity and/or diminution of impacts.

To provide context, we asked all respondents about their views of what constituted the major problems facing the Times Square area, and the relative importance of pornography and adult use businesses among these problems. The open-ended conversations that followed completion of the formal interview schedule were often most productive. Where possible, the interview results are presented below as quantified measures but in addition, many valuable insights emerge from interview material that is not easily quantified.

Property and Business Owners

Real Estate Owners, Managers, and Corporate Leaders

Our twelve-interview sample in this important category included five of the largest real estate companies or management agencies in the city, with multiple holdings in Times Square and elsewhere. We interviewed one appraiser familiar with the Times Square area, one owner of residential property, and one leasing agent. In addition, we spoke with executives of two important publishing and communications corporate groups.

Most of these respondents have been part of the Times Square scene for decades, and some are relatively recent arrivals. They are all aware of Times Square's history, in all its ups and downs, and some have played roles in this history. Their observations and expertise, however, are focused on the growth of Times Square as a unique conglomerate of entertainment uses, commercial tenants, tourist attractions, and, increasingly, a home for financial and multi-national corporations.

As our appraiser interviewee stated, we must evaluate how the presence of these adult entertainment uses slows down or reduces rentals and business activity in the long run. That is, it can be said that pornographic uses may attract other businesses and traffic, which brings revenue to the owners of those businesses in the short run. **But there is no way to encourage increased value of commercial properties for a variety of businesses in the long run if they are next door to a concentration of pornography establishments.**

This observation is confirmed by the direct experience of our real estate respondents. Three real estate developers had bought buildings in the Times Square area which housed adult use businesses, and they sought to terminate these leases as quickly as possible. They all asserted that the presence of such stores had a definitely negative effect on office leasing, especially for corporate tenants. **A leading real estate agent described the lower rents and difficult leasing conditions of an office building located on 42nd Street between Seventh and Eighth Avenues.** He also depicted the lower rents on Eighth Avenue as compared to Seventh Avenue for comparable buildings, and cited instances of tenants refusing to renew leases because of the Eighth Avenue location and its atmosphere.

An owner of a smaller residential property on 46th Street said that he believed that the adult use businesses on his corner at Eighth Avenue frighten people away. He had an apartment on the market recently and a prospective applicant who said he wanted to rent it for his daughter and friends turned out to be really interested in using it as a massage parlor. The owner recently advertised office space in his building, but has so far attracted two adult use businesses, while other applicants have been scarce.

The builder and owner of World Wide Plaza spoke of the need to oust a porn theatre one block to the north (which later relocated further south on Eighth Avenue) in order to attract major corporate tenants. While his tenants have long-term leases, and he recognizes that the development of his building was affected by recent downturns in the real estate market having little to do with porn, he nevertheless expressed concern about the new spread of porn uses along Eighth Avenue. In fact, though the block from 50th Street to 51st Street, north of World Wide Plaza, remains vacant because of these larger market trends, he is seeking to encourage the lessee to rent to local retail uses, rather than to adult entertainment businesses. **Members of this development organization stated that they believed that security costs in this building were somewhat higher than those of comparable buildings located in other neighborhoods.** They also were very concerned about the recent increase in adult uses on Eighth Avenue, which they fear is occurring because of the public agency condemnations along 42nd Street, which may well be forcing the porn merchants northward.

All of our respondents said that adjacency of porn establishments has a negative effect on sales and leasing, and that plainly the concentration of establishments affects the overall image of the western edge of Times Square. They describe Eighth Avenue and certain side streets where these stores are located as

"less hospitable places", and as injurious to the quality of life. One corporate executive said that one of his employees was mugged in front of an adult-entertainment store. A developer and an executive of a corporation both said that adult businesses on the same street, or diagonally across the street from a property have offensive and negative results.

All except one developer said that perhaps there is a way to limit the number of such establishments, and to disperse them. The dissenter said that not even one could be tolerated.

All of our property owners and business representatives--large and small--expressed the view that adult use businesses have a negative effect on the market or rental values of businesses located in their vicinity. It was very clear that negative effect was intensely felt if the adult business was right next door, in the same building, or on the same block. But every respondent also emphasized the negative effects of a concentration of businesses, stating that "Eighth Avenue is a less attractive place to do business" than other avenues in the Times Square area. One representative of a major property owner said that there were more improvements on Ninth Avenue in recent years than on Eighth Avenue, as evidenced in the numbers of new restaurants and small viable retail stores which have opened on that street. In the light of other improvement in the Times Square area, this respondent, too, expressed concern about "the march of porn stores up Eighth Avenue."

A corporate newcomer to the Times Square area expressed great optimism about its future and he said that the confidence was shared by employees and prospective retail tenants, but he also said that the positive trends were clear along Seventh Avenue and Broadway, and certainly less so along Eighth Avenue.

A real estate agent who tries to rent only to "Triple A" tenants said that proximity to adult establishment would be a deterrent to them. If there was an opportunity to rent to, say, a major fast food chain, which might be willing to locate on Eighth Avenue, in such a case, he was sure that concessions or sweeteners would have to be offered in the form of sharing in increased insurance costs, or in offering lower-priced rentals.

On the other hand, new area business and long-term owners both said that there is much improvement in Times Square and that its new identity as a center for corporations, entertainment, and tourism will continue to make it attractive to investment from all over the world. Because of the extraordinary pedestrian traffic, it can and will attract major retailers, and it is important that this trend not be deterred by the concentration of porn theatres, strip clubs, and adult video stores.

Theatre Owners

Interviews were held with high executives of the three major legitimate theatre organizations. All were very emphatic about the deleterious effects of the presence of adult use stores near their theatres and in the neighborhood in general. They stated that these uses "scare away audiences", and were not good for business. One respondent believed that one of his well-equipped and otherwise competitive theatres could not compete for bookings because of its location near 42nd Street's porn strip. That is, he could not obtain rentals for productions, and was forced to create projects of his own to keep the theatre from staying dark.

All three, including the owner of that theatre, mentioned the direct negative effects of the presence of an adult use establishment right next door to the Martin Beck Theatre. Despite the fact that this theatre now houses a musical hit, the owners describe complaints from patrons about the adjacent sex establishment. Complaints were voiced about the "unpleasant" atmosphere on the western edge of the streets on which their theatres were sited, West Forty Fourth Street and West Forty Seventh Street.

One respondent, with a more than twenty year history of theatre operation in the area, was unequivocal in his view that the presence of these establishments hurt business. From the days of massage parlors in the 1970s to the video stores of today and the resurgence of topless dancing establishments, there has been a continuing pattern of deterioration of facades, sidewalks, and blockfronts--a pattern damaging to theatregoing. He believed that low-level drug dealing and prostitution could be linked to the presence of these adult entertainment places, and that the presence of even one such store on a street is negative.

The other two theatre executives believe that the more concentration of porn businesses you have, the more it hurts property values. While they did express concern for free speech considerations, they were all quite critical of the negative effects of the appearance of these stores, which they say contributes to blight.

These exhibitors asserted that Broadway theatre and restaurant patrons are a class of people who are discouraged by the prospect of walking through pornography-filled streets. The respondent from a nonprofit theatre located in Times Square, not immediately near adult use businesses, did not express major problems or complaints related to such places. He recognized, however, that many of his patrons parked their cars west of Eighth Avenue, and that many of his promotions included dining on Restaurant Row, but he cited no specifically perceived negative effects.

The theatre owners stated that the incidence of crime has declined in the Times Square area, and that the area is cleaner and safer, its negative raffish image has improved markedly. But they were concerned about Eighth Avenue, about vacant stores, and about uses such as porn stores that were incompatible with theatregoers.

Restaurants

We interviewed seven respondents, representing eight variously-priced restaurants and chains in the Times Square area. Two were located on 46th Street's Restaurant Row, two on Eighth Avenue, and three elsewhere in Times Square. One restaurateur was also a building owner.

All of the respondents believed, in general, that the presence of the adult use establishments was not good for their business. One of the owners was not at all affected, he said, by the adult businesses, because the block on which his restaurants were located was free of such uses. But although this restaurant operator had been offered properties on Eighth Avenue as well as on 43rd Street, he said that he would not open restaurants on those sites even if they were free. "My customers want to be entertained, to be in an uplifting environment. My places attract family and friends. I don't want my customers to be put off by the atmosphere."

But the owner of a lower-priced coffee shop on Eighth Avenue who claimed that he sought tourists and local business said that the presence of these businesses made for a "terrible" influence, and that Eighth Avenue was no longer "a very popular area". He said that business is off after 7:30 or 8 at night on this Avenue, compared to business a few years ago.

Another popular restaurant with a substantial core of regular customers who are not bothered by the presence of porn stores said, however, **that the restaurant has great difficulty attracting the corporate parties that they have been seeking. They believe that there is a public perception that the area is unsavory, since they have had the experience of attracting potential parties, and then having those potential customers cancel.** This manager also expressed concern that tourists may pass her restaurant by because it is sandwiched between pornography establishments.

Three of the restaurant operators described complaints from customers about loitering. The food establishments located on or near Eighth Avenue said that they believed that new porn businesses were relocating from 42nd Street; they also said that the flamboyant advertising of porn stores, even ads seen from across the avenue, had a negative effect on their business.

All these respondents were aware of and complained about drug dealing which they could not directly tie to the adult entertainment ventures, but which they felt were part of the same picture.

Both a small coffee shop owner and the owner of two larger family restaurants expressed their opinion that Times Square remains a promising business growth area and that they intend to stay. But the coffee shop may be forced to move off Eighth Avenue, and would like to unless conditions improve.

Hotels

The three hotel operators who were part of the interview sample, and the owner of one of the properties--all located along Eighth Avenue--agreed that the dense concentration of adult entertainment venues was a deterrent to their trade.

The owner of a long-standing moderate priced tourist and convention hotel said that there had been a tremendous improvement in conditions in Times Square in the last two or three years. He attributed this to the work of the Police Department and the Times Square Business Improvement District. But this hotel owner continues to have some difficulty attracting airline and corporate business, and the trade shows that it seeks. He described complaints from airline personnel that women among them were verbally assaulted on Eighth Avenue. He said that Times Square is viewed as a "fun area", but that Eighth Avenue is the "seedy side of the district". He also said that he is himself "not a prude", that it is perhaps possible to live with some of these establishments, but that the concentration of them--more than one on every block on Eighth Avenue--is "disgusting and harmful". In sum, this manager of a large hotel said that there is great improvement, but there is still the need to combat sleaze through City action and through pressure on landlords.

An assistant manager of a chain hotel did not see any positive or negative direct effects of porn businesses on his own. But he did observe that prostitution activity seemed to be worse than last year, and he offered the opinion that plainly people do not like to see either that activity or porn establishments when they leave his hotel.

In the interviews with the owner and his lessee of a small hotel franchised by an international chain we heard about the direct effects of porn establishments. Though located on Eighth Avenue, with X-rated movies at the end of the block, they believed that they could attract customers because of their national booking service. But after obtaining their lease, an adult-use store opened right next to the front door of the hotel, and the respondent described many instances of customers having booked rooms through the national office arriving, looking, and cancelling. These customers sometimes took photographs of the adjacent porn store and sent them back to the national booking office. **As a consequence, business is down substantially.** Both owner and manager describe the constant activity of prostitution in front of the porn store and their hotel, and both associate drug dealing and crime with the loiterers attracted to the store.

The owner had the opportunity to acquire and rent the adjacent store. He could have rented to adult use businesses, he said, but refused. He claimed that the adult use is paying a much higher, above market rent than what the previous owner or any non-pornographic business would pay for that space. He also said that "I am certain that there are illegal activities in the back room [of the store]. The rent is too high to be sustained by the sales." Both men expressed concern about a store across the Avenue that had been vacant for a year and a half, and feared it would be rented for adult entertainment use.

Retailers

The five merchants interviewed had all been in business in the area for many years. Four are family-owned businesses which also own the buildings in which they operate. Three of the businesses are industry wholesalers, destination markets, and local service stores.

Two of the interview respondents saw no particular effects of the presence of adult use establishments on their own specific businesses. Both of these condemned the presence of drug and crack dealers in the vicinity. One of these two said that he knew the manager of a gay movie theatre across the Avenue and considered him a neighbor trying to do business.

Another interviewee felt differently, that conditions brought about by the porn businesses were pretty bad, negatively affecting rents. Though he said he was as concerned about the First Amendment as anyone, and "did not consider myself a saint", he did say that the people who hang out in front of these establishments are unsavory and are involved in petty street crime. He feels that the presence of such stores hurts the perception of Times Square as a place of entertainment and business. He had become optimistic about Times Square's future in the last years, but now found himself worried about the increase in the number of adult use stores on Eighth Avenue, and the consequent security and safety problems. Nevertheless, he plans to continue doing business in the area where his family has been since 1935, and would consider expanding into more space in an industrial or commercial building west of Eighth Avenue.

A liquor store owner said that his real living is from the residential and business trade in the area and he does not welcome the presence of the adult use stores. He is convinced that they are associated with street drug dealing, and claims to have observed known dealers in video stores many times per day. He believes that they frequent these places--which otherwise seem to be doing very little trade--because the video dealers are tied into the crack-selling business. **That owner and a manager of a store owned by a family which has been doing business in Times Square for ninety years expressed great concern about vacant stores, high rents that only the porn operators can afford, and loiterers who interfere with customers.**

Community Residents and Organizations

In the greater Times Square neighborhood there are eight block associations, approximately seven public schools, and about fifteen churches, six of them within the BID boundaries.

Block Associations

Of eight known block associations in the area west of Eighth Avenue, we interviewed representatives of five. All the respondents described the negative impact of the concentration of adult use businesses for both the residential and commercial communities. They all said that they believed and observed that these uses are negative in their effects because they attract loiterers, drug dealers, prostitutes, and their customers. Four of the block association leaders said that adult use establishments drive out legitimate businesses, and they deplored the recent loss of a stationery store and a drycleaners which had been replaced by adult entertainment businesses.

All five representatives said they had been directly affected by the presence of adult use establishments on their blocks, and indirectly, by the presence of groups of prostitutes who congregate in front of the establishments on Eighth Avenue, and also onto the side streets. They linked this prostitution activity to Eighth Avenue itself, but they acknowledge the presence of prostitution and drug dealing on other avenues to the west. Four of these respondents had made complaints to owners or operators of adult use establishments about their displays and about loitering. One had not. The same four had also complained to the Police, Midtown Enforcement, and the Community Board.

On the question of the scope of the area impacted by an adult use business, four of the respondents believed that the impact was neighborhood-wide, by which they mean that the image of the entire area is tarred: "It erodes the neighborhood's self-esteem." In terms of the impact of any single adult entertainment location, two believed that such impact extends across a street or avenue, and one believed that it extended more than five hundred feet. All respondents commented on the appearance of the stores; some called them aesthetically unpleasing and garish, obtrusive and tawdry, and disturbing to children. Some felt that the appearance of adult movie theatres was somewhat less disturbing than that of other adult businesses, and others complained that the covered, blanked-out windows of adult bookstores were forbidding and repellent.

These community interviewees believe that drugs and drug-related criminal activities constitute the number one issue for neighborhood residents, prostitution activity a close second, and the presence of pornography establishments was rated as third.

Another theme for longer-time residents was the belief that there had been many signs of renewal and community health in the Times Square area in recent years, but that the arrival of new adult use businesses, vacant stores, and resultant increases in drug activity were now posing new threats to community stability. These respondents viewed themselves as part of a working- and middle-class community in Clinton, adjacent to the commercial Times Square, and fighting to preserve the residential character of their home blocks.

Community Boards Four and Five

Community Board Five covers the Times Square area and reaches through most of the BID district to the east side of Eighth Avenue. Board Four covers the west side of Eighth Avenue, the Clinton residential and manufacturing communities to the west, as well as the Chelsea community to the south, where there has also been a recent increase in the presence of adult establishments.

We interviewed the District Manager and the Co-Chair of the Public Safety Committee of Board Four, and the Assistant District Manager and Co-Chair of the Public Safety Committee of Board Five. All four told of an increase in complaints and concern being directed to the Boards over the past two years. For Board Four, many of the complaints focused on the area along Sixth Avenue in Chelsea, as well as on the area just south of the BID boundaries, on Eighth Avenue. There were specific complaints about particular establishments, including the documenting of criminal activity along Sixth Avenue, along Eighth Avenue south of the BID, and at Forty Sixth Street and Eighth Avenue.

In terms of effects, one representative may have summed up the feeling by saying that the presence of these businesses makes "people feel that my neighborhood is no longer my own: people who are apolitical begin to organize against these stores." Another said "the block is taken away from the residents, you can't walk down the street. Other people who use the street to walk or shop cross over or avoid these businesses."

All these respondents described instances of loitering, late-night drinking, and, in the case of some establishments, documented criminal activity. Yet, because these activists also had experience with the negative impacts of non-pornographic bars and discos as well, they did state that perhaps every establishment had to be judged on its own effects on a block or a community. If any of these users could be good neighbors, if they could blend in with the community, then perhaps some could be tolerated. **But they also said that the experience has been that if there is one establishment, then others follow, leading to an unacceptable concentration of adult use stores.** This is what has occurred in Chelsea, and this is the case on Eighth Avenue. When there comes to be "a critical mass" and when the stores are poorly run, the area becomes a point of attraction for all sorts of undesirable activities.

These informants expressed their concern about impacts on their residential communities, but they also saw their interests linked to the prosperity of the theatre community in Times Square, for example, and to the continuing growth of other businesses in Clinton and Chelsea.

Schools

We were able to interview representatives of two public schools in the area, Public School 111, and Park West High School. They decried the proliferation of adult entertainment stores in general, and stated that they did not want young people to grow up assuming that "the sleazy image" provided by these stores is the norm. "Why throw this at children before they are ready?" They also expressed concerns about prostitution and drug dealing in the area, which, together with the presence of the porn stores, contributes to the negative image of the Times Square and Clinton areas. One representative had recently made specific complaints about a nude bar opposite the back of the school building, and had worked with the Community Board to lessen the effects and even, unsuccessfully, to close that bar.

Social Service Organizations

Three interviews were held with 1) the executive director of an organization providing residential and service needs for older citizens, 2) the executive director of a multi-service settlement house, and 3) the executive director of an AIDS project. A fourth, more informal conversation was held with the executive director of an organization serving the homeless.

Two of these respondents observed that the presence of adult entertainment businesses has a negative effect on the area. The settlement house leader said that the families and children she serves try to avoid Eighth Avenue, and the senior service representative believed that their ability to attract viable commercial tenants for their retail rental space was being hurt.

The AIDS organization representative asserted that pornography may be okay for some, but may be linked to drugs and prostitution because there is also commercial sex taking place in and around these establishments. He believes that there is a double standard prevailing, in that not enough is being done to combat drug dealing, prostitution, and the spread of AIDS. Each of these interviewees was concerned about the negative image of Times Square that may be fostered by the presence of the porn businesses and their ancillary activities.

The respondent from the homeless agency described the presence of a scantily dressed woman dancing on the street and distributing flyers for a newly-opened business one block south of the BID boundaries. This new business is on the same block as the outreach ministry of a church, and very close to the two residences for homeless adults run by her organization. She stated that she is working with people who are "trying to get their lives together" and she found the presence of these establishments not helpful. The three executive directors believed that the appearance and exterior displays were "embarrassing", "seamy", and "seemed to be violent".

As to the issues and problems facing the neighborhood and Times Square, all three mentioned drug dealing and prostitution, and two spoke of the negative effects of street crime, even if they were only perceived effects. All three said that Times Square is and should be a place of entertainment and tourism, but that there was a difference between this and sleaze. One person also mentioned that the stalled 42nd Street development and the empty buildings had "deadened" the block. She was also concerned about the decline of neighborhood service stores, needed by seniors and families living in the area.

Religious Organizations

Six church representatives were interviewed, one of whom had been in the area only a few months while the others had been working in the Times Square area for many years. While these people all decried the content of the advertising at adult use businesses, their image of women, and the negative effects of their existence, their true complaints were directed at the ancillary activities or effects that they insist were the inevitable result of the businesses' presence. Each of these members of the clergy spoke about the prevalence of prostitution activity. Many knew who these prostitutes were, and were concerned about the violence they had observed, women being beaten and other violent incidents associated with the selling of sex on the street.

They all stated that the presence of these stores attracted people who, as one put it, "are involved in some sort of scam". That is, the stores attract hangers-on, street people who engage in gambling, drug dealing, as well as groups of men looking for sex, and women, men, and boys selling sex. Three of these interviewees acknowledged that there is also a great deal of prostitution west of Eighth Avenue where there are no adult entertainment spots.

Clergy spoke of themselves and their parishioners being accosted by prostitutes; one described an attempt by a prostitute to pick his pocket as he walked his dog on Eighth Avenue. One church leader believed that people come from all over the world to patronize the pornography establishments in the area, but three others said that they did not believe that tourists came to Times Square for this purpose. Instead, they maintained that it was difficult for tourists to make their way past the sleaze of Eighth Avenue.

These church people, like the community residents, spoke of a feeling that things had been improving in their community until the most recent influx of additional adult entertainment businesses. In some respects they welcomed what they saw as the improved image of Times Square, and praised the work of the BID. But their major issue, above all others, remains the drug problem, and resultant street crime, which they see as the scourge of the entire community.

SOME ADDITIONAL TESTIMONY

During the course of this study, in addition to the interviews that made up the formal survey, we received or had passed along to us from time to time written communications from various individuals who live or work in the Times Square area. Some of these are sampled below:

, Proprietor, Restaurant:
(March 1, 1994)

I am a new business owner on West 47th Street between Broadway and Eighth Avenues. We opened our doors at on October 7, 1994 [sic, 1993?]. Our restaurant occupies the space of the old Delsomma Restaurant. During these four months we have seen BID's work in the neighborhood evident in the painting of storefront gates, removal of bills posted on abandoned buildings, helpful clean-up crews and ever so accommodating security people. Unfortunately, we have also noticed the opening of four new adult video stores in a two-block stretch between 46th and 48th Streets on Eighth Avenue. While I have never seen any of them with more than two customers inside, the element of underground business they attract is atrocious, namely prostitution, drug dealing and loitering. Since their customers are few they obviously generate their income in some other unobvious manner.

While the owners of the adult video stores have a civil right to earn a living, I am opposed to its impact on the neighborhood and would like to know what I can do to protect the area from similar new business and discourage store owners from operating in the area. Not only does it hurt the area's legitimate businesses but we must remember there are several high schools in the area whose students should not be exposed to these activities.

Thomas K. Duane, Councilmember:
(Letter to the owner of 320 West 45th Street, now occupied by an adult entertainment business, December 23, 1993)

As you may be aware, "Private Eyes" joins the growing list of adult uses (i.e. adult video stores and topless/bottomless dance clubs) in the Clinton neighborhood of Manhattan. Red Zones in other American cities have caused dramatic increases in crime and negatively impacted the local economy. While you may gain short-term economic benefits from renting out your property to an adult use, you also will be creating a negative economic climate for your own property.

You should also be aware that your property is directly across the street from a residentially zoned property filled with families and young children. Moreover, the City Council has been considering legislation which would illegalize adult uses within 500 feet of residentially zoned property. "Private Eyes" would clearly be illegal if such legislation were to pass.

The Block Associations in Clinton have been working long and hard to make their streets safer and drug-free. Renting your property to an adult use such as "Private Eyes" undermines their hard work and significant achievements.

I am aware the Community Board #4 has offered to assist you in identifying a more appropriate use for 320 West 45th Street. I urge you to accept the board's offer. I would be more than happy to provide assistance from my office as well.

The West 45th Street Block Association:
(Letter to Community Board 4, March 4, 1994)

...The "Private Eyes" adult nightclub at 320 W. 45th St. has become a continuous cause of concern and frustration among block residents. Although the club may be in technical compliance with various laws, little by little, Private Eyes has created conditions that cheapen the quiet ambiance of this mostly residential block, adversely affect our quality of life and attract elements (both patrons and non-patrons) who continually disturb the peace.

...

"No Parking" was established on this block several years ago to discourage loitering around parked cars. By allowing (or encouraging) patrons to disregard parking regulations, conditions are created for late night crowds and disturbances.

Indeed, we've noticed a distinct increase in Private Eyes patrons hanging out and milling around parked cars -- late at night usually between 2 and 4 a.m.. These patrons are often inebriated, rowdy and shouting, blowing car horns and in at least one instance they have even tried to overturn a car. A side effect is that car alarms tend to go off frequently.

This late-night congregating in front of the club happens again and again. These people do not live here or have any respect for block residents. And whether by design or happenstance, the club attracts certain non-patrons detrimental to the block. Street prostitution and drug dealing has increased.

...

Almost every night, Private Eyes has employees handing out advertising flyers on the corner of Eighth Avenue and 45th Street. Although we're cognizant of first amendment rights (which don't necessarily apply to commercial advertising),these pamphleteers tend to block a very busy corner, attract drug dealers and cause litter (from their discarded handouts).

...

We must relate that this is a residential block with approximately 2,000 apartments. This is not a problem of morals, but the presence and behavior of Private Eyes directly and adversely reduces whatever quality is left on this block. From various buildings, we've heard residents complain of being woken up in the middle of the night, others who claim they're afraid to go into their own building if blocked by dealers, crack addicts or other scurrilous characters.

Aside from a few storefront businesses, the Martin Beck Theatre is the only Broadway theatre west of 8th Avenue, bringing onto our block around 2,000 tourists every night and a portion of the $2.3 Billion revenue of the theatre industry. The conditions created by Private Eyes may not directly affect that revenue, but surely tourists are in increased danger and may leave our city with a foul impression.

Ross Graham and Timothy Gay, Chairperson and Committee Chairperson of Community Board #4:

(August 16, 1993)
Re: the building at the northwest corner of 46th St. and 8th Avenue:

Community Board No. 4 understands that the property you own at the above location is being renovated to possibly accommodate a multi-floor adult entertainment center, or, in other words, a "porn palace."

Community Board No. 4 is on record as opposing a concentration of adult entertainment businesses in any specific neighborhood. Store fronts along Eighth Avenue in the 40s are quickly being turned into pornographic video and literature outlets, and several theaters specialize in adult movies and live entertainment.

The "porno palace" appears to be the first proposed multi-level facility of its kind in the neighborhood.

However, you should know that each of the 300 Blocks from West 43rd to West 59th Street is residential. West 45th, 46th (your corner), 47th and 48th Streets are especially residential with active block associations, and West 46th Street, as you know, is Restaurant Row. A number of

legitimate Broadway, off-Broadway, and off-off-Broadway theaters operate within a few blocks, as well as businesses ranging from major law firms (at Worldwide Plaza) to child care centers. Junior High School 17, with more than 700 children, is located a half a block away, on West 47th Street between 8th and 9th Avenues. In addition, your proposed "porno palace" is within 100 feet of a church.

Community Board No. 4 strongly urges you to reconsider the proposed use of your building.

Rowan Murphy, Assistant Director of Common Ground Community (CGC), operator of The Times Square, an affordable housing program in what was formerly the Times Square Hotel at 25 W. 43 Street:

(Testimony before Manhattan Borough President's hearing, October, 1993)

...CGC acquired The Times Square in March of 1991. At that time, there was one adult use establishment on the south side of W. 43rd Street, across from our building. The block, at that time, had a growing reputation as a "safe corridor," as the result of intensive efforts by the Mayor's Office of Midtown Enforcement, Midtown South, and local businesses to increase community policing and security awareness. In September of '92, two additional adult use establishments opened, the 24-hour "Playpen" and "Malebox" located directly across from our front entrance.

For the 364 individuals who live at The Times Square, and our staff, this concentration of uses has meant a steadily deteriorating quality of life on 43rd Street. Before the Malebox and Playpen opened, tenants could enjoy sitting in the lobby or mezzanine during the evening, strolling to the corner for coffee or lingering on the steps for some fresh air. Now, the street is a gathering place for prostitutes and others involved in illegal activities.

Patrons for the adult use establishments harass and intimidate our elderly tenants, in particular. Patrons use our service entrance as a urinal on a regular basis. Our security staff is hassled when attempting to keep our entrance clear of loiterers from these establishments. The street is now ugly and intimidating at night, discouraging use of the lobby and mezzanine by our tenants and creating noise problems for tenants living at the front of the building overlooking 43rd Street.

The concentration of adult uses on West 43rd Street gives the block a very different appearance and feeling than it had when a single establishment existed there.

... [T]he density of adult uses, the disruptions they create, and the sordid street activity they attract have been major negative factors for those evaluating our building as a place to live. The majority of the applicants who decline acceptance at our building described their main reason for doing so as concern about the safety and quality of life on the block.

Public Nuisance and Public Health Problems: The Adonis Theatre

In January, 1994, the New York City Department of Health obtained a temporary closing order from the New York State Supreme Court,shutting down the Adonis Theatre, located at 693 Eighth Avenue, near 44th Street. This action was brought under the New York City Administrative Code, the State Sanitary Code and the Penal Law, in order to restrain a public nuisance at the premises and to stop acts of individuals which were detrimental to health and which are considered to be high risk sexual activity. This action was brought as part of the City's continuing effort to help control the spread of the AIDS virus. High risk sexual activities were observed by inspectors on nine visits to the Adonis Theatre over a four month period involving at least 95 individuals. The Court papers stated, "All incidents were seen in open areas. The management of the Adonis Theatre must obviously be aware--or must vigorously shield itself from knowledge--of all this high risk activity that is plainly visible to casual and occasional outside inspectors."

APPENDIX

The Department of City Planning Secondary Effects Study

The Department of City Planning is currently undertaking a study of secondary impacts of adult use establishments in six other locations in New York City. The Department compares assessed values but for the years 1986/7 and 1992/3. Comparing our findings for our years to their selected years, we found that the trends remained the same, but in somewhat different proportions: the difference between assessed valuation rates of change for 1986/7 and 1992/3 was less for the Eighth Avenue study block and the Ninth Avenue control block than for the years of 1985/6 and 1993/4, and the difference was greater for the "DCP years" of 1986/7 and 1992/3 as compared to our years of 1985/6 and 1993/4. These differences in findings may be related to the selection of different years in the real estate "boom and bust" cycle.

For both sets of data, the increases in assessed valuations occurred at a higher rate on the "control" blocks" on which there were no adult use establishments, than on the "study" blocks, on which there were adult use concentrations. We are not asserting a simple cause-and-effect relationship here. There are too many variables--zoning, market trends, public condemnation proceedings for the 42nd Street Development Project, personal decisions by owners--that may affect assessed values--in addition to the presence of adult uses.

REPORT OF THE ATTORNEY GENERAL'S WORKING GROUP ON THE REGULATION OF SEXUALLY ORIENTED BUSINESSES

June 6, 1989

HUBERT H. HUMPHREY, III
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INTRODUCTION

Many communities in Minnesota have raised concerns about the impact of sexually oriented businesses on their quality of life. It has been suggested that sexually oriented businesses serve as a magnet to draw prostitution and other crimes into a vulnerable neighborhood. Community groups have also voiced the concern that sexually oriented businesses can have an adverse effect on property values and impede neighborhood revitalization. It has been suggested that spillover effects of the businesses can lead to sexual harassment of residents and scatter unwanted evidence of sexual liaisons in the paths of children and the yards of neighbors.

Although many communities have sought to regulate sexually oriented businesses, these efforts have often been controversial and equally often unsuccessful. Much community sentiment against sexually oriented businesses is an outgrowth of hostility to sexually explicit forms of expression. Any successful strategy to combat sexually oriented businesses must take into account the constitutional rights to free speech which limit available remedies.

Only those pornographic materials which are determined to be "obscene" have no constitutional protection. As explained later in more detail, only that pornography which, according to community standards and taken as a whole, "appeals to the prurient interest" (as opposed to an interest in healthy sexuality), describes or depicts sexual conduct in a "patently offensive way" and "lacks serious literary, artistic, political or scientific value," can be prohibited or prosecuted. Miller v. California, 413 U.S. 15, 24 (1973).

Other pornography and the businesses which purvey it can only be regulated where a harm is demonstrated and the remedy is sufficiently tailored to prevent that harm without burdening First Amendment rights. In order to reduce or eliminate the impacts of sexually oriented businesses, each community must find the balance between the dangers of pornography and the constitutional rights to free speech. Each community must have evidence of harm. Each community must know the range of legal tools which can be used to combat the adverse impacts of pornography and sexually oriented businesses.

On June 21, 1988, Attorney General Hubert Humphrey III announced the formation of a Working Group on the Regulation of Sexually Oriented Businesses to assist public officials and private citizens in finding legal ways to reduce the impacts of sexually oriented businesses. Members of the Working Group were selected for their special expertise in the areas of zoning and law enforcement and included bipartisan representatives of the state Legislature as well as members of both the Minneapolis and St. Paul city councils who have played critical roles in developing city ordinances regulating sexually oriented businesses.

The Working Group heard testimony and conducted briefings on the impacts of sexually oriented businesses on crime and communities and the methods available to reduce or eliminate these impacts. Extensive research was conducted to review regulation and prosecution strategies used in other states and to analyze the legal ramifications of these strategies.

As testimony was presented, the Working Group reached a consensus that a comprehensive approach is required to reduce or eliminate the impacts of sexually oriented businesses. Zoning and licensing regulations are needed to protect residents from the intrusion of "combat zone" sexual crime and harassment into their neighborhoods. Prosecution of obscenity has played an important role in each of the cities which have significantly reduced or eliminated pornography. The additional threat posed by the involvement of organized crime, if proven to exist, may justify the resources needed for prosecution of obscenity or require use of a forfeiture or racketeering statute.

The Working Group determined that it could neither advocate prohibition of all sexually explicit material nor the use of regulation as a pretext to eliminate all sexually oriented businesses. This conclusion is no endorsement of pornography or the businesses which profit from it. The Working Group believes much pornography conveys a message which is degrading to women and an affront to human dignity. Commercial pornography promotes the misuse of vulnerable people and can be used by either a perpetrator or a victim to rationalize sexual violence. Sexually oriented businesses have a deteriorating effect upon neighborhoods and draw involvement of organized crime.

Communities are not powerless to combat these problems. But to be most effective in defending itself from pornography each community must work from the evidence and within the law. The report of this Working Group is designed to assist local communities in developing an appropriate and effective defense.

The first section of the report discusses evidence that sexually oriented businesses, and the materials from which they profit, have an adverse impact on the surrounding communities. It provides relevant evidence which local communities can use as part of their justification for reasonable regulation of sexually oriented businesses.

The Working Group also discussed the relationship between sexually oriented businesses and organized crime. Concerns about these broader effects of sexually oriented businesses underlie the Working Group's recommendations that obscenity should be prosecuted and the tools of obscenity seized when sexually oriented businesses break the law.

The second section of this report describes strategies for regulating sexually oriented businesses and prosecuting obscenity. The report presents the principal alternatives, the recommendations of the Working Group and some of the legal issues to consider when these strategies are adopted.

The goal of the Attorney General's Working Group in providing this report is to support and assist local communities who are struggling against the blight of pornography. When citizens, police officers and city officials are concerned about crime and the deterioration of neighborhoods, each of us lives next door. No community stands alone.

SUMMARY

The Attorney General's Working Group on the Regulation of Sexually Oriented Businesses makes the following recommendations to assist communities in protecting themselves from the adverse effects of sexually oriented businesses. Some or all of

these recommendations may be needed in any given community. Each community must decide for itself the nature of the problems it faces and the proposed solutions which would be most fitting.

1. City and county attorneys' offices in the Twin Cities metropolitan area should designate a prosecutor to pursue obscenity prosecutions and support that prosecutor with specialized training.

2. The Legislature should consider funding a pilot program to demonstrate the efficacy of obscenity prosecution and should encourage the pooling of resources between urban and suburban prosecutor offices by making such cooperation a condition for receiving any such grant funds.

3. The Attorney General should provide informational resources for city and county attorneys who prosecute obscenity crimes.

4. Obscenity prosecutions should begin with cases involving those materials which most flagrantly offend community standards.

5. The Legislature should amend the present forfeiture statute to include as grounds for forfeiture all felonies and gross misdemeanors pertaining to solicitation, inducement, promotion or receiving profit from prostitution and operation of a "disorderly house."

6. The Legislature should consider the potential for a RICO-like statute with an obscenity predicate.

7. Prosecutors should use the public nuisance statute to enjoin operations of sexually oriented businesses which repeatedly violate laws pertaining to prostitution, gambling or operating a disorderly house.

8. Communities should document findings of adverse secondary effects of sexually oriented businesses prior to enacting zoning regulations to control these uses so that such regulations can be upheld if challenged in court.

9. To reduce the adverse effects of sexually oriented businesses, communities should adopt zoning regulations which set distance requirements between sexually oriented businesses and sensitive uses, including but not limited to residential areas, schools, child care facilities, churches and parks.

10. To reduce adverse impacts from concentration of these businesses, communities should adopt zoning ordinances which set distances between sexually oriented businesses and between sexually oriented businesses and liquor establishments, and should consider restricting sexually oriented businesses to one use per building.

11. Communities should require existing businesses to comply with new zoning or other regulation of sexually oriented businesses within a reasonable time so that prior uses will conform to new laws.

12. Prior to enacting licensing regulations, communities should document findings of adverse secondary effects of sexually oriented businesses and the relationship between these effects and proposed regulations so that such regulations can be upheld if challenged in court.

13. Communities should adopt regulations which reduce the likelihood of criminal activity related to sexually oriented businesses, including but not limited to open booth ordinances and ordinances which authorize denial or revocation of licenses when the licensee has committed offenses relevant to the operation of the business.

14. Communities should adopt regulations which reduce exposure of the community and minors to the blighting appearance of sexually oriented businesses, including but not limited to regulations of signage and exterior design of such businesses, and should enforce state law requiring sealed wrappers and opaque covers on sexually oriented material.

IMPACTS OF SEXUALLY ORIENTED BUSINESSES

The Working Group reviewed evidence from studies conducted in Minneapolis and St. Paul and in other cities throughout the country. These studies, taken together, provide compelling evidence that sexually oriented businesses are associated with high crime rates and depression of property values. In addition, the Working Group heard testimony that the character of a neighborhood can dramatically change when there is a concentration of sexually oriented businesses adjacent to residential property.

Minneapolis Study

In 1980, on direction from the Minneapolis City Council, the Minneapolis Crime Prevention Center examined the effects of sex-oriented and alcohol-oriented adult entertainment upon property values and crime rates. This study used both simple regression and multiple regression statistical analysis to evaluate whether there was a causal relationship between these businesses and neighborhood blight.

The study concluded that there was a close association between sexually oriented businesses, high crime rates and low housing values in a neighborhood. When the data was reexamined using control variables such as the mean income in the neighborhood to determine whether the association proved causation, it was unclear whether sexually oriented businesses caused a decline in property values. The Minneapolis study concluded that sexually oriented businesses concentrate in areas which are relatively deteriorated and, at most, they may weakly contribute to the continued depression of property values.

However, the Minneapolis study found a much stronger relationship between sexually oriented businesses and crime rates. A crime index was constructed including robbery, burglary, rape and assault. The rate of crime in areas near sexually oriented businesses was then compared to crime rates in other areas. The study drew the following conclusions:

1. The effects of sexually oriented businesses on the crime rate index is positive and significant regardless of which control variable is used.

2. Sexually oriented businesses continue to be associated with higher crime rates, even when the control variables' impacts are considered simultaneously.

According to the statistical analysis conducted in the Minneapolis study, the addition of one sexually oriented business to a census tract area will cause an increase in the overall crime rate index in that area by 9.15 crimes per thousand people per year even if all other social factors remain unchanged.

St. Paul

In 1978, the St. Paul Division of Planning and the Minnesota Crime Control Planning board conducted a study of the relationship between sex-oriented and alcohol-oriented adult entertainment businesses and neighborhood blight. This study looked at crime rates per thousand and median housing values over time as indices of neighborhood deterioration. The study combined sex-oriented and alcohol-oriented businesses, so its conclusions are only suggestive of the effects of sexually oriented businesses alone. Nevertheless, the study reached the following important conclusions:

1. There is a statistically significant correlation between the location of adult businesses and neighborhood deterioration.

2. Adult entertainment establishments tend to locate in somewhat deteriorated areas.

3. Additional relative deterioration of an area follows location of an adult business in the area.

4. There is a significantly higher crime rate associated with two such businesses in an area than is associated with only one adult business.

5. Housing values are also significantly lower in an area where there are three adult businesses than they are in an area with only one such business.

Similar conclusions about the adverse impact of sexually oriented businesses on the community were reached in studies conducted in cities across the nation.

Indianapolis

In 1983, the City of Indianapolis researched the relationship between sexually oriented businesses and property values. The study was based on data from a national random sample of 20 percent of the American Institute of Real Estate Appraisers.

The Study found the following:

1. The appraisers overwhelmingly (80%) felt that an adult bookstore located in a neighborhood would have a negative impact on residential property values within one block of the site.

2. The real estate experts also overwhelmingly (71%) believed that there would be a detrimental effect on commercial property values within the same one block radius.

3. This negative impact dissipates as the distance from the site increases, so that most appraisers believed that by three blocks away from an adult bookstore, its impact on property values would be minimal.

Indianapolis also studied the relationship between crime rates and sexually oriented bookstores, cabarets, theaters, arcades and massage parlors. A 1984 study entitled "Adult Entertainment Businesses in Indianapolis" found that areas with sexually oriented businesses had higher crime rates than similar areas with no sexually oriented businesses.

1. Major crimes, such as criminal homicide, rape, robbery, assault, burglary, and larceny, occurred at a rate that was 23 percent higher in those areas which had sexually oriented businesses.

2. The sex-related crime rate, including rape, indecent exposure, and child molestation, was found to be 77 percent higher in those areas with sexually oriented businesses.

Phoenix

The Planning Department of Phoenix, Arizona published a study in 1979 entitled "Relation of Criminal Activity and Adult Businesses." This study showed that arrests for sexual crimes and the location of sexually oriented businesses were directly related. The study compared three areas with sexually oriented businesses with three control areas which had similar demographic and land use characteristics, but no sexually oriented establishments. The study found that,

1. Property crimes were 43 percent higher in those areas which contained a sexually oriented business.

2. The sex crime rate was 500 percent higher in those areas with sexually oriented businesses.

3. The study area with the greatest concentration of sexually oriented businesses had a sex crimes rate over 11 times as large as a similar area having no sexually oriented businesses.

Los Angeles

A study released by the Los Angeles Police Department in 1984 supports a relationship between sexually oriented businesses and rising crime rates. This study is less definitive, since it was not designed to use similar areas as a control. The study indicated that there were 11 sexually oriented adult establishments in the Hollywood, California, area in 1969. By 1975, the number had grown to 88. During the same time period, reported incidents of "Part I" crime (i.e., homicide, rape, aggravated assault, robbery, burglary, larceny and vehicle theft) increased 7.6 percent in the Hollywood area while the rest of Los Angeles had a 4.2 percent increase. "Part II" arrests (i.e. forgery, prostitution, narcotics, liquor law violations, and gambling) increased 3.4 percent in the rest of Los Angeles, but 45.4 percent in the Hollywood area.

Concentration of Sexually Oriented Businesses Neighborhood Case Study

In St. Paul, there is one neighborhood which has an especially heavy concentration of sexually oriented businesses. The blocks adjacent to the intersection of University Avenue and Dale Street have more than 20 percent of the city's adult uses (4 out of 19), including all of St. Paul's sexually oriented bookstores and movie theaters.

The neighborhood, as a whole, shows signs of significant distress, including the highest unemployment rates in the city, the highest percentage of families below the poverty line in the city, the lowest median family income and the lowest percentage of high school and college graduates. (See 40-Acre Study on Adult Entertainment, St. Paul Department of Planning and Economic Development, Division of Planning, 1987 at p. 19.) It would be difficult to attribute these problems in any simple way to sexually oriented businesses.

However, it is likely that there is a relationship between the concentration of sexually oriented businesses and neighborhood crime rates. The St. Paul Police Department has determined that St. Paul's street prostitution is concentrated in a "street prostitution zone" immediately adjacent to the intersection where the sexually oriented businesses are located. Police statistics for 1986 show that, of 279 prostitution arrests for which specific locations could be identified, 70 percent (195) were within the "street prostitution zone." Moreover, all of the locations with 10 or more arrests for prostitution were within this zone.

The location of sexually oriented businesses has also created a perception in the community that this is an unsafe and undesirable part of the city.. In 1983, Western State Bank, which is currently located across the street from an adult bookstore, hired a research firm to survey area residents regarding their preferred location for a bank and their perceptions of different locations. A sample of 305 people were given a list of locations and asked, "Are there any of these locations where you would not feel safe conducting your banking business?"

No more than 4 per cent of the respondents said they would feel unsafe banking at other locations in the city. But 36 percent said they would feel unsafe banking at Dale and University, the corner where the sexually oriented businesses are concentrated.

The Working Group reviewed the 1987 40-Acre Study on Adult Entertainment prepared by the Division of Planning in St. Paul's Department of Planning and Economic Development. This study summarized testimony presented to the Planning Commission regarding neighborhood problems:

> Residents in the University/Dale area report frequent sex-related harassment by motorists and pedestrians in the neighborhood. Although it cannot be proved that the harassers are patrons of adult businesses, it is reasonable to suspect such a connection. Moreover, neighborhood residents submitted evidence to the Planning Commission in the form of discarded pornographic literature allegedly found in the streets, sidewalks, bushes and alleys near adult businesses. Such literature is sexually very explicit, even on the cover,

and under the present circumstances becomes available to minors even though its sale to minors is prohibited.

Testimony

The Working Group heard testimony that a concentration of sexually oriented businesses has serious impacts upon the surrounding neighborhood. The Working Group heard that pornographic materials are left in adjacent lots. One person reported to the police that he had found 50 pieces of pornographic material in a church parking lot near a sexually oriented business. Neighbors report finding used condoms on their lawns and sidewalks and that sex acts with prostitutes occur on streets and alleys in plain view of families and children. The Working Group heard testimony that arrest rates understate the level of crime associated with sexually oriented businesses. Many robberies and thefts from "johns" and many assaults upon prostitutes are never reported to the police.

Prostitution also results in harassment of neighborhood residents. Young girls on their way to school or young women on their way to work are often propositioned by johns. The Flick theater caters to homosexual trade, and male prostitution has been noted in the area. Neighborhood boys and men are also accosted on the street. A police officer testified that one resident had informed him that he found used condoms in his yard all the time. Both his teenage son and daughter had been solicited on their way to school and to work.

The Working Group heard testimony that in the Frogtown neighborhood, immediately north of the University-Dale intersection in St. Paul, there has been a change over time in the quality of life since the sexually oriented businesses moved into the area. The Working Group heard that the neighborhood used to be primarily middle class, did not have a high crime rate and did not have prostitution. St. Paul police officers testified that they believed the sexually oriented businesses caused neighborhood problems, particularly the increase in prostitution and other crime rates. Property values were suffering, since the presence of high crime rates made the area

fashion with organized crime either the mafia or some other facet of non-mafia never-the-less highly organized crime.

Id. at 1047-48.

Thomas Bohling of the Chicago Police Department Organized Crime Division, Vice Control Section, told the Pornography Commission that "it is the belief of state, federal and local law enforcement that the pornography industry is controlled by organized crime families. If they do not own the business outright, they most certainly extract street tax from independent smut peddlers." Id. at 1048 (emphasis in original).

The Pornography Commission stated that it had been advised by Los Angeles Police Chief Daryl F. Gates that "organized crime families from Chicago, New York, New Jersey and Florida are openly controlling and directing the major pornography operations in Los Angeles." Id.

The Pornography Commission was told by Jimmy Fratianno, described by the Commission as a member of LCN, "that large profits have kept organized crime heavily involved in the obscenity industry." Id. at 1052. Fratianno testified that "95% of the families are involved in one way or another in pornography. . . . It's too big. They just won't let it go." Id. at 1052-53.

The Pornography Commission concluded that "organized crime in its traditional LCN forms and other forms exerts substantial influence and control over the obscenity industry. Though a number of significant producers and distributors are not members of LCN families, all major producers and distributors of obscene material are highly organized and carry out illegal activities with a great deal of sophistication." Id. at 1053.

The Pornography Commission reported that Michael George Thevis, reportedly one of the largest pornographers in the United States during the 1970's was convicted in 1979 of RICO (Racketeer Influenced and Corrupt Organizations) violations including murder, arson and extortion. The Commission also reported examples of other crimes associated with the pornography industry, including prostitution and other sexual

abuse, narcotics distribution, money laundering and tax violations, copyright violations and fraud. Id. at 1056-65.

Although the Pornography Commission report has been criticized for relying on the testimony of unreliable informants in drawing its conclusions finding links between pornography and organized crime (See Scott, Book Reviews, 78 J. Crim. L. & Criminology 1145, 1158-59 (1988)), its conclusions find additional support in recent state studies.

The California Department of Justice recently reported that:

> California's primacy in the adult videotape industry is of law enforcement concern because the pornography business has been prone to organized crime involvement. Immense profits can be realized through pornography operations, and until recently, making and distributing pornography involved a relatively low risk of prosecution. But more aggressive law enforcement efforts and turmoil within the pornography business has destabilized the smooth flow of easy money for some of its major operations . . . .
>
> As long as control over pornography distribution is contested, and organized crime figures continue their involvement in the business, the pornography industry will remain of interest to law enforcement officials statewide.

Bureau of Organized Crime and Criminal Intelligence, Department of Justice, State of California, Organized Crime in California 1987: Annual Report to the California Legislature at 59-62 (1988).

The Pennsylvania Crime Commission similarly determined in a 1980 report that most pornography stores examined were affiliated or owned by one of three men who had ties with "nationally known pornography figures who are members or associated of organized crime families." Pennsylvania Crime Commission, A Decade of Organized Crime: 1980 Report at 119.

For example, Reuben Sturman, a leading pornography industry figure based in Cleveland, was reported by the FBI in 1978 to have built his empire with the assistance of LCN member DiBernardo. Federal Bureau of Investigation Report Regarding the

Extent of Organized Crime Involvement in Pornography (1978). Sturman, who reportedly controls half of the $8 billion United States pornography industry, was recently indicted by a federal grand jury in Las Vegas for racketeering violations and by a federal grand jury in Cleveland for income tax evasion and tax fraud. Newsweek, August 8, 1988, p. 3.

Evidence of the vulnerability of sexually oriented businesses to organized crime involvement underscores the importance of criminal prosecution of these businesses when they engage in illegal activities, including distribution of obscenity and support of prostitution. Prosecution can increase the risk and reduce the profit margin of conducting illegal activities. It may also disclose organized crime association with local pornography businesses and increase the costs of criminal enterprise in Minnesota.

In addition to prosecution, forfeiture of property used in the illegal activities related to sexually oriented businesses can cut deeply into profits. Regulation to permit license revocation for conviction of subsequent crimes may also expose and increase control over criminal enterprises related to sexually oriented businesses.

PROSECUTORIAL AND REGULATORY ALTERNATIVES

The regulation of many sexually oriented businesses, like other businesses dealing in activity with an expressive component, is circumscribed by the First Amendment of the United States Constitution.3/ Nonetheless, the First Amendment does not impose a barrier to the prosecution of obscenity, which is not protected by the First Amendment, or to reasonable regulation of sexually oriented businesses if the

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3/ The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

The constitutional guarantee of freedom of speech, often the basis for challenges to regulation of sexually oriented businesses, restricts state as well as federal actions. See, e.g., Fiske v. Kansas, 274 U.S. 380, 47 S. Ct. 655 (1927).

regulation is not designed to suppress the content of expressive activity and is sufficiently tailored to accomplish the regulatory purpose.

The Working Group believes that communities have more prosecutorial and regulatory opportunities than they may currently recognize. The purpose of this section of the Report is to identify and recommend enforcement and regulatory opportunities. Of course, each community must decide on its own how to balance its limited resources and the wide variety of competing demands for such resources.

I. OBSCENITY PROSECUTION

Obscene material is not protected by the First Amendment. Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973). The sale or distribution of obscene material in Minnesota is a criminal offense. The penalty was recently increased to up to one year in jail and a $3,000 fine for a first offense, and up to two years in jail and a $10,000 fine for a second or subsequent offense within five years. Minn. Stat. § 617.241, subd. 3 (1988).4/

The Working Group believes that Minnesota's obscenity statutes are adequate to prosecute and penalize the sale and distribution of obscene materials. However, historically, widespread obscenity prosecution has not occurred.

The Working Group believes this is not because the sale or distribution of obscene publications in Minnesota is rare, but because prosecutors have been reluctant to bring obscenity charges, because of limited resources, difficulties faced when prosecuting obscenity, and because obscenity has historically been considered a victimless crime.

4/ The prior penalty was a fine only -- up to $10,000 for a first offense and up to $20,000 for a second or subsequent offense. Minn. Stat. § 617.241, subd. 3 (1986). Obscenity arrests are so infrequent that incidents involving possible violations of section 617.241 are not separately compiled by the Minnesota Bureau of Criminal Comprehension. See Bureau of Criminal Apprehension, 1987 Minnesota Annual Report on Crime, Missing Children and Bureau of Criminal Apprehension Activities.

Obscenity, however, should no longer be viewed as a victimless crime.5/ There is mounting evidence that sexually oriented businesses are, as described earlier in this report, often associated with increases in crime rates and a decline in the quality of life of neighborhoods in which they are located. Further, as discussed previously, when there is no prosecution of obscenity, large cash profits make pornographic operations very attractive to members of organized crime. The Working Group thus believes that prosecution of obscenity, particularly cases involving children, violence or bestiality, should assume a higher priority for law enforcement officials.

In addition, many of the difficulties faced when prosecuting obscenity can be addressed by adequate training and assistance. In order to prove that material is obscene, a prosecutor must prove:

> (i) that the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest in sex;
>
> (ii) that the work depicts sexual conduct . . . in a patently offensive manner; and
>
> (iii) that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Minn. Stat. § 617.241, subd. 1(a)(i-iii) (1988). This statutory standard was drawn to be consistent with constitutional standards set forth in Miller, supra.

5/ Two blue ribbon commissions have reached different conclusions regarding the harmfulness of sexually explicit material to individuals. A presidential Commission on Obscenity and Pornography concluded in 1970 that there was no evidence of "social or individual harms" caused by sexually explicit materials and, therefore, "federal, state and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consulting adults should be repealed." The Report of the Comm'n on Obscenity and Pornography at 57-8 (Bantam Paperback ed. 1970). However, in 1986, the Attorney General's Commission on Pornography concluded that "sexually violent materials . . . bear . . . a causal relationship to antisocial acts of sexual violence . . . [and that] the evidence supports the conclusion that substantial exposure to [non-violent] degrading material increases the likelihood for an individual [to] . . . commit an act of sexual violence or sexual coercion." Attorney General's Comm'n on Pornography, 1 Final Report at 326, 333 (1986).

To be sure, prosecutors face a number of hazards in prosecuting obscenity. They include inadequate training in this specialized area of law, attempts by defense attorneys to remove jurors who find pornography offensive, the offering into evidence of polls and surveys through expert testimony to prove tolerant community standards, efforts to guide jurors with jury instructions favorable to the defense, and discouragement with unsuccessful prosecutions.

But the hazards can be overcome. Alan E. Sears, former executive director of the U.S. Attorney General's Commission on Pornography has stated:

> Prosecutors can successfully obtain obscenity convictions in virtually any jurisdiction in the United States. In order to obtain a conviction, it is incumbent upon a prosecutor to prepare well, know the law, not fall into the "one case syndrome" trap, obtain a representative jury through proper voir dire, keep the focus of the trial on the unlawful conduct of the defendant, and obtain legally sound instructions.

Sears, "How To Lose A Pornography Case," The CDL Reporter (n.d.).

The Working Group heard testimony from prosecutors who have pursued obscenity cases nationally regarding effective ways to prosecute obscenity cases. Materials can be bought or rented, rather than seized under warrant. In the absence of survey data, community standards can be left to the wisdom of the jury. In that case, experts should be prepared to testify if the defense attempts to make a statistical case that the material is not obscene. Prosecution of obscenity is also likely to be most effective if initial prosecutions focus on materials which are patently offensive to the community, such as those involving children, violence or beastiality.

The experience of other cities has demonstrated that vigorous and sustained enforcement of obscenity statutes can sharply reduce or virtually eliminate sexually oriented businesses. Cincinnati, Omaha, Atlanta, Charlotte, Indianapolis and Fort Lauderdale were cited to the Working Group as examples of cities which have

successful programs of obscenity prosecution.6/ The Working Group encourages prosecutors to take advantage of increasing training opportunities and other assistance for obscenity prosecutions and to reassess the desirability of increased enforcement. The Working Group is pleased to note that county attorneys and law enforcement groups in Minnesota have recently held forums and seminars on obscenity law enforcement and prosecution. The U.S. Justice Department's National Obscenity Enforcement Unit offers assistance to local prosecutors, including sample pleadings, indictments, search warrants, motions, responses and trial memoranda.7/

RECOMMENDATIONS

1. City and county attorneys' offices in the Twin Cities metropolitan area should designate a prosecutor to pursue obscenity prosecutions and support that prosecutor with specialized training.

2. The Legislature should consider funding a pilot program to demonstrate the efficacy of obscenity prosecution and should encourage the pooling of resources between urban and suburban prosecuting offices by making such cooperation a condition of receiving any such grant funds.

6/ Memorandum to Jim Bellus, executive assistant to St. Paul Mayor George Latimer (prepared by St. Paul Department of Planning and Economic Development) (July 5, 1988); see also Waters, "The Squeeze on Sleaze," Newsweek, Feb. 1, 1988, at 45 ("After more than 10 years of levying heavy fines and making arrests, Atlanta has won national renown as 'the city that cleaned up pornography.'").

7/ The Address of the National Obscenity Enforcement Unit is U.S. Justice Department, 10th & Pennsylvania Ave. N.W., Room 2216, Washington, D.C. 20530. Its telephone number is 202-633-5780. Assistance is also available from Citizens for Decency through Law, Inc., 2845 E. Camelback Rd., Suite 740, Phoenix, AZ 85016. It is the publisher of "The Preparation and Trial of an Obscenity Case: A Guide for the Prosecuting Attorney." Its telephone number is 602-381-1322. The National Obscenity Law Center, another private organization, is located at 475 Riverside Drive, Suite 236, New York, N.Y. 10115. It publishes an Obscenity Law Bulletin and the "Handbook on the Prosecution of Obscenity Cases." Its telephone number is 212-870-3216.

3. **The Attorney General should provide informational resources for city and county attorneys who prosecute obscenity crimes.**

4. **Obscenity prosecutions should concentrate on cases that most flagrantly offend community standards.**

II. OTHER LEGAL REMEDIES

A. RICO/FORFEITURE

In addition to traditional criminal prosecutions, use of RICO statutes and criminal and civil forfeiture actions may also prove to be successful against obscenity offenders. By attacking the criminal organization and the profits of illegal activity, such actions can provide a strong disincentive to the establishment and operation of sexually oriented businesses. For example, the federal government and a number of the twenty-eight states which have enacted racketeer influenced and corrupt organization (RICO) statutes include obscenity offenses as predicate crimes. Generally speaking, to violate a RICO statute, a person must acquire or maintain an interest in or control of an enterprise, or must conduct the affairs of an enterprise through a "pattern of criminal activity." That pattern of criminal activity may include obscenity violations, which in turn can expose violators to increased fines and penalties as well as forfeiture of all property acquired or used in the course of a RICO violation. These statutes generally enable prosecutors to obtain either criminal or civil forfeiture orders to seize assets and may also be used to obtain injunctive relief to divest repeat offenders of financial interests in sexually oriented businesses. See 18 U.S.C. §§ 1961-68 (West Supp. 1988). RICO statutes may be particularly effective in dismantling businesses dominated by organized crime, but they may be applied against other targets as well.

The Working Group believes that Minnesota should enact a RICO-like statute that would encompass increased penalties for using a "pattern" of criminal obscenity acts to conduct the affairs of a business entity. Provisions authorizing the seizure of assets for obscenity violations should be considered, but the limitations imposed by the First Amendment must be taken into account.

It has been argued that a RICO or forfeiture statute based on obscenity crime violations threatens to "chill protected speech" because it would permit prosecutors to seize non-obscene materials from distributors convicted of violating the obscenity statute. American Civil Liberties Union, Polluting The Censorship Debate: A Summary And Critique Of The Final Report Of The Attorney General's Commission On Pornography at 116-117 (1986).

However, a narrow majority of the United States Supreme Court recently held that there is no constitutional bar to a state's inclusion of substantive obscenity violations among the predicate offenses for its RICO statute. Sappenfield v. Indiana, 57 U.S.L.W. 4180, 4183-4184 (February 21, 1989). The Court recognized that "any form of criminal obscenity . statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene." Id. at 4184. But the Court ruled that, "the mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedent." Id. The Court specifically upheld RICO provisions which increase penalties where there is a pattern of multiple violations of obscenity laws.

However, in a companion case, the Court also invalidated a pretrial seizure of a bookstore and its contents after only a preliminary finding of "probable cause" to believe that a RICO violation had occurred. Fort Wayne Books, Inc. v. Indiana, 57 U.S.L.W. 4180, 4184-4185 (February 21, 1989). The Court explained there is a rebuttable presumption that expressive materials are protected by the First Amendment. That presumption is not rebutted until the claimed justification for seizure of materials, the elements of a RICO violation, are proved in an adversary proceeding. Id. at 4185.

The Court did not specifically reach the fundamental question of whether seizure of the assets of a sexually oriented business such as a bookstore is constitutionally permissible once a RICO violation is proved. The Court explained:

> [F]or the purposes of disposing of this case, we assume without deciding that bookstores and their contents are forfeitable (like other property

> such as a bank account or yacht) when it is proved that these items are property actually used in, or derived from, a pattern of violations of the state's obscenity laws.

Id. at 4185. The Working Group believes that a RICO statute which provided for seizure of the contents of a sexually oriented business upon proof of RICO violations would have the potential to significantly curtail the distribution of obscene materials.

Although Minnesota does not have a RICO statute, it does have a forfeiture statute permitting the seizure of money and property which are the proceeds of designated felony offenses. Minn. Stat. § 609.5312 (1988). But, this statute does not permit seizure of property related to commission of the offenses most likely to be associated with sexually oriented businesses. Obscenity crimes are not among the offenses which justify forfeiture. Although solicitation or inducement of a person under age 13 (Minn. Stat. § 609.322, subd. 1) or between the ages of 16 and 18 to practice prostitution (Minn. Stat. § 609.322, subd. 2) are included among the offenses which could justify seizure of property, many crimes involving prostitution are outside the reach of the present Minnesota forfeiture law.

The following crimes are not included among the crimes which can justify seizure of property and profits: solicitation, inducement, or promotion of a person between the ages of 13 and 16 to practice prostitution (Minn. Stat. § 609.322, subd. 1A); solicitation, inducement or promotion of a person 18 years of age or older to practice prostitution (Minn. Stat. § 609.322, subd. 3); receiving profit derived from prostitution (Minn. Stat. § 609.323); owning, operating or managing a "disorderly house," in which conduct habitually occurs in violation of laws pertaining to liquor, gambling, controlled substances or prostitution (Minn. Stat. § 609.33).

Although its reach would be much more limited, the legislature should also consider providing for forfeiture of property used to commit an obscenity offense or which represents the proceeds of obscenity offenses. Under the holding in Fort Wayne Books, Inc. v. Indiana, such forfeiture could not take place, if at all, until it was proved that the underlying obscenity crimes had been committed.

There are no comparable constitutional issues raised by enacting or enforcement of forfeiture statutes based on violations of prostitution, gambling, or liquor laws. The legislature may require sexually oriented businesses which violate these laws to forfeit their profits. The Working Group believes that such an expansion of forfeiture laws would give prosecutors greater leverage to control the operation of those businesses which pose the greatest danger to the community.

RECOMMENDATIONS

1. The legislature should amend the present forfeiture statute to include as grounds for forfeiture all felonies and gross misdemeanors pertaining to solicitation, inducement, promotion or receiving profit from prostitution and operation of a "disorderly house."

2. The legislature should consider the potential for a RICO-like statute with an obscenity predicate.

B. NUISANCE INJUNCTIONS

Minnesota law enforcement authorities may obtain an injunction and close down operations when a facility constitutes a public nuisance. A public nuisance exists when a business repeatedly violates laws pertaining to prostitution, gambling or keeping a "disorderly house." The Minnesota public nuisance law permits a court to order a building to be closed for one year. Minn. Stat. §§ 617.80-.87 (1988).

Nuisance injunctions to close down sexually oriented businesses which repeatedly violate laws pertaining to prosecution, gambling or disorderly conduct are potentially powerful regulatory devices. The fact that a building in which prosecution or other offenses occur houses a sexually oriented business does not shield the facility from application of nuisance law based on such offenses. Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S. Ct. 3172 (1986) (First Amendment does not shield adult bookstore

from application of New York State nuisance law designed in part to close places of prostitution).

Although the Working Group believes that nuisance injunctions with an obscenity predicate would be effective in controlling sexually oriented businesses, such provisions would probably be unconstitutional under current U.S. Supreme Court decisions. Six Supreme Court justices joined in the Arcara result, but two of them -- Justices O'Connor and Stevens -- concurred with these words of caution:

> If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review. Because there is no suggestion in the record or opinion below of such pretextual use of the New York nuisance provision in this case, I concur in the Court's opinion and judgment.

Arcara, supra, 478 U.S. at 708, 106 S. Ct. at 3178.

In an earlier case, Vance v. Universal Amusement, 445 U.S. 308, 100 S. Ct. 1156 (1980), the Court ruled unconstitutional a Texas public nuisance statute authorizing the closing of a building for a year if the building is used "habitual[ly]" for the "commercial exhibition of obscene material." Id. at 310 n.2, 100 S. Ct. at 1158 n.2.

The Court's recent holdings in Sappenfield and Fort Wayne Books, Inc. give no indication that the Court would now look more favorably upon an injunction to close down a facility which sold obscene materials. The Court assumed without deciding that forfeiture of bookstore assets could be constitutional in a RICO case. But, in making this assumption, the Court distinguished forfeiture of assets under RICO from a general *restraint* on presumptively protected speech. The court approved the reasoning of the Indiana Supreme Court that, "The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." Fort Wayne Books, Inc. at 4185. The Court assumed that RICO provisions could be upheld on the basis that

"adding obscenity-law violations to the list of RICO predicate crimes was not a mere ruse to sidestep the First Amendment." Id. Without the relationship to proceeds of crime, a remedy which closed a facility for obscenity violations would be far less likely to withstand constitutional scrutiny.

RECOMMENDATIONS

1. Prosecutors should use the public nuisance statute to enjoin operations of sexually oriented businesses which repeatedly violate laws pertaining to prostitution, gambling or operating a disorderly house.

III. ZONING

Zoning ordinances can be adopted to regulate the location of sexually oriented businesses without violating the First Amendment. Such ordinances can be designed to disperse or concentrate sexually oriented businesses, to keep them at designated distances from specific buildings or areas, such as churches, schools and residential neighborhoods or to restrict buildings to a single sexually oriented usage. Because zoning is an important regulatory tool when properly enacted, the Working Group believes a careful explanation of the law and a review of potential problems in drafting zoning ordinances may be helpful to communities considering zoning to regulate sexually oriented businesses.

A. Supreme Court Decisions

The U.S. Supreme Court upheld the validity of municipal adult entertainment zoning regulations in Young v. American Mini Theaters, Inc., 427 U.S. 50, 96 S.Ct. 2440 (1976), and City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 926 (1986).8/

In Young, the Court upheld the validity of Detroit ordinances prohibiting the operation of theaters showing sexually explicit "adult movies" within 1,000 feet of any two other adult establishments.9/ The ordinances authorized a waiver of the 1,000-foot restriction if a proposed use would not be contrary to the public interest and/or other factors were satisfied. Young, supra, 427 U.S. at 54 n.7, 96 S.Ct. at 2444 n.7. The ordinances were supported by urban planners and real estate experts who testified that concentration of adult-type establishments "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." Id. at 55, 96 S.Ct. at 2445. A "myriad" of locations were left available for adult establishments outside the forbidden 1,000-foot distance zone, and no existing establishments were affected. Id. at 71 n.35, 96 S.Ct. at 2453 n.35.

Writing for a plurality of four, Justice Stevens upheld the zoning ordinance as a reasonable regulation of the place where adult films may be shown because (1) there was a factual basis for the city's conclusion that the ordinance would prevent blight; (2) the ordinance was directed at preventing "secondary effects" of adult-establishment concentration rather than protecting citizens from unwanted "offensive" speech; (3) the ordinance did not greatly restrict access to lawful speech, and (4) "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Id. at 63 n.18, 71 nn.34, 35, 96 S. Ct. at 2448-49 n.18, 2452-53 nn.34, 35.

8/ The only reported Minnesota court case reviewing an adult entertainment zoning ordinance is City of St. Paul v. Carlone, 419 N.W.2d 129 (Minn. Ct. App. 1988) (upholding facial constitutionality of St. Paul ordinance).

9/ The ordinances also prohibited the location of an adult theaters within 500 feet of a residential area, but this provision was invalidated by the district court, and that decision was not appealed. Young v. American Mini Theaters, Inc., 427 U.S. 50, 52 n.2, 96 S.Ct. 2440, 2444 n.2 (1976).

Justice Stevens did not expressly describe the standard he had used, but it was clear that the plurality would afford non-obscene sexually explicit speech lesser First Amendment protection than other categories of speech. However, four dissenters and one concurring justice concluded that the degree of protection afforded speech by the First Amendment does not vary with the social value ascribed to that speech. In his concurring opinion, Justice Powell stated that the four-part test of United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679 (1968), should apply. Powell explained:

> Under that test, a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedom is no greater than is essential to the furtherance of that interest."

427 U.S. at 79-80, 96 S.Ct. at 2457 (citation omitted), (Powell, J., concurring).

Perhaps because Justice Stevens' plurality opinion did not offer a clearly articulated standard of review, post-Young courts often applied the O'Brien test advocated by Justice Powell in his concurring opinion. Many ordinances regulating sexually oriented businesses were invalidated under the O'Brien test. See R.M. Stein, Regulation of Adult Businesses Through Zoning After Renton, 18 Pac. L.J. 351, 360 (1987) ("consistently invalidated"); S.A. Bender, Regulating Pornography Through Zoning: Can We 'Clean Up' Honolulu? 8 U. Haw. L. Rev. 75, 105 (1986) (ordinances upheld in only about half the cases).

Applying Young, the Eighth Circuit Court of Appeals invalidated a zoning ordinance adopted by the city of Minneapolis. Alexander v. City of Minneapolis, 698 F.2d 936 (8th Cir. 1983). In Alexander, the challenged ordinance had three major restrictions on sexually oriented businesses: distancing from specified uses, prevention of concentration and amortization. It prohibited a sexually oriented business from operating within 500 feet of districts zoned for residential or office-residences, a church,

state-licensed day care facility and certain public schools. It forbade an adults-only facility from operating within 500 feet of any other adults-only facility. Finally, the ordinance required existing sexually oriented entertainment establishments to conform to its provisions by moving to a new location, if necessary, within four years.

The Eighth Circuit ruled that the Minneapolis ordinance created restrictions too severe to be upheld under the Young decision. It would have required all five of the city's sexually oriented theaters and between seven and nine of the city's ten sexually oriented bookstores to relocate and would have required these facilities to compete with another 18 adult-type establishments (saunas, massage parlors and "rap" parlors) for a maximum of 12 relocation sites. The effective result of enforcing the ordinance would be a substantial reduction in the number of adult bookstores and theaters, and no new adult bookstores or theaters would be able to open, the Court concluded. Alexander, supra, 698 F.2d at 938.

In Renton, supra, the United States Supreme Court adopted a clearer standard under which regulation of sexually oriented businesses could be tested and upheld. The Court upheld an ordinance prohibiting adult movie theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park or school.

Justice Rehnquist, writing for a Court majority that included Justices Stevens and Powell, stated that the Renton ordinance did not ban adult theaters altogether and that, therefore, it was "properly analyzed as a form of time, place and manner regulation." Id. at 46, 106 S.Ct. at 928. When time, place and manner regulations are "content-neutral" and not enacted "for the purpose of restricting speech on the basis of its content," they are "acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication," Rehnquist stated. Id. He found the Renton ordinance to be content-neutral because it was not aimed at the content of films shown at adult theaters. Rather, the city's "predominate concerns" were with the secondary effects of the theaters. Id. at 47, 106 S.Ct. at 929 (emphasis in original). Once a time, place or manner regulation is determined to be content-neutral, "[t]he appropriate inquiry . . . is whether the . . . ordinance is designed to serve a substantial governmental interest and

allows for reasonable avenues of communication," Rehnquist wrote for the Court. Id. at 50, 106 S.Ct. at 930.

The Supreme Court found that Renton's "interest in preserving the quality of urban life" is a "vital" governmental interest. The substantiality of that interest was in no way diminished by the fact that Renton "relied heavily" on studies of the secondary effects of adult entertainment establishments by Seattle and the experiences of other cities, Rehnquist added. Id. at 51, 106 S.Ct. at 930-31.

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

Id. at 51-52, 106 S.Ct. at 931.

Rehnquist's inquiry then addressed the means chosen to further Renton's substantial interest and inquired into whether the Renton ordinance was sufficiently "narrowly tailored."

His comments on Renton's means to further its substantial interest suggest that municipalities have a wide latitude in enacting content-neutral ordinances aimed at the secondary effects of adult-entertainment establishments. He quoted the Young plurality for the proposition that:

> It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Id. at 52, 106 S.Ct. at 931 (quoting Young, supra, 427 U.S. at 71, 96 S.Ct. at 2453).

As to the "narrowly tailored" requirement, Rehnquist found that the Renton ordinance only affected theaters producing unwanted secondary effects and, therefore, was satisfactory. Id.

The second prong of Renton's "time, place, manner" inquiry -- the availability of alternative avenues of communication -- was satisfied by the district court's finding that 520 acres of land, or more than five percent of Renton, were left available for adult-entertainment uses, even though some of that developed area was already occupied and the undeveloped land was not available for sale or lease. A majority of the Court found:

> That [adult theater owners] must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . In our view, the First Amendment requires only that Renton refrain from effectively denying [adult theater owners] a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

Id. at 54, 106 S.Ct. at 932.

B. Standards and Need for Legal Zoning

Unlike Young, the Renton case spells out the standards by which zoning of sexually oriented businesses should be tested. Renton and several lower court decisions rendered in its wake suggest that the two most critical areas by which the ordinances will be judged are 1) whether there is evidence that ordinances were enacted to address secondary impacts on the community, and 2) whether there are enough locations still available for sexually oriented businesses so that zoning is not just a pretext to eliminate pornographic speech.10/

10/ Of 11 recent post-Renton adult-entertainment zoning decisions by federal courts, five invalidated ordinances, three upheld ordinances and three ordered a remand to district court for further proceedings. Zoning ordinances were struck in Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1987)(city council failed to offer

(Footnote 10 Continued on Next Page)

This section first describes some of the legal considerations which communities must keep in mind in drafting zoning ordinances for sexually oriented businesses. Then, some suggestions are provided, based on evidence reviewed by the Working Group, of types of zoning which can be enacted to reduce the secondary effects of sexually oriented businesses.

1. Documentation to Support Zoning Ordinances

Sexually oriented speech which is not obscene cannot be restricted on the basis of its content without running afoul of the First Amendment. The justification for regulating sexually oriented businesses is based on proof that the zoning is needed to reduce secondary effects of the businesses on the community.

Since Renton, a number of adult entertainment zoning ordinances have been invalidated for failure of the enacting body to document the need for zoning regulations. Thus, one court invalidated a zoning ordinance because there was "very little, if any, evidence of the secondary effects of adult bookstores . . . before the City Council . . . ."

(Footnote 10 Continued from Previous Page)
evidence suggesting neighborhood decline would result); Tollis, Inc. v. San Bernadino County, 827 F.2d 1329 (9th Cir. 1987) (no evidence presented to legislative body of secondary harmful effects); Ebel v. Corona, 767 F.2d 635 (9th Cir. 1985) (lack of effective alternative locations); 11126 Baltimore Boulevard, Inc. v. Prince George's County of Maryland, 684 F. Supp. 884 (D. Md. 1988) (insufficient evidence of secondary effects presented to legislative body; special exception provisions grant excessive discretionary authority to zoning officials); and Peoples Tags, Inc. v. Jackson County Legislature, 636 F. Supp. 1345 (W.D. Mo. 1986) (improper legislative purpose to prevent continued operation of adult-entertainment establishment). Zoning ordinances were upheld in SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988); FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988); and S & G News, Inc. v. City of Southgate, 638 F.Supp. 1060 (E.D. Mich. 1986), aff'd without published opinion, 819 F.2d 1142 (6th Cir. 1987). Remands were ordered in Christy v. City of Ann Arbor, 824 F.2d 489 (6th Cir. 1987), cert. denied, ___ U.S. ___, 108 S. Ct. 1013 (1988)(remand for determination of excessive restrictions); International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986) (remand for reconsideration in light of Renton, supra; nude bar ordinance), and Walnut Properties, Inc. v. City of Whittier, 808 F.2d 1331 (9th Cir. 1986) (remand, in part, for determination of land availability).

11126 Baltimore Boulevard, supra, 684 F. Supp. at 895; see also Tollis v. San Bernadino County, 827 F.2d 1329, 1333 (9th Cir. 1987) (ordinance construed to prohibit single showing of adult movie in zoned area; invalidated for failure to present evidence of secondary effects of single showing); but see Thames Enterprises v. City of St. Louis, 851 F.2d 199, 201-02 (8th Cir. 1988) (observations by legislator of secondary effects sufficient).

On the other hand, it is not necessary for each municipality to conduct research independent of that already generated by other cities. The Renton court held that evidence of the need for zoning of sexually oriented businesses can be provided by studies from other cities "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." Id. at 51, 106 S.Ct. at 931. See also SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1274 (5th Cir. 1988) (public testimony from experts, supporters and opponents and consideration of studies by Detroit, Boston, Dallas and Los Angeles sufficient evidence of legitimate purpose).

The first section of this report summarizes evidence from various cities documenting the secondary effects of sexually oriented businesses. Following Renton, it is intended that local communities will make use of this evidence in the course of assembling support for reasonable regulation of sexually oriented businesses.

2. Availability of Locations for Sexually Oriented Businesses

Courts also evaluate whether zoning of sexually oriented businesses is merely a pretext for prohibition by reviewing the alternative locations which remain for a sexually oriented business to operate under the zoning scheme. A municipality must "refrain from effectively denying . . . a reasonable opportunity to open and operate" a sexually oriented business. Renton, supra, 475 U.S. at 54, 106 S. Ct. at 932.

Access may be regarded as unduly restricted if adult entertainment zones are unreasonably small in area or if the number of locations is unreasonably few. There is no set amount of land or number of locations constitutionally required. The Renton

court found that 520 acres of "accessible real estate," including land "criss-crossed by freeways" -- more than five percent of the entire land area in Renton -- was sufficient. 475 U.S. at 53, 106 S.Ct. at 932. The Young court found the availability of "myriad" locations sufficient. 427 U.S. at 72 n.35, 96 S.Ct. at 2453 n.35.

Whether .058 square miles constituting .23 of 1 percent of the land area within the city's central business zone is sufficient is not clear. See Alexander v. The City of Minneapolis (Alexander II), No. 3-88-808, slip op. at 22 (D. Minn. May 22, 1989) (less than 1% of land area could be valid if "ample actual opportunities" for relocation exist); Christy v. City of Ann Arbor, 824 F.2d 489, 490, 493 (6th Cir. 1987) (remanding for a determination of excessive restriction). See also 11126 Baltimore Boulevard, Inc. v. Prince George's County of Maryland, 684 F. Supp. 884 (D. Md. 1988) (20 alternative locations sufficient); Alexander v. City of Minneapolis, 698 F.2d 936, 939 n.7 (8th Cir. 1983) (pre-Renton; 12 relocation sites for at least 28 existing adult establishments not sufficient).

The sufficiency of sites available for adult entertainment uses may be measured in relation to a number of factors. See, e.g., Alexander II, supra, slip op. at 22-23 (insufficient if relocation site owners refuse to sell or lease); International Food & Beverage Systems, Inc., 794 F.2d 1520, 1526 (11th Cir. 1986) (suggesting number of sites should be determined by reference to community needs, incidence of establishments in other cities, goals of city plan); Basiardanes v. City of Galveston, 682 F.2d 1203, 1209 (5th Cir. 1982) (pre-Renton case striking zoning regulation restricting adult theaters to industrial areas that were "largely a patchwork of swamps, warehouses, and railroad tracks . . . . lack[ing] access roads and retail establishments").

However, the fact that land zoned for adult establishments is already occupied or not currently for sale or lease will not invalidate a zoning ordinance. Renton, supra, 475 U.S. at 53-54, 106 S.Ct. at 932; but see, Alexander II, supra, slip op. at 22-23 (reasonable relocation opportunity absent where owners refuse to sell or rent). There is no requirement that it be economically advantageous for a sexually oriented business to locate in the areas permitted by law.

3. Distance Requirements

Another factor that may be examined by some courts is the distance requirement established by an adult entertainment zoning ordinance. In SDJ, Inc. v. Houston, 837 F.2d 1268 (5th Cir. 1988), the Court was asked to invalidate a 750-foot distancing requirement on the ground that the city had not proved that 750 feet, as opposed to some other distance, was necessary to serve the city's interest.

The Court found that an adult entertainment zoning ordinance is "sufficiently well tailored if it effectively promotes the government's stated interest" and declined to "second-guess" the city council. Houston, supra, 837 F.2d at 1276.

Courts have sustained both requirements that sexually oriented businesses be located at specified distances from each other, see Young, supra, (upholding distance requirement of 1000 feet between sexually oriented businesses), and requirements that sexually oriented businesses be located at fixed distances from other sensitive uses, see Renton, supra, (upholding distance requirement of 1000 feet between sexually oriented businesses and residential zones, single-or-multiple family dwellings, churches, parks or schools).

The Working Group heard testimony that when an ordinance establishes distances between sexually oriented uses, an additional regulation may be needed to prevent operators of these businesses to defeat the intent of the regulation by concentrating sexually oriented businesses of various types under one roof, as in a sexually oriented mini-mall. The city of St. Paul has adopted an ordinance preventing more than one adult use (e.g., sexually oriented theater, bookstore, massage parlor) from locating within a single building. A similar ordinance was upheld in the North Carolina case of Hart Book Stores, Inc. v. Edmisten, 612 F. 2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980).

The experience with multiple-use sexually oriented businesses at the University-Dale intersection suggests that these businesses have a greater potential for causing neighborhood problems than do single-use sexually oriented businesses. Following Renton, it is suggested that lawmakers document the adverse effects which the

community seeks to prevent by prohibiting multiple-use businesses before enacting this type of ordinance.

4. Requiring Existing Businesses to Comply with New Zoning

Zoning ordinances can require existing sexually-oriented businesses to close their operations provided they do not foreclose the operation of such businesses in new locations. Under such provisions, an existing business is allowed to remain at its present location, even though it is a non-conforming use, for a limited period.

The Minnesota Supreme Court has explained the theory this way:

> The theory behind this legislative device is that the *useful* life of the nonconforming use corresponds roughly to the amortization period, so that the owner is not deprived of his property until the end of its useful life. In addition, the monopoly position granted during the amortization period theoretically provides the owner with compensation for the loss of some property interest, since the period specified rarely corresponds precisely to the useful life of any particular structure constituting the nonconforming use.

Naegele Outdoor Advertising Co. v. Village of Minnetonka, 162 N.W.2d 206, 213 (Minn. 1968).

Such provisions applied to sexually oriented businesses have been said to be "uniformly upheld." Dumas v. City of Dallas, 648 F. Supp. 1061, 1071 (N.D. Tex. 1986), aff'd, FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988) (citing cases).

As detailed in the first section of this report (pp. 6-15), there are significant secondary impacts upon communities related to the location of sexually oriented businesses. These impacts are intensified when sexually oriented businesses are located in residential areas or near other sensitive uses and when sexually oriented businesses are concentrated near each other or near alcohol oriented businesses. The Working Group believes that evidence from studies such as those described in the first section of this report and anecdotal evidence from neighborhood residents and police

officers should be used to support the need for zoning ordinances which address these problems.

RECOMMENDATIONS

1. Communities should document findings of adverse secondary effects of sexually oriented businesses prior to enacting zoning regulations to control these uses so that such regulations can be upheld if challenged in court.

2. To reduce the adverse effects of sexually oriented businesses, communities should adopt zoning regulations to set distance requirements between sexually oriented businesses and sensitive uses, including but not limited to residential areas, schools, child care facilities, churches and parks.

3. To reduce adverse impacts from concentration of sexually oriented businesses, communities should adopt zoning ordinances which set distance requirements between liquor establishments and sexually oriented businesses and between sexually oriented businesses and should consider restricting sexually oriented businesses to one use per building.

4. Communities should require existing businesses to comply with new zoning or other regulation pertaining to sexually oriented businesses within a reasonable time so that prior uses will conform to new laws.

IV. LICENSING AND OTHER REGULATIONS

Licensing and other regulations may also be used to reduce the adverse effects of sexually oriented businesses. The critical requirements which communities must keep

in mind are that regulations must be narrowly crafted to address adverse secondary effects, they must be reasonably related to reduction of these effects and they must be capable of objective application. If these standards can be met, licensing and other regulatory provisions may play an important role in preventing unwanted exposure to sexually oriented materials and in reducing the crime problems associated with sexually oriented businesses.

It is clear that failure to act upon a license application for a sexually oriented business cannot take the place of regulation. Without justification, denial or failure to grant a license is a prior restraint in violation of the First Amendment. Parkway Theater Corporation v. City of Minneapolis, No. 716787, slip. op. (Henn. Co. Dist. Ct., Sept. 24, 1975).

An ordinance providing for license revocation of an adult motion picture theater if the licensee is convicted of an obscenity offense is also likely to be held unconstitutional as a prior restraint of free speech. Alexander v. City of St. Paul, 227 N.W.2d 370 (Minn. 1975). The Alexander court stated:

> [W]hen the city licenses a motion picture theater, it is licensing an activity protected by the First Amendment, and as a result the power of the city is more limited than when the city licenses activities which do not have First Amendment protection, such as the business of selling liquor or running a massage parlor.

Id. at 373 (footnote omitted); see also, Cohen v. City of Daleville, 695 F. Supp. 1168, 1171 (M.D. Ala. 1988) (past sale of obscene material cannot justify revocation of license).

However, the courts have permitted communities to deny licenses to sexually oriented businesses if the person seeking a license has been convicted of other crimes which are closely related to the operation of sexually oriented businesses.

In Dumas v. City of Dallas, supra, the court reviewed a requirement that a license applicant not have been convicted of certain crimes within a specified period. Five of the enumerated crimes were held to be not sufficiently related to the purpose of the

adult entertainment licensing ordinance because the city had made no findings on their justification. The invalid enumerated offenses were controlled substances act violations, bribery, robbery, kidnapping and organized criminal activity. The court upheld requirements that the licensee not have been convicted of prostitution and sex-related offenses. Id. at 1074. If a community seeks to require that persons with a history of other crimes be denied licenses, clear findings must first be made which justify denial of licenses on that basis.

The Dumas court also invalidated portions of the licensing ordinance permitting the police chief to deny a license if he finds that the applicant "is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner" or is not "presently fit to operate a sexually oriented business." Neither provision satisfied the constitutional requirement that "any license requirement for an activity related to expression must contain narrow, objective, and definite standards to guide the licensing authority." Id. at 1072. See also Alexander II, supra, slip op. at 16 (unconstitutionally vague to define regulated bookstores as those selling "substantial or significant portion" of certain publications); 11126 Baltimore Boulevard, supra, 684 F. Supp. at 898-99 (striking ordinance allowing zoning officials to deny permit if adult entertainment establishment is not "in harmony" with zoning plan, does not "substantially impair" master plan, does not "adversely affect" health, safety and welfare and is not "detrimental" to neighborhood because such standards are "subject to possible manipulation and arbitrary application").

A number of courts have upheld ordinances requiring that viewing booths in adult theaters be open to discourage illegal and unsanitary sexual activity. See, e.g., Doe v. City of Minneapolis, 693 F. Supp. 774 (D. Minn. 1988).

Licensing provisions and ordinances forbidding massage parlors employees from administering massages to persons of the opposite sex have withstood equal protection and privacy and associational right challenges. See Clampitt v. City of Ft. Wayne, 682 F. Supp. 401, 407-408 (N.D. Ind. 1988) (equal protection); Wigginess, Inc. v. Fruchtman, 482 F. Supp. 681, 689-90 (S.D. N.Y. 1979), aff'd, 628 F.2d 1346 (2d Cir. 1980), cert. denied, 449 U.S. 842, 101 S.Ct. 122. However, some courts have found same-sex massage regulations to be in violation of Title VII of the Civil Rights Act of

1964. See Stratton v. Drumm, 445 F. Supp. 1305, 1310-11 (D. Conn. 1978); Cianciolo v. Members of City Council, 376 F. Supp. 719, 722-24 (E.D. Tenn. 1974); Joseph v. House, 353 F. Supp. 367, 374-75 (E.D. Va.), aff'd sub nom. Joseph v. Blair, 482 D.2d 575 (4th Cir.), cert. denied, 416 U.S. 955, 94 S. Ct. 1968 (1974). Contra, Aldred v. Duling, 538 F.2d 637 (4th Cir. 1976).

Although the Working Group expressed strong concern about the operation of prostitution under the guise of massage parlors, this type of regulation is not advisable because legitimate therapeutic massage establishments could find their operations curtailed. Prostitution may be better controlled through prosecution and use of post-conviction actions such as forfeiture or enjoining a public nuisance.

In 1985, a court upheld an ordinance making it unlawful to display for commercial purposes material "harmful to minors" unless the material is in a sealed wrapper and, if the cover is harmful to minors, has an opaque cover. Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985). Last year, the legislature enacted a state law similarly prohibiting display of sexually explicit material which is harmful to minors unless items are kept in sealed wrappers and, where the cover itself would be harmful to minors, within opaque covers. Minn. Stat. § 617.293 (1988). This law has the potential to protect minors from exposure to sexually oriented materials. Communities also have considerable discretion to regulate signage so that the exterior of sexually oriented businesses does not expose unwitting observers to sexually explicit messages.

RECOMMENDATIONS

1. Prior to enacting licensing regulations, communities should document findings of adverse secondary effects of sexually oriented businesses and the relationship between these effects and proposed regulations so that such regulations can be upheld if challenged in court.

2. Communities should adopt regulations which reduce the likelihood of criminal activity related to sexually oriented businesses, including but not limited to open booth ordinances and ordinances which authorize denial or revocation of licenses when the licensee has committed offenses relevant to the operation of the business.

3. Communities should adopt regulations which reduce exposure of the community and minors to the blighting appearance of sexually oriented businesses including but not limited to regulations of signage and exterior design of such businesses and should enforce state law requiring sealed wrappers and opaque covers on sexually oriented material.

CONCLUSION

There are many actions which communities may take within the law to protect themselves from the adverse secondary effects of sexually oriented businesses. Prosecution of obscenity crimes can play a vital role in decreasing the profitability of sexually oriented businesses and removing materials which violate community standards from local outlets. Forfeiture and injunction to prevent public nuisance should be available where sexually oriented businesses are the site of sex-related crimes and violations of laws pertaining to gambling, liquor or controlled substances. These actions will remove the most egregious establishments from communities.

Zoning can reduce the likelihood that sexually oriented businesses will lead to neighborhood blight. Licensing can sever the link between at least some crime figures and sexually oriented businesses. Regulation and enforcement can protect minors from exposure to sexually explicit materials.

The Attorney General's Working Group on the Regulation of Sexually Oriented Businesses believes that prosecution, seizure of profits, zoning and regulation of sexually oriented businesses should only be done in keeping with the constitutional

requirements of the First Amendment. Rational regulation can be fashioned to protect both our communities and our constitutional rights.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Illusions-Dallas Private Club, Inc., a Not-for-Profit Texas Corporation d/b/a Penthouse Key Club, and; Hotel Development Texas Ltd., a Texas Limited Liability Company, and Silver City, an Unincorporated Membership Organization, and; Green Star, Inc., a Texas Corporation,	§	
Plaintiffs,	§	
v.	§	
	§	**CIVIL ACTION 3:04-CV-0201-R**
John T. Steen, Jr., in his Official Capacity as Chairman of the Texas Alcoholic Beverage Commission, and; Gail Madden, in her Official Capacity as a Member of the Texas Alcoholic Beverage Commission, and; Alan Steen, in his Official Capacity as Administrator of the Texas Alcoholic Beverage Commission,	§	
Defendant.	§	

EXPERT REPORT OF RICHARD MCCLEARY, PH.D.

I. **Opinions**: Based on my training, professional experience, research, and review of the facts and materials of this case, I hold the following opinions.

A. Public safety or crime-related secondary effects of sexually-oriented businesses (SOBs) can be established by methods that, while empirical, do not rely on formal, systematic designs.

1. These methods include simple observation and measurement, deduction from established theory, and induction from the results of analogous research based on formal, systematic designs.

2. The formal systematic, designs used in crime-related secondary effect studies include before-after and/or cross-sectional control comparisons. These designs are known as "quasi-experiments."

B. When formal scientific methods are used, inferential validity requires that an estimate of the ambient crime risk for an SOB be compared to the estimated risk for a comparable control. This comparison can be made in either of two ways.

1. In a "before/after" contrast, ambient crime rates are compared before and after an SOB opens. The validity of this contrast assumes that all relevant causal variables (other than the opening of the SOB) are stable over the before/after time frame.

2. In a "static group" contrast, ambient crime rates for an SOB are compared to ambient crime rates for some non-SOB business. The validity of this contrast assumes that the SOB and non-SOB control are equivalent on all relevant causal variables. If this assumption is unwarranted, the "static group" contrast can be adjusted statistically to approximate equivalence.

3. In either design, the contrast is used for the exclusive purpose of ruling out, or rendering implausible, the common, relevant "threats to internal validity."

4. Quasi-experimental estimates of ambient crime risk are not possible in every case. A strong quasi-experimental design assumes the availability of before/after data and/or suitable sites and controls. Otherwise, quasi-experimental analyses may not be feasible.

5 The authorities for my opinions on quasi-experimental design are cited below at **II.A**.

C. Ambient crime risk is measured by the ratio (or difference) of crime incidents to potential targets per unit of time and area.

1. Uniform Crime Reports (UCRs), collected by local police agencies for the Texas Department of Public Safety and the FBI, are an accepted measure of crime risk. Part I UCRs include the serious "violent" (homicide, rape, robbery, and assault) and "property" crimes (auto theft, larceny, burglary, and arson). The adverse secondary effects of SOBs ordinarily involve robbery, assault, and auto theft.

2. The adverse secondary effects of SOBs also involve Part II UCRs, especially so-called "victimless" crimes (alcohol, drugs, prostitution, *etc.*). These crimes are sensitive to police activity, which can affect risk estimates from Part II UCR rates. In that respect, Part I UCR rates are a more valid measure of crime-related secondary effects.

3. Part II UCRs directed against property (vandalism, trespassing, *etc.*) and persons (disorderly conduct, simple assault, *etc.*) are also relevant to the

secondary effects of SOBs. These Part II UCRs are less sensitive to police activities.

4. Although police calls-for-service (CFSs) are often used to evaluate liquor license renewals, CFSs are an unacceptable measure of crime risk.

a. The shortcomings of CFSs are well known to criminologists. CFSs are easily manipulated, are only weakly correlated with locations and times of crime incidents; are sensitive to minor variations in police policy; yield biased estimates of ambient crime risk; and so forth. The validity implications of these problems are so great and so well known that virtually no published research uses CFSs to measure crime risk. These problems are known to underwriters. Actuarial estimates of the crime risk at an insured address are *always* based on crime incidents at or in the vicinity of the address, *never* on CFSs to the address.

b. CFS-based measures of ambient crime risk also have statistical shortcomings, in particular, a relatively low "signal-to-noise" ratio. This reduces the statistical power of before/after and static-group comparisons, creating a bias in favor of a null finding (*i.e.*, no secondary effect).

c. In addition to general and statistical shortcomings, which apply to criminological studies, CFS-based measures of crime risk have shortcomings that are specific to SOBs. They underestimate the incidence rates of "victimless" crimes, *e.g.*, including prostitution, lewd behavior, and drug use. Since these vice crimes do not come to the attention of the police through the 911 system, they leave no CFS record.

d. Since these biases favor the null finding, CFS-based measures of ambient crime risk cannot be used to demonstrate the absence of a secondary effect. They can be used to demonstrate the presence of a secondary effect, however.

e. These shortcomings of CFS-based measures of ambient crime risk have been noted by courts, most recently, the Eleventh Circuit in *Daytona Grand, Inc. v. City of Daytona Beach, Florida*.

5. The authorities for my opinions on the properties of CFSs are cited below at **II.B**.

D. The fundamental measure of crime risk is the ambient crime rate (per unit of time and area). This is ordinarily defined as the ratio of crime incidents that occurred

within 500 feet (approximately one city block) of an SOB (or control) address during a fixed period of time. Ambient crime rates calculated this way are interpreted as victimization risks (*i.e.*, as the probabilities of victimization) per unit of time in a circular area centered on an SOB or control.

1. While smaller circular areas (*e.g.*, a 250-foot radius around an SOB and/or control) are acceptable in principle, smaller circles often exceed the precision of the UCR geo-coding system.

2. Larger circular areas (*e.g.*, a 1000-foot radius around an SOB) tend to "dilute" the estimated effect, biasing it toward zero.

3. The optimal fixed period of time for the estimate depends on the crime rate. Longer periods of time are required for rare crimes (homicide, rape, *etc.*). Crime indices (*e.g.*, total Part I UCRs) can be estimated from shorter periods.

4. Crime events are distributed as Poisson. "Waiting times" between crime events are distributed as exponential. Requisite spatio-temporal sample sizes are determined by Poisson and exponential parameters.

5. The authorities for my opinions on the distributional properties of crime incidents are cited below at **II.C**.

E. To assess the statistical significance of an observed secondary effect estimate, the ratio (or difference) of ambient crime rates for SOBs and/or controls is compared to a statistical model. The statistical test can have any of three outcomes.

1. An effect estimate is statistically *significant* if the ratio (or difference) is larger than "chance" (*e.g.*, sample or measurement error) with 95 percent confidence. Ninety-five percent confidence implies a complementary false-positive error rate of five percent or less.

2. If the confidence level of an effect estimate is less than 95 percent, the effect estimate is statistically *null* if and only if the associated level of statistical power is 80 percent or higher. Eighty percent power implies that the complementary false-negative rate is *smaller* than 20 percent.

a. Power calculations depend on an expected *substantive* effect size.

b. For ambient crime risk, an effect of 10 percent or more is *substantively* large.

3. If an effect estimate has *neither* 95 percent confidence *nor* 80 percent statistical power, the test result is *inconclusive*.

4. The authorities for my opinions on statistical hypothesis testing are cited below at **II.D**.

F. When optimal designs are possible, crime-related secondary effect studies find that SOBs pose high ambient crime risks.

1. These risks involve not only Part II UCR crimes, such as prostitution, public drunkenness, and disorderly conduct, but also Part I UCR crimes such as homicide, robbery, assault, and auto theft.

2. Having been observed in a wide range of situations, places, and times, this finding is scientifically robust.

3. The authorities for my opinions on the crime-related secondary effects of SOBs are the studies cited below at **II.E**.

G. The consensus finding that SOBs pose high ambient crime risks corroborates modern criminological theory. According to theory, victimization risk is concentrated around a "hotspot" (*e.g.*, an SOB) because of the quantity and quality of people drawn to the site.

1. Standard business practices designed to attract customers (sales, advertising, "giveaways," *etc.*) draw large numbers of customers from a wide catchment area.

2. SOB patrons have characteristics that make them particularly attractive, "soft" crime targets. In particular:

a. SOB patrons are drawn to the site from a wide catchment area and, thus, are strangers in the neighborhood;

b. SOB patrons are disproportionately male;

c. SOB patrons are open to vice overtures;

d. SOB patrons are likely to carry cash;

e. When victimized, SOB patrons tend not to complain to or seek assistance from the police.

3. The high density of "soft" targets near SOBs attracts predatory criminals to the neighborhood. The predators attracted to the SOB site are "professional" criminals who fall into two categories.

a. Some of the predators attracted to the SOB neighborhood are vice

purveyors who dabble in crime.

b. Others are criminals who pose as vice purveyors in order to lure or lull potential victims.

4. The authorities for my opinions on the criminological theory of secondary effects are cited below at **II.F**.

H. Controlling for relevant differences, criminological theory holds that proximity to alcohol aggravates the crime risk posed by SOBs.

1. The aggravating effect works through two theoretical mechanisms.

a. Access to alcohol makes an SOB more attractive, thereby drawing more customers to the site.

b. By lowering personal inhibition and clouding judgment, alcohol makes SOB patrons more vulnerable to predatory criminals.

2. The aggravating effect has been demonstrated explicitly and implicitly in secondary effect studies.

a. A 1991 study of Garden Grove SOBs, cited at **II.E.10** below, found an increase in ambient crime risk for an SOB following the opening of a tavern in the neighborhood.

b. A 2003 study of Greensboro SOBs by Dr. Daniel Linz and Mike Yao, cited at **II.E.17-18** below, reported a large, significant effect for neighborhoods with adult cabarets.

c. A 2004 Daytona Beach, FL study conducted by Dr. Linz, Mr. Yao, and Dr. Randy D. Fisher, cited at **II.E.21-22** below, replicates the findings of the 2003 Greensboro study.

3. The aggravating effect works through two theoretical mechanisms.

a. Access to alcohol makes an SOB more attractive, thereby drawing more customers to the site.

b. By lowering personal inhibition and clouding judgment, alcohol makes SOB patrons more vulnerable to predatory criminals.

4. The aggravating effect of alcohol at the individual level is corroborated by laboratory experiments cited below at **II.G**.

I. Chapter 32 of the Texas Alcoholic Beverage Commission Code, cited at **II.H.1** below and referred to hereafter as the "Regulation," is designed to mitigate the crime-related secondary effects of SOBs by separating alcohol and nudity. The factual predicate of the Regulation is sufficient for that purpose. Based on theory and research, there is a reasonable expectation that the Regulation will mitigate the crime-related secondary effects of SOBs.

J. In a declaration cited at **II.H.2** below, Dr. Daniel Linz expresses the contrary opinion that the factual predicate of the Regulation is *in*sufficient. In Dr. Linz's opinion, the crime-related secondary effect studies ordinarily relied on by legislatures, such as those cited in **II.E** below, "do not adhere to professional standards of scientific inquiry necessary in order to insure methodological integrity and thus reliability and validity." I disagree not only with Dr. Linz' general opinion of crime-related secondary effect literature but, also, with the methodological foundation of his opinion.

1. The methodological authority for Dr. Linz' opinion is an article, cited at **II.H.2.a** below, written by Dr. Bryant Paul, Dr. Linz, and Mr. Bradley J. Shafer.

a. The methodological rules endorsed in the Paul-Linz-Shafer article are not derived from primary authorities on quasi-experimental design (such as those cited below at **II.A**); on the spatio-temporal distribution of crime (such as those cited below at **II.B-C**); or on statistical hypothesis testing (such as those cited below at **II.D**).

b. Dr. Linz claims that the Paul-Linz-Shafer four-part validity test is derived from Justice Souter's opinion in *Daubert v. Merrell Dow*. The *Daubert* criteria are not a necessary-sufficient methodological canon, however, nor even well suited to legislative fact-finding.

i. The claim that legislatures must or should apply the four-part validity test to weigh secondary effect studies has been rejected by courts, particularly *G.M. Enterprises. Inc. v. Town of St. Joseph, Wisconsin.*

ii. I am aware of no legislature or government agency that has used the Paul-Linz-Shafer four-part validity test to design research or to assess the validity of research products.

c. Although the Paul-Linz-Shafer article is well known to SOB plaintiffs, it has had virtually no impact on any scientific or scholarly literature. Excluding citations by Dr. Linz and his colleagues, as of May, 15, 2007, the Linz-Paul-Shafer article has been cited only twice in peer-reviewed journals. I am aware of no

experts in social science methodology who would endorse the four-part validity test described in the Linz-Paul-Shafer article.

d. Dr. Linz claims that the Paul-Linz-Shafer four-part validity test is "neither difficult nor cumbersome to apply." I disagree. The Paul-Linz-Shafer validity criteria are too subjective to be used to guide the design of research or to assess the validity of research findings.

i. The sense of the Paul-Linz-Shafer "compared-to-what" test is that SOBs and controls must be "statistically adjusted" or "matched" to control for crime risks unrelated to secondary effects. I agree; see my opinion **II.B** above. Dr. Linz fails to specify objective criteria for grading the "compared-to-what" test, however. More important, the "compared-to-what" test assumes that inadequate "statistical adjustment" or "matching" generates a bias in favor of an adverse effect estimate. In fact, however, the opposite is true. Inadequate "statistical adjustment" or "matching" generates a bias in favor of finding of no significant secondary effect.

ii. The sense of the Paul-Linz-Shafer "one-time-fluke" test is that ambient crime risk should be estimated over a long enough period of time to ensure conventional statistical confidence levels. I agree; see my opinion **II.C** above. But again, because Dr. Linz does not specify the length of time required to pass the "one-time-fluke" test, the test is wholly subjective. And Dr. Linz assumes again that violating the "one-time-fluke" test biases the study in favor of an adverse effect. But in fact, shorter time series bias the study in favor a null finding.

iii. The sense of the Paul-Linz-Shafer "looking-for-more-crime" test is that proactive policing can exaggerate the ambient crime risk of SOBs. While this may be true for vice crimes (see my opinion **II.C.2** above), however, it is false for most other crimes. Proactive policing *reduces* the ambient risk of robbery, vandalism, assault, and other non-vice crimes.

iv. The sense of the Paul-Linz-Shafer "talking-only-to-people-who-give-answers-they-wanted-to-hear" test is non-random sampling can lead to biased estimates of public opinion. I agree in principle. In practice, on the other hand, estimates of public opinion of SOBs is invariant to sample properties. "Good" and "bad" samples lead to similar estimates. More

important, of course, no legislation relies exclusively on public opinion.

2. To criticize the validity of a secondary effect study, Dr. Linz *identifies* some weakness in a study's design and then *characterizes* the weakness as a "fatal flaw." This style of argument reflects a misunderstanding of the relevant principles of design.

a. Since all secondary effect studies use quasi-experimental designs, all have uncontrolled threats to internal validity or potential shortcomings. The consequences of most of these shortcomings are benign, however; *i.e.*, they do not affect the conclusions of the study.

b. A methodological shortcoming is irrelevant unless it satisfies two conditions:

i. The shortcoming must significantly affect the study's findings; *i.e.*, it *change* the study's findings. If the shortcoming does *not* change the study's finding, it is irrelevant.

ii. The shortcoming must *bias* the study's finding in favor of an adverse secondary effect finding. If the shortcoming biases the study in favor of a null finding, or if it favors neither finding, it is irrelevant.

c. Dr. Linz presents no evidence to suggest that a "fatal flaw" is significant, however, or that it would bias the study findings in favor of a significant adverse secondary effect. The evidence suggests, on the contrary, that the "fatal flaws" cited by Dr. Linz are small and unbiased.

3. The epistemological theory of quasi-experimentation, spelled out in the authorities cited at **II.A** below, holds that the *consistency* of a finding across a diverse settings renders artifactual explanations implausible. Whereas the findings of any specific study might be faulted on narrow methodological grounds, the *consensus* finding of the body of studies in the factual predicate of the Regulation cannot be dismissed on the same grounds. Since the Regulation rests on a *body* of studies, Dr. Linz' argument is irrelevant.

K. Following his general argument, Dr. Linz criticizes the methodological rigor of the secondary effect studies relied on by the State. I disagree with virtually all of Dr. Linz' methodological criticisms.

1. Dr. Linz dismisses studies that present no novel data or analyses. This criticism is irrelevant in my opinion. Synthetic literature reviews are a common, useful tool. Some of the most prestigious scientific journals publish these reviews for the simple reason that they *are* useful. If the author or publisher of a synthetic review (The American Center for Law and Justice, *e.g.*) has an interest in the debate, of course, the interest should be made known to the reader.

2. Dr. Linz criticizes the 1979 Phoenix study because, in his opinion, it fails the Paul-Linz-Shafer "compared-to-what" and "one-time-fluke" tests. I disagree.

a. The SOB-control differences in the Phoenix study lie well within the conventional range of sampling error. The differences are not statistically significant. Furthermore, the SOB-control differences in the Phoenix similar in size to analogous differences in Dr. Linz' studies.

b. The probability that the statistically significant secondary effect estimate reported in the Phoenix study is a "one-time-fluke" can be estimated from the Central Limit Theory and a weak stationarity assumption. The "one-time-fluke" probability is smaller than .05.

Dr. Linz' methodological critique of the 1979 Phoenix study demonstrates the subjective nature of the Paul-Linz-Shafer validity canon.

3. Dr. Linz' methodological critique of the 1991 Garden Grove study centers on the control sites that were used to rule out common threats to internal validity. In the Garden Grove study, ambient crime was measured before and after the opening of three SOBs. Whenever an SOB opened, ambient crime rose. To show that this before/after effect was not a spurious artifact of some uncontrolled threat to internal validity, Dr. James W. Meeker and I measured ambient crime for other Garden Grove SOBs over the same time. Finding no before/after difference for these controls, ruled out other explanations for the observed secondary effects.

a. Dr. Linz argues that non-SOBs should have been used as controls to show that the secondary effects were "endemic" to SOBs. This is a different issue, of course. A quasi-experimental design uses control sites to rule out plausible threats to internal validity. For that purpose, the SOB and controls sites should be as similar as possible. Existing SOBs located in the same neighborhood are nearly ideal quasi-experimental controls.

b. The question of whether the opening of a non-SOB would produce

a similar before/after effect is irrelevant and uninteresting.

4. Dr. Linz' methodological critique of the 1977 Los Angeles study dismisses a large, significant crime-related secondary effect because it occurs during a period of "stepped-up" police surveillance. Although "stepped-up" surveillance might explain an increase in vice crimes, however, it cannot explain an increase in non-vice crimes such as robbery. On the contrary, criminological authorities predict that "stepped-up" surveillance would produce a decrease in the ambient risk for non-vice crimes. The fact that the Los Angeles reported a large, significant effect for non-vice crimes invalidates Dr. Linz' methodological critique.

5. A 1984 Indianapolis study finds that SOBs have large, significant secondary effects on ambient crime and real estate values. Dr. Linz dismisses both findings on methodological grounds.

a. In Dr. Linz' opinion, the crime-related secondary effect finding fails the Paul-Linz-Shafer "compared to what" test. As in the 1979 Phoenix study, however, the Indianapolis SOB-control differences lie within the conventional range of sample error.

b. Dr. Linz dismisses the real estate finding on several grounds, none of which are convincing. In any event, Dr. Linz' methodological critiques of the 1984 Indianapolis findings have been rejected by several courts, at least implicitly; see especially the Fifth Circuit decision in *H and A Land Corp. v. City of Kennedale, Texas*.

6. Dr. Linz argues that the authors of some of the studies that the State relied on "disavow" their findings. I disagree with Dr. Linz' interpretation of the texts in question. Dr. Linz has misinterpreted the rhetorical qualifications that social scientists commonly use in reporting their findings.

a. Contrary to Dr. Linz' claim, the "path analysis" results reported in the 1980 Minneapolis study finds that SOBs have a statistically significant "direct effect" on crime. The text quoted by Dr. Linz refers to unrelated preliminary analyses. The City of Minneapolis interprets the 1980 finding as a large, statistically significant secondary effect and continues to rely on the 1980 study.

b. Contrary to Dr. Linz' claim, the quasi-experimental contrast reported in the 1978 Whittier study amounts to a large, statistically significant crime-related secondary effect. The authors do indeed qualify their finding. Because the study is a quasi-experiment, the authors note that "not all of" the large, significant effect can be attributed to the presence of SOBs along Whittier Boulevard. "Not

all of" and "none of" are not synonyms; nor is this qualification the "disavowal" that Dr. Linz claims. The City of Whittier interprets the 1978 finding as a large, statistically significant secondary effect and continues to rely on the 1978 study.

7. The authors of the1978 St. Paul study do acknowledge, as Dr. Linz claims, that the study found no statistically significant secondary effect for SOBs. The St. Paul findings have a more complicated interpretation than Dr. Linz' claim would suggest, however.

a. In addition to SOBs, the "adult entertainment business" category in the St. Paul study included non-SOB taverns, cabarets, and other entertainment venues. Although the effect estimates for the "adult entertainment business" category were statistically significant in six regression models, the estimates for the SOB subcategory were *not* significant.

b. Because all six of the SOB effect estimates were positive, the results are interpreted to mean that SOBs have an adverse (but not significant) effect on ambient crime. If the six positive SOB effect estimates are tested *jointly*, the St. Paul results are statistically significant at the conventional level of confidence.

8. Dr. Linz criticizes the 1994 New York City (Times Square) study on the same grounds as the 1979 Phoenix and 1984 Indianapolis studies: SOB-control differences are too large to pass the Paul-Linz-Shafer "compared-to-what" test. But here again, the SOB-control differences lie within the conventional range of sample error; the SOB-control differences are not statistically significant. To support his critique, Dr. Linz again quotes the authors of the report.

9. Dr. Linz criticizes the 1986 Austin study on grounds that SOBs in high-crime neighborhoods were excluded from the study design. While Dr. Linz is correct on that point, his characterization of the exclusion as a "fatal flaw" is incorrect. Excluding high-crime neighborhoods from the study favors the null hypothesis. Had the high-crime neighborhoods been included, the estimated secondary effect would have been several times higher than the estimate that was reported.

10. The 1986 El Paso study compared SOB and control areas, finding a large, statistically significant difference in ambient crime. A companion survey found large, significant differences in public opinions about SOBs.

a. Dr. Linz dismisses the crime-related secondary effect finding on two familiar grounds: the SOB- control differences fail the Paul-

Linz-Shafer "compared-to-what" test and several SOB sites are excluded from the study. In the first instance, the SOB-control differences not significantly different (not withstanding Dr. Linz' contrary claim). In the second instance, SOB sites are excluded because the city's geography would not permit their inclusion in the design.

b. Dr. Linz does not dismiss the findings of the public opinion survey but characterizes the findings as "equivocal."

11. The 1996 Newport News study finds a large, significant difference in ambient crime risk between SOB and control areas. Dr. Linz dismisses this finding because the study's two-year time frame is too short to pass the Paul-Linz-Shafer "one-shot-fluke" test. Dr. Linz does not reveal the length of time required to pass the test; nor does he explain how the effect estimate could exceed the conventional confidence threshold given that the time series was too short to pass the "one-shot-fluke" test.

12. Dr. Linz criticizes the 1997 Dallas study because the SOB and control areas are not adequately "matched" and, hence, fail the Paul-Linz-Shafer "compared-to-what" test. In this instance, the basis of Dr. Linz' critique is unclear to me. I am familiar with this report and to not see that the SOB-control could bias the study findings.

13. Dr. Linz dismisses several surveys of real estate appraisers on grounds that the opinions of these professionals are unrelated to real estate sales prices. Dr. Linz cites no authorities for this opinion, however. Lacking an authority, I disagree. The City of Kennedale, TX relied on a reasonably well designed and executed survey of real estate appraisers to enact an SOB ordinance. The Kennedale ordinance was upheld by the Fifth Circuit decision in *H and A Land Corp. v. City of Kennedale, Texas*.

Dr. Linz' detailed methodological critiques of the secondary effect studies relied on by the State are often incorrect or irrelevant and always arbitrary. SOBs and controls will always be different on one variable or another. It is not sufficient to *find* an SOB-control difference or to characterize the difference as a *fatal flaw*. To be taken seriously, a methodological critique must demonstrate that design shortcoming is associated with a spurious he finding. Dr. Linz' critiques do not meet this standard and cannot be taken seriously.

L. Following his detailed methodological criticisms of the studies relied on by the State, Dr. Linz reviews secondary effect studies that, in his opinion, are more rigorous than the studies relied on by the States. These studies, conducted by Dr. Linz and his colleagues, find no SOB-crime relationships. Had the State relied on these studies, according to Dr. Linz, it would not have enacted the Regulation. I

disagree with Dr. Linz' opinions.

1. The crime-related secondary effect studies conducted by Dr. Linz and his colleagues are neither more (nor less) methodologically rigorous than the secondary effects studies that the State relied on. Like all crime-related secondary effect studies, Dr. Linz' studies are quasi-experiments. As such, his studies are subject to the same methodological criticisms.

a. The 2001 study of Fort Wayne SOBs by Drs. Linz and Paul, cited at **II.E.14** below, finds no significant difference between SOB and "matched" control areas on a small subset of crime incidents.

i. The SOB-control differences in Fort Wayne are as large or larger than the differences in the 1979 Phoenix study or the 1984 Indianapolis study.

ii. Drs. Linz and Paul discard any crime incident not cleared by arrest. Since *most* of Fort Wayne's crime incidents are *not* cleared by arrest, *most* of the crime in Fort Wayne was excluded by design. The reader can only wonder about the consequences of this design idiosyncracy.

iii. Drs. Linz and Paul do not report an error rate for their finding; nor do they report the statistics that would allow a critical reader to calculate the error rate.

b. The study of Charlotte SOBs, cited at **II.H.2.b** below, compares UCRs within 500 feet of 20 adult cabarets to UCRs within 500 feet of three control businesses: a McDonald's restaurant, a Kentucky Fried Chicken restaurant, and a gasoline station mini-mart. The adult cabarets had lower ambient crime rates than the control businesses. Dr. Linz interprets this result to mean that SOBs as a class do not have crime-related secondary effects. But while this interpretation may be correct, Dr. Linz' co-authors suggest alternative interpretations, including:

i. *Crime reporting biases*: "Perhaps victims of crime in areas surrounding adult clubs are not motivated to report crime incidents to the police. If this were the case, there may not be stable crime reporting across study and control sites. It could be that, compared to the control sites, more of the crime that occurs in the adult dance club zone goes unreported. It seems plausible that many of the victims of crime in these areas might not want to draw attention to themselves." (p. 100)

ii. *Non-comparable controls*: "Conceptually, it may be more appropriate to compare adult club sites with non-adult club sites so that one can determine whether the type of club activity affects the level of crime. This comparison may be implicit (if not explicit) in the minds of citizens and justices when considering whether an adult club should be allowed to locate in a particular area. Methodologically, using basic service type businesses such as fast food restaurants as control sites may confound the comparisons being made in the research, even if they are located in areas equivalent to those in which adult dance clubs are located (p. 100)

iii. *The effects of SOB regulations*: "[T]he adult nightclub business in the late-1990s in many respects may be quite unlike that of the 1960s and 1970s when these establishments were relatively new forums of entertainment in American society. As noted in the introduction to this article, adult nightclubs have been subjected to over two decades of municipal zoning restrictions across the country, and they usually must comply with many other regulations as well. (p. 99)

iv. *Extraordinary security measure at the Charlotte clubs*: "[A]dult nightclubs, including those in Charlotte, often appear to have better lighting in their parking lots and better security surveillance than is standard for non-nightclub business establishments. These may be factors producing fewer crime oportunities and lower numbers of reported crime incidents in the surrounding areas of the clubs ... The extensive management of the parking lots adjoining the exotic dance nightclubs, in many cases including guards in the parking lots, valet parking, and other control mechanisms, may be especially effective in reducing the possibility of violent disputes in the surrounding area." (p. 99)

v. Finally, it is possible that the Charlotte adult cabarets studied by Dr. Linz and his colleagues are exceptional. The criminological theory of secondary effects, described at **I.G** above, allows for this possibility.

Nevertheless, judged by the conventional criteria described in my opinion **I.E** above, the Charlotte findings are *inconclusive*.

2. Not withstanding his contrary claim, Dr. Linz' studies are consistent with the crime-related secondary effects literature; *i.e.*, his studies are either *inconclusive* (as defined in my opinion at **I.E.3** above) or, else, find that *SOBs pose large, significant ambient crime risks*. In several studies, moreover, Dr. Linz and his colleagues find large effects but mistakenly claim that the estimates are not statistically significant.

a. The 2002 study of San Diego peep shows by Drs. Linz and Paul, cited at **II.E.15-16** below, find that peep show areas have sixteen percent more 911 calls than control areas. In the article cited at **II.B.2** below, published in a peer reviewed journal, Dr. James W. Meeker and I demonstrate that the confidence level associated with this difference exceeds the conventional 95 percent level required for statistical significance.

b. The 2004 study of crime rates in 67 Florida counties by Dr. Linz and several colleagues, cited at **II.H.2.c** below, finds no correlation between the number SOBs in a county and the county's Part I UCR crime rate. Dr. Linz interprets his inability to find an SOB-crime correlation to mean that SOBs have no secondary effects. I disagree with this interpretation.

i. Until now, no secondary effect study has looked for crime-related secondary effects at the county level.

ii. The criminological theory of secondary effects, described at **I.G** above, and the distributional properties of crime incidents, described at **I.D** above, define ambient crime risk at areal scales ranging from a few hundred thousand square feet to a "neighborhood." Looking for the ambient effects of SOBs at the scale of a typical county strains the limits of statistical power. To illustrate this issue, if each of Florida's 401 SOBs poses an ambient crime risk that extends a distance of 500 feet, the combined ambient risk would cover 11.3 square miles. This is only 0.02 percent of Florida's 54,200 square-mile land area.

ii. To illuminate the statistical power issue, one can calculate the number of counties needed to detect ambient secondary effects at the conventional 0.8 level. Based on reasonable effect sizes and models, the analysis would require more than 1,000 counties. Given the required sample size, Dr. Linz' interpretation of the 67 Florida county study can be stated as: "If there are more than 1,000 counties in Florida, then Florida's SOBs have no crime-related secondary

effects."

iii. At an earlier date, Dr. Randy D. Fisher characterized this study as "under review" at a journal named *Law and Human Behavior*.

3. Dr. Linz' does not mention two studies that might be relevant to the present suit.

a. The 2003 study of Greensboro SOBs by Drs. Linz.and Yao, cited at **II.E.17-18** below, found that neighborhoods with SOB cabarets have several times more 911 calls than neighborhoods with non-SOB taverns. The effect is consistent across six crime categories.

b. The 2004 study of Daytona Beach SOB cabarets by Drs. Linz.and Fisher, cited at **II.E.21-22** below, is a replication of the 2003 Greensboro study. As in Greensboro, in Daytona Beach, Linz and Fisher find that neighborhoods with SOB cabarets have several times more 911 calls than control neighborhoods.

i. In light of this finding, Drs. Linz and Fisher rejected the conventional definition of "statistical significance." Using novel definitions, Drs. Linz and Fisher argued that their large, significant effect estimates demonstrate that Daytona Beach SOB cabarets have no crime-related secondary effects.

ii. The Eleventh Circuit decision in *Daytona Grand, Inc. v. City of Daytona Beach, Florida* rejected the novel interpretation of Drs. Linz and Fisher.

In sum, secondary effects studies conducted by Dr. Linz and his colleagues are consistent with the studies relied on by the State and with the large body of studies that has accumulated over the last thirty years. The secondary effect studies conducted by Dr. Linz and his colleagues either find large, statistically significant crime-related secondary effects or, else, are inconclusive by the conventional criteria described in my opinion **I.E** above.

II. Data and information relied on: The data and information that I relied on to form these opinions consists of documents filed in this case and research reports written by me and others. Specific documents include:

A. Methodological and statistical authorities, including

1. Campbell, D.T. and J.C. Stanley*, Experimental and Quasi-Experimental*

Designs for Research (Rand-McNally, 1966).

2. Cook, T.D. and D.T. Campbell, *Quasi-Experimentation: Design and Analysis Issues for Field Settings* (Houghton-Mifflin, 1979).

3. Rubin, D. *Matched Sampling for Causal Effects*. Cambridge University Press, 2006.

4. Shadish, W.R., T.D. Cook, and D.T. Campbell, *Quasi-Experimental Designs for Generalized Causal Inference* (Houghton-Mifflin, 2002).

B. Authorities on crime measurement, including

1. Klinger, D. and G.S. Bridges. Measurement errors in calls-for-service as an indicator or crime. *Criminology*, 1997, 35:529-41.

2. McCleary, R. and J.W. Meeker. Do peep shows "cause" crime? *Journal of Sex Research*, 2006, 43:194-196.

3. McCleary, R., B.C. Nienstedt and J.E, Erven. Uniform Crime Reports as organizational outcomes. *Social Problems*, 1982, 29:361-372.

C. Authorities on the statistical properties of crime incidents, including

1 Cameron, A.C. and P.K. Trivedi. *Regression Analysis of Count Data, Econometric Society Monograph30*. (Cambridge U Press, 1998).

2 Diggle, P,J. *Statistical Analysis of Spatial Point Patterns, 2nd Ed.* Arnold, 2002.

3 Feller, W. *An Introduction to Probability Theory and its Applications, Volume I, 3rd Ed.* (Wiley, 1968 [*1st Ed.*, 1950]).

4. Greenberg, D.F. *Mathematical Criminology* (Rutgers U Press, 1979).

5. Haight, F. *Handbook of the Poisson Distribution* (Wiley, 1967).

6. Stiger, M. and R. McCleary. Confirmatory spatial analysis by regressions of a Poisson variable. *Journal of Quantitative Anthropology*, 1989, 2:13-38.

D. Authorities on the statistical hypothesis tests, including

1. Cohen, J. *Statistical Power Analysis for the Behavioral Sciences, 2nd Ed.* (L.E. Erlebaum Associates, 1988)

2. Hoenig, J.M. and D.M. Heisey. The abuse of power: the pervasive fallacy of power calculations for data analysis. *The American Statistician*, 2001, 55:1-6.

3. Kendall, M. and A. Stuart, Chapter 22 of *The Advanced Theory of Statistics, 4th Ed.* (Charles Griffin and Co., 1979 [*1st Ed.*, 1946]).

4. Lipsey, M. *Design Sensitivity: Statistical Power for Experimental Research.* (Sage Publications, 1990).

E. Secondary effect studies routinely relied on by legislatures, including

1. Los Angeles, CA, 1977. *Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles*. Department of City Planning, June, 1977.

2. Amarillo, TX, 1977. *A Report on Zoning and Other Methods of Regulating Adult Entertainment in Amarillo*. City of Amarillo Planning Department, September 12th, 1977.

3. Whittier, CA, 1978. *Staff Report, Amendment to Zoning Regulations, Adult Businesses in C-2 Zone with Conditional Use Permit, Case No. 353.015*. January 9th, 1978.

4. St. Paul, MN, 1978. *Effects on Surrounding Area of Adult Entertainment Businesses in St. Paul*. Department of Planning and Economic Development and Community Crime Prevention Project, June, 1978.

5. Phoenix, AZ, 1979. *Adult Business Study*. City of Phoenix Planning Department, May 25, 1979.

6. Minneapolis, MN, 1980. *An Analysis of the Relationship between Adult Entertainment Establishments, Crime, and Housing Values*. Minnesota Crime Prevention Center, Inc. M. McPherson and G. Silloway, October, 1980.

7. Indianapolis, IN, 1984. *Adult Entertainment Businesses in Indianapolis, An Analysis*. Department of Metropolitan Development, Division of Planning. March, 1984.

8. Austin, TX, 1986. *Report on Adult Oriented Businesses in Austin*. Office of Land Development Services, May 19th, 1986.

9. El Paso, TX, 1986. *Effects of Adult Entertainment Businesses on Residential Neighborhoods*. Office of the City Attorney, September 26th,

1986.

10. Garden Grove, CA, 1991. *Final Report to the City of Garden Grove: The Relationship between Crime and Adult Business Operations on Garden Grove Boulevard*. October 23, 1991. Richard McCleary, Ph.D. and James W. Meeker, J.D., Ph.D.

11. New York Times Square, NY, 1994. *Report on the Secondary Effects of the Concentration of Adult Use Establishments in the Times Square Area*. Insight Associates. April, 1994.

12. Newport News, VA, 1996. *Adult Use Study*. Department of Planning and Development. March, 1996.

13. Dallas, TX, 1997. *An Analysis of the Effects of SOBs on the Surrounding Neighborhoods in Dallas, Texas*. Peter Malin, MAI. April, 1997.

14. Ft. Wayne, IN, 2001. *Measurement of Negative Secondary Effects Surrounding Exotic Dance Nightclubs in Fort Wayne, Indiana*. Daniel Linz and Bryant Paul. February 13th, 2001.

15. San Diego, CA, 2002. *A Secondary Effects Study Relating to Hours of Operation of Peep Show Establishments in San Diego, California*. Daniel Linz and Bryant Paul. September 1, 2002.

16. San Diego, CA, 2003. A Methodical Critique of the Linz-Paul Report: A Report to the San Diego City Attorney's Office. R. McCleary and J.W. Meeker. March 12, 2003.

17. Greensboro, NC, 2003. *Evaluating Potential Secondary Effects of Adult Cabarets and Video/Bookstores in Greensboro: A Study of Calls for Service to the Police*. Daniel Linz and Mike Yao, November 30th, 2003.

18. Greensboro, NC, 2003. *A Methodical Critique of the Linz-Yao Report: Report to the Greensboro City Attorney.* R. McCleary. December 15th, 2003.

19. Toledo, OH, 2004. *Evaluating Potential Secondary Effects of Adult Cabarets and Video/Bookstores in Toledo, Ohio: A Study of Calls for Service to the Police.* Daniel Linz and Mike Yao. February 15th, 2004.

20. Toledo, OH, 2004. *A Methodological Critique of the Linz-Yao Report: Report to the City of Toledo, OH.* R. McCleary and J.W. Meeker. May 15th, 2004.

21. Daytona Beach, FL, 2004. *Evaluating Potential Secondary Effects of Adult Cabarets in Daytona Beach Florida: A Study of Calls for Service to the Police in Reference to Ordinance 02-496*. D. Linz, R.D. Fisher, and M. Yao. April 7th, 2004.

22. Daytona Beach. FL, 2006. *A Methodological Critique of Evaluating Potential Secondary Effects of Adult Cabarets in Daytona Beach, Florida: A Study of Calls for Service to the Police in Reference to Ordinance 02-496*. R. McCleary, May 1st, 2006.

23. Fort Worth, TX, 2004. *Effect of Land Uses on Surrounding Property Values: Survey of Appraisers*. Duncan Associates, Austin, TX.

F. Authorities on the criminological theory of secondary effects, including

1. Bennett, T., and R. Wright. *Burglars on Burglary: Prevention and the Offender.* (Gower, 1984).

2. Cohen, L.E. and M. Felson. Social change and crime rate trends: A routine activity approach. *American Sociological Review*, 1979, 44:588-608.

3. Felson, M. *Crime and Everyday Life, 2nd Ed.* Pine Forge Press, 1998.

4. Felson, M. *Crime and Nature*. Sage, 2006.

5. Feeney, F. Robbers as Decision-Makers. Pp. 53-71 in Cornish D. and R. Clarke (eds.), *The Reasoning Criminal: Rational Choice Perspectives on Offending*. (Springer-Verlag, 1986).

6. Fleisher, M. *Beggars and Thieves: Lives of Urban Street Criminals.* (U Wisconsin Press, 1995).

7. Goldstein, H. *Problem-Oriented Policing*. New York: McGraw-Hill, 1990.

8. Katz, J. *Seductions of Crime: Moral and Sensual Attractions in Doing Evil* (Basic Books, 1988).

9. Katz, J. The Motivation of the Persistent Robber. In Tonry, M. (ed.), *Crime and Justice: A Review of Research* (U Chicago Press , 1991).

10. Newman, O. *Defensible Space: Crime Prevention Through Urban Design*. New York: MacMillan, 1973.

11. Sanchez, L.E. *Sex, violence citizenship, and community: an ethnography and legal geography of commercial sex in one American city.* Ph.D. Dissertation, Criminology, Law and Society, University of California, Irvine, 1998.

12. Scott, M.S. *Assaults in and Around Bars*. U.S. Department of Justice, Office of Community Oriented Policing. 2002.

13. Shaw, C.R. *The Jack-Roller: A Delinquent Boy's Own Story*. University of Chicago Press, 1966 [1930].

14. Shover, N. *Great Pretenders: Pursuits and Careers of Persistent Thieves.* (Westview, 1996).

15. Snodgrass, J. *The Jack-Roller at Seventy*. Lexington, MA: Lexington Books, 1982.

16. Wilson, J.Q. and G.L. Kelling. Broken windows: The police and neighbor-hood safety. *Atlantic Monthly*, 1982, 249:29-38.

17. Wright, R.T. and S.H. Decker. *Armed Robbers in Action: Stickups and Street Culture* (Northeastern U Press, 1997).

G. Authorities on the relationship between alcohol and erotica, including

1. Davis, K.C., J. Norris, W.H. George, J. Martell, and R,J. Heiman. Men's likelihood of sexual aggression: The influence of alcohol, sexual arousal, and violent pornography. *Aggressive Behavior*, 2006, 32, 581 - 589.

2. Norris, J., K.C. Davis, W.H. George, J. Martell, and J.R. Heiman. Alcohol's direct and indirect effects on men's self-reported sexual aggression likelihood. *Journal of Studies on Alcohol*, 2002, 63, 688-695.

H. Documents submitted by the Plaintiffs and Defendants in this suit, including

1. Texas Alcoholic Beverage Commission Code, Chapter 32

2. Declaration of Daniel Linz, Ph.D. with exhibits,

a. Paul, B., D. Linz and B.J. Shafer. Government regulation of "adult" businesses through zoning and anti-nudity ordinances: de-bunking the legal myth of negative secondary effects. *Communication Law and Policy*, 2001, 6:355-391.

b. Linz, D., B. Paul, K.C. Land, M.E. Ezell and J.R. Williams. An

examination of the assumption that adult businesses are associated with crime in surrounding areas: A secondary effects study in Charlotte, North Carolina. *Law and Society Review*, 2004, 38(1):69-104.

c. *Examining the link between sexual entertainment and crime: The presence of adult businesses and the prediction of crime rates in Florida.* Fisher, R.D., Benton, C.V, Linz, D. and Paul, B. Manuscript under review at *Law and Human Behavior*.

3. Complaint, February 2nd, 2004

4. Answer, February 23rd, 2004

5. Deposition of Jeanenne Fox with exhibits, June 3rd, 2004

6. Documents produced by Defendant for the Plaintiff (CD)

I. Court decisions, including

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed.2d 469 (1993)

2. *G.M. Enterprises. Inc. v. Town of St. Joseph, Wisconsin.*, 350 F.3d 631, 640 (7th Cir. 2003)

3. *Daytona Grand, Inc. v. City of Daytona Beach, Florida* No. 06-12022 (11th Cir. 2007)

4. *H and A Land Corp. v. City of Kennedale, TX*, 480 F.3d 336 No. 05-11474 (5th Cir. Feb. 22, 2007).

III. Exhibits to be used: The documents that I would expect to use as exhibits in the trial include all of the documents listed in section **II** above.

IV. Qualifications: My curriculum vitae is appended.

V. Compensation: I am being compensated at the rate of $350 per hour for testimony and deposition, $250 per hour for other tasks. I do not expect the total compensation in this case to exceed $20,000.

VI. Cases in which I have testified or been deposed within the last four years: In the last four years, I have been deposed or testified in the following cases:

Alaska Inter-Tribal Council *v.* State. Alaska Superior Court, Dillingham Branch.

Artistic Entertainment *v.* City of Warner Robins. U.S. District Court, Middle District of Georgia (Case No. 97-00195-CV-4-HL-5); U.S. Court of Appeals, Eleventh Circuit (Case No. 02-10216).

Scamp's *v.* California Alcoholic Beverage Commission and City of Westminster, CA. Alcoholic Beverage Control Board Administrative Hearing.

Washington Retailtainment, Inc. *v.* City of Centralia, WA. U.S. District Court, Western District of Washington at Tacoma (Case No. C03-5137FDB).

People of the State of Illinois ex rel. Edward C. Deters *v.* The Lion's Den, Inc. Circuit Court for the 4th Judicial Circuit of Illinois (Case No. 04-CH-26).

New Albany DVD, LLC. *v.* City of New Albany, IN. U.S. District Court, Southern District of Indiana, New Albany Division (Cause No. 4:04-CV-0052-SEB-WGH).

Giovani Carandola Ltd. et al. *v.* Ann Scott Fulton et al. U.S. District Court, Middle District of North Carolina, Greensboro Division (Case No. 1:01 CV 115).

Fantasyland Video, Inc., *v.* County of San Diego. U.S. District Court, the Southern District of California (Case No. 02-CV-1909 LAB (RBB)).

Tollis, Inc. and 1560 N. Magnolia Ave., LLC. *v.* County of San Diego U.S. District Court, Southern District of California (Case No. 02-CV-2023 LAB (RBB))

Reliable Consultants, Inc., et al. *v.* City of Kennedale, TX U.S. District Court, Northern District of Texas, Fort Worth Division (Civil No. 4:05-CV-166-A).

Abelene Retail #30, Inc. *v.* County of Dickinson *et al.* U.S. District Court for the District of Kansas (Case No. 02:04-CV-02330-JWL).

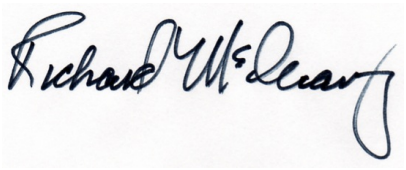
Regensberger *v.* City of Waterbury *et al.*, U.S. District Court, District of Connecticut (Civil No. 3:04-CV-1900(PCD)).

Charlie's Club, Inc. *v.* Mike Hale *et al.*, U.S. District Court, Northern District of Alabama, Southern Division (Case No. CV 05-CO-2189-S); and SJB, Inc., *et al.*, *v.* Troy King, *et al.* U.S. District Court, Northern District of Alabama, Southern Division (Case No. CV-05-TMP-2477-S).

Giovani Carandola Ltd. *et al. v.* City of Greensboro. U.S. District Court, Middle District of North Carolina, Greensboro Division (Civil No. 01:05-CV-1166).

YYBC, Inc. *v.* Town of Davie. U.S. District Court, Southern District of Florida (Case No. 06-60111-CIV-UNGARO-BENAGES/ O'Sullivan).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on October 5, 2007.



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Rural Hotspots

The Case of Adult Businesses

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A recent U.S. Tenth Circuit decision questions whether the routine activity theory of hotspots applies to adult businesses located in sparsely populated rural areas. Although few criminologists are interested in urban–rural differences, the Tenth Circuit decision makes this topic acutely relevant to policy makers and courts. To address the threshold question, the hotspot theory is analyzed to demonstrate its generality to urban, suburban, and rural locations. The results of a corroborating case study are then presented. When an adult entertainment business opens on an interstate highway off-ramp to a small rural village, total crime rises by 60%. Alternative explanations related to uncontrolled threats to internal validity are considered and ruled out. After reporting the results of the case study, the consequences of the theory and results for policy makers and courts are discussed.

Keywords: *secondary effects; hotspots; ambient crime risk; adult businesses; rural crime*

Expressive activities that occur inside adult entertainment businesses, including cabarets that feature live nude or seminude dancing, x-rated video arcades, and bookstores, enjoy First Amendment protection. Courts have ruled that governments may regulate these businesses, so long as the regulations are aimed at mitigating the businesses' potential adverse "secondary effects" (Andrew, 2002).

To defend an ordinance, a government must produce evidence to show that the businesses are associated with secondary effects such as ambient noise, litter, and in particular, crime. The government's evidence need not satisfy arbitrary standards of methodological rigor. On the contrary, the 1986 U.S. Supreme Court decision in *City of Renton v. Playtime Theatres* holds that governments may rely on any evidence "reasonably believed to be relevant to the problem that the city addresses." Taking advantage of this evidentiary standard, few governments conduct local secondary effects studies; most rely on the large body of studies conducted in other places and times.

The U.S. Supreme Court reviewed the evidentiary standard 16 years later. Though reaffirming the modest "reasonably believed to be relevant" *Renton* standard, in *City of Los Angeles v. Alameda Books*, the Court allowed adult businesses to challenge

Author's Note: Paul Brantingham, Marcus Felson, and Alan Weinstein read early drafts. The author also benefited from conversations with the late Dennis W. ("Denn") Roncek. Correspondence concerning this article should be addressed to Richard McCleary, School of Social Ecology, Irvine, CA 62697-7080; e-mail: mccleary@uci.edu.

the relevance of secondary effects evidence. If a business could demonstrate that the government's evidence was irrelevant to the problem that its ordinance purported to address, the ordinance could be struck down.

Relevance challenges fall into two categories. The first centers on the fact that secondary effects studies have typically ignored salient differences among distinct adult business models. In *Encore Videos v. City of San Antonio*, an adult bookstore argued that its products were sold for "off-site" use only and, thus, that it could not have the same secondary effects as cabarets, video arcades, and other "on-site" adult businesses. Accepting part of this argument, the Fifth Circuit struck down a San Antonio ordinance whose evidentiary predicate failed to include secondary effects studies of "off-site" adult bookstores.

An ambiguous passage in the *Encore Videos* decision left the impression that the Fifth Circuit had endorsed an interpretation of criminological theory favoring the plaintiffs. Citing the ambiguous passage, "off-site," adult businesses argued subsequently that criminological theory precluded secondary effects for their business model. Four years later, however, in *H and A Land Corp. v. City of Kennedale*, the Fifth Circuit upheld an ordinance the evidentiary predicate of which included studies of "off-site" adult bookstores. The three-judge panel, including one member who had participated in the *Encore Videos* decision, took the unusual step of retracting the passage that seemed to endorse an interpretation of criminological theory (McCleary & Weinstein, 2007).

The second category of Constitutional challenges centers on the fact that secondary effect studies have ignored idiosyncratic local conditions. In 2004, an adult bookstore in rural Kansas used criminological theory to argue that the sparsely populated rural environment precluded the possibility of secondary effects. And because the local government had not studied this issue prior to enactment, the ordinance should be struck down. Rejecting this argument, the trial court granted the defendant's summary judgment motion. On appeal, however, in *Abilene Retail #30 v. Dickinson County*, the Tenth Circuit agreed with the plaintiff's interpretation of criminological theory:

> All the studies relied on by the Board examine the secondary effects of sexually oriented businesses located in urban environments; none examines businesses situated in an entirely rural area. To hold that legislators may reasonably rely on those studies to regulate a single adult bookstore, located on a highway pullout far from any business or residential area within the County would be to abdicate "independent judgment" entirely. Such a holding would require complete deference to a local government's reliance on prepackaged secondary effects studies from other jurisdictions to regulate any single sexually oriented business of any type, located in any setting. (p. 1175)

Because the adult bookstore was located in an isolated rural area, and because the County had no evidence to suggest that rural adult businesses would have secondary effects, the Tenth Circuit reversed the summary judgment and remanded the case for trial.

Although the question of urban–rural generality is only one of many weighed in the Tenth Circuit's decision, it is the central question of this essay. Because most criminological research has been conducted in nonrural areas, criminological theories do not necessarily generalize to rural crime. Because relatively little crime occurs in rural areas, of course, few criminologists are interested in urban–rural questions. Following the Tenth Circuit's *Abilene Retail* decision, on the other hand, urban–rural differences are acutely relevant to policy makers and courts.

The potential cost of the decision is staggering. In the best case, local governments will be forced to rewrite ordinances to cover businesses located in more rural areas. In the worst case, litigious adult businesses will have an incentive to relocate to rural areas, forcing trial courts to judge the relative ruralness of areas, case by case. In any case, extrapolating the Tenth Circuit's argument to other variables not explicitly addressed by criminological theory threatens the ability of local governments to mitigate public safety hazards associated with adult businesses.

This essay addresses the threshold question of whether criminological theories can be generalized to rural areas. Although the generalization may be difficult for some criminological theories, the relevant theory of "hotspots" (Sherman, Gartin, & Buerger, 1989) applies to any accessible area, rural or urban. After describing the relevant criminological theory, I report the results of a corroborating quasi-experimental case study. When an adult business is opened on an interstate highway off-ramp in a sparsely populated rural community, ambient crime risk rises precipitously, in effect making a hotspot of the community.

The Criminological Theory of Secondary Effects

Writing shortly after the advent of Uniform Crime Reports, Vold (1941) confirmed that a city's crime rate was proportional to its population. The observed relationship had an obvious explanation: "[B]ehavior in the country in all probability comes under much greater informal control of the opinions and disapprovals of the neighbors than is the case in the relative anonymity of the city" (p. 38). The negative correlation confirmed not only grand sociological theory (e.g., Tönnies, 1887/1963; Durkheim, 1893/1964) but also the related criminological theory of social disorganization.

As proposed by Shaw and McKay (1942), the theory of social disorganization predicts that neighborhoods with low residential stability will have high rates of delinquency and vice versa. To the extent that a small town has the characteristics of a stable neighborhood, social disorganization theory would predict the low crime rates observed by Vold (1941). Moreover, when a small town is disrupted by an influx of newcomers, the same theory predicts an abrupt increase in the town's crime rate.

This can occur in at least two ways. First, the newcomers may victimize the town's residents. Indeed, fear of victimization by newcomers is implicated in the rapid spread of gated communities (Blandy, Lister, Atkinson, & Flint, 2003). Second, the influx of newcomers may disrupt the town's routine activities in a way that

attracts predatory criminals, creating a local "hot spot of predatory crime" (Sherman et al., 1989).

The discovery of hotspots by Sherman et al. (1989) was anticipated by the work of Brantingham and Brantingham (1981); adult business hotspots have many of the properties associated with crime "attractors" and "generators" (see also Brantingham & Brantingham, 1993). A simpler routine activity theory (Clarke, 1983; Cohen & Felson, 1979; Felson, 1998; Felson & Cohen, 1980) is sufficient for present purposes, however. In this context, the routine activity theory of crime equates ambient crime risk, generally defined as the number of crimes within 500-1,000 feet of a site, with the product of four risk factors. This can be written as:

$$\text{Ambient Crime Risk} = \frac{N \text{ of Targets} \times \text{Expected Value}}{\text{Police Presence}} \times \text{Offenders}$$

An increase (or decrease) in the number of targets at the site or in their expected value, defined in the usual way, yields an increase (or decrease) in ambient crime risk. An increase (or decrease) in police presence, on the other hand, yields a decrease (or increase) in ambient crime risk.

Targets

Adult business sites are crime hotspots because they attract potential victims, or targets, from wide catchment areas. Adult business sites are no different in that respect than tourist attractions (Danner, 2003; Dimanche & Lepetic, 1999) and sporting events (Corcoran, Wilson, & Ware, 2003; Westcott, 2006). Compared to the targets found at these better known hotspots, however, the targets found at adult businesses are exceptionally attractive to offenders. This reflects the presumed characteristics of adult business patrons. They are disproportionately male, open to vice overtures, and carry cash. Most important of all, when victimized, they are reluctant to involve the police. From the offender's perspective, they are "perfect" victims.

Offenders

The crime–vice connection has been a popular plot device for at least 250 years. John Gay's *Beggar's Opera* (1728/2006), for example, describes the relationship between MacHeath, a predatory criminal, and the vice ring composed of Peachum, Lucy, and Jenny. This popular view is reinforced by the empirical literature on criminal lifestyles and thought processes. The earliest and best-known study (Shaw, 1930/1966; Snodgrass, 1982) describes the life of "Stanley," a delinquent who lives with a prostitute and preys on her clients.

This simple application of the routine activity theory assumes a pool of rational offenders who move freely from site to site, choosing to work the most attractive site

available. These offenders lack legitimate means of livelihood and devote substantial time to illegitimate activities; they are "professional thieves" by Sutherland's (1937) definition. Otherwise, they are a heterogeneous group—some are vice purveyors who dabble in crime, whereas others are predatory criminals who promise vice to lure and lull their victims. Despite their heterogeneity, the offenders share a rational decision-making calculus that draws them to adult business sites.

Expected Value

Criminological thinking has changed little in the 75 years since Shaw's (1930/1966) *Jack-Roller*. To document the rational choices of predatory criminals, Wright and Decker (1997) interviewed 86 active armed robbers. Asked to describe a perfect victim, all mentioned victims involved in vice, either as sellers or buyers. Three of the armed robbers worked as prostitutes:

> From their perspective, the ideal robbery target was a married man in search of an illicit sexual adventure; he would be disinclined to make a police report for fear of exposing his own deviance. (p. 69)

The rational calculus described by these prostitute-robbers echoes the descriptions of other predators (see Bennett & Wright, 1984; Feeney, 1986; Fleisher, 1995; Katz, 1988, 1991; Shover, 1996).

Police Presence

With respect to the quantity and quality (or value) of the targets at a site, urban and rural adult business sites are equally attractive to the rational offender. Police presence is generally lower at rural sites, however. Some part of the urban–rural disparity is because of obvious factors. Rural police agencies protect larger areas with fewer personnel, for example, and drive longer distances in response to calls. Though less obvious, fuzzier jurisdictional lines and more complex demands for service make policing more difficult and less effective in rural areas (Thurman & McGarrell, 1997; Weisheit, Falcone, & Wells, 1999). Because police presence is relatively lower at rural sites, controlling for the quantity and quality of targets, rural sites are more attractive to the rational offender.

Montrose, Illinois: A Case Study

An unincorporated village of 250 residents, Montrose, Illinois is located on I-70 midway between St. Louis and Indianapolis. I-70 separates Montrose's residential dwellings from its businesses: a convenience store-gas station, a motel, and for a short period, a tavern. Other than gas and lodging, cross-country travelers had no reason to exit I-70 at Montrose prior to February, 2003. In that month, the Lion's

Den opened on a service road within 750 ft of the I-70 off-ramp. A large, elevated sign let I-70 travelers know that x-rated videos, books, and novelties could be purchased "24/7." The store was successful by all accounts.

The residents of Montrose did not welcome the new business. Unlike the village's other businesses, the Lion's Den was located on the residential side of I-70. Complaining that the store disrupted their idyllic lifestyle, villagers picketed the site on several occasions. Traffic was a chronic complaint. The narrow gravel access road connecting the site to I-70 could not support the weight of big-rig trucks; it soon fell into disrepair. The Lion's Den offered to build a new, larger access road from I-70 to its site. But fearing an even larger volume of traffic, the villagers declined the offer.

Like all Illinois villages, Montrose had no adult business ordinances. However, the Lion's Den was located within 1,000 feet of a public park, in violation of an Illinois statute. When the State moved to enforce its statute, the Lion's Den sued, arguing that "off-site" adult businesses could not generate the public safety hazards associated with adult cabarets, video arcades, and other on-site adult entertainment businesses. The trial in *State v. The Lion's Den et al.* lasted 4 days. The court upheld the statute and, in July, 2005, the Montrose Lion's Den closed its doors.

At the trial, the State presented evidence of the Lion's Den's adverse impact on the surrounding area: sexually explicit litter and decreased use of the nearby park. However neither party presented local crime data. Table 1 reports data bearing on the crime-related secondary effects of the adult business in Montrose. During the 1,642-day period beginning January 1, 2002, the Effingham County Sheriff's Office recorded 83 crime incidents in the village. The most common incidents involved the theft or destruction of property. Incidents of disorder and indecency, traffic-related incidents, and alcohol-drug offenses were nearly as common. Incidents involving danger or harm to persons (robbery, assault, etc.) were rare.

The columns labeled "Open" and "Closed" in Table 1 break the incidents down into an 881-day segment in which the Lion's Den was open and a 761-day segment in which it was closed. Crime rates are 22.39 and 13.92 total incidents per year for the "Open" and "Closed" segments, respectively. From these raw rates, it appears that crime in Montrose rose when the Lion's Den opened and fell when the Lion's Den closed. Of course, this assumes that plausible alternative hypotheses for the difference can be ruled out.

Null Hypothesis

The most obvious alternative explanation is that the difference is because of chance. To rule this out, the daily total crime count series was regressed on a binary variable representing "Open" and "Closed" days (Cameron & Trivedi, 1998). The log-parameter values reported in Table 1 were estimated with Stata 9.2 (Stata Corporation, 2007). Because the effect estimate $\beta = 0.475$ occurs with probability $p(t \geq 2.09) < 0.035$, by the conventional 95% confidence criterion, the chance explanation, or null hypothesis, is rejected.

Table 1
Crime-Related Secondary Effects of a Rural Adult Business

	Open		Closed		Log Effect	β	*t*
Property crimes	23	9.54	15	7.20			
Personal crimes	3	1.24	5	2.40	Constant	–3.267	–17.60
All other crimes	28	11.61	9	4.32	Open	0.475	2.06
Total crimes	54	22.39	29	13.92	$e^{0.475}$	1.61	

Although parameter estimation requires working in the natural log metric, log-parameters are not easily interpreted. However, the exponentiated effect estimate is approximately equal to the ratio of the segments. In this instance, the value ($e^{0.475}$) 1.61 is interpreted as a 61% difference. The rate of total crime in Montrose was 61% higher during the 29 months that the Lion's Den was open, that is, compared to the period prior to February 2003, before the Lion's Den opened, and the period after July 2005, when it closed. This is a large, statistically significant crime-related secondary effect.

Internal Validity

Another set of alternative explanations involve uncontrolled threats to internal validity. The switching regime (closed–open–closed) property of the quasi-experimental design controls many of the most common threats to internal validity. Nevertheless, authorities on quasi-experimental design (Campbell & Stanley, 1966; Cook & Campbell, 1979; Shadish, Cook, & Campbell, 2002) cite maturation, history, and instrumentation as the most plausible threats to the internal validity of time-series designs.

The threat of maturation refers to the possibility that the effect reported in Table 1 may be due, not to the opening of the Lion's Den but to a natural trend in the village's crime rate. However, because the daily time total crime time series satisfies the simple Poisson homogeneity assumption (Feller, 1968), the maturation hypothesis is rejected.

The threat of history refers to the possibility that the effect may be because of some event in the village that coincided with the opening of the Lion's Den. A search of local news media found only one significant event during the 1,662-day time series. Shortly after the Lion's Den opened, the village's only liquor-serving tavern closed permanently. However, if the tavern's closing had any effect on crime in Montrose, the expected effect would have been to reduce the crime rate during the 881 days that the Lion's Den was open. Accordingly, history is rejected as an alternative hypothesis.

Instrumentation refers to the possibility that the effect may be due, not to the opening of the Lion's Den but to a coincidental change in the way that crimes are recorded in the village. If the Effingham County Sheriff stepped up the frequency of

patrols in the village when the Lion's Den opened, for example, the effect reported in Table 1 might be a spurious artifact of heightened surveillance. Criminologists acknowledge that heightened surveillance can exaggerate "victimless" crime rates; proactive enforcement against prostitution and drugs invariably leads to higher vice crime rates. However, proactive enforcement against "serious" crime does not produce higher rates of homicide, assault, and robbery. On the contrary, criminologists generally agree that heightened surveillance reduces the rate of "serious" crime.

The detailed incident reports do not support an instrumentation hypothesis. During the 881 days that the Lion's Den was open, crime in the village grew more "serious." Although five "Personal Crimes" were reported during the 761 days that the Lion's Den was closed versus three when it was open, none of the five incidents involved a weapon or resulted in an injury. When the Lion's Den was open, in contrast, two of the three "Personal Crimes" reported in the Village were armed robberies, one committed by a gang of four men wearing ski masks and armed with shotguns. Moreover, both armed robberies were committed at the site of the Lion's Den and were the only robberies recorded in the village's modern history.

The timing of the crime incidents is related to their seriousness. During the 761 days that the Lion's Den was closed, Montrose's modal crime incidents were "drive-off" thefts from the village's gasoline station and vandalism at the Village's motel. Most of these incidents occurred during the day and required no immediate response from the Sheriff's Office; and because the businesses were separated from residences by I-70, the modal incidents attracted little attention. On the other hand, during the 881 days that the Lion's Den was open, a majority of incidents occurred at night and demanded immediate action; as more incidents began to occur on the residential side of I-70, crime became more noticeable to village residents.

Discussion

Following the opening of an adult business on an interstate highway off-ramp into a sparsely populated rural village, total crime in the village rose by approximately 60%. Two years later, when the business closed, total crime in the village dropped by approximately 60%. In light of the strong quasi-experimental design, artifactual explanations for this effect, including maturation, history, and instrumentation are implausible. The only plausible explanation for the effect reported in Table 1 is that, like adult businesses in urban and suburban settings, adult businesses in sparsely populated rural areas generate ambient crime-related secondary effects.

This finding was not unexpected. Although criminological theories are based largely on data collected in urban and suburban areas, the routine activity theory of hotspots (Sherman et al., 1989) generalizes to rural settings. Put simply, adult businesses attract patrons from wide catchment areas. Because these patrons are disproportionately male, open to vice overtures, and reluctant to report victimizations, their presence

attracts offenders. The spatiotemporal conjunction of targets and offenders generates ambient victimization risk—a hotspot of predatory crime. This theoretical mechanism operates identically in rural, suburban, and urban areas. Moreover, because rural areas ordinarily have lower levels of visible police presence, rural hotspots may be riskier than their suburban and urban counterparts.

The Tenth Circuit may not have found the Montrose results useful. Every case study is unique in some respect, after all; and although the U.S. Census Bureau considers both Effingham County, Illinois and Dickinson County, Kansas to be "rural," the Tenth Circuit may have focused on idiosyncratic, legally relevant factors. Nevertheless, the case study results demonstrate that, whether urban, suburban, or rural, hotspots are hotspots. In urban, suburban, and rural areas, adult businesses attract patrons who are disproportionately male, open to vice overtures, and reluctant to report victimizations to the police. This attracts offenders to the site with predictable consequences for ambient crime risk. In theory, of course, because of the relative scarcity of police in rural areas, offenders may find rural hotspots more attractive. Otherwise, the routine activity theory of hotspots generalizes to any site that is attractive to potential victims, or targets, and accessible to offenders.

Solving the problem of rural hotspots by allocating more police resources to rural areas is politically unfeasible. Governments allocate public safety resources across regions on utilitarian grounds. Per capita allocations have the greatest impact on per capita crime rates. This poses an obstacle to rural problem-oriented policing (Weisheit et al., 1999), of course, but it is a rational policy for a government. Because the targets attracted to a rural hotspot live outside the jurisdiction, and because victimizations are underreported, ignoring the hotspot is a more realistic strategy.

The future is unclear. The relocation of adult businesses to rural areas parallels the postwar "flight" of inner-cities families. From the perspective of adult business proprietors, the urban environment has become hostile. Zoning codes force adult businesses into "ghettos" where their operations are strictly regulated and where competition with other adult businesses is fierce. Rural areas have few regulations, on the other hand, and little competition; access to interstate highway traffic is a bonus. As urban environments become more hostile, more adult businesses will relocate to rural areas, forcing state and county governments into policy decisions. The case study reported here can, hopefully, inform that debate.

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"Strip Clubs According to Strippers: Exposing Workplace Sexual Violence"

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INTRODUCTION

The purpose of this paper is to investigate women's experiences in stripclubs and to describe the activities in stripclubs from the women's point of view. The format approach is collective story narrative with the author as part of the collective voice. The research was inspired by the author's experiences in stripping over the course of thirteen years. The author's intention is to examine the conditions of stripclubs by describing the fundamental way stripclubs are organized. The description features bar activities focused on stripper-customer interactions; survey data on sexual violence in stripclubs; and women's thoughts on stripping.

THEORETICAL FOUNDATION

Stripclubs are popularly promoted as providing harmless entertainment and as places where respectful men go to watch and talk to women (Reed 1997). Stripclub customers are described as normal men who use stripclubs to avoid adultery and therefor find a safe outlet for their sexual desires in balance with their marital commitments (Reed 1997). In contrast, stripclubs are criticized for being environments where men exercise their social, sexual, and economic authority over women who are dependent on them and as places where women are treated as things to perform sex acts and take commands from men (Ciriello 1993).

Stripclubs are organized according to gender and reflect gender power dynamics in greater society. "Gendered spaces are social arenas in which a person's gender shapes the roles, statuses, and interpersonal dynamics and generates differential political and economic outcomes and interaction expectations and practices" (Ronai, Zsembik, and Feagin 1997:6). Stripclubs are more specifically organized according to gender inequality, which is perpetuated by gendered spaces and consequently sexualized (Ronai, et al 1997). The typical stripclub scenario displays young, nude or partially nude women for fully clothed male customers (Thompson and Harred 1992).

The entire analysis of stripclubs is located within the context of men's domination over women. When organizations are produced in the context of the structural relations of domination, control, and violence, they reproduce those relations (Hearn 1994). These organizations may also make explicit use of gendered forms of authority with unaccountable and unjustifiable authority belonging to men (Hearn 1994). The stripclub elicits and requires direct expressions of male domination and control over women (Prewitt 1989).

In order to dominate or control and secure men's domestic, emotional and sexual service interests, male dominated institutions and individual men utilize violence (Hanmer 1989). Violence against women is identified as physical, sexual, emotional, verbal, and representational, but all violence from men against women should be understood as sexual violence (Hearn 1994).

The concept of a continuum is useful when discussing sexual violence, especially in stripclubs. Continuum is defined as a basic characteristic underlying many different events and as a series of elements or events that pass into one another (Kelly 1987). The common underlying element in stripclubs is that male customers, managers, staff, and owners use diverse methods of harassment, manipulation, exploitation, and abuse to control female strippers.

LITERATURE REVIEW

Despite a substantial amount of research on the topic of strippers, stripping, and stripclubs, none focuses on sexual violence in stripclubs perpetrated against strippers. Instead the studies focus on sociological and psychological profiles of the women (Forsyth and Deshotels 1997; Peretti and O' Connor 1989; Reid, Epstein, and Benson 1994; McCaghy and Skipper 1970; Thompson and Harred 1992) and their strategies for interaction with customers (Boles and Garbin 1974; Enck and Preston 1988; Ronai 1989). Although most studies mention male sexual violence and exploitation, the research regarding stripping fails to investigate and account for the problem of sexual violence in establishments that feature female strippers. The gap is the rationale for my study.

METHOD

Data for this research was obtained through interviews, a survey, and the researcher's participant observation while involved in stripping (Hamel 1993). Women in this study stripped in the local stripclubs in the Midwest metropolitan area where the researcher lives, in local nightclubs in the same area, in metropolitan and rural stripclubs and nightclubs across the United States, at private parties, in peep shows, and in saunas. The stripclubs featured a variety of attractions including topless dancing, nude dancing, table dancing, couch dancing, lap dancing, wall dancing, shower dancing, and bed dancing. In addition, some clubs had peepshows, female boxing and wrestling with customers, offered photographs of the dancers, or hired pornography models and actresses as headliners.

The study was conducted in two phases. In 1994, I conducted free-flowing qualitative interviews for one to four hours each with forty-one women while I was still involved in stripping and compiled participant observer notes about the activities in stripclubs. The women ranged in age from nineteen to forty years old and were involved in stripping from three months to eighteen years. All of the women identified themselves as Caucasian.

In 1996, I proceeded to design a twenty-six question survey according to themes derived from the interviews to investigate sexual violence in stripclubs. My long-time involvement in the strip industry allowed an association with strippers that was invaluable for administering in-depth surveys regarding sensitive issues. The surveys were administered face-to-face to insure the information was indeed from the women in stripping. Again, the surveys and consequent discussions lasted from one to four hours. Many women explained that they had never talked about their experiences so extensively because no one had ever asked them the right questions. Participants were asked to say whether they had experienced different abusive and violent actions in the stripclub, to estimate how often each action happened, and then to identify which men associated with the stripclub perpetrated the action. The categories of men were defined as customer, owner, staff, and manager. Since I exited stripping, snowball sampling was employed to recruit the eighteen participants for the survey. Participants in the survey were asked to pass on postcards to other women. The range of ages was eighteen to thirty-five years old. The age of entry into stripping ranged from fifteen to twenty-three years old, with a mean age of eighteen

years and ten months. The length of time the women in this study were involved in stripping ranged from three months to eighteen years with an average length of six years and seven months. Women predominantly identified themselves as Caucasian. Only one woman identified herself as Hispanic. Twelve of the women described their sexual orientation as heterosexual, two as lesbian, and four as bisexual. The survey data was analyzed on the Statistical Program for Social Sciences.

After the data was compiled, a focus group of 4 women currently in stripping and with no prior association with the study positively evaluated the relevancy of the study and approved the collective story.

Statements in quotations throughout this paper are derived from the 41 interviews and discussions that often followed the administration of the 18 surveys.

PART 1: TYPICAL STRIPCLUB ACTIVITIES

A. Recruitment

Women find out about stripping from a variety of sources. Upscale stripclub franchises recruit in new cities by having managers and imported dancers scout in nightclubs. Most women find out about stripping from girlfriends already in stripping, male associates, the media, and some from prior involvement in prostitution. One woman told how she loitered in and around urban stripclubs to pick up customers when she was fifteen and how her pimp eventually drove her to small town strip bars because those bars admitted her and hired her. Someone else got involved in stripping through an escort service for bachelor parties. Another young woman who went to a gentlemen's club to pick up her friend recounted her recruitment as an eighteen-year-old. She waited at the bar, was served alcohol, and the owner asked to check her I.D. Instead of censuring her for drinking, he told her she would make $1000 per week and pressured her to enter the amateur contest that night. She won the contest, $300, and worked there three weeks before being recruited into an escort service by a patron pimp.

In a typical hiring scenario women respond in person to a newspaper ad promising big money, flexible hours, no experience necessary. As an audition the club manager asks the applicants to perform on amateur night or bikini night, both of which are particularly popular with customers who hope to see girl-next-door types rather than seasoned strippers. The manager will make a job offer based on physical attributes and number of women already on the schedule. Clubs portray the job requirements as very flexible. Women are told that they will not be forced to do anything they do not want to do, but clubs overbook women so they are forced to compete with each other, often gradually engaging in more explicit activities in order to earn tips (Cooke 1987).

B. Working Conditions

Women in stripping are denied legal protection relating to the terms and conditions under which they earn their livings (Fischer 523). Most strippers are hired to work as independent contractors rather than employees. Most strippers are not paid a wage (Mattson 1995), therefor their income is totally dependent on their compliance with customer demands in order to earn tips. More often than not, the strippers have to pay for the privilege of working at a club (Cooke 1987; Forsyth and Deshotels 1997; Prewitt 1989). The majority of clubs demand that women turn over 40 to 50 percent of their income for stage or couch rental and enforce a mandatory tip

out to bouncers and disc jockeys (Enck and Preston 1988; Forsyth and Deshotels 1997). Usually a minimum shift quota is set and the women must turn over at least that quota amount. If a woman does not earn the quota and wants to continue working at the establishment, she owes the club and must pay off that shift's quota by adding it to the quota for the next shift she will work. The stripclubs may also derive income from promotional novelty items, kickbacks, door cover charges, beverage sales, prostitution, and capricious fines imposed on the women. As independent contractors, strippers are not entitled to file discrimination claims, receive workers' compensation, or unemployment benefits (Fischer 1996; Mattson 1995). Club owners are free from tax obligations and tort liability. Owners pay no Social Security, no health insurance, and no sick pay. Some club owners require strippers to sign agreements indicating that they are working as independent contractors and many clubs require women to sign a waiver of their right to sue the club for any reason.

Although strippers are classified as independent contractors, the reality of their relationship to their supervisors is an employee-employer relationship. Regardless of the agreements claiming independent contractor status, clubs maintain enormous control over the women. The club controls the schedule and hours, requires strippers to pay rental fees, tip support staff large amounts, and even sets the price of table dances and private dances. Clubs have specific rules about costuming and even dictate the sequence of stripping and nudity. For example, by the middle of the first song the woman must remove her top, she must be entirely nude by the end of the second song, and must perform a nude floorshow. All this regardless of whether customers are tipping her or not. A club may further influence dancers' appearances by pressuring them to shave off all their pubic hair, maintain a year-long tan, or undergo surgery for breast augmentation. At nude clubs, it is common for the performers to be shaved clean, giving them an adolescent and even childlike appearance.

Clubs also exert significant control over the strippers' behavior during their shifts by regulating when women may use the bathroom and how many of them can be in the dressing room at one time. Some clubs do not provide seating in the dressing room and forbid smoking in that room, thus preventing strippers from taking a break. When a woman wants to sit down or smoke a cigarette, she must do so on the main floor with a customer. Clubs enforce these rules through fines (Cooke 1987; Enck and Preston 1988; Ronai 1992). Women are fined heavily by club management: $1 per minute for being late, as much as $100 for calling in sick, and other arbitrary amounts for "talking back" to customers or staff, using the telephone without permission, and touching stage mirrors. Women are fined for flashing, prostitution (Enck and Preston 1988), taking off their shoes, fighting with a customer, being late on stage, leaving the main floor before the DJ calls her off, not cashing in one dollar bills, profanity in music, being sick, not cleaning the dressing room, using baby oil on stage, dancing with her back to a customer (Enck and Preston 1988) and being touched by a customer.

Despite the stripclub's representation of a dancing job as flexible, strippers attest that their relationship with the club becomes all consuming and everything associated with being a stripper interferes with living a normal life. And despite the common perception that a woman can dance her way through school, many strippers report that their jobs take over their lives. Long and late hours, fatigue, drug and alcohol problems, and out of town bookings make it difficult to switch gears. Not only do the women spend a significant amount of their time in stripclubs, the activities and influences from the club environment permeate their personal lives and detrimentally effect their well-being. Although stripclubs are considered legal forms of entertainment, people unassociated with the industry are unaware of the emotional (Peretti and O'Connor 1989; Ronai 1992), verbal (Mattson 1995; Ronai 1992), physical (Boles and Garbin

1974), and sexual abuse (Ciriello 1993; Ronai 1992) inherent in the industry. Despite claims from management that customers are prohibited from touching the women, this rule is consistently violated (Enck and Preston 1988; Forsyth and Deshotels 1997; Ronai and Ellis 1989; Thompson and Harred 1992). Furthermore, stripping usually involves prostitution (Boles and Garbin 1974; Forsyth and Deshotels 1997; Prewitt 1989; Ronai and Ellis 1989; Thompson and Harrod 1992).

C. Stripper-Customer Interactions

Main Floor

Stripclub activities are offered in public spaces or private rooms or other isolated parts of clubs (Forsyth and Deshotels 1997). The typical stripclub scenario presents young, nude or partially nude women mingling with fully clothed male customers. They circulate through the crowd, encouraging men to buy liquor, drinking and talking with men, and soliciting and performing a variety of private dances (Prewitt 1989; Ronai and Ellis 1989). Women describe their role in the stripclub as hostess, object, prostitute, therapist, and temporary girlfriend and say they are there to entertain and attract men and business for the owners.

Women who work at small strip joints say they can hang out, order in food, and play pool during their shifts. On the other hand, women who work at gentlemen's clubs have to hustle photographs and drinks and are required to sell promotional T-shirts, calendars, and videos. They can be mandated to sell the items with private dances. For example, the dancers buy T-shirts from the house mom for $8 and sell them for $15. So for $15, the customer receives a T-shirt and 2 $10 table dances. Strippers at gentlemen's clubs are further informed by management that they are not allowed to buy their own drinks, that they have to be sitting with customers, and can never turn down a drink, even when their drinks are full.

Stage

Women report dancing on stages as cheaply constructed by laying plywood on the benches of restaurant booths to stages covered with kitchen linoleum to wood parquet or marble stages in a few upscale clubs. Some stages are elevated runways so narrow that strippers say that cannot get away from customers on each side touching them, especially when they are kneeling down to accept a tip in the side of their g-strings/t-bars or when they have their backs turned. Stages can also be sunken pits with a rail around it and a bar for the customers' beverages. During a set, a stripper may do striptease, acrobatics, dance, walk, or squat to display her genitals. Generally the progression for striptease begins during the first song with the woman wearing a dress or costume covering her breasts and buttocks. Over the course of a set of 2 or 3 songs she will remove her bra and in nude clubs, her g-string/t-bar. Some clubs feature floorshows in which women crawl or move around on the floor posing in sexual positions and spread their legs at the customers' eye level. During a floorshow, a dancer changes her movements from upright to positions on her knees and squatting in a crabwalk in order to 'flash' tipping customers. "Flashing" is pulling the g-string/t-bar aside, revealing the pubic area and/or the genitals. Dancers describe this as "doing a show" for paying customers. Ordinarily, a dancer only positions herself in front of tipping patrons (Prewitt 145). Customers who fail to tip are ignored. Audience response can be expressed by clapping, hooting, barking, whistling, amount of money tipped, or complete silence depending upon time of day, state of inebriation, excitement over the musical selection, or the appearance and abilities of the stripper.

On stage, some women's thoughts wander, while others' focus on angry desperation. *"I daydream about nothing in particular to pass the time of 12 minutes."* *"I'm thinking about how good I look in the mirrors and how good I feel in dance movements."* *"I tell myself to smile."* *"I think about getting high and that I am making money to get high."* *"I am giving these guys every chance to be decent, so that I don't have to be afraid of them."* *"I am filled with disdain for the customers who do not tip, but sit and watch and direct you to do things for no money."* *"I think of how cheap these fuckers are, what bills I need to pay."*

Private Dance Activities

Private dances are usually performed in areas shielded from the larger club view (Forsyth and Deshotels 1997, Prewitt 1989). As a rule, the private dance involves one female dancer and one male customer. Private dances are situations where women are often forced into acts of prostitution in order to earn tips (Forsyth and Deshotels 1997; Prewitt 1989; Ronai and Ellis 1989). Men masturbate openly (Peretti and O'Connor 1989), get hand jobs (Forsyth and Deshotels 1997), and stick their fingers inside women (Ronai and Ellis 1989). Men with foot fetishes have been known to suck on dancers' toes.

A variety of private dances are promoted in strip clubs. **Table dancing** is performed on a low coffee table or on a small portable platform near the customer's seat. The woman's breasts and genitals are eye level to the customer. **Couch dancing** for a customer entails the dancer standing over him on the couch, dangling her breasts or bopping him in the face with her pubic area. **Lap dancing** requires the woman to straddle the man's lap and grind against him until he ejaculates in his pants. A variation involves the woman dancing between his legs while he slides down in his chair so that the dancer's thighs are rubbing his crotch as she moves. **Bed dancing** is offered in a private room and requires a woman to lay on top of a fully clothed man and simulate sexual intercourse until he ejaculates. **Shower dancing** is offered in upscale clubs and allows a

clothed patron to get into a shower stall with one or more women and massage their bodies with soap. **Wall dancing** requires a stripper to carry alcohol swabs to wash the customer's fingers before he inserts them into her vagina. His back is stationary against the wall and she is pressed against him with one leg lifted. **Peep shows** feature simulated or actual acts directed by openly masturbating customers. Customers sit in a private booth and view the women through a glass window. **Live sex shows** involve 2 or more individuals engaging in simulated or sexual activity performed behind glass or on a stage. Customers openly masturbate while watching the show from the audience or through an opening in a private booth.

During private dances women are conscientious about their boundaries and safety. *"I don't want him to touch me, but I am afraid he will say something violent if I tell him 'no'." "I was thinking about doing prostitution because that's when customers would proposition me." "I could only think about how bad these guys smell and try to hold my breath." "I spent the dance hyper vigilant to avoiding their hands, mouths, and crotches." "We were allowed to place towels on the guys' laps, so it wasn't so bad." "I don't remember because it was so embarrassing."*

D. Dressing Room

Women describe a range of types and qualities of dressing rooms. Strippers are expected to change clothing in beer coolers, broom closets, and public restrooms. Some stripclub dressing rooms are nice with lights, mirrors, vanities, and chairs, and are equipped with lockers, and tanning beds. Other clubs have make-up mirrors but no chairs or ashtrays to prevent dancers from lingering. Women complain that too many dressing rooms are down isolated halls or in the basements of establishments and that they have to scream for help when customers intrude. Some are so damp or filthy that the women cannot take their shoes off. Other dressing rooms are so frigid that dancers carry small space heaters to and from work. The dressing rooms are used to change costumes, drink, do drugs, do hair and make-up, iron costumes, do homework, bitch about customers, avoid customers, talk about problems, hang out. In strip joints and rural bars, women lay on blankets or inside sleeping bags between sets and nap and read.

The greatest response to questions regarding preparation for work was "drink". Women drink while getting ready to go to work and they drink while doing their hair and make-up once in the dressing room. Women who work at nude juice bars that do not serve alcohol or at bars that do not allow women to buy their own drinks report that they stop at another bar on their way in and "get loaded". Between stage sets and private dances, women drink some more, clean themselves with washcloths or babywipes after performing on a dirty stage or being touched by a lot of men, apply deodorant, and perfume their breasts and genitals.

PART 2: SURVEY DATA

One hundred percent of the eighteen women in the survey report being physically abused in the stripclub. The physical abuse ranged from three to fifteen times with a mean of 7.7 occurrences over the course of their involvement in stripping. One hundred percent of the eighteen women in this study report sexual abuse in the stripclub. The sexual abuse ranged from two to nine occurrences with a mean of 4.4 occurrences over the course of their involvement in stripping. One hundred percent of the women report verbal harassment in the stripclub. The verbal abuse ranged from one to seven occurrences with a mean of 4.8 occurrences over the course of their involvement in stripping. One hundred percent of the women report being propositioned for prostitution. Seventy eight percent of the women were stalked by someone associated with the stripclub with a range of one to seven incidents. Sixty one percent of the

women report that someone associated with the stripclub has attempted to sexually assault her with a range of one to eleven attempts. Not only do women suffer the abuse they experience, all of women in the survey witnessed these things happen to other strippers in the clubs. The overwhelming trend for violence against women in stripclubs was committed by customers of the establishments. Stripclub owners, managers, assistant managers, and the staff of bartenders, music programmers or disc jockeys, bouncers, security guards, floorwalkers, doormen, and valet were significantly less involved in violence against the women. According to the women in this study, almost all of the perpetrators suffered no consequence whatsoever for their actions.

Physical Abuse

Customers spit on women, spray beer, and flick cigarettes at them. Strippers are pelted with ice, coins, trash, condoms, room keys, pornography, and golf balls. Men pitched a live guinea pig and a dead squirrel at two women in the survey. Some women have been hit with cans and bottles thrown from the audience. Customers pull women's hair, yank them by the arm or ankle, rip their costumes, and try to pull their costumes off. Women are commonly bitten, licked, slapped, punched, and pinched.

Table 1 - Physical Abuse

Abusive Action	Ever (by men in stripclub) (%)	At Least Once Every Day (%)	At Least Once Every Week (%)	At Least Once Every Month (%)	At Least Once Every Year (%)
Grabbed by arm	78	44 C 6 M 11 S	17 C 6 O 6 M 11 S	11 C 6 O 6 M	6 M
Grabbed by ankle	56	28 C		6 C 6 M	11 C
Grabbed by waist	94	50 C 6 M 11 S	33 C 11 M 11 S	6 M	11 C
Bitten	56	6 C	11 C		11 C
Licked	78	28 C	17 C	11 C 6 O 6 M 11 S	22 C
Slapped	39	6 C	11 C		17 C
Hair pulled	39	6 C	6 C	11 C	
Punched	72	6 C			
Pinched	72	17 C	17 C	6 C 6 M 6 S	22 C 6 S
Kicked	11	6 C			
Spit on	61	6 C			28 C
Pulled costume off	83	22 C		6 C 6 O 6 M	22 C 6 S
Ripped costume	44	6 C		6 C	17 C
Flicked cigarette	33	6 C	6 C		11 C
Sprayed beer	39	6 C	6 C	6 C	6 C

Threw ice	61	6 C	11 C	6 C	6 C
Threw coins	83	17 C	11 C	11 C 6 S	28 C
Threw cans/glasses	22	6 C			
Threw garbage	39	17 C	11 C		
Threw other	28	11 C			

N = 18 **Key: C = customers, O = owners, M = managers , S = staff**

Sexual Abuse

Stripclub customers frequently grab women's breasts, buttocks, and genitals. Customers often attempt and succeed at penetrating strippers vaginally and anally with their fingers, dollar bills, and bottles. Customers expose their penises, rub their penises on women, and masturbate in front of the women. Women in this study consistently connected lap dances to the sexual abuse they suffered in the club. *"That's the first thing men try to do when they get close to you and always in a lap dance*." Stripclub owners, managers, and staff also expect women to masturbate them and some have forced intercourse on strippers.

Table 2 - Sexual Abuse

Abusive Action	Ever (by men in stripclub) (%)	At Least Once Every Day (%)	At Least Once Every Week (%)	At Least Once Every Month (%)	At Least Once Every Year (%)
Grabbed breasts	94	28 C 6 M	17 C	17 C 6 M	17 C 6 O
Grabbed buttocks	89	39 C	11 C	39 C 6 M 6 S	6 O 6 S
Grabbed genitals	67	17 C		11 C 6 M	17 C
Exposed penis to her	67	11 C	6 C	6 C 6 O 6 M	33 C
Rubbed penis on her	78	39 C 6 M	22 C 6 O 6 M 6 S	6 C	22 C 6 O
Masturbated in front of her	78	33 C 6 M	11 C	28 C	6 C

N = 18 **Key: C = customers, O = owners, M = managers, S = staff**

Table 3 - Sexual Abuse

Abusive Action	Experienced Attempted Abuse (%)	Experienced Successfully Completed Abuse (%)
Penetrate her vaginally with fingers	61 C 6 M	39
Penetrate her anally with fingers	33 C	17
Penetrate her with object	33 C 6 O	11
Force her to masturbate him	28 C 6 O 6 M	17
Force intercourse on her	17 C 6 O 6 M	11

N = 18 Key: C = customers, O = owners, M = managers, S = staff

Verbal Abuse

Customers, owners, managers, and staff alike engage in harassing namecalling. Women are continually called "cunt, "whore", "pussy", "slut", and "bitch". Women in this study charge that men in the stripclub called them other demeaning or degrading names like ugly, looser, fat, pregnant, boy, stupid, crack, slash, snatch, beaver, dog, dyke, lezzie, brown eye, hooters, junkie, crackhead, and shit.

Forty four percent of the women report that men associated with the stripclub have threatened to hurt them physically. These women report from three to 150 threats during their involvement in stripping. Threats range from verbal threats of slaps, ass whippings, and rapes to physical postures of punching and back hand slapping. *"When I wouldn't let a customer grab on me, he would call me a bitch and threaten to kick my ass or rape me." "When a customer grabs and the woman and the girl takes action, they threaten".*

Table 4 Verbal Abuse – Namecalling

Abusive Action	Ever (by men in stripclub) (%)	At Least Once Every Day (%)	At Least Once Every Week (%)	At Least Once Every Month (%)	At Least Once Every Year (%)
Called "cunt"	61	28 C 6 M	6 C	17 C	11 C 6 M
Called "slut"	61	28 C 6 S	6 C	17 C 6 O 6 M 6 S	11 C
Called "whore"	78	28 C 6 S	6 C	17 C 6 O 6 M 6 S	22 C
Called "pussy"	72	39 C 6 S	11 C	11 C	11 C
Called "bitch"	89	39 C 6 S	11 C 6 O 6 M 6 S	6 C	22 C 6 M
Called other	56	17 C	6 C	17 C 6 M	6 C

N = 18 Key: C = customers, O = owners, M = managers, S = staff

Stalking

Men associated with stripclubs repeatedly attempt to contact the women against their wishes. Strippers are followed home and stalked by stripclub customers. Customers telephone, write letters, send gifts, and follow the women around against their wishes. Women recount stories of catching customers following them to fitness clubs, parks and lakes, day care centers, and even lesbian bars. They describe times when customers have broken into their homes and taken underwear, hairbrushes, and family photographs. Women say that other customers have used their jobs at the telephone company or within the criminal justice system to target the women. The women complain that customers also have followed them home masturbating while

driving in the next lane. Women who travel the strip circuit to rural areas report that customers and stripclub owners, managers, and staff alike follow women from city to city and state to state. Furthermore, local men in small towns harass the visiting women by calling and knocking on the doors of the motel rooms and have been caught peeping in the windows of strippers' motel rooms.

Twelve percent of the women who reported being followed to their cars further reported that they were robbed (5.6 %), beaten (11.1%), threatened with a weapon (5.6%), verbally sexually harassed (66.7%), and sexually assaulted (16.7%) by customers. A customer who claimed he was in love with the woman followed her to her car, called her a "fucking cunt" and strangled her hard enough to cause blood to squirt from her neck.

Table 5 - Stalking

Abusive Action	**Ever (by men in stripclub) (%)**	**Range of occurrences**
Sent her letters against her wishes	28	3-100 times
Sent her gifts against her wishes	22	2-100 times
Called her home against her wishes	39	2-360 times
Followed her home against her wishes	56	2-500 times
Followed her to her car against her wishes	67	12-500 times
Followed her around on her private time	28	1-150 times
Followed her from club to club, city, and state	28	6-360 times
Other	28	1-360 times

N = 18

Sexual Exploitation

Only a minority of women report that they were asked to perform sexual acts on men associated with the stripclub in order to return to work (11% by owners); as a condition of being hired (11% by managers, 11% by owners); in order to continue working there (17% by owners); in order to get a better schedule (6% by owners); or for drugs (17% by customers, 11% by managers, 22% by owners, 11% by staff).

A majority of the women, however, report they were asked to perform sexual acts on men associated with the stripclub for money (100% by customers, 6% by managers, 17% by owners, 11% by staff). Customers and pimps constantly proposition women (Boles and Garbin 1974; Forsyth and Deshotels 1997; Ronai 1992; Ronai and Ellis 1989). Fourteen (78%) women from the survey report they are propositioned for prostitution every day by customers, three (17%) every week, one (6 %) every year. Women comment that customers ask them "Do you date?" all night long. "*Infinite…too many too count*." Women say that prostitution is influenced and suggested by management. One woman new to stripping was dumbfounded at how little money she was making taking her clothes off, so she asked the manager for his advice on increasing tips. He suggested turning tricks and said he could help her set up dates. Management sets up tricks, says it is good for business, and obligates women to turn over money from prostitution to the club. Women say prostitution is promoted even though owners tell women

they would be punished if they turn tricks. Some stripclubs are notorious for promoting prostitution. "*You have to be a 'ho to work there*".

Women disclosed that they were recruited into prostitution through stripping. Although the strip industry markets stripping as something other than prostitution, some women consider prostitution an extension of stripping and stripping a form of prostitution. Pimps season women first with stripping and then turn them out into brothels or escort services for more money. Tricks, sugar daddies, pimps, and drug dealers in the stripclub seek to engage women in prostitution. Another young woman said that soon after she became involved in stripping, a pimp who posed as a customer in the stripclub manipulated her into an escort service by promising that she could make more money in less time simply by accompanying businessmen to dinner. She agreed in order to feed her crack addiction and as her addiction increased she slid down from gentlemen's clubs to escort service to brothel to street and crack house prostitution.

Not only are women in stripping pressured by customers to perform sexual acts on them, owners, managers, and staff pressure the women to perform sexual acts on them, their relatives and associates, on vice officers and police officers. Women explain the pressure could range from being coerced into dancing for the intended with an expectation to put on a real good show with special treatment, extra time, and sexual contact, to engaging in prostitution. Strippers, like other subordinates in worker-management relationships, respond with obedience to directives from management and others with authority (McMahon 1989).

Table 6 - Sexual Exploitation

Recipient	Pressured by customer (%)	Pressured by owner (%)	Pressured by manager (%)	Pressured by staff (%)	Pressured by vice officer (%)	Pressured by police officer (%)
Owner's friend		39				
Owner's relative		11				
Owner's business associate		33				
Manager's friend			17			
Manager's relative			6			
Manager's business associate			11			
Customer	72	22	17	6		
Vice officer		17	11	6	11	
Police officer		17	11	6		22

N = 18

PART 3: WOMEN'S THOUGHTS ON STRIPPING

Women in stripping are overwhelmingly motivated by the promise of wealth or a will to survive (McCaghy and Skipper 1970; Ronai 1992; Thompson and Harred 1992). Stripclub owners, managers, pimps and the media portray stripping as a glamorous way to earn big money fast and use this strategy to lure young women into stripping. Women in this study report the

best part of stripping to be the money. *"The only part that keeps me there is the money*". At the same time, women are trapped and disappointed by the money. *"I hated it…but glad I had it at the time for the income." "Women are reduced to exposing genitals for $1 bills." "It pays the bills… if we could pay bills another way we would." "The bar owners and management are exploitative, they steal money." "It's hard to get out because of the money*." With respect to the money strippers seek to earn, they in turn must pay out fines, kickbacks, 100% of their social security insurance and taxes, travel and hotel expenses, and the costs for costumes, tanning, and plastic surgery. Women report that they have to have the right attitude to make money (Ronai 1992). This ordinarily was described as being drunk, high or numb (Forsyth and Deshotels 1997). Others feel it required tolerance. *"The ability to ignore customers for just being there*." Most women say it is easier when the men are tipping regularly and when they do not have to interact with men intimately. Women acknowledge that strippers measure their worth according to the amount of tips they earn and that they want attention, acceptance, and approval from the customers because it brings money (Futterman 1992).

Women in stripping feel it doesn't take much skill to be a stripper (Forsyth and Deshotels 1997; McCaghy and Skipper 1970). *"It would be nice to say women need dance talent but it's not true*." *"Tits, pussy, and blonde hair is all it takes*." Instead they referred to dissociation to abuse. *"It takes a willingness to do it…anybody can do it." "It takes somebody who can shut themselves off and be really fake." "…the ability to take a lot of abuse*." They state a stripper needs a good head on her shoulders, an open mind, guts, strength, and survival skills. They believe they need abuse counseling, a lifeline from the "outside world", and education about what's really going on. *"Need to know they have options, that they aren't always going to be a 'ho'*." Women in stripping want a union to protect strippers, decent working conditions, fair treatment, and an end to cruelty by management. Lastly, strippers think that women and girls don't know what they are getting into when they first start dancing. *"It's really harmful because it is so benign, so accepted*." *"Girls think they will have fun dancing and get paid, they have no idea they have to fight men's hands, and dicks, and tongues, and then fight for every fucking dollar bill you earn*." *"It was a lot different than I originally thought*."

The women in this study condemn the men associated with stripping and the impact stripping has on them as the worst parts of stripping. Women do not like the way customers treat them (Thompson and Harred 1992). Furthermore they say they do not like talking to customers, asking men for money, and resent having to have to deal with them at all. They find customers irritating because they are drunk and have negative attitudes towards women. Women characterize customers as scum, psycho mama's boys, rapists and child molesters, old perverted men, idiots, assholes, and pigs. Strippers are largely disgusted by customers and describe them as pitiful and pathetic, stupid and ignorant, sick, controlling and abusive. *"They smell so sour, they breathe very heavy and kind of wheeze when women are near*." *"They are weak abusers who have to subordinate women and girls to feel like a man*." *"I see my dad. They're old enough to be my father*." "*Yuck. I am repulsed by the sight, sound, smell, and touch of them*." *"I'm embarrassed for them*." The women offer insightful evaluations of stripclub customers. They say that these men do not know how to communicate. Moreover, they perceive that customers are out of control, have power and abuse problems, and will do anything to degrade women because they hate women. Strippers also state that customers want a free show and think women are cheap. In contrast, a few women positively perceived some customers as nice and added they are thankful to those who tip well.

Women in this study undoubtedly denounce stripclub owners as pimps and "glorified pimps" and maintain that owners misuse power and are sick. The women also label managers as

pimps citing that they mistreat women, that they make every attempt to take money from the women, and that they are sick because they are affiliated with the industry and know the harm they do. Strippers accuse managers of being threatened and jealous of the money women make and that women are just a dollar to management. Finally, women refer to staff music programmers, doormen, bartenders, bouncers, floorwalkers, and valet as wanna-be pimps because they always want to be tipped. The women see staff as derelicts who can't get a job anywhere else and who think they are cool for working in a stripclub. Strippers perceive staff as creepy and disrespectful and as "looky-lous" who just want to look at naked women for free. Women criticize staff by pointing out that at least owners are making big money. Few women had positive responses, but those that did felt they got along well with staff and had no real hard feelings.

Clearly strippers' attitudes about men are impacted by the activities in stripclubs. Women say they don't like men and men are worthless. Likewise women believe stripping inhibits their ability to be involved in a normal relationship. *"It affects your lovelife and feelings about men."* *"Nice boyfriends can't handle it."* *"Too large a percentage of men fit into category of customer and I do not want to hate men."*

Women in this study expressed mostly negativism regarding their experiences in stripping with themes of abuse, deception, drugs, and low self-esteem. *"I would never do it again. It was degrading."* *"No doubt that it led me to prostitution and my pimp."* *"Taught me how to control men and gave me a false illusion of control. Takes a long time to regain self-control."* *"Don't do it. Once you do it, it is hard to get out."* *"If there is any way you can avoid it…it is hard to get out once you start."* *"I wouldn't recommend it. It is too stressful and I am always comparing myself to other women on the outside."* *"I wish I had put more money away and had more education by the time I quit. I just didn't know it wasn't about success for us, it was about using us."* *"I spent my entire young adulthood being abused. It is hard to undo all this."* *"Drugs destroyed beautiful, healthy women."* *"I blame the men…it is all bad. I didn't think highly of myself while I was in stripping, but I am glad I got out of it by standing up for myself."* *"It is hard to view myself for who I am and my accomplishments rather than how I look and attention from men. I got this from stripping."*

Some women expressed fascination with stripping. *"It has been an experience of a lifetime. I've seen everything…some crazy shit."* *"I have never seen things like I have seen in stripping. It is weird."* Still others felt positively about their experience. *"If it wasn't for the money I made at it, I would have nothing right now. "It has its ups and downs, but I always enjoy the music and dancing and the attention."* *"I have been extremely fortunate as far as what happened in stripping. It provides a good life, but I look at it as a job, work day shifts and work a straight job at the same time."* A few women also determined positive outcomes for themselves from their involvement in stripping. *"It served its purpose as a group for a sense of belonging."* *"Helped me recognize what is right and wrong, and what is right and wrong for me."* *"After surviving it I felt strong."* *"Stripping distracted me from my personal problems that led me into stripping…no way could I have held normal job with the problems I had."*

Above all, women in stripping reject the popular image of stripping and clarify the common misperceptions about stripclubs. *"That no one touches you, women enjoy it, and it's okay for men to go there."* *"That women actually get to wear a costume and actually get to dance."* *"That we get sexually aroused doing this."* *"That men are there to have harmless fun, when they are really there to abuse women."* *"That it is a big party and that the women want to be there for some reason other than money, like sex or to meet men or because they are nudists*

or exhibitionists." "*That you are doing things you want to be doing*." "*That they are not degrading us because girls always are justifying it with college.*" "*That it is not prostitution*." "*That it is glamorous, fast money, easy work, way to get ahead*."

DISCUSSIONS AND CONCLUSIONS

Men associated with stripclubs use force and coercion to establish sexual contact with women in stripping, proposition women for prostitution, intentionally inflict bodily harm upon the women, and expose themselves to the women. These actions are prohibited by law, yet when these crimes are committed against women in stripclubs, the general attitude that strippers deserve what they get prevails. Women's complaints of abuse are met with contempt and are dismissed by owners, managers, and staff. Women are customarily told to ignore abuse and have been rebuffed with "Go bend over and do your job" and "You have to expect a certain amount of that." In the case of women in stripping, enduring sexual violence is part of her job description. Women in stripping are expected to endure these abuses, degradations, and humiliations with a smile and a "Thank You".

The degree of sexual violence perpetrated against strippers explodes the myths about stripping as harmless entertainment. The verbal harassment, physical and sexual abuse, and financial exploitation women suffer in stripclubs is unparalleled in any other legitimate workplace. Women in stripping are subject to actions that would be perceived as assaultive or a least unwanted in any other context or were directed against other women. Stripclubs allow men to use and abuse women in a manner that is not tolerated in any other business.

The organization and conditions of stripclubs not only produce and reproduce gender inequality, but facilitate and normalize men's violence against women. Sexual violence has been normalized, institutionalized, and legalized in the stripclub industry as socially sanctioned male behavior. Stripclubs and the men associated with stripclubs have turned acts of violence into entertainment and tied male sexual pleasure to victimizing and exploiting. Stripclubs are structured according to male domination and control, and are inherently violent. It is impossible to set up stripclubs without sexual violence and that is reason to challenge the legitimacy of stripclubs.

Future research should address men associated with stripclubs and their views on women in stripping and stripclub activities. An exploration of why stripclubs exist, an explanation of why men go to stripclubs, and a description of how stripclub owners and government policy establish the tone and culture of stripclubs are also in order. Future research should explore gender role socialization and female strippers' perceptions of sexual harassment and violence. The definition of sexual harassment should be tested with strippers to learn if they perceive actions differently than women in other workplaces. In turn, strippers' rights in the workplace must be considered. Studies focused on women's emotional and psychological response, including drug and alcohol abuse, to violence in stripclubs should be conducted.

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Testimony of
David Sherman

Former Midwest Manager of Deja Vu

Sexually Oriented Businesses: An Insider's View

Testimony before the Michigan House Committee --
Ethics and Constitutional Law
January 12, 2000

The National Organization Against Lewd Activities (N.O.A.L.A.)
1-800-552-1901

Having been involved in the Adult Entertainment Industry for fourteen years, I am very aware of the consequences this business can have on all involved. Over the years, I've seen friendships, families, and lives destroyed.

Much of the activity of the adult entertainment industry is illegal and criminal. In addition, there are tremendous negative effects on entertainers, communities, local businesses, as well as families.

The following, for your information, are some of my personal experiences with the Adult Entertainment Industry.

Right from the start, drug and alcohol use is rampant. The dancers call it partying. They don't realize that they are medicating themselves in order to do the work they do. Also, the abortion rate is extremely high due to the fact that most have lost contact with family members due to what they do. They also feel they could never take the chance on flawing the body from carrying a child. Additionally, the dancers believe they have no way to support a baby without dancing, and therefore can't quit to have one. Basically, they are caught in a very real, painful "Catch-22."

The girls, if they have never danced, are usually extremely against it and most of the time are hired as waitresses, even though waitresses are not needed. This makes the atmosphere become part of their life. At this point, they see it as a job -- not as stripping -- and are converted quite easily to dancing. Once dancing, they get used to being objectified. It becomes as important to them to hear how beautiful they are 200 times a day as it is to actually make the money from the dancing.

Between the use of drugs to medicate what they do and hearing how beautiful they are all the time, they soon experience what I call "BDA" *Basic Dancer Attitude*. This is when the dancer thinks that no matter what friends, children, husband, and families think about her, it doesn't matter. They can all be replaced because all of the patrons around her find her attractive, beautiful, and idolized. Now the dancers are truly caught in the "adult" scene. With friends and family gone from their lives, they exist alone in this dark, subculture of sex, drugs, alcohol, and prostitution. All of this perverse living, to the dancer, is now just part of her normal lifestyle.

After a couple of years at this level, the dancer realizes she is getting older and attempts to fit back into society. She tries boyfriends, school, or really anything to cling to what is "normal." Realizing that she cannot live in both worlds, she returns to the subculture of the Adult Business, actually despising the real world. This leads to more dependency on drugs and alcohol, which now makes her 100% lost to this life. The dancers will continue living like this until they realize they can no longer stay at their "current level" and keep making money and getting the compliments. Once they realize this, they begin to master more perverse things to make cash, to make up for fading looks and dancer burnout.

The cycle then becomes even more vicious with depression, drugs, alcohol, and body mutilation to stay thin. Finally, they realize they can no longer keep up with the new and younger girls and leave, going to one of five places:

1. They go to a very filthy, nasty club that's full of girls in their position. Here they perform and do some of the most vile and filthy acts you can imagine to make money.

2. Some turn to prostitution, meeting customers outside of the club. The club now becomes a place for them to meet new "clients."

3. Some marry just to be able to survive. But the addictions to drugs and alcohol normally shatters and destroys these relationships.

4. Some actually do break away and go to school to become productive citizens, but the frequency of this is around 1 of 50.

5. They become society's throw-away people -- people used up, degraded, abused, and even sold by the people who own these establishments.

Sadly, these young ladies, over time -- little by little -- become manipulated, controlled, and finally destroyed by a world that our communities have closed their eyes to. Thinking back, there are three girls that seem to stand out rather clearly as examples of what can -- and often times does -- happen to a young, innocent woman who naively gets sucked into the sexually oriented business industry.

1. She was a pretty, intelligent twenty-year-old girl who came into the business as a waitress. She was, from what I could see, from the upper middle class and a loving Christian family. She attended Bowling Green State University in Ohio and was fluent in several languages, plus carried a 3.8 grade point average. She soon became interested in stripping. She started dancing and very quickly got caught up in the lifestyle of drugs, alcoholism, and lesbianism. I watched her life deteriorate for about two years. She has, as far as I know, gone on to graduate from school. But still after five years, she has not left this subculture and only fallen deeper into it.

2. This young lady was also a nice, nineteen-year-old pharmacy major at the University of Toledo in Ohio. She too started as a waitress and soon converted to dancing. Her family was from Cleveland and were paying all of her schooling and housing. She was from a wealthy family who owned several businesses from construction to restaurants. After about eight months, her family found out what she was doing and did everything in their power to get her to quit. But by this time, she was making enough money and doing enough drugs to think she could handle life on her own. Her family lost all contact, and she lost all control. She disappeared into

this subculture and I haven't heard of her since, and that has been over three years ago.

3. Another young victim was a medical student from the University of Toledo. Her husband of only a couple of weeks worked in one of these adult clubs. Being newlyweds, they needed money, but she did not want to dance. Soon after waitressing, she easily converted to dancing. The life quickly consumed her. She moved to St. Louis for her medical career but soon quit school and started dancing at a club there. Divorce quickly followed, and she went on to California doing drugs and making XXX films. I recently learned she has contracted AIDS after about two years in the pornography film business and is now working in a fast food restaurant in San Diego.

THE MANAGER'S ROLE

As far as female employees in adult entertainment nightclubs – everyone that is hired is treated as a potential dancer. It really doesn't matter if she's hired as a waitress, hostess, or even a bartender.

First, you must make the girl feel at home in an environment that is so abnormal that most people have to be made comfortable. In fact, you could almost say they have to be "hardened' to the club life. This is easily accomplished by working there as many hours as possible and by having all of the staff treat them as if they were long lost friends. It's important for the management to do this also.

Second, after a few weeks, because the girl is now your friend, as a manager you bring up how short you are on girls that night or how short the amateur contestants are. You ask them to please help, that they don't need to take their clothes off, but the club just needs an extra body. Usually, they happily agree to do this. You then have them change into dancing attire, usually a skimpy dress, a teddy, g-string or a t-bar (which is a very small pair of panties). Often, the girls -- having become used to the environment and having seen nudity daily -- are intoxicated with the sense of being on stage and are lured out of their clothing by the other girls, customers, and promises of large tips.

Now at this point, the manager's job just starts. But if the girl has not taken her clothes off, the manager again has to start in on her about needing more help on the floor. Again, most of the girls will agree to help the manager out. At this time, you tell them that things are not that busy, and you take them out for dinner, "my treat." Of course, the club always writes this off! So you go out, have some drinks, and small talk with the girl. Returning to the club, she now believes that you're good friends, plus she is under the influence of alcohol. At this point, she easily disrobes on the customers request, with the other girls welcoming a new dancer into their ranks. The experienced dancers will then go on about how beautiful she is and how much money she'll make.

Of course, even now, she still might have not disrobed. But, by this point, you are her friend and can make her feel guilty about not helping out more and ask her to please disrobe, as without her, you'll not make much money that night. She is needed. People who need her and customers who tell her how beautiful she is surround her.

She now experiences a variety of emotions, and being human, needs to be needed. With this emotion fulfilled, she finds herself wanting to be complimented -- which she is -- and she wants to make money -- which she can. You then play on the "what more can a girl want?" and the subject of self-worth never really comes up.

At this point, if she still has not disrobed, you let her know you no longer need her for her position, but dancing is open if she wishes to still work at the club. This does not work unless she has incurred debts and needs the money, or she actually enjoyed the experience and doesn't want to lose her new friends. If she stays, the manager must start training her to be a professional. This means changing almost everything about her, including her personality. She must now be a passive/aggressive if she is to survive. This means that she needs to learn to say whatever it takes to make money. She can never talk about her personal life to anyone, as clients can hear this.

What you try to do is get the girls programmed to have regular customers. A regular customer is a customer who believes that this girl actually cares for him, and now his fantasy world is complete. He comes in on a regular basis, and she invites him back on certain days and times as to not interfere with other regular customers. This is usually set for the club's slow times because when it's busy, she can make money without her regular clientele. Of course, with all of these girls having regular clients, the club is guaranteed a steady income and solid revenues. The club regulars are usually family men looking for an escape from the real world, and the girls are taught to prey upon them.

Mandatory meetings are set for all the girls. This time is really used mostly for programming the girls and getting into their heads. You again let them know what you want and motivate them by whatever it takes. Soon the new dancer starts running around with the more hardened and seasoned girls, and they realize how much easier this job is being drunk, high, or more often than not, both. By now she's working until 2 a.m., staying out all night, partying after work, and then grabbing a breakfast with the girls. They wake up, go to work, and the cycle starts all over.

They have no time to go to the post office, the dentist, or any other "normal" things. They are deep into the club scene and on the road to hard times and even self-destruction. At this point, school, family, and friends -- as well as everything else they once had -- has faded into a world that no longer exists for them.

As a manager, at this point, anything you say, ask, or demand of the girl will gladly be done because the club is now her home. The girls don't realize this is their only world now, and the club manager now has total control over what's going on in their lives. The girls will even put up with degradation, verbal and emotional abuse, and everything else the manager wants to do.

At this time the girl may feel fed up and leave, going to a new club thinking to herself that she finally made a decision on her own and things will be better. But she is really just fooling herself. Now the manager at the new club does the same things except now she has no friends to talk to. And the manager knows that most of the time she cannot return to the old club, so he abuses her even worse than the first manager. Of course, she then drinks more and gets high more than ever, hoping it will go away. It will only get worse for her now.

Soon the dancer finds herself not being complimented as much or making the money she did at first. Because of the drugs and alcohol, she finds herself aging fast and losing her looks. Of course, this now leads to a downward spiral of more drinking, partying and drugs. Many opt for plastic surgery in one form or another because in their own eyes, their looks are what they are worth. With most people, if they gained weight or lost their tan, it would not be a problem. But to a dancer, it would be devastating for them for days and even weeks and beyond.

CUSTOMERS

I've found that there are five categories, or groups of customers that visit the clubs.

1. The first customer, usually 28 to 50, is married or recently divorced. He almost always becomes not only a pornography addict but also a "fantasy" addict. He is lured in for just a glimpse of the "other side." But once he is there, the well-trained dancer learns his weaknesses and strengths, and knowing what buttons to push, soon has him as her "regular." He is soon here three to four times a week, seeing only one dancer, believing she is is girlfriend while being friends with most of the dancers. After awhile, he may not come in on his lunch hour but after work before he goes home to his family. Soon bills are not being paid and clothes for his children are not being bought. I've seen them believe that this girl so deeply cares for him, that he will try and borrow money from her. I've also seen regulars leave a five-year-old child locked out in the car in the parking lot for hours while they lived out their fantasies. Also, I watched a patron cause a fatal accident outside of the club. While waiting for the authorities, he walked into the club to see his "girlfriend' who was dancing that night. Those are just a few examples of how physically and emotionally tied to the club these people become. Unfortunately, this group usually makes up about 30% of the entire group, but about 85% of the groups daytime traffic and 20% of the nightime. I could write pages on customer number one as far as bad decisions he makes trying to carry on his "love affair" with dancers.

2. Customer two is the young adult 18 to 30 there for a bachelor party, birthday, college party, and so on. A lot of these never come back except for special occasions. But a small percentage will become a regular, being addicted from day one. About 15% of these will return again and again to the club. This group makes up about 20% of the overall club business.

3. Customer three is the majority of your night business. He is 25 to 30, comes in maybe once or twice a month, and either feels a friendship there or maybe has a need being fulfilled. He continues to teeter-totter on the edge of becoming a regular #1. It only takes the right girl or the right experience, and he easily falls into that category.

4. Customer four is the gentleman 45 to 70 or the 18 to 25 age bracket. He comes in only once in a great while for special events, special entertainers or business meetings. He usually makes up the rest of the 15% of the dayshift business and the minority of your night shift unless he is there for a special event. Most of the time, this will be the only time you see him. A very small percentage of these will become a number one customer.

5. The fifth, and most dangerous customer, is the person there merely for business, selling, giving, and using the girls in his drug trade. Many clubs have several of these people all intertwined together in this dark world. They pull the life from and inflict pain not only on the girls, but their families as well. With girls wanting and needing drugs, number five has them in his control as well as the club. He becomes a friendly face everyone wants to see. The bad thing is, many girls owe him money, so he either makes them another bad deal (drawing the girl in deeper), or brings her to his world altogether to be a pusher, be involved in a biker gang, or give himself sexually to a small group of dealers. The sad thing is, the girl will feel like she is among friends and will try to drag others into this dark world with her.

OVERALL INSIDER OBSERVATIONS

Having been in the Adult Entertainment Industry for years, I have seen everything from monies not being entered into registers to owners leaving with shoeboxes full of cash on a weekly basis. I have walked into clubs and witnessed 15-year-old girls working -- with their parent's knowledge. I've seen girls leave with customers, meet them outside, as well as literally perform sex acts while lap dancing for customers. Again, the bar may pay an employee to watch for this, but the girls pay them more not to see it. If these are "clean upstanding businesses," why is it that day after day used condoms were found in V.I.P. rooms?

The owners many times hide themselves by owning several corporations, one of which will finally own the club. Many times in liquor clubs, the liquor license is not even in an owner's name, but a manager who was given stock to do this.

Even though the girls are private contractors, the clubs do have contracts with both stage names and real names on them. The clubs hire people to count every lap dance done in order to collect the percentage for the club, but yet the clubs claim there is no way to keep track of what the girls make. In turn, this allows the girls not to file taxes and also be on Federal and State Aid programs, even though she may be making hundreds and thousands of dollars weekly.

Again the clubs claim the girls are private contractors, but many are told when they will work which makes them employees.

As far as the clubs themselves following written law, I have copies of a Judgement Entry that ever since the day it was handed down has not been followed nor enforced. The club owner himself said not to follow it. This club also is part of a very large club chain.

Maybe the reason that it has not been enforced is that a lot of local law enforcement not only frequent these businesses, but also date the entertainers. This is true as well of firemen and city officials who all get in free. In fact, not long ago in a club in Detroit, an off-duty police officer lost his gun and could not find it. Another became mad at this girlfriend who was a dancer. Upon leaving, he discharged his gun into the door, hitting the owner of the club in his face.

Violence does occur. Once during a dancers' meeting, the manager had upset one of the girls who happened to be a member of a gang. She had him beaten up badly following the meeting.

Another manager tried to force himself on an entertainer. Again, her boyfriend belonged to a gang, and a bomb threat, as well as violence, occurred at the club. He was not terminated but merely sent to another club.

Another manager literally held a gun to a girl's head because she wanted to quit. He was still employed for years after that. Again, another manager went on a rampage in a hotel, and while he was there, discharged a firearm. He was simply moved to another location and is now in prison for attempted rape.

As far as the argument that the girls are only putting themselves through school, that is a farce. Very few of these even attend classes once they are making the kind of money that they do. Soon they are working until 2, 3 or 4 a.m.; and in no way, shape, or form are they getting up and going to classes. Very few of these girls finish school.

Another dimension to the concern surrounding sex clubs is the rampant tax evasion maneuvers exercised by the various employees.

TAX EVASION AND THE SEX CLUB EMPLOYEE

DJ

These people are paid in most clubs hourly; but as well as their hourly wages, the dancers are made to tip them nightly. Usually the tip is 10 percent of what the girl made that evening; and the DJ keeps track of how many dances the girls have done to insure his cut. Example: If there are, say, 30 girls working a night shift and the average tip to the DJ is, let's go low and say $15; then in cash income, the DJ just made $450. This income is generally not reported as the DJ receives his regular paycheck and usually only claims that.

DOORMEN

Again, in most clubs the girls are required to tip the doormen out, as he walks them to and from the parking lot and tries to ensure their safety in the club as well. While the tips are not as good as the DJ's, the doormen still could average $60 nights. Five nights a week figures out to $300 weekly in pretty much unreported income.

FLOORWALKERS

These are the people who count dances for the clubs to make sure that the girls pay the 33 percent they are required to the club for every dance done. These also are the same ones that are responsible for watching to make sure the girls are not doing things outside the line of the law. They make tips by turning their heads to illegal dances. In turn, the girls tip them better for letting them make more money by dancing a little more dirty then legal. I have seen floorwalkers leave with as much as $600 in one night. Again, they receive a paycheck so reporting the extra income generally does not happen. The truly bad thing about a dishonest floorwalker is if one girl is paying him to dance dirty, soon all girls have to. In order to make any money at all, they too must alter the dances they do to illegal ones.

DANCERS

I would say that by far the dancer is the worse offender of tax evasion in the clubs as she generally has nothing in her name and reports very little, if any, of her income. The dancers with children generally are on federal and state welfare programs collecting food stamps, checks, and insurance while making hundreds, if not thousands, of dollars a week or more.

BARTENDERS/WAITRESSES

This group is probably the least tipped by the dancers, but again most clubs require that the dancers do tip. The reasoning behind all this tipping is it lets the club owners pay bottom dollar for help but yet the employees make good money due to the tipping program.

MANAGERS

The managers, on the other hand, are not tipped; but in a lot of cases, if a girl does something wrong or doesn't show up for work, he will fine her. In turn, most of the time that money never makes it to the register but directly into his pocket. The clubs know of this. That's how they get by with paying some managers as little as $7 an hour. Again this money never gets reported as it too is untraceable cash.

I could easily fill an entire book with what I've observed in the Adult Pornography Industry. I've seen countless lives shattered and unbelievable heartache. You would be surprised at the amount of "it can't happen to me" or "I won't be like that" that I have heard.

I've formed National Association Against Lewd Activities (N.O.A.L.A.) with a few others to educate the public as to the manner in which these so-called Adult Clubs are sucking in well-intentioned young people, seeking quick bucks for survival. Unwittingly, the demands brought on by the abusive lifestyle leads to the degradation, if not the destruction, of themselves and countless others.

But it isn't enough just to educate the public. It is vital that this committee recognizes that it is the role of government to ensure the public health, safety, and welfare of its citizenry. My testimony here today represents merely a tip of the iceberg. What I have described is not just what occurs in one pornography outlet in some large city far away, but this IS the manner in which all pornography outlets operate from the six various Deja Vu's in Michigan (Saginaw, Lansing, Kalamazoo, Flint, Ypsilanti, Port Huron) to the scores of other similar outlets operating under various names from Sensations to Showgirls to Velvet Fingers, etc., etc.

Background checks, licensing as well as enforcing regulations, are essential for the safety of clients, entertainers, and communities.

LOBBYING - TO AVOID RESTRICTIONS

Adult entertainment businesses use lobbying as a key to keeping new ordinances or legislation from being passed. This plays a very important role in allowing them to run these businesses the way THEY want to.

Large turnouts by entertainers, owners, owners reps, as well as attorneys, law students, and even the A.C.L.U. at times are used to intimidate those in local government and to keep the new legislation from passing -- by making the government body think that masses have formed on their own, when in actuality they have been pulled together by a team of people paid to do just that.

Another thing not touched on is that in every club in the state where the new legislation is being considered there are signature cards for the patrons to sign as well as information giving times and locations of hearings.

In fact, one company I worked for had this down to a fine art. Every manager was required to attend all city council meetings in order to stay on top of any new legislation being proposed. They then were to buy the minutes from the meeting and fax or send them to the corporate office. If any new legislation was proposed, that information went to the person who was in charge of lobbying and to the corporate attorney.

Even if the proposed legislation involved a city, town, or state in which the adult business had no entities, the club attorneys and attorneys would still come out in full force to defeat it, as it may have had an adverse effect on them at a later time.

Another tactic used so frequently is to bring in big gun attorneys from elsewhere to intimidate and sue as well as tie up in court the passed ordinance for as long as possible or until it ran the city or township out of funding. These businesses have plenty to spend on staying open and running them the way THEY want to. From time to time the company would use a local attorney, coaching him and making him file the things they needed in order to make it look as though they were a local business.

In regard to the lobbying, the attorney -- the funding as well as lawsuits -- the adult businesses seem to somehow utilize the press to their advantage. The press simply didn't deal with the real issues in most cases.

INDEPENDENT CONTRACTORS

The entertainers who work in these clubs, even though supposedly independent contractors, oddly enough pay upwards of 30% of their income to work in these establishments. This does not include the unwritten laws of tipping which are all explained to them by the management or other entertainers. This includes tipping the DJ in order to listen to or dance to the music they want to have played. They also must tip doormen, floorwalkers, waitresses and bartenders in turn helping the club to pay the wages for the cheap labor which the clubs employ.

By the time a dancer is done, she may have paid up to 50% of her income just to work. Most of this income, in my experience, is not reported by these employees. One instance stands out clearly. An entertainer phoned me saying she knew that fines, or so-

called reinstatement fees, were not being rung into the register. I, in turn, told her to write the management a check and ask for a receipt. At that point, she was told to leave and not come back as the club did not give out receipts or accept checks for fines.

NINE REASONS FOR THE PASSAGE OF THE PROPOSED LEGISLATION

In closing, I would like to say that without regulation of the kind proposed by these bills -- and mind you this is merely the tip of the iceberg -- businesses like these will continue to get away with whatever, whenever they please.

There are several reasons as to why this legislation is needed. The following, while not an exhaustive list, are the ones that come immediately to mind:

1. Helping set and ENFORCE regulation on a statewide level will keep the criminals from moving from city to city staying employed in the same type of business, never having to be but a ghost to the current laws. In other words, these regulations will help keep these lawless ones more answerable to the laws of the land and prevent them from preying on naive young ladies, desensitizing them, duping them into gradual steps of so-called entertainment which ultimately leads them to their degradation and destruction.

2. Drug abuse and dealing run rampant in many clubs, almost always in the bathrooms, locker rooms, and yes, even offices. Again, licensing should help curb the offenders by letting them know it is no longer tolerated, and is being regulated on a statewide level in addition to local regulation.

3. It would keep known sex offenders as well as known felons from working, owning, or entertaining in the clubs and adult businesses, as many owners in these businesses have a criminal record.

4. The licensing issue should keep the entertainers from soliciting in any way which, as we all know, comes in many forms. In turn, that will help keep adult businesses as above table as possible. It will also help keep the seasoned entertainer from teaching the new ones the so-called “tricks of the trade” which most of the time are illegal.

5. The hours of operation will help in curbing many of the illegal activities such as drug dealing, solicitation, and illegal dances due to the fact that the more intoxicated the entertainer is the more the dancer is likely to do. It is a big plus on the safety and welfare of the entertainers, employees, citizens, and communities -- as many of the late night people are truly drunk or intoxicated on other forms of drugs and literally do things they would never do if it were not in the late night situation.

6. State regulation on lap dances and lewd behavior will keep the entertainers from just being fined or as it is called in the business "contract reinstatement fees" which most entertainers gladly pay as they make a lot more money then they lose the dirtier the dances are. Dirtier most of the time means illegal.

7. The proposed legislation will put the entertainer in a position to pay taxes as she would no longer be an unknown person without an income. This, in turn, will keep the clubs above board on what they are being paid by the entertainers as the girls will need every write-off they can get, including the stage fees. It will also keep the many girls who are on federal and state aid (while making hundreds of dollars a week) off these programs.

8. Several small clubs come to mind that it will really keep above board. I consulted on a few smaller clubs, and in the back room I found all paperwork hidden away that would ever be used to pay taxes. The pages were in total disarray as if they were just thrown in there nightly. What taxes were paid on, I'll never know, but it was not on the paperwork or register receipts I found or which dated back several years.

9. The next thing I'm sure it will curb is the blatant cash flowing out of clubs. In one club I had consulted on I found $672,000 in lost retail liquor sales. The owner, upon my telling him what I found, has not spoken to me since. He did, however, build a new house paying cash for the labor.

In closing, with great concern for our present generation and those who will come after us, I encourage this committee to vigorously support the passage of the proposed 13 bill package and to move it with great haste. This is a significant package of bills because if enforced, it will curb the criminality and lawlessness that is directly linked to sexually oriented businesses. Without its passage, untold numbers of lives will continue to be degraded, victimized and destroyed.

Exhibit M-4

Summary of IMPD UCR Classified Part I Crimes at Bookstore Addresses
Pre- and Post- Enforcement Periods/Regulated v Non-Regulated Hours

	Total Crimes	*Non-Regulated Hours*	*Mon-Sat Midnight to 10 am*	*Sunday*
LAFAYETTE VIDEO AND NEWSSTAND				
Apr 1 2002 - May 31 2005	8	2	5	1
Jun 1 2005 to March 31 2008	6	5		1
NEW FLICKS VIDEO				
Apr 1 2002 - May 31 2005	3	3		
Jun 1 2005 to March 31 2008	2	1	1	
KEYSTONE VIDEO & NEWSSTAND				
Apr 1 2002 - May 31 2005	11	3	3	5
Jun 1 2005 to March 31 2008	10	5	3	2
ANNEX BOOKS				
Apr 1 2002 - May 31 2005	9	5	3	1
Jun 1 2005 to March 31 2008	2	1	1	
VIDEO GALLERY				
Apr 1 2002 - May 31 2005	5	3	1	1
Jun 1 2005 to March 31 2008	1	1		
Grand Sum Apr 1 2002 - May 31 2005	**36**	**16**	**12**	**8**
Grand Sum Jun 1 2005 to March 31 2008	**21**	**13**	**5**	**3**

Prepared by IMPD Resource Coordinator based on UCR Case Numbers selected by City of Indianapolis Planning Division and follow-up reading by IMPD UCR specialist.
Pre-enforcement period (April 1, 2002 - May 31, 2005) represents 38 calendar months. Post-enforcement period (June 1, 2005 - March 31, 2008) represents 34 calendar months.
Time Ranges for crimes where the exact time was unknown were assigned based on the UCR convention of first likely time of occurrence.

IMPD UCR Classified Crime Listing - Adult Bookstore Locations

Exhibit M-5

Day Type	Time Range	Address	Case #	File Date	UCR Description
02402 N LAFAYETTE RD - LAFAYETTE VIDEO AND NEWSSTAND					
Apr 1 2002 - May 31 2005					
Monday - Saturday	10:01 am to 11:59 pm	02402 N LAFAYETTE RD	030087247	08/25/2003	141 ROBBERY - ARMED COMER H
Monday - Saturday	10:01 am to 11:59 pm	02402 N LAFAYETTE RD	040045406	04/22/2004	132 ROBBERY - ATTMP ARMED
Monday - Saturday	Midnight to 10am	02402 N LAFAYETTE RD	020046740	04/29/2002	141 ROBBERY - ARMED COMER H
Monday - Saturday	Midnight to 10am	02402 N LAFAYETTE RD	030056432	05/29/2003	242 LARC-50/200-SHOPLIFTING
Monday - Saturday	Midnight to 10am	02402 N LAFAYETTE RD	030117438	11/24/2003	150 ROBBERY - STRARM HIWAY
Monday - Saturday	Midnight to 10am	02402 N LAFAYETTE RD	030120630	12/05/2003	141 ROBBERY - ARMED COMER H
Monday - Saturday	Midnight to 10am	02402 N LAFAYETTE RD	040103315	10/05/2004	141 ROBBERY - ARMED COMER H
Sunday	Midnight to 10am	02402 N LAFAYETTE RD	020044274	04/21/2002	141 ROBBERY - ARMED COMER H
Jun 1 2005 to March 31 2008					
Monday - Saturday	10:01 am to 11:59 pm	02402 N LAFAYETTE RD	050100215	10/03/2005	252 LARC-UNDER 50-SHOPLIFTING
Monday - Saturday	10:01 am to 11:59 pm	02402 N LAFAYETTE RD	060012093	01/07/2006	141 ROBBERY - ARMED COMER H
Monday - Saturday	10:01 am to 11:59 pm	02402 N LAFAYETTE RD	070014989	01/29/2007	141 ROBBERY - ARMED COMER H
Monday - Saturday	10:01 am to 11:59 pm	02402 N LAFAYETTE RD	070129023	08/15/2007	141 ROBBERY - ARMED COMER H
Monday - Saturday	10:01 am to 11:59 pm	02402 N LAFAYETTE RD	070133426	08/22/2007	132 ROBBERY - ATTMP ARMED
Sunday	10:01 am to 11:59 pm	02402 N LAFAYETTE RD	060142733	12/10/2006	192 BURG - FRC ENT-NON-RES NGT

Total Location Count: 14

MILWAUKEE, WI AE REGS 001764

Prepared by IMPD Resource Coordinator based on UCR Case Numbers selected by City of Indianapolis Planning Division and follow-up reading by IMPD UCR specialist

The pre-enforcement period (April 1, 2002 - May 31, 2005) represents 38 calendar months. The post-enforcement period (June 1, 2005 - March 31, 2008) represents 34 calendar months.

Time Ranges for crimes where the exact time was unknown were assigned based on the UCR convention of first likely time of occurrence.

IMPD UCR Classified Crime Listing - Adult Bookstore Locations

Day Type	Time Range	Address	Case #	File Date	UCR Description
03580 N LAFAYETTE RD - NEW FLICKS VIDEO					
Apr 1 2002 - May 31 2005					
Monday - Saturday	10:01 am to 11:59 pm	03580 N LAFAYETTE RD	020126591	12/14/2002	141 ROBBERY - ARMED COMER H
Monday - Saturday	10:01 am to 11:59 pm	03580 N LAFAYETTE RD	040030138	03/06/2004	141 ROBBERY - ARMED COMER H
Monday - Saturday	10:01 am to 11:59 pm	03580 N LAFAYETTE RD	050017427	01/26/2005	132 ROBBERY - ATTMP ARMED
Jun 1 2005 to March 31 2008					
Monday - Saturday	10:01 am to 11:59 pm	03580 N LAFAYETTE RD	070092767	06/18/2007	141 ROBBERY - ARMED COMER H
Monday - Saturday	Midnight to 10am	03580 N LAFAYETTE RD	050095677	09/21/2005	192 BURG - FRC ENT-NON-RES NGT

Total Location Count: 5

Prepared by IMPD Resource Coordinator based on UCR Case Numbers selected by City of Indianapolis Planning Division and follow-up reading by IMPD UCR specialist

The pre-enforcement period (April 1, 2002 - May 31, 2005) represents 38 calendar months. The post-enforcement period (June 1, 2005 - March 31, 2008) represents 34 calendar months.

Time Ranges for crimes where the exact time was unknown were assigned based on the UCR convention of first likely time of occurrence.

IMPD UCR Classified Crime Listing - Adult Bookstore Locations

Day Type	Time Range	Address	Case #	File Date	UCR Description
04501 N KEYSTONE AV - KEYSTONE VIDEO & NEWSSTAND					
Apr 1 2002 - May 31 2005					
Monday - Saturday	10:01 am to 11:59 pm	04501 N KEYSTONE AV	020075627	07/20/2002	141 ROBBERY - ARMED COMER H
Monday - Saturday	10:01 am to 11:59 pm	04501 N KEYSTONE AV	030024566	02/20/2003	256 LARC-UNDER 50-BUILDING
Monday - Saturday	10:01 am to 11:59 pm	04501 N KEYSTONE AV	040128106	12/23/2004	252 LARC-UNDER 50-SHOPLIFTING
Monday - Saturday	Midnight to 10am	04501 N KEYSTONE AV	030042553	04/17/2003	172 ASSAULT - OTHER WEAPON
Monday - Saturday	Midnight to 10am	04501 N KEYSTONE AV	040030492	03/08/2004	141 ROBBERY - ARMED COMER H
Monday - Saturday	Midnight to 10am	04501 N KEYSTONE AV	050042724	04/20/2005	242 LARC-50/200-SHOPLIFTING
Sunday	10:01 am to 11:59 pm	04501 N KEYSTONE AV	020115672	11/10/2002	151 ROBBERY - STRARM COMER H
Sunday	10:01 am to 11:59 pm	04501 N KEYSTONE AV	030059986	06/08/2003	252 LARC-UNDER 50-SHOPLIFTING
Sunday	10:01 am to 11:59 pm	04501 N KEYSTONE AV	050037414	04/03/2005	192 BURG - FRC ENT-NON-RES NGT
Sunday	Midnight to 10am	04501 N KEYSTONE AV	020117905	11/17/2002	252 LARC-UNDER 50-SHOPLIFTING
Sunday	Midnight to 10am	04501 N KEYSTONE AV	040075446	07/18/2004	252 LARC-UNDER 50-SHOPLIFTING
Jun 1 2005 to March 31 2008					
Monday - Saturday	10:01 am to 11:59 pm	04501 N KEYSTONE AV	050083727	08/17/2005	141 ROBBERY - ARMED COMER H
Monday - Saturday	10:01 am to 11:59 pm	04501 N KEYSTONE AV	060072238	07/07/2006	141 ROBBERY - ARMED COMER H
Monday - Saturday	10:01 am to 11:59 pm	04501 N KEYSTONE AV	060077207	07/21/2006	236 LARC-OVER 200-BUILDING
Monday - Saturday	10:01 am to 11:59 pm	04501 N KEYSTONE AV	060094478	09/06/2006	232 LARC-OVER 200-SHOPLIFTING
Monday - Saturday	10:01 am to 11:59 pm	04501 N KEYSTONE AV	070081141	05/30/2007	141 ROBBERY - ARMED COMER H
Monday - Saturday	Midnight to 10am	04501 N KEYSTONE AV	050063459	06/20/2005	192 BURG - FRC ENT-NON-RES NGT
Monday - Saturday	Midnight to 10am	04501 N KEYSTONE AV	060037950	03/30/2006	174 ASSAULT - SIMPLE
Monday - Saturday	Midnight to 10am	04501 N KEYSTONE AV	060114182	11/01/2006	192 BURG - FRC ENT-NON-RES NGT
Sunday	10:01 am to 11:59 pm	04501 N KEYSTONE AV	060067976	06/25/2006	193 BURG - FRC ENT-NON-RES DAY
Sunday	Midnight to 10am	04501 N KEYSTONE AV	070042277	03/25/2007	191 BURG - FRC ENT - RES DAY

Total Location Count: 21

Prepared by IMPD Resource Coordinator based on UCR Case Numbers selected by City of Indianapolis Planning Division and follow-up reading by IMPD UCR specialist

The pre-enforcement period (April 1, 2002 - May 31, 2005) represents 38 calendar months. The post-enforcement period (June 1, 2005 - March 31, 2008) represents 34 calendar months.

Time Ranges for crimes where the exact time was unknown were assigned based on the UCR convention of first likely time of occurrence.

IMPD UCR Classified Crime Listing - Adult Bookstore Locations

Day Type	Time Range	Address	Case #	File Date	UCR	UCR Description
06767 E 38TH ST - ANNEX BOOKS						
Apr 1 2002 - May 31 2005						
Monday - Saturday	10:01 am to 11:59 pm	06767 E 38TH ST	020050986	05/11/2002	243	LARC-50/200-FROM VEHICL
Monday - Saturday	10:01 am to 11:59 pm	06767 E 38TH ST	020121395	11/27/2002	252	LARC-UNDER 50-SHOPLIFTING
Monday - Saturday	10:01 am to 11:59 pm	06767 E 38TH ST	030080621	08/06/2003	250	LARC-UNDER 50-PICKPOCK
Monday - Saturday	10:01 am to 11:59 pm	06767 E 38TH ST	040015016	01/16/2004	141	ROBBERY - ARMED COMER H
Monday - Saturday	10:01 am to 11:59 pm	06767 E 38TH ST	050053293	05/21/2005	132	ROBBERY - ATTMP ARMED
Monday - Saturday	Midnight to 10am	06767 E 38TH ST	020059759	06/05/2002	252	LARC-UNDER 50-SHOPLIFTING
Monday - Saturday	Midnight to 10am	06767 E 38TH ST	050017545	01/27/2005	141	ROBBERY - ARMED COMER H
Monday - Saturday	Midnight to 10am	06767 E 38TH ST	050031628	03/16/2005	141	ROBBERY - ARMED COMER H
Sunday	10:01 am to 11:59 pm	06767 E 38TH ST	040013054	01/11/2004	242	LARC-50/200-SHOPLIFTING
Jun 1 2005 to March 31 2008						
Monday - Saturday	10:01 am to 11:59 pm	06767 E 38TH ST	050003213	12/15/2005	242	LARC-50/200-SHOPLIFTING
Monday - Saturday	Midnight to 10am	06767 E 38TH ST	060121161	11/20/2006	192	BURG - FRC ENT-NON-RES NGT

Total Location Count: 11

MILWAUKEE, WI AE REGS 001767

Prepared by IMPD Resource Coordinator based on UCR Case Numbers selected by City of Indianapolis Planning Division and follow-up reading by IMPD UCR specialist
The pre-enforcement period (April 1, 2002 - May 31, 2005) represents 38 calendar months. The post-enforcement period (June 1, 2005 - March 31, 2008) represents 34 calendar months.
Time Ranges for crimes where the exact time was unknown were assigned based on the UCR convention of first likely time of occurrence.

IMPD UCR Classified Crime Listing - Adult Bookstore Locations

Day Type	Time Range	Address	Case #	File Date	UCR Description
06801 E 38TH ST - VIDEO GALLERY					
Apr 1 2002 - May 31 2005					
Monday - Saturday	10:01 am to 11:59 pm	06801 E 38TH ST	020003049	08/14/2002	252 LARC-UNDER 50-SHOPLIFTING
Monday - Saturday	10:01 am to 11:59 pm	06801 E 38TH ST	050034999	03/26/2005	141 ROBBERY - ARMED COMER H
Monday - Saturday	10:01 am to 11:59 pm	06801 E 38TH ST	050039455	04/09/2005	141 ROBBERY - ARMED COMER H
Monday - Saturday	Midnight to 10am	06801 E 38TH ST	040028841	03/03/2004	192 BURG - FRC ENT-NON-RES NGT
Sunday	10:01 am to 11:59 pm	06801 E 38TH ST	040058593	05/30/2004	141 ROBBERY - ARMED COMER H
Jun 1 2005 to March 31 2008					
Monday - Saturday	10:01 am to 11:59 pm	06801 E 38TH ST	060083259	08/07/2006	174 ASSAULT - SIMPLE

Total Location Count: 6

MILWAUKEE, WI AE REGS 001768

Prepared by IMPD Resource Coordinator based on UCR Case Numbers selected by City of Indianapolis Planning Division and follow-up reading by IMPD UCR specialist
The pre-enforcement period (April 1, 2002 - May 31, 2005) represents 38 calendar months. The post-enforcement period (June 1, 2005 - March 31, 2008) represents 34 calendar months.
Time Ranges for crimes where the exact time was unknown were assigned based on the UCR convention of first likely time of occurrence.

IMPD UCR Classified Crime Listing - Adult Bookstore Locations

Day Type	*Time Range*	*Address*	*Case #*	*File Date*	*UCR Description*

Total Report Count: 57

Prepared by IMPD Resource Coordinator based on UCR Case Numbers selected by City of Indianapolis Planning Division and follow-up reading by IMPD UCR specialist
The pre-enforcement period (April 1, 2002 - May 31, 2005) represents 38 calendar months. The post-enforcement period (June 1, 2005 - March 31, 2008) represents 34 calendar months.
Time Ranges for crimes where the exact time was unknown were assigned based on the UCR convention of first likely time of occurrence.

Exhibit M-6

IMPD UCR Classified Crime Summary (by Described Address)
500' Footer Buffer of 4 Points: Pre- and Post- Enforcement Time Frames (UCR Count Order)

2402 Lafayette Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Apr 1 2002 - May 31 2005									
02402 N LAFAYETTE RD - LAFAYETTE VIDEO AND NEWSSTAND	8		6	1				1	
02422 N GOODLET AV - Residence	4					1	1	2	
02421 N CENTENNIAL ST - Residence	3					1	2		
02429 N CENTENNIAL ST - Residence	3				1	2			
02440 N LAFAYETTE RD - A AND E LAUNDROMAT	3						1	2	
02440 N LAFAYETTE RD - SAV A TON GROCERY STORE	3						3		
02458 N GOODLET AV - Residence	3				1	1		1	
02362 N GOODLET AV - Residence	2					1	1		
02369 N GOODLET AV - Residence	2		1			1			
02371 N GOODLET AV - Residence	2				1			1	
02441 N LAFAYETTE RD - Papa John's Pizza	2			1				1	
02450 N LAFAYETTE RD - MENA AUTO SERVICE AND SALES	2						1	1	
Address Suppressed - Generic Street Address	2	2							
02353 N GOODLET AV - Residence	1				1				
02370 N LAFAYETTE RD - Generic Street Address	1				1				
02400 N GOODLET AV - Generic Street Address	1				1				
02400 N LAFAYETTE RD - Generic Street Address	1					1			
02401 N CENTENNIAL ST - Residence	1				1				
02402 N LAFAYETTE RD (Generic) - Generic Street Address	1				1				
02418 N CENTENNIAL ST - Residence	1						1		
02421 N GOODLET AV - Residence	1					1			
02424 KESSLER BL ND - Generic Street Address	1					1			
02425 N CENTENNIAL ST - Residence	1						1		
02429 N GOODLET AV - Residence	1					1			
02433 N GOODLET AV - Residence	1						1		

2402 Lafayette Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Apr 1 2002 - May 31 2005									
02434 N CENTENNIAL ST - Residence	1						1		
02437 N CENTENNIAL ST - Residence	1								1
02440 N LAFAYETTE RD - CRISTANS SUPER SANDWICH SHOPPE	1						1		
02440 N LAFAYETTE RD - Generic Street Address-BUSINESS	1							1	
02445 N LAFAYETTE RD - Generic Street Address	1								1
02445 N LAFAYETTE RD - KAPU AUTO SALES	1						1		
02445 N LAFAYETTE RD - Residence	1								1
02445 N LAFAYETTE RD - S AND S AUTO SALES	1								1
02449 N GOODLET AV - Residence	1				1				
02450 N CENTENNIAL ST - Residence	1						1		
02450 N LAFAYETTE RD - Generic Street Address	1								1
02453 N CENTENNIAL ST - Residence	1						1		
02453 N GOODLET AV - Residence	1						1		
02457 N CENTENNIAL ST - Residence	1					1			
02462 N GOODLET AV - Residence	1		1						
02500 N LAFAYETTE RD - Generic Street Address	1				1				
02500 N LAFAYETTE RD - M AND M CAR WASH	1							1	
02538 N LAFAYETTE RD - Generic Street Address-BUSINESS	1							1	
02545 N LAFAYETTE RD - ALIS AUTO SALES	1						1		
Address Suppressed - Residence	1	1							
Summary for Apr 1 2002 - May 31 2005 (45 detail records)									
Sum	***71***	***3***	***8***	***2***	***10***	***12***	***19***	***12***	***5***

2402 Lafayette Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Incident Occurred Out of Date Range									
02440 N LAFAYETTE RD - P & J LAUNDROMAT	1							1	
Summary for Incident Occurred Out of Date Range (1 detail record)									
Sum	***1***							***1***	
Jun 1 2005 to March 31 2008									
02405 N LAFAYETTE RD - NU LOOK FASHION	7						6	1	
02402 N LAFAYETTE RD - LAFAYETTE VIDEO AND NEWSSTAND	6		4				1	1	
02446 N CENTENNIAL ST - Residence	4							1	3
02450 N LAFAYETTE RD - MENA AUTO SERVICE AND SALES	4						1	2	1
02414 N CENTENNIAL ST - Residence	3						1	2	
02434 N GOODLET AV - Residence	3					1	2		
02438 N CENTENNIAL ST - Residence	3		1	1			1		
02440 N LAFAYETTE RD - Generic Street Address-BUSINESS	3		1	1			1		
02449 N GOODLET AV - Residence	3					2	1		
02500 N LAFAYETTE RD - M AND M CAR WASH	3		1				2		
02371 N GOODLET AV - Residence	2				2				
02400 N LAFAYETTE RD - Generic Street Address	2								2
02440 N LAFAYETTE RD - RUEBENS QUE	2						2		
02445 N LAFAYETTE RD - C AND C AUTO SALES OF INDY INC	2						1	1	
02445 N LAFAYETTE RD - KAPU AUTO SALES	2								2
02457 N CENTENNIAL ST - Residence	2						1		1
02465 N GOODLET AV - Residence	2				1		1		
02545 N LAFAYETTE RD - ALIS AUTO SALES	2								2
02361 N GOODLET AV - Generic Street Address	1							1	

2402 Lafayette Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Jun 1 2005 to March 31 2008									
02370 N LAFAYETTE RD - ORIENTAL MARKET	1						1		
02400 N GOODLET AV - Generic Street Address	1					1			
02400 N LAFAYETTE RD - BEAUTY SUPPLY PARKING LOT	1							1	
02401 GROFF AV - Residence	1						1		
02401 N GOODLET AV - Residence	1		1						
02402 N CENTENNIAL ST - Residence	1						1		
02402 N LAFAYETTE RD (Generic) - Generic Street Address	1					1			
02403 N LAFAYETTE RD - TOTAL LOOK BEAUTY SALON	1						1		
02406 N CENTENNIAL ST - Residence	1				1				
02409 N GOODLET AV - Residence	1					1			
02417 N CENTENNIAL ST - Residence	1							1	
02417 N GOODLET AV - Residence	1						1		
02421 N CENTENNIAL ST - Residence	1					1			
02429 N CENTENNIAL ST - Residence	1							1	
02434 N CENTENNIAL ST - Residence	1							1	
02440 N LAFAYETTE RD - ASIA CITY	1						1		
02440 N LAFAYETTE RD - Generic Street Address	1					1			
02441 N LAFAYETTE RD - C AND R CATERING	1							1	
02441 N LAFAYETTE RD - Generic Street Address	1								1
02445 N CENTENNIAL ST - Residence	1							1	
02450 N GOODLET AV - Residence	1							1	
02450 N LAFAYETTE RD - Generic Street Address	1							1	
02454 N GOODLET AV - Residence	1						1		
02457 N GOODLET AV - Residence	1							1	
02458 N GOODLET AV - Residence	1						1		

2402 Lafayette Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Jun 1 2005 to March 31 2008									
02469 N GOODLET AV - Residence	1						1		
02470 N GOODLET AV - Residence	1							1	
02500 N LAFAYETTE RD - Generic Street Address	1								1
02545 N LAFAYETTE RD - Generic Street Address	1								1
03002 N CAPITOL AV - Vehicle Recovery - Not A Crime	1								1
Summary for Jun 1 2005 to March 31 2008 (49 detail records)									
Sum	***86***		***8***	***2***	***4***	***8***	***30***	***19***	***15***
Summary for 'BufferArea' = 2402 Lafayette Buffer Area (95 detail records)									
Sum	***158***	***3***	***16***	***4***	***14***	***20***	***49***	***32***	***20***

3580 Lafayette Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Apr 1 2002 - May 31 2005									
03557 N LAFAYETTE RD - CASH AMERICA PAWN	5				1			4	
03602 N LAFAYETTE RD - QUICK STOP LIQUOR STORE	4							4	
03580 N LAFAYETTE RD - NEW FLICKS VIDEO	3		3						
03650 N LAFAYETTE RD - MIDAS MUFFLER SHOP	3						1	1	1
03600 N LAFAYETTE RD - HOURGLASS BOUTIQUE	2					1	1		
03605 N LAFAYETTE RD - Generic Street Address	2								2
03605 N LAFAYETTE RD - INSTANT AUTO FINANCE	2							1	1
03641 N LAFAYETTE RD - Generic Street Address	2							1	1
03649 N LAFAYETTE RD - STEFAN JOHANSON KARTING CENTER	2						1	1	
03653 N LAFAYETTE RD - CAR X	2					1	1		
03557 N LAFAYETTE RD - Generic Street Address	1							1	
03560 N LAFAYETTE RD - ABIDING FAITH LIGHTHOUSE CHR	1						1		
03564 N LAFAYETTE RD - LOS CAZADORES	1						1		
03574 N LAFAYETTE RD - CAR QUEST	1		1						
03585 N LAFAYETTE RD - SUPER KMART	1							1	
03641 N LAFAYETTE RD - INDY TIRE	1							1	
03652 N LAFAYETTE RD - Generic Street Address	1								1
03653 N LAFAYETTE RD - Generic Street Address-BUSINESS	1					1			
03654 N LAFAYETTE RD - VANS FISH MARKET	1						1		
Summary for Apr 1 2002 - May 31 2005 (19 detail records)									
Sum	***36***		***4***		***1***	***3***	***7***	***15***	***6***
Jun 1 2005 to March 31 2008									
03605 N LAFAYETTE RD - INSTANT AUTO FINANCE	11							5	6

3580 Lafayette Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Jun 1 2005 to March 31 2008									
03557 N LAFAYETTE RD - CASH AMERICA PAWN	8				2	1	1	4	
03641 N LAFAYETTE RD - INDY TIRE	7						6	1	
03650 N LAFAYETTE RD - MIDAS MUFFLER SHOP	4						2	2	
03605 N LAFAYETTE RD - Generic Street Address	3							3	
03641 N LAFAYETTE RD - Generic Street Address	3							2	1
03580 N LAFAYETTE RD - NEW FLICKS VIDEO	2		1				1		
03602 N LAFAYETTE RD - Generic Street Address	2							2	
03654 N LAFAYETTE RD - VANS FISH MARKET	2						1	1	
03564 N LAFAYETTE RD - EL PUERTO DE SAN BLAS	1						1		
03585 N LAFAYETTE RD - Generic Street Address	1					1			
03590 N LAFAYETTE RD - BEAUTY SHOP	1							1	
03600 N LAFAYETTE RD - Generic Street Address	1		1						
03602 N LAFAYETTE RD - QUICK STOP LIQUOR STORE	1							1	
03605 N LAFAYETTE RD - ALDI FOOD	1			1					
03649 N LAFAYETTE RD - Generic Street Address	1							1	
03652 N LAFAYETTE RD - CAR X	1						1		
03652 N LAFAYETTE RD - JIMS PLUMBING CORP	1							1	
03653 N LAFAYETTE RD - Generic Street Address	1								1
03654 N LAFAYETTE RD - Generic Street Address	1							1	
03654 N LAFAYETTE RD - Generic Street Address-BUSINESS	1						1		
03654 N LAFAYETTE RD - SHUN FAT ENT INC DBA VANS	1						1		
03690 N LAFAYETTE RD - ICI PAINTS	1							1	
03694 N LAFAYETTE RD - SUNLIGHT NAIL SUPPLY	1						1		
04503 W 38TH ST - MECHANIC SHOP	1								1

3580 Lafayette Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Jun 1 2005 to March 31 2008									
Summary for Jun 1 2005 to March 31 2008 (25 detail records)									
Sum	*58*		*2*	*1*	*2*	*2*	*16*	*26*	*9*
Summary for 'BufferArea' = 3580 Lafayette Buffer Area (44 detail records)									
Sum	*94*		*6*	*1*	*3*	*5*	*23*	*41*	*15*

4501 N Keystone Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Apr 1 2002 - May 31 2005									
02330 E 46TH ST - CVS	42		6	2				33	1
04501 N KEYSTONE AV - KEYSTONE VIDEO & NEWSSTAND	11		2	1	1		1	6	
02626 E 46TH ST - COMMUNITY ACTION CENTER	7		1	1		3		2	
02511 E 46TH ST - Generic Street Address-BUSINESS	6						1	5	
04435 N KEYSTONE AV - EASY PAWN	6		1					4	1
04440 N KEYSTONE AV - THOMAS CATERER	5						3	2	
04459 N ALLISONVILLE RD - NAPA AUTO CARE	5						2	1	2
04545 N KEYSTONE AV - ROYCE MOTORS	5							4	1
04600 N KEYSTONE AV - Generic Street Address	4				2	1		1	
02511 E 46TH ST - Generic Street Address	3							2	1
04555 N KEYSTONE AV - BUDGET TRUCK AND CAR RENTAL	3						1	1	1
04601 N KEYSTONE AV - Generic Street Address	3							1	2
04449 N ALLISONVILLE RD - FOOD PLUS	2						2		
04449 N ALLISONVILLE RD - LET IT BOUNCE BARBER AND BEAUTY	2						2		
04459 N ALLISONVILLE RD - FALL CREEK SERVICE CENTER	2						1	1	
04498 N KEYSTONE AV - Generic Street Address	2							1	1
04500 N KEYSTONE AV - Generic Street Address	2				1			1	
04545 N KEYSTONE AV - U-SAVE AUTO RENTAL	2							2	
04555 N KEYSTONE AV - Generic Street Address	2							1	1
04601 N KEYSTONE AV - Cal Fireworks	2		1				1		
02300 E 45TH ST - DAVE'S AUTO	1							1	
02316 E 45TH ST - MICHAEL MARTIN PROPERTIES	1							1	
02330 E 46TH ST - Generic Street Address	1		1						
02500 E 46TH ST - Generic Street Address	1							1	

4501 N Keystone Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Apr 1 2002 - May 31 2005									
02511 E 46TH ST - CORPORATE SQUARE EAST	1						1		
02511 E 46TH ST - FALL CREEK CONSULTING	1						1		
02511 E 46TH ST - FLEX WEIGHT MANAGEMENT	1				1				
02511 E 46TH ST - GREATER INDPLS COUNCIL ON ALCOHOLISM	1						1		
02511 E 46TH ST - MD STRUM HOUSING SERVICES	1							1	
02511 E 46TH ST - PROJECT IMPACT - OFFICE	1				1				
02511 E 46TH ST - TOTAL PIECE	1						1		
02511 E 46TH ST #Q2 - EUPHORIA	1							1	
02600 E 46TH ST - Generic Street Address	1					1			
02611 E 46TH ST - Generic Street Address	1		1						
02626 E 46TH ST - EBENEZER INTERNATIONAL MINISTRIES CHURCH	1						1		
02626 E 46TH ST - Generic Street Address	1					1			
04435 N KEYSTONE AV - Generic Street Address	1							1	
04435 N KEYSTONE AV - Generic Street Address-BUSINESS	1							1	
04435 N KEYSTONE AV - HAIRTIQUE	1						1		
04435 N KEYSTONE AV - TOWN AND COUNTRY FLEA MARKET	1						1		
04440 N KEYSTONE AV - Residence	1						1		
04446 N ALLISONVILLE RD - WILKERSON BODY SHOP	1							1	
04458 N ALLISONVILLE RD - DOWN WIT IT ENTERTAINMENT	1						1		
04459 N ALLISONVILLE RD - CUSTOM AUTO REPAIR	1							1	
04459 N ALLISONVILLE RD - Generic Street Address	1								1
04461 N KEYSTONE AV - AA-MCO TRANSMISSION	1							1	
04495 N KEYSTONE AV - Generic Street Address	1								1
04502 N KEYSTONE AV - EARL SHEIB PAINT AND BODY SHOP	1				1				

4501 N Keystone Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Apr 1 2002 - May 31 2005									
04510 N KEYSTONE AV - FURNITURE LAND	1						1		
04510 N KEYSTONE AV - Generic Street Address	1								1
04530 N KEYSTONE AV - LAWN MAINTENANCE/LANDSCAPING	1							1	
04545 N KEYSTONE AV - Otto Ind, LLC	1								1
04600 N KEYSTONE AV - AMOCO GAS STATION	1							1	
04600 N KEYSTONE AV - BP CONNECT	1								1
04600 N KEYSTONE AV - UNION PLANTERS BANK	1		1						
04601 N KEYSTONE AV - A-1 QUALITY CAR SALES	1							1	
04601 N KEYSTONE AV - CAR REPAIR	1							1	
04601 N KEYSTONE AV - Fireworks Store	1						1		
04601 N KEYSTONE AV - Generic Street Address-BUSINESS	1							1	
NOT STATED - Residence	1					1			
Summary for Apr 1 2002 - May 31 2005 (60 detail records)									
Sum	***156***		***14***	***4***	***7***	***7***	***25***	***83***	***16***
Jun 1 2005 to March 31 2008									
02330 E 46TH ST - CVS	18		3				1	14	
04501 N KEYSTONE AV - KEYSTONE VIDEO & NEWSSTAND	10		3			1	4	2	
02511 E 46TH ST - Generic Street Address	6					1		5	
04435 N KEYSTONE AV - EASY PAWN	5		1				3	1	
04545 N KEYSTONE AV - ROYCE MOTORS	5						2	3	
04600 N KEYSTONE AV - Generic Street Address	5		1		1	2		1	
02626 E 46TH ST - COMMUNITY ACTION CENTER	4					2		2	
04435 N KEYSTONE AV - CARIBBEAN VILLAGE BAR AND GRILL	4					2	2		

4501 N Keystone Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Jun 1 2005 to March 31 2008									
04545 N KEYSTONE AV - Generic Street Address	4							4	
02626 E 46TH ST - Generic Street Address	3							1	2
04502 N KEYSTONE AV - Generic Street Address	3							1	2
04555 N KEYSTONE AV - BUDGET TRUCK AND CAR RENTAL	3							2	1
02300 E 45TH ST - Generic Street Address	2							1	1
02511 E 46TH ST - Generic Street Address-BUSINESS	2						1	1	
04440 N KEYSTONE AV - Generic Street Address	2							1	1
04444 N ALLISONVILLE RD - TRANS TECH ELECTRIC	2						2		
04502 N KEYSTONE AV - DAVES PAINT AND BODY	2						1	1	
04530 N KEYSTONE AV - Generic Street Address	2							1	1
04550 N KEYSTONE AV - USA FIREWORKS	2						2		
04555 N KEYSTONE AV - Generic Street Address	2					1			1
04600 N KEYSTONE AV - Residence	2			1					1
04601 N KEYSTONE AV - Generic Street Address	2					1		1	
04602 N KEYSTONE AV - Generic Street Address	2							2	
01447 SHADOW RIDGE RD - Residence	1						1		
02318 E 45TH ST - Generic Street Address	1							1	
02325 E 45TH ST - Residence	1							1	
02330 E 46TH ST - Generic Street Address	1							1	
02500 E 46TH ST - Generic Street Address	1								1
02511 E 46TH ST - MARION COUNTY PUBLIC DEFENDER	1						1		
02511 E 46TH ST - QUINTON RESIDENTIAL LIVING	1							1	
02511 E 46TH ST - ROOFING COMPANY	1					1			
02511 E 46TH ST #SUIT - Generic Street Address-BUSINESS	1							1	
02601 E 46TH ST - ACE TAX PREPARATION	1						1		

4501 N Keystone Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Jun 1 2005 to March 31 2008									
02611 E 46TH ST - BIG DOG LIQUOR STORE	1		1						
02611 E 46TH ST - Generic Street Address	1								1
02626 E 46TH ST - COLLEGE AVENUE CONDUMINIUMS LL	1							1	
04435 N KEYSTONE AV - JOHN H BONNER TAX CENTER	1						1		
04435 N KEYSTONE AV - Residence	1							1	
04444 N ALLISONVILLE RD - AMACO	1							1	
04444 N ALLISONVILLE RD - Generic Street Address-BUSINESS	1						1		
04446 N ALLISONVILLE RD - CYCLE SHOP	1							1	
04446 N ALLISONVILLE RD - Generic Street Address	1							1	
04449 N ALLISONVILLE RD - FOOD PLUS	1		1						
04449 N ALLISONVILLE RD - Generic Street Address-BUSINESS	1					1			
04451 N ALLISONVILLE RD - GEORGE'S BARBER SHOP	1						1		
04455 N ALLISONVILLE RD - NATIONAL CITY BANK	1		1						
04461 N KEYSTONE AV - AA-MCO TRANSMISSION	1							1	
04461 N KEYSTONE AV - Generic Street Address	1								1
04500 N KEYSTONE AV - Generic Street Address	1				1				
04530 N KEYSTONE AV - LAWN MAINTENANCE/LANDSCAPING	1						1		
04545 N KEYSTONE AV - Residence	1							1	
04601 N KEYSTONE AV - A-1 QUALITY CAR SALES	1							1	
04601 N KEYSTONE AV - ENTERPRISE	1							1	
04602 N KEYSTONE AV - ALDI FOOD	1							1	
Summary for Jun 1 2005 to March 31 2008 (54 detail records)									
Sum	***123***		***11***	***1***	***2***	***12***	***25***	***59***	***13***

4501 N Keystone Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Summary for 'BufferArea' = 4501 N Keystone Buffer Area (114 detail records)									
Sum	*279*		*25*	*5*	*9*	*19*	*50*	*142*	*29*

6767 E 38th Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Apr 1 2002 - May 31 2005									
06800 E PENDLETON PK - Menard's	149		1	6		2		137	3
06800 E PENDLETON PK - FAMILY DOLLAR	14		1				5	8	
06767 E 38TH ST - Annex Books	9		4					5	
06845 E MASSACHUSETTS AV - ALDI FOOD	8		1			1		5	1
06801 E 38TH ST - VIDEO GALLERY	5		3				1	1	
06833 E MASSACHUSETTS AV - HINDEL LANES	4			1				3	
02805 BARBARY LN - Residence	3				1	2			
06685 E 38TH ST - HERROD AUTOMOTIVE	3							2	1
06800 E PENDLETON PK - Generic Street Address	3					1		1	1
06700 E 38TH ST - Generic Street Address	2					1		1	
06708 E 38TH ST - ANOTHER PHASE MEN'S CLOTHING	2						1	1	
06800 E MASSACHUSETTS AV - Generic Street Address	2					1			1
06801 E 38TH ST (Generic) - Generic Street Address	2								2
01600 N PENDLETON PK - Generic Street Address	1					1			
03799 N ELIZABETH ST - Generic Street Address	1		1						
06685 E 38TH ST - Residence	1							1	
06702 E 38TH ST - CLUB ESCALADE	1				1				
06708 E 38TH ST - Generic Street Address-BUSINESS	1						1		
06710 E 38TH ST - Generic Street Address	1								1
06710 E 38TH ST - PSYCHIC STUDIO SERVICES	1							1	
06710 E 38TH ST - Residence	1						1		
06713 E 38TH ST - Residence	1						1		
06718 E 38TH ST - Generic Street Address	1							1	
06755 E 38TH ST - VIP Hair Salon	1					1			
06802 E MASSACHUSETTS AV - Residence	1						1		

6767 E 38th Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Apr 1 2002 - May 31 2005									
06901 E 38TH ST - CULLIGAN WATER COMPANY	1							1	
06909 E 38TH ST - FIFTH THIRD BANK	1		1						
06909 E 38TH ST - FIFTH THIRD BANK - OUTSIDE	1		1						
Summary for Apr 1 2002 - May 31 2005 (28 detail records)									
Sum	***221***		***13***	***7***	***2***	***10***	***11***	***168***	***10***
Jun 1 2005 to March 31 2008									
06800 E PENDLETON PK - Menard's	176			6	1	2		167	
06800 E PENDLETON PK - FAMILY DOLLAR	17		4	1		2	3	7	
06700 E 38TH ST - CLUB ESCALADE	9			2	2			5	
06845 E MASSACHUSETTS AV - ALDI FOOD	8		1			1		6	
06800 E PENDLETON PK - Generic Street Address	5					1		2	2
06833 E MASSACHUSETTS AV - HINDEL LANES	4					2		2	
06909 E 38TH ST - FIFTH THIRD BANK	4		1				2	1	
06685 E 38TH ST - HERROD AUTOMOTIVE	2							2	
06708 E 38TH ST - PERSONAL TOUCH CLOTHING STORE	2						2		
06765 E 38TH ST - Generic Street Address	2								2
06765 E 38TH ST - WAX ON WAX OFF	2					1		1	
06767 E 38TH ST - Annex Books	2						1	1	
06800 E 38TH ST - Generic Street Address	2					1		1	
06901 E 38TH ST - CULLIGAN WATER COMPANY	2						1	1	
00545 E 19TH ST - IPS SCHOOL 27	1						1		
03736 N ELIZABETH ST - Residence	1						1		
03749 N KITLEY - BECKER LANDSCAPE CONTRACTORS	1								1

6767 E 38th Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Jun 1 2005 to March 31 2008									
06685 E 38TH ST - Generic Street Address	1							1	
06700 E 38TH ST - Generic Street Address	1								1
06710 E 38TH ST - CARPET FURNITURE AND MORE	1						1		
06712 E 38TH ST - CLUB ESCALADE	1							1	
06712 E 38TH ST - KJS SEAFOOD AND BBQ	1						1		
06718 E 38TH ST - SPEEDWAY AUTO PARTS	1						1		
06750 E 38TH ST - HINDEL LANES	1							1	
06751 E 38TH ST - ROOTS II HAIR STUDIOS	1		1						
06800 E 38TH ST - Menard's	1					1			
06800 E MASSACHUSETTS AV - Generic Street Address	1								1
06800 E PENDLETON PK - ANNIES ALTERATIONS INC	1						1		
06800 E PENDLETON PK - WILKERSON BARBER SHOP	1						1		
06801 E 38TH ST - VIDEO GALLERY	1					1			
06805 E 38TH ST - PAY DAY LOAN STORE	1		1						
06833 E MASSACHUSETTS AV - Generic Street Address	1								1
06900 E 34TH ST - Occurred outside buffer	1					1			
06900 E 38TH ST - CLUB ESCALADE	1							1	
06900 E 38TH ST - Menard's	1							1	
06900 E MASSACHUSETTS AV - THE POINT BAR PARKING LOT	1							1	
06901 E 38TH ST - WHITE CASTLE	1				1				
Summary for Jun 1 2005 to March 31 2008 (37 detail records)									
Sum	***260***		***8***	***9***	***4***	***13***	***16***	***202***	***8***

6767 E 38th Buffer Area

Location	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Summary for 'BufferArea' = 6767 E 38th Buffer Area (65 detail records)									
Sum	*481*		*21*	*16*	*6*	*23*	*27*	*370*	*18*

IMPD UCR Classified Crime Summary (by Described Address)
500' Footer Buffer of 4 Points: Pre- and Post- Enforcement Time Frames (UCR Count Order)

	Total UCR	Rape	Armed Robbery	Strong Arm Robb.	Agg. Assault	Simple Assault	Burglary	Larceny	Vehicle Theft
Grand Total	1012	3	68	26	32	67	149	585	82

Prepared by IMPD Resource Coordinator based on UCR Case Numbers selected by City of Indianapolis Planning Division and follow-up reading by IMPD UCR specialist

The pre-enforcement period (April 1, 2002 - May 31, 2005) represents 38 calendar months. The post-enforcement period (June 1, 2005 - March 31, 2008) represents 34.

The data selections did not contain any Criminal Homicides, so that Part I Crime is not presented on this report.

Konrad discovers that adult-video and sex-toy shops attract all kinds

BY KONRAD.MARSHALL

Posted: May 28, 2008 in Nightlife

Tags: porn, Adult Movies, Pornographic, vibrators, adult toys, adult shops, xxx

"Are you looking for anything in particular?"

This is the question that begs to be asked when a customer walks in, because if there's one truth that the racks of adult DVDs, stacks of pornographic magazines and walls of mature "toys" and gadgets confirms, it's that everyone likes something in particular.

In my two hours working in Keystone Video & Newsstand, on a recent Friday night, I saw them all. Young women venturing into the store in pairs for moral support, giggling. Couples whispering to one another in corners, with goods in hand. And men, lots of men, perusing all the store has to offer, some loudly and proudly, and some with a sheepish shuffle.

None of them seemed to want to answer the question, though. For the most part, they seemed to know exactly what something in particular that they wanted.

There were magazines, books, and videos grouped according to all tastes, featuring true porn stars (Jenna Jameson and Belladonna), amateur ones (like former Indy escort Marie McCrae, and even a former Keystone Video clerk, Jake Blade), and celebrities (from Screech to Paris Hilton to Jimi Hendrix). A movie featuring a relative unknown was playing in the background, the music coming from the store radio oddly fitting: "Still looking for that blue jean baby queen, prettiest girl I ever seen. See her shake on the movie screen."

There were things with harnesses, clips, suction cups, pumps, cavities, vibration and gyration. And things made of latex, blown glass, Cyberskin, metal and rubber (rubbers themselves were there, too).

I helped a young female cashier run through the purchases of a young man buying vibrators on behalf of his girlfriend, surprised to learn that the store puts batteries inside any motorized toys to make sure the tools operate as expected. (A little tip for guys: If you want to know what a device will feel like on your loved one, hold it up to the tip of your nose.)

Some of the items, though, particularly those in the fetish section, look like weapons of mass destruction, or tools of cruel and unusual punishment, but employees are taught never to express any judgment.

"When I first started -- and I was no stranger to this stuff -- it took a while to get comfortable," manager Lawrence Utley said. "It can be intense. It can definitely be intense."

But there's also a light side. After all, it's hard not to laugh at a 15-inch, 5-pound "device."

"A lot of the stuff we deal with, at first, it's hysterical," Utley said. "But you obviously can't laugh

in anybody's face. You get questions that you think are a joke, but they're serious. And then you get questions that you think are serious, and they're actually joking."

As an employee, however, you are permitted to laugh when someone calls Keystone Video hoping to reserve a copy of "The Rugrats Movie."

The only well-known titles in this store are "Debbie Does Dallas," "Behind the Green Door," "Caligula," and of course, the mother of them all, "Deep Throat," none of which have commanded "hardest of the hardcore" status for some time.

The mood of the store is truly softened by half the floor space being devoted to lingerie, novelties, costumes, incense, and things like edible underwear.

"It's all about enhancing your sex life, enhancing your love life, and enhancing your relationship," said Utley. "And I believe in the freedom angle, too."

Utley used to manage a store in Hebron, and he remembers the wrath incurred in that community, including weekly protesters with signs and bullhorns. He once had to stop truckers from setting their pit bulls on the people with placards.

"It was a little unnerving," Utley said. "Of course, the funny thing is a lot of them were customers. They'd protest you one day, and they would shop the next. So you have to be able to let that stuff go."

It isn't all excitement though. Some days there is nothing much to do but organizing stock and neatening the displays.

"It's a habit now," said one of the store cashiers. "I'll be in Wal-Mart and find myself straightening shelves."

Excellent article!

joe.shearer on May 28, '08 at 01:05 PM

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joe.shearer wrote:
Excellent article!

I agree Konrad's articles are always great.

randydaytona on May 29, '08 at 12:14 PM

So, Konrad, were you able to keep a straight face??? Great article

caralyn on May 29, '08 at 01:04 PM

I'd like to know the craziest/weirdest thing you sold that day.

Dexter on May 29, '08 at 01:12 PM

Thanks guys. I gotta say, there was definitely some freaky stuff in that place, but it was still a pretty comfortable atmosphere.

The guy who runs it told me a funny thing. He said he tells the girls who work there to be ready to be propositioned, that guys will just assume they're prostitutes, or that the doors in the back of the store lead to peep shows and dungeons and what not. He was a pretty cool guy, and funny.

As for the craziest thing sold, I didn't see any truly crazy sales. But I asked about how often some of the weirder stuff sells. The festish wall was pretty popular. And you would be AMAZED at how many gigantic ... male imitation devices ... sell. And you'd be shocked at how realistic the female .. pockets? ... seem.

More shocking still? Some people actually try to return used merchandise. (The store, for the record, does not accept said returns.)

Konrad.Marshall on May 29, '08 at 01:34 PM

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ha-ha-ha-HAH-ha-ha....funny post!

deb5683 on May 30, '08 at 08:45 AM

Why does it seem that all the "freaky" stories get thrown your way, Konrad? :)

FineWine on May 30, '08 at 09:43 AM

Just lucky, I guess :)

Konrad.Marshall on May 30, '08 at 09:53 AM

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10/26/2010 6:00:00 AM

Suspect sought in robbery of adult book store

Erin Taylor
Miner Staff Reporter

KINGMAN - Authorities are looking for a man who robbed a Golden Valley adult bookstore just after midnight Friday night.

Mohave County Sheriff's spokeswoman Trish Carter said a man between the age of 30 and 40 years old walked into the Pleasure Palace adult store on Highway 68 around 12:57 a.m. and demanded money from the clerk.

Carter said the man was wearing a black, hooded sweatshirt underneath a one-piece outfit that resembled a mechanic's jumpsuit. The suspect pointed his right hand at the clerk from inside his jumpsuit pocket as though he had a weapon.

The man made off with an undisclosed amount of cash. No other items were taken.

The suspect had the hood pulled over the top of his head with a black bandana or cloth covering his face. He is anywhere from 5-foot-10 to 6-foot tall, with a normal build and hazel colored eyes.

Anyone with any information is asked to call the Mohave County Sheriff's Office at (928) 753-0753 or Silent Witness at (928) 753-1234. A reward of up to $500 has been offered for information leading to the arrest and conviction of the person(s) responsible for the robbery.

Reader Comments

Posted: Saturday, October 30, 2010
Article comment by: **Henry O**

Porno stores always seem to smell strongly of chlorine and cheese.....yick! I wouldn't be working there for that reason alone.

Posted: Saturday, October 30, 2010
Article comment by: **makes ya wonder**

If Porno shops actually did pay better than Degreed positions. I think there would be one on every corner and the colleges would go bankrupt.

Im so glad its not that way. Theirs nothing. Not even a liquor store can destroy an area faster then a Porno shop. People who frequent these stores tend to be dregs. Before you hammer me with the "you have no right to be judgemental". Take a few moments and think about it. Im being realistic.

If you doubt my realisum sit in the parking lot for awhile. I Promise MOST of the folks you see shopping there. You would drop dead if your Child brought home and announced. "we're getting married".

These places turn an absolutely fantastic event two people can share. Into something that turns your stomach. I dont ever want to understand the "draw" people feel that brings them to a Porno shop. Working there for me would be the bottom of the barrel. My family would have to be homeless and starving.

Posted: Friday, October 29, 2010
Article comment by: **would you sellout your integrity?**

Hey College degree making less then Porno employee.

Somethings are worth more then a few bucks. Personnally I would do ANYTHING for any pay to NOT find myself degraded to the point of slinging Porno.

Then again our country has become "money first" over the last few decades. Selling out and joining the dregs seems to not bother many more people these days.

Im sure glad Im older and wont have to see how society evolves deeper into disgrace with each generation for much longer.

Posted: Friday, October 29, 2010
Article comment by: **World's down the tubes**

@ "@ talk about a horrible job--"

BULL! Unless you're working at McDonalds in spite of your degree? And if what you did say wasn't a lie, your friend is the exception! Doesn't mean that they all pay well!

Posted: Thursday, October 28, 2010
Article comment by: **@ talk about a horrible job --**

You might want to research and rethink your opinion. I have a friend who works at one of these stores and is paid more and has better health insurance than I do at my job that requires a college degree. As to the other comments about being open at that hour, I assume you think we should close gas stations and conveinence stores too?

Posted: Thursday, October 28, 2010
Article comment by: **talk about a horrible job**

Porno stores are the bottom feeders of all society.

Im not a "church lady" nor am I a prude. If you visit these places you must have a very low self esteem. Sex is cool and all...BUT. Its not the ultimate end all of things in life. Just thinking of visiting this kind of store makes me want to take a hot bleach bath.

Im glad the clerk didnt get hurt by this knucklehead. Its really to bad the clerk wasnt armed. I also hope this clerk gets a new job. Working for someone that respects their employees enough to hire an extra person for nights. For gods sake. You run a business with many customers that are seriously "different". Not to mention dangerous.
.
The owners need to be horse whipped for being so cheap or greedy they put an employee in such a precarious position. Hire a second clerk for nights. Train them to be proficient with a .45 auto at 30 feet.

Being robbed while working at a Porno shop is truely adding insult to injury. Do yourself a favor and look for better job.

Posted: Wednesday, October 27, 2010
Article comment by: **Sir Batson Belfry**

Any incident involving an Adult bookstore seems to bring out a lot of childish reactions in readers, which underscores the question: "How do you ever know you're selling to a Mature adult?"

Hey, here is a clerk: a person who is working what is probably not their idea of a glamorous gig with no one there for back up. Wouldn't be so humorous if the same robbery occurred in a Circle-K, now would it. I've little doubt the people who find this so entertaining have "frequent shopper" cards...and not at Circle-K.

Imagine how you would feel if you were alone in any retail store around 1 AM and some desperado walks in to rob the till. Would you feel afraid? Might you feel traumatized? And what, perchance, do you imagine would have happened if an actual customer had chosen to stop in to do some shopping while the robbery was in progress? This could have been a lot uglier than an empty cash register.

It's purely insane and unethical that anyone would be left working *alone* at that hour, on a Friday night, in what any rational person would consider an isolated location. Despite economic pressures, there is no excuse for leaving one person to run a shop, especially a shop that attracts more attention than most.

While there is a lot of traffic to and from cities like Laughlin and Kingman traveling the highway, I suspect someone in the local area had been casing the store or had entered the premises at various times as a customer and knew the lone clerk would be holding down the "fort" (so to speak).

It is fortunate this person was not hurt or killed by the robber and it is hoped there will be no incidents of this sort in future. Certainly, giving this media coverage won't increase the safety of anyone working nights at this store.

Attention owner(s): f there aren't surveillance cameras in the parking lot, I suggest to avert the potential liability and lower insurance premiums, you invest in a few cams with 360 degree views and at the very least, dedicate a monitor for viewing and VCR for taping activity around the sides and back of the building, particularly after the sun sets.

Motion sensor lights that also trigger a discreet signal within the store are, I'm certain, worth the money. I'm surprised there wasn't a silent "panic alarm" near the register to alert the local police.

If the owners believe it is too expensive to invest in this equipment, I ask them to compare this to the expense of closing the store at a reasonable hour or ensuring there is always another human being with a registered firearm present who can keep the cashier safe during the night shift. Ideally, both the equipment *and* the "late night Ninja" would be put into place.

And anyone who thinks a robbery is funny should steer clear of Adult Bookstores or risk being grounded for eternity by their wife or girlfriend(s). Or, as an alternative, grow up.

Posted: Wednesday, October 27, 2010
Article comment by: **Im Funny Dammit**

Thanks alot Jerry. You ol' fuddy duddy.

Posted: Wednesday, October 27, 2010
Article comment by: **Jerry J**

Wow, now the post from I'm Funny is HIGHLY inappropriate and suggestive...can't believe KDM published it!

(It slipped through. It's gone now. Thanks for the heads up. -Mark)

Posted: Tuesday, October 26, 2010
Article comment by: **Bart Simpson**

OMG!! Who would rob an adult book store!? What has the world come to when someone would violate the sanctity of such a holy place?

Posted: Tuesday, October 26, 2010
Article comment by: **Tim griffith**

The only problem here is that the establishments that were robbed should've provided handguns (pref. large calibre) to the employees. That way, they could've just blown these idiots out of their shoes, and the police could then easily just ID the bodies. "

Posted: Tuesday, October 26, 2010

Article comment by: **FBI'S FIBS**

This just brings to the forefront of my mind how happy I am that we don't have an adult bookstore within city limits and I hope it stays this way. Not from a religious standpoint, but it just looks like trash when you see that in a neighborhood! The last place I lived had them around and even my "open minded" friends agreed that it made the area look seedy.

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ARIZONA'S HOME PAGE

Police search for adult bookstore robber

by Lisa Halverstadt - Jul. 14, 2008 03:46 PM
The Arizona Republic

A Mesa man was arrested early Saturday after police said he and another man threatened others with a handgun at an adult bookstore on Apache Boulevard.

Richard Torres, 24, who Tempe police eventually arrested, allegedly yelled at a witness and ordered him to go inside the bookstore, police said.

An unidentified man with Torres stuck a handgun into a man's ribs at the Modern World Adult Bookstore and took $7 from him, according to police reports. He then walked up to another man, held a gun to his head and demanded he give up his cell phone. The unidentified robber hit that man in the face, knocking out one of his teeth and later yelled at Torres to get into a car.

The two men drove across the street and then abandoned their vehicle, police said.

Torres was later arrested at a fenced-in residence in the 1600 block of East Hudson Drive on suspicion of two counts of armed robbery and first-degree trespassing. He had been hiding in the bushes, police said.

Police are still searching for the other man who is described as about 5-foot-10 inches, tall with a thin-to-medium build and "Afro"-style hair. At the time of the armed robbery, he wore a white T-shirt and brown pants.

Adult bookstore robbed in Kearny Mesa «

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Adult bookstore robbed in Kearny Mesa

By Staff, City News Service
Monday, January 11, 2010

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A man robbed an adult bookstore at gunpoint in Kearny Mesa but no one was hurt, police said Monday.

The gunman robbed the Adult Emporium 2 at 5101 Convoy St. around 7:45 p.m. Sunday, San Diego police Officer Dino Delimitros said.

Police described the robber as black and in his 30s, last seen wearing a blue and gray windbreaker-type jacket. He carried a semi-automatic handgun, Delimitros said.

This story was written and edited by City News Service staff.

Tags: adult bookstore, Adult Emporium, black, gray windbreaker, gunman, Kearny Mesa, SDNN

This entry was posted on Monday, January 11th, 2010 at 7:53 am and is filed under Crime . You can follow any responses to this entry through the RSS 2.0 feed. You can skip to the end and leave a response. Pinging is currently not allowed.

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Article Published: Monday, August 01, 2005 - 9:53:02 PM PST

Bat used in robbery of adult bookstore

MONTCLAIR - A robber struck an adult bookstore employee with a bat and then took cash from the store Sunday afternoon, police said.

The employee didn't notice when the robber entered the Paradise Adult Book Store at 3894 E. Mission Blvd. The robber entered an area behind the counter through an open door around 4:15 p.m. and grabbed a baseball bat that was behind the counter.

He struck the employee in the back and demanded the employee open the register, police said.

The robber took all the cash in the register and left the business. The employee, who police said suffered little to no injuries, refused medical attention.

Police said the man left in a white Volkswagen, possibly a Jetta. Police received a partial plate number of 5BK787.

- Melissa Pinion-Whitt, (909) 483-9378

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Caught on Tape: Oakland Armed Adult Bookstore Robbery

POSTED: 9:07 am PDT April 23, 2008
UPDATED: 10:48 am PDT April 23, 2008

OAKLAND, Calif. -- Another night, another frightening armed robbery in Oakland -- the pattern repeated itself in the East Bay city when a bandit walked into a downtown adult bookstore, brandished a handgun and threatened the clerks and other patrons.

The manager, who asked not to be identified, said it was the third such recent robbery of an adult bookstore in the city.

Police released no other details about the 6:46 p.m. robbery at Cory's Adult Superstore at 2408 Telegraph and no arrests had been made.

The manager said police recommended he get a gun.

"The officer suggested I should arm myself," he told KTVU. "It's getting tough out there. These types of robberies are becoming an everyday happening."

The robbery took place just hours before an Oakland City Council meeting where police officials laid out a game plan to fight crime in Oakland. The officials promised more officers on the street, working longer hours.

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Video: CAUGHT ON TAPE: Watch Oakland Adult Bookstore Robbery

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Two officers kill robber's alleged getaway driver

By Debbi Farr Baker and Joe Hughes
UNION-TRIBUNE STAFF WRITERS

April 19, 2007

SAN DIEGO – Two San Diego police officers shot and killed a suspected getaway driver early yesterday morning after he opened fire on them following a robbery at a North Park adult bookstore.

The Medical Examiner's Office late Wednesday identified the man as Maurice Antoine White, 30, of Valencia Park.

Two patrol officers saw a man run out of the F Street Adult Video and Gifts store on University Avenue at Florida Street a few minutes after midnight.

Store employees said the man had come into the store carrying a gun and wearing gloves and a mask. He jumped over the counter, threatened them with the gun and stole money, said homicide Lt. Kevin Rooney.

Officers who were driving by saw the man running with his hands raised over his head – possibly as he took off his mask – carrying a white bag, Rooney said.

As the man headed north on Florida, he yelled something to White, who was in a green 1990 Chevy Cavalier parked with its lights on before running away, Rooney said.

The officers pulled behind the Cavalier, which drove a short distance before turning left and pulling over on Lincoln Avenue, a dead-end street. They got out of their patrol car and approached the car from either side.

The officer on the passenger side shined his flashlight into the car and saw that White was holding a gun pointed down between his legs, Rooney said.

“The passenger officer yells 'gun' to alert his partner and yells for the man to drop the weapon,” Rooney said. “Instead, he raised it and pointed it at the officer on the driver's side, and it appears he fired several rounds.

“Both officers drew their weapons and opened fire,” Rooney said.

Rooney did not say how many times White was hit, but he was still alive after the shooting and paramedics were called. He died a short time later.

The gun was found wedged next to the car door, police said.

Rooney said he did not know how many shots were fired during the encounter, but police were not aware of any collateral damage to buildings or homes in the area.

He said the officers were very lucky they were not shot.

“They did what they were trained to do, and they did it well,” Rooney said.

The two officers will be off for several days and placed on administrative leave, a routine practice when officers are involved in shootings. Both work out of Western Division. One has been on the force for two years and the other three.

Police are still looking for the man who robbed the video store. He is described as black, about 5 feet 8 inches tall, 130 pounds, wearing a beige shirt.

Police said the robber ran through an apartment complex, took off clothing and his gloves, and tossed his handgun. Those items have been recovered, Rooney said.

Detectives were at the scene for several hours as they investigated the shooting and robbery.

As the sun came up, the Cavalier was still parked on the cul-de-sac with the body inside. Its back window had been shot out. Several markers were on the ground indicating where the shell casings from the bullets fell.

Lincoln Avenue was roped off, but police were letting residents in and out of their homes, a mixture of small houses and apartment buildings. Some residents were not being allowed to move their cars, however.

The adult bookstore has been the scene of several robberies and a shooting over the years.

The store was robbed on Dec. 21, 2003; Nov. 8, 2001; and Nov. 1, 2001. The two November robberies were believed to have been committed by the same ski-masked bandit, who used a semi-automatic handgun.

On Nov. 12, 1997, a manager at the store was pistol-whipped during an armed robbery by two masked men. They got about $100.

On July 18, 1996, a would-be robber fired a shot at a security guard inside the store. The bandit then tried unsuccessfully to open the cash register before running off. The guard suffered minor glass cuts during the incident.

The store, which is part of a chain, recently curtailed hours. It used to be open all night, but it now closes at 2 a.m.

■Debbi Baker: (619) 293-1710; **debbi.baker@uniontrib.com**

Adult Book Store Robbed By Muscular Man

POSTED: 2:04 pm PDT July 8, 2006

Email This Story | Print This Story

SAN DIEGO -- A 6-foot tall muscular man in dark shorts and a baseball cap robbed an bookstore in North Park of an undisclosed amount of cash, said San Diego police.

The robbery at the F Street store in the 2000 block of University Avenue was reported a Friday, SDPD Sgt. Rich Nemetz said.

The suspect reportedly grabbe the drawer when the clerk ope register, police said.

Following the robbery the sus Nemetz said.

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Adult Bookstore Robbed At Gunpoint, Clerk Left Unharmed

POSTED: 9:46 am PDT August 20, 2006

Email This Story | Print This Story

SAN DIEGO -- An adult bookstore clerk was robbed at gunpoint Saturday of an unkno cash by two male suspects, 10News reported.

The heist took place at 5:35 a.m. at Mercury Books in the 7400 block of Clairemont Me according to San Diego police Sgt. Kerry Tom.

One robber carried a silver re dressed in a dark tan jacket.

The other suspect wore a brov said.

It was unclear whether that m a weapon.

The clerk was apparently not

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STOCKTON ADULT ENTERTAINMENT STORE ROBBED (1:05 P.M.)

By ***The Record***
August 26, 2008

STOCKTON – An adult entertainment store was robbed and an employee threatened Monday afternoon.

According to a Stockton police report, a 23-year-old employee of Suzie's Adult Store in the 3100 block of East Hammer Lane was alone in the store and went to the bathroom about 2:20 p.m.

A man was standing outside the bathroom door when she came out and he lifted his shirt to show her a semiautomatic handgun in the waistband of his pants.

"This is a robbery," the police report quoted the robber. "Give me everything you got or I will kill you."

The employee handed over nearly $400 and the robber left going east from the business. No vehicle was seen.

The robber was described as a black man in his 20s or 30s with short black hair. He wore large mirrored sunglasses, black T-shirt and black jeans.

Anyone with information is asked to contact the Stockton Police Department at (209) 937-8377.

TheDenverChannel.com

Porn Store Robber Still On The Loose

Police Are Asking For Help

Tara Kurtz, Contributor

POSTED: 10:09 am MDT July 28, 2006
UPDATED: 10:51 am MDT July 28, 2006

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Police hope someone will recognize this man.

DENVER -- Police are searching for a man who is suspected of robbing four adult bookstores in the past week.

The suspect is described as a black male about 5 feet, 10 inches tall and weighing 200 pounds with possibly a light mustache and goatee, according to police. Police also said he was wearing a white jersey with dark lettering, a blue hat and carried a black handgun.

The four adult bookstore locations hit were at the 100 block of South Broadway Avenue, the 8200 and 3400 blocks of Colfax Avenue and the 5500 block of North Federal Boulevard, police said.

The Denver Police are asking for any assistance in solving this crime.

Bookstore bandits wanted for armed robbery

written by: John Fosholt , Producer/Photographer
posted by: Dan Boniface , Web Producer

created: 5/24/2007 5:38:18 PM
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ENGLEWOOD - Police are searching for two men who threatened and robbed a clerk at a store on South Santa Fe Drive on May 19.

One of the men has been identified as 30-year-old Eric Brink. He has outstanding warrants for aggravated robbery and parole violations.

He and his partner used a rifle to stickup the Adult Bookstore at 4595 South Santa Fe Drive.

A security camera photographed the second man, and police are trying to identify him.

If you can help with the investigation, call Crime Stoppers at 720-913-7867. Your information could make you eligible for a cash reward.

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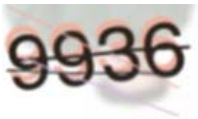

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THE DENVER POST

Sex-toy store clerk stabbed during robbery

By The Denver Post

Posted: 03/07/2011 08:09:53 PM MST

Updated: 03/07/2011 11:25:58 PM MST

An employee of a Lakewood adult store is in the hospital after suffering stab wounds during a robbery just before 6 p.m., police said.

A Lakewood Police spokeswoman said the robbery took place at the Pleasures Adult Entertainment store at 7570 W. Jewell Ave. The suspect, described as a Hispanic male in his 20s was armed with a knife, police said. After stabbing a male employee, the suspect escaped with an undisclosed amount of cash, police said.

The status of the wounded man is not known, and his identity has not been released.

Kyle Glazier: 303-954-1638

Police: Man Uses Sprinkler Head To Hold Up Adult Store

Same Man Accused Of Robbing Store 3 Times

POSTED: 5:46 pm EDT June 26, 2006

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HOLLYWOOD, Fla. -- Police say a man was arrested Monday after he was caught on surveillance tape using a most unusual item as a weapon.

The clerk of the Hollywood Adult Bookstore thought he was being held up at gunpoint. What the robber didn't realize was that police had the store under surveillance because it has been robbed twice in the past month.

Detectives say they nabbed Andre Clark as he ran from the store.

Capt. Tony Rode said when they got a closer look at Clark's "weapon," they realized it was the attachment you add to a hose to water your lawn.

Police said that they believe Clark is also responsible for the two prior robberies at the store.

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Two Sarasota adult stores robbed again

Last Update: 10/19/2010 6:38 pm

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SARASOTA - Sarasota Police are investigating two armed robberies that occurred minutes apart Wednesday night at two adult entertainment businesses. That makes a total of five robberies of adult entertainment businesses since July 16th in the City of Sarasota.

At approximately 11:25 p.m the suspect walked into the front door of X Factor in the 1900 block of 12th Street and pointed a handgun at the clerk and demanded money. The suspect was wearing a Halloween mask with hair sticking out of the top of the mask. He's described as a white male approximately 20–30 years old 6 feet tall and 190 lbs with brown hair and brown eyes.

As the suspect exited the store he instructed the clerk "I got something else to do give me ten minutes before you call the cops".

As officers arrived on the scene of the first robbery they received information on a robbery at XTC Super Center on 17th Street with a similar suspect description. Officers transported the clerk from the first robbery to the scene of the second robbery where they viewed the surveillance video and confirmed that it was video of the same person that robbed him.

The victim advised that he had observed a truck drive slowly past the business right before the robbery; the truck appeared to be a red Chevy with a loading lift on the rear of the vehicle.

The XTC store video possibly shows the suspect's vehicle which appears to have some type of a lift on the rear of the vehicle. Earlier that night a 2000 Forest Green Dodge Dakota was reported stolen in Sarasota County. The stolen vehicle is reported to have a lift on the rear of the vehicle.

Capt. Paul Sutton confirms that Sarasota Police are investigating the links between the suspect in these robberies and the man shot by Sarasota County Sheriff's Office today. they are looking for a white male that was wearing a mask and driving a green pickup with a lift on the back.

VOLUSIA & CENTRAL FLORIDA THE AREA IN BRIEF

3 rob adult bookstore near I-75

Posted April 11, 2006

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WILDWOOD -- Three men robbed the X-Mart Supercenter this weekend on State Ro Interstate 75, according to the Sumter County Sheriff's Office.

Two workers were inside the adult bookstore about 5 a.m. Saturday when three me store. One stayed by the door, while the other two entered and demanded money. C was armed with a gun and the other had a bat, according to the Sheriff's Office.

They ordered the employees to get on the floor and grabbed cash out of the register, reports said.

A few customers entered the store and were ordered to the floor. The suspects fled with an unknown amount of money, the Sheriff's Office said.

Etan Horowitz, Kevin P. Connolly, Stephen Hudak and Sarah Lundy of the Sentinel staff contributed to this report.

Armed men rob sex shop

By Ty Tagami
The Atlanta Journal-Constitution

11:24 p.m. Wednesday, November 17, 2010

Five men, two of them armed, burst into a Jonesboro sex shop Wednesday night and ran off with untold amounts of cash.

No one was injured in the robbery of the Starship Enterprises in the 7400 block of Tara Boulevard, but police did call in an ambulance.

"There was a pregnant lady at the store," Clayton County Police Officer Otis Willis told the AJC. "Rescue was called to check her out."

Willis said it was unclear whether she was an employee or customer, but he said she was fine.

The men, two of whom had handguns, ran south on Tara and jumped into a black Dodge Ram.

Police responded to the address after an alarm company alerted dispatchers at 9:48 p.m.

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Davenport, IA

Two men arrested fro armed robbery at adult bookstore

May 12, 2006 06:02 PM EDT

DAVENPORT, Iowa - Two Davenport men have been arrested for the armed robbery at an adult bookstore.

Police say 19-year-old Chrisopher Mitchell is the one who held up the store and 42-year-old Leroy Owens drove the get-away car. Both are being charged with first degree robbery.

It happened at TR Video last night. Luckily the store clerk remembered what the the car looked like and reported it to the police. Police busted them in a nearby neighborhood.

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Chicago Tribune
ONLINE EDITION

2 arrested in 4 robberies at X-rated bookstores

By Brendan McCarthy
Tribune staff reporter

July 15, 2005

While several robbers have taken hundreds of thousands of dollars from downtown banks in the last month, two Chicago men allegedly took a more novel approach: They have been accused of a series of X-rated adult book and novelty store holdups that began in mid-June.

David Joseph, 33, of the 2200 block of West Adams Street, and Paul Barney, 42, of the 2200 block of West Monroe Street, have been charged with several counts of robbery, police said.

They have admitted to four robberies at three adult bookstores, police said, and are suspected in several other thefts. They were arrested about 2:30 a.m. Thursday in a sting set up by officers from the Near North Police District.

Officers were staked out at Hubbard's Adult Book Store in the 100 block of West Hubbard Street when two men matching the descriptions of suspects in earlier robberies walked into the store. Police confronted the two as they left the store.

"We identified ourselves, and one guy pulled out a black Craftsman cordless hand drill from his pocket and started running," Patrolman Martin O'Flahertysaid.

Police said the men had just robbed the store, and officers found $151 in stolen money in their pockets.

Joseph and Barney also admitted an earlier robbery at the Hubbard store and robberies at Frenchy's Adult Book Store in the 800 block of North State Street and Over 21 Bookstore in the 1300 block of North Wells Street, police said.

"It seems like lately the adult bookstores have been getting hit a couple times a week," Patrolman Patrick Bryant said.

---

bmccarthy@tribune.com

Published: December 02, 2009 10:18 am

Sketch of Edgewood robber released

Tony Huffman
Effingham Daily News

The Effingham County Sheriff's Department released a sketch Tuesday of the man who allegedly held up the adult book store near Edgewood at 7:43 a.m. Nov. 23.

According to Effingham County Sheriff John Monnet, a man holding a large black pistol approached an employee of the store as she left the store with a money bag on her way to the bank to deposit an undisclosed amount of money. The suspect took the money bag and fled.

The man is described as a 5-foot 10-inch tall, skinny, white male with greasy shoulder-length hair. The suspect also reportedly had a slight mustache and bad teeth and was wearing mirrored sunglasses, blue jeans, a jeans jacket and boots at the time of the robbery.

The suspect fled the scene by getting in a late-1990's model Chevrolet truck with tinted windows driven by another suspect. The truck was last seen going southbound toward the Interstate 57 interchange, according to Monnet. A description of the driver was not available.

Monnet hopes the description of the robbery suspect and getaway vehicle will produce leads that will result in the arrest of the two suspects. Anyone with information about the incident is urged to contact the Effingham County Sheriff's Department at 217-342-2101.

Tony Huffman can be reached at 217-347-7151 ext. 135 or tony.huffman@effinghamdailynews.com

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The Effingham County Sheriff's Department released this sketch of the suspect in an armed robbery at Adult Time.
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Gunman robs Champaign adult bookstore

Wed, 11/24/2010 - 1:57pm | Mary Schenk (/author/mary-schenk) (/contact_author/418566)

CHAMPAIGN – Champaign police are investigating the armed robbery of an adult bookstore early Wednesday.

A Champaign police report said a man entered the Illini Video Arcade, 33 E. Springfield Ave., shortly after 2 a.m.

He pointed a gun at the 19-year-old male clerk and left with the clerk's cell phone, a business phone and an undisclosed amount of cash.

The report described the robber as a black man, about 30, 5 feet 11 inches tall, weighing 225 pounds, wearing a black Carhart jacket, black jeans and a brown bandana.

Police said the victim was not physically injured.

Anyone with information is asked to call Crimestoppers at 373-8477.

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#1 (/news/courts-police-and-fire/2010-11-24/gunman-robs-champaign-adult-bookstore.html#comment-65181)
Ryder (http://www.news-gazette.com/users/ryder) wrote on November 24, 2010 at 3:11 pm

When people were getting beat up for sport, I shrugged my shoulders. When peeping Toms somehow breached airtight dorm security, I said, "Oh well." But robbing the adult video store? TOO FAR, CROOKS, THAT WAS THE LAST STRAW.

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Man gets 20 years for robbing adult entertainment store

URBANA, Ill. A 21-year-old Champaign man has been sentenced to 20 years in prison for robbing an adult entertainment store last year and beating two men inside with a baseball bat.

Quentin Robinson pleaded guilty to armed robbery, admitting that he and a 23-year-old friend went into the Champaign shop at 2 a-m last August and took cash and a cellphone from the clerk and his friend.

He also admitted to hitting the men with a bat.

Prosecutors say the men also smashed glass counters, vending machines and video surveillance cameras.

Robinson will have to serve at least 17 years of his sentence.

His accomplice, Tori Starks, was sentenced to 40 years in prison in March.

Prosecutors said they have evidence linking both men to a similar attack last summer at another local adult entertainment store.

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MARION COUNTY

Man charged in

slaying of owner

of jewelry store

A suspect in the slaying of a Fountain Square jeweler had rings and a gun linked to the crime when he was arrested, police said Tuesday.

Michael Inman, 34, Indianapolis, faces a preliminary charge of murder in the slaying of David Pedigo, 55, who was found dead Friday in his store at 1042 Virginia Ave.

Inman also is charged with robbery in an April 3 theft and assault at Cirilla's, a Northwestside adult store.

Indianapolis Metropolitan Police Department officials credited Patrolman James Sparks with linking the two crimes.

Sparks arrested Inman on Saturday outside an apartment complex at 2011 Egret Court.

Sparks had nine rings believed stolen from Pedigo Jewelry, police said. Officers also saw him toss a gun, which was matched to the one used in the slaying, police said at a news conference.

Inman was charged with felony robbery in the holdup at Cirilla's. Police said he stole $75 and beat and kicked the clerk.

Teens critically hurt

in hit-and-run

Two teen girls were in critical condition after police say they were struck by a suspected drunken driver Tuesday night on the Eastside.

A vehicle hit the girls in the 2800 block of North Keystone Avenue about 9:30 p.m. and continued driving, said Indianapolis Metropolitan Police Department spokesman Lt. Jeff Duhamell.

The girls were taken to Methodist Hospital, Duhamell said. Their identities were withheld.

Shortly after the crash, police believe they found the vehicle in a yard in the 2800 block of Hillside Avenue. Officers questioned a 36-year-old man who appeared to walk from the vehicle, Duhamell said.

Graffiti tagger, 23,

gets work release

A man known by his "CHOKE" graffiti tag was sentenced to work release and community service Tuesday in Marion Superior Court.

Miguel Villanueva -- who missed an earlier guilty plea hearing, resulting in new felony charges -- was sentenced to 18 months in a work-release jail. He also must perform 1,050 hours of community service during four years on probation, including participation in an Indianapolis graffiti cleanup program.

Villanueva, 23, formerly of Richmond, painted his tag on dozens of buildings in Indianapolis last year, causing an estimated $100,000 in damage, prosecutors said.

He pleaded guilty Tuesday to all nine counts of criminal mischief and a count of criminal gang activity; his plea agreement left the sentence open to Judge Marc Rothenberg, who opted for community corrections over jail.

The judge will decide in June whether to order any restitution.

Man kills himself

during standoff

Indianapolis metropolitan police say a 39-year-old man died Tuesday after he shot himself inside his Westside apartment during a standoff with officers trying to serve an arrest warrant.

Police arrived about 11:10 a.m. at the Darby Court Apartments in the 6300 block of Sullivan Court, on West 21st Street just east of I-465.

Officers said several shots were fired at them through the door. One officer received minor injuries from shattered glass.

Alfred S. Grice, who was wanted on four counts of child molesting, barricaded himself inside his home for more than two hours.

During the siege police and SWAT team members fired tear gas into the apartment, used an explosive to breach the door and sent in a robot to search the apartment. Police ended the standoff shortly before 3 p.m. when the man was found dead in a bedroom.

Man stabbed to death following argument

A 32-year-old man was arrested Tuesday after an apparent disagreement led him to fight with and then stab a victim shortly before sunrise, police said.

Jose Luis Tinajero-Garcia called police at 5:54 a.m. and told the dispatcher he had just stabbed someone in a Northeastside apartment in the 8200 block of Heatherton Court, said Indianapolis Metropolitan Police Sgt. Matthew Mount.

When officers arrived, Tinajero-Garcia was standing in front of the apartment with a kitchen knife on the ground near his feet.

Inside, Fabian Gutierrez-Barcenas, 23, was found dead with several stab wounds. Tinajero-Garcia was held without bond at the Marion County Jail pending formal charges.

BOONE COUNTY

Zionsville teachers

OK cuts to save jobs

Zionsville - Zionsville teachers agreed to $1.4 million in salary and benefit concessions, letting the school district make needed cuts to the 2010-11 school budget.

The School Board voted 5-0 Monday to accept $2.1 million in cuts for the next school year. Drastic program and work-force cuts were avoided because the Zionsville teachers union agreed to concessions that included wage freezes and a halt to employer contributions to most teachers' retirement plans.

The concessions may have saved up to 30 teachers' jobs, said Union President Matt Doublestein.

HENDRICKS COUNTY

Man gets 13 years in

death of alleged rival

Danville - An Avon man has gotten a 13-year prison term in the death of a man he believed was having an affair with his wife.

John Gary Cooper, 59, was ordered to serve eight years for reckless homicide, plus five years for using a firearm, in the May 27 death of Michael R. Gelinas. Hendricks County Judge Karen Love sentenced him Monday.

Cooper had been charged with murder, but a jury found him guilty March 2 of reckless homicide after a weeklong trial.

Cooper's wife, Angela Cooper, was a caregiver for Gelinas' mother, who lived in his house.

Star reports

Abstract (Document Summary)

BOONE COUNTY Zionsville teachers OK cuts to save jobs Zionsville - Zionsville teachers agreed to $1.4 million in salary and benefit concessions, letting the school district make needed cuts to the 2010-11 school budget. Drastic program and work-force cuts were avoided because the Zionsville teachers union agreed to concessions that included wage freezes and a halt to employer contributions to most teachers' retirement plans.

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Man tries to rob adult book store with steak knife

Muncie police are looking for a man who tried to rob an adult bookstore late Sunday night, armed with a steak knife. Police were called to the scene at a store called "After Dark," where the attempted robbery took place. Police believe the suspect was scared away after noticing surveillance cameras inside the store.

Fox59.com
12:05 p.m. EDT, April 19, 2010

Muncie, Ind. Man tries to rob Muncie adult book store with steak knife

Muncie police are looking for a man who tried to rob an adult bookstore late Sunday night, armed with a steak knife. Police were called to the scene at a store called "After Dark."

The attempted robber didn't get away with any items or money, police believe he got nervous after noticing surveillance cameras inside the store.

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Posted on Sun, Aug. 15, 2010

Crime down in core, up in Wichita's outer areas

0 Comments

BY HURST LAVIANA
The Wichita Eagle

As he drove through Midtown last week, Officer Bart Norton recalled the days when crime was threatening to overwhelm his North Broadway beat.

"South Broadway always had the moniker, but there was a time that North was just as bad," he said.

The prostitution and drug dealing that had long plagued South Broadway were spreading north across Douglas.

But by focusing on the heart of the problem — the hotels — police and many who live and work in the area think North Broadway may be turning the corner on crime.

In an effort to closely monitor neighborhood crime trends, Wichita police divide the city into 491 crime reporting zones. Two of the three zones that saw the steepest drop in crime last year were along North Broadway in Norton's Beat 41.

A closer look at 2009 figures shows that many neighborhoods near the city's center saw significant decreases in crime last year.

PHOTOS

Gallery: Crime down in core area

See reported crimes on our daily Wichita crime maps

Searchable database: Search for crimes on your block (2008 and 2009)

CRIME DOWN IN CORE AREA

Click here to see the video in full screen or to e-mail to a friend.

Wichita overall saw a 1.5 percent drop in major crimes last year when compared with 2008. The figures show that the drop occurred because the increases in crime on the fringes of town were more than offset by decreases in the inner city.

Consider:

* In the 19 crime reporting zones that are within a mile of Douglas and Broadway, crime was down 4.7 percent last year when compared with the average of the previous four years.

* In the 39 zones that are 1 to 2 miles from the city's center, crime was down 5.4 percent.

* On the outskirts of the city, in the 242 zones that are more than 5 miles from Douglas and Broadway, crime was up 11.4 percent.

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But the figures also suggest that the bulk of the city's crime is still occurring in and around downtown Wichita.

Those 19 zones in the city's center cover 5.8 square miles — about 3 1/2 percent of the city's area. But they accounted for 11 1/2 percent of the city's auto thefts, 8 1/2 percent of the burglaries, 17 percent of the robberies and 10 1/2 percent of the homicides.

Crime on the move

Deputy Police Chief Terri Moses said it's no secret that crime follows people as they move toward the fringes of town.

"I always point to where I live now" she said of her east Wichita home. "It used to be a wheat field, so the chances of a crime occurring there were null."

As the city grows, she said, police monitor call loads to make sure that officers are allocated to areas where crimes are occurring.

Moses said there were probably several reasons for the sharp drop in crime last year in Beat 41, which covers neighborhoods west of Broadway between Central and 21st Street.

Part of the drop, she said, could be attributed to the construction of the Nomar International Marketplace on West 21st. The project forced the closing or relocation of several businesses, she said, including an adult bookstore that had often been the site of robberies and other crimes.

Construction today has limited access to businesses around 21st and Broadway.

"You couldn't commit a crime at that intersection now," she said.

Moses said that in any part of town, it's important for police to work with residents to fight crime. She said that appears to be happening on North Broadway.

"I would like to think it's a combination of the police as well as the community policing itself," she said.

On patrol on Beat 41

As Norton was starting his day last Wednesday, Ellis Dixon was cleaning up his barbershop. Burglars had broken a window overnight in the business in the 1900 block of West 13th Street and carried out a 42-inch television and other electronic equipment.

That afternoon, Norton was awaiting the results of fingerprint samples that he had sent to the lab. Dixon was making plans to beef up security.

"If I have to put bars up, if I have to put in more security, that's what I'm going to do," he said.

Norton asked anyone with information about the barbershop burglary, or any other crime on his beat, to contact him at the department's Patrol North Bureau.

Norton's beat stretches west from Broadway past North High School to the Arkansas River, but he spends much of his time working with businesses on Broadway. As he drove east from the barber shop, he described the area.

"It's pretty diverse in all aspects — race, income, housing," he said. "We've got some very nice houses, but then we've got some that need a lot of work.

"The majority of people over here go to work and live their lives doing what they're supposed to be doing. But there's a very small percentage..."

When he pulled into the Auto Motel at 1230 N. Broadway, owner Sanjib "Sam" Mitra was remodeling one of the rooms.

Teri Weitzman, the hotel manager, was in the office describing what it was like when she started working there 3 1/2 years ago.

"Every other door was a crack dealer," she said. "There were hookers everywhere."

Today, she said, prostitutes are discreet if they are working in the area. Drug dealers are no longer welcome, she said, and they no longer frequent the hotels.

Norton attributed the change to a crackdown that started more than five years ago after someone opened fire with an AK-47 on a second-floor hotel balcony.

Then in July 2007, a 48-year-old woman who worked as a maid at the Auto Motel was found strangled in her room. The case remains unsolved.

Today, anyone checking into a North Broadway hotel is required to show a photo identification, a copy of which is left at the desk. At the Auto Motel, visitors must leave their names and addresses with the clerk.

Norton said an important part of the crackdown required the help of hotel owners. They were encouraged to report suspicious activity and put unwelcome visitors on a "no-

trespassing" list.

For those on the list, merely showing up on the hotel property can result in their arrest.

"If they come on my property, they go to jail," Mitra said.

Norton said the hotels on his beat have dozens of names on their no-trespassing lists.

"We've made lots of arrests, and things have calmed down a little bit," he said.

Norton said he enjoys patrolling Beat 41, an area where he rode his bicycle as a youth. His grandmother still lives on North Fairview, which is in his beat.

He said the diversity of the neighborhood makes his job interesting and enjoyable.

"It's something different every day," he said.

Reach Hurst Laviana at 316-268-6499 or hlaviana@wichitaeagle.com.

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WHAS11 NEWS

LOCAL NEWS

Police catch the adult bookstore bandits

08:27 PM EDT on Tuesday, July 1, 2008

(WHAS11) - Police have arrested two men for robbing the same adult bookstore four times in just three months.

WHAS11 News

On one occasion Miles and Bailey allegedly left with not only cash, but with the entire cash register.

On one occasion they left with not only cash, but with the entire cash register.

Police have arrested 20-year-old Jamal Bailey and 21-year-old Anthony Miles.

Miles and Bailey are charged with robbing the Red Alley adult book store on south Seventh Street.

Police say the robbery spree began in late March before the two were nabbed over the weekend.

Each time they were armed with handguns and demanded cash.

The arrest report says that one time Bailey and Miles even took the whole register when the clerk could not open the drawer.

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Armed robbers target adult bookstore

By Michael Holtzman
Herald News Staff Reporter
Posted Feb 26, 2010 @ 08:07 PM
Last update Feb 26, 2010 @ 08:43 PM

FALL RIVER — A Flint Street pornography shop was robbed of cash at gunpoint by two masked men early Thursday night, police and the owner said.

It was the first time it had been robbed in their 15 years of business, said Paul Balasch, owner of XXXTRA Video at the corner of Pleasant Street. He said they stole about $400.

“We wanted to make everybody aware of what's going on,” Balasch said.

No one was harmed.

The armed robbery adds to about 50 others that have occurred since December, acting Police Chief Cathleen Moniz told the City Council this week during an extended dialogue over how to combat the spike in crime and reduced police staffing.

Half of that total were in December, and the number had dropped significantly this month, Moniz reported.

Police are offering a cash reward leading to an arrest for this latest armed crime, police spokesman Paul Gauvin said.

Balasch had left the store for the day to his brother, Michael Ponte, 54, who said one of the men carried a rifle that looked like a .22-caliber, while standing watch at the door.

He said they were in and out of the store “in two minutes.”

“One guy threw me a bag and told me to empty the cash register, and the other guy held the rifle on me,” he said.

They entered right after a customer exited the 203 Flint St. shop about 6:35 p.m., police said.

Both men were described as thin, white or light skinned, in their early 20s, wearing gloves and with black masks pulled up over their noses, Gauvin said.

The one carrying what looked like a small-caliber rifle with a wooden stock handle was about 5-foot-10 and 160 to 170 pounds, wearing a dark New York Yankees cap with white lettering and a dark hooded sweatshirt, Gauvin said.

The other man was described as an inch or two shorter and about 160 pounds, wearing a dark jacket with a white design.

After fleeing on foot south on Flint Street in the direction of Alden Street, the report filed by Officer Alan Beausoleil said, a silver sport utility vehicle was seen headed in that direction at a high rate of speed.

The incident is being investigated by the Major Crimes Division, and anyone with information is asked to contact Det. Richard Saraiva or the TIPS hot line, 508-672-8477.

Balasch said he closes his store the six days a week its open at 7 p.m. “just so I can avoid this kind of thing.”

He said they have video cameras showing the robbery. “But they had masks and gloves on. It (the cameras) doesn't deter these guys,” he said.

E-mail Michael Holtzman at **mholtzman@heraldnews.com**

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VICTIM OF CHOICE
1 year ago
Report Abuse
You must be logged in to report abuse.

Report Abuse

How absolutely horrible preying on these nice, hardworking, honest, taxpaying, entrepreneurs. I was talking about the two young men ha ha ha. Hey what

about THEIR civil rights & THEIR choice to make money blah blah blah. Smut is smut & it shouldn't be sold on the street, if the people don't want it. Can't feel all that sorry for them, making a living by ruining everyones lives.
truth hunter
1 year ago
Report Abuse
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Report Abuse

Perhaps the robbers were strip club entrepreneurs trying to stifle competition and amass some needed capital?

Anyone see who was driving the get-away car? Did they look familiar?
iNOTlistening
1 year ago
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Report Abuse

Look at the picture of the owner with a big water bong in the background lol
cnoodles
1 year ago
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Victim Of Choice....who do u think u r? I bet u r a recovering addict!!! Now u beg for God's firgiveness and guidance. I say to you...it's too late. Ask for God'd guidance when things are good. He will keep you on a righteous path. Ask him when things are bad and God will think you are using him?
102945tfp
1 year ago
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Hey look, it's passive bunnyrabbit of choice. Schizophrenia is a tough illness. Our prayers are with you.
myopinion79
1 year ago
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Report Abuse

the main focus should be the fact that the flint has a major crime issue right now and something needs to be done before it's the entire city having problems or people are getting hurt. i hope these guys get caught.
fallriverstyle
1 year ago
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Just a couple of chaps looking 'Behind The Green Door' or some good ole 'Swedish Erotica
voiceofreason72
1 year ago
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Report Abuse

when they get caught they will probably have it get dismissed just every other case in da riva.....they should be put away
voiceofreason72
1 year ago
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Report Abuse

victim you are a fool. its a local business that people can go to if they choose. just because you don't choose to doesn't make it a bad thing
founding father
1 year ago
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I did not know that business was there...now that i do i will go there and spend some money.....as for the robbers i hope the next person they rob defends themselves and doesn't miss.....get a real job and stop hurting your families.....
name something after me
1 year ago
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Report Abuse

It just keeps coming 3 shooting last night in Fall River one person murdered, HN has not reported as of this post.
tone611

1 year ago
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You must be logged in to report abuse.

Report Abuse

armed robbery for 400 dollars how pathetic can you be?
jnap1979
1 year ago
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Victimofchoice you are so ignorant. It doesn't matter what kind of business they run, it's a legal business and they are following the law. Getting robbed is awful, period. It doesn't matter what business you are in.
jonbetty
1 year ago
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Report Abuse

staged! what an *** you are, maybe you should try standing infront of a gun pointing at you and see if you call it staged. I know this guy and he's messed up over this, not to mention his wife who feels that the next time could be worse. Did anyone mention the variety store around the corner has been hit atleast four times this year, I guess the people there are ok with you and they didn't stage it.
Just Dick
1 year ago
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Report Abuse

I'm surprised this Mom and Pop store still survives when you can go online and buy whatever you want. Sorry for the loss. Hope they had insurance and hope the criminals get hard time.
WDW_Dad
1 year ago
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Seeing everyone is ok without serious injury....
I'm glad to see Mike is ok and didn't try to be a hero. $400 is peanuts and not worth the price of a life. Mike did the right thing and although I'm being a

monday morning quaterback, maybe it's time to put a buzzer lock on the door and allow entry to only one at a time.The buzzer system works. No one is allowed entry without that eletric lock opening.And if it's a robbery, most thiefs seeing this type of system do not bother. I know these fools are low-lifes and druggies and really don't care. But they want it to be fast too. They want easy entrance and exit. If they know they have to be buzzed in and out, it does curb future troubles. 'JONBETTY, if you personally know them, pass this idea over to Paul. It's not all that much to install and it lower insurance as well. Feel free to pass my email over to him.. WDW_Dad@yahoo.com
SSmith
1 year ago
Report Abuse
You must be logged in to report abuse.

Report Abuse

One of the 3 adult stores in Fall River, this one has been there for I would guess about 10 years maybe longer with no troubles. The tone for some comments displays personal disagreement with this legitimate and yes tax paying business. The flint neighborhood has made zero complaints about this business. Check your history books, pushing ones beliefs on others went out in 1776 in this country. Disagree or not they and all deserve equal protection under the law and save me that lip that the founding fathers are rolling in their graves, maybe they are, maybe theyre not.

Some of the commenters believe their personal opinions or beliefs trump the fact that someone was on a city street with a rifle, walking into a legitimate business with the threat of serious injury or death to rob. That should be your outrage. I could care less about porn or strip clubs. I dont think store 24, 7-11 or other stores should be open all night in Fall River either and they are asking for problems, but I dont think they should be robbed. If you dont like that stuff, fine, but some statements say all that needs to be said about your individual psyche. Whats next, someone who is poor deserves (what they get) or will color or race matter to you or do you think if a woman wears a dress she should deserves what happens? Some of you are truly lost in this world and have some very deep problems, and should probably double up on the daily doses.

alwaysAgoodtimewith theGoodLord
1 year ago
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Report Abuse

Why do they call them adult stores? They really should call them juvenile stores because there really isn't anything adult about it. Really, they should.
frhviolet
1 year ago
Report Abuse
You must be logged in to report abuse.

Report Abuse

First banks then stores now this . What is next ?
102945tfp
1 year ago
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Report Abuse

well, almost a passive bunnyrabbit of choice, maybe you should push that idea at your church, get those sickos straightened out first, then come back and take care of the rest of us. Good luck with that, little fella.
irate taxpayer
1 year ago
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Report Abuse

Some of you have the sense of humor of a quahog. Let's see a bank on one corner and adult store on the other. Hmmm, which one can we score? Probably customers of the store who knew only one person would be in there and no cameras!
vmc
1 year ago
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Report Abuse

A lot of comics around
iknowit
1 year ago
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Report Abuse

If u dont like adult stores or things like that u dont have to go there but they have a rite to operate and they pay taxes and i dont ever remember any problems there, so VICTIM OF CHOICE shut up k thanks
bengalsurock
1 year ago
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how sad...these drug addicts will rob anyone for any amount just to keep using,,,,,,Fall River needs to remove the gangs and addicts off the streets before the crime rate wil drop....The Fall River Police Department needs to step up their game and stop turning a blind eye!!! Public safety needs to be the number one priority!
Jethro Clambert
1 year ago
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Report Abuse

Interesting a parrallel in the lows of society - Adult book store robbed by a couple of gun men who likely would patronize the strip club. The stripper then can recieve 1 dollar bills from the robbers who stole the cash from the adult book store. Micro economy going on here!!!
passive Lamb VI
1 year ago
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Despite these 2 fumbling men, exercising THEIR right to operate & their choice ...I think they deserve an award of some sort.
neverhadtoknockonwood
1 year ago
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You must be logged in to report abuse.

Report Abuse

Babes in thailand how is that offensive.....
myopinion79
1 year ago
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Just wondering why most of the time no one sticks to the point of the article?? Not only on this article but most that are posted on here. Herald News should really keep a close eye on some of the idiotic comments posted on here. Majority of the comments most likely come from people who have no education but think they know it all.

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Employee Shot At Adult Bookstore

Deputies Investigate Whether Shooting Occurred During Robbery

POSTED: 12:07 pm EDT July 25, 2005

An employee was critically wounded in a shooting at an adult bookstore in Highland Park Monday morning.

The shooting occurred at the Worldwide News bookstore located on Woodward Avenue, south of McNichols Road, according to the Wayne County Sheriff's Department. A 31-year-old Highland Park man was shot in his chest, Local 4 reported.

The shooter is described as a black man in his early 20s, about 5 feet 7 inches tall and wearing blue jeans, a black jacket and a dark-colored cap.

Sheriff's deputies are investigating whether the shooting occurred during a robbery attempt. Investigators are reviewing a surveillance tape from the store.

No further information was available.

INTERNATIONAL Herald Tribune AMERICAS

Armed robber steals $140 cash, $22,000 in porn movies from Michigan adult bookstore

The Associated Press

Published: April 13, 2007

PONTIAC, Michigan: Police are hunting for a man who held up an adult bookstore, stealing $140 (€103) in cash and locking the clerk in the bathroom before also escaping with $22,000 (€16,336) worth of pornographic movies.

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Authorities said the unidentified man walked into the store on Wednesday night and browsed for several minutes. He then asked the clerk for help, pulled out a large semiautomatic handgun and demanded money from the register, Pontiac police Sgt. William Ware said.

The robber took $140 and locked the clerk in the bathroom, Ware said. He said the store employee emerged after several minutes and noticed that several cases of adult movies also were missing.

"It's possible the man may try to sell the stolen movies," Ware told The Oakland Press.

Fantasies Unlimited store manager Tim Merriwether said Friday that this was the first time the store had been robbed since it opened in Pontiac, a suburb north of Detroit.

Ware and Merriwether said they do not think the robber was a regular customer at the store.

The man, who can be seen on a surveillance tape, grabbed four cases holding about 800 movies, while leaving behind about seven other cases, the manager said. He said there was no apparent pattern in what the robber stole and what he left behind.

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"Apparently, he took all that he could grab," Merriwether said.

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Man Dressed As Woman Robs Berkeley Adult Video Store

Jennings Police Wonder If It Is The Same Bandit That Hit Clothing Store Friday

Male Robber Dressed As Woman Hits Berkeley Adult Video Story
(2:17)

By Chris Regnier
FOX2now.com
9:28 p.m. CST, February 15, 2010

BERKELEY, MO (KTVI-FOX2now.com) A man dressed up as a woman pulls off an armed robbery at a **Berkeley** adult entertainment store and it is all caught on surveillance video. It might not be the first robbery that this cross dressing bandit has committed. Berkeley police are talking to cops in Jennings to see if this cross dressing bandit may be on a crime spree.

On Monday, FOX 2 obtained exclusive surveillance video of a man dressed as a woman who robbed a Berkeley adult store over the weekend. A similar crime happened in Jennings last Friday.

The surveillance video shows just how far the suspect was willing to go to look like a woman in the Berkeley case. The cross dressing bandit had a dress on as well as a sweater and a scarf when he robbed the Hustler Hollywood store on Natural Bridge Road in Berkeley. Investigators say the suspect came in about 12:40am Sunday. He shopped for a few minutes, got in line, paid for a small item, then pulled a long barrel handgun on the clerk and came around the counter.

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St. Louis Mardi Gras 2011!

Berkeley Police Chief Frank McCall described what happened next.

"He says something to her. I haven't ascertained what that is at this time. But he decides he's going to take the entire drawer. And he reaches in- I guess there's a cable or something that attaches it to the computer system. He rips that out and as I said takes the entire drawer."

Berkeley police are now looking into whether the same cross dressing bandit is responsible for a robbery last Friday afternoon at the Workwear for Less store on Halls Ferry Road in Jennings. In that case, investigators say a man dressed as a woman again used a long barrel handgun to pull off the crime.

Berkeley and Jennings police are now combining resources.

McCall says, "We have contacted and spoken with Jennings. We will be working with Jennings to ascertain if were dealing with the same individual," explained McCall.

Investigators say in both cases, the suspect may have had either a short beard or a goatee. The suspect in both robberies also hid the gun in his clothes.

Nobody was hurt in either case.

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Police look for adult bookstore robber

by Newsdesk KRCG

Posted: 12.16.2009 at 11:00 AM

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PULASKI COUNTY, MO. -- Pulaski County Deputies are on the lookout for an armed robber who held up the Lions Den Adult Bookstore on Highway 17 in Waynesville before 1 a.m. Wednesday.

The sheriff said the male suspect threatened the clerk with a knife.

The clerk said the suspect was about 6'3", weighing 190 pounds, had a brown mustache and goatee. At the time of the robbery the suspect was wearing a white baseball cap, light colored jeans and a green Carhart style coat with a white tee shirt with a Chevrolet emblem. The suspect drove away in a mid-1990's purple Buick Regal or Century.

Anyone with information on this robbery is asked to call the Pulaski County Sheriff's Office at 573-774-6196.

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Do You Know This Armed Robber?

Last Edited: Thursday, 03 Apr 2008, 9:22 PM CDT
Created: Thursday, 03 Apr 2008, 3:45 PM CDT

By Teresa Woodard

Armed Robbery

(KTVI - myFOXstl.com) -- Police in St. Charles are looking for a criminal carrying a bold weapon and wearing a weird disguise. He robbed an adult bookstore at gunpoint, while his face was painted white.

At least police believe it was white paint on his face. The man walked into the Pure Pleasures Adult Mega center on Old Highway 94 about 4:15 Thursday morning. Police say he was carrying either a rifle or a shotgun and pointed it at the clerk.

Workers say he told the clerk to give him all the money in the cash register. And he instructed him not to look at his face.

"There's some kind of white substance that's on his face," says St. Charles Police Lt. Donovan Kenton. "We're not exactly sure what that is."

"It's a little out of the ordinary for someone to look like that," Kenton says. "It's an assumption he's trying to distort his features a little bit."

"It could be some kind of a skin condition."

Police hope surveillance pictures taken by their security camera lead them to their guy, or better yet that their guy leads police to him.

"Normally what'll happen is he'll brag about it to somebody," Kenton says.

"We're hoping someone in the community knows who this individual is," Kenton says.

He was wearing a grey hoodie, and had it pulled tight around his face. Despite the white disguise on his face, police were able to determine he has a reddish goatee. He's believed to be in his early to mid 30's, approximately 6 feet tall.

Pure Pleasures workers say they were going to immediately institute new security measures, including locking their door on the overnight shift. Anyone who wants in will have to be buzzed in by workers.

If you've got a tip, St. Charles police say someone is manning the phones 24 hours a day. You can call 636-949-3520, or Crimestoppers at 636-949-3333. There is a reward.

News Release from the St. Charles City Police Department:

The St. Charles Police Department is investigating an armed robbery that occurred in the early morning hours of Thursday April 3, 2008 at the Pure Pleasure Video Store located in the 1800 Block of Old Hwy. 94 South. A white male suspect entered the business at approximately 4:13 a.m., displayed a long gun and demanded money from the clerk. After obtaining money from the register, the suspect fled the store.

The suspect is described as a white male, early to mid 30's, approximately 6 feet tall with a medium build and a reddish colored goatee. The suspect was wearing a dark colored coat and a grey "hoodie" sweatshirt with the hood pulled tight around his face and dark colored pants. The suspect is described as having a "painted white face", with some sort of white substance covering his exposed facial area.

Any person having information reference to this crime is asked to contact the St. Charles Police Department at 636-949-3520 or can do so anonymously through St.

Charles CrimeStoppers at 636-949-3333.

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Adult-bookstore robber sentenced

- Story
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Adult-bookstore robber sentenced

Gazette Staff The Billings Gazette | Posted: Tuesday, July 27, 2010 12:00 am | (6) Comments

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A man who helped rob a Billings adult bookstore was sentenced Monday in District Court.

Joel Dean Sills, 42, received a sentence of 10 years to the state Department of Corrections, with five years suspended, for the robbery at the Ball Adult Books and Video store on South 26th Street on April 8, 2009.

Sills and a co-defendant, 25-year-old Benajah Phillip Shipp, were charged with robbing the store with a knife.

Shipp died in March, and the criminal case against him was dismissed. Prosecutors said Shipp was armed with a knife during the robbery.

Sills briefly apologized before he was sentenced for felony robbery by accountability.

Judge Gregory Todd followed a plea agreement in the case after a prosecutor said Sills has at least five prior felony convictions.

Sills paid $450 in restitution at the sentencing hearing. Todd agreed to recommend Sills for a state drug treatment program.

Posted in Crime-and-courts on *Tuesday, July 27, 2010 12:00 am* | Tags: Joel Dean Sills, Ball Adult Books And Video, Robbery

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Adult Bookstore Clerk Cut During Armed Robbery

Clerk Cut In Face, Drives Self To Hospital

POSTED: 1:43 pm EST January 15, 2010
UPDATED: 1:51 pm EST January 15, 2010

HIGH POINT -- A clerk at the Market Video and News adult bookstore on South Main Street was cut in the face by a man who robbed the business Friday morning, High Point police said.

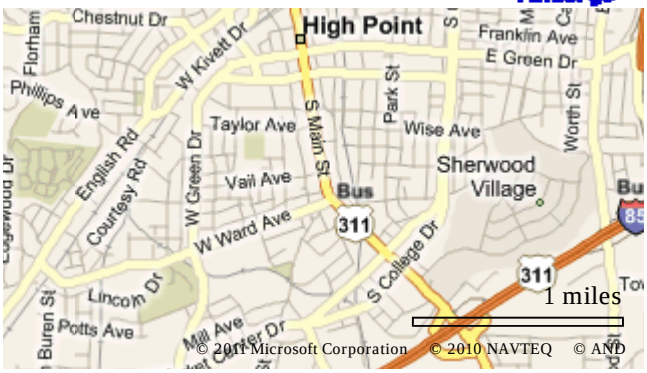
Police said a man went into the business at about 6:10 a.m., pulled out a knife, and began slashing at the clerk.

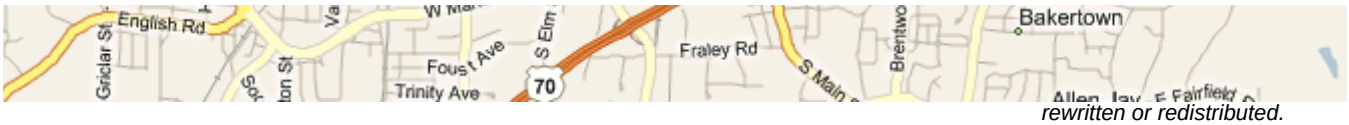
The clerk drove himself to High Point Regional Hospital to be treated for three lacerations on his face.

Police said by the time officers arrived, the man was gone. He was described as white, between 30 and 40 years old, with short hair and a goatee. He was also wearing camouflage pants and a dark toboggan hat, police said.

Police spokesman Lt. Steven Myers said something was stolen from the store, but wouldn't say what.

Myers said officers are reviewing surveillance video.





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- anoiselesspatientspider [Profile]
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  ncrangerwillie, tea baggers are those guys who dumped a lot of tea into lakes/rivers after Obama was elected to protest...I'm not sure what the point was, other than to show their dissatisfaction with the changing of the guard. Additionally, it is also a gay sex term (which I find ironic).
- ncrangerwilly [Profile]
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  pardon my dumbness, but whats a tea bagger.....
- anoiselesspatientspider [Profile]
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  Jan. 19, 2010 7:41am EST
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  I have to agree, aliluyya and billde (nice use of the Miller quote--and how applicable, considering the headline). Those who think the clerk "got what he deserved" probably also agree with Pat Robertson when he said that essentially, the Haitians got what they deserved because they "made a pact with the devil" during the Haitian revolution.
- billde [Profile]
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  billde
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  I have to agree with aliluyya. It seems that the right-wings idea of rights is that they are free to tell everyone how to live. I quote Henry Miller. "People who go around trying to save the world have either no problems of their own or do not want to deal with them." Tea baggers just go away.
- aliluyya [Profile]
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  Jan. 18, 2010 10:13am EST
  aliluyya
  Inappropriate

  

even if you work at a less-than-reputable establishment you don't deserve to get slashed on your shift. where are all the tea baggers (how well that term works here) complaining about their possible loss of rights?

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April 10, 2008

Tip leads to arrests of store robbery suspects

Reno police credit an anonymous tip for the arrest of two suspects in the March 30 robbery of a Reno adult bookstore.

Police said they interviewed Robert Mendoza, 44, and Michael Jason Cox, 26, both of Reno, on Tuesday and arrested them on suspicion of robbery, conspiracy to commit robbery and burglary.

Police believe they went into the Adult Theatre and Bookstore at 1052 S. Virginia St. and loitered before one of them used a black handgun to rob a clerk of an unspecified amount of money.

NIAGARA GAZETTE

August 1, 2010

BLOTTER: Police reports published Aug. 2 (http://niagara-gazette.com/policereports/x1936216986/BLOTTER-Police-reports-published-Aug-2)

Police sig

Staff Reports
Niagara Gazette (http://niagara-gazette.com)

NIAGARA FALLS — NIAGARA FALLS

Clerk foils attempted bookstore robbery

A clerk at an adult bookstore managed to disarm a sword-wielding robber early Sunday morning.

The counter clerk at the store in the 8600 block of Niagara Falls Boulevard told police a man entered the store about 3:30 a.m., wearing a goalie mask and holding a 2-foot long machete. The victim said as the suspect tried to come behind the counter, he grabbed the machete and disarmed him.

The suspect and the clerk then struggled with each other before the robber was able to break free and flee the store.

He was last seen running southwest on Cayuga Drive.

Man rescued after fall near Horseshoe Falls

Niagara Parks Police rescued a New Hampshire man after he tumbled in the Niagara River, just above the Horseshoe Falls on Friday.

The incident happened at 7:20 p.m. when parks officers were alerted to an injured man at the corner of Fraser Hill and the Niagara Parkway in the Falls, Ont.

When officers arrived on the scene they found a 43-year-old man from Londonderry, N.H., who had fallen about 10 feet down a steep bank into shallow water about 650 feet above the Horseshoe Falls.

The victim, who happened to be a paramedic, had fallen while trying to get a picture of the falls. He was unable to help himself back to shore because he had fractured his right leg.

Officers were able to climb down to the water level and assist the victim, who was becoming fatigued. He was extricated and then transported to Greater Niagara General Hospital with nonlife threatening injuries.

Police said the victim, who was just starting his honeymoon, was last seen apologizing profusely to his new wife.

Niagara Falls

• THEFT: Police are investigating a car break-in in the 2400 block of South Avenue. A 27-year-old woman told officers sometime between 9:45 p.m. Saturday and 7:30 a.m.. Sunday someone broke into her 2007 Dodge Caliber by smashing a rear driver's-side window. The victim said 15 cents was taken.

• ARRESTS: Two Falls men were arrested on drug and other charges. Keith K. Jackson, 25, 602 18th St., was charged with restricted use of alcohol and unlawful possession of marijuana. Kevin L. Jackson, 21, 1302 Garden Ave., was charged with unlawful possession of marijuana and false personation. Officers said they observed a crowd of people around a car being driven by Keith Jackson in a parking lot in the 1500 block of Pierce Avenue at 12:50 a.m. Sunday. When police approached the car, they found Keith Jackson drinking a beer while he was at the wheel. He also had 12 baggies containing marijuana in his possession. Kevin Jackson gave officers a fake name to avoid being arrested on an outstanding parole violation warrant and also had pot in his possession when he was taken into custody.

• ARREST: A Falls man was arrested after he caused a disturbance when he was stopped for traffic violations. Jeremy Scouten, 32, 2502 Falls St., Apt. 2, was charged with disorderly conduct in addition to the traffic violations. Officers said they stopped Scouten at 19th Street and Welch Avenue at 6:19 p.m. Saturday for running a stop sign and failing to signal a turn. After being stopped, Scouten got out of his car and began screaming and swearing at the officers.

Niagara Gazette 310 Niagara Street Niagara Falls, NY 14302

Published: 9/1/2012

Adult-bookstore robber sought by Oregon police

BLADE STAFF

Oregon police are seeking information about an armed robbery at an adult bookstore.

Police said a man with a gun entered X-Spot, 2246 Woodville Rd., about 6:20 a.m. Sunday and demanded cash from a clerk. He fled with an undisclosed amount of money.

Police describe the suspect as 30 to 40 years old, about 5 feet tall, 150 to 180 pounds, and of small build.

Anyone with information is asked to call police at 419-698-7060.

*Guidelines: Please keep your comments smart and civil. Don't attack other readers personally, and keep your language decent. If a comment violates these standards or our **privacy statement** or **visitor's agreement**, click the "X" in the upper right corner of the comment box to report abuse. To post comments, you must be a Facebook member. To find out more, please visit the **FAQ**.*

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- Man robs same bank 3 times in 3 months
- Four armed robberies in four days hit Eugene

Story Published: Nov 17, 2008 at 10:18 AM PST

By KVAL Web Staff

Video

EUGENE, Ore. -- Two masked men robbed an adult bookstore at gunpoint late Friday night, taking cash and merchandise before fleeing the scene.

The two suspects entered The Adult Shop at 720 Garfield Street around 11:50 p.m. and ordered the two employees to the ground at gunpoint.

The first suspect is described as a white male approximately 20 years-old. He is 5'8" tall with a thin build. He was wearing dark baggy clothing and his face was covered with a bandana.

The second suspect is described as a white male approximately 20 years-old. He is 6'0" tall with a thin build. He was wearing dark baggy clothing and his face was covered with a bandana.

Both subject's coats were described as "puffy."

A week earlier, armed robbers committed four crimes in as many days between Friday, Nov. 7, and Monday, Nov. 10. Armed suspects robbed a tavern Friday, a gas station Saturday, a restaurant Sunday and a private residence Monday in the Eugene area.

No one was reported injured in any of the robberies.

"While crime statistics naturally fluctuate, we are indeed seeing a higher-than-typical number of armed robberies this fall," said Kerry Delf with the Eugene Police Department.

Anyone with information about this incident is asked to call Detective Jeff Donaca at (541) 682-5193.

Find this article at:
http://www.kval.com/news/local/34591104.html

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Alert cops and a K-9 capture adult store robbery suspect

BY DAVID F. ASHTON
The Bee, *Sep 8, 2010*

When the 5 ft. 10 in. tall, 170 lb man came strolling into the Fantasyland Video Store — just north of S.E. 52nd Avenue on S.E. Foster Road, at 6 am on the morning of Saturday, August 7, turned out he wasn't looking to check out adult entertainment.

Charges against this suspect, 36-year-old Benjamin Anthony Gomez, include Second Degree Robbery.

COURTESY MULTNOMAH COUNTY SHERIFF'S OFFICE

Instead, the man's early Sunday morning plans included confronting an employee, and snatching the store's cash, before riding off into the sunrise.

"It helped that our police offers got a detailed description of the suspect and his vehicle," commented Portland Police Bureau East Precinct Commander Bill Walker about the case.

"From there on, officers demonstrated great police work," Walker continued. "For instance, the license plate number given them wasn't quite right; it didn't come up. An officer kept running similar plate numbers, and finally pulled the registration of a vehicle that matched the description [of the getaway car], at an address on the 3500 block of S.E. Kelly Street."

At that location, in the neighborhood north and west of S.E 39th Avenue and Powell Boulevard, a non-English- speaking neighbor communicated that he saw a man, matching the suspect's description, running in the area.

"There was a short foot pursuit," Walker revealed.

A Washington County Sheriff's Office K-9 Unit happened to be nearby, heard the call, and also headed to the location. With the help of the dog, officers took the suspect into custody about a block south of the suspect's listed residence — all happening before 7 am.

"Like I said, this is an example of great police work," Walker concluded, "and, good interagency cooperation."

36-year-old Benjamin Anthony Gomez was charged with the crime, reported police spokesperson Lt. Kelli Sheffer.

The Multnomah County Department of Corrections' records show that Gomez remains in custody, with bail set at more than $250,000 for charges that include Second Degree Robbery, Second Degree Theft, and First Degree Trespass.

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Man shot in shoulder as he robs Allentown gas station, police say
May 4, 2010

Man pleads guilty to 2 robberies

Robert Landis of Center Valley said he held up gas station, adult bookstore for drug money.

January 14, 2011 | By Kevin Amerman, OF THE MORNING CALL

A Center Valley crack user who was shot during a holdup at an Allentown gas station in May has pleaded guilty to two robbery charges.

Robert Leroy Landis, 41, admitted to Lehigh County Judge Robert L. Steinberg on Thursday that he robbed a Valero gas station on N. Fourth St. in Allentown and the Adult Arcade on Route 309 in Springfield Township, Bucks County, in May.

Each of the felony counts carries a maximum penalty of 10 years in prison.

Landis, who has four previous robbery convictions, according to authorities, was shot in the shoulder by a cashier's son after robbing the Allentown gas station.

Landis insists he didn't have a weapon, although authorities say he pretended to have a gun. Landis said he was trying to get money for crack cocaine.

"I wasn't out to hurt no one or nothing like that," he said. "I know they didn't know that."

According to Assistant District Attorney Craig Scheetz and a police affidavit:

Landis entered the Valero mini-mart just before 10:30 a.m. May 4 and bought a soda. He then demanded money — holding one hand in his pocket as though he had a gun — and began smashing items on the counter. He pushed the cashier, Laila Hadeed, and stole the cash register and cash drawer, valued at $500. Police didn't say how much cash was in the drawer.

Hadeed told her son, Terry Hadeed, that she had been robbed and the son confronted Landis in the parking lot with a gun. Terry Hadeed told police he fired two warning shots in the air to get Landis to stop while he was entering a station wagon. The son said Landis recklessly tried to drive away, nearly striking him and a customer, Sarina Smith.

Scheetz said after Terry Hadeed was nearly run over, he "emptied his gun into the car," hitting Landis.

At 10:43 a.m., an officer who saw Landis driving away with a smashed back window tried to pull Landis over. Landis wouldn't stop and drove on a sidewalk in an attempt to elude police. Landis eventually ditched the station wagon about two miles south of the gas station and ran into woods east of Basin Street. He was captured around 11 a.m. after yelling that he was hurt. Landis was taken to Lehigh Valley Hospital-Cedar Crest, where he was treated for a non-life-threatening wound.

In an interview with police, Landis admitted robbing the Adult Arcade the day before. In the robbery, he also stole the cash register, injuring employee Sharon Heebner.

Landis' attorney, Andrea Olsovsky, suggested that Terry Hadeed didn't have the right to shoot Landis, saying evidence suggests shots were fired before Landis started driving.

"If he was hit and killed, there would be some sympathy for Mr. Hadeed and not much for your client," Steinberg replied. "When you rob a store, you run the risk that a victim will be armed."

Scheetz noted that Landis had an aluminum baseball bat next to the driver's seat. Olsovsky said he coaches Little League baseball, but acknowledged the rest of the equipment was in the back of the vehicle.

"I think we could all agree he wasn't going to the batting cages that day," Steinberg quipped.

The judge is scheduled to sentence Landis in March.

kevin.amerman@mcall.com

610-820-6510

Porn Shop Robbery

Print Article

SHARE

5.0000/**5** rating

Reported by: Nate Potter
Friday, August 20 2010

ANTIS TOWNSHIP, BLAIR COUNTY - Police in Blair County are searching for the person who robbed an adult bookstore with a gun, early Friday morning.

Police say a man walked into the Adult World on Old Route 220 outside of Bellwood, just before 2:00 a.m., pointed a gun at an employee and demanded money.

Police said he got away with an undisclosed amount of cash.

Anyone with information is asked to call the Pennsylvania State Police in Hollidaysburg, (814) 696 - 6100.

You must be registered and logged in to post a comment.

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Bethlehem police investigate armed robberies

January 07, 2011 | By Pamela Lehman, OF THE MORNING CALL

Bethlehem police are investigating two armed robberies Thursday night at area businesses, but don't believe the holdups are related, according to police.

No one was injured in either robbery, said police Lt. Mark DiLuzio. He said police are still investigating exactly how much cash was stolen from each business.

According to police:

The first robbery happened shortly before 10:30 p.m. at the Lukoil, 2450 Catasauqua Road. Police said a man armed with a sawed-off shotgun came in and stole money from the register before running away.

He is Hispanic, about 5 feet 7 inches tall with a thin build. He was wearing a black baseball cap with a logo on it – possibly the New York Yankees. Police said he had a black bandana covering his face and was wearing a dark hoodie and baggy jeans.

The second robbery happened around 11:15 p.m. at the adult bookstore at 1162 Pembroke Road. Police said three men, one armed with a semi-automatic handgun, entered the store and robbed the clerk.

Two of suspects are Hispanic men who were both wearing bandanas to cover their faces – one white and one black. One man is about 5 feet 11 inches tall and the second is about 5 feet 7 inches tall. Police said they were also wearing dark hoodies.

The third suspect is a black man wearing a black jacket who stood watch at the door while the other men stole the cash.

Anyone with information may call the police crime tip line at 610-691-6660.

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East Neighborhoods

Gunman arrested in adult bookstore robbery

Sunday, December 04, 2005

Murrysville police arrested a Penn Hills man early yesterday morning just a few minutes after an armed robbery took place at an adult bookstore.

Solomon Kenneth Hickman, 36, faced charges on three counts of robbery, carrying a firearm without a license, reckless endangerment, resisting arrest, and receiving stolen property.

Shortly before 2 a.m., a masked gunman fled from The Adult Mart at 6094 William Penn Highway. Three Murrysville officers stopped a vehicle on Route 22 when they saw a driver fitting the description of the gunman. Police said the vehicle's driver, Mr. Hickman, was abusive and struggled as officers tried to arrest him.

Mr. Hickman is being held at the Westmoreland County Jail.

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TRIBUNE-REVIEW

Robbers use adult bookstore's handcuffs to restrain employee

By Paul Paterra
TRIBUNE-REVIEW
Tuesday, July 19, 2011

A clerk in an adult bookstore in Murrysville was restrained by handcuffs taken from the shelves by two masked robbers toting handguns early Monday morning.

Murrysville police Chief Thomas Seefeld said the two men entered Murrysville Video News on Route 22 at about 2:15 a.m. as the male clerk was closing for the night.

"The clerk was walking through the shop, and a man appears wearing a mask and gloves and displaying a handgun," Seefeld said. "Another male appears dressed the same way, also showing a handgun."

Police were contacted when the clerk's female friend arrived to pick him up and saw two men rushing out of the store to a pickup and driving west on Route 22. When she found the door locked, she called police.

Officers arrived at the bookstore and shattered the glass door to get into the building. The clerk was found in a utility room cuffed to a metal section of the wall, Seefeld said.

"Using handcuffs from the business, they secured (the clerk) to a stationary object," Seefeld said. "They ended up getting an undetermined amount of cash, some of the clerk's personal belongings, including his wallet, and a couple of items from the shop. The (bookstore) had some video surveillance. We don't know if it will be any benefit to us."

Westmoreland County Detectives are assisting with the investigation.

The bookstore, which opened in 1975 under the name Adult World, has a colorful and sometimes violent history marked by two slayings.

• On Nov. 25, 1992, clerk James Scott Swoyer, 23, was shot four times and stabbed once while working the overnight shift. Swoyer's wallet and car keys were not taken; about $80 remained in the cash register. The slaying of the Westmoreland County Community College student remains unsolved.

• In April 1992, the bookstore was raided as part of a statewide crackdown on pornography.

• In 1986, Richard "Rick" Drylie was sentenced to eight to 20 years for the stabbing death of Daryl G. "Larry" Vincent. According to court records, Vincent made a homosexual advance toward Drylie after asking him if he wanted to smoke marijuana. Vincent was stabbed more than 30 times, and his throat was slashed. His body was discovered in a wooded area behind the store.

• On Jan. 13, 1977, a war over the business between two factions escalated into a shootout. William Birdseye, the notorious owner of area pornography dens, and another bookstore operator, John VanEmburg, were in a turf war with Adult World operator Allen Morrow of eastern Pennsylvania. Birdseye was the building's legal owner at the time. He and VanEmburg barricaded themselves in the building with a small arsenal. Morrow, at least five other men, and a Doberman stormed the building. Two of Morrow's cronies were struck by shotgun fire.

Paul Paterra can be reached at ppaterra@tribweb.com or 724-836-6220.

Tribune-Review

Back to headlines

Pair of suspects sought in heist at Adult Video

By Paul Peirce
TRIBUNE-REVIEW
Tuesday, June 4, 2002

Murrysville police are seeking help from early-morning commuters in solving a robbery Monday at an adult bookstore along Route 22.

Police Chief Thomas Fitzgerald Jr. said a masked man entered Adult Video at 6 a.m. and pointed a gun at a store clerk. Police said the armed robber and an accomplice fled with an undetermined about of cash and merchandise, including a number of adult DVDs.

"The clerk was not watching the door. He heard the door open and when he turned, there was a guy wearing a mask, pointing a handgun at him," Fitzgerald said. "The robber came right over the rack, pointing a handgun at him, and immediately put the clerk down on the floor, tying him up with plastic handcuffs."

Police Detective John Verner said the clerk was unharmed. The clerk said that while he was restrained on the floor behind the counter he heard a second voice, according to police.

"There were at least two people involved," Fitzgerald said.

Verner said the robbers ransacked the store before fleeing out the front door.

"We believe they ran away through the woods to their car, which was parked farther (west) in a field just off Route 22. With all the traffic coming past here toward Pittsburgh at 6 a.m. we believe somebody must have seen something," Verner said.

Police said they believe the thieves parked a vehicle in a field about 100 yards west of the store, just off Route 22.

The clerk, who was not identified, was able to trip an alarm to summon police, but the robbers got away before authorities arrived.

"The clerk's pretty shook up, but otherwise he's OK," Fitzgerald said.

At the time of the robbery, no customers were in the bookstore, which is open 24 hours a day, Verner said.

Although the store is equipped with surveillance cameras, they were not operating at the time of

Photo Gallery

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Murrysville police officers

S.C. Spangler/Tribune-Review

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Hugh Shearer

S.C. Spangler/Tribune-Review

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the holdup, Fitzgerald said.

"We'd appreciate some help from the public on this one," he added.

Police said that while the bookstore has not been the subject of many police calls in recent months, it has, over the years, been the site of numerous incidents of violence.

Store clerk James Scott Swoyer of Jeannette, a 23-year-old Westmoreland County College student, was stabbed to death at the store early on the morning of Nov. 25, 1992. The murder of Swoyer, whose body was discovered by police behind a counter after they broke through a glass door to enter the building, remains unsolved. Police were summoned to the scene when a store manager could not get through a locked door to begin his shift at 9 a.m. the day before Thanksgiving.

Swoyer's was the second murder at the store in less than a decade. Store customer Daryl G. "Larry" Vincent of North Huntingdon Township was stabbed to death in the woods behind the store in 1985. Another customer, Richard "Rick" Drylie, also of North Huntingdon Township, eventually was sentenced to serve eight to 20 years in prison for killing.

According to court records, Drylie became angered after Vincent asked him to come to the woods to smoke a marijuana cigarette and then made a homosexual advance toward Drylie. Vincent was stabbed more than 30 times and his throat was slashed.

Even the issue of the store's ownership has prompted violence. A shootout took between warring factions claiming ownership of the business took place on Jan. 13, 1977, at the store, about two years after it opened as Adult World.

The late William Birdseye, a notorious owner of pornography-related businesses who owned the structure, and another bookstore operator, John VanEmburg, barricaded themselves inside the store.

Allen Morrow, an eastern Pennsylvania man who operated several Adult World chain stores, and five of Morrow's cronies stormed the building with a Doberman. Two of Morrow's men were injured by gunfire.

Anyone with information on yesterday's robbery is asked to call Fitzgerald or Verner at 724-327-2111.

Paul Peirce can be reached at ppeirce@tribweb.com or (724) 837-5374.

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Originally Published: 1/27/2011

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Police seek robber of adult bookstore on Penn Street

CITY OF READING

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Reading Eagle

Reading police are asking for help in identifying a man who robbed the Reading Adult Outlet, 316 Penn St., on Jan. 15.

Police said a black man wearing dark sunglasses and a black hat entered the store about 4 a.m. and ran behind the counter.

Investigators gave this further account:

A male clerk hit the panic button, alerting police dispatchers of the robbery.

The robber ordered the clerk to open the register, then grabbed an undisclosed amount of money, jumped over the counter and left the store. He was last seen running across Penn Street.

He was described as 5 feet 9 inches tall with a stocky build.

The clerk wasn't injured. It was unclear if any customers were in the store.

Anyone with information to help police identify the man should call Crime Alert Berks County's tip line at 877-373-9913. Crime Alert will pay a cash reward for information, and tipsters can collect the reward without revealing their identity.

[+] Enlarge. -

Courtesy of Reading police

Reading police are seeking this man, who they say robbed the Reading Adult Outlet on Jan. 15.

WEEU 830 AM | Reading Eagle Press
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08/28/2006

Sioux Falls Man Charged With Robbery

A Sioux Falls man is in jail for allegedly robbing a man he had just met at the adult bookstore downtown.

Twenty-one-year-old Lucas Johnson faces a number of charges. Police say he met a 28-year-old Baltic man late Sunday night. After going to eat, police say the two men were in a car, when Johnson pulled out a gun, and took the man's wallet. He also made him get cash out of an ATM.

Police found Johnson later and after a chase on foot they arrested him, finding the gun, the money, and some marijuana in the process.

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8NEWS RightNOW WRIC-TV8/DT RICHMOND/PETERSBURG

Adult Entertainment Store Robberies in Petersburg

March 16, 2007 06:20 PM EDT

FROM 8NEWS

Petersburg Police are investigating a string of robberies by a suspect targeting adult entertainment stores.

Police say "The Thriller" bookstore on East Washington Street was robbed at gunpoint March 4th.

Then on March 10th, just four blocks away, "The LTD" was robbed. In this case, we're told the clerks were pistol whipped, and then shot at as they tried to run away.

Early Friday morning, the same store was robbed again.

In each, the suspect escaped with cash and wallets.

If you have any information, call Petersburg Crime Solvers at (804) 861-1212.

LOCAL

Last updated June 19, 2007 4:43 p.m. PT

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Owner of Spokane adult bookstore beaten to death in robbery

THE ASSOCIATED PRESS

SPOKANE, Wash. -- The owner of an adult book and video rental store has died after being beaten in a robbery at his store, and police on Tuesday made an arrest in the case.

John G. "Jack" Allen, 74, owner of Best Buy Adult Entertainment, died Monday evening of head injuries he received in the robbery Sunday night, said his nephew, Jason Kazmark. The cash register was taken from the store, as was Allen's pickup, which police found about a block away.

Spokane police arrested Jeramie R. Davis, 36, for investigation of murder and robbery. Davis originally called 911 to report finding Allen on the book store floor. He was arrested after hours of questioning by police.

Allen bought the store in November 1995, when the city was fighting with sex-oriented business owners to curb lewd behavior, and immediately tore out eight viewing booths in favor of an expanded video sales and rental section.

Even so, the store frequently was plagued by burglaries and robberies.

Information from: The Spokesman-Review, http://www.spokesmanreview.com

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Red Letter robbery suspects could be linked to half-dozen holdups, police say

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Red Letter robbery suspects could be linked to half-dozen holdups, police say

BILL NOVAK | The Capital Times | bnovak@madison.com madison.com | Posted: Wednesday, December 15, 2010 11:55 am

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Madison police said they might be able to close the book on a half-dozen armed robberies with the arrest of three suspects in the holdup of an east-side adult bookstore.

Kiwanta Ali, 21, Norman Walker, 23 and Peter Zimmer, 29, all of Madison, were arrested in connection with the armed robbery of Red Letter News, 2528 E. Washington Ave., on Dec. 9, police said.

Ali is believed to have been the gunman who entered the store and allegedly struck a customer with a handgun before fleeing with cash, while Walker and Zimmer are believed to be parties to the crime, police said.

Ali and Walker were tentatively charged with parole violations while Zimmer was tentatively charged with being a party to the crime of armed robbery.

Police spokesman Joel DeSpain told madison.com the three suspects are "persons of interest" in other recent armed robberies dating back to mid-November.

Similar holdups over the past month, according to police incident reports, include:

— The armed robbery of the PDQ convenience store at 5280 Williamsburg Way in Fitchburg on Dec. 10.

— The armed robbery of the Speedway gas station at 4902 Verona Road on Dec. 6.

— The armed robbery of the PDQ convenience store at 4202 Milwaukee St. on Dec. 3.

— The armed robbery of Deon's gas station at 2301 Commercial Ave. on Dec. 1.

— The armed robbery of the Stop-N-Go store at 6202 Schroeder Road on Nov. 21.

— The armed robbery of the PDQ store at 7502 Mineral Point Road on Nov. 16.

Posted in Crime_and_courts on *Wednesday, December 15, 2010 11:55 am* Updated: 5:17 pm. | Tags: Crime, Armed Robbery, Madison Police, Joel Despain, Kiwanta Ali, Norman Walker, Peter Zimmer, Speedway, Pdq, Deon's, Stop-n-go

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Red Letter News robbed again

The Capital Times
November 18, 2008

Red Letter News, 2528 E. Washington Ave., was robbed again at about 5 a.m. Tuesday by a man reportedly wearing a ski mask and saying he had a weapon.

Madison police said the clerk at the adult bookstore didn't see a weapon. The robber took money from the cash register and fled.

The store was robbed twice in April by "bandana bandits," two Madison men who committed six robberies on the east side during the spring and were convicted of the crimes this

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Posted September 26, 2006

Reward offered in bookstore robberies

The Post-Crescent

TOWN OF MENASHA — The owners of an adult book and product store that has been robbed twice in the last three months have offered a $3,000 reward in the case.

Lt. Doug Jahsman said the reward would be paid for information that leads to the arrests and convictions of the person or people involved in the robberies at Eldorado's Adult Book Store, 2545 S. Memorial Drive, in June and last week.

A man wearing a hooded sweatshirt and cap pulled down to his eyes entered the store Thursday, pushed a clerk to the floor and fled with an undetermined amount of money.

The clerk described the suspect as 5 feet 8 to 6 feet tall with a medium build. He was reported to be wearing dark clothing, a hooded sweatshirt an eyes.

A robber also took an undetermined amount of money June 18.

Police ask anyone with information on the incidents or suspects to call investigators

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BREAKING NEWS» OVU names new president

Man charged in armed robbery

January 15, 2011

PARKERSBURG - A Parkersburg man was arrested Friday for robbing Pioneer Adult Bookstore at gunpoint this week, officials said.

Timothy Randall Constable, 21, 6337 Emerson Ave., was charged with armed robbery Friday and remains in custody waiting for a bond hearing in circuit court.

According to the Wood County Sheriff's Office, Constable and an accomplice entered Pioneer Adult Bookstore, 6603 Emerson Ave., around 11 p.m. Tuesday, threatened the clerk with a gun and demanded money. He fled with an undisclosed amount of cash and valuables, police said.

Deputy Mark Smith followed the suspect's footprints in the snow for more than a mile Tuesday night, giving officers a lead into the suspect's whereabouts, according to a press release from the Wood County Sheriff's Office.

Constable was arraigned Friday before Wood County Magistrate Brenda Marshall. Since his offense is a capital offense, his bond is set in circuit count rather than magistrate court.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK GALARDI, RED EYED INC. d/b/a CRAZY HORSE SALOON, WALLEYE, LLC MIA LUNA, INC. d/b/a PINK PONY SOUTH, and JG&P, LLC,	)	
Plaintiffs,	)	CIVIL ACTION FILE NUMBER
v.	)	1:09-CV-00965-RWS
CITY OF FOREST PARK, CORINE DEYTON, JOHN PARKER, CHIEF DWAYNE HOBBS, COUNCILPERSONS: DEBORAH YOUMANS, SPARKLE ADAMS, LINDA LORD, and MAUDIE MCCORD,	)	
Defendants.	)	

DECLARATION OF DWAYNE HOBBS UNDER PENALTY OF PERJURY

1.

My name is Dwayne Hobbs. I have personal knowledge of the facts set forth in this declaration and know them to be true and correct. I am over the age of eighteen years, am suffering no disabilities and am competent to execute this declaration.

2.

I am Chief of Police for the City of Forest Park, Georgia and a defendant in the above-captioned litigation. As Chief of Police, my duties include oversight of all law enforcement within the corporate city limits of the City of Forest Park. I have been employed as Chief of Police of the Forest Park Police Department since April 1, 1996.

3.

There have been reported crimes around the Crazy Horse, including entering of automobiles, drug offenses, and anonymous complaints of drugs. These businesses have asked for stepped up patrols in the area, which the Police Department has provided on a periodic basis.

4.

During my time serving the Forest Park Police Department, there have been at least two murders that were connected with the clubs. One occurred on the property of one of the clubs, and the other occurred off-premises but was allegedly connected with activities at one of the dancers.

5.

Recently, there have been two alleged rapes involving the Pink Pony South. In one instance, a dancer alleges that she was raped in one of the VIP rooms. In

another instance, a dancer alleged that she was raped at a nearby hotel. In this second instance, the allegation of rape turned out to be untrue, and instead the incident involved an instance of prostitution connected with the club.

6.

Attached hereto as Exhibit A are true and correct copies of the Police Department records relating to an alleged rape and battery that occurred at the Pink Pony South on July 7, 2010. The Forest Park Police Department investigated this incident, which involved a customer in a VIP room allegedly raping a dancer. These records are maintained during the normal course and scope of the operations of the Forest Park Police Department.

7.

Attached hereto as Exhibit B are true and correct copies of the Police Department records relating to a murder of a customer in the parking lot of the Crazy Horse Saloon on or about June 24, 2007. The Forest Park Police Department investigated this incident, which involved a fatal gunshot wound to the head of the victim. These records are maintained during the normal course and scope of the operations of the Forest Park Police Department.

8.

Attached hereto as Exhibit C are true and correct copies of the Police Department records relating to an incident of larceny, underage drinking, prostitution, and false reporting of a crime that occurred near the Pink Pony South on May 19, 2009, and originated at the club. The Forest Park Police Department investigated this incident, which involved waitress at the club making a false allegation of rape against a customer, allegations of underage drinking, and alleged prostitution. These records are maintained during the normal course and scope of the operations of the Forest Park Police Department.

9.

Attached hereto as Exhibit D is a true and correct copy of the most recent application for an adult entertainment license submitted by Jack Galardi, Red Eyed, Inc., and Mia Luna, Inc. In the application materials, Mr. Galardi represents that he is the owner of the Goldrush Showbar in Atlanta, Georgia.

10.

It is exceedingly difficult for my department to investigate activities within the clubs because the employees are familiar with all of my officers.

11.

In fact, one of my recent investigations was derailed because club employees recognized my undercover officer who had not worked within the City for more

than ten years. According to one of the dancers at the club, she and others were told to avoid criminal activity that night because of the knowledge that the City had and might again place an undercover officer in the club. This dancer provided this information to a private investigator the City had hired.

12.

By my signature below, I declare, under penalty of perjury, that the foregoing is true and correct.

Dwayne Hobbs

12/23/10

Date

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK GALARDI, RED EYED INC. d/b/a CRAZY HORSE SALOON, WALLEYE, LLC MIA LUNA, INC. d/b/a PINK PONY SOUTH, and JG&P, LLC,	)	
Plaintiffs,	)	CIVIL ACTION FILE NUMBER 1:09-CV-00965-RWS
vs.	)	
CITY OF FOREST PARK, CORINE DEYTON, JOHN PARKER, CHIEF DWAYNE HOBBS, COUNCILPERSONS: DEBORAH YOUMANS, SPARKLE ADAMS, LINDA LORD, and MAUDIE MCCORD,	)	
Defendants.	)	

DECLARATION OF GUY L. WATKINS, JR.
UNDER PENALTY OF PERJURY

1.

My name is Guy L. Watkins, Jr. I have personal knowledge of the facts set forth in this declaration and know them to be true and correct. I am over the age of eighteen years, am suffering no disabilities and am competent to execute this declaration.

2.

I am a licensed private detective and owner of Business Consulting & Investigations, Inc. ("BCI").

3.

The City of Forest Park hired BCI to conduct surveillance at Pink Pony South and Crazy Horse, both of which are adult entertainment clubs located in the City.

4.

In order to complete this assignment, I assigned six BCI representatives who are private detectives to go into the clubs during their open hours of operation on the following dates: December 16, 17, and 18, 2010.

5.

The BCI representatives provided me with verbal reports and are in the process of completing written reports.

6.

The activity at each club was generally the same other than at the Pink Pony South on the evening of December 17, 2010. With this exception, the BCI representatives witnessed dancers sitting on the patrons' laps fully nude and rubbing themselves on the patrons' genitals. BCI representatives witnessed dancers putting their breasts in customer's mouths, allowing customers to touch

their bare breasts and buttocks and allowing customers to insert their fingers into the dancers' vaginas.

7.

On numerous occasions, BCI representatives were asked by dancers to pay between $145 and $300 to go to a VIP room to engage in sexual activity.

8.

One of the dancers told a BCI representative that the house received most of the money from the VIP rooms so the club management encouraged the dancers and the waitresses to get customers into the VIP rooms.

9.

On at least one occasion, a BCI representative witnessed a dancer and a customer engaging in what appeared to be sexual intercourse in a VIP room.

10.

The dancers and waitresses encouraged the customers, including BCI representatives, to purchase drinks and alcohol shooters. The BCI representatives told the employees that they did not want to drink and the employees responded back that the drinks could be for the dancers. On several occasions, the BCI representatives purchased alcohol and it was then consumed by the dancers. Almost all of the dancers appeared to be under the influence of alcohol or other intoxicating substances.

11.

Several times, BCI representatives witnessed customers openly betting over games of pool.

12.

On December 17, 2010, a dancer at Pink Pony South told a BCI representative that club management informed the dancers that the police department had sent in an undercover officer to the club, so the girls were to refrain from criminal activity. That dancer told the BCI representative that she could "rock [his] world" however, if they went into a VIP room where "no one could see us."

13.

In addition to the assignments within the adult entertainment clubs, I was asked to locate the six former dancers who had provided affidavits and some of whom had provided counter-affidavits provided by plaintiffs' to the Court. After expending several hours on this task, we were able to confirm the location of two of the former dancers but were not able to speak to them directly. We have been unable to locate the other four former dancers.

14.

By my signature below, I declare, under penalty of perjury, that the foregoing is true and correct.

Guy L. Watkins, Jr.

12/23/2010

Date

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK GALARDI, RED EYED INC. d/b/a CRAZY HORSE SALOON, WALLEYE, LLC MIA LUNA, INC. d/b/a PINK PONY SOUTH, and JG&P, LLC,	)	CIVIL ACTION FILE NO. 1:09-CV-00965-RWS
Plaintiffs,	)	
v.	)	
CITY OF FOREST PARK, CORINE DEYTON, JOHN PARKER, CHIEF DWAYNE HOBBS, COUNCILPERSONS: DEBORAH YOUMANS, SPARKLE ADAMS, LINDA LORD, and MAUDIE MCCORD,	)	
Defendants.	)	

DECLARATION OF JOHN PARKER UNDER PENALTY OF PERJURY

Comes now JOHN PARKER, who being first duly sworn, deposes and states on oath the following:

1.

My name is John Parker. I am over eighteen years of age and competent in all respects to testify to the following facts, which are within my own personal knowledge unless expressly indicated otherwise herein.

2.

I am employed by the City of Forest Park, Georgia ("the City") as its City Manager and Director of Public Safety, and I have been so employed since April, 2006. Prior to that time, from January, 1990 to June, 1994, inclusive, I was also employed by the City as its City Manager.

3.

Included in my duties and responsibilities as City Manager and Director of Public Safety are to "direct and supervise the administration of all departments, offices and agencies of the [C]ity" and to "see that all laws, provisions of [the City's] charter and acts of the city council, subject to enforcement by [me] or by officers subject to [my] jurisdiction are faithfully executed."

4.

In addition, I am responsible, in cooperation with other officials of the City, for maintaining business records, ordinances, resolutions, court orders, and other public documents of the City.

5.

I have never reached the conclusion or made the determination that the City is or would be unable to produce evidence that would tend to demonstrate that there are adverse and pernicious secondary effects caused by or related to adult entertainment establishments specifically operating in the City. I have not

commissioned such a study or survey only because I understand that such studies are not required or necessary in order to sustain the City's ordinances and regulations governing adult entertainment.

6.

However, based on my review and reading of several studies produced by other jurisdictions, including but not limited to neighboring jurisdictions such as DeKalb County, Georgia and others, it is my opinion that there is no significant difference between these other local jurisdictions and the City, and that there are pernicious and adverse secondary effects caused by the operation of adult entertainment establishments in the City.

7.

Although there has been some relatively minor development in the past three to five years in the general vicinity of the Crazy Horse Saloon and along the Jonesboro Road corridor, such development has been slow, sluggish and of very low quality of the kind that is typical of very poor, blighted and economically depressed areas.

8.

These deteriorated and blighted areas in the City exist in relatively close proximity to adult entertainment establishments, and based on my review of

several studies produced by other jurisdictions, a contributing factor likely is the existence of the clubs.

9.

Plaintiff Red Eyed, Inc. owns and operates "the Crazy Horse Saloon," which is an adult entertainment establishment within the meaning of the City's ordinances that currently provides nude dancing and the retail sale of alcoholic beverages. The Crazy Horse Saloon is located and operates at 3920 Jonesboro Road, Forest Park, Georgia 30297, and was previously located and operated at 3950 Jonesboro Road, Forest Park, Georgia 30297.

10.

On or about September 7, 2010, the City filed a nuisance abatement action in the Municipal Court of the City of Forest Park, Georgia (Environmental Division) (hereinafter "the Municipal Court"), against three apartment complexes: the "Briarwood Forest Duplexes" at 890 Conley Road, Forest Park, Georgia 30297 (hereinafter the "Briarwood Forest Properties"); the "Taj Mahal Apartments" at 514 Bridge Avenue, Forest Park, Georgia 30297 (hereinafter the "Taj Mahal Properties"); and the "Moore Avenue Apartments" at 508 Moore Avenue, Forest Park, Georgia 30297 (hereinafter the "Moore Avenue Properties") (the three apartment complexes being hereinafter collectively referred to as the "Apartment Properties").

11.

The Briarwood Forest Properties are located approximately ¼ mile south of the Crazy Horse Saloon; the Taj Mahal Properties and the Moore Avenue Properties are located approximately 2500 feet +/- from the Crazy Horse Saloon and the Pink Pony South.

12.

The Briarwood Properties consist of approximately 56 separate dwelling units, none of which are fit for human habitation, and all of which have been boarded up and vacant, except for vagrants and squatters, for over five years.

13.

The Briarwood Properties have served as a breeding ground for illegal drug use and other criminal activities, requiring exceptional diligence and patrolling by the City's Police Department.

14.

The Taj Mahal Properties consist of approximately 48 separate dwelling units, none of which are fit for human habitation, and all of which have been boarded up and vacant, except for vagrants and squatters, for over five years.

15.

The Taj Mahal Properties have served as a breeding ground for illegal drug use and other criminal activities, requiring exceptional diligence and patrolling by the City's Police Department.

16.

The Moore Avenue Properties consist of approximately 56 separate dwelling units, none of which are fit for human habitation, and at least 52 of which have been boarded up and vacant, except for vagrants and squatters, for over five years.

17.

The Moore Avenue Properties have served as a breeding ground for illegal drug use and other criminal activities, requiring exceptional diligence and patrolling by the City's Police Department.

18.

On or about October 14, 2010, following a hearing, the Municipal Court entered a "Final Order – Nuisance Abatement" against all units located at the Briarwood Forest Properties.

19.

Attached hereto and incorporated herein is Exhibit A, which is a true and correct copy of the Municipal Court order referenced above.

20.

Among other findings, the Municipal Court entered a finding that the Briarwood Forest Properties, "including all units and structures existing thereon, are so old and dilapidated and are in such a state of disrepair as to be dangerous, unsafe, unsanitary and otherwise unfit for human habitation, and so inimical to the general public health, safety and welfare, ... and to the citizens of the City of Forest Park, Georgia, that they constitute a continuing nuisance."

21.

The Municipal Court also found that "it is neither feasible nor economically justified nor reasonable to attempt to make all the repairs and renovations necessary to bring [the Briarwood Forest Properties] into compliance with all the codes and ordinances of the City and the laws of the State of Georgia," and therefore ordered "all units and structures" located on the Briarwood Forest Properties to be demolished.

22.

Also following a hearing, the Municipal Court entered a "Final Order – Nuisance Abatement" against all units located at the Taj Mahal Properties and the Moore Avenue Properties.

23.

Attached hereto and incorporated herein is Exhibit B, which is a true and correct copy of the Municipal Court order referenced above.

24.

Among other findings, the Municipal Court entered a finding that the Taj Mahal Properties and the Moore Avenue Properties, "including buildings, apartments, units and structures situated thereon, are so old and dilapidated and are in such a state of disrepair as to be dangerous, unsafe, unsanitary and otherwise unfit for human habitation, and so inimical to the general public health, safety and welfare, ... and to the citizens of the City of Forest Park, Georgia, that they constitute continuing nuisances and continuing unsafe and dangerous conditions, in continuing violation of numerous provisions of the Code of Ordinances of the City, ... and the laws of the State of Georgia."

25.

The Municipal Court also ordered that the owners of the Taj Mahal Properties and the Moore Avenue Properties could elect to "abate ... the aforesaid nuisances and unsafe conditions by undertaking and completing those repairs and improvements [necessary to abate the nuisances]," or "by undertaking to demolish one or more of that Owner's buildings, apartments, units, or structures situated upon said Owner's properties."

26.

The Municipal Court also ordered that "if any Owner shall fail or refuse to comply with [the Municipal Court's] order within forty five (45) days from the date of this Order, then the [City] shall be entitled in the exercise of its police power to demolish the buildings, apartments, units or structures upon said Owner's properties, and to clean and clear the grounds underlying same."

27.

The Apartment Properties are located in relatively close proximity to the Crazy Horse Saloon, and based on my review of several studies produced by other jurisdictions, including but not limited to neighboring jurisdictions such as DeKalb County, Georgia and others, it is my opinion that the existence of the clubs contributed to the decline of the Apartment Properties.

27.

By my signature below, I declare, under penalty of perjury, that the foregoing is true and correct.

John Parker

12-30-10
Date

IN THE MUNICIPAL COURT OF THE CITY OF FOREST PARK, GEORGIA

CLAYTON COUNTY, STATE OF GEORGIA

2010 OCT 14 PM 1:0
P&Z DEPT.

City of Forest Park, Georgia, Petitioner, vs. All those persons and legal entities having an interest in the following properties (the "Properties"): **Briarwood Forest Duplexes, LLC, 890 Conley Road, Forest Park, Ga. 30297**; Taj Mahal Apartments, 514 Bridge Avenue, Forest Park, Ga. 30297; and Moore Avenue Apartments, 508 Moore Avenue, Forest Park, Ga. 30297, Respondents.	CASE NO. NO. ECAB-2010-FP-28 **Final Order – Nuisance Abatement** **890 Conley Road – All Units** **Forest Park, Georgia 30297**

ORDER

This matter having come before the Court for a hearing after due and legal notice being provided to all those persons and entities purporting to have an interest in the property known as "**890 Conley Road, Forest Park, Clayton County, Georgia, Clayton County Tax I.D. No. 13015D-C004,**" and more completely described in the Deed Records of the Clerk of the Superior Court of Clayton County, Georgia at Deed Book 8542, pp. 5 through 44 inclusive ("**the Property**"), upon consideration of all of the evidence, including sworn testimony and all documentary evidence, the Court hereby **FINDS AND ORDERS** the following:

1. **The Property, including all units and structures existing thereon**, are so old and dilapidated and are in such a state of disrepair as to be dangerous, unsafe, unsanitary and otherwise unfit for human habitation, and so inimical

EXHIBIT A to Pawlowski Decl.

to the general public health, safety and welfare, and the surrounding areas in proximity thereto, and to the citizens of the City, that they constitute a continuing nuisance and are in continuing violation of numerous provisions of the Code of Ordinances of the City of Forest Park, Georgia ("the City Code") and the laws of the State of Georgia; and

2. Based on the evidence in the record, none of which is contradicted or impeached, the Court finds that it is neither feasible nor economically justified nor reasonable to attempt to make all of the repairs and renovations necessary to bring said units and structures into compliance with all the codes and ordinances of the City and the laws of the State of Georgia; and so

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

The Property known as 890 Conley Road, Forest Park, Clayton County, Georgia, Clayton County Tax I.D. No. 13015D-C004, and each and every unit, building and structure thereon, shall be demolished and the lots on which they are situated shall be cleared and cleaned; this work shall be accomplished by the City of Forest Park, Georgia ("the City") through an independent contractor; and this Order shall apply, but shall not be limited to, the following lots, buildings, structures and units: Building A, Units 1 and 2, Building B, Units 3 and 4, Building C, Units 5 and 6, Building D, Units 7 and 8, Building E, Units 9 and 10, Building F, Units 11 and 12, Building G, Units 13 and 14, Building H, Units 15 and 16, Building I, Units 17 and 18, Building J, Units 19 and 20, Building K, Units 21 and 22, Building L, Units 23 and 24, Building M, Units 25 and 26, Building N, Units 27 and 28, Building O, Units 29 and 30, Building P, Units 31 and 32, Building Q, Units 33 and 34, Building R, Units 35 and 36, Building S,

Units 37 and 38, Building T, Units 39 and 40, Building U, Units 41 and 42, Building V, Units 43 and 44, Building W, Units 45 and 46, Building X, Units 47 and 48, Building Y, Units 49 and 50, Building Z, Units 51 and 52, Building AA, Units 53 and 54, Building BB, Units 55 and 56.

AND IT IS FURTHER ORDERED that all costs incurred by the City in accomplishing the demolition, cleaning and clearing of said lots, buildings and units and all remaining portions of the Property, shall constitute a lien upon all of the Property, which shall be recorded in the public records of the Clerk of the Superior Court of Clayton County, Georgia.

SO ORDERED this 14th day of October, 2010.

Honorable Ethenia F. King, Judge
Municipal Court of the City of Forest Park, Ga.

Prepared and submitted by:

Joe M. Harris, Jr.
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IN THE MUNICIPAL COURT OF THE CITY OF FOREST PARK, GEORGIA

CLAYTON COUNTY, STATE OF GEORGIA

City of Forest Park, Georgia, Petitioner, vs. All those persons and legal entities having an interest in the following properties (the "Properties"): Taj Mahal Apartments, 514 Bridge Avenue, Forest Park, Georgia 30297; and Moore Avenue Apartments, 508 Moore Avenue, Forest Park, Georgia 30297, Respondents,	)	CASE NO. NO. ECAB-2010-FP-28 **Final Order – Nuisance Abatement** **514 Bridge Avenue – All Buildings, Structures and Units; and** **508 Moore Avenue – All Buildings, Structures and Units** **Forest Park, Georgia 30297**

ORDER

This matter having come before the Court for a hearing after due and legal notice being provided to all those persons and entities purporting to have an interest in the properties known as **"Moore Avenue Apartments, 508 Moore Avenue, Buildings A, B, C and D and Lots 1 through 14 inclusive, Forest Park, Clayton County Georgia, 30297, Clayton County Tax I.D. Nos. 13051D-A082 through 13051D-A096 inclusive"** and the properties known as **"Taj Mahal Apartments, 514 Bridge Avenue, Lot 1, Block D and Lots 15 through 26 inclusive, Forest Park, Clayton County, Georgia, 30297, Clayton County Tax I.D. Nos. 13015D-A097 through 13051D-A109 inclusive," (collectively, the Properties")**, upon consideration of all of the evidence, including sworn testimony and all documentary evidence, the Court hereby **FINDS AND ORDERS** the following:

1. The Properties, including all buildings, apartments, units and structures situated thereon, are so old and dilapidated and are in such a state of disrepair as to be dangerous, unsafe, unsanitary and otherwise unfit for human habitation, and so inimical to the general public health, safety and welfare, and the surrounding areas in proximity thereto, and to the citizens of the City of Forest Park, Georgia (the "City"), that they constitute continuing nuisances and continuing unsafe and dangerous conditions, in continuing violation of numerous provisions of the Code of Ordinances of the City ("the City Code"), the "International Property Maintenance Code, 2006 Edition" (the "IPMC"), the "International Building Code, 2006 Edition" (the IBC"), and the laws of the State of Georgia, all of which are applicable in the City; and
2. Based on the evidence in the record, the Court finds that the Properties, including all buildings, apartments, units and structures situated thereon, individually and collectively, constitute continuing nuisances and continuing unsafe conditions which must be abated; and
3. The Court further finds and concludes that the aforesaid nuisances and unsafe conditions specifically include, but are not limited to, those deficiencies and unsafe conditions identified in Plaintiff's Exhibit 25, consisting of five (5) pages, each entitled "Property Maintenance Inspection Checklist" dated November 11, 2010, prepared and signed by Mike Tuttle, Chief Code Inspector and Deputy Director, Department of Planning, Building and Zoning for the City, and Plaintiff's Exhibit 26, consisting of seven (7) pages, each entitled "Property Maintenance Inspection Checklist" dated November 10,

2010, prepared and signed by Mike Tuttle, Chief Code Inspector and Deputy Director, Department of Planning, Building and Zoning for the City, both of said exhibits being attached hereto and incorporated herein by reference; and

4. The Court further finds that after due notice, the following owners of one or more buildings, apartments, units or structures situated upon the Properties entered an appearance in this case and demonstrated an interest in these matters: Dr. J. P. Agrawal, Ms. Sarla Agrawal, Dr. Pallava Agrawal, J. J. El-Awal, and Multiple Talents, LLC (each one of these being individually referred to herein as the "Owner" and collectively referred to herein as "the Owners"); now

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

The Nuisances and Unsafe Conditions described and identified herein shall be abated as follows:

A. Each of the Owners may elect to abate one or more of the aforesaid nuisances and unsafe conditions by undertaking and completing those repairs and improvements necessary to abate those deficiencies and unsafe conditions identified in Plaintiff's Exhibits 25 and 26, as applicable, contained within each building that said Owner intends to repair and improve; and any Owner who so elects shall obtain a building permit from the City's Department of Planning, Building and Zoning at 785 Forest Parkway, Forest Park, Georgia 30297 (the "PB&Z Department"), and shall begin the process required to obtain such building permit within forty five (45) days from the date of this Order by submitting to the PB&Z Department a written assessment of each of

those buildings, apartments, units and structures that said Owner intends to repair and improve; each assessment shall be prepared by an engineer licensed by the State of Georgia, and shall include a description of all corrective actions that are necessary to bring those properties, buildings, apartments, units and structures selected by the Owner for repair and improvement up to the minimum standards required by the City Code, the IPMC, the IBC, and the laws of the State of Georgia, an estimated cost for such corrective actions, and whether, in the opinion of the said engineer, it is economically feasible to take said corrective actions; **or in the alternative:**

B. Each of the Owners may elect to abate one or more of the aforesaid nuisances and unsafe conditions by undertaking to demolish one or more of that Owner's buildings, apartments, units, or structures situated upon said Owner's properties, in which case the Owner making such election shall apply for and obtain a demolition permit from the City's Department of Planning, Building and Zoning, 785 Forest Parkway, Forest Park, Georgia 30297 within forty five (45) days from the date of this Order; and

C. In the event that any Owner shall fail or refuse to comply with either Paragraph A or Paragraph B above within forty five (45) days from the date of this Order, then the City of Forest Park, Georgia shall be entitled in the exercise of its police power to demolish the buildings, apartments, units or structures upon said Owner's properties, and to clean and clear the grounds underlying the same; and

D. In the event that an Owner shall elect to repair and improve one or more buildings pertaining to his or her property, then that Owner shall diligently pursue the work necessary to complete the required repairs and improvements within a reasonable time, and the City shall monitor the progress made by the Owner in order to ensure compliance with this Order, and shall report to this Court at any time that the City's Code Inspector shall be of the opinion that said work is not being pursued in a reasonably timely manner; and

E. In the event that an Owner shall commence repairs and improvements and then fail to diligently pursue the work in a reasonably timely manner, then the City shall file a complaint with this Court and serve a copy upon the Owner; and upon notice being given, this Court shall conduct a hearing as to whether the work should continue, and if so, upon what conditions, or whether the work should stop, and the building, apartments, units or structures should be demolished; and

F. In the event that any of the buildings, apartments, units or structures upon any of the Properties shall be demolished by the City, then all costs incurred by the City in accomplishing the demolition of said buildings, apartments, units or structures, and the cleaning and clearing of the grounds pertaining thereto, shall constitute a lien upon those properties owned by said Owner, and the lien or liens shall be recorded in the public records of the Clerk of the Superior Court of Clayton County, Georgia.

SO ORDERED this 6th day of December, 2010.

Honorable Ethenia F. King, Judge
Municipal Court of the City of Forest Park, Ga.

Prepared and submitted by:

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EXHIBIT
B
to Parker Decl.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA d/b/a Mardi Gras, 6420 Roswell Road, Inc. d/b/a Flashers, and Fantastic Visuals, LLC d/b/a Inserection,	*	CIVIL ACTION FILE No. 1:09-CV-2747-RLV
Plaintiffs,	*	
v.	*	
CITY OF SANDY SPRINGS, GEORGIA, et al.	*	
Defendant.	*	

AFFIDAVIT OF ROBERT STEVENS

1. My name is Robert Stevens, I am over eighteen years of age, and I am competent to give this Affidavit.

2. I am a Captain in the City of Sandy Springs Police Department, and I have been with this department since July 1, 2006.

3. From late 2010 through May 2011, I supervised a narcotics/prostitution investigation concerning Sherell Allen, who was a dancer at **Mardi Gras**, an adult entertainment establishment in Sandy Springs. The investigation culminated in the arrest of Ms. Allen and five other women who were also dancers at Mardi Gras. Ms. Allen was convicted on drug charges. The other women were charged with solicitation for an illicit sexual act.

4. Attached to this affidavit is a five-page outline of activities, matters observed by law enforcement personnel, and factual findings from the above investigation. The outline is part of the case file for this legally authorized investigation by the Sandy Springs Police Department. As the outline records, an undercover officer bought drugs from dancers at Mardi Gras on the following dates:

December 2, 2010 (3.8 grams of cocaine)
December 30, 2010 (4.8 grams of cocaine)
January 21, 2011 (4.8 grams of cocaine)
February 2, 2011 (4.2 grams of cocaine)
March 1, 2011 (4.9 grams of cocaine)
May 20, 2011 (4.6 grams of cocaine)
May 24, 2011 (57.1 grams of cocaine)

5. The case investigation file also includes written statements that the five Mardi Gras dancers, who were arrested with Sherell Allen on May 26, 2011, provided to the Police Department. These five pages are also attached to this affidavit. The dancers, who were each over the age of 18 years, wrote their statements and certified that they were true and correct and freely given without promise of reward, coercion, intimidation, or any other unlawful influence. Their statements record that dancers participate in sex acts with customers inside Mardi Gras, including oral sex, masturbation, and sexual intercourse. The statements also reflect that dancers engage in drug transactions and drug use inside Mardi Gras.

6. Beginning in late 2011, I led an undercover investigation at **Flashers**, an adult entertainment establishment at 6420 Roswell Road NE in Sandy Springs, to investigate allegations of illegal drug distribution and prostitution occurring among the employees.

7. On Friday, **December 16, 2011**, Detective David Huffschmidt and I went to Flashers in an undercover capacity at about 10:30 P.M.

8. From the bar I saw 20-25 nude adult entertainers dancing on stage or among patrons on the main floor. I saw many nude entertainers having physical contact with customers that consisted of entertainers rubbing their bare breasts in the customers' faces and grinding their nude buttocks into customers' laps during lap dances. Bouncers for Flashers were about to see the physical contact that was occurring between nude entertainers and customers.

9. I received a lap dance from a nude adult entertainer, for which I paid $20-$25. Several times she rubbed her bare breasts in my face. She also sat on my lap and thrusted her hips into my crotch and along my leg. Later I received a lap dance from a different nude entertainer. She also

rubbed her bare breasts in my face repeatedly and rubbed along my legs with her bare buttocks. I also saw multiple nude entertainers have similar physical contact with Detective Huffschmidt.

10. On Friday, **December 23, 2011**, I returned to Flashers in an undercover capacity with Detective Huffschmidt.

11. On this visit I received several lap dances from a nude adult entertainer. I paid $20-$25 for each lap dance. During the dances she repeatedly sat on my lap and thrusted back and forth on my lap with her bare buttocks. She also would face me and rub her bare genitals with her fingers as if she were masturbating herself. Later I saw this entertainer have the same kind of physical contact with Detective Huffschmidt.

12. Another adult entertainer, Ebony, asked me to go with her to the VIP room for $125, and that we could "get close" for an extra $50. She told me the room was dark, no one could see in, no one would interrupt us, and we could touch each other. When I said I did not want to get into any trouble with the bouncers, she repeated that the bouncers would not come into the VIP room while we were in there.

13. Ebony gave me several lap dances for $20-$25 per dance. She would bend over away from me and spread her vagina apart with her fingers. She sat in my lap several times and rubbed on my crotch with her nude buttocks back and forth in a rapid motion. During lap dances she told me several times, "I give good oral sex." She also told me she was sexually aroused and that she wanted to give me oral sex. I told her I was interested, and she left me for a few minutes.

14. Ebony approached me later, squeezed my buttocks with her hands, and asked if I was ready to go back to the VIP room. When I said I would after another beer, she responded "I don't want you to get too drunk so you can't get it up and come on me." I believed this to mean that she did not want me to get too drunk so that I could not get an erection and be unable to ejaculate on her. Ebony approached me again later, stating she wanted to give me the "pornstar experience" and that she had "all the toys and protection." I asked her if we could instead meet sometime outside of the club. She said she understood, and she gave me a napkin with her telephone number.

15. During this visit to Flashers, I saw numerous nude adult entertainers having physical contact with paying customers that consisted of entertainers rubbing their nude butts and vaginal areas on customers' groin areas. Bouncers for Flashers were able to see the physical contact that was occurring between nude entertainers and customers, and yet it continued.

16. On Thursday, **January 5, 2012**, I returned to Flashers in an undercover capacity with Detective Huffschmidt.

17. On this visit had received six to seven lap dances from a nude adult entertainer. I paid $20-$25 for each lap dance. During each dance the entertainer rubbed her bare breasts in my face, grinded her bare buttocks into my crotch area, rubbed her bare vagina with her fingers for me to see, and in one instance grabbed my crotch with her hand. Flashers bouncers were able to see this physical contact, but they ignored it.

18. At one point I saw an adult entertainer and a customer enter the VIP room that was near where I sat. Before they entered, there was a dim green light on inside the VIP room. After they entered, the light went out and the interior of the room was completely dark until they came out. During the 20 to 30 minutes that the entertainer and the customer were in the VIP room, I did not see any bouncer look into their VIP room.

19. I also saw many other nude adult entertainers having physical contact with paying customers that consisted of entertainers rubbing their nude butts on customers' crotches and entertainers rubbing their bare breasts against customers' faces. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

20. On Friday, **January 13, 2012**, I returned to Flashers in an undercover capacity with Detective Huffschmidt, from about 11:30 P.M. to about 1:45 A.M. (on January 14).

21. As before, I received a lap dance from a nude adult entertainer. She sat on my lap and grinded her bare buttocks into my crotch area. I paid her $20-$25 in return. Afterwards she said she would have rubbed her

breasts in my face, but that they were too sensitive because she just had them pierced.

22. Then another adult entertainer, Mystery, came up to me and grabbed my crotch with her hand and asked if I wanted a dance. I agreed, so she removed her attire. During the lap dance she grabbed my crotch several more times with her hands, pushed her bare buttocks into my crotch area, and even straddled me on the bar stool and grinded her bare vaginal area on my crotch. For this dance, I paid $20-$25. Flashers bouncers were able to see this physical contact but they did not say anything to us about it.

23. Later another nude entertainer gave me lap dances for $20-$25 per dance. During each dance she grinded her bare buttocks into my crotch area, rubbed her breasts in my face, rubbed her knees in my crotch area, and touched her vagina with her fingers. This entertainer also gave dances to, and had the same kind of physical contact with, Detective Huffschmidt.

24. I also saw many other nude adult entertainers having physical contact with paying customers that consisted of entertainers rubbing their nude butts on customers' crotches and entertainers rubbing their bare breasts against customers' faces. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

25. On Saturday, **January 28, 2012**, I returned to Flashers in an undercover capacity with Detective Huffschmidt, from about 10:00 P.M. to about 11:30 P.M.

26. On this visit, the adult entertainers were—at first—not dancing for customers like usual, but rather would huddle in groups and whisper to each another. One of the adult entertainers, Vegas, approached me, and we recognized one another from a previous visit to the club. She told me that the dancers suspected that undercover officers were in the club. After some time I asked her who the cops were, and she pointed out two men sitting at a table. I did not recognize them and I was not aware of any other agency conducting an undercover operation at Flashers that night.

27. Later Vegas gave me a lap dance. She rubbed her bare breasts in my face, kissed my neck, rubbed her knees into my crotch, and grinded on my crotch with her bare buttocks. I received at least 6 lap dances from Vegas on this visit, and each one cost about $20 and involved the foregoing physical contact. One time, between dances, she reached under the table and grabbed my crotch before asking to give me another lap dance. Bouncers were able to see the physical contact during each lap dance, but they never tried to make her stop.

28. During this visit, I saw other entertainers rubbing their bare breasts in customers' faces, sitting and grinding their nude buttocks on customers' laps, and laying on top of customers while nude. Although Flashers staff could see that activity, no one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

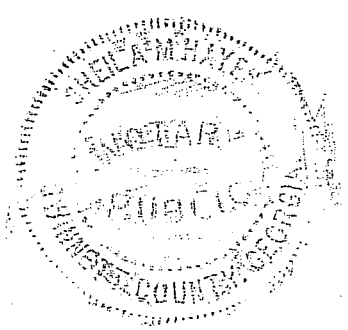
29. Affiant further sayeth not.

Robert Stevens 9-18-12

Robert Stevens

Sworn to and subscribed before me this 18th day of September, 2012.

Sheila M. Hayes, Notary Public



Outline on the Mardi Gras Case

On November 22, 2010, I went to the permits unit in effort to identify each person provided by the informant. Each stage name provided was entered into our reporting system. By doing so, the true identity and profile along with a photo was revealed. A copy of each profile was printed. At approximately 1630 Hours, the informant arrived at police headquarters. He was shown a photo of each person while their profiles were concealed. The informant identified each person by writing their stage name on the bottom profile. Each person was easily identified by the informant.

On December 01, 2010 at approximately 1803 hours, I went into the Mardi Strip Club located at 6300 Powers Ferry Rd along with the informant for purpose of being introduced. After being there approximate 20 minutes, I was introduced to a white female identified as "Morgan" her real name is Jessica Pelt and Teri Shields.

On December 02, 2010 at approximately 1702 hours, I went into the Mardi Gras Strip Club and made a hand to hand purchased approximately 3.8 grams of cocaine from Jessica Pelt. The purchase was made with $250.00 of confidential city funds.

On December 07, 2010 at approximately 1733 hours, I went to the Cocktail Cove Sports Bar located at 5840 Roswell Rd along with the CI. I was introduced to the main target Sherell Allen. After a brief conversation, Allen sold me approximately 4.8 grams of cocaine. The Purchase was made with $250.00 of confidential city funds.

On December 12, 2010 I went to the Mardi Gras Strip Club for the purpose of making a purchase of cocaine from Teri Shields. Shields had made prior arrangements via cell phone to sell to me on this date; however, she was unable to get her hands on the drugs.

On December 14, 2010 at approximately 1739 hours, I went to the Cocktail Cove Sports Bar and made a hand to hand purchase of approximately 4.8 grams of cocaine from Sherell Allen. The Purchase was made with $250.00 of confidential city funds.

On December 20, 2010 at approximately 1545 hours, I went to the Taco Mac Sports Bar and made a hand to hand purchase of approximately 7 grams of cocaine and 7 grams of marijuana from Sherell Allen. The Purchase was made with $635.00 of confidential city funds. The cocaine was sold for $475.00 and the marijuana at $160.00.

On December 30, 2010 I went to the Mardi Gras Strip Club along Detective Concepcion and made a hand to hand purchase of approximately 4.8 grams of cocaine from Sherell Allen. We were introduced to a white female "Athena" real name Connie Lee. Lee was described as Allen's right hand girl. We also met a white male who was introduced as JB. Detective Concepcion was brought in this date to get me into VIP. By doing so it showed me to have more credibility. We were asked to use cocaine while in VIP; however, we managed to control the situation.

On January 06, 2011 at approximately 1633 hours, I met Allen in the parking lot of the Publix Grocery Store located at 6300 Powers Ferry Rd and made a hand to hand purchase of approximately 4.8 grams of cocaine from Sherell Allen. The Purchase was made with $250.00 of confidential city funds.

On January 21, 2011 at approximately 1412 hours, I went into the Mardi Strip Club located at 6300 Powers Ferry Rd and made a hand to hand purchase of approximately 4.8 grams of cocaine from Sherell Allen. The Purchase was made with $250.00 of confidential city funds. On this date, Allen and Lee explained how they travel to Ft Lauderdale Fl, hide illegal drugs in their vaginas and fly back to Atlanta.

On February 2, 2011 at approximately 1245 hours, I went to the Mardi Gras Strip Club and made a hand to hand purchase of approximately 4.2 grams of cocaine. The Purchase was made with $250.00 of confidential city funds. During this meet, Allen advised me that she makes drops all over the metropolitan Atlanta including Forsyth County. Allen also informed me that she sells pills as well.

On March 01, 2011 at approximately 1803 hours, I went to the Mardi Gras Strip Club and purchase approximately 4.9 grams of cocaine from Sherell Allen. While talking to Allen and Jessica Pelt, I learned that new dancers at the club were also aware of the drug activity at Mardi Gras. Some of them were pointed out as users and/or as partaking in the sale of illegal drugs.

On Thursday April 07, 2011 at approximately 1825, I met Sherell Allen at the TacoMac located in Dunwoody Georgia. The purpose of the meet was to achieve installation of a tracking device and to seek more information related to Allen's drug supplier. In order to meet with Allen, I had to agree to purchase more cocaine. While sitting at the bar along with Allen, she handed a plastic bag containing two smaller bags. One of the bags contained approximately 4.7 grams of suspected cocaine and the other bag contained 5 blue and yellow pills which appeared to be ecstasy pills. The cocaine was later field tested and showed to be positive for cocaine.

On Monday April 18, 2011 at approximately 1845 hours, I entered the Buffalo Wild Wings Sports Bar for the purpose of meeting with Sherell Allen. At approximately 1855 hours, Allen arrived. She then asked for the money and pointed to her legs while telling me to take it. I handed her $250.00 of

confidential city funds and received approximately 4.8 grams of cocaine. Later that day a tracking device was placed on Allen's vehicle.

On Thursday April 29, 2011 at approximately 1730 hours, I met Sherell Allen at the TacoMac located at 5600 Roswell Road. The purpose of the meeting was for the HIDTA team to replace an inoperative tracking device and for me to discuss with Allen future plans of a so called party which is to become a takedown of her illegal drug enterprise. There were also two other females at that meeting. A white female "Athena" who's real name is Connie Lee and an unknown black female. There was no drug or money exchange at this meeting.

On Friday, May 20, 2011 at approximately 14:30 hours, I met with Sherell Allen at The Mardi Gras Strip Club for the purpose of finalizing plans of an upcoming party. This so called party is to become a drug and prostitution sting. Also at this meeting an 8-Ball (4.6 grams) of suspected cocaine was purchased. I had to agree to make this purchase in order to meet with Allen for finalization of take down plans. Approximately 20 minutes after meeting Allen at the upstairs bar area, the exchange was made when Allen tapped me on my leg and handed me the suspected cocaine. I then handed her $250.00 of confidential City funds. A field test of the drug confirmed it to be cocaine.

On Tuesday, May 24, 2011 at approximately 1300 hours, I met Sherell Allen at 8879 Roswell Road (The North River Tavern). The purpose of this meeting was to front Allen the money for four ounces of cocaine and to confirm the take down party. After giving her $2,700.00 of confidential city seized funds, Allen stated, "I`m going to pick up two ounces right now." I then advised her that I was under the impression that this was front money for four ounces. Allen stated that she had to purchase two ounces from her supplier first and then she would be able to bring two more ounces on the night of the party. Allen left a few minutes later being followed by Detectives Spears and Begeal. She was also being tracked by an electronic tracking device being monitored by Detective Simone. Detectives observed Allen walking up to the door of 1876 Madrona Street, Atlanta GA.

30318. A short while later, Allen was seen jogging to her car and driving off. At approximately 1350 hours, Allen called me via cell phone and advised that she had goods. At approximately 1430 hours the exchange was made at the bar area of the Mardi Gras Strip Club. The suspected cocaine was later field tested and showed to be positive for cocaine. It weighed approximate 57.1 grams, a little over two ounces.

On May 26, 2011 at approximately 1845 hours, Undercover Detectives Huffschmidt, Stansberry and I met Sherell Allen, Connie Lee, Amy Walker, Michelle Reynolds, Tameka Dixon and Rosario Garrett met in the bar area of the Crown Plaza Hotel. After talking and having a drink, we all went to room number 728. Allen and I then went to room number 712. Both rooms were equipped with listening bugs. Once in room number 712, Allen removed four small bags containing suspected cocaine. She then asked me how many did I want. She advised me that it would be $160.00 for all four bags. Allen then asked me if I would give her the money for the other two ounces we had agreed on. I then counted out $2,600.00 and an additional $1,800.00 which was to cover the cost for each female at $300.00 each for prostitution. During the transactions, Allen removed a handgun from her purse and showed it to me while stating, "See, here`s my gun. It`s a 38." She then placed it back into her purse. All funds were confidential city seized funds and all funds given to her on this date was recovered. At that time, takedown officers Sgt. Stevens, Detective Begeal and Detective Concepcion entered the room and placed Allen under arrest. Allen was transported back to police headquarters where she was read her rights by Sgt. Stevens and Detective Simone. After being informed of her charges and what she was facing, Allen advised that she wanted to speak to a lawyer. At that time the interview was terminated. The suspected cocaine (3.6 gms) was later tested and showed positive for cocaine. Allen`s handgun a 38cal. revolver, a samsung cell phone and the cocaine were placed into property and evidence.

On May 31, 2011 at approximately 1710 hours, Jessica Pelt arrived at the Sandy Springs Police Headquarters after being arrested on warrant number 11SWA0029 for distribute of cocaine. After being read her rights, Plet denied knowing Sherell Allen and others involved in this case. Plet denied ever selling me drugs

and claimed to never have seen me before. Pelt sold me two ounces of cocaine at the Mardi Gras Strip Club on December 2, 2010. I showed Plet her permit information which was file at the Sandy Springs Police Department; however, she continued to deny dancing at the Club. Pelt had renewed the permit on September 23, 2010. After a brief interview she was transported to the Fulton county jail.

SANDY SPRINGS POLICE DEPARTMENT
STATEMENT FORM

STATEMENT OF: ~~Connie Lee~~ TAKEN/WRITTEN BY: ~~Det. Thomas~~

RACE/SEX: W/F DOB: [redacted]/57 NICKNAME: ~~Athena~~

DATE: 5/26/11 TIME: ~~10:15 PM~~ CASE #: ~~2010-915880~~

HOME ADDRESS: [redacted] PHONE [redacted]

BUSINESS ADDRESS: _____ PHONE (___) _____

I have known Stacy for about 5 yrs. I only saw her sell to Morgon, Amy. when she was out having the baby I would hold it for her at work about a couple times a week at $40.00 bgs. I would buy from her when I was at work a ~~b~~$40.00 bg. about who she was paying off I do not know. and ~~the~~ In the VIP I have giving head I've seen Stacy, and morgan also do it ~~I've~~ I've Seen ~~alic~~ Alisa give head to guys in the VIP room. I've seen her ~~give~~ sell to guys inside the club but I do not know who They ~~are. Because~~ were, all of this took place at Mardi gras where I work.

I certify that I have read or have had read to me the above statement and that it is true and correct to the best of my knowledge and belief. I further certify that the statement was freely given and without promise of reward, coercion, intimidation, or any other unlawful influence.

SIGNATURE: Connie Lee DATE: 5/26/11

WITNESS: _____ DATE: 5/26/11

Revised 05-01-06

SANDY SPRINGS POLICE DEPARTMENT

STATEMENT FORM

CASE NUMBER: _____ DATE: _____ TIME: _____

STATEMENT OF: Rosario Gon~~t~~ RACE/SEX: F DOB: [redacted] 68

ALIAS (STREET NAME): Rose

HOME ADDRESS: [redacted] PHONE [redacted]

BUSINESS ADDRESS: Atlanta GA PHONE (___) _____

I done cocaine with Stacy, Athena and Serena inside her car one night at the crown plaza Hotel, ~~two~~ three weeks ago.
I did 10 Handjob with ~~the~~ for the Customer in the VIP room and had one sex with the customer. and also seen Athena done cocaine in the dressing rest room.

I certify that I have read or have had read to me the above statement and that it is true and correct to the best of my knowledge and belief. I further certify that the statement was freely given and without promise of reward, coercion, intimidation, or other unlawful influence.

SIGNATURE: Rosario [illegible] WITNESS: Det. [illegible] #103

WITNESS: _____ WITNESS: _____

03/07/06

SANDY SPRINGS POLICE DEPARTMENT
STATEMENT FORM

STATEMENT OF: Amy Walker TAKEN/WRITTEN BY: Amy Walker

RACE/SEX: F DOB: [redacted]89 NICKNAME: @heyanne

DATE: 05/26/11 TIME: CASE #:

HOME ADDRESS: [redacted] PHONE ( )

BUSINESS ADDRESS: PHONE [redacted]

I saw Atheena & Serena upstairs at Mardi Gras. They told me to meet Stacy downstairs. I went & Talked to her and She told me that She was having a private party at the Crowne Plaza on thursday The deal was before we went in we all would get $300 each and one girl told me to bring condoms, just in case but that would be more money. I showed up to find myself in jail.

I certify that I have read or have had read to me the above statement and that it is true and correct to the best of my knowledge and belief. I further certify that the statement was freely given and without promise of reward, coercion, intimidation, or any other unlawful influence.

SIGNATURE: Amy Walker DATE: 05/26/11

WITNESS: #127 DATE: 05-26-11

Revised 05-01-06

SANDY SPRINGS POLICE DEPARTMENT
STATEMENT FORM

STATEMENT OF: Tameka Dixon TAKEN/WRITTEN BY: _____

RACE/SEX: Female DOB: [redacted] 83 NICKNAME: Toy

DATE: 5-26-2011 TIME: CASE #: _____

HOME ADDRESS: [redacted] PHONE [redacted]

BUSINESS ADDRESS: _____ PHONE [redacted]

Last week, Stacy AKA Sherrell Allen, called me and asked if I wanted to do a party. I said yes. She told me that it would be three hundred dollars at the door just to show up. She also said that they wanted girls that partied, She told me I could fake and act as if I was doing cocaine. (Because she knew that I have been clean now for 3½ years) I figured she was just tryna be a friend and help me make some money, and as a friend I trusted her. Sherrell is a dealer, I work night shift, and she works days. So I don't get to see her as often but I do see her when I am coming into work, and she is leaving when I come in. There is only one girl that I know of that helps Sherell, her name is Connie, I am not sure of any other girls dealing for her, that is the only one that I know of.

I certify that I have read or have had read to me the above statement and that it is true and correct to the best of my knowledge and belief. I further certify that the statement was freely given and without promise of reward, coercion, intimidation, or any other unlawful influence.

SIGNATURE: T Dixon DATE: 5-26-2011

WITNESS: C. [redacted] #1013 DATE: 5/26/2011

Revised 05-01-06

SANDY SPRINGS POLICE DEPARTMENT

STATEMENT FORM

CASE NUMBER: _____ DATE: 5/26/11 TIME: 10:39 pm

STATEMENT OF: _____ RACE/SEX: BLK DOB: [redacted]-65

ALIAS (STREET NAME): Michelle Reynolds

HOME ADDRESS: [redacted] PHONE [redacted]

BUSINESS ADDRESS: _____ PHONE (___)_____

I was told It was a bachelor party. and that It was up to each individual as to what they wanted to participate in. It would last an 1 1/2hr. and to not be surprised at what you see. We all were to get $300; and what ever else happened was at each girls discretion. you could or could not indulge in party Favors or other activities If were propositioned it would be up to you if wanted to participate

I certify that I have read or have had read to me the above statement and that it is true and correct to the best of my knowledge and belief. I further certify that the statement was freely given and without promise of reward, coercion, intimidation, or other unlawful influence.

SIGNATURE: _____ WITNESS: _____ #103

WITNESS: _____ WITNESS: _____

03/07/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA d/b/a Mardi Gras, 6420 Roswell Road, Inc. d/b/a Flashers, and Fantastic Visuals, LLC d/b/a Inserection,	*	CIVIL ACTION FILE No. 1:09-CV-2747-RLV
Plaintiffs,	*	
v.	*	
CITY OF SANDY SPRINGS, GEORGIA, et al.	*	
Defendant.	*	

AFFIDAVIT OF DAVID HUFFSCHMIDT

1. My name is David Huffschmidt, I am over eighteen years of age, and I am competent to give this Affidavit.

2. I am a detective in the City of Sandy Springs Police Department, and I have been with this department since January 2008.

3. Beginning in late 2011, I participated in an undercover investigation at **Flashers**, an adult entertainment establishment at 6420 Roswell Road NE in Sandy Springs, to investigate allegations of illegal drug distribution and prostitution occurring among the employees.

4. On Friday, **December 16, 2011**, Sergeant Rob Stevens (now, Captain) and I went to Flashers in an undercover capacity at about 10:30 P.M.

5. From the bar I saw 20-25 nude adult entertainers dancing on stage or among patrons on the main floor. I saw many nude entertainers having physical contact with customers that consisted of entertainers rubbing their bare breasts in the customers' faces and grinding their nude buttocks into customers' laps during lap dances.

6. I received a lap dance from a nude adult entertainer for about $20. Several times she rubbed her bare breasts in my face. She also sat on my lap and rubbed my crotch with her bare buttocks. Later I received a lap dance from a different nude entertainer, who also had physical contact with me in similar ways. I paid for that lap dance as well. I also saw multiple nude entertainers have similar physical contact with Sergeant Stevens.

7. On Friday, **December 23, 2011**, I returned to Flashers in an undercover capacity with Sergeant Stevens shortly after 10:00 P.M.

8. On this visit I received lap dances from a nude adult entertainer called Chelsea. I paid $20-$25 for each lap dance. During the dances, Chelsea grinded on my crotch area with her bare buttocks. I also saw her have this kind of physical contact during lap dances with Sergeant Stevens.

9. While leaning her body against mine and exposing her bare breasts to me, Chelsea asked if I wanted to go with her to the VIP room. She said it would cost $125 for the club, plus $200 for her. I told her the price was too high, so she continued dancing in my lap. I asked where she was from, and she said El Salvador. She then whispered in my ear that we could go to the VIP room and she would take me to El Salvador. I understood this to mean she would have sex with me in the VIP room for $325.

10. Chelsea then led me to a different area of the club, where she said we could "get away with a lot more." She gave me a lap dance, grinding her bare buttocks on my crotch and rubbing her bare breasts. She turned around and touched her bare vagina, spreading it open slightly with her hand. Then, referring to her vagina, she said "we have to go to the VIP for that." She then started rubbing my crotch area with her bare breasts. For this lap dance I paid about $20 or $25.

11. Next I spoke with a nude entertainer called Trinity. She spoke to me about the VIP room, and she explained she did not want me to waste my money that night because, due to her female situation, it was a week of the month that she could not do the VIP room. Trinity then gave me a lap dance for about $20 or so. While still nude she grinded on my crotch area with her bare buttocks. She then turned around and caused her bare breasts to touch my face. After the dance, she took down my phone

number and then called my phone to give me her number.

12. During this visit to Flashers, I saw numerous nude adult entertainers having physical contact with paying customers that consisted of entertainers rubbing their nude butts and vaginal areas on customers' groin areas. Bouncers for Flashers were able to see the physical contact that was occurring between nude entertainers and customers, and yet it continued.

13. On Thursday, **January 5, 2012**, I returned to Flashers in an undercover capacity with Sergeant Stevens.

14. On this visit I received several lap dances from nude adult entertainers for $20-$25 per dance, and each involved physical contact. The entertainers rubbed their bare breasts in my face and grinded on my clothed genital area with their bare butts and vaginal areas.

15. I also saw many other nude adult entertainers having physical contact with paying customers that consisted of entertainers rubbing their nude butts on customers' crotches and entertainers rubbing their bare breasts against customers' faces. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

16. On Friday, **January 13, 2012**, I returned to Flashers in an undercover capacity with Sergeant Stevens, from about 11:30 P.M. to about 1:45 A.M. (on January 14).

17. On this visit I received several lap dances from nude adult entertainers for $20-$25 per dance, and each involved physical contact. The entertainers rubbed their bare breasts in my face and grinded on my clothed genital area with their bare butts and vaginal areas. During one such dance, an entertainer called Mystery placed her leg on top of my leg while grinding her nude vagina on my leg. Then she turned around, bent over, and grinded my crotch with her bare buttocks.

18. During a lap dance from Zoey, she sat in my lap, put her hands on my shoulders, and grinded her bare breasts and stomach in my face. Then she turned around, bent over, reached her hand between her legs and ran her finger between her vaginal lips for me to see. She did this several

times. I paid her about $20 or so for this lap dance.

19. I also saw many other nude adult entertainers having physical contact with paying customers that consisted of entertainers rubbing their nude butts on customers' crotches and entertainers rubbing their bare breasts against customers' faces. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

20. On Saturday, **January 28, 2012**, I returned to Flashers in an undercover capacity with Sergeant Stevens, from about 10:00 P.M. to about 11:30 P.M.

21. One of the nude entertainers, called Trinity, approached me and we talked. As we spoke, she mentioned that two men at the other end of the main stage were suspected to be undercover officers. She commented that it was stupid of one of the other nude entertainers to be dancing for them since she believed they were undercover officers.

22. Trinity then gave me lap dances for about three songs. She did so completely nude, she rubbed her bare breasts in my face and my chest area, and she grinded on my crotch/lap area with her bare buttocks. Later Trinity gave me another lap dance, and it also involved the same kind of physical contact. I paid her about $20 for each lap dance.

23. I also saw many other nude adult entertainers having physical contact with paying customers that consisted of entertainers rubbing their nude butts on customers' crotches and entertainers rubbing their bare breasts against customers' faces. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

24. Affiant further sayeth not.

R SCOTT LAUGHMAN
Notary Public, Georgia
Cobb County
My Commission Expires
06-26-15

David Huffschmidt

Sworn to and subscribed before me this 18 day of September, 2012.

_____, Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA d/b/a Mardi Gras, 6420 Roswell Road, Inc. d/b/a Flashers, and Fantastic Visuals, LLC d/b/a Inserection,	*	CIVIL ACTION FILE No. 1:09-CV-2747-RLV
Plaintiffs,	*	
v.	*	
CITY OF SANDY SPRINGS, GEORGIA, et al.	*	
Defendant.	*	

AFFIDAVIT OF CAMERON REEVES

1. My name is Cameron Reeves, I am over eighteen years of age, and I am competent to give this Affidavit.

2. I am the Owner of Reeves Investigations LLC, and I am a licensed private investigator.

3. On Friday, **October 7, 2011**, I went to **Flashers**, an adult entertainment establishment at 6420 Roswell Road NE in Sandy Springs, Georgia, from about 8:30 P.M. to about 11:05 P.M. On this visit I saw Mario Freese and Tamara Corazalla moving about throughout the club.

4. An adult entertainer solicited a personal dance to me, and I agreed to the $20 fee she quoted. The adult entertainer removed her thong underwear (exposing her genitals and buttocks), lifted up her tank top (exposing her bare breasts), and put both her hands on my upper thighs. The entertainer then began to rub my groin area with her nude butt. Her nude vaginal area also had physical contact with my groin area. The nude adult entertainer rubbed her bare breasts on my face and then licked my ear and neck area with her tongue. Mario Freese was sitting

next to me at the time, and he and Tamara Corazalla were both able to see the conduct described in this paragraph.

5. I later received dances from two other nude adult entertainers that consisted of the same kind of physical contact described in paragraph 4. I paid each of the entertainers $30 after each dance.

6. During this visit to Flashers, I saw at least 18 nude adult entertainers having physical contact with paying customers that consisted of entertainers rubbing their nude butts and vaginal areas on customers' groin areas and entertainers rubbing their bare breasts against customers' faces and bodies. Mario Freese and Tamara Corazalla were present in the room and were able to see the physical contact occurring between nude adult entertainers and paying customers. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

7. On Friday, **October 7, 2011**, I went to **MainStage**, an adult entertainment establishment at 5275 Roswell Road in Sandy Springs, Georgia, from about 11:15 P.M. to about 1:15 A.M (on October 8). On this visit I saw Grant Davis, Apostolos Kakaroumbas, and Kevin Gribbin in the establishment. MainStage is in the same location as the Coronet Club.

8. An adult entertainer solicited a personal dance to me, and I agreed to the $10 fee she quoted. The adult entertainer removed her thong underwear (exposing her genitals and buttocks), lifted up her tube top (exposing her bare breasts), and put both her hands on my upper thighs. The entertainer then began to rub my groin area with her nude butt. I paid the nude entertainer $20.

9. Then the nude entertainer asked me to go with her to the Gold Room, which she described as a more "private area." I agreed to go into the Gold Room for the quoted price of $25. In the Gold Room the nude entertainer rubbed her bare breasts on my face and rubbed her nude vaginal area on my thighs. She also rubbed my groin area with her nude butt. For this dance, I paid the nude entertainer $35.

10. Later an adult entertainer took me to the VIP room. To go to the VIP room, I had to pay Kevin Gribbin, who appeared to be a manager, a $240 fee. In the VIP room I sat on a couch and the adult entertainer removed

her thong underwear (exposing her genitals and buttocks) and her bra (exposing her bare breasts). The entertainer straddled my head, and she touched my face with her nude vaginal area. She then wrapped her legs around my body and rubbed her bare breasts against my face. In this position, the nude entertainer moved back and forth on my groin area (a motion known as "dry humping") for several minutes. Her nude vaginal area had physical contact with my thigh area and groin in the VIP room. I spent 15 minutes in the VIP room with the nude entertainer.

11. During this visit to MainStage, I saw at least 8 nude adult entertainers having physical contact with paying customers that consisted of entertainers rubbing their nude butts and vaginal areas on customers' groin areas, nude entertainers rubbing their breasts against customers' faces and bodies, and nude entertainers rubbing their vaginal and butt areas in customers' faces. Grant Davis, Apostolos Kakaroumbas, and Kevin Gribbin were present and able to see the physical contact occurring between nude adult entertainers and paying customers. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

12. On Saturday, **October 8, 2011**, I went to **Mardi Gras**, an adult entertainment establishment at 6300 Powers Ferry Road in Sandy Springs, Georgia, from about 9:30 P.M. to about 12:15 A.M. (on October 9). On this visit I saw Rick Peffer and a manager called Slater in the establishment.

13. An adult entertainer solicited a personal dance to me, and I agreed to the $40 fee she quoted. The adult entertainer removed her thong underwear (exposing her genitals and buttocks) and her bra (exposing her bare breasts). While nude, the entertainer straddled me, wrapped her legs around my torso, and rubbed my groin area with her nude vaginal area. She then changed positions and rubbed my groin area with her nude butt. Afterwards I paid the entertainer $50. During this visit to Mardi Gras, I received similar dances from two other nude adult entertainers.

14. While seated on the main floor, I saw Rick Peffer speaking with a group of customers who were part of a bachelor party. Three adult entertainers took the bachelor onto the stage where he sat in a chair. The adult entertainers removed their bras and thong underwear. They rubbed their

nude vaginal areas on the bachelor's thighs, rubbed their bare breasts on the bachelor's face, and rubbed the bachelor's groin area with their nude butts. Rick Peffer and Slater were able to see the physical contact between the 3 nude entertainers and the bachelor on the stage.

15. On this visit, I saw at least 40 nude adult entertainers having physical contact with paying customers that consisted of nude entertainers rubbing their nude butts and vaginal areas on customers' groin areas and entertainers rubbing their bare breasts on customers' faces and bodies. Rick Peffer and another manager called Slater were able to see the physical contact between nude adult entertainers and paying customers. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

16. On Thursday, **October 20, 2011**, I went to **Inserection**, an adult bookstore at 7855 Roswell Road, Sandy Springs, Georgia, between noon and 1:00 P.M.

17. After paying a $5 fee, I entered an area of the store containing 16 viewing booths. The area with booths was not viewable from the main merchandise showroom. Each booth had a video monitor and a bench approximately 4 feet long. I entered 6 booths, and in 2 of the booths I inserted cash to activate the video. The videos depicted both heterosexual and homosexual intercourse. In all 6 booths, the wall below the video monitor was soiled with what appeared to be the residue of human semen.

18. Two middle-aged men were in the booth area walking about while I was there. As I moved among the booths, they would walk next to the booth I was occupying and would seek to maintain eye contact with me. Their behavior made me feel like they wanted me to interact with them or perhaps to join them in anonymous sexual activity.

19. I departed the booth area and told the store clerk about the two men in the booth area. She stated she did not know about them and said she would investigate, but she did not appear to be concerned and she did not approach them during the following moments while I browsed the merchandise showroom.

20. On Wednesday, **November 30, 2011**, I returned to **Inserection** between 7:15 and 8:15 P.M. On this visit I was accompanied by a colleague.

21. My colleague and I each paid the store clerk the $5 fee to enter the booth area. The clerk, a bald African American male with facial hair, who was the only individual working and who appeared to be the manager, asked me whether I was a homosexual. When I replied "No, why?" he then replied, "Because usually only homosexuals go in there."

22. Once inside the booth area, my colleague and I went together into 4 different booths and sat or stood together in each booth for a period of time. In each booth I saw what appeared to be the residue of human semen on the floor directly below the video monitor.

23. On Thursday, **December 1, 2011**, I returned to **Flashers** from about 7:10 P.M. to about 9:10 P.M. On this visit I saw Joseph McCranie and Tamara Corazalla collecting money and walking about the establishment.

24. An adult entertainer solicited personal dances to me, and I agreed to the $20 fee per dance that she quoted. The adult entertainer removed her thong underwear (exposing her genitals and buttocks), lifted up her tank top (exposing her bare breasts), and put both her hands on my upper thighs. The entertainer then began to rub my genital area with her nude butt. Her nude vaginal area also had physical contact with my genital area. The nude adult entertainer rubbed her bare breasts on my face. I paid the nude entertainer $50 when she finished her dances. Joseph McCranie observed the foregoing physical contact.

25. Later, I received a similar dance from another nude entertainer, for which I paid $30. During the dance, the nude entertainer rubbed my genital area with her nude butt, and then she changed positions and rubbed her nude vaginal area on my thigh.

26. During this visit to Flashers, I saw at least 10 nude adult entertainers having physical contact with paying customers that consisted of entertainers rubbing their nude butts and vaginal areas on customers' groin areas and entertainers rubbing their bare breasts against customers' faces and bodies. Joseph McCranie and Tamara Corazalla were present and able to see the physical contact occurring between nude adult entertainers and paying customers. No one tried to stop or reduce

the physical contact that was repeatedly occurring between the nude entertainers and customers.

27. On Thursday, **December 1, 2011**, I returned to **Mardi Gras** from about 9:30 P.M. to about 11:30 P.M. During this visit, I saw David Lamb moving about the club.

28. An adult entertainer solicited a personal dance to me, and I agreed to the $20 fee she quoted. The adult entertainer removed her thong underwear (exposing her genitals and buttocks) and her bra (exposing her bare breasts). She rubbed her nude butt on my genital area and put her hands on my thighs. After the dance, I paid her $30. David Lamb was able to see the foregoing physical contact. I later received a similar dance from another nude entertainer, for which I paid $30.

29. Later an adult entertainer offered me a dance for $40 in an upstairs private room, and I agreed. The entertainer took me to an upstairs private room, and there she removed her bra and thong underwear. Once nude, the entertainer put her hands on my shoulders and straddled me, wrapping both her legs around my torso, and she rubbed my genital area with her nude vaginal area. She then changed positions and rubbed my genital area with her nude butt. After two such dances, I paid the nude entertainer $90.

30. During this visit to Mardi Gras, I saw at least 25 nude adult entertainers having physical contact with paying customers that consisted of entertainers rubbing their nude butts and vaginal areas on customers' groin areas and entertainers rubbing their bare breasts against customers' faces and bodies. David Lamb was a manager on the floor and he was able to see the physical contact occurring between nude adult entertainers and paying customers. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

31. On Thursday, **December 6, 2011**, I returned to **Flashers**, from about 8:00 P.M. to about 10:00 P.M. On this visit, I saw Kylie Rodgers and Tamara Corazalla collecting money and observing the main floor of the establishment.

32. An adult entertainer solicited a personal dance to me, and I agreed to the $20 fee she quoted. The adult entertainer removed her thong underwear (exposing her genitals and buttocks), took off her bra (exposing her bare breasts), and put both her hands on my upper thighs. The entertainer then began to rub my genital area with her nude butt. Her nude vaginal area also had physical contact with my genital area. The nude adult entertainer rubbed her bare breasts on my face. Afterwards, I paid her $30. Kylie Rodgers and Tamara Corazalla were able to see the foregoing physical contact.

33. Later an adult entertainer took me to the VIP room, which she said would cost $250 for 30 minutes. In the VIP room, the nude entertainer rubbed my genital area with her nude butt and vagina. Using her hand, she also rubbed my penis (which remained covered by my pants). The nude entertainer then put her mouth on my clothed penis and she rubbed her vagina and bare breast on my face. Afterwards, I paid the nude entertainer $270.

34. During this visit to Flashers, I saw at least 12 nude adult entertainers having physical contact with paying customers that consisted of entertainers rubbing their nude butts and vaginal areas on customers' groin areas and entertainers rubbing their bare breasts against customers' faces and bodies. Kylie Rodgers and Tamara Corazalla were present and able to see the physical contact occurring between nude adult entertainers and paying customers. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

35. On Tuesday, **December 6, 2011**, I returned to **Mardi Gras**, from about 10:15 P.M. to about 12:15 A.M. (on December 7). On this visit I saw Mike Fulton walking around the main floor of the establishment.

36. An adult entertainer solicited a personal dance to me, and I agreed to the $30 fee she quoted. The adult entertainer removed her underwear (exposing her genitals and buttocks), took off her bra (exposing her bare breasts), and rubbed my genital area with her nude butt. I paid the nude entertainer $60 for two dances. Mike Fulton was able to see the foregoing physical contact.

37. Later an adult entertainer took me upstairs to a corner booth for a 30 minute dance, which she said would cost $150. Once inside the booth, which was dark, the adult entertainer removed her underwear (exposing her genitals and buttocks), took off her bra (exposing her bare breasts), and put both her hands on my upper thighs. The entertainer then began to rub my genital area with her nude butt. Her nude vaginal area also had physical contact with my genital area. The nude adult entertainer rubbed her bare breasts on my face. At the conclusion, I paid the nude entertainer $150.

38. During this visit to Mardi Gras, I saw at least 25 nude adult entertainers having physical contact with paying customers that included entertainers rubbing their nude butts on customers' groin areas. Mike Fulton was there as a manager and was able to see the physical contact occurring between nude adult entertainers and paying customers. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

39. On Wednesday, **January 11, 2012**, I went to **Love Shack**, an adult bookstore at 5674 Roswell Road NE in Sandy Springs, Georgia, between 9:45 and 10:45 A.M.

40. I browsed the merchandise on display in the store, but it was not apparent to me whether there were any viewing booths in the establishment. So I asked the store clerk and she told me that the viewing booths were upstairs. The stairs were in a corner of the store and are fairly hidden.

41. I went up the stairs and found 9 booths, and each contained a monitor and a bench that was about 2 feet long. The booths could not be seen or observed from the merchandise display area on the lower level.

42. I entered each of the booths, and in 6 of them I saw what appeared to be the residue of human semen on the floor directly below the monitor. In one of the booths I inserted a dollar bill to activate the video monitor, which allowed the occupant to see several videos depicting heterosexual and homosexual intercourse.

43. Later that afternoon, I returned to Love Shack with a colleague. We each paid the $2 fee and proceeded upstairs to the booth area. The two of us

entered a booth together and activated the video monitor. The monitor showed videos depicting heterosexual and homosexual intercourse. Then we entered a second booth and, again, occupied that booth at the same time.

44. On Wednesday, January 11, 2012, I traveled to 350 Northridge Road in Sandy Springs, Georgia, looking for an establishment called Video Wholesalers. I could not find any such establishment at that address.

45. On Wednesday, January 11, 2012, I traveled to 8290 Roswell Road in Sandy Springs, Georgia, looking for an establishment called Extreme Video. I could not find any such establishment at that address.

46. On Wednesday, January 11, 2012, I went to Starship, a retail store at 8590 Roswell Road in Sandy Springs, Georgia. The establishment offered adult merchandise in one large room, but it did not have any type of back room or video booth area.

47. On Saturday, **January 14, 2012**, I returned to **Love Shack** with a colleague between 3:45 and 4:45 P.M. We again entered the booth area, where we occupied viewing booths together with no one correcting or stopping us. I also saw what appeared to be the residue of human semen on the floor directly below the video monitor in 6 of the 9 viewing booths. Again, the videos available in the booths were depicting heterosexual and homosexual intercourse.

48. Affiant further sayeth not.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 17th, 2012.

Cameron Reeves

Sworn to and subscribed before me this 17th day of September, 2012.

Notary Public

DEBORAH P EVANS
NOTARY PUBLIC
GWINNETT COUNTY, GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA d/b/a Mardi Gras, 6420 Roswell Road, Inc. d/b/a Flashers, and Fantastic Visuals, LLC d/b/a Inserection,	*	CIVIL ACTION FILE No. 1:09-CV-2747-RLV
Plaintiffs,	*	
v.	*	
CITY OF SANDY SPRINGS, GEORGIA, et al.	*	
Defendant.	*	

AFFIDAVIT OF WARREN SCHERR

1. My name is Warren Scherr, I am over eighteen years of age, and I am competent to give this Affidavit.

2. I am a licensed private investigator employed by Holliday Investigative Services.

3. On Friday, **September 23, 2011**, another investigator and I went to **Mardi Gras**, an adult entertainment establishment at 6300 Powers Ferry Road in Sandy Springs, Georgia, from about 9:55 P.M. to about 1:00 A.M. (on September 24). On this visit I saw a manager named Mike who was working on the floor in the establishment.

4. An adult entertainer solicited a personal dance to me, and I agreed to the fee she quoted. The adult entertainer removed her attire and was completely nude (exposing her genitals, her buttocks, and her bare breasts). For the entire duration of a song, the nude entertainer rubbed and grinded into my crotch area aggressively with her nude buttocks.

5. I also saw my colleague receive personal dances from nude entertainers. I saw the entertainers grinding his crotch area with their nude buttocks,

and some of them touching his face with their bare breasts. I also saw a nude entertainer grinding his crotch area with her nude vaginal area.

6. During this visit to Mardi Gras, I saw at least 8 nude adult entertainers having physical contact with other customers that consisted of entertainers grinding their nude buttocks on the crotch area of customers and rubbing their bare breasts in customers' faces. Mike, the manager, was present in the room and was able to see the physical contact occurring between nude adult entertainers and customers. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

7. On Saturday, **September 24, 2011**, another investigator and I went to **MainStage**, an adult entertainment establishment at 5275 Roswell Road in Sandy Springs, Georgia, from about 9:00 P.M. to about 11:30 P.M. On this visit, I saw Natasha Steward and Grant Davis in the establishment.

8. On this occasion, I saw my colleague receive a personal dance from a nude adult entertainer for a $25 fee. The entertainer removed her attire and was completely nude (exposing her genitals, buttocks, and bare breasts). During the dance, the nude entertainer grinded her nude body up against the body of my colleague. I saw her grind on his crotch area using her vagina and buttocks. She rubbed his body and hair with her hands, and then she rubbed his crotch area with her hands. I also saw her rub her breast against his mouth.

9. Later, I saw another nude entertainer grinding on my colleague's crotch with her nude buttocks and brushing her nude breast in his face. I also received several dances like this from nude adult entertainers.

10. During this visit to MainStage, I saw at least 6 nude adult entertainers having physical contact with other customers that included the entertainers grinding their nude buttocks on the crotch area of customers and rubbing their bare breasts in customers' faces. Natasha Steward and Grant Davis were present in the room and were able to see the physical contact occurring between nude adult entertainers and customers. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

11. On Friday, **September 23, 2011**, another investigator and I went to **Flashers**, an adult entertainment establishment at 6420 Roswell Road NE in Sandy Springs, Georgia, from about 11:45 P.M. to about 1:00 A.M. (on September 24). On this visit, I saw a duty manager named Tamara working in the club.

12. On this occasion, I received a personal dance from an adult entertainer for a fee. The entertainer was completely nude, exposing her buttocks, breasts, and vaginal area. The nude entertainer grinded on my crotch with her bare buttocks, and she rubbed her bare breasts in my face, all while sitting on my lap and grinding her body up against mine. I received multiple dances like this from nude adult entertainers. I also saw my colleague being touched in the same way by nude entertainers.

13. During this visit to Flashers, I saw at least 4 nude adult entertainers having physical contact with other customers that consisted of entertainers grinding their nude buttocks on the crotch area of customers and entertainers rubbing their bare breasts in customers' faces. Tamara, a manager, was present in the room and was able to see the physical contact occurring between nude adult entertainers and customers. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

14. On Tuesday, **December 13, 2011**, I returned to **Main Stage** from about 10:30 P.M. to about 12 midnight. On this visit, I saw Natasha Steward and Grant Davis in the establishment.

15. On this occasion I received a personal dance from an adult entertainer for a fee. The entertainer removed her bikini top and exposed her breasts. She was left wearing a g-string, which covered her genitals but left nearly all of her buttocks exposed. She grinded her exposed buttocks in my lap. She did that for part of a song and for the duration of another song.

16. Then the adult entertainer led me to the steps to the VIP room, and Grant Davis counted the $150 fee that I paid for fifteen minutes in the VIP room. I sat down in the VIP room and the adult entertainer took off all her clothes. For the entire 15 minutes she grinded her nude buttocks in my lap continuously, hugging me and kissing my cheek. After 15

minutes Natasha Steward came to the room to note the time, and she asked if I wanted to continue for an extra $150.

17. During this visit to MainStage, I saw at least 2 nude adult entertainers exposing their breasts while having physical contact with other customers that included the entertainers grinding their exposed buttocks on the crotch area of customers. Natasha Steward and Grant Davis were present in the room and were able to see the physical contact occurring between nude adult entertainers and customers. No one tried to stop or reduce the physical contact that was repeatedly occurring between the nude entertainers and customers.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 18th, 2012.

Warren Scherr

Sworn to and subscribed before me this 18th day of September, 2012.

Judith P. Horne Notary Public Cobb County, Georgia

_____, Notary Public

my commission expires: 6/10/16

Proposed Legislation

West's Florida Statutes Annotated

Title XLVI. Crimes (Chapters 775-899)

Chapter 787. Kidnapping; False Imprisonment; Luring or Enticing a Child; Custody Offenses (Refs & Annos)

West's F.S.A. § 787.06

787.06. Human trafficking

Effective: October 1, 2015

Currentness

(1)(a) The Legislature finds that human trafficking is a form of modern-day slavery. Victims of human trafficking are young children, teenagers, and adults. Thousands of victims are trafficked annually across international borders worldwide. Many of these victims are trafficked into this state. Victims of human trafficking also include citizens of the United States and those persons trafficked domestically within the borders of the United States. The Legislature finds that victims of human trafficking are subjected to force, fraud, or coercion for the purpose of sexual exploitation or forced labor.

(b) The Legislature finds that while many victims of human trafficking are forced to work in prostitution or the sexual entertainment industry, trafficking also occurs in forms of labor exploitation, such as domestic servitude, restaurant work, janitorial work, sweatshop factory work, and migrant agricultural work.

(c) The Legislature finds that traffickers use various techniques to instill fear in victims and to keep them enslaved. Some traffickers keep their victims under lock and key. However, the most frequently used practices are less obvious techniques that include isolating victims from the public and family members; confiscating passports, visas, or other identification documents; using or threatening to use violence toward victims or their families; telling victims that they will be imprisoned or deported for immigration violations if they contact authorities; and controlling the victims' funds by holding the money ostensibly for safekeeping.

(d) It is the intent of the Legislature that the perpetrators of human trafficking be penalized for their illegal conduct and that the victims of trafficking be protected and assisted by this state and its agencies. In furtherance of this policy, it is the intent of the Legislature that the state Supreme Court, The Florida Bar, and relevant state agencies prepare and implement training programs in order that judges, attorneys, law enforcement personnel, investigators, and others are able to identify traffickers and victims of human trafficking and direct victims to appropriate agencies for assistance. It is the intent of the Legislature that the Department of Children and Families and other state agencies cooperate with other state and federal agencies to ensure that victims of human trafficking can access social services and benefits to alleviate their plight.

THE FBI FEDERAL BUREAU OF INVESTIGATION

Wanted by the FBI

Human Trafficking


SEVERIANO MARTINEZ-ROJAS


ROGER GALINDO-SEPEDA


MARIA ISABEL CRUZ


WEI LI PANG


SHU GANG LI


ALFONSO ANGEL DIAZ-JUAREZ


AMPARO ALTAGRACIA MONTAS HERNANDEZ


EDDY VASQUEZ

ROGER GALINDO-SEPEDA

Conspiring to Engage in a Conspiracy to Conceal, Harbor, and Shield Illegal Aliens

REWARD: The FBI is offering a reward for information leading to the arrest of Roger Galindo-Sepeda.

informed that they were indebted to the leader of the enterprise in the amount of $7,000 to $10,000, and they would have to work off their debt. The victims were then quartered in safe houses with virtually no contact with the outside world. After being forced to wear excessive makeup and immodest clothing, the victims were then transported to clubs managed by the subjects and were forced to engage in prostitution. Women who refused to comply were threatened with being reported to the Immigration and Naturalization Service and imprisoned. Additionally, threats were made to harm the victims' families in Honduras and to inform the families of the victims' involvement in prostitution.

On May 24, 2002, a federal arrest warrant was issued by the United States District Court, Northern District of Texas, Fort Worth Division, after Galindo-Sepeda was charged federally with conspiring to

SUMMARY
SCARS & MARKS
ALIASES
DESCRIPTION
GET POSTER
SUBMIT A TIP

Operation Dancing Brides - 20 Individuals Charged for Participating in a Scheme to Recruit Illegal Immigrants to Work in Cheetah Adult Entertainment Clubs Controlled by La Cosa Nostra

December 1, 2011

Charges have been made against 20 individuals for their participation in a scheme that involved recruiting women from Russia and other Eastern European countries to illegally enter the U.S. to work as exotic dancers at adult entertainment clubs ("Strip Clubs") controlled by the Gambino and Bonnano Organized Crime Families of La Cosa Nostra. Several of the defendants also arranged for many of the women to enter into sham marriages with U.S. citizens. Defendants ALPHONSE TRUCCHIO, WILLIAM PAZIENZA, SR., CHRISTOPHER COLON, and RICHARD GUTKOWSKI, who are members or associates of the Gambino Organized Crime Family, and ANTHONY FRASCONE, PAUL CASELLA, and LAWRENCE ZAINO, who are members or associates of the Bonnano Organized Crime Family, are charged with racketeering and extortion crimes related to their control of several Strip Clubs located in Queens and Long Island, New York, at which the women worked. These seven defendants and 13 others—ALEKSANDR KRAVETS, THOMAS DEVITT III, GERALD MONFORT, YONG WANG, BORIS YUSUPOV, VITALIY MINDYUK, ZHANNA KUZNETSOVA, ELENA TURUBANOVA, NATALIA IVANOVA, CHRISTINE GUNNING, JEFFREY RINCHEY, OSCAR ZELEDON, and ALEXANDER BELESON—are also charged with several other crimes related to the scheme, including visa fraud, marriage fraud, and transporting, harboring, and inducing the entry of illegal aliens. All of the defendants were arrested today and will be presented before U.S. Magistrate Judge Gabriel W. Gorenstein in Manhattan federal court this afternoon. The case is assigned to U.S. District Judge Victor Marrero.

Manhattan U.S. Attorney Preet Bharara stated: "As alleged, the schemes in which these defendants participated ran the gamut of criminal activity—from racketeering and extortion, to immigration and marriage fraud. And the defendants themselves had one thing in common—the desire to turn the women they allegedly helped enter this country illegally into their personal profit centers. Today's arrests have brought an end to their illicit activities."

ICE HSI Special Agent in Charge James T. Hayes, Jr., stated: "Today's arrests bring to an end a long-standing criminal enterprise operated by colluding organized crime entities that profited wildly through a combination of extortion and fraud. As alleged, the defendants controlled their business and protected their turf through intimidation and threats of physical and economic harm. Today, that business model has been extinguished."

DSS Special Agent in Charge Robert Goodrich stated: "The Diplomatic Security Service is firmly committed to working with the U.S. Attorney's Office and our law enforcement partners at the Homeland Security Investigation's Document and Benefit Fraud Task Force, to investigate and bring to justice those who commit passport and visa fraud, which oftentimes leads to other criminal activities. This case demonstrates Diplomatic Security's continuing commitment to safeguard the integrity of the U.S. passport and U.S. visa by vigorously investigating and bringing those who commit passport or visa fraud to justice."

UNITED STATES DEPARTMENT OF STATE
BUREAU OF DIPLOMATIC SECURITY

DIPLOMATIC SECURITY INVESTIGATES

DS Case Files

RETURNING A FUGITIVE TO FACE JUSTICE

A Nigerian national was wanted in the United States for conspiracy to commit mail and wire fraud, as well as money-laundering schemes. Monetary losses to his victims exceeded $70 million. DS RSOs in Lagos worked successfully with the U.S. Department of Justice and other U.S. and Nigerian law enforcement agencies to return the Nigerian fugitive to the United States, where he was arrested and turned over to the U.S. judicial process.

CURBING FRAUDULENT ASYLUM CLAIMS

Over a four-year period, Chinese asylum claims doubled in the United States to 16,000 cases per year. During the same period, Chinese student visa asylum requests jumped from ten percent of all claims to 33 percent.

To confront potential fraud and improve investigative collaboration, the DS Regional Security Office in Shenyang and the U.S. Department of Homeland Security co-founded the China Visa Working Group, with key partnership by other U.S. law enforcement agencies as well. Following the Group's success in identifying fraudulent claims, Chinese student visa asylum claims dropped 63 percent, demonstrating the importance of the program and the need for active inter-agency collaboration.

PREVENTING INTERNATIONAL VISA FRAUD

A suspect was involved in a visa fraud scheme in the Massachusetts area regarding issuance of legitimate work visas based on fraudulent documentation presented to a U.S. embassy in South America. The suspect charged individuals $15,000 to facilitate the issuance of a visa. Upon their arrival in the United States, there was no expectation that these individuals would work at the company sponsoring their visas or that they would leave the U.S. after the authorized period of stay had ended.

The investigation lasted over two years and involved DS working together with members of the U.S. Department of Homeland Security, Foreign Service National Investigators employed by the U.S. embassy, and foreign law enforcement officers operating undercover. This complex visa conspiracy investigation led to the arrest of a recruiter and the identification of several companies that manipulated the work visa process to provide businesses with an illegal work force. The investigation showed that the scheme facilitated the entry of over 1,000 foreign nationals into the United States.

All five suspects were arrested and subsequently pled guilty or were convicted by a jury. Each received 18 to 30 months of prison time, and all were ordered removed from the United States.

CURTAILING GANG ACTIVITY

Operation Bloodhound, a large multi-agency investigation, targeted a violent nationwide street gang involved in narcotics, weapon trafficking, homicides, and kidnappings. The gang used passport and identity fraud to further their activities and to avoid prosecution or capture. DS special agents from several field offices presided over 23 arrests in Illinois on one day alone, and seized multiple vehicles, narcotics, and cash. Several of the gang members were sentenced to prison.

HALTING THE SMUGGLING OF PEOPLE AND NARCOTICS

Operation Dancing Brides was a joint federal investigation into a criminal enterprise that employed Eastern European females as exotic dancers. The women entered the United States on student visas and often ended up in Mafia-connected adult entertainment jobs or in sham marriages with U.S. citizens to obtain immigration benefits. The two-year investigation culminated in 31 arrests.

September 10, 2015

Veniamin Gonikman, Accused Human Trafficker, Should Pay Victims $1.6 Million, Prosecutors Say

The Huffington Post
Posted: 04/27/2012 12:13 pm EDT | Updated: 04/27/2012 12:13 pm EDT

Federal prosecutors Thursday urged a U.S. District Court to order accused human trafficker Veniamin Gonikman to pay $1.6 million to 12 victims, and ignore the defendant's plea for leniency.

According to the *Detroit Free Press*, the Ukranian nightclub owner, who was once on the FBI's Most Wanted list, faces up to 51 months in prison for his role in smuggling "Ukranian dancers" into the United States to work as strippers.

According to authorities, the women were forced work long hours, hand over their earnings -- sometimes "$3,000 to $4,000" a week, according to one victim's 2007 testimony before Congress -- and were verbally and physically abused. The *Detroit Free Press* reported that authorities estimated Gonikman extorted more than $1 million from his victims.

"I could not refuse to go to work or I would be beaten," the victim testified. "I was often yelled at for not making enough money, or had a gun put to my face."

Gonikman plead guilty to money laundering charges in September 2011, and is seeking a jail sentence of 10-to-16 months, but insists that it was his co-defendant son that was behind the human trafficking operation, according to the *Detroit Free Press*.

In 2005, Gonikman fled the United States after being charged in Detroit with a 22-count indictment on charges including "trafficking in persons, forced labor, alien smuggling, money laundering, extortion collection, and conspiracy," according to CBS Detroit. He was arrested in January 2011 after being deported from Ukraine.

In March 2011, the Associated Press reported that Michigan would strengthen its human trafficking laws in response to a rash of "modern-day slavery" in the state. That report cited Gonikman's case as a high-profile example, but indicated that human trafficking had become a major issue across the state, from Detroit to the Upper Peninsula.

MORE: $1.6 Million Detroit Veniamin Gonikman to Pay Veniamin Gonikman Ukraine Michigan Slave Trader Human Trafficking

Conversations

U.S. House of Representatives
Committee on the Judiciary

Statement of "Katya" Trafficking Victim from Ukraine
Before the
House Judiciary Committee
United States House of Representatives

October 31, 2007

Good afternoon. I would like to thank the House Committee on the Judiciary for the opportunity to speak on behalf of trafficking victims. This is my story. I did not work as a maid, or on a farm. I was not made to be a prostitute. I came from another country. But I will try to speak for all survivors of trafficking, no matter what they were made to do or where they are from. Because our desire is a universal one - the desire for freedom.

Please call me Katya. I cannot use my real name today and I am also in disguise because I fear that my captors will recognize me and place my life and that of my family in danger.

In Fall 2003 I was a university student in Ukraine. I found out about a summer program that would allow me to work in the United States and study English. I was very excited. I applied for the program and obtained a student visa. I found out that I would be working as a waitress in Virginia Beach.

In May 2004 I traveled to the United States. I flew from Kiev to Washington D.C. When I landed, I was surprised to see Michael Aronov and Alex Maksimenko, people I knew from Ukraine, at the airport in Washington D.C.. They told me that I would no longer be going to Virginia but not to worry because they had worked things out and I would be going to Detroit. They gave me a bus ticket to Detroit.

When the bus arrived in Detroit I saw Michael, Alex, and another Ukranian man that I knew, Veniamin Gonikman waiting for me. Once I got off the bus in Detroit, everything changed. They took me to a hotel and took all of my identity documents from me. They told me that they needed them in order to get a state identification card for me. They told me that I owed them $12,000 for travel to the United States and $10,000 for the identification document, and that I only had a short time to pay them off.

I quickly leaned how I would have to pay it off. They told me I was going to have to work at a strip club called Cheetah's. They forced me to work six days a week for twelve hours a day. I could not refuse to go to work or I would be beaten. I had to hand over all of my money to Michael and Alex. I was often yelled at for not making enough money or had a gun put to my face. Every week I handed over around $3000-$4000 to Alex and Michael. I was their slave.

My captors kept me in an apartment with one of the other girls. I was never allowed out of the apartment by myself. I was driven to work by Michael or Alex (sometimes both) every day, except when they were on vacation. Then, they hired a car service for us. There was no phone in our apartment. Sometimes I was forced to call home to talk to my mom and tell her I was okay. Someone was always listening in on the calls so I could not tell her the truth, but I think she could tell by my voice that I was in trouble.

I never felt safe, between the other girl and I we only had one key to our apartment. Michael and Alex also had keys. Sometimes they would just come into our apartment

without knocking, even if we were in the shower or sleeping. They would also come into our apartment when we weren't there. I know that they did this, because I found my things moved around. I think they were looking around to make sure we hadn't been keeping any of the money. The girl I lived with and I were trying to keep some money to escape. Our captors would give us money at the store and we would have to give them any leftover money. To try to keep some money for our escape we would slide some money into candy boxes. Once we got back to our place we hid the money in a hole outside in front of the apartment.

My enslavement finally ended when I escaped with the girl that I lived with. I was terrified that Alex and Michael were going to catch us. When we escaped from our apartment we put the stuff we wanted to take with us in garbage bags in case Alex or Michael showed up, that way we could just act like we were taking out the trash.

We escaped with the help from someone who believed us. The other girl confided in a man who came to the strip club regularly and who she felt she could trust. When he found out what happened, he agreed to help us. We were scared but went with him to ICE because they were supposed to help escapees. It was intimidating, but we told our story. The agents not only believed us and helped us, but they went that night and rescued two other women that had also been enslaved. They arrested Alex and Michael before they could run away or hide the evidence. Once they were arrested, I felt safe for the first time.

Since I escaped I have been learning English on my own and working full time. I really want to go back to school and finish my degree in sport medicine, but the money for college is an issue.

I am lucky, I escaped and survived being a victim of human trafficking. Many others are victims right now, they need help. Traffickers should not be able to exploit the student visa process. I was aware of human trafficking, I knew about it. I checked the program out and talked to people who had used the same company and come back safely. Still I was victim.

Businesses in the United States should not be able to make money off of slaves simply because they have someone else bring them into work. Not only did Alex and Michael make a lot of money by exploiting me, so did the strip club.

Finally, when I left Ukraine in May of 2004 and I said good-bye to my mother, I expected to see her again in a few months. Life in the United States is hard without my mother being with me. I never wanted to be here this long, but it is not safe for me to return to Ukraine. I miss my mom, and I worry about her safety since Alex's dad, Veniamin, is still in Ukraine. If the trafficking law had allowed for my mother to come and live with me in the United States it would have helped me and protected her.

Please help future victims like me, do not let this happen to anyone else. Thank you.

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BRPD Makes Human Trafficking Arrest in Connection With Plank Rd. Strip Club Incident
MARCH 27, 2015

Baton Rouge Police Identify Deceased Female Found on North

BRPD Makes Human Trafficking Arrest in Connection With Plank Rd. Strip Club Incident

Posted on March 27, 2015

Investigators with the BRPD Sex Crimes Division have arrested a Baker female and charged her with Human Trafficking in connection with the recent bust of an unlicensed strip club on Plank Rd.

An affidavit of probable cause says Kaylenceyia Carter, 19, 2319 College Ave., Baker, LA, is allegedly responsible for bringing the 16-year-old victim to the club at 3773 Plank Rd. to strip for money.

During an interview with BRPD, the teen told investigators that she contacted Carter on March 21st stating she was in need of some money because she had no job. Carter told the teen that she had been working at a strip club and could take her there for an audition.

Carter brought the teen to the club at 3773 Plank Rd. where they met with the co-owner of the club, Trudell Richardson, also know as 'Squalee Pope.' Richardson asked the teen how old she was, to which the teen replied 16. Richardson told her to tell anyone who asked that she was 21. He told the teen that he would introduce her to the 'money guys' and that she needed to do whatever was necessary to make the money. She was told that half of the money she made was to be paid back to the club.

Carter then brought the teen inside the club, where she was taught how to dance on a pole. Richardson asked the teen to dance for him and several other males in the club who were throwing money on the floor in front of her. The teen told investigators that she made approximately $300.00 for the dance. She stated that she later fell asleep in one of the rooms at the club which is where the BRPD located her during a search.

A warrant was issued for Carter's arrest and she was charged with a

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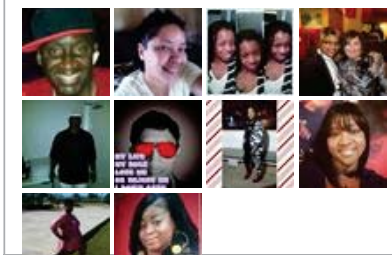

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Beaverton Stars Cabaret manager admits to pimping strippers, including a 13-year-old

12.10starswarrantserve.jpg

Police served a search warrant at Stars Cabaret in Beaverton and two homes Dec. 10 linked to an alleged sex trafficking operation ran out of the strip club. *(Beaverton Police Department)*

Emily E. Smith | The Oregonian/OregonLive By **Emily E. Smith | The Oregonian/OregonLive**
Email the author | **Follow on Twitter**

on September 09, 2014 at 2:42 PM, updated September 10, 2014 at 8:00 PM

Correction appended

Steven Toth, a Beaverton strip club manager, hired a 13-year-old girl to dance nude for customers and have sex with some of them.

He split the profits with her pimp.

After the girl's first day at work in fall 2012, Toth had her perform oral sex on him. Then he drove her back to her pimp.

These were the facts described Tuesday, when Toth pleaded guilty in **Washington County Court Circuit Court** to compelling prostitution, first-degree sex abuse and second-degree sodomy. Six other counts against him were dismissed. His sentencing is set for next week.

Authorities say Victor Moreno-Hernandez was the girl's pimp. He is charged with 16 counts alleging he sexually abused, drugged and prostituted her. After Toth's plea hearing, lawyers began picking a jury for Moreno-Hernandez's trial in Circuit Court.

Toth was scheduled to go to trial the same day as his co-defendant, but he changed his mind over the weekend, said Senior Deputy District Attorney Kevin Barton. He decided instead to take a plea deal, which requires him to testify against Moreno-Hernandez.

The victim in the case was a chronic runaway who met Toth through Moreno-Hernandez, Barton said. At the time, Toth managed the Beaverton location of Stars Cabaret, a strip club chain.

The arrangement between Toth and the girl's pimp involved her working as a stripper and performing sex acts on customers in the club's back room, Barton said. The back room, behind the employees' locker room, was generally reserved for traveling porn stars or vendors who sold jewelry or dresses to the workers.

"If a child was going to be performing sex acts for customers at Stars, this room was used for that as well," Barton said.

From left, Victor Moreno-Hernandez and Steven Toth

WCSO

The prosecutor told Circuit Judge Thomas Kohl that Toth wasn't only prostituting the young teen.

During their investigation, police learned that prostitution at the strip club was common, Barton said. An informant told police that customers could select a dancer and pay the club to have sex with her off-site. This practice was against the club's official rules, Barton said.

"Unofficially, it happens," he said.

Toth was charged in a separate case with three counts of promoting prostitution related to selling sex with the women. In his Tuesday plea deal, he admitted to one of those counts.

"Is Stars still doing business?" the judge asked.

"As far as I know, yes," Barton said.

-- Emily E. Smith

Correction appended Sept. 10, 2014: *A previous version of this article misstated the number of charges dismissed in Toth's case involving the child victim. The number of charges dismissed was six, not five.*

Home > News

Providence strip club Cheaters, facing closure, on the market for $8 million

August 29, 2013 11:30 PM

BY AMANDA MILKOVITS

Journal Staff Writer

amilkovi@providencejournal.com

PROVIDENCE — A strip club where a missing Boston 15-year-old girl was found dancing in July is up for sale — along with the adjoining adult bookstore, strip club, gay bathhouse and "personal service club."

Cheaters Gentlemens Club, at 245 Allens Ave., faces a possible closure by the city license board for hiring an underage girl and for the arrest of a dancer who allegedly solicited an undercover detective.

The big pink strip club is part of the "adult entertainment center" listed on stripclubs4sale.com with an asking price of $8 million. The ad says the business and real estate — strip clubs, bookstore, megaplex club, "personal service club," and two vacant spaces — are valued at $11.23 million.

"This is an outstanding business opportunity that offers cash flow in excess of $2.5 million!"

The ad doesn't give the exact location in Providence or reveal the names of the businesses, but the description only fits the Allens Avenue properties owned by H. Charles Tapalian and registered to him and his family: Cheaters, Studio 253, Mega-Plex, Adult Video & News, and The Body Shoppe, all listed at 245, 253, and 257 Allens Ave.

Tapalian refused to speak to a Providence Journal reporter Thursday regarding the sale.

The advertisement went up on July 22, a week before the police found an underage Boston girl dancing at Cheaters. The teen was accompanied by a Massachusetts sex offender, who the police say put her to work in the club and was acting as a pimp for her and another 15-year-old girl.

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- Missing girl from Boston found dancing at Providence strip club
- Providence Police seek to shutter Cheaters, where missing teen was found dancing
- Providence City Council president proposes background checks for exotic dancers

Police: Man Had Sex With 15-Year-Old At Strip Club

Club Says Incident Never Happened

Steve Tellier/WLKY

POSTED: 10:57 pm EST February 13, 2012
UPDATED: 9:31 am EST February 14, 2012

NEW ALBANY, Ind. -- Police are searching for a southern Indiana man accused of having sex with a 15-year-old girl at a strip club in May of last year.

On Monday morning, an arrest warrant was issued for 28-year-old Seth Jecker.

Court documents stated the teen was at the club with her aunt and uncle.

A manager at The Rustic Frog, off Highway 111 in New Albany, said the incident never happened. The Rustic Frog said the family was celebrating after a wedding.

According to court documents, the girl told police that Jecker gave her several drinks while she was at the club, and that she remembered, "being alone with Jecker in a room and being on a couch with her underwear off."

She told police she also remembered, "Seth being on top of her and feeling pain."

Police said the girl was very intoxicated when they took her initial report.

Jecker later told police he had "kissed a girl at The Rustic Frog and had been told she was only 15, but he thought since they were in a strip club, she was not underage."

WLKY asked a manager at that strip club what happened. He said police examined surveillance video taken inside the club and found no evidence of criminal activity.

He also said he doesn't believe the girl was ever even inside the club, as two guards were manning the doors that night, ensuring every patron was 21 or over.

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Underage stripper says club never asked to see ID

By Anita Kissée KATU News and KATU.com Staff | Published: Dec 30, 2011 at 12:18 AM PST (2011-12-30T8:18:52Z)

Nicole Madril, 17, holds a shoe she wore while dancing naked at a Salem strip club. She says the club never asked to see her ID.

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Man gets 4 years for pimping teen

Filed by **Brad Dicken** November 23rd, 2011 in **Top Stories**

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An Elyria man who forced a 16-year-old girl to work as a prostitute was sentenced Tuesday to 4½ years in federal prison.

Davis

Timothy "Jhon" Davis pleaded guilty earlier this year to a federal charge of juvenile sex trafficking in exchange for prosecutors agreeing to drop additional charges he had faced in the case.

Davis had potentially faced up to life in prison, but both federal prosecutors and Davis' lawyer had asked that he receive a lower sentence, court documents show.

After he completes serving his prison sentence, Davis will be monitored for five years, according to U.S. District Court records.

Davis was arrested earlier this year after the FBI launched an investigation when they saw a photo of a girl they knew to be under the age of 18 on the website Backpage.com, which law enforcement and others have said is sometimes used to advertise prostitutes.

The site listed the girl's age as 21, but when she was contacted by the Internet Crimes Against Children Task Force, the girl told her that Davis had taken the picture of her and had known how old he was, according to court documents.

"Mr. Davis admits that he is a small-time pimp," his lawyer, Leif Christman wrote, in court documents, but he also insisted that his client didn't know the girl was underage.

Christman wrote that Davis had met the girl while she was a dancer at an adult establishment and that she was using another woman's identification.

Posted on Sun, Mar. 13, 2011

Men charged with rape, human trafficking

216 Comments
BY RON SYLVESTER
The Wichita Eagle

The 13-year-old girl saw the black Cadillac Escalade pull up to a QuikTrip, and she climbed inside with a man she had never met.

She had been told by another teen that this man would treat her better than the other pimps in Wichita.

Last week, the girl mumbled through tears in Sedgwick County District Court to tell a judge how men bought and sold her for sex.

The men she accused also were in court last week. Prosecutors say it's the first time they have charged both a pimp who they say provided the child and the "john," who they say paid for her.

Donald L. Davis, 48, and James M. Cochran, 54, stood silent as a judge entered pleas of not guilty on their behalf. If convicted, they face charges that could send them to prison for the rest of their lives.

Davis is charged with rape and human trafficking. Cochran faces three charges of rape. Their attorneys declined comment at their arraignment.

The girl is one of hundreds across the city and perhaps among 2 million around the United States exploited through commercial sex, officials think.

Girls and boys, on average, enter the sex trade between the ages of 11 to 13, according the U.S. Department of Justice.

They're exploited through strip clubs, pornography and escort services. Investigators at the Wichita-Sedgwick County Exploited and Missing Child Unit say they have tracked local girls being

PHOTOS

« 1 of 1 »

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Wichita Eagle photo illustration

Fundraiser will aid kids forced into sex trade

Former exploited teen now runs KC-area nonprofit

HELPFUL RESOURCES

Veronica's Voice Kansas City-based education and outreach service to girls involved in commercial sexual exploitation, and the closest such "safe house" to Wichita.

National Runaway Switchboard: A resource to help runaways get off the street or teens thinking about running from home. Call 1-800-RUNAWAY
On Facebook

GEMS (Girls Educational and Mentoring Services) New York-based outreach to girls who have been involved in commercial sexual exploitation.
Watch a YouTube video from GEMS called "The Making of a Girl"

Breaking Free, based in St. Paul, Minn., provides education and help to girls in commercial sexual exploitation.

Children of the Night [http://childrenofthenight.org/] Los Angeles-area shelter, school and program to help girls

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Bennett, who at 6 feet stood a foot or more taller than the girl, used diagrams of the human body. The girl circled the parts of her body and the parts the men had put inside her. She faced the judge and kept her back turned to the defendants dressed in jail jumpsuits.

When asked to identify "Babe," the girl burst into tears.

She identified Davis as "Babe." She gestured to Cochran as "Mike."

Police had been looking for the girl since Thanksgiving. Authorities said they found her in Davis' trailer on Christmas Eve. They said she had been with Cochran earlier in the day.

That's how they were able to identify and build a case against both men. Police said they always aren't so lucky.

"They don't just come up front and tell you, 'I'm a victim of human trafficking,' " said Officer Kent Bauman of the Exploited and Missing Child Unit. "A lot of times we don't find out this girl's a victim until weeks or months afterwards, and the evidence is gone."

It was officials at the Wichita Children's Home who reported the girl as a runaway and initiated a search for her, not her family.

"So many times, they're not even reported as runaways," said Lund, the social worker, "because nobody misses them."

Beneath the surface

No one knows how many youths are currently involved in the U.S. sex trade.

"These children don't count, and nobody is counting them," wrote Julian Sher in his book, "Somebody's Daughter: The Hidden Story of America's Prostituted Children and the Battle to Save Them."

Sher found available estimates of children being sold for sex at between 300,000 and 2 million.

"That's obviously a huge gap," Countryman-Roswurm said.

What we do know in Wichita is that the Exploited and Missing Child Unit receives reports on some 1,200 runaways each year.

Now studying for her doctorate in community psychology, Countryman-Roswurm spent 10 years working with runaways and sex trade survivors.

In 2006 she founded the Anti-Sexual Exploitation Roundtable for Community Action in Wichita, which brought together law enforcement, therapists, social services and health care workers.

From 2007 to 2008, Countryman-Roswurm interviewed 250 youths coming through the Wichita Children's Home.

She found:

* 67 percent had been sexually assaulted or raped.

* 46 percent had been offered food, shelter, clothing, money or drugs in exchange for sex.

* 40 percent were "forced, prodded or coerced into trading sex for what they needed to survive."

"Only 6 percent of these youth have the skills or the strength to get away from that situation," Country-Roswurm said. "Which means to me we have to be doing more in our society in regards to prevention."

First, people have to start recognizing there is a problem, she said.

"We say it exists beneath the surface," said Bauman. "It goes on all over our community, but it's something no one wants to talk about."

And it exists, Countryman-Roswurm said, because people are willing to pay for sex with young girls.

False advertising

The 13-year-old girl said she told Davis she was 17.

That's not unusual, researchers say. Girls lie about their age, and pimps provide fake identification so they won't get caught trafficking children.

The girls perform in strip clubs and are made available on Internet "escort services."

"Amateur nights at the strip clubs are big," said Mike Nagy, a police officer who tracks runaways for the Exploited and Missing Child Unit. "On those nights, let's just say they can be lax on checking IDs."

Rehmert interviews girls who have worked in strip bars through the Wichita Children's Home's Street Outreach Program.

"There's always more going on than dancing," Rehmert said one 16-year-old told her.

On the Internet, authorities identified Backpage.com as a main source of advertising for traffickers. In the ads, teen girls lie about their ages. But they use their real pictures.

Both Rehmert and Lund recognize the pictures of girls they know to be minors on Backpage ads.

But even if customers don't know they are buying sex with a minor, they can still get in big trouble.

Cochran and Davis face 25 years to life if they're convicted of rape under Kansas' Jessica's Law. The 2006 law provides severe prison sentences for people having sexual relations with children under the age of 14.

Safe places

The 13-year-old testified she met Davis at a QuikTrip. But the convenience store chain is also the place runways in trouble can find help.

QuikTrip and Wichita fire stations are designated as "Safe Places."

Last year, Rehmert said the Wichita Children's Home received 250 calls from the Safe Places.

"The people who work at QuikTrip see a kid alone or who looks a little suspicious and they call us," Rehmert said. "They're learning what to look for."

If they get the chance to make that contact. Survivors of the sex trade talk about being under "pimp arrest," where they are denied contact with the outside world.

The 13-year-old girl who testified said Davis didn't give her a cell phone. After she had sex and collected the money, she said she would borrow the phone of her customer. She would call Davis, she said, to come pick her up.

Bennett, the prosecutor, said a group of women in the Junior League asked what they could do.

"Keep your eyes open," Bennett said. "If you see a girl at the QuikTrip getting in an Escalade and it doesn't seem right, get a tag number, call 911 and ask someone to check it out."

At the Children's Home, the runaways get warm clothes, food, a place to stay and access to counseling. Some flourish.

"These are really amazing, bright kids," Rehmert said. "All they need is opportunity and hope."

Others leave only to have their half-naked pictures return to Backpage.com.

Many have no place to go, other than the Juvenile Detention Facility.

"Good, safe, housing is a real need," Bauman said. "Sometimes, they're safer with us in the JDF than anywhere else."

The 13-year-old who testified last week stayed in detention, charged with prostitution, until authorities could place her in a home. Once she was safe, Bennett dropped the charges.

Countryman-Roswurm said agencies serving youths across the city need to better coordinate their efforts to identify at-risk children.

She also said attitudes about the sex trade need to change.

"People need to see, this can be my daughter; this can be my niece; this can be my sister; this can be my wife," Countryman-Roswurm said.

"But for so long, we've called them prostitutes. They are victims of sexual abuse, and they've been forced and coerced to participate in this form of slavery.

"And that's really what it is."

Reach Ron Sylvester at 316-268-6514 or rsylvester@wichitaeagle.com.

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Police: Detroit strip club employed 14-year-old

By COREY WILLIAMS (AP) – 3 hours ago

DETROIT — The manager of a Detroit strip club was charged after authorities learned a 14-year-old girl was employed as a topless dancer, making several hundred dollars a night, authorities said Friday.

The 31-year-old manager of the All Star topless bar was arraigned Friday on a charge of child sexually abusive activity.

Andrew Hutson was arrested Wednesday night at the club on Eight Mile Road. The girl, whose name was not released because of her age, is believed to have danced at the club several nights each week, making about $350 per night, Police Chief Warren Evans said at a news conference across the street from the establishment.

"It is clear that she danced there for a significant amount of time. It's clear, at least to us, that the club knew or should have known that she shouldn't be there," Evans said.

The girl's mother pulled her daughter from the club one night last week after learning she was working there. Employees of the club brought the girl out to a lobby area near the door, said her mother, whose name was withheld to protect her daughter's identity.

"Our youth are not some cheap commodity, to be used and cast aside," Prosecutor Kym Worthy said in a release. "We are sending a clear message that if you hire underage women you will face criminal charges."

An elaborate sign on an outside wall of the club bills it as "The 'ALL STARS' of GENTLEMEN CLUBS." But Evans described it as a constant thorn in the sides of police.

Over the past six years, there have been 11 nonfatal shootings and three fatal shootings "related to this club," Evans said. Violations also have been found in each of the last 15 Vice Squad inspections.

The Associated Press left a message Friday seeking comment from the club's owner. Hutson was released on a personal bond Friday. The AP could not determine if he has an attorney.

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Associated Press

Photo 1 of 2

All Star topless bar on Eight Mile Road is shown in Detroit, Friday, April 23, 2010. Police say the manager of a northwest Detroit strip club has been charged after authorities learned a 14-year-old girl was employed as a topless dancer. (AP Photo/Paul Sancya)

Map

Police: 15-Year-Old Found Working At Strip Club

Girl, 17-Year-Old Found At Playmates Club In Cocoa

POSTED: 8:18 pm EDT August 23, 2009
UPDATED: 8:38 pm EDT August 23, 2009

COCOA, Fla. -- An investigation is under way at a Brevard County strip club after a woman told police her teenage daughter was working there.

Cocoa police said they went to Playmates and found the 15-year-old girl and a 17-year-old.

They weren't topless or dancing, but police said they had on revealing clothing.

The club said the girls claimed they were over 18.

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Hello people check ID's, besides the owner knew the truth!!!!

Aug. 24, 2009 7:48am EDT | from ChelleAynn

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ajc.com
The Atlanta Journal-Constitution

Police: 15-year-old was stripping at Lilburn bar

Owner of Lucky Billiards arrested along with dancer, 21

By MIKE MORRIS

The Atlanta Journal-Constitution

Wednesday, May 27, 2009

A man and woman were charged with contributing to the delinquency of a minor Friday night after Gwinnett County police busted an alleged illegal strip club operating out of a Lilburn bar with dancers as young as 15 years old.

The owner of Lucky Billiards on Indian Trail-Lilburn Road, Jay Young Kim, was arrested, along with a dancer, Whitney Faith Blackburn.

Kim, 45, of Norcross, and Blackburn, 21, of Acworth, were released on bond Saturday morning.

According to a Gwinnett police incident report, an undercover officer went into the bar just before 11 p.m. Friday to investigate "numerous drug and possible prostitution complaints."

The officer "observed several women performing 'lap dances' for customers," the report states.

When the dancers, who were dressed in underwear, saw the officer, they "immediately ran towards the back room behind a closed curtain and began changing their clothes," according to the report.

In the back room, officers found money on the floor, as well as "a few pair of strippers shoes."

When officers questioned the women, they discovered that one was only 15 years old, police said.

That girl, also from Acworth, "stated that she has been coming here to dance for about six months," and told officers that Blackburn brought her to the club on numerous nights.

The underage girl was released to her mother's custody, and Blackburn was booked into the jail on a misdemeanor charge of contributing to the delinquency of a minor.

Kim told officers that he was unaware of the ages of the dancers, but that he had been told that all were over 18.

Teen stripper detained in Akron

By Beacon Journal staff

POSTED: 02:50 p.m. EDT, Apr 27, 2009

A 14-year-old girl was placed in protective custody during a raid in which four exotic dancers were arrested by Akron police vice officers.

Police working Operation Spring Cleaning served a search warrant Friday night at the Playhouse, 1700 E. Waterloo Road.

Police Lt. Rick Edwards said officers arrested four dancers for allegedly dancing topless and having contact with customers in a liquor establishment.

He said the club is not licensed as a sexually oriented business.

Vice officers said they saw the 14-year-old dancing topless. She did not have contact with customers.

The girl, whom Edwards said is not cooperating with police, has been placed with Summit County Children Services.

The club's owner, Robert T. Mitchell, 34, of Ravenna, and the bar manager, Christopher Wier, 34, of Ravenna, were charged with illegal use of a minor in a nudity-oriented performance and two counts of child endangering.

They were being held in the Summit County Jail.

Find this article at:
http://www.ohio.com/news/break_news/43797482.html

November 6, 2008

Lincoln Park strip club sued in teen dancer's death

FREE PRESS STAFF

The family of a 17-year-old who died of a drug overdose the first night she worked as a stripper filed a wrongful-death lawsuit Wednesday against the club where she worked.

Stephanie Brown died March 16, 2007, after dancing at the Atlantis Lounge in Lincoln Park, which hired her after she presented a fake ID.

The night before, she met Deleon Alexander II, a volunteer Ecorse High School coach, who took her and another exotic dancer to a Melvindale motel and gave them cocaine. He was convicted of delivery of a controlled substance causing a death and sentenced to 11 to 20 years in prison.

The multimillion-dollar suit names the club and its owner, Nagy Mickhail.

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dallasnews.com
The Dallas Morning News

Dallas club where girl, 12, stripped will keep license

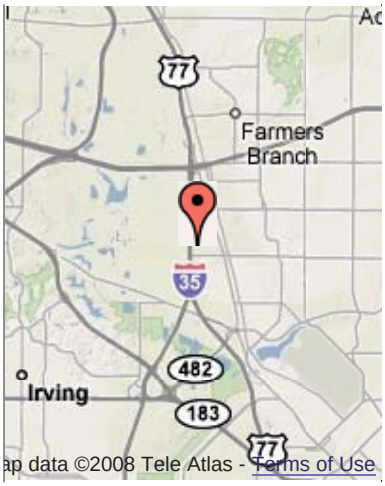
10:39 PM CDT on Wednesday, March 26, 2008

By TANYA EISERER / The Dallas Morning News
teiserer@dallasnews.com

The mere fact that a 12-year-old girl danced nude at a northwest Dallas strip club isn't enough to close its doors.

That's because the city ordinance that regulates sexually oriented businesses does not allow authorities to revoke the license of such a business for employing someone under the age of 18.

The sixth-grader danced at Diamonds Cabaret over a two-week period late last year, authorities say. They also say they found a 17-year-old girl working in the club in January.



Diamonds Cabaret

"If they're not shut down, it's like they're giving them permission to have underage girls dancing and working in that club," said the mother of the 12-year-old. The mother is not being named because her daughter, a runaway at the time of the incident, is considered a sexual assault victim.

Operators of the Diamonds Cabaret at 2444 Walnut Ridge Street did not return calls for comment. Their sexually oriented business license expires in November.

Demonica Abron, 27, who worked as a stripper in the club, and David Bell, 22, are facing charges in connection with the 12-year-old girl's dancing in the club. Mr. Bell does not appear to have been employed by the club.

Police officials are continuing to investigate whether the club's management knew she was underage.

The 23-page city ordinance does allow revocation of a club's license if, for example, the club knowingly allows prostitution, the sale or use of drugs at the club, or if there are two convictions for sex-related crimes at the club within a 12-month period.

The department also can suspend, but not revoke, the license of an escort agency for up to 30 days if it has employed

Virginia News

Richmond strip club owner to face additional charge

From NBC12 News

There was an unexpected twist in the case against a controversial Richmond strip club owner Tuesday. Prosecutors say they're seeking an additional charge against Samuel Moore. But, the man in question wasn't in the Richmond courtroom.

Moore was supposed to go to trial Tuesday on two charges of contributing to the delinquency of a minor. Prosecutors said Tuesday they plan to try Moore on those charges plus a felony charge of videotaping sex with a minor.

But, Moore wasn't in court. His attorney telling the judge he's in the psych ward at VCU.

The evidence apparently continues to mount against Samuel Moore. During a raid last month at his Club Velvet, the Shockoe Bottom strip joint, investigators confiscated a host of items including video.

As a result, prosecutors next month will ask a grand jury to indict Moore on a felony charge of videotaping sex with a minor.

Moore had already faced two misdemeanor charges of consensual sex with a minor.

The flamboyant Moore was expected to appear in court Tuesday. His attorney told the judge his client was hospitalized in the psych ward.

A person who answered the phone at Club Velvet said he didn't know where Moore was.

Outside court, attorneys said they were restructuring the charges so the juvenile victim may only have to testify in court once.

A grand jury will consider the felony charge April 8th.

Story Created: Mar 25, 2008 at 5:45 PM EDT

Underage dancer at strip club, police say

By JIMMY ISAAC

Tuesday, August 09, 2005

Five people were arrested early Sunday at a strip club where investigators said they discovered an underage dancer.

Chief Deputy Chuck Willeford of the Gregg County Sheriff's Office said that Kilgore residents Elisa V. Zamacona, 34, and Anthony C. Coleman, 44, co-owners of the Paradise Club, were employing unlicensed and underaged dancers at the club on Texas 31 about four miles west of Kilgore.

Seventeen-year-old Jennifer L. Haynes of Kilgore and fellow dancers Carrie Ann Dobberthien, 26, of Chandler, and Brittney Sade Jackson, 19 of Arlington were arrested for not having licenses to work at a sexually-oriented business. Both owners, along with Jackson and Haynes, were released Sunday on $1,000 bond each. Dobberthien remains in the Gregg County Jail on $1,000 bond.

"It's not like they don't know what the rules are," said Willeford. He noted sheriff's deputies were operating a regular, unannounced inspection of the club less than two months after a similar raid at Baby Dolls, another sexually-oriented club on Texas 31. Baby Dolls' manager and two employees were arrested in June, and the business faces a three-day suspension.

"The only one we found doing right at this time was the Streakers club," he said.

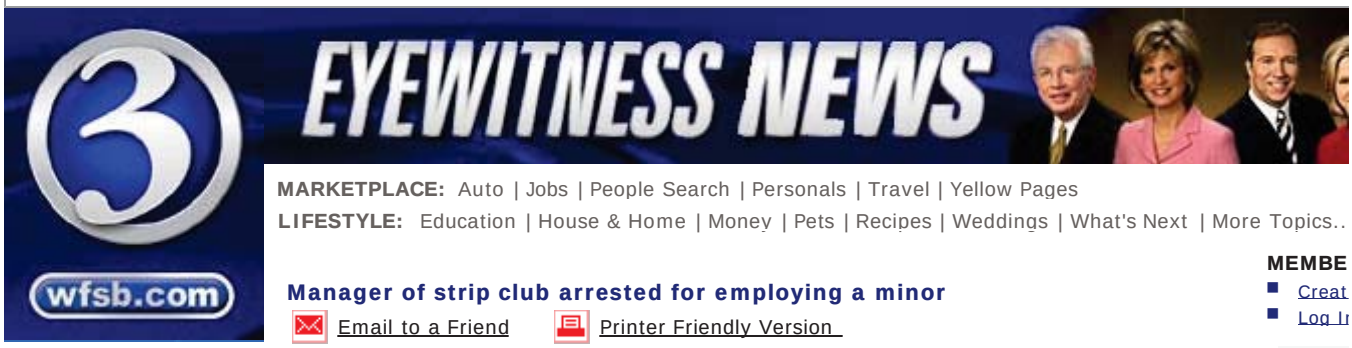
According to arrest warrants, Coleman's license to work at the club had expired on Dec. 14, 2002, while Dobberthien had worked at the club for three weeks without a license.

Haynes and Jackson told authorities that they were not working, but two witnesses stated that the two had been dancing in the club, warrants state.

Willeford said that Zamacona and Coleman, who are married, will receive a registered letter to appear for a hearing at a later date to address the violations.

On June 17, authorities investigating Baby Dolls arrested 18-year-old Sammy Jo Lucas, of Tyler, for not having a license. Investigators returned a week later and took Thomas Beasley into custody for allowing an employee to work without a license. Rodney Clarence Aldridge, 21, of Avinger, a parking lot employee, was also arrested for having an expired license. He was later released from jail on a $1,000 bond.

Lucas pleaded guilty this past week and is scheduled for sentencing on Sept. 22, according to a judicial records Web site.



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Manager of strip club arrested for employing a minor

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BERLIN (AP) -- Berlin police have charged the manager of a strip club with employing a 15-year-old stripper at the Infrared Cafe.

Kenneth Pina, 61, has been charged with employing a minor in an obscene performance as well as risking of injury to a minor. Police say they had gone to the club in February after receiving a complaint from the girl's family that she was dancing at the club.

Police says the girl, who lives in Waterbury, was taken out of the club and sent back to Waterbury. Pina, who lives in New Britain, was arrested Monday and released after posting bond.

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03/10/2005

Briefs

Strip club owner to go to trial

SCRANTON -- A strip club manager accused of letting a 14-year-old girl dance naked in his establishment -- and win the amateur contest -- will face trial on a charge of corruption of minors, a magisterial district judge decided Wednesday.

The girl, now 15, testified in Central Court that she willingly entered Superdad's in Mayfield and took off all her clothes.

Nevertheless, Assistant District Attorney Suzanne B. Tierney argued manager Antonio Dangio should be held responsible because he allegedly didn't check the girl's identification, and he twice encouraged her to dance.

Mr. Dangio, 44, whose address is the same as the club's at 1401 Business Route 6, Mayfield, did not testify.

Jennifer A. Bojarsky, 18, of Archbald, the girl's friend who accompanied her to the club and onto the stage, is also charged with corruption of minors. She waived her preliminary hearing after she reached a deal with prosecutors and became a witness for the Commonwealth.

Lake Como man killed in crash

PALMYRA TOWNSHIP -- A Lake Como man was killed Wednesday afternoon after he lost control of his truck on Route 6 in Palmyra Township.

State police said Robert Gagliardo, 64, was not wearing a seat belt when he lost control of his 1997 Chevrolet truck, crashing through a mailbox and then a sign for PJ's Farm Market & Garden Center before hitting a sign base and going airborne.

Mr. Gagliardo was pronounced dead at Wayne Memorial Hospital.

County testing weather response

SCRANTON -- County schools, hospitals, nursing homes and day-care centers will be testing their severe weather emergency response plans today as part of "Weather Emergency Preparedness Week."

The Lackawanna County Emergency Management Agency will also be conducting an exercise involving simulated weather damage to Marian Community Hospital.

The exercise will simulate the evacuation and transfer of about 100 patients from the hospital.

The tests are part of a statewide exercise in emergency response to severe weather.

Renowned dance troupe to visit

SCRANTON -- The nationally recognized dance company Dance Theatre X will perform Saturday at 8 p.m. at Marywood University's Sette LaVerghetta Theatre.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by State v. Spano, Ohio App. 7 Dist., November 18, 2011

124 S.Ct. 2219
Supreme Court of the United States

CITY OF LITTLETON, COLORADO, Petitioner,
v.
Z.J. GIFTS D-4, L.L.C., a Limited Liability Company, dba Christal's.

No. 02-1609.
|
Argued March 24, 2004.
|
Decided June 7, 2004.

Synopsis

Background: Owner of store that sold adult books brought § 1983 action challenging city's adult business licensing ordinance as unconstitutional, and seeking declaratory and injunctive relief, attorney fees and damages. The United States District Court for the District of Colorado, Edward W. Nottingham, J., entered summary judgment in favor of city, and owner appealed. The Tenth Circuit Court of Appeals, Lucero, Circuit Judge, 311 F.3d 1220, affirmed in part and reversed in part. Certiorari was granted.

Holdings: The Supreme Court, Justice Breyer, held that:

[1] for an "adult business" licensing scheme to satisfy First Amendment requirements, it is not enough that licensing scheme provides only assurance of speedy access to courts for review of adverse licensing decisions, without also providing assurance of speedy court decision; but

[2] where city's "adult business" licensing scheme simply conditioned operation of adult business on compliance with neutral and nondiscretionary criteria and did not seek to censor content, language in ordinance providing for judicial review of adverse licensing decisions in accordance with state's ordinary review procedures was sufficient to satisfy First Amendment requirements.

Reversed.

Justice Stevens concurred in part and concurred in judgment and filed opinion.

Justice Souter concurred in part and concurred in judgment and filed opinion, in which Justice Kennedy joined.

Justice Scalia concurred in judgment and filed opinion.

West Headnotes (3)

[1] Constitutional Law
Licenses and Permits in General

For an "adult business" licensing scheme to satisfy First Amendment requirements, it is not enough that licensing scheme provides only assurance of speedy access to courts for review of adverse licensing decisions, without also providing assurance of speedy court decision; delay in issuing judicial decision, no less than delay in obtaining access to court, can prevent license for First Amendment-protected business from being issued within requisite reasonable period of time. U.S.C.A. Const.Amend. 1.

52 Cases that cite this headnote

[2] Constitutional Law
Licenses and Permits in General

Constitutional Law
Content Neutrality

Public Amusement and Entertainment
Sexually Oriented Entertainment

Where city's "adult business" licensing scheme simply conditioned operation of adult business on compliance with neutral and nondiscretionary criteria and did not seek to censor content, language in ordinance providing for judicial review of adverse licensing decisions in accordance with state's ordinary review procedures was sufficient to satisfy First Amendment requirements, as long as courts remained sensitive to need to prevent First Amendment harms

and administered those review procedures accordingly; whether courts have done so is matter normally fit for case-by-case determination rather than facial challenge. U.S.C.A. Const.Amend. 1.

71 Cases that cite this headnote

[3] Constitutional Law
Licenses and Permits in General

Where regulation simply conditions operation of adult business on compliance with neutral and nondiscretionary criteria and does not seek to censor content, adult business is not entitled under First Amendment to unusually speedy judicial decision, of the *Freedman* type, on adverse licensing decision. U.S.C.A. Const.Amend. 1.

45 Cases that cite this headnote

****2220** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Under petitioner city's "adult business license" ordinance, the city's decision to deny a license may be appealed to the state district court pursuant to Colorado Rules of Civil Procedure. Respondent Z.J. Gifts D-4, L.L.C. (hereinafter ZJ), opened an adult bookstore in a place not zoned for adult businesses. Instead of applying for a license, ZJ filed suit attacking the ordinance as facially unconstitutional. The Federal District Court rejected ZJ's claims, but the Tenth Circuit held, as relevant here, that state law does not assure the constitutionally required "prompt final judicial *decision.*"

Held: The ordinance meets the First Amendment's requirement that such a licensing scheme assure prompt judicial review of an administrative decision denying a license. Pp. 2222-2226.

(a) The Court rejects the city's claim that its licensing scheme need only provide prompt access to judicial review, but not a "prompt judicial determination," of an applicant's legal claim. The city concedes that *Freedman v. Maryland,* 380 U.S. 51, 59, 85 S.Ct. 734, 13 L.Ed.2d 649, in listing constitutionally necessary "safeguards" applicable to a motion picture censorship statute, spoke of the need to assure a "prompt final judicial decision," but adds that Justice O'CONNOR's controlling plurality opinion in *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603, which addressed an adult business licensing scheme, did not use the word "decision," instead speaking only of the "*possibility of prompt judicial review,*" *id.,* at 228, 110 S.Ct. 596 (emphasis added). Justice O'CONNOR's *FW/PBS* opinion, however, points out that *Freedman's* "judicial review" safeguard is meant to prevent "undue delay," 493 U.S., at 228, 110 S.Ct. 596, which includes *judicial,* as well as *administrative,* delay. A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being "issued within a reasonable period of time." *Ibid.* Nothing in the opinion suggests the contrary. Pp. 2222-2224.

(b) However, the Court accepts the city's claim that Colorado law satisfies any "prompt judicial determination" requirement, agreeing that the Court should modify *FW/PBS,* withdrawing its implication that *Freedman's* special judicial review rules-*e.g.,* strict time limits-apply in this case. Colorado's ordinary "judicial review" rules suffice to assure ***775** a prompt judicial *decision,* as long as the courts remain sensitive to the need to prevent First Amendment harms and administer ****2221** those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge. Four considerations support this conclusion. First, ordinary court procedural rules and practices give reviewing courts judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, courts may arrange their schedules to "accelerate" proceedings, and higher courts may grant expedited review. Second, there is no reason to doubt state judges' willingness to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. And federal remedies would provide an additional safety valve in the event of any such problem. Third, the typical First Amendment harm at issue here differs from that at issue in *Freedman,* diminishing the need in the typical case for procedural rules imposing special decisionmaking

time limits. Unlike in *Freedman,* this ordinance does not seek to *censor* material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display. These criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally any specific item of adult material in the community. And the criteria's simple objective nature means that in the ordinary case, judicial review, too, should prove simple, hence expeditious. Finally, nothing in *FW/PBS* or *Freedman* requires a city or State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme. Pp. 2224-2226.

311 F.3d 1220, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, THOMAS, and GINSBURG, JJ., joined, in which STEVENS, J., joined as to Parts I and II-B, and in which SOUTER and KENNEDY, JJ., joined except as to Part II-B. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 2226. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, in which KENNEDY, J., joined, *post,* p. 2227. SCALIA, J., filed an opinion concurring in the judgment, *post,* p. 2228.

Attorneys and Law Firms

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Douglas R. Cole, for Ohio, et al., as amici curiae, by special leave of the Court, supporting the petitioner.

Michael W. Gross, Denver, CO, for respondent.

J. Andrew Nathan, Counsel of Record, Heidi J. Hugdahl, Nathan, Bremer, Dumm & Myers P.C., Denver, CO, Larry W. Berkowitz, City Attorney, Brad D. Bailey, Assistant City Attorney, Littleton, CO, Scott D. Bergthold, Law Office of Scott D. Bergthold, P.L.L.C., Chattanooga, TN, for petitioner.

Arthur M. Schwartz, Counsel of Record, Michael W. Gross, Cindy D. Schwartz, Schwartz & Goldberg, P.C., Denver, Colorado, for Respondent.

Opinion

Justice BREYER delivered the opinion of the Court.

***776** In this case we examine a city's "adult business" licensing ordinance to determine whether it meets the First Amendment's requirement that such a licensing scheme assure prompt judicial review of an administrative decision denying a license. See ****2222** *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); cf. *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). We conclude that the ordinance before us, considered on its face, is consistent with the First Amendment's demands.

I

Littleton, Colorado, has enacted an "adult business" ordinance that requires an "adult bookstore, adult novelty store ***777** or adult video store" to have an "adult business license." Littleton City Code §§ 3-14-2, 3-14-4 (2003), App. to Brief for Petitioner 13a-20a, 23a. The ordinance defines "adult business"; it requires an applicant to provide certain basic information about the business; it insists upon compliance with local "adult business" (and other) zoning rules; it lists eight specific circumstances the presence of which requires the city to deny a license; and it sets forth time limits (typically amounting to about 40 days) within which city officials must reach a final licensing decision. §§ 3-14-2, 3-14-3, 3-14-5, 3-14-7, 3-14-8, *id.,* at 13a-30a. The ordinance adds that the final decision may be "appealed to the [state] district court pursuant to Colorado rules of civil procedure 106(a)(4)." § 3-14-8(B)(3), *id.,* at 30a.

In 1999, the respondent, a company called Z.J. Gifts D-4, L.L.C. (hereinafter ZJ), opened a store that sells "adult books" in a place not zoned for adult businesses. Compare Tr. of Oral Arg. 13 (store "within 500 feet of a church and day care center") with § 3-14-3(B), App. to Brief for Petitioner 21a (forbidding adult businesses at such locations). Instead of applying for an adult business license, ZJ brought this lawsuit attacking Littleton's ordinance as unconstitutional on its face. The Federal District Court rejected ZJ's claims; but on appeal the Court of Appeals for the Tenth Circuit accepted two of them, 311 F.3d 1220, 1224 (2002). The court held that Colorado law "does not assure that [the city's] license

decisions will be given expedited [judicial] review"; hence it does not assure the "prompt final judicial *decision*" that the Constitution demands. *Id.,* at 1238. It also held unconstitutional another ordinance provision (not now before us) on the ground that it threatened lengthy administrative delay-a problem that the city believes it has cured by amending the ordinance. Compare *id.,* at 1233-1234, with § 3-14-7, App. to Brief for Petitioner 27a-28a, and Brief for Petitioner 3. Throughout these proceedings, ZJ's store has continued to operate.

***778** The city has asked this Court to review the Tenth Circuit's "judicial review" determination, and we granted certiorari in light of lower court uncertainty on this issue. Compare, *e.g.,* 311 F.3d, at 1238 (First Amendment requires prompt judicial *determination* of license denial); *Nightclubs, Inc. v. Paducah,* 202 F.3d 884, 892-893 (C.A.6 2000) (same); *Baby Tam & Co. v. Las Vegas,* 154 F.3d 1097, 1101-1102 (C.A.9 1998) (same); *11126 Baltimore Blvd., Inc. v. Prince George's County,* 58 F.3d 988, 998-1001 (C.A.4 1995) (en banc) (same), with *Boss Capital, Inc. v. Casselberry,* 187 F.3d 1251, 1256-1257 (C.A.11 1999) (Constitution requires only prompt *access* to courts); *TK's Video, Inc. v. Denton County,* 24 F.3d 705, 709 (C.A.5 1994) (same); see also *Thomas v. Chicago Park Dist.,* 534 U.S. 316, 325-326, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) (noting a Circuit split); *City News & Novelty, Inc. v. Waukesha,* 531 U.S. 278, 281, 121 S.Ct. 743, 148 L.Ed.2d 757 (2001) (same).

II

The city of Littleton's claims rest essentially upon two arguments. First, this Court, in applying the First Amendment's ****2223** procedural requirements to an "adult business" licensing scheme in *FW/PBS,* found that the First Amendment required such a scheme to provide an applicant with "*prompt access*" to judicial review of an administrative denial of the license, but that the First Amendment did not require assurance of a "prompt judicial *determination*" of the applicant's legal claim. Second, in any event, Colorado law satisfies any "prompt judicial determination" requirement. We reject the first argument, but we accept the second.

A

The city's claim that its licensing scheme need not provide a "prompt judicial determination" of an applicant's legal claim rests upon its reading of two of this Court's cases, *Freedman* and *FW/PBS.* In *Freedman,* the Court considered the First Amendment's application to a "motion picture ***779** censorship statute"-a statute that required an " 'owner or lessee' " of a film, prior to exhibiting a film, to submit the film to the Maryland State Board of Censors and obtain its approval. 380 U.S., at 52, and n. 1, 85 S.Ct. 734 (quoting Maryland statute). It said, "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.,* at 58, 85 S.Ct. 734. The Court added that those safeguards must include (1) strict time limits leading to a speedy administrative decision and minimizing any "prior restraint"-type effects, (2) burden of proof rules favoring speech, and (3) (using language relevant here) a "procedure" that will "*assure a prompt final judicial decision,* to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.,* at 58-59, 85 S.Ct. 734 (emphasis added).

In *FW/PBS,* the Court considered the First Amendment's application to a city ordinance that "regulates sexually oriented businesses through a scheme incorporating zoning, licensing, and inspections." 493 U.S., at 220-221, 110 S.Ct. 596. A Court majority held that the ordinance violated the First Amendment because it did not impose strict administrative time limits of the kind described in *Freedman.* In doing so, three Members of the Court wrote that "the full procedural protections set forth in *Freedman* are not required," but that nonetheless such a licensing scheme must comply with *Freedman's* "core policy"-including (1) strict administrative time limits and (2) (using language somewhat different from *Freedman's*) "*the possibility of prompt judicial review in the event that the license is erroneously denied.*" 493 U.S., at 228, 110 S.Ct. 596 (opinion of O'CONNOR, J.) (emphasis added). Three other Members of the Court wrote that all *Freedman'ssss* safeguards should apply, including *Freedman's* requirement that "a prompt judicial determination must be available." 493 U.S., at 239, 110 S.Ct. 596 (Brennan, J., concurring in judgment). Three Members of the Court wrote in dissent that *Freedman's* requirements ***780** did not apply at all. See 493 U.S., at 244-245, 110 S.Ct. 596 (White, J., joined by REHNQUIST, C. J., concurring in part and dissenting in

part); *id.,* at 250, 110 S.Ct. 596 (SCALIA, J., concurring in part and dissenting in part).

The city points to the differing linguistic descriptions of the "judicial review" requirement set forth in these opinions. It concedes that *Freedman,* in listing constitutionally necessary "safeguards," spoke of the need to assure a "prompt final judicial decision." 380 U.S., at 59, 85 S.Ct. 734. But it adds that Justice O'CONNOR's controlling plurality opinion in *FW/PBS* did not use the word "decision," instead speaking only of the "*possibility of prompt judicial* **2224 *review.*" 493 U.S., at 228, 110 S.Ct. 596 (emphasis added); see also *id.,* at 229, 110 S.Ct. 596 ("an avenue for prompt judicial review"); *id.,* at 230, 110 S.Ct. 596 ("availability of prompt judicial review"). This difference in language between *Freedman* and *FW/PBS,* says the city, makes a major difference: The First Amendment, as applied to an "adult business" licensing scheme, demands only an assurance of speedy access to the courts, not an assurance of a speedy court decision.

[1] In our view, however, the city's argument makes too much of too little. While Justice O'CONNOR's *FW/PBS* plurality opinion makes clear that only *Freedman's* "core" requirements apply in the context of "adult business" licensing schemes, it does not purport radically to alter the nature of those "core" requirements. To the contrary, the opinion, immediately prior to its reference to the "judicial review" safeguard, says:

> "The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two *[Freedman]* safeguards are essential ... ." 493 U.S., at 228, 110 S.Ct. 596.

***781** These words, pointing out that *Freedman's* "judicial review" safeguard is meant to prevent "undue delay," 493 U.S., at 228, 110 S.Ct. 596, include *judicial,* as well as *administrative,* delay. A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being "issued within a reasonable period of time." *Ibid.* Nothing in the opinion suggests the contrary. Thus we read that opinion's reference to "prompt judicial review," together with the similar reference in Justice Brennan's separate opinion (joined by two other Justices), see *id.,* at 239, 110 S.Ct. 596, as encompassing a prompt judicial decision. And we reject the city's arguments to the contrary.

B

[2] We find the second argument more convincing. In effect that argument concedes the constitutional importance of assuring a "prompt" judicial decision. It concedes as well that the Court, illustrating what it meant by "prompt" in *Freedman,* there set forth a "model" that involved a "hearing one day after joinder of issue" and a "decision within two days after termination of the hearing." 380 U.S., at 60, 85 S.Ct. 734. But the city says that here the First Amendment nonetheless does not require it to impose 2- or 3-day time limits; the First Amendment does not require special "adult business" judicial review rules; and the First Amendment does not insist that Littleton write detailed judicial review rules into the ordinance itself. In sum, Colorado's ordinary "judicial review" rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming.

Littleton, in effect, argues that we should modify *FW/PBS,* withdrawing its implication that *Freedman's* special judicial review rules apply in this case. And we accept that argument. In our view, Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer ***782** those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge. We reach this conclusion for several reasons.

First, ordinary court procedural rules and practices, in Colorado as elsewhere, **2225 provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, where necessary, courts may arrange their schedules to "accelerate" proceedings. Colo. Rule Civ. Proc. 106(a)(4)(VIII) (2003). And higher courts may quickly review adverse lower court decisions. See, *e.g., Goebel v. Colorado Dept. of Institutions,* 764 P.2d 785, 792 (Colo.1988) (en banc) (granting "expedited review").

Second, we have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. We presume that courts are aware of

the constitutional need to avoid "undue delay result[ing] in the unconstitutional suppression of protected speech." *FW/PBS, supra,* at 228, 110 S.Ct. 596; see also, *e.g., Schlesinger v. Councilman,* 420 U.S. 738, 756, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975). There is no evidence before us of any special Colorado court-related problem in this respect. And were there some such problems, federal remedies would provide an additional safety valve. See Rev. Stat. § 1979, 42 U.S.C. § 1983.

Third, the typical First Amendment harm at issue here differs from that at issue in *Freedman,* diminishing the need in the typical case for special procedural rules imposing special 2- or 3-day decisionmaking time limits. *Freedman* considered a Maryland statute that created a Board of Censors, which had to decide whether a film was " 'pornographic,' " tended to " 'debase or corrupt morals,' " and lacked " 'whatever other merits.' " 380 U.S., at 52-53, n. 2, 85 S.Ct. 734 (quoting Maryland statute). If so, it denied the permit and the film could not be shown. Thus, in *Freedman,* the Court considered a scheme with rather subjective standards and where a denial likely meant complete censorship.

***783** In contrast, the ordinance at issue here does not seek to *censor* material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display. The ordinance says that an adult business license "*shall*" be denied if the applicant (1) is underage; (2) provides false information; (3) has within the prior year had an adult business license revoked or suspended; (4) has operated an adult business determined to be a state law "public nuisance" within the prior year; (5) (if a corporation) is not authorized to do business in the State; (6) has not timely paid taxes, fees, fines, or penalties; (7) has not obtained a sales tax license (for which zoning compliance is required, see Tr. of Oral Arg. 16-17); or (8) has been convicted of certain crimes within the prior five years. § 3-14-8(A), App. to Brief for Petitioner 28a-29a (emphasis added).

These objective criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally the presence of any specific item of adult material in the Littleton community. Some license applicants will satisfy the criteria even if others do not; hence the community will likely contain outlets that sell protected adult material. A supplier of that material should be able to find outlets; a potential buyer should be able to find a seller. Nor should zoning requirements suppress that material, for a constitutional zoning system seeks to determine *where,* not *whether,* protected adult material can be sold. See *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The upshot is that Littleton's "adult business" licensing scheme does "not present the grave 'dangers ****2226** of a censorship system.' " *FW/PBS,* 493 U.S., at 228, 110 S.Ct. 596 (opinion of O'CONNOR, J.) (quoting *Freedman, supra,* at 58, 85 S.Ct. 734). And the simple objective nature of the licensing criteria means that in the ordinary case, judicial review, too, should prove simple, hence expeditious. Where that is not so-where, for example, censorship of material, as well as delay ***784** in opening an additional outlet, is improperly threatened-the courts are able to act to prevent that harm.

Fourth, nothing in *FW/PBS* or in *Freedman* requires a city or a State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme. *Freedman* itself said: "How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." 380 U.S., at 60, 85 S.Ct. 734. This statement is not surprising given the fact that many cities and towns lack the state-law legal authority to impose deadlines on state courts.

[3] These four sets of considerations, taken together, indicate that Colorado's ordinary rules of judicial review are adequate-at least for purposes of this facial challenge to the ordinance. Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria, cf. *post,* at 2226-2227 (STEVENS, J., concurring in part and concurring in judgment), and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type. Colorado's rules provide for a flexible system of review in which judges can reach a decision promptly in the ordinary case, while using their judicial power to prevent significant harm to First Amendment interests where circumstances require. Of course, those denied licenses in the future remain free to raise special problems of undue delay in individual cases as the ordinance is applied.

For these reasons, the judgment of the Tenth Circuit is

Reversed.

Justice STEVENS, concurring in part and concurring in the judgment.

There is an important difference between an ordinance conditioning the operation of a business on compliance with certain neutral criteria, on the one hand, and an ordinance ***785** conditioning the exhibition of a motion picture on the consent of a censor. The former is an aspect of the routine operation of a municipal government. The latter is a species of content-based prior restraint. Cf. *Graff v. Chicago,* 9 F.3d 1309, 1330-1333 (C.A.7 1993) (Flaum, J., concurring).

The First Amendment is, of course, implicated whenever a city requires a bookstore, a newsstand, a theater, or an adult business to obtain a license before it can begin to operate. For that reason, as Justice O'CONNOR explained in her plurality opinion in *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 226, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), a licensing scheme for businesses that engage in First Amendment activity must be accompanied by adequate procedural safeguards to avert "the possibility that constitutionally protected speech will be suppressed." But Justice O'CONNOR's opinion also recognized that the full complement of safeguards that are necessary in cases that "present the grave 'dangers of a censorship system' " are "not required" in the ordinary adult-business licensing scheme. *Id.,* at 228, 110 S.Ct. 596 (quoting *Freedman v. Maryland,* 380 U.S. 51, 58, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)). In both contexts, "undue delay results in the unconstitutional suppression ****2227** of protected speech," 493 U.S., at 228, 110 S.Ct. 596, and *FW/PBS* therefore requires both that the licensing decision be made promptly and that there be "the possibility of prompt judicial review in the event that the license is erroneously denied," *ibid.* But application of neutral licensing criteria is a "ministerial action" that regulates speech, rather than an exercise of discretionary judgment that prohibits speech. *Id.,* at 229, 110 S.Ct. 596. The decision to deny a license for failure to comply with these neutral criteria is therefore not subject to the presumption of invalidity that attaches to the "direct censorship of particular expressive material." *Ibid.* Justice O'CONNOR's opinion accordingly declined to require that the licensor, like the censor, either bear the burden of going to court to effect the denial of a license or otherwise assume responsibility for ensuring ***786** a prompt judicial determination of the validity of its decision. *Ibid.*

The Court today reinterprets *FW/PBS's* references to " '*the possibility of prompt judicial review*' " as the equivalent of *Freedman's* "prompt judicial decision" requirement. *Ante,* at 2223-2224. I fear that this misinterpretation of *FW/PBS* may invite other, more serious misinterpretations with respect to the content of that requirement. As the Court applies it in this case, assurance of a " 'prompt' judicial decision" means little more than assurance of the *possibility* of a prompt decision-the same possibility of promptness that is available whenever a person files suit subject to "ordinary court procedural rules and practices." *Ante,* at 2224. That possibility will generally be sufficient to guard against the risk of undue delay in obtaining a remedy for the erroneous application of neutral licensing criteria. But the mere possibility of promptness is emphatically insufficient to guard against the dangers of unjustified suppression of speech presented by a censorship system of the type at issue in *Freedman,* and is certainly not what *Freedman* meant by " 'prompt' judicial decision."

Justice O'CONNOR's opinion in *FW/PBS* recognized that differences between ordinary licensing schemes and censorship systems warrant imposition of different procedural protections, including different requirements with respect to which party must assume the burden of taking the case to court, as well as the risk of judicial delay. I would adhere to the views there expressed, and thus do not join Part II-A of the Court's opinion. I do, however, join the Court's judgment and Parts I and II-B of its opinion.

Justice SOUTER, with whom Justice KENNEDY joins, concurring in part and concurring in the judgment.

I join the Court's opinion, except for Part II-B. I agree that this scheme is unlike full-blown censorship, *ante,* at 2224-2226, so that the ordinance does not need a strict timetable of ***787** the kind required by *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), to survive a facial challenge. I write separately to emphasize that the state procedures that make a prompt judicial determination possible need to align with a state judicial practice that provides a prompt disposition in the state courts. The emphasis matters, because although Littleton's ordinance is not as suspect as censorship, neither is it as innocuous as common zoning. It is a licensing scheme triggered by the content of expressive materials to be sold. See *Los Angeles v. Alameda Books,*

Inc., 535 U.S. 425, 448, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (KENNEDY, J., concurring in judgment) ("These ordinances are content based, and we should call them so"); *id.,* at 455-457, 122 S.Ct. 1728 (SOUTER, J., dissenting). Because the sellers may be unpopular with local authorities, ****2228** there is a risk of delay in the licensing and review process. If there is evidence of foot dragging, immediate judicial intervention will be required, and judicial oversight or review at any stage of the proceedings must be expeditious.

Justice SCALIA, concurring in the judgment.

Were the respondent engaged in activity protected by the First Amendment, I would agree with the Court's disposition of the question presented by the facts of this case (though not with all of the Court's reasoning). Such activity, when subjected to a general permit requirement unrelated to censorship of content, has no special claim to priority in the judicial process. The notion that media corporations have constitutional entitlement to accelerated judicial review of the denial of zoning variances is absurd.

I do not believe, however, that Z.J. Gifts is engaged in activity protected by the First Amendment. I adhere to the view I expressed in *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 250, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (opinion concurring in part and dissenting in part): the pandering of sex is not protected by the First Amendment. "The Constitution does not require a State or municipality to permit a business that intentionally specializes in, and holds itself forth to the public as specializing in, ***788** performance or portrayal of sex acts, sexual organs in a state of arousal, or live human nudity." *Id.,* at 258, 110 S.Ct. 596. This represents the Nation's long understanding of the First Amendment, recognized and adopted by this Court's opinion in *Ginzburg v. United States,* 383 U.S. 463, 470-471, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966). Littleton's ordinance targets sex-pandering businesses, see Littleton City Code § 3-14-2 (2003); to the extent it could apply to constitutionally protected expression its excess is not so great as to render it substantially overbroad and thus subject to facial invalidation, see *FW/PBS,* 493 U.S., at 261-262, 110 S.Ct. 596. Since the city of Littleton "could constitutionally have proscribed the commercial activities that it chose instead to license, I do not think the details of its licensing scheme had to comply with First Amendment standards." *Id.,* at 253, 110 S.Ct. 596.

All Citations

541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84, 72 USLW 4451, 04 Cal. Daily Op. Serv. 4843, 2004 Daily Journal D.A.R. 6662, 19 Fla. L. Weekly Fed. S 350

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Declined to Extend by Free Speech Coalition, Inc. v. Attorney General United States, 3rd Cir.(Pa.), June 8, 2016

122 S.Ct. 1728
Supreme Court of the United States

CITY OF LOS ANGELES, Petitioner,
v.
ALAMEDA BOOKS, INC., et al.

No. 00-799.
|
Argued Dec. 4, 2001.
|
Decided May 13, 2002.

Adult businesses brought § 1983 action, challenging city ordinance prohibiting operation of multiple adult businesses in single building. The United States District Court for the Central District of California, Dean D. Pregerson, J., granted summary judgment for businesses. City appealed. The Ninth Circuit Court of Appeals, Michael Daly Hawkins, Circuit Judge, 222 F.3d 719, affirmed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that city could reasonably rely on police department study correlating crime patterns with concentrations of adult businesses when opposing businesses' First Amendment challenge.

Reversed and remanded.

Justice Scalia concurred and filed opinion.

Justice Kennedy concurred in judgment and filed opinion.

Justice Souter filed dissenting opinion, in which Justices Stevens and Ginsburg joined and Justice Breyer joined in part.

West Headnotes (2)

[1] Constitutional Law
Time, Place, or Manner Restrictions

Reducing crime is a substantial government interest, for purpose of justifying time, place and manner regulation of speech. U.S.C.A. Const.Amend. 1.

198 Cases that cite this headnote

[2] Constitutional Law
Secondary effects

Public Amusement and Entertainment
Sexually Oriented Entertainment

City could reasonably rely on police department study correlating crime patterns with concentrations of adult businesses when opposing First Amendment challenge to ordinance barring more than one adult entertainment business in same building, even though study had focused on single-use establishments; study fairly supported city's rationale for ordinance. (Per Justice O'Connor, with the Chief Justice and two Justices concurring and one Justice concurring in judgment). U.S.C.A. Const.Amend. 1.

238 Cases that cite this headnote

****1728 *425** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Based on its 1977 study concluding that concentrations of adult entertainment establishments are associated with higher crime rates in surrounding communities, petitioner city enacted an ordinance prohibiting such enterprises within 1,000 feet of each other or within 500 feet of a religious institution, school, or public park. Los Angeles Municipal Code § 12.70(C) (1978). Because the ordinance's method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure, the ****1729** city later amended the ordinance to prohibit "more than one adult entertainment business in the same building." § 12.70(C) (1983). Respondents, two adult establishments that openly operate combined bookstores/video arcades in

violation of § 12.70(C), as amended, sued under 42 U.S.C. § 1983 for declaratory and injunctive relief, alleging that the ordinance, on its face, violates the First Amendment. Finding that the ordinance was not a content-neutral regulation of speech, the District Court reasoned that neither the 1977 study nor a report cited in *Hart Book Stores v. Edmisten,* a Fourth Circuit case upholding a similar statute, supported a reasonable belief that multiple-use adult establishments produce the secondary effects the city asserted as content-neutral justifications for its prohibition. Subjecting § 12.70(C) to strict scrutiny, the court granted respondents summary judgment because it felt the city had not offered evidence demonstrating that its prohibition was necessary to serve a compelling government interest. The Ninth Circuit affirmed on the different ground that, even if the ordinance were content neutral, the city failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments was designed to serve its substantial interest in reducing crime. The court therefore held the ordinance invalid under *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29.

Held: The judgment is reversed, and the case is remanded.

222 F.3d 719, reversed and remanded.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS, concluded that Los Angeles may reasonably rely ***426** on its 1977 study to demonstrate that its present ban on multiple-use adult establishments serves its interest in reducing crime. Pp. 1733-1738.

(a) The 1977 study's central component is a Los Angeles Police Department report indicating that, from 1965 to 1975, crime rates for, *e.g.,* robbery and prostitution grew much faster in Hollywood, which had the city's largest concentration of adult establishments, than in the city as a whole. The city may reasonably rely on the police department's conclusions regarding crime patterns to overcome summary judgment. In finding to the contrary on the ground that the 1977 study focused on the effect on crime rates of a concentration of establishments-not a concentration of operations within a single establishment-the Ninth Circuit misunderstood the study's implications. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, such areas are also areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the 1977 study's findings, and thus reasonable, for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates. Neither the Ninth Circuit nor respondents nor the dissent provides any reason to question the city's theory. If this Court were to accept their view, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest. *Renton* specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. The Court there held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. 475 U.S., at 51-52, 106 S.Ct. 925. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support its rationale for its ordinance. If plaintiffs ****1730** fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the *Renton* standard. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. See, *e.g., Erie v. Pap's A. M.,* 529 U.S. 277, 298, 120 S.Ct. 1382, 146 L.Ed.2d 265. This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study fails to prove that the city's justification for its ordinance is necessarily ***427** correct. Therefore, it must be concluded that the city, at this stage of the litigation, has complied with *Renton's* evidentiary requirement. Pp. 1733-1738.

(b) The Court need not resolve the parties' dispute over whether the city can rely on evidence from *Hart Book Stores* to overcome summary judgment, nor respondents' alternative argument that the ordinance is not a time, place, and manner regulation, but is effectively a ban on adult video arcades that must be subjected to strict scrutiny. P. 1738.

Justice KENNEDY concluded that this Court's precedents may allow Los Angeles to impose its regulation in the exercise of the zoning authority, and that the city is not, at least, to be foreclosed by summary judgment. Pp. 1739-1744.

(a) Under *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, if a city can decrease the crime and blight associated with adult businesses by exercising its zoning power, and at the same time leave the quantity and accessibility of speech substantially undiminished, there is no First Amendment objection, even if the measure identifies the problem outside the establishments by reference to the speech inside-that is, even if the measure is content based. On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. For example, it may not impose a content-based fee or tax, see *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209, even if the government purports to justify the fee by reference to secondary effects, see *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134-135, 112 S.Ct. 2395, 120 L.Ed.2d 101. That the ordinance at issue is more a typical land-use restriction than a law suppressing speech is suggested by the fact that it is not limited to expressive activities, but extends, *e.g.,* to massage parlors, which the city has found to cause the same undesirable secondary effects; also, it is just one part of an elaborate web of land-use regulations intended to promote the social value of the land as a whole without suppressing some activities or favoring others. Thus, the ordinance is not so suspect that it must be subjected to the strict scrutiny that content-based laws demand in other instances. Rather, it calls for intermediate scrutiny, as *Renton* held. Pp. 1739-1741.

(b) *Renton's* description of an ordinance similar to Los Angeles' as "content neutral," 475 U.S., at 48, 106 S.Ct. 925, was something of a fiction. These ordinances are content based, and should be so described. Nevertheless, *Renton's* central holding is sound. P. 1741.

(c) The necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like the one at issue may reduce the costs of secondary effects without substantially reducing speech. If two adult businesses are under the same roof, an ordinance requiring ***428** them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. The premise must be that businesses-even those that have always been under one roof-will for the most part disperse rather than shut down, that the quantity of speech will be substantially ****1731** undiminished, and that total secondary effects will be significantly reduced. As to whether there is sufficient evidence to support this proposition, the Court has consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. See, *e.g., Renton, supra,* at 51-52, 106 S.Ct. 925. Here, the proposition to be shown is supported by common experience and a study showing a correlation between the concentration of adult establishments and crime. Assuming that the study supports the city's original dispersal ordinance, most of the necessary analysis follows. To justify the ordinance at issue, the city may infer-from its study and from its own experience-that two adult businesses under the same roof are no better than two next door, and that knocking down the wall between the two would not ameliorate any undesirable secondary effects of their proximity to one another. If the city's first ordinance was justified, therefore, then the second is too. Pp. 1741-1743.

(d) Because these considerations seem well enough established in common experience and the Court's case law, the ordinance survives summary judgment. Pp. 1743-1744.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C.J., and SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, *post,* p. 1738. KENNEDY, J., filed an opinion concurring in the judgment, *post,* p. 1739. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, and in which BREYER, J., joined as to Part II, *post,* p. 1744.

Attorneys and Law Firms

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Opinion

***429** Justice O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join.

Los Angeles Municipal Code § 12.70(C) (1983), as amended, prohibits "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." Respondents, two adult establishments that each operated an adult bookstore and an adult video arcade in the same building, filed a suit under Rev. Stat. § 1979, 42 U.S.C. § 1983 (1994 ed., Supp. V), alleging that § 12.70(C) violates the First Amendment and seeking declaratory and injunctive relief. The District Court granted summary judgment to respondents, finding that the city of Los Angeles' prohibition was a content-based regulation of speech that failed strict scrutiny. The Court of Appeals for the Ninth Circuit affirmed, but on different grounds. It held that, even if § 12.70(C) were a content-neutral regulation, the city failed to demonstrate that the ***430** prohibition was designed to serve a substantial government interest. Specifically, the Court of Appeals found that the city failed to present evidence upon which it could reasonably rely to demonstrate a link between multiple-use adult establishments and negative secondary effects. Therefore, the Court of Appeals held the Los Angeles prohibition on such establishments invalid under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and its precedents interpreting that case. 222 F.3d 719, 723-728 (2000). We reverse and remand. The city of Los Angeles may reasonably rely on a study it conducted some years before enacting the present version of § 12.70(C) to demonstrate that its ban on multiple-use adult establishments serves its interest in reducing crime.

****1732** I

In 1977, the city of Los Angeles conducted a comprehensive study of adult establishments and concluded that concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities. See App. 35-162 (Los Angeles Dept. of City Planning, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles (City Plan Case No. 26475, City Council File No. 74-4521-S.3, June 1977)). Accordingly, the city enacted an ordinance prohibiting the establishment, substantial enlargement, or transfer of ownership of an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters within 1,000 feet of another such enterprise or within 500 feet of any religious institution, school, or public park. See Los Angeles Municipal Code § 12.70(C) (1978).

There is evidence that the intent of the city council when enacting this prohibition was not only to disperse distinct adult establishments housed in separate buildings, but also to disperse distinct adult businesses operated under common ownership and housed in a single structure. See ***431** App. 29 (Los Angeles Dept. of City Planning, Amendment-Proposed Ordinance to Prohibit the Establishment of More than One Adult Entertainment Business at a Single Location (City Plan Case No. 26475, City Council File No. 82-0155, Jan. 13, 1983)). The ordinance the city enacted, however, directed that "[t]he distance between any two adult entertainment businesses shall be measured in a straight line ... from the closest exterior structural wall of each business." Los Angeles Municipal Code § 12.70(D) (1978). Subsequent to enactment, the city realized that this method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure.

Concerned that allowing an adult-oriented department store to replace a strip of adult establishments could defeat the goal of the original ordinance, the city council amended § 12.70(C) by adding a prohibition on "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." Los Angeles Municipal Code § 12.70(C) (1983). The amended ordinance defines an "Adult Entertainment Business" as an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters, and notes that each of these enterprises "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." § 12.70(B)(17). The ordinance uses the term "business" to refer to certain types of goods or services sold in adult establishments, rather than the establishment itself. Relevant for purposes of this case are also the ordinance's definitions of adult bookstores and arcades. An "Adult Bookstore" is an operation that "has as a substantial portion of its stock-in-trade and offers for sale" printed matter and videocassettes that emphasize the depiction of specified sexual activities. § 12.70(B)(2)(a). An adult arcade is an operation where, "for any form of consideration," five or fewer patrons together may view films or videocassettes ***432** that emphasize the depiction of specified sexual activities. § 12.70(B)(1).

Respondents, Alameda Books, Inc., and Highland Books, Inc., are two adult establishments operating in Los Angeles. Neither is located within 1,000 feet of another adult establishment or 500 feet of any religious institution, public park, or school. Each establishment occupies less than 3,000 square feet. Both respondents rent and sell sexually oriented products, including videocassettes. Additionally, both provide booths where patrons can view videocassettes for a fee. Although respondents are located in different buildings, each operates its retail sales and rental operations in the same commercial space in which its video booths are located. There are no **1733 physical distinctions between the different operations within each establishment and each establishment has only one entrance. 222 F.3d, at 721. Respondents concede they are openly operating in violation of § 12.70(C) of the city's code, as amended. Brief for Respondents 7; Brief for Petitioner 9.

After a city building inspector found in 1995 that Alameda Books, Inc., was operating both as an adult bookstore and an adult arcade in violation of the city's adult zoning regulations, respondents joined as plaintiffs and sued under 42 U.S.C. § 1983 for declaratory and injunctive relief to prevent enforcement of the ordinance. 222 F.3d, at 721. At issue in this case is count I of the complaint, which alleges a facial violation of the First Amendment. Both the city and respondents filed cross-motions for summary judgment.

The District Court for the Central District of California initially denied both motions on the First Amendment issues in count I, concluding that there was "a genuine issue of fact whether the operation of a combination video rental and video viewing business leads to the harmful secondary effects associated with a concentration of separate businesses in a single urban area." App. 255. After respondents filed a motion for reconsideration, however, the District *433 Court found that Los Angeles' prohibition on multiple-use adult establishments was not a content-neutral regulation of speech. App. to Pet. for Cert. 51. It reasoned that neither the city's 1977 study nor a report cited in *Hart Book Stores v. Edmisten,* 612 F.2d 821 (C.A.4 1979) (upholding a North Carolina statute that also banned multiple-use adult establishments), supported a reasonable belief that multiple-use adult establishments produced the secondary effects the city asserted as content-neutral justifications for its prohibition. App. to Pet. for Cert. 34-47. Therefore, the District Court proceeded to subject the Los Angeles ordinance to strict scrutiny. Because it felt that the city did not offer evidence to demonstrate that its prohibition is necessary to serve a compelling government interest, the District Court granted summary judgment for respondents and issued a permanent injunction enjoining the enforcement of the ordinance against respondents. *Id.,* at 51.

The Court of Appeals for the Ninth Circuit affirmed, although on different grounds. The Court of Appeals determined that it did not have to reach the District Court's decision that the Los Angeles ordinance was content based because, even if the ordinance were content neutral, the city failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments is "designed to serve" the city's substantial interest in reducing crime. The challenged ordinance was therefore invalid under *Renton,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29. 222 F.3d, at 723-724. We granted certiorari, 532 U.S. 902, 121 S.Ct. 1223, 149 L.Ed.2d 134 (2001), to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton, supra.*

II

In *Renton v. Playtime Theatres, Inc., supra,* this Court considered the validity of a municipal ordinance that prohibited any adult movie theater from locating within 1,000 feet of any residential zone, family dwelling, church, park, *434 or school. Our analysis of the ordinance proceeded in three steps. First, we found that the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations. The ordinance was properly analyzed, therefore, as a time, place, and manner regulation. *Id.,* at 46, 106 S.Ct. 925. We next considered whether the ordinance was content neutral or content based. If the regulation were content based, it would be considered presumptively invalid and subject to strict scrutiny. *Simon & Schuster, Inc. v. Members of N. Y. State* **1734 *Crime Victims Bd.,* 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 230-231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). We held, however, that the Renton ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary

effects of such theaters on the surrounding community, namely, at crime rates, property values, and the quality of the city's neighborhoods. Therefore, the ordinance was deemed content neutral. *Renton, supra,* at 47-49, 106 S.Ct. 925. Finally, given this finding, we stated that the ordinance would be upheld so long as the city of Renton showed that its ordinance was designed to serve a substantial government interest and that reasonable alternative avenues of communication remained available. 475 U.S., at 50, 106 S.Ct. 925. We concluded that Renton had met this burden, and we upheld its ordinance. *Id.,* at 51-54, 106 S.Ct. 925.

The Court of Appeals applied the same analysis to evaluate the Los Angeles ordinance challenged in this case. First, the Court of Appeals found that the Los Angeles ordinance was not a complete ban on adult entertainment establishments, but rather a sort of adult zoning regulation, which *Renton* considered a time, place, and manner regulation. 222 F.3d, at 723. The Court of Appeals turned to the second step of the *Renton* analysis, but did not draw any conclusions about whether the Los Angeles ordinance was content based. It explained that, even if the Los Angeles ordinance were content neutral, the city had failed to demonstrate, ***435** as required by the third step of the *Renton* analysis, that its prohibition on multiple-use adult establishments was designed to serve its substantial interest in reducing crime. The Court of Appeals noted that the primary evidence relied upon by Los Angeles to demonstrate a link between combination adult businesses and harmful secondary effects was the 1977 study conducted by the city's planning department. The Court of Appeals found, however, that the city could not rely on that study because it did not " 'suppor[t] a reasonable belief that [the] combination [of] businesses ... produced harmful secondary effects of the type asserted.' " 222 F.3d, at 724. For similar reasons, the Court of Appeals also rejected the city's attempt to rely on a report on health conditions inside adult video arcades described in *Hart Book Stores, supra,* a case that upheld a North Carolina statute similar to the Los Angeles ordinance challenged in this case.

The central component of the 1977 study is a report on city crime patterns provided by the Los Angeles Police Department. That report indicated that, during the period from 1965 to 1975, certain crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments in the city, than in the city of Los Angeles as a whole. For example, robberies increased 3 times faster and prostitution 15 times faster in Hollywood than citywide. App. 124-125.

[1] The 1977 study also contains reports conducted directly by the staff of the Los Angeles Planning Department that examine the relationship between adult establishments and property values. These staff reports, however, are inconclusive. Not surprisingly, the parties focus their dispute before this Court on the report by the Los Angeles Police Department. Because we find that reducing crime is a substantial government interest and that the police department report's conclusions regarding crime patterns may reasonably be relied upon to overcome summary judgment against ***436** the city, we also focus on the portion of the 1977 study drawn from the police department report.

The Court of Appeals found that the 1977 study did not reasonably support the inference that a concentration of adult operations within a single adult establishment produced greater levels of criminal activity because the study focused on the ****1735** effect that a concentration of establishments-not a concentration of operations within a single establishment-had on crime rates. The Court of Appeals pointed out that the study treated combination adult bookstore/arcades as single establishments and did not study the effect of any separate-standing adult bookstore or arcade. 222 F.3d, at 724.

[2] The Court of Appeals misunderstood the implications of the 1977 study. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, areas with high concentrations of adult establishments are also areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the findings of the 1977 study, and thus reasonable, for Los Angeles to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity. The assumption behind this theory is that having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments

in close proximity, much as minimalls and department stores similarly attract the crowds of consumers. Brief for Petitioner 28. Under this view, it is rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates.

***437** Neither the Court of Appeals, nor respondents, nor the dissent provides any reason to question the city's theory. In particular, they do not offer a competing theory, let alone data, that explains why the elevated crime rates in neighborhoods with a concentration of adult establishments can be attributed entirely to the presence of permanent walls between, and separate entrances to, each individual adult operation. While the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own.

The error that the Court of Appeals made is that it required the city to prove that its theory about a concentration of adult operations attracting crowds of customers, much like a minimall or department store does, is a necessary consequence of the 1977 study. For example, the Court of Appeals refused to allow the city to draw the inference that "the expansion of an adult bookstore to include an adult arcade would increase" business activity and "produce the harmful secondary effects identified in the Study." 222 F.3d, at 726. It reasoned that such an inference would justify limits on the inventory of an adult bookstore, not a ban on the combination of an adult bookstore and an adult arcade. The Court of Appeals simply replaced the city's theory-that having many different operations in close proximity attracts crowds-with its own-that the size of an operation attracts crowds. If the Court of Appeals' theory is correct, then inventory limits make more sense. If the city's theory is correct, then a prohibition on the combination of businesses makes more sense. Both theories are consistent with the data in the 1977 study. The Court of Appeals' analysis, however, implicitly requires the city to prove that its theory is the only one that can plausibly explain the data ***438** because only in this manner can the city refute the Court of Appeals' logic.

Respondents make the same logical error as the Court of Appeals when they suggest that the city's prohibition on multiuse establishments will raise crime rates in certain neighborhoods because it will ****1736** force certain adult businesses to relocate to areas without any other adult businesses. Respondents' claim assumes that the 1977 study proves that all adult businesses, whether or not they are located near other adult businesses, generate crime. This is a plausible reading of the results from the 1977 study, but respondents do not demonstrate that it is a compelled reading. Nor do they provide evidence that refutes the city's interpretation of the study, under which the city's prohibition should on balance reduce crime. If this Court were nevertheless to accept respondents' speculation, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest.

In *Renton,* we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. 475 U.S., at 51-52, 106 S.Ct. 925; see also, *e.g., Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (SOUTER, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects). This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's ***439** evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. See, *e.g., Erie v. Pap's A.M.,* 529 U.S. 277, 298, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only

by complaints that the 1977 study fails to prove that the city's justification for its ordinance is necessarily correct. Therefore, we conclude that the city, at this stage of the litigation, has complied with the evidentiary requirement in *Renton.*

Justice SOUTER faults the city for relying on the 1977 study not because the study fails to support the city's theory that adult department stores, like adult minimalls, attract customers and thus crime, but because the city does not demonstrate that freestanding single-use adult establishments reduce crime. See *post,* at 1747-1749 (dissenting opinion). In effect, Justice SOUTER asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary. See, *e.g., Barnes, supra,* at 583-584, 111 S.Ct. 2456 (SOUTER, J., concurring in judgment). Such a requirement would go too far in undermining our settled position that municipalities must be given a " 'reasonable opportunity to experiment with solutions' " to address the secondary effects of protected speech. *Renton, supra,* at 52, 106 S.Ct. 925 (quoting *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion)). A municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because ***440** the solution would, by definition, not have been implemented previously. The city's ordinance banning multiple-use ****1737** adult establishments is such a solution. Respondents contend that there are no adult video arcades in Los Angeles County that operate independently of adult bookstores. See Brief for Respondents 41. But without such arcades, the city does not have a treatment group to compare with the control group of multiple-use adult establishments, and without such a comparison Justice SOUTER would strike down the city's ordinance. This leaves the city with no means to address the secondary effects with which it is concerned.

Our deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests. On the one hand, we have an "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 666, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (plurality opinion); see also *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843-844, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). On the other hand, we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems. See *Turner, supra,* at 665-666, 114 S.Ct. 2445; *Erie, supra,* at 297-298, 120 S.Ct. 1382 (plurality opinion). We are also guided by the fact that *Renton* requires that municipal ordinances receive only intermediate scrutiny if they are content neutral. 475 U.S., at 48-50, 106 S.Ct. 925. There is less reason to be concerned that municipalities will use these ordinances to discriminate against unpopular speech. See *Erie, supra,* at 298-299, 120 S.Ct. 1382.

Justice SOUTER would have us rethink this balance, and indeed the entire *Renton* framework. In *Renton,* the Court distinguished the inquiry into whether a municipal ordinance is content neutral from the inquiry into whether it is "designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." 475 U.S., at 47-54, 106 S.Ct. 925. The former requires courts to verify that the "predominate concerns" motivating the ***441** ordinance "were with the secondary effects of adult [speech], and not with the content of adult [speech]." *Id.,* at 47, 106 S.Ct. 925 (emphasis deleted) The latter inquiry goes one step further and asks whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. Only at this stage did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects. *Id.,* at 50-52, 106 S.Ct. 925. Justice SOUTER would either merge these two inquiries or move the evidentiary analysis into the inquiry on content neutrality, and raise the evidentiary bar that a municipality must pass. His logic is that verifying that the ordinance actually reduces the secondary effects asserted would ensure that zoning regulations are not merely content-based regulations in disguise. See *post,* at 1746.

We think this proposal unwise. First, none of the parties request the Court to depart from the *Renton* framework. Nor is the proposal fairly encompassed in the question presented, which focuses on the sorts of evidence upon which the city may rely to demonstrate that its ordinance is designed to serve a substantial governmental interest. Pet. for Cert. i. Second, there is no evidence suggesting that courts have difficulty determining whether municipal ordinances are motivated primarily by the content of adult

speech or by its secondary effects without looking to evidence connecting such speech to the asserted secondary effects. In this case, the Court of Appeals has not yet had an opportunity to address the issue, having assumed for the sake of argument that the city's ordinance is content neutral. 222 F.3d, at 723. It would be inappropriate for this Court to reach the question of content neutrality before permitting the lower court to pass upon it. Finally, Justice SOUTER does **1738 not clarify the sort of evidence upon which municipalities may rely to meet the evidentiary burden he would require. It is easy to say that courts must demand evidence *442 when "common experience" or "common assumptions" are incorrect, see *post,* at 1747, but it is difficult for courts to know ahead of time whether that condition is met. Municipalities will, in general, have greater experience with and understanding of the secondary effects that follow certain protected speech than will the courts. See *Erie,* 529 U.S., at 297-298, 120 S.Ct. 1382 (plurality opinion). For this reason our cases require only that municipalities rely upon evidence that is " 'reasonably believed to be relevant' " to the secondary effects that they seek to address. *Id.,* at 296.

III

The city of Los Angeles argues that its prohibition on multiuse establishments draws further support from a study of the poor health conditions in adult video arcades described in *Hart Book Stores,* a case that upheld a North Carolina ordinance similar to that challenged here. See 612 F.2d, at 828-829, n. 9. Respondents argue that the city cannot rely on evidence from *Hart Book Stores* because the city cannot prove it examined that evidence before it enacted the current version of § 12.70(C). Brief for Respondents 21. Respondents note, moreover, that unsanitary conditions in adult video arcades would persist regardless of whether arcades were operated in the same buildings as, say, adult bookstores. *Ibid.*

We do not, however, need to resolve the parties' dispute over evidence cited in *Hart Book Stores.* Unlike the city of Renton, the city of Los Angeles conducted its own study of adult businesses. We have concluded that the Los Angeles study provides evidence to support the city's theory that a concentration of adult operations in one locale attracts crime, and can be reasonably relied upon to demonstrate that Los Angeles Municipal Code § 12.70(C) (1983) is designed to promote the city's interest in reducing crime. Therefore, the city need not present foreign studies to overcome the summary judgment against it.

*443 Before concluding, it should be noted that respondents argue, as an alternative basis to sustain the Court of Appeals' judgment, that the Los Angeles ordinance is not a typical zoning regulation. Rather, respondents explain, the prohibition on multiuse adult establishments is effectively a ban on adult video arcades because no such business exists independently of an adult bookstore. Brief for Respondents 12-13. Respondents request that the Court hold that the Los Angeles ordinance is not a time, place, and manner regulation, and that the Court subject the ordinance to strict scrutiny. This also appears to be the theme of Justice KENNEDY's concurrence. He contends that "[a] city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Post,* at 1742 (opinion concurring in judgment). We consider that unobjectionable proposition as simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban. The Court of Appeals held, however, that the city's prohibition on the combination of adult bookstores and arcades is not a ban and respondents did not petition for review of that determination.

Accordingly, we reverse the Court of Appeals' judgment granting summary judgment to respondents and remand the case for further proceedings.

It is so ordered.

Justice SCALIA, concurring.

I join the plurality opinion because I think it represents a correct application of our jurisprudence concerning regulation of the "secondary effects" of pornographic speech. As I have said elsewhere, however, in a case such as this our First Amendment **1739 traditions make "secondary effects" analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering *444 sex. See, *e.g., Erie v. Pap's A.M.,* 529 U.S. 277, 310, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (SCALIA, J., concurring in judgment); *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 256-261,

110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (SCALIA, J., concurring in part and dissenting in part).

Justice KENNEDY, concurring in the judgment.

Speech can produce tangible consequences. It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech. Speech can also cause secondary effects, however, unrelated to the impact of the speech on its audience. A newspaper factory may cause pollution, and a billboard may obstruct a view. These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.

Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood. The damage is measurable; it is all too real. The law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech. A city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion).

The question in this case is whether Los Angeles can seek to reduce these tangible, adverse consequences by separating adult speech businesses from one another-even two businesses that have always been under the same roof. In my view our precedents may allow the city to impose its regulation in the exercise of the zoning authority. The city is not, at least, to be foreclosed by summary judgment, so I concur in the judgment.

This separate statement seems to me necessary, however, for two reasons. First, *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), described a similar ordinance as "content neutral," and I agree with the dissent that the designation ***445** is imprecise. Second, in my view, the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur.

I

In *Renton,* the Court determined that while the material inside adult bookstores and movie theaters is speech, the consequent sordidness outside is not. The challenge is to correct the latter while leaving the former, as far as possible, untouched. If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection. This is so even if the measure identifies the problem outside by reference to the speech inside-that is, even if the measure is in that sense content based.

On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax. See *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) ("[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press"). This is true even if the government purports to justify the fee by reference to secondary effects. See *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134-135, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible ****1740** strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.

A zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech. It is well documented that multiple adult businesses in close proximity may change the character of a neighborhood ***446** for the worse. Those same businesses spread across the city may not have the same deleterious effects. At least in theory, a dispersal ordinance causes these businesses to separate rather than to close, so negative externalities are diminished but speech is not.

The calculus is a familiar one to city planners, for many enterprises other than adult businesses also cause undesirable externalities. Factories, for example, may cause pollution, so a city may seek to reduce the cost of that externality by restricting factories to areas far from residential neighborhoods. With careful urban planning a city in this way may reduce the costs of pollution for communities, while at the same time allowing the productive work of the factories to continue. The

challenge is to protect the activity inside while controlling side effects outside.

Such an ordinance might, like a speech restriction, be "content based." It might, for example, single out slaughterhouses for specific zoning treatment, restricting them to a particularly remote part of town. Without knowing more, however, one would hardly presume that because the ordinance is specific to that business, the city seeks to discriminate against it or help a favored group. One would presume, rather, that the ordinance targets not the business but its particular noxious side effects. But cf. *Slaughter-House Cases,* 16 Wall. 36, 21 L.Ed. 394 (1872). The business might well be the city's most valued enterprise; nevertheless, because of the pollution it causes, it may warrant special zoning treatment. This sort of singling out is not impermissible content discrimination; it is sensible urban planning. Cf. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303 (1926) ("A nuisance may be merely a right thing in the wrong place,-like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

***447** True, the First Amendment protects speech and not slaughterhouses. But in both contexts, the inference of impermissible discrimination is not strong. An equally strong inference is that the ordinance is targeted not at the activity, but at its side effects. If a zoning ordinance is directed to the secondary effects of adult speech, the ordinance does not necessarily constitute impermissible content discrimination. A zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it.

The ordinance at issue in this case is not limited to expressive activities. It also extends, for example, to massage parlors, which the city has found to cause similar secondary effects. See Los Angeles Municipal Code §§ 12.70(B)(8) (1978), 12.70(B)(17) (1983), 12.70(C) (1986), as amended. This ordinance, moreover, is just one part of an elaborate web of land-use regulations in Los Angeles, all of which are intended to promote the social value of the land as a whole without suppressing some activities or favoring others. See § 12.02 ("The purpose of this article is to consolidate and coordinate all existing zoning regulations and provisions into one comprehensive zoning plan ... in order to encourage the most appropriate use of land ... and to promote the health, safety, and the general welfare ..."). All this further suggests that the ordinance is more in the nature of a typical land-use restriction and less in the nature of a law suppressing speech.

****1741** For these reasons, the ordinance is not so suspect that we must employ the usual rigorous analysis that content-based laws demand in other instances. The ordinance may be a covert attack on speech, but we should not presume it to be so. In the language of our First Amendment doctrine it calls for intermediate and not strict scrutiny, as we held in *Renton.*

***448** II

In *Renton,* the Court began by noting that a zoning ordinance is a time, place, or manner restriction. The Court then proceeded to consider the question whether the ordinance was "content based." The ordinance "by its terms [was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views." 475 U.S., at 48, 106 S.Ct. 925 (internal quotation marks omitted). On this premise, the Court designated the restriction "content neutral." *Ibid.*

The Court appeared to recognize, however, that the designation was something of a fiction, which, perhaps, is why it kept the phrase in quotes. After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based. And the ordinance in *Renton* "treat[ed] theaters that specialize in adult films differently from other kinds of theaters." *Id.,* at 47, 106 S.Ct. 925. The fiction that this sort of ordinance is content neutral-or "content neutral"-is perhaps more confusing than helpful, as Justice SOUTER demonstrates, see *post,* at 1745 (dissenting opinion). It is also not a fiction that has commanded our consistent adherence. See *Thomas v. Chicago Park Dist.,* 534 U.S. 316, 322, and n. 2, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) (suggesting that a licensing scheme targeting only those businesses purveying sexually explicit speech is not content neutral). These ordinances are content based, and we should call them so.

Nevertheless, for the reasons discussed above, the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny. Generally, the government has no power to restrict speech based on content, but there are exceptions to the rule. See *Simon & Schuster, Inc. v. Members of N. Y. State Crime* ***449** *Victims Bd.,* 502 U.S. 105, 126-127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring in judgment). And zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.

III

The narrow question presented in this case is whether the ordinance at issue is invalid "because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions." Pet. for Cert. i. This question is actually two questions. First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition? The plurality skips to the second question and gives the correct answer; but in my view more attention must be given to the first.

****1742** At the outset, we must identify the claim a city must make in order to justify a content-based zoning ordinance. As discussed above, a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with Justice SOUTER. See *post,* at 1746. The rationale of ***450** the ordinance must be that it will suppress secondary effects-and not by suppressing speech.

The plurality's statement of the proposition to be supported is somewhat different. It suggests that Los Angeles could reason as follows: (1) "a concentration of operations in one locale draws ... a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity"; (2) "having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity"; (3) "reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates." *Ante,* at 1735.

These propositions all seem reasonable, and the inferences required to get from one to the next are sensible. Nevertheless, this syllogism fails to capture an important part of the inquiry. The plurality's analysis does not address how speech will fare under the city's ordinance. As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects. This reasoning would as easily justify a content-based tax: Increased prices will reduce demand, and fewer customers will mean fewer secondary effects. But a content-based tax may not be justified in this manner. See *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech.

The analysis requires a few more steps. If two adult businesses are under the same roof, an ordinance requiring them ***451** to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional

reduction does not suffice. Content-based taxes could achieve that, yet these are impermissible.

The premise, therefore, must be that businesses-even those that have always been under one roof-will for the most part disperse rather than shut down. True, this premise has its own conundrum. As Justice SOUTER writes, "[t]he city ... claims no interest in the proliferation of adult establishments." *Post,* at 1748. The claim, therefore, must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. This must be the rationale of a dispersal statute.

Only after identifying the proposition to be proved can we ask the second part of the question presented: is there sufficient evidence to support the proposition? As to this, we have consistently held that a city must have latitude to experiment, at ****1743** least at the outset, and that very little evidence is required. See, *e.g., Renton,* 475 U.S., at 51-52, 106 S.Ct. 925 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses"); *Young,* 427 U.S., at 71, 96 S.Ct. 2440 ("[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems"); *Erie v. Pap's A.M.,* 529 U.S. 277, 300-301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. See *Renton, supra,* at 51-52, 106 S.Ct. 925. The Los Angeles City Council ***452** knows the streets of Los Angeles better than we do. See *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 665-666, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); *Erie, supra,* at 297-298, 120 S.Ct. 1382 (plurality opinion). It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion.

In this case the proposition to be shown is supported by a single study and common experience. The city's study shows a correlation between the concentration of adult establishments and crime. Two or more adult businesses in close proximity seem to attract a critical mass of unsavory characters, and the crime rate may increase as a result. The city, therefore, sought to disperse these businesses. Los Angeles Municipal Code § 12.70(C) (1983), as amended. This original ordinance is not challenged here, and we may assume that it is constitutional.

If we assume that the study supports the original ordinance, then most of the necessary analysis follows. We may posit that two adult stores next door to each other attract 100 patrons per day. The two businesses split apart might attract 49 patrons each. (Two patrons, perhaps, will be discouraged by the inconvenience of the separation-a relatively small cost to speech.) On the other hand, the reduction in secondary effects might be dramatic, because secondary effects may require a critical mass. Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all. If so, a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech. Indeed, the very absence of secondary effects might increase the audience for the speech; perhaps for every two people who are discouraged by the inconvenience of two-stop shopping, another two are encouraged by hospitable surroundings. In that case, secondary effects might be eliminated at no cost to ***453** speech whatsoever, and both the city and the speaker will have their interests well served.

Only one small step remains to justify the ordinance at issue in this case. The city may next infer-from its study and from its own experience-that two adult businesses under the same roof are no better than two next door. The city could reach the reasonable conclusion that knocking down the wall between two adult businesses does not ameliorate any undesirable secondary effects of their proximity to one another. If the city's first ordinance was justified, therefore, then the second is too. Dispersing two adult businesses under one roof is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little.

IV

These propositions are well established in common experience and in zoning policies that we have already examined, and for these reasons this ordinance is not invalid on its face. If these assumptions ****1744** can be proved unsound at trial, then the ordinance might

not withstand intermediate scrutiny. The ordinance does, however, survive the summary judgment motion that the Court of Appeals ordered granted in this case.

Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, and with whom Justice BREYER joins as to Part II, dissenting.

In 1977, the city of Los Angeles studied sections of the city with high and low concentrations of adult business establishments catering to the market for the erotic. The city found no certain correlation between the location of those establishments and depressed property values, but it did find some correlation between areas of higher concentrations of such business and higher crime rates. On that basis, Los Angeles followed the examples of other cities in adopting a zoning ordinance requiring dispersion of adult ***454** establishments. I assume that the ordinance was constitutional when adopted, see, *e.g., Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and assume for purposes of this case that the original ordinance remains valid today. [1]

[1] Although *amicus* First Amendment Lawyers Association argues that recent studies refute the findings of adult business correlations with secondary effects sufficient to justify such an ordinance, Brief for First Amendment Lawyers Association as *Amicus Curiae* 21-23, the issue is one I do not reach.

The city subsequently amended its ordinance to forbid clusters of such businesses at one address, as in a mall. The city has, in turn, taken a third step to apply this amendment to prohibit even a single proprietor from doing business in a traditional way that combines an adult bookstore, selling books, magazines, and videos, with an adult arcade, consisting of open viewing booths, where potential purchasers of videos can view them for a fee.

From a policy of dispersing adult establishments, the city has thus moved to a policy of dividing them in two. The justification claimed for this application of the new policy remains, however, the 1977 survey, as supplemented by the authority of one decided case on regulating adult arcades in another State. The case authority is not on point, see *infra,* at 1748, n. 4, and the 1977 survey provides no support for the breakup policy. Its evidentiary insufficiency bears emphasis and is the principal reason that I respectfully dissent from the Court's judgment today.

I

This ordinance stands or falls on the results of what our cases speak of as intermediate scrutiny, generally contrasted with the demanding standard applied under the First Amendment to a content-based regulation of expression. The variants of middle-tier tests cover a grab bag of restrictive statutes, with a corresponding variety of justifications. ***455** While spoken of as content neutral, these regulations are not uniformly distinct from the content-based regulations calling for scrutiny that is strict, and zoning of businesses based on their sales of expressive adult material receives mid-level scrutiny, even though it raises a risk of content-based restriction. It is worth being clear, then, on how close to a content basis adult business zoning can get, and why the application of a middle-tier standard to zoning regulation of adult bookstores calls for particular care.

Because content-based regulation applies to expression by very reason of what is said, it carries a high risk that expressive limits are imposed for the sake of suppressing a message that is disagreeable to listeners or readers, or the government. See *Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 536, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) ("[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure ****1745** that communication has not been prohibited merely because public officials disapprove the speaker's views" (internal quotation marks omitted)). A restriction based on content survives only on a showing of necessity to serve a legitimate and compelling governmental interest, combined with least restrictive narrow tailoring to serve it, see *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); since merely protecting listeners from offense at the message is not a legitimate interest of the government, see *Cohen v. California,* 403 U.S. 15, 24-25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), strict scrutiny leaves few survivors.

The comparatively softer intermediate scrutiny is reserved for regulations justified by something other than content of the message, such as a straightforward restriction going only to the time, place, or manner of speech or

other expression. It is easy to see why review of such a regulation may be relatively relaxed. No one has to disagree with any message to find something wrong with a loudspeaker at three in the morning, see ***456** *Kovacs v. Cooper,* 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949); the sentiment may not provoke, but being blasted out of a sound sleep does. In such a case, we ask simply whether the regulation is "narrowly tailored to serve a significant governmental interest, and ... leave[s] open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). A middle-tier standard is also applied to limits on expression through action that is otherwise subject to regulation for nonexpressive purposes, the best known example being the prohibition on destroying draft cards as an act of protest, *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); here a regulation passes muster "if it furthers an important or substantial governmental interest ... unrelated to the suppression of free expression" by a restriction "no greater than is essential to the furtherance of that interest," *id.,* at 377, 88 S.Ct. 1673. As mentioned already, yet another middle-tier variety is zoning restriction as a means of responding to the "secondary effects" of adult businesses, principally crime and declining property values in the neighborhood. *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). [2]

2 Limiting such effects qualifies as a substantial governmental interest, and an ordinance has been said to survive if it is shown to serve such ends without unreasonably limiting alternatives. *Renton,* 475 U.S., at 50, 106 S.Ct. 925. Because *Renton* called its secondary-effects ordinance a mere time, place, or manner restriction and thereby glossed over the role of content in secondary-effects zoning, see *infra,* at 1745, I believe the soft focus of its statement of the middle-tier test should be rejected in favor of the *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), formulation quoted above. *O'Brien* is a closer relative of secondary-effects zoning than mere time, place, or manner regulations, as the Court has implicitly recognized. *Erie v. Pap's A.M.,* 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion).

Although this type of land-use restriction has even been called a variety of time, place, or manner regulation, *id.,* at 46, 106 S.Ct. 925, equating a secondary-effects zoning regulation with a mere regulation of time, place, or manner jumps over an important difference between them. A restriction on loudspeakers has no obvious relationship to the substance of ***457** what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does. And while it may be true that an adult business is burdened only because of its secondary effects, it is clearly burdened only if its expressive products have adult content. Thus, the Court has recognized that this kind of regulation, though called content neutral, occupies a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said. *Id.,* at 47, 106 S.Ct. 925.

****1746** It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it content correlated, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses. The risk lies in the fact that when a law applies selectively only to speech of particular content, the more precisely the content is identified, the greater is the opportunity for government censorship. Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove.

This risk of viewpoint discrimination is subject to a relatively simple safeguard, however. If combating secondary effects of property devaluation and crime is truly the reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one area), without suppressing the expressive activity itself. This capacity of zoning regulation to address the practical problems without eliminating the speech is, after all, the only possible excuse for speaking of secondary-effects zoning as akin to time, place, or manner regulations.

***458** In examining claims that there are causal relationships between adult businesses and an increase in secondary effects (distinct from disagreement), and between zoning and the mitigation of the effects, stress needs to be placed on the empirical character of the

demonstration available. See *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 510, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("[J]udgments ... defying objective evaluation ... must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"); *Young,* 427 U.S., at 84, 96 S.Ct. 2440 (Powell, J., concurring) ("[C]ourts must be alert ... to the possibility of using the power to zone as a pretext for suppressing expression"). The weaker the demonstration of facts distinct from disapproval of the "adult" viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation. [3]

[3] Regulation of commercial speech, which is like secondary-effects zoning in being subject to an intermediate level of First Amendment scrutiny, see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 557, 569, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), provides an instructive parallel in the cases enforcing an evidentiary requirement to ensure that an asserted rationale does not cloak an illegitimate governmental motive. See, *e.g., Rubin v. Coors Brewing Co.,* 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995); *Edenfield v. Fane,* 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). The government's "burden is not satisfied by mere speculation or conjecture," but only by "demonstrat[ing] that the harms [the government] recites are real and that its restriction will in fact alleviate them to a material degree." *Id.,* at 770-771, 113 S.Ct. 1792. For unless this "critical" requirement is met, *Rubin, supra,* at 487, 115 S.Ct. 1585, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression," *Edenfield, supra,* at 771, 113 S.Ct. 1792.

Equal stress should be placed on the point that requiring empirical justification of claims about property value or crime is not demanding anything Herculean. Increased crime, like prostitution and muggings, and declining property values in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of market ***459** value, all of which are within a municipality's capacity or available from the distilled experiences of comparable communities. See, *e.g., Renton,* ****1747** *supra,* at 51, 106 S.Ct. 925; *Young, supra,* at 55, 96 S.Ct. 2440.

And precisely because this sort of evidence is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction. It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it. We have appealed to common sense in analogous cases, even if we have disagreed about how far it took us. See *Erie v. Pap's A.M.,* 529 U.S. 277, 300-301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion); *id.,* at 313, and n. 2, 120 S.Ct. 1382 (SOUTER, J., concurring in part and dissenting in part). But we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics and municipal property valuations, lest we find out when the evidence is gathered that the assumptions are highly debatable. The record in this very case makes the point. It has become a commonplace, based on our own cases, that concentrating adult establishments drives down the value of neighboring property used for other purposes. See *Renton,* 475 U.S., at 51, 106 S.Ct. 925; *Young, supra,* at 55, 96 S.Ct. 2440. In fact, however, the city found that general assumption unjustified by its 1977 study. App. 39, 45.

The lesson is that the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government's failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration. See, *e.g., Schad v. Mount Ephraim,* 452 U.S. 61, 72-74, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). In this case, however, the government has not shown that bookstores containing viewing booths, isolated from other adult establishments, increase ***460** crime or produce other negative secondary effects in surrounding neighborhoods, and we are thus left without substantial justification for viewing the city's First Amendment restriction as content correlated but not simply content based. By the same token, the city has failed to show any causal relationship between the breakup policy and elimination or regulation of secondary effects.

II

Our cases on the subject have referred to studies, undertaken with varying degrees of formality, showing the geographical correlations between the presence or concentration of adult business establishments and enhanced crime rates or depressed property values. See, *e.g., Renton, supra,* at 50-51, 106 S.Ct. 925; *Young,* 427 U.S., at 55, 96 S.Ct. 2440. Although we have held that intermediate scrutiny of secondary-effects legislation does not demand a fresh evidentiary study of its factual basis if the published results of investigations elsewhere are "reasonably" thought to be applicable in a different municipal setting, *Renton, supra,* at 51-52, 106 S.Ct. 925, the city here took responsibility to make its own enquiry, App. 35-162. As already mentioned, the study was inconclusive as to any correlation between adult business and lower property values, *id.,* at 45, 106 S.Ct. 925, and it reported no association between higher crime rates and any isolated adult establishments. But it did find a geographical correlation of higher concentrations of adult establishments with higher crime rates, *id.,* at 43, 106 S.Ct. 925, and with this study in hand, Los Angeles enacted its 1978 ordinance requiring dispersion of adult stores and theaters. This original position of the ordinance is not challenged today, and I will assume its justification on the theory accepted in *Young,* that eliminating concentrations of adult establishments will spread out the documented secondary effects and render them more manageable that way.

****1748** The application of the 1983 amendment now before us is, however, a different matter. My concern is not with the ***461** assumption behind the amendment itself, that a conglomeration of adult businesses under one roof, as in a minimall or adult department store, will produce undesirable secondary effects comparable to what a cluster of separate adult establishments brings about, *ante,* at 1735. That may or may not be so. The assumption that is clearly unsupported, however, goes to the city's supposed interest in applying the amendment to the book and video stores in question, and in applying it to break them up. The city, of course, claims no interest in the proliferation of adult establishments, the ostensible consequence of splitting the sales and viewing activities so as to produce two stores where once there was one. Nor does the city assert any interest in limiting the sale of adult expressive material as such, or reducing the number of adult video booths in the city, for that would be clear content-based regulation, and the city was careful in its 1977 report to disclaim any such intent. App. 54. [4]

[4] Finally, the city does not assert an interest in curbing any secondary effects within the combined bookstore-arcades. In *Hart Book Stores, Inc. v. Edmisten,* 612 F.2d 821 (1979), the Fourth Circuit upheld a similar ban in North Carolina, relying in part on a county health department report on the results of an inspection of several of the combined adult bookstore-video arcades in Wake County, North Carolina. *Id.,* at 828-829, n. 9. The inspection revealed unsanitary conditions and evidence of salacious activities taking place within the video cubicles. *Ibid.* The city introduces this case to defend its breakup policy although it is not clear from the opinion how separating these video arcades from the adult bookstores would deter the activities that took place within them. In any event, while *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), allowed a city to rely on the experiences and studies of other cities, it did not dispense with the requirement that "whatever evidence the city relies upon [be] reasonably believed to be relevant to the problem that the city addresses," *id.,* at 51-52, 106 S.Ct. 925, and the evidence relied upon by the Fourth Circuit is certainly not necessarily relevant to the Los Angeles ordinance. Since November 1977, five years before the enactment of the ordinance at issue, Los Angeles has regulated adult video booths, prohibiting doors, setting minimum levels of lighting, and requiring that their interiors be fully visible from the entrance to the premises. Los Angeles Municipal Code §§ 103.101(i), (j). Thus, it seems less likely that the unsanitary conditions identified in *Hart Book Stores* would exist in video arcades in Los Angeles, and the city has suggested no evidence that they do. For that reason, *Hart Book Stores* gives no indication of a substantial governmental interest that the ban on multiuse adult establishments would further.

***462** Rather, the city apparently assumes that a bookstore selling videos and providing viewing booths produces secondary effects of crime, and more crime than would result from having a single store without booths in one part of town and a video arcade in another. [5] But the city neither says this in so many words nor proffers any evidence to support even the simple proposition that an otherwise lawfully located adult bookstore combined with video booths will produce any criminal effects. The Los Angeles study treats such combined stores as one, see *id.,* at 81-82, 96 S.Ct. 2440, and draws no general conclusion that individual stores spread apart from other adult establishments (as under the basic Los Angeles ordinance)

are associated with any degree of criminal activity above the general norm; nor has the city called the Court's attention to any other empirical study, or even anecdotal police evidence, that supports the city's assumption. In fact, if the Los Angeles study sheds any light whatever on the city's position, it is the light of skepticism, for we may fairly suspect that the study said nothing about the secondary effects of **1749 freestanding stores because no effects were observed. The reasonable supposition, then, is that splitting some of them up will have no consequence for secondary effects whatever. [6]

5 The plurality indulges the city's assumption but goes no further to justify it than stating what is obvious from what the city's study says about concentrations of adult establishments (but not isolated ones): the presence of several adult businesses in one neighborhood draws "a greater concentration of adult consumers to the neighborhood, [which] either attracts or generates criminal activity." *Ante,* at 1735.

6 In *Renton,* the Court approved a zoning ordinance "aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood." 475 U.S., at 50, 106 S.Ct. 925. The city, however, does not appeal to that decision to show that combined bookstore-arcades isolated from other adult establishments, like the theaters in *Renton,* give rise to negative secondary effects, perhaps recognizing that such a finding would only call into doubt the sensibility of the city's decision to proliferate such businesses. See *ante,* at 1736. Although the question may be open whether a city can rely on the experiences of other cities when they contradict its own studies, that question is not implicated here, as Los Angeles relies exclusively on its own study, which is tellingly silent on the question whether isolated adult establishments have any bearing on criminal activity.

*463 The inescapable point is that the city does not even claim that the 1977 study provides any support for its assumption. We have previously accepted studies, like the city's own study here, as showing a causal connection between concentrations of adult business and identified secondary effects. [7] Since that is an acceptable basis for requiring adult businesses to disperse when they are housed in separate premises, there is certainly a relevant argument to be made that restricting their concentration at one spacious address should have some effect on sales and traffic, and effects in the neighborhood. But even if that argument may justify a ban on adult "minimalls," *ante,* at 1735, it provides no support for what the city proposes to do here. The bookstores involved here are not concentrations of traditionally separate adult businesses that have been studied and shown to have an association with secondary effects, and they exemplify no new form of concentration like a mall under one roof. They are combinations of selling and viewing activities that have commonly been combined, and the plurality itself recognizes, *ante,* at 1736, that no study conducted by the city has reported that this type of traditional business, any more than any other adult business, has a correlation with secondary effects *464 in the absence of concentration with other adult establishments in the neighborhood. And even if splitting viewing booths from the bookstores that continue to sell videos were to turn some customers away (or send them in search of video arcades in other neighborhoods), it is nothing but speculation to think that marginally lower traffic to one store would have any measurable effect on the neighborhood, let alone an effect on associated crime that has never been shown to exist in the first place. [8]

7 As already noted, n. 1, *supra, amicus* First Amendment Lawyers Association argues that more recent studies show no such thing, but this case involves no such challenge to the previously accepted causal connection.

8 Justice KENNEDY would indulge the city in this speculation, so long as it could show that the ordinance will "leav[e] the quantity and accessibility of speech substantially intact." *Ante,* at 1742 (opinion concurring in judgment). But the suggestion that the speculated consequences may justify content-correlated regulation if speech is only slightly burdened turns intermediate scrutiny on its head. Although the goal of intermediate scrutiny is to filter out laws that unduly burden speech, this is achieved by examining the asserted governmental interest, not the burden on speech, which must simply be no greater than necessary to further that interest. *Erie,* 529 U.S., at 301, 120 S.Ct. 1382; see also n. 2, *supra.* Nor has Justice KENNEDY even shown that this ordinance leaves speech "substantially intact." He posits an example in which two adult stores draw 100 customers, and each business operating separately draws 49. *Ante,* at 1743. It does not follow, however, that a combined bookstore-arcade that draws 100 customers, when split, will yield a bookstore and arcade that together draw nearly

that many customers. Given the now double outlays required to operate the businesses at different locations, see *infra,* at 1751, the far more likely outcome is that the stand-alone video store will go out of business. (Of course, the bookstore owner could, consistently with the ordinance, continue to operate video booths at no charge, but if this were always commercially feasible then the city would face the separate problem that under no theory could a rule simply requiring that video booths be operated for free be said to reduce secondary effects.)

****1750** Nor is the plurality's position bolstered, as it seems to think, *ante,* at 1736, by relying on the statement in *Renton* that courts should allow cities a " 'reasonable opportunity to experiment with solutions to admittedly serious problems,' " 475 U.S., at 52, 106 S.Ct. 925. The plurality overlooks a key distinction between the zoning regulations at issue in *Renton* and ***465** *Young* (and in Los Angeles as of 1978), and this new Los Angeles breakup requirement. In those two cases, the municipalities' substantial interest for purposes of intermediate scrutiny was an interest in choosing between two strategies to deal with crime or property value, each strategy tied to the businesses' location, which had been shown to have a causal connection with the secondary effects: the municipality could either concentrate businesses for a concentrated regulatory strategy, or disperse them in order to spread out its regulatory efforts. The limitations on location required no further support than the factual basis tying location to secondary effects; the zoning approved in those two cases had no effect on the way the owners of the stores carried on their adult businesses beyond controlling location, and no heavier burden than the location limit was approved by this Court.

The Los Angeles ordinance, however, does impose a heavier burden, and one lacking any demonstrable connection to the interest in crime control. The city no longer accepts businesses as their owners choose to conduct them within their own four walls, but bars a video arcade in a bookstore, a combination shown by the record to be commercially natural, if not universal. App. 47-51, 229-230, 242. Whereas *Young* and *Renton* gave cities the choice between two strategies when each was causally related to the city's interest, the plurality today gives Los Angeles a right to "experiment" with a First Amendment restriction in response to a problem of increased crime that the city has never even shown to be associated with combined bookstore-arcades standing alone. But the government's freedom of experimentation cannot displace its burden under the intermediate scrutiny standard to show that the restriction on speech is no greater than essential to realizing an important objective, in this case policing crime. Since we cannot make even a best guess that the city's breakup policy will have any effect on crime ***466** or law enforcement, we are a very far cry from any assurance against covert content-based regulation. [9]

9 The plurality's assumption that the city's "motive" in applying secondary-effects zoning can be entirely compartmentalized from the proffer of evidence required to justify the zoning scheme, *ante,* at 1737, is indulgent to an unrealistic degree, as the record in this case shows. When the original dispersion ordinance was enacted in 1978, the city's study showing a correlation between concentrations of adult business and higher crime rates showed that the dispersal of adult businesses was causally related to the city's law enforcement interest, and that in turn was a fair indication that the city's concern was with the secondary effect of higher crime rates. When, however, the city takes the further step of breaking up businesses with no showing that a traditionally combined business has any association with a higher crime rate that could be affected by the breakup, there is no indication that the breakup policy addresses a secondary effect, but there is reason to doubt that secondary effects are the city's concern. The plurality seems to ask us to shut our eyes to the city's failings by emphasizing that this case is merely at the stage of summary judgment, *ante,* at 1736, but ignores the fact that at this summary judgment stage the city has made it plain that it relies on no evidence beyond the 1977 study, which provides no support for the city's action.

And concern with content-based regulation targeting a viewpoint is right to the point here, as witness a fact that involves no guesswork. If we take the city's breakup policy at its face, enforcing it will mean that in every case two establishments will operate instead of the traditional one. Since the city presumably does not wish ****1751** merely to multiply adult establishments, it makes sense to ask what offsetting gain the city may obtain from its new breakup policy. The answer may lie in the fact that two establishments in place of one will entail two business overheads in place of one: two monthly rents, two electricity bills, two payrolls. Every month business will be more expensive than it used to be, perhaps even twice as much. That sounds like a good strategy for driving out

expressive adult businesses. It sounds, in other words, like a policy of content-based regulation.

I respectfully dissent.

All Citations

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KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Mendoza v. Licensing Board of Fall River, Mass., May 11, 2005

120 S.Ct. 1382
Supreme Court of the United States

CITY OF ERIE, et al., Petitioners,
v.
PAP'S A.M. tdba "Kandyland".

No. 98–1161.
|
Argued Nov. 10, 1999.
|
Decided March 29, 2000.

Operator of establishment featuring nude erotic dancing brought action challenging constitutionality of city's public indecency ordinance proscribing nudity in public places. The Court of Common Pleas, Erie County, Civil Division, No. 1994-60059, Shad Connelly, A.J., declared ordinance unconstitutional. On appeal, the Pennsylvania Commonwealth Court, 674 A.2d 338, Nos. 445 and 446 C.D. 1995, reversed. Operator appealed. The Pennsylvania Supreme Court, Nos. 016 and 017 W.D. Appeal Docket 1997, reversed. Certiorari was granted, and operator moved to dismiss case as moot. The Supreme Court, Justice O'Connor, held that: (1) case was not rendered moot by closing of the establishment; (2) ordinance was content-neutral regulation; and (3) ordinance satisfied *O'Brien* standard for restrictions on symbolic speech.

Reversed and remanded.

Justice Scalia concurred in judgment and filed opinion in which Justice Thomas joined.

Justice Souter concurred in part and dissented in part and filed opinion.

Justice Stevens dissented and filed opinion in which Justice Ginsburg joined.

West Headnotes (12)

[1] Federal Courts
Inception and duration of dispute; recurrence;"capable of repetition yet evading review"

Case is moot when issues presented are no longer "live" or parties lack legally cognizable interest in outcome.

317 Cases that cite this headnote

[2] Constitutional Law
Mootness

Suit by operator of establishment featuring nude erotic dancing, challenging constitutionality of city's public indecency ordinance proscribing nudity in public places was not rendered moot by closing of the establishment, since operator was still incorporated, and could have decided to again operate nude dancing establishment in city; "advanced age" of owner did not make it "absolutely clear" that life of quiet retirement was his only reasonable expectation, and city had ongoing injury because it was barred from enforcing ordinance.

51 Cases that cite this headnote

[3] Constitutional Law
Nudity in general

Constitutional Law
Nude dancing in general

Being "in a state of nudity" is not inherently expressive condition, but erotic nude dancing is "expressive conduct," within outer ambit of First Amendment's protection. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

83 Cases that cite this headnote

[4] Constitutional Law

Content-Based Regulations or Restrictions

Constitutional Law

Symbolic speech

If governmental purpose in regulating expression is unrelated to suppression of expression, then regulation need only satisfy "less stringent" *O'Brien* standard for evaluating restrictions on symbolic speech, but if government interest is related to content of expression, regulation must be justified under more demanding standard. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment). U.S.C.A. Const.Amend. 1

22 Cases that cite this headnote

[5] **Constitutional Law**

Public nudity or indecency

Government restrictions on public nudity should be evaluated under framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[6] **Constitutional Law**

Public nudity or indecency

Ordinance banning all public nudity, regardless of whether that nudity was accompanied by expressive activity, was content-neutral regulation and thus subject to "less stringent" *O'Brien* standard for evaluating restrictions on symbolic speech; ordinance was aimed at combating crime and other secondary effects caused by presence of adult entertainment establishments. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

53 Cases that cite this headnote

[7] **Constitutional Law**

Motive

Supreme Court will not strike down otherwise constitutional statute on basis of alleged illicit motive. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment).

9 Cases that cite this headnote

[8] **Constitutional Law**

Symbolic speech

Under *O'Brien* standard for evaluating restrictions on symbolic speech, court inquires whether government regulation is within constitutional power of government to enact, whether regulation furthers important or substantial government interest, whether government interest is unrelated to suppression of free expression, and whether restriction is no greater than is essential to furtherance of the government interest. U.S.C.A. Const.Amend. 1.

32 Cases that cite this headnote

[9] **Constitutional Law**

Public nudity or indecency

Constitutional Law

Secondary effects

Municipal Corporations

Public safety and welfare

Obscenity

Exhibitions and performances

Public Amusement and Entertainment

Dancing and other performances

Ordinance proscribing nudity in public places satisfied *O'Brien* standard for restrictions on symbolic speech; city's efforts to protect public health and safety were clearly within its police powers, ordinance furthered city's interest in combating harmful secondary effects associated with nude dancing, government's interest was unrelated to suppression of

free expression, and incidental impact on expressive element of nude dancing was de minimis. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

168 Cases that cite this headnote

[10] Constitutional Law
Secondary effects

In demonstrating that secondary effects pose threat that justify regulation of nude dancing, city need not conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence city relies upon is reasonably believed to be relevant to problem that city addresses. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

57 Cases that cite this headnote

[11] Constitutional Law
Secondary effects

Public Amusement and Entertainment
Dancing and other performances

Because nude dancing at establishment was of same character as adult entertainment at issue in prior Supreme Court opinions, it was reasonable for city to conclude that such nude dancing was likely to produce same secondary effects, and, to justify ordinance regulating nude dancing, city could reasonably rely on evidentiary foundation set forth in Supreme Court opinions to effect that secondary effects were caused by presence of even one adult entertainment establishment in given neighborhood; city was not required to develop specific evidentiary record supporting ordinance. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment).

199 Cases that cite this headnote

[12] Administrative Law and Procedure
Matters of record or of common or expert knowledge

As long as party has opportunity to respond, administrative agency may take official notice of "legislative facts" within its special knowledge, and is not confined to evidence in record in reaching its expert judgment. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment).

1 Cases that cite this headnote

****1384** *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Erie, Pennsylvania, enacted an ordinance making it a summary offense to knowingly or intentionally appear in public in a "state of nudity." Respondent Pap's A.M. (hereinafter Pap's), a Pennsylvania corporation, operated "Kandyland," an Erie establishment featuring totally nude erotic dancing by women. To comply with the ordinance, these dancers had to wear, at a minimum, "pasties" and a "G-string." Pap's filed suit against Erie and city officials, seeking declaratory relief and a permanent injunction against the ordinance's enforcement. The Court of Common Pleas struck down the ordinance as unconstitutional, but the Commonwealth Court reversed. The Pennsylvania Supreme Court in turn reversed, finding that the ordinance's public nudity sections violated Pap's right to freedom of expression as protected by the First and Fourteenth Amendments. The Pennsylvania court held that nude dancing is expressive conduct entitled to some quantum of protection under the First Amendment, a view that the court noted was endorsed by eight Members of this Court in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504. The Pennsylvania court explained that, although one stated purpose of the ordinance was to combat negative secondary effects, there

was also an unmentioned purpose to "impact negatively on the erotic message of the dance." Accordingly, the Pennsylvania court concluded that the ordinance was related to the suppression of expression. Because the ordinance was not content neutral, it was subject to strict scrutiny. The court held that the ordinance failed the narrow tailoring requirement of strict scrutiny. After this Court granted certiorari, Pap's filed a motion to dismiss the case as moot, noting that Kandyland no longer operated as a nude dancing club, and that Pap's did not operate such a club at any other location. This Court denied the motion.

Held: The judgment is reversed, and the case is remanded.

553 Pa. 348, 719 A.2d 273, reversed and remanded.

Justice O'CONNOR delivered the opinion of the Court with respect to Parts I and II, concluding that the case is not moot. A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *County of Los Angeles v. Davis,* 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642. Simply closing Kandyland is not sufficient to moot the case because Pap's is still incorporated under Pennsylvania ***278** law, and could again decide to operate a nude dancing establishment in Erie. Moreover, Pap's failed, despite its obligation to the Court, to mention the potential mootness issue in its brief in opposition, which was filed after Kandyland was closed and the property sold. See *Board of License Comm'rs of Tiverton v. Pastore,* 469 U.S. 238, 240, 105 S.Ct. 685, 83 L.Ed.2d 618. In any event, this is not a run of the mill voluntary cessation case. Here it is the plaintiff who, having prevailed below, seeks to have the case declared moot. And it is the defendant city that seeks to invoke the federal judicial power to obtain this Court's review of the decision. Cf. *ASARCO Inc. v. Kadish,* 490 U.S. 605, 617–618, 109 S.Ct. 2037, 104 L.Ed.2d 696. The city has an ongoing injury because it is barred from enforcing the ordinance's public nudity provisions. If the ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot. See *Church of Scientology of Cal. v. United States,* 506 U.S. 9, 13, 113 S.Ct. 447, 121 L.Ed.2d 313. And Pap's still has a concrete stake in the case's outcome because, to the extent it has an interest in resuming operations, it ****1385** has an interest in preserving the judgment below. This Court's interest in preventing litigants from attempting to manipulate its jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness. See, *e.g., United States v. W.T. Grant Co.,* 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303. Pp. 1390–1391.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER, concluded in Parts III and IV that:

1. Government restrictions on public nudity such as Erie's ordinance should be evaluated under the framework set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, for content-neutral restrictions on symbolic speech. Although being "in a state of nudity" is not an inherently expressive condition, nude dancing of the type at issue here is expressive conduct that falls within the outer ambit of the First Amendment's protection. See, *e.g., Barnes, supra,* at 565–566, 111 S.Ct. 2456 (plurality opinion). What level of scrutiny applies is determined by whether the ordinance is related to the suppression of expression. *E.g., Texas v. Johnson,* 491 U.S. 397, 403, 109 S.Ct. 2533, 105 L.Ed.2d 342. If the governmental purpose in enacting the ordinance is unrelated to such suppression, the ordinance need only satisfy the "less stringent," intermediate *O'Brien* standard. *E.g., Johnson, supra,* at 403, 109 S.Ct. 2533. If the governmental interest is related to the expression's content, however, the ordinance falls outside *O'Brien* and must be justified under the more demanding, strict scrutiny standard. *Johnson, supra,* at 403, 109 S.Ct. 2533. An almost identical public nudity ban was held not to violate the First Amendment in *Barnes,* although no five Members of the Court agreed on a single rationale for that conclusion. The ordinance here, like the statute in *Barnes,* is on its face a general prohibition on public nudity. By its terms, it regulates conduct alone. It does not target ***279** nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. Although Pap's contends that the ordinance is related to the suppression of expression because its preamble suggests that its actual purpose is to prohibit erotic dancing of the type performed at Kandyland, that is not how the Pennsylvania Supreme Court interpreted that language. Rather, the Pennsylvania Supreme Court construed the preamble to mean that one purpose of the ordinance was to combat negative secondary effects. That is, the ordinance is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland, and not at

suppressing the erotic message conveyed by this type of nude dancing. See 391 U.S., at 382, 88 S.Ct. 1673; see also *Boos v. Barry,* 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333. The Pennsylvania Supreme Court's ultimate conclusion that the ordinance was nevertheless content based relied on Justice White's position in dissent in *Barnes* that a ban of this type *necessarily* has the purpose of suppressing the erotic message of the dance. That view was rejected by a majority of the Court in *Barnes,* and is here rejected again. Pap's argument that the ordinance is "aimed" at suppressing expression through a ban on nude dancing is really an argument that Erie also had an illicit motive in enacting the ordinance. However, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive. *O'Brien, supra,* at 382–383, 88 S.Ct. 1673. Even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is therefore *de minimis.* If States are to be able to regulate secondary effects, then such *de minimis* intrusions on ****1386** expression cannot be sufficient to render the ordinance content based. See, *e.g., Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 299, 104 S.Ct. 3065, 82 L.Ed.2d 221. Thus, Erie's ordinance is valid if it satisfies the *O'Brien* test. Pp. 1391–1395.

2. Erie's ordinance satisfies *O'Brien's* four-factor test. First, the ordinance is within Erie's constitutional power to enact because the city's efforts to protect public health and safety are clearly within its police powers. Second, the ordinance furthers the important government interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing. In terms of demonstrating that such secondary effects pose a threat, the city need not conduct new studies or produce evidence independent of that already generated by other cities, so long as the evidence relied on is reasonably believed to be relevant to the problem addressed. *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 51–52, 106 S.Ct. 925, 89 L.Ed.2d 29. Erie could reasonably ***280** rely on the evidentiary foundation set forth in *Renton* and *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton, supra,* at 51–52, 106 S.Ct. 925. In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres.* The evidentiary standard described in *Renton* controls here, and Erie meets that standard. In any event, the ordinance's preamble also relies on the city council's express findings that "certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare ...." The council members, familiar with commercial downtown Erie, are the individuals who would likely have had first-hand knowledge of what took place at, and around, nude dancing establishments there, and can make particularized, expert judgments about the resulting harmful secondary effects. Cf., *e.g., FCC v. National Citizens Comm. for Broadcasting,* 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697. The fact that this sort of leeway is appropriate in this case, which involves a content-neutral restriction that regulates conduct, says nothing whatsoever about its appropriateness in a case involving actual regulation of First Amendment expression. Also, although requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, *O'Brien* requires only that the regulation further the interest in combating such effects. The ordinance also satisfies *O'Brien's* third factor, that the government interest is unrelated to the suppression of free expression, as discussed *supra.* The fourth *O'Brien* factor—that the restriction is no greater than is essential to the furtherance of the government interest—is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.* The pasties and G-string requirement is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message. See, *e.g., Barnes,* 501 U.S., at 572, 111 S.Ct. 2456. Pp. 1395–1398.

Justice SCALIA, joined by Justice THOMAS, agreed that the Pennsylvania Supreme Court's decision must be reversed, but disagreed with the mode of analysis that should be applied. Erie self-consciously modeled its ordinance on the public nudity statute upheld in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504, calculating (one would have supposed reasonably) that the Pennsylvania courts would consider themselves bound by this Court's judgment on a question of federal constitutional law. That statute was constitutional not because it survived some lower

level of First Amendment scrutiny, but because, as a **1387 general law regulating conduct and not specifically directed at expression, it was not subject to First Amendment scrutiny at all. *Id.,* at 572, 111 S.Ct. 2456 (SCALIA, J., concurring in *281 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 the preamble explains the ordinance's purpose, in part, as limiting a recent increase in nude live entertainment, that city councilmembers in supporting the ordinance commented to that effect, and that the ordinance includes in the definition of nudity the exposure of devices simulating that condition, 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. That the city made no effort to enforce the ordinance against a production of Equus involving nudity that was being staged in Erie at the time the ordinance became effective does not render the ordinance discriminatory on its face. The assertion of the city's counsel in the trial court that the ordinance would not cover theatrical productions to the extent their expressive activity rose to a higher level of protected expression simply meant that the ordinance would not be enforceable against such productions if the Constitution forbade it. That limitation does not cause the ordinance to be not generally applicable, in the relevant sense of being *targeted* against expressive conduct. Moreover, even if it could be concluded that Erie specifically singled out the activity of nude dancing, the ordinance still would not violate the First Amendment unless it could be proved (as on this record it could not) that it was the communicative character of nude dancing that prompted the ban. See *id.,* at 577, 111 S.Ct. 2456. There is no need to identify "secondary effects" associated with nude dancing that Erie could properly seek to eliminate. The traditional power of government to foster good morals, and the acceptability of the traditional judgment that nude public dancing *itself* is immoral, have not been repealed by the First Amendment. Pp. 1400–1402.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which REHNQUIST, C.J., and KENNEDY, SOUTER, and BREYER, JJ., joined, and an opinion with respect to Parts III and IV, in which REHNQUIST, C.J., and KENNEDY and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post,* p. 1398. SOUTER, J., filed an opinion concurring in part and dissenting in part, *post,* p. 1402. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post,* p. 1406.

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Opinion

Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Parts III and IV, in which THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER join.

The city of Erie, Pennsylvania, enacted an ordinance banning public nudity. Respondent Pap's A.M. (hereinafter *283 Pap's), which operated a nude dancing establishment in Erie, challenged the constitutionality of the ordinance and sought a permanent injunction against its enforcement. The Pennsylvania Supreme Court, although noting that this Court in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), had upheld an Indiana ordinance that was "strikingly **1388 similar" to Erie's, found that the public nudity sections of the ordinance violated respondent's right to freedom of expression under the United States Constitution. 553 Pa. 348, 356, 719 A.2d 273, 277 (1998). This case raises the question whether the Pennsylvania Supreme Court properly evaluated the ordinance's constitutionality under the First Amendment. We hold that Erie's ordinance is a content-neutral regulation that satisfies the four-part test of *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Accordingly, we reverse the decision of the Pennsylvania Supreme Court and remand for the consideration of any remaining issues.

I

On September 28, 1994, the city council for the city of Erie, Pennsylvania, enacted Ordinance 75–1994, a public indecency ordinance that makes it a summary offense to

knowingly or intentionally appear in public in a "state of nudity." [*] ***284** Respondent Pap's, a Pennsylvania corporation, operated an establishment in Erie known as "Kandyland" that featured totally nude erotic dancing performed by women. To comply with the ordinance, these dancers must wear, at a minimum, "pasties" and a "G-string." On October 14, 1994, two days after the ordinance went into effect, Pap's filed a complaint against the city of Erie, the mayor of the city, and members of the city council, seeking declaratory relief and a permanent injunction against the enforcement of the ordinance.

[*] Ordinance 75–1994, codified as Article 711 of the Codified Ordinances of the city of Erie, provides in relevant part:

"1. A person who knowingly or intentionally, in a public place:

"a. engages in sexual intercourse

"b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code

"c. appears in a state of nudity, or

"d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.

"2. "Nudity" means the showing of the human male or female genital *[sic],* pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

"3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

"4. The prohibition set forth in subsection 1(c) shall not apply to:

"a. Any child under ten (10) years of age; or

"b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age."

The Court of Common Pleas of Erie County granted the permanent injunction and struck down the ordinance as unconstitutional. Civ. No. 60059–1994 (Jan. 18, 1995), Pet. for Cert. 40a. On cross appeals, the Commonwealth Court reversed the trial court's order. 674 A.2d 338 (1996).

The Pennsylvania Supreme Court granted review and reversed, concluding that the public nudity provisions of the ordinance violated respondent's rights to freedom of expression as protected by the First and Fourteenth Amendments. 553 Pa. 348, 719 A.2d 273 (1998). The Pennsylvania court first inquired whether nude dancing constitutes expressive conduct that is within the protection of the First Amendment. The court noted that the act of being nude, in and of ***285** itself, is not entitled to First Amendment protection because it conveys no message. *Id.,* at 354, 719 A.2d, at 276. Nude dancing, however, is expressive conduct that is entitled to some quantum of protection under the ****1389** First Amendment, a view that the Pennsylvania Supreme Court noted was endorsed by eight Members of this Court in *Barnes.* 553 Pa., at 354, 719 A.2d, at 276.

The Pennsylvania court next inquired whether the government interest in enacting the ordinance was content neutral, explaining that regulations that are unrelated to the suppression of expression are not subject to strict scrutiny but to the less stringent standard of *United States v. O'Brien, supra,* at 377, 88 S.Ct. 1673. To answer the question whether the ordinance is content based, the court turned to our decision in *Barnes.* 553 Pa., at 355–356, 719 A.2d, at 277. Although the Pennsylvania court noted that the Indiana statute at issue in *Barnes* "is strikingly similar to the Ordinance we are examining," it concluded that "[u]nfortunately for our purposes, the *Barnes* Court splintered and produced four separate, non-harmonious opinions." 553 Pa., at 356, 719 A.2d, at 277. After canvassing these separate opinions, the Pennsylvania court concluded that, although it is permissible to find precedential effect in a fragmented decision, to do so a majority of the Court must have been in agreement on the concept that is deemed to be the holding. See *Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). The Pennsylvania court noted that "aside from the agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." 553 Pa., at 358, 719 A.2d, at 278. Accordingly, the court concluded that "no clear precedent

arises out of *Barnes* on the issue of whether the [Erie] ordinance ... passes muster under the First Amendment." *Ibid.*

Having determined that there was no United States Supreme Court precedent on point, the Pennsylvania court ***286** conducted an independent examination of the ordinance to ascertain whether it was related to the suppression of expression. The court concluded that although one of the purposes of the ordinance was to combat negative secondary effects, "[i]nextricably bound up with this stated purpose is an unmentioned purpose ... to impact negatively on the erotic message of the dance." *Id.,* at 359, 719 A.2d, at 279. As such, the court determined the ordinance was content based and subject to strict scrutiny. The ordinance failed the narrow tailoring requirement of strict scrutiny because the court found that imposing criminal and civil sanctions on those who commit sex crimes would be a far narrower means of combating secondary effects than the requirement that dancers wear pasties and G-strings. *Id.,* at 361–362, 719 A.2d, at 280.

Concluding that the ordinance unconstitutionally burdened respondent's expressive conduct, the Pennsylvania court then determined that, under Pennsylvania law, the public nudity provisions of the ordinance could be severed rather than striking the ordinance in its entirety. Accordingly, the court severed §§ 1(c) and 2 from the ordinance and reversed the order of the Commonwealth Court. *Id.,* at 363–364, 719 A.2d, at 281. Because the court determined that the public nudity provisions of the ordinance violated Pap's right to freedom of expression under the United States Constitution, it did not address the constitutionality of the ordinance under the Pennsylvania Constitution or the claim that the ordinance is unconstitutionally overbroad. *Ibid.*

In a separate concurrence, two justices of the Pennsylvania court noted that, because this Court upheld a virtually identical statute in *Barnes,* the ordinance should have been upheld under the United States Constitution. 553 Pa., at 364, 719 A.2d, at 281. They reached the same result as the majority, however, because they would have held that the public nudity sections of the ordinance violate the Pennsylvania Constitution. *Id.,* at 370, 719 A.2d, at 284.

***287** The city of Erie petitioned for a writ of certiorari, which we granted. ****1390** 526 U.S. 1111, 119 S.Ct. 1753, 143 L.Ed.2d 786 (1999). Shortly thereafter, Pap's filed a motion to dismiss the case as moot, noting that Kandyland was no longer operating as a nude dancing club, and Pap's was not operating a nude dancing club at any other location. Respondent's Motion to Dismiss as Moot 1. We denied the motion. 527 U.S. 1034, 119 S.Ct. 2391, 144 L.Ed.2d 792 (1999).

II

[1] As a preliminary matter, we must address the justiciability question. " '[A] case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *County of Los Angeles v. Davis,* 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979) (quoting *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). The underlying concern is that, when the challenged conduct ceases such that " 'there is no reasonable expectation that the wrong will be repeated,' " *United States v. W.T. Grant Co.,* 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953), then it becomes impossible for the court to grant " 'any effectual relief whatever' to [the] prevailing party," *Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (quoting *Mills v. Green,* 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895)). In that case, any opinion as to the legality of the challenged action would be advisory.

[2] Here, Pap's submitted an affidavit stating that it had "ceased to operate a nude dancing establishment in Erie." Status Report Re Potential Issue of Mootness 1 (Sept. 8, 1999). Pap's asserts that the case is therefore moot because "[t]he outcome of this case will have no effect upon Respondent." Respondent's Motion to Dismiss as Moot 1. Simply closing Kandyland is not sufficient to render this case moot, however. Pap's is still incorporated under Pennsylvania law, and it could again decide to operate a nude dancing establishment in Erie. See Petitioner's Brief in Opposition to Motion to Dismiss 3. Justice SCALIA differs with our assessment as to the likelihood that Pap's may resume its nude dancing ***288** operation. Several Members of this Court can attest, however, that the "advanced age" of Pap's owner (72) does not make it "absolutely clear" that a life of quiet retirement is his only reasonable expectation. Cf. *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Moreover,

our appraisal of Pap's affidavit is influenced by Pap's failure, despite its obligation to the Court, to mention a word about the potential mootness issue in its brief in opposition to the petition for writ of certiorari, which was filed in April 1999, even though, as Justice SCALIA points out, Kandyland was closed and that property sold in 1998. See *Board of License Comm'rs of Tiverton v. Pastore,* 469 U.S. 238, 240, 105 S.Ct. 685, 83 L.Ed.2d 618 (1985) *(per curiam)*. Pap's only raised the issue after this Court granted certiorari.

In any event, this is not a run of the mill voluntary cessation case. Here it is the plaintiff who, having prevailed below, now seeks to have the case declared moot. And it is the city of Erie that seeks to invoke the federal judicial power to obtain this Court's review of the Pennsylvania Supreme Court decision. Cf. *ASARCO Inc. v. Kadish,* 490 U.S. 605, 617–618, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). The city has an ongoing injury because it is barred from enforcing the public nudity provisions of its ordinance. If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot. See *Church of Scientology of Cal. v. United States, supra,* at 13, 113 S.Ct. 447. And Pap's still has a concrete stake in the outcome of this case because, to the extent Pap's has an interest in resuming operations, it has an interest in preserving the judgment of the Pennsylvania Supreme Court. Our interest in preventing litigants from attempting ****1391** to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here. See *United States v. W. T. Grant Co., supra,* at 632, 73 S.Ct. 894; cf. ***289** *Arizonans for Official English v. Arizona,* 520 U.S. 43, 74, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). Although the issue is close, we conclude that the case is not moot, and we turn to the merits.

III

[3] Being "in a state of nudity" is not an inherently expressive condition. As we explained in *Barnes,* however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection. See *Barnes v. Glen Theatre, Inc.,* 501 U.S., at 565–566, 111 S.Ct. 2456 (plurality opinion); *Schad v. Mount Ephraim,* 452 U.S. 61, 66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981).

[4] To determine what level of scrutiny applies to the ordinance at issue here, we must decide "whether the State's regulation is related to the suppression of expression." *Texas v. Johnson,* 491 U.S. 397, 403, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); see also *United States v. O'Brien,* 391 U.S., at 377, 88 S.Ct. 1673. If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the "less stringent" standard from *O'Brien* for evaluating restrictions on symbolic speech. *Texas v. Johnson, supra,* at 403, 109 S.Ct. 2533; *United States v. O'Brien, supra,* at 377, 88 S.Ct. 1673. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard. *Texas v. Johnson, supra,* at 403, 109 S.Ct. 2533.

[5] In *Barnes,* we analyzed an almost identical statute, holding that Indiana's public nudity ban did not violate the First Amendment, although no five Members of the Court agreed on a single rationale for that conclusion. We now clarify that government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech.

The city of Erie argues that the ordinance is a content-neutral restriction that is reviewable under *O'Brien* because the ordinance bans conduct, not speech; specifically, public ***290** nudity. Respondent counters that the ordinance targets nude dancing and, as such, is aimed specifically at suppressing expression, making the ordinance a content-based restriction that must be subjected to strict scrutiny.

[6] The ordinance here, like the statute in *Barnes,* is on its face a general prohibition on public nudity. 553 Pa., at 354, 719 A.2d, at 277. By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. And like the statute in *Barnes,* the Erie ordinance replaces and updates provisions of an "Indecency and Immorality" ordinance that has been on the books since 1866, predating the prevalence of nude dancing establishments such as Kandyland. Pet. for Cert.

7a; see *Barnes v. Glen Theatre, Inc., supra,* at 568, 111 S.Ct. 2456.

Respondent and Justice STEVENS contend nonetheless that the ordinance is related to the suppression of expression because language in the ordinance's preamble suggests that its actual purpose is to prohibit erotic dancing of the type performed at Kandyland. *Post,* at 1406 (dissenting opinion). That is not how the Pennsylvania Supreme Court interpreted that language, however. In the preamble to the ordinance, the city council stated that it was adopting the regulation

> " 'for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely ****1392** impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.' " 553 Pa., at 359, 719 A.2d, at 279.

The Pennsylvania Supreme Court construed this language to mean that one purpose of the ordinance was "to combat negative secondary effects." *Ibid.*

***291** As Justice SOUTER noted in *Barnes,* "on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression." 501 U.S., at 585, 111 S.Ct. 2456 (opinion concurring in judgment). In that sense, this case is similar to *O'Brien.* O'Brien burned his draft registration card as a public statement of his antiwar views, and he was convicted under a statute making it a crime to knowingly mutilate or destroy such a card. This Court rejected his claim that the statute violated his First Amendment rights, reasoning that the law punished him for the "noncommunicative impact of his conduct, and for nothing else." 391 U.S., at 382, 88 S.Ct. 1673. In other words, the Government regulation prohibiting the destruction of draft cards was aimed at maintaining the integrity of the Selective Service System and not at suppressing the message of draft resistance that O'Brien sought to convey by burning his draft card. So too here, the ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing. Put another way, the ordinance does not attempt to regulate the primary effects of the expression, *i.e.,* the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are "caused by the presence of even one such" establishment. *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47–48, 50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); see also *Boos v. Barry,* 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988).

Although the Pennsylvania Supreme Court acknowledged that one goal of the ordinance was to combat the negative secondary effects associated with nude dancing establishments, the court concluded that the ordinance was nevertheless content based, relying on Justice White's position in dissent in *Barnes* for the proposition that a ban of this type *necessarily* has the purpose of suppressing the erotic message ***292** of the dance. Because the Pennsylvania court agreed with Justice White's approach, it concluded that the ordinance must have another, "unmentioned" purpose related to the suppression of expression. 553 Pa., at 359, 719 A.2d, at 279. That is, the Pennsylvania court adopted the dissent's view in *Barnes* that " '[s]ince the State permits the dancers to perform if they wear pasties and G—strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition.' " 553 Pa., at 359, 719 A.2d, at 279 (quoting *Barnes, supra,* at 592, 111 S.Ct. 2456 (White, J., dissenting)). A majority of the Court rejected that view in *Barnes,* and we do so again here.

[7] Respondent's argument that the ordinance is "aimed" at suppressing expression through a ban on nude dancing —an argument that respondent supports by pointing to statements by the city attorney that the public nudity ban was not intended to apply to "legitimate" theater productions—is really an argument that the city council also had an illicit motive in enacting the ordinance. As we have said before, however, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive. *O'Brien, supra,* at 382–383, 88 S.Ct. 1673; ****1393** *Renton v. Playtime Theatres, Inc., supra,* at 47–48, 106 S.Ct. 925 (that the "predominate" purpose of the statute was to control secondary effects was "more than adequate to establish" that the city's interest was unrelated to the suppression of expression). In light of the Pennsylvania court's determination that one

purpose of the ordinance is to combat harmful secondary effects, the ban on public nudity here is no different from the ban on burning draft registration cards in *O'Brien,* where the Government sought to prevent the means of the expression and not the expression of antiwar sentiment itself.

Justice STEVENS argues that the ordinance enacts a complete ban on expression. We respectfully disagree with that characterization. The public nudity ban certainly has ***293** the effect of limiting one particular means of expressing the kind of erotic message being disseminated at Kandyland. But simply to define what is being banned as the "message" is to assume the conclusion. We did not analyze the regulation in *O'Brien* as having enacted a total ban on expression. Instead, the Court recognized that the regulation against destroying one's draft card was justified by the Government's interest in preventing the harmful "secondary effects" of that conduct (disruption to the Selective Service System), even though that regulation may have some incidental effect on the expressive element of the conduct. Because this justification was unrelated to the suppression of O'Brien's antiwar message, the regulation was content neutral. Although there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message, that is not the case here.

Even if we had not already rejected the view that a ban on public nudity is necessarily related to the suppression of the erotic message of nude dancing, we would do so now because the premise of such a view is flawed. The State's interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood. See *Renton, supra,* at 50–51, 106 S.Ct. 925. In *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), we held that a National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in Washington, D.C., in connection with a demonstration intended to call attention to the plight of the homeless. Assuming, *arguendo,* that sleeping can be expressive conduct, the Court concluded that the Government interest in conserving park property was unrelated to the demonstrators' message about homelessness. *Id.,* at 299, 104 S.Ct. 3065. ***294** So, while the demonstrators were allowed to erect "symbolic tent cities," they were not allowed to sleep overnight in those tents. Even though the regulation may have directly limited the expressive element involved in actually sleeping in the park, the regulation was nonetheless content neutral.

Similarly, even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is *de minimis.* And as Justice STEVENS eloquently stated for the plurality in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 70, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the ****1394** interest in untrammeled political debate," and "few of us would march our sons and daughters off to war to preserve the citizen's right to see" specified anatomical areas exhibited at establishments like Kandyland. If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based. See *Clark v. Community for Creative Non—Violence, supra,* at 299, 104 S.Ct. 3065; *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (even if regulation has an incidental effect on some speakers or messages but not others, the regulation is content neutral if it can be justified without reference to the content of the expression).

This case is, in fact, similar to *O'Brien, Community for Creative Non—Violence,* and *Ward.* The justification for the government regulation in each case prevents harmful "secondary" effects that are unrelated to the suppression of expression. See, *e.g., Ward v. Rock Against Racism, supra,* at 791–792, 109 S.Ct. 2746 (noting that "[t]he principal justification for the ***295** sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the [adjacent] Sheep Meadow and its more sedate activities," and citing *Renton* for the proposition that "[a] regulation that serves purposes unrelated to the content of expression

is deemed neutral, even if it has an incidental effect on some speakers or messages but not others"). While the doctrinal theories behind "incidental burdens" and "secondary effects" are, of course, not identical, there is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity—nude erotic dancing—is particularly problematic because it produces harmful secondary effects.

Justice STEVENS claims that today we "[f]or the first time" extend *Renton's* secondary effects doctrine to justify restrictions other than the location of a commercial enterprise. *Post,* at 1406 (dissenting opinion). Our reliance on *Renton* to justify other restrictions is not new, however. In *Ward,* the Court relied on *Renton* to evaluate restrictions on sound amplification at an outdoor bandshell, rejecting the dissent's contention that *Renton* was inapplicable. See *Ward v. Rock Against Racism, supra,* at 804, n. 1, 109 S.Ct. 2746 (Marshall, J., dissenting) ("Today, for the first time, a majority of the Court applies *Renton* analysis to a category of speech far afield from that decision's original limited focus"). Moreover, Erie's ordinance does not effect a "total ban" on protected expression. *Post,* at 1407.

In *Renton,* the regulation explicitly treated "adult" movie theaters differently from other theaters, and defined "adult" theaters solely by reference to the content of their movies. 475 U.S., at 44, 106 S.Ct. 925. We nonetheless treated the zoning regulation as content neutral because the ordinance was aimed at the secondary effects of adult theaters, a justification unrelated to the content of the adult movies themselves. ***296** *Id.,* at 48, 106 S.Ct. 925. Here, Erie's ordinance is on its face a content-neutral restriction on conduct. Even if the city thought that nude dancing at clubs like Kandyland constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing.

We conclude that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishments like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing. The ordinance prohibiting public nudity is therefore valid ****1395** if it satisfies the four-factor test from *O'Brien* for evaluating restrictions on symbolic speech.

IV

[8] **[9]** **[10]** **[11]** Applying that standard here, we conclude that Erie's ordinance is justified under *O'Brien.* The first factor of the *O'Brien* test is whether the government regulation is within the constitutional power of the government to enact. Here, Erie's efforts to protect public health and safety are clearly within the city's police powers. The second factor is whether the regulation furthers an important or substantial government interest. The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important. And in terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities" to demonstrate the problem of secondary effects, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton v. Playtime Theatres, Inc., supra,* at 51–52, 106 S.Ct. 925. Because the nude dancing at Kandyland is of the same character as the adult entertainment ***297** at issue in *Renton, Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton v. Playtime Theatres, Inc., supra,* at 51–52, 106 S.Ct. 925 (indicating that reliance on a judicial opinion that describes the evidentiary basis is sufficient). In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres.* Even in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing. See *Nixon v. Shrink*

Missouri Government PAC, 528 U.S. 377, 393, n. 6, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) Regardless of whether Justice SOUTER now wishes to disavow his opinion in *Barnes* on this point, see *post,* at 1406 (opinion concurring in part and dissenting in part), the evidentiary standard described in *Renton* controls here, and Erie meets that standard.

[12] In any event, Erie also relied on its own findings. The preamble to the ordinance states that "the Council of the City of Erie *has, at various times over more than a century, expressed its findings* that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity." Pet. for Cert. 6a (emphasis added). The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments ***298** in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects. Analogizing to the administrative agency context, it is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such "legislative facts" within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment. See *FCC v. National Citizens Comm. for Broadcasting,* 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978); *Republic Aviation* ****1396** *Corp. v. NLRB,* 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945); 2 K. Davis & R. Pierce, Administrative Law Treatise § 10.6 (3d ed.1994). Here, Kandyland has had ample opportunity to contest the council's findings about secondary effects—before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited. And the study relied on by *amicus curiae* does not cast any legitimate doubt on the Erie city council's judgment about Erie. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16–23.

Finally, it is worth repeating that Erie's ordinance is on its face a content-neutral restriction that regulates conduct, not First Amendment expression. And the government should have sufficient leeway to justify such a law based on secondary effects. On this point, *O'Brien* is especially instructive. The Court there did not require evidence that the integrity of the Selective Service System would be jeopardized by the knowing destruction or mutilation of draft cards. It simply reviewed the Government's various administrative interests in issuing the cards, and then concluded that "Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people ***299** who knowingly and willfully destroy or mutilate them." 391 U.S., at 378–380, 88 S.Ct. 1673. There was no study documenting instances of draft card mutilation or the actual effect of such mutilation on the Government's asserted efficiency interests. But the Court permitted Congress to take official notice, as it were, that draft card destruction would jeopardize the system. The fact that this sort of leeway is appropriate in a case involving conduct says nothing whatsoever about its appropriateness in a case involving actual regulation of First Amendment expression. As we have said, so long as the regulation is unrelated to the suppression of expression, "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson,* 491 U.S., at 406, 109 S.Ct. 2533. See, *e.g., United States v. O'Brien, supra,* at 377, 88 S.Ct. 1673; *United States v. Albertini,* 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) (finding sufficient the Government's assertion that those who had previously been barred from entering the military installation pose a threat to the security of that installation); *Clark v. Community for Creative Non—Violence,* 468 U.S., at 299, 104 S.Ct. 3065 (finding sufficient the Government's assertion that camping overnight in the park poses a threat to park property).

Justice SOUTER, however, would require Erie to develop a specific evidentiary record supporting its ordinance. *Post,* at 1405–1406 (opinion concurring in part and dissenting in part). Justice SOUTER agrees that Erie's interest in combating the negative secondary effects associated with nude dancing establishments is a legitimate government interest unrelated to the suppression of expression, and he agrees that the ordinance should therefore be evaluated under *O'Brien. O'Brien,* of course, required no evidentiary showing at all that the threatened harm was real. But that case is

different, Justice SOUTER contends, because in *O'Brien* "there could be no doubt" that a regulation prohibiting the destruction of draft cards would alleviate the harmful secondary effects ***300** flowing from the destruction of those cards. *Post,* at 1402–1403, n. 1.

But whether the harm is evident to our "intuition," *ibid.,* is not the proper inquiry. If it were, we would simply say there is no doubt that a regulation prohibiting public nudity would alleviate the harmful secondary effects associated with nude dancing. In any event, Justice SOUTER conflates ****1397** two distinct concepts under *O'Brien:* whether there is a substantial government interest and whether the regulation furthers that interest. As to the government interest, *i.e.,* whether the threatened harm is real, the city council relied on this Court's opinions detailing the harmful secondary effects caused by establishments like Kandyland, as well as on its own experiences in Erie. Justice SOUTER attempts to denigrate the city council's conclusion that the threatened harm was real, arguing that we cannot accept Erie's findings because the subject of nude dancing is "fraught with some emotionalism," *post,* at 1404. Yet surely the subject of drafting our citizens into the military is "fraught" with more emotionalism than the subject of regulating nude dancing. *Ibid.* Justice SOUTER next hypothesizes that the reason we cannot accept Erie's conclusion is that, since the question whether these secondary effects occur is "amenable to empirical treatment," we should ignore Erie's actual experience and instead require such an empirical analysis. *Post,* at 1404, n. 3 (referring to a "scientifically sound" study offered by an *amicus curiae* to show that nude dancing establishments do not cause secondary effects). In *Nixon,* however, we flatly rejected that idea. 528 U.S., at 394, 120 S.Ct. 897 (noting that the "invocation of academic studies said to indicate" that the threatened harms are not real is insufficient to cast doubt on the experience of the local government).

As to the second point—whether the regulation furthers the government interest—it is evident that, since crime and other public health and safety problems are caused by the presence of nude dancing establishments like Kandyland, a ***301** ban on such nude dancing would further Erie's interest in preventing such secondary effects. To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects. Even though the dissent questions the wisdom of Erie's chosen remedy, *post,* at 1409 (opinion of STEVENS, J.), the " 'city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems,' " *Renton v. Playtime Theatres, Inc.,* 475 U.S., at 52, 106 S.Ct. 925 (quoting *American Mini Theatres,* 427 U.S., at 71, 96 S.Ct. 2440 (plurality opinion)). It also may be true that a pasties and G-string requirement would not be as effective as, for example, a requirement that the dancers be fully clothed, but the city must balance its efforts to address the problem with the requirement that the restriction be no greater than necessary to further the city's interest.

The ordinance also satisfies *O'Brien's* third factor, that the government interest is unrelated to the suppression of free expression, as discussed *supra,* at 1390–1395. The fourth and final *O'Brien* factor—that the restriction is no greater than is essential to the furtherance of the government interest—is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.* The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message. See *Barnes v. Glen Theatre, Inc.,* 501 U.S., at 572, 111 S.Ct. 2456 (plurality opinion of REHNQUIST, C. J., joined by O'CONNOR and KENNEDY, JJ.); *id.,* at 587, 111 S.Ct. 2456 (SOUTER, J., concurring in judgment). Justice SOUTER points out that zoning is an alternative means of addressing this problem. It is far from clear, however, that zoning imposes less of a burden on expression than the minimal requirement implemented here. In any event, since this is a content-neutral restriction, least restrictive ***302** means analysis is not required. See *Ward,* 491 U.S., at 798–799, n. 6, 109 S.Ct. 2746.

****1398** We hold, therefore, that Erie's ordinance is a content-neutral regulation that is valid under *O'Brien.* Accordingly, the judgment of the Pennsylvania Supreme Court is reversed, and the case is remanded for further proceedings.

It is so ordered.

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," "maintain[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.

[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 1390. 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 1391, asks us in light of the mootness to vacate the judgment below. Reply to Brief in Opposition to Motion to Dismiss 5.

***303** 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 1390. 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, 89 S.Ct. 361, 21 L.Ed.2d 344 (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 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 ****1399** —through Pap's or otherwise—in any nude dancing business, and given Panos' advanced ***304** 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]

[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 1390. That is *tres 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.

The situation here is indistinguishable from that which obtained in *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997), where the plaintiff-respondent, a state 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 ***305** Court of Appeals. *Id.,* at 72, 117 S.Ct. 1055 (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 23, 115 S.Ct. 386, 130 L.Ed.2d 233 (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, 109 S.Ct. 2037, 104 L.Ed.2d 696 (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 ****1400** 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 ***306** of Art. III to adjudication of actual disputes between adverse parties," *Richardson v. Ramirez,* 418 U.S. 24, 36, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), and that this limitation applies "at all stages of review," *Preiser v. Newkirk,* 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975) (quoting *Steffel v. Thompson,* 415 U.S. 452, 459, n. 10, 94 S.Ct. 1209, 39 L.Ed.2d 505 (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 1390. 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, 109 S.Ct. 2037, 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, 109 S.Ct. 2037.

I dissented on this point in *ASARCO,* see *id.,* at 634, 109 S.Ct. 2037 (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 ***307** reference to the lower court's adverse judgment. It was careful to note—however illogical that might have been, see *id.,* at 635, 109 S.Ct. 2037—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, 109 S.Ct. 2037. 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.

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 1390. 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.

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 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 ****1401** statute we upheld against constitutional challenge in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (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 ***308** subject to First Amendment scrutiny at all." *Id.,* at 572, 111 S.Ct. 2456 (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 1412–1413, 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 1413, 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, 111 S.Ct. 2456 (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 1411–1412, 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 ***309** "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 respondent, 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. ****1402** 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]

5 This followup explanation rendered what Justice STEVENS calls counsel's "categorical" assertion that such productions would be exempt, see *post,* at 1411, 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 footfault. That is not what constitutional adjudication ought to be.

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 1412, 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, *ibid.,* 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.

***310** 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,* 501 U.S., at 577, 111 S.Ct. 2456 (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 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.

Justice SOUTER, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion and agree with the analytical approach that the plurality employs in deciding this case. Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression under *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and the city's regulation is thus properly considered under the *O'Brien* standards. I do not believe, however, that the current record allows us to say that the city has made a sufficient ***311** evidentiary showing to sustain its regulation, and I would therefore vacate the decision of the Pennsylvania Supreme Court and remand the case for further proceedings.

I

In several recent cases, we have confronted the need for factual justifications to satisfy intermediate scrutiny under the First Amendment. See, *e.g., Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000); *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) *(Turner II); Turner Broadcasting System, Inc. v.*

FCC, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) *(Turner I)*. Those cases do not identify with any specificity a particular quantum of evidence, nor do I seek to do so in this brief concurrence.[1] What the **1403 cases do make plain, however, is that application of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue.

1 As explained below, *infra,* at 1405, the issue of evidentiary justification was never joined, and with a multiplicity of factors affecting the analysis, a general formulation of the quantum required under *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), will at best be difficult. A lesser showing may suffice when the means-end fit is evident to the untutored intuition. As we said in *Nixon,* "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." 528 U.S., at 391, 120 S.Ct. 897. (In *O'Brien,* for example, the secondary effects that the Government identified flowed from the destruction of draft cards, and there could be no doubt that a regulation prohibiting that destruction would alleviate the concomitant harm.) The nature of the legislating institution might also affect the calculus. We do not require Congress to create a record in the manner of an administrative agency, see *Turner II,* 520 U.S. 180, 213, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997), and we accord its findings greater respect than those of agencies. See *id.,* at 195, 117 S.Ct. 1174. We might likewise defer less to a city council than we would to Congress. The need for evidence may be especially acute when a regulation is content based on its face and is analyzed as content neutral only because of the secondary effects doctrine. And it may be greater when the regulation takes the form of a ban, rather than a time, place, or manner restriction.

*312 In *Turner I,* for example, we stated that

"[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' *Quincy Cable TV, Inc. v. FCC,* 768 F.2d 1434, 1455 (C.A.D.C.1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.,* at 664, 114 S.Ct. 2445 (plurality opinion).

The plurality concluded there, of course, that the record, though swollen by three years of hearings on the Cable Television Consumer Protection and Competition Act of 1992, was insufficient to permit the necessary determinations and remanded for a more thorough factual development. When the case came back to us, in *Turner II,* a majority of the Court reiterated those requirements, characterizing the enquiry into the acceptability of the Government's regulations as one that turned on whether they "were designed to address a real harm, and whether those provisions will alleviate it in a material way." 520 U.S., at 195, 117 S.Ct. 1174. Most recently, in *Nixon,* we repeated that "[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden," 528 U.S., at 392, 120 S.Ct. 897, and we examined the "evidence introduced into the record by petitioners or cited by the lower courts in this action ...," *ibid.*

The focus on evidence appearing in the record is consistent with the approach earlier applied in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). In *Young,* Detroit adopted a zoning ordinance requiring dispersal of adult theaters through the city and prohibiting them within 500 feet of a residential area. Urban planners and real estate experts attested to the harms created by clusters of such theaters, see 427 U.S., at 55, 96 S.Ct. 2440, and we found that "[t]he record *313 discloses a factual basis" supporting the efficacy of Detroit's chosen remedy, *id.,* at 71, 96 S.Ct. 2440. In *Renton,* the city similarly enacted a zoning ordinance requiring specified distances between adult theaters and residential zones, churches, parks, or schools. See 475 U.S., at 44, 106 S.Ct. 925. The city "held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities." *Ibid.* We found that Renton's failure to conduct its own studies before enacting the ordinance was not fatal; "[t]he First Amendment does not require a city **1404 ... to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.,* at 51–52, 106 S.Ct. 925.

The upshot of these cases is that intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed.[2] See, *e.g., Edenfield v. Fane,* 507 U.S. 761, 770–773, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (striking down regulation of commercial speech for failure to show direct and material efficacy). That evidentiary basis may be borrowed from the records made by other governments if the experience elsewhere is germane to the measure under consideration and actually relied upon. I will assume, further, that the reliance may be shown by legislative invocation of a judicial opinion that accepted an evidentiary foundation as sufficient ***314** for a similar regulation. What is clear is that the evidence of reliance must be a matter of demonstrated fact, not speculative supposition.

2 The plurality excuses Erie from this requirement with the simple observation that "it is evident" that the regulation will have the required efficacy. *Ante,* at 1397. The *ipse dixit* is unconvincing. While I do agree that evidentiary demands need not ignore an obvious fit between means and ends, see n. 1, *supra,* it is not obvious that this is such a case. It is not apparent to me as a matter of common sense that establishments featuring dancers with pasties and G-strings will differ markedly in their effects on neighborhoods from those whose dancers are nude. If the plurality does find it apparent, we may have to agree to disagree.

By these standards, the record before us today is deficient in its failure to reveal any evidence on which Erie may have relied, either for the seriousness of the threatened harm or for the efficacy of its chosen remedy. The plurality does the best it can with the materials to hand, see *ante,* at 1395–1396, but the pickings are slim. The plurality quotes the ordinance's preamble asserting that over the course of more than a century the city council had expressed "findings" of detrimental secondary effects flowing from lewd and immoral profitmaking activity in public places. But however accurate the recital may be and however honestly the councilors may have held those conclusions to be true over the years, the recitation does not get beyond conclusions on a subject usually fraught with some emotionalism. The plurality recognizes this, of course, but seeks to ratchet up the value of mere conclusions by analogizing them to the legislative facts within an administrative agency's special knowledge, on which action is adequately premised in the absence of evidentiary challenge. *Ante,* at 1395–1396. The analogy is not obvious; agencies are part of the executive branch and we defer to them in part to allow them the freedom necessary to reconcile competing policies. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843–845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). That aside, it is one thing to accord administrative leeway as to predictive judgments in applying " 'elusive concepts' " to circumstances where the record is inconclusive and "evidence ... is difficult to compile," *FCC v. National Citizens Comm. for Broadcasting,* 436 U.S. 775, 796–797, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978), and quite another to dispense with evidence of current fact as a predicate for banning a subcategory of expression.[3] As ***315** to current fact, the city council's closest ****1405** approach to an evidentiary record on secondary effects and their causes was the statement of one councilor, during the debate over the ordinance, who spoke of increases in sex crimes in a way that might be construed as a reference to secondary effects. See App. 44. But that reference came at the end of a litany of concerns ("free condoms in schools, drive-by shootings, abortions, suicide machines," and declining student achievement test scores) that do not seem to be secondary effects of nude dancing. *Ibid.* Nor does the invocation of *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), in one paragraph of the preamble to Erie's ordinance suffice. App. to Pet. for Cert. 42a. The plurality opinion in *Barnes* made no mention of evidentiary showings at all, and though my separate opinion did make a pass at the issue, I did not demand reliance on germane evidentiary demonstrations, whether specific to the statute in question or developed elsewhere. To invoke *Barnes,* therefore, does not indicate that the issue of evidence has been addressed.

3 The proposition that the presence of nude dancing establishments increases the incidence of prostitution and violence is amenable to empirical treatment, and the city councilors who enacted Erie's ordinance are in a position to look to the facts of their own community's experience as well as to experiences elsewhere. Their failure to do so is made all the clearer by one of the *amicus* briefs, largely devoted to the argument that scientifically sound studies show no such correlation. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16–23; *id.,* at App. 1–29.

There is one point, however, on which an evidentiary record is not quite so hard to find, but it hurts, not

helps, the city. The final *O'Brien* requirement is that the incidental speech restriction be shown to be no greater than essential to achieve the government's legitimate purpose. 391 U.S., at 377, 88 S.Ct. 1673. To deal with this issue, we have to ask what basis there is to think that the city would be unsuccessful in countering any secondary effects by the significantly lesser restriction of zoning to control the location of nude dancing, thus allowing for efficient law enforcement, restricting effects on property values, and limiting exposure of the public. ***316** The record shows that for 23 years there has been a zoning ordinance on the books to regulate the location of establishments like Kandyland, but the city has not enforced it. One councilor remarked that "I think there's one of the problems. The ordinances are on the books and not enforced. Now this takes place. You really didn't need any other ordinances." App. 43. Another commented, "I felt very, very strongly, and I feel just as strongly right now, that this is a zoning matter." *Id.,* at 45. Even on the plurality's view of the evidentiary burden, this hurdle to the application of *O'Brien* requires an evidentiary response.

The record suggests that Erie simply did not try to create a record of the sort we have held necessary in other cases, and the suggestion is confirmed by the course of this litigation. The evidentiary question was never decided (or, apparently, argued) below, nor was the issue fairly joined before this Court. While respondent did claim that the evidence before the city council was insufficient to support the ordinance, see Brief for Respondent 44–49, Erie's reply urged us not to consider the question, apparently assuming that *Barnes* authorized us to disregard it. See Reply Brief for Petitioners 6–8. The question has not been addressed, and in that respect this case has come unmoored from the general standards of our First Amendment jurisprudence. [4]

4 By contrast, federal courts in other cases have frequently demanded evidentiary showings. See, *e.g., Phillips v. Keyport,* 107 F.3d 164, 175 (C.A.3 1997) (en banc); *J & B Entertainment, Inc. v. Jackson,* 152 F.3d 362, 370–371 (C.A.5 1998).

Careful readers, and not just those on the Erie City Council, will of course realize that my partial dissent rests on a demand for an evidentiary basis that I failed to make when I concurred in *Barnes, supra.* I should have demanded the evidence then, too, and my mistake calls to mind Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, " 'Ignorance, sir, ignorance.' " *McGrath v. Kristensen,* 340 U.S. 162, 178, 71 S.Ct. 224, 95 L.Ed. 173 (1950) (concurring ***317** opinion). [5] I may not be less ignorant of nude dancing than I was nine years ago, but after many subsequent occasions to think further about the needs of the ****1406** First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted. I hope it is enlightenment on my part, and acceptable even if a little late. See *Henslee v. Union Planters Nat. Bank & Trust Co.,* 335 U.S. 595, 600, 69 S.Ct. 290, 93 L.Ed. 259 (1949) *(per curiam)* (Frankfurter, J., dissenting).

5 See Boswell, Life of Samuel Johnson, in 44 Great Books of the Western World 82 (R. Hutchins & M. Adler eds. 1952).

II

The record before us now does not permit the conclusion that Erie's ordinance is reasonably designed to mitigate real harms. This does not mean that the required showing cannot be made, only that, on this record, Erie has not made it. I would remand to give it the opportunity to do so. [6] Accordingly, although I join with the plurality in adopting the *O'Brien* test, I respectfully dissent from the Court's disposition of the case.

6 This suggestion does not, of course, bar the Pennsylvania Supreme Court from choosing simpler routes to disposition of the case if they exist. Respondent mounted a federal overbreadth challenge to the ordinance; it also asserted a violation of the Pennsylvania Constitution. Either one of these arguments, if successful, would obviate the need for the factual development that is a prerequisite to *O'Brien* analysis.

Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

Far more important than the question whether nude dancing is entitled to the protection of the First Amendment are the dramatic changes in legal doctrine that the Court endorses today. Until now, the "secondary effects" of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that

such effects may justify ***318** the total suppression of protected speech. Indeed, the plurality opinion concludes that admittedly trivial advancements of a State's interests may provide the basis for censorship. The Court's commendable attempt to replace the fractured decision in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), with a single coherent rationale is strikingly unsuccessful; it is supported neither by precedent nor by persuasive reasoning.

I

As the preamble to Ordinance No. 75–1994 candidly acknowledges, the council of the city of Erie enacted the restriction at issue "for the purpose of limiting a recent increase in nude live entertainment within the City." *Ante,* at 1391 (internal quotation marks omitted). Prior to the enactment of the ordinance, the dancers at Kandyland performed in the nude. As the Court recognizes, after its enactment they can perform precisely the same dances if they wear "pasties and G-strings." *Ante,* at 1393; see also *ante,* at 1404, n. 2 (SOUTER, J., concurring in part and dissenting in part). In both instances, the erotic messages conveyed by the dancers to a willing audience are a form of expression protected by the First Amendment. *Ante,* at 1391.[1] Despite the similarity between the messages conveyed by the two forms of dance, they are not identical.

1 Respondent does not contend that there is a constitutional right to engage in conduct such as lap dancing. The message of eroticism conveyed by the nudity aspect of the dance is quite different from the issue of the proximity between dancer and audience. Respondent's contention is not that Erie has focused on lap dancers, see *ante,* at 1401 (SCALIA, J., concurring in judgment), but that it has focused on the message conveyed by nude dancing.

If we accept Chief Judge Posner's evaluation of this art form, see *Miller v. South Bend,* 904 F.2d 1081, 1089–1104 (C.A.7 1990) (en banc), the difference between the two messages is significant. The plurality assumes, however, that the difference in the content of the message resulting from ***319** the mandated costume change is "*de minimis.*" *Ante,* at 1393. Although I suspect that the patrons of Kandyland are more likely to share Chief Judge Posner's view than the plurality's, for present purposes I shall accept the assumption that the difference in the message is small. The crucial point to remember, however, is ****1407** that whether one views the difference as large or small, nude dancing still receives First Amendment protection, even if that protection lies only in the "outer ambit" of that Amendment. *Ante,* at 1391. Erie's ordinance, therefore, burdens a message protected by the First Amendment. If one assumes that the same erotic message is conveyed by nude dancers as by those wearing miniscule costumes, one means of expressing that message is banned;[2] if one assumes that the messages are different, one of those messages is banned. In either event, the ordinance is a total ban.

2 Although nude dancing might be described as one protected "means" of conveying an erotic message, it does not follow that a protected message has not been totally banned simply because there are other, similar ways to convey erotic messages. See *ante,* at 1393. A State's prohibition of a particular book, for example, does not fail to be a total ban simply because other books conveying a similar message are available.

The plurality relies on the so-called "secondary effects" test to defend the ordinance. *Ante,* at 1391–1395. The present use of that rationale, however, finds no support whatsoever in our precedents. Never before have we approved the use of that doctrine to justify a total ban on protected First Amendment expression. On the contrary, we have been quite clear that the doctrine would not support that end.

In *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), we upheld a Detroit zoning ordinance that placed special restrictions on the location of motion picture theaters that exhibited "adult" movies. The "secondary effects" of the adult theaters on the neighborhoods where they were located—lower property values and increases in crime (especially prostitution) to name a few—justified the burden imposed ***320** by the ordinance. *Id.,* at 54, 71, and n. 34, 96 S.Ct. 2440 (plurality opinion). Essential to our holding, however, was the fact that the ordinance was "nothing more than a limitation on the place where adult films may be exhibited" and did not limit the size of the market in such speech. *Id.,* at 71, 96 S.Ct. 2440; see also *id.,* at 61, 63, n. 18, 70, 71, n. 35, 96 S.Ct. 2440. As Justice Powell emphasized in his concurrence:

> "At most the impact of the ordinance on [the First Amendment] interests is incidental and minimal. Detroit has silenced no message, has invoked no

censorship, and has imposed no limitation upon those who wish to view them. The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message to reach an audience." *Id.,* at 78–79, 96 S.Ct. 2440.

See also *id.,* at 81, n. 4, 96 S.Ct. 2440 ("[A] zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression").

In *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), we upheld a similar ordinance, again finding that the "secondary effects of such theaters on the surrounding community" justified a restrictive zoning law. *Id.,* at 47, 106 S.Ct. 925 (emphasis deleted). We noted, however, that "[t]he Renton ordinance, like the one in *American Mini Theatres,* does not ban adult theaters altogether," but merely "circumscribe[s] their choice as to location." *Id.,* at 46, 48, 106 S.Ct. 925; see also *id.,* at 54, 106 S.Ct. 925 ("In our view, the First Amendment requires ... that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city ..."). Indeed, in both *Renton* and *American Mini Theatres,* the zoning ordinances were analyzed as mere "time, ***321** place, and manner" regulations.[3] See ****1408** *Renton,* 475 U.S., at 46, 106 S.Ct. 925; *American Mini Theatres,* 427 U.S., at 63, and n. 18, 96 S.Ct. 2440; *id.,* at 82, n. 6, 96 S.Ct. 2440. Because time, place, and manner regulations must "leave open ample alternative channels for communication of the information," *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), a total ban would necessarily fail that test.[4]

3 The plurality contends, *ante,* at 1394, that *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), shows that we have used the secondary effects rationale to justify more burdensome restrictions than those approved in *Renton* and *American Mini Theatres.* That argument is unpersuasive for two reasons. First, as in the two cases just mentioned, the regulation in *Ward* was as a time, place, and manner restriction. See 491 U.S., at 791, 109 S.Ct. 2746; *id.,* at 804, 109 S.Ct. 2746 (Marshall, J., dissenting). Second, as discussed below, *Ward* is not a secondary effects case. See *infra,* at 1410–1411.

4 We also held in *Renton* that in enacting its adult theater zoning ordinance, the city of Renton was permitted to rely on a detailed study conducted by the city of Seattle that examined the relationship between zoning controls and the secondary effects of adult theaters. (It was permitted to rely as well on "the 'detailed findings' summarized" in an opinion of the Washington Supreme Court to the same effect.) 475 U.S., at 51–52, 106 S.Ct. 925. Renton, having identified the same problem in its own city as that experienced in Seattle, quite logically drew on Seattle's experience and adopted a similar solution. But if Erie is relying on the Seattle study as well (as the plurality suggests, *ante,* at 1395), its use of that study is most peculiar. After identifying a problem in its own city similar to that in Seattle, Erie has implemented a solution (pasties and G-strings) bearing no relationship to the efficacious remedy identified by the Seattle study (dispersal through zoning).

> But the city of Erie, of course, has not in fact pointed to any study by anyone suggesting that the adverse secondary effects of commercial enterprises featuring erotic dancing depends in the slightest on the precise costume worn by the performers—it merely assumes it to be so. See *infra,* at 1409–1410. If the city is permitted simply to assume that a slight addition to the dancers' costumes will sufficiently decrease secondary effects, then presumably the city can require more and more clothing as long as any danger of adverse effects remains.

And we so held in *Schad v. Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). There, we addressed a zoning ordinance that did not merely require the dispersal of adult theaters, but prohibited ***322** them altogether. In striking down that law, we focused precisely on that distinction, holding that the secondary effects analysis endorsed in the past did not apply to an ordinance that totally banned nude dancing: "The restriction [in *Young v. American Mini Theatres*] did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them. The Court did not imply that a municipality could ban all adult theaters—much less all live entertainment or all nude dancing—from its commercial districts citywide." *Id.,* at 71, 96 S.Ct. 2440 (plurality opinion); see also *id.,* at 76, 96 S.Ct. 2440; *id.,* at 77, 96 S.Ct. 2440 (Blackmun, J., concurring) (joining

plurality); *id.,* at 79, 96 S.Ct. 2440 (Powell, J., concurring) (same).

The reason we have limited our secondary effects cases to zoning and declined to extend their reasoning to total bans is clear and straightforward: A dispersal that simply limits the places where speech may occur is a minimal imposition, whereas a total ban is the most exacting of restrictions. The State's interest in fighting presumed secondary effects is sufficiently strong to justify the former, but far too weak to support the latter, more severe burden. [5] Yet it is perfectly clear that in the present case—to use Justice Powell's metaphor in *American Mini Theatres*—the city of Erie has totally silenced a message the dancers at Kandyland want to convey. The fact that this censorship may have a laudable ulterior purpose cannot mean that censorship is not censorship. ****1409** For these reasons, the Court's holding rejects the explicit reasoning in *American Mini Theatres* and *Renton* and the express holding in *Schad.*

5 As the plurality recognizes by quoting my opinion in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 70, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), see *ante,* at 1393–1394, "the First Amendment will not tolerate the total suppression of erotic materials that have some artistic value," though it will permit zoning regulations.

The Court's use of the secondary effects rationale to permit a total ban has grave implications for basic free speech principles. Ordinarily, laws regulating the primary effects of speech, *i.e.,* the intended persuasive effects caused by the ***323** speech, are presumptively invalid. Under today's opinion, a State may totally ban speech based on its secondary effects—which are defined as those effects that "happen to be associated" with speech, *Boos v. Barry,* 485 U.S. 312, 320–321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988); see *ante,* at 1392—yet the regulation is not presumptively invalid. Because the category of effects that "happen to be associated" with speech includes the narrower subset of effects caused by speech, today's holding has the effect of swallowing whole a most fundamental principle of First Amendment jurisprudence.

II

The plurality's mishandling of our secondary effects cases is not limited to its approval of a total ban. It compounds that error by dramatically reducing the degree to which the State's interest must be furthered by the restriction imposed on speech, and by ignoring the critical difference between secondary effects caused by speech and the incidental effects on speech that may be caused by a regulation of conduct.

In what can most delicately be characterized as an enormous understatement, the plurality concedes that "requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects." *Ante,* at 1397. To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible. It would be more accurate to acknowledge, as Justice SCALIA does, that there is no reason to believe that such a requirement "will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease." *Ante,* at 1402 (opinion concurring in judgment); see also *ante,* at 1404, n. 2 (SOUTER, J., concurring in part and dissenting in part). Nevertheless, the plurality concludes that the "less stringent" test announced in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), "requires only that the regulation further the interest in ***324** combating such effects," *ante,* at 1397; see also *ante,* at 1391. It is one thing to say, however, that *O'Brien* is more lenient than the "more demanding standard" we have imposed in cases such as *Texas v. Johnson,* 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). See *ante,* at 1391. It is quite another to say that the test can be satisfied by nothing more than the mere possibility of *de minimis* effects on the neighborhood.

The plurality is also mistaken in equating our secondary effects cases with the "incidental burdens" doctrine applied in cases such as *O'Brien;* and it aggravates the error by invoking the latter line of cases to support its assertion that Erie's ordinance is unrelated to speech. The incidental burdens doctrine applies when " 'speech' and 'nonspeech' elements are combined in the same course of conduct," and the government's interest in regulating the latter justifies incidental burdens on the former. *O'Brien,* 391 U.S., at 376, 88 S.Ct. 1673. Secondary effects, on the other hand, are indirect consequences of protected speech and may justify regulation of the places where that speech may occur. See *American Mini Theatres,* 427

U.S., at 71, n. 34, 96 S.Ct. 2440 ("[A] concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime"). [6] When a State enacts **1410 a regulation, it might focus on the secondary effects of speech as its aim, or it might concentrate on nonspeech related concerns, having no thoughts at all with respect to how its regulation will affect speech—and only later, when the regulation is found to burden speech, justify the imposition as an unintended incidental consequence. [7] But those interests are not the *325 same, and the plurality cannot ignore their differences and insist that both aims are equally unrelated to speech simply because Erie might have "recogniz[ed]" that it could possibly have had either aim in mind. See *ante,* at 1394. [8] One can think of an apple and an orange at the same time; that does not turn them into the same fruit.

6 A secondary effect on the neighborhood that "happen[s] to be associated with" a form of speech is, of course, critically different from "the direct impact of speech on its audience." *Boos v. Berry,* 485 U.S. 312, 320–321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). The primary effect of speech is the persuasive effect of the message itself.

7 In fact, the very notion of focusing in on incidental burdens at the time of enactment appears to be a contradiction in terms. And if it were not the case that there is a difference between laws aimed at secondary effects and general bans incidentally burdening speech, then one wonders why Justices SCALIA and SOUTER adopted such strikingly different approaches in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991).

8 I frankly do not understand the plurality's declaration that a State's interest in the secondary effects of speech that "are associated" with the speech are not "related" to the speech. *Ante,* at 1393. See, *e.g.,* Webster's Third New International Dictionary 132 (1966) (defining "associate" as "closely related"). Sometimes, though, the plurality says that the secondary effects are "caused" by the speech, rather than merely "associated with" the speech. See, *e.g., ante,* at 1392, 1393, 1395, 1396–1397. If that is the definition of secondary effects the plurality adopts, then it is even more obvious that an interest in secondary effects is related to the speech at issue. See *Barnes,* 501 U.S., at 585–586, 111 S.Ct. 2456 (SOUTER, J., concurring in judgment) (secondary effects are not related to speech because their connection to speech is only one of correlation, not causation).

Of course, the line between governmental interests aimed at conduct and unrelated to speech, on the one hand, and interests arising out of the effects of the speech, on the other, may be somewhat imprecise in some cases. In this case, however, we need not wrestle with any such difficulty because Erie has expressly justified its ordinance with reference to secondary effects. Indeed, if Erie's concern with the effects of the message were unrelated to the message itself, it is strange that the only means used to combat those effects is the suppression of the message. [9] For these reasons, the plurality's argument that "this case is similar to *O'Brien,*" *ante,* at 1392; see also *ante,* at 1394, is quite wrong, as are its *326 citations to *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), and *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), *ante,* at 1393–1394, neither of which involved secondary effects. The plurality cannot have its cake and eat it too—either Erie's ordinance was not aimed at speech and the plurality may attempt to justify the regulation under the incidental burdens test, or Erie has aimed its law at the secondary effects of speech, and the plurality can try to justify the law under that doctrine. But it cannot conflate the two with the expectation that Erie's interests aimed at secondary effects will be rendered unrelated to speech by virtue of this doctrinal polyglot.

9 As Justice Powell said in his concurrence in *Young v. American Mini Theatres,* 427 U.S., at 82, n. 4, 96 S.Ct. 2440: "[H]ad [Detroit] been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." Quite plainly, Erie's total ban evinces its concern with the message being regulated.

Correct analysis of the issue in this case should begin with the proposition that nude dancing is a species of expressive conduct that is protected by the First Amendment. As Chief Judge Posner has observed, nude dancing fits well within a broad, cultural tradition recognized as expressive **1411 in nature and entitled to First Amendment protection. See 904 F.2d, at 1089–1104; see also Note, 97 Colum. L.Rev. 1844 (1997). The nudity of the dancer is both a component of the protected expression and the specific target of the ordinance. It is pure sophistry to reason from the premise that the regulation of the nudity component of nude dancing is unrelated to the

message conveyed by nude dancers. Indeed, both the text of the ordinance and the reasoning in the plurality's opinion make it pellucidly clear that the city of Erie has prohibited nude dancing *"precisely because of its communicative attributes."* *Barnes,* 501 U.S., at 577, 111 S.Ct. 2456 (SCALIA, J., concurring in judgment) (emphasis in original); see *id.,* at 596, 111 S.Ct. 2456 (White, J., dissenting).

III

The censorial purpose of Erie's ordinance precludes reliance on the judgment in *Barnes* as sufficient support for the Court's holding today. Several differences between the Erie ordinance and the statute at issue in *Barnes* belie the plurality's assertion that the two laws are "almost identical." ***327** *Ante,* at 1391. To begin with, the preamble to Erie's ordinance candidly articulates its agenda, declaring:

> "Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana, which was approved by the U.S. Supreme Court in *Barnes v. Glen Theatre Inc., ... for the purpose of limiting a recent increase in nude live entertainment within the City.*" App. to Pet. for Cert. 42a (emphasis added); see also *ante,* at 1391–1392. [10]

10 The preamble also states: "[T]he Council of the City of Erie has [found] ... that certain lewd, immoral activities carried on in public places for profit ... lead to the debasement of both women and men ... ." App. to Pet. for Cert. 41a.

As its preamble forthrightly admits, the ordinance's "purpose" is to "limi[t]" a protected form of speech; its invocation of *Barnes* cannot obliterate that professed aim. [11]

11 Relying on five words quoted from the Supreme Court of Pennsylvania, the plurality suggests that I have misinterpreted that court's reading of the preamble. *Ante,* at 1392. What follows, however, is a more complete statement of what that court said on this point:

> "We acknowledge that one of the purposes of the Ordinance is to combat negative secondary effects. That, however, is not its only goal. Inextricably bound up with this stated purpose is an unmentioned purpose that directly impacts on the freedom of expression: that purpose is to impact negatively on the erotic message of the dance.... We believe ... that the stated purpose for promulgating the Ordinance is inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing." 553 Pa. 348, 359, 719 A.2d 273, 279 (1998).

Erie's ordinance differs from the statute in *Barnes* in another respect. In *Barnes,* the Court expressly observed that the Indiana statute had not been given a limiting construction by the Indiana Supreme Court. As presented to this Court, there was nothing about the law itself that would confine its application to nude dancing in adult entertainment establishments. See 501 U.S., at 564, n. 1, 111 S.Ct. 2456 (discussing Indiana Supreme Court's lack of a limiting construction); see also *id.,* at 585, n. 2, 111 S.Ct. 2456 (SOUTER, J., concurring in judgment). ***328** Erie's ordinance, however, comes to us in a much different posture. In an earlier proceeding in this case, the Court of Common Pleas asked Erie's counsel "what effect would this ordinance have on theater ... productions such as Equus, Hair, O[h!] Calcutta [!]? Under your ordinance would these things be prevented ... ?" Counsel responded: "No, they wouldn't, Your Honor." App. 53. [12] Indeed, as *stipulated* in ****1412** the record, the city permitted a production of Equus to proceed without prosecution, even after the ordinance was in effect, and despite its awareness of the nudity involved in the production. *Id.,* at 84. [13] Even if, in light of its broad applicability, the statute in *Barnes* was not aimed at a particular form of speech, Erie's ordinance is quite different. As presented to us, the ordinance is deliberately targeted at Kandyland's type of nude dancing (to the exclusion of plays like Equus), in terms of both its applicable scope and the city's enforcement. [14]

12 In my view, Erie's categorical response forecloses Justice SCALIA's assertion that the city's position on Equus and Hair was limited to "[o]ne instance," where "the city was [not] aware of the nudity," and "no one had complained." *Ante,* at 1401 (opinion concurring in judgment). Nor could it be contended that selective applicability by stipulated enforcement should be treated differently from selective applicability by statutory text. See *Barnes,* 501 U.S., at 574, 111 S.Ct. 2456 (SCALIA, J., concurring in judgment) (selective enforcement may affect a law's generality).

Were it otherwise, constitutional prohibitions could be circumvented with impunity.

13 The stipulation read: "The play, 'Equus' featured frontal nudity and was performed for several weeks in October/November 1994 at the Roadhouse Theater in downtown Erie with no efforts to enforce the nudity prohibition which became effective during the run of the play."

14 Justice SCALIA argues that Erie might have carved out an exception for Equus and Hair because it guessed that this Court would consider them protected forms of expression, see *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 550, 557–558, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (holding that Hair, including the "group nudity and simulated sex" involved in the production, is protected speech); in his view, that makes the distinction unobjectionable and renders the ordinance no less of a general law. *Ante,* at 1401–1402 (opinion concurring in judgment). This argument appears to contradict his earlier definition of a general law: "A law is 'general' ... if it regulates conduct without regard to whether that conduct is expressive." *Barnes v. Glen Theatre, Inc.,* 501 U.S., at 576, n. 3, 111 S.Ct. 2456 (opinion concurring in judgment). If the ordinance regulates conduct (public nudity), it does not do so without regard to whether the nudity is expressive if it exempts the public nudity in Hair *precisely* "because of its expressive content." *Ante,* at 1402, n. 6 (opinion concurring in judgment). Moreover, if Erie exempts Hair because it wants to avoid a conflict with the First Amendment (rather than simply to exempt instances of nudity it finds inoffensive), that rationale still does not explain why Hair is exempted but Kandyland is not, since *Barnes* held that both are constitutionally protected.

Justice SCALIA also states that even if the ordinance singled out nude dancing, he would not strike down the law unless the dancing was singled out because of its message. *Ante,* at 1402. He opines that here, the basis for singling out Kandyland is morality. *Ibid.* But since the "morality" of the public nudity in Hair is left untouched by the ordinance, while the "immorality" of the public nudity in Kandyland is singled out, the distinction cannot be that "nude public dancing *itself* is immoral." *Ibid.* (emphasis in original). Rather, the only arguable difference between the two is that one's message is more immoral than the other's.

***329** This narrow aim is confirmed by the expressed views of the Erie City Councilmembers who voted for the ordinance. The four city councilmembers who approved the measure (of the six total councilmembers) each stated his or her view that the ordinance was aimed specifically at nude adult entertainment, and not at more mainstream forms of entertainment that include total nudity, nor even at nudity in general. One lawmaker observed: "We're not talking about nudity. We're not talking about the theater or art .... We're talking about what is indecent and immoral .... We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." App. 39. Though not quite as succinct, the other councilmembers expressed similar convictions. For example, one member illustrated his understanding of the aim of the law by contrasting it with his recollection about high school students swimming in the nude in the school's pool. The ordinance was not intended to cover those incidents of nudity: "But what I'm getting at is [the swimming] wasn't indecent, it wasn't an immoral thing, and ***330** yet there was nudity." *Id.,* at 42. The same lawmaker then disfavorably compared the nude swimming incident to the activities that occur in "some of these clubs" that exist in Erie—clubs that would be covered ****1413** by the law. *Ibid.* [15] Though such comments could be consistent with an interest in a general prohibition of nudity, the complete absence of commentary on that broader interest, and the councilmembers' exclusive focus on adult entertainment, is evidence of the ordinance's aim. In my view, we need not strain to find consistency with more general purposes when the most natural reading of the record reflects a near obsessive preoccupation with a single target of the law. [16]

15 Other members said their focus was on "bottle clubs," and the like, App. 43, and attempted to downplay the effect of the ordinance by acknowledging that "the girls can wear thongs or a G-string and little pasties that are smaller than a diamond." *Ibid.* Echoing that focus, another member stated that "[t]here still will be adult entertainment in this town, only it will be in a little different form." *Id.,* at 47.

16 The plurality dismisses this evidence, declaring that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Ante,* at 1392 (citing *United States v. O'Brien,* 391 U.S. 367, 382–383, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47–48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). First, it is worth pointing out that this doctrinaire formulation of *O'Brien's* cautionary statement is overbroad. See

generally L. Tribe, American Constitutional Law § 12–5, pp. 819–820 (2d ed.1988). Moreover, *O'Brien* itself said only that we would not strike down a law "on the *assumption* that a wrongful purpose or motive has caused the power to be exerted," 391 U.S., at 383, 88 S.Ct. 1673 (emphasis added; internal quotation marks omitted), and that statement was due to our recognition that it is a "hazardous matter" to determine the actual intent of a body as large as Congress "on the basis of what fewer than a handful of Congressmen said about [a law]," *id.,* at 384, 88 S.Ct. 1673. Yet neither consideration is present here. We need not base our inquiry on an "assumption," nor must we infer the collective intent of a large body based on the statements of a few, for we have in the record the actual statements of all the city councilmembers who voted in favor of the ordinance.

The text of Erie's ordinance is also significantly different from the law upheld in *Barnes.* In *Barnes,* the statute defined "nudity" as "the showing of the human male or female ***331** genitals" (and certain other regions of the body) "with less than a fully opaque covering." 501 U.S., at 569, n. 2, 111 S.Ct. 2456. The Erie ordinance duplicates that definition in all material respects, but adds the following to its definition of "[n]udity":

> " '[T]he exposure of any device, costume, or covering *which gives the appearance of or simulates* the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, *which device simulates and gives the realistic appearance* of nipples and/or areola.' " *Ante,* at 1388, n. * (emphasis added).

Can it be doubted that this out-of-the-ordinary definition of "nudity" is aimed directly at the dancers in establishments such as Kandyland? Who else is likely to don such garments? [17] We should not stretch to embrace fanciful explanations when the most natural reading of the ordinance unmistakably identifies its intended target.

17 Is it seriously contended (as would be necessary to sustain the ordinance as a general prohibition) that, when crafting this bizarre definition of "nudity," Erie's concern was with the use of simulated nipple covers on "nude beaches and [by otherwise] unclothed purveyors of hot dogs and machine tools"? *Barnes,* 501 U.S., at 574, 111 S.Ct. 2456 (SCALIA, J., concurring in judgment); see also *ante,* at 1401 (SCALIA, J., concurring in judgment). It is true that one might *conceivably* imagine that is Erie's aim. But it is far more likely that this novel definition was written with the Kandyland dancers and the like in mind, since they are the only ones covered by the law (recall that plays like Equus are exempted from coverage) who are likely to utilize such unconventional clothing.

It is clear beyond a shadow of a doubt that the Erie ordinance was a response to a more specific concern than nudity in general, namely, nude dancing of the sort found in Kandyland. [18] Given that the ****1414** Court has not even tried to defend ***332** the ordinance's total ban on the ground that its censorship of protected speech might be justified by an overriding state interest, it should conclude that the ordinance is patently invalid. For these reasons, as well as the reasons set forth in Justice White's dissent in *Barnes,* I respectfully dissent.

18 The plurality states that Erie's ordinance merely "replaces and updates provisions of an 'Indecency and Immorality' ordinance" from the mid–19th century, just as the statute in *Barnes* did. *Ante,* at 1391. First of all, it is not clear that this is correct. The record does indicate that Erie's Ordinance No. 75–1994 updates an older ordinance of similar import. Unfortunately, that old regulation is not in the record. Consequently, whether the new ordinance merely "replaces" the old one is a matter of debate. From statements of one councilmember, it can reasonably be inferred that the old ordinance was merely a residential zoning restriction, not a total ban. See App. 43. If that is so, it leads to the further question why Erie felt it necessary to shift to a total ban in 1994.

But even if the plurality's factual contention is correct, it does not undermine the points I have made in the text. In *Barnes,* the point of noting the ancient pedigree of the Indiana statute was to demonstrate that its passage antedated the appearance of adult entertainment venues, and therefore could not have been motivated by the presence of those establishments. The inference supposedly rebutted in *Barnes* stemmed from the *timing* of the enactment. Here, however, the inferences I draw depend on the text of the ordinance, its preamble, its scope and enforcement, and the comments of the councilmembers. These do not depend on the timing of the ordinance's enactment.

All Citations

529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265, 68 USLW 4239, 28 Media L. Rep. 1545, 00 Cal. Daily Op. Serv. 2443, 2000 Daily Journal D.A.R. 3255, 2000 CJ C.A.R. 1618, 13 Fla. L. Weekly Fed. S 203

KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Boos v. Barry, U.S.Dist.Col., March 22, 1988

106 S.Ct. 925
Supreme Court of the United States

CITY OF RENTON, et al., Appellants
v.
PLAYTIME THEATRES, INC., et al.

No. 84–1360.
|
Argued Nov. 12, 1985.
|
Decided Feb. 25, 1986.
|
Rehearing Denied April 21, 1986.
|
See 475 U.S. 1132, 106 S.Ct. 1663.

Suit was brought challenging the constitutionality of a zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school. The United States District Court for the Western District of Washington ruled in favor of the city. The Court of Appeals for the Ninth Circuit, 748 F.2d 527, reversed and remanded for reconsideration, and the city appealed. The Supreme Court, Justice Rehnquist, held that the ordinance was a valid governmental response to the serious problems created by adult theaters and satisfied the dictates of the First Amendment.

Reversed.

Justice Blackmun concurred in the result.

Justice Brennan filed a dissenting opinion in which Justice Marshall joined.

West Headnotes (4)

[1] **Constitutional Law**
Zoning and land use

City ordinance that prohibited adult motion picture theaters from locating from within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school was properly analyzed as a form of time, place and manner regulation of speech. U.S.C.A. Const.Amend. 1.

823 Cases that cite this headnote

[2] **Constitutional Law**
Zoning and land use

A zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school was a valid governmental response to the serious problems created by adult theaters and satisfied the dictates of the First Amendment. U.S.C.A. Const.Amend. 1.

766 Cases that cite this headnote

[3] **Constitutional Law**
Theaters in general

The First Amendment does not require a city, before enacting an adult theater zoning ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever the evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. U.S.C.A. Const.Amend. 1.

547 Cases that cite this headnote

[4] **Zoning and Planning**
Sexually-oriented businesses;nudity

Cities may regulate adult theaters by dispersing them or by effectively concentrating them.

75 Cases that cite this headnote

***41** *Syllabus* [*]

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondents purchased two theaters in Renton, Washington, with the intention of exhibiting adult films and, at about the same time, filed suit in Federal District Court, seeking injunctive relief and a declaratory judgment that the First and Fourteenth Amendments were violated by a city ordinance that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The District Court ultimately entered summary judgment in the city's favor, holding that the ordinance did not violate the First Amendment. The Court of Appeals reversed, holding that the ordinance constituted a substantial restriction on First Amendment interests, and remanded the case for reconsideration as to whether the city had substantial governmental interests to support the ordinance.

Held: The ordinance is a valid governmental response to the serious problems created by adult theaters and satisfies the dictates of the First Amendment. Cf. ****925** *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310. Pp. 928–933.

(a) Since the ordinance does not ban adult theaters altogether, it is properly analyzed as a form of time, place, and manner regulation. "Content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. Pp. 928–929.

(b) The District Court found that the Renton City Council's "predominate" concerns were with the secondary effects of adult theaters on the surrounding community, not with the content of adult films themselves. This finding is more than adequate to establish that the city's pursuit of its zoning interests was unrelated to the suppression of free expression, and thus the ordinance is a "content-neutral" speech regulation. Pp. 928–930.

(c) The Renton ordinance is designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication. A city's interest in attempting to preserve the quality of urban life, as here, must be accorded high respect. Although the ordinance was enacted without the benefit of studies specifically relating to ***42** Renton's particular problems, Renton was entitled to rely on the experiences of, and studies produced by, the nearby city of Seattle and other cities. Nor was there any constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, or by effectively concentrating them, as in Renton. Moreover, the ordinance is not "underinclusive" for failing to regulate other kinds of adult businesses, since there was no evidence that, at the time the ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. Pp. 930–932.

(d) As required by the First Amendment, the ordinance allows for reasonable alternative avenues of communication. Although respondents argue that in general there are no "commercially viable" adult theater sites within the limited area of land left open for such theaters by the ordinance, the fact that respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a violation of the First Amendment, which does not compel the Government to ensure that adult theaters, or any other kinds of speech-related businesses, will be able to obtain sites at bargain prices. P. 932.

748 F.2d 527 (CA9 1984), reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., concurred in the result. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. ——.

Attorneys and Law Firms

****926** *E. Barrett Prettyman, Jr.,* arguedthe cause for appellants. With him on the briefs were *David W. Burgett, Lawrence J. Warren, Daniel Kellogg, Mark E. Barber,* and *Zanetta L. Fontes.*

Jack R. Burns argued the cause for appellees. With him on the briefs was *Robert E. Smith.**

* Briefs of *amici curiae* urging reversal were filed for Jackson County, Missouri, by *Russell D. Jacobson;* for the Freedom Council Foundation by *Wendell R. Bird* and *Robert K. Skolrood;* for the National Institute of Municipal Law Officers by *George Agnost, Roy D. Bates, Benjamin L. Brown, J. Lamar Shelley, John W. Witt, Roger F. Cutler, Robert J. Alfton, James K. Baker, Barbara Mather, James D. Montgomery, Clifford D. Pierce, Jr., William H. Taube, William I. Thornton, Jr.,* and *Charles S. Rhyne;* and for the National League of Cities et al. by *Benna Ruth Solomon, Joyce Holmes Benjamin, Beate Bloch,* and *Lawrence R. Velvel.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *David Utevsky, Jack D. Novik,* and *Burt Neuborne;* and for the American Booksellers Association, Inc., et al. by *Michael A. Bamberger.*

Eric M. Rubin and *Walter E. Diercks* filed a brief for the Outdoor Advertising Association of America, Inc., et al. as *amici curiae.*

Opinion

***43** Justice REHNQUIST delivered the opinion of the Court.

This case involves a constitutional challenge to a zoning ordinance, enacted by appellant city of Renton, Washington, that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Appellees, Playtime Theatres, Inc., and Sea-First Properties, Inc., filed an action in the United States District Court for the Western District of Washington seeking a declaratory judgment that the Renton ordinance violated the First and Fourteenth Amendments and a permanent injunction against its enforcement. The District Court ruled in favor of Renton and denied the permanent injunction, but the Court of Appeals for the Ninth Circuit reversed and remanded for reconsideration. 748 F.2d 527 (1984). We noted probable jurisdiction, ****927** 471 U.S. 1013, 105 S.Ct. 2015, 85 L.Ed.2d 297 (1985), and now reverse the judgment of the Ninth Circuit. [1]

[1] This appeal was taken under 28 U.S.C. § 1254(2), which provides this Court with appellate jurisdiction at the behest of a party relying on a state statute or local ordinance held unconstitutional by a court of appeals. As we have previously noted, there is some question whether jurisdiction under § 1254(2) is available to review a nonfinal judgment. See *South Carolina Electric & Gas Co. v. Flemming,* 351 U.S. 901, 76 S.Ct. 692, 100 L.Ed. 1439 (1956); *Slaker v. O'Connor,* 278 U.S. 188, 49 S.Ct. 158, 73 L.Ed. 258 (1929). But see *Chicago v. Atchison, T. & S.F. R. Co.,* 357 U.S. 77, 82–83, 78 S.Ct. 1063, 1066–1067, 2 L.Ed.2d 1174 (1958).

The present appeal seeks review of a judgment remanding the case to the District Court. We need not resolve whether this appeal is proper under § 1254(2), however, because in any event we have certiorari jurisdiction under 28 U.S.C. § 2103. As we have previously done in equivalent situations, see *El Paso v. Simmons,* 379 U.S. 497, 502–503, 85 S.Ct. 577, 580–581, 13 L.Ed.2d 446 (1965); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 927, 95 S.Ct. 2561, 2565, 45 L.Ed.2d 648 (1975), we dismiss the appeal and, treating the papers as a petition for certiorari, grant the writ of certiorari. Henceforth, we shall refer to the parties as "petitioners" and "respondents."

***44** In May 1980, the Mayor of Renton, a city of approximately 32,000 people located just south of Seattle, suggested to the Renton City Council that it consider the advisability of enacting zoning legislation dealing with adult entertainment uses. No such uses existed in the city at that time. Upon the Mayor's suggestion, the City Council referred the matter to the city's Planning and Development Committee. The Committee held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities. The City Council, meanwhile, adopted Resolution No. 2368, which imposed a moratorium on the licensing of "any business ... which ... has as its primary purpose the selling, renting or showing of sexually explicit materials." App. 43. The resolution contained a clause explaining that such businesses "would have a severe impact upon surrounding businesses and residences." *Id.,* at 42.

In April 1981, acting on the basis of the Planning and Development Committee's recommendation, the City Council enacted Ordinance No. 3526. The ordinance prohibited any "adult motion picture theater" from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school. App. to Juris. Statement 79a. The term "adult motion picture theater" was defined

as "[a]n enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' ... for observation by patrons therein." *Id.,* at 78a.

***45** In early 1982, respondents acquired two existing theaters in downtown Renton, with the intention of using them to exhibit feature-length adult films. The theaters were located within the area proscribed by Ordinance No. 3526. At about the same time, respondents filed the previously mentioned lawsuit challenging the ordinance on First and Fourteenth Amendment grounds, and seeking declaratory and injunctive relief. While the federal action was pending, the City Council amended the ordinance in several respects, adding a statement of reasons for its enactment and reducing the minimum distance from any school to 1,000 feet.

In November 1982, the Federal Magistrate to whom respondents' action had been referred recommended the entry of a preliminary injunction against enforcement of the Renton ordinance and the denial of Renton's motions to dismiss and for summary judgment. The District Court adopted the Magistrate's recommendations and entered the preliminary injunction, and respondents began showing adult films at their two theaters in Renton. Shortly thereafter, the parties agreed to submit the case for a final decision on whether a permanent ****928** injunction should issue on the basis of the record as already developed.

The District Court then vacated the preliminary injunction, denied respondents' requested permanent injunction, and entered summary judgment in favor of Renton. The court found that the Renton ordinance did not substantially restrict First Amendment interests, that Renton was not required to show specific adverse impact on Renton from the operation of adult theaters but could rely on the experiences of other cities, that the purposes of the ordinance were unrelated to the suppression of speech, and that the restrictions on speech imposed by the ordinance were no greater than necessary to further the governmental interests involved. Relying on *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), the court held that the Renton ordinance did not violate the First Amendment.

***46** The Court of Appeals for the Ninth Circuit reversed. The Court of Appeals first concluded, contrary to the finding of the District Court, that the Renton ordinance constituted a substantial restriction on First Amendment interests. Then, using the standards set forth in *United States v. O'Brien, supra,* the Court of Appeals held that Renton had improperly relied on the experiences of other cities in lieu of evidence about the effects of adult theaters on Renton, that Renton had thus failed to establish adequately the existence of a substantial governmental interest in support of its ordinance, and that in any event Renton's asserted interests had not been shown to be unrelated to the suppression of expression. The Court of Appeals remanded the case to the District Court for reconsideration of Renton's asserted interests.

In our view, the resolution of this case is largely dictated by our decision in *Young v. American Mini Theatres, Inc., supra.* There, although five Members of the Court did not agree on a single rationale for the decision, we held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments. *Id.,* 427 U.S., at 72–73, 96 S.Ct., at 2453 (plurality opinion of STEVENS, J., joined by BURGER, C.J., and WHITE and REHNQUIST, JJ.); *id.,* at 84, 96 S.Ct., at 2459 (POWELL, J., concurring). The Renton ordinance, like the one in *American Mini Theatres,* does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation. *Id.,* at 63, and n. 18, 96 S.Ct., at 2448 and n. 18; *id.,* at 78–79, 96 S.Ct., at 2456 (POWELL, J., concurring).

[1] Describing the ordinance as a time, place, and manner regulation is, of course, only the first step in our inquiry. This Court has long held that regulations enacted for the ***47** purpose of restraining speech on the basis of its content presumptively violate the First Amendment. See *Carey v. Brown,* 447 U.S. 455, 462–463, and n. 7, 100 S.Ct. 2286, 2291, and n. 7, 65 L.Ed.2d 263 (1980); *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 98–99, 92 S.Ct. 2286, 2289, 2291–2292, 33 L.Ed.2d 212 (1972). On the other

hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. See *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 807, 104 S.Ct. 2118, 2130, 80 L.Ed.2d 772 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 647–648, 101 S.Ct. 2559, 2563–2564, 69 L.Ed.2d 298 (1981).

****929** At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres,* does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council's "*predominate* concerns" were with the secondary effects of adult theaters, and not with the content of adult films themselves. App. to Juris. Statement 31a (emphasis added). But the Court of Appeals, relying on its decision in *Tovar v. Billmeyer,* 721 F.2d 1260, 1266 (CA9 1983), held that this was not enough to sustain the ordinance. According to the Court of Appeals, if "*a motivating factor* " in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision. 748 F.2d, at 537 (emphasis in original). This view of the law was rejected in *United States v. O'Brien,* 391 U.S., at 382–386, 88 S.Ct., at 1681–1684, the very case that the Court of Appeals said it was applying:

> ***48** "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive....
>
> "... What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *Id.,* at 383–384, 88 S.Ct., at 1683.

The District Court's finding as to "predominate" intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. See App. to Juris. Statement 90a. As Justice POWELL observed in *American Mini Theatres,* "[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." 427 U.S., at 82, n. 4, 96 S.Ct., at 2458, n. 4.

In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976) (emphasis added); *Community for Creative Non-Violence, supra,* 468 U.S., at 293, 104 S.Ct., at 3069; *International Society for Krishna Consciousness, supra,* 452 U.S., at 648, 101 S.Ct., at 2564. The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express ***49** less favored or more controversial views." *Mosley, supra,* 408 U.S., at 95–96, 92 S.Ct., at 2289–2290.

It was with this understanding in mind that, in *American Mini Theatres,* a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials,[2] zoning ordinances designed ****930** to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to "content-neutral" time, place, and manner regulations. Justice STEVENS, writing for the plurality, concluded that the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters "without violating the government's paramount obligation of neutrality in its regulation of protected

communication," 427 U.S., at 70, 96 S.Ct., at 2452, noting that "[i]t is th [e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech," *id.,* at 71, n. 34, 96 S.Ct., at 2453, n. 34. Justice POWELL, in concurrence, elaborated:

> "[The] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings.... Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. ***50** See, *e.g., Tinker v. Des Moines School Dist.,* 393 U.S. 503, 509–511 [89 S.Ct. 733, 737–739, 21 L.Ed.2d 731] (1969); *Procunier v. Martinez,* 416 U.S. 396, 413–414 [94 S.Ct. 1800, 1811, 40 L.Ed.2d 224] (1974); *Greer v. Spock,* 424 U.S. 828, 842–844 [96 S.Ct. 1211, 1219–1220, 47 L.Ed.2d 505] (1976) (POWELL, J., concurring); cf. *CSC v. Letter Carriers,* 413 U.S. 548 [93 S.Ct. 2880, 37 L.Ed.2d 796] (1973)." *Id.,* at 82, n. 6, 96 S.Ct., at 2458, n. 6.

[2] The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. See *Community for Creative Non-Violence,* 468 U.S., at 293, 104 S.Ct., at 3069; *International Society for Krishna Consciousness,* 452 U.S., at 649, 654, 101 S.Ct., at 2564, 2567. It is clear that the ordinance meets such a standard. As a majority of this Court recognized in *American Mini Theatres,* a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." 427 U.S., at 71, 96 S.Ct., at 2453 (plurality opinion); see *id.,* at 80, 96 S.Ct., at 2457 (POWELL, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial"). Exactly the same vital governmental interests are at stake here.

The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." 748 F.2d, at 537. We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof. The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood. See *Northend Cinema, Inc. v. Seattle,* 90 Wash.2d 709, 585 P.2d 1153 (1978). The opinion of the Supreme Court of Washington in *Northend Cinema,* which ***51** was before the Renton City Council when it enacted the ordinance in question here, described Seattle's experience as follows:

> "The amendments to the City's zoning code which are at issue here are the ****931** culmination of a long period of study and discussion of the problems of adult movie theaters in residential areas of the City.... [T]he City's Department of Community Development made a study of the need for zoning controls of adult theaters.... The study analyzed the City's zoning scheme, comprehensive plan, and land uses around existing adult motion picture theaters...." *Id.,* at 711, 585 P.2d, at 1155.
>
> "[T]he [trial] court heard extensive testimony regarding the history and purpose of these ordinances. It heard expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts. The court's detailed findings, which include a finding that the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight, are supported by substantial evidence in the record." *Id.,* at 713, 585 P.2d, at 1156.
>
> "The record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." *Id.,* at 719, 585 P.2d, at 1159.

[3] We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington

2 See *American Mini Theatres,* 427 U.S., at 70, 96 S.Ct., at 2452 (plurality opinion) ("[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate ...").

Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the ***52** problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

[4] We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas.... [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *American Mini Theatres,* 427 U.S., at 71, 96 S.Ct., at 2453 (plurality opinion). Moreover, the Renton ordinance is "narrowly tailored" to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), and *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

Respondents contend that the Renton ordinance is "under-inclusive," in that it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters. On this record the contention must fail. There is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. In fact, Resolution No. 2368, enacted in October 1980, states that "the City of Renton does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials." App. 42. That Renton chose first to address the potential problems created ***53** by one particular kind of adult business in no way suggests that the city has "singled out" adult theaters for discriminatory treatment. We simply have no basis on ****932** this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters. See *Williamson v. Lee Optical Inc.,* 348 U.S. 483, 488–489, 75 S.Ct. 461, 464–465, 99 L.Ed. 563 (1955).

Finally, turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of "[a]mple, accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads." App. to Juris. Statement 28a.

Respondents argue, however, that some of the land in question is already occupied by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the Renton ordinance. Brief for Appellees 34–37. The Court of Appeals accepted these arguments,[3] concluded that ***54** the 520 acres was not truly "available" land, and therefore held that the Renton ordinance "would result in a substantial restriction" on speech. 748 F.2d, at 534.

3 The Court of Appeals' rejection of the District Court's findings on this issue may have stemmed in part from the belief, expressed elsewhere in the Court of Appeals' opinion, that, under *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), appellate courts have a duty to review *de novo* all mixed findings of law and fact relevant to the application of First Amendment principles. See 748 F.2d 527, 535 (1984). We need not review the correctness of the Court of Appeals' interpretation of *Bose Corp.,* since we determine that, under any standard of review, the District Court's findings should not have been disturbed.

We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," *American Mini Theatres,* 427 U.S., at 71, n. 35, 96 S.Ct., at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See *id.,* at 78, 96 S.Ct., at 2456 (POWELL, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact"). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

In sum, we find that the Renton ordinance represents a valid governmental response to the "admittedly serious problems" created by adult theaters. See *id.,* at 71, 96 S.Ct., at 2453 (plurality opinion). Renton has not used "the power to zone as a pretext for suppressing expression," *id.,* at 84, 96 S.Ct., at 2459 (POWELL, J., concurring), but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning. Here, as in *American Mini Theatres,* the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the ***55** ****933** First Amendment.[4] The judgment of the Court of Appeals is therefore

Reversed.

Justice BLACKMUN concurs in the result.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there. The constitutionality of the ordinance is therefore not correctly analyzed under standards applied to content-neutral time, place, and manner restrictions. But even assuming that the ordinance may fairly be characterized as content neutral, it is plainly unconstitutional under the standards established by the decisions of this Court. Although the Court's analysis is limited to ***56** cases involving "businesses that purvey sexually explicit materials," *ante,* at 929, and n. 2, and thus does not affect our holdings in cases involving state regulation of other kinds of speech, I dissent.

I

"[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Consolidated Edison Co. v. Public Service Comm'n of N. Y.,* 447 U.S. 530, 536, 100

4 Respondents argue, as an "alternative basis" for affirming the decision of the Court of Appeals, that the Renton ordinance violates their rights under the Equal Protection Clause of the Fourteenth Amendment. As should be apparent from our preceding discussion, respondents can fare no better under the Equal Protection Clause than under the First Amendment itself. See *Young v. American Mini Theatres, Inc.,* 427 U.S., at 63–73, 96 S.Ct., at 2448–2454.

Respondents also argue that the Renton ordinance is unconstitutionally vague. More particularly, respondents challenge the ordinance's application to buildings "used" for presenting sexually explicit films, where the term "used" describes "a continuing course of conduct of exhibiting [sexually explicit films] in a manner which appeals to a prurient interest." App. to Juris. Statement 96a. We reject respondents' "vagueness" argument for the same reasons that led us to reject a similar challenge in *American Mini Theatres, supra.* There, the Detroit ordinance applied to theaters "used to present material distinguished or characterized by an emphasis on [sexually explicit matter]." *Id.,* at 53, 96 S.Ct., at 2444. We held that "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents." *Id.,* at 58–59, 96 S.Ct., at 2446. We also held that the Detroit ordinance created no "significant deterrent effect" that might justify invocation of the First Amendment "overbreadth" doctrine. *Id.,* at 59–61, 96 S.Ct., at 2446–2448.

S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980). The Court asserts that the ordinance is "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community," *ante,* at 929 (emphasis in original), and thus is simply a time, place, and manner regulation.[1] This analysis is misguided.

[1] The Court apparently finds comfort in the fact that the ordinance does not "deny use to those wishing to express less favored or more controversial views." *Ante,* at 929. However, content-based discrimination is not rendered "any less odious" because it distinguishes "among entire classes of ideas, rather than among points of view within a particular class." *Lehman v. City of Shaker Heights,* 418 U.S. 298, 316, 94 S.Ct. 2714, 2724, 41 L.Ed.2d 770 (1974) (BRENNAN, J., dissenting); see also *Consolidated Edison Co. v. Public Service Comm'n of N.Y.,* 447 U.S. 530, 537, 100 S.Ct. 2326, 2333, 65 L.Ed.2d 319 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic"). Moreover, the Court's conclusion that the restrictions imposed here were viewpoint neutral is patently flawed. "As a practical matter, the speech suppressed by restrictions such as those involved [here] will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores. Such restrictions, in other words, have a potent viewpoint-differential impact.... To treat such restrictions as viewpoint-neutral seems simply to ignore reality." Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U.Chi.L.Rev. 81, 111–112 (1978).

The fact that adult movie theaters may cause harmful "secondary" land-use effects may arguably give Renton a compelling ****934** reason to regulate such establishments; it does not mean, however, that such regulations are content neutral. ***57** Because the ordinance imposes special restrictions on certain kinds of speech on the basis of *content,* I cannot simply accept, as the Court does, Renton's claim that the ordinance was not designed to suppress the content of adult movies. "[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' " *Consolidated Edison Co., supra,* at 536, 100 S.Ct., at 2332 (quoting *Niemotko v. Maryland,* 340 U.S. 268, 282, 71 S.Ct. 325, 333, 95 L.Ed. 267 (1951) (Frankfurter, J., concurring in result)). "[B]efore deferring to [Renton's] judgment, [we] must be convinced that the city is seriously and comprehensively addressing" secondary-land use effects associated with adult movie theaters. *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 531, 101 S.Ct. 2882, 2904, 69 L.Ed.2d 800 (1981) (BRENNAN, J., concurring in judgment). In this case, both the language of the ordinance and its dubious legislative history belie the Court's conclusion that "the city's pursuit of its zoning interests here was unrelated to the suppression of free expression." *Ante,* at 929.

A

The ordinance discriminates on its face against certain forms of speech based on content. Movie theaters specializing in "adult motion pictures" may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Other motion picture theaters, and other forms of "adult entertainment," such as bars, massage parlors, and adult bookstores, are not subject to the same restrictions. This selective treatment strongly suggests that Renton was interested not in controlling the "secondary effects" associated with adult businesses, but in discriminating against adult theaters based on the content of the films they exhibit. The Court ignores this discriminatory treatment, declaring that Renton is free "to address the potential problems created by one particular kind of adult business," *ante,* at 931, and to amend the ordinance in the ***58** future to include other adult enterprises. *Ante,* at 932 (citing *Williamson v. Lee Optical Inc.,* 348 U.S. 483, 488–489, 75 S.Ct. 461, 464–465, 99 L.Ed. 563 (1955)).[2] However, because of the First Amendment interests at stake here, this one-step-at-a-time analysis is wholly inappropriate.

[2] The Court also explains that "[t]here is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton." *Ante,* at 931. However, at the time the ordinance was enacted, there was no evidence that any *adult movie theaters* were located in, or considering moving to, Renton. Thus, there was no legitimate reason for the city to

treat adult movie theaters differently from other adult businesses.

"This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See *e.g., Williamson v. Lee Optical Inc.,* 348 U.S. 483, 488–489, 75 S.Ct. 461, 464–465, 99 L.Ed. 563 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' *Police Dept. of Chicago v. Mosley,* 408 U.S., at 95 [92 S.Ct., at 2290]." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 215, 95 S.Ct. 2268, 2275, 45 L.Ed.2d 125 (1975).

In this case, the city has not justified treating adult movie theaters differently from other adult entertainment businesses. The ordinance's underinclusiveness is cogent evidence that it was aimed at the *content* of the films shown in adult movie theaters.

****935** B

Shortly *after* this lawsuit commenced, the Renton City Council amended the ordinance, adding a provision explaining that its intention in adopting the ordinance had been "to promote the City of Renton's great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land ***59** use planning." App. to Juris. Statement 81a. The amended ordinance also lists certain conclusory "findings" concerning adult entertainment land uses that the Council purportedly relied upon in adopting the ordinance. *Id.,* at 81a–86 a. The city points to these provisions as evidence that the ordinance was designed to control the secondary effects associated with adult movie theaters, rather than to suppress the content of the films they exhibit. However, the "legislative history" of the ordinance strongly suggests otherwise.

Prior to the amendment, there was no indication that the ordinance was designed to address any "secondary effects" a single adult theater might create. In addition to the suspiciously coincidental timing of the amendment, many of the City Council's "findings" do not relate to legitimate land-use concerns. As the Court of Appeals observed, "[b]oth the magistrate and the district court recognized that many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter." 748 F.2d 527, 537 (CA9 1984). [3] That some residents may be offended by the *content* of the films shown at adult movie theaters cannot form the basis for state regulation of speech. See *Terminiello v. Chicago,* 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).

3 For example, "finding" number 2 states that
"[l]ocation of adult entertainment land uses on the main commercial thoroughfares of the City gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for marital relationship and for the sanctity of marriage relations of others, and the concept of non-aggressive, consensual sexual relations." App. to Juris. Statement 86a.
"Finding" number 6 states that
"[l]ocation of adult land uses in close proximity to residential uses, churches, parks, and other public facilities, and schools, will cause a degradation of the community standard of morality. Pornographic material has a degrading effect upon the relationship between spouses." *Ibid.*

Some of the "findings" added by the City Council do relate to supposed "secondary effects" associated with adult movie ***60** theaters. [4] However, the Court cannot, as it does, merely accept these *post hoc* statements at face value. "[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Schad v. Mount Ephraim,* 452 U.S. 61, 77, 101 S.Ct. 2176, 2187, 68 L.Ed.2d 671 (1981) (BLACKMUN, J., concurring). As the Court of Appeals concluded, "[t]he record presented by Renton to support its asserted interest in enacting the zoning ordinance is very thin." 748 F.2d, at 536.

4 For example, "finding" number 12 states that
"[l]ocation of adult entertainment land uses in proximity to residential uses, churches, parks and other public facilities, and schools, may lead to increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses." *Id.,* at 83a.

The amended ordinance states that its "findings" summarize testimony received by the City Council at certain public hearings. While none of this testimony was ever recorded or preserved, a city official reported that residents had objected to having adult movie theaters located in their community. However, the official was unable to recount any testimony as to how adult movie theaters would specifically affect the schools, churches, parks, or residences "protected" by the ordinance. See App. 190–192. The City Council conducted no studies, and heard no expert testimony, on how the protected uses would be affected by the presence of an adult movie theater, and never considered whether residents' concerns could be met by "restrictions ****936** that are less intrusive on protected forms of expression." *Schad, supra,* 452 U.S., at 74, 101 S.Ct., at 2186. As a result, any "findings" regarding "secondary effects" caused by adult movie theaters, or the need to adopt specific locational requirements to combat such effects, were not "findings" at all, but purely speculative conclusions. Such "findings" were not such as are required to justify the burdens ***61** the ordinance imposed upon constitutionally protected expression.

The Court holds that Renton was entitled to rely on the experiences of cities like Detroit and Seattle, which had enacted special zoning regulations for adult entertainment businesses after studying the adverse effects caused by such establishments. However, even assuming that Renton was concerned with the same problems as Seattle and Detroit, it never actually reviewed any of the studies conducted by those cities. Renton had no basis for determining if any of the "findings" made by these cities were relevant to *Renton*'s problems or needs. [5] Moreover, since Renton ultimately adopted zoning regulations different from either Detroit or Seattle, these "studies" provide no basis for assessing the effectiveness of the particular restrictions adopted under the ordinance. [6] Renton cannot merely rely on the general experiences ***62** of Seattle or Detroit, for it must "justify its ordinance in the context of *Renton's* problems—not Seattle's or Detroit's problems." 748 F.2d, at 536 (emphasis in original).

5 As part of the amendment passed after this lawsuit commenced, the City Council added a statement that it had intended to rely on the Washington Supreme Court's opinion in *Northend Cinema, Inc. v. Seattle,* 90 Wash.2d 709, 585 P.2d 1153 (1978), cert. denied *sub nom. Apple Theatre, Inc. v. Seattle,* 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979), which upheld Seattle's zoning regulations against constitutional attack. Again, despite the suspicious coincidental timing of the amendment, the Court holds that "Renton was entitled to rely ... on the 'detailed findings' summarized in the ... *Northend Cinema* opinion." *Ante,* at 931. In *Northend Cinema,* the court noted that "[t]he record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." 90 Wash.2d, at 719, 585 P.2d, at 1159. The opinion however, does not explain the evidence it purports to summarize, and provides no basis for determining whether Seattle's experience is relevant to Renton's.

6 As the Court of Appeals observed:

> "Although the Renton ordinance *purports* to copy Detroit's and Seattle's, it does not solve the same problem in the same manner. The Detroit ordinance was intended to disperse adult theaters throughout the city so that no one district would deteriorate due to a concentration of such theaters. The Seattle ordinance, by contrast, was intended to *concentrate* the theaters in one place so that the whole city would not bear the effects of them. The Renton Ordinance is allegedly aimed at protecting certain uses—schools, parks, churches and residential areas—from the perceived unfavorable effects of an adult theater." 748 F.2d, at 536 (emphasis in original).

In sum, the circumstances here strongly suggest that the ordinance was designed to suppress expression, even that constitutionally protected, and thus was not to be analyzed as a content-neutral time, place, and manner restriction. The Court allows Renton to conceal its illicit motives, however, by reliance on the fact that other communities adopted similar restrictions. The Court's approach largely immunizes such measures from judicial scrutiny, since a municipality can readily find other municipal ordinances to rely upon, thus always retrospectively justifying special zoning regulations for adult theaters. [7] Rather than speculate about Renton's motives for adopting such measures, our cases require the conclusion that the ordinance, like any other content-based restriction on speech, is constitutional "only if the [city] can show ****937** that [it] is a precisely drawn means of serving a compelling [governmental] interest." *Consolidated Edison Co. v. Public Service Comm'n of N. Y.,* 447 U.S., at 540, 100 S.Ct., at 2334; see also *Carey v. Brown,* 447 U.S. 455, 461–462, 100 S.Ct. 2286, 2290–2291,

65 L.Ed.2d 263 (1980); *Police Department of Chicago v. Mosley,* 408 U.S. 92, 99, 92 S.Ct. 2286, 2292, 33 L.Ed.2d 212 (1972). Only this strict approach can insure that cities will not use their zoning powers as a pretext for suppressing constitutionally protected expression.

7 As one commentator has noted:

> "[A]nyone with any knowledge of human nature should naturally assume that the decision to adopt almost any content-based restriction might have been affected by an antipathy on the part of at least some legislators to the ideas or information being suppressed. The logical assumption, in other words, is not that there is not improper motivation but, rather, because legislators are only human, that there is a substantial risk that an impermissible consideration has in fact colored the deliberative process." Stone, *supra* n. 1, at 106.

***63** Applying this standard to the facts of this case, the ordinance is patently unconstitutional. Renton has not shown that locating adult movie theaters in proximity to its churches, schools, parks, and residences will necessarily result in undesirable "secondary effects," or that these problems could not be effectively addressed by less intrusive restrictions.

II

Even assuming that the ordinance should be treated like a content-neutral time, place, and manner restriction, I would still find it unconstitutional. "[R]estrictions of this kind are valid provided ... that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 648, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981). In applying this standard, the Court "fails to subject the alleged interests of the [city] to the degree of scrutiny required to ensure that expressive activity protected by the First Amendment remains free of unnecessary limitations." *Community for Creative Non-Violence,* 468 U.S., at 301, 104 S.Ct., at 3073 (MARSHALL, J., dissenting). The Court "evidently [and wrongly] assumes that the balance struck by [Renton] officials is deserving of deference so long as it does not appear to be tainted by content discrimination." *Id.,* at 315, 104 S.Ct., at 3080. Under a *proper* application of the relevant standards, the ordinance is clearly unconstitutional.

A

The Court finds that the ordinance was designed to further Renton's substantial interest in "preserv[ing] the quality of urban life." *Ante,* at 930. As explained above, the record here is simply insufficient to support this assertion. The city made no showing as to how uses "protected" by the ordinance would be affected by the presence of an adult movie theater. Thus, the Renton ordinance is clearly distinguishable from ***64** the Detroit zoning ordinance upheld in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). The Detroit ordinance, which was designed to disperse adult theaters throughout the city, was supported by the testimony of urban planners and real estate experts regarding the adverse effects of locating several such businesses in the same neighborhood. *Id.,* at 55, 96 S.Ct., at 2445; see also *Northend Cinema, Inc. v. Seattle,* 90 Wash.2d 709, 711, 585 P.2d 1153, 1154–1155 (1978), cert. denied *sub nom. Apple Theatre, Inc. v. Seattle,* 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979) (Seattle zoning ordinance was the "culmination of a long period of study and discussion"). Here, the Renton Council was aware only that some residents had complained about adult movie theaters, and that other localities had adopted special zoning restrictions for such establishments. These are not "facts" sufficient to justify the burdens the ordinance imposed upon constitutionally protected expression.

B

Finally, the ordinance is invalid because it does not provide for reasonable alternative avenues of communication. The District Court found that the ordinance left 520 acres in Renton available for adult theater sites, an area comprising about five ****938** percent of the city. However, the Court of Appeals found that because much of this land was already occupied, "[l]imiting adult theater uses to these areas is a substantial restriction on speech." 748 F.2d, at 534. Many "available" sites are also largely unsuited for use by movie theaters. See App. 231, 241. Again, these facts serve to distinguish this case from *American Mini Theaters,* where there was

no indication that the Detroit zoning ordinance seriously limited the locations available for adult businesses. See *American Mini Theaters, supra,* 427 U.S., at 71, n. 35, 96 S.Ct., at 2453 n. 35 (plurality opinion) ("The situation would be quite different if the ordinance had the effect of ... greatly restricting access to ... lawful speech"); see also *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1214 (CA5 1982) (ordinance effectively banned adult theaters ***65** by restricting them to " 'the most unattractive, inaccessible, and inconvenient areas of a city' "); *Purple Onion, Inc. v. Jackson,* 511 F.Supp. 1207, 1217 (ND Ga.1981) (proposed sites for adult entertainment uses were either "unavailable, unusable, or so inaccessible to the public that ... they amount to no locations").

Despite the evidence in the record, the Court reasons that the fact "[t]hat respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Ante,* at 932. However, respondents are not on equal footing with other prospective purchasers and lessees, but must conduct business under severe restrictions not imposed upon other establishments. The Court also argues that the First Amendment does not compel "the government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." *Ibid.* However, respondents do not ask Renton to guarantee low-price sites for their businesses, but seek only a reasonable opportunity to operate adult theaters in the city. By denying them this opportunity, Renton can effectively ban a form of protected speech from its borders. The ordinance "greatly restrict[s] access to ... lawful speech," *American Mini Theatres, supra,* 427 U.S., at 71, n. 35, 96 S.Ct., at 2453, n. 35 (plurality opinion), and is plainly unconstitutional.

All Citations

475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, 54 USLW 4160, 12 Media L. Rep. 1721

96 S.Ct. 2440
Supreme Court of the United States

Coleman A. YOUNG, Mayor the
City of Detroit, et al., Petitioners,
v.
AMERICAN MINI THEATRES, INC., et al.

No. 75-312.
|
Argued March 24, 1976.
|
Decided June 24, 1976.
|
Rehearing Denied Oct. 4, 1976.

See 429 U.S. 873, 97 S.Ct. 191.

The operator of an "adult" movie theater appealed from a ruling of the United States District Court for the Eastern District of Michigan, Southern Division, 373 F.Supp. 363, upholding the validity of Detroit ordinances prohibiting operation of any "adult" movie theater, bookstore and similar establishments within 1000 feet of any other such establishment, or within 500 feet of a residential area. The Court of Appeals, Sixth Circuit, reversed, 518 F.2d 1014. Following grant of certiorari, the Supreme Court, Mr. Justice Stevens, held that where theaters proposed to offer adult fare on regular basis and alleged that they admitted only adult patrons, and neither indicated any plan to exhibit pictures even arguably outside coverage of the ordinances, so that theaters were not affected by alleged vagueness, their challenge to ordinances on ground of alleged vagueness resulting in inadequate notice of what was prohibited would not be considered though ordinances affected communication protected by First Amendment. The ordinances were not violative of First Amendment rights or of the equal protection clause of the Fourteenth Amendment.

Judgment of Court of Appeals reversed.

Mr. Justice Powell filed an opinion concurring in part.

Mr. Justice Stewart dissented and filed opinion in which Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Blackmun joined.

Mr. Justice Blackmun dissented and filed opinion in which Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Marshall joined.

West Headnotes (13)

[1] Municipal Corporations
Proceedings to determine validity of ordinances

Where theaters proposed to offer adult fare on regular basis and alleged that they admitted only adult patrons, and neither indicated any plan to exhibit pictures even arguably outside coverage of municipal ordinances, so that theaters were not affected by alleged vagueness, their challenge to ordinances on ground of alleged vagueness resulting in inadequate notice of what was prohibited would not be considered though ordinances affected communication protected by First Amendment. U.S.C.A.Const. Amends. 1, 14.

91 Cases that cite this headnote

[2] Constitutional Law
Freedom of Speech, Expression, and Press

Where very existence of statute may cause persons not before court to refrain from engaging in constitutionally protected speech or expression, exception, in allowing litigant to assert rights of third parties, is justified by overriding importance of maintaining free and open market for interchange of ideas, but if deterrent effect of statute on legitimate expression is not both real and substantial and if statute is readily subject to narrowing construction by state courts, litigant is not permitted to assert rights of third parties. U.S.C.A.Const. Amends. 1, 14.

125 Cases that cite this headnote

[3] **Constitutional Law**
Hypothetical questions

There being less vital interest in uninhibited exhibition of material on borderline between pornography and artistic expression than in free dissemination of ideas of social and political significance, and where limited amount of uncertainty in ordinances was easily susceptible of narrowing construction, case was inappropriate one in which to adjudicate hypothetical claims of persons not before the court. U.S.C.A.Const. Amends. 1, 14.

29 Cases that cite this headnote

[4] **Zoning and Planning**
Entertainment and recreation;theaters

Municipality may control location of theaters as well as location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. U.S.C.A.Const. Amend. 1.

36 Cases that cite this headnote

[5] **Constitutional Law**
Prior restraints

Constitutional Law
Zoning and Land Use

Mere fact that commercial exploitation of material protected by First Amendment was subjected to zoning and other licensing requirements was not sufficient reason for invalidating city ordinances as prior restraints on free speech. U.S.C.A.Const. Amend. 1.

216 Cases that cite this headnote

[6] **Constitutional Law**
Reasonableness

Reasonable regulations of time, place and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by First Amendment. U.S.C.A.Const. Amend. 1.

111 Cases that cite this headnote

[7] **Constitutional Law**
Freedom of Speech, Expression, and Press

Question whether speech is, or is not, protected by First Amendment often depends on content of speech. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amend. 1.

8 Cases that cite this headnote

[8] **Constitutional Law**
Content-Based Regulations or Restrictions

Even within area of protected speech, difference in content may require a different governmental response. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amends. 1, 14.

8 Cases that cite this headnote

[9] **Constitutional Law**
Content-Based Regulations or Restrictions

General rule prohibits regulation based on content of protected communication, and essence of rule is need for absolute neutrality by government; its regulation of communication may not be affected by sympathy or hostility for point of view being expressed by communicator. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amends. 1, 14.

26 Cases that cite this headnote

[10] **Constitutional Law**
Difference in protection given to other speech

Measure of constitutional protection to be afforded commercial speech will surely be governed largely by content of communication; difference between commercial price and product advertising

and ideological communication permits regulation of former that First Amendment would not tolerate with respect to latter. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amends. 1, 14.

22 Cases that cite this headnote

[11] Constitutional Law

Motion Pictures and Videos

First Amendment protects communication, in area of motion picture films of sexual activities, from total suppression, but state may legitimately use contents of these materials as basis for placing them in different classification from other motion pictures. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amends. 1, 14.

105 Cases that cite this headnote

[12] Municipal Corporations

Nature and scope of power of municipality

City must be allowed reasonable opportunity to experiment with solutions to admittedly serious problems. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amends. 1, 14.

22 Cases that cite this headnote

[13] Constitutional Law

Adult uses

Zoning and Planning

Sexually-oriented businesses;nudity

In view of serious problems to which city's ordinances were addressed, in view of district court's finding that burden on First Amendment rights from enforcement of ordinances would be slight, and in view of factual basis, disclosed by record, for common council's conclusion that restriction imposed would have desired effect, city's interest in present and future character of its neighborhoods supported its classification of motion pictures, and, accordingly, zoning ordinances providing that adult motion picture theaters not be located within 1000 feet of two other regulated uses or within 500 feet of a residential area did not violate equal protection clause of Fourteenth Amendment. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amends. 1, 14.

480 Cases that cite this headnote

****2442** Syllabus [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***50** Respondent operators of two adult motion picture theaters brought this action against petitioner city officials for injunctive relief and a declaratory judgment of unconstitutionality regarding two 1972 Detroit zoning ordinances that amended an "Anti-Skid Row Ordinance" adopted 10 years earlier. The 1972 ordinances provide that an adult theater may not (apart from a special waiver) be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. The term "regulated uses" applies to 10 different kinds of establishments in addition to adult theaters, including adult book stores, cabarets, bars, taxi dance halls, and hotels. If the theater is used to present "material distinguished or characterized by an emphasis on matter depicting . . . 'Specified Sexual Activities' or 'Specified Anatomical Areas' " it is an "adult" establishment. The District Court upheld the ordinances, and granted petitioners' motion for summary judgment. The Court of Appeals ****2443** reversed, holding that the ordinances constituted a prior restraint on constitutionally protected communication and violated equal protection. Respondents, in addition to asserting the correctness of that court's ruling with respect to those constitutional issues, contend that the ordinances are void for vagueness. While not attacking the specificity of the definitions of sexual activities or anatomical areas, respondents maintain (1) that they cannot determine how much of the described activity may be permissible before an exhibition is "characterized by an emphasis" on such matter, and (2) that the ordinances do not specify

adequate procedures or standards for obtaining a waiver of the 1,000-foot restriction. Held:

1. The ordinances as applied to these respondents do not violate the Due Process Clause of the Fourteenth Amendment on the ground of vagueness. Pp. 2446-2448.

(a) Neither of the asserted elements of vagueness has affected these respondents, both of which propose to offer adult fare on a regular basis and allege no ground for claiming or anticipating any waiver of the 1,000-foot restriction. P. 2446.

***51** (b) T ordinances will have no demonstrably significant effect on the exhibition of films protected by the First Amendment. To the extent that any area of doubt exists as to the amount of sexually explicit activity that may be portrayed before material can be said to be "characterized by an emphasis" on such matter, there is no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." This would therefore be an inappropriate case to apply the principle urged by respondents that they be permitted to challenge the ordinances, not because their own rights of free expression are violated, but because of the assumption that the ordinances' very existence may cause others not before the court to refrain from constitutionally protected speech or expression. Pp. 2446-2448.

2. The ordinances are not invalid under the First Amendment as prior restraints on protected communication because of the licensing or zoning requirements. Though adult films may be exhibited commercially only in licensed theaters, that is also true of all films. That the place where films may be exhibited is regulated does not violate free expression, the city's interest in planning and regulating the use of property for commercial purposes being clearly adequate to support the locational restriction. P. 2448.

518 F.2d 1014, reversed.

Attorneys and Law Firms

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Stephen M. Taylor, Detroit, Mich., and John H. Weston for respondents.

Opinion

***52** Mr. Justice STEVENS delivered the opinion of the Court. **

** Part III of this opinion is joined by only THE CHIEF JUSTICE, Mr. Justice WHITE, and Mr. Justice REHNQUIST.

Zoning ordinances adopted by the city of Detroit differentiate between motion picture theaters which exhibit sexually explicit "adult" movies and those which do not. The principal question presented by this case is whether that statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment. [1]

1 "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." This Amendment is made applicable to the States by the Due Process Clause of the Fourteenth Amendment. Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697.

Effective November 2, 1972, Detroit adopted the ordinances challenged in this litigation. Instead of concentrating "adult" theaters in limited zones, these ordinances require that such theaters be dispersed. Specifically, an adult theater may not be located within 1,000 feet of any two other ****2444** "regulated uses" or within 500 feet of a residential area. [2] The term "regulated uses" includes 10 different kinds of establishments in addition to adult theaters. [3]

2 The District Court held that the original form of the 500-foot restriction was invalid because it was measured from "any building containing a residential, dwelling or rooming unit." The city did not appeal from that ruling, but adopted an amendment prohibiting the operation of an adult theater within 500 feet of any area zoned for residential use. The amended restriction is not directly challenged in this litigation.

3 In addition to adult motion picture theaters and "mini" theaters, which contain less than 50 seats, the regulated uses include adult bookstores; cabarets (group "D"); establishments for the sale of beer or intoxicating liquor for consumption on the premises; hotels or motels; pawnshops; pool or billiard halls;

public lodging houses; secondhand stores; shoeshine parlors; and taxi dance halls.

***53** The classification of a theater as "adult" is expressly predicated on the character of the motion pictures which it exhibits. If the theater is used to present "material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' "[4] it is an adult establishment.[5]

4 These terms are defined as follows:
"For the purpose of this Section, 'Specified Sexual Activities' is defined as:
"1. Human Genitals in a state of sexual stimulation or arousal;
"2. Acts of human masturbation, sexual intercourse or sodomy;
"3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.
"And 'Specified Anatomical Areas' is defined as:
"1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
"2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

5 There are three types of adult establishments bookstores, motion picture theaters, and mini motion picture theaters defined respectively as follows:
"Adult Book Store
"An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.
"Adult Motion Picture Theater
"An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below) for observation by patrons therein.
"Adult Mini Motion Picture Theater
"An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below), for observation by patrons therein."

***54** The 1972 ordinances were amendments to an "Anti-Skid Row Ordinance" which had been adopted 10 years earlier. At that time the Detroit Common Council made a finding that some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas.[6] The decision to add adult motion picture theaters and adult book stores to the list of businesses which, apart from a special waiver,[7] ****2445** could not be located within 1,000 feet of two other "regulated uses," was, in part, a response to the significant growth in the number ***55** of such establishments.[8] In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.

6 Section 66.000 of the Official Zoning Ordinance (1972) recited:
"In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i. e. not more than two such uses within one thousand feet of each other which would create such adverse effects)."

7 The ordinance authorizes the Zoning Commission to waive the 1,000-foot restriction if it finds:
"a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.
"b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.
"c) That the establishment of an additional regulated use in the area will not be contrary to any program of

neigh(bor)hood conservation nor will it interfere with any program of urban renewal.
"d) That all applicable regulations of this Ordinance will be observed."

8 A police department memorandum addressed to the assistant corporation counsel stated that since 1967 there had been an increase in the number of adult theaters in Detroit from 2 to 25, and a comparable increase in the number of adult book stores and other "adult-type businesses."

Respondents are the operators of two adult motion picture theaters. One, the Nortown, was an established theater which began to exhibit adult films in March 1973. The other, the Pussy Cat, was a corner gas station which was converted into a "mini theater," but denied a certificate of occupancy because of its plan to exhibit adult films. Both theaters were located within 1,000 feet of two other regulated uses and the Pussy Cat was less than 500 feet from a residential area. The respondents brought two separate actions against appropriate city officials, seeking a declaratory judgment that the ordinances were unconstitutional and an injunction against their enforcement. Federal jurisdiction was properly invoked [9] and the two cases were consolidated for decision. [10]

9 Respondents alleged a claim for relief under 42 U.S.C. s 1983, invoking the jurisdiction of the federal court under 28 U.S.C. s 1343(3).

10 Both cases were decided in a single opinion filed jointly by Judge Kennedy and Judge Gubow. Nortown Theatre v. Gribbs, 373 F.Supp. 363 (ED Mich.1974).

The District Court granted defendants' motion for summary judgment. 373 F.Supp. 363. On the basis of the reasons stated ***56** by the city for adopting the ordinances, the court concluded that they represented a rational attempt to preserve the city's neighborhoods. [11] The court analyzed and rejected respondents' argument that the definition and waiver provisions in the ordinances were impermissibly vague; it held that the disparate treatment of adult theaters and other theaters was justified by a compelling state interest and therefore did not violate the Equal Protection Clause; [12] and finally it concluded that the ****2446** regulation of the places where adult films could be shown did not violate the First Amendment. [13]

11 "When, as here, the City has stated a reason for adopting an ordinance which is a subject of legitimate concern, that statement of purpose is not subject to attack.
"Nor may the Court substitute its judgment for that of the Common Council of the City of Detroit as to the methods adopted to deal with the City's legitimate concern to preserve neighborhoods, so long as there is some rational relationship between the objective of the Ordinance and the methods adopted." Id., at 367.

12 "Because the Ordinances distinguish adult theatres and bookstores from ordinary theatres and bookstores on the basis of the content of their respective wares, the classification is one which restrains conduct protected by the First Amendment. See Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968). The appropriate standard for reviewing the classification, therefore, is a test of close scrutiny. Harper v. Virginia Board of Elections, 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Under this test, the validity of the classification depends on whether it is necessary to further a compelling State interest.
"The compelling State interest which the Defendants point to as justifying the restrictions on locations of adult theatres and bookstores is the preservation of neighborhoods, upon which adult establishments have been found to have a destructive impact. The affidavit of Dr. Mel Ravitz clearly establishes that the prohibition of more than one regulated use within 1000 feet is necessary to promote that interest. This provision therefore does not offend the equal protection clause." Id, at 369.

13 "Applying those standards to the instant case, the power to license and zone businesses and prohibit their location in certain areas is clearly within the constitutional power of the City. The government interest, i. e. the preservation and stabilization of neighborhoods in the City of Detroit, is unrelated to the suppression of free expression. First Amendment rights are indirectly related, but only in the sense that they cannot be freely exercised in specific locations. Plaintiffs would not contend that they are entitled to operate a theatre or bookstore, which are commercial businesses, in a residentially zoned area; nor could they claim the right to put on a performance for profit in a public street. Admittedly the regulation here is more restrictive, but it is of the same character." Id., at 371.

***57** The Court of Appeals reversed. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (CA6 1975). The majority opinion concluded that the ordinances imposed a prior restraint on constitutionally protected communication and therefore "merely establishing that they were designed to serve a compelling public interest" provided an insufficient justification for a classification of motion picture theaters on the basis of the content of the materials they purvey to the public.[14] Relying primarily on Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212, the court held the ordinance invalid under the Equal Protection Clause. Judge Celebrezze, in dissent, expressed ***58** the opinion that the ordinance was a valid " 'time, place and manner' regulation," rather than a regulation of speech on the basis of its content.[15]

14 "The City did not discharge its heavy burden of justifying the prior restraint which these ordinances undoubtedly impose by merely establishing that they were designed to serve a compelling public interest. Since fundamental rights are involved, the City had the further burden of showing that the method which it chose to deal with the problem at hand was necessary and that its effect on protected rights was only incidental. The City could legally regulate movie theatres and bookstores under its police powers by providing that such establishments be operated only in particular areas. . . . However, this ordinance selects for special treatment particular business enterprises which fall within the general business classifications permissible under zoning laws and classifies them as regulated uses solely by reference to the content of the constitutionally protected materials which they purvey to the public." 518 F.2d, at 1019-1020.

15 He stated in part:
"I do not view the 1000-foot provision as a regulation of speech on the basis of its content. Rather, it is a regulation of the right to locate a business based on the side-effects of its location. The interest in preserving neighborhoods is not a subterfuge for censorship." Id., at 1023.

Because of the importance of the decision, we granted certiorari, 423 U.S. 911, 96 S.Ct. 214, 46 L.Ed.2d 139.

As they did in the District Court, respondents contend (1) that the ordinances are so vague that they violate the Due Process Clause of the Fourteenth Amendment; (2) that they are invalid under the First Amendment as prior restraints on protected communication; and (3) that the classification of theaters on the basis of the content of their exhibitions violates the Equal Protection Clause of the Fourteenth Amendment. We consider their arguments in that order.

I

There are two parts to respondents' claim that the ordinances are too vague. They do not attack the specificity of the definition of "Specified Sexual Activities" or "Specified Anatomical Areas." They argue, however, that they cannot determine how much of the described activity may be permissible before the exhibition is "characterized by an emphasis" on such matter. In addition, they argue that the ordinances are vague because they do not specify adequate procedures or standards for obtaining a waiver of the 1,000-foot restriction.

[1] We find it unnecessary to consider the validity of either of these arguments in the abstract. For even if there may be some uncertainty about the effect of the ***59** ordinances on other litigants, they are unquestionably applicable to these respondents. The record indicates that both theaters ****2447** propose to offer adult fare on a regular basis.[16] Neither respondent has alleged any basis for claiming or anticipating any waiver of the restriction as applied to its theater. It is clear, therefore, that any element of vagueness in these ordinances has not affected these respondents. To the extent that their challenge is predicated on inadequate notice resulting in a denial of procedural due process under the Fourteenth Amendment, it must be rejected. Cf. Parker v. Levy, 417 U.S. 733, 754-757, 94 S.Ct. 2547, 2560-2562, 41 L.Ed.2d 439.

16 Both complaints allege that only adults are admitted to these theaters. Nortown expressly alleges that it "desires to continue exhibiting adult-type motion picture films at said theater." Neither respondent has indicated any plan to exhibit pictures even arguably outside the coverage of the ordinances.

[2] Because the ordinances affect communication protected by the First Amendment, respondents argue that they may raise the vagueness issue even though there is no uncertainty about the impact of the ordinances on their own rights. On several occasions we have determined that a defendant whose own speech was unprotected had standing to challenge the constitutionality of a statute which purported to prohibit protected speech, or even

speech arguably protected.[17] This exception ***60** from traditional rules of standing to raise constitutional issues has reflected the Court's judgment that the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression. See Broadrick v. Oklahoma, 413 U.S. 601, 611-614, 93 S.Ct. 2908, 2915-2917, 37 L.Ed.2d 830. The exception is justified by the overriding importance of maintaining a free and open market for the interchange of ideas. Nevertheless, if the statute's deterrent effect on legitimate expression is not "both real and substantial," and if the statute is "readily subject to a narrowing construction by the state courts," see Erznoznik v. City of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125, the litigant is not permitted to assert the rights of third parties.

17 "Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words.' Gooding v. Wilson, 405 U.S. 518, 520, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972). See Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. See Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); Shelton v. Tucker (364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)). Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct, see Grayned v. City of Rockford, supra, 408 U.S., at 114-121, 92 S.Ct., at 2302-2306; Cameron v. Johnson, 390 U.S., at 617-619, 88 S.Ct., at 1338, 1339; Zwickler v. Koota, 389 U.S. 241, 249-250, 88 S.Ct. 391, 396-397, 19 L.Ed.2d 444 (1967); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights. See Shuttlesworth v. Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); Cox v. Louisiana, 379 U.S. 536, 553-558, 85 S.Ct. 453, 463-466, 13 L.Ed.2d 471 (1965); Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938)." Broadrick v. Oklahoma, 413 U.S. 601, 612-613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830.

[3] We are not persuaded that the Detroit zoning ordinances will have a significant deterrent effect on the exhibition of films protected by the First Amendment. ***61** As already noted, the only vagueness in the ****2448** ordinances relates to the amount of sexually explicit activity that may be portrayed before the material can be said to "characterized by an emphasis" on such matter. For most films the question will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

The only area of protected communication that may be deterred by these ordinances comprises films containing material falling within the specific definitions of "Specified Sexual Activities" or "Specified Anatomical Areas." The fact that the First Amendment protects some, though not necessarily all, of that material from total suppression does not warrant the further conclusion that an exhibitor's doubts as to whether a borderline film may be shown in his theater, as well as in theaters licensed for adult presentations, involves the kind of threat to the free market in ideas and expression that justifies the exceptional approach to constitutional adjudication recognized in cases like Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22.

The application of the ordinances to respondents is plain; even if there is some area of uncertainty about their application in other situations, we agree with the District Court that respondents' due process argument must be rejected.

*62 II

Petitioners acknowledge that the ordinances prohibit theaters which are not licensed as "adult motion picture theaters" from exhibiting films which are protected by the First Amendment. Respondents argue that the ordinances are therefore invalid as prior restraints on free speech.

The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained.

[4] [5] It is true, however, that adult films may only be exhibited commercially in licensed theaters. But that is also true of all motion pictures. The city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances.

[6] Putting to one side for the moment the fact that adult motion picture theaters must satisfy a locational restriction not applicable to other theaters, we are also persuaded that the 1,000-foot restriction does not, in itself, create an impermissible restraint on protected communication. The city's interest in planning and regulating the use of property for commercial purposes *63 is clearly adequate to support that kind of restriction applicable to all theaters within the city limits. In short, apart from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited does not **2449 offend the First Amendment. [18] We turn, therefore, to the question whether the classification is consistent with the Equal Protection Clause.

18 Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment. See, E. g., Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (limitation on use of sound trucks); Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (ban on demonstrations in or near a courthouse with the intent to obstruct justice); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of the school session).

III

A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate, he said: "I disapprove of what you say, but I will defend to the death your right to say it." [19] The essence of that comment has been repeated time after time in our decisions invalidating attempts by the government to impose selective controls upon the dissemination of ideas.

19 S. Tallentrye, The Friends of Voltaire 199 (1907).

Thus, the use of streets and parks for the free expression of views on national affairs may not be conditioned upon the sovereign's agreement with what a speaker may intend to say. [20] Nor may speech be curtailed because it *64 invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger. [21] The sovereign's agreement or disagreement with the content of what a speaker has to say may not affect the regulation of the time, place, or manner of presenting the speech.

20 See Hague v. CIO, 307 U.S. 496, 516, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (opinion of Roberts, J.).

21 Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131.

If picketing in the vicinity of a school is to be allowed to express the point of view of labor, that means of expression in that place must be allowed for other points of view as well. As we said in Mosley :

"The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Cohen v. California, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 269-270, 84 S.Ct. 710, 720-721, 11 L.Ed.2d 686 (1964), and cases cited; NAACP v. Button, 371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963); Wood v. Georgia, 370 U.S. 375, 388-389, 82 S.Ct. 1364, 1371-1372, 8 L.Ed.2d 569 (1962); Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949); De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278 (1937). To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content ***65** would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan, supra*, 376 U.S., at 270, 84 S.Ct., at 721.

****2450** "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." 408 U.S., at 95-96, 92 S.Ct., at 2290. (Footnote omitted.)

This statement, and others to the same effect, read literally and without regard for the facts of the case in which it was made, would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication. But we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached. [22] When we review this Court's actual adjudications in the First Amendment area, we find this to have been the case ***66** with the stated principle that there may be no restriction whatever on expressive activity because of its content.

22 See E. g., Kastigar v. United States, 406 U.S. 441, 454-455, 92 S.Ct. 1653, 1661-1662, 32 L.Ed.2d 212; United Gas Imp. Co. v. Continental Oil Co., 381 U.S. 392, 404, 85 S.Ct. 1517, 1524, 14 L.Ed.2d 466.

[7] The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say. [23] Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected "fighting comment." [24] And in time of war "the publication of the sailing dates of transports or the number and location of troops" may unquestionably be restrained, see Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357, although publication of news stories with a different content would be protected.

23 See Bond v. Floyd, 385 U.S. 116, 133-134, 87 S.Ct. 339, 348, 17 L.Ed.2d 235; Harisiades v. Shaughnessy, 342 U.S. 580, 592, 72 S.Ct. 512, 520, 96 L.Ed. 586; Musser v. Utah, 333 U.S. 95, 99-101, 68 S.Ct. 397, 398-399, 92 L.Ed. 562.

24 In Chaplinsky v. New Hampshire, 315 U.S. 568, 574, 62 S.Ct. 766, 770, 86 L.Ed. 1031, we held that a statute punishing the use of "damned racketeer(s)" and "damned Fascist(s)" did not unduly impair liberty of expression.

[8] Even within the area of protected speech, a difference in content may require a different governmental response.

In New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, we recognized that the First Amendment places limitations on the States' power to enforce their libel laws. We held that a public official may not recover damages from a critic of his official conduct without proof of "malice" as specially defined in that opinion. [25] Implicit in the opinion is the assumption that if the content of the newspaper article had been different that is, if its subject matter had not been a public official a lesser standard of proof would have been adequate.

25 "Actual malice" is shown by proof that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S., at 280, 84 S.Ct., at 726.

[9] ***67** In a series of later cases, in which separate individual views were frequently stated, the Court addressed the broad problem of when the New York Times standard ****2451** of malice was required by the First Amendment. Despite a diversity of opinion on whether it was required only in cases involving public figures, or also in cases involving public issues, and on whether the character of the damages claim mattered, a common thread which ran through all the opinions was the assumption that the rule to be applied depended on the content of the communication. [26] But that assumption did not contradict the underlying reason for the rule which is generally described as a prohibition of regulation based on the content of protected communication. The essence of that rule is the need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator. [27] Thus, although ***68** the content of story must be examined to decide whether it involves a public figure or a public issue, the Court's application of the relevant rule may not depend on its favorable or unfavorable appraisal of that figure or that issue.

26 See, for example, the discussion of the " 'public or general interest' test" for determining the applicability of the New York Times standard in Gertz v. Robert Welch, Inc., 418 U.S. 323, 346, 94 S.Ct. 2997, 3010, 41 L.Ed.2d 789, and the reference, Id., at 348, 94 S.Ct., at 3011, to a factual misstatement "whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." The mere fact that an alleged defamatory statement is false does not, of course, place it completely beyond the protection of the First Amendment. "The First Amendment requires that we protect some falsehood in order to protect speech that matters." Id., at 341, 94 S.Ct. at 3007.

27 Thus, Professor Kalven wrote in The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup.Ct.Rev. 1, 29:
"(The Equal Protection Clause) is likely to provide a second line of defense for vigorous users of the public forum. If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached. The objection can then no longer be keyed to interferences with other uses of the public places, but would appear to implicate the kind of message that the groups were transmitting. The regulation would thus slip from the neutrality of time, place, and circumstance into a concern about content. The result is that equal-protection analysis in the area of speech issues would merge with considerations of censorship. And this is precisely what Mr. Justice Black argued in Cox :
" 'But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It is thus trying to prescribe by law what matters of public interest people it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form . . . ' (379 U.S., at 581, 85 S.Ct., at 453)."

[10] We have recently held that the First Amendment affords some protection to commercial speech. [28] We have also made it clear, however, that the content of a particular advertisement may determine the extent of its protection. A public rapid transit system may accept some advertisements and reject others. [29] A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere, [30] and regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive. [31] The measure of ****2452** constitutional protection ***69** to be afforded commercial speech will surely be governed largely by the content of the communication. [32]

28 Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346.

29 Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (product advertising accepted, while political cards rejected).

30 Markham Advertising Co. v. State, 73 Wash.2d 405, 439 P.2d 248 (1968), appeal dismissed for want of a substantial federal question, 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512.

31 In NLRB v. Gissel Packing Co., 395 U.S. 575, 617, 89 S.Ct. 1918, 1941, 23 L.Ed.2d 547, the Court upheld a federal statute which balanced an employer's free speech right to communicate with his employees against the employees' rights to associate freely by providing that the expression of " 'any views, argument, or opinion' " should not be " 'evidence of an unfair labor practice,' " So long as such expression contains " 'no threat of reprisal or force or promise of benefit' " which would involve interference, restraint, or coercion of employees in the exercise of their right to self-organization.
The power of the Federal Trade Commission to restrain misleading, as well as false, statements in labels and advertisements has long been recognized. See, E. g., Jacob Siegel Co. v. FTC, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888; FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485 (CA7 1975); E. F. Drew & Co. v. FTC, 235 F.2d 735, 740 (CA2 1956).

32 As Mr. Justice Stewart pointed out in Virginia Pharmacy Board v. Virginia Consumer Council, supra, 425 U.S., at 779, 96 S.Ct., at 1834 (concurring opinion), the "differences between commercial price and product advertising . . . and ideological communication" permits regulation of the former that the First Amendment would not tolerate with respect to the latter.

More directly in point are opinions dealing with the question whether the First Amendment prohibits the State and Federal Governments from wholly suppressing sexually oriented materials on the basis of their "obscene character." In Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, the Court upheld a conviction for selling to a minor magazines which were concededly not "obscene" if shown to adults. Indeed, the Members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution or exhibition of such materials to juveniles and unconsenting adults.[33] Surely the First Amendment does ***70** not foreclose such a prohibition;yet it is equally clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area.

33 In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 93 S.Ct. 2628, 2665, 37 L.Ed.2d 446, Mr. Justice Brennan, in a dissent joined by Mr. Justice Stewart and Mr. Justice Marshall, explained his approach to the difficult problem of obscenity under the First Amendment:
"I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material." Id., at 113, 93 S.Ct., at 2662.

Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.

[11] Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis ***71** for placing them in a different classification from other motion pictures.

[12] **[13]** The remaining question is whether the line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods. On this question we agree with the views expressed by District Judges Kennedy and Gubow. The record disclosed a factual basis for the Common Council's conclusion that this kind of restriction will have the ****2453** desired effect.[34] It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

34 The Common Council's determination was that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech. In contrast, in Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125, the justifications offered by the city rested primarily on the city's interest in protecting its citizens from exposure to unwanted, "offensive" speech. The only secondary effect relied on to support that ordinance was the impact on traffic an effect which might be caused by a distracting open-air movie even if it did not exhibit nudity.

Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited,[35] even though the determination of whether a ***72** particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures. We hold that the zoning ordinances requiring that adult ***73** motion picture theaters not be located within 1,000 feet of two other regulated uses does not violate the Equal Protection Clause of the Fourteenth Amendment.

35 The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that "(t)he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight." 373 F.Supp., at 370.

It should also be noted that the definitions of "Specified Sexual Activities" and "Specified Anatomical Areas" in the zoning ordinances, which require an emphasis on such matter and primarily concern conduct, are much more limited than the terms of the public nuisance ordinance involved in Erznoznik, supra, which broadly prohibited scenes which could not be deemed inappropriate even for juveniles.

"The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing Any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. See Ginsberg v. New York, supra. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S., at 213-214, 95 S.Ct., at 2274.

Moreover, unlike the ordinances in this case, the Erznoznik ordinance singled out movies "containing even the most fleeting and innocent glimpses of nudity . . . ." Id., at 214, 95 S.Ct., at 2275.

The Court's opinion in Erznoznik presaged our holding today by noting that the presumption of statutory validity "has less force when a classification turns on the subject matter of expression." Id., at 215, 95 S.Ct., at 2275. Respondents' position is that the presumption has no force, or more precisely, that any classification based on subject matter is absolutely prohibited.

The judgment of the Court of Appeals is

Reversed.

Mr. Justice POWELL, concurring in the judgment and portions of the opinion.

Although I agree with much of what is said in the Court's opinion, and concur in Parts I and II, my approach to the resolution of this case is sufficiently different to prompt me to write separately. [1] I view the **2454 case as presenting an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent.

[1] I do not think we need reach, nor am I inclined to agree with, the holding in Part III (and supporting discussion) that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression. I do not consider the conclusions in Part I of the opinion to depend on distinctions between protected speech.

I

One-half century ago this Court broadly sustained the power of local municipalities to utilize the then relatively novel concept of land-use regulation in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens. Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). The Court there noted the very practical consideration underlying the necessity for such power: "(W)ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." Id., at 386-387, 47 S.Ct., at 118. The Court also *74 laid out the general boundaries within which the zoning power may operate: Restrictions upon the free use of private land must find their justifications in "some aspect of the police power, asserted for the public welfare"; the legitimacy of any particular restriction must be judged with reference to all of the surrounding circumstances and conditions; and the legislative judgment is to control in cases in which the validity of a particular zoning regulation is "fairly debatable." Id., at 387, 388, 47 S.Ct., at 118.

In the intervening years zoning has become an accepted necessity in our increasingly urbanized society, and the types of zoning restrictions have taken on forms far more complex and innovative than the ordinance involved in Euclid. In Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), we considered an unusual regulation enacted by a small Long Island community in an apparent effort to avoid some of the unpleasantness of urban living. It restricted land use within the village to single-family dwellings and defined "family" in such a way that no more than two unrelated persons could inhabit the same house. We upheld this ordinance, noting that desires to avoid congestion and noise from both people and vehicles were "legitimate guidelines in a land-use project addressed to family needs" and that it was quite within the village's power to "make the area a sanctuary for people." Id., at 9, 94 S.Ct., at 1541.

II

Against this background of precedent, it is clear beyond question that the Detroit Common Council had broad regulatory power to deal with the problem that prompted enactment of the Anti-Skid Row Ordinance. As the Court notes, Ante, at 2444, and n. 6, the Council was motivated by its perception that the "regulated uses," when concentrated, worked a "deleterious effect upon the *75 adjacent areas" and could "contribute to the blighting or downgrading of the surrounding neighborhood." The purpose of preventing the deteriorationf commercial neighborhoods was certainly within the concept of the public welfare that defines the limits of the police power. See Berman v. Parker, 348 U.S. 26, 32-33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). Respondents apparently concede the legitimacy of the ordinance as passed in 1962, but challenge the amendments 10 years later that brought within its provisions adult theaters as well as adult bookstores and "topless" cabarets. Those amendments resulted directly from the Common Council's determination that the recent proliferation of these establishments and their tendency to cluster in certain parts of the city would have the adverse effect upon the surrounding areas that the ordinance was aimed at preventing.

Respondents' attack on the amended ordinance, insofar as it affects them, can be stated simply. Contending that it is the "character of the right, not of the limitation," which governs the standard of judicial review, see Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 322, 89 L.Ed. 430 (1945), and that zoning regulations therefore have no talismanic immunity from constitutional **2455 challenge, cf. New York Times Co. v. Sullivan, 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964), they argue that the 1972 amendments abridge First Amendment rights by restricting the places at which an

adult theater may locate on the basis of nothing more substantial than unproved fears and apprehensions about the effects of such a business upon the surrounding area. Cf., E. g., Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). And, even if Detroit's interest in preventing the deterioration of business areas is sufficient to justify the impact upon freedom of expression, the ordinance is nevertheless invalid because it impermissibly ***76** discriminates between types of theaters solely on the basis of their content. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

I reject respondents' argument for the following reasons.

III

This is the first case in this Court in which the interests in free expression protected by the First and Fourteenth Amendments have been implicated by a municipality's commercial zoning ordinances. Respondents would have us mechanically apply the doctrines developed in other contexts. But this situation is not analogous to cases involving expression in public forums or to those involving individual expression or, indeed, to any other prior case. The unique situation presented by this ordinance calls, as cases in this area so often do, for a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression.

Because a substantial burden rests upon the State when it would limit in any way First Amendment rights, it is necessary to identify with specificity the nature of the infringement in each case. The primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message. Vital to this concern is the corollary that there be full opportunity for everyone to receive the message. See, E. g., Whitney v. California, 274 U.S. 357, 377, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring); Cohen v. California, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971); Procunier v. Martinez, 416 U.S. 396, 408-409, 94 S.Ct. 1800, 1808-1809, 40 L.Ed.2d 224 (1974); Kleindienst v. Mandel, 408 U.S. 753, 762-765, 92 S.Ct. 2576, 2581-2582, 33 L.Ed.2d 683 (1972); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 763-765, 96 S.Ct. 1817, 1826-1827, 48 L.Ed.2d 346 (1976). Motion pictures, the medium of expression involved here, are fully within the protection of the First ***77** Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-503, 72 S.Ct. 777, 96 L.Ed. 1098 (1952). In the quarter century since *Burstyn* motion pictures and an analous medium, printed books, have been before this Court on many occasions, and the person asserting a First Amendment claim often has been a theater owner or a bookseller. Our cases reveal, however, that the central concern of the First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or a book might convey. Mr. Justice Douglas stated the core idea succinctly: "In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor." Superior Films v. Department of Education, 346 U.S. 587, 589, 74 S.Ct. 286, 287, 98 L.Ed. 329 (1954) (concurring opinion). In many instances, for example with respect to certain criminal statutes or censorship or licensing schemes, it is only the theater owner or the bookseller who can protect this interest. But the central First Amendment concern remains the need to maintain free access of the public to the expression. See, E. g., Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957); Smith v. California, 361 U.S. 147, 150, 153-154, 80 S.Ct. 215, 218-219, 4 L.Ed.2d 205 (1959); ****2456** Interstate Circuit v. Dallas, 390 U.S. 676, 683-684, 88 S.Ct. 1298, 1302-1303, 20 L.Ed.2d 225 (1968); compare Marcus v. Search Warrant, 367 U.S. 717, 736, 81 S.Ct. 1708, 1718, 6 L.Ed.2d 1127 (1961), and A Quantity of Books v. Kansas, 378 U.S. 205, 213, 84 S.Ct. 1723, 1727, 12 L.Ed.2d 809 (1964), with Heller v. New York, 413 U.S. 483, 491-492, 93 S.Ct. 2789, 2794, 37 L.Ed.2d 745 (1973); and cf. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70-71, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963).

In this case, there is no indication that the application of the Anti-Skid Row Ordinance to adult theaters has the effect of suppressing production of or, to any significant degree, restricting access to adult movies. The Nortown concededly will not be able to exhibit adult movies at its present location, and the ordinance limits the potential ***78** location of the proposed Pussy Cat. The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cas are legion that sustained zoning against claims of serious economic damage. See, E. g.,

Zahn v. Board of Public Works, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074 (1927).

The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them? On the record in this case, these inquiries must be answered in the negative. At most the impact of the ordinance on these interests is incidental and minimal. [2] Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them. The ordinance is addressed only to the places at which this type of ***79** expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message reach an audience. On the basis of the District Court's finding, Ante, at 2453, n. 35, it appears that if a sufficient market exists to support them the number of adult movie theaters in Detroit will remain approximately the same, free to purvey the same message. To be sure some prospective patrons may be inconvenienced by this dispersal. [3] But other patrons, depending upon where they live or work, may find it more convenient to view an adult movie when adult theaters are not concentrated in a particular section of the city.

2 The communication involved here is not a kind in which the content or effectiveness of the message depends in some measure upon where or how it is conveyed. Cf. Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); Police Dept. of Chicago v. Mosley, supra, 408 U.S. 92, 93, 92 S.Ct. 2286, 2288, 33 L.Ed.2d 212 (1972). There is no suggestion that the Nortown is, or that the Pussy Cat would be, anything more than a commercial purveyor. They do not profess to convey their own personal messages through the movies they show, so that the only communication involved is that contained in the movies themselves. Cf. United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968); Spence v. Washington, 418 U.S. 405, 409-411, 94 S.Ct. 2727, 2729-2730, 41 L.Ed.2d 842 (1974).

3 The burden, it should be noted, is no different from that imposed by more common ordinances that restrict to commercial zones of a city movie theaters generally as well as other types of businesses presenting similar traffic, parking, safety, or noise problems. After a half century of sustaining traditional zoning of this kind, there is no reason to believe this Court would invalidate such an ordinance as violative of the First Amendment. The only difference between such an ordinance and the Detroit ordinance lies in the reasons for regulating the location of adult theaters. The special public interest that supports this ordinance is certainly as substantial as the interests that support the normal area zoning to which all movie theaters, like other commercial establishments, long have been subject.

****2457** In these circumstances, it is appropriate to analyze the permissibility of Detroit's action under the four-part test of United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). Under that test, a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free ***80** expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Ibid.* The factual distinctions between a prosecution for destruction of a Selective Service registration certificate, as in *O'Brien*, and this case are substantial, but the essential weighing and balancing of competing interestare the same. Cf. Procunier v. Martinez, 416 U.S., at 409-412, 94 S.Ct., at 1809-1810.

There is, as noted earlier, no question that the ordinance was within the power of the Detroit Common Council to enact. See Berman v. Parker, 348 U.S., at 32, 75 S.Ct., at 102. Nor is there doubt that the interests furthered by this ordinance are both important and substantial. Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values. While I agree with respondents that no aspect of the police power enjoys immunity from searching constitutional scrutiny, it also is undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps "the most

essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." Village of Belle Terre v. Boraas, 416 U.S., at 13, 94 S.Ct., at 1543 (Marshall, J., dissenting).

The third and fourth tests of O'Brien also are met on this record. It is clear both from the chronology and from the facts that Detroit has not embarked on an effort to suppress free expression. The ordinance was already in existence, and its purposes clearly set out, for a full decade before adult establishments were brought under it. When this occurred, it is clear indeed it is not seriously challenged that the governmental interest prompting the inclusion in the ordinance of adult establishments was wholly unrelated to any suppression of ***81** free expression.[4] Nor is there reason to question ****2458** that the degree of incidental encroachment upon such expression was the minimum necessary to further the purpose ***82** of the ordinance. The evidence presented to the Common Council indicated that the urban deterioration was threatened, not by the concentration of *all* movie theaters with other "regulated uses," but only by a concentration of those that elected to specialize in adult movies.[5] The case would present a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas.[6]

4 Respondents attack the nature of the evidence upon which the Common Council acted in bringing adult entertainment establishments under the ordinance, and which petitioners submitted to the District Court in support of it. That evidence consisted of reports and affidavits from sociologists and urban planning experts, as well as some laymen, on the cycle of decay that had been started in areas of other cities, and that could be expected in Detroit, from the influx and concentration of such establishments. Respondents insist that a major part of that cycle is a kind of "self-fulfilling prophecy" in which a business establishment neighboring on several of the "regulated uses" perceives that the area is going downhill economically, and moves out, with the result that a less desirable establishment takes its place thus fulfilling the prophecy made by the more reputable business. As noted earlier, Supra, at 2454, respondents have tried to analogize these types of fears to the apprehension found insufficient in previous cases to justify stifling free expression. But cases like Cox and Terminiello, upon which respondents rely, involved individuals desiring to express Their own messages rather than commercial exhibitors of films or vendors of books. When an individual or a group of individuals is silenced, the message itself is silenced and free speech is stifled. In the context of movies and books, the more apt analogy to Cox or Terminiello would be the censorship cases, in which a State or a municipality attempted to suppress copies of particular works, or the licensing cases in which that danger was presented. But a zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression. Moreover, the Common Council did not inversely zone adult theaters in an effort to protect citizens against the Content of adult movies. If that had been its purpose, or the effect of the amendment to the ordinance, the case might be analogous to those cited by Mr. Justice STEWART's dissent, Post, at 2459. Moreover, an intent or purpose to restrict the communication itself because of its nature would make the O'Brien test inapplicable. See O'Brien, 391 U.S., at 382, 88 S.Ct., at 1681; Spence v. Washington, 418 U.S., at 414 n. 8, 94 S.Ct., at 2732; cf. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). But the Common Council simply acted to protect the economic integrity of large areas of its city against the effects of a predictable interaction between a concentration of certain businesses and the responses of people in the area. If it had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.

5 Respondents have argued that the Common Council should have restricted adult theaters' hours of operation or their exterior advertising instead of refusing to allow their clustering with other "regulated uses." Most of the ill effects, however, appear to result from the clustering itself rather than the operational characteristics of individual theaters. Moreover, the ordinance permits an exception to its 1,000-foot restriction in appropriate cases. See Ante, at 2444 n. 7.

6 In my view Mr. Justice STEWART's dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different

effects upon their surroundings. See n. 3, Supra. Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. See, E. g., Tinker v. Des Moines School Dist., 393 U.S. 503, 509-511, 89 S.Ct. 733, 737-739, 21 L.Ed.2d 731 (1969); Procunier v. Martinez, 416 U.S. 396, 413-414, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974); Greer v. Spock, 424 U.S. 828, 842-844, 96 S.Ct. 1211, 1219-1220, 47 L.Ed.2d 505 (1976) (Powell, J., concurring); cf. CSC v. Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). It is not analogous to Police Dept. of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), in which no governmental interest justified a distinction between the types of messages permitted in the public forum there involved.

***83** IV

The dissenting opinions perceive support for their position in Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). I believe this perception is a clouded one. The Jacksonville and Detroit ordinances are quite dissimilar, and our analysis of the infirmities of the former is inapplicable to the latter. In Erznoznik, an ordinance purporting to prevent a nuisance, not a comprehensive zoning ordinance, prohibited the showing of films containing nudity by drive-in theaters when the screens were visible from a public street or place. The governmental interests advanced as justifying the ordinance were three: (i) to protect citizens from unwilling exposure to possibly offensive material; (ii) to protect children from such materials; and (iii) to prevent the slowing of passing traffic and the likelihood of resulting accidents. We found the Jacksonville ordinance on its face either overbroad or underinclusive with respect to each of these asserted purposes. As to the first purpose, the ordinance was overbroad because it proscribed the showing of any nudity, however innocent or educational. Moreover, potential viewers who deemed particular nudity to be offensive were not captives; they had only to look elsewhere. Id., at 210-212, 95 S.Ct., at 2273-2274; see Cohen v. California, 403 U.S., at 21, 91 S.Ct., at 1786. As to minors the Jacksonville ordinance was overbroad because it "might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach." 422 U.S., at 213, 95 S.Ct., at 2275. Finally, the ****2459** ordinance was not rationally tailored to support its asserted purpose as a traffic regulation. By proscribing "even the most fleeting and innocent glimpses of nudity," it was strikingly underinclusive omitting "a wide variety ***84** of other scenes in the customary screen diet . . . (that) would be (no) less distracting to the passing motorist." *Id.*, at 214-215, 95 S.Ct., at 2275.

In sum, the ordinance in Erznoznik was a misconceived attempt directly to regulate content of expression. The Detroit zoning ordinance, in contrast, affects expression only incidentally and in furtherance of governmental interests wholly unrelated to the regulation of expression. At least as applied to respondents, it does not offend the First Amendment. Although courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression, it is clear that this is not such a case.

Mr. Justice STEWART, with whom Mr. Justice BRENNAN, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN join, dissenting.

The Court today holds that the First and Fourteenth Amendments do not prevent the city of Detroit from using a system of prior restraints and criminal sanctions to enforce content-based restrictions on the geographic location of motion picture theaters that exhibit nonobscene but sexually oriented films. I dissent from this drastic departure from established principles of First Amendment law.

This case does not involve a simple zoning ordinance, [1] or a content-neutral time, place, and manner restriction, [2] ***85** or a regulation of obscene expression or other speech that is entitled to less than the full protection of the First Amendment. [3] The kind of expression at issue here is no doubt objectionable to some, but that fact does not diminish its protected status any more than did the particular content of the "offensive" expression in Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (display of nudity on a drive-in movie screen); Lewis v. City of New Orleans, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (utterance of vulgar epithet); Hess v. Indiana, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (utterance of vulgar remark); Papish v. University of Missouri Curators, 410 U.S. 667, 93

S.Ct. 1197, 35 L.Ed.2d 618 (indecent remarks in campus newspaper); Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (wearing of clothing inscribed with a vulgar remark); Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (utterance of racial slurs); or Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (alluring portrayal of adultery as proper behavior).

[1] Contrast Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797, which upheld a zoning ordinance that restricted no substantive right guaranteed by the Constitution.

[2] Here, as in Police Dept. of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212, and Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125, the State seeks to impose a selective restraint on speech with a particular content. It is not all movie theaters which must comply with Ordinances No. 742-G and No. 743-G, but only those "used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' . . . ." The ordinances thus " 'sli(p) from the neutrality of time, place, and circumstance into a concern about content.' This is never permitted." Police Dept. of Chicago v. Mosley, supra, 408 U.S., at 99, 92 S.Ct., at 2292 (citation omitted). See, E. g., Hudgens v. NLRB, 424 U.S. 507, 520, 96 S.Ct. 1029, 1037, 47 L.Ed.2d 196; Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222.

[3] The regulatory scheme contains no provision for a judicial determination of obscenity. As the Court of Appeals correctly held, the material displayed must therefore, be presumed to be fully protected by the First Amendment. 518 F.2d 1014, 1019.

What this case does involve is the constitutional permissibility of selective interference with protected speech whose content is thought to produce distasteful effects. It is ****2460** elementary that a prime function of the First Amendment is to guard against just such interference.[4] By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment ***86** law, which require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience.[5] In place of these principles the Court invokes a concept wholly alien to the First Amendment. Since "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice," Ante, at 2452, the Court implies that these films are not entitled to the full protection of the Constitution. This stands "Voltaire's immortal comment," Ibid., on its head. For if the guarantees of the First Amendment were reserved for expression that more than a "few of us" would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty.[6]

[4] See, E. g., Terminiello v. Chicago, 337 U.S. 1, 4-5, 69 S.Ct. 894, 895-896, 93 L.Ed. 1131.

[5] See, E. g., Hudgens v. NLRB, supra; Erznoznik v. City of Jacksonville, supra; Police Dept. of Chicago v. Mosley, supra. This case does not involve state regulation narrowly aimed at preventing objectionable communication from being thrust upon an unwilling audience. See Erznoznik v. City of Jacksonville, supra, 422 U.S., at 209, 95 S.Ct., at 2272. Contrast Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770; Rowan v. Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736. Nor is the Detroit ordinance narrowly aimed at protecting children from exposure to sexually oriented displays that would not be judged obscene by adult standards. Contrast Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195.

[6] See, E. g., Terminiello v. Chicago, supra, 337 U.S., at 4-5, 69 S.Ct., at 895-896. The Court stresses that Detroit's content-based regulatory system does not preclude altogether the display of sexually oriented films. But, as the Court noted in a similar context in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448, this is constitutionally irrelevant, for " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " Id., at 556, 95 S.Ct., at 1245, quoting Schneider v. State, 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155. See also Interstate Circuit v. Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584.

***87** The fact that the "offensive" speech here may not address "important" topics "ideas of social and political

significance," in the Court's terminology, Ante, at 2447 does not mean that it is less worthy of constitutional protection. "Wholly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons." Winters v. New York, 333 U.S. 507, 528, 68 S.Ct. 665, 676, 92 L.Ed. 840 (Frankfurter, J., dissenting); accord, Cohen v. California, supra, 403 U.S., at 25, 91 S.Ct., at 1788. Moreover, in the absence of a judicial determination of obscenity, it is by no means clear that the speech is not "important" even on the Court's terms. "(S)ex and obscenity are not synonymous. . . . The portrayal of sex, E. g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." Roth v. United States, 354 U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 (footnotes omitted). See also Kingsley Pictures Corp. v. Regents, supra, 360 U.S., at 688-689, 79 S.Ct., at 1365.

I can only interpret today's decision as an aberration. The Court is undoubtedly sympathetic, as am I, to the well-intentioned efforts of Detroit to "clean up" its streets and prevent the proliferation of "skid rows." But it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height.

**2461 Heretofore, the Court has not shied from its responsibility to protect "offensive" speech from governmental interference. Just last Term in Erznoznik v. City of Jacksonville, supra, the Court held that a city could not, consistently with the First and Fourteenth Amendments, make it a public nuisance for a drive-in movie theater to show films containing nudity if the screen were visible *88 from a public street or place. The factual parallels between that case and this one are striking. There, as here, the ordinance did not forbid altogether the "distasteful" expression but merely required alteration in the physical setting of the forum. There, as here, the city's principal asserted interest was in minimizing the "undesirable" effects of speech having a particular content. And, most significantly, the particular content of the restricted speech at issue in Erznoznik precisely parallels the content restriction embodied in s 1 of Detroit's definition of "Specified Anatomical Areas." Compare Jacksonville Municipal Code s 330.313 with Detroit Ordinance No. 742-G, s 32.0007. In short, Erznoznik is almost on "all fours" with this case.

The Court must never forget that the consequences of rigorously enforcing the guarantees of the First Amendment are frequently unpleasant. Much speech that seems to be of little or no value will enter the market place of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom.

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN, Mr. Justice STEWART, and Mr. Justice MARSHALL join, dissenting.

I join Mr. Justice STEWART's dissent, and write separately to identify an independent ground on which, for me, the challenged ordinance is unconstitutional. That ground is vagueness.

I

We should put ourselves for a moment in the shoes of the motion picture exhibitor. Let us suppose that, having previously offered only a more innocuous fare, he *89 decides to vary it by exhibiting on certain days films from a series which occasionally deals explicitly with sex. The exhibitor must determine whether this places h theater into the "adult" class prescribed by the challenged ordinance. If the theater is within that class, it must be licensed, and it may be entirely prohibited, depending on its location.

"Adult" status Vel non depends on whether the theater is "used for presenting" films that are "distinguished or characterized by an emphasis on" certain specified activities, including sexual intercourse, or specified anatomical areas.[1] It will be simple enough, as the operator screens films, to tell when one of these areas or activities is being depicted, but if the depiction represents only a part of the films' subject matter, I am at a loss to know how he will tell whether they are "distinguished or characterized by an emphasis" on those areas and activities. The ordinance gives him no guidance. Neither does it instruct him on how to tell whether, assuming the films in question are thus "distinguished or characterized," his theater is being "used for presenting" such films. That phrase could mean Ever used, Often used, or Predominantly used, to name a few possibilities.

[1] See Ante, 2443-2445, and nn. 3-7. I reproduce, or cite specifically to, only those sections of the challenged ordinance that are not set out in the Court's opinion.

Let us assume the exhibitor concludes that the film series will render his showhouse an "adult" theater. He still must determine whether the operation of the theater is prohibited by virtue of there being two other "regulated uses" within 1,000 feet. His task of determining whether his own theater is "adult" is suddenly multiplied by however many neighbors he may have that arguably are within that same class. He must, in other ***90** words, know and ****2462** evaluate not only his own films, but those of any competitor within 1,000 feet. And neighboring theaters are not his only worry, since the list of regulated uses also includes "adult" bookstores, "Group 'D' Cabaret(s)," sellers of alcoholic beverages for consumption on the premises, hotels, motels, pawnshops, pool halls, public lodging houses, "secondhand stores," shoeshine parlors, and "taxi dance halls." The exhitor must master all these definitions. Some he will find very clear, of course; others less so. A neighboring bookstore is "adult," for example, if a "substantial or significant portion of its stock in trade" is "distinguished or characterized" in the same way as the films shown in an "adult" theater.

The exhibitor's compounded task of applying the statutory definitions to himself and his neighbors, furthermore, is an ongoing one. At any moment he could become a violator of the ordinance because some neighbor has slipped into a "regulated use" classification. He must know, for example, if the adjacent hotel has opened a bar or shoeshine "parlor" on the premises, though he may still be uncertain whether the hotel as a whole constitutes more than one "regulated use." He must also know the moment when the stock in trade of neighboring bookstores and theaters comes to be of such a character, and predominance, as to render them "adult." Lest he let down his guard, he should remember that if he miscalculates on any of these issues, he may pay a fine or go to jail. [2]

[2] Official Zoning Ordinance of Detroit s 69.000.

It would not be surprising if, under the circumstances, the exhibitor chose to forgo showing the film series altogether. Such deterrence of protected First Amendment activity in the "gray area" of a statute's possible ***91** coverage is, of course, one of the vices of vagueness. A second is the tendency of vague statutory standards to grant excessive and effectively unreviewable discretion to the officials who enforce those standards. That vice is also present here. It is present because the vague standards already described are left to the interpretation and application of law enforcement authorities. [3] It is introduced even more dangerously by the indefinite standards under which city officials are empowered to grant or deny licenses for "adult" theaters, and also waivers of the 1,000-foot rule. [4]

[3] A special opportunity for arbitrary or discriminatory application of the ordinance is apparently supplied by the operation of the 1,000-foot rule. Presumably, only one of three "regulated uses" within a 1,000-foot area must be eliminated in order for the remaining two to become legal. For all that appears from the ordinance, the choice of which use to eliminate is left entirely to the enforcement authorities.

[4] These two features of the ordinance constitute prior restraints and are challengeable on that ground alone. Cf. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). Since, for me, the most glaring defect in the operation of these restraints is the vagueness of the standards governing their applications, however, only the vagueness point is pursued here.

All "adult" theaters must be licensed, and licenses are dispensed by the mayor. The ordinance does not specify the criteria for licensing, except in one respect. The mayor is empowered to refuse an "adult" theater license, or revoke it at any time,
"upon proof submitted to him of the violation . . . , within the preceding two years, of any criminal statute . . . or (zoning) ordinance . . . which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." Code of Detroit s 5-2-3.

***92** If the operation of an "adult" theater would violate the 1,000-foot rule, the exhibitor must obtain the approval not only of the mayor but of the City Planning Commission, which is empowered to waive the rule. It may grant a waiver if it finds that the operation of an "adult" theater, in addition to satisfying several more definite criteria, "will not be contrary to the public interest or injurious to nearby properties," or violative of "the spirit and intent" of the ordinance.

**2463 II

Just the other day, in Hynes v. Mayor of Oradell, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976), we reaffirmed the principle that in the First Amendment area " 'government may regulate . . . only with narrow specificity,' " NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), avoiding the use of language that is so vague that "men of common intelligence must necessarily guess at its meaning." Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). In Hynes we invalidated for its vagueness an ordinance that required "Civic Groups and Organizations," and also anyone seeking to "call from house to house . . . for a recognized charitable . . . or . . . political campaign or cause," to register with the local police "for identification only." We found it intolerably unclear what "Groups and Organizations" were encompassed, what was meant by a "cause," and what was required by way of "identification." I fail to see how a statutory prohibition as difficult to understand and apply as the 1,000-foot rule for "adult" theaters can survive if the ordinance in Hynes could not.

The vagueness in the licensing and waiver standards of this ordinance is more pernicious still. The mayor's power to deny a license because of "flagrant disregard" for the "safety or welfare" of others is apparently exercisable only over those who have committed some *93 infraction within the previous two years, [5] but I do not see why even those persons should be subject to standardless licensing discretion of precisely the kind that this Court so many times has condemned. See *Shuttlesworth v. Birmingham,* 394 U.S. 147, 89 S.Ct. 935, 22.Ed.2d 162 (1969); Staub v. City of Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951); Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948); Schneider v. State, 308 U.S. 147, 163-164, 60 S.Ct. 146, 151-152, 84 L.Ed. 155 (1939); Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939); Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). For the exhibitor who must obtain a waiver of the 1,000-foot rule, the City Planning Commission likewise functions effectively as a censor, constrained only by its perception of the "public interest" and the "spirit and intent" of the ordinance. This Court repeatedly has invalidated such vague standards for prior approval of film exhibitions. See Interstate Circuit v. Dallas, 390 U.S. 676, 683, 88 S.Ct. 1298, 1302, 20 L.Ed.2d 225 (1968), and cases cited. [6] Indeed, a standard much like the waiver standardin *94 this case was the one found wanting in Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002, 96 L.Ed. 1359 (1952) (censor could ban films "of such character as to be prejudicial to the best interests of the people of said City").

5 The ordinance empowers the mayor to act "upon proof submitted to him of (a) violation." It is possible that he may entertain evidence not only of convictions but also of violations themselves, even though these have not been otherwise adjudicated. Whether legal infractions must be otherwise adjudicated or not, the mayor clearly retains the power to revoke a license for "flagrant disregard," should infractions occur at any time after the license's issuance.

6 Interstate Circuit disposes of any argument that excessively vague standards may be permitted here because the film exhibitions are not banned entirely, but merely prohibited in a particular place. The ordinance invalidated in Interstate Circuit required exhibitors to submit films for official determination whether persons under 16 should be excluded from the film exhibitions. It thus threatened the exhibitor with a loss of only part of his audience. The effect of the present ordinance is more severe, since if the exhibitor has only one theater, he is completely foreclosed. See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S., at 556 n. 8, 95 S.Ct., at 1245.

It is true that the mayor and the Planning Commission review the applications of theaters, rather than individual films. It might also be argued that at least if they adhere to the "spirit and intent" of the ordinance, their principal concern will be **2464 with the blighting of the cityscape, rather than that of the minds of their constituents. But neither of these aspects of the case alters its basic and dispositive facts: persons seeking to exhibit "adult," but protected, films must secure, in many cases, the prior approval of the mayor and City Planning Commission; they inevitably will make their decisions by reference to the content of the proposed exhibitions; they are not constrained in doing so by "narrowly drawn, reasonable and definite standards." Niemotko v. Maryland, 340 U.S., at 271, 71 S.Ct., at 327. This may be a permissible way to control pawnshops, pool halls, and the other "regulated uses" for which the ordinance was originally designed. It is not an acceptable

way, in the light of the First Amendment's presence, to decide who will be permitted to exhibit what films in what places.

III

The Court today does not really question these settled principles, or raise any doubt that if they were applied in this case, the challenged ordinance would not survive. The Court reasons, instead, that these principles need not be applied in this case because the plaintiffs themselves are clearly within the ordinance's proscriptions, and thus not affected by its vagueness. Our usual practice, as the Court notes, is to entertain facial challenges based on vagueness and overbreadth by anyone subject to a statute's proscription. The reasons given for departing ***95** from this practice are (1) that the ordinance will have no "significant deterrent effect on the exhibition of films protected by the First Amendment"; (2) that the ordinance is easily susceptible of "a narrowing construction"; and (3) that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." *Ante*, at 2447.

As to the first reason, I disagree on the facts, as is clear from the initial section of this opinion.[7] As to the second, no easy "narrowing construction" is proposed, and I doubt that one exists, particularly since (due to the operation of the 1,000-foot rule) not only the "used for presenting" and "characterized by an emphasis" language relating to "adult" theaters, and the "flagrant disregard" and "public interest" language of the licensing and waiver provisions, but also the definitions of Other regulated uses must all be reduced to specificity. See also Hynes v. Mayor of Oradell, 425 U.S., at 622, 96 S.Ct., at 1761. ("we are without power to remedy the (vagueness) defects by giving the ordinance constitutionally precise content").

[7] In Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), the case on which the Court relies for the proposition that only statutes having a "significant deterrent effect" may be facially challenged, such an effect in fact was found to exist. The ordinance there at issue prohibited drive-in theaters from exhibiting films in which nude parts of the human body would be "visible from any public street or public place." We perceived a "real and substantial" deterrent effect in the "unwelcome choice" to which the ordinance put exhibitors: "either (to) restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." Id., at 217, 95 S.Ct., at 2277. In the present case the second horn of the dilemma is even sharper: the construction (or acquisition) of an entirely new theater.

***96** As the third reason, that "adult" material is simply entitled to less protection, it certainly explains the lapse in applying settled vagueness principles, as indeed it explains this whole case. In joining Mr. Justice STEWART I have joined his forthright rejection of the notion that First Amendment protection is diminished for "erotic materials" that only a "few of us" see the need to protect.

We should not be swayed in this case by the characterization of the challenged ordinance as merely a "zoning" regulation, or by the "adult" nature of the affected material. By whatever name, this ordinance prohibits the showing of certain films in certain places, imposing criminal sanctions ****2465** for violation of the ban. And however distasteful we may suspect the films to be, we cannot approve their suppression without any judicial finding that they are obscene under this Court's carefully delineated and considered standards.

All Citations

427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, 1 Media L. Rep. 1151

111 S.Ct. 2456
Supreme Court of the United States

Michael BARNES, Prosecuting Attorney of St. Joseph County, Indiana, et al.
v.
GLEN THEATRE, INC., et al.

No. 90–26.
|
Argued Jan. 8, 1991.
|
Decided June 21, 1991.

Establishments wishing to provide totally nude dancing as entertainment and individual dancers employed at establishments brought suit to enjoin enforcement of Indiana public indecency statute which required dancers to wear pasties and a G-string, asserting that statute violated the First Amendment. The United States District Court for the Northern District of Indiana, 726 F.Supp. 728, permanently enjoined enforcement. The Court of Appeals for the Seventh Circuit, 802 F.2d 287, reversed and remanded. On remand, the District Court, 695 F.Supp. 414, found that nude dancing in question was not protected by the First Amendment. On appeal, the Court of Appeals, 887 F.2d 826, reversed and remanded. Opinion was vacated and rehearing en banc granted. The Court of Appeals, 904 F.2d 1081, reversed. After granting certiorari, the Supreme Court, Chief Justice Rehnquist, held that enforcement of public indecency statute to require that dancers at adult entertainment establishments wear pasties and a G-string did not violate the First Amendment.

Reversed.

Justices Scalia and Souter filed opinions concurring in the judgment.

Justice White filed dissenting opinion, in which Justices Marshall, Blackmun, and Stevens joined.

West Headnotes (3)

[1] **Constitutional Law**
Bookstores
Constitutional Law
Cabarets, Discotheques, Dance Halls, and Nightclubs in General

Totally nude dancing as sought to be performed in lounge presenting "go-go dancing," and in adult "bookstore," was expressive conduct within the outer perimeters of the First Amendment, although only marginally so. (Per Chief Justice Rehnquist, with two Justices concurring, and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1.

279 Cases that cite this headnote

[2] **Constitutional Law**
Conduct, protection of
Constitutional Law
Exercise of police power;relationship to governmental interest or public welfare
Constitutional Law
Narrow tailoring

Government regulation of expressive conduct is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to furtherance of that interest. (Per Chief Justice Rehnquist, with two Justices concurring, and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1.

151 Cases that cite this headnote

[3] **Constitutional Law**
Nude or semi-nude dancing
Obscenity

Exhibitions and performances

Enforcement of Indiana's public indecency law to require nude dancers in adult entertainment establishments to wear pasties and any G-string did not violate the First Amendment's guarantee of freedom of expression; statute was clearly within state's constitutional power, it furthered substantial governmental interest in protecting societal order and morality, governmental interest was unrelated to suppression of free expression, and incidental restriction on First Amendment freedom was no greater than was essential to furtherance of the governmental interest. (Per Chief Justice Rehnquist, with two Justices concurring, and two Justices concurring in the judgment.) West's A.I.C. 35–45–4–1; U.S.C.A. Const.Amend. 1.

455 Cases that cite this headnote

**2457 *560 *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondents, two Indiana establishments wishing to provide totally nude dancing as entertainment and individual dancers employed at those establishments, brought suit in the District Court to enjoin enforcement of the state public indecency law—which requires respondent dancers to wear pasties and G-strings—asserting that the law's prohibition against total nudity in public places violates the First Amendment. The court held that the nude dancing involved here was not expressive conduct. The Court of Appeals reversed, ruling that nonobscene nude dancing performed for entertainment is protected expression, and that the statute was an improper infringement of that activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers.

Held: The judgment is reversed.

904 F.2d 1081 (CA9 1990), reversed.

The Chief Justice, joined by Justice O'CONNOR and Justice KENNEDY, concluded that the enforcement of Indiana's public indecency law to prevent totally nude dancing does not violate the First Amendment's guarantee of freedom of expression. Pp. 2460–2463.

(a) Nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, although only marginally so. See, *e.g., Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648. P. 2460.

(b) Applying the four-part test of *United States v. O'Brien,* 391 U.S. 367, 376–377, 88 S.Ct. 1673, 1678–1679, 20 L.Ed.2d 672—which rejected the contention that symbolic speech is entitled to full First Amendment protection—the statute is justified despite its incidental limitations on some expressive activity. The law is clearly within the State's constitutional power. And it furthers a substantial governmental interest in protecting societal order and morality. Public indecency statutes reflect moral disapproval of people appearing in the nude among strangers in public places, and this particular law follows a line of state laws, dating back to 1831, banning public nudity. The States' traditional police power is defined as the authority to provide for the public health, safety, and morals, and such a basis for legislation ***561** has been upheld. See, *e.g., Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446. This governmental interest is unrelated to the suppression of free expression, since public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity. The law does not proscribe nudity in these establishments because the dancers are conveying an erotic message. To the contrary, an erotic performance may be presented without ****2458** any state interference, so long as the performers wear a scant amount of clothing. Finally, the incidental restriction on First Amendment freedom is no greater than is essential to the furtherance of the governmental interest. Since the statutory prohibition is not a means to some greater end, but an end itself, it is without cavil that the statute is narrowly tailored. Pp. 2460–2463.

Justice SCALIA concluded that the statute—as a general law regulating conduct and not specifically directed at expression, either in practice or on its face—is not

subject to normal First Amendment scrutiny and should be upheld on the ground that moral opposition to nudity supplies a rational basis for its prohibition. Cf. *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876. There is no intermediate level of scrutiny requiring that an incidental restriction on expression, such as that involved here, be justified by an important or substantial governmental interest. Pp. 2463–2467.

Justice SOUTER, agreeing that the nude dancing at issue here is subject to a degree of First Amendment protection, and that the test of *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, is the appropriate analysis to determine the actual protection required, concluded that the State's interest in preventing the secondary effects of adult entertainment establishments—prostitution, sexual assaults, and other criminal activity—is sufficient under *O'Brien* to justify the law's enforcement against nude dancing. The prevention of such effects clearly falls within the State's constitutional power. In addition, the asserted interest is plainly substantial, and the State could have concluded that it is furthered by a prohibition on nude dancing, even without localized proof of the harmful effects. See *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 50, 51, 106 S.Ct. 925, 930, 930, 89 L.Ed.2d 29. Moreover, the interest is unrelated to the suppression of free expression, since the pernicious effects are merely associated with nude dancing establishments and are not the result of the expression inherent in nude dancing. *Id.,* at 48, 106 S.Ct., at 929. Finally, the restriction is no greater than is essential to further the governmental interest, since pasties and a G-string moderate expression to a minor degree when measured against the dancer's remaining capacity and opportunity to express an erotic message. Pp. 2468–2471.

***562** REHNQUIST, C.J., announced the judgment of the Court and delivered an opinion, in which O'CONNOR and KENNEDY, JJ., joined. SCALIA, J., *post,* p. 2463, and SOUTER, J., *post,* p. 2468, filed opinions concurring in the judgment. WHITE, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post,* p. 2471.

Attorneys and Law Firms

Wayne E. Uhl, Deputy Attorney General of Indiana, argued the cause for petitioners. With him on the briefs was *Linley E. Pearson,* Attorney General.

Bruce J. Ennis, Jr., argued the cause for respondents. *Lee J. Klein* and *Bradley J. Shafer* filed a brief for respondents Glen Theatre, Inc., et al. *Patrick Louis Baude* and *Charles A. Asher* filed a brief for respondents Darlene Miller et al.*

*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Robert K. Corbin,* Attorney General of Arizona, and *Steven J. Twist,* Chief Assistant Attorney General, *Clarine Nardi Riddle,* Attorney General of Connecticut, and *John J. Kelly,* Chief State's Attorney, *William L. Webster,* Attorney General of Missouri, *Lacy H. Thornburg,* Attorney General of North Carolina, and *Rosalie Simmonds Ballentine,* Acting Attorney General of the Virgin Islands; for the American Family Association, Inc., et al. by *Alan E. Sears, James Mueller,* and *Peggy M. Coleman;* and for the National Governors' Association et al. by *Benna Ruth Solomon* and *Peter Buscemi.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Spencer Neth, Thomas D. Buckley, Jr., Steven R. Shapiro,* and *John A. Powell;* for the Georgia on Premise & Lounge Association, Inc., by *James A. Walrath;* for People for the American Way et al. by *Timothy B. Dyk, Robert H. Klonoff, Patricia A. Dunn, Elliot M. Mincberg, Stephen F. Rohde,* and *Mary D. Dorman.*

James J. Clancy filed a brief *pro se* as *amicus curiae.*

Opinion

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondents are two establishments in South Bend, Indiana, that wish to provide totally nude dancing as entertainment, and individual dancers who are employed at these ***563** establishments. They claim that the First Amendment's guarantee of freedom of expression prevents the State of Indiana from enforcing its public indecency law to prevent this form of dancing. We reject their claim.

The facts appear from the pleadings and findings of the District Court and are uncontested here. The Kitty Kat

Lounge, Inc. (Kitty Kat), is located in the city of South Bend. It sells alcoholic beverages and presents "go-go dancing." Its proprietor desires to present "totally nude dancing," but an applicable Indiana statute regulating public nudity requires that the dancers wear "pasties" **2459 and "G-strings" when they dance. The dancers are not paid an hourly wage, but work on commission. They receive a 100 percent commission on the first $60 in drink sales during their performances. Darlene Miller, one of the respondents in the action, had worked at the Kitty Kat for about two years at the time this action was brought. Miller wishes to dance nude because she believes she would make more money doing so.

Respondent Glen Theatre, Inc., is an Indiana corporation with a place of business in South Bend. Its primary business is supplying so-called adult entertainment through written and printed materials, movie showings, and live entertainment at an enclosed "bookstore." The live entertainment at the "bookstore" consists of nude and seminude performances and showings of the female body through glass panels. Customers sit in a booth and insert coins into a timing mechanism that permits them to observe the live nude and seminude dancers for a period of time. One of Glen Theatre's dancers, Gayle Ann Marie Sutro, has danced, modeled, and acted professionally for more than 15 years, and in addition to her performances at the Glen Theatre, can be seen in a pornographic movie at a nearby theater. App. to Pet. for Cert. 131–133.

Respondents sued in the United States District Court for the Northern District of Indiana to enjoin the enforcement of the Indiana public indecency statute, *564 Ind.Code § 35–45–4–1 (1988), asserting that its prohibition against complete nudity in public places violated the First Amendment. The District Court originally granted respondents' prayer for an injunction, finding that the statute was facially overbroad. The Court of Appeals for the Seventh Circuit reversed, deciding that previous litigation with respect to the statute in the Supreme Court of Indiana and this Court precluded the possibility of such a challenge,[1] and remanded to the District Court in order for the plaintiffs to pursue their claim that the statute violated the First Amendment as applied to their dancing. *Glen Theatre, Inc. v. Pearson,* 802 F.2d 287, 288–290 (1986). On remand, the District Court concluded that *565 "the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States," and rendered judgment in favor of the defendants. *Glen Theatre, Inc. v. Civil City of South Bend,* 695 F.Supp. 414, 419 (1988). The case was again appealed to the Seventh Circuit, and a panel of that court reversed the District Court, holding that the nude dancing involved here was expressive conduct protected by the First Amendment. **2460 *Miller v. Civil City of South Bend,* 887 F.2d 826 (1989). The Court of Appeals then heard the case en banc, and the court rendered a series of comprehensive and thoughtful opinions. The majority concluded that nonobscene nude dancing performed for entertainment is expression protected by the First Amendment, and that the public indecency statute was an improper infringement of that expressive activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers. *Miller v. Civil City of South Bend,* 904 F.2d 1081 (1990). We granted certiorari, 498 U.S. 807, 111 S.Ct. 38, 112 L.Ed.2d 15 (1990), and now hold that the Indiana statutory requirement that the dancers in the establishments involved in this case must wear pasties and G-strings does not violate the First Amendment.

1 The Indiana Supreme Court appeared to give the public indecency statute a limiting construction to save it from a facial overbreadth attack:

> "There is no right to appear nude in public. Rather, it *may* be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *State v. Baysinger,* 272 Ind. 236, 247, 397 N.E.2d 580, 587 (1979) (emphasis added), appeals dism'd *sub nom. Clark v. Indiana,* 446 U.S. 931, 100 S.Ct. 2146, 64 L.Ed.2d 783, and *Dove v. Indiana,* 449 U.S. 806, 101 S.Ct. 52, 66 L.Ed.2d 10 (1980).

Five years after *Baysinger,* however, the Indiana Supreme Court reversed a decision of the Indiana Court of Appeals holding that the statute did "not apply to activity such as the theatrical appearances involved herein, which may not be prohibited absent a finding of obscenity," in a case involving a partially nude dance in the "Miss Erotica of Fort Wayne" contest. *Erhardt v. State,* 468 N.E.2d 224 (Ind.1984). The Indiana Supreme Court did not discuss the constitutional issues beyond a cursory comment that the statute had been upheld against constitutional attack in *Baysinger,* and Erhardt's conduct fell within the statutory prohibition. Justice Hunter dissented, arguing that "a public indecency statute which prohibits nudity in any public place is unconstitutionally overbroad. My

reasons for so concluding have already been articulated in *State v. Baysinger,* (1979) 272 Ind. 236, 397 N.E.2d 580 (Hunter and DeBruler, JJ., dissenting)." 468 N.E.2d at 225–226. Justice DeBruler expressed similar views in his dissent in *Erhardt. Id.,* at 226. Therefore, the Indiana Supreme Court did not affirmatively limit the reach of the statute in *Baysinger,* but merely said that to the extent the First Amendment would require it, the statute might be unconstitutional as applied to some activities.

[1] Several of our cases contain language suggesting that nude dancing of the kind involved here is expressive conduct protected by the First Amendment. In *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975), we said: "[A]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue,* 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." In *Schad v. Mount Ephraim,* 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981), we said that "[f]urthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation" (citations omitted). These statements support the conclusion of the Court of Appeals ***566** that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so. This, of course, does not end our inquiry. We must determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity.

Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board. The Supreme Court of Indiana has construed the Indiana statute to preclude nudity in what are essentially places of public accommodation such as the Glen Theatre and the Kitty Kat Lounge. In such places, respondents point out, minors are excluded and there are no nonconsenting viewers. Respondents contend that while the State may license establishments such as the ones involved here, and limit the geographical area in which they do business, it may not in any way limit the performance of the dances within them without violating the First Amendment. The petitioners contend, on the other hand, that Indiana's restriction on nude dancing is a valid "time, place, or manner" restriction under cases such as *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

The "time, place, or manner" test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a "public forum," *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989), although we have on at least one occasion applied it to conduct occurring on private property. See *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). In *Clark* we observed that this test has been interpreted to embody much the same standards as those set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and we turn, therefore, to the rule enunciated in *O'Brien.*

[2] O'Brien burned his draft card on the steps of the South Boston Courthouse in the presence of a sizable crowd, and ***567** was convicted ****2461** of violating a statute that prohibited the knowing destruction or mutilation of such a card. He claimed that his conviction was contrary to the First Amendment because his act was "symbolic speech"—expressive conduct. The Court rejected his contention that symbolic speech is entitled to full First Amendment protection, saying:

"[E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is

no greater than is essential to the furtherance of that interest." *Id.,* at 376–377, 88 S.Ct., at 1678–1679 (footnotes omitted).

[3] Applying the four-part *O'Brien* test enunciated above, we find that Indiana's public indecency statute is justified despite its incidental limitations on some expressive activity. The public indecency statute is clearly within the constitutional power of the State and furthers substantial governmental interests. It is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted ***568** this statute, for Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose. Nonetheless, the statute's purpose of protecting societal order and morality is clear from its text and history. Public indecency statutes of this sort are of ancient origin and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common law, and this Court recognized the common-law roots of the offense of "gross and open indecency" in *Winters v. New York,* 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948). Public nudity was considered an act *malum in se. Le Roy v. Sidley,* 1 Sid. 168, 82 Eng.Rep. 1036 (K.B.1664). Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places.

This public indecency statute follows a long line of earlier Indiana statutes banning all public nudity. The history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition. At least as early as 1831, Indiana had a statute punishing "open and notorious lewdness, or ... any grossly scandalous and public indecency." Rev.Laws of Ind., ch. 26, § 60 (1831); Ind.Rev.Stat., ch. 53, § 81 (1834). A gap during which no statute was in effect was filled by the Indiana Supreme Court in *Ardery v. State,* 56 Ind. 328 (1877), which held that the court could sustain a conviction for exhibition of "privates" in the presence of others. The court traced the offense to the Bible story of Adam and Eve. *Id.,* at 329–330. In 1881, a statute was enacted that would remain essentially unchanged for nearly a century:

> "Whoever, being over fourteen years of age, makes an indecent exposure of his person in a public place, or in any place where there are other persons to be offended or annoyed thereby, ... is guilty of ****2462** public indecency...." 1881 Ind.Acts, ch. 37, § 90.

***569** The language quoted above remained unchanged until it was simultaneously repealed and replaced with the present statute in 1976. 1976 Ind.Acts, Pub.L. 148, Art. 45, ch. 4, § 1. [2]

2 Indiana Code § 35–45–4–1 (1988) provides:

> "Public indecency; indecent exposure
>
> "Sec. 1. (a) A person who knowingly or intentionally, in a public place:
>
> "(1) engages in sexual intercourse;
>
> "(2) engages in deviate sexual conduct;
>
> "(3) appears in a state of nudity; or
>
> "(4) fondles the genitals of himself or another person;
>
> commits public indecency, a Class A misdemeanor.
>
> "(b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state."

This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation. In *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446 (1973), we said:

> "In deciding *Roth* [*v. United States,* 354 U.S. 476 [77 S.Ct. 1304, 1 L.Ed.2d 1498] (1957)], this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' [*Id.*], at 485 [77 S.Ct., at 1309]." (Emphasis omitted.)

And in *Bowers v. Hardwick,* 478 U.S. 186, 196, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986), we said:

> "The law, however, is constantly based on notions of morality, and if all laws representing essentially

> moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."

Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.

***570** This interest is unrelated to the suppression of free expression. Some may view restricting nudity on moral grounds as necessarily related to expression. We disagree. It can be argued, of course, that almost limitless types of conduct—including appearing in the nude in public—are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct" in *O'Brien,* saying:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S., at 376, 88 S.Ct., at 1678.

And in *Dallas v. Stanglin,* 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989), we further observed:

> "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons coming together to engage in recreational dancing—is not protected by the First Amendment." *Id.,* at 25, 109 S.Ct., at 1595.

Respondents contend that even though prohibiting nudity in public generally may not be related to suppressing expression, prohibiting the performance of nude dancing is related to expression because the State seeks to prevent its erotic message. Therefore, they reason that the application of the Indiana statute to the nude dancing in this case violates the First Amendment, because it fails the third part of the *O'Brien* test, viz: ****2463** the governmental interest must be unrelated to the suppression of free expression.

But we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers. ***571** Presumably numerous other erotic performances are presented at these establishments and similar clubs without any interference from the State, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.

This conclusion is buttressed by a reference to the facts of *O'Brien.* An Act of Congress provided that anyone who knowingly destroyed a Selective Service registration certificate committed an offense. O'Brien burned his certificate on the steps of the South Boston Courthouse to influence others to adopt his antiwar beliefs. This Court upheld his conviction, reasoning that the continued availability of issued certificates served a legitimate and substantial purpose in the administration of the Selective Service System. O'Brien's deliberate destruction of his certificate frustrated this purpose and "[f]or this noncommunicative impact of his conduct, and for nothing else, he was convicted." 391 U.S., at 382, 88 S.Ct., at 1682. It was assumed that O'Brien's act in burning the certificate had a communicative element in it sufficient to bring into play the First Amendment, *id.,* at 376, 88 S.Ct., at 1682, but it was for the noncommunicative element that he was prosecuted. So here with the Indiana statute; while the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.

The fourth part of the *O'Brien* test requires that the incidental restriction on First Amendment freedom be no greater than is essential to the furtherance of the governmental interest. As indicated in the discussion above, the ***572** governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and G-strings is modest,

and the bare minimum necessary to achieve the State's purpose.

The judgment of the Court of Appeals accordingly is

Reversed.

Justice SCALIA, concurring in the judgment.
I agree that the judgment of the Court of Appeals must be reversed. In my view, however, the challenged regulation must be upheld, 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.

I

Indiana's public indecency statute provides:

> "(a) A person who knowingly or intentionally, in a public place:
>
> "(1) engages in sexual intercourse;
>
> "(2) engages in deviate sexual conduct;
>
> "(3) appears in a state of nudity; or
>
> "(4) fondles the genitals of himself or another person;
>
> commits public indecency, a Class A misdemeanor.
>
> ****2464** "(b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state." Ind.Code § 35–45–4–1 (1988).

On its face, this law is not directed at expression in particular. As Judge Easterbrook put it in his dissent below: "Indiana ***573** does not regulate dancing. It regulates public nudity.... Almost the entire domain of Indiana's statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech." *Miller v. Civil City of South Bend,* 904 F.2d 1081, 1120 (CA7 1990). The intent to convey a "message of eroticism" (or any other message) is not a necessary element of the statutory offense of public indecency; nor does one commit that statutory offense by conveying the most explicit "message of eroticism," so long as he does not commit any of the four specified acts in the process. [1]

[1] Respondents assert that the statute cannot be characterized as a general regulation of conduct, unrelated to suppression of expression, because one defense put forward in oral argument below by the attorney general referred to the "message of eroticism" conveyed by respondents. But that argument seemed to go to whether the statute could constitutionally be applied to the present performances, rather than to what was the purpose of the legislation. Moreover, the State's argument below was in the alternative: (1) that the statute does not implicate the First Amendment because it is a neutral rule not directed at expression, and (2) that the statute in any event survives First Amendment scrutiny because of the State's interest in suppressing nude barroom dancing. The second argument can be claimed to contradict the first (though I think it does not); but it certainly does not waive or abandon it. In any case, the clear purpose shown by both the text and historical use of the statute cannot be refuted by a litigating statement in a single case.

Indiana's statute is in the line of a long tradition of laws against public nudity, which have never been thought to run afoul of traditional understanding of "the freedom of speech." Public indecency—including public nudity—has long been an offense at common law. See 50 Am.Jur.2d, Lewdness, Indecency, and Obscenity 449, 472–474 (1970); Annot., Criminal offense predicated on indecent exposure, 93 A.L.R. 996, 997–998 (1934); *Winters v. New York,* 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948). Indiana's first public nudity statute, Rev. Laws of Ind., ch. 26, § 60 (1831), predated by many years the appearance of nude barroom dancing. It was general in scope, directed at all public nudity, and not just at public nude expression; and all succeeding statutes, down to ***574** the present one, have been the same. Were it the case that Indiana *in practice* targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools, see *Miller,* 904 F.2d, at 1120, 1121, it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct. Respondents have adduced no evidence of that. Indiana officials have brought many public indecency prosecutions for activities

having no communicative element. See *Bond v. State,* 515 N.E.2d 856, 857 (Ind.1987); *In re Levinson,* 444 N.E.2d 1175, 1176 (Ind.1983); *Preston v. State,* 259 Ind. 353, 354–355, 287 N.E.2d 347, 348 (1972); *Thomas v. State,* 238 Ind. 658, 659–660, 154 N.E.2d 503, 504–505 (1958); *Blanton v. State,* 533 N.E.2d 190, 191 (Ind.App.1989); *Sweeney v. State,* 486 N.E.2d 651, 652 (Ind.App.1985); *Thompson v. State,* 482 N.E.2d 1372, 1373–1374 (Ind.App.1985); *Adims v. State,* 461 N.E.2d 740, 741–742 (Ind.App.1984); *State v. Elliott,* 435 N.E.2d 302, 304 (Ind.App.1982); *Lasko v. State,* 409 N.E.2d 1124, 1126 (Ind.App.1980). [2]

2 Respondents also contend that the statute, as interpreted, is not content neutral in the expressive conduct to which it applies, since it allegedly does not apply to nudity in theatrical productions. See *State v. Baysinger,* 272 Ind. 236, 247, 397 N.E.2d 580, 587 (1979). I am not sure that theater versus nontheater represents a distinction based on content rather than format, but assuming that it does, the argument nonetheless fails for the reason the plurality describes, *ante,* at 2459, n. 1.

**2465 The dissent confidently asserts, *post,* at 2473, that the purpose of restricting nudity in public places in general is to protect nonconsenting parties from offense; and argues that since only consenting, admission-paying patrons see respondents dance, that purpose cannot apply and the only remaining purpose must relate to the communicative elements of the performance. Perhaps the dissenters believe that "offense to others" *ought* to be the only reason for restricting nudity in public places generally, but there is no *575 basis for thinking that our society has ever shared that Thoreauvian "you - may - do - what - you - like - so - long - as - it - does - not - injure - someone -else" beau ideal—much less for thinking that it was written into the Constitution. The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, *"contra bonos mores," i.e.,* immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality." See *Bowers v. Hardwick,* 478 U.S. 186, 196, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986) (upholding prohibition of private homosexual sodomy enacted solely on "the presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable"). See also *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 68, n. 15, 93 S.Ct. 2628, 2641, n. 15, 37 L.Ed.2d 446 (1973); *Dronenburg v. Zech,* 239 U.S.App.D.C. 229, 238, and n. 6, 741 F.2d 1388, 1397, and n. 6 (1984) (opinion of Bork, J.). The purpose of the Indiana statute, as both its text and the manner of its enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified. Since that is so, the dissent has no basis for positing that, where only thoroughly edified adults are present, the purpose must be repression of communication. [3]

3 The dissent, *post,* at 2472–2473, 2475–2476, also misunderstands what is meant by the term "general law." I do not mean that the law restricts the targeted conduct in all places at all times. A law is "general" for the present purposes if it regulates conduct without regard to whether that conduct is expressive. Concededly, Indiana bans nudity in public places, but not within the privacy of the home. (That is not surprising, since the common-law offense, and the traditional moral prohibition, runs against *public* nudity, not against all nudity. *E.g.,* 50 Am.Jur.2d, Lewdness, Indecency, and Obscenity, § 17, pp. 472–474 (1970).) But that confirms, rather than refutes, the general nature of the law: One may not go nude in public, whether or not one intends thereby to convey a message, and similarly one *may* go nude in private, again whether or not that nudity is expressive.

***576** II

Since the Indiana regulation is a general law not specifically targeted at expressive conduct, its application to such conduct does not in my view implicate the First Amendment.

The First Amendment explicitly protects "the freedom of speech [and] of the press"—oral and written speech—

not "expressive conduct." When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication (for instance, to reduce noise, see *Saia v. New York,* 334 U.S. 558, 561, 68 S.Ct. 1148, 1150, 92 L.Ed. 1574 (1948), to regulate election campaigns, see *Buckley v. Valeo,* 424 U.S. 1, 16, 96 S.Ct. 612, 633, 46 L.Ed.2d 659 (1976), or to prevent littering, see *Schneider v. State (Town of Irvington),* 308 U.S. 147, 163, 60 S.Ct. 146, 84 L.Ed. 155 (1939)), we insist that **2466 it meet the high, First–Amendment standard of justification. But virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition. See, *e.g., Florida Free Beaches, Inc. v. Miami,* 734 F.2d 608, 609 (CA11 1984) (nude sunbathers challenging public indecency law claimed their "message" was that nudity is not indecent). It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even—as some of our cases have suggested, see, *e.g., United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968)—that it be justified by an "important or substantial" *577 government interest. Nor do our holdings require such justification: We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest.

This is not to say that the First Amendment affords no protection to expressive conduct. Where the government prohibits conduct *precisely because of its communicative attributes,* we hold the regulation unconstitutional. See, *e.g., United States v. Eichman,* 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990) (burning flag); *Texas v. Johnson,* 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (same); *Spence v. Washington,* 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (defacing flag); *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (wearing black arm bands); *Brown v. Louisiana,* 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (participating in silent sit-in); *Stromberg v. California,* 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) (flying a red flag).[4] In each of the foregoing cases, we explicitly found that suppressing communication was the object of the regulation of conduct. Where that has not been the case, however—where suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons—we have allowed the regulation to stand. *O'Brien, supra,* 391 U.S., at 377, 88 S.Ct., at 1679 (law banning destruction of draft card upheld in application against card burning to protest *578 war); *FTC v. Superior Court Trial Lawyers Assn.,* 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990) (Sherman Act upheld in application against restraint of trade to protest low pay); cf. *United States v. Albertini,* 472 U.S. 675, 687–688, 105 S.Ct. 2897, 2905–2906, 86 L.Ed.2d 536 (1985) (rule barring respondent from military base upheld in application against entrance on base to protest war); *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (rule barring sleeping in parks upheld in application against persons engaging in such conduct to dramatize plight of homeless). As we clearly expressed the point in *Johnson:*

> "The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements. What might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for **2467 singling out that conduct for proscription." 491 U.S., at 406, 109 S.Ct., at 2540–2541 (internal quotation marks and citations omitted; emphasis in original).

4 It is easy to conclude that conduct has been forbidden because of its communicative attributes when the conduct in question is what the Court has called "inherently expressive," and what I would prefer to call "conventionally expressive"—such as flying a red flag. I mean by that phrase (as I assume the Court means by "inherently expressive") conduct that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else. I am not sure whether dancing fits that description, see *Dallas v. Stanglin,* 490 U.S. 19, 24, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989) (social dance group "do[es] not involve the sort of expressive association that the First Amendment has been held to protect"). But even if it does, this law is directed against nudity, not dancing. Nudity is *not* normally engaged in for the purpose of communicating an idea or an emotion.

All our holdings (though admittedly not some of our discussion) support the conclusion that "the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription." *Community for Creative Non–Violence v. Watt,* 227 U.S.App.D.C. 19, 55–56, 703 F.2d 586, 622–623 (1983) (en banc) (Scalia, J., dissenting), (footnote omitted; emphasis omitted), rev'd sub nom. *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). Such a regime ensures that the government does not act to suppress communication, without requiring that all conduct-restricting regulation ***579** which means in effect all regulation) survive an enhanced level of scrutiny.

We have explicitly adopted such a regime in another First Amendment context: that of free exercise. In *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), we held that general laws not specifically targeted at religious practices did not require heightened First Amendment scrutiny even though they diminished some people's ability to practice their religion. "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' " *Id.,* at 885 [110 S.Ct., at 1603], quoting *Lyng v. Northwest Indian Cemetery Protective Assn.,* 485 U.S. 439, 451, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988); see also *Minersville School District v. Gobitis,* 310 U.S. 586, 594–595, 60 S.Ct. 1010, 1012–1013, 84 L.Ed. 1375 (1940) (Frankfurter, J.) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs"). There is even greater reason to apply this approach to the regulation of expressive conduct. Relatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost anyone can violate almost any law as a means of expression. In the one case, as in the other, if the law is not directed against the protected value (religion or expression) the law must be obeyed.

III

While I do not think the plurality's conclusions differ greatly from my own, I cannot entirely endorse its reasoning. The plurality purports to apply to this general law, insofar as it regulates this allegedly expressive conduct, an intermediate level of First Amendment scrutiny: The government interest in the regulation must be " 'important or substantial,' " *ante,* at 2461, quoting *O'Brien, supra,* 391 U.S., at 377, 88 S.Ct., at 1679. As I have indicated, ***580** I do not believe such a heightened standard exists. I think we should avoid wherever possible, moreover, a method of analysis that requires judicial assessment of the "importance" of government interests—and especially of government interests in various aspects of morality.

Neither of the cases that the plurality cites to support the "importance" of the State's interest here, see *ante,* at 2462, is in point. *Paris Adult Theatre I v. Slaton,* 413 U.S., at 61, 93 S.Ct., at 2637 and *Bowers v. Hardwick,* 478 U.S., at 196, 106 S.Ct., at 2846, did uphold laws prohibiting private conduct based on concerns of decency and morality; but neither opinion held that those concerns were particularly "important" or "substantial," or amounted to anything more than a *rational basis* for regulation. *Slaton* involved an exhibition which, since it was obscene ****2468** and at least to some extent public, was unprotected by the First Amendment, see *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); the State's prohibition could therefore be invalidated only if it had no rational basis. We found that the State's "right ... to maintain a decent society" provided a "legitimate" basis for regulation—even as to obscene material viewed by consenting adults. 413 U.S., at 59–60, 93 S.Ct., at 2636–2637. In *Bowers,* we held that since homosexual behavior is not a fundamental right, a Georgia law prohibiting private homosexual intercourse needed only a rational basis in order to comply with the Due Process Clause. Moral opposition to homosexuality, we said, provided that rational basis. 478 U.S., at 196, 106 S.Ct., at 2846. I would uphold the Indiana statute on precisely the same ground: Moral opposition to nudity supplies a rational basis for its prohibition, and since the First Amendment has no application to this case no more than that is needed.

* * *

Indiana may constitutionally enforce its prohibition of public nudity even against those who choose to use public nudity as a means of communication. The State is regulating conduct, not expression, and those who choose to employ conduct ***581** as a means of expression must make sure that the conduct they select is not generally forbidden. For these reasons, I agree that the judgment should be reversed.

Justice SOUTER, concurring in the judgment.

Not all dancing is entitled to First Amendment protection as expressive activity. This Court has previously categorized ballroom dancing as beyond the Amendment's protection, *Dallas v. Stanglin,* 490 U.S. 19, 24–25, 109 S.Ct. 1591, 1594–1595, 104 L.Ed.2d 18 (1989), and dancing as aerobic exercise would likewise be outside the First Amendment's concern. But dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience. Such is the expressive content of the dances described in the record.

Although such performance dancing is inherently expressive, nudity *per se* is not. It is a condition, not an activity, and the voluntary assumption of that condition, without more, apparently expresses nothing beyond the view that the condition is somehow appropriate to the circumstances. But every voluntary act implies some such idea, and the implication is thus so common and minimal that calling all voluntary activity expressive would reduce the concept of expression to the point of the meaningless. A search for some expression beyond the minimal in the choice to go nude will often yield nothing: a person may choose nudity, for example, for maximum sunbathing. But when nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a striptease, are integrated into the dance and its expressive function. Thus I agree with the plurality and the dissent that an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection.

***582** I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), for judging the limits of appropriate state action burdening expressive acts as distinct from pure speech or representation. I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult ****2469** entertainment establishments of the sort typified by respondents' establishments.

It is, of course, true that this justification has not been articulated by Indiana's Legislature or by its courts. As the plurality observes, "Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose," *ante,* at 2461. While it is certainly sound in such circumstances to infer general purposes "of protecting societal order and morality ... from [the statute's] text and history," *ibid.,* I think that we need not so limit ourselves in identifying the justification for the legislation at issue here, and may legitimately consider petitioners' assertion that the statute is applied to nude dancing because such dancing "encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity." Brief for Petitioners 37.

This asserted justification for the statute may not be ignored merely because it is unclear to what extent this purpose motivated the Indiana Legislature in enacting the statute. Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. Cf. ***583** *McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 1961). At least as to the regulation of expressive conduct, [1] "[w]e decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *O'Brien, supra,* 391 U.S., at 384, 88 S.Ct., at 1683. In my view, the interest asserted by petitioners in preventing prostitution, sexual assault, and other criminal activity, although presumably not a justification for all applications of the statute, is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment at issue here.

1 Cf., *e.g., Edwards v. Aguillard,* 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (striking down state statute on Establishment Clause grounds due to impermissible legislative intent).

At the outset, it is clear that the prevention of such evils falls within the constitutional power of the State, which satisfies the first *O'Brien* criterion. See 391 U.S., at 377, 88 S.Ct., at 1679. The second *O'Brien* prong asks whether the regulation "furthers an important or substantial governmental interest." *Ibid.* The asserted state interest is plainly a substantial one; the only question is whether prohibiting nude dancing of the sort at issue here "furthers" that interest. I believe that our cases have addressed this question sufficiently to establish that it does.

In *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), we upheld a city's zoning ordinance designed to prevent the occurrence of harmful secondary effects, including the crime associated with adult entertainment, by protecting approximately 95% of the city's area from the placement of motion picture theaters emphasizing " 'matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" ... for observation by patrons therein.' " *Id.,* at 44, 106 S.Ct., at 927. Of particular importance to the present enquiry, we held that the city of Renton was not compelled to justify its restrictions by studies specifically relating to the problems ***584** that would be caused by adult theaters in that city. Rather, "Renton was entitled to rely on the experiences of Seattle and other cities," *id.,* at 51, 106 S.Ct., at 931, which demonstrated the harmful secondary effects correlated with the presence "of even one [adult] theater in a given neighborhood." *Id.,* at 50, 106 S.Ct., at 930; cf. *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, n. 34, 96 S.Ct. 2440, 2453, n. 34, 49 L.Ed.2d 310 (1976) (legislative finding that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime"); *California v. LaRue,* 409 U.S. 109, 111, 93 S.Ct. 390, 393, 34 L.Ed.2d 342 (1972) ****2470** (administrative findings of criminal activity associated with adult entertainment).

The type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton, American Mini Theatres,* and *LaRue.* It therefore is no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying "specified anatomical areas" at issue in *Renton.* Other reported cases from the Circuit in which this litigation arose confirm the conclusion. See, *e.g., United States v. Marren,* 890 F.2d 924, 926 (CA7 1989) (prostitution associated with nude dancing establishment); *United States v. Doerr,* 886 F.2d 944, 949 (CA7 1989) (same). In light of *Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's "bookstore" furthers its interest in preventing prostitution, sexual assault, and associated crimes. Given our recognition that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," *American Mini Theatres, supra,* 427 U.S., at 70, 96 S.Ct., at 2452, I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every ***585** case. The statute as applied to nudity of the sort at issue here therefore satisfies the second prong of *O'Brien.* [2]

2 Because there is no overbreadth challenge before us, we are not called upon to decide whether the application of the statute would be valid in other contexts. It is enough, then, to say that the secondary effects rationale on which I rely here would be open to question if the State were to seek to enforce the statute by barring expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of *Renton*-type adult entertainment was correlated with such secondary effects.

The third *O'Brien* condition is that the governmental interest be "unrelated to the suppression of free expression," 391 U.S., at 377, 88 S.Ct., at 1679, and, on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression. The dissent contends, however, that Indiana seeks to regulate nude dancing as its means of combating such secondary effects "because ... creating

or emphasizing [the] thoughts and ideas [expressed by nude dancing] in the minds of the spectators may lead to increased prostitution," *post,* at 2474, and that regulation of expressive conduct because of the fear that the expression will prove persuasive is inherently related to the suppression of free expression. *Ibid.*

The major premise of the dissent's reasoning may be correct, but its minor premise describing the causal theory of Indiana's regulatory justification is not. To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation ***586** actually are. It is possible, for example, that the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities, or from the simple viewing of nude bodies regardless of whether those bodies are engaged in expression or not. In neither case would the chain of causation run through the persuasive effect of the expressive component of nude dancing.

****2471** Because the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, rather than from a relationship between the other evils and the expressive component of the dancing, the interest is unrelated to the suppression of free expression. *Renton* is again persuasive in support of this conclusion. In *Renton,* we held that an ordinance that regulated adult theaters because the presence of such theaters was correlated with secondary effects that the local government had an interest in regulating was content neutral (a determination similar to the "unrelated to the suppression of free expression" determination here, see *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 298, and n. 8, 104 S.Ct. 3065, 3071, and n. 8, 82 L.Ed.2d 221 (1984)) because it was "*justified* without reference to the content of the regulated speech." 475 U.S., at 48, 106 S.Ct., at 929 (emphasis in original). We reached this conclusion without need to decide whether the cause of the correlation might have been the persuasive effect of the adult films that were being regulated. Similarly here, the "secondary effects" justification means that enforcement of the Indiana statute against nude dancing is "justified without reference to the content of the regulated [expression]," *ibid.* (emphasis omitted), which is sufficient, at least in the context of sexually explicit expression, [3] to satisfy the third prong of the *O'Brien* test.

3 I reach this conclusion again mindful, as was the Court in *Renton,* that the protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression. See *Renton, supra,* at 49, and n. 2, 106 S.Ct., at 929, and n. 2, citing *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976).

***587** The fourth *O'Brien* condition, that the restriction be no greater than essential to further the governmental interest, requires little discussion. Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message. Nor, so far as we are told, is the dancer or her employer limited by anything short of obscenity laws from expressing an erotic message by articulate speech or representational means; a pornographic movie featuring one of respondents, for example, was playing nearby without any interference from the authorities at the time these cases arose.

Accordingly, I find *O'Brien* satisfied and concur in the judgment.

Justice WHITE, with whom Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, dissenting.
The first question presented to us in this case is whether nonobscene nude dancing performed as entertainment is expressive conduct protected by the First Amendment. The Court of Appeals held that it is, observing that our prior decisions permit no other conclusion. Not surprisingly, then, the plurality now concedes that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment...." *Ante,* at 2460. This is no more than recognizing, as the Seventh Circuit observed, that dancing is an ancient art form and "inherently embodies the expression and communication of ideas and emotions." *Miller v. Civil City of South Bend,* 904 F.2d 1081, 1087 (1990) (en banc). [1]

1 Justice SCALIA suggests that performance dancing is not inherently expressive activity, see *ante,* at 2466, n. 4, but the Court of Appeals has the better view: "Dance has been defined as 'the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself.' 16 The New Encyclopedia Britannica 935 (1989). Inherently, it is the communication of emotion or ideas. At the root of all '[t]he varied manifestations of dancing ... lies the common impulse to resort to movement to externalise states which we cannot externalise by rational means. This is basic dance.' Martin, J. *Introduction to the Dance* (1939). Aristotle recognized in *Poetics* that the purpose of dance is 'to represent men's character as well as what they do and suffer.' The raw communicative power of dance was noted by the French poet Stéphane Mallarmé who declared that the dancer 'writing with her body ... *suggests* things which the written work could *express* only in several paragraphs of dialogue or descriptive prose.' " 904 F.2d, at 1085–1086. Justice SCALIA cites *Dallas v. Stanglin,* 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989), but that decision dealt with social dancing, not performance dancing; and the submission in that case, which we rejected, was not that social dancing was an expressive activity but that plaintiff's *associational* rights were violated by restricting admission to dance halls on the basis of age. The Justice also asserts that even if dancing is inherently expressive, nudity is not. The statement may be true, but it tells us nothing about dancing in the nude.

**2472 *588 Having arrived at the conclusion that nude dancing performed as entertainment enjoys First Amendment protection, the plurality states that it must "determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity." *Ante,* at 2460. For guidance, the plurality turns to *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), which held that expressive conduct could be narrowly regulated or forbidden in pursuit of an important or substantial governmental interest that is unrelated to the content of the expression. The plurality finds that the Indiana statute satisfies the *O'Brien* test in all respects.

The plurality acknowledges that it is impossible to discern the exact state interests which the Indiana Legislature had in mind when it enacted the Indiana statute, but the plurality nonetheless concludes that it is clear from the statute's text and history that the law's purpose is to protect "societal order and morality." *Ante,* at 2461. The plurality goes on to *589 conclude that Indiana's statute "was enacted as *a general prohibition,*" *ante,* at 2461 (emphasis added), on people appearing in the nude among strangers in public places. The plurality then points to cases in which we upheld legislation based on the State's police power, and ultimately concludes that the Indiana statute "furthers a substantial government interest in protecting order and morality." *Ante,* at 2462. The Court also holds that the basis for banning nude dancing is unrelated to free expression and that it is narrowly drawn to serve the State's interest.

The plurality's analysis is erroneous in several respects. Both the plurality and Justice SCALIA in his opinion concurring in the judgment overlook a fundamental and critical aspect of our cases upholding the States' exercise of their police powers. None of the cases they rely upon, including *O'Brien* and *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), involved anything less than truly *general* proscriptions on individual conduct. In *O'Brien,* for example, individuals were prohibited from destroying their draft cards at any time and in any place, even in completely private places such as the home. Likewise, in *Bowers,* the State prohibited sodomy, regardless of where the conduct might occur, including the home as was true in that case. The same is true of cases like *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which, though not applicable here because it did not involve any claim that the peyote users were engaged in expressive activity, recognized that the State's interest in preventing the use of illegal drugs extends even into the home. By contrast, in this case Indiana does not suggest that its statute applies to, or could be applied to, nudity wherever it occurs, including the home. We do not understand the plurality or Justice SCALIA to be suggesting that Indiana could constitutionally enact such an intrusive prohibition, nor do we think such a suggestion would be tenable in light of our decision in *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), in which we held that States could not punish the *590 mere possession of obscenity in the privacy of one's own home.

**2473 We are told by the attorney general of Indiana that, in *State v. Baysinger,* 272 Ind. 236, 397 N.E.2d 580

(1979), the Indiana Supreme Court held that the statute at issue here cannot and does not prohibit nudity as a part of some larger form of expression meriting protection when the communication of ideas is involved. Brief for Petitioners 25, 30–31; Reply Brief for Petitioners 9–11. Petitioners also state that the evils sought to be avoided by applying the statute in this case would not obtain in the case of theatrical productions, such as "Salome" or "Hair." *Id.,* at 11–12. Neither is there any evidence that the State has attempted to apply the statute to nudity in performances such as plays, ballets, or operas. "No arrests have ever been made for nudity as part of a play or ballet." App. 19 (affidavit of Sgt. Timothy Corbett).

Thus, the Indiana statute is not a *general* prohibition of the type we have upheld in prior cases. As a result, the plurality and Justice SCALIA's simple references to the State's general interest in promoting societal order and morality are not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity. Instead, in applying the *O'Brien* test, we are obligated to carefully examine the reasons the State has chosen to regulate this expressive conduct in a less than general statute. In other words, when the State enacts a law which draws a line between expressive conduct which is regulated and nonexpressive conduct of the same type which is not regulated, *O'Brien* places the burden on the State to justify the distinctions it has made. Closer inquiry as to the purpose of the statute is surely appropriate.

Legislators do not just randomly select certain conduct for proscription; they have reasons for doing so and those reasons illuminate the purpose of the law that is passed. Indeed, a law may have multiple purposes. The purpose of ***591** forbidding people to appear nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates. This is why *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), is of no help to the State: "In *Clark* ... the damage to the parks was the same whether the sleepers were camping out for fun, were in fact homeless, or wished by sleeping in the park to make a symbolic statement on behalf of the homeless." 904 F.2d, at 1103 (Posner, J., concurring). That cannot be said in this case: The perceived damage to the public interest caused by appearing nude on the streets or in the parks, as I have said, is not what the State seeks to avoid in preventing nude dancing in theaters and taverns. There the perceived harm is the communicative aspect of the erotic dance. As the State now tells us, and as Justice SOUTER agrees, the State's goal in applying what it describes as its "content neutral" statute to the nude dancing in this case is "deterrence of prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure." Reply Brief for Petitioners 11. The attainment of these goals, however, depends on preventing an expressive activity.

The plurality nevertheless holds that the third requirement of the *O'Brien* test, that the governmental interest be unrelated to the suppression of free expression, is satisfied because in applying the statute to nude dancing, the State is not "proscribing nudity because of the erotic message conveyed by the dancers." *Ante,* at 2463. The plurality suggests that this is so because the State does not ban dancing that sends an erotic message; it is only nude erotic dancing that is forbidden. The perceived evil is not erotic dancing but public ***592** nudity, which may be prohibited despite any incidental impact on ****2474** expressive activity. This analysis is transparently erroneous.

In arriving at its conclusion, the plurality concedes that nude dancing conveys an erotic message and concedes that the message would be muted if the dancers wore pasties and G-strings. Indeed, the emotional or erotic impact of the dance is intensified by the nudity of the performers. As Judge Posner argued in his thoughtful concurring opinion in the Court of Appeals, the nudity of the dancer is an integral part of the emotions and thoughts that a nude dancing performance evokes. 904 F.2d at 1090–1098. The sight of a fully clothed, or even a partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental "conduct." We have previously pointed out that " '[n]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Schad v. Mt. Ephraim,* 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981).

This being the case, it cannot be that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication. The nudity element of nude dancing performances cannot ***593** be neatly pigeonholed as mere "conduct" independent of any expressive component of the dance. [2]

2 Justice SOUTER agrees with the plurality that the third requirement of the *O'Brien* test is satisfied, but only because he is not certain that there is a causal connection between the message conveyed by nude dancing and the evils which the State is seeking to prevent. See *ante,* at 2470. Justice SOUTER's analysis is at least as flawed as that of the plurality. If Justice SOUTER is correct that there is no causal connection between the message conveyed by the nude dancing at issue here and the negative secondary effects that the State desires to regulate, the State does not have even a rational basis for its absolute prohibition on nude dancing that is admittedly expressive. Furthermore, if the real problem is the "concentration of crowds of men predisposed" to the designated evils, *ante,* at 2470, then the First Amendment requires that the State address that problem in a fashion that does not include banning an entire category of expressive activity. See *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

That fact dictates the level of First Amendment protection to be accorded the performances at issue here. In *Texas v. Johnson,* 491 U.S. 397, 411–412, 109 S.Ct. 2533, 2543–2544, 105 L.Ed.2d 342 (1989), the Court observed: "Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct.... We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.' *Boos v. Barry,* 485 U.S. [312], 321 [108 S.Ct. 1157, 1164, 99 L.Ed.2d 333] [(1988)]." Content based restrictions "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States v. Grace,* 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983); *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989). Nothing could be clearer from our cases.

That the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine. The Court's assessment of the artistic merits of nude dancing performances ****2475** should not be the determining factor in deciding this case. In the words of Justice Harlan: "[I]t is largely because governmental officials cannot make principled decisions ***594** in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California,* 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971). "[W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who ... wants some 'entertainment' with his beer or shot of rye." *Salem Inn, Inc. v. Frank,* 501 F.2d 18, 21, n. 3 (CA2 1974), aff'd in part *sub nom., Doran v. Salem Inn, Inc.,* 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

The plurality and Justice SOUTER do not go beyond saying that the state interests asserted here are important and substantial. But even if there were compelling interests, the Indiana statute is not narrowly drawn. If the State is genuinely concerned with prostitution and associated evils, as Justice SOUTER seems to think, or the type of conduct that was occurring in *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), it can adopt restrictions that do not interfere with the expressiveness of nonobscene nude dancing performances. For instance, the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators, that nude entertainment be limited to certain hours, or even that establishments providing such entertainment be dispersed throughout the city. Cf. *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Likewise, the State clearly has the authority to criminalize prostitution and obscene behavior. Banning an entire category of expressive activity, however, generally does not satisfy the narrow tailoring requirement of strict First

Amendment scrutiny. See *Frisby v. Schultz,* 487 U.S. 474, 485, 108 S.Ct. 2495, 2503, 101 L.Ed.2d 420 (1988). Furthermore, if nude dancing in barrooms, as compared with other establishments, is the most worrisome problem, the State could invoke its Twenty-first Amendment powers and impose appropriate regulation. *New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (*per curiam*); *California v. LaRue, supra.*

***595** As I see it, our cases require us to affirm absent a compelling state interest supporting the statute. Neither the plurality nor the State suggest that the statute could withstand scrutiny under that standard.

Justice SCALIA's views are similar to those of the plurality and suffer from the same defects. The Justice asserts that a general law barring specified conduct does not implicate the First Amendment unless the purpose of the law is to suppress the expressive quality of the forbidden conduct, and that, absent such purpose, First Amendment protections are not triggered simply because the incidental effect of the law is to proscribe conduct that is unquestionably expressive. Cf. *Community for Creative Non–Violence v. Watt,* 227 U.S.App.D.C. 19, 703 F.2d 586, 622–623 (1983) (Scalia, J., dissenting). The application of the Justice's proposition to this case is simple to state: The statute at issue is a general law banning nude appearances in public places, including barrooms and theaters. There is no showing that the purpose of this general law was to regulate expressive conduct; hence, the First Amendment is irrelevant and nude dancing in theaters and barrooms may be forbidden, irrespective of the expressiveness of the dancing.

As I have pointed out, however, the premise for the Justice's position—that the statute is a *general* law of the type our cases contemplate—is nonexistent in this case. Reference to Justice SCALIA's own hypothetical makes this clear. We agree with Justice SCALIA that the Indiana statute would not permit 60,000 consenting Hoosiers to expose themselves to each other in the Hoosier Dome. No one can doubt, however, that those same 60,000 Hoosiers would be perfectly ****2476** free to drive to their respective homes all across Indiana and, once there, to parade around, cavort, and revel in the nude for hours in front of relatives and friends. It is difficult to see why the State's interest in morality is any less in that situation, especially if, as Justice SCALIA seems to suggest, nudity is inherently evil, but clearly the statute does ***596** not reach such activity. As we pointed out earlier, the State's failure to enact a truly general proscription requires closer scrutiny of the reasons for the distinctions the State has drawn. See *supra,* at 2473.

As explained previously, the purpose of applying the law to the nude dancing performances in respondents' establishments is to prevent their customers from being exposed to the distinctive communicative aspects of nude dancing. That being the case, Justice SCALIA's observation is fully applicable here: "Where the government prohibits conduct *precisely because of its communicative attributes,* we hold the regulation unconstitutional." *Ante,* at 2466.

The *O'Brien* decision does not help Justice SCALIA. Indeed, his position, like the plurality's, would eviscerate the *O'Brien* test. *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), is likewise not on point. The Indiana law, as applied to nude dancing, targets the expressive activity itself; in Indiana nudity in a dancing performance is a crime because of the message such dancing communicates. In *Smith,* the use of drugs was not criminal because the use was part of or occurred within the course of an otherwise protected religious ceremony, but because a general law made it so and was supported by the same interests in the religious context as in others.

Accordingly, I would affirm the judgment of the Court of Appeals, and dissent from this Court's judgment.

All Citations

501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504, 59 USLW 4745

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93 S.Ct. 390
Supreme Court of the United States

CALIFORNIA et al., Appellants,
v.
Robert LaRUE et al.

No. 71—36.
|
Argued Oct. 10, 1972.
|
Decided Dec. 5, 1972.
|
Rehearing Denied Feb. 20, 1973.

See 410 U.S. 948, 93 S.Ct. 1351.

Actions were brought by various holders of California liquor licenses and dancers at licensed premises challenging constitutionality of state-wide rules adopted by Department of Alcoholic Beverage Control prohibiting explicitly sexual live entertainment and films and bars and other establishments licensed to dispense liquor by the drink. The United States District Court for the Central District of California, sitting as three-judge court, held certain of the regulations invalid, 326 F.Supp. 348, and the state appealed. The Supreme Court, Mr. Justice Rehnquist, held that in context, not of censoring dramatic performances in theater, but of licensing bars and nightclubs to sell liquor by the drink, California Department of Alcoholic Beverage Control had broad latitude under Twenty-first Amendment to control the manner and circumstances under which liquor might be dispensed, and conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor unreasonable.

Reversed.

Mr. Justice Stewart concurred and filed opinion.

Mr. Justice Douglas dissented and filed opinion.

Mr. Justice Brennan dissented and filed opinion.

Mr. Justice Marshall dissented and filed opinion.

West Headnotes (13)

[1] **Civil Rights**
Theaters and places of exhibition or entertainment

Claim that regulations of California Department of Alcoholic Beverage Control that regulate type of entertainment that might be presented in bars and nightclubs that it licensed exceed the constitutional authority of the Department as matter of state law was not cognizable in action under Civil Rights Act challenging the constitutionality of the regulations. West's Ann.Cal.Const. art. 20, § 22; 42 U.S.C.A. § 1983; U.S.C.A.Const. Amends. 1, 14.

9 Cases that cite this headnote

[2] **Courts**
Consent of Parties as to Jurisdiction

Federal Courts
Waiver, estoppel, and consent

Parties may not confer jurisdiction either upon the Supreme Court of the United States or a United States District Court by stipulation. U.S.C.A.Const. art. 3, § 2, cl. 1; 28 U.S.C.A. § 2201.

80 Cases that cite this headnote

[3] **Federal Courts**
Necessity of Objection;Power and Duty of Court

Request of licensees and of the California Department of Alcoholic Beverage Control that United States District Court adjudicate merits of constitutional claim concerning Department regulations governing entertainment in bars and nightclubs did not foreclose inquiry by Supreme Court into existence of "actual controversy." 28 U.S.C.A. § 2201;

U.S.C.A.Const. art. 3, § 1 et seq.; art. 3, § 2, cl. 1; Amend. 1.

8 Cases that cite this headnote

[4] Intoxicating Liquors
Legislative regulation

While the states, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment confers something more than the normal state authority over public health, welfare, and morals. U.S.C.A.Const. Amend. 21.

154 Cases that cite this headnote

[5] Administrative Law and Procedure
Rules, Regulations, and Other Policymaking

In legislative rule making, administrative agency may reason from the particular to the general.

Cases that cite this headnote

[6] Intoxicating Liquors
Direct control by state agencies

Wide latitude as to the choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the state's power under the Twenty-first Amendment to regulate intoxicating liquors. U.S.C.A.Const. Amend. 21.

27 Cases that cite this headnote

[7] Intoxicating Liquors
Licensing and regulation

Choice by California Department of Alcoholic Beverage Control of prohibition of nude dancing and certain other sexual activity within licensed premises instead of solution that would have required Department's own personnel to judge individual instances of inebriation was not an unreasonable one. West's Ann.Cal.Const. art. 20, § 22; U.S.C.A.Const. Amends. 1, 14, 21.

180 Cases that cite this headnote

[8] Intoxicating Liquors
Licensing and regulation

In context, not of censoring dramatic performances in theater, but of licensing bars and nightclubs to sell liquor by the drink, California Department of Alcoholic Beverage Control had broad latitude under Twenty-first Amendment to control the manner and circumstances under which liquor might be dispensed, and conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor unreasonable. West's Ann.Cal.Const. art. 20, § 22; U.S.C.A.const. Amends. 1, 14, 21.

220 Cases that cite this headnote

[9] Intoxicating Liquors
Validity and adoption

Although California Department of Alcoholic Beverage Control regulations prohibiting explicitly sexual live entertainment and films in bars and other licensed establishments on their face would proscribe some forms of visual presentation that would not be found obscene under United States Supreme Court guidelines, the state regulatory authority was not limited to either dealing with the problem it confronted within the limits of decisions as to obscenity or in accordance with decisional limits prescribed for dealing with some forms of communicative conduct. U.S.C.A.Const. Amends. 1, 14, 21.

147 Cases that cite this headnote

[10] Constitutional Law
Law Enforcement;Criminal Conduct

As mode of expression moves from the printed page to the commission of public acts that may themselves violate

valid penal statutes, scope of permissible state regulations significantly increases. U.S.C.A.Const. Amends. 1, 14.

21 Cases that cite this headnote

[11] Constitutional Law
Conduct, protection of

State may sometimes proscribe expression which is directed to the accomplishment of an end that the state has declared to be illegal when such expression consists, in part, of "conduct" or "action." U.S.C.A.Const. Amends. 1, 14.

6 Cases that cite this headnote

[12] Constitutional Law
Motor vehicles

States may validly limit the manner in which the First Amendment freedoms are exercised by forbidding sound trucks in residential neighborhoods and may enforce nondiscriminatory requirement that those who would parade on the public thoroughfare first obtain permit. U.S.C.A.Const. Amends. 1, 14.

16 Cases that cite this headnote

[13] Intoxicating Liquors
Licensing and regulation

There is presumption in favor of validity of state regulation in the area of licensing of the sale of alcoholic beverages by the drink. U.S.C.A.Const. Amends. 1, 14, 21.

28 Cases that cite this headnote

****392** ***109** Syllabus [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Following hearings, the California Department of Alcoholic Beverage Control issued regulations prohibiting explicitly sexual live entertainment and films in bars and other establishments licensed to dispense liquor by the drink. A three-judge District Court held the regulations invalid under the First and Fourteenth Amendments, concluding that under standards laid down by this Court some of the prescribed entertainment could not be classified as obscene or lacking a communicative element. Held: In the context, not of censoring dramatic performances in a theater, but of licensing bars and nightclubs to sell liquor by the drink, the States have broad latitude under the Twenty-first Amendment to control the manner and circumstances under which liquor may be dispensed, and here the conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor was the prophylactic solution unreasonable. Pp. 394—397.

326 F.Supp. 348, reversed.

Attorneys and Law Firms

****393** L. Stephen Porter, San Francisco, Cal., for appellants.

Harrison W. Hertzberg, Los Angeles, Cal., and Kenneth Philip Scholtz, Gardena, Cal., for appellees.

Opinion

***110** Mr. Justice REHNQUIST delivered the opinion of the Court.

[1] Appellant Kirby is the director of the Department of Alcoholic Beverage Control, an administrative agency vested by the California Constitution with primary authority for the licensing of the sale of alcoholic beverages in that State, and with the authority to suspend or revoke any such license if it determines that its continuation would be contrary to public welfare or morals. Art. XX, s 22, California Constitution. Appellees include holders of various liquor licenses issued by appellant, and dancers at premises operated by such licensees. In 1970 the Department promulgated rules regulating the type of entertainment that might be presented in bars and nightclubs that it licensed. Appellees

then brought this action in the United States District Court for the Central District of California under the provisions of 28 U.S.C. ss 1331, 1343, 2201, 2202, and 42 U.S.C. s 1983. A three-judge court was convened in accordance with 28 U.S.C. ss 2281 and 2284, and the majority of that court held that substantial portions of the regulations conflicted with the First and Fourteenth Amendments to the United States Constitution. [1]

[1] Appellees in their brief here suggest that the regulations may exceed the authority conferred upon the Department as a matter of state law. As the District Court recognized, however, such a claim is not cognizable in the suit brought by these appellees under 42 U.S.C. s 1983.

Concerned with the progression in a few years' time from 'topless' dancers to 'bottomless' dancers and other forms of 'live entertainment' in bars and nightclubs that it licensed, the Department heard a number of witnesses on the subject at public hearings held prior to the promulgation of the rules. The majority opinion ***111** of the District Court described the testimony in these words: 'Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers. . . .' 326 F.Supp. 348, 352.

References to the transcript of the hearings submitted by the Department to the District Court indicated that in licensed establishments where 'topless' and 'bottomless' dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.

Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.

At the conclusion of the evidence, the Department promulgated the regulations here challenged, imposing standards as to the type of entertainment that could be presented in bars and nightclubs that it licensed. Those portions of the regulations found to be unconstitutional by the majority of the District Court prohibited the following kinds of conduct on licensed premises:

(a) The performance of acts, or simulated acts, of 'sexual intercourse, ****394** masturbation, sodomy, ***112** bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law';

(b) The actual or simulated 'touching, caressing or fondling on the breast, buttocks, anus or genitals';

(c) The actual or simulated 'displaying of the public hair, anus, vulva or genitals';

(d) The permitting by a licensee of 'any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus'; and, by a companion section,

(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above. Rules 143.3 and 143.4. [2]

[2] In addition to the regulations held unconstitutional by the court below appellees originally challenged Rule 143.2 prohibiting topless waitresses, Rule 143.3(2) requiring certain entertainers to perform on a stage at a distance away from customers, and Rule 143.5 prohibiting any entertainment that violated local ordinances. At oral argument in that court they withdrew their objections to these rules, conceding 'that topless waitresses are not within the protection of the First Amendment; that local ordinances must be independently challenged depending upon their content; and that the requirement that certain entertainers must dance on a stage is not invalid.' 326 F.Supp. 348, 350—351.

[2] **[3]** Shortly before the effective date of the Department's regulations appellees unsuccessfully sought discretionary review of them in both the State Court of Appeal and the Supreme Court of California. The Department then joined with appellees in requesting the three-judge District Court to decide the merits of

appellees' claims that the regulations were invalid under the Federal Constitution. [3]

[3] Mr. Justice DOUGLAS in his dissenting opinion suggests that the District Court should have declined to adjudicate the merits of appellees' contention until the appellants had given the 'generalized provisions of the rules . . . particularized meaning.' Since parties may not confer jurisdiction either upon this Court or the District Court by stipulation, the request of both parties in this case that the court below adjudicate the merits of the constitutional claim does not foreclose our inquiry into the existence of an 'actual controversy' within the meaning of 28 U.S.C. s 2201 and Art. III, s 2, cl. 1, of the Constitution.

By pretrial stipulation, the appellees admitted they offered performances and depictions on their licensed premises that were proscribed by the challenged rules. Appellants stipulated they would take disciplinary action against the licenses of licensees violating such rules. In similar circumstances, this Court held that where a state commission had 'plainly indicated' an intent to enforce an act that would affect the rights of the United States, there was a 'present and concrete' controversy within the meaning of 28 U.S.C. s 2201 and of Art. III. Public Utilities Comm'n of California v. United States, 355 U.S. 534, 539, 78 S.Ct. 446, 450, 2 L.Ed.2d 470 (1958). The District Court therefore had jurisdiction of this action.

Whether this Court should develop a nonjurisdictional limitation on actions for declaratory judgments to invalidate statutes on their face is an issue not properly before us. Cf. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 56 S.Ct. 466, 480, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Certainly a number of our cases have permitted attacks on First Amendment grounds similar to those advanced by the appellees, see, e.g., Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964), and we are not inclined to reconsider the procedural holdings of those cases in the absence of a request by a party to do so.

***113** The District Court majority upheld the appellees' claim that the regulations in question unconstitutionally abridged the freedom of expression guaranteed to them by the First and Fourteenth Amendments to the United States Constitution. It reasoned that the state regulations had to be justified either as a prohibition of obscenity in accordance with the Roth line of decisions in this Court (****395** Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), or else as a regulation of 'conduct' having a communicative element in it under the standards ***114** laid down by this Court in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Concluding that the regulations would bar some entertainment that could not be called obscene under the Roth line of cases, and that the governmental interest being furthered by the regulations did not meet the tests laid down in O'Brien, the court enjoined the enforcement of the regulations. 326 F.Supp. 348. We noted probable jurisdiction. 404 U.S. 999, 92 S.Ct. 559, 30 L.Ed.2d 551.

The state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink. In Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 41, 86 S.Ct. 1254, 1259, 16 L.Ed.2d 336 (1966), this Court said:

'Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.''

[4] While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. In Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330, 84 S.Ct. 1293, 1297, 12 L.Ed.2d 350 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' Still ***115** earlier, the Court stated in State Board v. Young's Market Co., 299 U.S. 59, 64, 57 S.Ct. 77, 79, 81 L.Ed. 38 (1936):

> 'A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth.'

These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations. In Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), the fundamental notice and hearing requirement of the Due Process Clause of the Fourteenth Amendment was held applicable to Wisconsin's statute providing for the public posting of names of persons who had engaged in excessive drinking. But the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment:

'Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.' Hostetter v. Idlewild Bon Voyage Liquor Corp., supra, at 332, 84 S.Ct., at 1298.

[5] A common element in the regulations struck down by the District Court appears to be the Department's conclusion that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place in bars and cocktail lounges for which it has licensing responsibility. Based on the evidence from the hearings that it cited to the District Court, and mindful of the principle that in legislative rulemaking the agency may reason from the particular to the general, Assigned Car Cases, 274 U.S. 564, 583, 47 S.Ct. 727, 733—734, 71 L.Ed. 1204 (1927), we do ***116** not think it can be said ****396** that the Department's conclusion in this respect was an irrational one.

[6] **[7]** **[8]** Appellees insist that the same results could have been accomplished by requiring that patrons already well on the way to intoxication be excluded from the licensed premises. But wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment. Joseph E. Seagram & Sons v. Hostetter, supra, 384 U.S. at 48, 86 S.Ct. at 1262. Nothing in the record before us or in common experience compels the conclusion that either self-discipline on the part of the customer or self-regulation on the part of the bartender could have been relied upon by the Department to secure compliance with such an alternative plan of regulation. The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one under the holdings of our prior cases. Williamson v. Lee Optical Co., 348 U.S. 483, 487—488, 75 S.Ct. 461, 464—465, 99 L.Ed. 563 (1955).

[9] We do not disagree with the District Court's determination that these regulations on their face would proscribe some forms of visual presentation that would not be found obscene under Roth and subsequent decisions of this Court. See, e.g., Sunshine Book Co. v. Summerfield, 355 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352 (1958), rev'g per curiam, 101 U.S.App.D.C. 358, 249 F.2d 114 (1957). But we do not believe that the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in O'Brien, supra.

Our prior cases have held that both motion pictures and theatrical productions are within the protection of ***117** the First and Fourteenth Amendments. In Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), it was held that motion pictures are 'included within the free speech and free press guaranty of the First and Fourteenth Amendments,' though not 'necessarily subject to the precise rules governing any other particular method of expression.' Id., at 502—503, 72 S.Ct., at 781. In Schacht v. United States, 398 U.S. 58, 63, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970), the Court said with respect to theatrical productions:

> 'An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance.'

[10] **[11]** **[12]** But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action,' Hughes v. Superior Court,

339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949). [4] In O'Brien, supra, the Court suggested that the extent to which 'conduct' was protected **397 by the First Amendment depended on the presence of a 'communicative element,' and stated:

4 Similarly, States may validly limit the manner in which the First Amendment freedoms are exercised, by forbidding sound trucks in residential neighborhoods, Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949), and may enforce a nondiscriminatory requirement that those who would parade on a public thoroughfare first obtain a permit. Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). Other state limitations on the 'time, manner and place' of the exercise of First Amendment rights have been sustained. See, e.g., Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968), and Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

'We cannot accept the view that an apparently *118 limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express in idea.' 391 U.S., at 376, 88 S.Ct., at 1678.

The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

Viewed in this light, we conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

[13] The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first *119 Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution. [5]

5 Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 52, 86 S.Ct. 1254, 1264, 16 L.Ed.2d 336 (1966), is equally in point here: 'Although it is possible that specific future applications of (the statute) may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that so considered, the legislation is constitutionally valid.'

The contrary holding of the District Court is therefore reversed.

Reversed.

Mr. Justice STEWART, concurring.

A State has broad power under the Twenty-first Amendment to specify the times, places, and circumstances where liquor may be dispensed within its borders. Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336; Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330, 84 S.Ct. 1293, 1297, 12 L.Ed.2d 350; Dept. of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 344, 346, 84 S.Ct. 1247, 1249, 1250, 12 L.Ed.2d 362; California v. Washington, 358 U.S. 64, 79 S.Ct. 116, 3 L.Ed.2d 106; Ziffrin, Inc. v. Reeves, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128; Mahoney v. Joseph Triner, Corp., 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424; State Board of Equalization v. Young's Market Co., 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38. I should suppose, therefore, that nobody would question the power of California to prevent the sale of liquor by the drink in places where food is not served, or where dancing is permitted, or where gasoline is sold.

But here California has provided that liquor by the drink shall not be sold in places where certain grossly sexual exhibitions are performed; and that action by the State, say the appellees, violates **398 the First and Fourteenth Amendments. I cannot agree.

Every State is prohibited by these same Amendments from invading the freedom of the press and from impinging *120 upon the free exercise of religion. But does this mean that a State cannot provide that liquor shall not be sold in bookstores, or within 200 feet of a church? I think not. For the State would not thereby be interfering with the First Amendment activities of the church or the First Amendment business of the bookstore. It would simply be controlling the distribution of liquor, as it has every right to do under the Twenty-first Amendment. On the same premise, I cannot see how the liquor regulations now before us can be held, on their face, to violate the First and Fourteenth Amendments. *

* This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution. See Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515; Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329—334, 84 S.Ct. 1293, 1296—1299, 12 L.Ed.2d 350; Dept. of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362.

It is upon this constitutional understanding that I join the opinion and judgment of the Court.

Mr. Justice DOUGLAS, dissenting.

This is an action for a declaratory judgment, challenging Rules and Regulations of the Department of Alcoholic Beverage Control of California. It is a challenge of the constitutionality of the rules on their face; no application of the rules has in fact been made to appellees by the institution of either civil or criminal proceedings. While the case meets the requirements of 'case or controversy' within the meaning of Art. III of the Constitution and therefore complies with Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, the case does not mark the precise impact of these rules against licensees who sell alcoholic beverages in California. The opinion *121 of the Court can, therefore, only deal with the rules in the abstract.

The line which the Court draws between 'expression' and 'conduct' is generally accurate; and it also accurately describes in general the reach of the police power of a State when 'expression' and 'conduct' are closely brigaded. But we still do not know how broadly or how narrowly these rules will be applied.

It is conceivable that a licensee might produce in a garden served by him a play—shakespearean perhaps or one in a more modern setting—in which, for example, 'fondling' in the sense of the rules appears. I cannot imagine that any such performance could constitutionally be punished or restrained, even though the police power of a State is now buttressed by the Twenty-first Amendment. [1] For, as stated by the Court, that Amendment did not supersede all other constitutional provisions 'in the area of liquor regulations.' Certainly a play which passes muster under the First Amendment is not made illegal because it is performed in a beer garden.

1 Section 2 of the Twenty-first Amendment reads as follows:
'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.'

Chief Justice Hughes stated the controlling principle in Electric Bond & Share Co. v. SEC, 303 U.S. 419, 443, 58 S.Ct. 678, 687, 82 L.Ed. 936:

> 'Defendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts. . . . By the cross-bill, defendants seek a judgment that each **399 and every provision of the act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the *122 purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation. . . .'

The same thought was expressed by Chief Justice Stone in Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 470—471, 65 S.Ct. 1384, 1393—1394, 89 L.Ed. 1725. Some provisions of an Alabama law regulating labor relations were challenged as too vague and uncertain to meet constitutional requirements. The Chief Justice noted that state courts often construe state statutes so that in their application they are not open to constitutional objections. Id., at 471, 65 S.Ct., at 1394. He said that for us to decide the constitutional question 'by anticipating such an authoritative construction' would be either 'to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow.'[2] Ibid. He added:

2 Even in cases on direct appeal from state court, when the decision below leaves unresolved questions of state law or procedure which bear on federal constitutional questions, we dismiss the appeal. Rescue Army v. Municipal Court, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666.

'In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes.' Ibid.

Those precedents suggest to me that it would have been more provident for the District Court to have declined ***123** to give a federal constitutional ruling, until and unless the generalized provisions of the rules were given particularized meaning.

Mr. Justice BRENNAN, dissenting.

I dissent. The California regulation at issue here clearly applies to some speech protected by the First Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, and also, no doubt, to some speech and conduct which are unprotected under our prior decisions. See Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The State points out, however, that the regulation does not prohibit speech directly, but speaks only to the conditions under which a license to sell liquor by the drink can be granted and retained. But, as Mr. Justice MARSHALL carefully demonstrates in Part II of his dissenting opinion, by requiring the owner of a nightclub to forgo the exercise of certain rights guaranteed by the First Amendment, the State has imposed an unconstitutional condition on the grant of a license. See Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). Nothing in the language or history of the Twenty-first Amendment authorizes the States to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression. For that reason, I would affirm the judgment of the District Court.

****400** Mr. Justice MARSHALL, dissenting.

In my opinion, the District Court's judgment should be affirmed. The record in this case is not a pretty one, and it is possible that the State could constitutionally punish some of the activities described therein ***124** under a narrowly drawn scheme. But appellees challenge these regulations[1] on their face, rather than as applied to a specific course of conduct.[2] Cf. ***125** Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). When so viewed, I think it clear that the regulations are overbroad and therefore unconstitutional. See, e.g., Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965).[3] Although the State's broad power to regulate the distribution of liquor ****401** and to enforce health and safety regulations is not to be doubted, that power may not be exercised in a manner that broadly stifles First Amendment freedoms. Cf. Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960). Rather, as this Court has made clear, '(p)recision of regulation ***126** must be the touchstone' when First Amendment rights are implicated. NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963). Because I am convinced that these regulations lack the precision which our prior cases require, I must respectfully dissent.

1 Rule 143.3(1) provides in relevant part:
'No licensee shall permit any person to perform acts of or acts which simulate:

'(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
'(b) The touching, caressing or fondling on the breasts, buttocks, anus or genitals.
'(c) The displaying of the pubic hair, anus, vulva or genitals.'
Rule 143.4 prohibits: 'The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:
'(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
'(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.
'(3) Scenes wherein a person displays the vulva or the anus or the genitals.
'(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

2 This is not an appropriate case for application of the abstention doctrine. Since these regulations are challenged on their face for overbreadth, no purpose would be served by awaiting a state court construction of them unless the principles announced in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), govern. See Zwickler v. Koota, 389 U.S. 241, 248—250, 88 S.Ct. 391, 395—396, 19 L.Ed.2d 444 (1967). Thus far, however, we have limited the applicability of Younger to cases where the plaintiff has an adequate remedy in a pending criminal prosecution. See Younger v. Harris, supra, 401 U.S. at 43—44, 91 S.Ct. at 750. Cf. Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943). But cf. Berryhill v. Gibson, 331 F.Supp. 122, 124 (MD Ala.1971), probable jurisdiction noted, 408 U.S. 920, 92 S.Ct. 2487, 33 L.Ed.2d 331 (1972). The California licensing provisions are, of course, civil in nature. Cf. Hearn v. Short, 327 F.Supp. 33 (SD Tex.1971). Moreover, the Younger doctrine has been held to 'have little force in the absence of a pending state proceeding.' Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509, 92 S.Ct. 1749, 1757, 32 L.Ed.2d 257 (1972) (emphasis added). There are at present no proceedings of any kind pending against these appellees. Finally, since the Younger doctrine rests heavily on federal deference to state administration of its own statutes, see Younger v. Harris, supra, 401 U.S. at 44—45, 91 S.Ct. at 750—751, it is waivable by the State. Cf. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329, 84 S.Ct. 1293, 1296, 12 L.Ed.2d 350 (1964). Appellants have nowhere mentioned the Younger doctrine in their brief before this Court, and when the case was brought to the attention of the attorney for the appellants during oral argument, he expressly eschewed reliance on it. In the court below, appellants specifically asked for a federal decision on the validity of California's regulations and stated that they did not think the court should abstain. See 326 F.Supp. 348, 351 (CD Cal.1971).

3 I am startled by the majority's suggestion that the regulations are constitutional on their face even though 'specific future applications of (the statute) may engender concrete problems of constitutional dimension.' (Quoting with approval Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 52, 86 S.Ct. 1254, 1265, 16 L.Ed.2d 336 (1966). Ante, at 397 n. 5.) Ever since Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), it has been thought that statutes which trench upon First Amendment rights are facially void even if the conduct of the party challenging them could be prohibited under a more narrowly drawn scheme. See, e.g., Baggett v. Bullitt, 377 U.S. 360, 366, 84 S.Ct. 1316, 1319, 12 L.Ed.2d 377 (1964); Coates v. City of Cincinnati, 402 U.S. 611, 616, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214 (1971); NAACP v. Button, 371 U.S. 415, 432—433, 83 S.Ct. 328, 337—338, 9 L.Ed.2d 405 (1963).
Nor is it relevant that the State here 'sought to prevent (bacchanalian revelries)' rather than performances by 'scantily clad ballet troupe(s).' Whatever the State 'sought' to do, the fact is that these regulations cover both these activities. And it should be clear that a praiseworthy legislative motive can no more rehabilitate an unconstitutional statute than an illicit motive can invalidate a proper statute.

I

It should be clear at the outset that California's regulatory scheme does not conform to the standards which we have previously enunciated for the control of obscenity. [4] Before this Court's decision in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), some American courts followed the rule of Regina v. Hicklin, L.R. 3 Q.B. 360 (1868), to the effect that the obscenity vel non of a piece of work could be judged by examining isolated aspects of it. See, e.g., United States v. Kennerley, 209 F. 119 (1913); Commonwealth v. Buckley, 200 Mass. 346, 86 N.E. 910 (1909). But in Roth we held that '(t)he

Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press.' 354 U.S., at 489, 77 S.Ct., at 1311. Instead, we held that the material must ***127** be 'taken as a whole,' Ibid., and, when so viewed, must appeal to a prurient interest in sex, patently offend community standards relating to the depiction of sexual matters, and be utterly without redeeming social value.[5] See ****402** Memoirs v. Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (1966).

4 Indeed, there are some indications in the legislative history that California adopted these regulations for the specific purpose of evading those standards. Thus, Captain Robert Devin of the Los Angeles Police Department testified that the Department favored adoption of the new regulations for the following reason: 'While statutory law has been available to us to regulate what was formerly considered as antisocial behavior, the federal and state judicial system has, through a series of similar decisions, effectively emasculated law enforcement in its effort to contain and to control the growth of pornography and of obscenity and of behavior that is associated with this kind of performance.' See also testimony of Roy E. June, City Attorney of the City of Costa Mesa; testimony of Richard C. Hirsch, Office of Los Angeles County District Attorney. App. 117.

5 I do not mean to suggest that this test need be rigidly applied in all situations. Different standards may be applicable when children are involved, see Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968); when a consenting adult possesses putatively obscene material in his own home, see Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); or when the material by the nature of its presentation cannot be viewed as a whole, see Rabe v. Washington, 405 U.S. 313, 317 n. 2, 92 S.Ct. 993, 995, 31 L.Ed.2d 258 (1972) (Burger, C.J., concurring). Similarly, I do not mean to foreclose the possibility that even the Roth-Memoirs test will ultimately be found insufficient to protect First Amendment interests when consenting adults view putatively obscene material in private. Cf. Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967). But cf. United States v. Reidel, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971). But I do think that, at very least, Roth-Memoirs sets an absolute limit on the kinds of speech that can be altogether read out of the First Amendment for purposes of consenting adults.

Obviously, the California rules do not conform to these standards. They do not require the material to be judged as a whole and do not speak to the necessity of proving prurient interest, offensiveness to community standards, or lack of redeeming social value. Instead of the contextual test approved in Roth and Memoirs these regulations create a system of per se rules to be applied regardless of context: Certain acts simply may not be depicted and certain parts of the body may under no circumstances be revealed. The regulations thus treat on the same level a serious movie such as 'Ulysses' and a crudely made 'stag film.' They ban not only obviously pornographic photographs, but also great sculpture from antiquity.[6]

6 Cf. Fuller, Changing Society Puts Taste to the Test, The National Observer, June 10, 1972, p. 24: 'Context is the essence of esthetic judgment . . .. There is a world of difference between Playboy and less pretentious girly magazines on the one hand, and on the other, The Nude, a picture selection from the whole history of art, by that fine teacher and interpreter of civilization, Kenneth Clark. People may be just as naked in one or the other, the bodies inherently just as beautiful, but the context of the former is vulgar, of the latter, esthetic.
'The same words, the same actions, that are cheap and tawdry in one book or play may contribute to the sublimity, comic universality or tragic power of others. For a viable theory of taste, context is all.'

***128** Roth held 15 years ago that the suppression of serious communication was too high a price to pay in order to vindicate the State's interest in controlling obscenity, and I see no reason to modify that judgment today. Indeed, even the appellants do not seriously contend that these regulations can be justified under the Roth-Memoirs test. Instead, appellants argue that California's regulations do not concern the control of pornography at all. These rules, they argue, deal with conduct rather than with speech and as such are not subject to the strict limitations of the First Amendment.

To support this proposition, appellants rely primarily on United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), which upheld the constitutionality of legislation punishing the destruction or mutilation of Selective Service certificates. O'Brien rejected the notion that 'an apparently limitless variety of conduct can be

labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,' and held that Government regulation of speech-related conduct is permissible 'if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' Id., at 376—377, 88 S.Ct., at 1678—1679.

***129** While I do not quarrel with these principles as stated in the abstract, their application in this case stretches them beyond the breaking point.[7] In O'Brien, the Court began its discussion by noting that the statute in question 'plainly does not abridge free speech on its face.' Indeed, even O'Brien himself conceded that facially the statute dealt 'with conduct having no connection with speech.'[8] Id., at 375, 88 S.Ct., at 1678. ****403** Here, the situation is quite different. A long line of our cases makes clear that motion pictures, unlike draftcard burning, are a form of expression entitled to prima facie First Amendment protection. 'It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.' Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501, 72 S.Ct. 777, 780, 96 L.Ed. 1098 (1952) (footnote omitted). See also Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968); ***130** Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); Pinkus v. Pitchess, 429 F.2d 416 (CA9 1970), aff'd by equally divided court sub nom. California v. Pinkus, 400 U.S. 922, 91 S.Ct. 185, 27 L.Ed.2d 183 (1970). Similarly, live performances and dance have, in recent years, been afforded broad prima facie First Amendment protection. See, e.g., Schacht v. United States, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); P.B.I.C., Inc. v. Byrne, 313 F.Supp. 757 (Mass.1970), vacated to consider mootness, 401 U.S. 987, 91 S.Ct. 1222, 28 L.Ed.2d 526 (1971); In re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535 (1968), cert. denied sub nom. California v. Giannini, 395 U.S. 910, 89 S.Ct. 1743, 23 L.Ed.2d 223 (1969).

7 Moreover, even if the O'Brien test were here applicable, it is far from clear that it has been satisfied. For example, most of the evils that the State alleges are caused by appellees' performances are already punishable under California law. See n. 11, infra. Since the less drastic alternative of criminal prosecution is available to punish these violations, it is hard to see how 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential' to further the State's interest.

8 The Court pointed out that the statute 'does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views . . . A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.' 391 U.S., at 375, 88 S.Ct., at 1678.

If, as these many cases hold, movies, plays, and the dance enjoy constitutional protection, it follows, ineluctably I think, that their component parts are protected as well. It is senseless to say that a play is 'speech' within the meaning of the First Amendment, but that the individual gestures of the actors are 'conduct' which the State may prohibit. The State may no more allow movies while punishing the 'acts' of which they are composed than it may allow newspapers while punishing the 'conduct' of setting type.

Of course, I do not mean to suggest that anything which, occurs upon a stage is automatically immune from state regulation. No one seriously contends, for example, that an actual murder may be legally committed so long as it is called for in the script, or that an actor may inject real heroin into his veins while evading the drug laws that apply to everyone else. But once it is recognized that movies and plays enjoy prima facie First Amendment protection, the standard for reviewing state regulation of their component parts shifts dramatically. For while '(m)ere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, (they are) insufficient to justify such as diminishes the exercise of rights so vital' as freedom ***131** of speech. Schneider v. State, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939). Rather, in order to restrict speech, the State must show that the speech is 'used in such circumstances and (is) of such a nature as to create a clear and present danger that (it) will bring about the substantive evils that (the State) has a right

to prevent.' Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470 (1919). Cf. Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). [9]

9 Of course, the State need not meet the clear and present danger test if the material in question is obscene. See Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). But, as argued above, the difficulty with California's rules is that they do not conform to the Roth test and therefore regulate material that is not obscene. See supra, at 401—402.

When the California regulations are measured against this stringent standard, **404 they prove woefully inadequate. Appellants defend the rules as necessary to prevent sex crimes, drug abuse, prostitution, and a wide variety of other evils. These are precisely the same interests that have been asserted time and again before this Court as justification for laws banning frank discussion of sex and that we have consistently rejected. In fact, the empirical link between sex-related entertainment and the criminal activity popularly associated with it has never been proved and, indeed, has now been largely discredited. See, e.g., Report of the Commission on Obscenity and Pornography 27 (1970); Cairns, Paul, & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn.L.Rev. 1009 (1962). Yet even if one were to concede that such a link existed, it would hardly justify a broadscale attack on First Amendment freedoms. The only way to stop murders and drugs abuse is to punish them directly. But the State's interest in controlling material *132 dealing with sex is secondary in nature. [10] It can control rape and prostitution by punishing those acts, rather than by punishing the speech that is one step removed from the feared harm. [11] Moreover, because First Amendment rights are at stake, the State must adopt this 'less restrictive alternative' unless it can make a compelling demonstration that the protected activity and criminal conduct are so closely linked that only through regulation of one can the other be stopped. Cf. United States v. Robel, 389 U.S. 258, 268, 88 S.Ct. 419, 426, 19 L.Ed.2d 508 (1967). As we said in Stanley v. Georgia, 394 U.S. 557, 566—567 89 S.Ct. 1243, 1249, 22 L.Ed.2d 542 (1969), 'if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '(a)mong free men, the deterrents ordinarily to be applied to prevent *133 crime are education and punishment for violations of the law . . ..' Whitney v. California, 274 U.S. 357, 378, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). . . . Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.' [12]

10 This case might be different if the State asserted a primary interest in stopping the very acts performed by these dancers and actors. However, I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults. Cf. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Moreover, it is unnecessary to reach that question in this case since the State's regulations are plainly not designed to stop the acts themselves, most of which are in fact legal when done in private. Rather, the State punishes the acts only when done in public as part of a dramatic presentation. Cf. United States v. O'Brien, supra, 391 U.S. at 375, 88 S.Ct. at 1678. It must be, therefore, that the asserted state interest stems from the effect of the acts on the audience rather than from a desire to stop the acts themselves. It should also be emphasized that this case does not present problems of an unwilling audience or of an audience composed of minors.

11 Indeed, California already has statutes controlling virtually all of the misconduct said to flow from appellees' activities. See Calif.Penal Code s 647(b) (Supp.1972) (prostitution); Calif.Penal Code ss 261, 263 (1970) (rape); Calif.Bus. & Prof.Code s 25657 (Supp.1972) ('B-Girl' activity); Calif.Health & Safety Code ss 11500, 11501, 11721, 11910, 11912 (1964 and Supp.1972) (sale and use of narcotics).

12 Of course, it is true that Stanley does not govern this case, since Stanley dealt only with the private possession of obscene materials in one's own home. But in another sense, this case is stronger than Stanley. In Stanley, we held that the State's interest in the prevention of sex crimes did not justify laws restricting possession of certain materials, even though they were conceded to be obscene. It follows a fortiori that this interest is insufficient when the materials are not obscene and, indeed, are constitutionally protected.

**405 II

It should thus be evident that, under the standards previously developed by this Court, the California regulations are overbroad: They would seem to suppress not only obscenity outside the scope of the First Amendment, but also speech that is clearly protected. But California contends that these regulations do not involve suppression at all. The State claims that its rules are not regulations of obscenity, but are rather merely regulations of the sale and consumption of liquor. Appellants point out that California does not punish establishments which provide the proscribed entertainment, but only requires that they not serve alcoholic beverages on their premises. Appellants vigorously argue that such regulation falls within the State's general police power as augmented, when alcoholic beverages are involved, by the Twenty-first Amendment. [13]

13 The Twenty-first Amendment, in addition to repealing the Eighteenth Amendment, provides: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.'

*134 I must confess that I find this argument difficult to grasp. To some extent, it seems premised on the notion that the Twenty-first Amendment authorizes the States to regulate liquor in a fashion which would otherwise be constitutionally impermissible. But the Amendment by its terms speaks only to state control of the importation of alcohol, and its legislative history makes clear that it was intended only to permit 'dry' States to control the flow of liquor across their boundaries despite potential Commerce Clause objections. [14] See generally Joseph E. Seagram & Sons Inc. v. Hostetter, 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964). There is not a word in that history which indicates that Congress meant to tamper in any way with First Amendment rights. I submit that the framers of the Amendment would be astonished to *135 discover that they had inadvertently enacted a pro tanto repealer of the rest of the Constitution. Only last Term, we held that the State's conceded power to license the distribution of intoxicating beverages did not justify use of that power in a manner that conflicted with the Equal Protection Clause. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178—179, 92 S.Ct. 1965, 1974—1975, 32 L.Ed.2d 627 (1972). Cf. **406 Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Hornsby v. Allen, 326 F.2d 605 (CA5 1964). I am at a loss to understand why the Twenty-first Amendment should be thought to override the First Amendment but not the Fourteenth.

14 The text of the Amendment is based on the Webb-Kenyon Act, 37 Stat. 699, which antedated prohibition. The Act was entitled 'An Act Divesting intoxicating liquors of their interstate character in certain cases,' and was designed to allow 'dry' States to regulate the flow of alcohol across their borders. See, e.g., McCormick & Co. v. Brown, 286 U.S. 131, 140—141, 52 S.Ct. 522, 526, 76 L.Ed. 1017 (1932); Clark Distilling Co. v. Western Maryland R. Co., 242 U.S. 311, 324, 37 S.Ct. 180, 184, 61 L.Ed. 326 (1917). The Twenty-first Amendment was intended to embed this principle permanently into the Constitution. As explained by its sponsor on the Senate floor 'to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.
'(T)he pending proposal will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor.' 76 Cong.Rec. 4141 (remarks of Sen. Blaine).

To be sure, state regulation of liquor is important, and it is deeply embedded in our history. See, e.g., Colonnade Catering Corp. v. United States, 397 U.S. 72, 77, 90 S.Ct. 774, 777, 25 L.Ed.2d 60 (1970). But First Amendment values are important as well. Indeed in the past they have been thought so important as to provide an independent restraint on every power of Government. 'Freedom of press, freedom of speech, freedom of religion are in a preferred position.' Murdock v. Pennsylvania, 319 U.S. 105, 115, 63 S.Ct. 870, 876, 87 L.Ed. 1292 (1943). Thus, when the Government attempted to justify a limitation on freedom of association by reference to the war power, we categorically rejected the attempt. '(The) concept of 'national defense" we held, 'cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the

democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed, be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which ***136** makes the defense of the Nation worthwhile.' United States v. Robel, 389 U.S., at 264, 88 S.Ct., at 423—424. Cf. New York Times Co. v. United States, 403 U.S. 713, 716—717, 91 S.Ct. 2140, 2142—2143, 29 L.Ed.2d 822 (1971) (Black, J., concurring); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231, 235, 78 L.Ed. 413 (1934). If the First Amendment limits the means by which our Government can ensure its very survival, then surely it must limit the State's power to control the sale of alcoholic beverages as well.

Of course, this analysis is relevant only to the extent that California has in fact encroached upon First Amendment rights. Appellants argue that no such encroachment has occurred, since appellees are free to continue providing any entertainment they choose without fear of criminal penalty. Appellants suggest that this case is somehow different because all that is at stake is the 'privilege' of serving liquor by the drink.

It should be clear, however, that the absence of criminal sanctions is insufficient to immunize state regulation from constitutional attack. On the contrary, 'this is only the beginning, not the end, of our inquiry.' Sherbert v. Verner, 374 U.S. 398, 403—404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963). For '(i)t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.' Id., at 404, 84 S.Ct., at 1794. As we pointed out only last Term, '(f)or at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even thought the government may deny him the benefit for any number or reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected ***137** speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.' Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972).

Thus, unconstitutional conditions on welfare benefits,[15] unemployment compensation,[16] ****407** tax exemptions,[17] public employment,[18] bar admissions,[19] and mailing privileges[20] have all been invalidated by this Court. In none of these cases were criminal penalties involved. In all of them, citizens were left free to exercise their constitutional rights so long as they were willing to give up a 'gratuity' that the State had no obligation to provide. Yet in all of them, we found that the discriminatory provision of a privilege placed too great a burden on constitutional freedoms. I therefore have some difficulty in understanding why California nightclub proprietors should be singled out and informed that they alone must sacrifice their constitutional rights before gaining the 'privilege' to serve liquor.

15 See Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). But cf. Wyman v. James, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971).

16 See Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

17 See Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

18 See, e.g., Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

19 See, e.g., Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); Konigsberg v. State Bar, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). But cf. Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971); Konigsberg v. State Bar, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961).

20 See, e.g., Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971); Hannegan v. Esquire Inc., 327 U.S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586 (1946).

Of course, it is true that the State may in proper circumstances enact a broad regulatory scheme that incidentally restricts First Amendment rights. For example, if California prohibited the sale of alcohol altogether, I do not mean to suggest that the proprietors ***138** of theaters and bookstores would be

constitutionally entitled to a special dispensation. But in that event, the classification would not be speech related and, hence, could not be rationally perceived as penalizing speech. Classifications that discriminate against the exercise of constitutional rights per se stand on an altogether different footing. They must be supported by a 'compelling' governmental purpose and must be carefully examined to insure that the purpose is unrelated to mere hostility to the right being asserted. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969).

Moreover, not only is this classification speech related; it also discriminates between otherwise indistinguishable parties on the basis of the content of their speech. Thus, California nightclub owners may present live shows and movies dealing with a wide variety of topics while maintaining their licenses. But if they choose to deal with sex, they are treated quite differently. Classifications based on the content of speech have long been disfavored and must be viewed with the gravest suspicion. See, e.g., Cox v. Louisiana, 379 U.S. 536, 556—558, 85 S.Ct. 453, 465—466, 13 L.Ed.2d 471 (1965). Whether this test is thought to derive from equal protection analysis, see Police Department of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267, 280 (1951), or directly from the substantive constitutional provision involved, see Cox v. Louisiana, supra; Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), the result is the same: any law that has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them . . . (is) patently unconstitutional.' United States v. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968).

As argued above, the constitutionally permissible purposes asserted to justify ****408** these regulations are too remote to satisfy the Government's burden, when First Amendment rights are at stake. See supra, at 403—405. ***139** It may be that the Government has an interest in suppressing lewd or 'indecent' speech even when it occurs in private among consenting adults. Cf. United States v. Thirty-seven Photographs, 402 U.S. 363, 376, 91 S.Ct. 1400, 1408, 28 L.Ed.2d 822 (1971). But cf. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). That interest, however, must be balanced against the overriding interest of our citizens in freedom of thought and expression. Our prior decisions on obscenity set such a balance and hold that the Government may suppress expression treating with sex only if it meets the three-pronged Roth-Memoirs test. We have said that '(t)he door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.' Roth v. United States, 354 U.S., at 488, 77 S.Ct., at 1311. Because I can see no reason why we should depart from that standard in this case, I must respectfully dissent.

All Citations

409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342

KeyCite Yellow Flag - Negative Treatment
Abrogation Recognized by Hamilton's Bogarts, Inc. v. Michigan, 6th Cir.(Mich.), August 30, 2007

101 S.Ct. 2599
Supreme Court of the United States

NEW YORK STATE LIQUOR AUTHORITY
v.
Dennis BELLANCA, dba The Main Event, et al.

No. 80-813.
|
June 22, 1981.

Owners of nightclubs, bars and restaurants brought action in which they sought declaratory judgment that New York statute prohibiting topless dancing at licensed premises was unconstitutional and sought injunctive relief. The Supreme Court, Erie County, Special Term, John H. Doerr, J., granted plaintiffs summary judgment declaring statute unconstitutional, and State appealed. The Court of Appeals, 50 N.Y.2d 524, 429 N.Y.S.2d 616, 407 N.E.2d 460, Wachtler, J., affirmed, and certiorari was granted. The Supreme Court held that statute was constitutional.

Reversed and remanded.

Justice Marshall concurred in the judgment.

Justice Brennan dissented from summary disposition.

Justice Stevens dissented and filed opinion.

Opinion on remand, 54 N.Y.2d 228, 445 N.Y.S.2d 87, 429 N.E.2d 765.

West Headnotes (3)

[1] **Intoxicating Liquors**
Legislative Regulation

State has absolute power under Twenty-First Amendment to prohibit totally the sale of liquor within its boundaries. U.S.C.A.Const. Amend. 21.

80 Cases that cite this headnote

[2] **Intoxicating Liquors**
Legislative Regulation

State has broad power under Twenty-First Amendment to regulate time, places and circumstances under which liquor may be sold. U.S.C.A.Const. Amend. 21.

91 Cases that cite this headnote

[3] **Intoxicating Liquors**
Licensing and Regulation

New York statute prohibiting topless dancing in establishment licensed by state to serve liquor was not unconstitutional. N.Y.Alcoholic Beverage Control Law § 106, subd. 6a; U.S.C.A.Const. Amend. 21.

96 Cases that cite this headnote

Opinion

***714** ****2600** PER CURIAM.

The question presented in this case is the power of a State to prohibit topless dancing in an establishment licensed by the State to serve liquor. In 1977, the State of New York amended its Alcoholic Beverage Control Law to prohibit nude dancing in establishments licensed by the State to sell liquor for on-premises consumption. N.Y.Alco.Bev.Cont.Law, § 106, subd. 6-a (McKinney Supp.1980-1981).[1] The statute ***715** does not provide for criminal penalties, but its violation may cause an establishment to lose its liquor license.

1 The statute provides:

> "No retail licensee for on premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to

> expose to view any portion of the breast below the top of the areola, or any simulation thereof."

Respondents, owners of nightclubs, bars, and restaurants which had for a number of years offered topless dancing, brought a declaratory judgment action in state court, alleging that the statute violates the First Amendment of the United States Constitution insofar as it prohibits all topless dancing in all licensed premises. The New York Supreme Court, 50 N.Y.2d 524, 429 N.Y.S.2d 616, 407 N.E.2d 460, declared the statute unconstitutional, and the New York Court of Appeals affirmed by a divided vote. 50 N.Y.2d 524, 429 N.Y.S.2d 616, 407 N.E.2d 460. It reasoned that topless dancing was a form of protected expression under the First Amendment and that the State had not demonstrated a need for prohibiting "licensees from presenting nonobscene topless dancing performances to willing customers...." *Id.*, at 529, 429 N.Y.S.2d, at 619, 407 N.E.2d, at 463. The dissent contended that the statute was well within the State's power, conferred by the Twenty-first Amendment, to regulate the sale of liquor within its boundaries.[2] We agree with the reasoning of the dissent and now reverse the decision of the New York Court of Appeals.

[2] The Twenty-first Amendment provides in relevant part that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[1] **[2]** This Court has long recognized that a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 167, 84 L.Ed. 128 (1939). It is equally well established that a State has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold. In *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), we upheld the facial constitutionality of a statute prohibiting acts of "gross sexuality," including the display of the genitals and live or filmed performances of sexual acts, in establishments licensed by the State to serve ***716** liquor. Although we recognized that not all of the prohibited acts would be found obscene and were therefore entitled to some measure of First Amendment protection, we reasoned that the statute was within the State's broad power under the Twenty-first Amendment to regulate the sale of liquor.

****2601** In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), we considered a First Amendment challenge to a local ordinance which prohibited females from appearing topless not just in bars, but "any public place." Though we concluded that the District Court had not abused its discretion in granting a preliminary injunction against enforcement of the ordinance, that decision does not limit our holding in *LaRue*. First, because *Doran* arose in the context of a preliminary injunction, we limited our standard of review to whether the District Court abused its discretion in concluding that plaintiffs were *likely* to prevail on the merits of their claim, not whether the ordinance actually violated the First Amendment. Thus, the decision may not be considered a "final judicial decision based on the actual merits of the controversy." *University of Texas v. Camenisch*, 451 U.S. 390, 396, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981). Second, the ordinance was far broader than the ordinance involved either in *LaRue* or here, since it proscribed conduct at "any public place," a term that " 'could include the theater, town hall, opera place, as well as a public market place, street or any place of assembly, indoors or outdoors.' " 422 U.S., at 933, 95 S.Ct., at 2568 (quoting *Salem Inn, Inc. v. Frank*, 364 F.Supp. 478, 483 (EDNY 1973)). Here, in contrast, the State has not attempted to ban topless dancing in "any public place": As in *LaRue*, the statute's prohibition applies only to establishments which are licensed by the State to serve liquor. Indeed, we explicitly recognized in *Doran* that a more narrowly drawn statute would survive judicial scrutiny:

> "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in ***717** *California v. LaRue*, 409 U.S. 109, 118 [93 S.Ct. 390, 397, 34 L.Ed.2d 342] (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *LaRue*, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license control program." 422 U.S., at 932-933, 95 S.Ct., at 2568-2569.

[3] Judged by the standards announced in *LaRue* and *Doran*, the statute at issue here is not unconstitutional. What the New York Legislature has done in this case is precisely what this Court *in Doran* has said a State may do. Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs.

Respondents nonetheless insist that *LaRue* is distinguishable from this case, since the statute there prohibited acts of "gross sexuality" and was well supported by legislative findings demonstrating a need for the rule. They argue that the statute here is unconstitutional as applied to topless dancing because there is no legislative finding that topless dancing poses anywhere near the problem posed by acts of "gross sexuality." But even if explicit legislative findings were required to uphold the constitutionality of this statute as applied to topless dancing, those findings exist in this case. The purposes of the statute have been set forth in an accompanying legislative memorandum, New York State Legislative Annual 150 (1977).

> "Nudity is the kind of conduct that is a proper subject for legislative action as well as regulation by the State Liquor Authority as a phase of liquor licensing. It has long been held that sexual acts and performances ***718** may constitute disorderly behavior within the meaning of the Alcoholic Beverage Control Law ....
>
> "Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand."

In short, the elected representatives of the State of New York have chosen to avoid ****2602** the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption. Given the "added presumption in favor of the validity of the state regulation" conferred by the Twenty-first Amendment, *California v. LaRue,* 409 U.S., at 118, 93 S.Ct., at 397, we cannot agree with the New York Court of Appeals that the statute violates the United States Constitution. Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts.

Accordingly, the petition for certiorari is granted, the judgment of the New York Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice MARSHALL concurs in the judgment.

Justice BRENNAN dissents from the summary disposition and would set the case for oral argument.

Justice STEVENS, dissenting.

Although the Court has written several opinions implying that nude or partially nude dancing is a form of expressive ***719** activity protected by the First Amendment, the Court has never directly confronted the question. [1] Today the Court construes the Twenty-first Amendment as a source of power permitting the State to prohibit such presumably protected activities in establishments which serve liquor. The Court relies on *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, for that construction of the Twenty-first Amendment. The rationale of today's decision however, is not the same as the explanation the Court gave for its holding in that case. The syllogism supporting today's conclusion includes the premise that the State's Twenty-first Amendment power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where activity assumed to be protected by the First Amendment occurs. [2] If that reasoning is sound, then a State may ban any protected activity on such premises, no matter how innocuous or, more importantly, how clearly protected. [3]

1 See *Doran v. Salem, Inn., Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-558, 95 S.Ct. 1239, 1245-1246, 43 L.Ed.2d 448; *California v. LaRue*, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342;

Schad v. Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671.

2 "The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Ante*, at 2601.

3 Rejecting this reasoning, the New York Court of Appeals noted that "it would be most difficult to sustain a law prohibiting political discussions in places where alcohol is sold by the drink, even though the record may show, conclusively, that political discussions in bars often lead to disorderly behavior, assaults and even homicide." 50 N.Y.2d 524, 531, n. 7, 429 N.Y.S.2d 616, 620, n. 7, 407 N.E.2d 460, 464, n. 7.

In *California v. LaRue*, instead of relying on the simplistic reasoning employed by the Court today, the majority analyzed the issue by balancing the State's interests in preventing specifically identified social harms against the minimal interest in protected expression implicated by nude dancing. [4] ***720** The opinion reflected the view that the degree of protection afforded by the ****2603** First Amendment is a variable, and that the slight interest in free expression implicated by naked and lewd dancing was plainly outweighed by the State's interest-supported by explicit legislative findings-in maintaining order and decency. [5] The Twenty-first Amendment provided the Court with an "added presumption," 409 U.S., at 118, 93 S.Ct., at 397, to tip the scales in the direction of law and order, [6] but the opinion's ***721** evaluation of the conflicting interests would surely have led to the same result without that makeweight. [7]

4 The Court's opinion in *LaRue* recounted in explicit detail the undesirable consequences-described in evidence adduced at public hearings-resulting from the performance of lewd or naked dancing and entertainment in bars and cocktail lounges. See 409 U.S., at 111-112, 93 S.Ct., at 393-394. After emphasizing the State's interests in eliminating those consequences the Court turned to a discussion of the First Amendment and stated that "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases." *Id.*, at 117, 93 S.Ct., at 396.

5 In minimizing the First Amendment interests in nude dancing and recognizing the State's interest in regulating such behavior, the Court stated:

"The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication....

"... [W]e conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interest for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater." *Id.*, at 118, 93 S.Ct., at 397.

6 The Court recognized that the Twenty-first Amendment confers "something more than the normal state authority over public health, welfare, and morals." *Id.*, at 114, 93 S.Ct., at 395. In discussing decisions construing the Twenty-first Amendment, however, the Court noted that, "[t]hese decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations." *Id.*, at 115, 93 S.Ct., at 395.

7 In discussing the Twenty-first Amendment, the Court recognized that the States, "vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power...." *Id.*, at 114, 93 S.Ct., at 395. The Court held that the Department of Alcoholic Beverage Control's "conclusion ... that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution." *Id.*, at 118-119, 93 S.Ct., at 397.

The explicit legislative findings on which the Court heavily relied in *LaRue* have no counterpart in this case. The 1977 amendment to the New York Alcoholic Beverage

Control Law left in place the prohibition against nude dancing that had been in effect for some time. Prior to 1977, topless dancing had been permitted subject to regulation that required the performer to dance on a stage that was inaccessible to patrons. [8] The State has not indicated that the New York Legislature was presented with any evidence to the effect that this regulated form of entertainment had produced any undesirable consequences. A memorandum in the New York State Legislative Annual (1977), see *ante*, at 2601, notes that nudity had "long been held" to constitute disorderly behavior within the meaning of the law as it then existed, but that ***722** memorandum sheds no light whatever on the decision to prohibit topless dancing as well as nudity. [9] The New York Court of ****2604** Appeals stated that this law "was not prompted by hearings or any legislative awareness of deficiencies in the prior regulation permitting topless dancing subject to restrictions and the continued supervision of the State Liquor Authority." 50 N.Y.2d 524, 530, 429 N.Y.S.2d 616, 620, 407 N.E.2d 460, 464.

8 The pre-1977 regulation prohibited the licensee from permitting "any female to appear on licensed premises" so as "to expose to view any portion of the breast below the top of the areola" but contained an exception for "any female entertainer performing on a stage or platform which is at least 18 inches above the immediate floor level and which is removed by at least six feet from the nearest patron." See 50 N.Y.2d, at 526, n. 2, 429 N.Y.S.2d, at 617, n. 2, 407 N.E.2d, at 461-462, n. 2. The 1977 amendment incorporated the general prohibition of topless dancing but did not incorporate the exception. See N.Y.Alco.Bev.Cont.Law, § 106, subd. 6-a (McKinney Supp.1980-1981).

9 The New York Court of Appeals recognized the difference between nude and topless dancing and emphasized the limited nature of respondents' challenge:

> "In the case now before us the plaintiffs do not claim a right to offer performances of explicit sexual acts, live or filmed, real or simulated. Nor are we concerned with nude dancing. There is no contention that the plaintiffs should have a right to present their dancers entirely unclothed, and thus they do not challenge that portion of the statute which prohibits nudity. Nor do they contest the statute insofar as it would prohibit women other than dancers from appearing barebreasted on their premises. Similarly the plaintiffs do not contest the State's right to place some restriction on topless dancing performances as the Liquor Authority's regulations have done in the past. Finally, of course, the plaintiffs do not claim that they are exempted from the obscenity laws or that topless dancing should always be allowed no matter how, or where performed. The only question before us is whether the statute is constitutional to the extent that it absolutely prohibits liquor licensees from presenting nonobscene topless dancing performances to willing customers under all circumstances." 50 N.Y.2d, at 529, 429 N.Y.S.2d, at 619, 407 N.E.2d, at 463.

I therefore believe that we must assume that the pre-1977 regulation adequately avoided the kind of "gross sexuality" that gave rise to the regulation challenged in *LaRue*. Although the emphasis on the legislative findings in this Court's opinion in *LaRue* may have merely disguised the Court's real holding, the Court is quite wrong today when it implies that the factors that supported the holding in *LaRue* are also present in this case. This case does not involve "gross sexuality" or any legislative explanation for the 1977 change in the law to prohibit topless dancing.

Having said this, I must confess that if the question whether a State may prohibit nude or partially nude dancing ***723** in commercial establishments were squarely confronted on its merits, I might well conclude that this is the sort of question that may be resolved by the elected representatives of a community. Sooner or later that issue will be briefed and argued on its own merits. [10] I dissent in this case because I believe the Court should not continue to obscure that issue with irrelevancies such as its mischievous suggestion that the Twenty-first Amendment gives States power to censor free expression in places where liquor is served. [11] Neither the language [12] nor the history of that Amendment provides any ***724** support for that suggestion. [13] Nor does ****2605** *LaRue* justify it. [14] Without any aid from the Twenty-first Amendment, the ***725** State's ordinary police powers are adequate to support the prohibition of nuisances in taverns or elsewhere. Cf. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310.

10 If topless dancing is entitled to First Amendment protection, it would seem to me that the places where it should most appropriately be conducted are places where alcoholic beverages are served. A holding

that a state liquor board may prohibit its licensees from allowing such dancing on their premises may therefore be the practical equivalent of a holding that the activity is not protected by the First Amendment.

11 In *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350, the Court recognized the effect of the Twenty-first Amendment on the Commerce Clause but included a reminder that is pertinent here:

> "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332, 84 S.Ct., at 1298.
>
> That admonition is even more important in the context presented by the instant case, inasmuch as the drafters of the Twenty-first Amendment clearly intended the Amendment to have some impact on the Commerce Clause. That conclusion, contrary to the Court's reasoning, is totally unsupported with respect to the First Amendment.

12 In *California Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-107, 100 S.Ct. 937, 943-944, 63 L.Ed.2d 233, the Court rejected a claim that the Twenty-first Amendment prohibited the application of the Sherman Act to California's system of wine pricing and pointed out that in "determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision ...." The difference between the Court's interpretation of the Twenty-first Amendment and its plain language is quite dramatic. The pertinent section of that Amendment provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

13 In *Craig v. Boren*, 429 U.S. 190, 206, 97 S.Ct. 451, 461-462, 50 L.Ed.2d 397, the Court stated that "[t]his Court's decisions ... have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." The Court then unequivocally rejected the Twenty-first Amendment as a basis for sustaining state liquor regulations that otherwise violated the Equal Protection Clause:

> "Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: 'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.' P. Brest, Processes of Constitutional Decisionmaking, Cases and Materials, 258 (1975). Any departures from this historical view have been limited and sporadic." *Ibid.*
>
> Cf. *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515. Surely the First Amendment is entitled to a status equal to the Fourteenth Amendment.

14 Ironically, today the Court adopts an argument that the appellant expressly disclaimed during the oral argument in *LaRue* :

> "QUESTION: Mr. Porter, in your argument here, is it based at all on the Twenty-First Amendment, dealing with the State authority over regulation of alcoholic beverages?
>
> "MR. PORTER: Based to the extent that if we are in the First Amendment area, then as far as balancing the State's interests, we submit that both the traditional power that a State has had over the conditions surrounding the sale of alcoholic beverages and the power given to the States under the Twenty-First Amendment must be considered in balancing the State interests, that these are substantial and important State interests, where we're talking about the conditions surrounding the sale and consumption of alcoholic beverages.
>
> "We have never argued, nor would we ever argue, that the Twenty-First Amendment would automatically override the First Amendment, or any other part of the Constitution. We only urge that-
>
> "QUESTION: Well, it has been held that the Twenty-First Amendment overrode a great deal of the commerce clause, hasn't it?
>
> "MR. PORTER: Well,-
>
> "QUESTION: And it does, by its terms.
>
> "MR. PORTER: That's correct, but I-
>
> "QUESTION: And it has been held that the Twenty-First Amendment overrode a good deal of the equal protection clause of the Fourteenth Amendment, hasn't it? It was in the *Younger* case.

> "MR. PORTER: Yes, but I would submit that-or I would, myself, attempt to temper that somewhat, to the extent I think it shows an overriding State interest in weighing between the commerce clause and the Twenty-First Amendment, where you get up in equal protection, where you get up into the First Amendment or some so-called, alleged, preferred amendments of the Constitution.
> "As I said, we do not argue that it overrides the First Amendment. If we're dealing in a First Amendment area, that great weight should be given to the State's interest and power under the Twenty-First Amendment, in balancing and weighing, the State interest outweighs the State interest to be protected under the First Amendment." Tr. of Oral Arg. in *California v. LaRue*, O.T.1972, No. 71-36, pp. 10-12.

Although I voted to deny certiorari and allow the decision of the highest court of the State of New York to stand, certiorari having been granted. I dissent from the Court's disposition of the case on the basis of a blatantly incorrect reading of the Twenty-first Amendment.

All Citations

452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357, 7 Media L. Rep. 1500

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110 S.Ct. 596
Supreme Court of the United States

FW/PBS, INC., dba Paris Adult Bookstore II, et al., Petitioners
v.
CITY OF DALLAS et al.
M.J.R., INC., et al., Petitioners
v.
CITY OF DALLAS.
Calvin BERRY, III, et al., Petitioners
v.
CITY OF DALLAS et al.

Nos. 87–2012, 87–2051 and 88–49.
|
Argued Oct. 4, 1989.
|
Decided Jan. 9, 1990.

Petitioners involved with adult entertainment industry adversely affected by zoning and licensing ordinance, sued for declaratory and injunctive relief. The United States District Court for the Northern District of Texas, Jerry Buchmeyer, J., 648 F.Supp. 1061, held ordinance was not violative of First or Fourth Amendments, and petitioners appealed. The Court of Appeals for the Fifth Circuit, 837 F.2d 1298, affirmed, and certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) petitioners could challenge facial validity of ordinance, on First Amendment prior restraint grounds; (2) ordinance's failure to provide reasonable period during which decision whether to issue license must be made, and to provide avenue for prompt judicial review of adverse decision, rendered licensing requirements unconstitutional as enforced against petitioners engaged in First Amendment activity; (3) petitioners lacked standing to challenge ordinance provisions barring persons residing with individuals whose licenses to conduct sexually oriented businesses had been denied or revoked, or prohibiting applicants for such licenses who were convicted of specified offenses or whose spouses were so convicted, from obtaining such licenses; (4) petitioners lacked standing to challenge ordinance denying licenses to applicants who were convicted of enumerated crimes; (5) city council did not violate due process rights of motel owners by declaring that motels renting rooms for less than ten hours were "sexually oriented businesses" subject to ordinance; and (6) determination that such motels were "sexually oriented businesses" did not impinge upon the freedom of association rights of occupants of rooms.

Affirmed in part, reversed in part, vacated in part, and remanded.

Justice Brennan concurred in judgment and filed opinion, in which Justices Marshall and Blackmun joined.

Justice White concurred in part and dissented in part and filed opinion, in which the Chief Justice joined.

Justice Stevens concurred in part and dissented in part and filed opinion.

Justice Scalia concurred in part and dissented in part and filed opinion.

Opinion on remand, 896 F.2d 864.

West Headnotes (13)

[1] Constitutional Law
Licenses

Petitioners associated with sexually oriented businesses could raise facial constitutional challenge to city licensing ordinance applicable to such businesses, on First Amendment prior restraint grounds; ordinance vested "unbridled discretion" in licensor, as required for facial challenge, as there was no time limit during which licensing authority was required to act. (Per Justice O'Connor, with two Justices concurring and three Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

294 Cases that cite this headnote

[2] Constitutional Law
Licenses

Petitioners associated with sexually oriented businesses had valid First Amendment interest in challenging ordinance requiring licensing of such businesses, even though ordinance applied to some businesses that apparently were not protected by First Amendment, such as escort agencies and sexual encounter centers; ordinance largely targeted businesses purveying sexual explicit speech, which were conceded to be protected by First Amendment. (Per Justice O'Connor, with two Justices concurring and three Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

113 Cases that cite this headnote

[3] Constitutional Law

Licenses and permits in general

Ordinance requiring license in connection with the operation of sexually oriented businesses, as enforced, was unconstitutional prior restraint on licensees' First Amendment rights; ordinance lacked necessary limitation on period of time during which licensor must make decision whether to issue license, during which status quo was maintained, and ordinance did not provide possibility for prompt judicial review in the event license was erroneously denied. (Per Justice O'Connor, with two Justices concurring and three Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

368 Cases that cite this headnote

[4] Federal Courts

Presentation of Questions Below or on Review;Record;Waiver

Although neither party had raised issue of standing, and courts below had not passed on it, Supreme Court was required to consider whether owners of sexually oriented businesses had standing to challenge city ordinance regulating their activities; federal courts are under an independent obligation to examine their own jurisdiction.

666 Cases that cite this headnote

[5] Federal Civil Procedure

Pleading

Standing to sue cannot be inferred argumentatively from averments in pleadings but must affirmatively appear in record.

156 Cases that cite this headnote

[6] Federal Civil Procedure

Pleading

Party seeking exercise of jurisdiction in its favor has burden to allege facts demonstrating it is proper party to invoke judicial resolution of dispute.

366 Cases that cite this headnote

[7] Municipal Corporations

Proceedings to determine validity of ordinances

Petitioners involved with sexual oriented businesses lacked standing to challenge municipal ordinance prohibiting issuance of license to conduct such businesses to applicant who has resided with individual whose license application has been denied or revoked within preceding 12 months; record did not reveal any petitioner who was living with individual whose license was denied or revoked during applicable period.

16 Cases that cite this headnote

[8] Municipal Corporations

Proceedings to determine validity of ordinances

Petitioners involved with sexually oriented businesses lacked standing to challenge city ordinance which barred applicants who had been convicted of certain enumerated crimes as well as those whose spouses had been convicted of same crimes from obtaining license to operate such businesses, as no petitioner was member of affected class; although one petitioner alleged he had been

convicted for enumerated crime and also that his wife was interested in opening sexually oriented business, city council had deleted by amendment crime of which husband was convicted from those enumerated under ordinance.

10 Cases that cite this headnote

[9] **Municipal Corporations**
Proceedings to determine validity of ordinances

Petitioners involved with sexually oriented businesses lacked standing to challenge provision of city ordinance prohibiting person convicted of any of certain enumerated crimes from obtaining license to conduct such business; record showed only one party with potentially disabling criminal record, and record failed to indicate that five-year period following last conviction or release from confinement, whichever was later, during which prohibition was in effect, had not elapsed.

31 Cases that cite this headnote

[10] **Municipal Corporations**
Proceedings to determine validity of ordinances

Requirement that evidence of standing to sue be contained in record was not satisfied when attorney for city in suit challenging ordinance denying persons convicted of crime license to operate sexually oriented businesses stated in oral argument that there were one or two petitioners that had their license denied based on criminal conviction.

7 Cases that cite this headnote

[11] **Municipal Corporations**
Proceedings to determine validity of ordinances

Standing to challenge city ordinance prohibiting persons convicted of certain crimes from obtaining license to conduct sexually oriented businesses could not be established by city's affidavit stating that two licenses were revoked on grounds of prior conviction; affidavit could not be relied on because it was first introduced in Supreme Court proceedings and was not part of record of proceedings below.

13 Cases that cite this headnote

[12] **Constitutional Law**
Hotels, motels, and other lodging

The due process rights of motel owners were not violated when city adopted ordinance declaring that motels renting rooms for less than ten hours were sexually oriented businesses subject to regulation under ordinance covering such businesses, based only upon 1977 study by another city which allegedly considered only cursorily the effect of "adult" motels on surrounding neighborhoods; reasonableness of legislative judgment that motels offering short room rental periods fostered prostitution and that such type of criminal activity was what ordinance sought to suppress, combined with the study, was adequate to support determination that motels in question should be included in licensing scheme. U.S.C.A. Const.Amend. 14.

18 Cases that cite this headnote

[13] **Constitutional Law**
Freedom of Association

Assuming that motel owners had standing to claim that ordinance deeming motels permitting rental of rooms for less than ten hours as sexually oriented businesses and imposing ordinance regulations on such motels on grounds that ordinance violated their customers' constitutional right to freedom of association, such rights were limited to "traditional personal bonds" which have "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs," and ordinance would not have discernible effect on such rights. U.S.C.A. Const.Amend. 1.

19 Cases that cite this headnote

**598 *215 *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondent city of Dallas adopted a comprehensive ordinance regulating "sexually oriented businesses," which are defined to include "adult" arcades, bookstores, video stores, cabarets, motels, and theaters, as well as escort agencies, nude model studios, and sexual encounter centers. Among other things, the ordinance requires that such businesses be licensed and includes civil disability provisions prohibiting certain individuals from obtaining licenses. Three groups of individuals and businesses involved in the adult entertainment industry filed separate suits challenging the ordinance on numerous grounds and seeking injunctive and declaratory relief. The District Court upheld the bulk of the ordinance but struck down several subsections, and the city subsequently amended the ordinance in conformity with the court's judgment. The Court of Appeals affirmed, holding, *inter alia,* that the ordinance's licensing scheme did not violate the First Amendment despite its failure to provide the procedural safeguards set forth in *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and that its civil disability provisions and its provision requiring **599 licensing for "adult motel owners" renting rooms for fewer than 10 hours were constitutional.

Held: The judgment is affirmed in part, reversed in part, and vacated in part, and the cases are remanded.

837 F.2d 1298, (CA 5 1988), affirmed in part, reversed in part, vacated in part, and remanded.

Justice O'CONNOR delivered the opinion of the Court with respect to Parts III and IV, concluding that:

1. No petitioner has shown standing to challenge (1) the ordinance's provision which prohibits the licensing of an applicant who has resided with an individual whose license application has been denied or revoked, or (2) the civil disability provisions, which disable for specified periods those who have been convicted of certain enumerated crimes, as well as those whose spouses have been so convicted. The record does not reveal *216 that any petitioner was living with an individual whose application was denied or whose license was revoked. Moreover, although the record reveals one individual who potentially could be disabled under the spousal conviction provision, that person is not herself a license applicant or a party to this action. Even if she did have standing, however, her claim would now be moot, since the city council deleted from the statutory list the crimes of which her husband was convicted after the District Court ruled that the inclusion of such convictions was unconstitutional. Furthermore, although one party stated in an affidavit that he had been convicted of three enumerated misdemeanors, he lacked standing, since he failed to state when he had been convicted of the last misdemeanor or the date of his release from confinement and, therefore, has not shown that he is still within the ordinance's disability period. This Court cannot rely on the city's representations at oral argument that one or two of the petitioners had been denied licenses based on convictions, since the necessary factual predicate must be gleaned from the record below. Similarly, the city's affidavit indicating that two licenses were revoked for convictions is unavailing, since the affidavit was first introduced in this Court and is not part of the record, and, in any event, fails to identify the individuals whose licenses were revoked. Because the courts below lacked jurisdiction to adjudicate petitioners' claims, the Court of Appeals' judgment with respect to the disability provisions is vacated, and the court is directed to dismiss that portion of the suit. Pp. 607–610.

2. The ordinance's provision requiring licensing for motels that rent rooms for fewer than 10 hours is not unconstitutional. The motel owner petitioners' contention that the city has violated the Due Process Clause by failing to produce adequate support for its supposition that renting rooms for fewer than 10 hours results in increased crime or other secondary effects is rejected. As the Court of Appeals recognized, it was reasonable to believe that shorter rental time periods indicate that the motels foster prostitution, and that this type of criminal activity is what the ordinance seeks to suppress. The reasonableness of the legislative judgment, along with the Los Angeles study of the effect of adult motels

on surrounding neighborhoods that was before the city council when it passed the ordinance, provided sufficient support for the limitation. Also rejected is the assertion that the 10–hour limitation places an unconstitutional burden on the right to freedom of association recognized in *Roberts v. United States Jaycees,* 468 U.S. 609, 618, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462. Even assuming that the motel owners have standing to assert the associational rights of motel patrons, limiting rentals to 10 hours will not have any discernible effect on the sorts of traditional personal bonds considered in *Roberts:* those that play a critical role in the Nation's culture and traditions by cultivating and transmitting shared ideals and beliefs. This Court ***217** will not consider the motel owners' privacy and commercial speech challenges, since those issues were ****600** not pressed or passed upon below. Pp. 610–611.

Justice O'CONNOR, joined by Justice STEVENS and Justice KENNEDY, concluded in Part II that the ordinance's licensing scheme violates the First Amendment, since it constitutes a prior restraint upon protected expression that fails to provide adequate procedural safeguards as required by *Freedman, supra.* Pp. 603–607.

(a) Petitioners may raise a facial challenge to the licensing scheme. Such challenges are permitted in the First Amendment context where the scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad. Petitioners argue that the licensing scheme fails to set a time limit within which the licensing authority must act. Since *Freedman, supra,* 380 U.S. at 56–57, 85 S.Ct., at 737–38, held that such a failure is a species of unbridled discretion, every application of the ordinance creates an impermissible risk of suppression of ideas. Moreover, the businesses challenging the licensing scheme have a valid First Amendment interest. Although the ordinance applies to some businesses that apparently are not protected by the First Amendment—*e.g.,* escort agencies and sexual encounter centers—it largely targets businesses purveying sexually explicit speech which the city concedes for purposes of this litigation are protected by the First Amendment. While the city has asserted that it requires every business—regardless of whether it engages in First Amendment-protected speech—to obtain a certificate of occupancy when it moves into a new location or the use of the structure changes, the challenged ordinance nevertheless is more onerous with respect to sexually oriented businesses, which are required to submit to inspections—for example, when their ownership changes or when they apply for the annual renewal of their permits—whether or not they have moved or the use of their structures has changed. Pp. 603–604.

(b) *Freedman, supra,* at 58–60, 85 S.Ct., at 738–40, determined that the following procedural safeguards were necessary to ensure expeditious decisionmaking by a motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license. Thus, the license for a First Amendment-protected business must be issued in a reasonable period of time, and, accordingly, the first two *Freedman* safeguards are essential. Here, although ***218** the Dallas ordinance requires the chief of police to approve the issuance of a license within 30 days after receipt of an application, it also conditions such issuance upon approval by other municipal inspection agencies without setting forth time limits within which those inspections must occur. Since the ordinance therefore fails to provide an effective time limitation on the licensing decision, and since it also fails to provide an avenue for prompt judicial review so as to minimize suppression of speech in the event of a license denial, its licensing requirement is unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity, as determined by the court on remand. However, since the licensing scheme at issue is significantly different from the censorship system examined in *Freedman,* it does not present the grave dangers of such a system, and the First Amendment does not require that it contain the third *Freedman* safeguard. Unlike the *Freedman* censor, Dallas does not engage in presumptively invalid direct censorship of particular expressive material, but simply performs the ministerial action of reviewing the general qualifications of each license applicant. It therefore need not be required to carry the burden of going ****601** to court or of there justifying a decision to suppress speech. Moreover, unlike the motion picture distributors considered in *Freedman*—who were likely to be deterred from challenging the decision to suppress a particular

movie if the burdens of going to court and of proof were not placed on the censor—the license applicants under the Dallas scheme have every incentive to pursue a license denial through court, since the license is the key to their obtaining and maintaining a business. *Riley v. National Federation of Blind of N.C., Inc.,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), is not dispositive of this litigation, since, although it struck down a licensing scheme for failing to provide adequate procedural safeguards, it did not address the proper scope of procedural safeguards with respect to such a scheme. Since the Dallas ordinance summarily states that its terms and provisions are severable, the Court of Appeals must, on remand, determine to what extent the licensing requirement is severable. Pp. 604–607.

Justice BRENNAN, joined by Justice MARSHALL and Justice BLACKMUN, although agreeing that the ordinance's licensing scheme is invalid as to any First Amendment-protected business under the *Freedman* doctrine, concluded that *Riley* mandates application of all three of the *Freedman* procedural safeguards, not just two of them. *Riley v. National Federation of Blind of N.C., Inc.,* 487 U.S. 781, 802, 108 S.Ct., at 2680, applied *Freedman* to invalidate a professional licensing scheme with respect to charity fundraisers who were engaged in First Amendment-protected activity, ruling that the scheme must require that the licensor—*i.e.,* the State, not the would-be fundraiser—either issue a license within a specified brief period *or go to court.* The principal opinion's grounds for declining ***219** to require the third *Freedman* safeguard—that the Dallas scheme does not require an administrator to engage in the presumptively invalid task of passing judgment on whether the content of particular speech is protected, and that it licenses entire businesses, not just individual films, so that applicants will not be inclined to abandon their interests—do not distinguish the present litigation from *Riley,* where the licensor was not required to distinguish between protected and unprotected speech, and where the fundraisers had their entire livelihoods at stake. Moreover, the danger posed by a license that prevents a speaker from speaking at all is not derived from the basis on which the license was purportedly denied, but is the unlawful stifling of speech that results. Thus, there are no relevant differences between the fundraisers in *Riley* and the petitioners here, and, in the interest of protecting speech, the burdens of initiating judicial proceedings and of proof must be borne by the city. Pp. 611–613.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and IV, in which REHNQUIST, C.J., and WHITE, STEVENS, SCALIA, and KENNEDY, JJ., joined, the opinion of the Court with respect to Part III, in which REHNQUIST, C.J., and WHITE, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Part II, in which STEVENS and KENNEDY, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post,* p. 611. WHITE, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C.J., joined, *post,* p. 614. STEVENS, J., *post,* p. 617, and SCALIA, J., *post,* p. 617, filed opinions concurring in part and dissenting in part.

Attorneys and Law Firms

John H. Weston argued the cause for petitioners in all cases. With him on the briefs for petitioners in No. 87-2051 were *G. Randall Garrou, Cathy E. Crosson,* and *Richard L. Wilson. Arthur M. Schwartz* filed briefs for petitioners in No. 87-2012. *Frank P. Hernandez* filed a brief for petitioners in No. 88-49.

Analeslie Muncy argued the cause for respondents in all cases. With her on the brief were *Kenneth C. Dippel* and *Thomas P. Brandt.*†

† Briefs of *amici curiae* urging reversal were filed for the American Booksellers Association, Inc., et al. by *Michael A. Bamberger;* and for PHE, Inc., by *Bruce J. Ennis, Jr.,* and *Mark D. Schneider.*

Briefs of *amici curiae* urging affirmance were filed for the American Family Association, Inc., by *Peggy M. Coleman;* for the Children's Legal Foundation by *Alan E. Sears;* for the National Institute of Municipal Law Officers by *William I. Thornton, Jr., Frank B. Gummey III,* and *William H. Taube;* and for the U. S. Conference of Mayors et al by *Benna Ruth Solomon* and *Peter Buscemi.*

Bruce A. Taylor filed a brief for Citizens for Decency Through Law, Inc., as *amicus curiae.*

Opinion

***220** Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with

respect to Parts I, III, and IV, and an opinion with respect to Part II, in which Justice STEVENS and Justice KENNEDY join.

These cases call upon us to decide whether a licensing scheme in a comprehensive city ****602** ordinance regulating sexually oriented businesses is a prior restraint that fails to provide adequate procedural safeguards as required by *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). We must also decide whether any petitioner has standing to address the ordinance's civil disability provisions, whether the city has sufficiently justified its requirement that motels renting rooms for fewer than 10 hours be covered by the ordinance, and whether the ordinance impermissibly infringes on the right to freedom of association. As this litigation comes to us, no issue is presented with respect to whether the books, videos, materials, or entertainment available through sexually oriented businesses are obscene pornographic materials.

I

On June 18, 1986, the city council of the city of Dallas unanimously adopted Ordinance No. 19196 regulating sexually oriented businesses, which was aimed at eradicating the secondary effects of crime and urban blight. The ordinance, as amended, defines a "sexually oriented business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center." Dallas City Code, ch. 41A, Sexually Oriented Businesses § 41A–2(19) (1986). The ordinance regulates sexually oriented businesses through a scheme incorporating zoning, licensing, ***221** and inspections. The ordinance also includes a civil disability provision, which prohibits individuals convicted of certain crimes from obtaining a license to operate a sexually oriented business for a specified period of years.

Three separate suits were filed challenging the ordinance on numerous grounds and seeking preliminary and permanent injunctive relief as well as declaratory relief. Suits were brought by the following groups of individuals and businesses: those involved in selling, exhibiting, or distributing publications or video or motion picture films; adult cabarets or establishments providing live nude dancing or films, motion pictures, videocassettes, slides, or other photographic reproductions depicting sexual activities and anatomy specified in the ordinance; and adult motel owners. Following expedited discovery, petitioners' constitutional claims were resolved through cross-motions for summary judgment. After a hearing, the District Court upheld the bulk of the ordinance, striking only four subsections. See *Dumas v. Dallas,* 648 F.Supp. 1061 (ND Tex.1986). The District Court struck two subsections, §§ 41A–5(a)(8) and 41A–5(c), on the ground that they vested overbroad discretion in the chief of police, contrary to our holding in *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150–151, 89 S.Ct. 935, 938–939, 22 L.Ed.2d 162 (1969). See 648 F.Supp., at 1072–1073. The District Court also struck the provision that imposed a civil disability merely on the basis of an indictment or information, reasoning that there were less restrictive alternatives to achieve the city's goals. See *id.,* at 1075 (citing *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). Finally, the District Court held that five enumerated crimes from the list of those creating civil disability were unconstitutional because they were not sufficiently related to the purpose of the ordinance. See 648 F.Supp., at 1074 (striking bribery, robbery, kidnaping, organized criminal activity, and violations of controlled substances Acts). The city of Dallas subsequently ***222** amended the ordinance in conformity with the District Court's judgment.

The Court of Appeals for the Fifth Circuit affirmed. 837 F.2d 1298 (1988). Viewing the ordinance as a content-neutral time, place, and manner regulation under *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Court of Appeals upheld the ordinance against petitioners' facial attack on the ground that it is " 'designed to serve a substantial government interest' " and allowed for " 'reasonable alternative avenues of communication.' " ****603** 837 F.2d, at 1303 (quoting *Renton, supra,* at 47, 106 S.Ct., at 928). The Court of Appeals further concluded that the licensing scheme's failure to provide the procedural safeguards set forth in *Freedman v. Maryland, supra,* withstood constitutional challenge, because such procedures are less important when regulating "the conduct of an ongoing commercial enterprise." 837 F.2d, at 1303.

Additionally, the Court of Appeals upheld the provision of the ordinance providing that motel owners renting rooms for fewer than 10 hours were "adult motel owners" and, as such, were required to obtain a license under the

ordinance. See §§ 41A–2(4), 41A–18. The motel owners attacked the provision on the ground that the city had made no finding that adult motels engendered the evils the city was attempting to redress. The Court of Appeals concluded that the 10–hour limitation was based on the reasonable supposition that short rental periods facilitate prostitution, one of the secondary effects the city was attempting to remedy. See 837 F.2d, at 1304.

Finally, the Court of Appeals upheld the civil disability provisions, as modified by the District Court, on the ground that the relationship between "the offense and the evil to be regulated is direct and substantial." *Id.,* at 1305.

We granted petitioners' application for a stay of the mandate except for the holding that the provisions of the ordinance regulating the location of sexually oriented businesses do not violate the ***223** Federal Constitution, 485 U.S. 1042, 108 S.Ct. 1605, 99 L.Ed.2d 919 (1988), and granted certiorari, 489 U.S. 1051, 109 S.Ct. 1309, 103 L.Ed.2d 578 (1989). We now reverse in part and affirm in part.

II

We granted certiorari on the issue whether the licensing scheme is an unconstitutional prior restraint that fails to provide adequate procedural safeguards as required by *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Petitioners involved in the adult entertainment industry and adult cabarets argue that the licensing scheme fails to set a time limit within which the licensing authority must issue a license and, therefore, creates the likelihood of arbitrary denials and the concomitant suppression of speech. Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue decided by the Court of Appeals whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented businesses. Cf. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 562, 95 S.Ct. 1239, 1248, 43 L.Ed.2d 448 (1975).

A

[1] **[2]** We note at the outset that petitioners raise a facial challenge to the licensing scheme. Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad. See *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 798, and n. 15, 104 S.Ct. 2118, 2125 n. 15, 80 L.Ed.2d 772 (1984). In *Freedman,* we held that the failure to place limitations on the time within which a censorship board decisionmaker must make a determination of obscenity is a species of unbridled discretion. See *Freedman, supra,* 380 U.S., at 56–57, 85 S.Ct., at 737–738 (failure to confine time within which censor must make decision "contains the same vice as a statute delegating excessive administrative discretion"). Thus, where a scheme creates a "[r]isk of delay," 380 U.S., at 55, 85 S.Ct., at 737, ***224** such that "every application of the statute create[s] an impermissible risk of suppression of ideas," *Taxpayers for Vincent, supra,* 466 U.S., at 798, n. 15, 104 S.Ct. at 2125 n. ****604** 15, we have permitted parties to bring facial challenges.

The businesses regulated by the city's licensing scheme include adult arcades (defined as places in which motion pictures are shown to five or fewer individuals at a time, see § 41A–2(1)), adult bookstores or adult video stores, adult cabarets, adult motels, adult motion picture theaters, adult theaters, escort agencies, nude model studios, and sexual encounter centers, §§ 41A–2(19) and 41A–3. Although the ordinance applies to some businesses that apparently are not protected by the First Amendment, *e.g.,* escort agencies and sexual encounter centers, it largely targets businesses purveying sexually explicit speech which the city concedes for purposes of these cases are protected by the First Amendment. Cf. *Smith v. California,* 361 U.S. 147, 150, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959) (bookstores); *Southeastern Promotions, Ltd. v. Conrad, supra* (live theater performances); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (motion picture theaters); *Schad v. Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (nude dancing). As Justice SCALIA acknowledges, *post,* at 624, the city does not argue that the businesses targeted are engaged in purveying obscenity which is unprotected by the First Amendment. See Brief for Respondents 19, 20, and n. 8 ("[T]he city is not arguing that the ordinance does not raise First Amendment concerns.... [T]he right to

sell this material is a constitutionally protected right ...”). See also *Miller v. California,* 413 U.S. 15, 23–24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Nor does the city rely upon *Ginzburg v. United States,* 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966), or contend that those businesses governed by the ordinance are engaged in pandering. It is this Court's practice to decline to review those issues neither pressed nor passed upon below. See *Youakim v. Miller,* 425 U.S. 231, 234, 96 S.Ct. 1399, 1401–02, 47 L.Ed.2d 701 (1976) *(per curiam)*.

***225** The city asserted at oral argument that it requires every business—without regard to whether it engages in First Amendment-protected speech—to obtain a certificate of occupancy when it moves into a new location or the use of the structure changes. Tr. of Oral Arg. 49; see also App. 42, Dallas City Code § 51–1.104 (1988) (certificate of occupancy required where there is new construction or before occupancy if there is a change in use). Under the challenged ordinance, however, inspections are required for sexually oriented businesses whether or not the business has moved into a new structure and whether or not the use of the structure has changed. Therefore, even assuming the correctness of the city's representation of its “general” inspection scheme, the scheme involved here is more onerous with respect to sexually oriented businesses than with respect to the vast majority of other businesses. For example, inspections are required whenever ownership of a sexually oriented business changes, and when the business applies for the annual renewal of its permit. We, therefore, hold, as a threshold matter, that petitioners may raise a facial challenge to the licensing scheme, and that as the suit comes to us, the businesses challenging the scheme have a valid First Amendment interest.

B

[3] While “[p]rior restraints are not unconstitutional *per se* ... [a]ny system of prior restraint ... comes to this Court bearing a heavy presumption against its constitutional validity.” *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S., at 558, 95 S.Ct., at 1246. See, *e.g., Lovell v. Griffin,* 303 U.S. 444, 451–452, 58 S.Ct. 666, 668–669, 82 L.Ed. 949 (1938); *Cantwell v. Connecticut,* 310 U.S. 296, 306–307, 60 S.Ct. 900, 904–905, 84 L.Ed. 1213 (1940); *Cox v. New Hampshire,* 312 U.S. 569, 574–575, 61 S.Ct. 762, 765, 85 L.Ed. 1049 (1941); *Shuttlesworth v. Birmingham,* 394 U.S., at 150–151, 89 S.Ct., at 938–939. Our cases addressing prior restraints have identified two evils that will not be tolerated ****605** in such schemes. First, a scheme that places “unbridled discretion in the hands of a government official or agency constitutes a prior restraint ***226** and may result in censorship.” *Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 757, 108 S.Ct. 2138, 2143, 100 L.Ed.2d 771 (1988). See *Saia v. New York,* 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948); *Niemotko v. Maryland,* 340 U.S. 268, 71 S.Ct. 328, 95 L.Ed. 280 (1951); *Kunz v. New York,* 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); *Staub v. City of Baxley,* 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Cox v. Louisiana,* 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Shuttlesworth v. Birmingham, supra; Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). “ ‘It is settled by a long line of recent decisions of this Court that an ordinance which ... makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.’ ” *Shuttlesworth, supra,* 394 U.S., at 151, 89 S.Ct., at 938–39 (quoting *Staub, supra,* 355 U.S., at 322, 78 S.Ct. at 282).

Second, a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible. *Freedman, supra,* 380 U.S., at 59, 85 S.Ct., at 739; *Vance v. Universal Amusement Co.,* 445 U.S. 308, 316, 100 S.Ct. 1156, 1161–62, 63 L.Ed.2d 413 (1980) (striking statute on ground that it restrained speech for an “indefinite duration”). In *Freedman,* we addressed a motion picture censorship system that failed to provide for adequate procedural safeguards to ensure against unlimited suppression of constitutionally protected speech. 380 U.S., at 57, 85 S.Ct., at 738. Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license. In *Riley v. National Federation of Blind of N.C., Inc.,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), this Court held that a licensing scheme failing to provide for definite limitations on the time within which the licensor must issue the license was constitutionally

unsound, because the "delay compel[led] the speaker's silence." *Id.,* at 802, 108 S.Ct., at 2680. The failure to confine the time within which the licensor must make a decision "contains the same vice as a statute delegating ***227** excessive administrative discretion," *Freedman, supra,* 380 U.S., at 56–57, 85 S.Ct., at 737–738. Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech.

Although the ordinance states that the "chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application," the license may not issue if the "premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances." § 41A–5(a)(6). Moreover, the ordinance does not set a time limit within which the inspections must occur. The ordinance provides no means by which an applicant may ensure that the business is inspected within the 30–day time period within which the license is purportedly to be issued if approved. The city asserted at oral argument that when applicants apply for licenses, they are given the telephone numbers of the various inspection agencies so that they may contact them. Tr. of Oral Arg. 48. That measure, obviously, does not place any limits ****606** on the time within which the city will inspect the business and thereby make the business eligible for the sexually oriented business license. Thus, the city's regulatory scheme allows indefinite postponement of the issuance of a license.

In *Freedman,* we determined that the following three procedural safeguards were necessary to ensure expeditious decisionmaking by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Freedman, supra,* at 58–60, 85 S.Ct., at 738–740. ***228** Although we struck the licensing provision in *Riley v. National Federation of Blind of N.C., Inc., supra,* on the ground that it did not provide adequate procedural safeguards, we did not address the proper scope of procedural safeguards with respect to a licensing scheme. Because the licensing scheme at issue in these cases does not present the grave "dangers of a censorship system," *Freedman, supra,* at 58, 85 S.Ct., at 738–39, we conclude that the full procedural protections set forth in *Freedman* are not required.

The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied. See *Freedman, supra,* at 51, 85 S.Ct., at 734. See also *Shuttlesworth,* 394 U.S., at 155, n. 4, 89 S.Ct., at 941, n. 4 (content-neutral time, place, and manner regulation must provide for "expeditious judicial review"); *National Socialist Party of America v. Skokie,* 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977).

The Court in *Freedman* also required the censor to go to court and to bear the burden in court of justifying the denial.

> "Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country...." 380 U.S., at 59, 85 S.Ct., at 739.

***229** Moreover, a censorship system creates special concerns for the protection of speech, because "the risks of freewheeling censorship are formidable." *Southeastern Promotions,* 420 U.S., at 559, 95 S.Ct., at 1246–47.

As discussed *supra,* the Dallas scheme does not provide for an effective limitation on the time within which the licensor's decision must be made. It also fails to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a

license denial. We therefore hold that the failure to provide these essential safeguards renders the ordinance's licensing requirement unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity, as determined by the court on remand.

The Court also required in *Freedman* that the censor bear the burden of going to court in order to suppress the speech and the burden of proof once in court. The licensing scheme we examine today is significantly different from the censorship scheme examined in *Freedman.* In *Freedman,* the censor engaged in direct censorship of particular expressive ****607** material. Under our First Amendment jurisprudence, such regulation of speech is presumptively invalid and, therefore, the censor in *Freedman* was required to carry the burden of going to court if the speech was to be suppressed and of justifying its decision once in court. Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid. The Court in *Freedman* also placed the burdens on the censor, because otherwise the motion picture distributor was likely to be deterred from challenging the decision to suppress the speech and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech. The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in *Freedman,* where only one film was censored. Because the ***230** license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court. Because of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court. Limitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the "principle that the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584 (1963).

Finally, we note that § 5 of Ordinance No. 19196 summarily states that "[t]he terms and provisions of this ordinance are severable, and are governed by Section 1–4 of CHAPTER 1 of the Dallas City Code, as amended." We therefore remand to the Court of Appeals for further determination whether and to what extent the licensing scheme is severable. Cf. *Lakewood v. Plain Dealer Publishing Co.,* 486 U.S., at 772, 108 S.Ct., at 2152 (remanding for determination of severability).

III

[4] We do not reach the merits of the adult entertainment and adult cabaret petitioners' challenges to the civil disability provision, § 41A–5(a)(10), and the provision disabling individuals residing with those whose licenses have been denied or revoked, § 41A–5(a)(5), because petitioners have failed to show they have standing to challenge them. See Brief for Petitioners in No. 87–2051, pp. 22–40, 44; Brief for Petitioners in No. 87–2012, pp. 12–20. Neither the District Court nor the Court of Appeals determined whether petitioners had standing to challenge any particular provision of the ordinance. Although neither side raises the issue here, we are required to address the issue even if the courts below have not passed on it, see *Jenkins v. McKeithen,* 395 U.S. 411, 421, 89 S.Ct. 1843, 1848–49, 23 L.Ed.2d 404 (1969), and even if the parties fail to raise the issue before ***231** us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing "is perhaps the most important of [the jurisdictional] doctrines." *Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

> "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell v. Maurer,* 293 U.S. 237, 244 [55 S.Ct. 162, 165, 79 L.Ed. 338] (1934). See *Juidice v. Vail,* 430 U.S. 327, 331–332 [97 S.Ct. 1211, 1215–1216, 51 L.Ed.2d 376] (1977) (standing). 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it.' " ****608** *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986).

[5] **[6]** It is a long-settled principle that standing cannot be "inferred argumentatively from averments in the pleadings," *Grace v. American Central Ins. Co.,* 109 U.S. 278, 284, 3 S.Ct. 207, 210, 27 L.Ed. 932 (1883),

but rather "must affirmatively appear in the record." *Mansfield C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884). See *King Bridge Co. v. Otoe County,* 120 U.S. 225, 226, 7 S.Ct. 552, 552, 30 L.Ed. 623 (1887) (facts supporting Article III jurisdiction must "appea[r] affirmatively from the record"). And it is the burden of the "party who seeks the exercise of jurisdiction in his favor," *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L.Ed. 1135 (1936), "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Warth v. Seldin,* 422 U.S. 490, 518, 95 S.Ct. 2197, 2215, 45 L.Ed.2d 343 (1975). Thus, petitioners in this case must "allege ... facts essential to show jurisdiction. If [they] fai[l] to make the necessary allegations, [they have] no standing." *McNutt, supra,* 298 U.S., at 189, 56 S.Ct., at 785.

The ordinance challenged here prohibits the issuance of a license to an applicant who has resided with an individual whose license application has been denied or revoked within ***232** the preceding 12 months.[1] The ordinance also has a civil disability provision, which disables those who have been convicted of certain enumerated crimes as well as those whose spouses have been convicted of the same enumerated crimes. This civil disability lasts for two years in the case of misdemeanor convictions and five years in the case of conviction of a felony or of more than two misdemeanors within a 24–month period.[2] Thus, under the amended ordinance, ****609** once the disability ***233** period has elapsed, the applicant may not be denied a license on the ground of a former conviction.

1 Section 41A–5(a)(5) provides as follows: "The chief of police shall approve the issuance of a license ... unless he finds [that] ... [a]n applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months."

2 Sections 41A–5(a)(10), (b), and (c), as amended, provide as follows:
"The chief of police shall approve the issuance of a license ... unless he finds [that] ...
"(10) An applicant or an applicant's spouse has been convicted of a crime:
"(A) involving:
"(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:
"(aa) prostitution;
"(bb) promotion of prostitution;
"(cc) aggravated promotion of prostitution;
"(dd) compelling prostitution;
"(ee) obscenity;
"(ff) sale, distribution, or display of harmful material to minor;
"(gg) sexual performance by a child;
"(hh) possession of child pornography;
"(ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:
"(aa) public lewdness;
"(bb) indecent exposure;
"(cc) indecency with a child;
"(iii) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;
"(iv) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code; or
"(v) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;
"(B) for which:
"(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;
"(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or
"(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24–month period.
"(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.
"(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10) may qualify for a sexually oriented business license only when the time period required by Section 41A–5(a)(10)(B) has elapsed."

[7] **[8]** Examination of the record here reveals that no party has standing to challenge the provision involving those residing with individuals whose licenses were denied or revoked. Nor does any party have standing to challenge

the civil disability provision disabling applicants who were either convicted of the specified offenses or whose spouses were convicted.

First, the record does not reveal that any party before us was living with an individual whose license application was denied or whose license was revoked. Therefore, no party has standing with respect to § 41A–5(a)(5). Second, § 41A–5(a)(10) applies to applicants whose spouses have been convicted of any of the enumerated crimes, but the record reveals only one individual who could be disabled under this provision. An individual, who had been convicted under the Texas Controlled Substances Act, asserts that his wife was interested in opening a sexually oriented business. But the wife, although an officer of petitioner Bi–Ti Enterprises, Inc., ***234** is not an applicant for a license or a party to this action. See 12 Record, Evert Affidavit 3–6. Cf. *Bender,* 475 U.S., at 548, and n. 9, 106 S.Ct., at 1335, and n. 9.

Even if the wife did have standing, her claim would now be moot. Her husband's convictions under the Texas Controlled Substances Act would not now disable her from obtaining a license to operate a sexually oriented business, because the city council, following the District Court's decision, deleted the provision disabling those with convictions under the Texas Controlled Substances Act or Dangerous Drugs Act. App.H. to Pet. for Cert. in No. 87–2012, p. 107. See *Hall v. Beals,* 396 U.S. 45, 48, 90 S.Ct. 200, 201–02, 24 L.Ed.2d 214 (1969).

[9] Finally, the record does not reveal any party who has standing to challenge the provision disabling an applicant who was convicted of any of the enumerated crimes. To establish standing to challenge that provision the individual must show both (1) a conviction of one or more of the enumerated crimes, and (2) that the conviction or release from confinement occurred recently enough to disable the applicant under the ordinance. See §§ 41A–5(a)(10)(A), (B). If the disability period has elapsed, the applicant is not deprived of the possibility of obtaining a license and, therefore, cannot be injured by the provision.

The only party who could plausibly claim to have standing to challenge this provision is Bill Staten, who stated in an affidavit that he had been "convicted of three misdemeanor obscenity violations within a twenty-four month period." 7 Record, Staten Affidavit 2. That clearly satisfies the first requirement. Under the ordinance, any person convicted of two or more misdemeanors "within any 24–month period," must wait five years following the last conviction or release from confinement, whichever is later, before a license may be issued. See § 41A–5(a)(10)(B)(iii). But Staten failed to state when he had been convicted of the last misdemeanor or the date of release from confinement and, thus, has failed "clearly to allege facts demonstrating that he is a proper ***235** party" to challenge the civil disability provisions. No other petitioner has alleged facts to establish standing, and the District Court made no factual findings that could support standing. Accordingly, we conclude that the petitioners lack standing to challenge the provisions. See *Warth,* 422 U.S., at 518, 95 S.Ct., at 2215.

[10] **[11]** At oral argument, the city's attorney responded as follows when asked whether there was standing to challenge the civil disability provisions: "I believe that there are one or two of the Petitioners that have had their licenses denied based on criminal conviction." Tr. of Oral Arg. 32. See also Foster Affidavit 1 (affidavit filed by the city in its Response to Petitioner's Application for Recall and Stay of the Mandate stating that two licenses were *revoked* on the ****610** grounds of a prior conviction since the ordinance went into effect but failing to identify the licensees). We do not rely on the city's representations at argument as "the necessary factual predicate may not be gleaned from the briefs and arguments themselves," *Bender, supra,* 475 U.S., at 547, 106 S.Ct., at 1334. And we may not rely on the city's affidavit, because it is evidence first introduced to this Court and "is not in the record of the proceedings below," *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, n. 16, 90 S.Ct. 1598, 1608, n. 16, 26 L.Ed.2d 142 (1970). Even if we could take into account the facts as alleged in the city's affidavit, it fails to identify the individuals whose licenses were revoked and, therefore, falls short of establishing that any petitioner before this Court has had a license revoked under the civil disability provisions.

Because we conclude that no petitioner has shown standing to challenge either the civil disability provisions or the provisions involving those who live with individuals whose licenses have been denied or revoked, we conclude that the courts below lacked jurisdiction to adjudicate petitioners' claims with respect to those provisions. We accordingly vacate the judgment of the Court of Appeals with respect to those provisions with directions to dismiss that portion of the action. See *Bender, supra,* 475 U.S. at

549, 106 S.Ct., at 1335 (vacating judgment below on ***236** ground of lack of standing); *McNutt,* 298 U.S., at 190, 56 S.Ct., at 785 (same). [3]

[3] Petitioners also raise a variety of other First Amendment challenges to the ordinance's licensing scheme. In light of our conclusion that the licensing requirement is unconstitutional because it lacks essential procedural safeguards and that no petitioner has standing to challenge the residency or civil disability provisions, we do not reach those questions.

IV

The motel owner petitioners challenge two aspects of the ordinance's requirement that motels that rent rooms for fewer than 10 hours are sexually oriented businesses and are, therefore, regulated under the ordinance. See § 41A–18(a). First, they contend that the city had an insufficient factual basis on which to conclude that rental of motel rooms for fewer than 10 hours produced adverse impacts. Second, they contend that the ordinance violates privacy rights, especially the right to intimate association.

[12] With respect to the first contention, the motel owners assert that the city has violated the Due Process Clause by failing to produce adequate support for its supposition that renting rooms for less than 10 hours results in increased crime or other secondary effects. They contend that the council had before it only a 1977 study by the city of Los Angeles that considered cursorily the effect of adult motels on surrounding neighborhoods. See Defendant's Motion for Summary Judgment, Vol. 2, Exh. 11. The Court of Appeals thought it reasonable to believe that shorter rental time periods indicate that the motels foster prostitution and that this type of criminal activity is what the ordinance seeks to suppress. See 837 F.2d, at 1304. Therefore, no more extensive studies were required than those already available. We agree with the Court of Appeals that the reasonableness of the legislative judgment, combined with the Los Angeles study, is adequate to support the city's determination that motels permitting room rentals for fewer than 10 hours should be included within the licensing scheme.

***237** **[13]** The motel owners also assert that the 10–hour limitation on the rental of motel rooms places an unconstitutional burden on the right to freedom of association recognized in *Roberts v. United States Jaycees,* 468 U.S. 609, 618, 104 S.Ct. 3244, 3250, 82 L.Ed.2d 462 (1984) ("Bill of Rights ... must afford the formation and preservation of certain kinds of highly personal relationships"). The city does not challenge the motel owners' standing to raise the issue whether the associational rights of their motel patrons have been violated. There can be little question that the motel owners have "a live controversy ****611** against enforcement of the statute" and, therefore, that they have Art. III standing. *Craig v. Boren,* 429 U.S. 190, 192, 97 S.Ct. 451, 454, 50 L.Ed.2d 397 (1976). It is not clear, however, whether they have prudential, *jus tertii* standing to challenge the ordinance on the ground that the ordinance infringes the associational rights of their motel patrons. *Id.,* at 193, 97 S.Ct., at 454–55. But even if the motel owners have such standing, we do not believe that limiting motel room rentals to 10 hours will have any discernible effect on the sorts of traditional personal bonds to which we referred in *Roberts.* Any "personal bonds" that are formed from the use of a motel room for fewer than 10 hours are not those that have "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." 468 U.S., at 618–619, 104 S.Ct., at 3249–3250. We therefore reject the motel owners' challenge to the ordinance.

Finally, the motel owners challenge the regulations on the ground that they violate the constitutional right "to be let alone," *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), and that the ordinance infringes the motel owners' commercial speech rights. Because these issues were not pressed or passed upon below, we decline to consider them. See, *e.g., Rogers v. Lodge,* 458 U.S. 613, 628, n. 10, 102 S.Ct. 3272, 3281, n. 10, 73 L.Ed.2d 1012 (1982); *FTC v. Grolier Inc.,* 462 U.S. 19, 23, n. 6, 103 S.Ct. 2209, 2212, n. 6, 76 L.Ed.2d 387 (1983).

***238** Accordingly, the judgment below is affirmed in part, reversed in part, and vacated in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, concurring in the judgment.

I concur in the judgment invalidating the Dallas licensing provisions, as applied to any First Amendment-protected business, because I agree that the licensing scheme does not provide the procedural safeguards required under our previous cases. [1] I also concur in the judgment upholding the provisions applicable to adult motels, because I agree that the motel owners' claims are meritless. I agree further that it is not necessary to reach petitioners' other First Amendment challenges. I write separately, however, because I believe that our decision two Terms ago in *Riley v. National Federation* ***239** *of Blind of N.C., Inc.,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), mandates application of all three of the procedural safeguards specified in *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), not just two of them, and also to point out that Part III of Justice O'CONNOR's opinion reaches a question not necessary to the decision.

1 Justice SCALIA's opinion concurring in part and dissenting in part, purportedly grounded in my opinion in *Ginzburg v. United States,* 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966), does not persuade me otherwise. In *Ginzburg,* this Court held merely that, in determining whether a given publication was obscene, a court could consider as relevant evidence not only the material itself but also evidence showing the circumstances of its production, sale, and advertising. *Id.,* at 465–466, 86 S.Ct., at 944–945. The opinion concluded: "It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged." *Id.,* at 475, 86 S.Ct., at 950. As Justice O'CONNOR's opinion makes clear, *ante* at 603–604, there is no "obscenity vel non" question in this case.

What *Ginzburg* did not do, and what this Court has never done, despite Justice SCALIA's claims, is to abrogate First Amendment protection for an entire category of speech-related businesses. We said in *Ginzburg* that we perceived "no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question." 383 U.S., at 474, 86 S.Ct., at 949. History has proved us right, I think, that the decision itself left First Amendment guarantees secure. Justice SCALIA's transmogrification of *Ginzburg,* however, is far from innocuous.

****612** I

In *Freedman v. Maryland, supra,* as Justice O'CONNOR notes, we held that three procedural safeguards are needed to "obviate the dangers of a censorship system": (1) any prior restraint in advance of a final judicial determination on the merits must be no longer than that necessary to preserve the status quo pending judicial resolution; (2) a prompt judicial determination must be available; and (3) the would-be censor must bear both the burden of going to court and the burden of proof in court. 380 U.S., at 58–59, 85 S.Ct., at 738–739. *Freedman* struck down a statute that required motion picture houses to submit films for prior approval, without providing any of these protections. Similar cases followed, *e.g., Teitel Film Corp. v. Cusack,* 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966 (1968) (invalidating another motion picture censorship ordinance for failure to provide adequate *Freedman* procedures); *Blount v. Rizzi,* 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971) (invalidating postal rules permitting restrictions on the use of the mails for allegedly obscene materials because the rules lacked *Freedman* safeguards); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (finding unconstitutional a city's refusal to rent municipal facilities for a musical because of its content, absent *Freedman* procedures).

We have never suggested that our insistence on *Freedman* procedures might vary with the particular facts of the prior restraint before us. To the contrary, this Court has continued to require *Freedman* procedures in a wide variety of contexts. In *National Socialist Party of America v. Skokie,* 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977), we held that even a court-ordered injunction must be stayed if appellate review is not expedited. ***240** *Id.,* at 44, 97 S.Ct., at 2206. And in *Vance v. Universal Amusement Co.,* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), we held that a general public nuisance statute could not be applied to enjoin a motion picture theater's future exhibition of films for a year, based on a presumption that such films would be obscene merely because prior films had been, when such a determination could be constitutionally made only in accordance with *Freedman* procedures. 445 U.S., at 317, 100 S.Ct., at 1162.

Two Terms ago, in *Riley,* this Court applied *Freedman* to a professional licensing scheme because the professionals

involved, charity fundraisers, were engaged in First Amendment-protected activity. We held that, even if North Carolina's interest in licensing fundraisers was sufficient to justify such a regulation, it "must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.' " 487 U.S., at 802, 108 S.Ct., at 2680, quoting and applying *Freedman, supra,* 380 U.S., at 59, 85 S.Ct., at 739. The North Carolina statute did not so provide, and we struck it down. 487 U.S., at 802, 108 S.Ct., at 2681.

In *Riley,* this Court, to be sure, discussed the failure of the North Carolina statute to set a time limit for actions on license applications, but it also held that the *licensor* must be required to go to court, not the would-be fundraiser. Because I see no relevant difference between the fundraisers in *Riley* and the bookstores and motion picture theaters in these cases, I would hold that the city of Dallas must bear the burden of going to court and proving its case before it may permissibly deny licenses to First Amendment-protected businesses.

Justice O'CONNOR bases her disinclination to require the third *Freedman* procedure on two grounds: the Dallas licensing scheme does not involve an administrator's passing judgment on whether the content of particular speech is protected or not; and the Dallas scheme licenses entire businesses, not just individual films. Justice O'CONNOR finds the first distinction significant on the theory that our jurisprudence holds only that suppression of speech on the ostensible ground of ***241** content is presumptively invalid. She finds the second significant because it anticipates that applicants with an entire ****613** business at stake will pursue their interests in court rather than abandon them.

While Justice O'CONNOR is certainly correct that these aspects distinguish the facts before us from those in *Freedman,* neither ground distinguishes these cases from *Riley.* The licensor in *Riley* was not required to distinguish between protected and unprotected speech. He was reviewing applications to practice a particular profession, just as the city of Dallas is acting on applications to operate particular businesses. Similarly, the fundraisers in *Riley* had their entire livelihoods at stake, just as the bookstores and others subject to the Dallas ordinance. Nonetheless, this Court placed the burden of going to court on the State, not the applicant.[2] 487 U.S., at 802, 108 S.Ct. at 2680.

2 *Vance v. Universal Amusement Co.,* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), also involved censorship that threatened proprietors' entire businesses, rather than single films. This Court, notwithstanding, affirmed the Court of Appeals which had held that the statute was unconstitutional because it lacked the procedural safeguards required under *Freedman.* 445 U.S., at 314, 317, 100 S.Ct., at 1162.

Moreover, I believe *Riley* was rightly decided for the same reasons that the limitation set forth in Justice O'CONNOR's opinion is wrong. The danger posed by a license that prevents a speaker from speaking at all is not derived from the basis on which that license was purportedly denied. The danger posed is the unlawful stifling of speech that results. As we said in *Freedman,* it is "the transcendent value of speech" that places the burden of persuasion on the State. 380 U.S., at 58, 85 S.Ct., at 738–739. The heavy presumption against prior restraints requires no less. Justice O'CONNOR does not, nor could she, contend that those administering this ordinance will always act according to their own law. Mistakes are inevitable; abuse is possible. In distributing the burdens of initiating judicial proceedings and proof, we are obliged ***242** to place them such that we err, if we must, on the side of speech, not on the side of silence.

II

In Part III of the opinion, Justice O'CONNOR considers at some length whether petitioners have made an adequate showing of standing to bring their claims against the cohabitation and civil disability provisions of the licensing scheme. Were it of some precedential value, I would question this Court's reversal of the findings of both the District Court and the Court of Appeals[3] that petitioners had standing to bring their claims, where the basis for reversal is an affidavit that is at worst merely ambiguous. But because the discussion is wholly extraneous to the actual holding in this case, I write only to clarify that Part III is unnecessary to the decision and is pure dictum.

3 Both the District Court and the Fifth Circuit, after finding that plaintiffs had standing to challenge the ordinance, reached the civil disability question. See 837 F.2d 1298, 1301, 1304–1305 (1988); *Dumas v. Dallas,* 648 F.Supp. 1061 (ND Tex.1986).

The first claim for which the Court fails to find a petitioner with standing—an unspecified objection to the provision denying a license to any applicant residing with someone whose own application has been denied or revoked within the past year—is not directly presented by the parties, was not reached by the court below, and is not among the questions on which certiorari was granted. The second claim for which the Court fails to find a petitioner with standing—petitioners' objection to the ordinance's civil disability provisions—is clearly before this Court, but consideration of this claim is rendered redundant by Justice O'CONNOR's holding in Part II.

The civil disability claim is an objection to that part of the licensing scheme which provides for denial or revocation of a license because of prior criminal convictions, on the ****614** ground ***243** that these provisions "impose an impermissible prior restraint upon protected expression." Brief for Petitioners FW/PBS, Inc., et al. 12.[4] Because the challenge is based solely on the First Amendment, a victory on the merits would benefit only those otherwise regulated businesses which are protected by the First Amendment.

4 Petitioners M.J.R., Inc., et al. phrase the same objection slightly differently. They characterize license denial or revocation based on certain listed prior speech offenses as a "classic prior restraint of the type prohibited as facially unconstitutional under the rule of *Near v. Minnesota* [*ex rel. Olson*], 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931)," and they characterize license denial or revocation based on other listed prior offenses as "prior restraints which cannot withstand strict scrutiny and are therefore invalid under the first amendment." See Brief for Petitioners M.J.R., Inc., et al. 22, 33.

But since the Court invalidates the application of the entire Dallas licensing scheme to any First Amendment-protected business under the *Freedman* doctrine, it is unnecessary to decide whether some or all of the same provisions are also invalid, as to First Amendment-protected businesses, on other grounds. Justice O'CONNOR recognizes this and wisely declines to reach petitioners' challenge to various requirements under the licensing scheme, other than the civil disability and cohabitation provisions, on the First Amendment ground that the ordinance impermissibly singles out persons and businesses engaged in First Amendment-protected activities for regulation.[5]

5 See Brief for Petitioners FW/PBS, Inc., et al. 21–24.

For reasons unexplained and inexplicable, the opinion separates the prior restraint and singling out claims and accords them different treatment. Perhaps, if the inquiry had reached the merits of the prior restraint claim, one could infer a motive to take the opportunity to offer guidance in an area of the law badly in need of it. But because the inquiry proceeds no further than jurisdiction, no such explanation is available. Whatever the reason for including Part III, it is superfluous.

***244** Justice WHITE, with whom the Chief Justice joins, concurring in part and dissenting in part.

I join Parts I, III, and IV of the Court's opinion but do not agree with the conclusion in Part II that the Dallas ordinance must include two of the procedural safeguards set forth in *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), in order to defeat a facial challenge. I would affirm the Fifth Circuit's holding that *Freedman* is inapplicable to the Dallas scheme.

The Court has often held that when speech and nonspeech elements "are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 1678–79, 20 L.Ed.2d 672 (1968). See also *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 298–299, 104 S.Ct. 3065, 3071–3072, 82 L.Ed.2d 221 (1984); *Cox v. Louisiana,* 379 U.S. 559, 562–564, 85 S.Ct. 476, 479–481, 13 L.Ed.2d 487 (1965); *Adderley v. Florida,* 385 U.S. 39, 48, n. 7, 87 S.Ct. 242, 247, n. 7, 17 L.Ed.2d 149 (1966). Our cases upholding time, place, and manner restrictions on sexually oriented expressive activity are to the same effect. See *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). Time, place, and manner restrictions are not subject to strict scrutiny and are sustainable if they are content neutral, are designed to serve a substantial governmental interest, and do not unreasonably limit alternative means of communication. *Renton, supra,* 475 U.S., at 47, 106 S.Ct., at 928. See also ****615** *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 647–648, 101 S.Ct. 2559, 2563–2564, 69 L.Ed.2d 298 (1981);

Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976). *Renton* and *Young* also make clear that there is a substantial governmental interest in regulating sexually oriented businesses because of their likely deleterious effect on the areas surrounding them and that such regulation, although focusing on a limited class of businesses involved in expressive activity, is to be treated as content neutral.

***245** Justice O'CONNOR does not suggest that the businesses involved here are immune from the kind of regulation sustained in *Young* and *Renton.* Neither is it suggested that the prerequisites for obtaining a license, such as certificates of occupancy and inspections, do not serve the same kind of a substantial governmental interest dealt with in those cases nor that the licensing system fails the test of content neutrality. The ordinance in no way is aimed at regulating what may be sold or offered in the covered businesses. With a license, operators can sell anything but obscene publications. Without one—without satisfying the licensing requirements—they can sell nothing because the city is justified in enforcing the ordinance to avoid the likely unfavorable consequences attending unregulated sexually oriented businesses.

Justice O'CONNOR nevertheless invalidates the licensing provisions for failure to provide some of the procedural requirements that *Freedman v. Maryland, supra,* imposed in connection with a Maryland law forbidding the exhibition of any film without the approval of a board of censors. There, the board was approving or disapproving every film based on its view of the film's content and its suitability for public viewing. Absent procedural safeguards, the law imposed an unconstitutional prior restraint on exhibitors. As I have said, however, nothing like that is involved here; the predicate identified in *Freedman* for imposing its procedural requirements is absent in these cases.

Nor is there any other good reason for invoking *Freedman.* The Dallas ordinance is in many respects analogous to regulations requiring parade or demonstration permits and imposing conditions on such permits. Such regulations have generally been treated as time, place, and manner restrictions and have been upheld if they are content neutral, serve a substantial governmental interest, and leave open alternative avenues of communication. *Cox v. New Hampshire,* 312 U.S. 569, 574–576, 61 S.Ct. 762, 765–766, 85 L.Ed. 1049 (1941); *Clark v. Community for Creative Non–Violence, supra,* 468 U.S., at 293–298, 104 S.Ct., at 3068–3071. The Dallas scheme regulates ***246** who may operate sexually oriented businesses, including those who sell materials entitled to First Amendment protection; but the ordinance does not regulate content and thus it is unlike the content-based prior restraints that this Court has typically scrutinized very closely. See, *e.g., Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); *National Socialist Party of America v. Skokie,* 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977); *Vance v. Universal Amusement Co.,* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *Freedman v. Maryland, supra.*

Licensing schemes subject to First Amendment scrutiny, however, even though purporting to be time, place, and manner restrictions, have been invalidated when undue discretion has been vested in the licensor. Unbridled discretion with respect to the criteria used in deciding whether or not to grant a license is deemed to convert an otherwise valid law into an unconstitutional prior restraint. *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150–152, 89 S.Ct. 935, 938–939, 22 L.Ed.2d 162 (1969); *Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 757, 108 S.Ct. 2138, 2143, 100 L.Ed.2d 771 (1988); *Staub v. City of Baxley,* 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Niemotko v. Maryland,* 340 U.S. 268, 71 S.Ct. 328, 95 L.Ed. 280 (1951); *Kunz v. New York,* 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951);
****616** *Saia v. New York,* 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948). That rule reflects settled law with respect to licensing in the First Amendment context. But here there is no basis for invoking *Freedman* procedures to protect against arbitrary use of the discretion conferred by the ordinance before us. Here, the Court of Appeals specifically held that the ordinance did not vest undue discretion in the licensor because the ordinance provides sufficiently objective standards for the chief of police to apply. 837 F.2d 1298, 1305–1306 (CA5 1988). Justice O'CONNOR's opinion does not disturb this aspect of the Court of Appeals' decision, and because it does not, one arguably tenable reason for invoking *Freedman* disappears.

Additionally, petitioners' reliance on *Riley v. National Federation of Blind of N.C., Inc.,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), is misplaced. *Riley* invalidated a licensing requirement for professional

fundraisers which prevented them from soliciting ***247** prior to obtaining a license, but which permitted nonprofessionals to solicit while their license applications were pending. We there held that a professional fundraiser was a speaker entitled to First Amendment protection and that because "the State's asserted power to license professional fundraisers carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter," *id.,* at 801, 108 S.Ct., at 2670, the requirement was subject to First Amendment scrutiny to make sure that the licensor's discretion was suitably confined. *Riley* thus appears to be a straightforward application of the "undue-discretion" line of cases. The Court went on to say, however, that even assuming, as North Carolina urged, that the licensing requirement was a time, place, and manner restriction, *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), required that there be provision for either acting on the license application or going to court within a specified brief period of time.

Contrary to the ordinance in these cases, the *Riley* licensing requirement was aimed directly at speech. The discretion given the licensors in *Riley* empowered them to affect the content of the fundraiser's speech, unless that discretion was suitably restrained. In that context, the Court invoked *Freedman.* That basis for applying *Freedman* is not present here, for, as I have said, the licensor is not vested with undue discretion.

Neither is there any basis for holding that businesses dealing in expressive materials have been singled out; all sexually oriented businesses—including those not involved in expressive activity such as escort agencies—are covered, and all other businesses must live up to the building codes, as well as fire and health regulations. Furthermore, the Court should not assume that the licensing process will be unduly prolonged or that inspections will be arbitrarily delayed. There is no evidence that this has been the case, or that inspections in other contexts have been delayed or neglected. Between the time of the District Court's judgment and that of the ***248** Fifth Circuit, Dallas granted some 147 out of 165 license requests, and none of the petitioners in making this facial challenge to the ordinance asserts that its license application was not promptly dealt with, that it was unable to obtain the required inspections promptly, or that it was unable to secure reasonably prompt review of a denial. Clearly the licensing scheme neither imposes nor results in a ban of any type of adult business.

I see no basis for invalidating this ordinance because it fails to include some prophylactic measures that will guard against highly speculative injuries. As Justice O'CONNOR notes in the course of refusing to apply one of the *Freedman* procedural mandates, the licensing in these cases is required of sexually oriented businesses, enterprises that will have every incentive to pursue the license applications vigorously. *Ante,* at 606–607. The ordinance requires that an application be acted on within 30 ****617** days. Licensing decisions suspending or revoking a license are immediately appealable to a permit and license appeal board and are stayed pending that appeal. In addition, no one suggests that licensing decisions are not subject to immediate appeal to the courts. As I see it, there is no realistic prospect that the requirement of a license will have anything more than an incidental effect on the sale of protected materials.

Perhaps Justice O'CONNOR is saying that those who deal in expressive materials are entitled to special procedures in the course of complying with otherwise valid, neutral regulations generally applicable to all businesses. I doubt, however, that bookstores or radio or television stations must be given special breaks in the enforcement of general health, building, and fire regulations. If they must, why would not a variety of other kinds of businesses, like supermarkets and convenience stores that sell books and magazines, also be so entitled? I question that there is authority to be found in our cases for such a special privilege.

***249** For the foregoing reasons, I respectfully dissent from Part II of Justice O'CONNOR's opinion.

Justice STEVENS, concurring in part and dissenting in part.

As the Court explains in Part III of its opinion, it is not certain that any petitioner has standing to challenge the provisions of the licensing scheme that disqualify applicants who are themselves unqualified or who reside with, or are married to, unqualified persons. Given the breadth of those provisions, the assertions in the Staten and Foster affidavits, and the District Court's understanding of the relevant facts, however, I cannot join the decision to direct dismissal of this portion of the

litigation. See *ante,* at 609–610. I would remand for an evidentiary hearing on the standing issues.

I join Parts I, II, and IV of Justice O'CONNOR's opinion. With respect to Justice SCALIA's proposed resurrection of *Ginzburg v. United States,* 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966), I have this comment. As I explained in my dissenting opinion in *Splawn v. California,* 431 U.S. 595, 602, 97 S.Ct. 1987, 1991–92, 52 L.Ed.2d 606 (1977), *Ginzburg* was decided before the Court extended First Amendment protection to commercial speech and cannot withstand our decision in *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). If conduct or communication is protected by the First Amendment, it cannot lose its protected status by being advertised in a truthful and inoffensive manner. Any other result would be perverse,

> "Signs which identify the 'adult' character of a motion picture theater or of a bookstore convey the message that sexually provocative entertainment is to be found within.... Such signs ... provide a warning to those who find erotic materials offensive that they should shop elsewhere for other kinds of books, magazines, or entertainment. Under any sensible regulatory scheme, truthful description of subject matter that is pleasing to ***250** some and offensive to others ought to be encouraged, not punished." 431 U.S., at 604, 97 S.Ct., at 1992.

Justice SCALIA, concurring in part and dissenting in part. I join Part I of the Court's opinion, Part III, holding that there is no standing to challenge certain portions of the Dallas ordinance, and Part IV, sustaining on the merits certain other portions. I dissent from the judgment, however, because I would affirm the Fifth Circuit's holding that the ordinance is constitutional in all respects before us.

I

Since this Court first had occasion to apply the First Amendment to materials treating of sex, some three decades ago, we have been guided by the principle that "sex and obscenity are not synonymous," ****618** *Roth v. United States,* 354 U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 (1957). The former, we have said, the Constitution permits to be described and discussed. The latter is entirely unprotected, and may be allowed or disallowed by States or communities, as the democratic majority desires.

Distinguishing the one from the other has been the problem. Obscenity, in common understanding, is material that "treat[s] sex in a manner appealing to prurient interest," *id.,* at 488, 77 S.Ct., at 1311. But for constitutional purposes we have added other conditions to that definition, out of an abundance of concern that "the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Ibid.* To begin with, we rejected the approach previously adopted by some courts, which would permit the banning of an entire literary work on the basis of one or several passages that in isolation could be considered obscene. Instead, we said, "the dominant theme of the material *taken as a whole* " must appeal to prurient interest. *Id.,* at 489, 77 S.Ct., at 1311 (emphasis added). We have gone on to add other conditions, which are reflected in the three-part test pronounced in *Miller v. California,* 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973):

> ***251** "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

These standards' immediate purpose and effect—which, it is fair to say, have met with general public acceptance—have been to guarantee the access of all adults to such works of literature, once banned or sought to be banned, as Dreiser's An American Tragedy,[1] Lawrence's Lady Chatterley's Lover,[2] Miller's Tropic of Cancer and Tropic of Capricorn,[3] and Joyce's Ulysses,[4] and to many stage and motion picture productions of genuine dramatic or entertainment value that contain some sexually explicit or even erotic material.

1 Held obscene in *Commonwealth v. Friede,* 271 Mass. 318, 171 N.E. 472 (1930).

2 Held obscene in *People v. Dial Press, Inc.*, 182 Misc. 416, 48 N.Y.S.2d 480 (N.Y.Magis.Ct.1944).

3 Held obscene in *United States v. Two Obscene Books*, 99 F.Supp. 760 (ND Cal.1951), aff'd *sub nom. Besig v. United States*, 208 F.2d 142 (CA9 1953).

4 Unsuccessfully challenged as obscene in *United States v. One Book Called "Ulysses,"* 5 F.Supp. 182 (SDNY 1933), aff'd, 72 F.2d 705 (CA2 1934).

Application of these standards (or, I should say, misapplication of them) has had another effect as well—unintended and most certainly not generally approved. The Dallas ordinance at issue in these cases is not an isolated phenomenon. It is one example of an increasing number of attempts throughout the country, by various means, not to withhold from the public any particular book or performance, but to prevent the erosion of public morality by the increasingly general appearance of what the Dallas ordinance delicately calls "sexually ***252** oriented businesses." Such businesses flourish throughout the country as they never did before, not only in New York's Times Square, but in much smaller communities from coast to coast. Indeed, as a case we heard last Term demonstrates, they reach even the smallest of communities via telephonic "dial-a-porn." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989).

While many communities do not object to such businesses, others do, and have sought to eliminate them. Attempts to do so by focusing upon the individual books, motion pictures, or performances that these businesses ****619** market are doomed to failure by reason of the very stringency of our obscenity test, designed to avoid any risk of suppressing socially valuable expression. Communities cannot close down "porn-shops" by banning pornography (which, so long as it does not cross the distant line of obscenity, is protected), just as Congress cannot eliminate specialized "dial-a-porn" telephone services by prohibiting individual messages that are "indecent" but not quite obscene. *Id.*, at 131, 109 S.Ct., at 2839. Consequently, communities have resorted to a number of other means, including stringent zoning laws, see *e.g.*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (ordinance adopting unusual zoning technique of requiring sexually oriented businesses to be dispersed rather than concentrated); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (ordinance restricting theaters that show "adult" films to locations comprising about 5% of the community's land area, where the Court of Appeals had found no "commercially viable" sites were available), Draconian sanctions for obscenity which make it unwise to flirt with the sale of pornography, see *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989) (state Racketeer Influenced and Corrupt Organizations (RICO) statute), and the ordinance we have before us today, a licensing scheme purportedly designed to assure that porn-shops are run by a better class of person. Not only are these oblique methods less than entirely effective in eliminating the ***253** perceived evil at which they are directed (viz., the very existence of sexually oriented businesses anywhere in the community that does not want them), but they perversely render less effective our efforts, through a restrictive definition of obscenity, to prevent the "chilling" of socially valuable speech. State RICO penalties for obscenity, for example, intimidate not just the porn-shop owner, but also the general bookseller who has been the traditional seller of new books such as Ulysses.

It does not seem to me desirable to perpetuate such a regime of prohibition by indirection. I think the means of rendering it unnecessary is available under our precedents and should be applied in the present cases. That means consists of recognizing that a business devoted to the sale of highly explicit sexual material can be found to be engaged in the marketing of obscenity, even though each book or film it sells might, in isolation, be considered merely pornographic and not obscene. It is necessary, to be sure of protecting valuable speech, that we compel all communities to tolerate individual works that have only marginal communicative content beyond raw sexual appeal; it is not necessary that we compel them to tolerate businesses that hold themselves forth as specializing in such material. Because I think that Dallas could constitutionally have proscribed the commercial activities that it chose instead to license, I do not think the details of its licensing scheme had to comply with First Amendment standards.

II

The Dallas ordinance applies to any sexually oriented business, which is defined as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort

agency, nude model studio, or sexual encounter center." Dallas City Code § 41A–2(19) (1986). Operators of escort agencies and sexual encounter centers are not before us.

***254** "Adult bookstore or adult video store" is defined, *inter alia,* as a "commercial establishment which as one of its *principal business purposes* offers for sale or rental" books or other printed matter, or films or other visual representations, "which depict or describe 'specified sexual activities' or 'specified anatomical areas.' " § 41A–2(2)(A) (emphasis added).[5] "Adult motion picture theater" ****620** is defined as a commercial establishment where films "are *regularly* shown" that depict specified sexual activities or specified anatomical areas. § 41A–2(5) (emphasis added).[6] Other sexually oriented businesses are similarly defined as establishments that "regularly" depict or describe specified sexual activities or specified anatomical areas.[7] "Specified sexual activities" means

5 "Adult Bookstore or Adult Video Store means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:
"(A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe 'specified sexual activities' or 'specified anatomical areas'; or
"(B) instruments, devices, or paraphernalia which are designed for use in connection with 'specified sexual activities.' " Dallas City Code §§ 41A–2(2)(A), (B) (1986).
The regulation of businesses that sell the items described in subsection (B) raises no First Amendment question.

6 "Adult Motion Picture Theater means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas.' " § 41A–2(5).

7 "(3) Adult Cabaret means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:
"(A) persons who appear in a state of nudity; or
"(B) live performances which are characterized by the exposure of 'specified anatomical areas' or by 'specified sexual activities'; or
"(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas.' "
. . . . .
"(6) Adult Theater means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of 'specified anatomical areas' or by 'specified sexual activities.'
. . . . .
"(12) Nude Model Studio means any place where a person who appears in a state of nudity or displays 'specified anatomical areas' is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.
"(13) Nudity or a State of Nudity means:
"(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or
"(B) a state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast." § 41A–2.
As to nude model studios, the ordinance further provides as a defense to prosecution that
"a person appearing in a state of nudity did so in a modeling class operated:
"(1) by a proprietary school licensed by the state of Texas; a college, junior college, or university supported entirely or partly by taxation;
"(2) by a private college or university which maintains and operates educational programs in which credits are transferrable to a college, junior college, or university supported entirely or partly by taxation; or
"(3) in a structure:
"(A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and
"(B) where in order to participate in a class a student must enroll at least three days in advance of the class; and
"(C) where no more than one nude model is on the premises at any one time." § 41A–21(d).

***255** "(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;

"(B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

"(C) masturbation, actual or simulated; or

"(D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above." § 41A–2(21).

Finally, "specified anatomical areas" means "human genitals in a state of sexual arousal." § 41A–2(20).

***256** As I shall discuss in greater detail presently, this ordinance is unusual in that it does not apply "work by work." It can reasonably be interpreted to restrict not sales of (or businesses that sell) any particular book, film, or entertainment, but only businesses ****621** that *specialize* in books, films, or entertainment of a particular type. That places the obscenity inquiry in a different, and broader, context. Our jurisprudence supports the proposition that even though a particular work of pornography is not obscene under *Miller,* a merchant who concentrates upon the sale of such works is engaged in the business of obscenity, which may be entirely prohibited and hence (*a fortiori*) licensed as required here.

The dispositive case is *Ginzburg v. United States,* 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966). There the defendant was convicted of violating the federal obscenity statute, 18 U.S.C. § 1461, by mailing three publications which our opinion assumed, see 383 U.S., at 465–466, 86 S.Ct., at 944–945, were in and of themselves not obscene. We nonetheless upheld the conviction, because the evidence showed "that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' " *Id.,* at 467, 86 S.Ct., at 945 (quoting *Roth v. United States,* 354 U.S., at 495–496, 77 S.Ct., at 1314–1315 (Warren, C.J., concurring)). Justice BRENNAN's opinion for the Court concluded that the advertising for the publications, which "stressed the [ir] sexual candor," 383 U.S., at 468, 86 S.Ct., at 946, "resolve[d] all ambiguity and doubt" as to the unprotected status of the defendants' activities. *Id.,* at 470, 86 S.Ct., at 947.

"The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content.... And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the ***257** circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test." *Id.,* at 470–471, 86 S.Ct., at 947.

We held one of the three publications in question to be, in the circumstances of its sale, obscene, despite the trial court's finding that only 4 of the 15 articles it contained "predominantly appealed to prurient interest and substantially exceeded community standards of candor," *id.,* at 471, 86 S.Ct., at 947; and another to be obscene despite the fact that it previously had been sold by its author to numerous psychiatrists, some of whom testified that they found it useful in their professional practice. We upheld the convictions because the petitioners had "deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed." *Id.,* at 472, 86 S.Ct., at 948.

In *Memoirs v. Attorney General of Massachusetts,* 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), decided the same day as *Ginzburg,* we overturned the judgment that a particular book was obscene, but, citing *Ginzburg,* made clear that this did not mean that all circumstances of its distribution would be constitutionally protected. We said:

"On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected.... In this proceeding, however, the courts were asked to judge the obscenity

of *Memoirs* in the abstract, and ***258** the declaration of obscenity was neither ****622** aided nor limited by a specific set of circumstances of production, sale, and publicity. All possible uses of the book must therefore be considered, and the mere risk that the book might be exploited by panderers because it so pervasively treats sexual matters cannot alter the fact ... that the book will have redeeming social importance in the hands of those who publish or distribute it on the basis of that value." 383 U.S., at 420–421, 86 S.Ct., at 978–979 (footnote omitted).

Ginzburg was decided before our landmark *Miller* decision, but we have consistently applied its holding post-*Miller*. See *Hamling v. United States,* 418 U.S. 87, 130, 94 S.Ct. 2887, 2914, 41 L.Ed.2d 590 (1974); *Splawn v. California,* 431 U.S. 595, 597–599, 97 S.Ct. 1987, 1989–1990, 52 L.Ed.2d 606 (1977); *Pinkus v. United States,* 436 U.S. 293, 303–304, 98 S.Ct. 1808, 1814–1815, 56 L.Ed.2d 293 (1978). Although *Ginzburg* narrowly involved the question whether particular publications were obscene, the foundation for its holding is that "the sordid business of pandering," *Ginzburg, supra,* 383 U.S., at 467, 86 S.Ct., at 945, is constitutionally unprotected—that the sale of material "solely to produce sexual arousal ... does not escape regulation because [the material] has been dressed up as speech, or in other contexts might be recognized as speech." 383 U.S., at 474, n. 17, 86 S.Ct., at 949, n. 17. But just as *Miller* established some objective criteria concerning what particular publications can be regarded as "appealing to the prurient interest," it impliedly established some objective criteria as to what stock-in-trade can be the raw material (so to speak) of pandering. Giving this limitation full scope, it seems to me that *Ginzburg,* read together with *Miller,* establishes at least the following: The Constitution does not require a State or municipality to permit a business that intentionally specializes in, and holds itself forth to the public as specializing in, performance or portrayal of sex acts, sexual organs in a state of arousal, or live human nudity. In my view that suffices to sustain the Dallas ordinance.

***259** III

In evaluating the Dallas ordinance under the principles I have described, we must of course give it the benefit of any "limiting construction [that] has been or could be placed" on its text. *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). Moreover, we cannot sustain the present facial attack unless the ordinance is "*substantially* overbroad," *id.,* at 615, 93 S.Ct., at 2918 (emphasis added), that is, "unless it reaches a substantial number of impermissible applications," *New York v. Ferber,* 458 U.S. 747, 771, 102 S.Ct. 3348, 3362, 73 L.Ed.2d 1113 (1982), "judged in relation to the statute's plainly legitimate sweep," *Broadrick, supra,* 413 U.S., at 615, 93 S.Ct., at 2918.

Favorably construed, the Dallas ordinance regulates only the business of pandering, as I have defined it above. It should be noted, to begin with, that the depictions, descriptions, and displays that cause any of the businesses before us to qualify as a "sexually oriented business" must be sexually explicit in more than a minor degree. What is at issue here is not the sort of nude photograph that might commonly appear on a so-called "pin-up calendar" or "men's magazine." The mere portrayal of the naked human body does *not* qualify unless (in the definition of adult cabaret, adult theater, and nude model studio) it is featured live. Qualifying depictions and descriptions do not include human genitals, but only human genitals in a state of sexual arousal, the fondling of erogenous zones, and normal or perverted sexual acts.

In addition, in order to qualify for regulation under the ordinance the business that provides such live nudity or such sexually explicit depictions or descriptions must do so "as one of its principal business purposes" (in the case of adult bookstores and adult video stores) or "regularly" (in the case of adult ****623** motion picture theaters, adult cabarets, and adult theaters). The adverb "regularly" can mean "constantly, continually, steadily, sustainedly," Roget's International Thesaurus § 135.7, p. 77 (4th ed. 1977), and also "in a ... methodical way," Webster's Third New International Dictionary 1913 (1981). I think it can reasonably be interpreted ***260** in the present context to mean a continuous presentation of the sexual material as one of the very objectives of the commercial enterprise. Similarly, the phrase "as one of its principal business purposes" can connote that the material containing the specified depictions and descriptions does not merely account for a substantial proportion of sales volume but is also intentionally marketed *as material of that character.*

All of the establishments at issue, therefore, share the characteristics that they offer (1) live nudity or hardcore sexual material, (2) as a constant, intentional objective

of their business. But there is still more. With the single exception of "adult motion picture theater," the descriptions of all the establishments at issue contain some language that suggests a requirement that the business hold itself forth to the public precisely as a place where sexual stimulation of the described sort can be obtained. Surely it would be permissible to interpret the phrase "as one of its principal business purposes" in the definition of "adult bookstore or adult video store" to require such holding forth. A business can hardly have as a principal purpose a line of commerce it does not even promote. Likewise, the portion of the definitions of "adult cabaret" and "adult theater" which requires that they regularly "feature" the described sexual material suggests that it must not merely be there but must be promoted or marketed as such. The definition of nude model studio, while containing no such requirement, is subject to a defense which contains as one of its elements that the structure where the studio is located "has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available
for viewing." Dallas City Code § 41A–21(d)(3)(A) (1986). Even the definitions of the two categories of enterprises not at issue in this case, "escort agencies" and "sexual encounter centers," contain language that arguably requires a "holding forth" (a "primary business purpose" requirement). Given these indications of the importance of "holding forth" contained ***261** in all except one of the definitions, it seems to me very likely—especially if that should be thought necessary to sustain the constitutionality of the measure—that the Dallas ordinance in all its challenged applications would be interpreted to apply only to businesses that not only (1) offer live nudity or hardcore sexual material, (2) as a constant and intentional objective of their business, but also (3) seek to promote it as such. It seems to me that any business that meets these requirements can properly be described as engaged in "the sordid business of pandering," and is not protected by the First Amendment. Indeed, even the first two requirements alone would suffice to sustain the ordinance, since it is most implausible that any enterprise which has as its constant intentional objective the sale of such material does not advertise or promote it as such; if a few such enterprises bent upon commercial failure should exist, they would certainly not be numerous enough to render the ordinance *substantially* overbroad.

The Dallas ordinance's narrow focus distinguishes these cases from *Schad v. Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), in which we held unconstitutional a municipal ordinance that prohibited all businesses offering live entertainment, including but not limited to nude dancing. That ordinance was substantially overbroad because, on its face, it prohibited "a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments." *Id.,* at 65, 101 S.Ct., at 2181. The Dallas ordinance, however, targets only businesses engaged in unprotected activity.

****624** Even if it were possible to conceive of a business that could meet the above-described qualifications and yet be engaged in First Amendment activities rather than pandering, we do not invalidate statutes as overbroad on the basis of imagination alone. We have always held that we will not apply that "strong medicine" unless the overbreadth is both "real" and "substantial." *Broadrick v. Oklahoma,* 413 U.S., at 613, 615, 93 S.Ct., at 2916–17, 2917–18. I think we must sustain the current ordinance just as we sustained the statute at issue in *New York v. Ferber, supra,* ***262** which forbade the distribution of materials depicting minors in a "sexual performance." The state court had applied overbreadth analysis because of its "understandabl[e] concer[n] that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute." *Id.,* at 773, 102 S.Ct., at 3363. We said:

> "[W]e seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.' Under these circumstances, § 263.15 is 'not substantially overbroad and ... whatever overbreadth may exist should be cured through a case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.' *Broadrick v. Oklahoma,* 413 U.S., at 615–616 [93 S.Ct., at 2917–2918]." *Id.,* 458 U.S., at 773–774, 102 S.Ct., at 3363.

The legitimate reach of the Dallas ordinance "dwarfs its arguably impermissible applications." *Id.,* at 773, 102 S.Ct., at 3363.

To reject the present facial attack upon the ordinance is not, of course, to deprive someone who is not engaged in pandering and who is somehow caught within its provisions (if that could possibly occur) from asserting his First Amendment rights. But that eventuality is so improbable, it seems to me, that no substantial quantity of First Amendment activity is anticipatorily "chilled." The Constitution is adequately safeguarded by conducting further review of this reasonable ordinance as it is applied.

Justice O'CONNOR's opinion correctly notes that respondents conceded that the *materials* sold are protected by the First Amendment. *Ante,* at 603. But they did not concede that the activity of pandering at which the Dallas ordinance is directed is constitutionally protected. They did not, to be ***263** sure, specifically argue *Ginzburg,* or suggest the complete proscribability of these businesses as a basis for sustaining their manner of licensing them. But we have often sustained judgments on grounds not argued—particularly in the area of obscenity law, where our jurisprudence has been, let us say, not entirely predictable. In *Ginzburg* itself, for example, the United States did not argue that the convictions could be upheld on the pandering theory the Court adopted, but only that the materials sold were obscene under *Roth.* Brief for United States in *Ginzburg v. United States,* O.T.1965, No. 42, p. 18. In *Mishkin v. New York,* 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966), one of the companion cases to *Ginzburg,* the State of New York defended the convictions under *Roth* and explicitly disagreed with those commentators who would determine obscenity by looking to the "intent of the disseminator," rather than "character of the material." Brief for Appellee in *Mishkin v. New York,* O.T.1965, No. 49, p. 45, and n. See also Brief for Appellee in *Memoirs v. Attorney General of Massachusetts,* O.T.1965, No. 368, p. 17 (defending convictions under *Roth* and *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962)). Likewise in *Roth,* where we held that the test for obscenity was appeal to prurient interest, 354 U.S., at 489, 77 S.Ct., at 1311, the United States had argued that ****625** obscenity was established if the material "constitutes a present threat to the morals of the average person in the community." Brief for United States in *Roth v. United States,* O.T.1956, No. 582, p. 100. And no one argued that the *Miller* Court should abandon the "utterly without redeeming social value" test of the *Memoirs* plurality, but the Court did so nevertheless. Compare 413 U.S., at 24–25, 93 S.Ct., at 2614–16, with Brief for Appellee in *Miller v. California,* O.T.1972, No. 70–73, pp. 26–27.

* * *

The mode of analysis I have suggested is different from the rigid test for obscenity that we apply to the determination whether a particular book, film, or performance can be banned. The regulation here is not directed to particular ***264** works or performance, but to their concentration, and the constitutional analysis should be adjusted accordingly. What Justice STEVENS wrote for the plurality in *American Mini Theatres* is applicable here as well: "[W]e learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached." 427 U.S., at 65, 96 S.Ct., at 2450. The prohibition of concentrated pornography here is analogous to the prohibition we sustained in *American Mini Theatres.* There we upheld ordinances that prohibited the concentration of sexually oriented businesses, each of which (we assumed) purveyed material that was not constitutionally proscribable. Here I would uphold an ordinance that regulates the concentration of sexually oriented material in a single business.

The basis of decision I have described seems to me the proper means, in Chief Justice Warren's words, "to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments." *Jacobellis v. Ohio,* 378 U.S. 184, 199, 84 S.Ct. 1676, 1684, 12 L.Ed.2d 793 (1964) (dissenting opinion). It entails no risk of suppressing even a single work of science, literature, or art—or, for that matter, even a single work of pornography. Indeed, I fully believe that in the long run it will expand rather than constrict the scope of permitted expression, because it will eliminate the incentive to use, as a means of preventing commercial activity patently objectionable to large segments of our society, methods that constrict unobjectionable activity as well.

For the reasons stated, I respectfully dissent.

110 S.Ct. 596, 107 L.Ed.2d 603, 58 USLW 4079

All Citations

493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603, 58 USLW 4079

109 S.Ct. 1591
Supreme Court of the United States

CITY OF DALLAS, et al., Petitioners
v.
Charles M. STANGLIN, Individually, and d/b/a Twilight Skating Rink.

No. 87–1848.
|
Argued March 1, 1989.
|
Decided April 3, 1989.

City filed petition for writ of certiorari after the Texas Court of Appeals, Fifth District, 744 S.W.2d 165 declared city's ordinance limiting use of dance halls to persons between ages of 14 and 18 violative of those persons' associational rights. After granting certiorari, the Supreme Court, Chief Justice Rehnquist, held that: (1) ordinance did not infringe on First Amendment right of association, and (2) ordinance was rationally related to legitimate purpose and did not violate equal protection clause.

Reversed and remanded.

Justice Stevens, with whom Justice Blackmun joined, concurred in judgment.

West Headnotes (2)

[1] **Constitutional Law**
Expressive association
Constitutional Law
Intimate association;dating relationships in general
Public Amusement and Entertainment
Constitutional, Statutory and Regulatory Provisions

City ordinance restricting admission to certain dance halls to persons between ages of 14 and 18 did not infringe on First Amendment right of association; dance hall patrons were not engaged in any form of intimate or expressive association, and there was no generalized right of "social association" that included chance encounters in dance halls. U.S.C.A. Const.Amend. 1.

236 Cases that cite this headnote

[2] **Constitutional Law**
Juvenile justice
Infants
Prohibited hours and premises;curfew
Public Amusement and Entertainment
Constitutional, Statutory and Regulatory Provisions

City ordinance restricting admission to certain dance halls to persons between ages of 14 and 18 did not violate equal protection clause because it was rationally related to city's legitimate effort to protect teenagers within that age group from what could be corrupting influences of older teenagers and young adults. U.S.C.A. Const.Amend. 14.

51 Cases that cite this headnote

**1592 *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***19** For the express purpose of providing a place where teenagers can socialize with each other but not be subject to the potentially detrimental influences of older teenagers and adults, a Dallas ordinance authorizes the licensing of "Class E" dance halls, restricting admission thereto to persons between the ages of 14 and 18 and limiting their hours of operation. Respondent, whose roller-skating rink and Class E dance hall share a divided floorspace, filed suit in state court to enjoin the ordinance's age and hour restrictions, contending, *inter alia,* that they violated the First Amendment and the Equal Protection Clause of

the Fourteenth Amendment. The trial court upheld the ordinance, but the Texas Court of Appeals struck down the ordinance's age restriction, holding that it violated the First Amendment associational rights of minors.

Held:

1. The ordinance does not infringe on the First Amendment right of association. Respondent's patrons, who may number as many as 1,000 per night, are not engaged in a form of "intimate association." Nor do the opportunities of adults and minors to dance with one another, which might be described as "associational" in common parlance, involve the sort of "expressive association" that the First Amendment has been held to protect. The teenagers who congregate are not members of any organized association, and most are strangers to one another. The dance hall admits all who pay the admission fee, and there is no suggestion that the patrons take positions on public questions or perform other similar activities. Moreover, the Constitution does not recognize a generalized right of "social association" that includes chance encounters in dance halls. *Griswold v. Connecticut,* 381 U.S. 479, 483, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510, distinguished. Pp. 1594–1595.

2. The ordinance does not violate the Equal Protection Clause because there is a rational relationship between the age restriction for Class E dance halls and the city's interest in promoting the welfare of teenagers. Respondent's claims—that the ordinance does not meet the city's objectives because adults and teenagers can still associate with one another in places such as his skating rink and that there are other, less intrusive, alternatives to achieve the objectives—misapprehend the nature of ***20** rational-basis scrutiny, the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause. Under this standard, a classification that has some reasonable basis does not offend the Constitution because it is imperfect. Here, the city could reasonably conclude that teenagers might be more susceptible to corrupting influences if permitted to frequent dance halls with older persons or that limiting dance-hall contacts between adults and teenagers would make less likely illicit or undesirable juvenile involvement with alcohol, illegal drugs, or promiscuous sex. While the city permits teenagers and adults to rollerskate together, skating involves less physical contact than dancing, a differentiation that need not be striking to survive rational-basis scrutiny. Pp. 1595–1597.

744 S.W.2d 165 (Tex.App.1987), reversed and remanded.

REHNQUIST, C.J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post,* p. 1597.

Attorneys and Law Firms

Craig Hopkins argued the cause for petitioners. With him on the briefs were *Analeslie Muncy* and *Kenneth C. Dippel.*

Daniel J. Sheehan, Jr., argued the cause and filed a brief for respondent.*

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Opinion

****1593** Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner city of Dallas adopted an ordinance restricting admission to certain dance halls to persons between the ages of 14 and 18. Respondent, the owner of one of these "teenage" dance halls, sued to contest the constitutional validity of the ordinance. The Texas Court of Appeals held that the ordinance violated the First Amendment right of persons between the ages of 14 and 18 to associate with persons outside ***21** that age group. We now reverse, holding that the First Amendment secures no such right.

In 1985, in response to requests for dance halls open only to teenagers, the city of Dallas authorized the licensing of "Class E" dance halls.[1] The purpose of the ordinance was to provide a place where teenagers could socialize with each other, but not be subject to the potentially detrimental influences of older teenagers and

young adults. The provision of the ordinance at issue here, Dallas City Code § 14–8.1 (1985), restricts the ages of admission to Class E dance halls to persons between the ages of 14 and 18.[2] This provision, as ***22** enacted, restricted admission to those between 14 and 17, but it was subsequently amended to include 18–year olds. Parents, guardians, law enforcement, and dance-hall personnel are excepted from the ordinance's age restriction. The ordinance also limits the hours of operation of Class E dance halls to between 1 p.m. and midnight daily when school is not in session. § 14–5(d)(2).

[1] Dallas also licenses Class A, B, and C dance halls, which differ in the number of days per week dancing is permitted; Class D is for dance instruction. Persons under 17 must be accompanied by a parent for admission to Class A, B, and C dance halls. Dallas City Code §§ 14–1, 14–8 (1985–1986). A dance-hall license is not needed if the dance is at any of the following locations: a private residence from which the general public is excluded; a place owned by the federal, state, or local government; a public or private elementary school, secondary school, college, or university; a place owned by a religious organization; or a private club. *Ibid.*

[2] Section 14–8.1 of the Dallas City Code provides:
"(a) No person under the age of 14 years or over the age of 18 years may enter a Class E dance hall.
"(b) A person commits an offense if he is over the age of 18 years and:
"(1) enters a Class E dance hall; or
"(2) for the purposes of gaining admittance into a Class E dance hall, he falsely represents himself to be:
"(A) of an age from 14 years through 18 years;
"(B) a licensee or an employee of the dance hall;
"(C) a parent or guardian of a person inside the dance hall;
"(D) a governmental employee in the performance of his duties.
"(c) A licensee or an employee of a Class E dance hall commits an offense if he knowingly allows a person to enter or remain on the premises of a dance hall who is:
"(1) under the age of 14 years; or
"(2) over the age of 18 years.
"(d) It is a defense to prosecution under Subsections (b)(1) and (c)(2) that the person is:
"(1) a licensee or employee of a dance hall;
"(2) a parent or guardian of a person inside the dance hall; or
"(3) a governmental employee in the performance of his duties."

Respondent operates the Twilight Skating Rink in Dallas and obtained a license for a Class E dance hall. He divided the floor of his roller-skating rink into two sections with moveable plastic cones or pylons. On one side of the pylons, persons between the ages of 14 and 18 dance, while on the other side, persons of all ages skate to the same music—usually soul and "funk" music played by a disc jockey. No age or hour restrictions are applicable to the skating rink. Respondent does not serve alcohol on the premises, and security personnel are present. The Twilight does not have a selective admissions policy. It charges between $3.50 and $5 per person for admission to the dance hall and between $2.50 and $5 per person for admission to the skating rink. Most of the patrons are strangers to each other, and the establishment serves as many as 1,000 customers per night.

Respondent sued in the District Court of Dallas County to enjoin enforcement of the ****1594** age and hour restrictions of the ordinance. He contended that the ordinance violated substantive due process and equal protection under the United States and Texas Constitutions, and that it unconstitutionally infringed the rights of persons between the ages of 14 and 17 (now 18) to associate with persons outside that age bracket.[3] The trial court upheld the ordinance, finding that it was rationally ***23** related to the city's legitimate interest in ensuring the safety and welfare of children.

[3] The Court of Appeals held that respondent had standing to assert the associational rights of the teenage patrons of his establishment. 744 S.W.2d 165, 168 (1987). That issue has not been raised before us.

The Texas Court of Appeals upheld the ordinance's time restriction, but it struck down the age restriction. 744 S.W.2d 165 (1987). The Court of Appeals held that the age restriction violated the First Amendment associational rights of minors. To support a restriction on the fundamental right of "social association," the court said that "the legislative body must show a compelling interest," and the regulation "must be accomplished by the least restrictive means." *Id.*, at 168. The court recognized the city's interest in "protect[ing] minors from detrimental, corrupting influences," *ibid.*, but held that the "City's stated purposes ... may be achieved in ways that are less intrusive on minors' freedom to associate," *id.*, at 169.

The Court of Appeals stated that "[a] child's right of association may not be abridged simply on the premise that he 'might' associate with those who would persuade him into bad habits," and that "neither the activity of dancing *per se,* nor association of children aged fourteen through eighteen with persons of other ages in the context of dancing renders such children peculiarly vulnerable to the evils that defendant City seeks to prevent." *Ibid.* We granted certiorari, 488 U.S. 815, 109 S.Ct. 51, 102 L.Ed.2d 30 (1988), and now reverse.

[1] The dispositive question in this case is the level of judicial "scrutiny" to be applied to the city's ordinance. Unless laws "create suspect classifications or impinge upon constitutionally protected rights," *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 40, 93 S.Ct. 1278, 1300, 36 L.Ed.2d 16 (1973), it need only be shown that they bear "some rational relationship to a legitimate state purpose" *id.,* at 44, 93 S.Ct., at 1302. Respondent does not contend that dance-hall patrons are a "suspect classification," but he does urge that the ordinance in question interferes with associational rights of such patrons guaranteed by the First Amendment.

While the First Amendment does not in terms protect a "right of association," our cases have recognized that it embraces ***24** such a right in certain circumstances. In *Roberts v. United States Jaycees,* 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), we noted two different sorts of "freedom of association" that are protected by the United States Constitution:

> "Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.,* at 617–618, 104 S.Ct., at 3249.

It is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of ****1595** "intimate human relationships" referred to in *Roberts.* The Texas Court of Appeals, however, thought that such patrons were engaged in a form of expressive activity that was protected by the First Amendment. We disagree.

The Dallas ordinance restricts attendance at Class E dance halls to minors between the ages of 14 and 18 and certain excepted adults. It thus limits the minors' ability to dance with adults who may not attend, and it limits the opportunity of such adults to dance with minors. These opportunities might be described as "associational" in common parlance, but they simply do not involve the sort of expressive association that the First Amendment has been held to protect. The hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment. ***25** Most are strangers to one another, and the dance hall admits all who are willing to pay the admission fee. There is no suggestion that these patrons "take positions on public questions" or perform any of the other similar activities described in *Board of Directors of Rotary International v. Rotary Club of Duarte,* 481 U.S. 537, 548, 107 S.Ct. 1940, 1947, 95 L.Ed.2d 474 (1987).

The cases cited in *Roberts* recognize that "freedom of speech" means more than simply the right to talk and to write. It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment. Thus this activity qualifies neither as a form of "intimate association" nor as a form of "expressive association" as those terms were described in *Roberts.*

Unlike the Court of Appeals, we do not think the Constitution recognizes a generalized right of "social association" that includes chance encounters in dance halls. The Court of Appeals relied, mistakenly we think, on a statement from our opinion in *Griswold v. Connecticut,* 381 U.S. 479, 483, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510 (1965), that "[t]he right to freely associate is not limited to 'political' assemblies, but includes those that 'pertain to the *social,* legal, and economic benefit'

of our citizens." 744 S.W.2d, at 168, quoting *Griswold v. Connecticut, supra,* 381 U.S., at 483, 85 S.Ct., at 1681. But the quoted language from *Griswold* recognizes nothing more than that the right of expressive association extends to groups organized to engage in speech that does not pertain directly to politics.

[2] The Dallas ordinance, therefore, implicates no suspect class and impinges on no constitutionally protected right. The question remaining is whether the classification engaged in by the city survives "rational-basis" scrutiny under the Equal Protection Clause. The city has chosen to impose a ***26** rule that separates 14– to 18–year–olds from what may be the corrupting influences of older teenagers and young adults. Ray Couch, an urban planner for the city's Department of Planning and Development, testified:

> " '[O]lder kids [whom the ordinance prohibits from entering Class E dance halls] can access drugs and alcohol, and they have more mature sexual attitudes, more liberal sexual attitudes in general.... And we're concerned about mixing up these [older] individuals with youngsters that [sic] have not fully matured.' " 744 S.W.2d, at 168, n. 3.

A Dallas police officer, Wesley Michael, testified that the age restriction was intended to discourage juvenile crime.

Respondent claims that this restriction "has no real connection with the City's stated interests and objectives." Brief for Respondent 13. Except for saloons and teenage dance halls, respondent argues, teenagers and adults in Dallas may associate ****1596** with each other, including at the skating area of the Twilight Skating Rink. *Id.,* at 14. Respondent also states, as did the court below, that the city can achieve its objectives through increased supervision, education, and prosecution of those who corrupt minors. *Id.,* at 15.

We think respondent's arguments misapprehend the nature of rational-basis scrutiny, which is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause. In *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), in rejecting the claim that Maryland welfare legislation violated the Equal Protection Clause, the Court said:

> "[A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78 [31 S.Ct. 337, 340, 55 L.Ed. 369 (1911)]. ***27** 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago,* 228 U.S. 61, 69–70 [33 S.Ct. 441, 443, 57 L.Ed. 730 (1913)]....
>
> "... [The rational-basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.,* 397 U.S., at 485–486, 90 S.Ct., at 1162 (footnote omitted).

We think that similar considerations support the age restriction at issue here. As we said in *New Orleans v. Dukes,* 427 U.S. 297, 303–304, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976): "[I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." See also *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 177, 101 S.Ct. 453, 461, 66 L.Ed.2d 368 (1980). The city could reasonably conclude, as Couch stated, that teenagers might be susceptible to corrupting influences if permitted, unaccompanied by their parents, to frequent a dance hall with older persons. See 7 E. McQuillin, Law of Municipal Corporations § 24.210 (3d ed. 1981) ("Public dance halls have been regarded as being in that category of businesses and vocations having potential evil consequences"). The city could properly conclude that limiting dance-hall contacts between juveniles and adults would make less likely illicit or undesirable juvenile involvement with alcohol, illegal drugs, and promiscuous sex.[4] It is true that the city allows teenagers ***28** and adults to roller-skate together, but skating involves less physical ****1597** contact than dancing. The differences between the two activities may not be striking, but differentiation need not be striking in order to survive rational-basis scrutiny.

[4] The Court considered similar factors in *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), where it upheld, over claims of infringement on religious freedom and equal

protection, a statute prohibiting children under 12 from selling newspapers on the street. After noting that the statute would have been invalid if applied to adults, the Court said:

"The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment.... Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power." *Id.,* at 168–169, 64 S.Ct., at 443 (footnotes omitted).

See also *Bellotti v. Baird,* 443 U.S. 622, 635, 99 S.Ct. 3035, 3044, 61 L.Ed.2d 797 (1979) (plurality opinion), quoting *McKeiver v. Pennsylvania,* 403 U.S. 528, 550, 91 S.Ct. 1976, 1989, 29 L.Ed.2d 647 (1971) (plurality opinion) ("State is entitled to adjust its legal system to account for children's vulnerability and their need for 'concern, ... sympathy, and ... paternal attention' "); *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (upholding right of State to prohibit sale of "girlie" magazines to minors).

We hold that the Dallas ordinance does not infringe on any constitutionally protected right of association, and that a rational relationship exists between the age restriction for Class E dance halls and the city's interest in promoting the welfare of teenagers. The judgment of the Court of Appeals is therefore reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice BLACKMUN joins, concurring in the judgment.

In my opinion the opportunity to make friends and enjoy the company of other people—in a dance hall or elsewhere—is an aspect of liberty protected by the Fourteenth Amendment. For that reason, I believe the critical issue in this case involves substantive due process rather than the First Amendment right of association. Nonetheless, I agree with the Court that the city has adequately justified the ordinance's modest impairment of the liberty of teenagers. Indeed, I suspect that the ordinance actually gives teenagers ***29** greater opportunity to associate than they would have if the Class E dance-hall provision were invalidated. [*] I therefore join the Court's judgment.

[*] I do not join the Court's assessment of this case under the Equal Protection Clause. Although the equal protection issue received nominal attention in the trial court, see Pet. for Cert. C–1 to C–7, it was neither reviewed by the Texas Court of Appeals nor briefed before us. See 744 S.W.2d 165 (1987); Pet. for Cert. 3; Brief for Petitioners 4.

All Citations

490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18, 57 USLW 4406

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251 F.3d 1121
United States Court of Appeals,
Seventh Circuit.

BLUE CANARY CORPORATION,
Plaintiff-Appellant,
v.
CITY OF MILWAUKEE, Defendant-Appellee.

No. 00-3543.
|
Argued March 30, 2001.
|
Decided May 29, 2001.
|
Rehearing and Rehearing En Banc Denied June 26, 2001.

Exotic dance club appealed city licensing board's refusal to renew club's liquor license. The United States District Court for the Eastern District of Wisconsin, John W. Reynolds, J. granted summary judgment in favor of city. Club appealed. The Court of Appeals, Posner, Circuit Judge, held that: (1) ordinance which required club to apply for renewal of liquor license annually was not "prior restraint"; (2) licensing board's consideration of the type of entertainment provided by club in residential neighborhood did not violate free speech clause; and (3) failure to renew club's license did not violate free speech clause.

Affirmed.

West Headnotes (5)

[1] **Constitutional Law**
Prior Restraints

The term "prior restraint" refers to requiring governmental permission to engage in specified expressive activity in violation of the free speech clause of the First Amendment, in contrast to punishing the activity after it has taken place. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[2] **Constitutional Law**
Prior Restraints

"Prior restraints" that do not limit content of speech or activity are reviewed under a more permissive standard applicable to restrictions merely on the time, place, or manner of expression to determine whether free speech rights are violated. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[3] **Constitutional Law**
Intoxicating Liquors

Intoxicating Liquors
Municipal Ordinances

City ordinance which required exotic dance club to apply for renewal of liquor license annually was not "prior restraint" that violated free speech clause of First Amendment; sale of liquor was unexceptionably a licensed activity even when the licensed club provided entertainment for its customers. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[4] **Constitutional Law**
Intoxicating Liquors

Intoxicating Liquors
Places

City licensing board's consideration of the type of entertainment provided by exotic dance club in residential neighborhood in determining whether to renew club's liquor license did not violate free speech clause of the First Amendment; any impairment of free speech rights was slight, and any expressive activity was not suppressed, but merely forced to relocate to another part of the city. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[5] **Constitutional Law**

Intoxicating Liquors

Intoxicating Liquors

Places

City's failure to renew liquor license of exotic dance club in residential neighborhood, pursuant to city ordinance which prohibited renewal of liquor licenses to bars and restaurants when the "proposed activity was not compatible with the normal activity of the neighborhood" in which the bar or restaurant was located, did not violate free speech clause of First Amendment; neighbors testified that club's activities were incompatible with the residential character of the neighborhood, and club could have reopened in another part of the city. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

Attorneys and Law Firms

***1122** Jeff Scott Olson (argued), Madison, WI, for plaintiff-appellant.

Bruce Schrimpf (argued), Milwaukee City Attorney's Office, Milwaukee, WI, for defendant-appellee.

Before FLAUM, Chief Judge, and POSNER and EVANS, Circuit Judges.

Opinion

POSNER, Circuit Judge.

The plaintiff, appealing from the grant of summary judgment in favor of the defendant, the City of Milwaukee, argues that the City's refusal to renew the plaintiff's liquor license violated the free speech clause of the First Amendment. The plaintiff had bought a tavern in Milwaukee that entertained its patrons with polkas. It obtained a liquor license and shortly afterward changed the name of the tavern from Blue Canary to Runway 94 and applied for and received a "cabaret license," which permits a tavern to provide entertainment in the form of dancing by performers. On the application form the plaintiff's manager checked "floor shows" rather than "exotic dancers/male and/or female strippers," and at a hearing on the application she explained that she wanted to put on "Las Vegas style" nightclub acts. But instead, after receiving the cabaret license, the tavern put on shows in which the performers danced in only pasties and bikini bottoms, which the licensing authority believed constituted "exotic dancing" rather than "Las Vegas style" dancing even though the dancers did not strip on stage but merely appeared, as it were, fully unclothed down to the pasties and bikini bottoms. The plaintiff reluctantly applied for a supplementary license to permit "exotic dancing." This was denied, but the tavern continued to exhibit "exotic dancing" in the form described, with some weird touches, such as dancers who sucked on their breasts while hanging upside down. The erotic character of the entertainment was not concealed. One dancer allowed a customer to slip money between her breasts. Another acknowledged that she tried to "turn guys on" in order to get tips. Others simulated intercourse.

When the tavern's liquor license came up for renewal at the end of its one-year term, a hearing was held at which residents of the immediate neighborhood opposed renewal on grounds of noise, traffic, and litter, but also moral disapproval of the entertainment. One neighbor complained that a person had come out of the tavern and urinated in his mailbox. The license was not renewed, and this suit ensued.

The plaintiff complains primarily about the vagueness of the ordinance governing grants and renewals of liquor licenses-which so far as bears on this case requires merely a determination of "whether or not the applicant's proposed operations are basically compatible with the normal activity of the neighborhood in which the licensed premises is to be located," Milwaukee Code of Ordinances § 90-35-1-e-and of the category in the application form "exotic dancers/male and/or female strippers." The vagueness of the category is relevant, however, only if the City violated the plaintiff's rights by refusing to renew its liquor license. If it did, the next question would be whether the City committed a further violation by refusing to grant an "exotic dancers" supplement to the plaintiff's cabaret license. But if the City was entitled to conclude that the nature of the entertainment in the plaintiff's tavern, whatever one calls it, was so inappropriate to the neighborhood as to justify not renewing the liquor license (since the plaintiff was uninterested in switching to a form of entertainment that the neighbors would not have objected to), it is irrelevant whether the entertainment was or was not "exotic dancing."

***1123** **[1]** The plaintiff repeats its complaint about vagueness under the rubric of "prior restraint." The term refers to requiring governmental permission to engage in specified expressive activity, in contrast to punishing the activity after it has taken place. *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993); *Freedman v. Maryland*, 380 U.S. 51, 57, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). In the England of Shakespeare's day and indeed for centuries afterwards, a play could not be exhibited in a theater without a license from the Lord Chamberlain. That was a classic prior restraint. Blackstone defined freedom of speech and the press as freedom from prior restraints, 4 William Blackstone, *Commentaries on the Laws of England* 151-53 (1769); see *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 389-90, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973); *MacDonald v. City of Chicago,* 243 F.3d 1021, 1031 (7th Cir.2001); *Thomas v. Chicago Park District,* 227 F.3d 921, 923-24 (7th Cir.2000); *Hudson v. Chicago Teachers Union,* 743 F.2d 1187, 1192 (7th Cir.1984); *City of Paducah v. Investment Entertainment Inc.*, 791 F.2d 463, 466 (6th Cir.1986), and while the First Amendment has not been interpreted to be limited so, the idea that prior restraints are particularly harmful to expressive freedoms has lingered. Besides the cases that we have cited already, see *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Near v. Minnesota*, 283 U.S. 697, 713-16, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); *Stokes v. City of Madison,* 930 F.2d 1163, 1168 (7th Cir.1991); *Auburn Police Union v. Carpenter,* 8 F.3d 886, 903 (1st Cir.1993).

[2] **[3]** But the rationale for condemning prior restraints limits the scope of the concept. By "prior restraint" Blackstone and modern courts alike mean censorship-an effort by administrative methods to prevent the dissemination of ideas or opinions thought dangerous or offensive. The censor's concern is with the content of speech, and the ordinary judicial safeguards are lacking. "Prior restraints" that do not have this character are reviewed under the much more permissive standard applicable to restrictions merely on the time, place, or manner of expression. See, e.g., *MacDonald v. City of Chicago, supra*; *Thomas v. Chicago Park District, supra*. Permit requirements are routinely imposed on the use of public parks and other public spaces for expressive uses, including entertainment and political demonstrations; and the sale of liquor is unexceptionably a licensed activity even when the licensed restaurant or tavern provides entertainment for its customers, and even though the Twenty-First Amendment is no longer deemed a limitation on First Amendment rights. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 515-16, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). The prior-restraint issue that the plaintiff attempts to raise is thus a red herring. There was nothing amiss in the City's requiring the plaintiff to seek a renewal of its liquor license annually.

[4] Nor was there anything amiss in the City's taking into account, in deciding whether to renew the license, the character of the entertainment that the plaintiff served with its drinks. It is true that the "exotic dancing" was not, or at least is not contended to have been, obscene (despite the breast sucking-which was not nursing), and therefore illegal. Nor did it violate any state or city law-if there is one in Wisconsin or Milwaukee-against public nudity, compare *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); ***1124** *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), because the dancers were scantily clad, rather than nude. But this is not a case about *banning* exotic (or erotic) dance performances on the ground of their being obscene or violating the nudity laws. The City does not ban the kind of entertainment that Runway 94 offered. We are told without contradiction that there are 22 such establishments in Milwaukee. All the City is trying to do is to zone them out of areas in which neighbors object to the presence of a strip joint. The plaintiff is emphatic (this is the core of its objection to the "exotic dancers" category) that Runway 94 was not a strip joint, because the dancers stripped down to their pasties and bikini bottoms *before* appearing on stage, but the difference between stripping and having already stripped strikes us as minute, and so for want of a better term we'll call Runway 94 a strip joint. Countless cases allow municipalities to zone strip joints, adult book stores, and like erotic sites out of residential and the classier commercial areas of the city or town. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-52, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion); *Schultz v. City of Cumberland,* 228 F.3d 831, 845-46 (7th Cir.2000); *North Avenue Novelties, Inc. v. City of Chicago,* 88 F.3d 441 (7th Cir.1996); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1253 (11th Cir.1999); *Richland Bookmart, Inc. v. Nichols,* 137 F.3d 435 (6th Cir.1998); *Walker v. City of Kansas City,*

911 F.2d 80, 90 n. 13 (8th Cir.1990). Establishments that purvey erotica, live or pictorial, tend to be tawdry, to be offensive to many people, and to attract a dubious, sometimes a disorderly, clientele. Liquor and sex are an explosive combination, so strip joints that sell liquor are particularly unwelcome in respectable neighborhoods. The impairment of First Amendment values is slight to the point of being risible, since the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a modest social value and is anyway not suppressed but merely shoved off to another part of town, where it remains easily accessible to anyone who wants to patronize that kind of establishment.

[5] Because the standard in the ordinance is compatibility with the "normal" activity of the neighborhood and the City relies heavily on testimony by neighbors to determine what that activity is, the plaintiff asks us to consider the possibility that a strait-laced community might exclude all erotic cultural expression on the ground that any public recognition of sex was abnormal activity in that community-and so Salome's "Dance of the Seven Veils" (in Wilde's play or Strauss's opera), the *Afternoon of a Faun,* and countless Balanchine ballets could not be performed. But we are dealing in this case with the ordinance not of a small town but of a major city, which is neither homogeneous nor entirely residential, and so the ordinance has not resulted in the exclusion of the erotic even from bars, but merely in the segregation of bars that present erotic entertainment from other land uses in the city. The ordinance is limited, moreover, to bars (and to restaurants that serve liquor). It is not a regulation of theaters or concert halls, but only of places where liquor is served. And the City has not delegated the zoning decision to the neighbors, but merely relies upon them to inform the City concerning the normal activity of their neighborhoods. The plaintiff was entitled to a hearing on its application to renew its license, Milwaukee Code of Ordinances § 90-11, and received one-at which much evidence was presented of the profound incompatibility of a strip joint with the normal activity of the immediate neighborhood, a residential neighborhood whose ***1125** normal activity is raising kids in a tranquil environment rather than fending off the drunken patrons of a noisy strip joint. So far as appears, the plaintiff could have reopened Runway 94 a few blocks away. The First Amendment would not have been damaged by such a move.

AFFIRMED.

All Citations

251 F.3d 1121

270 F.3d 1156
United States Court of Appeals,
Seventh Circuit.

BLUE CANARY CORPORATION,
Plaintiff–Appellant,
v.
CITY OF MILWAUKEE, Defendant–Appellee.

No. 01–2104.
|
Submitted Oct. 11, 2001.
|
Decided Nov. 7, 2001.

Burlesque theater sued city challenging city's denial of permit for nude dancing. The United States District Court for the Eastern District of Wisconsin, John W. Reynolds, J., dismissed suit. Theater appealed. The Court of Appeals, Posner, Circuit Judge, held that: (1) denial of permit to operate theater in residential district did not violate First Amendment; (2) city's zoning ordinance did not grant impermissible degree of discretion to zoning commissioner; and (3) burlesque theater was "similar" to adult theater under ordinance.

Affirmed.

West Headnotes (3)

[1] **Constitutional Law**
Theaters in general
Zoning and Planning
Sexually-oriented businesses;nudity

City's denial of application for permit for nude dancing at burlesque theater in residential district did not violate First Amendment; city did not prohibit operation of burlesque theater, but merely prohibited operation in proximity to residential neighborhood, leaving abundant convenient locations within city in which operation of such theater would not have violated zoning law. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[2] **Constitutional Law**
Zoning and Land Use
Constitutional Law
Zoning, planning, and land use

City's zoning ordinance allowing zoning commissioner to determine whether unlisted use was "similar" to listed use did not inject impermissible degree of discretion into administration of zoning law in violation of First Amendment; some degree of discretion was unavoidable, since legislature was not omniscient and could not be expected to enumerate every possible land use that might present zoning issue. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[3] **Zoning and Planning**
Sexually-oriented businesses;nudity

Burlesque theater that exhibited nude dancing was "similar" to adult movie theater under city's zoning ordinance; both were theaters, both presented erotic entertainment, and if anything live sex show was more erotic than celluloid one.

2 Cases that cite this headnote

Attorneys and Law Firms

***1157** Jeff Scott Olson (submitted), Madison, WI, for Plaintiff-Appellant.

Stuart S. Mukamal, Milwaukee City Attorney's Office, Milwaukee, WI, for Defendant-Appellee.

Before FLAUM, Chief Judge, and POSNER and EVANS, Circuit Judges.

Opinion

POSNER, Circuit Judge.

Several months ago we upheld against a challenge based on the free speech clause of the First Amendment Milwaukee's refusal to renew the plaintiff's liquor license. 251 F.3d 1121 (7th Cir.2001). The plaintiff had bought a tavern in Milwaukee that entertained its patrons with polkas. The plaintiff obtained its own liquor license and shortly afterward changed the name of the tavern and applied for and received a "cabaret license," which permits a tavern to provide entertainment in the form of dancing by performers. On the application form the plaintiff's manager checked "floor shows" rather than "exotic dancers/male and/or female strippers," and at a hearing on the application she explained that she wanted to put on "Las Vegas style" nightclub acts. But instead, after receiving the cabaret license, the tavern put on shows in which the performers danced in only pasties and bikini bottoms, with some weird touches such as dancers who sucked on their breasts while hanging upside down. The erotic character of the entertainment was not concealed. One dancer allowed a customer to slip money between her breasts. Another acknowledged that she tried to "turn guys on" in order to get tips. Others simulated intercourse.

Fearing that the City's refusal to renew the tavern's liquor license would stand—as indeed it did, as a result of our previous decision—the plaintiff applied for a license to use the premises for a burlesque theater that would provide the same entertainment described in the preceding paragraph (and characterized by the plaintiff itself as "burlesque dancing which features dancers who are nude or semi-nude") but without sale of alcoholic beverages. The City denied the application on the basis of the provision of its zoning ordinance governing proposed land uses that are not listed in the ordinance. Such a use must conform to the rules applicable to a "similar" use that is listed. Milwaukee Code of Ordinances § 295–27. Burlesque theaters are not a listed use, but are similar, the City's zoning commissioner determined, to "adult motion picture theater[s]," which are a listed use—and a use that is banned in the part of Milwaukee in which the plaintiff's premises are located because it abuts a residential area. Milwaukee Code of Ordinances §§ 295–14–9, 295–322–10e. So the application was denied, precipitating this suit, which claims that the denial violated the plaintiff's right of free speech. The district court dismissed, precipitating this appeal.

[1] The City has not prohibited the plaintiff from operating a burlesque theater, with or without nudity. It has merely prohibited the operation of such a theater in proximity to a residential neighborhood. Milwaukee is a large city and the plaintiff does not deny that there are abundant convenient locations in which the operation of such a theater would not violate the City's zoning law. In these circumstances, as we said in our previous opinion, "the impairment of First Amendment values is slight to the point of being risible, since the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a modest social value and is anyway not suppressed but merely shoved off to another part of town, where it remains easily accessible to anyone who wants to patronize that kind of establishment." 251 F.3d at 1124. True, a theater is not a bar; we remarked that "liquor and sex ***1158** are an explosive combination, so strip joints that sell liquor are particularly unwelcome in respectable neighborhoods," *id.*, and this concern is inapplicable to the proposed operation of the plaintiff's premises as a theater. But the impairment of free speech is still minimal and is outweighed by the legitimate social interest in segregating sex-oriented businesses from residential land uses. As we noted in our previous opinion, "countless cases allow municipalities to zone strip joints, adult book stores, and like erotic sites out of residential and the classier commercial areas of the city or town." *Id.* To the cases cited there we now add *David Vincent, Inc. v. Broward County,* 200 F.3d 1325, 1333–37 (11th Cir.2000); *D.H.L. Associates, Inc. v. O'Gorman,* 199 F.3d 50, 59–60 (1st Cir.1999); *Buzzetti v. City of New York,* 140 F.3d 134, 140–41 (2d Cir.1998); *Z.J. Gifts D–2, L.L.C. v. City of Aurora,* 136 F.3d 683 (10th Cir.1998), and *Alexander v. City of Minneapolis,* 928 F.2d 278, 282–84 (8th Cir.1991).

[2] **[3]** The plaintiff argues that allowing the zoning commissioner to determine whether an unlisted use is "similar" to a listed one injects an impermissible degree of discretion into the administration of the zoning law. And it is true that the case law expresses concern about arming public officials with discretion to deny expressive activities, lest that discretion be used to suppress unpopular speech. E.g., *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988); *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 649, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); *MacDonald v. City of Chicago,* 243 F.3d 1021, 1026 (7th Cir.2001); *Steele v. City of Bemidji,* 257 F.3d 902, 907 (8th Cir.2001). But some degree of discretion is an unavoidable feature of law enforcement. *Ward v. Rock Against Racism,* 491

U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Legislatures are not omniscient and cannot be expected to enumerate every possible land use that might present a zoning issue. The use of a term such as "similar" to stop up potential loopholes is not forbidden by the First Amendment, cf. *Gold Coast Publications, Inc. v. Corrigan*, 42 F.3d 1336, 1348–49 (11th Cir.1994) ("equivalent"), at least where no feasible alternative is suggested. And there is no reasonable doubt that a burlesque theater that exhibits nude dancing is similar to an adult movie theater. Both are theaters, both present erotic entertainment, and if anything a live sex show is more erotic than a celluloid one.

AFFIRMED.

All Citations

270 F.3d 1156

477 F.3d 461
United States Court of Appeals,
Seventh Circuit.

ILLINOIS ONE NEWS, INC., doing business as The Gift Spot, Plaintiff-Appellant,
v.
CITY OF MARSHALL, ILLINOIS, Defendant-Appellee.

No. 06-1828.
|
Argued Oct. 17, 2006.
|
Decided Feb. 13, 2007.

Synopsis

Background: Operator of adult book and video store brought § 1983 First Amendment action against city, challenging zoning ordinance that restricted siting for such businesses. Following bench trial, the United States District Court for the Southern District of Illinois, 2006 WL 449018, J. Phil Gilbert, J., entered judgment for city, and operator appealed.

[Holding:] The Court of Appeals, Easterbrook, Circuit Judge, held that fact that challenged ordinance restricted adult-oriented businesses to approximately 94 acres, or four percent, of land within city limits, did not deprive operator of adequate siting opportunity.

Affirmed.

West Headnotes (2)

[1] Constitutional Law
Sexually Oriented Businesses;Adult Businesses or Entertainment
Constitutional Law
Secondary effects

State and local governments may regulate adult businesses to curtail secondary effects of their operations, but not to restrict speech of which local residents disapprove. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[2] Constitutional Law
Zoning and land use in general
Zoning and Planning
Sexually-oriented businesses;nudity

Fact that zoning ordinance prohibiting adult-oriented businesses' locating within 1,000 feet of schools and churches restricted such businesses to approximately 94 acres, or four percent, of land within city limits, did not deprive business owner, which wished to locate adult-oriented store within city, of adequate opportunity to do so, and thus did not infringe First Amendment; if owner chose to locate within city, it could, under city's nondiscretionary subdivision process, acquire intended amount of land, i.e. two acres, within available area. U.S.C.A. Const.Amends. 1, 14.

10 Cases that cite this headnote

Attorneys and Law Firms

***462** Roger B. Webber (argued), Brett N. Olmstead, Beckett & Webber, Urbana, IL, for Plaintiff-Appellant.

Ronald S. Cope (argued), Ungaretti & Harris, Chicago, IL, Richard J. Bernardoni, Meehling & Bernardoni, Marshall, IL, for Defendant-Appellee.

Before EASTERBROOK, Chief Judge, and BAUER and FLAUM, Circuit Judges.

Opinion

EASTERBROOK, Chief Judge.

The City of Marshall, Illinois, is a small municipality located near Interstate 70 about 18 miles southwest of Terre Haute, Indiana. It is small in both population (some 3,700 people call it home) and extent (3.2 square miles). It is the county seat of Clark County, an agricultural area of 505 square miles comprising about 17,000 persons.

Property owners face few restrictions on what they can build and operate in the County's unincorporated areas. Marshall, however, has an elaborate zoning code for its 3.2 square miles, and Illinois One News does not like that code one bit. For Illinois One News ("Illinois One" for short) operates "The Gift Spot," an adult book and video store that features 15 booths for private viewing, and Marshall's zoning code requires such establishments to be at least 1,000 feet from any school, church, daycare center, or public park. Because Marshall is so small, a 1,000-foot-distance rule puts most of the city off-limits to adult enterprises. Illinois One had an opportunity to seek a permit that would allow its outlet to continue operating what is now a non-conforming use; deeming such an application futile, Illinois One filed a federal suit under 42 U.S.C. § 1983 and argues that the ordinance violates the first amendment (applied to the states by the fourteenth).

About 12% of the City's area is open to adult uses under the zoning code. The district court found that 94.1 acres, or 4.1% of the City's area, could be devoted to ***463** adult uses if Illinois One were to keep 1,000 feet from any residential zone as well. 2006 WL 449018 at *11, 2006 U.S. Dist. LEXIS 9570 at *28 (S.D.Ill. Feb. 22, 2006). (Illinois One fears, reasonably so given the City's stated objectives, that if it relocates The Gift Spot within 1,000 feet of a residence, the City will just amend its code to send it packing again.) The locations where Marshall allows adult businesses to operate are unattractive to Illinois One-not because they are garbage dumps or otherwise undesirable physically, but because they are on the south side of town and thus some distance from the nearest exit to Interstate 70. Highway traffic is the principal source of The Gift Spot's business.

[1] The Supreme Court has held that state and local governments may regulate adult businesses to curtail the secondary effects of their operations but not to restrict speech of which local residents disapprove. See *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). See also, e.g., *R.V.S., L.L.C. v. Rockford,* 361 F.3d 402 (7th Cir.2004); *Andy's Restaurant & Lounge, Inc. v. Gary,* 466 F.3d 550 (7th Cir.2006). The district court concluded after a bench trial that (a) Marshall's zoning law is designed to address the business's secondary effects rather than the content of the materials it offers for sale, and (b) the secondary effects (such as higher crime rates near adult businesses) are real rather than imagined or pretextual. Illinois One does not contend that these findings of fact are clearly erroneous. (It does argue as if we could make an independent decision, but that's not an appellate court's job after a trial has been held. See Fed.R.Civ.P. 52(a).)

[2] Illinois One's principal contention is that 4% of the City is just not enough. *Playtime Theatres* and *Alameda Books* say that regulation justified by secondary effects is permissible only if adequate avenues of communication remain open. An inconveniently located 4% is not "adequate," Illinois One insists.

Although *Playtime Theatres* and *Alameda Books* conclude that an adult-oriented business is entitled to "adequate" opportunities to sell its wares, neither decision holds that those opportunities must be in the same jurisdiction. The fourteenth amendment directs its commands to the states; how any given state slices up responsibilities among subdivisions normally is of no federal concern. See *Whalen v. United States,* 445 U.S. 684, 689 n. 4, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 615 n. 13, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974); *Highland Farms Dairy, Inc. v. Agnew,* 300 U.S. 608, 612, 57 S.Ct. 549, 81 L.Ed. 835 (1937); *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 225, 29 S.Ct. 67, 53 L.Ed. 150 (1908); *Dreyer v. Illinois,* 187 U.S. 71, 84, 23 S.Ct. 28, 47 L.Ed. 79 (1902); *Chicago Observer, Inc. v. Chicago,* 929 F.2d 325, 328 (7th Cir.1991).

If the State of Illinois were to designate Marshall as a bedroom community and surrounding land as the location for adult businesses, manufacturing plants, and grain silos, what would be the constitutional objection? *Illinois* would have satisfied *its* obligation to ensure that time, place, and manner regulations leave ample opportunities for speech. A constitutional doctrine expressed in terms of municipal rather than state boundaries could not have any long-term effect. If we were to hold that 4% of the land at the southern end of Marshall is too little, the City could annex some currently unincorporated land ***464** on the north and offer that instead as a site for adult businesses. But if land to the north of the City's current border would supply a constitutionally adequate venue for speech if the City extended its border by half a mile or so, why is the same parcel a constitutionally inadequate venue when it is outside the City's border? The constitutional rule is that a person have adequate opportunity to speak, not that the

land be in one polity (the City of Marshall) rather than another (Clark County).

When the municipal jurisdiction is large, a regulatory system that forces the speaker to go elsewhere may leave inadequate options to reach the intended audience. Chicago, for example, covers 234 square miles, and closing all of that territory to adult bookstores would not leave businesses with an adequate opportunity to reach the millions of people who work and play inside Chicago's city limits. Anchorage, Alaska, is substantially larger, at 1,961 square miles; relegating all adult businesses to areas where only moose and bears would be available as patrons could not satisfy the first amendment. A zoning system that excludes all adult businesses also could cause problems if other nearby jurisdictions adopted the same rule; when each points to the other as the "right" place for adult entertainment, the upshot may be that all locations are closed. The NIMBY syndrome ("not in my back yard") may end up meaning not in *anyone's* back yard. This may be why several Justices (and particularly Justice Blackmun in concurrence) expressed skepticism in *Schad v. Mt. Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), about an argument that a borough in New Jersey could treat Philadelphia, Pennsylvania, as the "adequate" venue for adult entertainment. In this case, however, the district court found that there is plenty of available land adjacent to the City of Marshall; we do not have a situation in which neighboring jurisdictions enact mirror-image rules in an effort by each to move adult businesses to the other.

Schad reserved judgment on this subject, however, and since then at least one court of appeals has expressed sympathy for the argument that a small community might insist that adult business remove to outside its borders. See *Boss Capital, Inc. v. Casselberry,* 187 F.3d 1251 (11th Cir.1999). Large cities such as Chicago can insist that adult businesses stay away from residential areas and schools, while leaving plenty of land for their operation. But if it is constitutional for Chicago to insist that these businesses move a mile or two to find a suitable spot, why can't Marshall insist that The Gift Spot move a few hundred yards? The answer "because Marshall is so small that even a short move will place us outside its borders" falls flat. Suppose all county seats in rural Illinois were two miles square (four square miles), while equivalent cities in Indiana were six miles square (36 square miles). Could it be that the Constitution would allow Indiana's cities to establish 2,000 foot (or 5,000 foot) buffer zones between residential areas and adult businesses, while Illinois's cities could not have more than 200 feet of separation? That's the gist of Illinois One's argument, and it makes little sense given that the same first amendment applies in both Illinois and Indiana.

Like the court in *Boss Capital,* however, we need not reach closure on this subject, for we agree with the district court's conclusion that land available in Marshall itself supplies an adequate alternative. No business has a constitutional right to be adjacent to the ramp of an Interstate highway. (Anyway, if proximity to Interstate 70 is Illinois One's prime objective, it can relocate without legal hindrance, and closer to the highway than it is now, on unincorporated ***465** land north of the City.) Whether the available land is 25%, 12%, 4%, or even 1% of Marshall's surface area does not matter: all The Gift Spot wants is two acres (which provides space for parking as well as the store). That much land it can have, and to spare. The need to subdivide any parcel it buys-for Illinois One does not want to devote 20 or 40 acres to the store and so will sell what it does not use (or ask the seller to subdivide and keep all but two acres of the original parcel)-could be an obstacle if the City readily could block an effort to carve two acres out of a larger parcel. (The need to subdivide is reinforced by the zoning ordinance's application of the 1,000-foot separation rule to parcel boundaries rather than the building located on a given parcel.)

The City has demonstrated both a desire to kick The Gift Spot out of town and a willingness to take legal steps that raise its cost of doing business. A prospect that the City would stall or block subdivision through the use of discretionary powers would render that land unavailable as a practical matter. Yet at oral argument Illinois One conceded that the subdivision process is not discretionary, and our review of the City's ordinances confirms this assessment. Once a property owner has taken the prescribed steps, "the [city] council shall approve the final plat within 60 days". Marshall Ordinances § 74-57(a)(3). Illinois One must do what any developer of vacant land must do: put in (or pay someone else to install) utility connections, sidewalks, and the like. It would have to do the same if it built outside the City; so would the proprietor of a convenience store or filling station. The first amendment does not relieve bookstore owners of

those expenses that business and residential owners alike must bear.

Remaining arguments are makeweights. Illinois One contends, for example, that the zoning ordinance is unconstitutionally vague because the definition of "adult bookstore" contains the word "substantial." ("[A]n establishment having a substantial or significant portion of its stock in trade" displaying or describing "specified anatomical areas" or "specified sexual activities"-themselves defined terms.) Illinois One sensibly concedes, however, that The Gift Spot is an "adult" establishment by any possible definition. The vagueness argument therefore is advanced on behalf of third parties, who might be confused even though Illinois One knows full well that it is covered. Arguments on behalf of third parties are permissible, however, only when they cannot fend for themselves, see *Kowalski v. Tesmer,* 543 U.S. 125, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004), or the statute is so ambulatory that it really offers no notice at all and therefore is not susceptible to a more precise definition by a state court-for the state rather than the federal judiciary ultimately fleshes out the meaning of state and local enactments.

Adult establishments are not children and can take care of themselves; the "helpless stranger" category does not apply. Marshall's ordinance does not fit the latter category either; the law is full of descriptive material enabling most proprietors to classify most outlets accurately. It is all but impossible to write a law or regulation without some qualitative words such as "substantial," and these do not automatically prevent enforcement. See *Thomas v. Chicago Park District,* 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002); *Second City Music, Inc. v. Chicago,* 333 F.3d 846 (7th Cir.2003). If a law making it a crime to mail a firearm "capable of being concealed on the person" is clear enough to be enforced, even though people come in many sizes and wear clothing with different capacity to conceal, see ***466** *United States v. Powell,* 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975), the use of "substantial" does not make a definition intolerably vague. *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 61, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), holds that the phrase "characterized by an emphasis"-certainly no more precise than "substantial"-supplies a core of meaning that the state judiciary may make more concrete. That knocks out any possibility of third-party standing. And we know from *Littleton v. Z.J. Gifts D-4, L.L.C.,* 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004), that state and local laws cannot be condemned as prior restraints just because it may take a few weeks for state courts to interpret the ordinance.

Illinois One's other arguments have been considered but do not require discussion. The judgment is affirmed.

All Citations

477 F.3d 461

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Annex Books, Inc. v. City of Indianapolis, Ind., 7th Cir.(Ind.), September 3, 2009

350 F.3d 631
United States Court of Appeals,
Seventh Circuit.

G.M. ENTERPRISES, INC., Plaintiff–Appellant,
v.
TOWN OF ST. JOSEPH,
WISCONSIN, Defendant–Appellee.

No. 03–1428.
|
Argued Sept. 16, 2003.
|
Decided Nov. 25, 2003.
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Rehearing and Rehearing En Banc Denied Feb. 09, 2004.

Owner of adult-oriented business sued town pursuant to § 1983, challenging constitutionality of town ordinances that regulated manner in which nude dancers performed in any "sexually oriented business" and prohibited establishments licensed to sell alcoholic beverages from permitting nude dancing on the premises. The United States District Court for the Western District of Wisconsin, John C. Shabaz, J., granted summary judgment for town. Owner appealed. The Court of Appeals, Flaum, Chief Judge, held that: (1) challenged ordinances did not regulate constitutionally protected activity; (2) as an issue of first impression, ordinance prohibiting physical contact between nude dancers and patrons did not violate First Amendment; (3) challenged ordinances were subject to intermediate scrutiny under First Amendment; (4) business failed to undermine validity of town ordinances; and (5) town was not required to establish that studies upon which it relied in enacting ordinances were of sufficient methodological rigor to satisfy *Daubert* test.

Affirmed.

West Headnotes (15)

[1] Constitutional Law
Nude dancing in general

Nude dancing is expressive conduct within the outer ambit of the First Amendment's protection. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] Constitutional Law
Nude or semi-nude dancing

Intoxicating Liquors
Licensing and regulation

Town ordinances that barred establishment from selling alcoholic beverages if dancer performing on premises exposed any "specified anatomical area," and also required that such dancer perform on stage at least 18 inches above and five feet away from patrons, did not regulate activity protected under First Amendment. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[3] Constitutional Law
Nude dancing in general

In the First Amendment context, requirement that dancers wear pasties and G-strings has only a de minimis effect on the expression conveyed by nude dancing. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[4] Constitutional Law
Nude or semi-nude dancing

First Amendment does not entitle either dancers or patrons to have alcohol available during a presentation of nude or semi-nude dancing. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] Constitutional Law

Contact between performers and patrons

Public Amusement and Entertainment

Dancing and other performances

Town ordinance prohibiting physical contact between nude dancers and their patrons did not violate First Amendment, inasmuch as physical contact was beyond the scope of protected expressive activity of nude dancing. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[6] Constitutional Law

Nude or semi-nude dancing

Town ordinances that barred establishment from selling alcoholic beverages if dancer performing on premises exposed any "specified anatomical area," and required that such dancer perform on stage at least 18 inches above and five feet away from patrons, had incidental effect on protected expression and thus had to meet First Amendment standards to be valid. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[7] Constitutional Law

Content neutrality

Constitutional Law

Secondary effects

In addressing First Amendment challenge to regulation of adult-oriented business, court must first verify that predominate concerns motivating regulation were with secondary effects of adult speech, rather than content of adult speech, and, if so, court then applies intermediate scrutiny to regulation. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[8] Constitutional Law

Secondary effects

To survive step of First Amendment analysis requiring that ordinance regulating adult-oriented business be targeted at secondary effects of adult speech to be subject to intermediate scrutiny, rationale of ordinance must be that it will suppress secondary effects, and will do so by means other than by suppressing speech. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[9] Constitutional Law

Nude or semi-nude dancing

Town ordinances barring establishment from selling alcoholic beverages if dancer performing on premises exposed any "specified anatomical area," and requiring that such dancer perform on stage at least 18 inches above and five feet away from patrons, were motivated by interest in reducing secondary effects associated with adult speech, rather than interest in suppressing speech, and thus were subject to intermediate scrutiny under First Amendment, in that ordinances did not prohibit nude dancing, but rather sought to minimize factors that town board believed would heighten probability that adverse secondary effects would result from nude dancing, and restrictions were not triggered if all dancers chose to wear de minimis clothing necessary to cover all "specified anatomical parts." U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[10] Constitutional Law

Secondary effects

Zoning regulations of adult businesses aimed at suppressing secondary effects of adult speech are constitutional so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[11] Constitutional Law

Public nudity or indecency

Regulations of public nudity aimed at suppressing secondary effects of such speech are analyzed under *O'Brien* intermediate scrutiny test, which asks (1) whether regulating body had power to enact regulation, (2) whether regulation furthers important or substantial governmental interest, (3) whether that interest is unrelated to suppression of free expression, and (4) whether regulation's incidental impact on expressive conduct is no greater than is essential to the furtherance of that interest. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[12] Constitutional Law
Nude or semi-nude dancing

Intoxicating Liquors
Licensing and regulation

Adult-oriented business failed to undermine validity, under First Amendment, of town ordinances barring establishment from selling alcoholic beverages if dancer performing on premises exposed any "specified anatomical area," and requiring that such dancer perform on stage at least 18 inches above and five feet away from patrons, despite offering evidence that arguably undermined town's inference of correlation between adult entertainment and adverse secondary effects, including study questioning methodology employed in numerous studies relied upon by town board, evidence of increased property values near business, and evidence that most police calls involving business did not occur when semi-nude dancing was being performed; such evidence showed only that board could have reached different and equally reasonable conclusion. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[13] Constitutional Law
Sexually oriented businesses

In reviewing regulation of adult-oriented business under intermediate scrutiny standard for First Amendment claims, court is not required to re-weigh the evidence considered by a legislative body, nor is it empowered to substitute its judgment as to whether a regulation will best serve a community, so long as regulatory body has satisfied requirement that it consider evidence reasonably believed to be relevant to the problem addressed. U.S.C.A. Const.Amend. 1.

13 Cases that cite this headnote

[14] Constitutional Law
Secondary effects

Public Amusement and Entertainment
Sexually Oriented Entertainment

To defeat First Amendment challenge to ordinances regulating adult-oriented businesses, town was not required to establish that studies upon which it relied in enacting ordinances were of sufficient methodological rigor to satisfy *Daubert* test for admissibility of specialized expert testimony, but rather only had to show that it relied on some evidence in reaching reasonable conclusion as to secondary effects of adult-oriented businesses targeted by ordinances. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[15] Constitutional Law
Adult speech or use in general

For ordinance targeting secondary effects of adult-oriented speech to withstand intermediate scrutiny under First Amendment, municipality need not prove efficacy of its rationale for reducing secondary effects prior to implementation. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

Attorneys and Law Firms

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Richard M. Burnham (argued), Lafollette, Godfrey & Kahn, Madison, WI, for Defendant-Appellee.

Before FLAUM, Chief Judge, and DIANE P. WOOD and WILLIAMS, Circuit Judges.

Opinion

FLAUM, Chief Judge.

G.M. Enterprises, Inc., owner of the Cajun Club of the Town of St. Joseph, Wisconsin, appeals the District Court's grant of summary judgment to the Town upholding the constitutionality of two town ordinances. G.M. argues that Ordinance 2001–02, which regulates the manner in which nude dancers perform in any "sexually oriented business," and Ordinance 2001–03, which prohibits establishments licensed to sell alcoholic beverages from permitting nude dancing on the premises, violate the First and Fourteenth Amendments. We conclude that the record supports the Town's claim that the ordinances are not an attempt to regulate the expressive content of nude dancing, but that the Town had a reasonable basis for believing that the ordinances will reduce the undesirable "secondary effects" associated with sexually oriented businesses, and therefore, we affirm.

I. Background

In 1999, the Town Board ("Board") of the Town of St. Joseph ("Town"), an unincorporated town in Wisconsin, began to consider whether to regulate sexually oriented businesses located within its borders. The Board collected sixteen studies regarding the relationships between sexually oriented businesses and property values, crime statistics, public health risks, illegal sexual activities such as prostitution, and organized crime. These studies, undertaken in various communities throughout the country, demonstrated a correlation between sexually oriented businesses ***634** and negative secondary effects. The Board also consulted a number of judicial opinions from other jurisdictions that address adverse secondary effects associated with sexually oriented businesses. Further, the Board considered police reports of calls made in regards to each licensed liquor establishment in St. Joseph for the period of 1989 through 1999, furnished by the St. Croix County Sheriff's Department. The sheriff informed the Board that the sheriff department had "received far more calls regarding the Cajun Club [the Town's sole sexually oriented business licensed to sell alcoholic beverages] than we have for the other liquor establishment in the Town of St. Joseph that do[es] not offer sexually oriented entertainment such as nude dancing." The studies, judicial opinions, and police reports were available to members of the Board for their consideration.

In June 2001, the Board adopted Ordinance 2001–02, which was codified under the town code, Chapter 153, entitled "Sexually Oriented Businesses." "Sexually oriented businesses," as defined by § 153–4, include "business[es] featuring adult entertainment." "Adult entertainment," as defined by § 153–4, is any "live performance, display or dance of any type which has as a significant or substantial portion ... characterized by an emphasis on ... viewing of specified anatomical areas." § 153–4. According to § 153–4, "[s]pecified anatomical areas" include:

A. The human male genitals in a discernible turgid state, even if fully and opaquely covered; or

B. Less than completely and opaquely covered human genitals, pubic region, anus, anal cleft or cleavage; or

C. Less than completely and opaquely covered nipples or areolas of the human female breast.

Ordinance 2001–02, published in Section 153–3(A), prohibits sexually oriented businesses from allowing any:

> person, employee, entertainer or patron ... to have any physical contact with any entertainer on the premises of a sexually oriented business during any performance ... all performances shall occur on a stage or table that is elevated at least 18 inches above the immediate floor level and shall not be less than 5 feet from any area occupied by any patron.

Further, § 153–5(B) prohibits the "sale, use or consumption of alcoholic beverages on the premises of a sexually oriented business."

The Board stated in § 153–1 that its motivation for passing this ordinance was that it:

> finds that sexually oriented businesses are frequently used for unlawful sexual activities ... and ... concern over sexually transmitted diseases is a legitimate health concern of the Town Board ... there is convincing documented evidence that sexually oriented businesses have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values; and, whereas, the Town Board desires to minimize and control these adverse secondary effects... and, whereas it is not the intent of this chapter to suppress any speech activities protected by the First Amendment, but to ... address[ ] the negative secondary effects of sexually oriented businesses.

Concurrent with the adoption of Ordinance No.2001–02, the Board adopted Ordinance No.2001–03, codified under Chapter 114, Article VI of the town code, entitled "Nude Dancing in Licensed Establishments Prohibited." Ordinance ***635** No.2001–03 applies to "[a]ny establishment licensed by the Town Board ... to sell alcohol beverages." § 114–19. Under Ordinance No.2001–03,

> [i]t is unlawful for any person to perform or engage in ... any live act, demonstration, dance or exhibition on the premises of a licensed establishment which:
>
> A. Shows his/her genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering.
>
> B. Shows the female breast with less than a fully opaque covering of any part of the nipple and areola.
>
> C. Shows the human male genitals in a discernibly turgid state, even if fully and opaquely covered.

§ 114–17. The Board expressed its intent in regards to Ordinance 2001–03 by stating in Section 114–16 that:

> the Town Board is aware, based on the experiences of other communities, that bars and taverns, in which live, totally nude, non-obscene, erotic dancing occurs may and do generate secondary effects which the Town Board believes are detrimental to the public health, safety and welfare ... the Town Board desires to minimize, prevent and control these adverse effects ... the Town Board has determined that the enactment of an ordinance prohibiting live, totally nude, non-obscene, erotic dancing in bars and taverns licensed to serve alcoholic beverages promotes the goal of minimizing, preventing and controlling the negative secondary effects associated with such activity.

The plaintiff in this action, G.M. Enterprises, operates the Cajun Club ("Club") of St. Joseph. The Club enjoys a St. Joseph liquor license and, for 16 years, has served alcohol and offered semi-nude, topless dance entertainment. It is uncontested that G.M. is a "sexually oriented business" subject to Ordinances Nos.2001–02 and 2001–03, as its dancers expose "specified anatomical areas." G.M. filed a complaint in the United States District Court, Western District of Wisconsin, pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief and alleging that the ordinances are unconstitutional. The complaint alleged that the Board did not rely on adequate evidence to demonstrate the necessity of the ordinances to combat adverse secondary effects; that the ordinances prohibit more expression than is necessary to combat any adverse secondary effects that might be caused by adult entertainment; and further that Ordinance No.2001–03 expressly conditions the grant of a liquor license, a government benefit, on the surrender of the constitutional right to freedom of expression.

The Town moved for summary judgment, arguing that the Board relied on an adequate evidentiary foundation to reasonably believe that the ordinances would reduce adverse secondary effects. In support of its motion, the Town submitted an affidavit by the city clerk attesting to the Board's access to the studies, cases, and police

reports relied upon in its deliberations, and further that every member of the Board "spent time reviewing the materials." The Town also submitted an affidavit by the county sheriff attesting to the fact that more police calls were made in regards to the Club than any other liquor establishment in the Town.

In its opposition to the Town's motion, G.M. questioned the Board's conclusion that the ordinances would have the effect of minimizing adverse secondary effects. G.M. argued that the Board did not actually review or rely on the studies and cases that it gathered. G.M. presented a study by Bryant Paul, Daniel Linz & Bradley ***636** Shafer that finds the majority of the studies the Board collected "fundamentally unsound," and methodologically flawed, and also submitted an affidavit of Daniel Linz that discusses the study. G.M. further argued that the Board's findings are contrary to the locality's actual experience, and, in support, referred to a 1993 study of the county where the Club is located that states that "St. Croix county has not experienced any major problems with adult entertainment establishments." In addition, G.M. submitted an affidavit stating that the property values near the Club have increased over time. G.M. contested the Town's inference that the Club's entertainment generates secondary effects by submitting an affidavit of the president of G.M. Enterprises which stated that the majority of calls to the police regarding incidents at the Club were generated during the hours when no nude or semi-nude dancing entertainment was offered. G.M. also submitted a statement by the sheriff that the volume of police calls generated by the Club were unrelated to nude dancing.

The district court entered judgment in favor of the Town, finding that the ordinances do not impermissibly infringe on G.M.'s constitutional rights, and further that G.M.'s challenge to the Town's secondary effects rationale did not raise an issue of material fact to allow the case to proceed to trial. G.M. now appeals.

II. Discussion

We review the District Court's grant of summary judgment *de novo,* construing the facts in the record in favor of G.M., the non-moving party. *Ben's Bar v. Village of Somerset,* 316 F.3d 702, 707 (7th Cir.2003).

[1] **[2]** Nude dancing is expressive conduct "within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.,* 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). The ordinances at issue regulate nude dancing in two ways. If a dancer exposes any "specified anatomical area," then the establishment where he or she performs must (1) not sell any alcoholic beverages, § 153–3(B), § 114–17, and (2) require that he or she perform on a stage at least eighteen inches above and five feet away from patrons, as required by § 153–3(A). However, neither requirement is implicated if dancers cover all "specified anatomical areas" during performances, and neither ordinance prohibits nude dancing outright.

[3] **[4]** **[5]** **[6]** Still, plaintiff argues that Ordinances Nos.2001–02 and 2001–03 regulate constitutionally protected activity. We disagree. The requirement that dancers wear pasties and G-strings has only a "*de minimis* " effect on the expression conveyed by nude dancing. *Pap's A.M.,* 529 U.S. at 294, 120 S.Ct. 1382; *Ben's Bar,* 316 F.3d at 708. Further, the "First Amendment does not entitle ... dancers, or ... patrons, to have alcohol available during a 'presentation' of nude or semi-nude dancing." *Ben's Bar,* 316 F.3d at 726. And, while the constitutionality of a restriction prohibiting physical contact between nude dancers and their patrons is an issue of first impression in this circuit, the Fifth Circuit has twice had the occasion to consider similar restrictions and has found them to be constitutional on the grounds that physical contact is beyond the scope of the protected expressive activity of nude dancing. *Hang On, Inc. v. City of Arlington,* 65 F.3d 1248, 1253 (5th Cir.1995); *Baby Dolls Topless Saloons, Inc. v. City of Dallas,* 295 F.3d 471, 484 (5th Cir.2002). Yet, as these regulations do have an incidental effect on protected expression, they must meet constitutional standards to be upheld.

The parties submit that, in order to determine the correct constitutional analysis ***637** to apply to the ordinances at issue, this Court must first decide whether the ordinances intend to regulate the expressive element of nude dancing, or whether they are neutral as to content. In the Town's view, the ordinances seek to regulate only the adverse secondary effects associated with nude dancing, and are thus content neutral. In support, the Town cites *City of Renton v. Playtime Theatres,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). In *Renton,* the Supreme Court held that an adult entertainment zoning ordinance was a " 'content-neutral' regulation of speech because while

'the ordinance treats theaters that specialize in adult films differently from other kinds of theaters ....[it] is aimed not at the *content* of the films shown ... but rather at the *secondary effects* of such theaters on the surrounding community.' " *Ben's Bar,* 316 F.3d at 716 (quoting *Renton,* 475 U.S. at 47, 106 S.Ct. 925) (emphasis in original). In contrast, the plaintiff argues that the secondary effects rationale of *Renton* is no longer good law, and further that the ordinances are content based and therefore subject to strict scrutiny.

[7] In light of the Supreme Court's divided ruling in *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), we need not decide whether the ordinances are content based or content neutral, so long as we first conclude that they target not "the activity, but ... its side effects," *see Alameda Books,* 535 U.S. at 447, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment), and then apply intermediate scrutiny. In *Alameda Books,* the plurality upheld at summary judgment a Los Angeles ordinance that prohibited multiple adult entertainment businesses from operating in the same building. The plurality assumed the ordinance to be content neutral, but did not consider the issue directly due to the fact that the Ninth Circuit had not addressed it below. *Alameda Books,* 535 U.S. at 434, 441, 122 S.Ct. 1728. However, the plurality reaffirmed that the first step of the *Renton* analysis is to verify that the "predominate concerns motivating the ordinance were with the secondary effects of adult speech, and not with the content of the adult speech." *Alameda Books,* 535 U.S. at 440–41, 122 S.Ct. 1728 (internal quotations omitted). In his concurring opinion, Justice Kennedy agreed that the *Renton* test provided the appropriate level of scrutiny for a regulation that is "targeted not at the activity, but at its side effects." *Alameda Books,* 535 U.S. at 447, 122 S.Ct. 1728. And, employing an approach similar to the plurality's, Justice Kennedy insisted that a municipality first "advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact," before a court applies intermediate scrutiny. *Id.* at 449, 122 S.Ct. 1728. Although, unlike the plurality, Justice Kennedy wrote that zoning ordinances of adult businesses are "content based," *see id.,* he agreed with the plurality that "[n]evertheless, ... the central holding of *Renton* is sound: A zoning ordinance that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.* at 448, 122 S.Ct. 1728. As Justice Kennedy's concurrence is the narrowest opinion joining the judgment of the Court, it is the controlling authority under *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). *Ben's Bar,* 316 F.3d at 722.

[8] **[9]** Under the first step of the analysis set forth by both Justice Kennedy and the plurality, we must first determine whether the ordinances at issue are motivated by an interest in reducing the secondary ***638** effects associated with the speech, rather than an interest in reducing the speech itself, before turning to *Renton. See Alameda Books,* 535 U.S. at 440–41, 450, 122 S.Ct. 1728. To survive this step of the analysis, "the rationale of the ordinance must be that it will suppress secondary effects—and not by suppressing speech." *Id.* at 450, 122 S.Ct. 1728. The Town has met this burden. Neither of the ordinances prohibit nude dancing; rather, they merely seek to minimize the factors that the Board believed would heighten the probability that adverse secondary effects would result from nude dancing: physical proximity between the dancers and patrons, and the consumption of alcohol by patrons. Requiring that adult entertainment establishments maintain a minimal physical buffer between patrons and dancers does not reduce the availability of nude dance entertainment. And, "alcohol prohibition is, as a practical matter, the least restrictive means of furthering the ... interest in combating the secondary effects resulting from the combination of adult entertainment and alcohol consumption." *Ben's Bar,* 316 F.3d at 725. Further, if all dancers choose to wear the *de minimus* clothing necessary to cover all "specified anatomical parts," then neither the physical proximity nor alcohol prohibition requirements are implicated. Thus, as the ordinances will leave the availability of nude dance entertainment substantially the same, under Justice Kennedy's test of "how speech will fare under the city's ordinance[s]," *Alameda Books,* 535 U.S. at 450, 122 S.Ct. 1728, the Town has demonstrated that its goal is to minimize secondary effects, rather than the speech itself.

[10] **[11]** Therefore, we move to the second step of the *Renton* analysis. In *Renton,* the Court set forth the intermediate scrutiny test for zoning regulations of adult businesses aimed at suppressing secondary effects. Such regulations are constitutional "so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of

communication." *Renton,* 475 U.S. at 47, 106 S.Ct. 925, *reaffirmed in Alameda Books,* 535 U.S. at 434, 122 S.Ct. 1728. Regulations of public nudity, however, are analyzed under the intermediate scrutiny test of *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *Pap's A.M.,* 529 U.S. at 289, 120 S.Ct. 1382. The *O'Brien* test asks (1) whether the regulating body had the power to enact the regulation; (2) whether the regulation furthers an important or substantial governmental interest; (3) whether that interest is unrelated to the suppression of free expression; and (4) whether the regulation's incidental impact on expressive conduct is no greater than is essential to the furtherance of that interest. *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673.

Ordinances Nos. 2001–02 and 2001–03 are neither public indecency nor zoning regulations. They regulate the manner in which patrons view nude dancing; specifically, the patron's physical proximity to the nude dancer and the patron's access to alcoholic beverages in establishments where nude dancing is provided. Because this case concerns only the "substantial government interest" prong that is found in both the *O'Brien* and *Renton* tests, we need not decide which test of intermediate scrutiny provides the correct analytical framework for these ordinances. Indeed, this Court has held that the constitutional standard for "evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable." *Ben's Bar,* 316 F.3d at 714.

[12] The issue before this Court is what quality and quantum of evidence a ***639** regulating body must consider in order to demonstrate that it has a reasonable basis for believing that the regulated activity generates adverse secondary effects, the reduction of which is a "substantial government interest" under the *Renton* or *O'Brien* tests. This issue was most recently before the Supreme Court in *Alameda Books;* in the plurality's words, the case required the court to "clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton.*" *Alameda Books,* 535 U.S. at 433, 122 S.Ct. 1728. In *Alameda Books,* the plurality reaffirmed that "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books* at 438, 122 S.Ct. 1728, (quoting *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925). The plurality upheld an ordinance that prohibited the operation of multiple adult entertainment business in the same building, even though the regulating body did not rely upon a study that specifically addressed whether the concentration of such establishments in a single building would result in a higher incidence of adverse secondary effects. *Id.* at 437, 122 S.Ct. 1728. According to the plurality, it was reasonable for the regulating body to infer—from a somewhat dated study that concluded that the concentrated growth of adult entertainment establishments in a particular neighborhood led to increased crime there—that the concentration of adult establishments in a single building would lead to a similar increase in crime. *Id.* at 435–38, 122 S.Ct. 1728. The plurality did not require that a regulating body rely on research that targeted the exact activity it wished to regulate, so long as the research it relied upon reasonably linked the regulated activity to adverse secondary effects.

However, the plurality cautioned that:

> a municipality's evidence must fairly support the municipality's rationale .... If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standards set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438–39, 122 S.Ct. 1728. Plaintiff argues that it has "substantially challenged the validity of the town's determination that its regulation was justified by the need to combat adverse secondary effects of adult entertainment," and has therefore precluded summary judgment by shifting the burden back to the Town to supplement the record. We disagree. Plaintiff submitted some evidence that might arguably undermine the Town's inference of the correlation of adult entertainment and adverse secondary effects, including a study that questions

the methodology employed in the numerous studies relied upon by the Board; evidence of an increase of property values near the Club; and evidence that the majority of police calls in regards to the Club originated during periods of time when no semi-nude dancing occurred. Although this evidence shows that the Board might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the Board's legislative process.

[13] *Alameda Books* does not require a court to re-weigh the evidence considered by a legislative body, nor does it empower ***640** a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence "reasonably believed to be relevant to the problem" addressed. *See Renton,* 475 U.S. at 51–52, 106 S.Ct. 925, *see also Alameda Books,* 535 U.S. at 445, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) ("in my view, the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur."). Wrote Justice Kennedy, "as a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners ... the Los Angeles City Council knows the streets of Los Angeles better than we do." *Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728. The plurality expressed similar support for judicial deference to local lawmakers: "we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems." *Id.* at 440, 122 S.Ct. 1728.

[14] **[15]** Plaintiff argues that its complaint must survive summary judgment because the evidence relied upon by the Board does not meet the standards of *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under the plaintiff's view, the Town cannot demonstrate a reasonable belief in a causal relationship between the activity regulated and secondary effects, as required by *Alameda Books* and *Renton,* unless the studies it relied upon are of sufficient methodological rigor to be admissible under *Daubert.* This argument is completely unfounded. The plurality in *Alameda Books* bluntly rejected Justice Souter's suggestion that the municipality be required to present empirical data in support of its contention: "such a requirement would go too far in undermining our settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Alameda Books,* 535 U.S. at 439, 122 S.Ct. 1728. Further, the purpose of the evidentiary requirement of *Alameda Books* is to require municipalities to demonstrate reliance on some evidence in reaching a reasonable conclusion about the secondary effects. The municipality need not "prove the efficacy of its rationale for reducing secondary effects prior to implementation." *Ben's Bar,* 316 F.3d at 720. A requirement of *Daubert*-quality evidence would impose an unreasonable burden on the legislative process, and further would be logical only if *Alameda Books* required a regulating body to prove that its regulation would—undeniably—reduce adverse secondary effects. *Alameda Books* clearly did not impose such a requirement.

III. Conclusion

For the reasons discussed, the judgment of the district court is AFFIRMED.

All Citations

350 F.3d 631, 62 Fed. R. Evid. Serv. 1656

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466 F.3d 550
United States Court of Appeals,
Seventh Circuit.

ANDY'S RESTAURANT & LOUNGE, INC., and Rusben Corp. d/b/a/ Trucker's World Book & Video Store, Plaintiffs–Appellants,
Pandora's Showclub, K.K.S., Inc. d/b/a Variety Video, J.A. Sales, Inc. d/b/a Video Heaven, Terrence L. Crossley d/b/a/ Jokers Club, Players Club, and Corvette Club, Plaintiffs–Intervenors/Appellants,
v.
CITY OF GARY, Defendant–Appellee.

Nos. 05–2225, 05–2287, 05–2288.
|
Argued Feb. 21, 2006.
|
Decided Oct. 11, 2006.

Synopsis

Background: Businesses brought action challenging constitutionality of city ordinance regulating sexually oriented businesses. The United States District Court for the Northern District of Indiana, Andrew P. Rodovich, United States Magistrate Judge, granted summary judgment in favor of city and plaintiffs appealed.

[Holding:] The Court of Appeals, Kanne, Circuit Judge, held that city ordinance regulating sexually oriented businesses was reasonable attempt to reduce or eliminate undesirable secondary effects.

Affirmed.

West Headnotes (7)

[1] Constitutional Law
Zoning and Land Use

Constitutional Law
Public nudity or indecency

Intermediate scrutiny under the First Amendment is applied if a challenged zoning ordinance or public indecency statute is found to be either content neutral or for the purpose of decreasing secondary effects of speech, rather than speech itself. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] Constitutional Law
Sexually Oriented Businesses;Adult Businesses or Entertainment

Public Amusement and Entertainment
Sexually Oriented Entertainment

City ordinance regulating sexually oriented businesses, by establishing operating hours, prohibiting physical contact, requiring open-booths, and containing sanitation provisions, was reasonable attempt to reduce or eliminate undesirable secondary effects associated with sexually oriented businesses, in lawsuit challenging constitutionality of ordinance in light of free speech clause of First Amendment; ordinance emphasized its purpose was to control adverse effects of sexually oriented businesses, reports before city council primarily addressed secondary effects, and hour regulations and open-booth requirements similar to those in ordinance had previously been upheld as narrowly tailored. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[3] Public Amusement and Entertainment
Sexually Oriented Entertainment

Federal courts evaluating the predominant concerns behind the enactment of a city ordinance regulating sexually oriented businesses may do so by examining a wide variety of materials including, but not limited to, the text of the ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware.

2 Cases that cite this headnote

[4] **Constitutional Law**
Sexually Oriented Businesses;Adult Businesses or Entertainment

Laws regulating sexually oriented businesses pass intermediate scrutiny under the First Amendment so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[5] **Constitutional Law**
Secondary effects

On judicial review of ordinance regulating sexually oriented businesses, laws are designed to serve a substantial government interest when the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[6] **Constitutional Law**
Sexually oriented businesses

The First Amendment does not require a city, before enacting an ordinance regulating sexually oriented businesses, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[7] **Federal Courts**
In general;necessity

Arguments not raised in the district court are waived on appeal.

5 Cases that cite this headnote

Attorneys and Law Firms

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Before BAUER, KANNE, and ROVNER, Circuit Judges.

Opinion

KANNE, Circuit Judge.

This appeal concerns the constitutionality of an ordinance enacted by the City of Gary ("City") affecting "sexually oriented businesses." In a thorough and well reasoned opinion, Magistrate Judge Rodovich granted summary judgment for the City on the declaratory judgment action filed by some of the businesses affected by the ordinance. We affirm.

I. HISTORY

The City adopted the challenged Ordinance No.2000–83 ("the Ordinance") on December 19, 2000. Its preamble states the City's concern that "sexually oriented businesses," among other things, "have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them." By enacting the Ordinance, the City "desire[d] to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry ... and deter the spread of urban blight." The intent of the Ordinance, the preamble states, is "to enact a content neutral ordinance ***552** which address the secondary effects of sexually oriented business" while not "suppress[ing] any speech activities protected by the First Amendment of the U.S. Constitution." In support of its findings, the Ordinance cites a number of federal cases dealing with similar laws

affecting sexually oriented businesses and eighteen reports detailing the secondary effects of these businesses.

The Ordinance defines "sexually oriented business" broadly, including a number of businesses separately defined by the Ordinance, which, generally speaking, means all manner of adult bookstores, arcades, novelty stores, theaters, and dancing establishments. It includes operating hours of 10:00 a.m. to 11:00 p.m., seven days a week, and a prohibition on any physical contact between employees appearing in a semi-nude condition (i.e., dancers) and customers. It also has an open-booth requirement, which prohibits the placement of doors, curtains or other materials on viewing booths so that an employee of the business is able to look into it at all times. The Ordinance also contains numerous sanitation provisions, including a prohibition on rugs or carpet, a requirement of "non-porous, easily cleanable surfaces," and waste disposal procedures, as well as other obligations for employees, such as ensuring that no sexual activity occurs on the premises.

All sexually oriented businesses covered by the Ordinance are required to obtain a license. Once an application is filed, "the City Comptroller shall immediately issue a Temporary License to the applicant," which only "expire[s] upon the final decision of the City to deny or grant the license." The Ordinance requires that a permanent license be issued, unless (1) the applicant is below the age of 18, (2) the applicant fails to provide, or provides false information on the application, (3) the fee is not paid, (4) the applicant has committed certain violations of the Ordinance within the last year, or (5) the physical premises of the business do not comply with the Ordinance's requirements. A license can be suspended on the basis of a knowing violation of the Ordinance, and revoked if a knowing violation occurs within twelve months of a suspension.

Denial, suspension, or revocation of a license only occurs after a hearing at which the aggrieved party has the opportunity to be heard. If any adverse action is taken, the party must be notified of the right to appeal to a court of competent jurisdiction. During the pendency of any such appeal, the City must issue the aggrieved party a provisional license, which allows the business to stay open until final judgment is rendered by a court.

II. ANALYSIS

We review the district court's summary judgment ruling de novo, viewing all material disputes of fact in the light most favorable to the plaintiff. *Moser v. Ind. Dep't of Corr.*, 406 F.3d 895, 900 (7th Cir.2005). The plaintiffs' arguments on appeal rely upon the First Amendment, Fourth Amendment, and Indiana law.

A. First Amendment

The plaintiffs' argument can be organized as follows: the Ordinance discriminates on the basis of content, and, therefore, should be analyzed under strict scrutiny; even when analyzed under lesser, intermediate scrutiny, the City has not met its burden of justifying the Ordinance; and that the Ordinance acts as an impermissible prior restraint on speech.

To assess whether the Ordinance violates the First Amendment, both parties echo the district court's analysis by relying on the analytical framework set forth by *City of Los Angeles v. Alameda Books,* ***553** *Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The *Alameda Books*/*Renton* line of cases deal with zoning ordinances aimed at dispersing adult entertainment businesses throughout a community, which are considered time, place, and manner restrictions. *Alameda Books,* 535 U.S. at 434, 122 S.Ct. 1728 (plurality opinion). Another line of Supreme Court cases, however, uses the intermediate scrutiny test of *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), to review public indecency statutes, which are considered laws affecting expressive conduct. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion).

[1] There is some confusion about which line of cases should be used in evaluating laws like the Ordinance, which do not fall neatly into either category. *See Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 714 (7th Cir.2003) (expressing uncertainty as whether to analyze an adult entertainment liquor regulation "as a time, place, and manner restriction [under *Alameda Books*/*Renton*] or as a regulation of expressive conduct under [*Pap's A.M.*/

Barnes]") (citing *LLEH, Inc. v. Wichita County, Texas,* 289 F.3d 358, 365 (5th Cir.2002)). And for most cases, it may not matter which test is employed. *Id.* (noting that the analysis between the two lines of cases may be "entirely interchangeable"). The crucial analytical step of both tests is the same; which is to say, that under both lines of cases, intermediate scrutiny is applied if the challenged law is found to be either content neutral or for the purpose of decreasing secondary effects. *See Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J. concurring) ("A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny."); *R.V.S., L.L.C. v. City of Rockford,* 361 F.3d 402, 408 (7th Cir.2004) ("[O]nly after confirming that a zoning ordinance's purpose is to combat the secondary effects of speech do we employ *Renton's* intermediate scrutiny test."). *Cf. Pap's A.M.* 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion) ("We now clarify that government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech.").

We need not choose between either line of cases (nor need we rule that the differences between them are immaterial) because both parties proceed under the general framework of *Alameda Books*/*Renton*, which we will employ, while referring to other case law as appropriate, as the parties do.[1] Moreover, all of the issues raised by plaintiffs are clearly controlled by the Court's precedents or ours, and, therefore, our resolution of the issues would be same under either line of cases.

1 Without any elaboration, the plaintiffs do state in the middle of their brief, "Moreover, the District Court has completely ignored the fact that [the Ordinance] is not a 'land use' regulation, as was the regulation in *Renton*." We do not, and cannot, read this mere sentence as an argument that it is improper to apply, as the district court did, the *Alameda Books*/*Renton* line of cases to the Ordinance. *Kramer v. Banc of Am. Sec., LLC,* 355 F.3d 961, 964 n. 1 (7th Cir.2004) ("We have repeatedly made clear that perfunctory and undeveloped arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues).") (quoting *United States v. Berkowitz,* 927 F.2d 1376, 1384 (7th Cir.1991)).

***554** *1. Secondary Effects*/*Content Neutrality*

[2] The plaintiffs argue that the Ordinance does not regulate the secondary effects of speech, but, rather, directly regulates speech.[2] This determination is crucial, because if the Ordinance only combats secondary effects of otherwise protected speech, then it is considered the equivalent of content neutral, and, therefore, need only survive intermediate scrutiny. *See Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J. concurring); *R. V.S.,* 361 F.3d at 408. *Cf. Pap's A.M.* 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion) (explaining that restrictions on public nudity are content neutral and should be analyzed under *O'Brien* intermediate scrutiny).

2 The plaintiffs concede that the Ordinance passes the first step of the *Alameda Books*/*Renton* analysis in that it does not ban all speech. *See Alameda Books,* 535 U.S. at 434–35, 122 S.Ct. 1728.

[3] Our inquiry in this regard "is best conceived as [one] into the purpose behind an ordinance." *R.V.S.,* 361 F.3d at 407–08 (citations omitted). Our task is "to verify that the 'predominant concerns' motivating the ordinance 'were with the secondary effects of the adult [speech], and not with the content of adult [speech].' " *Alameda Books,* 535 U.S. at 440–41, 122 S.Ct. 1728 (plurality opinion) (quoting *Renton,* 475 U.S. at 47, 106 S.Ct. 925). "Federal courts evaluating the 'predominant concerns' behind the enactment of a [n] ... ordinance ... may do so by examining a wide variety of materials including, but not limited to, the text of the ... ordinance ..., any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware." *R.V.S.,* 361 F.3d at 409 n. 5 (citing *Ben's Bar,* 316 F.3d 702, 723 n. 28).

A review of those materials makes clear that the Ordinance is directed toward secondary effects. The Ordinance emphasizes that its purpose is to control the "adverse effects" of sexually oriented businesses and the reports before the council primarily addressed secondary effects. Plaintiffs provide nothing of relevance in response. One argument they do make is that the Ordinance contains a shocking admission that it is not concerned with secondary effects—the City's belief that sexually oriented businesses, *because of their very nature,* downgrade the quality of life. There is no such admission in the Ordinance; plaintiffs merely infer that this must be the City's thought process. More importantly, plaintiffs fail to grasp that the concept of "secondary effects," as developed in *Renton* and *Alameda Books,* assumes

that the properly regulated externalities are caused by protected speech. *See Alameda Books,* 535 U.S. at 445–48, 122 S.Ct. 1728 (Kennedy, J. concurring) (explaining that an ordinance is content neutral and addresses secondary effects "even if [it] identifies the [secondary effects] by reference to the speech ... that is, even if the measure is in that sense content based").

Plaintiffs also posit that a city council cannot rely on reports and studies when creating an ordinance because such things are hearsay, or, it might be that the argument is a city council can rely on these documents in creating an ordinance, but cannot later use the fact of its reliance on such reports in warding off a constitutional challenge in court because such reports are hearsay. Plaintiffs finish this argument by telling us we cannot look to the preamble of the ordinance because it is hearsay. Nevertheless, we feel comfortable relying on the findings and preamble of the statute and the reports cited therein to ***555** determine that the Ordinance is content neutral. *See, e.g., Pap's A.M.,* 529 U.S. at 296–97, 120 S.Ct. 1382 (plurality opinion) (explaining that the city could "reasonably rely on the evidentiary foundation set forth in *Renton,"* as well as examining the findings and preamble of the city's ordinance to determine content neutrality); *Ben's Bar,* 316 F.3d at 723–24 (examining the preamble and findings of the challenged statute to determine whether the challenged statute should be analyzed under intermediate scrutiny).

2. Intermediate Scrutiny

[4] Laws pass this lower level of scrutiny "so long as they are designed to serve a substantial government[al] interest and do not unreasonably limit alternative avenues of communication." *R.V.S.,* 361 F.3d at 408 (quoting *Renton,* 475 U.S. at 47, 106 S.Ct. 925, citing *Alameda Books,* 535 U.S. at 434, 122 S.Ct. 1728); *see also Pap's A.M.,* 529 U.S. at 296, 301–02, 120 S.Ct. 1382 (plurality opinion) (explaining that under *O'Brien,* a content-neutral restriction must "further[ ] an important or substantial government interest" and be "no greater than is essential to the furtherance of the government interest").

[5] **[6]** Laws are designed to serve a substantial government interest when the "municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *R.V.S.,* 361 F.3d at 408 (quoting *Ben's Bar,* 316 F.3d at 724). "In evaluating the sufficiency of this connection, courts must 'examine evidence concerning regulated speech and secondary effects.' " *Id.* (quoting *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728). "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925; *see also Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J. concurring) ("[W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required."). A city may rely upon previous judicial opinions evaluating secondary effects the city desires to regulate. *Pap's A.M.* 529 U.S. at 297, 120 S.Ct. 1382 (plurality opinion) (explaining that the city could "reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood").

The evidence relied upon by the City is more than adequate to establish the secondary effects regulated by the Ordinance. The record contains numerous studies evidencing the secondary effects of sexually oriented businesses. Moreover, we have previously affirmed the only two portions of the Ordinance plaintiffs specifically attack—the hour regulation and open-booth requirement. In *Schultz v. City of Cumberland,* an hour regulation similar to that imposed by the Ordinance was upheld by this court against a First Amendment challenge. 228 F.3d 831, 846 (7th Cir.2000) (upholding a portion of an ordinance "limiting the business hours for sexually oriented businesses to between 10 a.m. and midnight, Monday through Saturday."). And we have also upheld open-booth requirements similar to the one in the Ordinance. *See Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 1003–04 (7th Cir.2002) (explaining that the open-booth requirement was a valid time, place, and manner restriction); *Matney v. County of* ***556** *Kenosha,* 86 F.3d 692 (7th Cir.1996) (same).

To counter these decisions the plaintiffs simply nitpick at the relevance and reliability of the City's studies, claiming that they are either too old or inapplicable because they discuss problems in other cities and not Gary. All of these arguments are without merit. *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925; *G.M. Enterprises, Inc. v. Town of St. Joseph,*

350 F.3d 631, 639–40 (7th Cir.2003); *Ben's Bar,* 316 F.3d at 725.

Faced with our precedent and the City's substantial evidentiary record, the plaintiffs present nothing of relevance. "Instead, [they] have simply asserted that the council's evidentiary proof is lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited." *Pap's A.M.,* 529 U.S. at 298, 120 S.Ct. 1382 (plurality opinion); *see also Alameda Books,* 535 U.S. at 438–39, 122 S.Ct. 1728 (plurality opinion) ("If plaintiffs fail to cast direct doubt on [the city's] rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*.").

We also reject plaintiffs' argument that the Ordinance is not sufficiently narrow. *See Alameda Books,* 535 U.S. at 434, 122 S.Ct. 1728 (plurality opinion) (explaining that a content neutral ordinance designed to serve a substantial government interest must still leave "reasonable alternative avenues of communication."); *Pap's A.M.,* 529 U.S. at 301–02, 120 S.Ct. 1382 (plurality opinion) (noting that the fourth factor of the *O'Brien* test is "that the restriction is no greater than is essential to the furtherance of the government interest"). We have previously held that similar hour restrictions and open-booth requirements are narrowly tailored, and we stick to those rulings here. *Pleasureland Museum, Inc.,* 288 F.3d at 1004 ("[W]e have repeatedly held that regulations like the Open Booth Restrictions leave open ample alternative channels of communication.") (citations omitted); *Schultz,* 228 F.3d at 846 (explaining that an hour restriction similar to that of this case was "not 'substantially broader than necessary,' even if more restrictive than absolutely necessary") (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

3. Prior Restraint/Prompt Judicial Review

Plaintiffs argue that the Ordinance is invalid because it does not demand prompt judicial review of a decision to deny, suspend, or revoke a license. Plaintiffs also concede that this argument is foreclosed by our decision in *Graff v. City of Chicago*, but nevertheless ask us to reconsider. 9 F.3d 1309 (7th Cir.1993) (en banc) (holding that common law review of a licensing decision was sufficient). We see no reason to reconsider *Graff* on this record, especially where the Ordinance requires continuous operation under a provisional license until the culmination of judicial review. *See also City of Littleton v. Z.J. Gifts D–4, L.L.C.,* 541 U.S. 774, 781–84, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004) (explaining that ordinary judicial review of a licensing decision was sufficient where the ordinance was content neutral and only conditioned operation on neutral, nondiscriminatory criteria).

B. Fourth Amendment and Indiana Law

[7] Plaintiffs argue that the Ordinance allows for searches in violation of the Fourth Amendment and that the Ordinance is preempted by Indiana Law. Both of these arguments are waived because the ***557** plaintiff failed to raise them before the district court. *See Estremera v. United States,* 442 F.3d 580, 587 (7th Cir.2006) ("arguments not raised in the district court are waived on appeal") (quoting *Belom v. National Futures Ass'n,* 284 F.3d 795, 799 (7th Cir.2002)). When moving for summary judgment, the City defended an inspection provision in the Ordinance against a possible Fourth Amendment challenge by arguing first, that sexually oriented businesses have no reasonable expectation of privacy in the public areas of their premises during business hours; and, second, that if plaintiffs were able to establish a privacy interest implicating the Fourth Amendment that the businesses were "closely-regulated industries" for which no warrant is necessary. [3] *See New York v. Burger,* 482 U.S. 691, 702–03, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (applying the "closely-regulated industry" exception to the Fourth Amendment). In response, the plaintiffs simply assumed that the inspection provision implicated the Fourth Amendment, and only argued that sexually oriented businesses are not closely-regulated industries—despite the fact that the Ordinance only allows inspections in areas open to the public during business hours.

3 The inspection provision states:

> (A) Sexually oriented business operators and sexually oriented business employees shall permit officers or agents of the City of Gary who are performing functions connected with the enforcement of this Chapter to inspect the portions of the sexually oriented business premises where patrons are permitted, for the purpose of ensuring compliance with this Chapter, at any time the sexually oriented

> business is occupied by patrons or open for business.
> (B) The provisions of this Section do not apply to areas of an adult motel which are currently being rented by a customer for use as a permanent or temporary habitation.

As the district court explained, plaintiffs "simply ignore[d] the law's clear mandate" that the inspection provision did not implicate a privacy interest. Finding persuasive the City's unrebutted argument on this point, the district court did not address the plaintiffs' argument that adult businesses were not "closely-regulated industries." Plaintiffs' failure to argue the existence of a privacy interest implicated by the Ordinance below waives the issue on appeal. In any event any concerns about privacy violations are abated by the language of the statute that limits inspection to assuring compliance with the specific requirements of the Ordinance—that is the open booth requirement, the hours of operation restrictions, the prohibition of physical contact, and other requirements as specifically listed in the Ordinance. Ordinance at § 7(A). In other words, as counsel assured the panel at oral argument, officers or agents of the City cannot enter non-public areas of the premises, cannot enter when the business is closed to the public, cannot remove anything from the premises, cannot take pictures or videos, cannot ask patrons to disclose their names, or do anything other than check for compliance with the requirements of the Ordinance. (Oral argument at 25–30 min). Accordingly, we will not disturb the district court's ruling that the Ordinance does not violate the Fourth Amendment.

Plaintiffs also attempt to raise a preemption argument relying on Indiana law. Before the plaintiffs filed their brief in the district court, the Indiana Attorney General asked for permission, which was granted, to file an amicus brief with the district court addressing the issue "that state alcoholic beverage statutes preempt local regulation of adult entertainment establishments." *See* Ind.Code § 7.1–3–9–6 (prohibiting certain local interference with liquor licenses provided by the state).

***558** The plaintiffs then filed their brief opposing summary judgment without raising this issue. The very next day the Indiana Attorney General informed the district court that no amicus brief would be filed because no state law issues had been raised by the briefing.

Plaintiffs now attempt to argue that the Ordinance is preempted by Indiana law. But their earlier approach in the district court has deprived us of an analysis by the magistrate judge (and the views of the Indiana Attorney General), and, therefore, plaintiffs have waived the issue. *See Estremera,* 442 F.3d at 587.

III. CONCLUSION

Accordingly, the grant of summary judgment in favor of the City of Gary is AFFIRMED.

All Citations

466 F.3d 550

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316 F.3d 702
United States Court of Appeals,
Seventh Circuit.

BEN'S BAR, INC., Plaintiff–Appellant,
v.
VILLAGE OF SOMERSET, Defendant–Appellee.

No. 01–4351.
|
Argued May 30, 2002.
|
Decided Jan. 17, 2003.

Tavern and two of its nude dancers brought § 1983 action against city, seeking declaratory and injunctive relief against enforcement of ordinance that prohibited sale, use, or consumption of alcohol on premises of "Sexually Oriented Businesses," alleging violation of their right to freedom of expression under First and Fourteenth Amendments. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Chief Judge, granted judgment for city. Plaintiffs appealed. The Court of Appeals, Manion, Circuit Judge, held that municipal ordinance was reasonable attempt to reduce or eliminate undesirable "secondary effects" associated with barroom adult entertainment.

Affirmed.

West Headnotes (12)

[1] **Constitutional Law**
Conduct, protection of

Constitutional Law
Exercise of police power;relationship to governmental interest or public welfare

Constitutional Law
Narrow tailoring

A governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[2] **Constitutional Law**
Sexually Oriented Businesses;Adult Businesses or Entertainment

A time, place, and manner regulation of adult entertainment will be upheld under the First Amendment if it is designed to serve a substantial government interest and reasonable alternative avenues of communication remain available; additionally, a time, place, and manner regulation must be justified without reference to the content of the regulated speech and narrowly tailored to serve the government's interest. U.S.C.A. Const.Amend. 1.

14 Cases that cite this headnote

[3] **Constitutional Law**
Sexually Oriented Businesses;Adult Businesses or Entertainment

Constitutional Law
Zoning and land use in general

The analytical frameworks and standards utilized in evaluating adult entertainment regulations under the First Amendment, be they zoning ordinances or public indecency statutes, are virtually indistinguishable. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[4] **Constitutional Law**
Prohibition against intoxicating liquors in adult establishments

A liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments does

not violate the First Amendment if: (1) the state is regulating pursuant to a legitimate governmental power; (2) the regulation does not completely prohibit adult entertainment; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments; and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available, or, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. U.S.C.A. Const.Amend. 1.

23 Cases that cite this headnote

[5] **Constitutional Law**
Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors
Licensing and regulation

Municipal ordinance, that restricted sale or consumption of alcohol on premises of businesses that served as venues for adult entertainment, was reasonable attempt to reduce or eliminate undesirable "secondary effects" associated with barroom adult entertainment, in § 1983 lawsuit under free speech clause of First Amendment; regulation of alcohol was within city's general police powers, regulation did not have any impact on tavern's ability to offer nude or semi-nude dancing to its patrons, and liquor prohibition was no greater than was essential to further city's substantial interest in combating secondary effects resulting from combination of nude and semi-nude dancing and alcohol. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

33 Cases that cite this headnote

[6] **Constitutional Law**
Content neutrality

The level of First Amendment scrutiny a court uses to determine whether a regulation of adult entertainment is constitutional depends on the purpose for which the regulation was adopted; if the regulation was enacted to restrict certain viewpoints or modes of expression, it is presumptively invalid and subject to strict scrutiny, if, on the other hand, the regulation was adopted for a purpose unrelated to the suppression of expression, e.g., to regulate nonexpressive conduct or the time, place, and manner of expressive conduct, a court must apply a less demanding intermediate scrutiny. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[7] **Administrative Law and Procedure**
Construction

Municipal Corporations
Construction and operation

Statutes
Language and intent, will, purpose, or policy

Federal courts evaluating the "predominant concerns" behind the enactment of a statute, ordinance, regulation, or the like, may do so by examining a wide variety of materials including, but not limited to, the text of the regulation or ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware.

4 Cases that cite this headnote

[8] **Constitutional Law**
Secondary effects

Regulations of adult entertainment receive intermediate scrutiny under the First Amendment if they are designed not to suppress the "content" of erotic expression, but rather to address the negative secondary effects caused by such expression. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[9] **Constitutional Law**
Nude or semi-nude dancing

Regulations that prohibit nude dancing where alcohol is served or consumed are independent of expressive or communicative elements of conduct, and, therefore, are treated as if they were content-neutral under the First Amendment. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[10] **Constitutional Law**
Intoxicating Liquors

In the context of the First Amendment, whether an adult entertainment liquor regulation is treated as a time, place, and manner regulation, or as a regulation of expressive conduct, a court is required to ask whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. U.S.C.A. Const.Amend. 1.

13 Cases that cite this headnote

[11] **Constitutional Law**
Content-Based Regulations or Restrictions

In order to justify a content-based time, place, and manner restriction under the First Amendment, or a content-based regulation of expressive conduct, a municipality must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact; the regulation may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside, and, furthermore, a municipality may not assert that it will reduce secondary effects by reducing speech in the same proportion. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[12] **Constitutional Law**
Nude or semi-nude dancing

The First Amendment does not entitle a tavern, its dancers, or its patrons, to have alcohol available during a "presentation" of nude or semi-nude dancing; even though the First Amendment does require that such establishments be given a reasonable opportunity to disseminate the speech at issue, a "reasonable opportunity" does not include a concern for economic considerations. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

Attorneys and Law Firms

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Before FLAUM, Chief Judge, and WOOD, Jr. and MANION, Circuit Judges.

Opinion

MANION, Circuit Judge.

Ben's Bar, Inc. operates a tavern in the Village of Somerset, Wisconsin, that formerly served as a venue for nude and semi-nude dancing. After the Village enacted an ordinance that, in part, prohibited the sale, use, or consumption of alcohol on the premises of "Sexually Oriented Businesses," Ben's Bar and two of its dancers filed suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the enforcement of the ordinance. The plaintiffs' complaint alleged, among other things, that the ordinance's alcohol prohibition violated their right to freedom of expression under the First and Fourteenth Amendments to the United States Constitution. Shortly thereafter, plaintiffs filed a motion for a preliminary injunction, which the district court denied. The Village then filed a motion for summary judgment, which the district court granted. Ben's Bar appeals this decision. Because we conclude that the record sufficiently supports the Village's claim that the

liquor prohibition is a reasonable attempt to reduce or eliminate the undesirable "secondary effects" associated with barroom adult entertainment, rather than an attempt to regulate the expressive content of nude dancing, we affirm the district court's judgment.

I.

On October 24, 2000, the Village of Somerset, a municipal corporation located in St. Croix County, Wisconsin ("Village"), enacted Ordinance A–472, entitled "Sexually ***705** Oriented Business Ordinance" ("Ordinance"), for the purpose of regulating "Sexually Oriented Businesses and related activities to promote the health, safety, and general welfare of the citizens of the Village of Somerset, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of Sexually Oriented Businesses within the Village of Somerset." The Ordinance regulates hours of operation, location, distance between patrons and performers, and other aspects concerning the operations of Sexually Oriented Businesses.

In the legislative findings section of the Ordinance, the Village noted that:

> Based on evidence concerning the adverse secondary effects of Sexually Oriented Businesses on the community in reports made available to the Village Board, and on the holdings and findings in [numerous Supreme Court, federal appellate, and state appellate judicial decisions], as well as studies and summaries of studies conducted in other cities ... and findings reported in the Regulation of Adult Entertainment Establishments in St. Croix County, Wisconsin; and the Report of the Attorney General's Working Group of Sexually Oriented Businesses ... the Village Board finds that:
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> (a) Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located.
>
> (b) Studies of the relationship between sexually oriented businesses and neighborhood property values have found a negative impact on both residential and commercial property values.
>
> (c) Sexually oriented businesses may contribute to an increased public health risk through the spread of sexually transmitted diseases.
>
> (d) There is an increase in the potential for infiltration by organized crime for the purpose of unlawful conduct.
>
> (e) *The consumption of alcoholic beverages on the premises of a Sexually Oriented Business exacerbates the deleterious secondary effects of such businesses on the community.*

(Emphasis added.)

On February 2, 2001, two months before the Ordinance's effective date of April 1, 2001, Ben's Bar, Inc. ("Ben's Bar"), a tavern in the Village featuring nude and semi-nude barroom dance,[1] and two of its dancers, Shannen Richards and Jamie Sleight, filed a four-count complaint against the Village, pursuant to 42 U.S.C. § 1983 and Wis. Stat. § 806.04 (the State's "Uniform Declaratory Judgments Act"), in the United States District Court for the Western District of Wisconsin. The plaintiffs' complaint alleged that portions of the Ordinance were unconstitutional and preempted by Wisconsin law, sought a declaratory judgment resolving those issues, and requested permanent injunctive relief. Specifically, the plaintiffs argued that the Ordinance: (1) violated their right of free expression under the First and Fourteenth Amendments to the United States Constitution and Article I, § 3 of the Wisconsin Constitution;[2] (2) violated their right to ***706** equal protection under the Fourteenth Amendment to the United States Constitution and Article 1, § 1 of the Wisconsin Constitution;[3] (3) was an illegal "policy or custom" of the Village within the meaning of *Monell v. New York City Dep't of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and *Owen v. City of Independence, Missouri,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); and (4) was an *ultra vires* legislative act in violation of Wis. Stat. § 66.0107(3).[4]

1 Ben's Bar holds a liquor license issued by the Village.

2 Article 1, § 3 of the Wisconsin Constitution provides, *inter alia,* that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws

shall be passed to restrain or abridge the liberty of speech or of the press." Wis. Const., art. I, § 3.

3 Article 1, § 1 of the Wisconsin Constitution provides that "[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const., art. I, § 1.

4 Wis. Stat. § 66.0107(3) provides that "[t]he board or council of a city, village or town may not, by ordinance, prohibit conduct which is the same as or similar to conduct prohibited by § 944.21 [i.e., the state's obscenity statute]."

On March 19, 2001, the plaintiffs moved for a preliminary injunction against the enforcement of Sections 5(a) and (b) of the Ordinance. Section 5(a) provides that "[i]t shall be a violation of this ordinance for any Person to knowingly and intentionally appear in a state of Nudity in a Sexually Oriented Business."[5] Section 5(b) of the Ordinance provides that "[t]he sale, use, or consumption of alcoholic beverages on the Premises of a Sexually Oriented Business is prohibited." Plaintiffs argued that under § 66.0107(3) the Village was prohibited from enacting these regulations of adult entertainment because such conduct is already covered by the state's obscenity statute—i.e., Wis. Stat. § 944.21. They also contended that, notwithstanding § 66.0107, Sections 5(a) and (b) violated their right to free expression under the First and Fourteenth Amendments.

5 Under Section 3(*o*) of the Ordinance, "Nudity" or "state of nudity" is defined as "the appearance of the human bare anus, anal cleft or cleavage, pubic area, male genitals, female genitals, or the nipple or areola of the female breast, with less than a fully opaque covering; or showing of the covered male genitals in a discernibly turgid state."

On April 17, 2001, the district court denied plaintiffs' motion for preliminary injunctive relief, holding that they did not have a reasonable chance of succeeding on the merits of their complaint. The district court, utilizing the test established by this circuit in *Schultz v. City of Cumberland,* 228 F.3d 831 (7th Cir.2000), held that Section 5(a)'s complete prohibition of full nudity in Sexually Oriented Businesses was constitutional under the First Amendment because " 'limiting erotic dancing to semi-nudity [i.e., pasties and G-strings] represents a *de minimis* restriction that does not unconstitutionally abridge expression.' " (quoting *Schultz,* 228 F.3d at 847). The district court also concluded that Section 5(b) passed constitutional muster under *Schultz* because it: (1) was justified without reference to the content of the regulated speech; (2) was narrowly tailored to serve a significant government interest in curbing adverse secondary effects; and (3) left open ample alternative channels for communication. Finally, the district court ruled that the Ordinance was not subject to preemption under Wis. Stat. § 66.0107(3) because the plaintiffs had conceded that: (1) the Ordinance only regulates non-obscene conduct; and (2) they were seeking only to provide non-obscene barroom dancing.

Following unsuccessful attempts at settlement, on August 20, 2001, the Village moved for summary judgment of plaintiffs' complaint. On November 23, 2001, the district court granted the Village's motion, concluding that the Ordinance was constitutional for the reasons expressed in its ***707** April 17, 2001 order. The court also addressed plaintiffs' equal protection claim, noting that they had waived the argument by failing to develop it in their briefs. A judgment in conformity with that order was entered on November 26, 2001. Ben's Bar appeals the district court's decision granting summary judgment,[6] arguing that the court erred in concluding that Section 5(b) does not constitute an unconstitutional restriction on nude dancing under the First Amendment. *See DiMa Corp. v. Town of Hallie,* 185 F.3d 823, 827 n. 2 (7th Cir.1999) (holding that corporations may assert First Amendment challenges). We review the district court's grant of summary judgment *de novo,* construing all facts in favor of Ben's Bar, the non-moving party. *Commercial Underwriters Ins. Co. v. Aires Envtl. Services, Ltd.,* 259 F.3d 792, 795 (7th Cir.2001).

6 Plaintiffs Shannen Richards and Jamie Sleight did not appeal the district court's judgment.

II.

The First Amendment provides, in part, that "Congress shall make no law ... abridging the freedom of speech ...." U.S. Const. amend. I. The First Amendment's Free Speech Clause has been held by the Supreme Court to apply to the states through the Fourteenth Amendment's due process clause. *Gitlow v. New York,* 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *DiMa Corp.,* 185 F.3d at 826 (acknowledging the applicability of the

Supreme Court's "incorporation doctrine" in the First Amendment context). The Supreme Court has further held that "nude dancing ... is expressive conduct *within the outer perimeters of the First Amendment,* though we view it as only marginally so." *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion) (emphasis added). *See also Blue Canary Corp. v. City of Milwaukee,* 251 F.3d 1121, 1124 (7th Cir.2001) (noting that "[t]he impairment of First Amendment values is slight to the point of being risible since the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a modest social value ...."). Thus, while few would argue "that erotic dancing ... represents high artistic expression," *Schultz v. City of Cumberland,* 228 F.3d 831, 839 (7th Cir.2000), the Supreme Court has, nevertheless, afforded such expression a diminished form of protection under the First Amendment. *City of Erie v. Pap's A.M.,* 529 U.S. 277, 294, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion) (holding that " 'even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, *it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate* ....' ") (citation omitted) (emphasis added).

This case requires us to determine whether a municipality may restrict the sale or consumption of alcohol on the premises of businesses that serve as venues for adult entertainment without violating the First Amendment. On appeal, Ben's Bar's primary argument is that Section 5(b) is unconstitutional because the regulation has the "effect" of requiring its dancers to wear more attire than simply pasties and G-strings. [7] This argument ***708** may be summed up as follows: (1) Section 5(b) prohibits the sale, use, or consumption of alcohol on the premises of Sexually Oriented Businesses; [8] (2) Ben's Bar is an "Adult cabaret," a sub-category of a Sexually Oriented Business under the Ordinance, [9] if it features nude or semi-nude dancers; (3) Section 3(*o*) of the Ordinance defines "seminude or semi-nudity" as "the exposure of a bare male or female buttocks or the female breast below a horizontal line across the top of the areola at its highest point with less than a complete and opaque covering"; and (4) Ben's Bar's dancers must wear more attire than that required by the Ordinance's definition of "semi-nude or semi-nudity" in order for the tavern to be able to sell alcohol during their performances and comply with Section 5(b)—i.e., more than pasties and G-strings. Ben's Bar contends that Section 5(b) significantly impairs the conveyance of an erotic message by the tavern's dancers [10] and is not narrowly tailored to meet the Village's stated goal of reducing the adverse secondary effects associated with adult entertainment. [11]

7 The Supreme Court has, on two separate occasions, held that requiring nude dancers to wear pasties and G-strings does not violate the First Amendment. *Pap's A.M.,* 529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion), *id.* at 307–10, 120 S.Ct. 1382 (Scalia, J., concurring); *Barnes,* 501 U.S. at 571–72, 111 S.Ct. 2456 (plurality opinion), *id.* at 582, 111 S.Ct. 2456 (Souter, J., concurring).

8 Section 3(w) of the Ordinance defines "Sexually Oriented Business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency or sexual encounter center."

9 Section 3(c) of the Ordinance is the definition for "Adult cabaret," which "means a nightclub, dance hall, *bar,* restaurant, or similar commercial establishment that regularly features: (1) persons who appear in a state of Nudity or Semi-nudity; or (2) live performances that are characterized by 'specified sexual activities'; or (3) films, motion pictures, video cassettes, slides, or other photographic reproductions that are characterized by the depiction or description of 'specified sexual activities' or Nudity or 'specified anatomical areas.' " (Emphasis added.)

10 According to Ben's Bar, Section 5(b) goes far beyond the pasties and G-strings regulation upheld by the Supreme Court in *Barnes* and *Pap's A.M.,* prohibiting "any display of the buttocks or of breast below the top of the areola"—i.e., "conservative two piece swimsuits, moderately low-cut blouses, short shorts, sheer fabrics and many other types of clothing that are regularly worn in the community and are in mainstream fashion."

11 It is not entirely clear whether Ben's Bar is arguing that Section 5(b) is facially unconstitutional or merely unconstitutional as applied. To the extent Ben's Bar seeks to bring a facial challenge, it faces an uphill battle. Ben's Bar does not argue that the regulation is vague or overbroad, and therefore may only prevail if it can demonstrate "that no set of circumstances exists under which the [regulation] would be valid."

United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). *See also Horton v. City of St. Augustine, Florida,* 272 F.3d 1318, 1331 (11th Cir.2001) (noting exception to the *Salerno* rule; that, in the limited context of the First Amendment, a plaintiff may also bring a facial challenge for overbreadth and/or vagueness).

The central fallacy in Ben's Bar's argument, however, is that Section 5(b) restricts the sale and consumption of alcoholic beverages in establishments that serve as venues for adult entertainment, not the attire of nude dancers. In the absence of alcohol, Ben's Bar's dancers are free to express themselves all the way down to their pasties and G-strings. The question then is not whether the Village can require nude dancers to wear more attire than pasties and G-strings, but whether it can prohibit Sexually Oriented Businesses like Ben's Bar from selling alcoholic beverages in order to prevent the deleterious secondary effects arising from the explosive combination of nude dancing and alcohol consumption.

While the question presented is rather straightforward, the issue is significantly complicated by a long series of Supreme Court decisions involving the application of the First Amendment in the adult entertainment ***709** context. Because these decisions establish the analytical framework under which we must operate, our analysis necessarily begins with a comprehensive summary of the Supreme Court's jurisprudence in this area.

A. *California v. LaRue*

Initially, we note that the Supreme Court addressed the precise issue before us in *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), when it considered the constitutionality of regulations promulgated by California's Department of Alcoholic Beverages ("Department") that prohibited bars and nightclubs from featuring varying degrees of adult entertainment.[12] The Department enacted the regulations, after holding public hearings, because it concluded that the consumption of alcohol in adult entertainment establishments resulted in a number of adverse secondary effects—e.g., acts of public indecency and sex-related crimes. As in this case, adult entertainment businesses filed suit alleging that the regulations violated the First Amendment. *Id.* at 110, 93 S.Ct. 390.

12 The regulations at issue in *LaRue* prohibited:

> (a) The performance of acts, or simulated acts, of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;
> (b) The actual or simulated touching, caressing or fondling on the breast, buttocks, anus or genitals;
> (c) The actual or simulated displaying of the pubic hair, anus, vulva or genitals;
> (d) The permitting by a licensee of any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus; and, by a companion section;
> (e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above.
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> 409 U.S. at 411–12.

The Supreme Court began its analysis in *LaRue* by stressing that "[t]he state regulations here challenged come to us, not in the context of a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink." 409 U.S. at 114, 93 S.Ct. 390. For this reason, the vast majority of the Court's opinion addressed the States' power to regulate "intoxicating liquors" under the Twenty-first Amendment.[13] *See generally id.* at 115–19, 93 S.Ct. 390. Specifically, the *LaRue* Court concluded that:

13 The second section of the Twenty-first Amendment provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

> While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.
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> 409 U.S. at 114, 93 S.Ct. 390.

In doing so, the *LaRue* Court rejected the plaintiffs' contention that the state's regulatory authority over "intoxicating beverages" was limited, as applied to adult entertainment establishments, to "either dealing with the problem it confronted within the limits of our decisions as to obscenity [i.e., *Roth v. United States,* 354 U.S. 476,

77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) and its progeny] or in accordance with the limits prescribed for dealing with some forms of communicative conduct in [*United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)]," 409 U.S. at 116, 93 S.Ct. 390, reasoning " '[w]e ***710** cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.' " *Id.* at 117–18, 93 S.Ct. 390 (citation omitted). The Court found that "the substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication." *Id.* at 118, 93 S.Ct. 390. The Court also concluded that although "at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board ... [but] has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *Id.* The *LaRue* Court ended its analysis by noting that "[t]he Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one," and that "[g]iven the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution." *Id.* at 118–19, 93 S.Ct. 390. [14]

14 *See also City of Newport v. Iacobucci,* 479 U.S. 92, 95, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986) (upholding the constitutionality of a city ordinance prohibiting nude or nearly nude dancing in local establishments licensed to sell liquor for consumption on the premises); *New York State Liquor Auth. v. Bellanca,* 452 U.S. 714, 717, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (holding that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs"); *Doran v. Salem Inn. Inc.,* 422 U.S. 922, 932–33, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (noting that under *LaRue* states may ban nude dancing as part of their liquor licensing programs); *City of Kenosha v. Bruno,* 412 U.S. 507, 515, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973) (noting that "regulations prohibiting the sale of liquor by the drink on premises where there were nude but not necessarily obscene performances [are] facially constitutional").

B. *44 Liquormart, Inc. v. Rhode Island*

After the Supreme Court's decision in *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), however, the precedential value of the reasoning anchoring the Court's holding in *LaRue* was severely diminished. In *44 Liquormart,* the Court held that Rhode Island's statutory prohibition against advertisements providing the public with accurate information about retail prices of alcoholic beverages was "an abridgement of speech protected by the First Amendment and that is not shielded from constitutional scrutiny by the Twenty-first Amendment." *Id.* at 489, 116 S.Ct. 1495. In reaching this conclusion, the Court noted:

> Rhode Island argues, and the Court of Appeals agreed, that in this case the Twenty-first Amendment tilts the First Amendment analysis in the State's favor [of the advertising ban] .... [T]he Court of Appeals relied on our decision in *California v. LaRue* ... [where] five Members of the Court relied on the Twenty-first Amendment *to* buttress the conclusion that the First Amendment did not invalidate California's prohibition of certain grossly sexual exhibitions in premises licensed to serve alcoholic beverages. Specifically, the opinion stated that the Twenty-first Amendment required that the prohibition be given an added presumption in favor of its validity. ***711** *We are now persuaded that the Court's analysis in* LaRue *would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment. Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases, the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of "bacchanalian revelries" described in the* LaRue *opinion regardless of whether alcoholic beverages are involved.... See, e.g., Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). As we recently noted: "*LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." *Rubin v. Coors Brewing Co.,* 514 U.S., at 483, n. 2, 115 S.Ct. 1585. Without questioning the holding of *LaRue,* we now disavow

its reasoning insofar as it relied on the Twenty-first Amendment.

Id. at 515–16, 116 S.Ct. 1495 (emphasis added).

The foregoing makes clear that *LaRue*'s holding remains valid after *44 Liquormart,* but for a different reason. The *44 Liquormart* Court concluded that "the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment," 517 U.S. at 515, 116 S.Ct. 1495 because "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *Id.* In making this assertion, the *44 Liquormart* Court relied on the *LaRue* Court's conclusion that: "the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power ... [i.e.,] the normal state authority over public health, welfare, and morals." 409 U.S. at 114, 93 S.Ct. 390. But in recent years, the Supreme Court has held, on a number of occasions, that "non-obscene" adult entertainment is entitled to a minimal degree of protection under the First Amendment, even in relation to laws enacted pursuant to a State's general police powers. *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 1739, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring) (noting that "if a city can decrease the crime and blight associated with [adult entertainment] speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of speech substantially undiminished, there is no First Amendment objection"); *Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) (holding that city's public indecency ordinance, enacted to "protect public health and safety," must be analyzed as a content-neutral regulation of expressive conduct); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

Given the foregoing, it is difficult to ascertain exactly what "analysis" the *44 Liquormart* Court was referring to as having persuaded it that the *LaRue* Court would have reached the same result even without the "added presumption" of the Twenty-first Amendment. We find noteworthy, however, the *44 Liquormart* Court's citation of the post-*LaRue* decisions of *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 582, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), in support of its assertion that "the States' inherent police powers provide ample authority to restrict the kind of 'bacchanalian revelries' ***712** described in the *LaRue* opinion regardless of whether alcoholic beverages are involved." *44 Liquormart,* 517 U.S. at 515, 116 S.Ct. 1495. In *American Mini Theatres* and *Barnes,* the Supreme Court held that the adult entertainment regulations at issue were subject to intermediate scrutiny for purposes of determining their constitutionality under the First Amendment. *American Mini Theatres,* 427 U.S. at 79, 96 S.Ct. 2440 (Powell, J., concurring) ("it is appropriate to analyze the permissibility of Detroit's action [zoning ordinance separating adult theaters from residential neighborhoods and churches] under the four-part test of *United States v. O'Brien* ...."); *Barnes,* 501 U.S. at 582, 111 S.Ct. 2456 (Souter, J., concurring) ("I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in *United States v. O'Brien* ....").

Like the Fourth and Eleventh Circuits, we conclude that after *44 Liquormart* state regulations prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments must be analyzed in light of *American Mini Theatres* and *Barnes,* as modified by their respective progeny. *See Giovani Carandola Ltd. v. Bason,* 303 F.3d 507, 513 n. 2 & 519 (4th Cir.2002) (noting the *44 Liquormart* Court's reliance on *American Mini Theatres* and *Barnes* and holding that "the result reached in *LaRue* remains sound not because a state enjoys any special authority when it burdens speech by restricting the sale of alcohol, but rather because the regulation in *LaRue* complied with the First Amendment"); *Sammy's of Mobile, Ltd. v. City of Mobile,* 140 F.3d 993, 996 (11th Cir.1998) (holding that "the Supreme Court [in *44 Liquormart*] ... reaffirmed the precedential value of *LaRue* and the *Barnes*–O'Brien *test .... [and] reaffirmed that the* Barnes–*O'Brien* intermediate level of review applies to [adult entertainment liquor regulations]"). *But see BZAPS, Inc. v. City of Mankato,* 268 F.3d 603, 608 (8th Cir.2001) (upholding the constitutionality of an adult entertainment liquor regulation solely on the basis of *LaRue*'s holding).

We reach this conclusion notwithstanding the fact that in *LaRue* the Supreme Court upheld the constitutionality of the adult entertainment liquor regulations using the rational basis test, *see* 409 U.S. at 115–16, 93 S.Ct.

390, and explicitly refused to subject the regulations to *O'Brien*'s intermediate scrutiny test. *Id.* at 116, 93 S.Ct. 390 ("We do not believe that the state regulatory authority in this case was limited to ... dealing with the problem it confronted ... in accordance with the limits prescribed for dealing with some forms of communicative conduct in [*O'Brien*]"). We do so because the *44 Liquormart* Court's reference to *American Mini Theatres* and *Barnes* makes clear that the Court is of the opinion that adult entertainment liquor regulations, like the ones at issue in *LaRue,* will pass constitutional muster even under the heightened intermediate scrutiny tests outlined in those cases.

In making this determination, we are by no means suggesting that the Supreme Court's decisions in *American Mini Theatres* and *Barnes* are of greater precedential value than *LaRue.* On the contrary, as noted *infra,* our decision in this case is largely dictated by *LaRue*'s holding. At the time *LaRue* was decided, however, the Supreme Court had not yet established a framework for analyzing the constitutionality of adult entertainment regulations. This changed with the Court's subsequent decisions in *American Mini Theatres* and *Barnes,* cases that serve as a point of origin for two distinct, yet overlapping, lines of jurisprudence that address the degree of First Amendment ***713** protection afforded to adult entertainment. Given the significant development of the law in this area since *LaRue,* as well as the Court's refashioning of *LaRue*'s reasoning in *44 Liquormart,* we conclude that it is necessary to apply *LaRue*'s holding in the context of this precedent.

C. The *44 Liquormart* "road map"

The *44 Liquormart* decision established a road map of sorts for analyzing the constitutionality of adult entertainment liquor regulations, i.e., the Supreme Court's decisions in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), providing two separate but similar routes. [15] First, the *American Mini Theatres* decision, as modified by the Court's subsequent decisions in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), delineates the standards for evaluating the constitutionality of *adult entertainment zoning ordinances.* Second, the *Barnes* decision, as modified by the Court's recent decision in *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), provides guidelines for analyzing the constitutionality of *public indecency statutes.*

15 *See J & B Social Club No. 1, Inc. v. City of Mobile,* 966 F.Supp. 1131, 1136 (S.D.Ala.1996) (Hand, J.).

[1] The analytical frameworks utilized in both lines of jurisprudence can be traced back to the four-part test enunciated by the Supreme Court in *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), where the Court held that a statute prohibiting the destruction or mutilation of draft cards was a content-neutral regulation of expressive conduct. *American Mini Theatres,* 427 U.S. at 79, 96 S.Ct. 2440 (Powell, J., concurring) (applying *O'Brien* test); *Barnes,* 501 U.S. at 582, 111 S.Ct. 2456 (Souter, J., concurring) (same). Under the *O'Brien* test, a governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673.

[2] While the *O'Brien* test is still utilized by the Supreme Court in analyzing the constitutionality of public indecency statutes, *see Pap's A.M.,* 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part), the Court currently evaluates adult entertainment zoning ordinances as time, place, and manner regulations. *Alameda Books,* 122 S.Ct. at 1733 (plurality opinion); *id.* at 1741 (Kennedy, J., concurring); *Renton,* 475 U.S. at 46–47, 106 S.Ct. 925. A time, place, and manner regulation of adult entertainment will be upheld if it is "designed to serve a substantial government interest and ... reasonable alternative avenues of communication remain[ ] available." *Alameda Books,* 122 S.Ct. at 1734. Additionally, a time, place, and manner regulation must be justified without reference to the content of the regulated speech and narrowly tailored to serve the government's ***714** interest. *Schultz,* 228 F.3d at 845. [16]

16 In *Renton,* the Supreme Court created some confusion as to the appropriate test for analyzing time, place, and manner regulations by asserting that "time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." 475 U.S. at 47, 106 S.Ct. 925. However, as we emphasized in *City of Watseka v. Illinois Public Action Council,* 796 F.2d 1547 (7th Cir.1986), "[t]he Supreme Court does not always spell out the 'narrowly tailored' step as part of its standard for evaluating time, place, and manner restrictions." *Id.* at 1553. Moreover, a close examination of *Renton* reveals that the Court did consider whether the zoning ordinance at issue was narrowly tailored. 475 U.S. at 52, 106 S.Ct. 925 ("[t]he Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects ...."). In any event, both the Supreme Court and this circuit have continued to apply the "narrowly tailored" step to time, place, and manner regulations. *See Ward v. Rock Against Racism,* 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *Frisby v. Schultz,* 487 U.S. 474, 481, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988); *Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 1000 (7th Cir.2002).

[3] In this case, however, we are not dealing with a zoning ordinance or a public indecency statute. Instead, we are called upon to evaluate the constitutionality of an adult entertainment liquor regulation. Therefore, it is not entirely clear whether Section 5(b) should be analyzed as a time, place, and manner restriction or as a regulation of expressive conduct under *O'Brien*'s four-part test; or for that matter whether the tests are entirely interchangeable. *See LLEH, Inc. v. Wichita County, Texas,* 289 F.3d 358, 365 (5th Cir.), *cert. denied,* 537 U.S. 1045, 123 S.Ct. 621, 154 L.Ed.2d 517 (2002) (noting uncertainty as to which test courts should use in analyzing the constitutionality of adult entertainment regulations: "the test for time, place, or manner regulations, described in *Renton* ... or the four-part test for incidental limitations on First Amendment freedoms, established in *O'Brien* ...."). For all practical purposes, however, the distinction is irrelevant because the Supreme Court has held that the time, place, and manner test embodies much of the same standards as those set forth in *United States v. O'Brien. Barnes,* 501 U.S. at 566, 111 S.Ct. 2456 (plurality opinion) (relying on *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 298–99, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)); *LLEH,* 289 F.3d at 365–66 (same).[17] Moreover, as explained *infra,* two of the Supreme Court's post-*44 Liquormart* decisions—*Pap's A.M.* and *Alameda Books*—make it abundantly clear that the analytical frameworks and standards utilized by the Court in evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable. We, therefore, conclude that it is appropriate to analyze the constitutionality of Section 5(b) using the standards articulated by the Supreme Court in the five decisions comprising the *American Mini Theatres* and *Barnes* lines of jurisprudence. Thus, before proceeding to the merits of Ben's Bar's argument, we begin our analysis by summarizing the reasoning and holdings of these decisions.

17 *But see Alameda Books,* 122 S.Ct at 1745 n. 2 (Souter, J., dissenting) (joined by Stevens, J. and Ginsburg, J.) (noting that "[b]ecause *Renton* called its secondary-effects ordinance a mere, time, place, or manner restriction and thereby glossed over the role of content in secondary-effects zoning ... I believe the soft focus of its statement of the middle-tier test should be rejected in favor of the ... [*O'Brien*] formulation ... a closer relative of secondary effects zoning than mere time, place, and manner regulations, as the Court ... implicitly recognized [in *Pap's A.M.*].").

715 (1) *Young v. American Mini Theatres, Inc.

In *Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Supreme Court addressed, *inter alia,* whether a zoning ordinance enacted by the City of Detroit violated the First Amendment.[18] *Id.* at 58, 96 S.Ct. 2440. The "dispersal" ordinance at issue prohibited the operation of any adult entertainment movie theater within 1,000 feet of any two other "regulated uses" (e.g., adult bookstores, bars, hotels, pawnshops), or within 500 feet of a residential area. *Id.* at 52, 96 S.Ct. 2440. A majority of the Court upheld the constitutionality of the ordinance, but in doing so did not agree on a single rationale for the decision. *Id.* at 62–63, 96 S.Ct. 2440 (plurality opinion); *id.* at 84, 96 S.Ct. 2440 (Powell, J. concurring). The plurality concluded that "apart from the fact that the ordinance treats adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in respective theaters, *the regulation of the place where such films may be exhibited does not offend the First Amendment.*" *Id.* at 63, 96 S.Ct. 2440 (emphasis added).

In reaching this conclusion, the plurality emphasized that "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Id.* at 70, 96 S.Ct. 2440. The plurality also found that the city's zoning ordinance was justified by its interest in "preserving the character of its neighborhoods," *id.* at 71, 96 S.Ct. 2440, and therefore "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* The plurality concluded its analysis by noting that "what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited ...." *Id.* [19]

18 The Court also concluded that the zoning ordinance did not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, *American Mini Theatres,* 427 U.S. at 61, 72–73, 96 S.Ct. 2440; *see generally id.* at 73–84, 96 S.Ct. 2440 (Powell, J., concurring), issues that are not before us on appeal.

19 The *American Mini Theatres* plurality also noted, in a footnote, that the city had enacted the zoning ordinance because of its determination that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, *effects* which are not attributable to theaters showing other types of films," 427 U.S. at 71 n. 34, 96 S.Ct. 2440 (emphasis added), noting "[i]t is this *secondary effect* which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech." *Id.* (emphasis added).

Justice Powell concurred in the judgment of the Court, agreeing with the plurality that the zoning ordinance "is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content." *Id.* at 78–79, 96 S.Ct. 2440. He disagreed, however, with the plurality's determination that "nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." *Id.* at 73 n. 1, 96 S.Ct. 2440. Instead, Justice Powell concluded that it was appropriate to analyze and uphold the constitutionality of the zoning ordinance under the four-part test enunciated in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *Id.* at 79, 96 S.Ct. 2440. [20]

20 Under *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), Justice Powell's concurrence is the controlling opinion in *American Mini Theatres,* as the most narrow opinion joining four other Justices in the judgment of the Court. *Entertainment Concepts, Inc., III v. Maciejewski,* 631 F.2d 497, 504 (7th Cir.1980).

716 (2) *City of Renton v. Playtime Theatres, Inc.

The Supreme Court's decision in *American Mini Theatres* laid the groundwork for the Court's decision in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). [21] In *Renton,* the Court considered the validity of an adult entertainment zoning ordinance virtually indistinguishable from the one at issue in *American Mini Theatres. Id.* at 46, 106 S.Ct. 925. Unlike the *American Mini Theatres* plurality, however, the *Renton* Court outlined an analytical framework for evaluating the constitutionality of these ordinances. The Court's analysis proceeded in three steps. First, the Court found that the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations. *Id.* Next, the Court considered whether the ordinance was content-neutral or content-based. If an ordinance is content-based, it is presumptively invalid and subject to strict scrutiny. *Id.* at 46–47, 106 S.Ct. 925. On the other hand, if an ordinance is aimed not at the content of the films shown at adult theaters, but rather at combating the secondary effects of such theaters on the surrounding community (e.g., increased crime rates, diminished property values), it will be treated as a content-neutral regulation. *Id.* In *Renton,* the Court held that the zoning ordinance was a "content neutral" regulation of speech because while "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters .... [it] is aimed not at the *content* of the films shown ... but rather at the *secondary effects* of such theaters on the surrounding community." 475 U.S. at 47, 106 S.Ct. 925. Finally, given this finding, the *Renton* Court found that the zoning ordinance would be upheld as a valid time, place and manner regulation, *id.* at 46, 106 S.Ct. 925, if it "was designed to serve a substantial governmental interest and [did] not unreasonably limit alternative avenues of communication." *Id.* at 47, 106 S.Ct. 925. The Court concluded that the zoning ordinance met this test, noting that a " 'city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *id.* at 50, 106 S.Ct. 925 (quoting *American Mini Theatres,* 427 U.S. at 71, 96 S.Ct. 2440), [22]

and that the ordinance allowed for reasonable alternative avenues of communication because there was "ample, accessible real estate" open for use as adult theater sites. *Id.* at 53, 96 S.Ct. 2440.

21 Falling in between *American Mini Theatres* and *Renton* is the Supreme Court's decision in *Schad v. Borough Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), where the Court struck down, on First Amendment grounds, a zoning ordinance that did not—like the ordinance in *American Mini Theatres*—require the dispersal of adult theaters, but instead prohibited them altogether. *Id.* at 71–72, 96 S.Ct. 2440 (plurality opinion); *id.* at 77, 96 S.Ct. 2440 (Blackmun, J., concurring); *id.* at 79, 96 S.Ct. 2440 (Powell, J., concurring). The only significance of *Schad,* for purpose of our analysis, is that the holding of that case serves as the basis for the first step in the *Renton* framework—i.e., does the ordinance completely prohibit the expressive conduct at issue? *See Alameda Books,* 122 S.Ct. at 1733 (noting that the first step in the *Renton* framework was the Court's determination that "the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations"); *Renton,* 475 U.S. at 46, 106 S.Ct. 925.

22 *See also American Mini Theatres,* 427 U.S. at 80, 96 S.Ct. 2440 (Powell, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial").

The Supreme Court's decision in *Renton* is also notable because in addition to upholding the constitutionality of the zoning ordinance, the Court also held that the ***717** First Amendment did not require municipalities, before enacting such ordinances, to conduct new studies or produce evidence independent of that already generated by other cities (whether summarized in judicial decisions or not), *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925, so long as "whatever evidence [a] city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.*

(3) *Barnes v. Glen Theatre, Inc.*

In *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), the Supreme Court was called upon to address the constitutionality of Indiana's public indecency statute. In a splintered decision, a narrow majority of the Court held that the statute —which prohibited nudity in public places—could be enforced against establishments featuring nude dancing, i.e., by requiring dancers to wear pasties and G-strings during their performances, without violating the First Amendment's right of free expression. *Id.* at 565, 111 S.Ct. 2456 (plurality opinion); *id.* at 572, 111 S.Ct. 2456 (Scalia, J. concurring); *id.* at 582, 585, 111 S.Ct. 2456 (Souter, J. concurring). Of that majority, however, only three Justices agreed on a single rationale.

The plurality—Chief Justice Rehnquist and Justices O'Connor and Kennedy—began its analysis by emphasizing that while "nude dancing ... is expressive conduct within the outer perimeters of the First Amendment .... [w]e must [still] determine the level of protection to be afforded to the expressive conduct at issue, and ... whether the Indiana statute is an impermissible infringement of that protected activity." *Barnes,* 501 U.S. at 566, 111 S.Ct. 2456. The plurality noted that the public indecency statute did not "ban [ ] nude dancing, as such, but ... proscribed public nudity across the board," *id.,* and that "the Supreme Court of Indiana has construed the Indiana statute to preclude nudity in what are essentially places of public accommodation." *Id.* Next, the plurality concluded that the public indecency statute should be analyzed under *O'Brien*'s four-part test for evaluating regulations of expressive conduct protected by the First Amendment. [23] Applying this test, the plurality found "that Indiana's public indecency statute [was] justified despite its incidental limitations on some expressive activity," *id.* at 567, 111 S.Ct. 2456, because: (1) the statute was "clearly within the constitutional power of the State and furthers substantial governmental interests [i.e., protecting societal order and morality]," *id.* at 568, 111 S.Ct. 2456; (2) the state's interest in protecting societal order and morality by enforcing the statute to prohibit nude dancing was "unrelated to the suppression of free expression" because "the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic [and] [t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity," *id.* at 570–71, 111 S.Ct. 2456; (3) the incidental restriction on First Amendment freedom placed on nude dancing by the statute was no greater than essential to the furtherance of the governmental interest because "[t]he statutory prohibition is not a means to some greater end, but an end in itself," *id.* at 571–72, 111 S.Ct. 2456; and (4) the public indecency statute was narrowly tailored because

"Indiana's requirement that the dancers wear pasties and G-strings is modest, and the *bare minimum necessary* ***718** *to achieve the State's purpose.*" *Id.* at 572, 111 S.Ct. 2456 (emphasis added).

23 In doing so, the *Barnes* plurality noted that the *O'Brien* test and the time, place, and manner test utilized by the Court in *Renton* have "been interpreted to embody much the same standards ...." 501 U.S. at 566, 111 S.Ct. 2456.

Justice Scalia concurred in the judgment of the Court, but in doing so expressed his opinion that "the challenged regulation must be upheld 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, 111 S.Ct. 2456. Justice Souter also concurred in the judgment of the Court, agreeing with the plurality that "the appropriate analysis to determine the actual protection required by the First Amendment is the four-part inquiry described in *United States v. O'Brien.*" *Id.* at 582, 111 S.Ct. 2456. He wrote separately, however, to rest his concurrence in the judgment, "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments ...." *Id.* [24] In doing so, Justice Souter relied heavily on the Court's decision in *Renton. Id.* at 583–87, 111 S.Ct. 2456.

24 Under *Marks,* 430 U.S. at 193, 97 S.Ct. 990, Justice Souter's concurrence is the controlling opinion in *Barnes,* as the most narrow opinion joining the judgment of the Court. *Schultz,* 228 F.3d at 842 n. 2; *DiMa Corp.,* 185 F.3d at 830.

(4) *City of Erie v. Pap's A.M.*

The Supreme Court revisited the *Barnes* holding in *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), where a majority of the Court upheld the constitutionality of a public indecency ordinance "strikingly similar" to the one at issue in *Barnes. Id.* at 283, 120 S.Ct. 1382. Unlike *Barnes,* however, in *Pap's A.M.* five justices agreed that the proper framework for analyzing public indecency statutes was *O'Brien*'s four-part test. *Id.* at 289, 120 S.Ct. 1382 (plurality opinion) ("We now clarify that government restrictions on public nudity ... should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech"); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part) (agreeing with the "analytical approach that the plurality employs in deciding this case [i.e., the *O'Brien* test]"). *See also Ranch House, Inc. v. Amerson,* 238 F.3d 1273, 1278 (11th Cir.2001) (holding that "[a]lthough no opinion in [*Pap's A.M.*] was joined by more than four Justices, a majority of the Court basically agreed on how these kinds of statutes should be analyzed [i.e., *O'Brien*'s four-part test]"). A majority of the Justices also agreed that combating the adverse secondary effects of nude dancing was within the city's constitutional powers and unrelated to the suppression of free expression, *Pap's A.M.,* 529 U.S. at 296, 301, 120 S.Ct. 1382 (plurality opinion) ("Erie's efforts to protect public health and safety are clearly within the city's police powers .... [and] [t]he ordinance is unrelated to the suppression of free expression ...."); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part) ("Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression ...."), thus satisfying the first and third prongs of the *O'Brien* test.

A majority of the Justices in *Pap's A.M.* could not, however, agree on whether the public indecency statute furthered an important or substantial interest of the city (second prong of *O'Brien*), and if so whether the incidental restriction on nude dancing was no greater than that essential to the furtherance of this interest (fourth prong). The plurality—Chief Justice Rehnquist and Justices O'Connor, Kennedy, ***719** and Breyer—concluded that Erie's public indecency ordinance furthered an important or substantial government interest under *O'Brien* because "[t]he asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing [e.g., the increased crime generated by such establishments] are undeniably important." *Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382. [25] The *Pap's A.M.* plurality also found that Erie's public indecency statute was no greater than that essential to furthering the city's interest in combating the harmful secondary effects of nude dancing because:

25 The *Pap's A.M.* plurality's reliance on *Renton*'s secondary effects doctrine is significant because it marks a departure from the *Barnes* plurality's determination that a public indecency ordinance may be justified by a State's interest in protecting societal order and morality, *Barnes,* 501 U.S. at 568, 111 S.Ct.

> 2456, and an adoption of the approach advocated by Justice Souter in his concurrence in that case. *Id.* at 582, 111 S.Ct. 2456.
>
> The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.* The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message. 529 U.S. at 301, 120 S.Ct. 1382.

Justice Scalia, joined by Justice Thomas, agreed with the plurality that the ordinance should be upheld, but wrote separately to emphasize that " 'as a general law regulating conduct and not specifically directed at expression, [the city's public indecency ordinance] is not subject to First Amendment scrutiny at all,' " *Pap's A.M.,* 529 U.S. at 307–08, 120 S.Ct. 1382 (quoting *Barnes,* 501 U.S. at 572, 111 S.Ct. 2456 (Scalia, J., concurring)), and that "[t]he 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." *Id.* at 310, 120 S.Ct. 1382. Justice Souter concurred in part and dissented in part, stressing his belief that "the current record [does not] allow us to say that the city has made a sufficient evidentiary showing to sustain its regulation ...." *Id.* at 310–11, 120 S.Ct. 1382. Justice Stevens, joined by Justice Ginsburg, dissented, asserting that the ordinance was a "patently invalid" content-based ban on nude dancing that censored protected speech. *Id.* at 331–32, 120 S.Ct. 1382. Because the plurality's decision offers the narrowest ground for the Supreme Court's holding in *Pap's A.M.,* we find the reasoning of that opinion to be controlling. *Marks,* 430 U.S. at 193, 97 S.Ct. 990.

(5) *City of Los Angeles v. Alameda Books, Inc.*

This past term in *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), the Supreme Court upheld, at the summary judgment stage, an ordinance prohibiting multiple adult entertainment businesses from operating in the same building. *Id.* at 1733. The Court reached this conclusion despite the fact that the city had not, prior to the enactment of the ordinance, conducted or relied upon studies (or other evidence) specifically demonstrating that forbidding multiple adult entertainment businesses from operating under one roof reduces secondary effects. *Id.* at 1736 (plurality opinion); *id.* at 1744 (Kennedy, J., concurring). Once again, however, a majority of the Court could not agree on a single rationale for this decision.

***720** The primary issue in *Alameda Books* was the appropriate standard "for determining whether an ordinance serves a substantial government interest under *Renton.*" 122 S.Ct. at 1733. The plurality—written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Scalia and Thomas—concluded that whether a municipal ordinance is " 'designed to serve a substantial government interest and does not unreasonably limit alternative avenues of communication' ... requires [courts to] ... ask[ ] whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Id.* at 1737. According to the plurality, this requirement is met if the evidence upon which the municipality enacted the regulation " 'is reasonably believed to be relevant' for demonstrating a connection between [secondary effects producing] speech and a substantial, independent government interest." *Id.* at 1736. The plurality stressed that once a municipality presents a rational basis for addressing the secondary effects of adult entertainment through evidence that "fairly support[s] the municipality's rationale for its ordinance," *id.,* the plaintiff challenging the constitutionality of the ordinance must "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings." *Id.* If a plaintiff fails to cast doubt on the municipality's rationale, the inquiry is over and "the municipality meets the standard set forth in *Renton.*" *Id.* If, however, a plaintiff succeeds "in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* Because the plurality concluded that the city, for purposes of summary judgment, had complied with the evidentiary requirement outlined in *Renton, id.,* it remanded the case for further proceedings. *Id.* at 1738.

Justice Scalia, in addition to joining the plurality opinion, wrote separately to emphasize that while the plurality's opinion "represents a correct application of our jurisprudence concerning the regulation of the 'secondary effects' of pornographic speech .... our First Amendment traditions make 'secondary effects' analysis

quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex." *Alameda Books,* 122 S.Ct. at 1738–39.

Justice Kennedy concurred in the judgment of the Court, but writing separately because he concluded, *inter alia,* that "the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur." *Id.* at 1739. He began, however, by expressing his agreement with the plurality that the secondary effects resulting from "high concentrations of adult businesses can damage the value and integrity of a neighborhood," *id.,* stressing "[t]he damage is measurable; it is all too real." *Id.* He also agreed with the plurality that "[t]he law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech," *id.,* emphasizing that "[a] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *Id.* (quoting *American Mini Theatres,* 427 U.S. at 71, 96 S.Ct. 2440). In Justice Kennedy's opinion, if a municipality ameliorates the secondary effects of adult entertainment through "the traditional exercise of its zoning power, and at the same time leaves the quantity and accessibility of the speech ***721** substantially undiminished, there is no First Amendment objection .... even if the measure identifies the problem outside by reference to the speech inside—that is, even if the measure is in that sense content based." [26] *Id.* Like the plurality, he concluded that "[a] zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it." *Id.* at 1740. He also expressed his belief that zoning regulations "do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use ... [and that] [t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional." *Id.* at 1741.

26 The plurality in *Alameda Books* characterized the second step of the *Renton* framework as follows: "[w]e next consider[ ] whether the ordinance [is] content neutral or content based." 122 S.Ct. at 1734. In his concurrence, Justice Kennedy joined the four dissenters, *id.* at 1744–45, in jettisoning the "content neutral" label, noting that the "fiction" of adult entertainment zoning ordinances being "content neutral ... is perhaps more confusing than helpful .... These ordinances are content based and we should call them so." *Id.* at 1741. In reaching this conclusion, Justice Kennedy emphasized that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Id.* Justice Kennedy concluded, however, that an adult entertainment zoning ordinance is not subject to strict scrutiny simply because it "identifies the problem outside by reference to the speech inside," *id.* at 1740, and, as such, "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.* at 1741. Thus, while the label has changed, the substance of *Renton*'s second step remains the same.

Based on the foregoing principles, Justice Kennedy believes that two questions must be asked by a court seeking to determine whether a zoning ordinance regulating adult entertainment is designed to meet a substantial government interest: (1) "what proposition does a city need to advance in order to sustain a secondary-effects ordinance?", *Alameda Books,* 122 S.Ct at 1741; and (2) "how much evidence is required to support the proposition?" *Id.* According to Justice Kennedy, the plurality skipped the second question, giving the correct answer, but neglected to give sufficient "attention" to the first question, *id.,* i.e., "the claim a city must make to justify a content-based ordinance." *Id.* at 1742. In his view, "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact," *id.,* and "[t]he rationale of the ordinance must be that it will suppress secondary effects ... not ... speech." *Id.* Justice Kennedy's primary area of disagreement with the plurality's analysis was that, in his opinion, it failed to "address how speech [would] fare under the city's ordinance." *Id.*

The differences between Justice Kennedy's concurrence and the plurality's opinion are, however, quite subtle. Justice Kennedy's position is not that a municipality must *prove* the efficacy of its rationale for reducing secondary effects *prior to* implementation, as Justice Souter and the other dissenters would require, *see generally Alameda Books,* 122 S.Ct. at 1744–51; but that a municipality's *rationale* must be *premised* on the theory that it "*may* reduce the costs of secondary effects without substantially reducing speech." *Id.* at 1742 (emphasis

added). Significantly, while Justice Kennedy believed that the plurality did not adequately address this aspect of the city's rationale, he agreed ***722** with the plurality's overall conclusion that a municipality's initial burden of demonstrating a substantial government interest in regulating the adverse secondary effects associated with adult entertainment is slight, noting:

> As to this, we have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required .... As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; *and if its inferences appear reasonable,* we should not say there is no basis for its conclusion.

Id. at 1742–43 (emphasis added).

The dissenting opinion of Justice Souter, joined by Justices Stevens and Ginsburg in full and by Justice Breyer with respect to part II, asserted that the Court should have struck down the ordinance. *Alameda Books,* 122 S.Ct. at 1747 (Souter, J., dissenting).

Because Justice Kennedy's concurrence is the narrowest opinion joining the judgment of the Court in *Alameda Books,* we conclude that it is the controlling opinion. *Marks,* 430 U.S. at 193, 97 S.Ct. 990.

D. Does Section 5(b)'s prohibition of alcohol on the premises of Sexually Oriented Businesses violate the First Amendment?

[4] Based on the road map provided by the Supreme Court in *44 Liquormart,* as described *supra,* we conclude that a liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments is constitutional if: (1) the State is regulating pursuant to a legitimate governmental power, *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673; (2) the regulation does not completely prohibit adult entertainment, *Renton,* 475 U.S. at 46, 106 S.Ct. 925; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments, *Pap's A.M.,* 529 U.S. at 289–91, 120 S.Ct. 1382;[27] and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available, *see Alameda Books,* 122 S.Ct. at 1734 (plurality opinion); *id.* at 1739–44 (Kennedy, J. concurring); *or,* alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. *Pap's A.M.,* 529 U.S. at 296, 301 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

27 This prong is, for all practical purposes, identical to the *Alameda Books* plurality's inquiry into whether the zoning ordinance "was content neutral or content based." 122 S.Ct. at 1733–34. Although a majority of the Justices no longer employ the content neutral label when evaluating the constitutionality of a "secondary effects" ordinance, the ultimate inquiry remains the same. *See supra* n. 26.

[5] Applying the foregoing analytical framework here, we conclude that Section 5(b) does not violate the First Amendment. To begin with, the Village's regulation of alcohol sales and consumption in "inappropriate locations" is clearly within its general police powers. *44 Liquormart,* 517 U.S. at 515, 116 S.Ct. 1495; *LaRue,* 409 U.S. at 114, 93 S.Ct. 390. As such, the Village enacted Section 5(b) "within the constitutional power of the Government." *Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382 (holding that a municipality's efforts to protect the public's health and safety through its ***723** general police powers satisfies this requirement); *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673 (same).

[6] The next two prongs of our test concern the level of constitutional scrutiny that must be applied to Section 5(b). The level of First Amendment scrutiny a court uses to determine whether a regulation of adult entertainment is constitutional depends on the purpose for which the regulation was adopted. If the regulation was enacted to restrict certain viewpoints or modes of expression, it is presumptively invalid and subject to strict scrutiny. *Texas v. Johnson,* 491 U.S. 397, 403, 411–12, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Renton,* 475 U.S. at 46–47, 106 S.Ct. 925. If, on the other hand, the regulation was adopted for a

purpose unrelated to the suppression of expression—e.g., to regulate nonexpressive conduct or the time, place, and manner of expressive conduct—a court must apply a less demanding intermediate scrutiny. 491 U.S. at 406–07, 109 S.Ct. 2533; *Pap's A.M.,* 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

[7] **[8]** The Supreme Court has held that regulations of adult entertainment receive intermediate scrutiny if they are designed not to suppress the "content" of erotic expression, but rather to address the negative secondary effects caused by such expression. *Alameda Books,* 122 S.Ct. at 1733–34 (plurality opinion), *id.* at 1741 (Kennedy, J., concurring); *Renton,* 475 U.S. at 48, 106 S.Ct. 925. Here, Section 5(b), like the liquor regulations at issue in *LaRue,* 409 U.S. at 118, 93 S.Ct. 390, does not completely prohibit Ben's Bar's dancers from conveying an erotic message; it merely prohibits alcohol from being sold or consumed on the premises of adult entertainment establishments. *See, e.g., Wise Enterprises, Inc. v. Unified Gov't of Athens–Clarke County, Georgia,* 217 F.3d 1360, 1365 (11th Cir.2000) (holding that "[t]he ordinance does not prohibit all nude dancing, but only restricts nude dancing in those locations where the unwanted secondary effects arise"); *Sammy's of Mobile, Ltd. v. City of Mobile,* 140 F.3d 993, 998 (11th Cir.1998) (holding that ordinance prohibiting alcohol on the premises of adult entertainment establishments did not ban nude dancing, but merely restricted "the place or manner of nude dancing without regulating any particular message it might convey"). Moreover, it is clear that the "predominant concerns" motivating the Village's enactment of Section 5(b) " 'were with the secondary effects of adult [speech], and not with the content of adult [speech].' " *Alameda Books,* 122 S.Ct. at 1737 (plurality opinion) (quoting *Renton,* 475 U.S. at 47, 106 S.Ct. 925); *id.* at 1739–41 (Kennedy, J., concurring). [28] The Village enacted the Ordinance because it believed "there is convincing documented evidence that Sexually Oriented Businesses have a deleterious effect on both existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values." Specifically, the Village concluded that "the consumption of alcoholic beverages on the premises of a Sexually Oriented Business exacerbates the deleterious secondary effects of such businesses on the community." Additionally, in passing the Ordinance, the Village emphasized (in the text of the Ordinance) that its intention was not ***724** "to suppress any speech activities protected by the First Amendment, but to enact a[n] ... ordinance which addresses the secondary effects of Sexually Oriented Businesses," and that it was not attempting to "restrict or deny access by adults to sexually oriented-materials protected by the First Amendment ...."

28 Federal courts evaluating the "predominant concerns" behind the enactment of a statute, ordinance, regulation, or the like, may do so by examining a wide variety of materials including, but not limited to, the text of the regulation or ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware. *Ranch House,* 238 F.3d at 1280.

[9] For all of the foregoing reasons, Section 5(b) is properly analyzed as a content-based time, place, and manner restriction, or as a content-based regulation of expressive conduct, and therefore is subject only to intermediate scrutiny. *Alameda Books,* 122 S.Ct. at 1733–36 (plurality opinion), *id.* at 1741 (Kennedy, J. concurring); *Pap's A.M.,* 529 U.S. at 294–96, 120 S.Ct. 1382 (plurality opinion), *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part). [29] *See also Artistic Entm't, Inc. v. City of Warner Robins,* 223 F.3d 1306, 1308–09 (11th Cir.2000) (holding that "a prohibition on the sale of alcohol at adult entertainment venues ... [is] content-neutral and subject to the *O'Brien* test"); *Wise Enterprises,* 217 F.3d at 1364 (holding that "[i]t is clear from these [legislative] statements the County's ordinance is aimed at the secondary effects of nude dancing combined with the consumption of alcoholic beverages, not at the message conveyed by nude dancing .... [T]he district court was [therefore] correct in [applying] ... intermediate scrutiny ...."). Regulations that prohibit nude dancing where alcohol is served or consumed are independent of expressive or communicative elements of conduct, and therefore are treated as if they were content-neutral. *Wise Enterprises,* 217 F.3d at 1363.

29 *Compare G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark, Missouri,* 83 S.W.3d 98, 103 (2002) (holding that because the city presented no evidence that its purpose in enacting an ordinance restricting nudity in establishments where alcoholic beverages are sold "was to prevent the negative secondary effects associated with erotic dancing establishments,

and, thus, that the ordinance was unrelated to the suppression of expression, the City had the heavy burden of justifying the ordinance under the strict scrutiny standard").

[10] This brings us to the heart of our analysis: whether Section 5(b) is designed to serve a substantial government interest, narrowly tailored, and does not unreasonably limit alternative avenues of communication, *or,* alternatively, furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. As previously noted, it is not entirely clear whether an adult entertainment liquor regulation is to be treated as a time, place, and manner regulation, or instead as a regulation of expressive conduct under *O'Brien. See, e.g., LLEH, Inc.,* 289 F.3d at 365. But in either case, we are required to ask "whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Alameda Books,* 122 S.Ct. at 1737 (plurality opinion). At this stage, courts must "examine evidence concerning regulated speech and secondary effects." *Id.* In conducting this inquiry, we are required, as previously noted, to answer two questions: (1) "what proposition does a city need to advance in order to sustain a secondary-effects ordinance?"; and (2) "how much evidence is required to support the proposition?" *Id.* at 1741 (Kennedy, J. concurring). [30]

30 As noted *supra,* under *Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), Justice Kennedy's concurrence is the controlling opinion, as the most narrow opinion joining the judgment of the Court.

***725** **[11]** At the outset, we note that in order to justify a content-based time, place, and manner restriction or a content-based regulation of expressive conduct, a municipality "must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects [i.e., is designed to serve, or furthers, a substantial or important governmental interest], while leaving the quantity and accessibility of speech substantially intact [i.e., that the regulation is narrowly tailored and does not unreasonably limit alternative avenues of communication, or, alternatively, that the restriction on expressive conduct is no greater than is essential in furtherance of that interest]." [31] *Alameda Books,* 122 S.Ct. at 1741 (Kennedy, J. concurring). The regulation may identify the speech based on content, "but only as a shorthand for identifying the secondary effects outside." *Id.* A municipality "may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* Thus, the rationale behind the enactment of Section 5(b) must be that it will suppress secondary effects, not speech. *Id.*

31 In this case, it is unnecessary to conclusively resolve which of these two standards is applicable. As explained *infra,* Section 5(b)' s alcohol prohibition is, as a practical matter, the least restrictive means of furthering the Village's interest in combating the secondary effects resulting from the combination of adult entertainment and alcohol consumption, and therefore satisfies either standard.

The Village's rationale in support of Section 5(b) is that the liquor prohibition will significantly reduce the secondary effects that naturally result from combining adult entertainment with the consumption of alcoholic beverages without substantially diminishing the availability of adult entertainment, in this case nude and semi-nude dancing. In enacting the Ordinance, the Village Board relied on numerous judicial decisions, studies from 11 different cities, and "findings reported in the Regulation of Adult Entertainment Establishments of St. Croix, Wisconsin; and the Report of the Attorney General's Working Group of Sexually Oriented Businesses (June 6, 1989, State of Minnesota)," to support its conclusion that adult entertainment produces adverse secondary effects.

Ben's Bar argues that the Village may not rely on prior judicial decisions or the experiences of other municipalities, but must instead conduct its own studies, at the local level, to determine whether adverse secondary effects result when liquor is served on the premises of adult entertainment establishments. This view, however, has been expressly (and repeatedly) rejected by the Supreme Court. *Alameda Books,* 122 S.Ct. at 1743 (Kennedy, J. concurring) (holding that " '[t]he First Amendment does not require a city, before enacting ... an [adult entertainment secondary effects] ordinance to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.' ") (quoting *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925);

Barnes, 501 U.S. at 584, 111 S.Ct. 2456 (Souter, J. concurring) (same).

Ben's Bar also contends that the Village failed to meet its burden of demonstrating the constitutionality of Section 5(b) because "the Village's evidentiary record did not include any written reports relating specifically to the effects of serving alcohol in establishments offering nude and semi-nude dancing." In *LaRue,* however, the Supreme Court explicitly held that a State's conclusion that "certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational ***726** one." 409 U.S. at 118, 93 S.Ct. 390. Because the adult entertainment at issue in this case is of the same character as that at issue in *LaRue,* it was entirely reasonable for the Village to conclude that barroom nude dancing was likely to produce adverse secondary effects at the local level, even in the absence of specific studies on the matter. *Alameda Books,* 122 S.Ct. at 1736–37 (plurality opinion) (adopting view of plurality in *Pap's A.M.* as to the evidentiary requirement for adult entertainment cases), *id.* at 1741 (Kennedy, J., concurring) (agreeing with the plurality on this point, as a fifth vote); *Pap's A.M.,* 529 U.S. at 296–97, 120 S.Ct. 1382 (plurality opinion) (same); *Giovani,* 303 F.3d at 516 (same). In fact, the Supreme Court has gone so far as to assert that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Bellanca,* 452 U.S. at 718, 101 S.Ct. 2599. *See also Blue Canary,* 251 F.3d at 1124 (noting that "[l]iquor and sex are an explosive combination"); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. of California,* 99 Cal.App.4th 880, 121 Cal.Rptr.2d 729, 737 (2002) (same). For these reasons, we conclude that the evidentiary record fairly supports the Village's proffered rationale for Section 5(b), and that Ben's Bar has failed "to cast direct doubt on this rationale either by demonstrating the [Village's] evidence does not support its rationale or by furnishing evidence that disputes the [Village's] factual findings ...." *Alameda Books,* 122 S.Ct. at 1736.

Ben's Bar also contends that Section 5(b) is not narrowly tailored because the Village offered no evidence that "the incidental restrictions placed on Ben's [Bar], over and above the pasties and G-strings requirement, ameliorate any purported negative secondary effects." This argument, however, is problematic for several reasons, two of which we will address briefly.

[12] First, as previously noted, Section 5(b) does not impose any restrictions whatsoever on a dancer's ability to convey an erotic message. Instead, the regulation prohibits Sexually Oriented Businesses like Ben's Bar from serving alcoholic beverages to its patrons during a dancer's performance. This is not a restriction on erotic expression, but a prohibition of nonexpressive conduct (i.e., serving and consuming alcohol) during the presentation of expressive conduct. The First Amendment does not entitle Ben's Bar, its dancers, or its patrons, to have alcohol available during a "presentation" of nude or semi-nude dancing. *See Gary v. City of Warner Robins, Georgia,* 311 F.3d 1334, 1340 (11th Cir.2002) (holding that ordinance prohibiting persons under the age of 21 from entering or working at "any establishment ... which sells alcohol by the drink for consumption on premises" did not violate an underage nude dancer's First Amendment right to free expression because she "remains free to observe and engage in nude dancing, but she simply cannot do so ... in establishments that primarily derive their sales from alcoholic beverages consumed on the premises"); *Sammy's of Mobile,* 140 F.3d at 999 (holding that while nude dancing is entitled to a degree of protection under the Supreme Court's First Amendment jurisprudence, "we are unaware of any constitutional right to drink while watching nude dancing"); *Dept. of Alcoholic Beverage Control,* 99 Cal.App.4th at 895, 121 Cal.Rptr.2d 729 (noting that "[t]he State ... has not prohibited dancers from performing with the utmost level of erotic expression. They are simply forbidden to do so in establishments which serve alcohol, and the Constitution is thereby not offended"). What the First Amendment does require is that establishments like Ben's Bar be given "a ***727** 'reasonable opportunity' to disseminate the speech at issue." *North Ave. Novelties, Inc. v. City of Chicago,* 88 F.3d 441, 445 (7th Cir.1996). A "reasonable opportunity," however, does not include a concern for economic considerations. *Renton,* 475 U.S. at 54, 106 S.Ct. 925. [32]

32 In an affidavit filed with the district court, Barry Breault, part-owner of Ben's Bar, stated that:

> The bulk of Ben's Bar's revenues are derived from beverage sales and associated food sales. Revenues from adult entertainment ... account for only about one-third of Ben's revenues. *Ben's Bar cannot operate at a profit without the revenue from the sale of alcoholic beverages, and the business such sales bring in.*

(Emphasis added.)

Second, Section 5(b)'s alcohol prohibition, like the one in *LaRue,* is limited to adult entertainment establishments, and does not apply to:

> [T]heaters, performing arts centers, civic centers, and dinner theaters where live dance, ballet, music, and dramatic performances of serious artistic merit are offered on a regular basis; and in which the predominant business or attraction is not the offering of entertainment which is intended for the sexual interests or titillation of customers; and where the establishment is not distinguished by an emphasis on or the advertising or promotion of nude or semi-nude performances. [33]

33 This section of the Ordinance also emphasizes that "[w]hile expressive live nudity may occur within these establishments [those noted in section (6)], this ordinance seeks only to minimize and prevent the secondary effects of Sexually Oriented Businesses on the community. Negative secondary effects have not been associated with these establishments."

Ordinance A–472(6). *Compare Giovani,* 303 F.3d at 515 (noting that lack of evidentiary support for adult entertainment liquor regulations "might not pose a problem if the challenged restrictions applied only to bars and clubs that present nude or topless dancing").

Finally, we note that Section 5(b)'s liquor prohibition is no greater than is essential to further the Village's substantial interest in combating the secondary effects resulting from the combination of nude and semi-nude dancing and alcohol consumption because, as a practical matter, a complete ban of alcohol on the premises of adult entertainment establishments is the *only* way the Village can advance that interest. As the Supreme Court recognized in *LaRue,*

> Nothing in the record before us or in common experience compels the conclusion that either self-discipline on the part of the customer or self-regulation on the part of the bartender could have been relied upon by the Department to secure compliance with ... [the] regulation[s]. The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one ....

409 U.S. at 116, 93 S.Ct. 390. *See also Wise Enterprises, Inc. v. Unified Government of Athens–Clarke County, Georgia,* 217 F.3d 1360, 1364–65 (11th Cir.2000) (holding that ordinance prohibiting alcohol on the premises of adult entertainment establishments satisfied *O'Brien*'s requirement that restriction on First Amendment rights be no greater than necessary to the furtherance of the government's interest because "[t]here is no less restrictive alternative"). Indeed, unlike the zoning ordinance at issue in *Alameda Books,* there is no need to speculate as to whether Section 5(b) will achieve its stated purpose. Prohibiting alcohol on the premises of adult entertainment establishments will unquestionably reduce the enhanced secondary ***728** effects resulting from the explosive combination of alcohol consumption and nude or semi-nude dancing.

Given the foregoing, we conclude that Section 5(b) does not violate the First Amendment. The regulation has no impact whatsoever on the tavern's ability to offer nude or semi-nude dancing to its patrons; it seeks to regulate alcohol and nude or semi-nude dancing without prohibiting either. The citizens of the Village of Somerset may still buy a drink and watch nude or semi-nude dancing. They are not, however, constitutionally entitled to do both at the same time and in the same place. *Gary,* 311 F.3d at 1338 (holding that there is no generalized right to associate with other adults in alcohol-purveying establishments with other adults). The deprivation of alcohol does not prevent the observer from witnessing nude or semi-nude dancing, or the dancer from conveying an erotic message. Perhaps a sober patron will find the performance less tantalizing, and the dancer might therefore feel less appreciated (not necessarily from the reduction in ogling and cat calls, but certainly from any decrease in the amount of tips she might otherwise receive). And we do not doubt Ben's Bar's assertion that its profit margin will suffer if it is unable to serve alcohol to its patrons. But the First Amendment rights of each are not offended when the show goes on without liquor.

III.

For the reasons expressed in this opinion, Section 5(b)'s prohibition of alcohol on the premises of adult entertainment establishments does not violate the First Amendment. We, therefore, affirm the district court's decision granting the Village's motion for summary judgment.

All Citations

316 F.3d 702

26 F.Supp.2d 1128
United States District Court,
W.D. Wisconsin.

Joseph SCHULTZ, d/b/a Island Bar, and Tonya Norwood, Plaintiffs,
v.
THE CITY OF CUMBERLAND, Defendant.

No. 98–C–0107–C.
|
Nov. 5, 1998.

Nude dancer and owner of bar at which she performed brought action for declaratory and injunctive relief, challenging a city ordinance establishing a comprehensive licensing and regulatory scheme for "sexually oriented businesses." On plaintiffs' motions to strike affidavits and for summary judgment, the District Court, Crabb, J., held that: (1) city would be allowed to supplement enumerated findings in a ordinance with evidence in form of affidavits from members of subcommittee which drafted ordinance; (2) prohibition against depicting specified sexual acts and appearing in a state of nudity satisfied secondary effects test as to bar, but was facially overbroad; (3) ordinance section regulating hours of operation did not violate First Amendment or equal protection; (4) three of nine challenged licensing provisions were unconstitutional prior restraints; and (5) unconstitutional provisions were not severable from remainder of ordinance.

Motion to strike denied, motion for summary judgment granted.

West Headnotes (41)

[1] **Constitutional Law**
Zoning and land use

Local government may not force adult movie theaters to be located in a particular area of the city on the ground that the government finds the content of films displayed by such theaters distasteful, as that would be viewpoint discrimination prohibited by the First Amendment, but the same government could enact a similar regulation to control urban blight and related problems associated with adult theaters. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] **Constitutional Law**
Nudity in general

Constitutional Law
Public nudity or indecency

Constitutional Law
Nude dancing in general

Public nudity by itself is not protected speech, but nonobscene nude dancing does have some status under the First Amendment, because it is expressive conduct that conveys an erotic message. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[3] **Constitutional Law**
Conduct, protection of

Constitutional Law
Flag desecration or disrespect

Governments may ban or restrict nonverbal expressive activity because of the action it entails, but not because of the ideas it expresses; thus, burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] **Constitutional Law**
Time, Place, or Manner Restrictions

Constitutional Law
Governmental disagreement with message conveyed

For purposes of First Amendment analysis, laws that regulate protected speech fall into one of two categories: content-based or content-neutral; "content-based law"

regulates speech or conduct on the basis of hostility or favoritism towards the underlying message expressed. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[5] **Courts**
Number of judges concurring in opinion, and opinion by divided court

When courts are confronted with fractured Supreme Court opinions, the holding of the Supreme Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds; courts should attempt to find the common denominator upon which a majority of justices agree, but where no such common denominator exists, courts are not required to create one.

Cases that cite this headnote

[6] **Courts**
Number of judges concurring in opinion, and opinion by divided court

In cases in which at least five justices of the Supreme Court do not agree implicitly on a single rationale, no particular standard constitutes the law of the land, because no single approach can be said to have the support of a majority of the court.

Cases that cite this headnote

[7] **Constitutional Law**
Content-Neutral Regulations or Restrictions
Constitutional Law
Narrow tailoring requirement; relationship to governmental interest
Constitutional Law
Existence of other channels of expression

Time, place or manner restriction designed to combat the undesirable secondary effects associated with certain businesses is reviewed under the First Amendment standards applicable to "content-neutral" laws; such a restriction does not amount to illegal viewpoint discrimination if it is (1) justified without reference to the content of the regulated speech; (2) narrowly tailored to serve a substantial governmental interest; and (3) preserves ample alternative means of communication. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] **Constitutional Law**
Content neutrality
Municipal Corporations
Public morals

Ordinance establishing a licensing and regulatory scheme for sexually oriented businesses was content-neutral for purposes of First Amendment analysis, despite claim that, because it targeted only sexually oriented businesses, it discriminated on its face against a particular viewpoint, namely, a sexual or erotic viewpoint; language of ordinance revealed that it was justified by reference to certain harmful secondary effects associated with sexually oriented businesses, not by reference to the erotic content of the message expressed by such businesses. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Content-Neutral Regulations or Restrictions

Operative consideration in determining whether law is "content-neutral," for purposes of First Amendment analysis, is whether the law is justified without reference to the content of regulated speech, not whether it focuses on some businesses but not on others. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**
Motive

Court can not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.

Cases that cite this headnote

[11] **Constitutional Law**
Content-Neutral Regulations or Restrictions

For purposes of First Amendment analysis, court does not ask why municipality actually enacted challenged ordinance, but whether it has offered evidence that it could have enacted it for a content-neutral reason; when answering this question, the court is guided primarily by the text of the law in question. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[12] **Constitutional Law**
First Amendment in General

To justify a regulation challenged on First Amendment grounds, a city government need not conduct its own studies, but may rely upon the experiences of other cities, as well as studies conducted by them, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem addressed by the regulation; this evidence may be nothing more than a reference to detailed findings summarized in a legal opinion involving a similar regulation. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] **Constitutional Law**
First Amendment in General

To show that substantial governmental interests are served by a regulation challenged on First Amendment grounds, a government is not required to establish conclusively that the regulated activity actually causes the secondary effects, only that it reasonably believes that the effects are correlated with the existence of such establishments. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[14] **Constitutional Law**
Narrowing, requirement of

Regulation is narrowly tailored, for purposes of First Amendment analysis, so long as the means chosen are not substantially broader than necessary to achieve the government's interest; put another way, the means chosen are narrowly tailored if a less restrictive alternative would promote the governmental interest less effectively. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[15] **Municipal Corporations**
Construction and operation

City would be allowed to supplement the enumerated findings in an ordinance challenged on First Amendment grounds with evidence that provided a more detailed explanation of the basis of those findings, and thus, affidavits submitted by various individuals who served on the subcommittee that drafted the ordinance would not be stricken; supplemental evidence contained in the affidavits did not contradict any of the ordinance's existing provisions and did not create new findings or justifications. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[16] **Statutes**
Motives, Opinions, and Statements of Legislators

Wisconsin rule that a court may not rely upon the testimony of members of a legislative body for the purpose of determining what that body intended when it enacted a particular piece of legislation is inapplicable in a case governed by federal law.

Cases that cite this headnote

[17] **Constitutional Law**

Nude or semi-nude dancing

Intoxicating Liquors

Licensing and regulation

Ordinance section prohibiting employees of sexually oriented businesses from appearing totally nude, and prohibiting the depiction of specified sexual activities in such businesses, was a valid time, place and manner restriction, for purposes of First Amendment analysis, as applied to a bar featuring nude dancing; there were legislative findings regarding crime and health concerns associated with such businesses, and objective lawmaker could have concluded that a ban on total nudity in adult cabarets was likely to reduce illicit activity cataloged in the ordinance. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[18] **Constitutional Law**

Nude or semi-nude dancing

Intoxicating Liquors

Licensing and regulation

Findings as to the incidence of crime associated with a bar featuring nude dancing did not have to be measured against law enforcement problems associated with nonsexually oriented businesses in city for such findings to support ordinance regulating sexually oriented businesses, challenged on First Amendment grounds. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[19] **Constitutional Law**

First Amendment in General

Overbreadth doctrine allows a person who has engaged in conduct not protected by the First Amendment to challenge the constitutionality of a law that might be used against individuals who do engage in protected conduct, but such persons may do so only when the threat presented by a statute is real and substantial, and then only as a last resort. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[20] **Constitutional Law**

Nude or semi-nude dancing

Constitutional Law

Secondary effects

Public Amusement and Entertainment

Dancing and other performances

Ordinance section prohibiting employees of sexually oriented businesses from appearing totally nude, and prohibiting the depiction of specified sexual activities in such businesses, was unconstitutionally overbroad under First Amendment analysis, as it made no exceptions for live performances with serious artistic, social, and political value; those and other similar forms of unclothed entertainment were not correlated with the type of harmful secondary effects identified by city, but could conceivably fall within the sweep of the ordinance. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[21] **Constitutional Law**

Secondary effects

Municipal Corporations

Public safety and welfare

Ordinance section permitting sexually oriented businesses to be open only from 10:00 a.m. to midnight, Monday through Saturday, satisfied the secondary effects test for validity under First Amendment analysis; legislators could conclude that restricting the number of hours of operation would promote public safety by permitting local law enforcement to focus its limited resources on matters unrelated to the illicit activity associated with such businesses, some of which was more likely to occur during the hours between midnight and dawn. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[22] **Constitutional Law**

Narrow tailoring

Regulation challenged on First Amendment grounds will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative; the relevant inquiry is whether the provision is substantially broader than necessary, not whether the statute is need of fine-tuning. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[23] **Constitutional Law**

Other particular occupations and businesses

Municipal Corporations

Public safety and welfare

Ordinance section permitting sexually oriented businesses to be open only from 10:00 a.m. to midnight, Monday through Saturday, satisfied the rational basis test for validity under equal protection analysis; city had a legitimate interest in reducing illicit activity associated with sexually oriented businesses, and ordinance forced those businesses to remain closed when this activity was most likely to happen and when law enforcement was least capable of responding to it. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[24] **Constitutional Law**

Prior restraints

In general, a law that requires an individual to obtain a license before engaging in some form of protected speech is a "prior restraint," against which a facial First Amendment challenge may be brought if the law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[25] **Constitutional Law**

Presumption of invalidity

Prior restraints bear a heavy presumption against constitutionality because a free society prefers to punish the few who abuse rights of speech after they break the law than throttle them and all others beforehand. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[26] **Constitutional Law**

Prior restraints

To avoid running afoul of the First Amendment, a prior restraint must not place unbridled discretion in the hands of a government official or agency, and must place some limits on the time within which a government decisionmaker must issue or deny the license. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[27] **Constitutional Law**

Licenses

Sole proprietor of bar featuring nude dancing lacked standing to assert First Amendment challenge to section of ordinance imposing licensing requirements on corporate entity or partnership applying for a license to operate a sexually oriented businesses. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[28] **Constitutional Law**

Disclosure and recordkeeping requirements

Municipal Corporations

Permits

Licensing requirement of ordinance regulating sexually oriented businesses, mandating applicants to disclose specified prior criminal convictions, was not an unconstitutional prior restraint on free speech; there was evidence from which a legislator could conclude that refusing to

license a sexually oriented business run by an individual with a prior conviction for a sex-related crime would reduce the amount of illicit activity correlated with such businesses, ordinance did not require disclosure of older offenses, and it drew a distinction between misdemeanor and felony offenses. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[29] **Constitutional Law**
Licenses and permits in general
Municipal Corporations
Permits

Licensing requirement of ordinance regulating sexually oriented businesses, mandating applicants to disclose past licenses and whether past licenses had been denied, suspended or revoked, was not an unconstitutional prior restraint on free speech; requirement was narrowly tailored to require disclosure only of licenses to operate sexually oriented businesses and limited disqualification only to those applicants who had had a license denied or revoked within the past year. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[30] **Constitutional Law**
Licenses and permits in general
Municipal Corporations
Permits

Licensing requirement of ordinance regulating sexually oriented businesses, mandating applicants for an operator's license to disclose any aliases and provide city with a passport-size photograph, was not an unconstitutional prior restraint on free speech; without photographs and aliases, city would not be able to conduct background checks necessary to the purpose of deterring crime associated with sexually oriented businesses. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[31] **Constitutional Law**
Licenses and permits in general
Municipal Corporations
Permits

Licensing requirement of city ordinance regulating sexually oriented businesses, mandating approval of the premises by health department, fire department, and building official, was an unconstitutional prior restraint on free speech; city presented no evidence and cited no opinion containing findings showing that sexually oriented businesses tended to present a greater fire hazard than other businesses or were not as sound structurally. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[32] **Constitutional Law**
Licenses and permits in general
Municipal Corporations
Permits
Public Amusement and Entertainment
Sexually Oriented Entertainment

Licensing requirement of city ordinance regulating sexually oriented businesses, disqualifying applicants who were overdue in payment to city of taxes, fees, fines, or penalties, was an unconstitutional prior restraint on free speech; city presented no findings showing that the owners of adult cabarets are more likely than other business owners not to pay their taxes, and adduced no evidence establishing a correlation between tax delinquency and the undesirable secondary effects associated with sexually oriented businesses. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[33] **Constitutional Law**
Licenses and permits in general
Municipal Corporations
Permits

Licensing requirement of ordinance regulating sexually oriented businesses, prohibiting such businesses from employing anyone who did not hold a valid employee license, was not an unconstitutional prior restraint on free speech; employee licensing would help insure that individuals with a demonstrated propensity to engage in the type of illicit activity associated with sexually oriented businesses worked elsewhere. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[34] **Constitutional Law**
Disclosure and recordkeeping requirements
Municipal Corporations
Permits

Licensing requirement of city ordinance regulating sexually oriented businesses, mandating disclosure of information regarding employees, including their home telephone numbers and their fingerprints, was an unconstitutional prior restraint on free speech; city failed to show that the employee disclosure provisions were narrowly tailored to serve crime prevention, absent adequate safeguards to insure the confidentiality of information disclosed. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[35] **Constitutional Law**
Narrow tailoring

Regulation is narrowly tailored, for purposes of First Amendment analysis, so long as the interest it seeks to promote would be achieved less effectively without the regulation; however, this does not mean that a regulation may burden substantially more speech than is necessary to further the government's legitimate interest. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[36] **Constitutional Law**
Licenses and permits in general
Municipal Corporations
Permits

Licensing fees imposed by ordinance regulating sexually oriented businesses, a $100 nonrefundable application fee, an additional $400 licensing fee, and a $25 nonrefundable business employee licensing application fee, were reasonably related to the costs of administering the licensing system and did not constitute a tax prohibited by the First Amendment; in establishing the licensing fees, city considered costs associated with processing and investigating an application, ongoing records maintenance, licensing fees imposed on other establishments, and the estimated cost of enforcing the ordinance. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[37] **Constitutional Law**
Particular Issues and Applications

Government may not levy a tax on the exercise of First Amendment rights, but may impose a fee that is incidental to a valid licensing scheme; fee must be a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[38] **Constitutional Law**
Particular Issues and Applications

If a government seeks to impose a fee for the operation of a business protected by the First Amendment, it has the burden of demonstrating that the fees are reasonably related to costs of administering the licensing system. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[39] **Municipal Corporations**
Effect of partial invalidity

Unconstitutional provisions in city ordinance regulating "sexually oriented businesses," specifically a facially overbroad prohibition against depicting specified sexual acts and appearing in a state of nudity and three licensing provisions which were prior restraints on speech, could not be severed from the ordinance as a whole; without a workable definition of "sexually oriented business," city had no way of identifying those establishments that it could legitimately regulate and license. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[40] Statutes

Effect of Partial Invalidity;Severability

Unconstitutionally overbroad statute should be invalidated only to the extent that it reaches too far, but otherwise left intact.

Cases that cite this headnote

[41] Municipal Corporations

Effect of partial invalidity

Even in the face of a strong severability clause, courts are not authorized to completely reconstruct a local ordinance when nothing short of rewriting could save it.

1 Cases that cite this headnote

Attorneys and Law Firms

***1133** Randall D.B. Tigue, Minneapolis MN, for Plaintiffs.

Brady C. Williamson, Lafollette & Sinykin, Madison WI, for Defendant.

OPINION AND ORDER

CRABB, District Judge.

In this civil action for declaratory and injunctive relief, plaintiffs challenge a municipal ordinance enacted by defendant City of Cumberland that establishes a comprehensive licensing and regulatory scheme for all "sexually oriented businesses." Among other things, the ordinance prohibits the depiction of "specified sexual activities" in a sexually oriented business and it bars anyone from appearing in a state of nudity in such a business. Also, the ordinance limits the hours that sexually oriented businesses may operate and prohibits anyone from operating or working in such a business without a valid license. Plaintiff Joseph Schultz is the sole proprietor of the Island Bar, an establishment located in the City of Cumberland that features live dancers, including plaintiff Tonya Norwood, who perform in a state of total nudity. Plaintiffs contend that numerous aspects of the ordinance violate their right to free speech or are unconstitutionally overbroad. Plaintiffs ask the court to declare the ordinance invalid and to enjoin defendant permanently from enforcing it. Defendant maintains that the ordinance is a content-neutral time, place and manner restriction designed to further defendant's substantial interest in reducing undesirable secondary effects associated with sexually oriented businesses.

The case is before this court on plaintiffs' motion for summary judgment and plaintiffs' motion to strike certain affidavits submitted by defendant. I conclude that by prohibiting the depiction of specified sexual activities and by prohibiting anyone from appearing in a state of nudity, the ordinance is unconstitutionally overbroad. These prohibitions could be applied just as easily to the Island Bar as they could to a commercial establishment featuring mainstream motion pictures or plays of unquestioned artistic merit in which there is a naked female breast or the depiction of two individuals engaging in sexual intercourse. Despite this potential, defendant has presented no evidence suggesting that prostitution, urban blight or other harmful secondary effects are associated with non-adult cinemas and theaters. I find ***1134** also that the disclosure requirements for individuals applying for a license to work in a sexually oriented business are unconstitutional. These requirements are not narrowly tailored to serve defendant's interest in insuring that employees of sexually oriented businesses refrain from engaging in criminal activity; the ordinance does not contain adequate measures to protect the confidentiality of personal information disclosed by applicants. Finally, provisions in the ordinance that make obtaining a

license to operate a sexually oriented business contingent upon passing a building inspection and being current on all taxes are not justified by any evidence. In all other respects, the ordinance withstands scrutiny. However, because the unconstitutionally overbroad provision cannot be severed from the ordinance or rewritten by the court, the ordinance as a whole will be declared unenforceable. Plaintiffs are entitled to summary judgment. Plaintiffs' motion to strike will be denied.

On a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Oates v. Discovery Zone,* 116 F.3d 1161, 1165 (7th Cir.1997). For the purpose of deciding this motion for summary judgment, I find from the parties' proposed findings of fact that there is no genuine dispute with respect to the following material facts.

UNDISPUTED FACTS

Plaintiff Joseph Schultz is proprietor of the Island Bar, located in Cumberland, Wisconsin. Plaintiff Tonya Norwood is employed at the Island Bar as an exotic dancer. Defendant City of Cumberland is a municipal corporation organized under the laws of the state of Wisconsin.

In 1994, defendant enacted an ordinance regulating nude dancing in establishments that serve alcohol on their premises. Plaintiff Schultz challenged the ordinance unsuccessfully. On October 12, 1994, the city revoked the Island Bar's liquor license after determining that improper sexual activity had occurred on the premises. Presently, the Island Bar features the sale of non-alcoholic beverages and live nude entertainment.

In 1997, the mayor of Cumberland, Lawrence Samlaska, learned about communities that were enacting ordinances to regulate sexually oriented businesses. In May 1997, the mayor directed the city planning commission to consider zoning aspects of such ordinances and to establish a subcommittee to coordinate the process of accumulating, disseminating and analyzing data relevant for drafting such an ordinance. The subcommittee convened its first meeting on July 2, 1997; it met ten times between July 1997 and January 1998. The subcommittee delegated specific areas of research and inquiry to individual committee members.

From the outset, the subcommittee relied on a model ordinance created by the National Family Legal Foundation. According to its mission statement, the foundation is dedicated to providing legal assistance and educational resources to communities interested in combating negative secondary effects associated with sexually oriented businesses. Also, subcommittee members reviewed similar ordinances enacted by other communities in Wisconsin and Minnesota. Some of these ordinances dealt solely with zoning, others only with licensing and still others incorporated both zoning and licensing characteristics. Subcommittee member Carolyn Burns spoke with the city attorneys in these communities and, in some instances, with others familiar with the problems associated with sexually oriented businesses. Burns told the rest of the subcommittee what she had learned from these conversations and from her review of two books: *Local Regulation of Adult Businesses,* by Jules Gerard, a professor of law at Washington University; and *Protecting Communities from Sexually Oriented Businesses,* by Len Munsil, a lawyer.

Mayor Samlaska provided information to the planning commission and subcommittee. He told these bodies about undercover police surveillance that had taken place at the Island Bar and had resulted in arrests and convictions for prostitution, underage drinking, disorderly conduct and theft. Surveillance films depicted employees having intimate ***1135** physical contact and sexual relations with patrons.

Subcommittee member Jeffrey Streeter researched zoning and licensing issues. With respect to establishing an appropriate license fee, he considered estimated costs associated with processing an application and conducting background checks, ongoing records maintenance, estimated enforcement costs and license fees applicable to other types of businesses. For example, the fee for a liquor license is $500. Streeter and the subcommittee determined that a $100 application fee was necessary, in part, to cover investigation costs. On the basis of defendant's experiences with establishments licensed to sell liquor, the subcommittee determined that $400 was necessary to defray enforcement costs. The $25 fee for employee

licenses was necessary to cover administration costs, records maintenance and issuing identification cards.

Subcommittee member Richard Nerbun researched health-related findings listed in the ordinance. He did so by culling statistics from publications issued by the Centers for Disease Control. For the most part, Nerbun focused on statistics related to sexually transmitted diseases. In addition, Nerbun researched the ordinance's hours of operation provision. He considered matters related to sexual assault and molestation of children and law enforcement response time on weekends. On several occasions, the subcommittee discussed police staffing concerns and how these concerns should play into the hours of operation provision. Specifically, subcommittee members recognized that there is only one police officer on duty Sunday through Thursday. During this period, citizens must rely on the county sheriff's office for law enforcement, which can result in a longer response time.

On December 10, 1997, the subcommittee sent a draft of the ordinance to the planning commission. Following a public hearing, all seven members of the planning commission voted unanimously to recommend adoption of the ordinance by the city council. On January 6, 1998, the city council conducted a public hearing. Following review and discussion, the city council voted unanimously, with all members present, to enact the ordinance. No other licensed businesses in the City of Cumberland are subject to the licensing, inspection, disclosure and disqualification requirements that apply to sexually oriented businesses.

Plaintiff Norwood and other dancers at the Island Bar perform in a state of nudity, as defined in the ordinance. She uses a stage name to prevent customers from learning her true name or her home address. Plaintiff Norwood is afraid that a customer would be able to obtain personal information about her from licensing records kept by defendant pursuant to the ordinance. In the event that the ordinance is enforced, Norwood will not apply for a license in order to continue working for the Island Bar. Instead, she will practice her profession as an exotic dancer elsewhere.

OPINION

I. THE ORDINANCE

Defendant's ordinance regulates so-called "sexually oriented businesses" and is divided into twenty-four sections, three of which are the subject of this lawsuit: 1) the prohibition against depicting "specified sexual acts" and appearing in a "state of nudity"; 2) the hours of operation provision; and 3) various licensing requirements imposed on owners and employees of sexually oriented businesses. Key to an understanding of these provisions and the constitutionality of the ordinance are two sections containing extensive findings and definitions of important terms.

The preamble and first section of the ordinance set forth several declarations and findings. Among the declarations provided are the following:

> **WHEREAS,** sexually oriented businesses require special supervision from the public safety agencies of the City in order to protect and preserve the health, safety and welfare of the patrons of such businesses as well as the citizens of the City;
>
> **WHEREAS,** the City Council finds that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and
>
> **WHEREAS,** the concern over sexually transmitted diseases is a legitimate health ***1136** concern of the City which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens; and
>
> **WHEREAS,** licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation; and

* * * * * *

WHEREAS, the City Council has determined that location criteria alone do not adequately protect the health, safety, and general welfare of the people of this City;

* * * * * *

City of Cumberland, Wis., Municipal Code, § 12.15. In addition to these and other declarations, the ordinance

contains a number of findings based on "evidence" in "studies" from several cities. Included among such findings are several statements regarding the connection between sexually oriented businesses and the spread of crime, urban blight and sexually transmitted diseases. For example, one finding contained in the ordinance declares:

> It is desirable in the prevention of the spread of communicable diseases to obtain a limited amount of information regarding certain employees who may engaged in the conduct which this ordinance is designed to prevent or who are likely to be witnesses to such activity.

§ 1(B)(22).

Section 8(A) of the ordinance prohibits anyone in a sexually oriented business from appearing in a "state of nudity," defined as

> the showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

§ 2(15). An employee of a sexually oriented business may appear in a state of semi-nudity, provided the employee is at least ten feet from patrons and perched on a stage elevated at least two feet off the floor. § 8(B). The ordinance contains the following definition of "semi-nude":

> [T]he showing of the female breast below a horizontal line across the top of the areola at its highest point or the showing of the male or female buttocks. This definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast, exhibited by a dress, skirt, leotard, bathing suit, or other wearing apparel provided the areola is not exposed in whole or in part.

§ 2(19). In addition to prohibiting total nudity, section 8(A) also bars the depiction of "specified sexual acts," a term that encompasses "sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, masturbation, or sodomy." § 2(24).

Included among the definition of "sexual oriented businesses" are adult cabarets, theaters and motion picture theaters. § 2(21). "Adult cabaret" is defined as "nightclub, bar, restaurant, or similar commercial establishment which regularly features: (a) persons who appear in a state of nudity or semi-nude; or ... (c) films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas.' " § 2(3). The ordinance does not define "regularly feature" but states that "specified anatomical areas" include "(a) the human male genitals in a discernibly turgid state, even if completely and opaquely covered; or (b) less than completely and opaquely covered human genitals, pubic region, buttocks or a female breast below a point immediately above the top of the areola." § 2(22).

Sexually oriented businesses may operate only within certain times set by the ordinance. They must remain closed on Sundays and may operate only between 10 a.m. to 12 midnight, Monday through Saturday. These restrictions apply to all sexually oriented businesses except for adult motels. § 10.

Under the ordinance, it is illegal to operate a sexually oriented business or work in such a business without a license from defendant. § 11. These licenses are issued subject to certain disclosure, inspection and disqualification ***1137** provisions. To obtain an operator's license, an applicant must provide his or her name, age, mailing and residential addresses, aliases, a recent photograph and must divulge whether he or she has been convicted of "specified criminal activity." § 11(E). An individual applying for an employee license must provide this same information as well as his or her date and place of birth, height, weight, hair and eye color, home and business telephone numbers and fingerprints. § 11(F) and (G). If the prospective operator of a sexually oriented business is a corporate entity, as opposed to an individual, each person with an ownership interest

in the business greater than 20% must sign the license application and comply with the disclosure provisions set forth in subsection (E). § 11(D).

The ordinance establishes certain standards with which defendant must comply when investigating applications and issuing licenses. Upon receiving an employee license application, defendant must issue a temporary license to the applicant. § 12(A). Defendant must complete the licensing process within thirty days after receiving an application, whereupon defendant must issue a license unless review of the application reveals one or more of five enumerated "findings," including a determination that the applicant has been convicted of specified criminal activity. *Id.* With respect to applications for an operator's license, defendant must act within the same 30–day time frame and may deny a license if it finds, among other things, that the applicant owes overdue taxes, fees, fines or penalties, that the applicant has been convicted of specified criminal activity or that "the premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances." § 12(C). In addition, defendant not issue a license if the applicant has not paid his or her application fee, $25 for an employee license and $400 for an operator's license. § 14.

II. INTRODUCTION

[1] The constitutionality of many of the provisions from defendant's ordinance turns on whether these provisions are designed to combat secondary effects associated with nude dancing or whether they target the content of the message conveyed by such dancing. For example, a local government may not force adult movie theaters to be located in a particular area of the city because the government finds the content of films displayed by such theaters distasteful; this would be viewpoint discrimination, which is prohibited by the First Amendment. However, the same government could enact a similar regulation in order to control urban blight and related problems associated with adult theaters. *See Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). As already indicated, the constitutionally significant distinction between these approaches to regulating adult theaters is that the first ordinance is justified by reference to content while the second ordinance is justified by reference to "undesirable secondary effects of such businesses." *Id.* at 49, 106 S.Ct. 925. An analysis of defendant's ordinance must be guided by two Supreme Court opinions. *See Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *Renton,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29.

A. *Barnes and Renton*

[2] The First and Fourteenth Amendments prohibit governments from abridging "the freedom of speech." Although the term "speech," as used in the Constitution, encompasses nonverbal communication and expressive conduct, the Supreme Court has long since rejected the notion "that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). For example, public nudity by itself is not protected speech, *see Barnes,* 501 U.S. at 571, 111 S.Ct. 2456 (plurality) (little if any message conveyed by appearance of individuals at nude beach), *id.* at 573–574, 111 S.Ct. 2456 (Scalia, J., concurring) (same), *id.* at 581, 111 S.Ct. 2456 (Souter, J., concurring) (same), but non-obscene nude dancing does have some status under the First Amendment because it is expressive conduct that conveys an erotic message. *See Barnes,* at 565–566, 111 S.Ct. 2456 (plurality) (nude dancing is "expressive ***1138** conduct within the outer perimeters of the First Amendment, though we view it as only marginally so"); *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 65, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (an entertainment program may not be prohibited solely because it displays the nude human figure); *Jenkins v. Georgia,* 418 U.S. 153, 161, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974) (nudity alone does not place otherwise protected material outside mantle of First Amendment).

[3] **[4]** Governments may ban or restrict nonverbal expressive activity "because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 386, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (citations omitted). In other words, laws that regulate protected speech fall into one of two categories: content-based or content-neutral. A content-

based law regulates speech or conduct on the basis of "hostility or favoritism towards the underlying message expressed." *Id.* at 386, 112 S.Ct. 2538.

At first glance, many laws that regulate expressive conduct do not fit neatly into either of these categories. *See Renton,* 475 U.S. at 47, 106 S.Ct. 925 (zoning restrictions for adult movie theaters). To distinguish between content-neutral and content-based laws, the Supreme Court has applied two different analytical frameworks, one of which is derived from *O'Brien,* 391 U.S. at 367, 88 S.Ct. 1673, the other from *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). Although these frameworks are not formulated alike, the Court has acknowledged that there is little, if any, substantive difference between them. *See Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality) (*O'Brien* and *Clark* tests "embody much the same standards...."); *Clark,* 468 U.S. at 298, 104 S.Ct. 3065 (same). *See also International Eateries of America, Inc. v. Broward County,* 941 F.2d 1157, 1161 n. 2 (11th Cir.1991) (same substantive outcome under either standard).

O'Brien and *Clark* each involved laws that restricted or banned expressive activity. In *O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, an individual protesting the Vietnam War was arrested for burning his draft card in violation of federal law. The Court held that the type of "symbolic speech" engaged in by the protester is entitled only to qualified protection under the First Amendment, concluding that "when 'speech' and nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376, 88 S.Ct. 1673. In these situations, courts are directed to gauge the sufficiency of a governmental interest by inquiring whether: 1) the regulation is within the constitutional power of the government; 2) the regulation furthers an important or Substantial governmental interest; 3) the governmental interest is unrelated to the suppression of free expression; and 4) whether the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest. *Id.* at 377, 88 S.Ct. 1673.

In *Clark,* 468 U.S. at 289, 104 S.Ct. 3065, the Court held that a National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment when applied to prohibit demonstrators from sleeping in such parks as a part of their demonstration. After acknowledging that all manner of expression is subject to reasonable time, place and manner restrictions, the Court noted that such restrictions "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* at 293, 104 S.Ct. 3065 (citations omitted).

The Court has applied the *O'Brien* and *Clark* tests in two cases involving laws that regulate erotic speech. *See Barnes,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504; *Renton,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29. *Renton* stands for two propositions: 1) ***1139** time, place and manner restrictions enacted to combat secondary effects associated with some form of erotic speech are content-neutral; and 2) governments need not conduct independent studies in order to justify the existence of a causal link between the restricted activity and the secondary effects so long as they rely upon the experiences of other cities. *Renton* involved a zoning restriction prohibiting any adult movie theater from locating within 1,000 feet of a residential zone, family dwelling, church or park and within one mile of a school. The Court concluded that "the Renton ordinance is aimed not at the *content* of the films shown at [adult theaters], but rather at the *secondary effects* of such theaters on the surrounding community." *Renton,* 475 U.S. at 47, 106 S.Ct. 925. Secondary effects identified by the Renton city council included unspecified "harmful effects on the area and ... neighborhood blight." *Id.* at 51, 106 S.Ct. 925. Addressing the first part of the *Clark* test, the Court labeled the ordinance "content-neutral" because Renton "*justified* [it] without reference to the content of the regulated speech." *Id.* at 48, 106 S.Ct. 925 (citations and quotation marks omitted). For this reason, Renton could draw a distinction between adult theaters and other theaters without running afoul of the First Amendment. In addition, the Court dismissed an objection regarding the evidence used by the Renton city council to justify the need for such an ordinance. Rather than compiling a study documenting the harmful secondary effects brought about by adult theaters located in Renton, the city council "relied heavily on the experience of, and studies produced by, the city of Seattle." *Id.* at 50, 106 S.Ct. 925. Despite this shortcut, the

Court held that the "First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce new evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51–52, 106 S.Ct. 925.

[5] **[6]** *Barnes* is the Court's latest exegesis on the subject of erotic speech. It presents a vexing interpretive problem. Although five justices voted to uphold Indiana's public indecency law requiring exotic dancers to wear G-strings and adhesive patches covering their nipples (known in the business as "pasties"), the case produced three divergent opinions, neither of which commanded a majority of the Court. Chief Justice Rehnquist announced the judgment of the Court, in which Justices O'Connor and Kennedy joined. Justices Souter and Scalia filed separate concurrences. When courts are confronted with such fractured Supreme Court opinions, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). Put another way, courts confronted with such opinions should attempt to find the common denominator upon which a majority of justices agree. *See Village of Bolingbrook v. Citizens Utilities Company of Illinois,* 864 F.2d 481, 483 (7th Cir.1988). However, where no such common denominator exists, courts are not required to create one. *See Schindler v. Clerk of Circuit Court,* 715 F.2d 341, 345 n. 5 (7th Cir.1983). Expanding on this concept, the Court of Appeals for the Third Circuit has emphasized that

> it is not always possible to discover a single standard that legitimately constitutes the narrowest ground for the decision.... "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another —only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment."

Rappa v. New Castle County, 18 F.3d 1043, 1057 (3d Cir.1994) (quoting *King v. Palmer,* 950 F.2d 771, 781 (D.C.Cir.1991) (en banc)). In cases in which at least five justices do not agree implicitly on a single rationale, "no particular standard constitutes the law of the land, because no single approach can be said to have the support of a majority of the court." *Rappa,* 18 F.3d at 1058. In a case such as *Barnes* where "the majority votes to uphold a law as constitutional, the 'narrowest grounds' principle will identify as authoritative the standard articulated by a Justice or ***1140** Justices that would uphold the fewest laws as constitutional." *Planned Parenthood v. Casey,* 947 F.2d 682, 694 (3d Cir.1991), *aff'd in part, rev'd in part,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). This formulation of the standard suggests that the purpose behind *Marks* is two-fold: "to promote predictability in the law by ensuring lower court adherence to Supreme Court precedent," *id.* at 693, and, at the same time, to limit the precedential reach of cases in which a majority of justices do not join in a single opinion.

In *Barnes,* the plurality and Justice Souter agreed that the statute furthered a substantial interest but parted ways over what that interest was. The Court could not forge a consensus on this issue, in part, because the text of the statute contained no indication why the Indiana legislature enacted it. The Chief Justice surmised that the legislature did so to protect "order and morality" and concluded that this constituted a substantial governmental interest under the second step of the *O'Brien* test. *See Barnes,* 501 U.S. at 569, 111 S.Ct. 2456. Justice Souter identified a different governmental interest, the eradication of secondary effects associated with nude dancing, such as prostitution, sexual assault and other criminal activity. *See Barnes,* 501 U.S. at 582–583, 111 S.Ct. 2456 (citing *Renton,* 475 U.S. at 44, 106 S.Ct. 925).

The disagreement in *Barnes* between Justice Souter and the plurality has broad implications for the ability of governments to regulate erotic speech. For example, defendant has justified its ordinance, in part, to promote the "morals" of its citizenry. Governments interested in enacting regulations like the one promulgated by defendant would enjoy considerably more latitude to do so if such regulations could be justified by nothing more than a vague reference to "morals" and "order." Adoption of this proposition by the Court would virtually eliminate the requirement imposed in *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925, that a city rely on some evidence—however tenuous—establishing a link between the form of expression and the governmental interest asserted. In contrast to Justice Souter, the opinion of the Chief Justice reveals no indication that such evidence would be

necessary in order to sustain morality-based justifications. For these reasons, most courts that have applied the *Marks* rule to *Barnes* have concluded that Justice Souter's opinion represents the controlling holding because it is "narrower" than the rationale to which the plurality subscribed. *See, e.g., J & B Entertainment, Inc. v. City of Jackson,* 152 F.3d 362 (5th Cir.1998); *Triplett Grille, Inc. v. City of Akron,* 40 F.3d 129 (6th Cir.1994); *International Eateries of America, Inc. v. Broward County,* 941 F.2d 1157 (11th Cir.1991); *Lounge Management v. Town of Trenton,* 219 Wis.2d 13, 580 N.W.2d 156, 160 (1998). To the extent that these cases stand for the proposition that the standard articulated by Justice Souter is narrower because it would uphold the fewest laws as constitutional, *see Planned Parenthood,* 947 F.2d at 694, I agree.

However, I believe that these cases fail to take into account that the fifth member of the Court who voted in favor of upholding the Indiana statute, Justice Scalia, arrived at this conclusion by a route entirely different from his colleagues. Justice Scalia concluded that the Indiana law should be upheld, "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." *Barnes,* 501 U.S. at 572, 111 S.Ct. 2456 (Scalia, J., concurring). Justice Scalia did not agree implicitly or explicitly that the First Amendment is implicated by a statute such as the one in this lawsuit that is targeted at nude dancing, as opposed to public nudity in general. Indeed, he reached the opposite conclusion, maintaining that expressive conduct is entitled to First Amendment protection only "[w]here the government prohibits conduct *precisely because of its communicative attributes....* " *Id.* at 577, 111 S.Ct. 2456. Examples of such laws, according to Justice Scalia, include statutes that ban flag burning, *see United States v. Eichman,* 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990); defacing the flag, *see Spence v. Washington,* 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974); wearing a black arm band, *see Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); participating ***1141** in a silent sit-in, *see Brown v. Louisiana,* 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); and flying a red flag, *see Stromberg v. California,* 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). Laws that suppress expressive conduct "as an incidental side effect of forbidding the conduct for other reasons," *Barnes,* 501 U.S. at 577, 111 S.Ct. 2456 (Scalia, J., concurring), fall outside the category delineated by Justice Scalia and should be subject to a rational basis standard, not the type of intermediate level First Amendment scrutiny endorsed by the plurality and Justice Souter. *See id.* at 579–580, 111 S.Ct. 2456. "Moral opposition to nudity supplies a rational basis for its prohibition, and since the First Amendment has no application to this case no more than that is needed." *Id.* at 580, 111 S.Ct. 2456. From this discussion, it is evident that Justice Scalia would likely classify defendant's ordinance as a content-neutral law that suppresses expressive conduct for reasons other than the communicative attributes inherent in nude dancing. *Cf. Triplett Grille,* 40 F.3d at 133 ("Justice Scalia ... concluded that nude dancing is not inherently expressive activity entitled to First Amendment protection").

These observations notwithstanding, it is possible to say that all five justices in the *Barnes* majority agreed on one issue: the Indiana statute did not violate the Constitution. Though these justices disagreed what threshold standard governments must meet in order to justify the constitutionality of laws regulating public nudity, all believed that Indiana had surpassed this threshold; some would simply set the bar higher than others. It is difficult to say whether this is enough of a consensus to conclude, as other courts have, that Justice Souter's opinion represents the authoritative holding in *Barnes.* The answer depends upon the extent to which *Marks* permits a court to "associate Justices with propositions they expressly rejected." Mark Alan Thurmon, Note, *When The Court Divides: Reconsidering The Precedential Value Of Supreme Court Plurality Decisions,* 42 Duke Law Journal 419, 429–430 (1992).

Fortunately, these questions need not be resolved here. The Court's earlier holding in *Renton* is substantially consistent with Justice Souter's concurrence in *Barnes;* both require evidence of secondary effects to justify content-neutral regulation. To the extent that there are any differences between the two, these differences do not affect any substantive issues in this case. Therefore, I refer to Justice Souter's concurrence in *Barnes* for the persuasive guidance it offers in interpreting *Renton,* not to anoint it as "authoritative" under the *Marks* rule.

B. *Secondary Effects*

[7] A time, place or manner restriction designed to combat the undesirable secondary effects associated with certain businesses is reviewed under the standards applicable to "content-neutral" laws. *See Renton,* 475 U.S. at 49, 106 S.Ct. 925. Such a restriction does not amount to illegal viewpoint discrimination if it is 1) justified without reference to the content of the regulated speech; 2) narrowly tailored to serve a substantial governmental interest; and 3) preserves ample alternative means of communication. *See Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *Clark,* 468 U.S. at 293, 104 S.Ct. 3065. *See also TK's Video, Inc. v. Denton County,* 24 F.3d 705, 707 (5th Cir.1994) (citing *Renton,* 475 U.S. at 50, 106 S.Ct. 925); *International Eateries,* 941 F.2d at 1161–1162.

[8] **[9]** **[10]** **[11]** Plaintiffs argue unpersuasively that this analytical framework is inapplicable because the ordinance is not content-neutral. They maintain that a law such as this one that targets only sexually oriented businesses discriminates on its face against a particular viewpoint, namely, a sexual or erotic viewpoint. The Supreme Court has held otherwise. Like defendant's law, the zoning ordinance upheld in *Renton* applied only to adult theaters but not to theaters that featured non-pornographic fare. Nevertheless, the Court characterized Renton's ordinance as content-neutral. *See Renton,* 475 U.S. at 47–48, 106 S.Ct. 925. The operative consideration is whether a law is *justified* without reference to the content of regulated speech, not whether it focuses on some businesses but not on others. *See id.* at 48, 106 S.Ct. 925. Plaintiffs' evidence regarding the shadowy influence of a nefarious right-wing organization is irrelevant to this inquiry. The court can "not strike down an otherwise constitutional ***1142** statute on the basis of an alleged illicit legislative motive." *Id.* at 48, 106 S.Ct. 925 (quoting *O'Brien,* 391 U.S. at 383, 88 S.Ct. 1673). In other words, the court does not ask why defendant *actually* enacted its ordinance; it asks whether defendant has offered evidence that it *could have* enacted it for a content-neutral reason. *See J & B Entertainment,* 152 F.3d at 373 ("We do not ask whether the regulator subjectively believed or was motivated by other concerns, but whether an objective lawmaker could have so concluded, supported by an actual basis for the conclusion"). When answering this question, the court is guided primarily by the text of the law in question. The language of the defendant's ordinance reveals that it is justified by reference to certain harmful secondary effects associated with sexually oriented businesses, not by reference to the erotic content of the message expressed by such businesses. The secondary effects identified in the ordinance include the prevention of crime, urban blight and the spread of sexually transmitted diseases. These are substantial governmental interests. *See, e.g., Renton,* 475 U.S. at 50, 106 S.Ct. 925. Thus, the ordinance fits comfortably within the content-neutral category.

[12] **[13]** **[14]** The first two parts of the secondary effects test actually embrace three important precepts. First, to justify a regulation, a government need not conduct its own studies; it may rely upon the experiences of other cities, as well as studies conducted by them, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem" addressed by the regulation. *Renton,* 475 U.S. at 52, 106 S.Ct. 925. This evidence may be nothing more than a reference to "detailed findings" summarized in a legal opinion involving a similar regulation. *See id.* at 51, 106 S.Ct. 925. Second, to show that substantial governmental interests are served by a regulation, a government is not required to establish conclusively that the regulated activity actually causes the secondary effects, only that it reasonably believes that "the effects are correlated with the existence of such establishments." *Barnes,* 501 U.S. 560, 585, 111 S.Ct. 2456, 115 L.Ed.2d 504 (Souter, J., concurring). For example, the Supreme Court did not force the city of Renton to prove that urban blight is affirmatively associated with adult theaters in Renton or that such blight would move with the theaters. Instead, the Court allowed some latitude for Renton to "experiment with solutions to admittedly serious problems." *Renton,* 475 U.S. at 52, 106 S.Ct. 925 (quoting *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality)). Finally, a regulation is narrowly tailored "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." *Ward,* 491 U.S. at 800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Put another way, the means chosen are narrowly tailored if a less restrictive alternative would promote the governmental interest less effectively. *See id.* at 799, 109 S.Ct. 2746 (quoting *United States v. Albertini,* 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)).

To summarize, a government satisfies the first two elements of the *Clark/ Ward* test by showing that 1) it has evidence upon which to base a reasonable belief

that there is a correlation between the activity regulated and the alleged secondary; effect of that activity and 2) it reasonably believes the regulation enacted ameliorates the correlated secondary effect and the regulation is not substantially broader than necessary to achieve that goal.

III. MOTION TO STRIKE

[15] Many of defendant's proposed findings of fact are based on affidavits submitted by various individuals who served on the subcommittee formed by the city planning commission. This subcommittee drafted defendant's ordinance. Plaintiff maintains that these affidavits should be stricken from the record because they violate the rule in Wisconsin that "a court may not rely upon the testimony of members of a legislative body for the purpose of determining what that body intended when it enacted a particular piece of legislation." *See La Crosse County v. Gershman, Brickner & Bratton,* 982 F.2d 1171, 1174 (7th Cir.1993) (citing *Labor and Farm Party v. Elections Bd.,* 117 Wis.2d 351, 344 N.W.2d 177, 180 (1984)). In *La Crosse,* the court of appeals reviewed a decision by the district court allowing seven members of a county board to testify about their motivations ***1143** for voting for a particular resolution. The court held that the district court acted within its discretion in admitting testimony that supplemented language in the resolution but did not impeach it. *Id.* at 1174. However, the district court should not have allowed board members to explain their motivations for voting in favor of the resolution. The jury could have interpreted this testimony as the board's collective intent behind the resolution just as easily it could have attributed these views to the individuals who expressed them. *Id.*

[16] The Wisconsin rule relied upon by plaintiff is inapplicable in a case such as this one governed by federal law. Once again, *Barnes* and *Renton* provide guidance. As this court noted recently in a similar case:

> [A]s "long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem," it is evidence enough. *Renton,* 475 U.S. at 52, 106 S.Ct. 925. Moreover, it appears from Justice Souter's opinion in *Barnes,* 501 U.S. at 582, 111 S.Ct. 2456, that this evidence can be developed prior to enactment of the regulation *or* adduced at trial (or, presumably, as in this case, on a motion for summary judgment). *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 582, 111 S.Ct. 2456, 115 L.Ed.2d 504 (Souter, J., concurring). Certainly nothing in the *Barnes* plurality opinion would prevent the town from adducing evidence of secondary effects post-enactment, since the plurality (unlike Justice Souter) would not require the town to produce any evidence at all. *See Barnes,* 501 U.S. at 568, 111 S.Ct. 2456 ("It is impossible to discern, other than from the text of the statute, what governmental interest the Indiana legislators had in mind when they enacted this statute").

DiMa Corporation v. Town of Hallie, No. 98–C–240–C at 11–12 (W.D.Wis.1998). This passage expands upon a principle established earlier in this opinion: governments enjoy broad latitude in developing the evidence necessary to justify a content-neutral time, place or manner restriction that targets expressive conduct. Thus, defendant may supplement the enumerated findings in its ordinance with evidence that provides a more detailed explanation of the basis of these findings. The supplemental evidence contained in the affidavits submitted by defendant do not contradict any of the ordinance's existing provisions and do not create new findings or justifications.

Plaintiffs' motion will be denied.

IV. MOTION FOR SUMMARY JUDGMENT

A. *Section 8(A)*

Section 8(A) of the ordinance prohibits employees of sexually oriented businesses from appearing in a state of total nudity and it prohibits the depiction of specified sexual activities in a sexually oriented business. Plaintiffs argue that this provision is unconstitutional for two reasons: 1) defendant enacted it for the purpose of restraining the content of protected speech; and 2) it is facially overbroad.

1. *Secondary effects*

[17] **[18]** Section 8(A) satisfies the minimal evidentiary burden established by the Supreme Court. As in *Renton,* defendant has justified this provision by reference to "findings" in certain judicial opinions and in studies conducted by several other governments, including

something called the "Report of the Attorney General's Working Group On the Regulation of Sexually Oriented Businesses." *See* § 1(B). Collectively, this forms the basis of twenty-five specific findings articulated in the ordinance. *See* §§ 1(B)(1) –1(B)(25). Defendant has supplemented these findings from the ordinance with evidence regarding the incidence of crime associated with the Island Bar. Contrary to plaintiffs' assertion, these findings need not be measured against the law enforcement problems associated with non-sexually oriented businesses in Cumberland. Nothing in *Renton* or any of the three opinions written by the *Barnes* majority would require defendant to engage in this type of rigorous, comparative analysis. As underwhelming as defendant's "evidence" may be, it passes muster because it is reasonably relevant to the problems identified by defendant. *See Renton,* 475 U.S. at 51–52, 106 S.Ct. 925. For example, two provisions from the ordinance assert that employees of sexually oriented businesses "engage ***1144** in higher incidence of certain types of illicit sexual behavior than employees of other establishments" and that "[p]ersons frequent ... sexually oriented businesses for the purpose of engaging in sex within the premises" of these businesses. §§ 1(B)(2) and 1(B)(5). These findings are relevant to defendant's interest in preventing criminal activity, such as prostitution, and the spread of sexually transmitted diseases.

Whether these interests are *furthered* by requiring dancers to wear G-strings and pasties is, at first blush, a dubious proposition. It is not inherently obvious how covering a dancer's nipples with adhesive patches would reduce criminal activity associated with adult cabarets. Nevertheless, Justice Souter saw some logic to this notion, *see Barnes,* 501 U.S. at 584–586, 111 S.Ct. 2456 (Souter, J., concurring), and I find the correlation sufficiently plausible to agree. One can assume reasonably that an establishment featuring completely naked women gyrating on a stage is less likely to draw clientele of both sexes than an establishment featuring more modestly clad dancers. Further, one can assume that there is greater potential for trouble in an establishment in which the entertainment is all female and all naked and in which the clientele is all male. With these concerns in mind, an objective lawmaker reviewing the evidence of secondary effects described above *could have* concluded that there is a correlation between adult businesses and the illicit activity cataloged in the ordinance and that a ban on total nudity in adult cabarets is likely to reduce such activity.

The restrictions imposed on erotic dancing by section 8(A) of the ordinance are narrowly tailored and they preserve ample alternative means for communication. The only alternative less restrictive than pasties and G-strings would be total nudity—not an effective option. Dancers at establishments such as the Island Bar may still engage in expressive conduct that conveys an erotic message provided they do so in a semi-nude state. *See* § 12.15(8)(b). To convey their message effectively, they must simply rely more on technique and less on simple exposure.

In conclusion, section 8(A) is a valid time, place and manner restriction because it is justified without reference to the content of the expressive conduct that it regulates, because it is narrowly tailored to further defendant's substantial interest in reducing secondary effects associated with adult cabarets and because the ordinance leaves ample alternative means for erotic expression.

2. *Overbreadth*

[19] Plaintiffs argue that even if section 8(A) of the ordinance is constitutional as applied to plaintiffs, it is facially overbroad because it applies to conduct defendant cannot legitimately regulate. An overbroad law burdens protected as well as unprotected speech. In doing so, such a law chills the First Amendment rights of third parties by encouraging them to remain silent for fear of prosecution in the face of a law of uncertain scope. *See Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *NAACP v. Button,* 371 U.S. 415, 432–33, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). For this reason, the overbreadth doctrine allows a person who has engaged in conduct not protected by the Constitution to challenge the constitutionality of a law that might be used against individuals who do engage in protected conduct, *see Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 503, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985), but such persons may do so only when the threat presented by a statute is real and substantial, and "then only as a last resort." *Broadrick,* 413 U.S. at 615, 93 S.Ct. 2908.

[20] Under this framework, even if section 8(A) is constitutional as applied to the Island Bar, it is overbroad because it makes no exceptions for "live performances with serious artistic, social and political value." *Triplett Grille,* 40 F.3d at 136; *see also Lounge Management Ltd. v. Town of Trenton,* 219 Wis.2d 13, 580 N.W.2d 156 (1998); *Fond Du Lac County v. Mentzel,* 195 Wis.2d 313,

536 N.W.2d 160 (Ct.App.1995). These and other similar forms of unclothed entertainment are not correlated with the type of harmful secondary effects identified by defendant but could conceivably fall within the sweep of the ordinance.

Defendant contends that the ordinance is not susceptible to limitless application because a business does not qualify as an "adult ***1145** theater" or "adult cabaret" unless it "regularly features" nudity or semi-nudity. *See* § B(3) and (7). Similar qualifications apply to the definition of "adult motion picture theaters." *See* §§ 2(5) and (6) ("establishment ... where ... motion pictures ... are regularly shown which are characterized by the depiction ... of 'specified sexual activities' or 'specified anatomical areas' "). The operative terms from these provisions, "regularly feature" and "regularly shown," are not defined in the ordinance. This is a problem. With no limitation on the scope of interpretation, the ordinance could apply to many businesses not connected with the harmful secondary effects identified in the ordinance. High brow artistic productions such as *Equus* and Diaghilev's *L'apres midi d'un faun* all feature nude performers who expose a "specified anatomical area" of their bodies. Many popular motion pictures such as *Titanic* have scenes which, in the stilted parlance of the ordinance, feature "the showing of [a] female breast with less than a fully opaque covering of any part of the nipple...." § 2(15). Numerous other commercial films like *The Godfather* include depictions of "specified sexual activities," as defined in section 2(24) of the ordinance ("sex acts, normal or perverted, actual or simulated, including intercourse ..."). *Titanic* and *The Godfather* have run for many weeks, even months, in movie theaters across the country. Such a theater located in the City of Cumberland could easily be classified as a sexually oriented business and become subject to the licensing requirements of the ordinance. Worse yet, even a licensed theater would be prohibited from showing mainstream, non-pornographic fare in which naked female breasts are depicted. As a result, films of unquestioned artistic merit, from *Last Tango in Paris* to *Schindler's List,* would be prohibited under the ordinance.

Defendant's reliance on *Barnes* is misplaced for two reasons. First, the Court explicitly refused to examine the Indiana statute under the overbreadth doctrine. As observed by the Chief Justice, "The Indiana Supreme Court appeared to give the ... statute a limiting construction to save it from a facial overbreadth attack." *Barnes,* 501 U.S. at 564 n. 1, 111 S.Ct. 2456 (plurality). Specifically, the Indiana high court held that the statute applied only to nude dancing that takes place outside the context "of some larger form of expression." *State v. Baysinger,* 272 Ind. 236, 397 N.E.2d 580, 587. Unlike the Indiana statute, defendant's ordinance has not been so "limited" by a Wisconsin court. Second, Justice Souter expressed some skepticism whether the statute could survive an overbreadth challenge if it barred "expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in *Renton* [ ]." *Barnes,* 501 U.S. at 585 n. 2, 111 S.Ct. 2456 (Souter, J., concurring).

B. *Hours of Operation*

Section 10 of the ordinance permits sexually oriented business to be open from 10:00 a.m. to midnight, Monday through Saturday; businesses must remain closed all day Sunday. Plaintiffs argue that this provision is unconstitutional because it does not satisfy the secondary effects test and because it violates the equal protection clause of the Fourteenth Amendment. There is no merit to either of these claims.

1. *Secondary effects*

[21] Defendant has satisfied its threshold burdens with respect to the hours of operation provision. It has pointed to studies and experiences from other towns that show a correlation between sexually oriented businesses and the secondary effects it seeks to regulate. This evidence consists of general findings from the ordinance regarding the effect of adult entertainment on surrounding neighborhoods, crime and public health. Defendant has supplemented these findings with affidavits from those responsible for drafting the ordinance, providing a more detailed explanation of the rationale and studies relied upon by defendant. Specifically, these affidavits reveal that defendant has only one police officer on duty Sunday through Thursday. From this evidence, a legislator could conclude that restricting the number of hours of operation of sexually oriented businesses would promote public safety by permitting local law enforcement to focus its limited resources on matters unrelated to the problems associated with such businesses, some of which are more likely to occur during the ***1146** hours between midnight

and dawn. Other courts have upheld similar ordinances on the basis of similar reasoning and evidence. *See, e.g., Richland Bookmart, Inc. v. Nichols,* 137 F.3d 435 (6th Cir.1998); *Mitchell v. Commission on Adult Entertainment Establishments,* 10 F.3d 123 (3d Cir.1993); *Tee & Bee, Inc. v. City of West Allis,* 936 F.Supp. 1479 (E.D.Wis.1996).

I agree with plaintiffs that the evidence presented by defendant in support of this provision does not explain in an entirely satisfactory way why sexually oriented businesses may not open until 10 a.m. Monday through Saturday and must remain closed entirely on Sunday. For example, defendant maintains that it cannot adequately protect school children from the dangers posed by sexually oriented businesses if those businesses are open as children are making their way to school each morning. Although this reasoning would seem to apply with equal force to children returning home from school, the ordinance allows sexually oriented businesses to be open during the after-school period. The justifications offered by defendant regarding the Sunday closure requirement are also problematic. According to defendant, this restriction is necessary because there is only one police officer on duty on Sunday. For some reason, however, the ordinance permits sexually oriented businesses to remain open other days of the week when only one officer is working. This leaves defendant's second justification, that Sunday closure is necessary to protect the morals of the community. As explained already, the plurality in *Barnes* agreed that preservation of morality could serve as a legitimate governmental interest but Justice Souter explicitly rejected this notion.

These issues are serious but not fatal to section 10 of the ordinance. Had defendant justified the entire provision or the entire ordinance by reference solely to morality, this would be a problem of constitutional magnitude. Defendant has not done so, however. In light of the generous standard to which governments are held on these threshold issues, it is sufficient that the evidence and rationale presented by defendant supports the ordinance generally. The rigorous, searching inquiry suggested by plaintiffs is inconsistent with this standard. If the questions raised by plaintiffs belong anywhere in the secondary effects test, it is within a discussion of the remaining considerations: whether the provision is narrowly tailored and whether it preserves ample alternative means of communication.

[22] The hours of operation provision satisfies these elements. Like other parts of the ordinance, the provision is narrowly tailored to affect only the category of businesses shown to produce the unwanted secondary effects. *See Renton,* 475 U.S. at 52, 106 S.Ct. 925. Although the problems identified by plaintiffs suggest that the provision is over-inclusive, I am loathe to question the methods chosen by defendant too vigorously. Doing so would exceed the Supreme Court's mandate that "a regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward,* 491 U.S. at 800, 109 S.Ct. 2746; *see also Renton,* 475 U.S. at 52, 106 S.Ct. 925 ("city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems"). The relevant inquiry is whether the provision is "substantially broader than necessary," *Ward,* 491 U.S. at 800, 109 S.Ct. 2746, not whether the statute is need of fine-tuning. Arguably, defendant could achieve its objectives effectively by allowing sexually oriented businesses to open at 8 a.m. rather than 10 a.m. but this is the type of judicial second-guessing the Court sought to prevent in *Ward.* Finally, despite the restrictions imposed by section 10, sexually oriented businesses enjoy ample alternative means to communicate their sexually explicit messages. Plaintiff Schultz may operate the Island Bar fourteen hours a day, six days a week.

2. *Equal protection*

[23] In analyzing an equal protection claim, the court must determine initially whether the claim involves a suspect class or a fundamental right. *See Pryor v. Brennan,* 914 F.2d 921, 923 (7th Cir.1990). Plaintiffs are not a members of a suspect class, *see City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), and nude dancing is not a fundamental right. In light of these findings, plaintiffs' equal protection claim must be evaluated ***1147** pursuant to the "rational basis test." *See Pryor,* 914 F.2d at 923. Under this test, the ordinance is presumed valid and will be upheld if it is "rationally related" to a "legitimate state interest." *See id.* I have decided these issues previously in the context of the discussion of the secondary effects test. To summarize: defendant has a legitimate interest in reducing illicit activity associated with sexually oriented businesses; section 10 of the ordinance is rationally related to this interest because it forces these businesses to remain

closed when this activity is most likely to happen and when law enforcement is least capable of responding to it.

C. *Licensing Provisions*

Plaintiffs argue that several licensing requirements contained in the ordinance are unconstitutional prior restraints on their right to free speech. Plaintiffs concede that defendant may require owners and operators of sexually oriented businesses to comply with a licensing scheme but maintain that this one is invalid in many respects. Further, plaintiffs contend that there is no constitutionally permissible justification for requiring employees of sexually oriented businesses to obtain a license. Beyond this general challenge, plaintiffs object to the disclosure requirements applicable to employees. [1]

[1] Defendant has agreed to amend sections 11(E)(10) and 11(F)(7) insofar as they require employee and operator applicants to disclose their social security numbers.

The constitutionality of these provisions turns on two separate inquires: whether adequate procedural safeguards are built into the ordinance to limit the discretion of those administering it and whether the provisions are valid content-neutral time, place and manner restrictions aimed at secondary effects associated with sexually oriented businesses. *See FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 223, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). Before proceeding, one qualification must be made. Even though the Supreme Court has indicated that application of the secondary effects test is appropriate when evaluating a licensing scheme for sexually oriented businesses, *see id.,* it is doubtful whether the third part of this test fits logically into an analysis of a prior restraint. Specifically, it does not make sense to ask whether someone denied an application to work as an exotic dancer still has ample alternative means to engage in this type of erotic expression under the licensing scheme. Without a license, such an individual has no alternatives. Perhaps in response to this problem, the Fifth Circuit has applied a hybrid of the secondary effects test that essentially lops off the third step. *See TK's Video,* 24 F.3d at 709–10 (citing *Buckley v. Valeo,* 424 U.S. 1, 64, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam)). This seems to be a suitable way to adapt the secondary effects test to the licensing provisions in defendant's ordinance.

[24] In general, a law that requires an individual to obtain a license before engaging in some form of protected speech is a prior restraint. *See Stokes v. City of Madison,* 930 F.2d 1163, 1168 (7th Cir.1991). Because nude dancing is a form of speech protected under the First Amendment, the licensing requirements imposed by defendant's ordinance on operators and employees of sexually oriented businesses are a prior restraint. A facial challenge may be brought against this type of law if it "gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 759, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). There are two reasons why defendant's ordinance confers such authority on those administering the licensing scheme. First, under § 13(B) of the ordinance, licenses are subject to annual review. *See id.* at 760, 108 S.Ct. 2138 ("periodic licensing requirement is sufficiently threatening to invite judicial review"). Second, the licensing system implemented by defendant's ordinance is directed "narrowly and specifically" at conduct associated with expression: nude dancing. *See id.*

[25] **[26]** Prior restraints bear a heavy presumption against constitutionality because "a free society prefers to punish the few who abuse rights of speech *after* they break the law than throttle them and all others beforehand." *See Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). To avoid running ***1148** afoul of the First Amendment, a prior restraint must not place unbridled discretion in the hands of a government official or agency, *see Lakewood,* 486 U.S. at 757, 108 S.Ct. 2138, and must place some limits on the time within which a government decisionmaker must issue or deny the license. *See Vance v. Universal Amusement Co.,* 445 U.S. 308, 316, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980).

The ordinance has these two procedural safeguards. First, officials in charge of administering the ordinance are constrained by reasonably detailed, content-neutral standards. The ordinance requires defendant to issue temporary licenses pending the outcome of an initial determination or an appeal and it provides for prompt judicial review. Second, the ordinance sets appropriate time limits within which defendant must review applications. It requires defendant to make the

initial licensing decision within 30 days of the application. Fire, health and building certifications must be completed within 20 days of the application.

Before analyzing the validity of the licensing provisions under the secondary effects test, a preliminary matter must be addressed. In support of their contention that the ordinance's licensing provisions are unconstitutional, plaintiffs rely heavily on *Genusa v. Peoria,* 619 F.2d 1203 (7th Cir.1980), which involved a municipal ordinance that imposed similar licensing requirements on the owners and employees of adult bookstores. Peoria passed this ordinance to prevent adult bookstores and other sexually oriented businesses from concentrating in a single area of the city or locating in close proximity to places of worship, schools and residential neighborhoods. *See id.* at 1209. The Seventh Circuit characterized three of the licensing requirements in Peoria's ordinance as content-based prior restraints. One such requirement provided that an adult bookstore could not obtain a license unless it passed certain building and fire code inspections not imposed on other businesses. The city maintained that this provision helped retard urban blight. The court found no evidence to support this justification, observing that "there is nothing in the record to indicate that adult bookstores, as a class, contain more faulty light switches or other violations than regular bookstores, as a class." *Id.* at 1214. In the absence of a proper evidentiary basis, Peoria could not "single[ ] out [adult bookstores] for special regulation" without violating the standards applicable to time, place and manner restrictions established by the Supreme Court in *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673, and *Young v. American Mini Theatres,* 427 U.S. at 79–80. The two other provisions of the Peoria ordinance struck down by the Seventh Circuit made obtaining an employer license contingent upon passing a criminal background check and made working for an adult store contingent upon obtaining a special employee permit. The court of appeals concluded that these provisions had nothing to do with the city's interest in scattering sexually oriented businesses. *See Genusa,* 619 F.2d at 1218–19 and 1221.

Genusa no longer carries much persuasive weight because it predates what are now the leading cases on the regulation of sexually oriented businesses, *Renton* and *Barnes.* As discussed at great length elsewhere in this opinion, the standards applied by the Supreme Court in *Renton* and *Barnes* are considerably more generous and deferential to governments than those that existed at the time the Seventh Circuit decided *Genusa.* However, defendant's ordinance is much more ambitious than the Peoria law, encompassing a broad array of sweeping goals that go beyond the lone governmental interest recognized by the Seventh Circuit in *Genusa:* preventing sexually oriented businesses from clustering in one location. *See TK's Video,* 24 F.3d at 710 (Denton County ordinance outlines more ambitious objective than ordinance in *Genusa*). The court doubted that Peoria's ordinance could be interpreted to include the prevention of urban blight. *See Genusa,* 619 F.2d at 1214. *Renton* and *Barnes* do not mean that defendant enjoys a free ride. In particular, defendant still must produce some evidence to justify its regulations. *See J & B Entertainment,* 152 F.3d at 372 (Justice Souter's concurrence in *Barnes* did not eliminate government's evidentiary burden).

1. *Operator disclosure: corporate affiliation*

[27] Under section 11(D) of the ordinance, if a corporate entity or partnership ***1149** applies for a license to operate a sexually oriented business, every shareholder with an ownership interest of 20 percent or more must comply with all of the disclosure and disqualification provisions applicable to individual applicants. Plaintiff Schultz does not have standing to challenge this provision. *See J.F. Shea Co. v. City of Chicago,* 992 F.2d 745, 749 (7th Cir.1993) (to establish standing, plaintiff "must be able to allege an injury that affects his own legal rights," not those of third party). The undisputed facts reveal that plaintiff Schultz is the sole proprietor of the Island Bar. Thus, he has no stake in the outcome of a challenge to section 11(D). *See Sierra Club v. Morton,* 405 U.S. 727, 732, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

2. *Operator disclosure and disqualification: prior criminal history*

[28] Under section 11(E)(3), applicants for an operator license must indicate whether they or anyone with whom they reside have been convicted of "specified criminal activity," a term defined as:

> prostitution or promotion of prostitution; dissemination of obscenity; sale, distribution or display of harmful material to a minor; sexual performance by a child; possession or distribution of child pornography; public lewdness;

> indecent exposure; indecency with a child; engaging in organized criminal activity; sexual assault; molestation of a child; gambling; or distribution of a controlled substance; or any similar offenses to those described above under the criminal or penal code of other states or countries.

§ 2(23)(a). An applicant need not disclose a prior conviction for specified criminal activity if the conviction was a misdemeanor and it is over two years old. In the case of a felony conviction, disclosure is not required if the offense is over five years old. § 2(23)(b). Applicants who have been convicted of specified criminal activity cannot receive a license. § 13(A)(3). In *Genusa,* 619 F.2d at 1219, the Seventh Circuit struck down similar requirements. The court found no evidence supporting Peoria's contention that "one of the deleterious effects caused by adult uses is an increase in crime." *Id.* More important, the Seventh Circuit concluded that the leading Supreme Court case at the time regarding the regulation of sexually oriented businesses, *Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, did not authorize such a requirement. *See Genusa,* 619 F.2d at 1219.

By contrast, defendant has submitted evidence that shows a correlation between sexually oriented businesses and criminal activity. Indeed, defendant has gone one step further by proving that crime is associated with plaintiffs' establishment. Given this evidence, a legislator could conclude that refusing to license a sexually oriented business run by an individual with a prior conviction for a sex-related crime would reduce the amount of illicit activity correlated with such businesses. This objective cannot be accomplished without the information necessary to conduct such a background check. Under the more forgiving standard applied by the Supreme Court in *Renton* and *Barnes,* courts have upheld provisions similar to those enacted by defendant, provided they are narrowly tailored to require disclosure only of those offenses that bear some relationship to the type of criminal activity associated with sexually oriented businesses. *See, e.g., TK's Video,* 24 F.3d at 710; *FW/PBS, Inc. v. City of Dallas,* 837 F.2d 1298, 1304–05 (5th Cir.1988), *rev'd on other grounds,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603; *Tee & Bee, Inc.,* 936 F.Supp. at 1488–91; *Ellwest Stereo Theater, Inc. v. Boner,* 718 F.Supp. 1553, 1571 (M.D.Tenn.1989). With few exceptions, defendant's ordinance applies exclusively to sex-related crimes such as prostitution, solicitation, child pornography and sexual assault. Defendant has narrowed its ordinance even further by not requiring disclosure of older offenses and by drawing a distinction between misdemeanor and felony offenses. [2]

[2] Section 11(E)(3) requires applicants to disclose not only their own criminal history, but the criminal history of persons with whom they reside. Similarly, an applicant may not receive a license if someone with whom the applicant lives has been convicted of specified criminal activity. § 13(C)(5). There are other disclosure and disqualification provisions in the ordinance that pertain to third parties. Plaintiffs have not challenged these provisions and it does not appear that they have standing to do so. Third party disclosure requirements were not a feature of the ordinances at issue in *TK's Video, FW/PBS, Tee & Bee* or *Ellwest.* I have grave doubts whether such requirements would withstand scrutiny. Nevertheless, this issue is not before the court.

***1150** 3. *Operator disclosure and disqualification: past licenses*

[29] The ordinance requires operator-applicants to disclose whether they have ever applied for or held a license under the ordinance or a similar law; if so, applicants must state whether past licenses have been denied, suspended or revoked. § 11(E)(4). Applicants must also disclose whether they currently hold a sexually oriented businesses license. § 11(E)(5). An applicant is disqualified from receiving a license if defendant has revoked or denied a sexually oriented business license previously held by the applicant within the past year or if the applicant has had a similar license revoked or denied by another government within the past year. § 13(C)(4). Like the provisions providing for disclosure of an applicant's criminal history, these requirements will further defendant's interest in insuring that sexually oriented businesses are not run by persons inclined to encourage illicit activity. A legislator could conclude that an individual with a checkered licensing record presents more of a risk to the governmental interests identified in the ordinance. These provisions are narrowly tailored to require disclosure only of licenses to operate sexually oriented businesses and limit disqualification only to those applicants who have had a license denied or revoked within the past year.

4. *Operator disclosure: photographs and aliases*

[30] Applicants for an operator's license must disclose any aliases and provide defendant with a passport-size photograph. § 11(E)(1)(a) and (9). Without photographs and aliases, defendant would not be able to conduct background checks necessary to the purpose of deterring crime associated with sexually oriented businesses.

5. *Operator disqualification: building inspection*

[31] Under the ordinance, defendant will not issue a sexually oriented business license until the premises to be used for the business have "been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances." § 13(C)(6). Defendant must complete such inspections within twenty days after receiving an application. § 13(E). According to defendant, this provision "furthers substantial governmental interests in avoiding urban blight, preventing criminal activity and promoting the health and safety of its citizens." Def.'s Br., dkt. # 21, at 39. Undoubtedly, these are substantial governmental interests. However, defendant has presented no evidence and cited no opinion containing findings showing that sexually oriented businesses tend to present a greater fire hazard than other businesses or are not as sound structurally. In the absence of such evidence, defendant cannot single out sexually oriented businesses for special regulation. *See Genusa,* 619 F.2d at 1214. By doing so, defendant has created a content-based law that burdens plaintiffs' ability to engage in constitutionally protected speech. Like every other business in the City of Cumberland, the Island Bar must comply with applicable health, fire and building regulations. If defendant is truly concerned about code violations at sexually oriented business such as the one run by plaintiff Schultz, defendant is free to enforce these regulations at any time.

6. *Employer disqualification: taxes*

[32] Section 13(C)(2) of the ordinance disqualifies applicants who are "overdue in payment to the City of taxes, fees, fines or penalties assessed against or imposed upon him/her in relation to any business." This requirement is without any evidentiary foundation. Specifically, defendant has presented no findings showing that the owners of adult cabarets are more likely than other business owners not to pay their taxes and it has adduced no evidence establishing a correlation between tax delinquency and the undesirable secondary effects associated with sexually oriented businesses. Defendant points to a similar provision in an ordinance governing the issuance of liquor licenses but fails to explain how selling alcohol can be characterized as constitutionally protected speech.

7. *Employee licensing*

[33] Under section 11(A)(2) of the ordinance, sexually oriented businesses are prohibited ***1151** from employing anyone who does not hold a valid employee license. This requirement is constitutional for the same reasons that defendant can require owners and operators to obtain a license. In other words, employee licensing will help insure that individuals with a demonstrated propensity to engage in the type of illicit activity associated with sexually oriented businesses work elsewhere. This purpose could not be accomplished by simply relying on laws that outlaw prostitution.

8. *Employee disclosure*

[34] Section 11(F) of the ordinance requires an individual applying for a sexually oriented business employee license to disclose substantially the same information that operators must provide. Unlike operators, however, employees must disclose their home telephone numbers and submit a form displaying their fingerprints. § 11(F)(4) and (G)(1). Defendant has satisfied the threshold requirement of presenting some evidence demonstrating a correlation between disclosure of this information and defendant's interest in reducing crime associated with sexually oriented businesses. To effectively investigate the backgrounds of applicants and verify information submitted by applicants, defendant must rely on detailed personal information.

This conclusion notwithstanding, defendant has failed to show that the employee disclosure provisions are narrowly tailored to serve crime prevention. Plaintiff Norwood has submitted an affidavit indicating that she would not perform as an exotic dancer in Cumberland if forced to reveal her real name, home address and telephone number. Norwood fears that a stalker could use Wisconsin's public records law, *see* Wis.Stat. §§ 19.31—19.39, to obtain this information. Ordinarily, Norwood prefers to conceal her true identity by using a stage name, lest any customer get the wrong idea. In response, defendant asserts that disclosure under the state open records law is

not automatic; custodians of public records must perform a balancing test, weighing the general policy in favor of public access against any risk of harm to someone such as Norwood. *See Morke v. Record Custodian,* 159 Wis.2d 722, 725, 465 N.W.2d 235, 236 (Ct.App.1990). Even if these protections are inadequate, defendant asserts that plaintiff Norwood's concerns are of no relevance to whether the disclosure provisions are narrowly tailored. Defendant is wrong.

[35] A regulation is narrowly tailored so long as the interest it seeks to promote would be achieved less effectively without the regulation. *See Ward,* 491 U.S. at 799, 109 S.Ct. 2746. This does not mean, as defendant suggests, that a regulation "may burden substantially more speech than is necessary to further the government's legitimate interest." *Id.* at 799, 109 S.Ct. 2746. Plaintiff Norwood has averred that the disclosure requirements in the ordinance will not merely burden her willingness to engage in protected speech but squelch it entirely. In the absence of adequate safeguards built into the ordinance that will insure the confidentiality of information disclosed by employee applicants, sections 11(F) and (G) are not narrowly tailored because they "target[ ] ... more than the exact source of the 'evil' [they] seeks to remedy." *Frisby v. Schultz,* 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).

9. *License fees*

[36] All applications for a license to operate a sexually oriented business must be accompanied by a $100 non-refundable fee. § 14(A). In the event that defendant issues such a license, an applicant must pay an additional $400 licensing fee. § 14(B). Individuals applying for a sexually oriented business employee license must pay a $25 non-refundable licensing fee. § 14(C). Licenses must be renewed after one year.

[37] **[38]** It is well-established that the government may not levy a tax on the exercise of First Amendment rights. *See Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). However, the government may impose a fee that is incidental to a valid licensing scheme. The fee must be a "nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Id.* at 113–14, 63 S.Ct. 870. If a government seeks to impose a fee for the operation of a business protected by the First Amendment, it has the burden of demonstrating that the fees are reasonably related to costs of administering the licensing system. *See South–Suburban Housing Center v. Greater Suburban Board of Realtors,* 935 F.2d 868, 898 (7th Cir.1991).

***1152** Defendant has met this burden. In establishing licensing fees imposed by the ordinance, defendant considered costs associated with processing and investigating an application, ongoing records maintenance, licensing fees imposed on other establishments, such as liquor stores, and the estimated cost of enforcing the ordinance. Plaintiffs have offered no evidence that casts doubt on the accuracy of these estimates.

D. *Severability*

[39] **[40]** **[41]** The prohibition against depicting specified sexual acts and appearing in a state of nudity is facially overbroad. In addition, three other aspects of the ordinance's licensing scheme are unconstitutional. The invalidity of these provisions raises the question whether the rest of the ordinance can he salvaged. An unconstitutionally overbroad statute should be invalidated only "to the extent that it reaches too far, but otherwise left intact." *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). A statute may be amenable to a limiting construction if it contains a severability clause. *See id.* at 506, 105 S.Ct. 2794. However, partial invalidation may not be possible if the legislature would not have adopted the statute without the unconstitutional element. *See id.* Section 22 of the ordinance has this to say about severability:

> In the event any section, subsection, clause, phrase or portion of this ordinance is for any reason held illegal invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remainder of this ordinance. It is the legislative intent of the Common Council that this ordinance would have been adopted if such illegal provision had not been included or

> any illegal application had not been made.

Even in the face of a strong severability clause such as this one, courts are not authorized to "completely reconstruct a local ordinance ... [when] nothing short of rewriting could save [it]." *See American Booksellers Ass'n, Inc. v. Hudnut,* 771 F.2d 323, 332 (7th Cir.1985). Severance is improper if the unconstitutional provisions in defendant's ordinance are an integral part of the ordinance. *See Ragsdale v. Turnock,* 841 F.2d 1358, 1375 (7th Cir.1988).

In *Ragsdale,* the Seventh Circuit invalidated portions of a statutory scheme regulating the ability of physicians to perform abortions in privately-run clinics. The statute contained provisions forcing clinics to counsel and test patients as well as a comprehensive licensing system that imposed a variety of staffing and physical plant requirements which, if implemented, would have made clinics "the functional equivalent of small hospitals." *Id.* at 1374. The court found that these aspects of the statute violated the right to privacy as established by the Supreme Court in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Addressing the issue of severability, the Seventh Circuit concluded that the statute did not represent a coherent regulatory scheme without the unconstitutional provisions—a troubling observation in light of the stiff penalties faced by physicians who violated the law. *See Ragsdale,* 841 F.2d at 1375. No useful purpose would be served by rewriting minor provisions of the law in an attempt to make the entire statutory framework constitutional. *See id.*

The unconstitutional provisions in defendant's ordinance cannot be severed from the ordinance as a whole. Doing so would produce an unclear statutory scheme that most likely would represent a greater problem than an unabridged version of the ordinance. Without a workable definition of "sexually oriented business," defendant has no way of identifying those establishments that it may legitimately regulate and license. In essence, what the ordinance needs is not redaction but revision.

ORDER

IT IS ORDERED that:

1. The motion of plaintiffs Joseph Schultz and Tonya Norwood to strike certain affidavits submitted by defendant City of Cumberland is DENIED;

2. The motion of plaintiffs for summary judgment is GRANTED;

3. Section 8(A) of City of Cumberland Ordinance Section 12.15 is unconstitutionally overbroad.

4. Sections 11(F) and (G), 13(C)(6) and 13(C)(2) of the ordinance violate the First Amendment of the United States Constitution.

***1153** 5. Defendant City of Cumberland is enjoined permanently from enforcing the ordinance as it is presently drafted.

6. The clerk of the court is directed to enter judgment for plaintiffs and close this case.

All Citations

26 F.Supp.2d 1128

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228 F.3d 831
United States Court of Appeals,
Seventh Circuit.

Joseph SCHULTZ, doing business as Island Bar, and Tonya Norwood, Plaintiffs–Appellees/Cross–Appellants,
v.
CITY OF CUMBERLAND, Defendant–Appellant/Cross–Appellee.

Nos. 98–4126, 98–4209.
|
Argued Sept. 9, 1999
|
Decided Sept. 26, 2000
|
Rehearing and Rehearing En Banc Denied Dec. 1, 2000

Nude dancer and owner of bar at which she performed brought action for declaratory and injunctive relief, challenging a city ordinance establishing a comprehensive licensing and regulatory scheme for "sexually oriented businesses." The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, J., 26 F.Supp.2d 1128, permanently enjoined enforcement of ordinance, and city appealed. The Court of Appeals, Kanne, Circuit Judge, held that: (1) ordinance was content-based, but would be analyzed as content-neutral time, place or manner regulation; (2) limitation on hours of sexually oriented business was valid time, place or manner restriction; (3) ban on full nudity was valid, but ban on performance of specified sexually explicit movements was unconstitutional; (4) ban on full nudity was not facially overbroad; (5) licensing scheme was valid in part but improperly requested certain information from applicants; and (6) unconstitutional provisions would be severed from valid provisions of ordinance.

Affirmed in part and reversed in part.

West Headnotes (30)

[1] **Constitutional Law**
Indecency in general

Sexual expression which is indecent but not obscene is protected by the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] **Constitutional Law**
Nudity in general

Entertainment may not be prohibited solely because it displays the nude human figure; nudity alone does not place otherwise protected material outside the mantle of the First Amendment. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[3] **Constitutional Law**
Content neutrality

Municipal ordinance regulating sexually oriented businesses was content-based, since it banned nudity with reference to certain expressive conduct, but ordinance would be analyzed as content-neutral time, place or manner regulation and subjected to intermediate scrutiny, under which regulations of time, place or manner of adult entertainment are reasonable if they do not remove alternative channels of communication. U.S.C.A. Const.Amend. 1.

26 Cases that cite this headnote

[4] **Constitutional Law**
Content-Based Regulations or Restrictions

Content-based regulations by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed; since it is the content of the speech that determines whether it is within or without the regulation, they single out certain

viewpoints or subject matter for differential treatment. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[5] **Constitutional Law**
Strict or exacting scrutiny;compelling interest test

Content-based regulations draw strict scrutiny because their purpose is typically related to the suppression of free expression and thus contrary to the First Amendment imperative against government discrimination based on viewpoint or subject matter. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[6] **Constitutional Law**
Viewpoint or idea discrimination

Constitutional Law
Content-Neutral Regulations or Restrictions

The government cannot favor one viewpoint over another, nor can the government suppress an entire category of speech, even if the regulation is viewpoint-neutral within that category of speech, because the First Amendment bars prohibition of public discussion of an entire topic. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[7] **Constitutional Law**
Content-Neutral Regulations or Restrictions

Content-neutral regulations are justified without reference to the content of the regulated speech and do not raise the specter of government discrimination. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[8] **Constitutional Law**
Content-Neutral Regulations or Restrictions

"Time, place or manner regulations" control the surrounding circumstances of speech without obstructing discussion of a particular viewpoint or subject matter. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[9] **Constitutional Law**
Conduct, protection of

Government may generally regulate conduct without regard to the First Amendment because most conduct carries no expressive meaning of First Amendment significance; however, broad regulations of conduct implicate First Amendment concerns when they apply to specific instances of expressive conduct. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**
Content-Neutral Regulations or Restrictions

When the government enacts a content-neutral regulation on a class of conduct, citing the harmful secondary effects related to that conduct, that is, the subsidiary effects or noncommunicative impact of the speech, courts presume that the government did not intend to censor speech, even if the regulation incidentally burdens particular instances of expressive conduct. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[11] **Constitutional Law**
Public nudity or indecency

A general prohibition on all public nudity receives intermediate scrutiny, rather than strict scrutiny, under the First Amendment, when the government offers as its legislative justification the suppression of public nudity's negative secondary effects. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[12] **Constitutional Law**
Content-Neutral Regulations or Restrictions

The mere assertion of a content-neutral purpose does not save a law which, on its face, discriminates based on content, and a secondary-effects rationale by itself does not bestow upon the government free license to suppress specific content or a specific message because such a regime would permit the government to single out a message expressly, formulate a regulation that prohibits it, then draw content-neutral treatment nonetheless simply by producing a secondary-effects rationale as pretextual justification. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[13] **Constitutional Law**
Content-Neutral Regulations or Restrictions

Some time, place or manner regulations are treated as content-neutral, even though they are content-based on their faces. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[14] **Constitutional Law**
Content neutrality

Constitutional Law
Secondary effects

In the domain of adult entertainment, discriminatory time, place or manner restrictions can be upheld as content-neutral restrictions on adult entertainment if they (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant government interest in curbing adverse secondary effects; and (3) still leave open ample alternative channels for communication. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[15] **Constitutional Law**
Hours of operation

Constitutional Law
Secondary effects

Public Amusement and Entertainment
Sexually Oriented Entertainment

Municipal ordinance provision limiting hours of operation for sexually oriented businesses to between 10 a.m. and midnight, Monday through Saturday, was valid time, place or manner restriction, under First Amendment, as provision furthered city's significant government interest in combating harmful secondary effects of adult entertainment and was not substantially broader than necessary. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[16] **Constitutional Law**
Nudity in general

Constitutional Law
Nude or semi-nude dancing

Public Amusement and Entertainment
Dancing and other performances

Municipal ordinance provision that proscribed appearing in a state of nudity or depicting specified sexual activities in a sexually oriented business was valid to extent that it banned full nudity, but restriction on performance of specified sexually explicit movements unconstitutionally burdened protected expression, in violation of First Amendment, since it prevented erotic dancers from practicing their protected form of expression. U.S.C.A. Const.Amend. 1.

21 Cases that cite this headnote

[17] **Constitutional Law**
Strict or exacting scrutiny;compelling interest test

To survive strict scrutiny, a content-based provision must be necessary to serve a

compelling state interest and be narrowly drawn to achieve that end. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[18] **Constitutional Law**
Theaters in general

Constitutional Law
Cabarets, Discotheques, Dance Halls, and Nightclubs in General

Public Amusement and Entertainment
Dancing and other performances

Municipal ordinance provision prohibiting full nudity in sexually oriented businesses was not facially overbroad, despite claim that ordinance could apply to venues that presented theatrical and artistic performances featuring nudity or sexual content, as ordinance was readily susceptible to narrowing construction by which venue would fall within ordinance's definitions for adult theater and adult cabaret only if it featured nudity, semi-nudity, or specified sexual content as the permanent focus of its business and gave special prominence to such content on a permanent basis. U.S.C.A. Const.Amend. 1.

14 Cases that cite this headnote

[19] **Constitutional Law**
Freedom of Speech, Expression, and Press

Constitutional Law
Invalidation of all enforcement

The "overbreadth doctrine" prevents the government from casting a net so wide that its regulation impermissibly burdens speech, and to avoid chilling the speech of third parties who may be unwilling or unlikely to raise a challenge in their own stead, the overbreadth doctrine in certain circumstances permits litigants already before the court to challenge a regulation on its face and raise the rights of third parties whose protected expression is prohibited or substantially burdened by the regulation. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[20] **Constitutional Law**
Prohibition of substantial amount of speech

A facial overbreadth challenge to a regulation affecting speech is successful when it establishes a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[21] **Constitutional Law**
Limiting construction

A facial overbreadth challenge to a regulation affecting speech fails when the regulation's plain language is readily susceptible to a narrowing construction that would make it constitutional. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[22] **Constitutional Law**
Licenses and permits in general

Public Amusement and Entertainment
Sexually Oriented Entertainment

Municipal ordinance's licensing scheme for sexually oriented businesses was valid time, place and manner regulation to extent that it required disclosure of applicant's name and age, type of license sought, proposed location and description of business premises, identifying personal data, and proof of employees' ages, and to extent that it required application fee and required compliance with other extant health and safety laws applicable to all city businesses. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[23] **Constitutional Law**
Presumption of invalidity

Any system of prior restraint comes bearing a heavy presumption against its constitutional validity. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[24] **Constitutional Law**
Prior Restraints

The proponent of a prior restraint carries a heavy burden of showing justification for the imposition of such a restraint; however, prior restraints are not per se unconstitutional because the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[25] **Constitutional Law**
Licenses and Permits in General
Constitutional Law
Time limits for grant or denial

Licensing, though functioning as a prior restraint, is constitutionally legitimate when it complies with the standard for time, place or manner requirements. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[26] **Constitutional Law**
Licenses and permits in general
Public Amusement and Entertainment
Sexually Oriented Entertainment

Municipal licensing scheme for sexually oriented businesses was unconstitutional regulation of expression to extent that applicants were required to produce their residential address, recent color photograph, Social Security number, fingerprints, tax-identification number, and driver's license information, since such information was redundant, with respect to other required information, and was unnecessary for city's stated purposes. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[27] **Constitutional Law**
Licenses and Permits in General

The First Amendment does not allow licensing provisions based on criminal history that totally prohibit certain classes of persons from First Amendment expression. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[28] **Constitutional Law**
Secondary effects
Public Amusement and Entertainment
Sexually Oriented Entertainment

Disqualification provisions of municipal licensing scheme for sexually oriented businesses, which prevented certain classes of people from obtaining licenses, were unconstitutional under First Amendment, since provisions produced complete ban on certain expression for a disqualified group of applicants who, by definition, wished to speak, and provisions could not be justified as narrowly tailored to resist noisome secondary effects. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[29] **Municipal Corporations**
Effect of partial invalidity

A municipal ordinance's severability clause can save the constitutionally viable remainder, after invalidation of portions of the ordinance, only if the invalidated elements were not an integral part of the statutory enactment viewed in its entirety.

2 Cases that cite this headnote

[30] **Municipal Corporations**
Effect of partial invalidity

Unconstitutional portions of municipal ordinance regulating sexually oriented businesses, including ban on certain sexually

explicit movements and disqualification provisions preventing certain classes of persons from obtaining a license, would be severed from portions of ordinance that were constitutional, including restrictions on full nudity and hours of operation for such businesses, which could stand separately from unconstitutional provisions. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

Attorneys and Law Firms

***835** Randall D.B. Tigue (argued), Minneapolis, MN, for Plaintiffs-Appellees.

Richard M. Burnham (argued), Brady C. Williamson, LaFollette & Sinykin, Madison, WI, for Defendant-Appellant.

Before COFFEY, KANNE and EVANS, Circuit Judges.

Opinion

KANNE, Circuit Judge.

The City of Cumberland had sought for years to close the Island Bar, a strip club within the small Wisconsin town, when it enacted a municipal ordinance regulating "sexually oriented businesses." The ordinance imposed comprehensive regulations on the operation of adult-entertainment establishments in Cumberland. In response, Joseph Schultz, the Island Bar's owner, and Tonya Norwood, an Island Bar exotic dancer, sued in district court challenging the ordinance's constitutionality under the First Amendment. We uphold the portions of the ordinance that serve as reasonable time, place or manner restrictions and strike the portions of the ordinance that ban sexually explicit dance movements and disqualify certain persons from holding adult-entertainment licenses.

I. HISTORY

In Cumberland, Wisconsin, the Island Bar is the lone sexually oriented business located in the small town of 2,200 residents. The Island Bar opened in 1993 and quickly attracted notoriety when Schultz converted the bar into a strip club featuring nude female dancers, including co-plaintiff Norwood. After assiduous undercover investigation by Barron County law enforcement, Cumberland authorities discovered prostitution and sexual contact between nude dancers and bar patrons, and revoked the Island Bar's liquor license on October 12, 1994. The Island Bar later reopened as a non-alcoholic bar, still featuring nude female dancing, but two convictions of Island Bar patrons for prostitution in March 1997 led to its closing for one year under Wis. Stat. § 823.13 as a public nuisance. *See State v. Schultz*, 218 Wis.2d 798, 582 N.W.2d 113 (1998).

Unsatisfied with the one-year closure, the Cumberland city council established a municipal planning subcommittee dedicated to exploring more restrictive methods of regulating nude dancing. Happy to offer assistance were conservative interest groups devoted to fighting "sexually oriented businesses" (wittily abbreviated as "SOBs"). For example, the National Family Legal Foundation ("NFLF") provided a comprehensive handbook entitled *Protecting Communities From Sexually Oriented Businesses*. The handbook explains that it "is not meant to be a neutral overview of current methods of regulating 'adult' businesses. This is a 'how-to' manual for those who are serious about protecting their communities and doing battle with the incredibly powerful and profitable sex club industry." Copying virtually verbatim the NFLF's model regulation, Cumberland received comments on its new draft ordinance from the NFLF and Morality in Media, Inc., among others.

Following the NFLF's instructions on "Making the Legislative Record," Cumberland set about constructing legislative findings to support the NFLF ordinance in their community. The Cumberland committee in charge of drafting the ordinance divided research duties among its members. Mayor Lawrence Samlaska reviewed police reports and spoke to the Cumberland police about its investigation of crime at the Island Bar. Committee member Jeffrey Streeter researched the appropriate zoning location for sexually oriented businesses to minimize depreciation of real estate values and disturbances of the peace. Committee member Richard Nerbun obtained current health statistics from the Centers for Disease Control on sexually transmitted diseases and included them in the ordinance findings.

Nerbun also considered the appropriate hours of operation for sexually oriented businesses, taking into account the proximity of the ***836** Island Bar to schools and school bus stops, citizen safety issues, the school schedule and hours-of-operation provisions in the ordinances of other cities. Committee member Carolyn Burns examined past cases involving municipal regulation of adult entertainment and reviewed studies published by other communities concerning the negative effects of adult businesses on surrounding neighborhoods. Based ostensibly on this research, supplemented heavily by NFLF assistance, the subcommittee drafted a legislative preamble lifted from the NFLF model ordinance. It expressed Cumberland's concern about the adverse effects of sexually oriented businesses on "the health, safety and welfare of the patrons of such businesses as well as the citizens of the City," including "prostitution and sexual liaisons of a casual nature," "sexually transmitted diseases," the "deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them" and "objectionable operational characteristics, particularly when they are located in close proximity to each other, thereby contributing to urban blight and downgrading the quality of life in the adjacent area."

After a public hearing, the Cumberland planning commission voted to recommend the ordinance to the city council, and on January 6, 1998, the city council unanimously adopted City of Cumberland Ordinance 12.15 ("Ordinance"), establishing a licensing and regulatory system for all "sexually oriented businesses." First, the Purpose and Findings Section explains that the Ordinance has "neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials." Instead, the purpose of the Ordinance is "to regulate sexually oriented businesses in order to promote the health, safety, morals, and general welfare of the citizens of the City" based on "the adverse secondary effects of adult uses on the community presented in hearings and in reports made available to the Council, and on findings incorporated in the cases of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), *Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), and on studies in other communities."

Second, Section II defines the different types of sexually oriented businesses subject to the Ordinance. Cumberland and the plaintiffs agree that the Island Bar is covered by the definitions for two categories of sexually oriented business: "adult theater" and "adult cabaret." Section II(3) defines "Adult Cabaret":

> a nightclub, bar, restaurant, or similar commercial establishment which regularly features:
>
> (a) persons who appear in a state of nudity or semi-nude; or
>
> (b) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
>
> (c) films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

Section II(7) defines "Adult Theater":

> a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or semi–nude, or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

In addition, the definitions for "adult arcade," "adult bookstore, novelty store or video store," "adult motel," "adult motion picture theater" and "adult mini-motion picture theater" all incorporate the phrase "characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas.' " Specified sexual activities include "the fondling or other erotic touching of human genitals, pubic ***837** region, buttocks, anus, or female breasts"; "sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, masturbation, or sodomy"; and "excretory functions" in connection with sexual activity. Cumberland Municipal Code Section 12.15, at § II(24). Specified anatomical areas include "(a) the human male genitals in a discernibly turgid state, even if completely and opaquely covered; or (b) less than completely and opaquely covered human genitals, pubic region, buttocks or a female breast

below a point immediately above the top of the areola." *Id.* at § II(22).

Third, Section VIII(A) declares the following: "It shall be a ***violation*** for a person who knowingly and intentionally, in a sexually oriented business, appears in a state of nudity or depicts specified sexual activities." The Ordinance defines "a state of nudity" as the following:

> [T]he showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, the showing of the female breast with less than fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

Section VIII(B) makes it a "***violation***" for an employee of a sexually oriented business to appear even semi-nude, unless the employee does not receive any pay or gratuity from customers and remains on a stage at least two feet off the floor and at least ten feet from any customer. The Ordinance defines "semi-nude condition" as the following:

> [T]he showing of the female breast below a horizontal line across the top of the areola at its highest point or the showing of the male or female buttocks. This definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast, exhibited by a dress, blouse, skirt, leotard, bathing suit, or other wearing apparel provided the areola is not exposed in whole or in part.

Fourth, the Ordinance imposes operating restrictions and licensing requirements on sexually oriented businesses. Section X limits sexually oriented businesses (except adult motels) to business hours of 10 a.m. to midnight Monday through Saturday, closed on Sunday. Sections XI and XIII require operators of sexually oriented businesses and their employees to obtain licenses from Cumberland. Section XIII(A) explains that Cumberland must issue an employee license within thirty days of application unless it finds any of the enumerated reasons for denial, including overdue payment of Cumberland taxes, fees or fines; recent denial or revocation of a license or recent conviction for a sex-related crime by the applicant or a cohabitant of the applicant; and non-approval of the premises of the sexually oriented business by Cumberland inspectors under applicable laws and ordinances. [1] Applicants ***838** must provide a legal name and any aliases, proof of age, residential and business addresses, a recent photograph, a physical description, fingerprints, driver's license information, a Social Security number and the specified sex-related criminal history and sexually oriented business license history for both the applicant and the applicant's cohabitants. *See id.* at § XI(D)-(G). Applicants for operators' licenses must divulge all this information in addition to the identities of any partners, directors and principal stockholders, and diagrams of both the business's interior and the 750–square–foot area surrounding the business's exterior. *See id.* Section XIII(C) provides that Cumberland will issue an operator's license within thirty days of receipt of a completed application, unless it finds any of eight enumerated reasons by a preponderance of the evidence.

[1] Section XIII provides in pertinent part:

> (A) Upon the filing of said application for a sexually oriented business employee license, the city shall issue a temporary license to said applicant. The application shall then be referred to the appropriate city departments for an investigation to be made on such information as is contained on the application. The application process shall be completed within thirty (30) days from the date the completed application is filed. After the investigation, the City shall issue a license, unless it is determined by a preponderance of the evidence that one or more of the following findings is true:
>
> (1) The applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form;
>
> (2) The applicant is under the age of eighteen (18) years;
>
> (3) The applicant has been convicted of a "specified criminal activity" as defined in this ordinance;
>
> (4) The sexually oriented business employee license is to be used for employment in a business prohibited by local or state law,

statute, rule or regulation, or prohibited by a particular provision of this ordinance; or

(5) The applicant has had a sexually oriented business employee license revoked by the City within two (2) years of the date of the current application. If the sexually oriented business employee license is denied, the temporary license previously issued is immediately deemed null and void....

(B) A license granted pursuant to this section shall be subject to annual renewal upon the written application of the applicant and a finding by the City that the applicant has not been convicted of any specified criminal activity as defined in the ordinance or committed any act during the existence of the previous license which would be grounds to deny the initial license application. The renewal of the license shall be subject to the payment of the fee as set forth in Section XIV.

(C) Within 30 days after receipt of a completed sexually oriented business application, the City shall approve or deny the issuance of a license to an applicant. The City shall approve the issuance of a license to an applicant unless it is determined by a preponderance of the evidence that one or more of the following findings is true:

(1) An applicant is under eighteen (18) years of age.

(2) An applicant or a person with whom applicant is residing is overdue in payment to the City of taxes, fees, fines, or penalties assessed against or imposed upon him/her in relation to any business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or a person with whom the applicant is residing has been denied a license by the City to operate a sexually oriented business within the preceding twelve (12) months or whose license to operate a sexually oriented business has been revoked within the preceding twelve (12) months.

(5) An applicant or a person with whom the applicant is residing has been convicted of a specified criminal activity defined in this ordinance.

(6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building officials as being in compliance with applicable laws and ordinances.

(7) The license fee required by this ordinance has not been paid.

(8) An applicant of the proposed establishment is in violation of or is not in compliance with any of the provisions of this ordinance.

Section XIII(E) guarantees that the health department, fire department and building official shall complete their inspection of an applicant's premises, necessary for licensing, within twenty days of the application. Each application for a sexually oriented business license requires a $100 application and investigation fee. *See id.* at § XIV(A). Section XVIII promises that judicial review of denial, refusal to renew or suspension of a license will be "promptly reviewed" by a court of competent jurisdiction.

Fifth, Section XXII contains a sweeping severability provision:

> In the event any section, subsection, clause, phrase or portion of this ordinance is for any reason held illegal, invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remainder of this ordinance. It is the legislative intent of the Common Council that this ordinance would have been adopted if such illegal provision had not ***839** been included or any illegal application had not been made.

On February 8, 1998, the plaintiffs sued Cumberland in district court seeking a permanent injunction against enforcement of the Ordinance, alleging under 42 U.S.C. § 1983 that the Ordinance violates their First Amendment rights to present nude dancing at the Island Bar. Cumberland agreed not to enforce the Ordinance until the district court reached decision on summary judgment. On November 5, 1998, the district court held that the Ordinance imposed content-neutral restrictions on expressive conduct and upheld the Ordinance's operating regulations. *See Schultz v. City of Cumberland,* 26 F.Supp.2d 1128, 1144 (W.D.Wis.1998). However, the

court also found that the Section VIII(A) nudity ban is unconstitutionally overbroad and that the employee-disclosure provisions and several operator-license requirements lacked rational connection in the record to be deemed narrowly tailored to the Ordinance's purposes. *See id.* at 1150–51. After finding the defective sections of the Ordinance non-severable from the valid provisions, the court granted summary judgment in favor of the plaintiffs and permanently enjoined enforcement of the Ordinance. *See id.* at 1152.

II. ANALYSIS

[1] **[2]** Although once furiously debated, it is now well-established that erotic dancing of the sort practiced at the Island Bar enjoys constitutional protection as expressive conduct. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 1385, 146 L.Ed.2d 265 (2000); *Miller v. Civil City of South Bend,* 904 F.2d 1081, 1087 (7th Cir.1990), *rev'd sub nom. on other grounds*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Of course, no one argues that erotic dancing at the Island Bar represents high artistic expression, but "[n]ude barroom dancing, though lacking in artistic value, and expressing ideas and emotions different from those of more mainstream dances, communicates them, to some degree, nonetheless." *Miller*, 904 F.2d at 1087. The Supreme Court has agreed, explaining that "nude dancing of the type at issue here is expressive conduct, although ... it falls only within the outer ambit of the First Amendment's protection." *Erie,* 120 S.Ct. at 1391 (addressing nude barroom dancing); *see also Barnes*, 501 U.S. at 566, 111 S.Ct. 2456 ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."). Moreover, "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). Entertainment may not be prohibited "solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (citations omitted).

While the parties agree that nude dancing receives First Amendment protection, this case presents three disputed issues on appeal. The first question is whether the operating restrictions in Sections X and VIII(A) are unconstitutional content-based regulations of expression or legitimate time, place or manner restrictions. The second question is whether Section VIII(A) is overbroad. The third question is whether the licensing provisions in Sections XI and XIII are unconstitutional prior restraints on expression. We review *de novo* the district court grant of summary judgment. *See Matney v. County of Kenosha*, 86 F.3d 692, 695 (7th Cir.1996).

A. Operating Regulations for Sexually Oriented Businesses

[3] The plaintiffs challenge the Section X hours-of-operation restriction and the Section VIII(A) ban on live nudity and ***840** sexually explicit gestures as content-based regulations of protected expression. They argue that these provisions of the Ordinance are content-based on their face because they explicitly target adult entertainment. The Ordinance applies only to sexually oriented businesses, which are defined by the Ordinance with reference to the expressive activity performed inside. In response, Cumberland admits that the Ordinance applies only to adult-entertainment establishments. Nonetheless, Cumberland insists that the Ordinance is a content-neutral regulation of nudity viable under the secondary-effects theory of *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504, and *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265.

[4] **[5]** **[6]** The Supreme Court has long held that regulations designed to restrain speech on the basis of its content are subject to strict scrutiny and are presumptively invalid under the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Stromberg v. California,* 283 U.S. 359, 368–69, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). Content-based regulations "by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). Since "it is the content of the speech that determines whether it is within or without the [regulation]," they single out certain viewpoints or subject matter for differential treatment.

Carey v. Brown, 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). These regulations draw strict scrutiny because their purpose is typically related to the suppression of free expression and thus contrary to the First Amendment imperative against government discrimination based on viewpoint or subject matter. *See Texas v. Johnson,* 491 U.S. 397, 403, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Owing to the profound national commitment to robust, open debate, "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." *R.A.V.*, 505 U.S. at 382, 112 S.Ct. 2538 (internal citations omitted). The government cannot favor one viewpoint over another, *see City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), nor can the government suppress an entire category of speech, even if the regulation is viewpoint-neutral within that category of speech, because the First Amendment bars "prohibition of public discussion of an entire topic." *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

[7] **[8]** In contrast, content-neutral regulations are justified without reference to the content of the regulated speech and do not raise the specter of government discrimination. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). These regulations do not refer to expressive content and do not single out a particular viewpoint or category of speech for different treatment. Instead, all speech is treated similarly in an effort to advance significant government interests unrelated to content. A general ban on speech in the vicinity of a school is content-neutral, *see Grayned v. City of Rockford*, 408 U.S. 104, 119–20, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), whereas an analogous ban on speech containing an exemption for speech relating to labor disputes is content-based. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). The former regulation requires no consideration of content before applying the ban, while the latter regulation requires consideration ***841** whether the speech in question refers to a labor dispute before it is possible to determine if the regulation applies. When the government treats all expression equally without regard to the ideas or messages conveyed, courts can be more certain that the government intends to serve important interests unrelated to suppression of speech and is not acting with censorial purpose. In that vein, the government may institute reasonable time, place or manner regulations that apply to all speech alike, such as restrictions on sound amplification at an outdoor bandshell, *see Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), or a prohibition on targeted residential picketing. *See Frisby v. Schultz,* 487 U.S. 474, 488, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Such regulations control the surrounding circumstances of speech without obstructing discussion of a particular viewpoint or subject matter.

[9] **[10]** However, the First Amendment tolerates greater interference with expressive conduct, provided that this interference results as an unintended byproduct from content-neutral regulation of a general class of conduct. In most cases, the government may regulate conduct without regard to the First Amendment because most conduct carries no expressive meaning of First Amendment significance. *See Graff v. City of Chicago*, 9 F.3d 1309, 1315–16 (7th Cir.1993). However, broad regulations of conduct implicate First Amendment concerns when they apply to specific instances of expressive conduct. For example, in *United States v. O'Brien,* 391 U.S. 367, 382, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), the Court considered whether a ban on destroying draft cards violated the First Amendment, given that draft-card burning represented a powerful symbol of political protest at the time. The government argued that the ban was necessary for the administration of the Selective Service program, and as the Court explained, the statute "plainly does not abridge free speech on its face.... [It] on its face deals with conduct having no connection with speech." *Id.* at 375, 88 S.Ct. 1673. The effect on expression was merely incidental to the content-neutral ban on the general class of conduct because the ban applied to draft-card destruction of all forms, not only to draft-card burning intended as expression. Although it recognized the symbolic conduct of draft-card burning as First Amendment expression, the Court applied intermediate scrutiny because the restraint on expression was only an "incidental burden" generated by the government's content-neutral attempt at furthering significant governmental interests unrelated to the suppression of speech. *See O'Brien,* 391 U.S. at 382, 88 S.Ct. 1673; *see also Erie,* 120 S.Ct. at 1391; *Clark v. Community for Creative Non–Violence,* 468 U.S.

288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). As a result, the government "generally has a freer hand" with respect to expressive conduct than with respect to verbal expression. *Johnson*, 491 U.S. at 406, 109 S.Ct. 2533. When the government enacts a content-neutral regulation on a class of conduct, citing the harmful secondary effects related to that conduct, *i.e.*, the subsidiary effects or "noncommunicative impact" of the speech, courts presume that the government did not intend to censor speech, even if the regulation incidentally burdens particular instances of expressive conduct. *See Erie,* 120 S.Ct. at 1392.

[11] As such, a general prohibition on all public nudity receives intermediate scrutiny, rather than strict scrutiny, when the government offers as its legislative justification the suppression of public nudity's negative secondary effects. *See id.* In *Barnes*, the Court upheld as content-neutral an Indiana public-indecency statute prohibiting nudity in public places because the statute was directed at preventing prostitution, sexual assaults and other criminal activity associated with adult entertainment—government interests "not at ***842** all inherently related to expression." *Barnes*, 501 U.S. at 585, 111 S.Ct. 2456 (Souter, J., concurring). [2] In *Erie*, the Court sustained an ordinance nearly identical to the *Barnes* statute banning all public nudity because the government's predominant purpose again was to combat the harmful secondary effects of public nudity. *See Erie*, 120 S.Ct. at 1392. In both cases, plaintiffs challenged these facially content-neutral proscriptions on conduct because the broad prohibitions incidentally illegalized some expression as well, namely nude dancing. The Court upheld both regulations because each was nondiscriminatory on its face with respect to content and each cited as its legislative justification the abatement of public nudity's noxious secondary effects. *See id.* at 1391–93; *Barnes,* 501 U.S. at 585, 111 S.Ct. 2456 (Souter, J., concurring). As the Court explained, "there is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech)." *Erie*, 120 S.Ct. at 1394. In neither case did the regulation outlaw nude dancing specifically or refer to expressive content; the restriction on nude dancing resulted incidentally from the general, content-neutral prohibition on all public nudity.

2 A divided Court issued four separate opinions in *Barnes*, but under *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), Justice Souter's concurrence is the controlling opinion on this issue, as the most narrow opinion joining the judgment of the Court. *See DiMa Corp. v. Town of Hallie,* 185 F.3d 823, 830 (7th Cir.1999); *see also Tunick v. Safir*, 209 F.3d 67, 83 (2d Cir.2000) (collecting cases in agreement from other circuits).

Cumberland argues that the Ordinance is constitutional under *Barnes* and *Erie* because the Ordinance is justified without reference to communicative content and supported by a legislative record of pernicious secondary effects. The nominal purpose of the Cumberland Ordinance was addressing secondary effects allegedly affiliated with nude dancing, including "prostitution and sexual liaisons of a casual nature," "sexually transmitted diseases" and "urban blight and downgrading the qualify of life in the adjacent area." Cumberland mustered extensive efforts to construct a legislative record substantiating their concerns, and the Ordinance offers the city council's research as legislative findings and articulates the abatement of secondary effects as its purpose. Moreover, as the Court commended in *Erie*, Cumberland referenced the evidentiary foundation set forth in previous Supreme Court decisions regarding the baneful secondary effects of adult entertainment. *Erie,* 120 S.Ct. at 1395; *cf. Renton*, 475 U.S. at 50–52, 106 S.Ct. 925. *But see Erie,* 120 S.Ct. at 1403–05 (Souter, J., dissenting in part) (arguing that the government must demonstrate a particularized factual basis for finding evidence from previous cases to be relevant). Cumberland argues that its significant government interest in stemming harmful secondary effects justifies all the Ordinance regulations of adult entertainment, including the ban on nudity and certain sexually explicit movements.

However, in patent contrast to the regulations in *Barnes* and *Erie*, the Ordinance is not a content-neutral prohibition on a general class of conduct. Like the *Barnes* and *Erie* regulation, the Cumberland Ordinance bans nudity. But unlike the *Barnes* and *Erie* regulation, the Ordinance bans it with reference to certain expressive content. We can see this by examining the Ordinance definitions for various types of sexually oriented businesses to which the Ordinance arrogates within its Section VIII(A) ban on live nudity and sexually explicit movements, Section X operating restrictions and Section XI and XIII licensing provisions. Specifically, the plaintiffs challenge Section II(3) and II(7), which define "adult cabaret" and "adult theater" respectively

and apply to the Island Bar. Both these sections cover a commercial establishment that "regularly features ... live performances which are ***843** characterized by the exposure of 'specified anatomical areas' or 'specified sexual activities.' " This definition is the predominant one in the Ordinance for defining sexually oriented businesses, appearing within the definitions for adult arcade, adult motel, adult motion picture theater, adult mini-motion picture theater and adult bookstore, novelty store or video store, in addition to those for adult theater and adult cabaret. [3]

[3] The definition for "adult cabaret" has an additional clause that again refers to content. This prong of the definition apprehends within its ambit a commercial establishment that "regularly features films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas.' "

The definitions of "nudity," "semi-nude," "specified anatomical areas" and "specified sexual activities" are uncontroversial, and the parties do not contend otherwise.

This definition on its face targets erotic expression. According to *Webster's Third New International Dictionary*, the word "performance" in this context means "a public presentation or exhibition ... <the play ran for 285 [performances]> <the orchestra gave a benefit [performance]>" or "something resembling a dramatic representation." *Webster's Third New Int'l Dictionary* 1678 (1986). This term undeniably denotes communicative content and applies explicitly to expression, not mere conduct. The qualifier "characterized by the exposure of 'specified anatomical areas' or 'specified sexual activities' " then indicates the type of content that expression must convey to fall inside the Ordinance's reach. "Characterize" means "to describe the essential character or quality of" or "to be a distinguishing characteristic." *Id.* at 376. The Ordinance therefore discriminates against establishments that regularly feature certain expressive conduct distinguished by sexual content. Cumberland modeled its definition on the discriminatory ordinances in *Renton* and *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), which defined the regulated adult material in those cases as "distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas.' " Indeed, following the Supreme Court's lead, we already have held that a substantially similar definition specifically singled out adult entertainment for different treatment. *See Entertainment Concepts, Inc. v. Maciejewski,* 631 F.2d 497, 504 (7th Cir.1980); *see also Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 438–39 (6th Cir.1998); *International Eateries of America, Inc. v. Broward County,* 941 F.2d 1157, 1160–61 (11th Cir.1991).

As a result, we regard the Ordinance as content-based. The Ordinance applies only to certain establishments characterized by their presentation of live performances with particular erotic content, and it is the presentation of expressive content that determines whether particular establishments are within or without the regulation. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. at 429, 113 S.Ct. 1505, the Court explained that a ban on newsracks containing commercial handbills was content-based because "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'content based.' " By the same token, the Cumberland Ordinance is content-based on its face because whether an establishment falls within the Ordinance's sweep is determined by the content of expression inside it. *Cf. Berg v. Health & Hosp. Corp.*, 865 F.2d 797, 802 (7th Cir.1989) (finding an ordinance content-neutral because "it makes no distinction between types of films or entertainment."). As we explained in *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 828 (7th Cir.1999), an ordinance that regulates only adult-entertainment businesses "singles out adult-oriented establishments for different treatment ***844** based on the content of the materials they sell or display." *See also National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 738 (1st Cir.1995) (stating that facial discrimination is "a telltale harbinger of content-based regulation"). The Ordinance restrictions on nude dancing are not incidental byproducts from the content-neutral regulation of a larger, inclusive class of nonexpressive conduct. Unlike the statute in *O'Brien*, for example, which "plainly does not abridge free speech on its face," 391 U.S. at 374, 88 S.Ct. 1673, the Ordinance by its plain terms specifically targets erotic expression.

This quality sharply distinguishes the Ordinance from the regulations examined in *Erie*, *Barnes* and other cases elaborating the permissibility of incidental burdens

from the regulation of general conduct. Those cases analyzed content-neutral regulations of conduct and depended on the consequent presumption of government nondiscrimination. The government could lawfully prohibit an entire class of conduct, so long as it did not define the regulated conduct with reference to expressive content. *See Clark*, 468 U.S. at 293, 104 S.Ct. 3065; *O'Brien,* 391 U.S. at 382, 88 S.Ct. 1673; *see also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986) (distinguishing regulations of general applicability from regulations that inevitably single out those engaged in First Amendment protected activities for the imposition of its burden). Thus, for example, an ordinance forbidding all camping and sleeping in downtown Washington, D.C., withstood a constitutional challenge because it was content-neutral on its face, even though its application to certain demonstrators who intended to stay overnight in Lafayette Park effectively squelched their protest. *See Clark*, 468 U.S. at 293, 104 S.Ct. 3065.

[12] Similarly, the public-indecency regulation in *Barnes* and *Erie* does not articulate its prohibitions with any reference to expressive content. It prohibits public nudity "across the board" in a facially content-neutral manner, *Barnes*, 501 U.S. at 566, 111 S.Ct. 2456, and "does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity." *Erie*, 120 S.Ct. at 1391. The regulation applied to nude dancing only because it was a form of public nudity, even though the unintended effect of this application was the restriction of adult entertainment. However, neither *Erie* nor *Barnes* applied a secondary-effects rationale to a discriminatory regulation that expressly targets nude dancing or adult entertainment for prohibition. *See International Eateries*, 941 F.2d at 1161 (refusing to apply *Barnes* to an ordinance that singles out nude dancing for regulation); *see also R.A.V.*, 505 U.S. at 394, 112 S.Ct. 2538 (questioning whether "an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech."). As the Supreme Court has explained, the mere assertion of a content-neutral purpose does not "save a law which, on its face, discriminates based on content." *Turner Broadcasting,* 512 U.S. at 642–43, 114 S.Ct. 2445. A secondary-effects rationale by itself does not bestow upon the government free license to suppress specific content or a specific message because such a regime would permit the government to single out a message expressly, formulate a regulation that prohibits it, then draw content-neutral treatment nonetheless simply by producing a secondary-effects rationale as pretextual justification. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 794, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (Scalia, J., dissenting in part) ("The vice of content-based legislation—what renders it *deserving* of the high standard of strict scrutiny —is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes."). As a result, we have never applied *Barnes* or *Erie* to cases in which the government regulation by its ***845** plain language targets adult entertainment, even when justified by secondary-effects theories. *See DiMa*, 185 F.3d 823; *North Ave. Novelties, Inc. v. City of Chicago*, 88 F.3d 441 (7th Cir.1996); *Matney*, 86 F.3d 692.

[13] **[14]** Nevertheless, the fact that the Ordinance definition is content-based on its face does not necessarily dictate that the Ordinance is analyzed as content-based and subjected to strict scrutiny. *See DiMa*, 185 F.3d at 828; *Richland Bookmart*, 137 F.3d at 439. Some time, place or manner regulations are treated as content-neutral, even though they are content-based on their faces. Courts at times have referred to these regulations as content-neutral, since they are treated as such in certain contexts. *See, e.g., 11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988, 995 (4th Cir.1995). But these courts often called them content-neutral without explaining that the regulations are in fact content-based and only analyzed as content-neutral when certain preconditions are met. *See DiMa*, 185 F.3d at 828 (explaining that the Supreme Court held this type of content-based regulation is to be "treated like content-neutral time, place, and manner regulations, not that it was content-neutral."); *Richland Bookmart,* 137 F.3d at 439. At least in the domain of adult entertainment, discriminatory time, place or manner restrictions can be upheld as content-neutral restrictions on adult entertainment if they (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant government interest in curbing adverse secondary effects; and (3) still leave open ample alternative channels for communication. *See Renton*, 475 U.S. at 47, 106 S.Ct. 925; *Young,* 427 U.S. at 61, 96 S.Ct. 2440; *DiMa*, 185 F.3d at 828. This standard strikes a healthy balance between the citizenry's First Amendment interests and the government's legitimate interests unrelated to suppression of speech. The government may further substantial state

interests by directing speech through certain avenues rather than others, but only if the government's means preserve legitimate opportunity for continued speech. Even when actuated by a secondary-effects motive, the government may not "deprive the public of its ability to 'satisfy its appetite for sexually explicit fare.' " *Matney*, 86 F.3d at 697–98 (quoting *Berg*, 865 F.2d at 803).

Content-discriminatory time, place or manner regulations received intermediate scrutiny in *Renton* and *Young* because the government did not censor expression and instead advanced zoning schemes supported by secondary-effects rationales. *Renton,* 475 U.S. at 54, 106 S.Ct. 925; *Young*, 427 U.S. at 72–73, 96 S.Ct. 2440. Although neither addressed nude dancing, both ordinances targeted adult-film entertainment on the basis of content. With language similar to the Cumberland Ordinance, those ordinances defined the regulated adult material as that "distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas.' " Discriminatory on their faces, the ordinances did not ban adult entertainment; instead, the ordinances imposed on adult bookstores and theaters geographic-zoning restrictions that fell comfortably within the rubric of a time, place or manner regulation. Inside the appropriate zones, sexually oriented establishments were permitted to purvey adult entertainment "essentially unrestrained." *Young,* 427 U.S. at 62, 96 S.Ct. 2440; *see also North Ave. Novelties*, 88 F.3d at 444. The *Renton* ordinance isolated adult entertainment in concentrated regions to protect residential and commercial centers, and the *Young* ordinance dispersed adult establishments to diffuse their secondary effects. Neither ordinance stifled or significantly burdened the availability of adult entertainment. The Court noted in *Young*, "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, ***846** however, ... '[the] burden on First Amendment rights is slight.' " *Young*, 427 U.S. at 71 n. 35, 96 S.Ct. 2440 (citation omitted).

Applying *Renton* and *Young* to a Chicago zoning ordinance that limited the location of "adult uses," we explained that a content-discriminatory regulation of time, place or manner is constitutional only if it preserves " 'reasonable opportunity' to disseminate the speech at issue." *North Avenue Novelties*, 88 F.3d at 445. The key inquiry focuses upon "the ability of producers as a group to provide sexually explicit expression, as well as on the ability of the public as a whole to receive it." *Id.* at 444. We upheld the Chicago ordinance because it "does not prohibit sexually explicit expression, but merely requires that such expression take place only in specified areas, and only in a non-concentrated manner." *Id.*; *see also Matney*, 86 F.3d at 698 (upholding an open-booth requirement for adult-entertainment viewing booths because it in no sense purported to ban or even limit adult entertainment); *Berg*, 865 F.2d at 802 (same). Thus, only the provisions of the Ordinance that regulate the time, place or manner of adult entertainment without removing alternative channels of communication are reasonable under the First Amendment.

[15] Under this standard, we uphold the Section X limitations on the hours of operation for sexually oriented businesses. Section X is a classic time, place or manner restriction, limiting the business hours for sexually oriented businesses to between 10 a.m. and midnight, Monday through Saturday. In *DiMa*, we found an ordinance that restricted the operating hours of adult-oriented establishments to be content-based, but analyzed and upheld it under content-neutral analysis consistent with *Renton* and *Young*. *DiMa*, 185 F.3d at 831; *see also Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1365 (11th Cir.1999); *Richland Bookmart*, 137 F.3d at 439–41; *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3d Cir.1993). Combating harmful secondary effects of adult entertainment is a significant government interest unrelated to speech content, and Cumberland satisfactorily established a secondary-effects justification for its time, place or manner regulation. *See DiMa*, 185 F.3d at 830. Whereas the municipality in *DiMa* did nothing more than cite the experiences of another Wisconsin town, Cumberland collected and reviewed a host of studies on secondary effects and the need for constrained operating hours. Cumberland's legislative research indicated that the hours-of-operation constraint enabled local law enforcement to concentrate its limited resources for those business hours. Although Section X provides fewer hours of operation than the ordinance in *DiMa*, we find that the restriction is not "substantially broader than necessary," even if more restrictive than absolutely necessary or justified. *Ward,* 491 U.S. at 800, 109 S.Ct. 2746.

[16] Section VIII(A) presents a more difficult question. Section VIII(A) proscribes "appear[ing] in a state of nudity or depict[ing] specified sexual activities" in a sexually oriented business. Cumberland bases Section VIII(A) on the significant government interest in fighting injurious secondary effects and justifies it by citing the history of crime at the Island Bar and research on secondary effects from studies and other cases. Section VIII(A) is cleverly styled as a mere time, place or manner restriction because it forbids certain expressive activity only within sexually oriented businesses but not elsewhere. Yet the operation of Section VIII(A) is clear. In practice, it effectively bans commercial nude dancing. Section II of the Ordinance defines a sexually oriented business as one that regularly features live performances characterized by the exposure of specified anatomical areas or specified sexual activities. But such performances by Ordinance definition always contain nudity (by virtue of exposed specified anatomical areas) or depictions of specified sexual activities, ***847** both of which Section VIII(A) bans within those sexually oriented establishments. Thus, Section II defines sexually oriented businesses with reference to the presentation of live adult entertainment, then Section VIII(A) stifles that presentation by forbidding nudity and sexual depictions within those sexually oriented businesses. To wit, the Island Bar is a sexually oriented business because it presents nudity, and as a result, the Ordinance bans nudity within the Island Bar, the sole supplier of nude dancing in Cumberland. Paradoxically, only by refraining from protected speech can a venue, its operator and its performers avoid the Section VIII(A) restrictions. For this reason, Section VIII(A) is not a mere time, place or manner restriction.

Nonetheless, the Supreme Court held in *Erie* and *Barnes* that limiting erotic dancing to semi-nudity represents a *de minimis* restriction that does not unconstitutionally abridge expression. *Erie*, 120 S.Ct. at 1397; *Barnes*, 501 U.S. at 571, 111 S.Ct. 2456. As the Court explained in Barnes, "the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." *Barnes*, 501 U.S. at 571, 111 S.Ct. 2456. Similarly in *Erie*, the Court reiterated that "[t]he requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message." *Erie*, 120 S.Ct. at 1397. Insofar as it prohibits full nudity and requires dancers to wear pasties and G-strings while performing, Section VIII(A) does not offend the First Amendment. *Cf. Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs*, 5 32 F.3d 1436, 1443 (10th Cir.1994) (upholding similar nudity restrictions under the Twenty–First Amendment). The Ordinance, however, goes several steps further. Section VIII(A) outlaws the performance of a strikingly wide array of sexually explicit dance movements, or what the Ordinance misdenominates as "specified sexual activities," including "the fondling or erotic touching of human genitals, pubic region, buttocks, anus, or female breasts."

By restricting the particular movements and gestures of the erotic dancer, in addition to prohibiting full nudity, Section VIII(A) of the Ordinance unconstitutionally burdens protected expression. The dominant theme of nude dance is "an emotional one; it is one of eroticism and sensuality." *Miller,* 904 F.2d at 1086–87. Section VIII(A) deprives the performer of a repertoire of expressive elements with which to craft an erotic, sensual performance and thereby interferes substantially with the dancer's ability to communicate her erotic message. It interdicts the two key tools of expression in this context that imbue erotic dance with its sexual and erotic character —sexually explicit dance movements and nudity. Unlike a simple prohibition on full nudity, Section VIII(A) does much more than inhibit "that portion of the expression that occurs when the last stitch is dropped." *Erie,* 120 S.Ct. at 1393. Section VIII(A) constrains the precise movements that the dancer can express while performing. The dancer may use non-sexually explicit elements and semi-nudity to convey a certain degree of sensuality, but putting taste aside, more explicit and erotic content is commonly available on primetime television without being fairly regarded as adult entertainment. The Court has declared that the government cannot "ban all adult theaters— much less all live entertainment or all nude dancing." *Schad,* 452 U.S. at 71, 101 S.Ct. 2176. We ourselves explained in *DiMa*, "Because this speech is not obscene, government may not simply proscribe it." *DiMa,* 185 F.3d at 827. Cumberland cannot avoid this dictate by regulating nude dancing with such stringent restrictions that the dance no longer conveys eroticism nor resembles adult entertainment. The portion of Section VIII(A) that bars the "depiction of specified sexual activities" is unconstitutional ***848** because it prevents erotic dancers from practicing their protected form of expression.

[17] None of the Supreme Court's precedent permits a government regulation expressly directed at adult entertainment and imposing such a restriction on non-obscene adult entertainment. Analyzed under strict scrutiny, as befits a content-based regulation, this portion of Section VIII(A) violates the First Amendment. To survive strict scrutiny, the provision must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991). This provision fails because it is not necessary to serve Cumberland's significant interest in arresting secondary effects. Cumberland can employ a variety of less speech-restrictive and more direct means to fight prostitution, illicit sex, sexually transmitted disease and urban blight. *See Leverett v. City of Pinellas Park,* 775 F.2d 1536, 1540 (11th Cir.1985). We uphold the portion of Section VIII(A) that bans full nudity within sexually oriented businesses but strike the portion of Section VIII(A) that bans the performance of specified sexually explicit movements within sexually oriented businesses.

B. Section VIII(A) and Overbreadth

[18] **[19]** **[20]** Having found part of Section VIII(A) to be a constitutional time, place or manner restriction, we now reach the plaintiffs' claim that Section VIII(A) is overbroad. The overbreadth doctrine prevents the government from casting a net so wide that its regulation impermissibly burdens speech. To avoid chilling the speech of third parties who may be unwilling or unlikely to raise a challenge in their own stead, the overbreadth doctrine in certain circumstances permits litigants already before the court to challenge a regulation on its face and raise the rights of third parties whose protected expression is prohibited or substantially burdened by the regulation. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). A facial overbreadth challenge is successful when it establishes "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). The Supreme Court has cautioned that overbreadth is "manifestly, strong medicine," *Broadrick*, 413 U.S. at 613, 93 S.Ct. 2908, and has invalidated regulations only when a limiting construction is not readily available and the unconstitutional applications of the regulation are real and substantial in relation to the regulation's plainly legitimate sweep. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987); *Brockett v. Spokane Arcades,* 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980).

Cumberland claims that *Barnes* and *Erie* shield the Ordinance from an overbreadth challenge, but the Supreme Court did not reach the issue of overbreadth in either case. In *Barnes*, a state court decision provided a limiting construction that saved the public-nudity statute from overbreadth. *Barnes*, 501 U.S. at 565 n. 1, 111 S.Ct. 2456. However, speaking for the Court, Justice Souter questioned skeptically whether the secondary-effects rationale from that case would protect against an overbreadth challenge if the statute "bar[red] expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in *Renton*." *Barnes*, 501 U.S. at 585 n. 2, 111 S.Ct. 2456 (Souter, J., concurring). He doubted that the statute could be applied ***849** to "a production of 'Hair' or 'Equus' ... in the absence of evidence that expressive nudity outside the context of *Renton*-type adult entertainment was correlated with such secondary effects." *Id.* In *Erie*, the Court again did not reach the overbreadth question presented by the parties. The Court simply reversed the Pennsylvania Supreme Court on other grounds and remanded without addressing overbreadth. *See Erie*, 120 S.Ct. at 1398, *see also Erie*, 120 S.Ct. at 1406 n. 5 (Souter, J., dissenting in part) (noting that the lower court on remand could dispose of the case on overbreadth grounds, which the Court did not address). Thus, *Barnes* and *Erie* are unhelpful with respect to overbreadth.

We already have found that the Section VIII(A) ban on full nudity is a permissible restriction of erotic dancing at the Island Bar, but the plaintiffs argue on behalf of third parties who wish to engage in protected speech yet are deterred by what the plaintiffs regard as the Ordinance's real and substantial threat of overbreadth. In this context, the overbreadth doctrine guards against the suppression of protected speech unconnected to the

negative secondary effects cited as legislative justification. *See Tunick v. Safir*, 209 F.3d 67, 83 (2d Cir.2000); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135 (6th Cir.1994). When the government restricts speech not associated with harmful secondary effects, then the government cannot be fairly said to be regulating with those secondary effects in mind and the regulation extends beyond its legitimate reach. Cumberland has made no finding of harmful secondary effects resulting from venues outside of adult entertainment, so the overbreadth doctrine would invalidate Section VIII(A) if it stifles substantial expressive conduct unassociated with the pernicious secondary effects advanced as the Ordinance's purpose. The plaintiffs argue that Section VIII(A) unconstitutionally forbids the regular showing of live performances featuring live nudity or depiction of sexual activity, but which sit outside the domain of adult entertainment and are uncorrelated with harmful secondary effects. Specifically, the plaintiffs explain that the definitions for adult theater and adult cabaret would cover venues that present theatrical and artistic performances which feature nudity or sexual content, but also contain serious artistic, social or political value.

The plain language of the Ordinance determines whether Section VIII(A) is overbroad. The Section II definitions for adult theater and adult cabaret cover a commercial establishment that "regularly features ... persons who appear in a state of nudity or semi-nude." This definition lends itself to expansive interpretation. "Regularly" means "in a regular, orderly, lawful, or methodical way," and "regular" means "returning, recurring or received at stated, fixed or uniform intervals <in the [regular] course of events>." *Webster's*, at 1913. "Features" means "to give special prominence to ... <the theater was *featuring* a murder-mystery film>." *Id.* at 832. The definition for adult theater and adult cabaret might include within the Ordinance's province any venue that presents at orderly intervals, as a matter of normal course, performances that prominently include nudity or semi-nudity. So construed, this definition would include a theater or playhouse that shows on a regular basis an interpretation of *Hair*, a presentation characterized by much nudity but which the Court has indicated constitutes protected speech. *See Barnes*, 501 U.S. at 585 n. 2, 111 S.Ct. 2456 (Souter, J., concurring); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). The text does not limit its regulation to adult entertainment because an array of "regularly feature[d]" artistic and theatrical expression includes live nudity or semi-nudity without necessarily becoming content readily analogous to the adult entertainment regulated in *Renton* and *Young*. Unlike statutes upheld against overbreadth challenges in other cases, the Ordinance contains no explicit exception for expression that contains nudity or sexual depiction but also possesses ***850** serious artistic, social or political value. *See, e.g., Tunick*, 209 F.3d at 71 (exception for "performances or exhibitions that [take] place indoors before audiences"); *J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 365 (5th Cir.1998) (exception for persons "engaged in expressing a matter of serious literary, artistic, scientific or political value"); *Farkas v. Miller*, 151 F.3d 900, 905 (8th Cir.1998) (exception for venues "primarily devoted to the arts or theatrical performances"). Nor has the Ordinance been narrowed by state courts, as was the statute in *Barnes*, to exclude protected expression.

[21] Nonetheless, a facial overbreadth challenge fails when the regulation's plain language is readily susceptible to a narrowing construction that would make it constitutional. *See American Booksellers*, 484 U.S. at 397, 108 S.Ct. 636. "Regularly features" lends itself to the definition described above—giving special prominence at uniform, orderly intervals as a matter of normal course. However, the Ordinance does not specify how long a venue must regularly feature such content before it qualifies as a sexually oriented business. For example, a local theater might offer nightly showings of *Hair* for only a month, and it is unclear whether this regularity suffices to qualify the theater as an adult theater or cabaret. The local theater probably would not resemble an adult-entertainment establishment in the sense contemplated by *Renton* and *Young*, provided that it also regularly showcased other plays and performances, not all of which contain nudity, semi-nudity or sexual content. In this context, a narrowing construction that comports with the Ordinance's express intent is readily available: giving special prominence at uniform, orderly intervals on a *permanent* basis. "Regularly features" can be interpreted to mean "always features." Under this interpretation, a venue falls within the definitions for adult theater and adult cabaret only if it features nudity, semi-nudity or specified sexual content as the permanent focus of its business and gives special prominence to such content on a permanent basis. [4] This construction limits the Ordinance to adult-entertainment establishments, which always feature nudity, semi-nudity and specified sexual content,

and excludes theatrical venues that present shows like *Hair* or *Equus* for long stretches but not on a permanent basis. It is conceivable, though unlikely, that a theater might make the presentation of artistic performances featuring nudity its abiding focus. But even so, the Ordinance's unconstitutional applications would not be real and substantial in relation to its plainly legitimate sweep. *See Brockett*, 472 U.S. at 503, 105 S.Ct. 2794. At worst, the Ordinance might require theatrical dancers to don pasties and G-strings while performing, and those performers can bring as-applied challenges to the Ordinance at that time, assuming Cumberland enforces it against them. In a facial challenge like this one, there must be a realistic danger that the Ordinance will significantly compromise the First Amendment rights of parties not before the Court. *See Taxpayers for Vincent*, 466 U.S. at 801, 104 S.Ct. 2118. The plaintiffs suggest scenarios ***851** to which the Ordinance might apply on its face and would unconstitutionally restrict protected expression, but the Ordinance is readily susceptible to a narrowing construction that saves the potentially unconstitutional applications from dwarfing the Ordinance's legitimate reach. We reject the plaintiffs' overbreadth claims and reverse the district court's grant of summary judgment in the plaintiffs' favor on those claims.

4 In practice, the Ordinance defines adult cabaret and adult theater as establishments that regularly feature semi-nudity or depictions of specified sexual activities. Under the Ordinance, it is legally impossible to feature nudity regularly. Any establishment that regularly features full nudity qualifies as a sexually oriented business under the Ordinance. As a sexually oriented business, the venue is then prohibited by Section VIII(A) from presenting nudity even once. At that point, the venue could not be characterized as regularly featuring nudity and thus would no longer be classified as a sexually oriented business. As such, it would be free to show nudity so long as it did not again "regularly feature" it. The point is that the Section VIII(A) prohibition on nudity in establishments that regularly feature nudity is a legal nullity unless Cumberland or courts define a time period during which the venue will be classified as a sexually oriented business, by virtue of its regular featuring of nudity in the past, even after Section VIII(A) prevents further presentation of nudity within.

C. Licensing Provisions

[22] The plaintiffs argue that Sections XI and XIII impose prior restraints on expression, in the form of licensing, disclosure and qualification requirements, that are not narrowly tailored to Cumberland's significant government interests in stemming detrimental secondary effects. The plaintiffs do not challenge the procedural adequacy of the licensing schemes contained in Sections XI and XIII of the Ordinance. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (requiring constrained discretion by the licensor, a limited time frame within which the licensor must decide and opportunity for prompt judicial review).

[23] **[24]** Any system of prior restraint comes "bearing a heavy presumption against its constitutional validity." *Southeastern Promotions*, 420 U.S. at 558, 95 S.Ct. 1239 (quoting *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)). The proponent of a prior restraint " 'carries a heavy burden of showing justification for the imposition of such a restraint.' " *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (quoting *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971)). However, prior restraints are not per se unconstitutional because "the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest." *Taxpayers for Vincent*, 466 U.S. at 804, 104 S.Ct. 2118. Indeed, we already have decided that a licensing requirement for adult-entertainment establishments is not unconstitutional *per se* as a prior restraint, if it otherwise conforms to the constitutional requirements of *Young*. *See Genusa v. City of Peoria*, 619 F.2d 1203, 1213 (7th Cir.1980).

[25] Licensing, though functioning as a prior restraint, is constitutionally legitimate when it complies with the standard for time, place or manner requirements. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 575–76, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). Time, place or manner restrictions that regulate the conditions under which expression may take place are permissible so long as the regulation is narrowly tailored to serve a significant government interest unrelated to the suppression of free expression and leaves alternative channels for communication. *See DiMa,* 185 F.3d at 828. In *Genusa v. City of Peoria*, we held that

a city government could require municipal licensing for adult bookstores based on a secondary-effects rationale from *Young*. *Genusa*, 619 F.2d at 1215. We upheld required disclosure of certain information, such as the license applicant's name, address and proposed place of business, because this information was "legitimately related to the state interest that underlies the zoning provisions." *Id.* at 1216; *see also TK's Video, Inc. v. Denton County,* 24 F.3d 705, 710 (5th Cir.1994) (requiring a "relevant correlation" or "substantial relation" between the information required and the government interest). We also upheld the requirement that licensees openly display their adult-use license because this was rationally related to policing for licensing compliance and had "no discernible impact on protected freedoms." *Genusa,* 619 F.2d at 1221.

Similarly here, we uphold the Ordinance inspection requirements and certain portions of Section XI requiring applicant disclosures. Section V of the Ordinance imposes interior-configuration requirements, which the plaintiffs appear not to challenge ***852** and analogs of which we have approved before as reasonable time, place or manner regulations. *See Matney,* 86 F.3d at 698; *Berg,* 865 F.2d at 803. Section XIII(C)(6) forbids licensing when the premises of the business have not been approved as in compliance with applicable laws and ordinances, including those configuration requirements. This provision enables the city to enforce compliance with the special health and safety requirements for sexually oriented businesses. To the degree that the Ordinance requires compliance with other extant health and safety laws applicable to all Cumberland businesses, Section XIII(C)(6) is redundant and constitutionally inoffensive. *Cf. Arcara,* 478 U.S. at 707, 106 S.Ct. 3172 (permitting closure of an adult bookstore for violating health laws applicable to all businesses). In contrast to the City of Peoria in *Genusa*, Cumberland collected an adequate body of research to justify its interior-configuration requirements and substantiate a connection between these regulatory requirements and the city's legitimate interest in arresting secondary effects.

[26] We also uphold the Section XI required disclosures of the following: the applicant's name; proof of the applicant's age; the type of license for which the applicant is applying; the proposed location, address and descriptions of the business premises; identifying personal data. All this information allows Cumberland to regulate the time, place or manner of adult entertainment without censoring expression. This data enables Cumberland to administer licenses and monitor compliance with its zoning requirements, which the plaintiffs do not challenge. Likewise, requiring proof of employee age legitimately relates to the government's interest in preventing underage performers from engaging in adult entertainment. In addition, we uphold the Ordinance requirement of a revenue-neutral license application fee to defray the costs of administration. *See Genusa*, 619 F.2d at 1213. [5] Yet we invalidate the required production of a residential address, recent color photograph, Social Security number, fingerprints, tax-identification number and driver's license information. This information is redundant and unnecessary for Cumberland's stated purposes. Its required disclosure serves "no purpose other than harassment," *Genusa,* 619 F.2d at 1217, because it is not narrowly tailored to the government's interests in the time, place or manner of adult entertainment.

5 Section XI(3)-(5) requires disclosure of information relating to the applicant's cohabitants, and Section XIII(C)(2) and XIII(C)(4)-(5) disqualify applicants based on that information. The plaintiffs do not challenge these provisions on appeal, and the district court correctly held that they lack third-party standing to challenge these provisions on behalf of their cohabitants. *See Schultz*, 26 F.Supp.2d at 1149 n. 2. Similarly, the plaintiffs do not have standing to challenge Ordinance provisions relating to corporate shareholders because the Island Bar is a sole proprietorship.

[27] The First Amendment also does not allow licensing provisions based on criminal history that "totally prohibit certain classes of persons" from First Amendment expression. *Genusa,* 619 F.2d at 1218. We struck provisions of the Peoria licensing scheme in *Genusa* that disqualified applicants who previously had a liquor-license revocation, felony conviction or a specified sex-related conviction. *Id.* at 1218. These provisions were absolute prohibitions on speech, and the city failed to demonstrate that its goals "[could not] be effectuated by means that impact less drastically on protected freedoms." *Id.* at 1219. The disqualification provisions were content-based prohibitions of expression that do not fall within *Barnes* and *Erie* and fail to provide alternative channels for communication under *Renton* and *Young*. As we explained in *Genusa,* "We know of no doctrine that permits the state to deny to a person First Amendment

liberties other than the right to vote solely because that person was once convicted of a crime or other offense." *Genusa*, 619 F.2d at 1219 n. 40.

***853** **[28]** Accordingly, the Ordinance disqualification provisions in Section XIII for operator and employee licensing are unconstitutional as well. Sections XIII(A)(3) and (C)(5) disqualify any applicant who has been convicted of a "specified criminal activity," defined as any of the vice offenses listed in Section II(23). [6] Sections XIII(A)(5) and (C)(4) disqualify any applicant who recently had been denied or revoked a license by the city. Section XIII(C)(2) disqualifies any applicant who is overdue in payment of city taxes, fees, fines, or penalties in relation to any business. Like the disqualification provisions struck as unconstitutional in *Genusa*, these license ineligibility provisions absolutely disentitle classes of speakers from a category of expression. They produce a complete ban on certain expression for a disqualified group of applicants who, by definition, wish to speak, and such a drastic measure cannot be justified here as narrowly tailored to resist noisome secondary effects. Indeed, Cumberland neither conducted nor cited any study establishing its basic premise that ownership or performance by those convicted of specified criminal activity or misconduct is more likely to lead to secondary effects than ownership or performance by anyone else.

6 Section II(23)(a) defines "specified criminal activity" as

> prostitution or promotion of prostitution; dissemination of obscenity; sale, distribution or display of harmful material to a minor; sexual performance by a child; possession or distribution of child pornography; public lewdness; indecent exposure; indecency with a child; engaging in organized criminal activity; sexual assault; molestation of a child; gambling; or distribution of a controlled substance; or any similar offenses to those described above under the criminal or penal code of other states or countries.

The government may regulate the conditions under which operators and performers may stage adult entertainment, and in accordance, it may withhold or revoke a license pending compliance with legitimate time, place or manner requirements. Yet the government may not categorically disenfranchise a class from protected expression in this licensing context, at least on the factual record Cumberland has compiled, because it thereby fails to provide the alternative channels for communication required by *Renton* and *Young* for those speakers. Consequently, the Section XI(E)(3)-(5) required disclosures of the applicant's criminal and past licensing histories are unnecessary because, absent any disqualification ground on those bases, such disclosures are unjustified by a government interest here.

D. Severability

[29] **[30]** The severability clause in Section XXII of the Ordinance provides that "[i]n the event that any section, subsection, clause, phrase or portion of this ordinance is for any reason held illegal, invalid or unconstitutional ... such holding shall not affect the validity of the remainder of this ordinance." However, the severability clause can save the constitutionally viable remainder only if the invalidated elements were not "an integral part of the statutory enactment viewed in its entirety." *Zbaraz v. Hartigan*, 763 F.2d 1532, 1545 (7th Cir.1985) (internal quotation and citation omitted). We have found unconstitutional as they apply to adult theaters and adult cabarets, the Section VIII(A) ban on certain sexually explicit movements, several Section XI disclosure requirements and all the Section XIII licensing disqualification provisions. This leaves several discrete sections that stand on their own: the Section VIII(A) ban on nudity within sexually oriented businesses, the Section X hours-of-operation provision and a licensing system that requires disclosure of applicant age and business data relating to the time, place or manner of the sexually oriented business's operation. In deference to the Ordinance's robust severability clause, we think that the unconstitutional provisions of the Ordinance may be severed workably ***854** from the rest. We therefore permanently enjoin only the stricken sections and permit the operation of those sections either upheld or unchallenged.

III. CONCLUSION

For the foregoing reasons, the following provisions of the Ordinance violate the First Amendment: the Section VIII(A) ban on sexually explicit movements within sexually oriented businesses; Section XI(C) (fingerprinting requirement); Section XI(E)(3)-(5), (8)-(10), Section XI(F)

(3)-(4), (6)-(7), and Section XI(G) (certain disclosure requirements); Section XIII(A)(3), (5) and Section XIII(C)(2), (4)-(5) (certain disqualification provisions); and Section XIII(B) (ineligibility for license renewal on the basis of specified criminal activity). The following provisions of the Ordinance are constitutional and severed from the invalidated provisions: the Section VIII(A) prohibition on nudity within sexually oriented businesses; and the remaining licensing provisions in Sections XI and XIII. We offer no opinion regarding other provisions of the Ordinance that the plaintiffs did not challenge. We AFFIRM in part and REVERSE in part the judgment of the district court.

All Citations

228 F.3d 831

86 F.3d 692
United States Court of Appeals,
Seventh Circuit.

Phil MATNEY and Satellite News and Video, Inc., Plaintiffs–Appellants,
v.
COUNTY OF KENOSHA, Defendant–Appellee.

No. 95–2590.
|
Argued Feb. 14, 1996.
|
Decided June 13, 1996.

Adult video store and patron of store brought action challenging constitutionality of county ordinance which required that all coin-operated booths used in "adult-oriented establishments" have at least one side open to public lighted aisle to permit unobstructed view of occupants at all times. The United States District Court for the Eastern District of Wisconsin, John W. Reynolds, 887 F.Supp. 1235, granted summary in favor of county. Plaintiffs appealed. The Court of Appeals, Flaum, Circuit Judge, held that: (1) ordinance was valid time, place, and manner restriction; thus (2) any "chill" on viewers' rights to receive protected sexually explicit speech was constitutionally tolerable; and (3) ordinance did not place impermissible content-based financial burden on affected establishments.

Affirmed.

West Headnotes (14)

[1] Federal Courts
Summary judgment

Court of Appeals reviews district court's grant of summary judgment de novo. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

1 Cases that cite this headnote

[2] Federal Civil Procedure
Burden of proof

Although court draws all reasonable inferences in favor of party opposing motion for summary judgment, that party may not simply rest on its pleadings or on mere conclusory allegations to avoid summary judgment; rather nonmoving party must come forward with evidence to show existence of each element of its case on which it will bear burden at trial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

5 Cases that cite this headnote

[3] Federal Civil Procedure
Lack of cause of action or defense

If no reasonable jury could find in favor of party opposing motion for summary judgment, it must be granted. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2 Cases that cite this headnote

[4] Constitutional Law
Reasonableness

Constitutional Law
Narrow tailoring requirement; relationship to governmental interest

Constitutional Law
Existence of other channels of expression

Government may impose reasonable restrictions on time, place, or manner of protected speech, provided restrictions are justified without reference to content of regulated speech, are narrowly tailored to serve significant governmental interest, and leave open ample alternative channels for communication of information. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] Constitutional Law
Content-Neutral Regulations or Restrictions

Regulation that serves purposes unrelated to content of expression is deemed "content neutral," even if it has incidental effect on

some speakers or messages but not others. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] **Constitutional Law**
Booths
Health
Adult establishments

County regulation requiring that all coin-operated video booths used in "adult-oriented establishments" have at least one side open to public lighted aisle to permit unobstructed view of occupants at all times was "content neutral," for purpose of First Amendment challenge, as regulation was established for purpose unrelated to content of expression, namely preserving health, preventing spread of sexually transmitted diseases, preventing unsanitary, unsafe, and unhealthy conditions, and there was no evidence that county disagreed with content of videos shown. U.S.C.A. Const.Amend. 1; Kenosha County, Wis., Regulation No. HD–1.01–1.

Cases that cite this headnote

[7] **Constitutional Law**
Booths
Health
Adult establishments

County regulation requiring that all coin-operated video booths used in "adult-oriented establishments" have at least one side open to public lighted aisle to permit unobstructed view of occupants at all times served legitimate government interest, for purposes of First Amendment challenge, of fighting spread of communicable and sexually transmitted diseases and maintaining safe and sanitary conditions. U.S.C.A. Const.Amend. 1; Kenosha County, Wis., Regulation No. HD–1.01–1.

1 Cases that cite this headnote

[8] **Constitutional Law**
Time, Place, or Manner Restrictions

In order for regulation placing time, place, or manner restriction on free speech activity to be narrowly tailored, means chosen must not be substantially broader than necessary to achieve government's interest; however, government need not choose least restrictive means. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[9] **Constitutional Law**
Motion Pictures and Videos
Health
Adult establishments

County regulation requiring that all coin-operated movie booths used in "adult-oriented establishments" have at least one side open to public lighted aisle to permit unobstructed view of occupants at all times was not substantially broader than necessary to achieve government's interest in preventing spread of sexually transmitted diseases and acquired immune deficiency syndrome (AIDS), and preventing unsanitary, unsafe, or unhealthy conditions, for purpose of First Amendment challenge, as evidence of semen and used condoms in booths at such establishments showed relation between regulation and objective, and less restrictive "one person one booth" policy would not achieve same results. U.S.C.A. Const.Amend. 1; Kenosha County, Wis., Regulation No. HD–1.01–1.

1 Cases that cite this headnote

[10] **Constitutional Law**
Motion Pictures and Videos
Constitutional Law
Booths
Health
Adult establishments

County regulation requiring that all coin-operated movie booths used in "adult-oriented establishments" have at least one side open to public lighted aisle to permit unobstructed view of occupants at all times satisfied time, place, and manner requirement

of availability of ample alternative channels of communication, for purpose of First Amendment challenge, as regulation did not in any way limit availability of video booths as means of viewing sexually explicit material and there remained plenty of ways, other than through private viewing booths, that sexually explicit material could be disseminated and received. U.S.C.A. Const.Amend. 1; Kenosha County, Wis., Regulation No. HD–1.01–1.

1 Cases that cite this headnote

[11] **Constitutional Law**
Sexually oriented businesses

There is no constitutional privacy right to view sexually explicit movies in public place in seclusion.

1 Cases that cite this headnote

[12] **Constitutional Law**
Booths

Health
Adult establishments

County regulation requiring that all coin-operated video booths used in "adult-oriented establishments" have at least one side open to public lighted aisle to permit unobstructed view of occupants at all times constituted valid time, place, and manner restriction, and thus any "chill" on viewers' rights to receive protected sexually explicit speech was constitutionally tolerable. U.S.C.A. Const.Amend. 1; Kenosha County, Wis., Regulation No. HD–1.01–1.

3 Cases that cite this headnote

[13] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

Regulation which imposes financial burden on speakers because of content of their speech must be narrowly tailored to achieve compelling state interest. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[14] **Constitutional Law**
Booths

Health
Adult establishments

County regulation requiring that all coin-operated video booths used in "adult-oriented establishments" have at least one side open to public lighted aisle to permit unobstructed view of occupants at all times did not impermissibly impose substantial content based financial burden on adult oriented establishments; because regulation was not content based, fact that it may have incidental financial effect on adult entertainment speakers and not on others was of no consequence. U.S.C.A. Const.Amend. 1; Kenosha County, Wis., Regulation No. HD–1.01–1.

1 Cases that cite this headnote

Attorneys and Law Firms

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***694** Raymond J. Pollen (argued), Michele M. Ford, Crivello, Carlson, Mentkowski & Steeves, Milwaukee, WI, for defendant-appellee.

Before COFFEY, FLAUM, and RIPPLE, Circuit Judges.

Opinion

FLAUM, Circuit Judge.

Plaintiffs Satellite News and Video, Inc. ("Satellite") and Phil Matney brought suit in district court, seeking to have a Kenosha County, Wisconsin "open-booth" ordinance declared unconstitutional and to obtain an injunction prohibiting its enforcement. The ordinance requires that movie-viewing booths at "adult entertainment" establishments, such as the one owned by Satellite and patronized by Matney, be totally accessible from a public

area and have at least one side totally open to a lighted public aisle. The district court granted summary judgment in favor of Kenosha County ("County") and the plaintiffs appeal. We affirm.

I.

Satellite owns and operates an "adult entertainment" business in Kenosha County, Wisconsin, which displays sexually explicit but non-obscene films and videotapes in small, single-person viewing booths. Each booth is equipped with a monitor connected to several videotape players. By depositing a token in a device located within each booth, patrons of Satellite can activate the monitors and choose one of the several videotapes or films offered. The video booths are specifically designed and built so that persons standing outside the booths cannot determine the content or the specific nature of the film being viewed. Phil Matney is a resident of Kenosha County and a patron of Satellite. Matney does not wish to have the content of the videos he views and listens to revealed to persons passing by the booths.

In 1992, the Kenosha County Board of Health issued regulation HD–1.01–1, which establishes standards for the construction and maintenance of booths, rooms, or cubicles available for the private viewing of "adult entertainment" at "adult-oriented" establishments. The stated purpose of the regulation is to preserve health, prevent the spread of AIDS and other communicable or sexually transmitted diseases, and prevent unsanitary, unsafe and unhealthy conditions. Specifically, the regulation states:

> (1) PURPOSE. It is a lawful purpose of the Kenosha County Board of Health to enact rules and regulations as are necessary for the preservation of health and to prevent the spread of AIDS and other communicable or sexually transmitted diseases in Kenosha County. It has been found by localities throughout the State of Wisconsin, particularly Milwaukee, Racine, Waukesha, Delafield, and Kenosha, as well as communities around the country, that many adult-oriented establishments install movie viewing booths with doors in which patrons view adult-oriented videotapes, movies, films and other forms of adult entertainment, and that such booths have been and are being used by patrons to engage in sexual acts resulting in unsanitary, unhealthy and unsafe conditions in said booths and establishments. This regulation establishes standards for booth construction and maintenance in order to prevent the spread of AIDS and other communicable or sexually transmitted diseases.

The Board considered evidence from the sheriff's departments in Kenosha County and other communities in reaching its conclusion that activity occurring in booths at adult oriented establishments leads to unhealthy and unsanitary conditions and to the transmission of AIDS and other sexually transmitted and communicable diseases.

Under the regulation, adult entertainment viewing booths must be "totally accessible to and from aisles and public areas ... and shall be unobstructed by any door, lock, curtain, blind, or other control-type devices." HD–1.10–1(3)(a). Further, each booth "shall be separated from adjacent booths ... by a wall" and "shall have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same." HD–1.10–1(3)(b). The regulation also speaks to the lighting in and around the booths as well as to the color, texture, and material of booth walls and ***695** floors. In addition, the regulation provides that only one individual occupy a booth at any time and that no occupant shall "engage in any type of sexual activity, cause any bodily discharge or litter while in the booth." HD–1.10–1(3)(c). The regulation does not attempt to restrict or control in any way the content of the adult videos shown.

Satellite received several citations for violating HD–1.10–1 and the County has threatened to continue enforcing the regulation, thereby prompting the instant litigation. Satellite and Matney's complaint alleged that the open booth regulation violates their First Amendment rights because it 1) impermissibly chills their "expressive privacy rights" by revealing the content of the protected expression they wish to disseminate and receive and 2)

because it imposes a content-based financial burden on Satellite's protected expression. The plaintiffs also alleged that the regulation is not reasonably related to a legitimate government interest. The County moved for summary judgment and the district court granted its motion, finding that the proper question was whether the ordinance was a valid time, place, and manner restriction, which the court answered in the affirmative. The court also concluded that there is no "expressive privacy right" to view adult entertainment at public establishments in seclusion and anonymity and, additionally, that the regulation did not impose a constitutionally impermissible financial burden on Satellite.

II.

[1] [2] [3] Satellite and Matney contend on appeal that the district court erred in granting the County summary judgment on their First Amendment claims. [1] We review a district court's grant of summary judgment *de novo*. *Hedberg v. Indiana Bell Telephone Co., Inc.,* 47 F.3d 928, 931 (7th Cir.1995). Summary judgment should be granted when the pleadings and supplemental materials present no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Although we draw all reasonable inferences in favor of the party opposing a motion for summary judgment, this party may not simply rest on its pleadings or on mere conclusory allegations to avoid summary judgment; rather the non-moving party must come forward with evidence to show the existence of each element of its case on which it will bear the burden at trial. *Hedberg,* 47 F.3d at 931; *Midwest Imports, Ltd. v. Coval,* 71 F.3d 1311, 1317 (7th Cir.1995). If no reasonable jury could find in favor of the party opposing the motion, it must be granted. *Hedberg,* 47 F.3d at 931.

1 We note that the County also argued that we and the district court lacked jurisdiction under *Rooker–Feldman* and also that we should abstain under the *Younger* and *Pullman* abstention doctrines. These claims are either without merit or have been waived, and as such will not be addressed.

A.

The district court was correct in noting that the proper constitutional measure of an "open-booth" regulation is whether the regulation constitutes a valid time, place, or manner restriction. *See Berg v. Health and Hosp. Corp. of Marion County, Ind.,* 865 F.2d 797 (7th Cir.1989). In *Berg,* we confronted similar challenges to an ordinance analogous to the Kenosha County regulation at issue here and concluded that the ordinance was a constitutional manner restriction. *Id.* at 802–03. In fact, courts around the nation have consistently upheld open booth regulations and ordinances in the face of First Amendment challenges, finding them to be valid time, place, and manner restrictions. *See Wall Distributors, Inc. v. City of Newport News,* 782 F.2d 1165 (4th Cir.1986); *Ellwest Stereo Theatres, Inc. v. Wenner,* 681 F.2d 1243 (9th Cir.1982); *Doe v. City of Minneapolis,* 898 F.2d 612 (8th Cir.1990); *Bamon Corp. v. City of Dayton,* 923 F.2d 470 (6th Cir.1991); *Suburban Video, Inc. v. City of Delafield,* 694 F.Supp. 585 (E.D.Wis.1988); *Broadway Books, Inc. v. Roberts,* 642 F.Supp. 486 (E.D.Tenn.1986); *Libra Books, Inc. v. City of Milwaukee,* 818 F.Supp. 263 (E.D.Wis.1993). Today we add another case to this already long line of authority.

***696 [4]** In *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), the Supreme Court set forth the appropriate standard for reviewing limitations on the time, place, or manner of speech. It held that the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions: 1) are justified without reference to the content of the regulated speech; 2) are narrowly tailored to serve a significant governmental interest, and 3) leave open ample alternative channels for communication of the information. *Id.* at 791, 109 S.Ct. at 2753–54 (quoting *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)); *see also Bamon,* 923 F.2d at 473; Doe, 898 F.2d at 616–17. Thus, we analyze the Kenosha ordinance using the *Ward* factors.

[5] The plaintiffs concede, with good reason, that the Kenosha County open booth regulation is content neutral. As the *Ward* Court explained, "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech *because* of disagreement with the message it conveys." *Ward,* 491 U.S. at 791, 109 S.Ct. at 2754

(emphasis added). The controlling consideration is the government's purpose in enacting the regulation. *Id.* "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.*

[6] In this case, the plain language of the regulation makes clear that it was passed for the purposes of preserving health, preventing the spread of AIDS and other communicable or sexually transmitted diseases, and preventing unsanitary, unsafe, and unhealthy conditions. Nothing in the words of the ordinance or in the County Board minutes suggests that the Board disagreed with the content or the message of the films and videos shown. The regulation is aimed at the "secondary effects" of private viewing booths—the possible spread of AIDS and other diseases and the creation of unsanitary, unhealthy conditions—not at the content of the films viewed in the booths. *See Berg,* 865 F.2d at 803; *Bamon,* 923 F.2d at 473; *Doe,* 898 F.2d at 617.

[7] **[8]** The plaintiffs additionally admit that the open booth regulation serves a legitimate government interest. It cannot be doubted that fighting the spread of communicable and sexually transmitted diseases and maintaining safe and sanitary conditions constitute significant government interests, nor is there any question that the regulation at issue furthers those interests. *See Berg,* 865 F.2d at 803; *Ellwest,* 681 F.2d at 1246; *Doe,* 898 F.2d at 617; *Wall,* 782 F.2d at 1169. Plaintiffs do contend, however, that the Kenosha regulation is not narrowly tailored to serve those interests. According to *Ward,* a requirement is narrowly tailored "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward,* 491 U.S. at 799, 109 S.Ct. at 2758; *see also Graff v. City of Chicago,* 9 F.3d 1309, 1321 (7th Cir.1993), *cert. denied,* 511 U.S. 1085, 114 S.Ct. 1837, 128 L.Ed.2d 464 (1994). The Court further explained that provided "the means chosen are not substantially broader than necessary to achieve the government's interest, [ ] the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward,* 491 U.S. at 800, 109 S.Ct. at 2758. *Ward* thus expressly rejected the argument that the government must choose the "least restrictive means" or the "least restrictive alternative" in order to meet the definition of narrowly tailored. *Id.* at 798–99, 109 S.Ct. at 2757 ("Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.").

[9] Although the plaintiffs acknowledge in their brief that the County need not employ the "least restrictive means" to achieve its stated purpose, they nonetheless argue that the Kenosha regulation is not narrowly ***697** tailored precisely because they believe there are less speech-infringing possibilities. This, of course, is not the correct inquiry under *Ward.* We are satisfied that Kenosha's goals of preventing the spread of certain diseases and maintaining sanitary and safe conditions at adult entertainment establishments "would be achieved less effectively absent the regulation." *See Berg,* 865 F.2d at 804.[2] Other courts have unanimously agreed. *See Doe,* 898 F.2d at 619 (8th Cir.1990); *Bamon,* 923 F.2d at 474 (6th Cir.1991); *Libra Books,* 818 F.Supp. at 267 (E.D.Wis.1993); *Wall,* 782 F.2d at 1170 (4th Cir.1986) (ordinance narrowly tailored under stricter "least restrictive means" test). Moreover, the alleged less restrictive alternative proposed by the plaintiffs—a strictly enforced one-person-per-booth rule-may prevent the spread of sexually transmitted diseases at Satellite,[3] but as the district court pointed out, the Kenosha regulation is aimed at preventing the spread of disease at all Kenosha establishments, not just Satellite. And the County had substantial evidence that condoms and semen were found in single-person booths at various establishments in Kenosha. In addition, evidence from other localities, which Kenosha was entitled to rely upon, *see Berg,* 865 F.2d at 803, demonstrated similar conditions. Furthermore, a one-person-per-booth policy would not be as effective as an open booth rule in preventing unsanitary and unhealthy conditions, as it would not effectively control solitary sexual activity. *See Libra,* 818 F.Supp. at 267 ("the ordinance is designed not just to eliminate sexual activity *among* customers, but also to alleviate the unsanitary conditions caused by sexual activity and 'bodily discharge' in general") (emphasis in original). Thus, we agree with the district court's conclusion that the open booth regulation is not "substantially broader than necessary to achieve the government's interest."

2 In *Berg,* which was decided prior to the issuance of *Ward*, we applied the stricter "least restrictive means" test, yet still found the ordinance to be narrowly tailored. *Id.* at 803–04, 109 S.Ct. at 2761. Plaintiffs attempt to distinguish *Berg* by arguing that they, unlike the plaintiffs in *Berg,* have suggested less restrictive alternatives. However, as already mentioned, this is not dispositive under *Ward* and, further, in *Berg* we stated not only that "*Berg* identified no less restrictive alternatives," but also that we did not think any existed. *Id.*

3 Satellite argues that at its facility it is physically impossible for more than one person to occupy a booth at any one time or for any patron to have interaction with patrons in neighboring booths. Further, it alleges that it strictly enforces this one-person-per-booth policy. Satellite therefore claims that sexual activity does not occur in its booths and that the transmission of AIDS and other diseases is effectively prevented with far less intrusion on First Amendment rights. Satellite contends that its claim is supported by the fact that health officials have inspected Satellite on several occasions and have never found semen residue or condoms in its booths.

[10] Moving on to the final *Ward* factor, we have previously held that open booth regulations leave open ample alternative channels of communication. *Berg,* 865 F.2d at 803. Similar to the ordinance in *Berg* and others that have been upheld, nothing in the Kenosha regulation limits the availability of individual booths as an avenue for watching adult entertainment, nor does it attempt to regulate in any manner the content of the films or videos displayed in the booths. *Id.; Bamon,* 923 F.2d at 474 (ample alternatives requirement "easily satisfied" by open booth ordinance); *Doe,* 898 F.2d at 620 (burden of showing ample alternatives "is easily met"). Persons in Kenosha County can watch the same sexually explicit material in the same single-person booths, just as they previously have, there will simply be no door on the booth. And in *Berg,* we concluded that "[p]lainly, for First Amendment purposes, an open booth is the equivalent to a closed booth, so far as viewing materials is concerned." 865 F.2d at 803.

In addition, there remain plenty of ways, other than through private viewing booths, that sexually explicit material can be disseminated and received. For example, Satellite could offer videos in a larger theater-type area, rather than in "private viewing" booths, rooms, or cubicles. *See Libra,* 818 F.Supp. at 267. And of course, patrons can always view adult entertainment supplied by Satellite in the privacy of their residences. In sum, the regulation in no way denies the viewing public access to the adult movie market, nor does it deprive the public of its ***698** ability to "satisfy its appetite for sexually explicit fare." *Berg,* 865 F.2d at 803 (quoting *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 62, 96 S.Ct. 2440, 2448, 49 L.Ed.2d 310 (1976)); *Ellwest,* 681 F.2d at 1245. On the contrary, under the regulation, Satellite can provide, except in totally closed booths, whatever protected videos or films it wishes, whenever and wherever it desires. The open booth regulation "in no sense purports to ban or even limit the number of forums for the public exhibition of erotic films. Erotic films continue to be fully available for public consumption, albeit not in enclosed booths." *Wall,* 782 F.2d at 1168 n. 5; *see also Doe,* 898 F.2d at 620. [4] The Kenosha County open booth provision leaves open ample means of communication and we thus conclude as a matter of law that it is a constitutional time, place, and manner restriction.

4 Satellite and Matney apparently recognize that the Kenosha ordinance does not on its face limit the use of single-person booths for viewing adult entertainment. They argue, however, that there are not ample alternative channels of communication because the open booth regulation will chill the use of viewing booths and will *in effect* foreclose such booths as a means of disseminating sexually explicit materials. First, as will be discussed, *infra* Section B, plaintiffs "chilling effect" argument is not supported by the record. In addition, even if single-person viewing booths are effectively foreclosed to some extent, there are still ample alternative avenues of communication. Generally, time, place, and manner restrictions limit or foreclose some avenue of communication; the question is whether there are other adequate means of dissemination. Here there clearly are. Thus, plaintiffs "chilling effect" argument does not persuade us to change our conclusion that the Kenosha regulation leaves open ample alternatives channels of communication.

B.

Plaintiffs also argue on appeal that the Kenosha regulation violates the First Amendment because it impermissibly chills their "expressive privacy right," i.e., their right to watch the films and videos in anonymity. They contend that if the doors are removed from

viewing booths, persons will not be able to watch films without disclosing the content or specific nature of the videos to people standing in the required public aisles. This disclosure, plaintiffs maintain, will likely subject the viewers to embarrassment and humiliation. As a result, plaintiffs claim viewers will be chilled from receiving the protected expression, and the ability of adult entertainment establishments to disseminate the expression will be seriously burdened. Plaintiffs' argument fails for several reasons.

[11] Every court that has addressed a privacy claim in this situation has concluded that patrons of public adult entertainment establishments do not have a general privacy right, whether within the penumbra of the First, Fourth, or Fourteenth Amendments, to watch sexually explicit movies in seclusion and anonymity. *See Berg,* 865 F.2d at 801 n. 4; *Doe,* 898 F.2d at 615–16 n. 11; *Bamon,* 923 F.2d at 474; *Broadway Books,* 642 F.Supp. at 492; *Suburban Video*, 694 F.Supp. at 591. Courts have stated that to recognize such a right "would be tantamount to finding that the patrons have some kind of right to masturbate ... in the seclusion of these booths." *Broadway Books,* 642 F.Supp. at 492; *see also Ellwest,* 681 F.2d at 1248 ("We decline to hold that the 'right' to unobserved masturbation in a public theater is 'fundamental' or 'implicit in the concept of ordered liberty.' "). We agree that there is no constitutional privacy right to view sexually explicit movies in a public place in seclusion. *See Berg,* 865 F.2d at 801 n. 4.

However, Satellite and Matney are not arguing that there is a general privacy right in the sense of a right to be behind closed doors or in seclusion or in a private place; rather they appear to be claiming that the First Amendment affords them a right to privacy in one's choice or selection of speech because of the chilling effect that will occur if the choices are publicized. In other words, they seek to avoid making public the connection between the individual patrons and the content of the materials they each choose to view. They believe the First Amendment offers this protection because without it, patrons will forego their right to receive the protected speech. Plaintiffs' basic contention is that "where a regulation's inevitable effect is to chill persons from engaging in or disseminating protected speech, even where the purpose of a regulation is unrelated to the ***699** content of speech, the regulation is unconstitutional and must be invalidated."

[12] This is simply not an accurate statement of First Amendment law. The Constitution does not afford a right to totally unrestricted, unchilled speech. Rather, the First Amendment affords the right to receive and disseminate protected speech, *subject to* valid time, place, and manner restrictions. *Ward*, 491 U.S. at 791, 109 S.Ct. at 2753–54. Almost all time, place, and manner restrictions chill or restrict protected speech to a certain extent; however, this chill or limitation is often acceptable under the First Amendment. We have determined as a matter of law that the Kenosha regulation is a valid manner restriction, and thus any chill on viewers' rights to receive the protected sexually explicit speech is constitutionally tolerable. [5]

5 In support of its proposition that a regulation is invalid anytime it chills First Amendment rights, the plaintiffs cite *NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) and *Bates v. City of Little Rock,* 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960). In those cases the Court struck down ordinances that required the NAACP to disclose its membership lists because of the chilling effect the ordinances would have on the members' right to associate. However, plaintiffs read these cases much too broadly; the cases do not hold that any chill on First Amendment rights will invalidate a regulation. Rather, in both cases the Court engaged in a balancing type test and in the end determined that the government's interest was not strong enough or related enough to justify the substantial infringement on association rights. *See NAACP v. Alabama,* 357 U.S. at 463–67, 78 S.Ct. at 1172–74; *Bates,* 361 U.S. at 524–27, 80 S.Ct. at 417–19. On the contrary, in the instant case, we have concluded, using the appropriate time, place, and manner analysis, that the Kenosha ordinance is a justified government action.

In addition, even if the plaintiffs "chilling effect" argument were viable, nothing in the regulation forces the booths to be arranged in a manner that reveals the content or nature of the film being displayed. The regulation requires only that each booth "have at least one side totally open to a public lighted aisle so there is an unobstructed view at all times of anyone occupying the same." Under the regulation, only the person, not the video screen, must be visible. Satellite presented no evidence that it was impossible to arrange the booths so that the screen itself was not visible, but the person inside was. *See Suburban Video,* 694 F.Supp. at 591. Therefore, the regulation does not have the inevitable effect of discouraging patrons from receiving protected speech;

any First Amendment chilling effect can be avoided by rearranging or reconstructing the viewing booths. Beyond that, plaintiffs have presented no evidence demonstrating that viewers are in fact foregoing or would forego their right to watch sexually explicit films and videos because of the open booth policy.

C.

Finally, Satellite maintains that the open booth regulation is unconstitutional because it imposes a substantial, content-based financial burden on its protected expression. Satellite alleged that the regulation would deprive it of income it would normally receive from patrons since, without doors on the booths, persons would be able to view the films from the public aisles without having to pay.

[13] The Supreme Court has held that if a law or regulation imposes a financial burden on speakers because of the content of their speech, it must be narrowly tailored to achieve a compelling state interest. *See Simon and Schuster, Inc. v. Members of the New York Crime Victims Board,* 502 U.S. 105, 115–18, 112 S.Ct. 501, 508–09, 116 L.Ed.2d 476 (1991) (holding unconstitutional "Son of Sam law," which required forfeiture of income derived from reenactment of crime by way of movie, book, article, etc.); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (holding unconstitutional ordinance making it unlawful for drive-in theater to exhibit films showing nudity). Satellite likens the Kenosha County regulation to the laws at issue in *Simon and Schuster* and *Erznoznik* and further argues that similar to those laws, the regulation fails to meet strict scrutiny.

[14] Satellite's argument fails for several fundamental reasons. First and foremost, as discussed above, the Kenosha regulation is not content-based. It was not passed "because of a disagreement with the message" ***700** conveyed. *Ward,* 491 U.S. at 791, 109 S.Ct. at 2754. It was enacted for legitimate health and safety reasons. The fact that it may have an incidental financial effect on adult entertainment speakers and not on others is of no consequence. *Id.* Further, this argument suffers from the same infirmities as plaintiffs' chilling effect argument. The regulation does not compel the result that non-paying patrons will be able to view the films in the booths—only the person must be visible under the regulation. And again, Satellite offered no evidence to support its claim that it will suffer a serious financial burden due to the regulation. Therefore, we find that the district court was correct in granting summary judgment in favor of Kenosha County on this claim.

III.

In sum, we find that Kenosha County's open booth regulation is a valid time, place, and manner restriction, and as such does not violate the First Amendment. Further, we find that Satellite and Matney's claims that the regulation violates their "expressive privacy rights" and is an impermissible content-based financial restriction are without support in fact or law. We thus AFFIRM the district court's grant of summary judgment in favor of Kenosha County.

All Citations

86 F.3d 692

865 F.2d 797
United States Court of Appeals,
Seventh Circuit.

Stanley BERG and Berg Investments, Inc., an Indiana Corporation d/b/a The Body Works, PFW, Inc., an Indiana Corporation, Plaintiffs-Appellants,
v.
The HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, INDIANA, Defendant-Appellee.

No. 87-2493.
|
Argued Feb. 24, 1988.
|
Decided Jan. 20, 1989.

Business offering customers private viewings of motion pictures, which was cited for violating ordinance designed to decrease spread of "acquired immune deficiency syndrome (AIDS)," sought injunction against enforcement of ordinance and declaratory judgment that portions of ordinance were unconstitutional. Other adult entertainment establishments were allowed to intervene as plaintiffs. On cross motions for summary judgment, the United States District Court for the Southern District of Indiana, 667 F.Supp. 639, S. Hugh Dillin, J., upheld the ordinance, and adult entertainment businesses appealed. The Court of Appeals, Manion, Circuit Judge, held that: (1) ordinance designed to decrease spread of AIDS by regulating doors on individual entertainment enclosures was not unconstitutional prior restraint, and mere fact that agency had authority to close business because it violated ordinance did not transform ordinance into prior restraint on expressive activities; (2) the ordinance constituted valid time, place, and manner restriction; and (3) the ordinance was not unconstitutionally overbroad or vague.

Affirmed.

West Headnotes (8)

[1] Constitutional Law
Physical Layout and Staging Requirements

Ordinance designed to decrease spread of "acquired immune deficiency syndrome (AIDS)" by regulating doors on individual entertainment enclosures was not prior restraint of speech prohibited by First Amendment; the ordinance did not ban viewing any forms of entertainment or grant officials discretion to suppress any speech based upon content, but merely regulated environment in which viewing of entertainment occurred, and the ordinance did not require obtaining of license or permit before exhibiting any particular form of speech. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[2] Constitutional Law
Physical Layout and Staging Requirements

Ordinance designed to decrease spread of "acquired immune deficiency syndrome (AIDS)" by regulating doors on individual entertainment enclosures was not an impermissible prior restraint of speech on theory that ordinance would have chilling effect on those wishing to view entertainment behind closed doors. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[3] Constitutional Law
Physical Layout and Staging Requirements

Ordinance designed to decrease spread of "acquired immune deficiency syndrome (AIDS)" by regulating doors on individual entertainment enclosures would not be found impermissible prior restraint of speech based on business owner's claim that ordinance infringed upon his privacy rights because it could require removal of his office door; that asserted interest was distinct privacy interest from that of patrons, and regulations specifically made ordinance inapplicable to private offices, thus mooting the privacy claim. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] **Constitutional Law**
Physical Layout and Staging Requirements

Mere fact that agency had authority to close business because it violated ordinance designed to decrease spread of "acquired immune deficiency syndrome (AIDS)" by regulating doors on individual entertainment enclosures did not transform ordinance into unconstitutional prior restraint on expressive activities; ordinance's application did not depend on advance determination that particular entertainment was permissible, and business owners remained free to carry on their businesses with open booths. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[5] **Constitutional Law**
Physical Layout and Staging Requirements

Proper standard for determining constitutionality of ordinance designed to decrease spread of "acquired immune deficiency syndrome (AIDS)" by regulating doors on individual entertainment enclosures was whether ordinance constituted valid time, place, and manner restriction. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[6] **Constitutional Law**
Physical Layout and Staging Requirements

Ordinance designed to decrease spread of "acquired immune deficiency syndrome (AIDS)" by regulating doors on individual entertainment enclosures was valid state police power regulation of time, manner, or place of expressive activity; the ordinance was content neutral, the open booth requirement left ample alternative channels of communication, and the ordinance was narrowly tailored in that it responded precisely to the substantive problem, which was legitimate concern of discouraging multiple anonymous sexual encounters facilitating spread of AIDS. U.S.C.A. Const.Amend. 1.

21 Cases that cite this headnote

[7] **Constitutional Law**
Physical Layout and Staging Requirements

Ordinance designed to decrease spread of "acquired immune deficiency syndrome (AIDS)" by regulating doors on individual entertainment enclosures was not unconstitutionally overbroad when read with implementing regulations; together, the ordinance and regulations limited open booth provision's application to private or individual entertainment enclosures in which entertainment was sold as part of business on commercial premises, and the ordinance was precisely aimed at matters within agency's power to regulate and achieved its end without encroaching on First Amendment rights. U.S.C.A. Const.Amend. 1.

10 Cases that cite this headnote

[8] **Health**
Validity

Ordinance designed to decrease spread of "acquired immune deficiency syndrome (AIDS)" by regulating doors on individual entertainment enclosures was not unconstitutionally vague on theory the ordinance did not clearly define particular premises to which it applied; the ordinance and regulations together were plainly directed at establishments which provided individual booths where high-risk sexual activity might occur and to businesses that offered as part of their business entertainment to be viewed within enclosure; persons of ordinary intelligence were capable of identifying those establishments subject to the ordinance. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

Attorneys and Law Firms

***799** Richard Kammen, McClure McClure & Kammen, Indianapolis, Ind., for plaintiffs-appellants.

Richard M. Knoth, Squire Sanders & Dempsey, Cleveland, Ohio, for defendant-appellee.

Before BAUER, Chief Judge, KANNE and MANION, Circuit Judges.

Opinion

MANION, Circuit Judge.

Plaintiffs[1] filed suit seeking a judgment declaring unconstitutional the "open booth" ordinance enacted by The Health and Hospital Corporation of Marion County, Indiana (HHC). On cross-motions for summary judgment, the district court upheld the ordinance. *Berg v. Health and Hospital Corporation of Marion County,* 667 F.Supp. 639 (S.D.Ind.1987). We affirm.

1 For the sake of clarity and simplicity we will refer to all plaintiffs and plaintiffs-appellants as "Berg."

I.

HHC is an independent governmental body created pursuant to Ind.Code § 16-12-21-1 *et seq.* It is governed by a board of trustees and is responsible for protecting, promoting, and improving public health. The Board of Trustees (Board) is empowered to enact ordinances to promote public health in Marion County, Indiana. To combat the spread of acquired immune deficiency syndrome (AIDS) in Marion County, HHC's Board of Trustees adopted General Ordinance No. 5-1985(A) (open booth ordinance) in February 1986. The ordinance is designed to eliminate structures which promote anonymous sexual activity and hence to curtail such activity, in the hope that this will help prevent or slow the spread of AIDS.

At a public hearing regarding the ordinance, HHC heard testimony from several persons who viewed the ordinance as a positive step toward containing the spread of AIDS.[2] At the hearing, a professor of microbiology and immunology at the Indiana University School of Medicine, the State Health Commissioner for the Indiana State Board of Health, and the acting chief of HHC's Bureau of Disease Prevention/Health Promotion all testified in favor of the ordinance. Among other things, they testified concerning the fatal nature of AIDS, the rapid increase in the number of persons afflicted with the disease both nationwide and in Marion County, and the great risk of persons becoming infected with the disease by engaging in high-risk sexual activity[3] with multiple partners.

2 The substance of the testimony, given at a hearing before HHC concerning the adoption of the ordinance, was before the district court in the form of affidavits (in opposition to Berg's motion for summary judgment) by persons who recounted the testimony they had given. Additional background information came from the "legislative finding" by HHC (Appendix A) regarding the ordinance.

3 High-risk sexual activity is defined in § 7-402(b) of the ordinance as fellatio and anal intercourse.

Indiana's State Health Commissioner, Dr. Woodrow A. Myers, Jr., also testified before the Board and explained that the State Board of Health's statewide AIDS prevention plan had recommended to each local health officer that, among other things, they identify those businesses or establishments operated wholly or in part to provide opportunities for high-risk sexual behavior and to eliminate the dangers these establishments presented to their communities. Dr. Myers further testified that because high-risk sexual activity was thought to be the primary factor in the transmission of AIDS, those establishments where such high-risk sexual activity occurred were places where the likelihood of the disease's transmission was at its highest.

***800** HHC also heard testimony from an officer of the Indianapolis Police Department, Lieutenant Rogers. Rogers was assigned to the police department's sex offenses branch and, before that, to the vice branch. Rogers informed the Board that high-risk sexual activity regularly occurred in certain Marion County establishments. In some places, booths are available where patrons may watch entertainment behind closed doors. Typically, the booths have apertures which allow

participants on either side of the wall to engage in sexual activity with one another. According to Rogers, hundreds of arrests have been made in such places over the last few years, usually for public indecency. Undercover police officers have reported observing sexual activity occurring in these areas. Rogers concluded that the booths facilitated anonymous sexual activity.

This appeal involves those parts of the ordinance designed to curtail anonymous high-risk sexual activities and, thus, the spread of AIDS, by regulating the design and structure of commercial premises. Section 19-309, for example, provides that no commercial building shall be designed for or used to promote high-risk sexual conduct. Section 19-311 establishes minimum standards for the design and maintenance of commercial buildings. Section 19-311(a) prohibits partitions in buildings which have apertures designed to encourage sexual activity between persons on either side of the partition. Section 19-311(b) provides that "booths, stalls, or partitioned portions of a room, or individual rooms, used for the viewing of motion pictures or other forms of entertainment" are required to have "at least one side open to an adjacent public room so that the area inside is visible to persons in the adjacent public room." Section 19-311(c) provides that no commercial buildings or structures shall be constructed so that private rooms or accommodations can be offered to customers if the building is in violation of § 19-309 and is not a validly operating hotel, motel, apartment complex or condominium. Section 19-310 provides that "the health officer shall be guided" by regulations adopted by HHC's Board and "by the most recent instructions, opinions and guidelines of the Center for Disease Control of the United States Department of Health and Human Services which relate to the spread of infectious diseases...." (The ordinance's relevant provisions are set forth in Appendix A.)

The Board subsequently adopted several health officer regulations to help administer and enforce § 19-311(b). These regulations limit the applicability of the "open booth" provisions to enclosures offered to the public for a fee "as part of a business operated on the premises which offers as part of its business the entertainment to be viewed within the enclosure...." Section 19-311(b)(1). The regulations also excluded private offices used by the owners and employees of the business. The regulations further define the terms "doors, curtains or portal partitions" and the term "open to an adjacent public room" as those terms are used in § 19-311(b). (These regulations are set forth in Appendix B.)

In March 1986, HHC cited PFW, Inc. (PFW) for violating § 19-311(a) and (b). PFW, joined by Stanley Berg and Stanley Berg Investments, Inc., which describes itself as a business offering its customers "private relaxation and entertainment" rooms, filed suit seeking a declaratory judgment and an injunction against the enforcement of the ordinance. The district court permitted Draix, Inc., Annex Adult Books, Inc., Shadeland Avenue Adult Bookstore, and Keystone Avenue Adult Books to intervene in the action as plaintiffs. All of the intervenors are Marion County businesses that were notified by HHC that they were in violation of the "open booth" provisions of § 19-311(b). They alleged that they would buy, make available or otherwise deal with constitutionally protected materials in Marion County. The intervenors further alleged that the ordinance will prevent them from doing so in the future.

Berg moved for summary judgment, contending that the ordinance violated his rights under the First Amendment. Although broadly contending that §§ 19-101.1, 19-309, 19-310, 19-311(b) and (c), and the ***801** regulations governing 19-311(b), violated the First Amendment, Berg declared that the "gravamen" of his complaint was the "open booth" provision of § 19-311(b). Berg argued that § 19-311(b) was an unconstitutional prior restraint on expressive activities in violation of the First Amendment. Alternatively, he argued that, if the ordinance did not constitute a prior restraint, it nevertheless was not a reasonable time, place, and manner restriction. Berg further argued that the ordinance was unconstitutionally overbroad and vague. HHC filed a cross-motion for summary judgment, seeking to have the ordinance declared constitutional.

The district court rejected Berg's claims and upheld the ordinance as a valid time, place, and manner restriction. The court further rejected Berg's overbreadth and vagueness arguments. Berg appeals the district court's grant of summary judgment in favor of HHC.

II.

A. *Prior Restraint*

As in the district court, Berg's appeal focuses on the "open booth" provision of § 19-311(b). He first argues that the district court erred in holding the "open booth" ordinance was not a prior restraint of speech prohibited by the First Amendment. According to Berg, the "open booth" provision constitutes a prior restraint because it "effectively bans" the showing of movies or other forms of entertainment in a commercial building with a door where the public is charged a fee for access, because it substantially restricts the availability of constitutionally protected material, and because the ordinance purports to give HHC the authority to close businesses who fail to comply with § 19-311(b).

[1] The ordinance manifestly is not a prior restraint. "Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated." *United States v. Kaun,* 827 F.2d 1144, 1150 (7th Cir.1987) (quoting *In re G. & A. Books, Inc.,* 770 F.2d 288, 296 (2d Cir.1985), *cert. denied, sub nom. M.J.M. Exhibitors, Inc. v. Stern,* 475 U.S. 1015, 106 S.Ct. 1195, 89 L.Ed.2d 310 (1986)). The Supreme Court has struck down regulations as unconstitutional prior restraints on speech where "public officials [have] the power to deny use of a forum in advance of actual expression." *See Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553, 95 S.Ct. 1239, 1244, 43 L.Ed.2d 448 (1975). The Marion County ordinance simply does not ban the viewing of any forms of entertainment or grant officials the discretion to suppress any speech based upon its content. Berg is in no way restrained in his ability to sell books, movies, or other forms of entertainment so long as he complies with the ordinance. As the district court noted, "[t]he ordinance does not ban the viewing of films or other entertainment, but merely regulates the environment in which the viewing occurs." *Berg,* 667 F.Supp. at 642. *See also Broadway Books, Inc. v. Roberts,* 642 F.Supp. 486, 490 n. 2 (E.D.Tenn.1986) (open booth ordinance held not to constitute a prior restraint). The ordinance also does not require a person to obtain a license or a permit before exhibiting any particular form of speech.

[2] **[3]** **[4]** Berg's prior restraint argument centers on HHC's ability to close an operation for failure to comply with the "open booth" provision.[4] The Supreme Court's ***802** reasoning in *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), however, forecloses this argument. In *Arcara,* the owners of a bookstore argued that a New York statute authorizing the closure of a building determined to be a public nuisance violated their First Amendment rights. In the course of rejecting the plaintiffs' claims that the closure of the bookstore was entitled to First Amendment protection even though it violated the state statute, the Court specifically rejected the position that such a closure would constitute a prior restraint. The Court explained:

> The closure order sought in this case differs from a prior restraint in two significant respects. *First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business* at another location, even if such locations are difficult to find. Second, *the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited-indeed, the imposition or the closure order has nothing to do with any expressive conduct at all.*
> 478 U.S. at 705-06 n. 2, 106 S.Ct. at 3177 n. 2 (emphasis added). Thus, the mere fact that HHC has the authority to close a business because it violates the ordinance does not transform the ordinance into a prior restraint on expressive activities. The ordinance's application does not depend on an advance determination that the particular entertainment is permissible, and Berg

4 In further support of the argument that the ordinance constitutes an impermissible prior restraint, Berg asserts that the ordinance will have a "chilling effect" on those wishing to view entertainment behind closed doors. In other words, Berg contends that some people will choose not to watch certain entertainment at all rather than to do so in public-or at least without a door. This privacy-based argument is without merit. *Cf. Ellwest Stereo Theatres, Inc. v. Wenner,* 681 F.2d 1243, 1248 (9th Cir.1982). Beyond that, there is no evidence that such a "chilling effect" will result. *Compare Doe v. City of Minneapolis,* 693 F.Supp. 774, 778 (D.Minn.1988) (affidavits submitted asserting that removal of doors would have such a "chilling effect"). In an affidavit attached to the complaint, Berg asserted only that the ordinance infringed upon *his* privacy rights because it could require the removal of his office door. This, however, is a distinct privacy interest from his patrons'. Moreover, the regulations specifically provide that the ordinance is inapplicable to private offices, thus making moot Berg's privacy claim.

remains free to carry on his business (albeit with open booths).

B. *Time, Place, And Manner Restriction*

[5] We conclude, as have several other courts confronted with similar ordinances, that the proper constitutional measure here is whether the ordinance constitutes a valid time, place, and manner restriction. *See Wall Distributors, Inc. v. City of Newport News,* 782 F.2d 1165 (4th Cir.1986); *Ellwest Stereo Theatres, Inc. v. Wenner,* 681 F.2d 1243 (9th Cir.1982); *Suburban Video, Inc. v. City of Delafield,* 694 F.Supp.585 (E.D.Wis.1988); *Doe v. City of Minneapolis,* 693 F.Supp. 774 (D.Minn.1988); *Broadway Books, Inc. v. Roberts,* 642 F.Supp. 486. We will assume-because it is not an issue in this case-that the material viewed in the booths is protected by the First Amendment. "To sustain a time, place, and manner restriction on First Amendment activities, the government must show that the restriction (1) is content-neutral, (2) serves a legitimate governmental objective, (3) leaves open ample alternative channels of communication, and (4) is narrowly tailored to serve the governmental objective." *City of Watseka v. Illinois Public Action Council,* 796 F.2d 1547, 1552 (7th Cir.1986), *aff'd,* 479 U.S. 1048, 107 S.Ct. 919, 93 L.Ed.2d 972 (1987).

[6] Under the time, place, and manner analysis, other courts have consistently upheld "open booth" ordinances as valid exercises of state police power. *See Wall Distributors, Inc., supra; Ellwest, supra; Suburban Video, supra; Doe v. City of Minneapolis, supra; Broadway Books, supra.* Likewise, we find no constitutional infirmity in Ordinance 5-1985(A).

There can be no doubt that the first two elements of the time, place, and manner test are met. The ordinance is clearly content-neutral; it makes no distinction between types of films or entertainment. Thus, it "would apply to a showing of 'Rebecca of Sunnybrook Farm' as well as any other film or performance. The ordinance regulates only the non-communicative aspects relating to the environment in which such material may be disseminated or received, and thereby 'imposes only an incidental burden' on plaintiffs' first amendment rights." *Doe v. City of Minneapolis,* 693 F.Supp. at 780 (construing an ordinance patterned on the Marion County ordinance at issue in this case). Indeed, the ordinance by its terms applies to all ***803** such enclosed booths, regardless of the type of film shown. *Ellwest,* 681 F.2d at 1245 n. 2. The ordinance is not directed at the content of the films or the type of entertainment which might be viewed in the booths; rather, it is directed at the booth's "secondary effects," namely the possible spread of AIDS through the anonymous sexual activity which may occur there. *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47, 106 S.Ct. 925, 929, 89 L.Ed.2d29 (1986). *See also Wall Distributors, Inc.,* 782 F.2d at 1169.

The ordinance also serves a legitimate governmental objective. HHC has the responsibility "[t]o protect, promote or improve public health" and to "control disease" within Marion County. Ind.Code § 16-12-21-28 3(i). Ordinance 5-1985(A) is clearly consistent with that mandate. Further, combating the spread of a deadly disease which has no known cure doubtless constitutes a legitimate governmental objective. *Cf. City of Watseka,* 796 F.2d at 1554 (protecting peace and quiet and preventing crime an "obvious" legitimate governmental objective).

Moreover, the "open booth" ordinance leaves ample alternative channels of communication.[5] Here we consider "methods of communication" and ask "whether those methods not prohibited by the challenged regulation" (viewing the films, etc., with an open door) "are equivalent to the prohibited methods" (viewing the films, etc., behind a closed door). *Wisconsin Action Coalition v. City of Kenosha,* 767 F.2d 1248, 1254 n. 3 (7th Cir.1985). There is absolutely nothing in the ordinance limiting the availability of films or other entertainment. The ordinance does not bar people from watching films or entertainment in individual enclosures. The viewing public is in no way "denied access to the market ... or ... unable to satisfy its appetite for sexually explicit fare." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 62, 96 S.Ct. 2440, 2448, 49 L.Ed.2d 310 (1976). Persons who wish to watch entertainment in individual enclosures may continue to do so; their access to such films and other entertainment is not substantially impaired by the removal of doors on the booths. Plainly, for First Amendment purposes, an open booth is the equivalent to a closed booth, so far as viewing materials is concerned.

5 As we have explained elsewhere, the "ample alternative channels" factor of the time, place, and manner analysis differs from the "less restrictive alternatives" prong of the "narrowly tailored interest" factor. *Wisconsin Action Coalition v. City of Kenosha,* 767 F.2d 1248, 1254 n. 3 (7th Cir.1985).

Lastly, the ordinance is narrowly tailored to serve the governmental objective. *City of Watseka,* 796 F.2d at 1552. Whether an enactment is narrowly tailored really involves two separate inquiries. First, there must be a significant relationship between the ordinance and the governmental interest. *Id.* at 1554; *City of Kenosha,* 767 F.2d at 1257. Second, less restrictive alternatives must be inadequate to protect the governmental interest. *City of Watseka,* 796 F.2d at 1554.

Berg contends there is no connection between the ordinance and the served interest. He argues that HHC has not established that anyone has contracted AIDS from a commercial enterprise such as those in the instant suit or, for that matter, in Marion County. The proof Berg would require-specifically identifying such a commercial enterprise as the place where one contracted AIDS-is probably not possible in such exact terms, or if possible, would be exceedingly difficult to establish; however, it is also not necessary. HHC was entitled to rely on the experiences of other communities and it need only demonstrate that the evidence relied upon was "reasonably believed to be relevant to the problem" that it was addressing. *City of Renton,* 475 U.S. at 51-52, 106 S.Ct. at 931; *Doe v. City of Minneapolis,* 693 F.Supp. at 781; *Broadway Books,* 642 F.Supp. at 491. Thus, it was entirely proper to rely on the more general information which HHC considered.

When HHC adopted Ordinance 5-1985(A), it had information concerning the incidence of AIDS in Marion County, its rapid increase in other cities, its incurable, fatal nature, its transmission via multiple, ***804** anonymous sexual encounters, and about the casual sexual activity, including anal intercourse, observed in the types of local establishments sought to be regulated. Further, HHC heard testimony from a health professional who testified that the ordinance was an important step in the prevention of unsafe sexual practices and, thus, in the spread of AIDS. This information establishes a significant relationship between the ordinance and HHC's legitimate interest in fighting the spread of AIDS.

But to be narrowly tailored there also must be no less restrictive alternative which could serve the governmental interest. *City of Watseka,* 796 F.2d at 1554. This requirement is easily met here, as the ordinance "responds precisely to the substantive problem which legitimately concerns" HHC. *Id.* at 1553 (quoting *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 810, 104 S.Ct. 2118, 2131, 80 L.Ed.2d 772 (1984)). As the Fourth Circuit observed in regard to a similar enactment:

> [t]he open booth regulation appears to be the least burdensome means of controlling offensive and illegal activity within booths that can be imagined. The regulation in no way limits the time of operation, number of booths, or content of exhibitions. We conclude that the regulation is ... narrowly tailored to serve the specific interest advanced by the City....

Wall Distributors, Inc., 782 F.2d at 1170.[6] Moreover, we decline to engage in speculation as to other possible alternatives which HHC might have employed to fight the spread of AIDS. In both *City of Watseka* and *City of Kenosha,* where we did consider alternatives to the challenged enactments, there already existed less restrictive alternatives which could adequately protect the articulated interests at issue. There is nothing similar found in the record here. This case is also unlike *Doe v. City of Minneapolis, supra,* where the ordinance's challengers proffered specific alternatives to the open booth ordinance (a one-person-one-booth restriction, or the removal of the bottom 24 inches of the door as opposed to the entire door). Berg identified no less restrictive alternatives, nor do we think any exist.

6 The Fourth Circuit's reasoning was in connection with the final factor of the time, place, and manner analysis as articulated in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), namely, that the restriction on First Amendment interests be no greater than is essential to achieve the interest advanced by the government. *Wall Distributors, Inc.,* 782 F.2d at 1170. This is completely consistent with our "less restrictive alternative" factor. *City of Watseka,* 796 F.2d at 1554 (citing *U.S. v. O'Brien*).

III.

Berg also contends that the ordinance is unconstitutionally overbroad and vague. We disagree.

[7] The ordinance is overbroad, Berg argues, because it could be applied to rooms where activities such as watching movies or plays or reading books and magazines take place as opposed to high-risk sexual activity. An overbroad enactment "sweeps within its prohibitions [that which] may not be punished under the First and Fourteenth Amendments." *Grayned v. City of Rockford,* 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). An ordinance or statute may be invalidated on its face only if the overbreadth is substantial. *Board of Airport Commissioners v. Jews for Jesus, Inc.,* 482 U.S. 569, 107 S.Ct. 2568, 2571, 96 L.Ed.2d 500 (1987); *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973); *United States v. Rodgers,* 755 F.2d 533, 542 (7th Cir.1985), *cert. denied,* 473 U.S. 907, 105 S.Ct. 3532, 87 L.Ed.2d 656 (1985). "[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick,* 413 U.S. at 615, 93 S.Ct. at 2918. "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." ***805** *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984). *See also Board of Airport Commissioners v. Jews for Jesus, Inc.,* 482 U.S. 569, 107 S.Ct. at 2571 (quoting *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 503, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985)). However, even where an ordinance "appears overbroad because of its ambiguity [it] should not be struck down if it is subject to a reasonable limiting instruction." *U.S. v. Rodgers,* 755 F.2d at 542.

The ordinance by itself or through its regulations specifically excludes its application to private business offices or to hotels and motels. As the district court found, the regulation and the ordinance when read together limit the "open booth" provision's application to private or individual enclosures in which entertainment is sold as part of a business on commercial premises. This is sufficiently tailored to fend off an overbreadth challenge. Moreover, as we elsewhere have stated, the ordinance is precisely aimed at matters within HHC's power to regulate, and it achieves its end without encroaching on First Amendment rights. *Broadway Books, Inc.,* 642 F.Supp. at 490 n. 2.

[8] Nor is the ordinance unconstitutionally vague. Essentially Berg argues that the ordinance does not clearly define the particular premises to which it applies, leaving this determination to the individual discretion of enforcement officers. "[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. at 108, 92 S.Ct. at 2298. Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.; Baer v. City of Wauwatosa,* 716 F.2d 1117, 1124 (7th Cir.1983). But enactments need not provide "meticulous specifics" or mathematical precision; they are permitted "flexibility and reasonable breadth." *Grayned v. City of Rockford,* 408 U.S. at 110, 92 S.Ct. at 2300. When evaluating a facial challenge to an ordinance, we must consider any limiting construction that an enforcement agency proffers. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 1191 n. 5, 71 L.Ed.2d 362 (1982).

Read as a whole, the ordinance and its regulations plainly are directed at those establishments which provide individual booths where high-risk sexual activity may occur and to businesses that offer as part of their business the entertainment to be viewed within the enclosure. And, although the term "entertainment" is arguably general, when read in the particular context of this ordinance, it cannot be said that it is beyond the grasp of persons of ordinary intelligence. *Grayned v. City of Rockford,* 408 U.S. at 108, 92 S.Ct. at 2298; *Broadway Books, Inc.,* 642 F.Supp. at 490 n. 2. In sum, we believe that persons of ordinary intelligence are capable of identifying those establishments subject to the ordinance.

IV.

HHC's "open booth" ordinance is a valid and constitutional regulation serving a legitimate governmental interest, and it is neither so vague nor overbroad as to be unconstitutional. For the foregoing reasons, the district court is in all respects

AFFIRMED.

APPENDIX A

Legislative Finding

Sec. 19-101.1. It is hereby further found that there exist within Marion County, Indiana, commercial premises, commercial structures or parts thereof, which by reason of the design, and intended use of such premises or structures or parts thereof are conducive to the spread of communicable disease found to be of danger to persons frequenting such premises, structures, or parts thereof, and to the public health, safety and welfare. The health, safety and welfare of all persons in Marion County must be protected by the establishment of standards for such premises, structures, or parts thereof, to eliminate the possibility of infection of contagious disease. Of specific danger is the sexually transmissible disease of Acquired Immune Deficiency Syndrome, which is currently found to be irreversible and uniformly fatal. ***806** The incidence of this disease is found to occur in discernible population groups, and the risk factors for obtaining or spreading the disease are associated with high-risk sexual conduct with multiple partners. The commercial premises, structures, or parts thereof, which place persons at risk of infection from this disease due to their design or intended use for high-risk sexual conduct, are necessarily subject to regulation and minimal standards for the prevention of the spread of this disease and for the protection of the public health, safety and welfare.

Sec. 19-309. No commercial building, structure, premises or subdivision, partition, portion or part thereof or facilities therein, shall be so constructed, used, or operated for the purpose of sexual activities, in which facilities high-risk sexual conduct takes place. No commercial building, structure, premises or subdivision, partition, or portion shall be designed for or used to promote high-risk sexual conduct.

Sec. 19-310. In exercising powers conferred by this, or any other, section of the Code relating to communicable disease, the health officer shall be guided by the most recent instructions, opinions and guidelines of the Center for Disease Control of the United States Department of Health and Human Services which relate to the spread of infectious diseases and any regulations which may be adopted by this Board which relate to controlling the spread of infectious diseases.

Sec. 19-311. Minimum standards for prevention of certain communicable diseases in commercial premises.

No person shall occupy any commercial building, structure, premises, or portion or part thereof, which does not comply with the following requirements:

(a.) For the prevention of the spread of sexually transmitted disease, no partitions between subdivisions of a room, portion or part of a building, structure or premises may have an aperture which is designed or otherwise constructed to encourage sexual activity between persons on either side of the partition.

(b.) No booths, stalls, or partitioned portions of a room, or individual rooms, used for the viewing of motion pictures or other forms of entertainment, shall have doors, curtains or portal partitions, but all such booths, stalls, partitioned portions of a room, or individual rooms so used shall have at least one side open to an adjacent public room so that the area inside is visible to persons in the adjacent public room. All such described areas shall be lighted in such a manner that the persons in the areas used for viewing motion pictures or other forms of entertainment are visible from the adjacent public rooms, but such lighting shall not be of such intensity as to prevent the viewing of the motion pictures or other offered entertainment.

(c.) No commercial building, structure or premises shall be so constructed that private rooms or accommodations can be offered to patrons of that business operated therein if:

(1.) The building, structure or premises is in violation of Sec. 19-309, above; and

(2.) The building, structure or premises is not a validly operating hotel, motel, apartment complex or condominium.

APPENDIX B

SECTION 19-311(b):

(1) The words “booth, stalls, partitioned portions of a room or individual rooms” mean such enclosures as are specifically offered to the public or members of that establishment for hire or for a fee as part of a business operated on the premises which offers as

part of its business the entertainment to be viewed within the enclosure; which shall include, without limitation, such enclosures wherein the entertainment is dispensed for a fee, but a fee is not charged for mere access to the enclosure.

(2) The words "booths, stalls, partitioned portions of a room or individual rooms" do not mean such enclosures that are private offices used by the owners, managers or persons employed on the premises for attending to the tasks of their employment, which enclosures are not held out to the public ***807** or members of the establishment for hire or for a fee or for the purpose of viewing entertainment for a fee, and are not open to any persons other than employees.

(3) The words "doors, curtains or portal partitions" mean full, complete, nontransparent closure devices through which one cannot see or view the activity taking place within the enclosure.

(4) The words "open to an adjacent public room so that the area inside is visible to persons in the adjacent public room" shall mean either the absence of any "door, curtain or portal partition" or a door or other device which is made of clear, transparent material such as glass, plexiglass or other such material meeting building code and safety standards, extending from the floor to the top of the door frame, exclusive of the door or device framing itself, so that the activity inside the enclosure may be viewed or seen by persons outside the enclosure.

All Citations

865 F.2d 797

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Declined to Follow by White River Amusement Pub, Inc. v. Town of Hartford, 2nd Cir.(Vt.), March 28, 2007

185 F.3d 823
United States Court of Appeals,
Seventh Circuit.

DIMA CORPORATION, Plaintiff-Appellant,
v.
TOWN OF HALLIE, Defendant-Appellee.

No. 98-3997.
|
Argued April 15, 1999.
|
Decided July 26, 1999.
|
Rehearing and Suggestion for Rehearing
En Banc Denied Aug. 24, 1999.

Operator of adult bookstore brought § 1983 action, seeking declaratory and injunctive relief as to ordinance restricting the hours of operation of adult establishments. Summary judgment for town was granted by the United States District Court for the Western District of Wisconsin, Barbara B. Crabb, J., and bookstore operator appealed. The Court of Appeals, Manion, Circuit Judge, held that: (1) ordinance was not content neutral, but because that content was sexually explicit, ordinance was constitutional so long as it satisfied the requirements of a reasonable time, place, and manner restriction; (2) the actual motives of those who enacted ordinance were irrelevant; and (3) town minimally met its burden of making a record to justify its ordinance's limitation on hours of operation.

Affirmed.

West Headnotes (16)

[1] **Constitutional Law**
First Amendment

The Fourteenth Amendment incorporated the free speech provision of the First Amendment, and so it prohibits state governments from abridging these freedoms as well. U.S.C.A. Const.Amends. 1, 14.

3 Cases that cite this headnote

[2] **Constitutional Law**
First Amendment in General

A corporation may assert a First Amendment challenge. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[3] **Constitutional Law**
Content-Based Regulations or Restrictions

The threshold question in a First Amendment free speech case is whether the challenged law is content-based, that is, whether the law regulates speech based on the ideas or messages it expresses. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[4] **Constitutional Law**
Content-Based Regulations or Restrictions

Constitutional Law
Strict or Exacting Scrutiny;Compelling Interest Test

Content-based regulations are presumptively invalid, but government is given much more leeway when its content-neutral regulations happen to limit some speech, and such regulation is subject only to intermediate scrutiny. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[5] **Constitutional Law**
Time, Place, or Manner Restrictions

Government may impose reasonable time, place, and manner restrictions on speech if they are justified without reference to the content of the regulated speech. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[6] **Constitutional Law**
"Fighting Words"
Constitutional Law
Defamation
Constitutional Law
Obscenity in General
Constitutional Law
Pornography

Within constitutional limits, government may proscribe obscenity, child pornography, defamation, and so-called "fighting words," but even within these traditional categorical exceptions, the First Amendment does not permit government to discriminate only against speech that contains some other message of which the government disapproves. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[7] **Constitutional Law**
Sexual Expression

Government may not simply proscribe sexually explicit, nonobscene, materials, but these materials are entitled to less First Amendment protection than nonsexually-explicit materials. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[8] **Constitutional Law**
Content Neutrality
Public Amusement and Entertainment
Sexually Oriented Entertainment

Ordinance which singled out adult-oriented establishments for different treatment was not content neutral, but because that content was sexually explicit, strict scrutiny did not apply, and ordinance was constitutional so long as it satisfied the requirements of a reasonable time, place, and manner restriction. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[9] **Constitutional Law**
Reasonableness
Constitutional Law
Narrow Tailoring Requirement; Relationship to Governmental Interest
Constitutional Law
Existence of Other Channels of Expression

Time, place, and manner restrictions are "reasonable," that is, do not violate the First Amendment, if they: (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[10] **Constitutional Law**
Bookstores
Public Amusement and Entertainment
Sexually Oriented Entertainment

The actual motives of those who enacted ordinance regulating hours of operation of adult bookstores were irrelevant to First Amendment analysis of whether the restrictions were justified without reference to the content of the regulated speech; issue was not whether the motives of the town board could be justified as content-neutral time, place, and manner restrictions, but rather whether the ordinance itself could be so justified. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[11] **Constitutional Law**
Secondary Effects

Combating potential undesirable "secondary effects" of adult-oriented establishments, including the spread of crime and sexually transmitted diseases, a decline in property value, or an increase in public sexual acts, is a significant government interest, which may support content-neutral time, place, and

manner restrictions. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[12] **Constitutional Law**
Time, Place, or Manner Restrictions

In response to a First Amendment challenge to time, place, and manner restrictions on speech, a municipality bears the burden of showing that there is evidence that supports its proffered justification, but this burden is not overwhelming, as the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[13] **Constitutional Law**
Bookstores

Public Amusement and Entertainment
Sexually Oriented Entertainment

Conclusory assertions regarding goals and effect of ordinance restricting hours of operation of adult bookstores were insufficient by themselves to survive a First Amendment challenge because they were not evidence; town had to offer some record support for the existence of secondary effects of operation of such bookstores, and for the ordinance's amelioration thereof. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[14] **Civil Rights**
Trial in General

A municipality may make a record for summary judgment or at trial with evidence of secondary effects of adult-oriented establishments that it may not have had when it enacted its ordinance imposing time, place and manner restrictions on such establishments. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[15] **Constitutional Law**
Bookstores

Public Amusement and Entertainment
Sexually Oriented Entertainment

Town minimally met its burden of making a record to justify its ordinance's limitation on hours of operation of adult bookstores, by relying on the factual record supporting the experience of the municipality from which it copied its ordinance, as reported in a district court opinion; fairly meager record supporting town's justification of combating crime was sufficient where First Amendment challenge was limited to the ordinance's regulation of hours of operation, and where bookstore operator had not created a record to show what sort of impact this limitation would have on its business. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[16] **Constitutional Law**
Bookstores

Public Amusement and Entertainment
Sexually Oriented Entertainment

Evidence which merely contradicted other evidence that town board could have reasonably relied upon in enacting ordinance restricting hours of operation of adult bookstores was irrelevant to the question of whether there was some evidence that did support the board's conclusions that the ordinance would combat crime, which was all that was required to uphold it against First Amendment challenge. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

Attorneys and Law Firms

***826** Randall D.B. Tigue (argued), Randall Tigue Law Office, Minneapolis, MN, for Plaintiff-Appellant.

Joel L. Aberg (argued), Weld, Riley, Prenn & Ricci, Eau Claire, WI, for Defendant-Appellee.

Before CUDAHY, COFFEY, and MANION, Circuit Judges.

Opinion

MANION, Circuit Judge.

In the Town of Hallie, Wisconsin, DiMa Corporation operates an adult bookstore, which is currently open 24 hours per day. After Hallie adopted an ordinance limiting the hours such bookstores may be open, DiMa filed this suit under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against enforcing the ordinance, claiming that the ordinance violates DiMa's free speech rights under the First and Fourteenth Amendments. The district court granted summary judgment for Hallie. Because we conclude that the record sufficiently supports Hallie's claim that the ordinance is a reasonable attempt to control undesirable "secondary effects" rather than an attempt to regulate speech because of its objectionable content, we affirm the district court.

Background

Hallie is a small town in rural Wisconsin between Eau Claire and Chippewa Falls. DiMa operates the "Pure Pleasure" bookstore in Hallie. Pure Pleasure sells sexually explicit, nonobscene books and magazines, and it has private booths in which a patron can watch sexually explicit, non-obscene video tapes. [1] Since it opened, Pure Pleasure has operated 24 hours per day. In March 1998, Hallie adopted Ordinance No. 98-1, which regulates "adult-oriented establishments," including "adult bookstores." DiMa does not dispute that Pure Pleasure falls within the ordinance's definition of these terms. The ordinance regulates adult-oriented establishments in various ways but in this suit DiMa challenges only one of them: the hours of operation limits contained in Section 1.06. Under that section, an adult-oriented establishment may not be open between 2:00 A.M. and 8:00 A.M. Monday through Friday, between 3:00 A.M. and 8:00 A.M. on Saturday, and between 3:00 A.M. and noon on Sunday. The ordinance thus requires adult bookstores to be closed about one-quarter of the hours during a week. (These are the same hours of operation limits that Wisconsin has placed on establishments that serve alcohol. *See* Wisc. Stat. §§ 125.32(3) & 125.68(4).) Section 1.06 has not yet been enforced: the parties stipulated to an injunction of it while the matter was pending in the district court, and the district court continued that injunction pending the outcome of this appeal.

1 There has been no judicial finding, nor even the allegation, that these materials are obscene. Hallie decided to regulate these materials as not obscene and the parties have so treated them in this litigation. We therefore do the same.

Analysis

[1] [2] [3] [4] [5] The First Amendment provides in part that "Congress shall make no law ... abridging the freedom of speech, or of the press." Section One of the Fourteenth Amendment incorporated this provision and so it prohibits state government from abridging these freedoms as well. *See, e.g., Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n. 1, 116 S.Ct. 1495, 1501 n. 1, 134 L.Ed.2d 711 (1996). [2] Because the ***827** ordinance has not yet been applied to Pure Pleasure, we are confronted with a facial challenge to the statute, rather than a challenge to the way the statute has been applied to Pure Pleasure. The threshold question in a First Amendment free speech case is whether the challenged law is content-based, that is, whether the law regulates speech based on the ideas or messages it expresses. "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). On the other hand, government is given much more leeway when its content-neutral regulations happen to limit some speech. *See United States v. Wilson*, 154 F.3d 658, 663 (7th Cir.1998) ("If a statute is content-based, it must survive strict scrutiny to be constitutional. If a statute is content-neutral, it is subject only to intermediate scrutiny."). Therefore, government may impose reasonable time, place, and manner restrictions if they are "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct.

2746, 105 L.Ed.2d 661 (1989) (internal quotation marks omitted).

2 Although DiMa is a corporation rather than a natural person, it may assert a First Amendment challenge. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ("The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the legislation in question] abridges expression that the First Amendment was meant to protect."); *see also Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578, 592, 17 S.Ct. 198, 41 L.Ed. 560 (1896) ("It is now settled that corporations are persons, within the meaning of [the Fourteenth Amendment's protections].").

[6] **[7]** There are some categorical exceptions to this general analysis, however; government has more freedom to regulate certain kinds of speech, even though it does so based on the content of the speech. Within constitutional limits, government may proscribe obscenity, *see Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); child pornography, *see Osborne v. Ohio*, 495 U.S. 103, 111, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990); defamation, *see New York Times Co. v. Sullivan*, 376 U.S. 254, 268, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); and so-called "fighting words," *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).[3] The Supreme Court applies yet a different kind of analysis to the category of speech at issue here: sexually explicit, non-obscene materials. Because this speech is not obscene, government may not simply proscribe it. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("[A]n entertainment program [may not] be prohibited solely because it displays the nude human figure."). But because these materials border on the obscene, they are entitled to less First Amendment protection than non-sexually-explicit materials. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70-71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality) ("Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."). So in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Court held that "at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." (Footnote omitted.)

3 But even within these traditional categorical exceptions, the First Amendment does not permit government to discriminate only against speech that contains some other message of which the government disapproves. *R.A.V.*, 505 U.S. at 385, 112 S.Ct. 2538 ("The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace and has found application in many contexts.").

[8] As the Sixth Circuit recently noted, the Court's analysis has caused some confusion ***828** among courts and litigants, and that confusion is evident in this case. *See Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998). The Court held that regulation of sexually explicit material would be treated *like* content-neutral time, place, and manner regulations, not that it *was* content-neutral. Thus when courts and litigants fall into the shorthand of simply referring to regulations like the one here as "content-neutral," they can find themselves arguing about irrelevancies. Here, DiMa, with ample citation to cases, argues that the ordinance is not content-neutral, while Hallie argues that it is. DiMa is obviously correct: the ordinance singles out adult-oriented establishments for different treatment based on the content of the materials they sell or display. *Richland Bookmart, Inc.*, 137 F.3d at 438-39. But because that content is sexually explicit materials, DiMa's conclusion that strict scrutiny applies here does not follow. Rather, Hallie's ordinance is constitutional so long as it satisfies the requirements of a reasonable time, place, and manner restriction.

[9] Time, place, and manner restrictions are "reasonable," that is, do not violate the First Amendment, if they: (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information. *Ward*, 491 U.S. at 791, 109 S.Ct. 2746; *see also United States v. O'Brien*, 391 U.S. 367, 377, 88

S.Ct. 1673, 20 L.Ed.2d 672 (1968) (stating test with slightly different language). Hallie asserts that the third prong is satisfied because the ordinance permits Pure Pleasure to be open for significant periods of time, about three-quarters of the hours during a week, and DiMa does not challenge this assertion. DiMa also does not contend that the second prong is not satisfied: it neither challenges Hallie's proffered interests as being not significant nor does it claim that it should be required to close for some fewer number of hours. Our analysis, then, focuses only on the first prong. DiMa levels a number of attacks at the ordinance, arguing that it is not justified as anything other than a regulation of sexually explicit material of which the Hallie city officials disapprove.

[10] We can reject DiMa's first argument rather easily. DiMa claims that at least some of the Hallie Township Board members had an improper motive when they voted for the ordinance: rather than acting to combat crime, deter sexually transmitted diseases, and the other "legitimate" goals that the ordinance's preamble asserts, at least some of the Board members voted for the ordinance because of local opposition to the "vice" of sexually explicit materials. The record shows that DiMa is correct. Some members of the Board desired to close down Pure Pleasure altogether because of numerous complaints from Hallie residents who objected to having an adult bookstore in their town. Recognizing that the Constitution did not permit proscribing sexually explicit materials, at least some of the Board members seemed willing to enact the ordinance because it was the most that they could do consistent with the Constitution. But attacking the ordinance because it was enacted by persons with "impure hearts" gets DiMa nowhere. The actual motives of those who enacted the ordinance are irrelevant to our First Amendment analysis. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383, 88 S.Ct. 1673; *Renton*, 475 U.S. at 47-48, 106 S.Ct. 925 (quoting *O'Brien*). Similarly, in a case applying the First Amendment's free-exercise clause, Justice Scalia, joined by the Chief Justice, rejected the idea that the motives of those who enacted the law were relevant to whether it was constitutional:

> [The language of the First Amendment] does not put us into the business of ***829** invalidating laws by reason of the evil motives of their authors. Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to "prohibi[t] the free exercise" of religion. Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558-59, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (Scalia, J., concurring in part and concurring in the judgment).[4] It would indeed be an exercise in futility if we struck down the ordinance because of the improper motives of some Board members, and the Board was then able to immediately reenact the same ordinance but with the members all being careful to avoid stating their illegitimate motives. *See O'Brien*, 391 U.S. at 384, 88 S.Ct. 1673 (declining to void otherwise constitutional statute "which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it."). Thus, in analyzing whether Hallie's ordinance violates the First Amendment, we do not ask whether the motives of the Board can be justified as content-neutral time, place, and manner restrictions, but rather whether the ordinance itself can be so justified. *See Renton*, 475 U.S. at 48, 106 S.Ct. 925.

4 Justice Kennedy, who wrote the opinion for the majority, believed that the motives of the city council were relevant, and applied an analysis adopted from cases applying the Fourteenth Amendment's equal protection clause. *Hialeah*, 508 U.S. at 540-42, 113 S.Ct. 2217. But this part of his opinion was joined only by Justice Stevens.

[11] **[12]** **[13]** The justification advanced by Hallie is combating potential undesirable "secondary effects" of adult-oriented establishments. This is a significant government interest. *Renton*, 475 U.S. at 50, 106 S.Ct. 925. Those undesirable secondary effects could include the spread of crime and sexually transmitted diseases, a decline in property value, or an increase in public sexual acts. Although the ordinance's preamble cites numerous

secondary effects that it was meant to combat, on appeal, as it did in the court below, Hallie focuses on the Board's conclusion that one of the secondary effects of the adult-oriented businesses was increased crime and the ordinance was reasonably necessary to combat it. In response to a First Amendment challenge, the municipality bears the burden of showing that there is evidence that supports its proffered justification. *See J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 370-71 (5th Cir.1998) (city bears burden both of production and persuasion). This burden is not overwhelming. "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925. The district court correctly concluded that Hallie's ordinance does not itself contain any evidence to support its proffered justification; its conclusory assertions regarding its goals and its effect are insufficient by themselves to survive a First Amendment challenge because they are not "evidence" as the Court required in *Renton*. The Third Circuit succinctly stated the appropriate burden in this kind of case: "[O]ur First Amendment jurisprudence requires that the [municipality] identify the justifying secondary effects with some particularity, that [it] offer some record support for the existence of those effects and for the Ordinance's amelioration thereof, and that the plaintiffs be afforded some opportunity to offer evidence in support of the allegations of their complaint." *Phillips v. Borough of Keyport*, 107 F.3d 164, 175 (3d Cir.1997) (*en banc*).

[14] We also agree with the district court that a municipality may make a record ***830** for summary judgment or at trial with evidence that it may not have had when it enacted its ordinance. D. Ct. Op. at 11-12. The Court in *Renton* did not address this issue because in that case, the city council had created an extensive record prior to enacting its ordinance. 475 U.S. at 44, 106 S.Ct. 925. The Court's most relevant guidance on this issue comes from *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). In that case, the Court addressed a First Amendment challenge to enforcing a statute banning public nudity by prohibiting totally nude dancing in establishments providing "adult entertainment." The Chief Justice, writing the plurality opinion but joined only by two other Justices, held that such nude dancing was "expressive conduct within the outer perimeters of the First Amendment, though we view it only as marginally so." *Id.* at 566, 111 S.Ct. 2456. The plurality opinion affirmed the state's enforcement of its public nudity statute as a reasonable time, place, and manner restriction, without analyzing whether the enforcement combated undesirable secondary effects of the nude dancing; the plurality considered moral disapproval of nudity to be a sufficient justification. Justice Scalia concurred in the judgment, but concluded that because the law at issue was a general one regulating conduct not specifically directed at expression, it should not be subject to any level of First Amendment scrutiny. *Id.* at 572, 111 S.Ct. 2456. Justice Souter concurred in the judgment and provided the fifth vote needed to overcome the views of the four dissenting Justices. Justice Souter, like the plurality, affirmed the statute as a reasonable time, place, and manner restriction, but unlike the plurality did so based on the proffered justification of combating the undesirable secondary effects of adult entertainment establishments. *Id.* at 582-83, 111 S.Ct. 2456. Justice Souter's reasoning, then, appears to be the Court's holding because his was the narrowest reasoning supporting the judgment. [5] Justice Souter accepted the state's justification and its evidence, which it proffered during the litigation, although there was no evidence that the state had been motivated by combating secondary effects when it enacted the statute or that it had had any of the evidence before it. *Id.* Moreover, Justice Souter accepted the experiences of other cities *as reported in judicial opinions* as being evidence upon which the legislature could have reasonably relied. *Id.* at 583-86, 111 S.Ct. 2456. The *Renton* Court had similarly accepted the city's reliance on the experience of Seattle, as expressed in the detailed findings of fact summarized by the Washington Supreme Court in a prior case. 475 U.S. at 51-52, 106 S.Ct. 925 (citing *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153, 1159 (Wash.1978)).

5 "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (internal quotation marks omitted). Three other circuits have also concluded that Justice Souter's concurrence is the Court's holding. *See J & B Entertainment*, 152 F.3d at

370; *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir.1994); *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1161 (11th Cir.1991).

[15] Under these standards, we conclude that Hallie has met its burden of making a record to justify its ordinance's limitation on hours of operation, but we agree with the district court that it has only minimally done so. *See* D. Ct. Op. at 10. Hallie relies primarily on the experience of West Allis, Wisconsin, and Hallie's ordinance was essentially copied from the one enacted by West Allis. (West Allis is next to Milwaukee and is thus geographically far removed from Hallie.) Hallie relies on the factual record supporting West Allis's experience as reported in *Tee & Bee, Inc. v. City of West Allis*, 936 F.Supp. 1479 (E.D.Wis.1996), in which the ***831** district court upheld West Allis's ordinance against a First Amendment challenge. Before enacting its ordinance, West Allis had done considerable analysis of studies from other cities, which its ordinance specifically cited. 936 F.Supp. at 1483 & 1485 n. 3. We agree with DiMa that it is unusual for Hallie in this court to rely principally on a district court opinion. In *Barnes*, Justice Souter relied on findings reported in Supreme Court decisions and appellate decisions from the circuit in which the municipality was located. 501 U.S. at 584, 111 S.Ct. 2456. Although *Tee & Bee*'s discussion of the evidence relied on by West Allis is some record support justifying Hallie's similar ordinance, it is not compelling evidence.[6] Likewise, although the Hallie corporate counsel examined the First Amendment issue, the record does not reflect that he conducted any extensive analysis of the experiences of other municipalities, as was done in other cases. *Cf. Renton*, 475 U.S. at 44, 106 S.Ct. 925 (describing extensive studies and hearings conducted by Planning Committee); *Tee & Bee*, 936 F.Supp. at 1483 (committee studied issue for 12 months). Thus, we have a fairly meager record to support Hallie's justification of combating crime. But it is enough of a record in this case because DiMa's First Amendment challenge is limited to the ordinance's hours of operation regulation, and we have no reason to believe that this is a significant impairment of Pure Pleasure's business. DiMa has not created a record to show what sort of impact this limitation would have on its business. That is, we don't know how much revenue Pure Pleasure takes in during the hours that are subject to the regulations or whether, when the hours of operation regulation is enforced, these revenues will be lost rather than merely shifted to other hours when Pure Pleasure is open. Nor do we know how Pure Pleasure's profits would be affected, considering that presumably limiting the hours of operation would reduce its operating expenses. So we caution other municipalities not to read our decision today too broadly. We would expect a municipality defending a more substantial set of regulations to create a more substantial record in support of summary judgment. *Cf. Tee & Bee*, 936 F.Supp. at 1486 ("The record is replete with information showing that the City determined it necessary to provide for the licensing and regulation of adult-oriented businesses in order to combat the secondary effects of such facilities in the surrounding community.").

6 We do not want our reasoning to be construed as a slight of the district court's opinion in *Tee & Bee*. The court's opinion was thorough and well reasoned. In referring to *Tee & Bee* as not compelling evidence supporting Hallie's ordinance, we mean that as a district court opinion, to this court *Tee & Bee* is persuasive but not binding precedent.

[16] We must address one more aspect of DiMa's argument before closing. In the court below, DiMa submitted expert testimony and a study done in Phoenix to show there is no relation between an adult-oriented business' hours of operation and crime. It also proffered various evidence showing that there was in fact no correlation between Pure Pleasure being open 24 hours a day and crime in Hallie. The district court properly rejected this evidence because it merely contradicts other evidence that the Hallie Board could have reasonably relied upon. It is therefore irrelevant to the question of whether there is some evidence that does support the Board's conclusions. DiMa's contradictory evidence would be highly probative if our task were to discover the objective truth about the effect of Pure Pleasure's operating in Hallie. But our task under the First Amendment is far different. The Hallie Board has the job of sorting through the available evidence and making a political judgment about what regulations best serve Hallie's interest. We are not here to judge how well the Board did its job; our task is to determine whether the law it enacted violates the Constitution. It does not.

***832** The judgment of the district court is AFFIRMED.

All Citations

185 F.3d 823

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926 F.Supp.2d 1039
United States District Court,
S.D. Indiana,
Indianapolis Division.

ANNEX BOOKS, INC., New Flicks, Inc. d/b/a New Flicks, Lafayette Video & News, Inc. d/b/a Lafayette Video & News, Keystone Video & Newsstand, Inc d/b/a Keystone Video, Southern Nights, Inc., Plaintiffs,
v.
CITY OF INDIANAPOLIS, Defendant.

No. 1:03–cv–00918–SEB–TAB.
|
Feb. 25, 2013.

Synopsis

Background: Owners of adult entertainment establishments brought action challenging constitutionality of city's adult entertainment business ordinance. Bench trial was held.

[Holding:] The District Court, Sarah Evans Barker, J., held that city adequately established that public benefits justified ordinance without unjustified, substantial decrease in freedom of speech.

Judgment for city.

West Headnotes (4)

[1] Constitutional Law
Sexually Oriented Businesses;Adult Businesses or Entertainment

Law regulating sexually oriented businesses satisfies intermediate scrutiny test under First Amendment so long as it is designed to serve substantial governmental interest and does not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] Constitutional Law
Secondary effects

In reviewing ordinance regulating sexually oriented businesses, laws are designed to serve substantial government interest when municipality can demonstrate connection between speech regulated by ordinance and secondary effects that motivated ordinance's adoption. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[3] Constitutional Law
Secondary effects

First Amendment does not require city, before enacting ordinance regulating sexually oriented businesses, to conduct new secondary effects studies or produce evidence independent of that already generated by other cities, so long as whatever evidence city relies upon is reasonably believed to be relevant to problem that city addresses. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] Constitutional Law
Hours of operation

Constitutional Law
Secondary effects

Public Amusement and Entertainment
Sexually Oriented Entertainment

City adequately established that public benefits flowing from city's adult entertainment business ordinance, which required establishments without on-premises viewing to close from midnight to 10:00 a.m. Monday through Saturday and all day on Sunday, justified ordinance without unjustified, substantial decrease in freedom of speech, where city presented evidence that adult businesses without on-premises viewing caused secondary effects similar to

those caused by adult businesses offering such activities, that approximately 20% of all violent/person crimes during pre-enforcement period occurred at adult bookstore addresses, even though bookstores represented only 3% of addresses within 500 foot circles, that overall violent/person crime decreased at adult bookstores while ordinance was in force, that pre-enforcement declines in sales were in number of cases greater than declines in sales during enforcement period, and that closure did not prevent any patron from accessing speech during enforcement period. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

***1040** J. Michael Murray, Lorraine R. Baumgardner, Steven D. Shafron, Berkman Gordon Murray & Devan, Cleveland, OH, Richard Kammen, Gilroy, Kammen & Hill, Indianapolis, IN, for Plaintiffs.

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ORDER UPHOLDING CONSTITUTIONALITY OF CHAPTER 807 OF THE REVISED CODE OF THE CONSOLIDATED CITY AND COUNTY OF INDIANAPOLIS

SARAH EVANS BARKER, District Judge.

This matter was tried to the Court on October 17–19, 2012, presenting the constitutional issues arising under the First and Fourteenth Amendments relating to Chapter 807 of the Revised Code of the Consolidated City and County of Indianapolis ("City–County Code"), which ordinance governs the licensing and regulation of adult entertainment establishments. Plaintiffs, Annex Books, Inc., New Flicks, Inc. d/b/a New Flicks, Lafayette Video & News, Inc., d/b/a Lafayette Video & News, Keystone Video & Newsstand, Inc., d/b/a Keystone Video, and Southern Nights, Inc., are adult bookstores within the meaning ***1041** of Ordinance 87,2003 ("the Ordinance"). [1]

1 During the period of time when the Ordinance was not being enforced, Plaintiff New Flicks ceased its business operations and has not reopened. Thus, the parties have agreed that any injunctive relief is moot as to New Flicks.

This is not our first encounter with these issues. Indeed, this litigation has a long history before our court as well as the Court of Appeals. When this cause of action was originally filed, Plaintiffs sought declaratory and injunctive relief prohibiting the enforcement of Chapter 807, as amended, which they contended violated their rights under the First and Fourteenth Amendments. On November 3, 2003, after a hearing, the Court preliminarily enjoined enforcement of the Ordinance pending "further order of the Court or a final resolution of the merits of the case." Docket No. 51, at 9. Defendant, the City of Indianapolis ("the City"), subsequently agreed to refrain from enforcing the Ordinance until a final decision on the merits was rendered. On April 1, 2005, the Court entered final judgment in favor of the City holding that enforcement of Chapter 807 did not violate Plaintiffs' constitutional rights.

Plaintiffs appealed that ruling and, on September 3, 2009, the Seventh Circuit affirmed the Court's judgment regarding the licensing procedure set out in the Ordinance, but reversed and remanded the case for an evidentiary hearing on the First Amendment issues. The mandate from the Seventh Circuit was issued on November 3, 2009. On remand, Plaintiffs requested and were granted leave to file a second amended complaint to include a claim for damages. On November 6, 2009, Plaintiffs also filed a motion for preliminary injunction requesting that the Court enjoin the City from enforcing Chapter 807 until a final decision could be reached on the merits. On December 2, 2009, 673 F.Supp.2d 750 (S.D.Ind.2009), after a hearing during which both sides presented evidence and argument, the Court granted Plaintiffs' request for injunctive relief, enjoining the City from enforcing Chapter 807 until further order of the Court. That decision was affirmed by the Seventh Circuit on October 1, 2010, 624 F.3d 368 (7th Cir.2010).

The trial having now been completed, during which the Court received and considered documentary and

testimonial evidence as well as heard the parties' oral arguments, we now hold that the Ordinance is valid under the First Amendment and may be enforced according to its terms.

Ordinance 87,2003 was approved by the City–County Council on October 6, 2003, and signed into law on October 14, 2003. Chapter 807 of the City–County Code regulates adult entertainment establishments, and, under the definitions set out in § 807–103, each of the plaintiffs qualifies as an "adult bookstore." Specifically, the Ordinance defines an adult bookstore as "an establishment having at least twenty-five percent (25%) of its (1) retail floor space used for the display of adult products; or (2) stock in trade consisting of adult products; or (3) weekly revenue derived from adult products."

Among other things, the Ordinance requires that Plaintiffs be licensed and that they close their store operations between midnight and 10 a.m. six days a week and remain closed all day on Sundays. The Ordinance also requires businesses with video booths to comply with section 807–301(h), which includes booth configuration, employee monitoring, and minimum lighting requirements. [2] Each of the Plaintiffs ***1042** offers adult oriented videos for sale, rental or display, as well as magazines and other materials. Annex Books is the only plaintiff that offers coin operated machines allowing its patrons to view sexually oriented videos in booths on the store's premises. The Ordinance was in effect between June 1, 2005 and December 2, 2009, prior to our issuance of the preliminary injunction.

2 Plaintiffs are not challenging the provisions addressing booth configuration, employee monitoring, and lighting requirements.

[1] [2] [3] Because the Ordinance is directed toward regulating secondary effects, it need survive only intermediate scrutiny. *See City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 448, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (Kennedy, J. concurring). A law satisfies the intermediate scrutiny test so long as it is "designed to serve a substantial governmental interest and [does] not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *see also Alameda Books,* 535 U.S. at 434, 122 S.Ct. 1728. "Laws are designed to serve a substantial government interest when the 'municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.' " *Andy's Restaurant & Lounge, Inc. v. City of Gary,* 466 F.3d 550, 555 (7th Cir.2006) (quoting *R.V.S., L.L.C. v. City of Rockford,* 361 F.3d 402, 408 (7th Cir.2004)). To assess the sufficiency of this connection, courts must "examine evidence concerning regulated speech and secondary effects." *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728 (citing *Renton,* 475 U.S. at 50–52, 106 S.Ct. 925). "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925.

In its decision remanding the case for an evidentiary hearing on the substantive First Amendment issues, the Seventh Circuit held that in order for the revised Ordinance to pass constitutional muster, the City must present evidence that adult book or video stores without live entertainment or private booths, open after midnight, or on Sunday, cause adverse secondary effects sufficiently severe to justify the curtailment of speech which results from the City's post–2003 system of regulation. *See Annex Books, Inc. v. City of Indianapolis, Ind.,* 581 F.3d 460, 465–67 (7th Cir.2009) ("*Annex Books I* "). Thus, the City must establish: first, that adult entertainment businesses lacking facilities for on-premise viewing create the same secondary effects as establishments providing those services, and second, that the revised Ordinance requiring Plaintiffs to close from midnight to 10:00 a.m. Monday through Saturday and all day on Sunday "has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 465 (quoting *Alameda Books, Inc.,* 535 U.S. at 449, 122 S.Ct. 1728 (Kennedy, J., concurring)).

[4] In determining whether the City has met its burden as elucidated by the Seventh Circuit in *Annex Books I,* we again rely heavily on the parties' respective analyses of the crime statistics in Indianapolis before and after enforcement of the revised Ordinance. [3] We relied on a ***1043** portion of these same statistics in our December 2, 2009 Order granting Plaintiffs' request for a preliminary injunction. However, we made clear in that ruling that the evidence and argument presented by the parties was only preliminary and that the statistical evidence

would need further development at the full evidentiary hearing. Having now had the opportunity to review and evaluate the fully developed evidence, including the proffered statistical analyses, we hold for the reasons detailed below that the City has succeeded in making the necessary showing detailed in *Annex Books I* to satisfy the Constitutional requirements.

3 Much of the other evidence in the record before us, including a number of studies on which the City relied to justify the adoption of revised Chapter 807 and which it continues to cite in this litigation in support of the revised ordinance, was criticized by the Seventh Circuit in *Annex Books I.* Judge Easterbrook, writing for the panel, highlighted various deficiencies in those studies. He noted, for example, that none of the studies specifically dealt with the type of ordinance at issue here, to wit, an hours of operation restriction, nor did any of the studies assess the effects of stores that sell as little as 25% adult products, such as the businesses covered under the City's revised ordinance. Moreover, many of the studies concerned adult businesses that offer on-premise viewing booths, live shows, or both, while only one of the Plaintiffs in this lawsuit, to wit, Annex Books, offers such entertainment. Accordingly, the weight we accord these studies is greatly diminished in the Court's current analysis.

First, consistent with the first prong of the test elucidated in *Annex Books I,* we find that the City has presented sufficient evidence to establish a reasonable basis for its legislative finding that adult businesses without on-premises viewing cause secondary effects similar to those caused by adult businesses offering such activities. As noted above, in reaching this conclusion, we rely heavily on the comparative crime statistics in Indianapolis before and after the Ordinance went into effect. Both parties' experts testified regarding the advantages associated with the use of before and after studies in which crime data in the vicinity of a sexually oriented business is collected for a time period before and after some change in its operation as a method of assessing secondary effects. In such a study, the sexually oriented business serves as its own control, eliminating many of the challenges associated with finding an area sufficiently similar to the area surrounding the sexually oriented business on characteristics known to be associated with crime to act as a control.

Here, the City studied Uniform Crime Reporting Part I crimes ("UCR Part I crimes")[4] that occurred within 500 feet of Plaintiffs' businesses during the pre-enforcement and enforcement periods.[5] This data, collected in a 2009 study ("the 2009 data"),[6] is the same data analyzed in our December 2, 2009 Order granting Plaintiffs' ***1044** request for a preliminary injunction. In that Order, while noting the early juncture at which we were making our decision, we held that the City had failed to meet its burden as explicated in *Annex Books I* because, although there was statistical evidence from that 2009 study showing that violent/person crime (as opposed to property crime) had decreased while the Ordinance was in effect, the actual numbers were too small to be considered statistically significant so as to justify the reduction in speech effected by the Ordinance. However, having now had the benefit of further development and explanation of the data by the parties' experts at the evidentiary hearing, we understand the data more fully. The expert testimony proffered at the hearing highlighted the importance of shifting our focus from simply the raw numbers of crimes to include an analysis of the underlying nature of those crimes as a way of putting the numbers in context.

4 The FBI has administered the Uniform Crime Reporting Program since 1930. There are eight crimes classified as Part I crimes within the UCR system, including the violent/person crimes of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault, and the property crimes of burglary, larceny-theft, and motor vehicle theft. Arson was subsequently added as the eighth Part I offense category.

5 The pre-enforcement period ran from April 2002 through May 2005 (38 months) and the enforcement period was June 2005 through March 2008 (34 months). At the evidentiary hearing, Dr. Linz opined that the four month difference between the two time periods would likely affect no more than a few crimes and the record supports this opinion. *See* Exh. P at 2, 12 (showing that only two crimes occurred at Plaintiffs' addresses between April and July 2008, neither of which occurred during the hours regulated by the Ordinance). Accordingly, this discrepancy is not material to our analysis.

6 Plaintiff Southern Nights was included in all of the parties' original filings and remains listed on the Court's docket as a plaintiff in this litigation. However, it is not included in the 2009 data.

At the evidentiary hearing, the City provided substantially more detail underlying the 2009 data. Specifically, the

City reviewed the police reports to identify the type of Part I crime reflected in the 2009 data as well as the specific address(es) at which each crime occurred. On this basis, the City ranked the addresses within each 500 foot circle surrounding Plaintiffs' bookstores [7] according to the number of crimes that occurred at each of the addresses within that area. The evidence shows that, in the pre-enforcement period, a total of 107 violent/person crimes occurred at all addresses within the 500–foot circles surrounding Plaintiffs' locations, 21 of which occurred *at* the five adult bookstore addresses (the four plaintiffs and another adult bookstore, Video Gallery). Thus, approximately 20% of all violent/person crimes during the pre-enforcement period occurred at the adult bookstore addresses, even though the five adult bookstores represent only 3% of the 152 total addresses within the 500 foot circles that had at least one UCR Part I crime during the period. Of those 21 violent/person crimes, 18 were armed robberies, and those 18 armed robberies at the adult bookstore addresses account for 46% of the total number (39) of armed robberies that occurred during the pre-enforcement period in all of the 500–foot circles. *See* Exh. M–4; Exh. M–5; and Exh. M–6.

[7] According to Dr. McCleary's testimony, the 500 foot circumference (which is tantamount to an average city block) is a commonly used distance in secondary effects studies for both practical and empirical reasons.

Both parties' experts have endorsed and employed the use of this hotspot analysis, to wit, the ranking of addresses in a particular area based on crimes occurring at them. They agree that this is a recognized method of assessing secondary effects. Here, during the pre-enforcement period, Lafayette Video & News was ranked first in its buffer area for both total UCR crimes as well as armed robberies. In its area, New Flicks Video was third for total UCR crimes and first in armed robberies. Keystone Video & Newsstand was second in its circle behind the CVS Pharmacy in both total UCR crimes and armed robberies. Plaintiff Annex Books and another adult store, Video Galley, are located within the same 500–foot circle, and within that area, Annex Books and Video Gallery were third and fifth, respectively, in total UCR crimes and ranked first and second in armed robberies. *See* Exh. M–6. These rankings are consistent with Dr. McCleary's conclusion that adult bookstores are hotspots for serious crime, including armed robberies. *See* Exh. V at 2 (McCleary 2004 expert report: "The adverse secondary effects of [sexually oriented ***1045** businesses] ordinarily involve robbery,....").

The evidence also established that, during the period of time when the Ordinance was being enforced, overall violent/person crime, including the number of armed robberies, decreased at the adult bookstores, with the greatest decreases in total UCR Part I crimes (over 50%) coming during the regulated hours. *See* Exh. M–4; Exh. M–5; Exh. M–6. Specifically, total UCR Part I crimes at Plaintiffs' and Video Gallery's addresses decreased during the overnight hours (midnight to 10 a.m.) from 12 crimes pre-enforcement to 5 crimes during the enforcement period and, on Sundays, from 8 crimes pre-enforcement to 3 crimes after. Exh. M–4. Total armed robberies committed at the adult bookstores during the regulated hours (overnight hours and Sundays combined) decreased from 8 during the period before the Ordinance was enforced to 0 during enforcement. *See* Exh. M–5. During the period of enforcement, violent/person crime as a whole decreased approximately 44% during the overnight hours within the 500 foot circles surrounding the bookstores, while violent/person crime in the balance of the IPD District rose almost 12% during that same time period. *See* Exh. 7A.

To support their claims, Plaintiffs focus on the fact that, within the 500–feet circles surrounding Plaintiffs' premises, property crime and total UCR Part I crime rates as well as violent/person crime on Sundays all increased during the enforcement period. Specifically, property crime increased by: 16% overall; 32% during the overnight hours; and 20% on Sundays. Exh. 7. Overall UCR Part I crimes also increased in those areas by: 9% overall; 12% during the overnight hours; and 37% on Sundays. *Id.* Finally, Plaintiffs highlight that, although the violent/person crime rate decreased significantly in the 500–foot circles both overall as well as specifically during the overnight hours as described above, it increased from 8 to 19 crimes (138%) on Sundays during the enforcement period in the 500–foot circles surrounding Plaintiffs' locations. *Id.* Based on the overall testimony and evidence presented at trial, however, we are not persuaded that this excerpted data support a reliable conclusion.

The trial testimony establishes that focusing on violent/person crime both in the 500–foot circles surrounding Plaintiffs' bookstores, and even more narrowly, on violent/person crime occurring at the Plaintiffs' specific

addresses, as opposed to total crime or property crime in this context is, for a number of reasons, more reasonable. First, one of the main challenges related to the assessment of secondary effects identified by the experts is the difficulty associated with accurately determining the time and exact location at which individual crimes occur in order to collect reliable data. Many property crimes, for example, cannot be reported in detail because the details are unknown (*e.g.* often property crimes like break-ins occur when the victim is away from his or her home or vehicle so the victim is unable to pinpoint with precision when the crime occurred). In contrast, because violent/person crimes involve a witness, usually the victim, the details of such crimes are generally more accurately reported, including the specific act that occurred as well as the time and location of the crime. Moreover, the City's expert, Dr. Richard McCleary, testified that relying on property crime rates in assessing secondary effects can be problematic because the property crime category is overwhelmed with larceny, and yet there are very few larcenies ***1046** involved in secondary effects. [8] Dr. McCleary also testified that property crimes occur much more frequently than violent/person crime; thus, fluctuations in property crime can have a disproportionate effect on the total crime rate as well.

[8] Consistent with Dr. McCleary's opinion, the evidence shows that a significant percentage of the property crimes reflected in the 2009 data consist of shoplifting and larcenies occurring at Menards. *See* Exh. M–6.

Plaintiffs' expert, Dr. Daniel Linz, among other witnesses, testified that there can be inaccuracies in coding crimes to particular locations when, as is true here, the 500–foot area around a sexually oriented business includes a large retail establishment or a strip mall or shopping center. Some large businesses have multiple addresses, which can lead to police reporting errors. Retail establishments located within strip malls and shopping centers may also affect the reliability of the data because it is common for the strip mall or shopping center to have a single address while the individual establishments and stores have suite numbers. If a police officer does not know the respective suite number of a particular establishment or store, the officer may assign a crime incident to an address belonging to the entire shopping center rather than the particular store at which the crime actually occurred, which clearly might skew the data. Dr. Linz further testified that large parking lots that adjoin such businesses might also affect data, especially property crime numbers because property crimes happen with increased frequency at such locations. Another reliability issue noted by the experts arises when, as the experts testified here, a significant number of crimes are coded to intersections rather than specific addresses because in those cases, the exact location of the crime is not always discernible. The data collecting difficulties referenced here, while carefully considered by us, have not undermined our overall conclusion, however.

We found the testimony of both parties' experts who opined that one way to minimize such potential reliability issues is to review the underlying police reports, rather than relying merely on the machine-readable data, helpful and enlightening. In his testimony, Dr. Linz agreed that such an approach yields a more accurate assessment of the actual relationship between the adult bookstores and the offenses that occurred within the 500 foot circles. [9] In both his expert report and in his testimony, Dr. McCleary explained that he had identified numerous reliability issues associated with much of the machine-readable data he had received from Indianapolis, making it difficult to render opinions based on that data. However, he testified that manually reading a small sample of the police reports underlying the machine-readable data is a feasible way to collect reliable information. Both Lynn Phelps, the City's UCR coding specialist, and Jean Ritsema, the City's crime data facilitator, also testified regarding various difficulties inherent in crime-data collection and emphasized the importance of reading the underlying police reports in order to obtain reliable information about crime in Indianapolis.

[9] Dr. Linz himself used this method in his studies in Seattle, Richmond, and Rancho Cordova, California.

As noted previously, the City used this method endorsed by the experts, namely, conducting a review of the underlying police reports, in order to create the detailed exhibits it submitted during the evidentiary hearing, which distinguished between the crimes committed at the bookstore addresses and the other addresses within the 500–foot circles and ranked those addresses ***1047** within the 500–foot circles by number of crimes. The data contained in the supplemental exhibits presented by the City comprises the only evidence reflecting the underlying police reports. This more detailed and nuanced data shows that, during the period of time when the Ordinance was being enforced, the greatest decreases in total UCR Part I crimes (over 50%) occurred during the regulated hours,

and overall violent/person crime, including the number of armed robberies, also decreased at the adult bookstores during the enforcement period. Moreover, although it is true as Plaintiffs point out that violent/person crime on Sundays increased significantly during the enforcement period in the 500–foot circles surrounding the adult bookstores, when the focus is turned specifically on the adult bookstore addresses, the data reveals that total UCR Part I crime decreased by over 50% (from 8 incidents pre-enforcement to 3 after) on Sundays at the adult bookstores themselves, and violent/person crime incidents at the adult bookstores on Sundays decreased from 3 incidents to 0. *See* Exh. M–4; Exh. M–5.

As a final matter, the evidence establishes that violent/person crimes occur less frequently and are generally more serious than property crimes. For example, though armed robbery is a very rare crime relative to other offenses, it is extremely dangerous, sometimes even resulting in homicide.[10] Thus, while these raw numbers as such appear small, the City nevertheless has a clear and significant interest in reducing incidences of serious crimes such as armed robbery. The testimony established that, merely because the numbers are small, they are not necessarily insignificant. For example, Dr. McCleary testified that statistically speaking a randomly chosen hypothetical person in Indianapolis would have to wait 245 years before being a victim of an armed robbery. He further testified that, if an address or intersection in Indianapolis were chosen at random, one would have to wait approximately 99.1 years before an armed robbery occurred there. However, during the approximately six year period on which the summary of 2009 data is based, 26 armed robberies at the five adult bookstores (four Plaintiffs and Video Gallery) occurred. Thus, because armed robberies on the whole occur so infrequently, it is clear that the numbers attributable to the adult bookstores are in fact quite significant. This conclusion is consistent with Dr. McCleary's view that these locations, even those without live entertainment are hotspots for armed robbery.[11]

10 In 1997, before the adoption of the ordinance, an individual was shot and killed during the commission of an armed robbery at Plaintiff Lafayette Video & News.

11 Although Plaintiffs' expert, Dr. Daniel Linz, testified that he would not consider Plaintiffs' businesses to be hotspots for crime because the raw numbers reflected in the 2009 data were de minimis, he did concede that, in determining whether a particular address was a hotspot, the type of crimes underlying the numbers would be information that would factor into his decision. He went on to testify that, even if a particular address would not be a hotspot for crime in general because the crime numbers were too small, it would still be possible for that location to be a hotspot for a particular type of crime.

Our conclusion is further buttressed by an examination of evidence relating to areas outside of Indianapolis. As Judge Easterbrook noted in *Annex Books I,* the City is not required to use "local" evidence to show that adult businesses without on-premise viewing cause similar secondary effects as businesses that do offer such services. Apparently relying on that guidance, the City introduced an article co-authored by its expert, Dr. McCleary, ***1048** which, based on his research, including his study conducted in Sioux City, Iowa, establishes a link between adult bookstores without live entertainment or private viewing and secondary effects crimes. Richard McCleary & Alan C. Weinstein, *Do "Off–Site" Adult Businesses Have Secondary Effects? Legal Doctrine, Social Theory, and Empirical Evidence,* 31 Law & Policy 217–35 (2009) ("McCleary Article"). In the McCleary Article, the authors theorize that: "To the extent that on-site and off-site adult bookstores attract high-value targets from wide catchment areas, both business types are expected to attract predators to their neighborhoods, thereby generating ambient victimization risk." *Id.* at 223. In support of that conclusion, the authors cited to a Sioux City case study, which showed that crime rose 190% in the area within 500 feet of a new off-site viewing adult bookstore, while crime in a comparable control area rose only 25% during the same period. *Id.* at 223–25. The study also revealed that the most significant increase in crime occurred during the store's "overnight shift" from 8:00 p.m. to 3:59 a.m. *Id.* at 227–28.

The data in the McCleary Article also address some of the concerns expressed by Judge Easterbrook regarding the evidence initially relied upon by the City in enacting the Ordinance. Unlike those studies, the Sioux City study focused on an adult bookstore without live entertainment and, although the statute at issue there was not an hours of operation ordinance, the study did include a breakdown of crime statistics for daytime versus overnight hours. At the evidentiary hearing, Dr. McCleary testified that not only did crime increase after the adult bookstore opened

in Sioux City, but the character of the crimes observed changed as well, such that, before the store opened, there were no incidences of crimes where life was at risk, but, after it opened, more serious crimes began to occur. Although this evidence is not by itself determinative of our decision here, the data from Indianapolis coupled with the Sioux City case study are highly persuasive as well as probative in establishing that adult bookstores without live entertainment cause similar secondary effects as adult businesses that do provide live viewing booths. [12]

12 In our December 2, 2009 Order granting Plaintiffs' request for a preliminary injunction, we noted that Dr. McCleary's Sioux City study had been heavily criticized in *Dr. John's Inc. v. City of Sioux City,* 438 F.Supp.2d 1005 (N.D.Iowa 2006), where Dr. McCleary's data was originally submitted in support of Sioux City's regulation of an adult bookstore. However, in response to the court's criticisms, Dr. McCleary supplemented the data, using larger data sets and evaluating crimes within 500 feet of the adult bookstore instead of fifty feet to address the concerns raised by the court in *Dr. John's.* Because the conclusions contained in the McCleary Article are now buttressed by the expanded data, the prior criticisms of the study carry less weight in our analysis.

Having concluded that the City has shown a reasonable basis for its finding that adult bookstores without live entertainment create similar secondary effects as those with such offerings, and that when the Ordinance was in effect those secondary effects were reduced to some degree, we now turn to the issue of whether the reduction in crime attributable to the Ordinance is sufficient to justify the corresponding reduction in speech. This is neither an easy nor a straightforward determination. As Judge Easterbrook recognized in *Annex Books I:* "[B]ecause crime and speech cannot be reduced to a common metric, a direct comparison (how much speech should be sacrificed to achieve how much reduction in crime?) is difficult if not impossible." 581 F.3d at 465–66. However, in an effort to make such a calculation in a way that embraces a ***1049** rigorous analysis of the evidence presented by the parties, while affording the City "the benefit of the doubt," (*id.* at 466), we hold that the City has shown that the public benefits flowing from the Ordinance are sufficient to justify the regulation without an unjustified, substantial decrease in freedom of speech.

Plaintiffs attempted to correlate a decline in sales with a decline in speech, but the evidence showed that sales at the stores were declining before enforcement of the Ordinance, and, in fact the pre-enforcement declines in sales were in a number of cases greater than the declines in sales during the enforcement period. Moreover, as the Supreme Court recognized in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), although it is often commercial distributors of speech who are in a position to assert the kind of claims asserted here, the First Amendment's concern is not a seller's access to profits, but rather "the central First Amendment concern remains the need to maintain free access of the public to the expression." *Id.* at 77, 96 S.Ct. 2440.

Here, no evidence was introduced showing that any book, film, video or magazine was taken off of the shelves or made unavailable to a patron as a result of the Ordinance. Nor was there evidence that any patron was unable to access speech during the enforcement period because he or she could visit the stores only on Sundays or between the hours of midnight and 10:00 a.m. Additionally we note, and the parties have stipulated, that, although adult bookstores are currently free to operate twenty-four hours a day, seven days a week, none of Plaintiffs' stores actually do so. According to the parties' stipulation, Keystone and Annex Books are open 9:00 a.m. to 3:00 a.m., seven days a week. Lafayette is open 10:00 a.m. to midnight, Monday through Thursday as well as on Sunday. On Friday and Saturday nights, Lafayette's hours are 10:00 a.m. to 3:00 a.m. New Flicks went out of business during the time period when the Ordinance was not being enforced and it has not reopened.

Given these facts, there is no persuasive support for a conclusion that the opportunity to purvey expressive materials of the nature sold at Plaintiffs' businesses is curtailed to a significant degree by the Ordinance. We are persuaded that the remaining hours of opportunity for an unfettered dissemination of speech under the Ordinance are sufficient to satisfy the First Amendment and that the Ordinance is not "substantially broader than necessary" to further the City's legitimate interest in reducing the secondary effects described above. *Ward v. Rock Against Racism,* 491 U.S. 781, 800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). In fact, we note, similar hours restrictions have previously been upheld by the Seventh Circuit against First Amendment challenges

in other analogous cases. *See Andy's Restaurant,* 466 F.3d at 555–56 (upholding ordinance which, among other regulations, limited operating hours of sexually oriented businesses to 10:00 a.m. to 11:00 p.m., seven days a week); *Schultz v. City of Cumberland,* 228 F.3d 831, 846 (7th Cir.2000) (upholding a provision of an ordinance "limiting the business hours for sexually oriented businesses to be between 10 a.m. and midnight, Monday through Saturday").

For these reasons, we hold that the City has presented sufficient evidence to establish that the Ordinance satisfies the intermediate scrutiny test set out in *Alameda Books* and its progeny. Accordingly, we declare that the Ordinance 87,2003 is valid under the First Amendment and is thus ***1050** enforceable by the City. Final judgment shall issue accordingly.

IT IS SO ORDERED.

All Citations

926 F.Supp.2d 1039

740 F.3d 1136
United States Court of Appeals,
Seventh Circuit.

ANNEX BOOKS, INC., et al., Plaintiffs–Appellants,
v.
CITY OF INDIANAPOLIS, INDIANA, Defendant–Appellee.

No. 13–1500.
|
Argued Jan. 15, 2014.
|
Decided Jan. 24, 2014.
|
Rehearing and Rehearing En Banc Denied Feb. 24, 2014.

Synopsis

Background: Owners of adult entertainment establishments brought action challenging constitutionality of city's adult entertainment business ordinance. The United States District Court for the Southern District of Indiana, Sarah Evans Barker, J., 926 F.Supp.2d 1039, upheld ordinance. Owners appealed.

Holding: The Court of Appeals, Easterbrook, Circuit Judge, held that prevention of armed robberies at or near adult bookstores did not support closure of adult bookstores overnight.

Reversed and remanded.

West Headnotes (1)

[1] **Constitutional Law**
Licenses and permits
Public Amusement and Entertainment
Sexually Oriented Entertainment

The prevention of armed robberies at or near adult bookstores was not a permissive regulation of the secondary effects of adult establishment that would support city ordinance which required adult bookstores to remain closed between the hours of midnight and 10 a.m. every day, and all day Sunday, under First Amendment freedom of speech protections, where there was no significant difference between the rate of robberies at or near adult bookstores and other late-night retail outlets, and the risk of robberies fell on owners and patrons of adult bookstores, who could decide for themselves what risks to run. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

Attorneys and Law Firms

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Before FLAUM, EASTERBROOK, and ROVNER, Circuit Judges.

Opinion

EASTERBROOK, Circuit Judge.

The Supreme Court has held that state and local governments may regulate adult establishments by using time, place, and manner restrictions to reduce the secondary effects of those businesses on third parties, but may not regulate them to restrict the dissemination of speech disapproved by local residents. *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *see also, e.g., Illinois One News, Inc. v. Marshall*, 477 F.3d 461, 463 (7th Cir.2007).

Indianapolis requires adult bookstores to remain closed between the hours of midnight and 10 a.m. every day,

and all day Sunday. Other retail businesses are not subject to these restrictions. In earlier rounds of this litigation, Indianapolis contended that closure would curtail secondary effects, but we concluded that the evidence it offered was weak, contested in material respects, or concerned different kinds of businesses or different kinds of laws, such as minimum distances between adult outlets rather than closure. See 581 F.3d 460 (7th Cir.2009); 624 F.3d 368 (7th Cir.2010). The district court then held a trial. Indianapolis gave a single justification: fewer armed robberies at or near adult bookstores. The district court found this adequate and entered judgment for the City. 926 F.Supp.2d 1039 (S.D.Ind.2013).

The current justification is weak as a statistical matter. The City did not use a multivariate regression to control for other potentially important variables, such as the presence of late-night taverns. The change in the number of armed robberies is small; the difference is not statistically significant. The data do not show that robberies are more likely at adult bookstores than at other late-night retail outlets, such as liquor stores, pharmacies, and convenience stores, that are not subject to the closing hours imposed on bookstores. And most of the harm of armed robberies falls on the bookstores (and their patrons) rather than on strangers. The secondary-effects approach endorsed by *Alameda Books* and *Playtime Theatres* permits governments to protect persons who want nothing to do with dirty books from harms created by adult businesses; the Supreme Court has not endorsed an approach under which governments can close bookstores in ***1138** order to reduce crime directed against businesses that knowingly accept the risk of being robbed, or persons who voluntarily frequent their premises. As we remarked in *New Albany DVD, LLC v. New Albany,* 581 F.3d 556 (7th Cir.2009), adults may decide for themselves what risks to run by the literature they choose, and cities must protect readers from robbers rather than reduce risks by closing bookstores. *Cf. Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (fear that readers will act unwisely does not justify restricting otherwise-lawful speech).

That the City's regulation takes the form of closure is the nub of the problem. Justice Kennedy, whose vote was essential to the disposition of *Alameda Books,* remarked that "a city may not regulate the secondary effects of speech by suppressing the speech itself." 535 U.S. at 445, 122 S.Ct. 1728 (opinion concurring in the judgment). Yet that's what Indianapolis has done. The benefits come from closure: shuttered shops can't be robbed at gunpoint, and they lack customers who could be mugged. If that sort of benefit were enough to justify closure, then a city could forbid adult bookstores altogether.

Indianapolis observes that customers are free to patronize stores during the hours they are allowed to be open. As the City depicts things, there is no loss to speech—anyone who wants any magazine, book, or movie can get it, eventually —and some gain in the reduction of armed robberies. With even a little gain on one side, and no loss on the other, the City maintains that it must prevail.

To test the proposition that delay in obtaining reading matter does not cause loss, we put a hypothetical at oral argument. Suppose Indianapolis were to prohibit the distribution of newspapers on Sundays. (Just newspapers: our hypothetical law differs from a general Sunday-closing statute. See *McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).) Closure could achieve multiple benefits, including a reduction in the number of traffic accidents (newspapers generate lots of traffic because trucks deliver newsprint to plants and printed papers throughout the region; home delivery carriers may drive their own cars); a reduction in robberies of paper deliverers, who may be on the street when few others are awake to protect them; and a reduction in the newspaper's carbon footprint and other pollutants. All the news (and ads) now in the Sunday paper could appear in Monday's paper, so readers would retain access, and anyone who wants up-to-the-minute news could get it on the Internet while avoiding accidents, robberies, and pollution. The lawyer representing Indianapolis was shocked at the idea, however; he proclaimed that the City could not do such a thing consistent with the first amendment.

What is the difference between preventing a newspaper from selling paper copies on Sunday (or before 10 a.m.) and preventing an adult bookstore from selling paper copies on Sunday (or before 10)? Not secondary effects: the harms to third parties caused by a newspaper likely exceed those caused by an adult bookstore. The difference lies in the content of the reading material. Indianapolis likes G-rated newspapers but not sexually oriented books, magazines, and movies. Yet neither *Alameda Books*

nor *Playtime Theatres* permits units of government to stop the distribution of books because their content is objectionable, unless the material is obscene. See also, e.g., *United States v. Stevens,* 559 U.S. 460, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) ("crush videos" cannot be suppressed); *American Booksellers Association, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir.1985), affirmed summarily, 475 U.S. 1001, 106 S.Ct. 1172, 89 L.Ed.2d 291 (1986) (material that is pornographic, but not obscene, cannot be suppressed). Indianapolis does not contend that any of the plaintiffs sells obscene material; it follows that objection to the plaintiffs' stock in trade cannot justify closure.

***1139**

The judgment of the district court is reversed, and the case is remanded with instructions to enter an injunction against enforcement of the closure ordinance.

All Citations

740 F.3d 1136

9 F.3d 1309
United States Court of Appeals,
Seventh Circuit.

Richard GRAFF, Plaintiff–Appellant,
v.
CITY OF CHICAGO, an Illinois corporation, Defendant–Appellee.

No. 92–2352.
|
Argued June 2, 1993.
|
Decided Nov. 24, 1993.

News vendor brought action challenging constitutionality of city ordinance governing licensing of sidewalk newsstands. The United States District Court for the Northern District of Illinois, George W. Lindberg, J., 800 F.Supp. 576, dismissed action, and vendor appealed. Withdrawing prior opinion, 986 F.2d 1055, the Court of Appeals, Manion, Circuit Judge, held that: (1) construction and operation of newsstand on public sidewalk was mere conduct, and not expressive activity protected by the First Amendment; (2) ordinance qualified as reasonable time, place and manner restriction, even assuming that operation of newsstand involved speech; and (3) imposition of different permitting requirements on newsstand vendors and operators of sidewalk cafes did not violate vendor's equal protection rights.

Affirmed.

Flaum, Circuit Judge, concurred in judgment and filed opinion, in which Cudahy, Circuit Judge, joined.

Ripple, Circuit Judge, concurred in result and filed opinion, in which Cudahy and Ilana Diamond Rovner, Circuit Judges, joined.

Cummings, Circuit Judge, dissented and filed opinion, in which Bauer, Circuit Judge, and Fairchild, Senior Circuit Judge, joined.

West Headnotes (13)

[1] Federal Courts
Preliminary injunction;temporary restraining order

Court of Appeals had jurisdiction to hear interlocutory appeal from order denying preliminary injunction, though one count of complaint remained alive in district court. 28 U.S.C.A. § 1292(a)(1).

Cases that cite this headnote

[2] Constitutional Law
Streets and highways

No person has a First Amendment right to erect or maintain a structure on public way. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[3] Constitutional Law
Streets and highways

Construction and operation of newsstand is conduct, not speech, which city may lawfully proscribe on public way consistent with First Amendment. (Per Manion, Circuit Judge with four Judges concurring, and four Judges concurring in result.) U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[4] Constitutional Law
Vendors in general

Licenses
Constitutionality and Validity of Acts and Ordinances

Newsstand ordinance that required Commissioner of Transportation to consider certain criteria in deciding whether to reissue permit for operation of newsstand on public way, including the design, materials and color scheme of newsstand, the number of publications it proposes to sell, and

the size of stand relative to the number of days that it will be open, sufficiently restricted Commissioner's discretion to satisfy First Amendment concerns, notwithstanding the discretion accorded to Commissioner in deciding how many permits to reissue. U.S.C.A. Const.Amend. 1.

15 Cases that cite this headnote

[5] **Constitutional Law**
First Amendment in General

Not all discretionary decisions implicate the First Amendment. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[6] **Constitutional Law**
Vendors in general

Licenses
Constitutionality and Validity of Acts and Ordinances

Restriction on the size of newspaper stands that could be constructed on public way, which also required that any stand allow at least six feet of clear passage and not be located within three feet of property line, was a reasonable time, place and manner restriction, which did not violate newsstand owner's First Amendment rights. U.S.C.A. Const.Amend. 1.

18 Cases that cite this headnote

[7] **Constitutional Law**
Vendors in general

Licenses
Constitutionality and Validity of Acts and Ordinances

Newsstand ordinance which allegedly did not allow newsstands to sell videotapes or books, by allowing Commissioner of Transportation to consider the number of newspapers and periodicals sold as a significant factor in deciding whether to issue newsstand permit, was reasonable time, place and manner restriction, that did not violate newsstand owner's First Amendment rights; to the extent that ordinance discriminated against newsstand owners who desired to sell videotapes or books, municipal legislature could reasonably conclude that the purchase of such items would be more time consuming and would cause more congregating and impede flow of pedestrian traffic around newsstand. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[8] **Constitutional Law**
Time, Place, or Manner Restrictions

Requirement that time, place and manner restriction be "narrowly tailored" in order to satisfy First Amendment concerns is satisfied as long as restriction promotes a substantial government interest that would be achieved less effectively absent restriction. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[9] **Federal Civil Procedure**
Clear or certain nature of insufficiency

Facial challenge to the constitutionality of newsstand ordinance, as allegedly violating newsstand owner's First Amendment rights by discriminating against him merely because he wished to sell videotapes and books and publications other than newspapers and periodicals, could properly be dismissed at pleading stage, where case did not involve any disputed issues of material fact and interest that municipality raised in case were not unique or different. U.S.C.A. Const.Amend. 1.

10 Cases that cite this headnote

[10] **Constitutional Law**
Particular claims

Even in First Amendment context, plaintiff is not excused from requirement that facts as alleged must state cause of action. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[11] **Constitutional Law**
Pleading

When courts have already upheld similar ordinance because of governmental interest at stake, future litigant should not be able to challenge similar governmental interests without showing some distinction at pleading stage.

2 Cases that cite this headnote

[12] **Constitutional Law**
Sidewalks

Licenses
Constitutionality and Validity of Acts and Ordinances

Newsstand ordinance did not violate newsstand owner's First Amendment rights, by failing to provide for prompt judicial review of administrative denial of owner's application for permit to operate newsstand on public sidewalk; newsstand owner could obtain review of agency's decision by means of common-law writ of certiorari, which was in itself sufficient review. U.S.C.A. Const.Amend. 1.

32 Cases that cite this headnote

[13] **Constitutional Law**
Sidewalks

Licenses
Constitutionality and Validity of Acts and Ordinances

Rational basis existed for mandating different permit requirements for sidewalk cafes and for newsstands; accordingly, differences in permit requirements did not violate newsstand owner's equal protection rights. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

Attorneys and Law Firms

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Lawrence R. Levin, Damon E. Dunn, Levin & Funkhouser, Chicago, IL, for amicus curiae Chicago Sun–Times, Inc., Gannett Satellite Information Network, Inc. and Chicago Tribune Co.

Before POSNER, Chief Judge, and CUMMINGS, BAUER, CUDAHY, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

Opinion

MANION, Circuit Judge.

For nearly seventy years a newsstand has stood in front of the City of Chicago Cultural Center (formerly the Chicago Public Library). The plaintiff, Richard Graff, has operated his newsstand there since July 1984, when he purchased the stand for over fifty thousand dollars. This case concerns a City of Chicago municipal ordinance designed to force newsstand operators, such as Graff, to either acquire a permit or face eviction. Chicago threatened to remove Graff from his location. Rather than request a permit, Graff ultimately sought relief in the federal district court, with a facial challenge to the ordinance. The district court denied Graff's request to enjoin Chicago's proposed enforcement of the ordinance. 800 F.Supp. 576. For the following reasons, we affirm.

I. Background

From all indications Graff's predecessors had no ownership or property rights to the newsstand. Such newsstands seemed to have operated on public property by sheer acquiescence. At the time Graff purchased the newsstand, Chicago ostensibly required newsstand operators to acquire permits. We say ostensibly, because Graff asserted that then and now newsstands have operated on the public way without permits and only Graff has been targeted for eviction.

Under what we shall call the old ordinance, these permits were issued at the discretion of the commissioner of streets and sanitation, and the mayor could revoke a permit at any time. The old ordinance provided that such newsstands could only sell Chicago papers, and provided the mayor with no standards to guide his discretion. It also lacked hearing procedures to review the decisions to deny or revoke a permit. Chicago Mun.Code §§ 10–28–130 to –190. Graff attempted to apply for a permit under the old ordinance without much success, although Chicago continued to issue permits for newsstands at other locations.

In November 1990, Chicago gave Graff two months' notice to remove his newsstand from the public way. This order was later rescinded. Graff, however, had had enough. On February 20, 1991, he filed a complaint against Chicago and Mayor Daley alleging that the old ordinance violated the Commerce Clause and the First and Fourteenth Amendments to the United States Constitution.[1] He sought injunctive relief, compensatory damages and attorneys fees. Rather than defend the old ordinance, on June 28, 1991, Chicago amended it. Chicago Mun.Code §§ 10–28–130 to –192 (1991). The defendants thereafter moved to dismiss the complaint arguing the new ordinance corrected the constitutional deficiencies that Graff had identified in his complaint. The court dismissed the case without prejudice. Rather than apply for a permit under the new ordinance, on September 11, 1991, Graff amended his complaint and attacked the new ordinance on its face. The complaint sought comprehensive relief: declaratory, preliminary and permanent injunctions, compensatory ***1312** damages and attorneys fees under the First and Fourteenth Amendments.

[1] Mayor Daley was sued only in his official capacity. Graff does not appeal the district court's dismissing Mayor Daley from the case. *See Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (official capacity suits are essentially against the municipality).

Broadly speaking, in count one Graff alleges that Chicago's permit ordinance constitutes an unlawful prior restraint of free speech. In count two he alleges that the new ordinance violates the Equal Protection Clause because other, non-expressive uses of the public way (such as sidewalk cafes) are treated more favorably than newsstands. In count three he alleges that the old ordinance denied him equal protection of law under the Fourteenth Amendment. In 1987 Graff moved his newsstand from the east side of the Cultural Center to the west side entrance off of Randolph Street to accommodate construction of the underground Pedway Tunnel. Under count three he seeks to recoup the expenses of having had to move his newsstand and certain architectural expenses he incurred when filing his application for a permit under the old ordinance.

Again, Chicago moved to dismiss. Before the court ruled on the motion, on May 14, 1992, Chicago again notified Graff that it intended to remove his newsstand in fifteen days. Chicago had consistently objected to the size of the newsstand and had requested that it be built out of steel rather than wood. Graff filed an "Emergency Motion for Temporary Restraining Order and for Preliminary Injunction." The motion had the effect of quickly forcing the court's hand. On May 28, 1992, the court dismissed counts one and two and denied injunctive relief entirely.

The court initially found that the complaint could be read to raise an as-applied and a facial challenge to the new ordinance. But because Graff had not applied for a permit under the new ordinance, the court concluded that only a facial challenge was before it. As to count one, the court concluded that the new ordinance was content-neutral and did not raise the threat of self-censorship as enunciated in *City of Lakewood v. Plain Dealer,* 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). The court also concluded that the new ordinance contained reasonable time, place and manner restrictions necessary to accommodate the multiple uses of the public way, and contained adequate procedural safeguards. As to count two, the court ruled that Chicago could establish size limitations for newsstands, even though it did not do

the same for sidewalk cafes. The court ruled that the municipal code did not support Graff's allegation that the landmark commission treated newsstands differently than other structures that visibly affected landmark property. Because Graff could not show a substantial likelihood of success on the merits, the district court denied Graff's motions for injunctive relief. Count three dealing with the old ordinance remains alive in the district court.

While Graff appealed the dismissal of counts one and two, he applied for a permit to operate two newsstands in front of the Cultural Center. Because of the location, Graff had to first seek permission from the Commission on Chicago Historical and Architectural Landmarks. That application was denied on August 13, 1992, because the newsstands would compromise the architectural integrity of the adjoining landmark building. On August 14, 1992, Chicago again notified Graff that he had fifteen days to remove his newsstand. Graff sought an injunction in this court, which we promptly dismissed. We directed him to file the matter in the district court pursuant to Fed.R.App.P. 8(a). After the district court denied him relief, on September 16, 1992, we granted Graff's motion and enjoined Chicago from destroying the newsstand pending appeal.

On February 8, 1993, after oral argument but before decision, Chicago moved to dissolve the injunction because of planned rehabilitation of the Cultural Center. Chicago had hoped to replace the handicap access ramp, and clean and remodel the exterior stonework. On February 16, 1993 a panel of this court issued its opinion reversing the district court because the new ordinance failed to provide sufficient judicial oversight, in violation of the First Amendment as espoused in *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 228, 110 S.Ct. 596, 606, 107 L.Ed.2d 603 (1990). *See Graff v. City of Chicago,* 986 F.2d 1055 (7th Cir.1993). Chicago's motion to dissolve the injunction was denied as moot. On April 15, 1993, this court granted Chicago's petition for rehearing *en* ***1313** *banc* and vacated the panel opinion. After *en banc* review, we now affirm.

II. Jurisdiction

[1] In his complaint, Graff requested a preliminary injunction. He did not press the district court for an early hearing apparently because Chicago had not yet moved the bulldozers in for the kill. On May 14, 1992, however, Chicago notified Graff that he had fifteen days to vacate. A week later Graff filed an "Emergency Motion for Temporary Restraining Order and for Preliminary Injunction." Within the week the court dismissed counts one and two, and denied all injunctive motions as moot. In his notice of appeal, Graff sought review of the district court's order "denying the plaintiff's motion for a temporary restraining order, and granting, in part, defendant's motion to dismiss plaintiff's first amended complaint."

Initially, the City argues that we lack jurisdiction to hear this appeal because one count remains alive in the district court, and therefore, final judgment has not been entered. However, 28 U.S.C. § 1292(a)(1) grants us jurisdiction to hear certain interlocutory appeals, as when the district court refuses to enter an injunction. Here, the district court did just that; it refused to enter an injunction in favor of Graff by dismissing counts one and two of the complaint. *Holmes v. Fisher,* 854 F.2d 229, 230 (7th Cir.1988). It does not matter that Graff also sought review of the denial of his temporary restraining order (which is not yet appealable). *See Geneva Assurance Syndicate, Inc. v. Medical Emergency Servs. Ass'n,* 964 F.2d 599, 600 (7th Cir.1992) (per curiam). Therefore, we have jurisdiction to review the district court's refusal to enter an injunction and whether the district court properly dismissed counts one and two.

III. Analysis

This case essentially involves two interdependent questions: whether the district court should have enjoined Chicago from removing Graff's newsstand and whether Chicago's newsstand ordinance is constitutional. We conclude that the statute is constitutional. Also, the district court acted properly in refusing to enter a preliminary injunction and in dismissing counts one and two. Graff attempts to have Chicago's newsstand ordinance declared unconstitutional in the hope that his newsstand stays put. However, without the newsstand ordinance, Graff still has no right to operate his newsstand on public property. Contrary to Graff's contentions about speech, this case involves a structure. Graff has no First Amendment right to build a structure on public property. The district court also acted properly in dismissing Graff's challenges to the new ordinance. The ordinance does

not allow Chicago the opportunity to grant or deny newsstand permits because of the personal or institutional views of a government official. To the extent that the ordinance restricts the types of publications sold from a newsstand, the restrictions are reasonable. The ordinance contains reasonable time, place and manner restrictions, justified without reference to speech content, and leaves open alternative avenues to communicate the same information. We also conclude that the ordinance contains sufficient judicial review provisions and passes muster under Equal Protection analysis.

A. Newsstand Structure

1.

Chicago has passed numerous ordinances attempting to deal with the myriad of problems that arise on its public way, from carnivals to snow removal. Chicago Mun.Code §§ 10–28–010 to –800. Chicago asserts that this ordinance prohibits all vendors from building structures on the public way; newspaper vendors can erect a structure only after obtaining a permit. As a general starting point, unless another ordinance specifically authorizes otherwise, "no person shall erect or place any building, structure, or other stationary object, in whole or in part, upon any public way or other public ground within the city." *Id.* at –040. There are exceptions. "It shall be unlawful for any person to erect, place or maintain in, upon or over any public way or other public place in the city, any [stand] ... for the display or sale of goods, wares or merchandise ... unless a permit for the same shall be obtained from the superintendent of compensa ***1314** tion...." *Id.* at –050. Specifically for newspaper vendors,

> It shall be unlawful for any person to erect, locate, construct or maintain any newspaper stand on the public way or any other unenclosed property owned or controlled by the city without obtaining a permit therefor from the commissioner of transportation as hereinafter provided.

Id. –130. In this case the parties have focused their arguments in the district court and on appeal on the constitutionality of Chicago's newsstand permit ordinance, *id.* at –130 to –196. Graff sought an injunction to prevent Chicago from removing his newsstand under the supposition that if the permit ordinance were declared unconstitutional, his newsstand should stay. But even without the challenged newsstand ordinance, Graff still has no right to occupy the public sidewalk; that is, unless he has a constitutional right to build or maintain a newsstand on public property. If the ordinance goes down (along with the availability of a permit) the newsstand goes down as well. As a preliminary matter, then, we must examine whether he has an independent constitutional right to erect his newsstand on the public sidewalk.

In *Lakewood* the city had "absolutely prohibited the private placement of any structure on public property." 486 U.S. at 753, 108 S.Ct. at 2142. The district court found that this prohibition violated the First Amendment as applied to newsracks. The city, however, did not appeal; rather, it enacted ordinances that permitted newsracks under certain conditions. The Supreme Court concluded that the new ordinances placed too much discretion with the city officials, thus rendering the ordinances unconstitutional. The Court did not reach the question of whether "a city may constitutionally prohibit the placement of newsracks on public property." *Id.* at 762 n. 7, 108 S.Ct. at 2147 n. 7. Today, with regard to newsstands, we reach that question.

[2] At the outset we note that no person has a constitutional right to erect or maintain a structure on the public way. In *Lubavitch Chabad House, Inc. v. City of Chicago,* 917 F.2d 341 (7th Cir.1990), the City had decorated O'Hare Airport with Christmas trees and other ornaments; persons desiring to display religious symbols were allowed to lease an area of the airport. The Lubavitch Chabad House, however, did not want to pay. The organization sought to display a free standing Chanukah menorah in one of the public areas. We held that the ordinance did not involve any form of constitutionally protected speech. *Id.* at 347. There is no

> private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures. Public parks are certainly quintessential public forums where free speech is protected, but the Constitution neither provides, nor has it ever been construed to

> mandate, that any person or group be allowed to erect structures at will.

Id.; accord Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 813–15, 104 S.Ct. 2118, 2133–34, 80 L.Ed.2d 772 (1984).

Two years after we decided *Lubavitch,* the Supreme Court ruled that an airport was not considered a traditional public forum. The *Lubavitch* rule nevertheless stands that even in a public forum there is no constitutional right to erect a structure. 917 F.2d at 347. The structure of a Chanukah menorah deserves no less protection than the structure of a newsstand. The building of a newsstand is simply not a form of constitutionally protected expression. Thus *Lubavitch* is dispositive of Graff's request for an injunction. Requiring a permit for the structure is not a prior restraint on speech. While public forums certainly provide places where people have a right to express their views through handbills, literature and the spoken word, *Jamison v. Texas,* 318 U.S. 413, 416, 63 S.Ct. 669, 671, 87 L.Ed. 869 (1943), they do not have the right to erect a newsstand, in this case on a public sidewalk. Without an ordinance and the permit it requires, newsstands and other structures have no protection from the city's bulldozer.

2.

Lubavitch involved a structure used to advance speech and religion. Graff nevertheless ***1315** maintains that Supreme Court precedent entitles structures for newspaper distribution to constitutional protection. In *Lakewood* a newspaper challenged a city ordinance that allowed the mayor to grant or deny permits to publishers to place their newsracks on public property. The mayor had to state specific reasons if he denied the application; in granting a permit, the mayor could add such terms and conditions he deemed reasonable and necessary. The newspaper elected not to apply for a permit, instead bringing a facial challenge to the ordinance. 486 U.S. at 754, 108 S.Ct. at 2142.

> [A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.... The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.

Id. at 759, 108 S.Ct. at 2145. The Court (in a four to three decision) found that the First Amendment was implicated because the specific ordinance involved newspapers and required them to renew their newsrack licenses annually. The Court saw the printing and circulation of newspapers as "conduct commonly associated with expression" and the periodic licensing scheme as closer to a regulation that allows the government to view actual speech content before issuing a permit.

Graff argues that newsracks and newsstands should receive identical First Amendment protection. But *Lakewood* does not so easily bridge the gap between newsracks and newsstands. They are significantly different methods of distribution and we must assess them on standards uniquely suited to each. *See Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 557, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems") (citations omitted).

[3] Newsstands are large, permanent-type structures. [2] They are constructed, and once in place they are not easily moved. Newsstands do not present one viewpoint; rather they supply many and varying editorial opinions. Newsstands shelter a business operator and his operation; they do not merely dispense or hand deliver newspapers. [3] Newsstands also are more likely to obstruct the views of pedestrians and automobile drivers. In short, newsstands compared to newsracks are much larger, more permanent structures that occupy a significant portion of limited sidewalk space. [4] Thus, building and operating a newsstand is conduct, not speech, which the City can lawfully proscribe:

2 In *Lakewood* the newspaper publisher insisted that it was not seeking to rent or permanently build a structure on the sidewalk; the newsrack was characterized as similar to a newsboy, and the newsrack his "mechanical cousin." *Id.,* 486 U.S. at 778 n. 6, 108 S.Ct. at 2155 n. 6. This large,

immobile and permanent newsstand is precisely what the publisher in *Lakewood* implied was unacceptable.

3 In *Lakewood,* 486 U.S. at 781–83, 108 S.Ct. at 2157, Justice White, in dissent, feared that equating newsracks with newsboys and conduct commonly associated with expression could allow newspaper publishers the right to take public property for private use. He concluded that such a comparison also ignored the governmental interests at stake: allowing all members of the public use of their streets and sidewalks, insuring the public's safety and aesthetic interests, especially where alternative methods of newspaper distribution are available. Although this argument was not successful as applied to newsracks, permanent newsstand structures present a much more imposing problem.

4 We disagree with Judge Cummings that "size itself suggests nothing about whether the selling of newspapers and magazines from a stand is speech or conduct." Cummings, J. opinion at 1336. Size is relevant, because at a certain size the city's unfettered ability to regulate structures eclipses its limited ability to regulate speech. The dissent will concede that the city can place a "prior restraint" on the construction of a ten story building on public property, even if the building happens to have a newspaper store on the first floor. The same is true for a five story building or a one story building. We submit that the same is also true for a newsstand on public property even if it is not true for a newsrack on public property. Size matters, and a newsstand is more closely related to a building than it is to a newsrack.

***1316** Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion. *Schneider v. State,* 308 U.S. 147, 160–61, 60 S.Ct. 146, 150–51, 84 L.Ed. 155 (1939); *accord Lee,* 505 U.S. at ——, 112 S.Ct. at 2717 ("The principal purpose of streets *and sidewalks,* like airports, is to facilitate transportation, not public discourse." (emphasis added) (Kennedy, J., concurring)).

In *Lakewood* the Court concluded the ordinance implicated speech because it required periodic license renewal and the licensing system was "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers." 486 U.S. at 760. This case neither concerns simply the circulation and printing of newspapers nor conduct commonly associated with expression. This case involves a structure. A newsrack, as a source of news, is inextricably tied to the publication it contains. For instance, Chicago has newsracks for the Chicago Tribune, the Chicago Sun–Times, USA Today, the Wall Street Journal, and whatever other publications might be popular in the city. To give a city official unfettered discretion over newsracks is to raise the possibility that the official—because of dissatisfaction over a particular editorial policy—might ban or severely limit the newsracks of a particular publication. For instance, if the official is lampooned by, say, the Chicago Tribune, as he or his boss makes a re-election bid, he would have an incentive to limit their newsracks. At the very least, the Chicago Tribune might limit its editorial efforts because of fear of such censorship.

The same threat of prior restraint does not exist for newsstands. They are structures not at all tied to particular publications. In our hypothetical, the Chicago official —even if he wanted to—could not retaliate against the Chicago Tribune by regulating newsstands. Only under the least likely scenario would a Chicago official be able to target a certain publication by targeting a certain newsstand. For a city official to accomplish this type of censorship, he would need a large staff to check all of the newsstands in the city to find the ones disseminating the objectionable material. Then he would have to deny permits to those newsstands. To "chill" similar distribution by others, he would have to make public that he was closing certain newsstands because they were

distributing objectionable material. This scenario is hardly similar to one Chicago official nixing all of the newsracks of a certain publication by the stroke of his pen, while safely hidden behind the walls of city hall. So unlikely is the former scenario that the First Amendment does not require the ordinance to be drafted to avoid it. Further, the closing of newsstands would affect all of the publications in the newsstand equally, and the Chicago Tribune would still have its other methods of dissemination—newsboys, newsracks, in-building newsstands, etc.—to sell papers.

The protections provided newsracks are tailored to their peculiar characteristics. Judge Cummings' dissent and Judge Flaum's concurrence take the position that the same protections tailored to fit newsracks should be placed upon newsstands. But newsstands are not newsracks. The same threat of targeting one publication inherent in the regulation of newsracks is not present in the regulation ***1317** of newsstands. Judge Cummings' dissent offers a remote scenario where a city official might target certain "off-beat publications" or "pornographic" publications by targeting certain newsstands. Cummings, J. dissent at 1337–38. But the First Amendment does not require that we create unlikely scenarios for the censorship of speech and require city governments to draft their regulations to avoid these scenarios. Only when the ordinance at issue presents an obvious and immediate threat of censorship—as in the case of the newsrack ordinance in *Lakewood*—should we allow a facial challenge to head off the possibility of censorship. When the threat of censorship derives from the unlikeliest of scenarios—such as the targeting of "off-beat" or "pornographic" publications when issuing newsstand permits—a facial challenge is inappropriate. The threat is too remote and speculative.

Given that there is no constitutional right to build or maintain a newsstand on the public way, the district court properly refused to enjoin Chicago from removing Graff's newsstand. But Chicago is not interested in removing Graff's newsstand because it occupies public land. Rather Chicago wants to remove Graff's newsstand because he has no permit. Thus, the parties in this case did not focus their arguments on the propriety of whether the district court should have issued an injunction. They wanted a ruling on the constitutionality of the new ordinance. The district court obliged, and upheld the ordinance by granting Chicago's motions to dismiss. On appeal Graff claims the ordinance gives Chicago too much discretion, imposes unreasonable time, place and manner restrictions, does not provide sufficient judicial review, and denies equal protection by treating newsstands and sidewalk cafes differently. We will address each of these constitutional challenges.

B. The Commissioner's Limited Discretion

[4] Graff argues that Chicago's newsstand ordinance violates the First Amendment by vesting too much discretion in the government official, here the commissioner of transportation. In *Lakewood* the Court struck down the City's ordinance because it vested too much discretion in the hands of a government official. 486 U.S. at 772, 108 S.Ct. at 2152. Graff argues that such a danger of viewpoint discrimination also exists in this case.

"[A] licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Id.* at 757, 108 S.Ct. at 2143. A major premise in *Lakewood* was that "the Constitution requires that the City establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *Id.* at 760, 108 S.Ct. at 2146. The Court struck down the Lakewood ordinance specifically because there were "no explicit limits on the Mayor's discretion." *Id.* at 769, 108 S.Ct. at 2150. In denying a permit application, the mayor was required only to state "it is not in the public interest." Although the ordinance required the mayor to state his reasons, the Court found troubling the lack of specificity required and the limitless reasons the mayor could assert. *Id.* at 769–70, 108 S.Ct. at 2150–51. In granting a permit, the mayor could require the newsrack to be located "in an inaccessible location without providing any explanation whatsoever." *Id.* This constituted "unfettered discretion" abridging the First Amendment. *See FW/PBS,* 493 U.S. at 223, 110 S.Ct. at 603; *Freedman,* 380 U.S. at 56, 85 S.Ct. at 737 (party can "challenge a statute on the ground that it delegates overly broad licensing discretion"); *Thornhill v. Alabama,* 310 U.S. 88, 97–98, 60 S.Ct. 736, 741–42, 84 L.Ed. 1093 (1939) (the offending statute subjected the defendant to "harsh and discriminatory enforcement by local prosecuting officials").

In this case the commissioner of transportation considers six exclusive criteria by which to grant or deny permission to build a newsstand:

> (1) Whether the design, materials and color scheme of the newspaper

> stand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses; (2) Whether the newspaper stand complies with this code; (3) Whether the applicant has previously ***1318** operated a newspaper stand at that location; (4) The extent to which services that would be offered by the newspaper stand are already available in the area; (5) The number of daily publications proposed to be sold from the newspaper stand; and (6) The size of the stand relative to the number of days the stand will be open and operating. [5]

[5] Under the new ordinance, all existing newsstand permits expired on January 1, 1992. Chicago Mun.Code § 10–28–135. Although Graff has operated his newsstand since 1984, he has not operated under a permit. Presumably he must now compete for a permit on the same basis as any other person. As such, "when two or more otherwise equally qualified application are pending ... preference shall be given to the application for the newspaper stand offering the largest number of different daily publications." *Id.* at –160(e). Once Graff is issued a permit under the new ordinance, the Commissioner's only consideration in not renewing it is whether the newspaper stand has complied with the code. *Id.* at –135(a) & –160(b).

Chicago Mun.Code § 10–28–160(a). The ordinance also contains a number of technical considerations, such as application forms, *id.* at –150, size and location regulations, *id.* at –170, and maintenance requirements, *id.* at –180. Graff specifically alleges that the commissioner should not be given discretion to remove a newsstand that "endangers public safety or property," that "interferes with or impedes the flow of pedestrian or vehicular traffic," or is placed "in such a manner as to impede or interfere with the reasonable use of [a display window]." *Id.* at –185(a) & (b).

By requiring the commissioner to consider these factors, his discretion is limited, not unbridled. The criteria give adequate and specific guidance to the commissioner as well as reasons for the applicant to anticipate the basis for granting or denying a particular permit to build a newsstand. If a permit to build a newsstand were denied, these express standards (and the commissioner's written reasons, *see id.* at –160(c)) give the plaintiff adequate guidance in challenging the application of the ordinance to his particular case, and upon judicial review allow an informed inquiry into whether the commissioner made his decision in an unconstitutional manner, such as by disfavoring certain speech.

Even though the ordinance allows the commissioner to use some discretion, *Lakewood* nevertheless required the law to have "a close enough nexus to expression, or to conduct commonly associated with expression, *to pose a real and substantial threat of the identified censorship risks.*" 486 U.S. at 759, 108 S.Ct. at 2145 (emphasis added). The criteria set out in Chicago's ordinance in no sense pose a "real or substantial threat" of censorship. *See Ward v. Rock Against Racism,* 491 U.S. 781 at 794–95, 109 S.Ct. 2746 at 2755–56 (upholding as content-neutral regulations aimed at achieving the best musical volume and sound or appropriate sound quality in light of surrounding neighborhoods). *Jacobsen v. Crivaro,* 851 F.2d 1067, 1070 (8th Cir.1988) (upholding as non-discretionary an ordinance restricting newsrack locations and sizes). The criteria give the commissioner proper authority to advance the city's desire to permit a given number of newsstands. At the same time they help avoid the threat of someone building a permanent newsstand of whatever size, design and location he chooses.

Graff still finds a problem with what he terms the commissioner's unbridled discretion in determining the number of permits to issue. But the ordinance caps the number of permits the commissioner may issue to the number of newsstands already located on Chicago's streets. Chicago Mun.Code § 10–28–130 ("No new permit for a newspaper stand shall be issued on or after the effective date of this ordinance"). As permits expire, or have been revoked, the commissioner may advertise that a permit is available. *Id.* at –130 & –135. Graff and others may compete for those the commissioner chooses to reissue. *Id.* at –160(e). [6]

[6] In a footnote in his reply brief, Graff argues for the first time that the current restrictions on the number of permits issued is a codification of arbitrary practices under the old ordinance. This argument is waived. Fed.R.App.P. 28(f) ("A reply brief shall be limited to matter in reply."). The parties also have

> not addressed the extent to which having a permit under the old ordinance affects the locations of future newsstands. These issues are not properly before us on appeal.

[5] True, the commissioner has discretion in determining how many permits to reissue. ***1319** But that is "the business of government." *Chicago Observer, Inc. v. City of Chicago,* 929 F.2d 325, 329 (7th Cir.1991). Not all discretionary decisions implicate the First Amendment. *See City of Cincinnati,* 507 U.S. at ——, 113 S.Ct. at 1517 (the City may limit the total number of newsracks for safety and aesthetic reasons). Since the limited discretion given to the commissioner in Chicago's ordinance does not in any way limit the speech content of the newsstand operator, there is no threat or risk of censorship which violates the First Amendment.

C. Reasonable Time, Place and Manner Restrictions

If the government seeks to control speech without reference to viewpoint, ordinances can contain reasonable time, place and manner restrictions. These restrictions, however, must serve significant government interests (narrowly tailored) and leave alternative avenues to communicate the same information. *See Ward v. Rock Against Racism,* 491 U.S. 781, 798, 109 S.Ct. 2746, 2757, 105 L.Ed.2d 661 (1989); *Clark,* 468 U.S. 288 at 293, 104 S.Ct. 3065 at 3069, 82 L.Ed.2d 221. If, however, the ordinance discriminates on the basis of viewpoint, such as allowing only communication of particular political or religious messages, the government would face a near insurmountable burden. *See City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, ——, 113 S.Ct. 1505, 1516, 123 L.Ed.2d 99 (1993) (noting that prohibiting the use of sound trucks because of noise must apply equally to "music, political speech, and advertising."). Graff alleges that the ordinance controls speech content in several ways. Because the ordinance permits the newsstand to carry only newspapers, periodicals and similar publications, and favors the applicant who will carry the most daily publications, he claims it eliminates vendors who carry other expressive materials. He also complains that the newsstands' size limitation magnifies these impermissible restrictions. Chicago does not dispute these characteristics; rather it argues that they are necessary and reasonable time, place and manner restrictions.

This case resembles *City of Renton,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29. There the City of Renton, Washington, enacted a zoning ordinance to prohibit adult motion picture theaters from locating within a certain distance from residential, church, or school property. *Id.* at 43, 106 S.Ct. at 926. The Supreme Court determined that the ordinance

> does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the district court concluded, the Renton ordinance is aimed not at the content of the films shown at "adult motion picture theatres," but rather at the secondary effects of such theaters on the surrounding community.

Id. at 47, 106 S.Ct. at 929. The Court analyzed the ordinance by looking at the time, place and manner restrictions in the regulation. The Court held that the ordinance was justified without reference to content, was thus "content-neutral," *id.* at 48, 106 S.Ct. at 929, and served a substantial government interest while allowing for reasonable alternatives of communication. *Id.* at 53, 106 S.Ct. at 933. Surely if a city can restrict speech through the planning, regulation, and zoning of property because of the secondary effects of adult motion pictures on the neighborhood, *id., Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 62, 96 S.Ct. 2440, 2448, 49 L.Ed.2d 310 (1976), Chicago should be allowed to regulate property on which newsstands could be located. *Accord Cornelius,* 473 U.S. at 799–800, 105 S.Ct. at 3447–48 ("Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."). Here the time, place and manner restrictions are entirely reasonable.

[6] Graff asserts that there is no showing that accommodating multiple uses of the public way and public safety requires an arbitrary size limitation on newsstands. The ***1320** ordinance requires that the newsstand not occupy more than one-hundred and twenty square feet nor stand more than nine feet in height. Chicago Mun.Code §

10–28–170. In addition, the newsstand must always allow pedestrians at least six feet of clear passage, and cannot be located within three feet of a property line. *Id.* at –185(b). This is "the business of government." *Chicago Observer,* 929 F.2d at 329. We are not in a position to second-guess the city council's concerns. In any event, these restrictions are eminently reasonable. Pedestrians certainly should have access to enough space to walk on the sidewalks. Where structures block part of the sidewalk, pedestrians also have an interest in how far they must walk to get around them. In addition to being reasonable, these restrictions are content-neutral and do not constitute a prior restraint. [7]

7 *See Chicago Observer,* 929 F.2d at 328; *Jacobsen,* 851 F.2d at 1070; *International Caucus of Labor Comm. v. City of Chicago,* 816 F.2d 337, 340 (7th Cir.1987) (upholding restrictions on physical props used to spread message based on the size of the property and public safety); *see also Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 707, 106 S.Ct. 3172, 3177, 92 L.Ed.2d 568 (1986) ("the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books"); *Heffron v. International Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 644 n. 4, 101 S.Ct. 2559, 2562 n. 4 (1981) (noting that there was no First Amendment violation when several hundred potential exhibitors were prevented from speaking because of the cap on booths and a "first come—first serve" policy).

[7] Chicago readily admits that the "intended function" of the ordinance "is merely a preference for newsstands that maximize the number of newspapers sold." Apparently Graff wants to carry more than newspapers, periodicals and similar publications. He asserts that the ordinance is content-based because it does not allow newsstands to sell books or videotapes, relying on *Discovery Network, Inc. v. City of Cincinnati,* 946 F.2d 464 (6th Cir.1991). [8] There the district court held unconstitutional an ordinance that completely prohibited the distribution of commercial handbills on public property. The city had asserted its interests in safety and aesthetics, although it allowed newsracks to carry all other publications. The court of appeals concluded that the ordinance was an impermissible content-based restriction. 946 F.2d at 472, *aff'd,* 507 U.S. at ——, 113 S.Ct. at 1516. In distinguishing *City of Renton,* the Sixth Circuit stated: "Had Cincinnati produced evidence that the types of newsracks distributing commercial speech caused effects distinct from newsracks distributing newspapers, such as the clogging of downtown streets, ... the ordinance may have been constitutional under the secondary effects doctrine." *Discovery Network,* 946 F.2d at 472 n. 12. In affirming, the Supreme Court also noted that in contrast to *City of Renton* there were no distinguishing secondary effects attributable to newsracks containing commercial publications as compared to newsracks containing newspapers that would justify differing treatment. *City of Cincinnati,* 507 U.S. at ——, 113 S.Ct. at 1517. Chicago, following this reasoning, notes that newspapers do not represent any favored viewpoints not represented in books or videotapes. The restrictions are "simply an effort to reduce clutter on the public way, ... and facilitate the distribution of newspapers from a newsstand without undue obstruction of the public ways."

8 *Discovery Network,* 946 F.2d 464, was affirmed after the parties had completed briefing and while the appeal was pending. *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).

Certainly a city can regulate newsstands to reduce clutter on its streets. *See Taxpayers for Vincent,* 466 U.S. at 805, 104 S.Ct. at 2128. But Chicago has advanced no argument that books and videotapes clutter the streets any more than do newspapers. The assertion that newsstands themselves clutter the streets merely restates the issue. Chicago more convincingly argues that books and videotape sales would obstruct the flow of pedestrians. The city can recognize that people impulsively or routinely purchase newspapers in seconds. The more time-consuming purchase of books or videotapes, in contrast, would cause congregation and impede the flow of others who would then have to walk around not only the newsstand structure but the audience it attracted. *See* ***1321** *Heffron,* 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298. Also, browsers would block access to those who wanted to make a quick purchase of a newspaper. *See Gannett Satellite Info. Net. v. Metro Transp. A.,* 745 F.2d 767, 773–4 (2d Cir.1984) (upholding as content neutral a regulation which allowed newspapers but not other vendors to install coin operated vending machines; "the newspapers are in a privileged position and are not and will not become the victims of discrimination").

That the ordinance considers how many publications the newsstand will carry does not infringe, but rather promotes First Amendment interests. The ordinance clearly favors an applicant who has the higher, not the lower, proposed number of publications to be sold from the newsstand. This conceivably "censors" only the newsstand operator who himself might eliminate certain publications from distribution. In addition, an ordinance directed at the number of publications concerns quantity, not quality or content. Graff cites no case where an ordinance promoting more speech (in general) infringes the First Amendment.

Graff asserts that promoting the dailies serves to advance a message less controversial to the greatest number of people. This ignores the reality of the marketplace. The dailies succeed only because they sell to the greatest number of people, notwithstanding the government's perceived agreement with any particular viewpoint. Any notion that Chicago is promoting the dailies because based on past experience it is likely to agree with their future viewpoints is mitigated by the ordinance favoring the newsstand operator who sells the most dailies—an obvious attempt at variety, not indoctrination. Chicago argued in the district court that the Supreme Court has encouraged the promotion of daily publications over the sale of other "expressive materials." As stated in *Lakewood,* 486 U.S. at 771, 108 S.Ct. at 2151, "News is not fungible. Some stories may be particularly well covered by certain publications, providing that newspaper with a unique opportunity to develop readership. In order to benefit from that event, a paper needs public access at a particular time; eventual access would come too little and too late." The manner in which this ordinance regulates the newsstand operation allows that necessary access.

Graff finally argues that the time, place and manner restrictions are not narrowly tailored to serve the asserted governmental interests. *See Ward,* 491 U.S. at 796, 109 S.Ct. at 2756; *City of Los Angeles v. Preferred,* 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986). Specifically, Graff argues the ordinance sets an arbitrary cap on the number of permits and that given the provision requiring minimum clearance around the newsstand, there is no reason for the arbitrary size limitation. He wants further discovery to show there are less restrictive alternatives.

[8] The "requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward,* 491 U.S. at 799, 109 S.Ct. at 2758 (citations omitted). This test is not as heightened as Graff would have us believe.

> So long as the means chosen are not substantially broader than necessary to achieve the government's interest, ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Id. at 800, 109 S.Ct. at 2758. Because Chicago has the ability to ban all newsstands, providing for some by a comprehensive permit scheme serves the people of Chicago well. The ordinance accommodates competing interests where pedestrians wish room to walk, several newsstand operators desire the same location, and tourists wish to take a picture of a famous landmark without a newsstand front and center. Without the permit ordinance, Chicago's interests would not only be achieved with less effectiveness, but would fail. The restrictions also leave open alternative channels for communication of the information. *Id.* at 802, 109 S.Ct. at 2760. Chicago not only "teems with ads and with publications," *Chicago Observer,* 929 F.2d at 328, one can easily discern that the public has no problem picking up a newspaper, book or videotape, be it in stores that ***1322** actually own their own property or from newsboys yelling out the headlines.

For the foregoing reasons, we conclude that the time, place and manner restrictions contained in the new ordinance are reasonable, are justified without reference to specific content, and are narrowly tailored to serve significant interests of the people of Chicago. Alternative channels are also available to communicate any speech otherwise restricted.

D. The Propriety of Dismissal Versus Summary Judgment

[9] The district court dismissed two counts of the complaint based in part on the reasonableness of the ordinance's time, place and manner restrictions. Graff argues that the pleading stage is no place for such an inquiry, especially because the government has the burden on this issue. *See Preferred,* 476 U.S. at 496, 106 S.Ct. at 2038; *accord Speiser v. Randall,* 357 U.S. 513, 78 S.Ct.

1332, 2 L.Ed.2d 1460 (1958) (invalidating state procedure because it placed the burden on the individual to show the restriction on speech was unjustified). No doubt the norm is to wait until the summary judgment stage of the litigation to address the ultimate question of whether the ordinance should stand. *FW/PBS,* 493 U.S. at 221, 110 S.Ct. at 602; *Renton,* 475 U.S. at 45, 106 S.Ct. at 927; *Vincent,* 466 U.S. at 793, 104 S.Ct. at 2122; *Young,* 427 U.S. at 55, 96 S.Ct. at 2445. And Chicago does not dispute that it bears the burden on these issues. Contrary to Graff's assertions, however, in this case the district court was correct in resolving this matter.

[10] In *International Caucus of Labor Committees v. City of Chicago,* 816 F.2d 337, 339 (7th Cir.1987), the district court dismissed a facial attack on an ordinance that prohibited persons from setting up tables, hanging signs and storing literature at O'Hare International Airport. We had previously upheld parts of a similar ordinance in *International Society for Krishna Consciousness, Inc. v. Rochford,* 585 F.2d 263 (7th Cir.1978). The court, quoting from Supreme Court precedent, gave credence to the government's case at the pleading stage:

> A state's interests in protecting the safety and convenience of persons using the public forum is a valid governmental objective. The characteristic nature and function of the forum must be considered in assessing the constitutionality of the regulation.... As held in *Rochford,* the City has valid concerns about expediting the processing of travelers, maintaining the free and orderly flow of traffic, and avoiding the disruption of normal airport activities. Prohibitions on the use of banners or signs that exceed the body width and on the storing of materials, except in a carry bag that must be carried or harnessed, are reasonably related to the City's legitimate interests.

International Caucus, 816 F.2d at 339–40 (citations and quotations omitted). As we have seen, Chicago asserted that many of these interests apply in this case as well. In *International Caucus,* we concluded that even in the First Amendment context, the plaintiff is not excused "from the requirement that the facts as alleged must state a cause of action." *Id.* at 340.

In *Rothner v. City of Chicago,* 929 F.2d 297 (7th Cir.1991), we also affirmed the district court's dismissal of a facial challenge to a city ordinance. Chicago had prohibited minors from playing video games while school was in session. With the caveat that "courts should proceed cautiously when asked to dismiss on the basis of the pleadings," *id.* at 302, we concluded that the purpose of the ordinance, to encourage students to complete high school and discourage truancy, was unrelated to speech content. Also, the ordinance was narrowly tailored to serve an important governmental interest, namely "insuring that children receive an adequate education." *Id.* at 303. And alternative channels of communication were open—the children were free to play the video games on their own time. There, we concluded that the First Amendment did not require us to "try the statute" beyond the pleading stage. *Id.* at 304 (citations omitted).

[11] From *Preferred, International Caucus* and *Rothner* we gather several important principles. Courts should not merely assume that an ordinance advances the state's interests. ***1323** *Preferred,* 476 U.S. at 496, 106 S.Ct. at 2038. In *Preferred* the Court remanded to the district court because it needed to "know more about the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them." *Id.* at 495, 106 S.Ct. at 2038. In this case, however, no one is questioning the present uses of newspapers or sidewalks on the streets of Chicago. How Graff proposes to use his newsstand we accept as true from his complaint. *See City of Renton,* 475 U.S. at 53, 106 S.Ct. at 931. (City does not have to conduct studies or produce independent evidence on issues that are well developed here or elsewhere). Where the courts have already upheld a similar ordinance because of the governmental interests at stake, a future litigant should not be able to challenge similar governmental interests without showing some distinction at the pleading stage. *E.g., International Caucus,* 816 F.2d at 340.

In this case there are no disputed issues of material fact that we need to resolve. Nor are the interests that Chicago raises in this case unique or different. It has not relied on independent research studies or findings. Rather, Chicago has relied on a common sense approach and the desire to best allocate public property within the spirit of the

First Amendment. As discussed in Part C, we conclude that as a matter of law Chicago can reasonably restrict newsstands to selling daily newspapers. Thus, the district court properly dismissed at the pleading stage Graff's arguments that the ordinance should allow him to operate a larger newsstand in which to sell books, videotapes and other methods of expression.

E. The Adequacy of Procedural Safeguards

Graff asserts that the ordinance is completely devoid of safeguards for review of the commissioner's decision. Chicago responds that state law provides for judicial review, which in itself is sufficient. Primarily, the First Amendment protects speech by prohibiting the government from engaging in censorship. But even if an ordinance properly limits an administrator's discretion, theoretically the government could still act improperly where its decision is not subject to review. The question is whether sufficient procedural safeguards exist to "obviate the dangers of a censorship system." *Southeastern Promotions,* 420 U.S. at 559, 95 S.Ct. at 1247. In *Freedman of Maryland,* 380 U.S. 51, 58–59, 85 S.Ct. 734, 738–39, 13 L.Ed.2d 649 (1965), the Court set out certain "safeguards," later summarized by Justice Brennan as follows:

> (1) any prior restraint in advance of a final judicial determination on the merits must be no longer than that necessary to preserve the status quo pending judicial resolution; (2) a prompt judicial determination must be available; and (3) the would-be censor must bear both the burden of going to court and the burden of proof in court.

FW/PBS, 493 U.S. at 239, 110 S.Ct. at 611.[9] Of concern to Graff, since he has no permit, are the procedures Chicago follows in removing a newsstand without a permit. Once the commissioner discovers a newsstand operating on public property without a valid permit, the commissioner has the authority to give the operator fifteen days after the posting of a removal notice to restore the public property to its original condition. Chicago Mun.Code § 10–28–190(c). Within that time the owner or operator may request a hearing before the commissioner of transportation, which will be scheduled within thirty days. Even if the commissioner were to rule unfavorably, the operator would not have to remove his newsstand until fifteen days after the commissioner's final decision. Whether a newsstand is ordered removed, or a permit is granted, denied or renewed, the ordinance leaves these final determinations solely in the hands of the commissioner of transportation. But there is much opportunity for input and ***1324** discussion before that final determination is made.[10]

9 In *FW/PBS* a plurality (O'Connor, Stevens and Kennedy, JJ.) found that "the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained and there must be the possibility of prompt judicial review in the event that the license is erroneously denied." 493 U.S. at 228, 110 S.Ct. at 606. Justices White and Scalia and Chief Justice Rehnquist did not apply any of the "safeguards." And Justices Brennan, Marshall and Blackmun would have applied all three. The Court considered the nature of the speech and the discretion in the ordinance when determining to what extent the *Freedman* safeguards were necessary. Thus, if the full procedural protections of *Freedman* are not necessary in the context of sexually oriented licensing schemes, *FW/PBS,* 493 U.S. at 228, 110 S.Ct. at 606, it is an open question whether they are necessary in an ordinance that regulates the building of newsstands on public property.

10 In this case Chicago utilizes the usual procedure in ruling on a permit application—set up more than one level of inquiry and get as many people involved in the process as possible; public hearings, of course, are necessary, at least politically. To begin the process, the commissioner of transportation advertises the availability of newsstand permits (in a newspaper, of course) and shortly thereafter accepts applications. Chicago Mun.Code § 10–28–135. Copies are soon distributed to the commissioner of planning and development and the alderman of the ward affected. The appropriate city council committee is also involved in holding public hearings on the permit. All interested persons, including the applicant, are given an opportunity to speak. The city council committee submits its recommendation to the commissioner of planning and development. He then submits a report to the commissioner of transportation, who gives the previous recommendations "due consideration," and acts on it within thirty days of that receipt. *Id.* at –160(a). All are bound by the six enumerated considerations, listed *supra.* The total time from

> application to decision can be no less than thirty-five and no more than sixty-five days. If the application is denied, the applicant can request a hearing before the commissioner of transportation which must be held within the next thirty days (a quasi-motion for reconsideration). *Id.* at –160(c).

[12] Graff argues that the ordinance does not provide for "expeditious judicial review" of the commissioner's decision. *See FW/PBS,* 493 U.S. at 239, 110 S.Ct. at 611.[11] The ordinance contains no mention of the role of the judiciary in reviewing the commissioner's decisions. As an initial matter, it is not clear why the Court in *Freedman* set out the apparent requirement that an ordinance such as this explicitly provide for prompt judicial review. A person always has a judicial forum when his speech is allegedly infringed. Neither Graff nor the City argues that the judiciary cannot hear challenges to this ordinance simply because it does not have a specific provision designating a review process. The lack of these additional procedural safeguards does not in any way increase the threat of speech censorship. The "safeguards" or the absence thereof neither expand nor detract from the courts' jurisdiction over constitutional questions. But we are not writing on a clean slate.

11 In *FW/PBS* the Court held that the city of Dallas need not bear the burden of going to court nor the burden of proof once in court for two reasons: The ordinance was not presumptively invalid because the decisionmaker did not pass "judgment on the content of any protected speech." Also, "[b]ecause the license [or in this case, a permit] is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through the court." 493 U.S. at 229–30, 110 S.Ct. at 606. These same reasons apply in this case. We have already held that the ordinance does not give the commissioner unfettered discretion and that any content restrictions are reasonable. Graff's newsstand is also as much a business as an adult book store. Therefore, Chicago need not prove its case in court before ruling on a permit application or removing a newsstand.

The Constitution of the State of Illinois, Article 7, Section 6 (1970), delineates the explicit powers of home rule units (which the parties do not dispute includes Chicago). *See City of Chicago v. State & Mun. Teamsters,* 127 Ill.App.3d 328, 82 Ill.Dec. 488, 492, 468 N.E.2d 1268, 1272 (1984). "A home rule unit may exercise any power and perform any function pertaining to its government and affairs." Ill. Const. art. 7, § 6(a). The Supreme Court of Illinois took little time in holding that this power does not include providing for judicial review of administrative agency decisions. *Paper Supply Co. v. City of Chicago,* 57 Ill.2d 553, 317 N.E.2d 3, 16–17 (1974); *Cummings v. Daley,* 58 Ill.2d 1, 317 N.E.2d 22, 23 (1974). In each of those cases the Supreme Court of Illinois rejected a home rule municipality's attempts to determine "both the jurisdiction of the circuit court to review its municipal administrative determinations and the procedure to be followed in seeking judicial review of those determinations." ***1325** *Nowicki v. Evanston Fair Housing Review Bd.,* 62 Ill.2d 11, 338 N.E.2d 186, 187 (1975); *see Quinlan & Tyson, Inc. v. City of Evanston,* 25 Ill.App.3d 879, 324 N.E.2d 65 (1975). Just because Chicago lacks the separate authority to make available "expeditious judicial review," *FW/PBS,* 493 U.S. at 239, 110 S.Ct. at 611, does not mean that such review does not exist.

The appropriate method to review Chicago's administrative agency decisions is by the common law writ of *certiorari. Holstein v. City of Chicago,* 803 F.Supp. 205, 210 (N.D.Ill.1992); *Stratton v. Wenona Comm'n Unit Dist. No. 1,* 133 Ill.2d 413, 141 Ill.Dec. 453, 458, 551 N.E.2d 640, 645 (Ill.App.1990); *Norton v. Nicholson,* 187 Ill.App.3d 1046, 135 Ill.Dec. 485, 491, 543 N.E.2d 1053, 1059 (1989). Unless excused, claimants have six months to file, wherein review "is extremely broad in scope, and extends to all questions of fact and law contained in the record before the court, including *de novo* review of any constitutional issues." *Holstein,* 803 F.Supp. at 210, *citing Howard v. Lawton,* 22 Ill.2d 331, 175 N.E.2d 556, 557 (1961).

> [T]he court determines from the record alone whether there is any evidence fairly tending to support the order reviewed, and the court cannot set aside the order unless it is contrary to the manifest weight of the evidence.... [F]indings and conclusions on questions of fact are *prima facie* true and correct. It is not the court's function to resolve conflicting evidence.

Norton, 187 Ill.App.3d 1046, 135 Ill.Dec. 485, 543 N.E.2d at 1059. "If the circuit court, on the return of the writ, finds from the record that the inferior tribunal proceeded according to law, the writ is quashed; however, if the

proceedings are not in compliance with the law, the judgment and proceedings shown by the return will be quashed." *Stratton,* 133 Ill.2d 413, 141 Ill.Dec. 453, 551 N.E.2d at 645. [12]

12 The case of *Smith v. Department of Public Aid,* 67 Ill.2d 529, 10 Ill.Dec. 520, 367 N.E.2d 1286 (1977), helps illustrate the importance of the common law writ of *certiorari* in the constitutional context. In *Smith* a county public aid department increased the purchase price for food stamps. A state department of public aid affirmed that decision. On writ of *certiorari* the trial court declared certain state and federal statutes unconstitutional. In particular, the trial court found that the Illinois Public Aid Code, Ill.Rev.Stat.1975, ch. 23, par. 11–8.7, and a portion of the federal food stamp program, 7 U.S.C. § 2022 (1970), deprived the plaintiffs of due process and equal protection under the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, because they did not provide for sufficient judicial review. 67 Ill.2d 529, 367 N.E.2d at 1292. The Supreme Court of Illinois reversed, holding that the common law writ of *certiorari* provided sufficient oversight. *Id.* at 1293.

In some other First Amendment cases the Supreme Court seemed to require an ordinance to provide for judicial review, even when the writ of common law *certiorari* was available. However, the Court has not been presented directly with the argument that *certiorari* was in itself sufficient review, especially where a state makes the common law writ the current common practice, and in fact forbids any other kind of review. We conclude that such review is sufficient. Illinois has shown that a judicial forum is available to review administrative agency decisions. The state maintains uniform judicial review procedures by forbidding home rule units such as Chicago from commenting on the matter. As such the state can expect such uniform procedures to expedite cases and better serve the interests of Graff in a case such as this one.

F. Equal Protection

[13] In count two, Graff alleges that newsstands are treated differently than other permitted uses of the public way, such as sidewalk cafes. One would hope so. Differences are obvious. Each use requires a permit, but separate ordinances necessarily provide different criteria for issuing them. Where, as here, the newsstand ordinance passes strict scrutiny under the First Amendment, it most certainly will pass the rational basis test under equal protection analysis.

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state ***1326** of facts that could provide a rational basis for the classification.

Federal Commun. Comm. v. Beach Commun., Inc., 508 U.S. 307, ——, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993). We have already explained why the ordinance infringes no fundamental First Amendment right. [13] If reasonable time, place and manner restrictions outweigh Graff's right to free speech, they certainly are sufficient to pass as "conceivable" and "rational."

13 Graff alleged in his amended complaint and in the facts section of his brief on appeal that then and now newsstands have operated on the public way without permits and only Graff has been targeted for eviction. Why was this not pursued in response to Chicago's motion to dismiss? If Chicago was allowing newsstands without permits, surely it could not seriously argue that it could remove a newsstand that had not secured one. *See Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 295 n. 6, 104 S.Ct. 3065, 3070 n. 6, 82 L.Ed.2d 221 (1984). Obviously there would be no need for the district court to rule on the constitutionality of an ordinance on its face when it was being applied in such a random fashion. Indeed, the record shows that Graff received notices to remove his newsstand which for whatever reasons were later rescinded. Graff, however, raised the equal protection analysis only in arguing that Chicago discriminated by its treatment of newsstands as compared to other, nonexpressive uses of the public way. He did not explicitly or implicitly argue any disparity in requiring newsstand permits to the district court or on appeal; thus, the issue is; waived. *Brookins v. Kolb,* 990 F.2d 308, 316 (7th Cir.1993); *Textile Banking Co. v. Rentschler,* 657 F.2d 844, 853 (7th Cir.1981). We have proceeded in this case on the

assumption that Chicago evenhandedly enforces its ordinances.

Graff argues that Chicago taxes newsstands but not other uses of the public way. Chicago responds that Graff waived the argument because in the district court he questioned only the propriety of a newsstand fee as an invalid prior restraint under the First Amendment, an issue he has not raised on appeal. Graff also argues that newsstands and sidewalk cafes are treated differently with respect to landmark commission approval. Chicago disputes this. It argues Chicago Municipal Code section 2–120–740 subjects all structures on public property to equal treatment. In fact, it argues that section 4–384–060 gives the City even more discretion in refusing to grant a cafe permit (as compared to refusing a newsstand permit).

These distinctions do not really matter. Varying taxes and different permit requirements for obviously different uses do not merit word-by-word scrutiny by judges who might prefer to tax and regulate some other way. The question is whether the different treatment of newsstands and cafes occupying the public sidewalks are for "conceivable" and "rational" reasons. We can conceive of many rational reasons for the differences,[14] not the least of which one serves food (a highly regulated enterprise) and the other does not. The only real similarity is that they occupy the sidewalk. It would arguably be irrational to treat these completely different purposes the same way. In fact, equal treatment with a sidewalk cafe would probably result in much more burdensome limitations for a newsstand anyway. Chicago has a very rational basis for mandating different ***1327** permit requirements for these very different uses.

14 Chicago could reasonably feel that newsstands impede the flow of pedestrian traffic more so than sidewalk cafes. Cafes involve a restaurant that seeks to extend its eating facility to the fresh air. It is reasonable for Chicago to believe that newsstands will not ordinarily attach to nearby buildings. They are free standing on the sidewalk, thus requiring size limitations so as to accommodate adjacent structures. For pedestrians wishing to determine whether it is safe to cross the street, or for drivers wishing to avoid hitting pedestrians, cafes pose less serious threats to safety. It is not only conceivable, but probably a certainty, that many cafes are located in front of property already in use as a restaurant. Extending that type of business onto part of the sidewalk would compromise landmark property no more than the restaurant operating there in the first place. Newsstands, by contrast, stick out; Chicago could feel that such structures are not as aesthetically pleasing. They are separate entities usually having nothing to do with adjoining property. Chicago should be given deference in asserting that lack of patrons would run unattractive cafes out of business, giving them ample incentive to maintain aesthetically pleasing premises. Persons merely wanting a newspaper probably do not regard the beauty of the newsstand of any consequence. Cafes require sufficient space to accommodate sitting customers and tables for food. Newsstands, in contrast, differ radically in the amount of space necessary, and employ fewer people. Eating establishments are heavily regulated and taxed in their own right.

IV. Conclusion

Graff does not have a constitutional right to build a newsstand on public property. This case involves a structure which in itself has no First Amendment protection. Thus, the district court properly refused to enter a preliminary injunction, notwithstanding the validity of a permit ordinance. Even if newsstands involve speech, Chicago's new ordinance passes muster. The ordinance does not allow for content based discrimination by giving the commissioner of transportation too much discretion in ruling on a permit. To the extent that the ordinance restricts speech, Chicago has articulated reasonable time, place and manner restrictions to justify any infringement. The ordinance is also subject to adequate procedural safeguards; therefore the district court was correct in dismissing count one. Because the ordinance is constitutional under Equal Protection analysis, the court was correct in dismissing count two.

The district court is AFFIRMED.

FLAUM, Circuit Judge, with whom CUDAHY, Circuit Judge, joins, concurring.

I concur in the judgment of the majority but write separately to emphasize my belief that the erection and maintenance of newspaper stands qualifies as "conduct commonly associated with expression." *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 759, 108 S.Ct. 2138, 2145, 100 L.Ed.2d 771 (1988). Accordingly, Chicago's licensing ordinance (hereinafter

"the Ordinance") implicates the First Amendment's protection of expression, *see id.* at 769, 108 S.Ct. at 2150, and a facial challenge against it lies if the Ordinance carries with it significant risks of self-censorship and of post-decision difficulty in detecting whether censorship motives clandestinely prompted license denials, *see id.* at 759, 108 S.Ct. at 2145. Because Chicago's scheme at the outset establishes a discretionary system to govern the issuance of permits, the specter of these risks looms and a facial review of the ordinance is in order. Scrutiny of the Ordinance's provisions, however, reveals that the danger of content-based censorship presented by such licensing schemes is in this case sufficiently mitigated to allow the Ordinance to survive facial attack. In addition, I do not feel that the Ordinance is the kind of scheme for which the lack of a special provision for prompt judicial review is fatal. [1]

1 I do not think it is necessary for the majority to reach the question of whether or not there is an independent constitutional right to erect newsstands on public property. Because Chicago did not enact an absolute ban on newsstands and the majority today finds that capping permits at their historical level is a reasonable restriction, passing on this question is not necessary for the resolution of this case. Comment on the nonexistence of such a right may be tempting but is probably unadvised as the issue is by no means settled. *Compare Providence Journal Co. v. City of Newport,* 665 F.Supp. 107, 112 (D.R.I.1987) (intimating that a total prohibition of newsracks, newsstands and newsboys may be unconstitutional), *and City of Lakewood,* 486 U.S. at 762 n. 7, 108 S.Ct. at 2147 n. 7 (declining to pass on whether a city may constitutionally prohibit the placement of newsracks on public property), *with id.* at 780–81, 108 S.Ct. at 2156 (White, J., dissenting) (stating that there is no First Amendment right to erect newsracks on city streets) *and City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, ——, 113 S.Ct. 1505, 1525, 123 L.Ed.2d 99 (1993) (Rehnquist, C.J., dissenting) (same).

I.

I respectfully suggest that the majority misses the mark in asserting that "[t]his case neither concerns simply the circulation and printing of newspapers nor conduct commonly associated with expression." *Ante,* at 1316. Like newsracks, newsstands are in the business of circulating expressive materials. *See City of Lakewood,* 486 U.S. at 768, 108 S.Ct. at 2149. That they do so on a larger scale, with greater variety [2] and take up ***1328** more physical space in performing their distributive function does not alter the fundamental fact that maintaining a newsstand, just like maintaining a newsrack, is an activity peculiarly linked to expression. In that respect a newsstand is not like a candy machine or a hot dog stand or any other mere "structure." *See id.* at 760–61, 108 S.Ct. at 2145–46. A newsstand is an instrument for the dissemination of expressive materials, and as such it falls within that special category of activities whose regulation implicates First Amendment values.

2 The majority seems to suggest that because newsstands facilitate the distribution of many different publications they are somehow *less* associated with expression than newsracks which typically only offer for sale a single publication. *See ante,* at 1316. The majority apparently believes this follows from the fact that shutting down whole newsstands because of displeasure with one publication is a more awkward and less effective means of censoring that publication than targeting its individual newsracks directly. While this observation may buttress an eventual conclusion that Chicago's mechanism for licensing newsstands passes constitutional muster, to conclude that this single characteristic renders the maintenance of newsstands any less conduct intimately tied to expression is fallacious. The result from such a logical leap and its concomitant hasty dismissal of the constitutional dimensions of this case is a failure to consider the full breadth of First Amendment risks occasioned by discretionary control over newsstands. Admittedly, the licensing of newsstands is a clumsy way to censor the Chicago Tribune, but it has the potential to be a honed weapon in a war against the lone operator who insists on including controversial or unpopular publications in his selection. Judge Cummings' dissent succeeds in putting its finger on the panoply of hardly fanciful dangers to free expression that can be the bedfellows of the regulation of even mere newsstands. *See post,* at 1337–38. These potential dangers must be acknowledged before turning to address the procedural adequacy of Chicago's licensing system.

Since this licensing scheme is "directed narrowly and specifically at ... conduct commonly associated with expression," *id.* at 760, 108 S.Ct. at 2145, a facial challenge is an appropriate means to test for constitutional infirmity when by its nature the scheme does not foreclose the

"identifiable risks to free expression," *id.* at 757, 108 S.Ct. at 2144, that a system of prior restraint engenders and that can be "effectively alleviated only through a facial challenge." *Id.* Now the Ordinance does not fit the traditional mold of a prior restraint since it does not directly regulate speech *qua* speech. *See, e.g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 552, 95 S.Ct. 1239, 1243, 43 L.Ed.2d 448 (1975) (city preventing performance of rock musical "Hair"); *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150–52, 89 S.Ct. 935, 938–39, 22 L.Ed.2d 162 (1969) (city requiring permit to conduct a parade); *Freedman v. Maryland,* 380 U.S. 51, 57, 85 S.Ct. 734, 738, 13 L.Ed.2d 649 (1965) (movie censorship system); *Near v. Minnesota,* 283 U.S. 697, 713–17, 51 S.Ct. 625, 630–31, 75 L.Ed. 1357 (1931) (newspaper censorship). Rather, it is one aspect of Chicago's effort to keep within reasonable bounds businesses' usage of the public ways. *See* Chicago Mun.Code § 4–384–060 (establishing discretionary licensing of sidewalk cafes based on considerations of pedestrian flow, building access, safety and aesthetics). But by targeting for licensing a business inextricably connected to the exercise of First Amendment freedoms, Chicago's scheme raises the possibility of those identifiable risks that we commonly associate with prior restraints.

Firstly, just as the licensure of newsracks can chill a newspaper's zest to pursue issues and opinions displeasing to the licensor, *see City of Lakewood,* 486 U.S. at 757–58, 108 S.Ct. at 2144–45, licensure of newsstands has the potential to prompt vendors to spurn publications offensive to the licensor's (or his constituents') sensibilities and politics. Only a facial challenge adequately addresses such a risk. Secondly, discretionary licensing schemes frequently provide fertile ground for "*post hoc* rationalizations by the licensing official ..., making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *Id.* at 758, 108 S.Ct. at 2145. In an "as applied" challenge, an unsuccessful applicant for a discretionary newsstand permit would face the same kind of struggle in demonstrating that his rejection was motivated by which publications he sells as a disappointed newspaper would in showing it lost its newsrack because of what it writes. The Ordinance sets out what is basically a discretionary system of licensing, the sort of system in which such risks can lurk, and appellants have alleged that under it city officials "enjoy unfettered discretion to deny ... permits altogether." *Ward v. Rock Against Racism,* 491 U.S. 781, 794, 109 S.Ct. 2746, 2755, 105 L.Ed.2d 661 (1989). "Thus, waiting for an alleged abuse before considering ... a challenge would achieve nothing except ... to ***1329** risk censorship of free expression during the interim." *Id.* 486 U.S. at 770 n. 11, 108 S.Ct. at 2151 n. 11. Therefore, I feel it is appropriate to examine under the lens of a facial challenge whether the Ordinance is characterized by standards and other features adequate to rein in the exercise of discretion and minimize the risk of content discrimination. *See Freedman,* 380 U.S. at 56–57, 85 S.Ct. at 738 ("Although we have no occasion to decide whether the vice of overbroadness infects the ... statute, we think that appellant's assertion of a similar danger in the ... apparatus of censorship—one always fraught with danger and viewed with suspicion—gives him standing to make that challenge.").

II.

Turning to the details of the Ordinance, none of the six factors upon which the Commissioner of Public Works' permit decisions are based facially vest him with unbridled discretion in accepting and rejecting applicants.[3] Thus, the Ordinance does not grant to city officials the sort of standardless carte blanche that the Supreme Court has unfailingly condemned. *See, e.g., Shuttlesworth v. Birmingham,* 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969), *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), *Thornhill v. Alabama,* 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). I do recognize that some of the enumerated factors, as well as having a scheme where six are weighed in combination, allow a measure of flex. We must remember, however, that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Ward,* 491 U.S. at 793, 109 S.Ct. at 2755, and these are after all the kinds of legitimate concerns one would expect a city to weigh when deciding how to allocate limited public space in a neutral way. Moreover, these criteria provide definite and finite guidelines against which the Commissioner's written reasons for a denial, *see* Chicago Mun.Code § 10–28–160(c), can be measured and comparisons made from case to case—a safeguard that the standardless system in *Lakewood* lacked. *See Lakewood,* 486 U.S. at 771, 108 S.Ct. at 2151.

[3] The Commissioner of Public Works (CPW) in his ultimate decision (as well as the Commissioner of Planning when making his recommendation to the CPW and the City Council, if making a recommendation to the CPW) can only consider:

(1) whether the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses;
(2) whether the newspaper stand complies with this Code;
(3) whether the applicant has previously operated a newspaper stand at that location;
(4) the extent to which services that would be offered by the newspaper stand are already available in the area;
(5) the number of daily publications proposed to be sold from the newspaper stand; and
(6) the size of the stand relative to the number of days the stand will be open and operating.

Chicago Mun.Code § 10–28–160(a).

In spite of the presence of these exclusive factors, their residual malleability may still have proven unacceptable had the ordinance been written to apply them to permit renewal and not just the initial decision to issue. The fact that the full range of discretionary criteria does not apply to renewal—renewals are automatic so long as existing newsstands are in compliance with the City Code, *see* Chicago Mun.Code 10–28–160(b)—indicates to me that the Ordinance neither was intended to promote nor in fact dangerously facilitates content discrimination in the licensing of newsstands. One of the distressing features of the newsrack ordinance in *Lakewood* was the need to annually reapply for licenses. This periodic requirement enabled the licensor to routinely discipline newspapers for speech already uttered. *See Lakewood,* 486 U.S. at 759–60, 108 S.Ct. at 2145–46. In the context of newsstands such a system would allow the licensor to monitor the type of publications offered for sale, effectively presenting the more "direct ... threat to speech [of] allowing a licensor to view the actual content of the speech to be licensed." *Id.* at 760, 108 S.Ct. at 2146. Then, under the cloak of discretionary decision making, the licensor could easily reject a renewal application because he disapproves of what the stand sells. Chicago's *pro forma* renewal process, by contrast, does not afford that kind of opportunity for ongoing censorship. ***1330** On application for renewal, the discrete question of compliance with the Code replaces the discretion of the initial permit decision. Furthermore, first time applicants, who are subject to the full discretionary process, do not provide in their application a list of publications that they intend to sell. Therefore, overall, Chicago's mechanism offers few routes by which content motives can obliquely infiltrate the permit process.

III.

Seemingly the most difficult feature of the Ordinance, in light of Supreme Court precedent, is the absence of any provision for expeditious judicial review of the Commissioner's decision. However, I believe that because the Ordinance does not involve separating protected from unprotected speech and by its own terms presents little risk of facilitating content discrimination, it can survive constitutional attack despite the lack of a self-contained provision for prompt judicial review.

A.

Since the Supreme Court's decision in *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), it has become accepted practice to examine licensing schemes that regulate speech related activities for the presence of three procedural safeguards: 1) the administrative decision allowing or forbidding the speech must be forthcoming within a short and fixed time; 2) prompt judicial review of a license denial must be available; and 3) the licensor must bear both the burden of going to court and the burden of proof in court. *See id.* at 58–59, 85 S.Ct. at 738–39. The only possible modification to the *Freedman* requirements may have been anticipated in *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), where three Justices asserted that a city licensing scheme aimed at the operation of sexually oriented businesses need not include the third *Freedman* safeguard.[4] *See id.* 493 U.S. at 229, 110 S.Ct. at 607.

[4] In *FW/PBS,* three Justices (Brennan, Marshall and Blackmun) thought that all three *Freedman* requirements were necessary, *see* 493 U.S. at 239–42, 110 S.Ct. at 612–13 (Brennan, J., concurring in the judgment), while three (O'Connor, Stevens and Kennedy) were content with just the first two, *see id.* 493 U.S. at 227–31, 110 S.Ct. at 606–07 (opinion of O'Connor, J.). To justify dropping the third *Freedman*

> safeguard, Justice O'Connor distinguished Dallas' ordinance from the licensing systems in *Freedman* and its progeny on two grounds. She observed, first, that under its ordinance Dallas did not purport to "pass [ ] judgment on the content of any protected speech," *id.* 493 U.S. at 231, 110 S.Ct. at 607, unlike the obscenity censors in *Freedman et al.,* and, second, that because Dallas required a license to operate an adult entertainment business *at all,* "there is every incentive for the applicant to pursue a license denial through the court," *id.* All this is of course dicta since six Justices agreed that the ordinance must fall because the other two *Freedman* requirements did apply and were not satisfied. However, the three who propounded the more narrow reading of *Freedman* are still on the Court as well as one Justice (Rehnquist) who believed *Freedman* did not apply at all. *See id.* 493 U.S. at 243, 110 S.Ct. at 614 (White, J., concurring in part and dissenting in part).

I do not doubt that the Ordinance satisfies the first requirement of rapid and certain administrative action. The Commissioner must make decisions between 35 and 65 days after filing for first time applications and within 10 days for renewal applications. *See* Chicago Mun.Code 10–28–160(c). The longer period is not an unreasonable start-up delay for a new business and can be accounted for by sound planning, and the shorter period both is brief and more importantly, if timely commenced, does not have to interrupt the operation of an existing newsstand. Further, after *FW/PBS,* it seems likely that *Freedman*'s third requirement—that the licensor bear all court-related burdens—does not apply in this case. Chicago's ordinance is not designed to distinguish between protected and unprotected speech, and, like Dallas' ordinance in *FW/PBS,* it sets out a prerequisite to maintaining whole businesses, thus creating strong incentives to challenge adverse decisions. *See supra* note 4.

B.

While *Freedman*' s first and third requirements are obstacles which the ordinance can clear, the second requirement plainly is not. Simply no provision is made for prompt judicial review. The majority tries to finesse ***1331** this shortcoming by suggesting that the common law writ of *certiorari* stands as an adequate substitute for an explicit system of swift judicial review set out in the licensing law. Professing confusion about the rationale behind the Supreme Court's insistence on prompt review, the majority glosses over both that there is no indication in the record that Illinois' writ of *certiorari* is any quicker a judicial process than other common law actions and that review of administrative findings of fact is highly deferential in Illinois on *certiorari. See Norton v. Nicholson,* 187 Ill.App.3d 1046, 135 Ill.Dec. 485, 491, 543 N.E.2d 1053, 1059 (1989), *appeal denied,* 129 Ill.2d 565, 140 Ill.Dec. 673, 550 N.E.2d 558, *cert. denied,* 496 U.S. 938, 110 S.Ct. 3217, 110 L.Ed.2d 665 (1990). This is clearly not the sort of review *Freedman* envisioned. That Court was explicit about its concerns and holding:

> [B]ecause only a judicial determination in an adversary proceeding assures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid prior restraint.... Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.... [A]n administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Freedman, 380 U.S. at 58–59, 85 S.Ct. at 738–39 (citations omitted). In *FW/PBS,* Justice O'Connor reemphasized that judicial review must be promptly forthcoming "so as to minimize the suppression of the speech in the event of a license denial." *FW/PBS,* 493 U.S. at 229, 110 S.Ct. at 606. This idea that speech delayed is speech denied and the recognition that "the censor's business is to censor," *Freedman,* 380 U.S. at 57, 85 S.Ct. at 738, underlie *Freedman*' s clear demand for a specialized system of prompt judicial review on the merits. And if *Freedman* were to apply to this case, there can be little doubt that the Ordinance must fall.

However, I believe that a close look at the holding and rationale of *Freedman* shows that it does not apply here of its own force. Moreover, uncritically extending *Freedman's* reach to strike down the Ordinance for lack of judicial review, by attributing broad significance to language in later cases that dealt with schemes substantially dissimilar from the one at issue here, would embark us upon a senseless departure from the core logic undergirding the holdings in *Freedman* and its progeny; for neither the purpose nor effect of the Ordinance, unlike the laws challenged in that line of cases, is to involve the licensor in any decisionmaking of constitutional proportion.

Freedman and its immediate offspring involved various administrative attempts to ban obscene materials. Typically, bodies were set up to cull through the contents of expressive materials to decide whether or not to permit dissemination. If an administrative finding of obscenity or the like was made, a license would not issue, and the material could not legally be promulgated in the desired forum. *See Freedman,* 380 U.S. at 521 n. 2, 85 S.Ct. at 736 n. 2 (Board of Censors approving films which are "moral and proper" and disapproving those which are "obscene, or ... tend ... to debase or corrupt moral or incite to crimes"); *Teitel Film Corp. v. Cusack,* 390 U.S. 139, 140, 88 S.Ct. 754, 755, 19 L.Ed.2d 966 (1968) (*per curiam*) (licensing system examining films for obscenity); *Blount v. Rizzi,* 400 U.S. 410, 411–14, 91 S.Ct. 423, 425–27, 27 L.Ed.2d 498 (1971) (postal censorship scheme inspecting mails for obscenity); *United States v. Thirty-seven Photographs,* 402 U.S. 363, 365–66, 91 S.Ct. 1400, 1402–03, 28 L.Ed.2d 822 (1971) (custom agents confiscating imported obscene materials); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 548, 95 S.Ct. 1239, 1241, 43 L.Ed.2d 448 (municipal theater directors rejecting performance of "Hair" believing show was obscene and thus not "in the best interest of the community"); *cf. Vance v. Universal Amusement Co.,* 445 U.S. 308, 316 & n. 14, 100 S.Ct. 1156, 1161 & n. 14 (1980) (*per curiam*) (state law authorizing ***1332** state judges to enter temporary restraining orders and injunctions of indefinite duration against motion pictures without a final adjudication of obscenity).

Several themes emerged from the post-*Freedman* cases with regard to the necessity for procedural safeguards. The first, initially dominant theme permeated *Freedman* itself. There the Court's concerns focused on the institutional tendency of censorship boards to overcensor. "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." *Freedman,* 380 U.S. at 57–58, 85 S.Ct. at 738–39. Prompt judicial review and other procedural requirements were required to ameliorate the unacceptable risk of undue suppression of speech. *See id.* at 58, 85 S.Ct. at 738.[5] This distrust of anything short of a full-blown judicial determination of the protected character of speech carried through the cases that followed[6] and together with the general distaste for unnecessary delay of speech underlaid the continuing insistence on prompt judicial review.

5 Note that the basic problem in *Freedman* was not unbridled discretion in administrative hands, but the inadequacy of administrative processes in general to demarcate the correct line between protected and unprotected speech. The Court did recognize, however, that these two very different shortcomings present a common danger: the risk of oversuppression of speech. *See id.* 380 U.S. at 57, 85 S.Ct. at 738.

6 In *Southeastern Promotions,* the Court acknowledged that independent of an administrative board's ability to correctly categorize speech, it is always necessary that what the administrative body purports to decide constitutes a constitutionally permissible basis for preventing speech. *See Southeastern Promotions,* 420 U.S. at 558, 95 S.Ct. at 1246. But because the Court found inadequate procedural safeguards in the case, it did not reach the issue of whether as a substantive matter a production can be kept off a public stage because it is not deemed "culturally uplifting or healthful." *Id.* at 558, 561, 95 S.Ct. at 1246, 1247.

A second, and somewhat different, theme can be gleaned from the two most recent cases invoking *Freedman.* These cases did not involve licensing laws under which administrative officials were overtly charged with making decisions of constitutional dimension. In *Riley v. National Federation of the Blind of North Carolina,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), the Supreme Court examined a Maryland requirement that professional fundraisers be licensed before conducting charitable solicitations. The law did not purport to pass judgment on the expressive content of anticipated solicitation, but neither did it set a time limit within which the licensor was required to decide upon permit requests. *See id.* at 802, 108 S.Ct. at 2680. Because of

the possibility of indefinite delay, nothing "effectively constrain[ed] the licensor's discretion," and the statute was struck down for lack of procedural safeguards. *Id. FW/PBS* also involved an administrative provision requiring that those who wished to engage in a particular line of business—in this case maintaining adult entertainment establishments—procure a special license. Here too "[the] regulatory scheme allow[ed] indefinite postponement of the issuance of a license." *FW/PBS,* 493 U.S. at 227, 110 S.Ct. at 606. Expanding on what was intimated by the *Riley* Court, Justice O'Connor's opinion[7] pointed out that granting a licensor unlimited time to issue a license and vesting him with broad discretion in making the decision to issue are really two sides of the same coin: "Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion." *Id.* at 227, 110 S.Ct. at 605.

7 She was writing for three Justices. *See supra* note 4.

The common danger posed by licensors not anchored by either standards or time constraints is the opportunity for the content based suppression of speech. *See Lakewood,* 486 U.S. at 763–64, 108 S.Ct. at 2147–48. By manipulating loose standards or by delaying action, a licensor can suppress speech of which he disapproves. This grave risk, *see R.A.V. v. City of St. Paul,* 505 U.S. 377, —— – ——, 112 S.Ct. 2538, 2543–44, 120 L.Ed.2d 305 (1992), was presented by the non-time restricted processes in both *Riley* and *FW/PBS* and could be adequately abated ***1333** only by the availability of prompt judicial review.

I believe that these cases indicate that the judgments we wisely do not trust to administrative officials without the benefit of a watchful judicial eye are those judgments that are made or are likely to be made in the First Amendment plane. *Cf. Chicago Teachers Union v. Hudson,* 475 U.S. 292, 309, 106 S.Ct. at 1077 (1986) (reasoning that *because* "the agency shop itself impinges on the nonunion employees' First Amendment interests," a "reasonably prompt decision by an impartial decisionmaker" as to the appropriateness of mandatory contributions to a collective bargaining agent is necessary). Determinations of what is protected speech and determinations likely to be made according to one person's view of what is favored speech involve those sorts of judgments. As a corollary, then, schemes that abjure such judgments —unlike those in *Riley* and *FW/PBS*—should not be required to include a *Freedman* system of judicial review. *Cf. Hudson,* 475 U.S. at 307 n. 20, 106 S.Ct. at 1076 n. 20 (suggesting that *Freedman* procedures are not necessary in all situations involving First Amendment materials). Clearly included among such nonthreatening schemes are those that only ask *and* allow administrators to make the kind of determinations for which they are especially suited; *e.g.* questions about city aesthetics, traffic flow or City Code violations.

Certainly, the Ordinance is in that category of innocuous schemes which a specially mandated judicial review mechanism would only hamper through inappropriate and inefficient second-guessing of legitimate administrative decisions. As discussed, the Ordinance contains definite and reasonable time constraints as well as standards and a structure which effectively foreclose any serious opportunity for content based decisionmaking. It does not put before the licensor the authority, information or mechanism by which he could make decisions of direct First Amendment concern. Consequently, the Ordinance does not implicate the kinds of risks which should necessitate a special provision for judicial review.

IV.

Furthermore, I agree with the majority's conclusion that the place and manner restrictions that the Ordinance imposes on licensed newsstands fall within the limits of constitutional acceptability. For all of the foregoing reasons, I believe that the Ordinance survives facial attack and should be upheld. I therefore concur in the judgment.

RIPPLE, Circuit Judge, with whom CUDAHY and ILANA DIAMOND ROVNER, Circuit Judges, join concurring.

The significant number of opinions already filed in this case would, under most circumstances, be a substantial disincentive to another contribution by a single member of the court. The eyes of the bench and bar, and certainly those of the Justices of the Supreme Court of the United States who will undoubtedly be asked to review our work, are a fragile national resource. Under the unique circumstances presented here, however, an addition to the dialogue is justified because this case presents a most difficult problem for the court, a problem that, in the

final analysis, can only be resolved by additional guidance from the Supreme Court of the United States. Under such circumstances, we have an obligation to examine thoroughly the matter while it is before us.

We must frankly admit the source of our difficulty. The opinions of the Supreme Court in *FW/PBS v. City of Dallas,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), and *Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988), applied literally, appear to provide an analytical framework for the problem before us. My dissenting colleagues have filed a thorough exposition of this approach and, if the Supreme Court intends that *FW/PBS* and *Lakewood* be read and applied in such a formal fashion, this opinion has much to recommend it. By contrast, the principal opinion apparently finds the approach of these cases to produce an unrealistic result and seeks to avoid their application by recharacterizing the situation presented by this case as devoid of any expressive activity. In order to accomplish this feat, the principal opinion must declare that the placement ***1334** of a newsstand, as opposed to a newsrack, does not implicate expressive activity. I respectfully submit that this approach is untenable. In *Lakewood,* the Supreme Court expressly noted that the regulatory scheme at issue in that case involved "expression or conduct commonly associated with expression: the circulation of newspapers." 486 U.S. at 760, 108 S.Ct. at 2145. This case also involves the circulation of newspapers. The fact that one case involved a small, mechanical stand and the other a larger, manned stand cannot alter the reality that both involve expression. Indeed, the awkwardness of the plurality's attempt at a quick fix to this difficult problem is readily apparent in the opinion's subsequent reliance, despite its declaration that the First Amendment is not implicated, on a traditional First Amendment analysis—time, place, and manner regulation—to resolve ultimately the merits of the case.

In my view, we must frankly face up to the difficulty before us. This case *does* involve a First Amendment interest. Like Judge Flaum, I believe that, if *FW/PBS* and *Lakewood* do not govern our decision, we must be able to discern a principled doctrinal distinction between them and the case before us. A useful key to unlocking this analytical conundrum is, I believe, the established analysis applicable to time, place, or manner restrictions. For a very long time the Supreme Court has had to deal with even-handed attempts to regulate the exercise of expression in public forums. Parade or demonstration permits are the usual context in which these cases have arisen. The Court has evaluated such attempts by governments to bring order to the public forum under what is commonly known as time, place, or manner analysis. *See Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). The Court has "often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternate channels for communication of the information." *Id.* at 293, 104 S.Ct. at 3069; *see also Cox v. New Hampshire,* 312 U.S. 569, 576, 61 S.Ct. 762, 766, 85 L.Ed. 1049 (1941) ("If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place, and manner in relation to the other purposes of the streets."). [1]

[1] The Court also has used time, place, and manner analysis to evaluate restrictions on expression outside the parade and demonstration context. *See, e.g., Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989) (upholding noise ordinance under *Clark* time, place, and manner formulation); *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (stating that zoning ordinance limiting placement of adult theatres was content neutral and valid as a time, place, manner regulation); *Heffron v. International Soc'y for Krishna Consciousness,* 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (holding state fair rule that required all distribution and sale of materials to take place from fixed location was reasonable time, place, and manner restriction); *Virginia Pharmacy Bd. v. Virginia Consumer Council,* 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976) (acknowledging time, place, manner analysis for restrictions "that are justified without reference to the content of speech, that ... serve a significant governmental interest, and that ... leave open ample alternative channels for communication of the information," but holding test inapplicable to ban on advertisement of prescription drug prices which made reference to content).

If we are to apply this approach to the situation before us, we must deal frankly with *FW/PBS* and *Lakewood* which, our dissenting colleagues remind us, appear to have

an easy application to this case. These two cases appear to apply prior restraint analysis to fact situations that are the functional equivalent of those situations that the Court had analyzed traditionally under the time, place, and manner analysis. Specifically, in *Lakewood,* the Court struck down as facially invalid an ordinance requiring a license to place newspaper dispensing machines on the city streets. Similarly, in *FW/PBS,* the Court struck down parts of an ordinance requiring the licensing of adult businesses. In both cases, the Court characterized the restriction imposed by the ordinance as a prior restraint and determined that its failure to comply with the stringent mandate of ***1335** *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), rendered the ordinance unconstitutional.

We must determine why, in *Lakewood* and *FW/PBS,* the Court did not follow its usual approach of treating factual situations such as these as susceptible to time, place, and manner analysis and instead employed prior restraint analysis. What distinguishes the Court's treatment of licensing schemes in these two sets of cases is the presence of unfettered discretion. In both *Cox* and *Clark,* the Court dealt with the administration of an ordinance or regulation which proscribed the activity of the licensing authority. In fact, the *Cox* Court distinguished those cases in which government officials were unrestrained in their power to grant or deny permits. 312 U.S. at 577, 61 S.Ct. at 766. In both *Lakewood* and *FW/PBS,* however, there was unfettered discretion to grant or deny the license—in *Lakewood* pursuant to the very language of the ordinance and in *FW/PBS* pursuant to the way the licensing official could delay the licensing decision, presumably indefinitely. This type of discretion, in the Court's eyes, "gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Lakewood,* 486 U.S. at 759, 108 S.Ct. at 2145. It also presents the possibility of selfcensorship. *Id.* Because of these concerns, the Court in *Lakewood* struck down the ordinance absent "neutral criteria to insure that the licensing decision is not based on the content," *id.* at 760, 108 S.Ct. at 2146, and, in *FW/PBS,* struck down the ordinance absent the procedural guarantees of *Freedman,* 493 U.S. at 228, 110 S.Ct. at 606.

The concerns the Court voiced in both *Lakewood* and *FW/PBS* are not present here. The Chicago ordinance sets forth criteria according to which a permit must be evaluated. Furthermore, there is a time limit within which city officials must respond to the application. In no way does the ordinance place unfettered discretion in the hands of city officials. As a result, there is no risk of either hidden or self censorship.[2] It is the absence of this discretion, and the risks inherent in it, which allows us to evaluate the ordinance according to the guidelines of *Cox, Clark,* and, as the plurality mentions, *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

2 *Lakewood* hints at this distinction. In excepting building permits from the scope of its holding, it noted that its holding did not apply to "laws of general application that are not aimed at conduct commonly associated with expression." *Lakewood,* 486 U.S. at 760–61, 108 S.Ct. at 2145–46. It noted that, although such laws of general application are subject to abuse, the abuse easily can be detected because "the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the licensor's occasional speech-related decision." *Id.* at 761, 108 S.Ct. at 2146. Here, we do not deal with laws of general applicability. As demonstrated in the text, however, we do deal with a statute whose structure and operation render content-based abuse at the hand of governmental officials detectable in a relatively easy manner.

I therefore respectfully submit that time, place, and manner analysis is an appropriate analytical tool for the assessment of this statute and, like my colleagues who have joined the principal opinion, I believe that the ordinance in question can be sustained on this basis. I hasten to add, however, that there is a great need for clarification of standards in this area, and I respectfully suggest that this case is deserving of further review in the Supreme Court of the United States. City officials ought to be able to address matters as basic as the regulation of newsstands on the city streets in a more expeditious manner than afforded by litigation of this sort.

CUMMINGS, Circuit Judge, with whom BAUER, Circuit Judge, and FAIRCHILD, Senior Circuit Judge, join, dissenting.

I agree with the majority that no person has an inherent or fundamental right under the Constitution to build a structure on public property, but my agreement with

Judge Manion's opinion ends there. The issue is not whether a municipality may regulate speech taking place on a public sidewalk—of course it may—but what the city must demonstrate to justify the regulation. ***1336** *Hague v. CIO,* 307 U.S. 496, 515–516, 59 S.Ct. 954, 963–64. I respectfully dissent because the majority's decision is at odds with two recent Supreme Court decisions: *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771, and *FW/PBS v. City of Dallas,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603. In each case, the Court struck down municipal licensing schemes that regulated some form of speech—in *Lakewood* newsracks, and in *FW/PBS* sexually oriented businesses—because the ordinances placed too much power in the hands of a city official. The Court feared that the city official might abuse his authority by discriminating against the speaker based on the content of his speech. In the present case, Chicago also seeks to license First Amendment activity and in so doing has vested a city administrator with the power of content discrimination.

By upholding the Chicago ordinance, the majority ignores or contradicts *Lakewood* and *FW/PBS* in at least three respects. First, Judge Manion contends that Chicago's newsstand ordinance does not implicate the First Amendment at all because it merely regulates conduct, not speech. This is insupportable. *Lakewood* struck down a regulation of newsracks as a prior restraint under the First Amendment, and newsracks and newsstands are as close an analogy as one is likely to find. Not even the majority seems persuaded by this view of the First Amendment, since the opinion goes on to analyze Richard Graff's challenge in constitutional terms. Second, *Lakewood, FW/PBS* and a long series of earlier decisions review licensing schemes directed at First Amendment activity as prior restraints on speech that are valid only if the licensor's power is checked by procedural safeguards. The majority, however, frames Chicago's ordinance as merely a time, place and manner regulation, not a prior restraint, and subjects it to only the most deferential scrutiny. Third, *FW/PBS* requires an ordinance like Chicago's to provide for prompt judicial review of the decision to deny a license—and *FW/PBS* shows that common law certiorari cannot meet this requirement. Yet the majority upholds Chicago's newsstand ordinance (which is silent on the subject of judicial review) on the ground that common law certiorari is available. Today's decision can only sow confusion in First Amendment jurisprudence and weaken the protections it affords for newsstand operators and others as well.

Because *Lakewood* held that erecting newsracks on public property is speech protected under the First Amendment, the majority must explain how newsstands differ from newsracks if it is to hold that the former do not constitute speech. According to the opinion, "newsstands compared to newsracks are much larger, more permanent structures that occupy a significant portion of limited sidewalk space. Thus, building and operating a newsstand is conduct, not speech * * * " (Opinion at p. 1315). The argument, in essence, is that newsstands receive less First Amendment protection than newsracks because they hold more opinions and are bigger. With all due respect, these distinctions cannot remove newsstands from the First Amendment. It is true that the size of newsstands might make them a more inviting subject of municipal regulation, although one large newsstand produces less clutter than several newsracks chained to various street lamps. Yet size itself suggests nothing about whether the selling of newspapers and magazines from a stand is speech or conduct. And since the First Amendment is all about seeing to it that citizens have access to a wide variety of opinions and information, the fact that stands offer more opinions than racks would suggest that they should receive greater, not lesser protection. Cf. *Whitney v. California,* 274 U.S. 357, 377, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (Brandeis, J., concurring); *Associated Press v. United States,* 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013; *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 266, 84 S.Ct. 710, 718, 11 L.Ed.2d 686. Newsracks might be a more convenient target for content discrimination because they sell discrete products, but this fact is also irrelevant in the initial judgment about whether the operation of a newsstand is conduct or speech.

In truth, it is both. Cf. *Texas v. Johnson,* 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342; *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284; ***1337** *Tinker v. Des Moines School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731. As the majority points out, erecting a structure on a sidewalk is a physical act. But Graff did not seek a permit merely to build a stand on the public pavement; he also wanted permission to show up every morning and hawk his newspapers and magazines from its confines, just like the publisher in *Lakewood* who used newsracks to sell papers. There is of course no inherent First Amendment value in the mundane activity of placing

metal boxes on street corners. Nevertheless, the boxes in *Lakewood* received constitutional protection because they made the distribution of First Amendment material easier. Here the city argues that Graff can sell his papers and magazines from the sidewalk without the stand, but this misses the point. The stand is an implement of commerce that facilitates the vendor's free speech. Graff's newsstand gives him greater visibility, a stable location, and the ability to sell a wide variety of publications. The publishers in *Lakewood* could also have sold their papers without newsracks by simply leaving piles of papers on street corners under rocks—with honest purchasers depositing their quarters in small cups. But the Supreme Court has long recognized that the First Amendment protects the expression of ideas as well as ideas themselves, and that distribution is an inseparable part of expression. See, *e.g., Smith v. California,* 361 U.S. 147, 150, 80 S.Ct. 215, 217, 4 L.Ed.2d 205. To hold otherwise would be to elevate form over substance; one might as well say that publishing a newspaper is purely conduct because, after all, putting ink to paper is a physical act. Moreover, the speech the city seeks to regulate here takes place on a traditional public forum: the sidewalk. *Hague,* 307 U.S. at 515–516, 59 S.Ct. at 963–64. I do not suggest that all regulation is inappropriate. But to pretend that the First Amendment does not come into play at all is mistaken. As Justice Roberts said in *Hague,* the right of citizens to use the sidewalk for speech "is not absolute, but relative * * *. But it must not, in the guise of regulation, be abridged or denied." *Id.*

A second fallacy underlies the majority's discussion. It is that newsstand operators such as Graff do not need the protections of the First Amendment because the potential for abuse is small. The majority suggests both that Chicago lacks the means and will to discriminate on the basis of content, and that newsstands, since they are not associated with one particular publication, are not likely targets of such discrimination. This reasoning is undoubtedly behind the majority's failure to recognize that licensing of newsstand operators constitutes a prior restraint. But newsstand operators do have a point of view based on the publications they choose to peddle. Their decisions to sell or not sell pornography, religious literature and political publications are matters of judgment, advocacy and editorial discretion, like booksellers. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; *Smith v. California,* 361 U.S. 147, 150, 80 S.Ct. 215, 217, 4 L.Ed.2d 205. Recall that Graff's suit like *FW/PBS* and *Lakewood* is a facial challenge; thus the harm is necessarily theoretical. As the majority correctly points out, it is unlikely that the mayor in a pique over an unfavorable editorial would order municipal employees to revoke the license of every newsstand selling the *Chicago Tribune* (*i.e.,* every newsstand in the city). But it is hardly a stretch to imagine city officials using the threat, of license renewal to combat the prevalence of pornographic but perfectly legal magazines on the sidewalks. Nor is it difficult to imagine officials, angry over articles in one of the many smaller, less visible weekly publications sold in Chicago, threatening newsstand operators who refuse to drop the offending organ. The majority suggests that even if every newsstand were closed, the *Chicago Tribune* would have other methods of distribution including newsboys, newsracks and in-building newsstands. This is true enough for the *Chicago Tribune,* but not so for the hundreds of other, smaller, off-beat publications that are available only at newsstands. To these publications, newsstands—where the marginal cost of carrying an additional paper or magazine is low—represent the only access to the marketplace; after all, not every publisher can afford to blanket the city with newsracks or persuade bookstores paying premium rents to sell its product.

***1338** Moreover, contrary to the majority's assertions, the ordinance at issue does leave room for city officials to punish newsstands based on content. Though at first blush the statute offers elaborate procedural guidelines for the issuance and denial of permits, these are illusory. For example, Section 10–28–160(a) outlines procedures for hearings and reports by which a City Council committee is to comment on a proposed newsstand license. But these procedures are entirely optional. Under the ordinance the City Council could decide not to comment on newsstand applications at all. In addition, in each case not involving an historical landmark, the Commissioner of Public Works is the sole, unfettered decisionmaker. It is a measure of the leniency of the city's criteria that Graff's application was ultimately denied even though his stand has operated at the same site for approximately seventy years; the ordinance instructs the Commissioner to consider a stand's longevity before granting or denying a permit, but this did not help Graff. Perhaps the most glaring deficiency in the ordinance, however, is the lone reference to subsequent review of the Commissioner's decision. Under Section 10–28–160(c), a vendor whose

application is denied has ten days to request a hearing "at which he will be given an opportunity to prove that the determination of the Commissioner was in error." The ordinance does not define error or specify what proof is required. And the person who reviews the decision by the Commissioner of Public Works is none other than the Commissioner of Public Works! The ordinance merely instructs the Commissioner to issue a permit promptly if he "determines that his previous determination was incorrect." Chicago Mun.Code § 10–28–160(c). Given the lack of genuine means for appeal, judicial or otherwise, and the purely optional nature of these procedures, the city's standards are mere window-dressing rather than a practical check on the power of the administrator.

The city contends that any attempt at content discrimination would fail because permit applications do not contain a list of what publications a particular newsstand sells. This is hardly comforting. City officials, were they so inclined, could stroll over to a stand and examine for themselves what magazines are sold. The ordinance also contains no minimum or maximum limit on the number of permits issued. Thus were the Commissioner seeking to punish a stand for selling a specific publication, he would not face the obstacle of having to find a replacement vendor. Officials also are expressly instructed under the ordinance to give preference to stands selling the most daily newspapers. The majority characterizes this provision as "an obvious attempt at variety, not indoctrination" (Opinion at p. 1321). But why does Chicago feel compelled to state a preference when the marketplace itself will prompt newsstand operators to carry more dailies if, as the majority maintains, they reach the most number of people? This looks like an attempt by officials to curry favor with the most powerful press in the city.

Each of these deficiencies is aggravated by the silence of the ordinance on the subject of judicial review. Here is where the Chicago regulation runs smack into a constitutional wall. The majority tries to steer around the wall by holding that the ordinance is not a prior restraint and subject to merely time, place and manner analysis. The majority's view ensues from its treatment of the Chicago regulation as a zoning ordinance rather than a licensing scheme. Thus the majority analogizes Graff's challenge to *City of Renton v. Playtime Theatres,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29. In that case the Court upheld a municipal ordinance prohibiting adult theaters from setting up shop close to a house, church, park or school. The Court applied a time, place and manner analysis —that is, the justices asked only whether the ordinance was designed to serve a substantial governmental interest and whether it allowed for reasonable alternative avenues of communication. *Id.* at 50, 106 S.Ct. at 930. But the ordinance in *City of Renton* was a zoning restriction— that is, it established rules that applied across the board to all similarly situated enterprises. There was no threat in *City of Renton,* then, that a decisionmaker would discriminate against individual merchants based on the content of what they sold. Under a licensing scheme, by contrast, a city official is vested with the power to make decisions regarding individual ***1339** permit applicants. The Chicago ordinance—where an official grants or denies individual permit applications and then reviews the permits periodically—is analogous not to the ordinance in *City of Renton* but to the ordinances in *FW/PBS* and *Lakewood.*

Chicago's licensing scheme represents a classic prior restraint because it forces news vendors to apply for a permit from local officials before they can sell newspapers and magazines; the city itself assumes the power to regulate speech and puts the authority of denial in the hands of one official. As the Court said in *Lakewood,* "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." 486 U.S. at 759, 108 S.Ct. at 2145. There the Court recognized two critical factors—both present in this case as well—that identified a licensing scheme subject to facial challenge. First, businesses had to apply for licenses that were periodically renewed by the issuer. Second, the licensing system was "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers." *Id.* at 760, 108 S.Ct. at 2145. The Chicago ordinance is also directed specifically at newsstand operators: "It shall be unlawful for any person to erect, locate, construct or maintain any newspaper stand * * * without obtaining a permit * * *." Chicago Mun.Code § 10–28–130.

A licensing scheme that operates as a prior restraint, as opposed to a zoning ordinance, is subject to more intense scrutiny than mere time, place and manner analysis; the regulation must also provide adequate procedural safeguards to prevent city officials from abusing their

discretion. The Supreme Court has held in a long line of cases that authority exercised to administer a licensing scheme must be bounded by clear and precise standards where officials have the power to foreclose speech in public places. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553, 95 S.Ct. 1239, 1243, 43 L.Ed.2d 448; *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150–151, 89 S.Ct. 935, 938–39; *Staub v. City of Baxley,* 355 U.S. 313, 322, 78 S.Ct. 277, 282, 2 L.Ed.2d 302; *Kunz v. New York,* 340 U.S. 290, 293–294, 71 S.Ct. 312, 314–15, 95 L.Ed. 280; *Schneider v. State,* 308 U.S. 147, 161–162, 60 S.Ct. 146, 149–51, 84 L.Ed. 155; *Hague v. CIO,* 307 U.S. 496, 59 S.Ct. 954. A prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland,* 380 U.S. 51, 58, 85 S.Ct. 734, 738, 13 L.Ed.2d 649. An ordinance must contain explicit limits on the decisionmaker's discretion. *Lakewood,* 486 U.S. at 769, 108 S.Ct. at 2150. It is also clear that these limits must exist whether or not a municipal ordinance also happens to pass muster as a time, place and manner restriction. In *FW/PBS,* for example, the plurality did not even reach the time, place and manner question because the procedural safeguards in that ordinance were inadequate. 493 U.S. at 223, 110 S.Ct. at 603.

It is thus both surprising and dismaying that the Court's decision today focuses so heavily on the merits of the Chicago ordinance as a time, place and manner restriction, to the exclusion of its other failings. Given the lack of sufficient procedural safeguards, the majority's discussion of time, place and manner is interesting, but beside the point. Under *FW/PBS,* which by the way follows from a long line of cases setting forth similar standards, a city may only license a business associated with First Amendment freedoms if, first, the licensor is obligated to grant or deny the permit within a specified and reasonable time during which the status quo is maintained and, second, if there is the possibility of prompt judicial review in the event the license is erroneously denied. *Id.* at 228, 110 S.Ct. at 606. A ministerial action denying a license is not presumptively invalid, unlike most prior restraints, and the city is not required to justify its decision in court on every occasion. *Id.* at 229, 110 S.Ct. at 607. However, the vendor denied a license must be able to seek prompt judicial review, and the absence of review is fatal. See *Southeastern Promotions,* 420 U.S. at 561–562, 95 S.Ct. at 1247–48; ***1340** *FW/PBS,* 493 U.S. at 229, 110 S.Ct. at 606;[1] *Freedman,* 380 U.S. at 58, 85 S.Ct. at 738; cf. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 442–443, 77 S.Ct. 1325, 1328–29, 1 L.Ed.2d 1469.

1 The majority suggests that reliance on *FW/PBS* is misplaced because part of Justice O'Connor's opinion was joined by only two other justices. But three other justices concurred in the judgment and criticized Justice O'Connor's position because the procedural safeguards she prescribed were not strong enough!

Even the majority admits that in *Freedman* the Supreme Court has "set out the apparent requirement that an ordinance such as this explicitly provide for prompt judicial review" (Opinion at p. 1324). Since the Chicago ordinance makes no mention of prompt judicial review, and indeed provides no mechanism for it, it must be invalid. According to the majority, however, "it is not clear" why the *Freedman* Court chose to require that licensing schemes make explicit provision for prompt judicial review when common law certiorari is available (Opinion at p. 1324). The majority uses its confusion as an excuse simply to ignore the requirement by stating that the availability of common law certiorari is an adequate form of judicial review when an ordinance is otherwise silent. The majority's conclusion is in direct conflict with *FW/PBS,* 493 U.S. at 229, 110 S.Ct. at 606. In that case, the Supreme Court held that a municipal ordinance—where of course appeal by common law certiorari was also available—was invalid in part because it "fail[ed] to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial. We therefore hold that the failure to provide these essential safeguards renders the ordinance's licensing requirement unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity * * *." 493 U.S. at 229, 110 S.Ct. at 606. In fact, the ordinance struck down in *FW/PBS* for want of judicial review had a more elaborate appeals procedure than Chicago's newsstand ordinance, including the right to take one's case to a permit and license appeal board and to an automatic stay during those proceedings.[2] Clearly, if the ever-present availability of common law certiorari was unable to cure the ordinance in Dallas, it cannot save the Chicago ordinance either. The majority's holding to the contrary puts this Circuit at odds with an explicit and oft-repeated mandate from the Supreme Court.

2 The Dallas ordinance is reprinted as an appendix to the district court's decision in *FW/PBS. Dumas*

> *v. City of Dallas,* 648 F.Supp. 1061, 1084–1085 (N.D.Tex.1986).

Common law certiorari is insufficient because it is much too slow and uncertain as a mechanism for safeguarding speech. It is an unfortunate fact of life in the modern court system that it may take years, and cost a plaintiff a great deal of money, before his complaint receives a hearing on the merits. Contrast that with the traditional vigilance First Amendment jurisprudence has shown toward prior restraints on speech:

> Any system of prior restraint * * * "comes to this Court bearing a heavy presumption against its constitutional validity." * * * The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 316 n. 13, 100 S.Ct. 1156, 1161 n. 13, 63 L.Ed.2d 413 (citations omitted). To force a purveyor of First Amendment materials whose speech has been stifled to wait months, if not years, for a court to pass judgment on his case is anathema to prior restraint law. See *Kingsley Books,* 354 U.S. at 438–443, 77 S.Ct. at 1326–29 (upholding procedural safeguards where statute required obscenity hearing within one day of charge, and judicial decision within two days of hearing). Moreover, under common law certiorari the government is as a general rule ***1341** not enjoined from prohibiting speech while the case is being appealed. Chicago profits by delay while the speaker and audience suffer.

The majority posits the curious argument that Illinois law prevents municipalities from specifying what form of judicial review an administrative decision must receive. Perhaps. But since when does a city gain special dispensation to violate the United States Constitution because a state law contradicts it? Under the Supremacy clause, the state law must give. Nor is it clear that Illinois law does prevent Chicago from specifying a form of prompt judicial review. The cases cited by the majority, *Nowicki v. Evanston Fair Housing Review Board,* 62 Ill.2d 11, 338 N.E.2d 186 (1975), and *Quinlan & Tyson, Inc. v. City of Evanston,* 25 Ill.App.3d 879, 324 N.E.2d 65 (1st Dist.1975), stand mainly for the proposition that Illinois cities lack the power to alter the jurisdiction of state circuit courts. This would not prevent the municipality from specifying an expedited procedure, or petitioning the state legislature for a minor change in the law, or even setting up an administrative review procedure at least to blunt the unfairness of having the Commissioner of Public Works act as the primary reviewer of his own decisions.

The majority's approach to Graff's challenge is confusing indeed. After today's decision, it is unclear who may bring facial challenges, whether licensing schemes directed at First Amendment activity are to be analyzed as prior restraints, whether a licensing restriction aimed purportedly only at the time, place and manner of speech must include procedural safeguards, and whether those safeguards must encompass prompt judicial review. Indeed, it is not even clear after today's decision whether selling newspapers from anything other than a corner box implicates the First Amendment. While regulation of the typical modern newsstand, with its shabby mix of magazines specializing in pornography, tattoos and motorcycles, may not arouse passionate concern about the denial of free speech, newsstands remain an important sector of the newspaper industry, particularly in a big-city market such as Chicago. See amici curiae of *Chicago Tribune, Chicago Sun–Times* and Gannett Satellite Information Network, Inc., publisher of *USA Today.* The city's regulation thus strikes at the core of the First Amendment. I would hold that Chicago may regulate newsstands,[3] but that its burden must be higher than what the Court requires today—a burden that the Chicago ordinance in its present form cannot meet because of the absence of judicial review. Because of the confusion that will inevitably flow from the majority decision, I respectfully dissent.

3 The newsstand in question harmonizes with the appearance of the adjacent former Chicago Public Library, is set unobtrusively at the edge of one side of the building, does not interfere with its maintenance and does not block the sidewalk.

All Citations

9 F.3d 1309, 62 USLW 2366

62 USLW 2366

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88 F.3d 441
United States Court of Appeals,
Seventh Circuit.

NORTH AVENUE NOVELTIES, INCORPORATED, Plaintiff–Appellant,
v.
CITY OF CHICAGO, an Illinois municipal corporation, Defendant–Appellee.

No. 95–2474.
|
Argued May 17, 1996.
|
Decided July 1, 1996.
|
Rehearing Denied July 18, 1996.

Adult bookstore brought action against city challenging constitutionality of "adult use" provisions of city zoning ordinance. The United States District Court for the Northern District of Illinois, Harry D. Leinenweber, J., held that ordinance was constitutional. Bookstore appealed. The Court of Appeals, Cummings, Circuit Judge, held that ordinance offers reasonable opportunity to disseminate speech at issue so as to comply with First Amendment even though ordinance sets aside lesser amount of space for adult uses than other cities.

Affirmed.

West Headnotes (6)

[1] Federal Civil Procedure
Construction against pleader

Complaints are construed favorably to their drafters.

3 Cases that cite this headnote

[2] Zoning and Planning
Validity of regulations

Adult bookstore which was operating in planned manufacturing district and within 1,000 feet from residential district in violation of adult-use provisions of city zoning ordinance had standing to challenge provisions as unconstitutional limitation on total amount of sexually explicit speech. U.S.C.A. Const.Amend. 1; Chicago, Ill. Municipal Code §§ 17–9.3–2(B)(6), 17–9.3–3(A)(4) (1992).

11 Cases that cite this headnote

[3] Constitutional Law
Time, Place, or Manner Restrictions

Time, place, and manner regulations of expression are constitutional so long as they are designed to serve substantial government interest and do not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[4] Constitutional Law
Time, Place, or Manner Restrictions

Government bears burden of justifying restriction which time, place, or manner regulation places on speech. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] Constitutional Law
Zoning and Land Use

Federal Constitution does not mandate that any minimum percentage of land be made available for certain types of speech; what it does require is that zoning schemes which regulate location of speech provide reasonable opportunity to disseminate speech at issue. U.S.C.A. Const.Amend. 1.

14 Cases that cite this headnote

[6] Constitutional Law
Zoning and land use

Zoning and Planning

Sexually-oriented businesses;nudity

City zoning ordinance, which limits location of adult uses to commercial and manufacturing districts and permits uses only if they are more than 1,000 feet from existing adult use, school, place of worship, or residential district, offers reasonable opportunity to disseminate speech at issue so as to comply with First Amendment even though ordinance sets aside lesser amount of space for adult uses than other cities; numerous adult-use sites were available when plaintiff opened adult bookstore business, between 22 and 56 locations were available for new adult uses, city zoning administrator received only about four or five inquiries per year concerning adult-use locations, and no person had attempted to open adult use but was prevented from doing so by ordinance. U.S.C.A. Const.Amend. 1; Chicago, Ill. Municipal Code §§ 17–9.3–2(B)(6), 17–9.3–3(A)(4) (1992).

24 Cases that cite this headnote

Attorneys and Law Firms

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Lawrence Rosenthal, Benna R. Solomon, Anita K. Modak–Truran, Kenneth L. Schmetterer (argued), and Susan S. Sher, Office of Corporation Counsel, Appeals Division, Chicago, IL, for City of Chicago.

Before CUMMINGS, BAUER and KANNE, Circuit Judges.

Opinion

CUMMINGS, Circuit Judge.

Plaintiff North Avenue Novelties, Inc. ("Novelties") seeks a declaratory judgment that the provisions of the Chicago Zoning Ordinance specifying the location of "adult uses" in Chicago are unconstitutional. For the following reasons, we affirm the district court's conclusion that the ordinance is not unconstitutional.

I.

It is helpful to begin by examining the overall scheme of the Chicago Zoning Ordinance. Decades ago, the City of Chicago was divided into Residential Districts, Business Districts, Commercial Districts, and Manufacturing Districts. The ordinance was subsequently amended to create a fifth type: Planned Manufacturing Districts ("PMDs"). Like any zoning scheme, the purpose of these divisions was to ensure conformity in the types of buildings and activities that comprise each area, and to achieve this result the Chicago Municipal Code outlines the specific "permitted uses" and "special uses" for each district. Any use that is not specifically listed is prohibited. See ***443** *Williams v. City of Bloomington,* 108 Ill.App.2d 307, 311, 247 N.E.2d 446, 449 (4th Dist.1969).

In 1992, the City of Chicago amended the Zoning Ordinance to limit the location of "adult uses." It did so in two ways. First, it designated adult uses as "special uses" only for Commercial and Manufacturing Districts.[1] Second, it dictated that adult uses are only permitted if they are located at least 1,000 feet from (a) any existing adult use; (b) any existing school or place of worship; and (c) any district zoned for residential use. *Chicago, Ill. Municipal Code* §§ 17–9.3–2(B)(6) & 17–9.3–3(A)(4) (1992).

1 Originally, adult uses were only "special uses" in General Commercial Districts (C2–1 to C2–5) and Commercial–Manufacturing Districts (C3–1 to C3–7). However, amendments in 1993 and 1994 expanded the area to encompass all Commercial Districts and Manufacturing Districts.

Novelties opened its bookstore in 1992 at 1308 W. North Avenue in Chicago. Given the sexual character of its products, the bookstore easily qualified as an "adult use" under the ordinance. However, the bookstore's location is such that it fails both adult use requirements. It is not within a Commercial or Manufacturing District, but is located in a PMD known as the "Elston Corridor PMD." And, it is only 825 feet from a Residential District. Thus Novelties is precluded from operating the bookstore at its current location.

II.

As in any case, we must initially determine whether this dispute is properly before us. Although the district court concluded that the adult use provisions of the Chicago Zoning Ordinance were not unconstitutional, it initially held that Novelties lacked standing to assert its claim. This conclusion was based upon the fact that commercial and retail businesses—adult or otherwise—are not permitted to operate in PMD areas. See *Chicago, Ill. Municipal Code* §§ 17, Part F, ch. 10.3–1 (permitted uses) & 10.4–1 (special uses).[2] As a result, the court decided that a determination that the specific adult use provisions were unconstitutional would not change Novelties' position because the provisions prohibiting commercial operations in PMDs would still preclude the bookstore's operation.

[2] The regulations for the Elston Corridor PMD are the same as those governing an M1–3 Restricted Manufacturing District. However, despite this fact, adult uses are not permitted anywhere within the PMD because the amendment that allowed adult uses in M1–3 districts specifically stated that it did not apply to PMDs.

We recently addressed a similar situation in *Harp Advertising Illinois v. Village of Chicago Ridge,* Ill., 9 F.3d 1290 (7th Cir.1993). In *Harp*, an advertising company wanted to erect a billboard in Chicago Ridge, Illinois, but the village's zoning code prohibited all off-premises signs. The company brought suit alleging that the zoning code violated the First Amendment. That code was not the only ordinance in play, however, for the village's sign code prohibited all signs with faces exceeding 200 square feet, which the plaintiff's sign did. Because the plaintiff did not contest the validity of the sign ordinance, we held that it had no standing to challenge the zoning ordinance. We noted that one of the essential elements of standing is redressability: a favorable decision of the court must redress the plaintiff's injury. *Id.* at 1292 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559–560, 112 S.Ct. 2130, 2135–36, 119 L.Ed.2d 351). Holding that the zoning ordinance was unconstitutional would not have changed the plaintiff's position because its sign would still have been precluded by another, valid, existing ordinance.

Harp is similar to our case in that another zoning provision also precludes adult bookstores in Novelties' area: The ordinance prohibits all commercial activity, without regard to sexually explicit nature, in PMD areas. Thus the court below was correct that if one were to simply delete the adult use provisions from the ordinance, the PMD provisions would still remain to preclude Novelties' operation. However, the distinguishing factor between our case and *Harp* is that, unlike the plaintiff in *Harp*, Novelties challenges the PMD provisions of the ordinance as well as the adult use provisions, although admittedly it didn't spell this out in its complaint as clearly as it could have.

***444** **[1]** **[2]** Novelties concedes that the City of Chicago is lawfully permitted under its police power to prohibit commercial and retail operations in areas, like the area here, that have been designated only for manufacturing and industrial business. See *Cosmopolitan Nat'l Bank v. County of Cook,* 103 Ill.2d 302, 310, 82 Ill.Dec. 649, 653, 469 N.E.2d 183, 187 (1984). However, Novelties challenges Chicago's overall scheme of limiting adult uses to certain specified areas. In essence, this is a facial attack on the ordinance because Novelties alleges that it unconstitutionally limits the total amount of sexually explicit speech. In making this challenge, Novelties necessarily contends that the PMD provisions contribute to the overall speech restriction. One must only set forth in a complaint a "short and plain statement of the claim" in federal court, Fed.R.Civ.P. 8(a)(2), and "unlike insurance contracts, complaints are construed favorably to their drafters." *Hrubec v. National R.R. Passenger Corp.,* 981 F.2d 962, 963 (7th Cir.1992). It would make little sense to read Novelties' complaint so strictly that it had fully conceded that some provisions of Chicago's Zoning Ordinance could preclude its operation such that it had no case. We conclude that we have jurisdiction to resolve Novelties' claim.

III.

[3] **[4]** Many municipalities have attempted to lessen the "secondary effects" of adult establishments by controlling their locations. The Chicago Zoning Ordinance is typical in this regard: It does not prohibit sexually explicit expression, but merely requires that such expression take place only in specified areas, and only in a non-concentrated manner. Such restrictions are viewed as content-neutral "time, place, and manner regulations," and are constitutional so long as they are "designed to serve a substantial government interest

and do not unreasonably limit alternative avenues of communication." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S.Ct. 925, 930, 89 L.Ed.2d 29. As with any restriction on speech, the government bears the burden of justifying the regulation. See, *e.g.*, *Board of Trustees of State University of New York v. Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028, 3034–35, 106 L.Ed.2d 388; *City of Watseka v. Illinois Pub. Action Council,* 796 F.2d 1547, 1552 (7th Cir.1986), aff'd, 479 U.S. 1048, 107 S.Ct. 919, 93 L.Ed.2d 972.

Novelties does not disagree with the City of Chicago's substantial interest in regulating the location of sexually explicit materials; it contends only that the ordinance fails to leave open sufficient alternate communication avenues. It recognizes that the Supreme Court has previously upheld very similar zoning schemes: One which dispersed adult uses by requiring that they be 1,000 feet from each other, see *Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, and one that concentrated them by requiring that they be 1,000 feet from residential areas, schools, and places of worship, see *Renton*, *supra*. Novelties contends, however, that while both of these schemes may have been constitutional in their respective cities, the Chicago Zoning Ordinance violates the First Amendment by merging the strategies and applying them to Chicago. We agree that the holdings of *Young* and *Renton* cannot merely be "combined" to conclude that the Chicago zoning scheme is necessarily constitutional; instead the scheme, as it is applied to Chicago's geographic area, must be considered.

In *Young*, the plurality focused on the fact that the ordinance at issue did not "deny [distributors of sexually explicit materials] access to the market or [render] the viewing public ... unable to satisfy its appetite for sexually explicit fare." *Young,* 427 U.S. at 62, 96 S.Ct. at 2448. Justice Powell agreed and stated that the "primary concern of the free speech guarantee is that there be full opportunity for expression in all its varied forms to convey a desired message [and] that there be full opportunity for everyone to receive the message." *Id.* at 76, 96 S.Ct. at 2455 (J. Powell, concurring). Thus in analyzing Chicago's scheme, it is necessary to focus both on the ability of producers as a group to provide sexually explicit expression, as well as on the ability of the public as a whole to receive it.

Both parties used experts to evaluate the available locations for adult uses under the ***445** ordinance. Edwin Thomas, a professor of quantitative geography, testified for Novelties, and Thomas Smith, Director of Planning and Development, testified for Chicago. Using the most expansive definition of "school" and "place of worship" possible, Professor Thomas concluded that the zoning ordinance left available roughly 270 acres, in various locations, or less than one percent of the land within Chicago's city limits. Mr. Smith's calculations led to figures for land available for adult use ranging from one percent to three percent. Novelties' entire argument rests upon comparing Thomas' figures with the figures relating to the ordinances at issue in other adult use zoning cases. It notes that the Chicago figures represent smaller acreage than that in Renton, Washington: Chicago would have to set aside for adult uses 5 percent of its land to be equivalent based on total acreage, or make 16,602 acres available to be equivalent based on population. See *Renton, supra.* And to equal the percentages of available land in Los Angeles, Chicago would need to provide roughly 3,637 acres (compared by land) or 5,943 acres (compared by population) for adult uses. See *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir.1993) (affirming grant of preliminary injunction against ordinance's application to adult uses). Because Chicago's ordinance sets aside a lesser amount of space for adult uses than other cities, argues Novelties, its scheme is unconstitutional.

[5] The district court properly dismissed these comparisons by noting that the amount of acreage, standing alone, is largely irrelevant. The constitution does not mandate that any minimum percentage of land be made available for certain types of speech. What it does require is that zoning schemes that regulate the location of speech provide a "reasonable opportunity" to disseminate the speech at issue. *Renton,* 475 U.S. at 52, 106 S.Ct. at 931; *Young,* 427 U.S. at 71, 96 S.Ct. at 2452–53. Requiring a "reasonable opportunity" in each region can, and most likely does, result in vastly different acreage percentages. But those differences in no way imply that the regions with lower percentages are acting unconstitutionally.

[6] With "reasonable opportunity" as the proper focus, the relevant evidence was as follows: There are currently 35 adult uses within Chicago's city limits. Thomas testified that "numerous" adult use sites were available when Novelties opened for business. He further testified that

between 22 and 56 locations (depending upon precisely where adult uses would actually open) are available for new adult uses. The Chicago Zoning Administrator testified that his office receives only about 4 or 5 inquiries per year concerning possible adult use locations. There was no evidence that any person has attempted to open an adult use, but was prevented from doing so by Chicago's ordinance. From this it is clear that the zoning scheme has not lessened the ability of producers of sexually explicit materials to find legal locations throughout Chicago to sell their product. Moreover, there is no indication that the Chicago population is having any difficulty receiving this product. Therefore, the Chicago Zoning Ordinance provides for sufficient alternate channels of communication for sexually explicit materials and is not unconstitutional.

IV.

For the foregoing reasons, the district court's judgment is affirmed.

All Citations

88 F.3d 441

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633 F.2d 27
United States Court of Appeals,
Seventh Circuit.

Charles CHULCHIAN, Plaintiff-Appellant,
v.
CITY OF INDIANAPOLIS et al., Defendants-Appellees.

No. 79-2232.
|
Argued April 28, 1980.
|
Decided Oct. 6, 1980.

Theater owner appealed from an order of the District Court for the Southern District of Indiana, Indianapolis Division, William E. Steckler, Chief Judge, which upheld certain sections of a city's general business licensing ordinance. The Court of Appeals, Bauer, Circuit Judge, held that: (1) city's construction of the ordinance sufficiently clarified the word "permit;" (2) ordinance was not vague; (3) licensing ordinance which required that licensee knowingly permit illegal conduct on the premises in order to be denied a license did not grant boundless discretion to city, which acknowledged that it bore the burden to prove knowledge of the illegal conduct and that it would not deny a license because of an isolated incident; (4) procedures of the license review board comported with due process; (5) theater owner's 1979 license was wrongfully withheld and it was therefore not permissible to base a further denial on the 1979 proceedings; and (6) federal court of appeals could not order city to issue a license because the administrative process was not complete.

Affirmed.

West Headnotes (13)

[1] Federal Courts
Questions Considered

Federal Court of Appeals would consider merits of theater owner's challenge of validity of city's general business licensing ordinance as situation capable of repetition, yet evading review, after license administrator denied theater owner's application for 1980 license for substantially same reasons as those advanced to deny 1979 license.

1 Cases that cite this headnote

[2] Licenses
Constitutionality and Validity of Acts and Ordinances

City's construction of licensing ordinance, which provided that licensee shall not "permit" any sort of illegal conduct or practices to take place, to require knowledge of the illegal conduct by licensee sufficiently clarified word "permit.".

3 Cases that cite this headnote

[3] Licenses
Constitutionality and Validity of Acts and Ordinances

While city ordinance, which prohibited licensee from knowingly allowing any illegal activity granted discretion to controller and license review board to consider quantity and quality of illegal conduct, the ordinance was not vague.

1 Cases that cite this headnote

[4] Constitutional Law
Trade or Business

Businesses which deal in material protected by First Amendment are not immune from all regulations; they can be subject to usual panoply of health, safety, licensing, and zoning regulations, as all other businesses. U.S.C.A.Const. Amend. 1.

2 Cases that cite this headnote

[5] Constitutional Law
Exercise of police power;relationship to governmental interest or public welfare

Constitutional Law
Narrow tailoring

Governmental regulation is justified, despite its incidental impact on speech, if it is within constitutional power of the government, if it furthers important or substantial governmental interest, if governmental interest is unrelated to suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of that interest. U.S.C.A.Const. Amend. 1.

Cases that cite this headnote

[6] **Municipal Corporations**
Public safety and welfare

Municipal Corporations
Public health

City may reasonably desire to protect health, safety, and welfare of patrons of business from illegal conduct and city's interest may properly extend beyond health and safety laws.

Cases that cite this headnote

[7] **Constitutional Law**
Licenses and Permits in General

Licenses
Constitutionality and Validity of Acts and Ordinances

City ordinance which provided that licensee shall not permit any sort of illegal conduct or practices on the premises, under which ordinance licensee is required to have knowledge of the illegal conduct in order to be denied license, furthered legitimate and substantial governmental interest which was unrelated to suppression of free expression for First Amendment purposes. U.S.C.A.Const. Amend. 1.

5 Cases that cite this headnote

[8] **Licenses**
Constitutionality and Validity of Acts and Ordinances

City business licensing ordinance which required that licensee knowingly permit illegal conduct on the premises in order to be denied license did not grant boundless discretion to city, which acknowledged that it bore burden to prove knowledge of the illegal conduct and that it would not deny license because of isolated incident, but, rather, would require pattern of arrests, and was constitutional on its face. U.S.C.A.Const. Amend. 1.

3 Cases that cite this headnote

[9] **Constitutional Law**
Licenses, permits, and certifications in general

Under Indiana law, city business licensing ordinance providing for trial de novo in which city is free to assert new grounds to support its decision comports with due process. U.S.C.A.Const. Amends. 5, 14.

Cases that cite this headnote

[10] **Constitutional Law**
Licenses, permits, and certifications in general

Procedures of city license review board which must follow requirements in general business licensing ordinance comport with due process. U.S.C.A.Const. Amends. 5, 14.

Cases that cite this headnote

[11] **Public Amusement and Entertainment**
Motion pictures in general

Public Amusement and Entertainment
Motion pictures, videos and games

Because 1979 proceedings wherein theater owner sought license were dismissed, city license review board never had opportunity to consider whether arrests other than violations of "obscene conduct" ordinance which had been invalidated justified denial of theater owner's 1979 license; therefore, at least for purposes of 1979 license, city failed to meet its burden to prove that theater owner was not qualified for a license under general business licensing ordinance. U.S.C.A.Const. Amend. 1.

Cases that cite this headnote

[12] Public Amusement and Entertainment
Motion pictures in general

It was not permissible to base denial of theater owner's application for 1980 license on 1979 proceeding wherein city failed to meet its burden to prove that theater owner was not qualified for a license. U.S.C.A.Const. Amend. 1.

Cases that cite this headnote

[13] Public Amusement and Entertainment
Judicial review or intervention

Federal Court of Appeals could not order city to issue license to theater owner because administrative process was not complete.

Cases that cite this headnote

Attorneys and Law Firms

***28** Richard Kammen, Indianapolis, Ind., for plaintiff-appellant.

JoAnn Hoffman, Indianapolis, Ind., for defendants-appellees.

Before FAIRCHILD, Chief Circuit Judge, BAUER, Circuit Judge, and GRANT, Senior District Judge. *

* The Honorable Robert A. Grant, Senior Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

Opinion

BAUER, Circuit Judge.

The issue here is the validity of the general business licensing ordinance of the City of Indianapolis under the First Amendment, as applied to the States by the Fourteenth Amendment. Plaintiff-appellant Charles Chulchian was denied a license to operate a movie theatre under the ordinance. He appeals that part of the district court's order which upheld certain sections of the ordinance. We affirm the district court's order.

I.

The City of Indianapolis, defendant-appellee here, requires the annual licensing of all businesses in the City. [1] Regulations issued ***29** pursuant to the licensing ordinance designate a license administrator as the first level of review. If an application for a license is denied, the applicant is entitled to a hearing before the controller. [2] If the controller also denies the application, the applicant may then appeal to a license review board, whose decision is final. [3]

1 Pertinent sections of the ordinance provide:

Sec. 17-1. Definitions.

As used in this chapter, the following terms shall have the meanings ascribed to them in this section:

Business shall mean and include all kinds of vocations, occupations, professions, enterprises, establishments and all other kinds of activities and matters, together with all devices, vehicles and appurtenances used therein, which are conducted directly or indirectly, on any premises in this city or anywhere else within the jurisdiction of the city.

License shall mean and include the word "permit" and shall mean the privilege of carrying on a specified business within the city; however, both permits and licenses may be granted where specifically authorized under this Code.

Licensee shall include the word "permittee" and shall mean the person to whom a license has been granted and his agents and employees.

Premises shall include all lands, structures, places, the equipment and appurtenances connected with or used in any business, and also any personal property which is either affixed to or is otherwise used in connection with any business.

Public welfare shall mean the prosperity, well-being and convenience of the inhabitants of the city, either as a whole or in some limited group.

Sec. 17-2. Purpose of this chapter.

It is the purpose of this chapter to license certain business activities for the purpose of protecting the public welfare and, in order to achieve this

objective, the provisions of this chapter should be liberally construed to that end.

Sec. 17-25. When license is required.

It shall be unlawful for any person, either directly or indirectly, to conduct or maintain any business or premises for which a license is required by this Code or other ordinance, unless a valid license has been obtained therefor from the controller and kept in effect at all times. No person shall operate or permit the operation for him of any business when his license therefor has been suspended, revoked or expired.

Code of Indianapolis ss 17-1, -2, -25.

2 Code of Indianapolis s 17-31(3)-(5). See notes 7, 8 infra.

3 Code of Indianapolis s 17-68.

Plaintiff-appellant Charles Chulchian operates the Rivoli Theater, a movie theatre in Indianapolis, Indiana. The theatre exhibits sexually explicit films. In years prior to 1979, Chulchian sought and obtained a license from the City. Chulchian's application for his 1979 license, however, was denied first by the license administrator and, after a hearing, by the controller. Both the administrator and the controller stated two reasons for refusing Chulchian's license. Both stated that Chulchian violated section 17-6(4) of the ordinance because there were at least ten arrests on the premises for "illegal, immoral or obscene conduct." Second, they stated that the "residents of the area consider the Rivoli 'to create a nuisance,' " in violation of section 17-6(2).[4] Chulchian then filed this suit, attacking the constitutionality of the licensing ordinance and seeking declaratory and injunctive relief under 42 U.S.C. s 1983. The License Review Board voluntarily stayed its consideration of Chulchian's appeal pending the court's decision.

4 The ordinance provides:

Sec. 17-6. General duties of licensees.

Every licensee, his agents and employees, shall:

(1) Permit inspections of his business and premises by public authorities acting pursuant to law;

(2) Conduct his business and premises in such a manner as not to create a nuisance or any sort of hazard to the public;

(3) Keep the premises clean and free from any sort of rubbish or combustible or explosive material;

(4) Not permit any sort of illegal, immoral or obscene conduct or practices to take place on his premises or in the conduct of his business.

On Chulchian's motion for summary judgment, the district court ruled that certain sections of the licensing ordinance were unconstitutional. Evansville Book Mart, Inc. v. City of Indianapolis, 477 F.Supp. 128 (S.D.Ind.1979). The court first reviewed the arrests constituting the "illegal, immoral or obscene conduct" allegedly permitted by appellant. The arrests were made pursuant to Indianapolis Code s 20-44, the "obscene conduct ordinance."[5] Without ***30** ruling on the ordinance's constitutionality, the court held it invalid under Indiana law as an attempted local law. Id. at 131.

5 Section 20-44, Code of Indianapolis, states:

Any person who utters any obscene or licentious language, where there are persons other than males to be offended thereby; or who applies words to the person of another, or who uses in the presence of another any opprobrious or vile epithet involving moral turpitude or profaning God, Jesus Christ or the Holy Ghost; or who by the use of profane, vile or indecent language, or loud and unusual noises, collects or causes to be collected upon any of the streets, ways or public places of the city, a crowd of three (3) or more persons; or who disturbs the peace and quiet of the city or its inhabitants by loud talking, making unusual noises or by crying any alarm without good cause, or by threatening any person, or challenging him to fight, or menacing him with physical injury or pecuniary loss; or who accosts or approaches any person of the opposite sex unknown to the person, and by word, sign or gesture attempts to speak or become acquainted with such person against his or her will in a public street or in any public place in the city, except in the transaction of legitimate business; or who attempts to entice or procure a person of the opposite or same sex to commit an unlawful act; or who accosts or approaches any person and by word, sign or gesture suggests or invites the doing of an indecent or unnatural act; shall be guilty of an offense.

The court next considered Chulchian's challenges to the two sections on which the controller based denial of his license. The court struck down section 17-31(c)(6) of the ordinance, which permits the controller

> to take into consideration the effect of the proposed business or calling upon surrounding property and upon residents or inhabitants thereof; and in granting, denying or revoking said license the controller may exercise his sound discretion as to whether said license should be granted, transferred, denied or revoked.

Code of Indianapolis s 17-31(c)(6). The court held the section "unconstitutional due to its lack of guiding standards for the licensing officials." 477 F.Supp. at 132-33.

The second section provides that a licensee shall "(n)ot permit any sort of illegal, immoral or obscene conduct or practices to take place on his premises or in the conduct of his business." Code of Indianapolis s 17-6(4). The City conceded, and the court ruled, that the use of the words "immoral" and "obscene" was unconstitutional. 477 F.Supp. at 131. The court upheld the rest of the ordinance "because it is content neutral in that it does not single out adult theatres, and is the expression of an equally legitimate City concern, the City's interest in preventing the licensing of businesses the owners of which permit illegal occurrences." Id. at 132. The court ruled that the City may constitutionally deny a license on the basis of illegal conduct other than prior convictions for showing obscene films. The court stated that it did not "have before it documentation of arrests under valid statutes." Id. The court nevertheless denied appellant's request to order the issuance of a license because of representations by the City that "other arrests for violations of valid state statutes had been made recently at the theatre." Id. The court also upheld as constitutionally sufficient the procedures governing the decision of the controller and the License Review Board. Id. at 130.

Chulchian appeals, first, the district court's order upholding the "permitting illegal conduct" portion of section 17-6(4); second, the court's ruling upholding the constitutionality of the procedures governing the controller's decision of the License Review Board; and third, the court's refusal to order the City to issue him a license.

II.

At the outset, we must resolve the procedural posture of this suit. A license to do business in Indianapolis is effective for only one year. We did not hear oral argument until April 1980, after appellant's 1979 license would have expired. The License Review Board, which had agreed to stay consideration of appellant's appeal until this court rendered its decision, dismissed Chulchian's appeal. The present appeal is not moot, however, because appellant's application for a 1980 license has also been denied.

[1] The License Administrator denied appellant's application on the grounds that his 1979 license had been denied and that under section 17-6(2) the operation of his business constituted a nuisance. These reasons are substantially the same as those advanced to deny appellant's 1979 license. We therefore consider the merits of appellant's case as a situation " 'capable of repetition, yet evading review.' " ***31** Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147 (1973), quoting Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911).

III.

A.

The district court's decision striking the words "obscene" and "immoral" from section 17-6(4) is not challenged by the parties. As construed by the district court, the section now reads that a licensee "shall not permit any sort of illegal conduct or practices to take place ...." Appellant argues that the ordinance is unconstitutionally vague because "permit" is undefined and because the type of illegal conduct which will justify denial is not specified.

[2] Although the ordinance has not been authoritatively construed by the Indiana courts, the body charged with its enforcement, the City, has provided a narrowing construction of the statute. See Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 162-63, 91 S.Ct. 720, 726, 27 L.Ed.2d 749 (1971). The City first concedes that it cannot deny a license based on conduct beyond the licensee's control. The City acknowledges that section 17-6(4) requires knowledge of

the illegal conduct by the licensee. We agree that such a construction sufficiently clarifies "permit."

[3] We also agree that the ordinance has standards for its enforcement. The ordinance prohibits a licensee from knowingly allowing any illegal activity, i. e., any violation of law. It is hornbook law that all persons are deemed to have notice of the law. Other laws which similarly impose liability for violations of law have been upheld from vagueness attacks. See, e. g., United States v. Polizzi, 500 F.2d 856, 874-75 (9th Cir. 1974), cert. denied, 419 U.S. 1121, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975). (Interstate Travel Act.) Compare Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980) (no definition of "adult" in zoning ordinance). While the ordinance grants discretion to the controller and the License Review Board to consider the quantity and quality of illegal conduct, it is not vague.

Chulchian next challenges section 17-6(4) as an impermissible regulation of his movie theatre. Chulchian asserts that the ordinance impermissibly treads on constitutionally protected speech because it authorizes the closing of his theatre if he permits illegal conduct. We disagree.

[4] **[5]** Businesses which deal in material protected by the First Amendment, for example bookstores and theatres, are not immune from all regulation. They can be subject to the usual panoply of health, safety, licensing, and zoning regulations as all other businesses. See Young v. American Mini Theatres, Inc., 427 U.S. 50, 62, 79, 96 S.Ct. 2440, 2448, 2456, 49 L.Ed.2d 310 (Powell, J., concurring) (1976); Genusa v. City of Peoria, 619 F.2d 1203, 1214, 1218 (7th Cir. 1980). Enforcement of the ordinance here, however, implicates First Amendment rights. The four part test of United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), therefore governs our review. Under that test, a governmental regulation is justified, despite its incidental impact on speech,

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377, 88 S.Ct. at 1679. We hold that section 17-6(4), as now construed, meets all these requirements. Consequently, we hold that enforcement of the ordinance by denial of a license is constitutional.

First, the section applies to all businesses in Indianapolis. Although it covers theatres, it does not regulate them based on content. Compare Entertainment Concepts, Inc., III v. Maciejewski; Genusa v. City of Peoria. The Indianapolis provision is typical of many municipal licensing ordinances which hold the operator responsible ***32** for conduct on the premises. See, e. g., James Bakalis & Nickie Bakalis, Inc. v. Simonson, 434 F.2d 515, 519 (D.C.Cir.1970) (liquor license ordinance).

[6] The district court held the ordinance valid as fulfilling "the City's interest in preventing the licensing of businesses the owners of which permit illegal occurrences." 477 F.Supp. at 132. The ordinance serves the dual goal of encouraging business responsibility and protecting patrons who frequent the premises. The City may reasonably desire to protect the health, safety, and welfare of patrons of business from illegal conduct, and the City's interest may properly extend beyond health and safety laws. Ralston v. Ryan, 217 Ind. 482, 29 N.E.2d 202 (1940).

[7] The ordinance furthers this interest. First, the illegal conduct must occur on the premises where it is likely to affect the patrons. Next, because of the knowledge requirement, the ordinance does not penalize a licensee for an isolated incident over which he has no control. The ordinance therefore furthers a legitimate and substantial governmental interest that is unrelated to the suppression of free expression. United States v. O'Brien, 391 U.S. at 377, 88 S.Ct. at 1679.

The ordinance here is distinguishable from an ordinance forbidding licensing of an applicant who has been convicted of certain crimes. See, e. g., Genusa v. City of Peoria, 619 F.2d at 1218-19. Such regulations offend two constitutional values-they first deny a certain class of people the opportunity to exercise First Amendment rights; second, they have not been shown to further any legitimate state interest. Id. A licensee's conduct off the premises may or may not be related to the conduct of his business. In addition, the "criminal convictions" type of statute invariably penalizes the licensee for prior conduct

which again may or may not be related to his present conduct of his business. The Indianapolis ordinance, in contrast, holds a licensee responsible only for present conduct on the premises. [6]

6 We briefly considered a similar ordinance in Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980). The Peoria ordinance required "that no licensee or person associated with a licensee shall permit anything to occur on licensed premises that is in any manner unlawful." Id. at 1221 (footnote omitted). We held, "(o)n the assumption that Peoria does not mean by this provision to enlarge the licensee's vicarious criminal liability beyond traditional bounds, we see no problem with the provision. As we construe it, it is merely a legal redundancy." Id.

> Appellant's counsel interprets Genusa to mean that the ordinance makes the licensee responsible only for conduct sufficient to hold the licensee liable as a conspirator, accessory, or aider and abettor. We do not think that Genusa intended to define the kinds of conduct for which permits can be revoked by the criminality of the licensee. Were that the case, the provision would run smack into the court's holding striking down the "criminal convictions" provision. Id. at 1218-19. Since the City cannot legitimately deny a license to a person convicted of a crime, it hardly seems logical to allow the City to deny a license to persons who conspire with or aid criminals. Under the interpretation pressed by appellant, the provisions would not be a "legal redundancy," id. at 1221, but a legal nullity. We think that Genusa simply meant that the ordinance could not create a new level of vicarious criminal responsibility. We do think that it is more than a "legal redundancy," however, because it creates a potential civil liability.

[8] Finally, the means chosen are limited so as not to trample on protected expression. United States v. O'Brien, 391 U.S. at 377, 88 S.Ct. at 1679. The ordinance, as we have construed it, requires that a licensee knowingly permit illegal conduct. The City conceded that it cannot use obscenity convictions to justify denial of a license. See Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980). The City acknowledged in oral argument that it bears the burden to prove knowledge, so that a licensee does not act at his peril. The City also indicated that it would not deny a license because of an isolated incident, but would require a pattern of arrests. The discretion granted under the ordinance is therefore not boundless. As construed by Judge Steckler and this opinion, the provision is constitutional on its face.

***33** B.

The scope of our review of the procedures contained in the Indianapolis licensing ordinance has been narrowed considerably due to several concessions by the City in its brief and oral argument. The City first concedes that the applicant must show only that he is generally qualified for a license under sections 17-31(c) and 17-29. [7] Cf. Indiana State Bd. of Registration v. Cummings, 387 N.E.2d 491, 494 (Ind.App.1979) (applicant for health facility administrator's license must make prima facie showing of qualifications). Once he has demonstrated that he has the qualifications listed in section 17-29, the burden "shifts to the agency before whom the application is pending (to) present evidence to the contrary." Appellee's Brief at 7. The City further concedes that if the City fails to present sufficient contrary evidence the controller must issue the license. [8]

7 Section 17-31(c)(3) provides in pertinent part:

> (3) Before issuing or renewing a license, the controller may institute an investigation to determine the qualifications of the applicant or the surety, if a bond is required. Each applicant for a license or the renewal of a license shall have the burden of proving that he is qualified and is entitled to a hearing before the controller, or someone appointed by the controller, to present evidence as to his qualifications. Each applicant for a license or a surety on a bond may be required by the controller to submit evidence under oath or in the form of an affidavit.

Section 17-29 provides:

General qualifications of licensees.

> In order to obtain any license required by this Code or other city ordinance, the applicant shall meet the following requirements:
>
> (1) The applicant must be a citizen of the United States or a declarant for citizenship, as prescribed by law;
>
> (2) The applicant must not have had any license to operate a business revoked or suspended because of his conduct of the business or because of his violation of any law or regulation while conducting that business;

(3) The applicant must agree to comply with all laws, provisions of this Code and other ordinances, all regulations promulgated thereunder and the orders and decisions of all public officials which pertain to his business or premises; he shall also agree that his business and premises will not be used for any unlawful or immoral purposes;

(4) Each corporation must be organized and controlled by the laws of the state or be authorized and qualified by its laws to engage in business in the state.

The qualifications required in section 17-29 are of the general type approved by Genusa v. City of Peoria, 619 F.2d at 1215. We presume that the City will read the word "immoral" out of section 17-29(3), as it has conceded its use is unconstitutional in section 17-6(4). Supra at 31.

8 Sections 17-31(c)(4) and (5) provide:

(4) If the controller finds an applicant qualified to receive the license for which he has applied, he shall issue the license with his official seal affixed after all license fees have been paid to him, and shall deposit them in the city general fund. All bonds required to be posted in connection with any license shall be approved by the controller as to the surety thereon, and shall be filed with the controller prior to the issuance of the license.

(5) If any license or permit is refused by the controller, the reasons for the refusal shall be stated in writing and delivered to the applicant upon his request; and, if the applicant remedies the reasons for the refusal and becomes qualified for the license or permit, and such facts are presented to the controller and found by him to be correct, the license or permit shall then be issued.

Counsel for the City stated in oral argument that the language in sections (4) and (5) is mandatory in nature.

[9] Two of appellant's contentions remain after the City's concessions. First, Chulchian argues that the provision for a trial de novo in which the City is free to assert new grounds to support its decision is improper. We disagree.

The Board conducts its proceedings pursuant to the Indiana Administrative Adjudication and Court Review Act. Code of Indianapolis s 17-38(c). Indiana law provides that a hearing by a full administrative board governed by that Act may be de novo. Indiana cases have determined that the procedure comports with due process because the parties are afforded notice and an opportunity to prepare. Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N.E.2d 399, 409 (1940).

[10] Finally, we reject Chulchian's assertion that no standards govern the decision of the License Review Board. The Board must follow the requirements in the ***34** Licensing Ordinance. The Chairman of the License Review Board testified that the Board also refers to applicable Indiana law and court decisions in making a judgment. We conclude that on their face, the procedures of the License Review Board comport with due process. Any charge that the Board has acted arbitrarily or otherwise in violation of appellant's constitutional rights will have to await action by the Board.

C.

[11] **[12]** We must now consider the current status of appellant's application. The proceedings on Chulchian's 1979 application were dismissed and further action on his 1980 application was stayed pending our decision. The License Administrator, however, denied Chulchian's 1980 application on the basis of the denial of his 1979 license. Counsel for the City admitted that it denied Chulchian's 1979 license because of violations of the obscene conduct ordinance struck down by Judge Steckler. Contrary to the City's assertion in brief, the judge also invalidated the finding that Chulchian's business was a nuisance since the controller based his determination on community opinion. 477 F.Supp. at 132. Judge Steckler was assured that there were other valid arrests sufficient to justify denial. But because the 1979 proceedings were dismissed, the License Review Board never had the opportunity to consider whether other arrests justified denial of Chulchian's 1979 license. We must assume therefore that at least for purposes of the 1979 license, the City failed to meet its burden that Chulchian was not qualified for a license. The 1979 license was therefore wrongfully withheld, and it is not permissible to base a further denial on the 1979 proceedings.

[13] We cannot order the City to issue a license because the administrative process is not complete. See Indiana State Bd. of Registration v. Cummings, 387 N.E.2d at 497. We note, however, that the License Administrator also denied Chulchian's 1980 application because he "conducted (his) business and premises in such a manner

as to create a nuisance to the public" in violation of section 17-6(2). While we have grave reservations about its validity on vagueness and overbreadth grounds, see generally, Rendleman, Civilizing Pornography: The Case For an Exclusive Obscenity Nuisance Statute, 44 U.Chi.L.Rev. 509 (1977), the lower court did not rule on the section's constitutionality. We therefore do not consider it here.

We affirm the order of the district court.

All Citations

633 F.2d 27

936 F.Supp. 1479
United States District Court,
E.D. Wisconsin.

TEE & BEE, INC., Plaintiff,
v.
CITY OF WEST ALLIS, Defendant.

No. 92–CV–1299.
|
Aug. 19, 1996.

Adult bookstore brought action alleging that municipal ordinance regulating adult-oriented establishments violated First Amendment. On municipality's motion for summary judgment, the District Court, Randa, J., held that: (1) bookstore had standing to bring action, even though it had brought state court suit seeking declaration that it no longer qualified as "adult business" under ordinance, and (2) ordinance restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of adult-oriented establishments.

Motion granted.

West Headnotes (29)

[1] Municipal Corporations
Proceedings to determine validity of ordinances

To have standing to challenge municipal ordinance as facially unconstitutional, adult bookstore was required to demonstrate concrete and specific facts indicating both that challenged ordinance injured bookstore, and that court intervention would benefit bookstore in tangible way.

2 Cases that cite this headnote

[2] Municipal Corporations
Proceedings to determine validity of ordinances

Adult bookstore's standing to challenge constitutionality of municipal ordinance was required to be evaluated separately with respect to each contested provision of ordinance.

Cases that cite this headnote

[3] Municipal Corporations
Proceedings to determine validity of ordinances

Adult bookstore had standing in federal action to challenge constitutionality of municipal ordinance restricting adult businesses, even though bookstore had brought state court suit seeking declaration that bookstore no longer qualified as "adult business" under ordinance; bookstore reorganized its business in response to municipality's denial of its license application, application was denied based on ordinance disputed in federal action, and bookstore intended to return to its former status should ordinance be invalidated. West Allis, Wis., Revised Municipal Code § 9.28.

Cases that cite this headnote

[4] Constitutional Law
Sexually Oriented Businesses;Adult Businesses or Entertainment

First Amendment does not immunize adult-oriented businesses from regulations designed to protect public health, safety, and general welfare. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[5] Constitutional Law
Time, Place, or Manner Restrictions

Municipality may regulate activities protected by First Amendment provided that: (1) intended activity lies within governmental body's sphere of regulatory power; (2) regulation furthers important or substantial governmental interest; (3) governmental interest is unrelated to suppressing content of regulated material; and (4) incidental restriction on alleged First Amendment freedoms is no greater than essential

to furtherance of that interest. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] **Constitutional Law**
Sexually Oriented Businesses;Adult Businesses or Entertainment
Licenses
Municipal corporations

Municipality acted within scope of its police power in enacting ordinance restricting First Amendment activity of adult-oriented establishments. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28.

Cases that cite this headnote

[7] **Constitutional Law**
Secondary effects

To establish presence of substantial government interests in enacting ordinance regulating First Amendment activity of adult businesses, municipality was required only to demonstrate that, in enacting ordinance, it relied upon evidence that was reasonably believed to be relevant to problem that municipality addressed. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28.

1 Cases that cite this headnote

[8] **Constitutional Law**
Secondary effects
Licenses
Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance restricting First Amendment activity of adult businesses was to further substantial government interests of preventing crime, promoting safe and sanitary conditions, and protecting against urban blight and decreased property values. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28.

Cases that cite this headnote

[9] **Constitutional Law**
Content neutrality
Constitutional Law
Secondary effects
Licenses
Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance restricting First Amendment activity of adult businesses was "content-neutral" time, place, and manner restriction, as opposed to "content-based" prior restraint of speech; ordinance's preamble, read together with minutes of city council meeting, indicated that purpose of ordinance was to combat deleterious secondary effects of adult-oriented establishments. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28.

Cases that cite this headnote

[10] **Constitutional Law**
Reasonableness

Reasonable regulations of time, place, and manner of protected speech are permitted by First Amendment, where those regulations are necessary to further significant government interests. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[11] **Constitutional Law**
Secondary effects
Licenses
Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provisions, requiring adult-oriented establishments and their employees to be licensed, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of such

establishments; requirements were reasonably well-tailored to prevent spread of Acquired Immune Deficiency Syndrome (AIDS), prevent crime, and maintain property values. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(2)(a), (5).

1 Cases that cite this headnote

[12] Constitutional Law

Licenses and permits in general

Requiring adult-oriented establishment to secure license, and its employees to secure permits, does not violate First Amendment provided such regulations serve substantial governmental purposes and are not unduly burdensome. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] Constitutional Law

Licenses and Permits in General

Licensing is considered a valid means by which to ensure adherence to ordinance provisions, for purposes of determining whether incidental restriction on alleged First Amendment freedoms is no greater than essential to furtherance of municipality's substantial governmental interest. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[14] Constitutional Law

Secondary effects

Licenses

Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provisions, requiring disclosure of information concerning applicants for operators' and employees' licenses in connection with adult-oriented establishments, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of such establishments; municipality cited findings that criminal activity increases in areas surrounding such establishments, and that some of that activity is linked to operators and employees of such establishments. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(4)(a), (6)(a, b).

Cases that cite this headnote

[15] Constitutional Law

Secondary effects

Licenses

Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provision, requiring disclosure of information concerning shareholders holding more than ten-percent share of adult-oriented establishments, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of such establishments; ten percent interest requirement ensured that stockholder possessing mere de minimus interest would not be subjected to disclosure requirement. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(4)(a).

2 Cases that cite this headnote

[16] Constitutional Law

Secondary effects

Licenses

Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provision, requiring that applicants for licenses to operate adult-oriented establishments must not have violated ordinance restricting such establishments within past five years, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of such establishments; requirement was reasonable means by which to ensure that those licensed would respect and abide by provisions regulating such establishments. U.S.C.A.

Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28, 9.28(4)(a)(2)(ii).

1 Cases that cite this headnote

[17] **Constitutional Law**
Secondary effects
Licenses
Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provision, requiring that applicants for licenses to operate adult-oriented establishments must not have been convicted of offense involving moral turpitude, prostitution, obscenity, or other sex-related offense within past five years, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of such establishments; provision referred to offenses only of a sexual nature, and denied license only when applicant had recently participated in type of criminal activity which ordinance sought to impede. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(4)(a)(2)(iii).

4 Cases that cite this headnote

[18] **Constitutional Law**
First Amendment in General

Persons with prior criminal records are not First Amendment outcasts. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[19] **Federal Courts**
Anticipating or predicting state decision

When no reported state court decisions construing language of municipal statute exist, federal court must examine all data before it and decide the matter according to how it believes the highest state court would decide.

Cases that cite this headnote

[20] **Constitutional Law**
Secondary effects
Licenses
Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provision, requiring that adult-oriented establishments pay fees for licenses and employee permits, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of such establishments; fees were reasonably related to administrative and enforcement costs of regulatory process. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(8)(a, b).

Cases that cite this headnote

[21] **Constitutional Law**
Secondary effects
Licenses
Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provision, requiring that permits issued to employee of adult-oriented establishments be carried on employee's person and displayed upon request to authorized individuals, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of such establishments; requirement was rational means by which municipality could enforce ordinance and ensure that only authorized employees were working. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(9)(b).

Cases that cite this headnote

[22] **Constitutional Law**
Licenses and permits in general
Licenses

Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provision, requiring that police department file information about operators and employees of adult-oriented establishments in connection with applications to renew establishments' licenses, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in preventing crime and preserving quality of neighboring communities; provision was means of gathering information about renewal applicants such that educated decision could be made concerning eligibility for continued operation or employment. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(10)(c, f).

1 Cases that cite this headnote

[23] **Constitutional Law**

Secondary effects

Licenses

Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provision, requiring that permits issued to employees of adult-oriented establishments were not transferable, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of such establishments; allowing permits to be transferable would defeat purpose of permit requirement, i.e., to ensure that only employees without convictions for crimes of sexual nature were working in establishments. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(11)(e).

Cases that cite this headnote

[24] **Constitutional Law**

Secondary effects

Licenses

Constitutionality and Validity of Acts and Ordinances

License revocation provisions of municipality's ordinance restricting adult-oriented establishments restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of such establishments; District Court had decided that denial of license to certain individuals was well-tailored to ordinance's stated purpose of preventing sex-related crimes, and it followed that commission of such crimes after issuance of license would be grounds for revocation of license. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(12)(a)(2, 4, 6, 7).

Cases that cite this headnote

[25] **Constitutional Law**

Secondary effects

Licenses

Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provision, restricting hours of operation of adult-oriented establishments, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of such establishments; restricted hours of operation fell within period of time when crime was more likely to occur. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(14)(a).

2 Cases that cite this headnote

[26] **Constitutional Law**

Sexually Oriented Businesses;Adult Businesses or Entertainment

Licenses

Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provision, requiring that adult-oriented establishments be open to inspection at reasonable times, restricted First Amendment freedoms to no greater extent than was essential to further municipality's

interests in preventing criminal activity from occurring on premises of establishments and in preventing ordinance violations. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(14)(b), (21).

Cases that cite this headnote

[27] **Constitutional Law**
Physical layout and staging requirements
Licenses
Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provision, requiring that booths for private viewing of adult-oriented entertainment have one side open so that person occupying booth may be seen from aisle, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of adult-oriented establishments. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(15)(b).

Cases that cite this headnote

[28] **Constitutional Law**
Secondary effects
Licenses
Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provision, requiring adult-oriented establishments to maintain register listing personal information about employees, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of such establishments; municipality had substantial need to notify license holders of violations committed by their employees, and register provided tracking device to verify that only authorized employees were working. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(16)(a).

Cases that cite this headnote

[29] **Constitutional Law**
Sexually Oriented Businesses;Adult Businesses or Entertainment
Licenses
Constitutionality and Validity of Acts and Ordinances

Municipality's ordinance provision, requiring adult-oriented establishments to post list of titles and prices of all entertainment provided at establishment, and to present list to authorized persons upon request, restricted First Amendment freedoms to no greater extent than was essential to further municipality's interests in combating deleterious secondary effects of such establishments; list provided means by which authorized persons might inspect for obscenity violations. U.S.C.A. Const.Amend. 1; West Allis, Wis., Revised Municipal Code § 9.28(16)(d).

Cases that cite this headnote

Attorneys and Law Firms

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Scott E. Post, West Allis City Attorney's Office, West Allis, WI, for Defendant.

DECISION AND ORDER

RANDA, District Judge.

This matter comes before the Court on defendant City of West Allis' ("the City") motion for summary judgment. For the following reasons, the City's motion is granted and the case dismissed.

FACTS

In 1990 and 1991, the West Allis Common Council ("the Council") considered Ordinance No. 5835, which, among other things, created section 9.28 of the West Allis Revised

Municipal Code. Section 9.28 was designed to regulate the operation of adult businesses in the City. The ordinance was first introduced on July 17, 1990 and was sent to the Council's License and Health Committee, where it remained until August 15, 1991. During that time, the ordinance was sent to various staff members for analysis, discussion, and revision.

The ordinance set forth the Council's factual findings and listed the studies the Council relied upon in finding the ordinance necessary. Based on those findings, the Council deemed the ordinance necessary to prevent the concentration of adult businesses and to prevent such businesses from locating near certain other uses. The Council also found it necessary to regulate and license each individual adult business in order to minimize the negative secondary effects associated with adult businesses. On August 20, 1991, the Council ("the Council") formally passed Ordinance No. 5835.

In October and November of 1991, the License and Health Committee considered amending § 9.28. On November 18, 1991, the Council passed Ordinance No. 5867 amending § 9.28. The amended ordinance defined "adult bookstore" as follows:

> "Adult bookstore" means an establishment having a substantial portion of its stock in trade, for sale, rent, lease, inspection or viewing, books, films, video cassettes, magazines or other periodicals, which are distinguished or characterized by their emphasis on matters depicting, describing or relating to "specified anatomical areas," as defined below, and in conjunction therewith have facilities for the presentation of "adult entertainment," as defined below, including adult oriented films, movies, or live performances for observation by patrons therein.

The effect of this change was to classify as an "adult bookstore" only those businesses that offered the viewing of certain materials on the business premises.

On or about May 20, 1992, Tee and Bee, Inc. ("T & B") opened Super Video and Variety ("Super Video") at 9800 West Greenfield Avenue. Super Video engaged in the sale of sexually explicit books, magazines, videotapes, and other materials. Because Super Video had no facilities for the presentation of adult materials, it did not fall within the definition of "adult bookstore." This did not alleviate the public's concerns, however. In response to public anxiety concerning Super Video, the License and Health Committee considered another amendment to § 9.28. Committee meetings were held on the matter on July 16, August 13, and October 15, 1992. In addition, a public hearing was held on September 22, 1992, at which time City staff members, along with members of the public, provided additional information regarding ***1484** adult businesses in general and Super Video in particular.

On October 20, 1992, the Council passed the proposed amendment to § 9.28 which, among other things, redefined the phrase "adult bookstore":

> "Adult bookstore" means an establishment which has a facility or facilities, including but not limited to booths, cubicles, rooms, or stalls, for the presentation of "adult entertainment" as defined below, including adult oriented films, movies or live performances for observation by patrons therein, or which, as part of its regular and substantial course of conduct, offers for sale, rent, trade, lease, inspection or viewing books, films, video cassettes, magazines or other periodicals, which are distinguished or characterized by their emphasis on matters depicting, describing or relating to "specified anatomical areas" or "specified sexual activities" as defined below.

In November of 1992, the City Clerk sent out a questionnaire to all of the City's known bookstores and video stores. T & B's response was to file this lawsuit on December 4, 1992, seeking a preliminary and permanent injunction enjoining enforcement of amended § 9.28. Initially, a magistrate judge issued a recommendation granting the preliminary injunction. However, on September 2, 1994, the Court declined to adopt the magistrate's recommendation, denied plaintiff's

request for a preliminary injunction, and dissolved whatever preliminary injunction may have been in effect.

On September 15, 1994, T & B sought a license to operate an adult bookstore. The Council denied the plaintiff's application. In denying the application, the Council relied on provisions of amended § 9.28 which are disputed in this action. In response to the Council's denial, T & B reorganized its business so that less than fifty percent of its stock-in-trade consisted of sexually explicit material. As a result, T & B's business is no longer classified as an adult-oriented business.

LAW

I. SUMMARY JUDGMENT

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.Pro. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Summary judgment is particularly appropriate in a case challenging the facial constitutionality of a statute. *Felix v. Young,* 536 F.2d 1126, 1130, n. 7 (6th Cir.1976). The Court finds that no genuine issues of material fact are present in the record before it.

II. STANDING

[1] **[2]** T & B's suit against the City presents a facial challenge to the constitutionality of § 9.28. T & B must have standing to bring such a challenge. To have standing, T & B must demonstrate concrete and specific facts indicating both that the challenged ordinance injured T & B and that court intervention would benefit T & B in a tangible way. *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). T & B's standing to challenge the ordinance's constitutionality must be evaluated separately with respect to each contested provision of the ordinance. *Genusa v. City of Peoria,* 619 F.2d 1203, 1209 (7th Cir.1980). The magistrate judge concluded that T & B had standing to challenge the following provisions of § 9.28: (1) the license disability and disclosure provisions for applicants, shareholders, officers, and directors; (2) the employee permit and disclosure provisions; (3) the license revocation provisions; (4) the hours-of-operation provision; (5) the special inspection provision; (6) the employee register provision; (7) the vicarious liability provision; (8) the entertainment listing provision; and (9) the employee permit procedural provisions. This Court previously affirmed and adopted the magistrate's ruling on standing.

[3] The City argues that T & B no longer has standing to challenge § 9.28 because T & B brought suit in state court seeking a declaration that Super Video no longer qualifies as an "adult business". Lacking such status, ***1485** Super Video would not be subject to the provisions of § 9.28. The Court does not believe the state court action affects T & B's standing to challenge the ordinance. T & B reorganized its business solely in response to the Council's denial of its license application to operate an adult bookstore. The Council denied the application based on provisions of the ordinance disputed in this action. [1] Moreover, it is undisputed that T & B will return Super Video to its former status as an adult bookstore should the ordinance be invalidated. Therefore, T & B has standing to contest the provisions of the ordinance.

1 The reasons for the denial were as follows: (1) Conviction of T & B for Possession of Drug Paraphernalia with Intent to Deliver, an offense involving moral turpitude under § 9.28(4)(a)(2)(iii); (2) Conviction of T & B for Exposing a Minor to Sexually Explicit Material, a violation of §§ 9.28(4)(a)(2)(ii) & 9.28(4)(a)(2)(iii); and (3) Failure of T & B to cooperate with the licensing process, a violation of § 9.28(e).

III. CONSTITUTIONALITY

[4] **[5]** **[6]** **[7]** **[8]** **[9]** **[10]** The First Amendment does not immunize adult-oriented businesses from regulations designed to protect public health, safety, and general welfare. *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 62, 96 S.Ct. 2440, 2448, 49 L.Ed.2d 310 (1976) (Powell, J. concurring); *Genusa,* 619 F.2d at 1214; *Chulchian v. City of Indianapolis,* 633 F.2d 27, 31 (7th Cir.1980). A municipality may regulate activities protected by the First Amendment provided the following four-part test is met: (1) the intended activity lies within the governmental body's sphere of regulatory power; (2) the regulation "furthers an important or substantial governmental interest"; (3) the governmental interest is unrelated to suppressing the content of the regulated material; and (4) "the incidental restriction on alleged

First Amendment freedoms is no greater than essential to the furtherance of that interest." *United States v. O'Brien,* 391 U.S. 367, 376–77, 88 S.Ct. 1673, 1678–79, 20 L.Ed.2d 672 (1968). A facial examination of § 9.28 indicates that all four parts of the *O'Brien* test are satisfied. First, the City clearly acted within the scope of its police power in enacting an ordinance relating to the regulation and licensing of adult-oriented establishments. *See generally Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Genusa v. City of Peoria,* 619 F.2d 1203 (7th Cir.1980); *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); *TK's Video, Inc. v. Denton County,* 24 F.3d 705 (5th Cir.1994). Second, in order to establish the presence of substantial government interests, the City need only demonstrate that, in enacting its ordinance, it relied upon evidence that "is reasonably believed to be relevant to the problem that the city addresses." *Renton,* 475 U.S. at 51–52, 106 S.Ct. at 931. The record indicates that the purpose of the City's ordinance was to further a number of substantial governmental interests, including preventing crime, promoting safe and sanitary conditions, and protecting against urban blight and decreased property values.[2] Third, the preamble of the ordinance, read together with the minutes of the Council's September 22, 1992 meeting, indicate that the purpose of enacting § 9.28 was to combat the deleterious "secondary effects" of adult-oriented establishments.[3] Thus, the contested ordinance is a "content-neutral" time, place, and manner restriction as opposed to a ***1486** "content-based" prior restraint of speech.[4] "Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment." *Young,* 427 U.S. at 63, n. 18, 96 S.Ct. at 2449, n. 18. The remaining test is whether the restrictions imposed by the ordinance are "no greater than essential" for furtherance of the government interest. While the Court finds this element to be satisfied as well, the analysis is more involved, as the extent of the imposed burden must be evaluated with respect to each of the ordinance's contested provisions.

2 The substantial government interests furthered by the separate provisions of the ordinance will be discussed in more detail *infra.*

3 In making this determination, the Council relied on findings from the locales of Indianapolis, Indiana; Austin, Texas; Chattanooga, Tennessee; Newport News, Virginia; Marion County, Indiana; Detroit, Michigan; and Seattle, Washington. These studies found that adult businesses are predisposed to the creation of unsafe and unsanitary conditions; that operators and employees of adult business tend to participate in various offenses—particularly sex-related offenses—on the premises of such establishments; that adult businesses create a substantial law enforcement problem; and that the operational characteristics of adult businesses have a deleterious effect on surrounding areas, resulting in neighborhood blight and reduced property values, especially when such businesses are concentrated in one area.

4 The United States Supreme Court holds that "at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content neutral' time, place, and manner regulations." *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 49, 106 S.Ct. 925, 929–30, 89 L.Ed.2d 29 (1986) (footnote omitted).

A. *Genusa*

In this regard, T & B generally contends that all non-locational provisions of the City's ordinance are unconstitutional, relying on the invalidation of similar requirements in the case of *Genusa v. City of Peoria.* In *Genusa,* the 7th Circuit struck down as unconstitutional several licensing and permit provisions similar and/or identical to those involved in the case at bar. *Genusa,* 619 F.2d at 1221. However, as the Court indicated in its prior decision on the injunction issue, *Genusa* is distinguishable from the case at bar in two important respects.

First, the *Genusa* ordinance had as its only express purpose the "scattering" of adult establishments in order to avoid the undesirable consequences associated with their concentration in a single area. *Id.* at 1208–09. The 7th Circuit thus struck down various inspection, investigation, disclosure, and employee permit requirements, along with various standards for the issuance and revocation of licenses, because they bore no rational relation to the express goal of "inverse or scatter zoning". *Id.* at 1212–22. In other words, the various licensing and permit requirements were "unrelated to the

City's stated goal of preventing adult businesses from congregating in one location." *TK's Video,* 24 F.3d at 710. Here, the purposes of the ordinance exceed that of mere "scatter zoning". A primary purpose of the ordinance is to mitigate the deleterious secondary effects associated with adult businesses. For instance, one important purpose of the ordinance is to prevent crime—specifically, crimes of a sexual nature—that are often associated with both the patrons and the operators of adult establishments. Another purpose is to prevent the unsanitary and often unsafe conditions of such businesses. Unlike the ordinance in *Genusa,* these purposes are directed at "curtailing side effects not simply of clusters of adult businesses, but of each adult business." *TK's Video,* 24 F.3d at 710. In fact, the 5th Circuit relied upon this important distinction to uphold the very type of regulations involved in the case at bar and struck down in *Genusa. Id.*

Second, the *Genusa* court noted that the record before it was devoid of any evidence that adult establishments presented other types of dangers posited by the City but not mentioned in the ordinance's preamble. *Genusa,* 619 F.2d at 1214–20. Here, the ordinance references factual studies and experiences from other cities supporting such a connection. Evidence gleaned from such studies is a sufficient basis for local regulation. Courts have repeatedly held that local municipalities need not conduct their own studies on areas of important local concern, but instead may rely on studies performed in other locales. *City of Renton,* 475 U.S. at 51–52, 106 S.Ct. at 931; *Suburban Video, Inc. v. City of Delafield,* 694 F.Supp. 585, 590 (E.D.Wis.1988). The record is replete with information showing that the City determined it necessary to provide for the licensing and regulation of adult-oriented businesses in order to combat the secondary effects of such facilities in the surrounding community. For these reasons, the Court finds that the 7th Circuit holding in *Genusa* does not compel the invalidation of all non-locational regulatory provisions. Rather, the *Genusa* court invalidated several non-locational ordinance provisions because the city failed to prove that the non-locational regulations ***1487** were designed to further a substantial government interest unrelated to the content of the regulated material. *Genusa,* 619 F.2d at 1219.

B. Licensing and Permit Requirements

1. The license and permit.

[11] **[12]** The ordinance requires that a license be obtained before an adult-oriented establishment may be operated in the City. § 9.28(2)(a). The ordinance further mandates that all employees in adult businesses must have permits. § 9.28(5). Requiring an adult-oriented establishment to secure a license and its employees to secure permits is constitutional provided such regulations serve substantial governmental purposes and are not unduly burdensome. Both the license and the permit requirements in the ordinance satisfy these requirements. The City cited numerous purposes for implementing the ordinance, including deterring the spread of AIDS, preventing crime, and maintaining property values. The findings further illustrate that "operators and employees of said establishments have been found to have participated in various offenses, including, but not limited to, sex-related offenses, at such establishments," and that licensing adult businesses and their employees is necessary "to minimize the impact of ... secondary effects known to be associated with said adult-oriented establishments...." The Court finds that these purposes constitute substantial government interests under *Renton.*

[13] The City also has an obvious and substantial interest in preventing the violation of the ordinance itself. Licensing is considered a valid means by which to ensure adherence to ordinance provisions. *See Genusa,* 619 F.2d at 1212–13. Furthermore, a licensing scheme similar to that presented by the West Allis ordinance was upheld in *T.K.'s Video:*

> The requirement that all owners of a sexually oriented business be licensed is reasonable. It serves as a means to enhance the likelihood that owners of the business will comply with the order's regulations and will not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation. The requirement that clerks and employees of a sexually oriented business be licensed is also reasonable. This requirement bears a reasonable relationship to the stated purpose of the

> order by preventing the spread of sexually transmitted diseases and illegal sexual activity. Both requirements are narrowly tailored and impose no greater restriction on First Amendment freedoms than is necessary to further the county's substantial interest.

T.K's Video, Inc. v. Denton County, 830 F.Supp. 335, 343 (E.D.Tex.1993), *vac'd-in-part on other grounds,* 24 F.3d 705 (5th Cir.1994). The Court agrees and finds that the licensing and permit requirements involved in this case are reasonably well-tailored toward furthering the City's substantial interest in preventing the specific harms articulated in the ordinance. The general license and permit requirements of the ordinance are therefore constitutional.

2. Disclosure requirements.

[14] In order to obtain an operating license, the applicant must provide the City with information including: (1) the applicant's name, aliases, address, and date of birth; (2) similar information for any directors, officers, and shareholders holding more than a ten percent stock interest; (3) the nature of the proposed adult business and expected address; and (4) whether the named individuals currently operate or previously operated another adult-oriented business. § 9.28(4)(a). In order to obtain an employee permit, the employee must provide the following data: (1) name, aliases, age, and address; and (2) whether he or she has ever had such a license or permit revoked or suspended. § 9.28(6)(a) & (b). T & B contends that this portion of the ordinance should be invalidated because the City did not establish a relationship between the mandated disclosure of information and a substantial government interest. This assertion is without merit. In the preamble of its ordinance, the City cites findings indicating that criminal activity, and particularly criminal activity of a sexual nature, increases in the areas surrounding adult businesses, and ***1488** that some of that activity is linked to the operators and employees of such establishments. As the court in *TK's Video* reasoned:

> Disclosure of owner and employee personal history might not be tailored to locating adult businesses, but it does monitor persons with a history of regulatory violations or sexual misconduct who would manage or work in them. These histories are plainly correlated with the side effects that can attend these businesses, the regulation of which was the legislative objective. In more legalistic and abstract terms, ends and means are substantially related. Insisting on this fit of ends and means both assures a level of scrutiny appropriate to the protected character of the activities and sluices regulation away from content, training it on business offal.

TK's Video, 24 F.3d at 710.

[15] T & B argues, however, that the stockholder licensing and disclosure requirements are unconstitutional because they restrict more First Amendment freedoms than is necessary for the furtherance of the City's interest. [5] In support of this contention, T & B relies on the invalidation of a similar provision by the district court in *T.K.'s Video. See T.K.'s Video,* 830 F.Supp. at 335. *T.K.'s Video* is distinguishable from the case at bar in this respect. The district court in *T.K.'s Video* invalidated the portion of the provision mandating stockholder disclosure because it required that "all stockholders regardless of their interest must be licensed even if their interest is merely *de minimis* ...." *Id.* at 343. Conversely, another federal court upheld disclosure requirements for "each individual who has a 20 percent or greater interest in the business." *See Dumas v. City of Dallas,* 648 F.Supp. 1061 (N.D.Tex.1986), *aff'd sub nom, FW/PBS, Inc. v. City of Dallas,* 837 F.2d 1298 (5th Cir.1988), *vac'd-in-part on other grounds,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). The important distinction seems to be the setting of a minimum level of interest in the adult-oriented establishment in order to ensure that an individual shareholder is not subjected to regulation when he or she possesses a mere *de minimus* interest. The City safeguarded against such a result by requiring a license for shareholders holding more than ten percent of the corporation's stock. [6] Therefore, the stockholder and other disclosure and license requirements are constitutional.

5 Because the City's disclosure provision seeks to control the secondary effects of adult-oriented

businesses, its purpose goes beyond mere notice and accountability concerns. Such a provision was struck down with respect to shareholder disclosure requirements in *Acorn Investments, Inc. v. City of Seattle,* 887 F.2d 219, 226 (9th Cir.1989). Unlike the case at bar, the government in *Acorn* did not articulate concern about the possibility of owners and shareholders of adult-oriented businesses having recent convictions for sex-related offenses. Rather, the concern centered around notifying owners and shareholders about ordinance violations. Consequently, the court in *Acorn* invalidated the shareholder disclosure provision because prompt notification to shareholders of ordinance violations was not substantially related to ensuring compliance with the ordinance, given that shareholders are not legally responsible for a corporation's management. *Id.*

6 While the Court recognizes that the interest level set by the City (greater than 10%) is lower than that set by Denton County in *Dumas* (20%), the main concern is that licensing and disclosure requirements not attach to shareholders whose interests are *de minimis.* Drawing lines in this regard may be somewhat arbitrary, but the Court believes the City acted reasonably in limiting the reach of the ordinance to shareholders with greater than a ten percent interest in the corporation.

3. Standards for issuance of license.

For a corporate applicant to receive a license to operate an adult-oriented business, the following must be true: (1) all officers, directors, and shareholders must be at least eighteen years old; (2) none of the above-named persons shall have violated § 9.28 within five years preceding the application date; and (3) none of the above-named persons shall have a conviction for offenses of moral turpitude, prostitution, obscenity or other sex-related offense within five years preceding the application date, unless the individual has been pardoned. § 9.28(4)(a)(2)(i)–(iii). These standards do not vest overly-broad discretion in any governmental figure, as they consist of objectively determinable facts. *FW/PBS,* 837 F.2d 1298, 1305–06 (5th Cir.1988), *vacated in part* ***1489** *on other grounds,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); *Keyishian v. Board of Regents of University of State of N. Y.,* 385 U.S. 589, 603–04, 87 S.Ct. 675, 684, 17 L.Ed.2d 629 (1967).

[16] **[17]** An individual's past actions are very often the best indicator of that person's future actions. Denying licensure to individuals who have recently violated an adult-oriented business ordinance is a reasonable means by which to ensure that those licensed to operate adult businesses will respect and abide by the provisions regulating the business. Likewise, when an individual has been convicted of specified crimes that relate to the "crime-control intent" of the ordinance, a municipality may deny licensure. *Dumas,* 648 F.Supp. at 1073.[7] In *Dumas,* the 5th Circuit agreed with the district court's analysis in this regard:

7 The *Dumas* court expanded the holding of *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986). In *Arcara,* the U.S. Supreme Court upheld the closing of an adult-oriented establishment where it was found that the management of the establishment was aware that illegal sexual activity was occurring on the premises. *Id.,* 478 U.S. at 704–05, 106 S.Ct. at 3176. The *Dumas* court stated that "[i]f violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied licensure." *Dumas,* 648 F.Supp. at 1074, n. 34.

> ... the city's findings demonstrate a compelling interest in limiting the involvement of convicted persons in the operation of sexually oriented businesses; that by documenting the strong relationship between sexually-oriented businesses and sexually-related crimes, the City established a compelling justification for barring those prone to such crimes from the management of these businesses. The argument would continue that the City's findings conform with the well-accepted notion that the government may attach to criminal convictions disabilities aimed at preventing recidivism.
>
> *FW/PBS, Inc. v. City of Dallas,* 837 F.2d at 1305.

As mentioned previously, the City has a substantial interest in preventing crimes associated with adult-oriented establishments, particularly crimes of a sexual nature. The constitutionality of the ordinance's civil disability provision consequently turns on whether the standards for license denial are sufficiently well-tailored to furthering the City's interest.

[18] "Persons with prior criminal records are not First Amendment outcasts." *Fernandes v. Limmer,* 663 F.2d 619, 630 (5th Cir.1981). However, courts have upheld civil disability provisions denying adult-oriented business licenses to individuals who have been convicted of certain sex-related offenses within a specified period of time. *See T.K.'s Video,* 830 F.Supp. at 345; *FW/PBS,* 837 F.2d

at 1305. T & B argues that the City's civil disability provision is not sufficiently well-tailored because the "moral turpitude" language extends the scope of the disability beyond sex-related offenses. In support of this contention, T & B refers to the treatment of a similar civil disability provision in *FW/PBS,* 837 F.2d at 1305. In upholding that provision, the *Dumas* court narrowed it, invalidating five of the enumerated crimes on the grounds that they were not sufficiently related to the purpose of the ordinance. *Dumas,* 648 F.Supp. at 1074. [8] The remaining crimes, deemed by the 5th Circuit to be "related to the kinds of criminal activity associated with sexually oriented businesses," were all of a sexual nature. *FW/PBS,* 837 F.2d at 1305.

8 It was actually the district court which invalidated the provisions at issue; the 5th Circuit later affirmed the district court holding in *FW/PBS.* The five crimes which were eliminated from the list of offenses included the following: "(1) a controlled substances act violation, (2) bribery, (3) robbery, (4) kidnapping, or (5) organized criminal activity...." *Dumas,* 648 F.Supp. at 1074. T & B emphasizes the invalidation of the controlled substances provision because one of the City's reasons for denying T & B's license application was the fact that T & B had been convicted of Possession of Drug Paraphernalia with Intent to Deliver, cited by the City as a crime involving "moral turpitude".

[19] In examining the City's civil disability provision with respect to what types of criminal convictions will render an applicant ineligible for a license, the Court must look closely at the plain language of the provision. When no reported state court decisions construing the language exist, a federal court ***1490** must examine all the data before it and decide the matter according to how it believes the highest state court would decide. *Green v. J.C. Penney Auto Ins. Co., Inc.,* 806 F.2d 759, 761 (7th Cir.1986). Under the City's civil disability provision, ineligibility results from a conviction "of any offense involving moral turpitude, prostitution, obscenity or other offense of a sexual nature in any jurisdiction within five (5) years immediately preceding the date of the application." § 9.28(4)(a)(2)(iii). This language is made subject to §§ 111.321, 111.322, and 111.335 of the Wisconsin Statutes. Most significantly, § 111.335 states the following:

> Notwithstanding s. 111.322, it is not employment discrimination because of conviction record, to refuse to employ or license, or to bar or terminate from employment or licensing, any individual who:
>
> 1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity.

Wis.Stat. § 111.335(1)(c).

The foregoing allows municipalities to discriminate in the issuance of licenses on the basis of prior criminal convictions, but only if the prior conviction involves an offense substantially related to the activity being licensed. The civil disability provision of § 9.28 is expressly made subject to the foregoing statute. Accordingly, the Court interprets the phrase "any offense involving moral turpitude, prostitution, obscenity or other offense of a sexual nature" as including only offenses of a sexual nature. This interpretation is further supported by the fact that the most logical reading of the provision is that the phrase "or other offense of a sexual nature" modifies all three offenses preceding it. [9]

9 A contrary reading would interpret the phrase "or other offenses of a sexual nature" as modifying only the offense of obscenity. However, this reading is illogical given that the offense of obscenity is preceded by the offense of prostitution, which is clearly another offense of a sexual nature. A better reading of the provision is that it enumerates moral turpitude, prostitution, and obscenity as specific examples of sex-related crimes, but not the only sex-related crimes that will render an applicant ineligible for a license.

Courts have held that, when the civil disability provision of an adult-oriented business ordinance is tailored to apply to sex-related crimes only, the "relationship between the offense and the evil to be regulated is direct and substantial." *FW/PBS, Inc.,* 837 F.2d at 1305; *see also TK's Video,* 24 F.3d at 711. Findings specified by the City in the ordinance confirm that the presence of adult-oriented businesses in a neighborhood has been connected to an increase in crimes of a sexual nature. Therefore, the Court finds that the City's civil disability provision is facially constitutional. [10] As construed, the provision denies a license based only on convictions for sex-related crimes. Furthermore, after five years has elapsed, an individual with a prior criminal conviction may once again be eligible. These built-in limitations on the scope of the

provision ensure that licenses are denied only when the applicant has recently participated in the type of criminal activity associated with adult-oriented establishments, precisely the sort of activity which the ordinance seeks to impede.

10 While the ordinance is facially constitutional under the Court's interpretation, the effect of the Court's reading of the provision is to invalidate one of the reasons for denying T & B's license. Conviction for Possession of Drug Paraphernalia with Intent to Deliver is not an offense involving moral turpitude under the Court's reading of the ordinance, as it is not a sex-related offense. However, the City's other reasons for denying T & B a license remain valid, particularly the fact that T & B was previously convicted of exposing a minor to sexually explicit material, a sex-related offense. (See footnote 1, *supra*).

4. License and permit fee.

[20] Provided that the license and permit requirements are valid, a municipality may collect fees to mitigate the administrative costs of such regulation. *Murdock v. Com. of Pennsylvania,* 319 U.S. 105, 114, n. 8, 63 S.Ct. 870, 875, n. 14, 87 L.Ed. 1292 (1943); *Genusa,* 619 F.2d at 1213. The West Allis ordinance sets its license fee at $500, with $250 being returned to the applicant if the license is denied. § 9.29(8)(a). The employee permit fee is set at $50, with $25 being returned if the permit is denied. § 9.28(8)(b). Similar fees have been upheld ***1491** as constitutional. In *T.K.'s Video,* the district court held that both a $500 business licensing fee and a $50 employee licensing fee were reasonably related to the administrative costs of issuing the licenses. *T.K.'s Video,* 830 F.Supp. at 345. A $100 licensing fee was upheld in *Genusa. Genusa,* 619 F.2d at 1213. In the absence of an argument from T & B that the City's fee schedule is excessive, the Court finds that the license and permit fees are reasonably related to the administrative and enforcement costs associated with the regulatory process.

5. Display of permit provision.

[21] An employee permit must be carried by the employee and displayed upon request to authorized individuals. § 9.28(9)(b). The Court has already found that the permit requirement for employees of adult-oriented establishments is constitutional. The requirement that employees retain possession of the secured permit is a rational and logical means by which the City may enforce its ordinance and ensure that only authorized employees are working at any given time. Accordingly, the Court upholds this provision.

6. Renewal of license or permit provisions.

[22] T & B contests the license and permit renewal provisions which require the West Allis Police Department to file information about operators and employees of adult-oriented businesses with the City Clerk. See §§ 9.28(10)(c) & 9.28(10)(f). The Court finds that, coupled with the licensing and permit provisions, these provisions are well-tailored to the City's goals of preventing crime and preserving the quality of neighboring communities. The provision is merely another means of gathering information about renewal applicants such that an educated decision may be made concerning their eligibility for continued operation of, or employment in, an adult-oriented business.

T & B also contests the provisions relating to employee permit renewal. Employee permits are renewable every year, so long as applications for renewal are filed at least sixty days before the permit expires. § 9.28(10)(d). The permit renewal fee is $50, with $25 being returned if the application is denied. § 9.28(10)(e). T & B does not argue that the time limitations are unreasonable, nor that the fee is excessive. Rather, T & B claims that the entire employee permit scheme is invalid under *Genusa.* However, as the Court previously stated, the case at bar is distinguishable from *Genusa* in that the City has shown a substantial government interest in licensing employees as a means to control the deleterious secondary effects of adult-oriented establishments. Furthermore, the Court has found that the permit requirement is well-tailored towards furthering that interest. While T & B characterizes the permit scheme as onerous because it prevents the business from replacing outgoing employees immediately, "hiring difficulties do not translate into constitutional infirmities." *Clampitt v. City of Ft. Wayne,* 682 F.Supp. 401, 406 (N.D.Ind.1988), *aff'd, Oriental Health Spa v. City of Ft. Wayne,* 864 F.2d 486 (7th Cir.1988). Accordingly, the Court upholds these provisions of the City's ordinance.

[23] Employee permits are not transferrable. § 9.28(11)(e). The non-transferrable nature of an employee permit is consistent with the City's legitimate interest in preventing crime. Requiring employees to secure permits assists the City in denying a permit to any employee whose record contains a sex-related offense and assures the City that only employees without convictions for crimes of a sexual nature are working in adult-oriented establishments. This interest can only be furthered if permits are employee-specific; allowing permits to be transferrable would defeat the purpose of the permit requirement. For these reasons, the Court finds § 9.28(11)(e) constitutional.

7. License revocation provisions.

[24] An operator may have its license suspended or revoked if he or she employs an individual or independent performer who has not secured the required permit. § 9.28(12)(a)(4). Further justification for revocation or suspension of a license include: (1) violation of the ordinance by the operator or any employee/entertainer of the operator, ***1492** § 9.28(12)(a)(2); (2) the serving or consumption of intoxicating liquors or fermented malt beverage on the premises, § 9.28(12)(a)(6); and (3) selling or showing adult material to a minor. § 9.28(12)(a)(7). If the Council believes that a violation has occurred, it will issue the operator written notice of revocation, at which time the operator may request a hearing to review the revocation. § 9.28(12)(b).

The Court has stated above that the denial of a license to individuals that have recently violated the ordinance or have recently committed a sex-related crime is sufficiently well-tailored to the stated purpose of preventing sex-related crimes. It follows that if a license may be denied initially on these grounds, commission of such offenses after a license is issued is grounds for revocation or suspension of that license. Furthermore, the revocation proceedings provide for procedural safeguards in the form of both written notice of license revocation/suspension and a hearing. The license revocation provisions of the City's ordinance are valid.

C. Other Contested Provisions

1. Hours of operation provision.

[25] Under the City's ordinance, adult-oriented establishments are not permitted to operate between the hours of 2:00 a.m. and 8:00 a.m., Monday through Friday, between 3:00 a.m. and 8:00 a.m. on Saturdays, and between 3:00 a.m. and 12:00 noon on Sundays. § 9.28(14)(a). Ordinances restricting the hours of operation in adult-oriented establishments have been upheld on numerous occasions. *See Star Satellite, Inc. v. City of Biloxi,* 779 F.2d 1074 (5th Cir.1986) (upheld adult business ordinance which restricted hours of operation to 10:00 a.m. to 12 midnight, Mondays through Saturdays, with no hours of operation allowed on Sundays); *Broadway Books, Inc. v. Roberts,* 642 F.Supp. 486 (E.D.Tenn.1986) (upheld hours of operation provision which mandated that adult businesses be closed between the hours of 3:00 a.m. and 8:00 a.m. on weekdays and between 3:00 a.m. and 12:00 noon on Sundays).

The record indicates that, in enacting the adult-oriented business ordinance, the City included the goals of preventing crime and preserving the quality of neighborhoods in the list of governmental interests at stake. The Court finds that the manner in which the City seeks to regulate the hours of adult businesses rationally relates to the goal of preventing crime. The restricted hours of operation fall within the period of time when crime is more likely to occur and law enforcement personnel are more likely to be busy with other matters. Furthermore, the hours of operation relate to the goal of preserving the quality of neighborhoods because they provide special precautions during those times when people are generally sleeping and when peaceful enjoyment of the home is most important. The prescribed schedule is not overly burdensome, as it allows for normal operation during a large portion of each day. Furthermore, the closing hours for adult businesses imposed by the ordinance are consistent with the closing hours of taverns, another highly-regulated business. *See* Wis.Stat. §§ 125.32(3) & 125.68(4). In reviewing a similar provision, the court in *Ellwest Stereo Theater, Inc. v. Boner,* 718 F.Supp. 1553, 1577 (M.D.Tenn.1989), held that "the required closure of these adult-oriented establishments for a few hours each day is only a minimum infringement on the plaintiffs' First Amendment rights and is justified by the difficulty of policing and enforcing the ordinance in the wee hours of the morning." Similarly, the hours restriction imposed by the City's ordinance is content-neutral, aims at combating the deleterious secondary effects of adult-oriented establishments, and

only mandates closure for a few hours each day. The Court concludes that the restrictions are narrowly tailored to further the City's articulated goals of preventing crime and preserving the quality of neighborhoods.

2. Inspection and enforcement provisions.

[26] The West Allis ordinance provides that "adult-oriented establishments shall be open to inspection at all reasonable times by the West Allis Police Department, the Building Inspector and the Health Department." § 9.28(14)(B). In another section of the ordinance, the Police Department is given authorization to enter an adult-oriented establishment ***1493** "at all reasonable times to inspect the premises and enforce this section." § 9.28(21). The imposition of these inspection provisions as a means of enforcing the ordinance is constitutionally sound. *T.K.'s Video,* 830 F.Supp. at 345; *FW/PBS,* 837 F.2d at 1306. In upholding a similar provision, the 5th Circuit held that "sexually oriented businesses face a degree of regulation that renders the inspection provision presumptively reasonable." *FW/PBS,* 837 F.2d at 1306. As an added safeguard, the ordinance imposes a requirement that all inspections occur at "reasonable times". A similar provision was struck down in *Genusa* only because the government "failed to demonstrate that the special inspection provisions further a legitimate interest 'unrelated to the suppression of free expression.' " *Genusa,* 619 F.2d at 1214, *quoting O'Brien,* 391 U.S. at 377, 88 S.Ct. at 1679. Here, the City's provision suffers from no such deficiency. The Court upholds the provision, finding that the inspection and enforcement provisions of the ordinance are well-tailored not only to the City's substantial interest in preventing criminal activity from occurring on the premises of adult-oriented businesses, but also to the City's interest in preventing ordinance violations.

3. Open booth provision.

[27] Under the City's ordinance, booths for private viewing of adult oriented entertainment must have one side completely open such that a person occupying the booth may be seen from the aisle at all times. § 9.28(15)(b). In its complaint, T & B contended that the open booth provision was invalid based on both the First Amendment and the Videotape Privacy Protection Act. For the purposes of the preliminary injunction, T & B withdrew its claim with respect to the invalidity of the open booth provision. Subsequent to this withdrawal, T & B made no further argument with respect to the open booth provision. Under these circumstances, the Court will treat this claim as abandoned. However, even if T & B had not abandoned its claim regarding the validity of the open booth provision, precedent upholding similar provisions under similar circumstances makes it clear that the booth provisions are valid. *See Matney v. County of Kenosha,* 86 F.3d 692 (7th Cir.1996); *Libra Books, Inc. v. City of Milwaukee,* 818 F.Supp. 263 (E.D.Wis.1993); *Suburban Video, Inc. v. City of Delafield,* 694 F.Supp. 585 (E.D.Wis.1988).

4. Operator responsibility provisions.

[28] The City's ordinance mandates that employers maintain an employee register which lists employee personal information, including name, aliases, home address, phone number, age, birth date, sex, height, weight, hair and eye color, dates employment began and terminated, and employee duties. § 9.28(16)(a). In furthering its interest of preventing crime, the City has a substantial need to notify license holders of ordinance violations committed by their employees. *Ellwest Stereo Theater,* 718 F.Supp. at 1566; *City of Colorado Springs v. 2354 Inc.,* 896 P.2d 272, 291 (Colo.1995). An employee register serves this purpose, as well as providing the City with a tracking device to verify that only authorized employees are working in adult-oriented establishments. The Court finds that the use of an employee register is constitutionally valid as a well-tailored means to further the important governmental goal of crime prevention.

[29] Owners and operators must post a list of the titles and prices of all entertainment provided at an adult-oriented establishment and present this list to authorized persons upon request. § 9.28(16)(d). A similar provision was upheld in *Broadway Books,* 642 F.Supp. at 495. The posting requirement relates to the City's interest in combating increased crime, one of the deleterious secondary effects associated with adult-oriented establishments. The specific crime targeted by the City in this particular provision seems to be obscenity. Obscenity was also specifically addressed under the ordinance's licensing provisions as a sex-related offense which disqualifies an applicant, thus indicating that

obscenity offenses are of particular concern. A posted list of available entertainment at each adult-oriented establishment provides a means by which authorized persons may inspect for obscenity violations. ***1494** This provision is reasonably necessary and well-tailored to a substantial government interest. As such, it is constitutional.

5. Other ordinance provisions.

T & B does not specifically contest the remaining provisions of the City's ordinance and it is therefore unnecessary for the Court to address their constitutionality.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Defendant's motion for summary judgment is granted and the case is dismissed.

SO ORDERED.

All Citations

936 F.Supp. 1479

KeyCite Yellow Flag - Negative Treatment
Distinguished by Town of Lyndon v. Beyer, Wis.App., March 15, 2001

237 Wis.2d 545
Court of Appeals of Wisconsin.

† Petition for Review denied Aug. 29, 2000.

Melisa URMANSKI, d/b/a Melisa's Mistake, Plaintiff-Appellant, †
v.
TOWN OF BRADLEY, Defendant-Respondent.

No. 99-2330.
|
Submitted on Briefs April 10, 2000.
|
Opinion Released May 23, 2000.
|
Opinion Filed May 23, 2000.

Operator of establishment pursuant to a retail Class B liquor license issued by town brought declaratory judgment action seeking determination that town ordinance prohibiting nudity on premises operating under a retail Class B liquor license was unconstitutional. The Circuit Court, Lincoln County, J. Michael Nolan, J., found ordinance was constitutional, and operator appealed. The Court of Appeals, Cane, C.J., held that town's anti-nudity statute was constitutional as a content-neutral regulation of conduct.

Affirmed.

West Headnotes (6)

[1] **Appeal and Error**
Cases Triable in Appellate Court

Challenge to the constitutionality of the town's nudity ordinance presents a question of law that the Court of Appeals reviews de novo.

1 Cases that cite this headnote

[2] **Constitutional Law**
Presumptions and Construction as to Constitutionality

In general, statutes and ordinances are the beneficiaries of a presumption of constitutionality which the attacker must refute.

1 Cases that cite this headnote

[3] **Constitutional Law**
First Amendment in General

Constitutional Law
First Amendment in General

Where an ordinance regulates the exercise of First Amendment rights, the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] **Constitutional Law**
Exercise of Police Power;Relationship to Governmental Interest or Public Welfare

When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[5] **Constitutional Law**
Conduct, Protection Of

Constitutional Law
Exercise of Police Power;Relationship to Governmental Interest or Public Welfare

Constitutional Law
Narrow Tailoring

In instances when "speech" and "nonspeech" elements are combined in the same course of conduct, the government may infringe upon First Amendment freedoms to regulate conduct as long as: (1) the targeted conduct falls within the domain

of state regulatory power; (2) the statutory scheme advances important or substantial government interests; (3) the state's regulatory efforts are unrelated to the suppression of free expression; and (4) the regulations are narrowly tailored. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] Constitutional Law
Nudity in General

Intoxicating Liquors
Licensing and Regulation

Town ordinance prohibiting nudity on premises operating under a retail Class B liquor license was constitutional as a content-neutral regulation of conduct; town's efforts to promote public health and safety by preventing negative secondary effects associated with nudity at locations where consumption of public alcohol occurred were within town's police powers, town reasonably relied on evidentiary foundation set forth in previous cases addressing such negative secondary effects, ordinance did not attempt to regulate primary effects of expression, and ban was no greater than essential to further town's interest in preventing negative secondary effects. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

Attorneys and Law Firms

****906 *547** On behalf of the plaintiff-appellant, the cause was submitted on the briefs of Matthew A. Biegert of Doar, Drill & Skow, S.C. of New Richmond, and Randall D.B. Tigue of Randall Tigue Law Office, P.A. of Minneapolis, MN.

On behalf of the defendant-respondent, the cause was submitted on the brief of Harry R. Hertel of Hertel & Gibbs, S.C. of Eau Claire.

Before CANE, C.J., HOOVER, P.J., and PETERSON, J.

Opinion

¶ 1 CANE, C.J.

Melisa Urmanski, d/b/a Melisa's Mistake, appeals from an order upholding the constitutionality of a Town of Bradley ordinance prohibiting nudity on premises operating under a retail Class B liquor license. Urmanski argues that the ordinance is facially overbroad and, thus, violates the First and Fourteenth Amendments to the United States Constitution. Because the Town's ordinance is a content-neutral regulation, justified under *O'Brien* 's[1] four-factor test, we conclude the ordinance is constitutional and affirm the judgment.

1 *See United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

BACKGROUND

¶ 2 Urmanski operates an establishment known as "Melisa's Mistake," pursuant to a retail Class B liquor license issued by the Town. In September 1998, Melisa's Mistake began featuring live topless dancing. In November, the Town issued Urmanski ****907** an administrative summons and complaint advising her that her liquor license could be revoked for violating the Town's ***548** nudity ordinance. TOWN OF BRADLEY, WIS., CODE § 5.20(5) provides:

> (a) No retail Class B licensee, shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva, or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof.
>
> (b) Any licensee who shall violate the preceding paragraph shall be subject to revocation, suspension or refusal to renew the license as set forth in s. 125.12 Stats., and the procedures in such section shall govern.

¶ 3 On November 20, the Town suspended Urmanski's liquor license for sixty days. Urmanski subsequently filed suit against the Town, seeking a judgment pursuant to 42 U.S.C. § 1983 declaring the Town's ordinance void under

the First and Fourteenth Amendments to the United States Constitution, and art. I, § 3, of the Wisconsin Constitution. The circuit court limited the ordinance's application to the public areas of premises holding a class B liquor license and under this limiting construction, determined that the ordinance was constitutional. This appeal followed.

ANALYSIS

[1] [2] [3] ¶ 4 Urmanski's challenge to the constitutionality of the Town's nudity ordinance presents a question of law that this court reviews de novo. *See Lounge* ***549** *Mgmt., Ltd. v. Town of Trenton*, 219 Wis.2d 13, 19-20, 580 N.W.2d 156 (1998). In general, statutes and ordinances "are the beneficiaries of a presumption of constitutionality which the attacker must refute." *Id.* at 20, 580 N.W.2d 156. Where an ordinance regulates the exercise of First Amendment rights, however, "the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt." *Id.*

[4] [5] ¶ 5 The United States Supreme Court has recognized that although "being in a 'state of nudity' is not an inherently expressive condition … nude dancing … is expressive conduct." *City of Erie v. Pap's A.M.*, 529 U.S. 277, ----, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265 (2000). When "speech" and "nonspeech" elements are combined in the same course of conduct, however, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). In such instances, the government may infringe upon First Amendment freedoms to regulate conduct as long as:

> (1) the targeted conduct falls within the domain of state regulatory power; (2) the statutory scheme advances important or substantial government interests; (3) the state's regulatory efforts are unrelated to the suppression of free expression; and (4) the regulations are narrowly tailored.

Lounge, 219 Wis.2d at 20-21, 580 N.W.2d 156 (citing *O'Brien*, 391 U.S. at 376-77, 88 S.Ct. 1673). Before *Erie*, however, the Court had splintered over the permissible manner in which the ***550** government could reasonably regulate the protected expression inherent in nude dancing. [2]

2 The parties here cite *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), in which a plurality of the court applied the four-factor *O'Brien* test, "but disagreed among themselves over the requisite important or substantial interest that the state needed to show under *O'Brien* when infringing on First Amendment expression." *Lounge Mgmt., Ltd. v. Town of Trenton*, 219 Wis.2d 13, 21, 580 N.W.2d 156 (1998); *see also O'Brien*, 391 U.S. at 376-77, 88 S.Ct. 1673. Although the *Barnes* Court upheld the constitutionality of an Indiana statute banning public nudity, no five members of the Court agreed on a single rationale for that conclusion.

In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), a majority of the Court clarified that the government's interest in preventing the negative secondary effects associated with adult entertainment establishments justified any de minimis intrusions on the expression inherent in nude dancing. *See id.* at 1394. Four justices, in an opinion authored by Justice O'Connor, set out the appropriate analytical framework. Although Justice Souter agreed with the analytical approach employed by the plurality, he dissented from the judgment. *See id.* at 1402. A majority of the Court nevertheless concluded that *Erie* 's anti-nudity ordinance passed constitutional muster.

Because the application of *Erie* 's analytical framework is dispositive of the issue presented in the instant case, we refrain from addressing Urmanski's alternative arguments. *See Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559 (Ct.App.1983) (only dispositive issues need be addressed).

****908** I. *ERIE* AND CONTENT-NEUTRAL RESTRICTIONS ON CONDUCT

¶ 6 *Erie* involved a public indecency ordinance that made it an offense to "knowingly or intentionally appear in public in a 'state of nudity.' " ***551** *Erie*, 120 S.Ct. at 1388. [3] The Court first determined what level of scrutiny would apply to the ordinance. It noted that to determine what level of scrutiny applied, it had to decide "whether the State's regulation is related to the suppression of expression." *Id.* at 1391. The Court recognized:

[3] The ordinance at issue in *Erie* defined "nudity," as:

> the showing of the human male or female genital [sic], pubic hair or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

In turn, "public place" was defined to include:

> all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

Erie, 120 S.Ct. at 1388 n. * (citing ord. 75-1994, codified as CITY OF ERIE, PENN., CODIFIED ORD. art. 711).

> If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the "less stringent" standard from *O'Brien* for evaluating restrictions on symbolic speech. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard. *Id.*

***552** ¶ 7 The Court recognized that the ordinance did "not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity." *Id.* By its terms, the *Erie* ordinance, like the ordinance in the instant case, regulated conduct alone. *See id.*

¶ 8 Despite language in the *Erie* ordinance's preamble suggesting that its actual purpose was to prohibit erotic dancing, the preamble also indicated that one purpose of the ordinance was to combat the negative secondary effects associated with adult entertainment establishments. *See id.* at 1392. The Pennsylvania Supreme Court concluded that although one goal of the ****909** ordinance was to combat negative secondary effects, a ban of this type "necessarily has the purpose of suppressing the erotic message of the dance." *Id.* The *Erie* Court rejected this conclusion and determined:

> [T]he ordinance does not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are "caused by the presence of even one such" establishment.

Id. (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). The Court further concluded:

> [E]ven if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at … such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is *de minimis.*

***553** *Id.* at 1393. Consequently, the Court noted, "[i]f States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based." *Id.* The Court held that *Erie* 's ordinance was, on its face, a content-neutral restriction on conduct and further recognized:

> Even if the city thought that nude dancing at clubs like [the one at issue in *Erie*] constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing.

Id. at 1394.

¶ 9 As in *Erie*, the ordinance here was enacted, in part, to prevent the negative secondary effects associated with

adult entertainment establishments. A post-enactment affidavit by John Huston, town chairman, stated, in relevant part, that it was his "understanding and belief" that the ordinance had been passed in order to promote important and substantial interests of the Town, including "[its interest in avoiding] the potential for secondary effects such as prostitution, sexual assault, and criminal activity which can occur when nudity takes place at locations where the consumption of public alcohol occurs."

¶ 10 The affidavit further intimated that the desire to avoid secondary effects was "based upon the information made available to the Town through the League of Municipalities, as well as other reliable sources, including legal opinions previously rendered ***554** by the Supreme Court of the United States and the Supreme Court of the State of Wisconsin."[4]

[4] Although Urmanski challenged the admissibility of the post-enactment affidavit before the circuit court, she does not now contend that it was inadmissible, but rather, simply characterizes it as self-serving. Certainly, it would have been better had there been a preamble to the ordinance, as in *Erie*, or some documents contemporary to the ordinance's enactment showing that the Town enacted the ordinance to prevent negative secondary effects. However, because Urmanski does not assert that the affidavit was otherwise inaccurate or incredible, and further because she has failed to develop any argument against its admissibility, we refrain from addressing it further. *See Barakat v. DHSS*, 191 Wis.2d 769, 786, 530 N.W.2d 392 (Ct.App.1995) (we will not develop an appellant's unsupported arguments).

¶ 11 Because, according to the affidavit, an asserted purpose of the Town's ordinance was to combat negative secondary effects, we conclude, consistent with *Erie*, that the instant ordinance is a content- ****910** neutral restriction on conduct. *See id.* at 1394.

II. THE *O'BRIEN* TEST

[6] ¶ 12 After determining that the ordinance was content-neutral, the *Erie* Court applied the "less stringent" four-factor test from *O'Brien* for evaluating restrictions on symbolic speech and concluded that *Erie* 's ordinance passed constitutional muster. *See id.* at 1395. With regard to the first factor, "whether the government regulation is within the constitutional power of the government to enact," the Court held that "Erie's efforts to protect public health and safety are clearly within the city's police powers." *Id.* Applying this reasoning to the present case, the Town's efforts to promote public health and safety by preventing negative ***555** secondary effects are well within the Town's police powers and thus satisfy the first factor of the *O'Brien* test.

¶ 13 The second factor of the *O'Brien* test asks "whether the regulation furthers an important or substantial government interest." *Id.* The *Erie* Court recognized the importance of regulating conduct through the public nudity ban and of combating the negative secondary effects associated with nude dancing. *See id.* It additionally noted that:

> in terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities" to demonstrate the problem of secondary effects, *"so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."*

Id. (emphasis added).

¶ 14 Comparing *Erie* to cases with similar anti-nudity ordinances, the Court recognized that the nude dancing at issue in *Erie* was of the same character as the adult entertainment at issue in the other cases. It consequently held that "it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects … [a]nd Erie could reasonably rely on the evidentiary foundation set forth in [the other cases] to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood." *Id.*

¶ 15 Here the asserted interest of combating the harmful secondary effects associated with adult entertainment establishments featuring nude dancing is "undeniably important." *Id.* Huston's affidavit indicates ***556** that the Town's desire to prevent these secondary effects was based on information from the League of Municipalities as well as relevant legal opinions rendered by both the United States and Wisconsin Supreme Courts. We conclude that the Town could reasonably rely on the evidentiary foundation set forth in previous cases addressing negative secondary effects.

¶ 16 The third *O'Brien* factor asks whether the government interest is unrelated to the suppression of free expression. *See Erie*, 120 S.Ct. at 1397. As discussed earlier in this opinion, the ordinance does not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impact on public health, safety and welfare. *See id.* at 1392. Further, if the Town is to be able to regulate secondary effects, then any de minimis intrusions on expression are not sufficient to render the ordinance content based. *See id.* at 1394.

¶ 17 Finally, the fourth factor requires that the restriction be no greater than is essential to the furtherance of the government interest. *See id.* at 1397. With respect to this factor, the *Erie* Court reiterated ****911** that the ordinance there regulated conduct and "any incidental impact on the expressive element of nude dancing is *de minimis.*" *Id.* It concluded that the restrictions on nudity, i.e. having to wear "pasties and G-strings," nevertheless left "ample capacity to convey the dancer's erotic message." Further, the Court upheld Erie's ordinance despite its ban against all public nudity. Here, the Town's ordinance bans nudity only at those establishments holding a retail Class B liquor license. Because the restrictions imposed by the Town's ordinance are less restrictive than those of *Erie*, we ***557** determine that the Town's ordinance falls within the permissible class of restrictions that are no greater than essential to further the Town's interest in preventing negative secondary effects. Accordingly, we conclude that the ordinance at issue is constitutional as a content-neutral regulation, justified under *O'Brien* 's four-factor test.

Order affirmed.

All Citations

237 Wis.2d 545, 613 N.W.2d 905, 2000 WI App 141

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KeyCite Yellow Flag - Negative Treatment
Certiorari Granted in Part by City News and Novelty, Inc. v. City of Waukesha, U.S.Wis., June 19, 2000

231 Wis.2d 93
Court of Appeals of Wisconsin.

† Petition to review denied Jan. 18, 2000.

CITY NEWS & NOVELTY, INC., Plaintiff–Appellant, †
v.
CITY OF WAUKESHA, Defendant–Respondent.

No. 97–1504.
|
Oral Argument April 13, 1999.
|
Opinion Released Oct. 20, 1999.
|
Opinion Filed Oct. 20, 1999.

Operator of adult-oriented establishment filed a certiorari action seeking judicial review of the administrative review appeals board's denial of its license renewal application. The Circuit Court, Waukesha County, Robert G. Mawdsley, J., affirmed board's determination, and operator appealed. The Court of Appeals, Snyder, J., held that: (1) public hearing provision of city ordinance governing licensing of adult-oriented entertainment establishments created unconstitutional prior restraint on free speech rights, but provision was severable from remainder of ordinance; (2) operator's due process rights were not violated during license renewal procedure; (3) denying renewal of operator's license, rather than a lesser sanction, did not offend procedural due process requirements; and (4) substantial evidence of operator's ordinance violations supported denial of license renewal.

Affirmed in part and reversed in part.

West Headnotes (30)

[1] Administrative Law and Procedure
Scope

In an action for certiorari review, appellate review is the same as in the trial court, with the Court of Appeals confining its review to whether: (1) the board kept within its jurisdiction; (2) the board acted according to the law; (3) the action was arbitrary, oppressive or unreasonable; and (4) the evidence presented was such that the board might reasonably make the order or determination in question.

5 Cases that cite this headnote

[2] Appeal and Error
Cases Triable in Appellate Court

Constitutional questions and questions of statutory construction are questions of law that the Court of Appeals reviews de novo.

Cases that cite this headnote

[3] Constitutional Law
Prior restraints

Regulatory scheme established in licensing ordinances cannot place unbridled discretion in the hands of a government official or agency; thus, if a permit or license may be granted or withheld solely at the discretion of a government official, this is an unconstitutional censorship or prior restraint upon the exercise of the freedom of speech. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[4] Constitutional Law
Prior restraints

Prior restraint upon the exercise of free speech that fails to place limits on the time within which the decisionmaker must issue the license is impermissible; a licensing decision must be made within a specified and reasonable time period during which the status quo is maintained. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[5] Constitutional Law
Availability of judicial review

Regulatory scheme that established a prior restraint on the exercise of free speech must provide for prompt judicial review in the event that a license is erroneously denied. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] **Constitutional Law**
First Amendment in general
Constitutional Law
First Amendment in general

Although ordinances normally receive a presumption of constitutionality which the challenger must refute, when the ordinance regulates First Amendment activities, the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[7] **Constitutional Law**
Licenses and permits in general
Public Amusement and Entertainment
Sexually Oriented Entertainment

City ordinance governing issuance, revocation and renewal of licenses for adult-oriented entertainment establishments contained specific guidelines for license renewal, providing narrow, objective, and definite standards to guide city, and, thus, was a constitutionally permissible restraint on license holder's exercise of free speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] **Constitutional Law**
Licenses and permits in general
Public Amusement and Entertainment
Sexually Oriented Entertainment

Although city ordinance governing licensing of adult-oriented entertainment establishments did not contain a statement specifically requiring the granting of a license when the applicant was not rendered ineligible, ordinance contained clear-cut standards for licensing, including requirements pertaining to establishment's physical layout, conduct of patrons, and responsibilities of employees and operator, and, thus, city council was not free to grant or deny applications at its whim, in violation of applicant's free speech rights. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Licenses and permits in general
Public Amusement and Entertainment
Sexually Oriented Entertainment

City ordinance governing licensing of adult-oriented entertainment establishments was not unconstitutionally vague and was not impermissible restraint on license applicant's free speech rights because it did not define applicable level of proof under provision barring licensure in the event an applicant was "found" to have previously violated the ordinance; ordinance gave city council power to make its own findings. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**
Licenses and permits in general
Public Amusement and Entertainment
Sexually Oriented Entertainment

City's licensing scheme for adult-oriented entertainment establishments was not constitutionally defective as prior restraint on license holder's free speech rights because it required building inspection and allowed for filing of police inspection but did not prescribe mandatory time limits for these actions; discretionary filing of police information and building inspection did not create a means for delaying city's 21-day licensure period. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[11] **Constitutional Law**
Licenses and permits in general
Public Amusement and Entertainment
Sexually Oriented Entertainment

Although city ordinance governing licensing of adult-oriented entertainment establishments did not contain provision requiring preservation of the status quo pending judicial review of a license denial or revocation, ordinance preserved status quo pending review, as was required to permissibly restrain license applicant's free speech rights. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[12] **Constitutional Law**
Licenses and permits in general
Public Amusement and Entertainment
Sexually Oriented Entertainment

Provisions of city's licensing scheme for adult-oriented entertainment establishments governing access to judicial review of a license denial or revocation satisfied requirement for prompt judicial review necessary to protect applicant's free speech rights; ordinance established framework for review by providing a fixed timetable from time of city's initial determination to date of the administrative review appeals board's decision and allowing for immediate review of board's decision. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[13] **Constitutional Law**
Particular claims

Facial challenge asserted by operator of adult-oriented entertainment establishment, alleging city's licensing scheme was invalid prior restraint on its free speech rights, was sufficient to challenge ordinance's public hearing provision, regardless of recourse operator pursued in seeking review of denial of its license renewal. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[14] **Constitutional Law**
Licenses and permits in general
Public Amusement and Entertainment
Sexually Oriented Entertainment

Public hearing provision of city ordinance governing licensing of adult-oriented entertainment establishments created a risk of an indefinite delay by putting applicant at the mercy of city and, thus, was unconstitutional prior restraint on license applicant's free speech rights. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[15] **Municipal Corporations**
Effect of partial invalidity

Defective public hearing provision of city ordinance governing licensing of adult-oriented entertainment establishments was severable from remainder of ordinance; even though ordinance did not contain express severability clause, severance of public hearing provision would not undermine city's overriding goal of regulating adult establishments. W.S.A. 990.001(11).

2 Cases that cite this headnote

[16] **Municipal Corporations**
Effect of partial invalidity
Statutes
Effect of Partial Invalidity;Severability

Court may sever the unconstitutional portions of a statute or an ordinance to leave intact the remainder of the legislation.

3 Cases that cite this headnote

[17] **Statutes**
Effect of Partial Invalidity;Severability

Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of

legislative intent, but the presumption is in favor of severability.

2 Cases that cite this headnote

[18] **Constitutional Law**
Public amusement and entertainment
Public Amusement and Entertainment
Administrative agencies and proceedings

Mayor's presiding over both the common council's initial determination not to renew license to operator of adult-oriented entertainment establishment and the administrative review appeals board's subsequent administrative review did not violate operator's due process rights, absent evidence mayor was influenced by impending financial interests in the outcome of the proceedings or had been the target of any personal abuse from operator. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[19] **Constitutional Law**
Local government

Due process protections, including the right to an impartial decision maker, extend to common council proceedings. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[20] **Constitutional Law**
Impartiality

Circumstances which lead to a high probability of bias by a decision maker, even though no actual bias is revealed in the record, may be sufficient to give the proceedings an unacceptable constitutional taint, in violation of due process clause. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[21] **Constitutional Law**
Public amusement and entertainment
Public Amusement and Entertainment
Administrative agencies and proceedings

Operator of adult-oriented entertainment establishment had a property interest in the renewal of its operating license, which warranted the minimal safeguards of procedural due process, including notice of the charges upon which the license denial was based and giving an opportunity to challenge the charges. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[22] **Constitutional Law**
Public amusement and entertainment
Public Amusement and Entertainment
Administrative agencies and proceedings

Admission of minor's testimony that he entered adult-oriented entertainment establishment and stole adult magazines, offered at administrative hearing to rebut employee's testimony regarding establishment's personal identification policy and to establish that employee had been issued a citation for permitting a minor to loiter on premises, did not implicate due process protections, where administrative appeals board's decision relied upon testimony of police officers who observed minors loitering on premises and patrons engaging in sexual activity and upon building inspector's report regarding size of viewing booths, rather than minor's testimony. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[23] **Constitutional Law**
Public amusement and entertainment
Public Amusement and Entertainment
Administrative agencies and proceedings

Operator of adult-oriented entertainment establishment, who received citations for and was convicted of open booth violations, had adequate notice, for due process purposes, that administrative review appeals board could consider violations in reviewing denial

of operator's application for license renewal. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[24] **Constitutional Law**
Public amusement and entertainment
Public Amusement and Entertainment
Administrative agencies and proceedings

Denying renewal of license to operator of adult-oriented entertainment establishment, due to nine separate ordinance violations occurring within a one-year period, involving minors loitering on premises, open booth violations, and customers performing sexual acts in viewing booths, did not offend procedural due process requirements; there was no requirement that city pursue lesser sanction or least restrictive sanction in event of ordinance violations, and operator had adequate notice of charges and opportunity to challenge charges. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[25] **Public Amusement and Entertainment**
Sexually Oriented Entertainment

Citations issued to patrons of adult-oriented entertainment establishment for lewd and lascivious conduct were properly imputed to establishment's operator for purposes of determining revocation, suspension or renewal of license.

Cases that cite this headnote

[26] **Public Amusement and Entertainment**
Sexually Oriented Entertainment

Testimony of police officers regarding observations of minors loitering in adult-oriented entertainment establishment on three separate occasions, together with testimony of minors involved in two incidents, was substantial evidence supporting nonrenewal of operator's license due to violation of licensing ordinance prohibiting loitering by minors.

Cases that cite this headnote

[27] **Zoning and Planning**
Substantial evidence in general

In reviewing a zoning board's findings, the Court of Appeals applies the substantial evidence test to determine whether the evidence is sufficient.

Cases that cite this headnote

[28] **Zoning and Planning**
Substantial evidence in general

Substantial evidence, in context of appeal from decision of a zoning board, is evidence of such convincing power that reasonable persons could reach the same decision as the board.

Cases that cite this headnote

[29] **Zoning and Planning**
Substantial evidence in general

Substantial evidence test is highly deferential and the Court of Appeals may not substitute its view of the evidence for that of a zoning board.

Cases that cite this headnote

[30] **Public Amusement and Entertainment**
Administrative agencies and proceedings

Conviction for alleged violations of ordinance governing adult-oriented entertainment establishments was not required for administrative review appeals board to consider testimony presented at underlying hearings as part of its review of denial of operator's application for license renewal.

Cases that cite this headnote

Attorneys and Law Firms

****873** ***97** On behalf of the plaintiff-appellant, there were briefs and oral arguments by Jeff Scott Olson of Madison.

On behalf of the defendant-respondent, there was a brief by Curt R. Meitz, city attorney, and Julie M. Gay, assistant city attorney. There were oral arguments by Curt R. Meitz, city attorney.

Before NETTESHEIM, ANDERSON and SNYDER, JJ.

Opinion

****874** ¶ 1 SNYDER, J.

City News and Novelty, Inc. (City News) appeals from a circuit court judgment affirming the City of Waukesha's (the City) decision not to renew City News's license to operate an adult-oriented establishment. City News raises the following issues on appeal. First, it contends that the City's adult establishment licensing scheme is unconstitutional because it fails to offer explicit standards for license renewal, provides inadequate time limits for judicial review, fails to preserve the status quo throughout the administrative process and does not permit prompt judicial review. Second, City News raises due process arguments claiming that it was deprived of an impartial administrative review, that it was given inadequate notice of the allegations against it and that the City improperly invoked the most severe sanction of nonrenewal. Finally, it contends that the grounds for nonrenewal were insufficient as a matter of law. [1]

[1] We certified the issues of preservation of the status quo, prompt judicial review and imposition of the most severe municipal sanction to the supreme court. *See* RULE 809.61, STATS. The supreme court, however, declined to take the case.

***98** ¶ 2 While we find City News's arguments unavailing in large part, we conclude that § 8.195(3)(d) of the CITY OF WAUKESHA, WIS., MUNICIPAL CODE (1995) (hereinafter MUNICIPAL CODE), providing an applicant the right to a public hearing, is constitutionally infirm. However, because the public hearing provision of § 8.195(3)(d) is severable from the remainder of the ordinance, we reverse as to this provision and affirm as to the remainder.

BACKGROUND

¶ 3 City News is an adult-oriented establishment in the city of Waukesha which sells, rents and otherwise makes available to its customers sexually explicit books, magazines, videotapes and other materials. It also provides viewing booths in which its customers may view videotapes.

¶ 4 City News is licensed annually under the provisions of § 8.195 of the MUNICIPAL CODE. [2] Licensure ***99** is required for an individual or a corporation to operate or maintain an adult-oriented establishment. *See id.* § ***100** 8.195(2)(a). An application to renew ****875** a license must be filed no later than sixty days before the license expires. *See id.* § 8.195(7). The city clerk shall notify the applicant ***101** whether the application is granted or denied within twenty-one days of the application's receipt. *See id.* § 8.195(3)(c).

[2] The pertinent provisions of CITY OF WAUKESHA, WIS., MUNICIPAL CODE § 8.195 (1995), include the following:

> (2) LICENSE. (a) [N]o adult oriented establishment shall be operated or maintained in the City without first obtaining a license to operate issued by the City.
>
> ....
>
> (3) APPLICATION FOR LICENSE. (a) Any person desiring to secure a license shall make application to the City Clerk....
>
> ....
>
> (c) Within 21 days of receiving an application for a license, the City Clerk shall notify the applicant whether the application is granted or denied.
>
> (d) Whenever an application is denied, the City Clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter before the Council or its designated committee as hereinafter provided.
>
> ....
>
> (4) STANDARDS FOR ISSUANCE OF LICENSE. To receive a license to operate an adult oriented establishment, an applicant must meet the following standards:
>
> ....
>
> (b) If the applicant is a corporation:

1. All officers, directors, and stockholders required to be named under par. (3)(b) shall be at least 18 years of age.
2. No officer, director, or stockholder required to be named under par. (3)(b) shall have been found to have previously violated this section within 5 years immediately preceding the date of the application.
….
(7) RENEWAL OF LICENSE OR PERMIT. (a) Every license issued pursuant to this section will terminate at the expiration of one year from date of issuance, unless sooner revoked and must be renewed before operation is allowed in the following year. Any operator desiring to renew a license shall make application to the City Clerk. The application for renewal must be filed not later than 60 days before the license expires. The application for renewal shall be upon a form provided by the City Clerk and shall contain such information and data given under oath or affirmation as is required for an application for a new license.
….
(c) If the City Police Department is aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the City Clerk.
(d) The building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance.
....
(9) PHYSICAL LAYOUT OF ADULT ORIENTED ESTABLISHMENT. Any adult oriented establishment having available for customers, patrons or members, any booth, room or cubicle for the private viewing of any adult entertainment must comply with the following requirements:
(a) *Access.* Each booth, room or cubicle shall be totally accessible to and from aisles and public areas of the adult oriented establishment and shall be unobstructed by any door, lock or other control-type devices.
(b) *Construction.* Every booth, room or cubicle shall meet the following construction requirements:
1. Each booth, room or cubicle shall be separated from adjacent booths, rooms or cubicles and any non-public areas by a wall.
2. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same.
….
(c) *Occupants.* Only one individual shall occupy a booth, room or cubicle at any time. No occupants of same shall engage in any type of sexual activity, cause any bodily discharge or litter while in the booth. No individual shall damage or deface any portion of the booth.
(d) *Inspections.* The Building Inspector shall conduct monthly inspections of the premises to insure compliance with the provisions of this subsection.
(10) RESPONSIBILITIES OF THE OPERATOR. (a) Every act or omission by an employee constituting a violation of the provisions of this Section shall be deemed the act or omission of the operator if such act or omission occurs either with the authorization, knowledge, or approval of the operator, or as a result of the operator's negligent failure to supervise the employee's conduct, and the operator shall be punishable for such act or omission in the same manner as if the operator committed the act or caused the omission.
(b) Any act or omission of any employee constituting a violation of the provisions of this section shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed.
(c) No employee of an adult oriented establishment shall allow any minor to loiter around or to frequent an adult oriented establishment or to allow any minor to view adult entertainment as defined herein.
….
(f) The operator shall insure compliance of the establishment and its patrons with the provisions of this section.
(11) ADMINISTRATIVE REVIEW PROCEDURE. The City ordinances and State law shall govern the administrative procedure and review regarding the granting, denial, renewal, nonrenewal, revocation or suspension of a license.

¶ 5 For a corporate applicant, the licensure standards state that no officer, director or stockholder "shall have been found to have previously violated this section within 5 years immediately preceding the date of the application." *Id.* § 8.195(4)(b)2. The ordinance then sets forth specific

requirements for the physical layout and the conduct of patrons and employees of the establishment which, among other things, provide that: (1) every viewing booth or room must have at least one side entirely open to the public, [3] (2) no patron may engage in any type of sexual activity, and (3) no employee may permit a minor to loiter around or patronize the establishment. *See id.* § 8.195(9)(b)2, (9)(c), (10)(c).

[3] City News has previously challenged the City's open booth policy. In *City News & Novelty, Inc. v. City of Waukesha*, 170 Wis.2d 14, 23, 487 N.W.2d 316, 319 (Ct.App.1992), we upheld the ordinance by concluding that City News's patrons did not have a protected First Amendment right to privacy in viewing sexual materials in a public setting.

¶ 6 On November 15, 1995, City News applied for renewal of its license which was ****876** due to expire on January 25, 1996. On December 19, 1995, the common council passed a resolution finding that City News had committed several code violations and therefore denied its renewal application. The violations included permitting ***102** minors to loiter on the premises, failing to maintain an unobstructed view of the viewing booths and allowing patrons to engage in sexual conduct inside the booths.

¶ 7 After City News requested review of the resolution, the common council affirmed the decision. City News sought administrative review, and on June 28, 1996, the City of Waukesha Administrative Review Appeals Board affirmed the common council's decision. City News then filed a certiorari action in the circuit court seeking judicial review of the denial of its license renewal application. In an April 2, 1997 decision, the circuit court affirmed the board's determination. City News appeals. [4]

[4] We note that in *Suburban Video, Inc. v. City of Delafield*, 694 F.Supp. 585 (E.D.Wis.1988), the District Court for the Eastern District of Wisconsin addressed the constitutionality of a licensing scheme identical in relevant part to the City of Waukesha's. There, the court found the City of Delafield's ordinance constitutional except for a provision requiring disclosure of an applicant's detailed personal information. *See id.* at 592. While the court did not specifically address the issues raised here, we nevertheless remark that the licensing scheme was upheld as being narrowly tailored and furthering a substantial governmental purpose. *See id.* at 589 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)).

STANDARD OF REVIEW

[1] **[2]** ¶ 8 In an action for certiorari review, appellate review is the same as in the trial court. *See State ex rel. Wilson v. Schocker*, 142 Wis.2d 179, 183, 418 N.W.2d 8, 9 (Ct.App.1987). We confine our review to whether: (1) the board kept within its jurisdiction; (2) the board acted according to the law; (3) the action was arbitrary, ***103** oppressive or unreasonable; and (4) the evidence presented was such that the board might reasonably make the order or determination in question. *See State v. Goulette*, 65 Wis.2d 207, 215, 222 N.W.2d 622, 626 (1974). The primary issues raised in this case involve constitutional questions and questions of statutory construction which are questions of law that we review de novo. *See City of Waukesha v. Town Bd.*, 198 Wis.2d 592, 601, 543 N.W.2d 515, 518 (Ct.App.1995); *State v. Migliorino*, 150 Wis.2d 513, 524, 442 N.W.2d 36, 41 (1989).

DISCUSSION

A. First Amendment Protections

¶ 9 City News raises a number of facial challenges to the constitutionality of the City's licensing scheme. "Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990).

[3] **[4]** **[5]** ¶ 10 *FW/PBS* is the United States Supreme Court's most recent articulation of the constitutional principles that apply to municipal licensing schemes implicating First Amendment rights. The Court held that a licensing scheme that exists as a prior restraint on businesses purveying sexually explicit but protected speech is constitutionally permissible if it contains safeguards to minimize the possibility that the licensing procedure will be used to suppress speech. *See id.* at 226, 110 S.Ct. 596. The Court then set forth several requirements that licensing ordinances must follow to

pass constitutional ***104** scrutiny. First, the regulatory scheme cannot place "unbridled discretion in the hands of a government official or agency." ****877** *Id.* at 225, 110 S.Ct. 596 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)). In other words, if a permit or license may be granted or withheld solely at the discretion of a government official, this is an "unconstitutional censorship or prior restraint" upon the exercise of the freedom of speech. *See id.* at 226, 110 S.Ct. 596. Second, "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *Id.* A licensing decision must be made "within a specified and reasonable time period during which the status quo is maintained." *Id.* at 228, 110 S.Ct. 596. Finally, a regulatory scheme must provide for "prompt judicial review" in the event that a license is erroneously denied. *See id.*

[6] ¶ 11 We apply the constitutional framework in *FW/PBS* to our examination of the City's licensing scheme. In doing so, we note that although ordinances normally receive a presumption of constitutionality which the challenger must refute, when the ordinance regulates First Amendment activities "the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt." *County of Kenosha v. C & S Management, Inc.*, 223 Wis.2d 373, 383, 588 N.W.2d 236, 242 (1999) (quoted source omitted). Wisconsin courts have routinely applied this burden-shifting approach in First Amendment cases. *See, e.g., id.*; *Lounge Management, Ltd. v. Town of Trenton*, 219 Wis.2d 13, 20, 580 N.W.2d 156, 159, *cert. denied,* 525 U.S. 1001, 119 S.Ct. 511, 142 L.Ed.2d 424 (1998); *Town of Wayne v. Bishop*, 210 Wis.2d 218, 231, 565 N.W.2d 201, 206 (Ct.App.1997). *FW/PBS*, however, rejected this approach where First Amendment prior restraints are concerned ***105** and the government action at issue is the review of an applicant's qualifications for a business operating license. The *FW/PBS* Court explained its reasoning in the following passage, distinguishing its licensing scheme from the scheme in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

> The Court ... required in *Freedman* that the censor bear the burden of going to court in order to suppress the speech and the burden of proof once in court. The licensing scheme we examine today is significantly different from the censorship scheme examined in *Freedman*. In *Freedman*, the censor engaged in direct censorship of particular expressive material. Under our First Amendment jurisprudence, such regulation of speech is presumptively invalid and, therefore, the censor in *Freedman* was required to carry the burden of going to court if the speech was to be suppressed and of justifying its decision once in court. Under the Dallas ordinance [in *FW/PBS*], the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid. The Court in *Freedman* also placed the burdens on the censor, because otherwise the motion picture distributor was likely to be deterred from challenging the decision to suppress the speech and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech. The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through ***106** court. *Because of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court.*

****878** *FW/PBS*, 493 U.S. at 229–30, 110 S.Ct. 596 (emphasis added). The licensing ordinance at play here is

the same type that was before the Court in *FW/PBS*. Both involve the ministerial act of assessing license applications; however, neither engages in direct censorship or entails the "exercise [of] discretion by passing judgment on the content of any protected speech." *Id.* at 229, 110 S.Ct. 596. Consequently, we conclude that the burden does not shift to the City to defend the ordinance's constitutionality.

1. Renewal Standards

[7] ¶ 12 City News first contends that the ordinance is unconstitutional because it fails to provide explicit standards for license renewal. This argument goes to the issue of whether the ordinance permits "unbridled discretion." Because we conclude that the ordinance contains specific guidelines for renewal, we reject City News's argument.

¶ 13 Our review begins with subsec. (7) of the ordinance, entitled "RENEWAL OF LICENSE OR PERMIT," which contains several guidelines for renewal. *See* MUNICIPAL CODE § 8.195(7). Every license terminates after one year and must be renewed before operation is permitted for the following year. *See id.* § 8.195(7)(a). The applicant for renewal must provide a $250 renewal fee, the building must be inspected prior to renewing the license and the City of Waukesha Police Department must file with the city clerk any information it finds bearing on the operator's qualifications. *See id.* § 8.195(7)(b), (c), (d). The application ***107** "shall contain such information and data given under oath or affirmation as is required for an application for a new license." *Id.* § 8.195(7)(a). City News contends that because the subsec. (7) standards fall under the "RENEWAL" heading, these are the only guidelines that apply for renewal and that the standards found under subsec. (4), entitled "STANDARDS FOR ISSUANCE OF LICENSE," only apply to the issuance of *new* licenses. We disagree.

¶ 14 At first blush, the ordinance appears to contain discrete subsections on issuance, revocation and renewal of licenses because each of these procedures has a separate heading. However, when read as a whole, it is clear that the standards of issuance are also meant to apply to renewal. Following the subsection on renewal are provisions addressing all matters of licensing. In particular, para. (10)(b) of the subsection entitled "RESPONSIBILITIES OF THE OPERATOR" states that

> [a]ny act or omission of any employee constituting a violation of the provisions of this section shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or *renewed.* [Emphasis added.]

Paragraph (10)(f) also provides that "[t]he operator shall insure compliance of the establishment and its patrons with *the provisions of this section.*" (Emphasis added.) The phrase "the provisions of this section" comprises *all* regulations within the licensing scheme, whether falling under renewal subsec. (7) or not. As outlined earlier, the ordinance's guidelines under subsecs. (9) and (10) address the proper physical layout of the premises and the conduct of the operators, employees ***108** and patrons. City News does not dispute the adequacy of these guidelines, and we are satisfied that they provide "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). We therefore reject City News's argument that the scheme gives the City unfettered discretion to issue licenses.

[8] ¶ 15 Apart from the renewal standards, City News asserts that the ordinance is defective because it does not expressly ****879** state that a new license *must* be issued upon satisfaction of the new license standards. City News cites *Wolff v. City of Monticello*, 803 F.Supp. 1568 (D.Minn.1992), for the proposition that a licensing scheme must direct the granting of a license when an applicant is not rendered ineligible under its standards.

¶ 16 In *Wolff*, the court reviewed a licensing ordinance for an adult-oriented establishment that instructed the city council to investigate each application and hold a public hearing. Following the hearing, the council had the unconditional power to "grant or refuse the application." *Id.* at 1573. The court determined that because the ordinance only provided guidelines as to which persons and places were *ineligible* for a license, there were no criteria establishing which persons and places were *eligible. See id.* at 1574. The court faulted this scheme because

> there [was] no provision in the ordinance requiring the city council to grant license applications for any

person or place that is not rendered ineligible under [the ordinance]. Limits on discretion in licensing schemes must "be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." Thus, the city may neither rely on claims of implied limits ***109** nor ask the Court to write limits into a silent regulation.

Id. (quoting *City of Lakewood*, 486 U.S. at 770, 108 S.Ct. 2138).

¶ 17 Unlike *Wolff*, the ordinance here has clear-cut standards for licensing. The applicant must not have violated any provision in the ordinance, including requirements pertaining to the physical layout of the establishment, the conduct of the patrons and the responsibilities of the employees and operator. While the ordinance does not contain a statement specifically requiring the granting of a license when the applicant is not rendered ineligible, the common council is not free to grant or deny applications at its whim. The ordinance's standards are plainly spelled out and are not contingent upon the type of "silent regulation" at play in *Wolff*. *See id.*

¶ 18 City News's reliance on *City of Lakewood* is also misplaced. There, the Supreme Court ruled unconstitutional a licensing ordinance that gave the mayor unbounded discretion to grant or deny applications and which merely required an explanation of the reasons for denial without the use of standards. *See City of Lakewood*, 486 U.S. at 769–72, 108 S.Ct. 2138. *City of Lakewood* carries no weight here because the City's licensing scheme does set forth specific guidelines and expressly provides that a violation of such guidelines constitutes a ground for nonissuance or nonrenewal.

[9] ¶ 19 City News further contends that the ordinance is unconstitutionally vague and permits unbridled discretion because there are no rules defining the level of proof of findings under MUNICIPAL CODE § 8.195(4)(b)2, the provision barring licensure in the event an applicant is "found" to have previously violated the ordinance. City News claims that the ordinance must establish whether the finding is to be a ***110** mere accusation, a municipal citation, a conviction in municipal court or a conviction in a court of record.

¶ 20 While the criteria for the common council's findings are clearly circumscribed by the ordinance, we agree that the scheme does not set forth levels of proof for the council's findings. However, City News cites no authority, and we can find none, that requires such direction. As the City points out, the common council is given the power "to act for the government … and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation … and other necessary or convenient means." ****880** Section 62.11(5), STATS. Within the council's power is the authority to make its own findings. While licensing ordinances must include narrow and detailed standards, City News presents no case law indicating that such standards extend to the level of proof of the municipality's findings. We therefore conclude that City News has failed to rebut the presumption of the ordinance's constitutionality on this issue.

2. Inadequate Time Limits

[10] ¶ 21 City News contends that the City's licensing scheme is defective because it does not prescribe mandatory time limits for the application process. We disagree.

¶ 22 The City's licensing ordinance requires that a license renewal application be filed at least sixty days before the license is due to expire. *See* MUNICIPAL CODE § 8.195(7)(a). Within twenty-one days of the application's receipt, the City "shall notify the applicant whether the application is granted or denied."[5] *Id.* § 8.195(3)(c). As part of the renewal process, "[i]f the City Police Department is aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the City Clerk." *Id.* ***111** § 8.195(7)(c). In addition, "[t]he building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance." *Id.* § 8.195(7)(d).

[5] Although City News points out that the City did not give notice of its denial until thirty-five days after receipt of the application, this fact has no bearing on a facial challenge to the ordinance.

¶ 23 Despite the time sequence set forth above, City News contends that the filing of police information and the building inspection render the City's licensing scheme constitutionally defective because these conditions permit a delay in the application process beyond the prescribed

time limits. While we agree that a licensing condition must place time limits on the issuance of the license, *see FW/PBS*, 493 U.S. at 226, 110 S.Ct. 596 we are not persuaded that the ordinance fails here.

¶ 24 In *FW/PBS*, the City of Dallas enacted a licensing scheme for sexually-oriented businesses giving the city police chief thirty days to accept a license application. *See id.* at 227, 110 S.Ct. 596. Issuance of the license was contingent upon a building inspection for which there was no mandated time period. *See id.* Because there was no time limitation on the inspection and because the ordinance provided no means for an applicant to ensure inspection within the thirty-day application period, the Court concluded that the scheme was unconstitutional. *See id.*

¶ 25 In contrast to *FW/PBS*, the building inspection and filing of police information here do not create a means for delaying the City's twenty-one day licensure period. First, while a building inspection is required, the ordinance provides that the inspection ***112** must occur "prior to the renewal of [the] license." MUNICIPAL CODE § 8.195(7)(d). The onus is on the building inspector to complete his or her inspection before the license is to be renewed. This provision does not compare to *FW/PBS* because the ordinance there simply stated that a license will not be issued if the premises "have not been approved by the health department, fire department, and the building official." *FW/PBS*, 493 U.S. at 227, 110 S.Ct. 596.

¶ 26 Second, MUNICIPAL CODE § 8.195(7)(c) provides that the filing of police information is to occur only if the police are "aware of any information bearing on the operator's qualifications." Unlike the building inspection, the filing of police information is not compulsory. This provision, therefore, does not stand in the way of the twenty-one day approval deadline ****881** because the submission of information is solely at the discretion of the police department. We conclude, therefore, that the City's ordinance does not permit delays in the twenty-one day application period.

3. Preserving the Status Quo

[11] ¶ 27 City News contends that the ordinance is defective because it fails to explicitly require preservation of the status quo pending judicial review of a license denial or revocation. We conclude that while the ordinance does not contain a status quo provision, such language is unnecessary. What is important is that the status quo is maintained by the operation of the licensing scheme. The ordinance here does just that.

¶ 28 *FW/PBS* instructs that "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained." *FW/PBS*, 493 U.S. at 228, 110 S.Ct. 596. As illustrated above, the licensing scheme in this case ***113** starts with a license renewal application deadline sixty days before the license's expiration date. Upon receipt of the application, the City then has twenty-one days to inform the applicant whether the application is accepted or denied. Through these provisions, a decision must be rendered at the very least thirty-nine days before the license is due to lapse. As the City points out, because the common council's review of an application is completed prior to expiration of the license, the status quo is automatically maintained. Therefore, because we do not read *FW/PBS* as requiring anything more than the effective preservation of the status quo during the period in which the licensor makes its decision, we conclude that the ordinance satisfies the constitutional safeguards.

4. Prompt Judicial Review

[12] ¶ 29 City News next asserts that the ordinance does not guarantee "prompt judicial review," as established by the Supreme Court in *Freedman*. The *Freedman* Court held that a licensing scheme must "assure a *prompt final judicial decision,* to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.* at 59, 85 S.Ct. 734 (emphasis added). "Any restraint imposed in advance of a *final judicial determination on the merits* must … be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Id.* (emphasis added).

¶ 30 While the *Freedman* Court apparently contemplated timely issuance of a final "decision" or "determination," more recently in *FW/PBS* the Court appears to have relaxed this requirement by emphasizing the "possibility" and "availability" of prompt ***114** judicial review. Justice O'Connor [6] wrote that "expeditious judicial review of that decision must be *available* " and that "there must be the

possibility of prompt judicial review in the event that the license is erroneously denied." *FW/PBS*, 493 U.S. at 227, 228, 110 S.Ct. 596 (emphasis added). In his concurrence to *FW/PBS*, Justice Brennan, the author of the *Freedman* opinion, also stated that "a prompt judicial determination must be *available.*" *FW/PBS*, 493 U.S. at 239, 110 S.Ct. 596 (emphasis added). While we note this change in the Court's language, we also acknowledge that the Court has yet to squarely define the parameters of "prompt judicial review."

6 Although the Court in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), was split (three-way) as to which, if any, of the *Freedman* procedural safeguards applied, a majority of the justices agreed that (1) the licensor should make its decision within a specified and reasonable time period during which the status quo is maintained and (2) a licensing scheme must guarantee prompt judicial review. *See FW/PBS*, 493 U.S. at 227, 239, 110 S.Ct. 596.

****882** ¶ 31 Since *FW/PBS*, federal courts of appeal have been divided on the issue of "prompt judicial review." The Fourth, Sixth and Ninth Circuits hold the view that "prompt judicial review" means a timely judicial determination on the merits. *See Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101–02 (9th Cir.1998); *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 998–1001 (4th Cir.1995) (en banc); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir.1995). [7] These courts have reasoned that because a person always has a judicial ***115** forum available when his or her speech is allegedly encroached, "to hold that mere access to judicial review fulfills [*Freedman* 's prompt review requirement] makes the safeguard itself meaningless." *Baby Tam*, 154 F.3d at 1101.

7 Like the Fourth, Sixth and Ninth Circuits, the Eleventh Circuit has rejected the view that mere access to judicial review is sufficient, but it has not stated what more is required to satisfy the "prompt judicial review" standard. *See Redner v. Dean*, 29 F.3d 1495, 1501–02 (11th Cir.1994).

¶ 32 In the First, Fifth and Seventh Circuits, the courts have taken the alternative approach that prompt *access* to judicial review qualifies as "prompt judicial review." *See TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir.1994); *Graff v. City of Chicago*, 9 F.3d 1309, 1324–25 (7th Cir.1993) (en banc); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir.1993). In *Graff*, the court concluded that a newsstand ordinance that did not specifically mention judicial review was nonetheless constitutional because access to judicial review was afforded by means of the common law writ of certiorari. *See Graff*, 9 F.3d at 1324–25.

¶ 33 Because we believe that a municipality does not have the authority to direct a state judicial court to issue a decision within a specified period of time, we are inclined to follow the reasoning of the First, Fifth and Seventh Circuits and the precise language of Justice O'Connor's opinion in *FW/PBS* that prompt access or availability of judicial review satisfies First Amendment protections. *See FW/PBS*, 493 U.S. at 227, 110 S.Ct. 596. As the court explained in *TK's Video*, 24 F.3d at 709, "the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period. A 'brief period' within which all judicial avenues are exhausted would be an oxymoron." While a local governing body can pass an ordinance directing judicial review within a short period of time, we doubt that it can also require a court to make a complete and final judicial review on the merits within ***116** a specified time period. We therefore conclude that the City's ordinance will be upheld as long as expeditious judicial review is available.

¶ 34 Here, the licensing scheme satisfies the prompt judicial review standard. MUNICIPAL CODE § 2.11(1) provides that administrative review of a municipality's determination is to be addressed by ch. 68, STATS.: [8]

8 CITY OF WAUKESHA, WIS., MUNICIPAL CODE § 8.195(11) (1995) also states that state law governs the administrative procedure and judicial review of a license renewal case.

> To insure fair play and due process in the administration of the affairs, ordinances, resolutions and bylaws of the City, the Council hereby declares that the provisions of Ch. 68, Wis. Stats., relating to municipal administrative review procedure shall be in full force and effect in the City....
> Under ch. 68, an aggrieved party has thirty days in which to seek review of an initial determination before the municipal authority making the determination. *See* § 68.08, STATS. The municipal authority then has fifteen days to conduct its review. *See* § 68.09(3), STATS. Once the municipality ****883** issues its

> decision, the person aggrieved may then appeal; the appeal is taken within thirty days of the issuance of the decision. *See* § 68.10(1), (2), STATS. The municipality must provide a hearing to the appellant within fifteen days of receipt of the notice of appeal. *See* § 68.11(1), STATS. After the hearing is held, the reviewing body has twenty days to make its final determination. *See* § 68.12(1), STATS. The appellant may then seek judicial review by certiorari within thirty days of receipt of the final determination. *See* § 68.13, STATS.

***117** ¶ 35 The ch. 68, STATS., framework for review provides a fixed timetable from the time of the municipal authority's initial determination to the date of the administrative review appeals board's decision. Contrary to City News's assertion, judicial review may not be delayed for an indefinite period of time, as was the case in *Redner v. Dean*, 29 F.3d 1495, 1502 (11th Cir.1994). There, the licensing scheme was struck down because it stated (1) that an applicant "may" begin operating its establishment "unless and until the County Administrator notifies the applicant of a denial of the application," and (2) that an appeal will be heard "as soon as the Board's calendar will allow." *Id.* at 1500–01. Unlike *Redner*, however, ch. 68 does not contain contingencies that leave an applicant at the mercy of the licensor's discretion.

¶ 36 Perhaps more importantly, once the administrative review appeals board has issued its final determination, *see* § 68.12(1), STATS., an appellant may obtain *immediate* judicial review. Review by certiorari must be filed within thirty days of receipt of the final determination. *See* § 68.13(1), STATS. We conclude that because the ch. 68, STATS., timetable provides prompt access to judicial review, the dictates of *FW/PBS* are satisfied. *See FW/PBS*, 493 U.S. at 227, 110 S.Ct. 596.

5. Public Hearing Provision

¶ 37 City News further argues that an indefinite time period is created as to the public hearing set forth under MUNICIPAL CODE § 8.195(3)(d). This provision states:

> Whenever an application is denied, the City Clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within 10 days of receipt of notification of ***118** denial, a public hearing shall be held within 10 days thereafter before the Council or its designated committee as hereinafter provided.

While § 8.195(3)(d) provides a ten-day period in which a hearing will be held to review the common council's initial determination, there is no language addressing what is to take place following the hearing. And although the provision concludes that the public hearing shall be held "as hereinafter provided," *id.*, there is no further explanation within § 8.195.

[13] ¶ 38 The City responds that City News is precluded from raising this argument because it failed to pursue the public hearing and instead sought alternative means of review under ch. 68, STATS. This response must fail, however, because City News has brought a facial challenge alleging invalid prior restraints contrary to the First Amendment and such a challenge may be raised regardless of the recourse City News has pursued. *See Brandmiller v. Arreola*, 199 Wis.2d 528, 546–47, 544 N.W.2d 894, 902 (1996) ("[I]n asserting an overbreadth challenge an individual may hypothesize situations in which a statute or ordinance would unconstitutionally intrude upon First Amendment rights of third parties."). City News, moreover, has standing to contest this provision because

> [i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.

Freedman, 380 U.S. at 56, 85 S.Ct. 734.

[14] ***119** ¶ 39 We agree with City News that MUNICIPAL CODE § 8.195(3)(d) creates ****884** a risk of an indefinite delay by putting an applicant at the mercy of the licensing body. While the applicant may receive a public hearing within ten days, the common council is given no direction as to what it must do following the hearing or when it must presumably take action in response to the hearing. If a decision is to follow, there are no guidelines providing when such a decision must be

issued. Therefore, we conclude, consistent with *Redner*, that the public hearing provision within § 8.195(3)(d) is unconstitutionally deficient. *See Redner*, 29 F.3d at 1502.

[15] [16] [17] ¶ 40 We are not convinced, however, that the entire ordinance must fail. A court may sever the unconstitutional portions of a statute or an ordinance to leave intact the remainder of the legislation. *See State v. Janssen*, 219 Wis.2d 362, 378–79, 580 N.W.2d 260, 267 (1998). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." *Id.* at 379, 580 N.W.2d at 267 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 653, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984)).

¶ 41 As a rule of statutory construction, severability is codified under § 990.001(11), STATS., which states:

> The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be ***120** given effect without the invalid provision or application.

¶ 42 In *City of Madison v. Nickel*, 66 Wis.2d 71, 223 N.W.2d 865 (1974), our supreme court saved an obscenity ordinance by severing a portion of it that provided an unconstitutional definition of obscenity. *See id.* at 80, 223 N.W.2d at 870; *see also State v. Zarnke*, 224 Wis.2d 116, 135–37, 589 N.W.2d 370, 377–78 (1999). In determining whether a defective section of an ordinance fatally infects the remainder of the law, a court should look to the legislative intent, particularly whether "the legislature would be presumed to have enacted the valid portion without the invalid [portion]." *Nickel*, 66 Wis.2d at 79, 223 N.W.2d at 869 (quoted source omitted). If a statute contains distinct parts and the offending parts can be extracted while leaving intact a "living, complete law capable of being carried into effect … the valid portions must stand." *Id.* at 79–80, 223 N.W.2d at 870 (quoted source omitted). Additional consideration is given to whether the ordinance contains a severability clause.

¶ 43 Although the ordinance in this case does not contain an express severability clause, the "severability intention" of the common council can be gleaned from the purpose and structure of the ordinance. *See Denver Area Educ. Telecomms. Consortium, Inc. v. Federal Communications Comm'n*, 518 U.S. 727, 767, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (where the Cable Television Consumer Protection and Competition Act did not contain a severability clause, the Court looked to its purpose and structure to decipher the legislature's intent). The common council has clearly expressed its objective in creating the adult establishment licensing ordinance:

> ***121** WHEREAS although the provisions of this ordinance have neither the purpose or effect of imposing a limitation or restriction on the content of any communicative materials, the Common Council deems it to be in the interests of the City of Waukesha to provide for licensing and regulation of adult oriented establishments … to combat and curb the secondary effects of such establishments.

MUNICIPAL CODE § 8.195 preamble. While there is no stated purpose regarding the ****885** methods of administrative review, we fail to see how severance of the public hearing provision would undermine the overriding goal of regulating adult establishments. *Cf. Katt v. Village of Sturtevant*, 269 Wis. 638, 642, 70 N.W.2d 188, 190 (1955) (where intention of village board could not be carried out by severing one provision, the whole ordinance was void).

¶ 44 Although MUNICIPAL CODE § 8.195(3)(d) may offer an aggrieved applicant an avenue for administrative review, the primary method of review lies under ch. 68, STATS. As the common council has provided under § 8.195(11) ("Administrative Review Procedure"),

> The City ordinances and State law shall govern the administrative procedure and review regarding the granting, denial, renewal, nonrenewal, revocation or suspension of a license.

In addition, § 2.11(1) of the MUNICIPAL CODE specifically declares that ch. 68 is controlling for purposes of administrative review. As we have already determined, ch. 68 sets forth narrow, definite and objective standards

for bringing an appeal, and City News does not directly challenge this chapter.

***122** ¶ 45 Based on the purpose and structure of the ordinance, we are certain that the common council would have still enacted the ordinance even without the public hearing provision. Therefore, because we conclude that severance of the invalid provision leaves intact an otherwise complete licensing scheme, we refuse to strike the entire ordinance.

B. Due Process Considerations

1. Impartial Decision Maker

[18] ¶ 46 City News claims that it was deprived of an impartial decision maker when Mayor Carol Opel presided over both the common council's initial determination and the administrative review appeals board's subsequent administrative review.[9] We are not persuaded.

9 The administrative review appeals board is established under CITY OF WAUKESHA, WIS., MUNICIPAL CODE, § 2.11(3) (1995).

[19] ¶ 47 Due process protections, including the right to an impartial decision maker, extend to common council proceedings. *See State ex rel. DeLuca v. Common Council*, 72 Wis.2d 672, 677, 679, 242 N.W.2d 689, 692, 693 (1976). These protections have been adopted under ch. 68, STATS., which guarantees an appellant the right to a hearing on administrative appeal following the municipality's initial determination. *See* §§ 68.10(1)(a), 68.11(1), STATS.[10] Section 68.11(2) states that for purposes of the administrative hearing, the ***123** municipality must provide "an impartial decision maker, who may be an officer, committee, board, commission or the governing body who did not participate in making or reviewing the initial determination, who shall make the decision on administrative appeal."

10 An appellant, however, is not granted a hearing on administrative appeal "[i]f the person aggrieved had a hearing substantially in compliance with s. 68.11 when the initial determination was made." Section 68.10(1)(b), STATS.

¶ 48 The city mayor is directed to preside over common council meetings. *See* § 62.09(8)(b), STATS. In this case, the mayor was present for council meetings addressing City News's license application. The mayor also signed the council's December 19, 1995 resolution denying City News's license application. Later, when the administrative review appeals board conducted its § 68.09, STATS., review, the mayor was one of three individuals who decided to uphold the common council's resolution. City News now argues that because the mayor is the chief executive officer of Waukesha and is entrusted with the power to veto all acts of the common council, *see* § 62.09(8)(a) and (c), she ****886** thereby "participate[d] in making or reviewing the initial determination," § 68.11(2), STATS., by presiding over the council and signing the December 19 resolution. City News claims that by approving the resolution and, in turn, choosing not to exercise her veto power, the mayor disqualified herself as an "impartial decision maker."

[20] ¶ 49 *DeLuca* is instructive on this issue. There, the court explained that due process protections extend both to the bias and the appearance of bias of the decision maker. "Circumstances which lead to a high probability of bias, even though no actual bias is revealed in the record, may be sufficient to give the proceedings an unacceptable constitutional taint." *DeLuca*, 72 Wis.2d at 684, 242 N.W.2d at 695. Following *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), the court ***124** recognized two circumstances that show "such a high probability of actual bias as to be constitutionally intolerable." *DeLuca*, 72 Wis.2d at 684, 242 N.W.2d at 695. The first situation presents itself when the decision maker has a financial interest at stake; the second occurs when the adjudicator has been subject to "personal abuse or criticism" from the party before it. *See id.*

¶ 50 In the present case, there is no indication that the mayor was influenced by impending financial interests in the outcome of the proceedings or had been the target of any personal abuse from City News. In addition, during the administrative review hearings, the mayor stated that

> I, too[,] believe that I can be an impartial hearer of this testimony. While I have chaired all the common council meetings, I act as a facilitator. I have not offered

> testimony or debate or spoke to the issue before the council at any time.

These statements support the conclusion that the mayor did not play a role in the decision-making process, and City News has not presented any evidence suggesting that the mayor did more than facilitate the common council's meetings. We agree with the City that under the circumstances the mayor's signature was a purely administrative act and was not indicative of her position on the merits of the dispute. Although the mayor had the power to veto the council's resolution, this discretion did not constitute review of the resolution. Therefore, because we are persuaded that the mayor did not participate in making or reviewing the resolution, we conclude that she was not disqualified from her subsequent participation in the administrative review proceedings.

***125** *2. Adequate Notice*

[21] ¶ 51 City News next raises several arguments alleging a lack of sufficient notice as to the charges against it. As it points out, it has a property interest in the renewal of its operating license. *See Manos v. City of Green Bay*, 372 F.Supp. 40, 48–49 (E.D.Wis.1974) (property interest was found for retention of liquor license). Such a property interest warrants the minimal safeguards of procedural due process. *See id.* at 49. These basic guarantees include providing notice of the charges upon which the license denial was based and giving an opportunity to challenge the charges. *See id.* at 51.

¶ 52 City News claims that following the issuance of the City's resolution, the City exceeded the scope of the allegations contained therein when it presented testimony from T.M., and related exhibits, at the administrative review hearing. [11] We are not persuaded.

11 City News also complains that testimony about Jamie Bahr, including Exhibits 36 and 37, should not have been presented because this evidence went beyond the scope of the December 19 resolution. While we understand that the evidence about Bahr concerns a citation for displaying sexual material to minors, City News does not explain, and we cannot readily determine, the substance of the testimony. We therefore decline to address the issue. *See State v. Pettit*, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct.App.1992).

[22] ¶ 53 T.M. testified that he was seventeen years old when he entered City ****887** News on March 7, 1996, and stole adult magazines. At the administrative hearing, City News objected to T.M.'s testimony because it had not received notice that the City was going to call T.M. and his actions were not mentioned in the December 19, 1995 resolution because the March 7 incident ***126** occurred after the common council had issued the resolution. The City responded that T.M.'s testimony was offered to impeach the prior testimony of City News employee David Hull concerning City News's personal identification policy and the fact that Hull had been issued a citation for permitting a minor to loiter on its premises. The administrative review appeals board noted City News's objection but nonetheless permitted T.M. to testify. [12]

12 The administrative review appeals board explained that it was its policy to note all objections but to nonetheless receive the evidence and determine its weight upon deliberation.

¶ 54 We agree with the City. T.M.'s testimony was not used as a new ground for rejecting City News's license application. Rather, it was brought for the purpose of impeaching Hull's testimony that he abided by the store's policy of checking the identification of every person who appeared younger than thirty years of age. City News admitted as much in its proposed findings of fact for the administrative review appeals board where it stated, "[W]e find that [T.M.'s] testimony is not credible and is not sufficient to rebut the testimony of David Hull, the purpose for which it was offered." The administrative review appeals board's findings are also telling. There, the board relies upon the testimony of police officers who observed minors loitering on City News's premises and patrons engaging in sexual activity, and upon a building inspector's report regarding the size of the viewing booths. There is no mention, however, of T.M. We conclude, therefore, that the admission of T.M.'s testimony did not implicate due process protections.

[23] ¶ 55 Next, City News complains that it was denied adequate notice of a November 7, 1995 open booth violation that was raised at the administrative ***127** review hearing but not cited in the December 19 resolution. The resolution cited three open booth violations for which City News's operator received

ordinance citations and was subsequently convicted. The resolution states:

> WHEREAS, on 11/30/94, 12/1/94 and 12/2/94 City News and Novelty, Inc. through its employees and/or agents violated the provisions of section 8.195(9)(b)2 of the Waukesha Municipal Code by failing to have every booth, room or cubicle totally open to a public lighted aisle so [as to] permit[ ] an unobstructed view at all times of anyone occupying the same.

During the administrative review, however, city building inspector Marvis Lemke reported that while City News's booths had violated the open booth ordinance upon his annual inspection on November 7, by November 30 the booth entrances had been reopened to an acceptable level. In the administrative review appeals board's findings, the board included Lemke's November 7 inspection report and mentioned the three ordinance violations. City News now claims that it had no notice of the November 7 open booth violation.

¶ 56 City News was provided sufficient notice to defend against the November 7 booth violation. First, MUNICIPAL CODE § 8.195(7)(d) advises that "[t]he building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance." City News therefore had notice that an inspection would be made before ****888** its license would be renewed. Second, City News does not deny that it received citations for and was convicted of open booth violations occurring on November 30 and December 1 and 2, 1994. The December 19 resolution cited these violations. Third, the basis of all of the open ***128** booth violations was the same—City News's use of wood paneling to narrow the booth openings, thereby creating an obstructed view of the booths.

3. Sanctions Imposed

[24] ¶ 57 City News next raises the issue of whether the City's response to its alleged violations of the ordinance, which was to invoke the most severe form of sanction and deny renewal of the license, passes constitutional muster. City News claims that the City acted unreasonably in "saving up" all of its complaints past the point where City News could effectively remedy them prior to renewal. City News argues that by utilizing a "sub rosa theory of strict liability without ever articulating it as such," the City has offended procedural due process requirements.

¶ 58 The City responds that the issue of whether it may deny a license renewal application rather than issue a license suspension or revocation is solely a matter of discretion for the licensing body. It asserts that there is no licensing requirement that it first provide a warning, a suspension or some lesser penalty before nonrenewal is appropriate. It adds that City News has failed to cite any authority addressing the issue of the appropriateness of particular sanctions sought by a municipality based upon ordinance violations.

¶ 59 We agree with the City that there is no authority requiring a municipality to pursue a lesser sanction or the least restrictive sanction in the event of an ordinance violation. There are, however, particular procedural due process considerations at play. These include providing notice of the charges, an opportunity to respond to and challenge the charges, an opportunity to present witnesses, and an opportunity to confront and cross-examine opposing witnesses. *See* ***129** *Manos*, 372 F.Supp. at 51. In this case, we have already determined that City News was provided adequate notice of the charges. In addition, there is no dispute that it was afforded an opportunity to challenge the charges.

¶ 60 We next consider the particular types of sanctions available when an operator violates the ordinance. First, there is nonissuance and nonrenewal of a license. This measure is conditioned upon an applicant having violated a provision of the licensing scheme within five years of the application. Second, revocation of a license for one year is similarly available where "[t]he operator or any employee of the operator violates any provision of this section or any rules or regulation adopted by the Council pursuant to this section." MUNICIPAL CODE § 8.195(8)(a)2. Finally, a suspension of thirty days or less may be invoked "in the case of a first offense by an operator where the conduct was solely that of an employee … if the Council shall find that the operator had no actual or constructive knowledge of such violation and could not by the exercise of due diligence have had such actual or constructive knowledge." *Id.*

¶ 61 Suspension is inappropriate here because the board specifically found that a director of City News had committed various violations of the ordinance. According to the board's June 28, 1996 findings, Police Officer Richard Piagentini observed a minor patron on City News's premises on December 24, 1994, and City News director Daniel Bishop was subsequently convicted for permitting the minor on the premises contrary to MUNICIPAL CODE § 8.195(10)(c). The findings indicate that Bishop also received convictions for three other ordinance violations based on City ****889** News's failure to maintain open viewing booths pursuant ***130** to § 8.195(9)(b)2. Therefore, because a director of City News was found to have contravened the ordinance, we attribute knowledge of the violations to City News. We further note that the violations cited by the board were not solely at the hands of an employee. Thus, suspension is not an available sanction in this case.

¶ 62 While revocation and nonrenewal both rely upon a violation of the ordinance, we believe the City properly exercised its discretion in deciding to impose a nonrenewal sanction. In its findings, the board listed nine separate ordinance violations occurring within a one-year period. Four of these involved minors loitering on the premises, three involved open booth violations and two dealt with customers masturbating in viewing booths. In its preamble, the ordinance speaks to particular health and safety concerns endemic to adult-oriented establishments. Such concerns include the transmission of AIDS and other sexually transmitted diseases and increased levels of criminal activity such as prostitution, rape and assaults. Considering both the health and safety issues as well as City News's record of ordinance violations, we are satisfied that the City acted within its discretion.

C. Sufficiency of Nonrenewal Grounds

[25] ¶ 63 Finally, City News asserts that the grounds upon which the nonrenewal determination was based were inadequate as a matter of law. It claims that citations issued to patrons in February and March 1995 for lewd and lascivious conduct cannot stand as a ***131** basis for nonrenewal.[13] City News further argues that because the standards for issuance of a new license concern only the conduct of officers, directors and stockholders of the corporation,[14] the conduct of patrons is immaterial. City News is wrong.

13 The administrative review appeals board's findings were, in pertinent part, as follows:

> 1. On February 28, 1995, Officer John Gibbs observed a patron of City News and Novelty, Inc. … masturbating in a viewing booth.… There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20, Wis. Stats.…
>
> 2. On March 11, 1995, Officer Paul De Jarlais observed a patron at City News … masturbating in a viewing booth. There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20, Wis. Stats.…

14 MUNICIPAL CODE § 8.195(4)(b)2 provides, "No officer, director, or stockholder required to be named under par. (3)(b) shall have been found to have previously violated this section within 5 years immediately preceding the date of the application."

¶ 64 As we have previously outlined, the ordinance contains specific restrictions under subsecs. (9) and (10) that stand apart from the general licensure standards under MUNICIPAL CODE § 8.195(4)(b). One such requirement is that no occupants of booths, rooms or cubicles shall engage in any type of sexual activity. *See id.* § 8.195(9)(c). At the end of the licensing scheme, the ordinance states generally that "[t]he operator shall insure compliance of the establishment and its *patrons* with the provisions of this section." *Id.* 8.195(10)(f) (emphasis added). "Operator" is defined as any "person, partnership, or corporation operating, ***132** conducting, maintaining or owning any adult-oriented establishment." *Id.* § 8.195(1).

¶ 65 It is clear from the ordinance that City News is the operator here and that when patrons were issued citations for and convicted of lewd and lascivious behavior, City News violated the ordinance by not ensuring compliance with the para. (9)(c) prohibition on sexual activity. A plain reading of the ordinance does not limit the ****890** City's review to only the conduct of officers, directors and stockholders. If it did, then the conduct of employees, including permitting the exposure of sexual material to minors, would be of no consequence. City News's position, therefore, contravenes the explicit condition that actions of "any employee constituting a violation of the provisions

of this section" are imputed to the operator for purposes of determining revocation, suspension or renewal. *See id.* § 8.195(10)(b). We reject this narrow reading of the ordinance.

[26] [27] [28] [29] ¶ 66 City News next asserts that the testimony of police officers that minors had been found loitering in the store on three separate occasions [15] was insufficient ***133** evidence as a matter of law to qualify as a "finding," as this concept is used within the licensing ordinance. *See id.* § 8.195(4)(b)2 ("[N]o officer, director, or stockholder … shall have been *found* to have previously violated this section …."). (Emphasis added.) In reviewing the board's findings, we apply the substantial evidence test to determine whether the evidence is sufficient. *See Clark v. Waupaca County Bd. of Adjustment*, 186 Wis.2d 300, 304, 519 N.W.2d 782, 784 (Ct.App.1994). Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the board. *See id.* The substantial evidence test is highly deferential and we may not substitute our view of the evidence for that of the board. *See id.*

15 The administrative review appeals board's findings stated the following:

> 2. On July 23, 1995, Officer John Konkol observed S.S., a patron, at City News … who was a minor. Officer Konkol made the observation while on duty. Additionally, S.S. testified that she was a patron at City News … on July 23, 1995 and … was a minor. Christopher Alverson, the employee on duty at the time, was convicted of a civil ordinance violation contrary to Section 8.195, Subsection 8.195(10)(c) of the Municipal Code of Waukesha on August 25, 1995. There was no evidence to refute the credible testimony of Officer Konkol or S.S.
>
> 3. On October 18, 1995, Officer Mark Howard observed S.D., a patron, at City News … who was a minor. Officer Howard made the observation during the course of a routine investigation. Additionally, S.D. testified that he was a patron of City News … on October 18, 1995 and … was a minor. There was no evidence to refute the credible testimony of Officer Howard and S.D.
>
> 4. On November 29, 1995, Officer Paul Paikowski observed a patron of City News … who was a minor. Officer Paikowski made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News …. There was no evidence to refute the credible testimony of Officer Paikowski.

Because the July 23 incident led to a conviction, City News is wrong in stating that it "has never been convicted, even in municipal court, of these violations." City News is otherwise correct that the October 18 and November 29 incidents did not result in convictions.

¶ 67 We conclude that substantial evidence supported the board's findings. At the administrative hearings, a police officer testified to each of the three incidents involving minors. Each observation made by the officers took place while the officer was on duty. For two of these incidents, the minor involved testified to ***134** his or her conduct. This evidence was substantial and City News has failed to present any evidence to refute the testimony of the officers or the minor patrons.

[30] ¶ 68 Finally, City News seeks to refute evidence of a fourth incident involving a minor loitering on its premises. At the administrative hearings, an officer testified that while on patrol he observed a minor at City News on December 24, 1994. The board's findings indicate that an employee and a director of City News were convicted of civil ordinance violations for this incident. City News now contends that because these convictions were later dismissed on appeal and because a conviction ****891** must stand to qualify as a finding of the board, this incident carries no weight in support of the board's decision. We disagree.

¶ 69 First, City News provides no authority to support its view that only a conviction can constitute a finding of the board. Contrary to this position, the board has the discretion to make its own findings of fact based on the evidence presented. As was the case with the July 23, October 18 and November 29, 1995 incidents involving minors, an officer testified that he observed a minor patron on City News's premises. This evidence was not refuted by City News, and while the convictions of the employee and director were dismissed, the board was still justified in relying on the evidence presented at the hearings. Because we conclude that the board's findings are supported by a reasonable view of the evidence, *see Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis.2d 468, 476, 247 N.W.2d 98, 103 (1976), City News's argument is without merit.

***135 CONCLUSION**

¶ 70 While City News's due process and sufficiency of the evidence challenges fail, we agree that the public hearing provision under § 8.195(3)(d) of the MUNICIPAL CODE is constitutionally deficient. However, rather than striking the entire ordinance, we conclude that § 8.195(3)(d) is severable and thus reverse as to this provision and affirm as to the remainder.

Costs are denied to both parties.

Judgment affirmed in part and reversed in part.

All Citations

231 Wis.2d 93, 604 N.W.2d 870

721 F.3d 729
United States Court of Appeals,
Sixth Circuit.

ENTERTAINMENT PRODUCTIONS, INC., Platinum Rose, Inc., 777 Memphis, Inc., Manhattan, Inc., and Tennessee Entertainment Concepts, Inc., Tennessee Corporations; 2882 Lambs Place, L.L.C., a Tennessee Limited Liability Company; 600 Marshall Entertainment Concepts, LLC, a Tennessee Limited Liability Corporation, Plaintiffs–Appellants,
v.
SHELBY COUNTY, TENNESSEE, a Political Subdivision of the State of Tennessee; City of Memphis, a Tennessee Municipal Corporation, Defendants–Appellees, Robert E. Cooper, Jr., Tennessee Attorney General, Intervenor Defendant–Appellee.

No. 11–6396.
|
Argued: Dec. 6, 2012.
|
Decided and Filed: July 9, 2013.

Synopsis

Background: Owners of adult-oriented entertainment establishments brought action challenging constitutionality of state law regulating such establishments. The United States District Court for the Western District of Tennessee, Frederick Motz, J., 2011 WL 3903002, entered judgment against owners. Owners appealed.

Holdings: The Court of Appeals, Boggs, Circuit Judge, held that:

[1] statute, as enforced by local ordinance, did not violate First Amendment;

[2] ordinance did not violate First Amendment; and

[3] prior determination relating to statutory definitions was law of the case.

Affirmed.

Karen Nelson Moore, Circuit Judge, filed opinion concurring in the judgment.

West Headnotes (20)

[1] Federal Courts
Summary judgment

Court of Appeals reviews the district court's grant of summary judgment de novo.

1 Cases that cite this headnote

[2] Federal Courts
Statutes, regulations, and ordinances, questions concerning in general

Court of Appeals reviews de novo a challenge to the constitutionality of a state statute.

Cases that cite this headnote

[3] Constitutional Law
Sexual Expression

Erotic dance is a form of symbolic speech or expressive conduct which, though protected by the First Amendment, falls within the outer ambit of the First Amendment's protection. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] Constitutional Law
Secondary effects

Court of Appeals assesses the constitutionally of regulations that purport to ameliorate the deleterious secondary effects of sexually oriented establishments under an intermediate-scrutiny standard, under which content-neutral regulations of the time, place, or manner of protected expression are valid so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] **Constitutional Law**
Secondary effects

Because regulations that purport to ameliorate the deleterious secondary effects of sexually oriented establishments are actual regulations of First Amendment expression, as opposed to regulations of conduct, Court of Appeals looks first to the defendants to provide a connection between the regulations of protected speech and the adverse secondary effects that they seek to control. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[6] **Constitutional Law**
Secondary effects

A state issuing a regulation that purports to ameliorate the deleterious secondary effects of sexually oriented establishments must have had a reasonable evidentiary basis for concluding that its regulation would have the desired effect; although not extraordinarily high, this evidentiary burden requires that the state show that the evidence upon which it relied was reasonably believed to be relevant to the problem that the entity sought to address. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[7] **Constitutional Law**
Secondary effects

There is no hard-and-fast rule that the government have any empirical data directly supporting a link between a regulation purporting to ameliorate the deleterious secondary effects of sexually oriented establishments and the secondary effect it seeks to ameliorate. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[8] **Constitutional Law**
Freedom of speech, expression, and press
Constitutional Law
Sexual Expression

Once a state has established a substantial interest in regulating erotic speech, the burden shifts to the plaintiffs to cast direct doubt on the state's rationale for the challenged regulation; they may do this either by demonstrating that the state's evidence does not support its rationale or by furnishing evidence that disputes the state's factual findings. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Sexual Expression

A state may rely upon a variety of data, including empirical studies from other states and cities, the laws and experiences of other jurisdictions, and prior court decisions to support its rationale for its challenged regulation limiting erotic speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**
Sexual Expression

Evidence suggesting that a different conclusion by the state legislature is also reasonable does not prove that the state's findings in support of regulation of erotic speech were impermissible or its rationale unsustainable. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[11] **Constitutional Law**
Sexual Expression

Notwithstanding the reasonableness of the state's rationale, a statute regulating erotic speech must leave the quantity and accessibility of speech substantially intact. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[12] **Constitutional Law**
Secondary effects

A state or municipality may not set out to reduce the secondary effects of erotic speech by proportionally reducing the availability of the speech itself. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] **Constitutional Law**
Secondary effects

Public Amusement and Entertainment
Sexually Oriented Entertainment

State statute, as enforced by local ordinance, that regulated sexually-oriented businesses, and which prohibited certain activities in such establishments, served substantial government interest of combating harmful secondary effects of such establishments, and therefore did not violate First Amendment; despite claim by establishment owners, state was not required to provide direct empirical support to sustain regulation, and vast array of germane, widely accepted evidence of secondary effects supported state's rationale in regulating sexually-oriented businesses. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[14] **Federal Courts**
"Clearly erroneous" standard of review in general

Court of Appeals reviews factual disputes for clear error.

Cases that cite this headnote

[15] **Constitutional Law**
Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors
Licensing and regulation

Public Amusement and Entertainment
Sexually Oriented Entertainment

Ordinance that regulated sexually-oriented businesses and which prohibited the sale of alcohol in erotic entertainment establishments served substantial government interest of combating harmful secondary effects of such establishments, and therefore did not violate First Amendment; any reduction in the availability of erotic speech was due not to the operation of the ordinance, but to the establishment owners' economic choice to invest their resources elsewhere. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[16] **Federal Courts**
Former decision as law of the case

Prior determination by Court of Appeals on review of denial of request for preliminary injunction, relating to statutory definitions of "adult-oriented establishments," "adult cabaret," and "adult entertainment" in statute that regulated sexually-oriented businesses, was law of the case in action alleging statute was overbroad and void for vagueness, precluding Court of Appeals from revisiting interpretation of such terms on subsequent appeal. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[17] **Courts**
Previous Decisions in Same Case as Law of the Case

Under the law-of-the-case doctrine, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation.

6 Cases that cite this headnote

[18] **Courts**
Previous Decisions in Same Case as Law of the Case

Court of Appeals generally will not disturb law-of-the-case findings unless there is (1) an intervening change of controlling law; (2) new

evidence available; or (3) a need to correct a clear error or prevent manifest injustice.

3 Cases that cite this headnote

[19] Federal Civil Procedure

Government records, papers and property

Owners of adult entertainment establishments were not prejudiced by denial of motion to compel city to produce police reports and crime data sheets, in action challenging constitutionality of state statute, as enforced by local ordinance, that regulated sexually-oriented businesses, where such request fell into category of a fishing expedition. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

Cases that cite this headnote

[20] Federal Civil Procedure

Inconvenience or other detriment

Federal Civil Procedure

Scope

Though parties generally may discover any unprivileged evidence relevant to their claim, a district court may limit discovery due to irrelevance and burdensomeness. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

Cases that cite this headnote

Attorneys and Law Firms

***732 ARGUED:** J. Michael Murray, Berkman, Gordon, Murray & Devan, Cleveland, Ohio, for Appellants. Robert B. Rolwing, Shelby County, Tennessee, Memphis, Tennessee, for Appellee Shelby County. Steven A. Hart, Office of the Tennessee Attorney General, Nashville, Tennessee, for Appellee Attorney General. **ON BRIEF:** J. Michael Murray, Raymond V. Vasvari, Jr., Berkman, Gordon, Murray & Devan, Cleveland, Ohio, for Appellants. Robert B. Rolwing, Shelby County, Tennessee, Memphis, Tennessee, Roane Waring III, City of Memphis, Nashville, Tennessee, for Appellee Shelby County. Steven A. Hart, Office of the Tennessee Attorney General, Nashville, Tennessee, for Appellee Attorney General.

Before: BOGGS, MOORE, and SUTTON, Circuit Judges.

BOGGS, J., delivered the opinion of the court, in which SUTTON, J., joined, and MOORE, J., joined in the result. MOORE, J. (pp. 744–46), delivered a separate opinion concurring in the judgment.

OPINION

BOGGS, Circuit Judge.

In this second chapter of the litigation over Shelby County Ordinance 344, Entertainment Productions, Inc., *et al.,* seek to resuscitate their case against Shelby County and the State of Tennessee after a final judgment against them in the district court below. The appellants, a group of business entities that collectively own a substantial fraction of the adult nightclubs in Memphis, seek to enjoin and invalidate the Tennessee Adult–Oriented Establishment Registration Act of 1998, as locally enforced by Ordinance 344. They assert that the Act violates the First Amendment under a variety of theories. We disagree. For the reasons set out below, we affirm the district court.

I

We have chronicled the facts of this case in detail elsewhere. *Entm't Prods., Inc. v. Shelby Cnty.* (*Entm't Prods. I*), 588 F.3d 372, 376–77 (6th Cir.2009). The Act at issue is a county-option state law, enacted to address the deleterious secondary effects associated with adult-oriented businesses, including crime, the spread of venereal disease, decreased property values, and other public-welfare and safety issues. The Act applies to all businesses falling within the statutory definition of "adult-oriented establishment." These establishments are regulated in two principal ways. First, all businesses subject to the Act, as well as their employees, must obtain a license. Second, the Act regulates the manner in which entertainment may be provided by these establishments in four major ways: (1) it prohibits nudity; (2) it prohibits certain sexual activities, touching ***733** of

certain anatomical areas, and all physical contact during performances; (3) it prohibits the sale or consumption of alcohol on the premises; and (4) it requires that all performances take place on a stage at least 18 inches above floor level and that all performers stay at least six feet away from customers and other performers.

Shelby County adopted the Act in September 2007. The appellants filed suit against the county in January 2008 in the United States District Court for the Western District of Tennessee. Claiming that the Act violated the First Amendment, they sought declaratory relief and preliminary and permanent injunctions. The Tennessee Attorney General moved to intervene, which the district court permitted in March 2008. The court subsequently denied the appellants' request for a preliminary injunction the following month. We affirmed this decision. *Entm't Prods. I,* 588 F.3d at 395.

Proceeding on remand, the appellants based their First Amendment argument on three different theories: (1) facial invalidity under intermediate scrutiny, (2) overbreadth, and (3) vagueness. The district court granted summary judgment for the appellees as to all claims except the claim of facial invalidity attacking the reasonableness of the Ordinance's coverage of establishments featuring "briefly attired" dancers. After a bench trial, the district court upheld the regulation as to this final challenge.

II

[1] We review the district court's grant of summary judgment *de novo. Trs. of the Mich. Laborers' Health Care Fund v. Gibbons,* 209 F.3d 587, 590 (6th Cir.2000). The decision below may be affirmed only if the pleadings, affidavits, and other submissions show "that there is no genuine dispute as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(a). In determining whether a genuine issue of material fact exists, we draw all reasonable inferences in favor of the nonmoving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587–88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

[2] We also review *de novo* the sole claim that proceeded to trial, as it challenges the constitutionality of a state statute. *Associated Gen. Contractors of Ohio, Inc. v. Drabik,* 214 F.3d 730, 734 (6th Cir.2000).

III

The appellants' first argument does not focus on any single provision of the Act, but rather attacks the statute as a whole. The appellants claim that the Act fails intermediate scrutiny because the data used to justify the regulations are "shoddy." They criticize the methodology employed by the myriad studies cited by the state,[1] and offer their own statistical data showing no correlation between the existence of adult-oriented businesses and a number of the secondary effects that the appellees seek to eliminate. The appellants further charge that, regardless of the reliability of the data used, the Act impermissibly regulates the secondary effects of adult-oriented speech by eliminating the speech itself. Specifically, they claim that the regulations reduce the accessibility of erotic entertainment to a point that the nightclubs would rather leave the market than be regulated.

1 We refer primarily to the challenge against the state Act in this part, but the arguments apply with equal force to the county Ordinance, as it adopts the Act *in toto.*

A

[3] The Act regulates the exhibition of erotic dance, a form of symbolic speech or ***734** expressive conduct. *Richland Bookmart, Inc. v. Knox Cnty., Tenn.* (*Richland Bookmart II*), 555 F.3d 512, 520 (6th Cir.2009). Though protected by the First Amendment, " 'nude dancing of the type at issue here is expressive conduct,' which falls 'within the outer ambit of the First Amendment's protection.' " *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.,* 274 F.3d 377, 391 (6th Cir.2001) (quoting *City of Erie v. Pap's A.M.,* 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion)). Such speech receives protection, " 'of a wholly different, and lesser magnitude.' " *Richland Bookmart, Inc. v. Nichols* [*Richland Bookmart I*], 137 F.3d 435, 439 (6th Cir.1998) (quoting *Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50, 70, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)).

[4] **[5]** We assess the constitutionally of regulations that purport to ameliorate the deleterious secondary effects of sexually oriented establishments under the intermediate-scrutiny standard announced in *City of Renton v. Playtime Theatres,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). *Richland Bookmart II,* 555 F.3d at 523–24. According to *Renton,* content-neutral regulations of the time, place, or manner of protected expression are valid "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton,* 475 U.S. at 47, 106 S.Ct. 925. Because these regulations are "actual regulation[s] of First Amendment expression," as opposed to regulations of conduct (*e.g.,* prohibitions on public nudity or the destruction of draft cards), we look first to the defendants to provide a connection between the regulations of protected speech and the adverse secondary effects that they seek to control. *Richland Bookmart II,* 555 F.3d at 523.

[6] **[7]** The state issuing the regulation must have "had a reasonable evidentiary basis for concluding that its regulation would have the desired effect. Although not extraordinarily high, this evidentiary burden requires that the state show that the evidence upon which it relied was 'reasonably believed to be relevant to the problem' that the entity sought to address." *729, Inc. v. Kenton Cnty. Fiscal Ct.,* 515 F.3d 485, 491 (6th Cir.2008) (quoting *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925). It need not produce new empirical data specific to the local situation that it seeks to abate. *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925. Indeed, there is no hard-and-fast rule that the government have *any* empirical data directly supporting a link between a given regulation and the secondary effect it is purported to ameliorate. *See City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 438–39, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality opinion) (observing that such a requirement would undermine the settled position that municipalities must be given a reasonable opportunity to experiment with solutions to the problem of secondary effects); *id.* at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in judgment) ("[W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." (citations omitted)). So long as the state is reasonable in its belief that the evidence upon which it relied is relevant, it will meet this initial burden.

[8] **[9]** **[10]** Once the state has established a substantial interest in regulating erotic speech, the burden shifts to the plaintiffs to "cast direct doubt" on the state's rationale for the challenged regulation. *Id.* at 438, 122 S.Ct. 1728 (plurality opinion). They may do this "either by demonstrating that the [state's] evidence does not ***735** support its rationale or by furnishing evidence that disputes the [state's] factual findings." *Id.* at 438–39, 122 S.Ct. 1728. Though the state is not allowed to "get away with shoddy data or reasoning," *id.* at 426, 122 S.Ct. 1728, it is not "required to demonstrate empirically that its proposed regulations will or are likely to successfully ameliorate adverse secondary effects." *Richland Bookmart II,* 555 F.3d at 524. A state may rely upon a variety of data, including empirical studies from other states and cities, the laws and experiences of other jurisdictions, and prior court decisions. *84 Video/Newsstand, Inc. v. Sartini,* 455 Fed.Appx. 541, 552 (6th Cir.2011); *see also Alameda Books,* 535 U.S. at 439–40, 122 S.Ct. 1728 (plurality opinion) (noting that the Court has never *per se* required empirical data); *Renton,* 475 U.S. at 51, 106 S.Ct. 925 ("We hold that [the defendant] was entitled to rely on the experiences of Seattle and other cities, and in particular on the 'detailed findings' summarized in the [state supreme court's] opinion, in enacting its adult theater zoning ordinance."). Additionally, "evidence suggesting that a different conclusion [by the legislature] is also reasonable does not prove that the [state's] findings were impermissible or its rationale unsustainable." *Richland Bookmart II,* 555 F.3d at 527. Rather, the defendants must show either that the data relied upon are irrelevant or that the government has drawn an unreasonable conclusion from those data.

[11] **[12]** Finally, and notwithstanding the reasonableness of the state's rationale, the statute must leave "the quantity and accessibility of speech substantially intact." *Alameda Books,* 535 U.S. at 449, 122 S.Ct. 1728 (Kennedy, J., concurring in judgment). Justice Kennedy did not expand upon this final requirement beyond noting that a state or municipality may not set out to reduce the secondary effects of adult speech by proportionally reducing the availability of the speech itself. *Id.* at 450–51, 122 S.Ct. 1728 ("If two adult businesses are under the same roof, an ordinance requiring them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter."). Justice Kennedy made

his concurrence with the plurality contingent upon this requirement, *see ibid.* ("[T]he necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech."), which accordingly binds us. *729, Inc.,* 515 F.3d at 491.

B

1

We have previously recognized the state's substantial interest in controlling the adverse secondary effects of sexually oriented establishments, "which include violent, sexual, and property crimes as well as blight and negative effects on property values." *Richland Bookmart II,* 555 F.3d at 524. As evidenced by documents submitted by the state attorney general, the Tennessee Act and the Shelby County Ordinance purport to do the very same. Both governmental entities embarked upon extensive fact-finding processes during the drafting of the respective provisions: The preamble of the 1998 Act references "convincing documented evidence" of the adverse secondary effects caused by sexually oriented businesses; the preamble to the Act's 1995 predecessor cites 15 municipal studies on the secondary effects of sexually oriented business, and 15 state and federal judicial opinions upholding similar regulatory schemes; before enacting the law, the legislature sought the opinion of the state attorney general, who vouched for the Act's constitutionality; and before Shelby County enacted Ordinance 344, it hired Duncan Associates, a ***736** Texas-based consulting firm, to make an additional set of findings based upon local crime statistics and in-person, undercover visits to a number of adult-oriented businesses in the area (including many of the appellants' businesses).

[13] With this, the appellees easily clear *Renton's* initial hurdle: Both the state and the county passed their respective legislation to advance a governmental interest that we have previously recognized to be substantial. They relied upon ample empirical, legal, and anecdotal evidence that they reasonably believed to be relevant to the issues created by adult-oriented speech. This evidence provided a reasonable basis for concluding that the Act would have the desired effect of ameliorating the deleterious effects of erotic expression. The first step in our intermediate-scrutiny analysis is therefore satisfied.

2

Next, the burden shifts to appellants to show that the evidence presented does not support the rationale asserted or to furnish their own studies that dispute the state's findings. Appellants attack the Act on both fronts. They allege that the data relied upon by both the state and Shelby County are "fatally flawed" and additionally present their own research that purportedly negates the link between adult-oriented establishments and the deleterious secondary effects that the state wishes to control. However, we find no merit in either of these arguments. Viewing the appellants' evidence in the most charitable light possible, they have, at most, demonstrated that the methodological framework used to assess the relationship between adult-oriented businesses and the purported secondary effects of such businesses is subject to reasonable debate. This is to say that they have failed to show that the state's data have been *discredited,* thus making their reliance upon them unreasonable. What's more, the state relied upon a substantial amount of non-empirical evidence that appellants do not contest. Even if we do not consider the studies, the state is still entitled to summary judgment.

a

Appellants submitted a 36–page expert report by Dr. Daniel Linz that goes through each of the studies relied upon by the state and briefly explains how these studies are either methodologically flawed or irrelevant. Dr. Linz bases his criticism on an analytical framework expounded by himself and a group of colleagues in a 2001 article. *See* Daniel Linz et al., *Government Regulation of "Adult" Businesses Through Zoning and Anti–Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects,* 6 Comm. L. & Pol'y 355 (2001). The foundational premise of his argument is that a study must meet a *Daubert*-style definition of scientific validity before a state may reasonably rely upon it for the purposes of regulating adult-oriented businesses. *See id.* at 366–67, 391 (citing *Daubert v. Merrell Dow Pharm.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). He goes on to advance a four-point methodology for assessing the scientific validity of a secondary-effects study: (1) the control area must be equivalent to the area containing the

adult-oriented businesses in terms of crime, blight, and economic factors; (2) the study must assess the areas for a "sufficient period of elapsed time"—at least one year before and after the establishment of the adult-oriented business, according to Linz; (3) the source and types of crime data assessed must be similar (*e.g.,* if the control area is measured by calls for service, which he asserts is best, the test area must be measured by the same); (4) any survey research must be conducted in a proper, unbiased manner. *Id.* at 372–75.

***737** In his report, Dr. Linz attacks all of the studies cited by the state for shortcomings related to his framework. For example, he claims that the 1979 Phoenix and 1986 Indianapolis studies are unreliable because both failed to account for differences in socio-economic conditions and property values between the sample and control areas. He attacks other studies, such as the 1977 Los Angeles survey, for failing to control for ramped-up police enforcement in the sampling area. Finally, he assails other studies, such as the 1983 Houston study, for not being empirical.

b

The appellants' argument fails as a matter of law for a variety of reasons. First and foremost, the foundational premise of their argument—that the state's evidence must pass muster under *Daubert* or some equivalent—is flatly wrong. Neither the Supreme Court nor this court has ever held that the First Amendment demands direct empirical support, let alone a specific methodology, to sustain a regulation on erotic expression. *Alameda Books,* 535 U.S. at 439–40, 122 S.Ct. 1728 (plurality opinion); *id.* at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in judgment); *Richland Bookmart II,* 555 F.3d at 527. If a governmental entity need not rely upon direct empirical evidence, *a fortiori* it need not rely upon direct empirical evidence that meets a particular commentator's threshold of scientific validity.

As the Supreme Court observed in *Alameda Books,* this does not mean that governmental entities can rely upon "shoddy data." 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion). This statement, however, does not mean that the state's evidence must hurdle some methodological bar before it may be relied upon. Rather, we understand the nature of the state's ultimate burden—a *reasonable* belief of relevance—to set nothing more than a floor. States may not regulate erotic speech based upon evidence that is nongermane or, worse, nonexistent. Post–*Alameda Books* case law confirms this. Take for example the three cases upon which the appellants principally rely: *New Albany DVD, LLC v. City of New Albany,* 581 F.3d 556 (7th Cir.2009), *Annex Books, Inc. v. City of Indianapolis,* 581 F.3d 460 (7th Cir.2009), and *Abilene Retail # 30, Inc. v. Board of Commissioners of Dickinson County,* 492 F.3d 1164 (10th Cir.2007). Addressing them in chronological order, *Abilene Retail* concerned a zoning ordinance passed in a rural county based upon the standard litany of urban-based secondary-effects studies. The Tenth Circuit reversed a grant of summary judgment because of a material dispute as to the relevance of the existing canon of studies to a non-urban setting. 492 F.3d at 1175–76. Next, the Seventh Circuit in *Annex Books* found a material question as to the relevance of data on the dispersal of businesses featuring live sexual entertainment to a set of regulations of the conditions and hours of operation of adult bookstores. 581 F.3d at 461–63. The Seventh Circuit again reversed a grant of summary judgment in *New Albany DVD,* where a municipality passed regulations of adult bookstores based upon threadbare anecdotal evidence that theft and pornographic litter tended to occur with higher frequency around such stores. 581 F.3d at 559–61.

In contrast, the State of Tennessee and Shelby County relied upon a vast array of germane, widely accepted evidence in passing their respective regulations. To the extent that the appellants ask the federal courts to declare this evidence insufficient, they ask the court system to effect a paradigm shift in empirical criminology through judicial decree, if not a fundamental restructuring of First Amendment law. Similar requests have been roundly rejected by our sister circuits, and we now join ***738** them. *See, e.g., Imaginary Images, Inc. v. Evans,* 612 F.3d 736, 747–48 (4th Cir.2010) ("So while the Linz study and others may well be of interest to legislatures or those formulating policy, it does not provide the kind of 'clear and convincing' evidence needed to rebut the government's showing and invalidate the regulation."); *Doctor John's v. Wahlen,* 542 F.3d 787, 791–93 (10th Cir.2008) ("Even Doctor John's concedes that 'courts continue to rule that studies of secondary effects ... do not have to meet the standard of *Daubert.*' ... [I]n light of the Supreme Court's rejection of this specific analysis by Dr. Linz, we see little need to continue." (alterations in original)); *Daytona Grand, Inc. v. City of Daytona Beach,* 490 F.3d 860, 882–83

& n. 33 (11th Cir.2007) ("We also note that at least three other circuits have rejected, for similar reasons, attempts by plaintiffs to use studies based on [call-for-police-service] data to cast direct doubt on an ordinance that the municipality supported with evidence of the sort relied upon by the City of Daytona Beach here. Interestingly, Daniel Linz, one of the experts hired by Lollipop's, also co-authored the studies found to be insufficient in two of these cases." (citations omitted)); *Gammoh v. City of La Habra,* 395 F.3d 1114, 1126–27 (9th Cir.2005) ("The Appellants' proffered expert [Linz] declared that the City's evidence was flawed because 'systematically collecting police call-for-service information' and adhering to the Appellants' suggested methodological standards were 'the only reliable information' that could have supported the City's concern. This is simply not the law."); *G.M. Enters., Inc. v. Town of St. Joseph,* 350 F.3d 631, 639–40 (7th Cir.2003) ("Plaintiff argues that its complaint must survive summary judgment because the evidence relied upon by the Board does not meet the standards of *Daubert v. Merrell Dow Pharmaceuticals.* Under the plaintiff's view, the Town cannot demonstrate a reasonable belief in a causal relationship between the activity regulated and secondary effects, as required by *Alameda Books* and *Renton,* unless the studies it relied upon are of sufficient methodological rigor to be admissible under *Daubert.* This argument is completely unfounded." (citations omitted)).

We do not suggest that Dr. Linz's work is flawed. To the contrary, we construe it in the most charitable light possible. However, the most we may fairly say of his work is that it is a minority viewpoint within the secondary-effects literature. As suggested by two of our sister circuits[2]—and as we state clearly now—federal court is simply not the appropriate forum for Dr. Linz and his colleagues to wage methodological combat with other studies on the secondary effects of adult speech. At best, the appellants have demonstrated that the ***739** State of Tennessee and Shelby County faced a choice between two reasonable alternative viewpoints when assessing the need for the challenged regulations. The appellants effectively ask us to second-guess the deliberative judgments of both legislative bodies. We decline to do so.

2 *See Imaginary Images,* 612 F.3d at 749 ("None of this is to say that Virginia's policy is unassailable or even right. But the primary means to challenge legislative misconceptions is through the channels of representative government: hearings, speeches, conversations, debates, the whole clamorous drama of democracy that leads to the enactment of the given law. In the First Amendment context, those affected by restrictions designed to combat secondary effects may of course demonstrate that the justification for a particular restriction rests on 'shoddy data or reasoning.' But to invoke the power of the judiciary to set the policy aside, such evidence must be sufficiently convincing to 'prove[ ] unsound' the government's justification for its policy."); *G.M. Enters.,* 350 F.3d at 639–40 ("*Alameda Books* does not require a court to re-weigh the evidence considered by a legislative body, nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence 'reasonably believed to be relevant to the problem' addressed.").

c

Though the foregoing analysis amply supports the district court's grant of summary judgment on the appellant's intermediate-scrutiny argument, we briefly note that the appellants would not prevail even if we did not consider the contested studies. The state may rely upon "*any* evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion) (emphasis added) (quoting *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925). This includes "land-use studies, prior judicial opinions, surveys of relevant professionals (such as real-estate appraisers), anecdotal testimony, police reports, and other direct and circumstantial evidence." *84 Video/Newsstand,* 455 Fed.Appx. at 549. The studies assailed by the appellants are but one piece of a larger body of evidence relied upon by both the state and the county, which included the experiences of other states and municipalities, judicial opinions, crime statistics, anecdotes from police, their own prior experiences with regulating adult-oriented businesses, and plain common sense. Even if we count the reasonableness of the state's reliance upon these studies as disputed, the district court's decision is supported by the uncontested, non-empirical evidence in the record.

C

[14] The district court separately considered the issue of whether the state was reasonable in its belief that the same body of data justified regulation of "briefly attired dancers." [3] After a bench trial, the district court ruled in favor of the state, relying upon our opinion in *Richland Bookmart II,* 555 F.3d at 529–30. The appellants' primary quarrel with the district court's opinion appears to be that it credited the testimony of Dr. Richard McCleary, the state's expert, over that of Dr. Linz. Factual disputes such as this are reviewed only for clear error, *Morrison v. Colley,* 467 F.3d 503, 506 (6th Cir.2006), and we find none.

3 By "briefly attired," we understand appellants to mean "entertainers who are distinctly not nude, but are clad in bikinis, swimsuits, and other materials which, while opaque, do not completely cover the entire buttocks, or all portions of the breast below the topmost portion of the areola." *Entm't Prods. I,* 588 F.3d at 383 (internal quotation marks omitted).

The appellants additionally cite *R.V.S., L.L.C. v. City of Rockford,* 361 F.3d 402 (7th Cir.2004), as establishing that the existing body of secondary-effects literature is devoid of a link between non-nude dancing and the adverse effects that the state and the county wish to ameliorate. This argument, however, represents a misunderstanding of the applicable First Amendment case law and of *R.V.S.* itself. As discussed in detail in the previous section, a state or municipality is not obliged to produce direct evidence of a link between a particular activity that it wishes to regulate and the secondary effects that it wishes to mitigate—it need only produce evidence that it reasonably believed to be relevant to the problem and upon which it reasonably relied in concluding that the regulations passed would have the effects desired. *See 729, Inc.,* 515 F.3d at 491. Furthermore, *R.V.S.* falls into the previously discussed category of cases in which a federal court has struck down an adult- ***740** entertainment regulation due to a total absence of evidence relied upon by the state or municipality. *See* 361 F.3d at 405 ("[I]t is undisputed that the City Council did not rely on any studies from other towns or conduct any of their own studies.... The Ordinance does not contain any preamble or legislative findings and the journal of proceedings for the City Council meeting at which it was adopted does not state any findings."). Thus, *R.V.S.* neither conflicts with nor bears upon our prior case law holding that it is reasonable for governments to conclude that establishments featuring scantily clad dancers pose the same types of problems as establishments featuring nude and semi-nude entertainment. *Entm't Prods. I,* 588 F.3d at 383 (citing *Richland Bookmart II,* 555 F.3d at 529–30).

D

The appellants mount a final effort to strike down the Act under intermediate scrutiny by threatening to shut down if they lose. They argue that the Act fails Justice Kennedy's proportionality requirement from *Alameda Books,* 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring in judgment), because the appellants' exit from the adult-entertainment market would cause a rapid decrease in the quantity and accessibility of adult speech. *See ibid.* The appellants submitted two affidavits by two nightclub proprietors, which speak of the economic impact that the Act—namely the ban on the sale or consumption of alcohol at their clubs—would have on their business. At oral argument, counsel for the appellants stated that his clients' nightclubs have ceased production of nude and semi-nude entertainment, choosing to operate as bikini bars so as to avoid regulation by the Act. The county confirms that no bar has filed for a license to operate as an adult-oriented business in Shelby County since the January 2013 effective date of Ordinance 344.

In *Alameda Books,* the Supreme Court assessed the effects of a Los Angeles zoning ordinance on the availability of adult speech. The challenged ordinance prohibited the operation of multiple adult businesses in a single building, on the theory that a concentration of adult-oriented businesses bred higher crime rates. 535 U.S. at 430–31, 122 S.Ct. 1728. In his decisive concurrence, Justice Kennedy posited that a proper *Renton* analysis must "address how speech will fare under the [challenged] ordinance." 535 U.S. at 450, 122 S.Ct. 1728. He observed:

> [T]he necessary rationale for applying intermediate scrutiny is the promise that ... ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects.... It is no trick to reduce secondary effects by reducing speech or its

> audience; but a city may not attack secondary effects indirectly by attacking speech.

Ibid.

We applied this framework in our opinion in *729, Inc.* 515 F.3d at 492–93. At issue was the constitutionality of a "cooling off" provision—a one-hour period after a performance during which erotic entertainers could not come within five feet of a patron. *Id.* at 490. We held that, though the regulation did affect speech by preventing dancers from being physically present in a particular area for a particular period of time, it did not run afoul of *Alameda Books. Id.* at 493. The regulation served a substantial governmental interest in minimizing customer-entertainer contact that carried a risk of prostitution and did so in a manner that substantially preserved erotic speech. *Ibid.* It neither banned communication between customers ***741** and entertainers outright (affected performers could communicate with patrons while still complying with the buffer-zone restriction) nor substantially reduced the opportunity to engage in protected conduct (it affected only those dancers performing on that night within the preceding hour). *Ibid.*

Turning to the issue before us, we have no trouble making the initial conclusion that Ordinance 344 serves a substantial governmental interest. It seems almost too obvious to say that the combination of intoxicating beverages and erotic entertainment can be extremely volatile, and that banning the consumption of alcohol at adult-oriented businesses may reduce a variety of secondary effects. This common-sense observation is supported by the findings contained in the Duncan Associates report, which uncovered instances of patrons drinking "to the point of total inebriation," coupled with numerous violations of state and local laws proscribing customer-patron sexual contact. The report further suggested that the combination of drinking and sexual stimulation increased the risk of patrons become targets for crime, as these individuals are likely to "have their guard down." This conclusion is, in some sense, too narrow, in that it does not take into account the increased risk that the intoxicated, sexually stimulated patrons may themselves engage in criminal activity, *e.g.,* soliciting performers for sex, exposing themselves in public, and like crimes.

Our analysis becomes more complex when we turn to the proportional impact that this regulation has on the availability of adult speech in Shelby County. The appellants would have us believe that because they have voluntarily ceased production of adult entertainment, the availability of protected adult speech has dropped to zero. However, their argument ultimately proves too much. The appellants do not allege that the alcoholic-beverage ban would damage their revenue stream so profoundly that it makes their businesses unprofitable. Rather, they allege that the ban would merely make their clubs *less* profitable. Though they do not specify how much their profits would be reduced were they to stay in the adult-entertainment business, it is telling that an owner of one of the defendant clubs operates an alcohol-free cabaret in Nashville. Although he notes that the Nashville club is less profitable than his other clubs, compliance with the ban has clearly not driven him from the market.

At bottom, we understand the appellants to make the following argument: Compliance with the alcoholic-beverage ban would reduce their profits. This reduction in profits results in a situation where it is more profitable to operate outside of the Ordinance's coverage as a bikini bar than it is to operate within the Ordinance's coverage as a strip club. Being rational actors, the appellants choose to convert their establishments into the more lucrative bikini bars, resulting in a substantial drop-off in the availability of erotic speech. Accordingly, they theorize, the Ordinance cannot pass muster under *Alameda Books.*

[15] The problem with this argument is that it ignores the fact that any reduction in the availability of erotic speech is due not to the operation of the Ordinance, but to the appellants' economic choice to invest their resources elsewhere. This scenario is categorically different from the ones faced in *Alameda Books,* where Justice Kennedy expressed concern that municipalities could enact zoning ordinances to force adult-oriented businesses to close, and in *729, Inc.,* where this court scrutinized a local cool-down provision to ensure that it did not directly effect a substantial reduction in the opportunities for erotic expression. Shelby County did not premise ***742** its alcoholic-beverage ban on the elimination of adult speech, and the ban imposes neither a crushing financial burden nor a direct and substantial curtailment of opportunities for erotic expression. It merely regulates the types of revenue-generating activities that proprietors of adult-oriented businesses may conduct.

It is not enough that the ban, combined with outside forces such as the relative demands for striptease, bikini contests, and alcohol, result in an economic climate where it is more lucrative to operate a non-nude club with alcohol than a nude club without. Were this sufficient to sustain a proportionality argument under *Alameda Books,* it is hard to see how any government action that alters the economic calculus of adult-oriented businesses would not potentially violate the First Amendment. Suppose that Shelby County decided to discourage nude and semi-nude entertainment not by regulating adult-oriented businesses, but by subsidizing non-adult-oriented businesses. Giving financial breaks to comedy clubs, disco bars, and the local theatre may well create an economic choice similar to the one presented here, yet it is patently absurd to say that such action would violate the First Amendment. The appellants' legal theory would expand Justice Kennedy's concurrence beyond any recognizable limiting principle, and we accordingly reject it.

IV

The appellants' next set of challenges relate to the statutory definitions of "adult-oriented establishments," "adult cabaret," and "adult entertainment." They attack these critical terms, which ultimately define the scope of the Act's coverage, under theories of overbreadth and void-for-vagueness. We previously addressed the meaning of these terms during our review of the appellants' request for a preliminary injunction. *Entm't Prods. I,* 588 F.3d at 383–89. We denied the preliminary injunction after finding that the operative terms were susceptible to a narrowing construction that would clearly exempt mainstream artistic venues, thereby curing any potential overbreadth and sufficiently clarifying any portion of the Act allegedly contaminated by vagueness. *Id.* at 389, 394–95.

[16] **[17]** **[18]** Appellants' arguments here are, in substantial part, an attempt to relitigate that finding. However, "[u]nder the law-of-the-case doctrine, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation." *Rouse v. DaimlerChrysler Corp.,* 300 F.3d 711, 715 (6th Cir.2002). We generally will not disturb these findings unless there is "(1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Louisville/Jefferson Cnty. Metro Gov't v. Hotels.com, L.P.,* 590 F.3d 381, 389 (6th Cir.2009) (internal quotation marks omitted). The appellants claim that the Supreme Court's intervening opinion in *United States v. Stevens,* 559 U.S. 460, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010), vitiated our analysis in *Entertainment Productions I.* They read *Stevens* to circumscribe our ability to apply a narrowing construction to potentially overbroad terms, such that we must revisit our prior holding. However, we find no new principle of First Amendment law in *Stevens* that affects our analysis, and appellants' counsel could not point us to one during oral arguments.

The *Stevens* Court struck down a federal law that criminalized the commercial creation, sale, or possession of "a depiction of animal cruelty," which the statute defined as "[one] in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." ***743** *Id.* at 1582 (quoting 18 U.S.C. § 48(a), (c)(1) (amended 2010)). The Court found no language in § 48 that would delineate acts that are traditionally considered animal cruelty, such as the "crush videos" that were the original target of statute, from arguably protected speech, such as depictions of hunting and livestock slaughter. *Id.* at 1588–89. Rather, the statute's criminal scope was a function of the legality of the act depicted in the jurisdiction in which it was made, thereby subjecting citizens to a "bewildering maze of regulations from at least 56 separate jurisdictions." *Id.* at 1589.

The appellants point us not to what the Court held, but rather to what it did not. They argue that the Court's rejection of the government's various defensive arguments elucidates a new and deeper understanding of the overbreadth doctrine. This argument, however, reads too much into a rudimentary application of preexisting law to an overbroad statute. The government first argued that the phrase "depiction of animal cruelty" should be construed to require an accompanying act of cruelty. *Id.* at 1588. The Court rejected this argument out of hand:

> The Government contends that the terms in the definition should be read to require the additional element of "accompanying acts of cruelty." The Government bases this argument on the definiendum, "depiction of animal cruelty"....

....

> But the phrase "wounded ... or killed" at issue here contains little ambiguity. The Government's opening brief properly applies the ordinary meaning of these words, stating for example that to " 'kill' is 'to deprive of life.' " We agree that "wounded" and "killed" should be read according to their ordinary meaning. Nothing about that meaning requires cruelty.

Ibid. (citations omitted). The government next argued that the statute's exemption clause, which carved out "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," 18 U.S.C. § 48(b) (amended 2010), protected speech that contained "anything more than scant social value." *Id.* at 1590 (internal quotation marks omitted). The Court again rejected this argument as an "unrealistically broad reading of the exceptions clause." *Ibid.* This left the government with only a bare assertion of prosecutorial discretion, which the Court rejected forcefully by stating that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Id.* at 1591.

To the extent that the Court may have appeared exceptionally strict in its analysis of the proposed narrowing constructions, it is likely because those proposed constructions were exceptionally weak. We discern no new principle of First Amendment law flowing from the Court's opinion. Indeed, the *Stevens* Court began its analysis exactly where we began ours: by citing *United States v. Williams,* 553 U.S. 285, 293, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008), for the proposition that "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Compare Stevens,* 130 S.Ct. at 1587, *with Entm't Prods. I,* 588 F.3d at 381. Our analyses diverged at this point because the Court found that "animal cruelty" was not readily susceptible to a narrowing construction in light of the plain-text definition of the phrase, while we found the opposite with regards to "adult-oriented establishments," "adult cabaret," and "adult entertainment." Having presented no persuasive reason for us to revisit our prior interpretation of the Act, we adhere to our ruling in *Entertainment* ***744** *Productions I* and reject the appellants' overbreadth and void-for-vagueness arguments.

V

The appellants make two final arguments unrelated to the First Amendment. They first argue that Ordinance 344 is preempted by Section 7–51–1121(b) of the Act, which states

> Notwithstanding any provision of subsection (a) or any other law to the contrary, if a city or other political subdivision in this state chooses to enact and enforce its own regulatory scheme for adult-oriented establishments and sexually-oriented businesses [sic], then this part shall not apply within the jurisdiction of such city or other political subdivision.

Appellants suggest that this provision preempts enforcement of the Act in Shelby County because the City of Memphis and the county have a number of other provisions that address sexually oriented businesses. Appellants' suggested reading contradicts the provision's plain text. This section does quite the opposite of preemption: it allows localities to enact and enforce their own regulatory schemes without fear of being preempted by the state. We focus specifically on the operative verb of the provision—"choose." If a city or other political subdivision chooses to enact and enforce its own regulatory regime, then the state opt-in regime does not apply. If, however, the political subdivision chooses to opt into the state regulatory regime, as Shelby County has done here, then it only makes sense that the Act applies. The appellants have not shown how any county or city ordinance conflicts with the operation of the Act. They present no argument as to why the Act should be preempted, save the fact that both the county and the city have other laws that touch on the same subject matter. We reject this argument.

[19] **[20]** Finally, appellants claim they were prejudiced by an erroneous denial of a motion to compel the City of Memphis to produce a number of police reports and crime-data sheets. According to the magistrate judge's order, the appellants sought the production of "essentially all records and reports relating to crimes within the city limits over a five-year time period." *Entm't Prods.*

v. Shelby Cnty., No. 08–2047–D/P, 2009 WL 1148240 (W.D.Tenn. Apr. 28, 2009). The magistrate judge denied the request as overly broad and irrelevant, and the district court affirmed. We agree. Though the parties generally may discover any unprivileged evidence relevant to their claim, Fed.R.Civ.P. 26(b)(1), the district court may limit discovery due to irrelevance and burdensomeness. *Surles ex rel. Johnson v. Greyhound Lines, Inc.,* 474 F.3d 288, 305 (6th Cir.2007). We have previously ruled that litigants challenging an adult-entertainment regulation are not entitled to discovery regarding localized manifestations of secondary effects, as a state or municipality need not rely upon this data in order to pass a valid regulation. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.,* 466 F.3d 391, 398 (6th Cir.2006). Since the discovery sought would not resolve any factual disputes that could entitle the appellants to relief, their request "falls more in the category of a fishing expedition," and the district court did not err in denying it. *See Stanford v. Parker,* 266 F.3d 442, 460 (6th Cir.2001).

VI

For the foregoing reasons, we **AFFIRM** the district court.

KAREN NELSON MOORE, Circuit Judge, concurring in the judgment.

I write separately to address the district court's grant of summary judgment. In ***745** my view, the district court's decision is supported by the simple fact that plaintiffs failed to address defendants' public health, safety, and welfare rationales for introducing the Act.

Under the burden-shifting framework announced in *City of Los Angeles v. Alameda Books, Inc.,* defendants have the initial burden of putting forth "any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." 535 U.S. 425, 438, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (quoting *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 51–52, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). Then the burden shifts to plaintiffs to "cast direct doubt on this rationale, either by demonstrating that [defendants'] evidence does not support [their] rationale or by furnishing evidence that disputes [defendants'] factual findings." *Id.* at 438–39, 122 S.Ct. 1728. "If plaintiffs succeed in casting doubt on [defendants'] rationale in either manner, the burden shifts back to [defendants] to supplement the record with evidence renewing support for a theory that justifies [the Act]." *Id.* at 439, 122 S.Ct. 1728. This case concerns the second step, when the burden is on plaintiffs.

As both the district court and majority opinion note, our cases make clear that "evidence suggesting that a different conclusion is also reasonable does not prove that the County's findings were impermissible or its rationale unsustainable." *Richland Bookmart, Inc. v. Knox County,* 555 F.3d 512, 527 (6th Cir.2009). With this, both opinions hold that summary judgment was appropriate. To me, relying on this proposition of law to grant summary judgment in favor of defendants undermines the wisdom of the burden-shifting mechanism. Frankly, it is exceptionally unclear from our cases what evidence plaintiffs needed to present to raise a genuine issue of material fact as to whether they have cast doubt on defendants' rationale for introducing the Act. Given this uncertainty, I think that the issue is more suited for trial than summary judgment.

Noting this concern, I would nonetheless affirm the district court's grant of summary judgment because plaintiffs failed to present any evidence that casts doubt on the public health, safety, and welfare rationales for introducing the Act. The district court aptly noted in granting summary judgment in favor of defendants:

> Dr. Linz analyzed studies on property values and crime relied on by the County and the State. Dr. Linz' critiques and supplemental studies did not extend to the spread of sexually transmitted diseases or any other public health, safety, and welfare issues, and Plaintiffs submitted no other evidence to counter the County's and State's concerns on those issues. As such, Plaintiffs have failed to shift the burden of proof from themselves back to the County with regard to the City's public health concerns.

R. 123 (9/29/09 D. Ct. Order at 13) (Page ID # 4727). Given that plaintiffs failed to raise any doubt on the public health, safety, and welfare rationales for adopting Act, plaintiffs failed to shift the burden

back to defendants. *See 84 Video/Newsstand, Inc. v. Sartini,* 455 Fed.Appx. 541, 552 (6th Cir.2011), *cert. denied,* —— U.S. ——, 132 S.Ct. 1637, 182 L.Ed.2d 234 (2012) ("Linz's testimony and studies fail to cast doubt on the entire body of evidence relied on by the General Assembly, including those secondary-effects studies not discussed by Linz and the significant quantity of other types of evidence relied on by the Legislature with which Linz does not engage, including prior court decisions, news reports, and anecdotal testimony by law enforcement officials and others."); *see also* ***746** *Heideman v. South Salt Lake City,* 165 Fed.Appx. 627, 631–32 (10th Cir.2006) ("Simply put, the record does not contain any evidence to counter the City's concern over unsanitary conditions or the possibility of public health concerns associated with unregulated nude conduct in adult business establishments.... Accordingly, Plaintiffs failed to shift the burden of proof from themselves back to the City."). Instead of heightening plaintiffs' burden at summary judgment to meet some unknown (or perhaps unattainable) evidentiary burden to create a genuine issue of material fact as to whether they have cast doubt on defendants' rationale, I would hold simply that plaintiffs were required to cast doubt on each rationale presented by defendants. Because plaintiffs failed to address all of defendants' rationales, the district court did not err in granting summary judgment in favor of defendants, and therefore I concur in the judgment.

All Citations

721 F.3d 729

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714 F.3d 65
United States Court of Appeals,
First Circuit.

Gary LUND, d/b/a Club Martinique, Plaintiff, Appellant,

v.

CITY OF FALL RIVER, MA; James Hartnett, City Planner; Fall River Zoning Board of Appeals; David Assad, as Chairman of the Fall River Zoning Board of Appeals; Gene Alves, as Vice Chairman of the Fall River Zoning Board of Appeals; Richard Mateus, as Member of the Fall River Zoning Board of Appeals; Andrea Merolla–Simister, as Member of the Fall River Zoning Board of Appeals; John Frank, III, as Member of the Fall River Zoning Board of Appeals, Defendants, Appellees.

No. 12–1758.
|
April 22, 2013.

Synopsis

Background: Plaintiff brought Massachusetts state–court action against city, challenging zoning ordinances as violating his First Amendment rights by preventing him from opening adult entertainment establishment on property zoned as industrial without providing adequate opportunity elsewhere. City removed action. The United States District Court for the District of Massachusetts, George A. O'Toole, Jr., J., 2012 WL 1856947, entered judgment for city. Plaintiff appealed.

Holdings: The Court of Appeals, Souter, Associate Justice, sitting by designation, held that:

[1] that purportedly available sites were subject to long-term leases or required costly development was not relevant in constitutional analysis;

[2] court reasonably determined that there were eight available sites in city for adult establishments; and

[3] ordinances provided plaintiff with reasonable means of commercial adult activity as alternative to their restrictions.

Affirmed.

West Headnotes (8)

[1] Federal Courts
"Clearly erroneous" standard of review in general

Where, in a nonjury case, the basic dispute between the parties concerns the factual inferences that one might draw from the more basic facts of the case, where there are no significant disagreements about those basic facts, and where neither party has sought to introduce additional factual evidence or asked to present witnesses, the Court of Appeals applies a clear error standard of review, rather than a de novo standard, on all issues not purely legal.

1 Cases that cite this headnote

[2] Federal Courts
Mode and sufficiency of presentation

Plaintiff forfeited his argument that district court, in entering judgment in favor of city, failed to assess impact of zoning ordinance's requirement of 750–foot buffer between loading facilities and any structure used for residential purposes, by raising that argument for first time on appeal in his suit to challenge ordinances as violating his First Amendment rights by preventing him from opening adult entertainment establishment on property zoned as industrial without providing adequate opportunity elsewhere. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[3] Constitutional Law
Availability of other sites

Zoning and Planning

Sexually-oriented businesses;nudity

Even if purportedly available sites in city for adult entertainment establishments were subject to long-term leases or would require costly development, these were not relevant considerations in assessing whether zoning ordinances interfered with plaintiff's First Amendment rights by preventing him from opening establishment on property zoned as industrial without providing adequate opportunity elsewhere; fact that other private parties leased properties before plaintiff, alone, was of no moment in constitutional analysis, and cost of development was nothing more than business consideration for plaintiff to weigh. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] **Constitutional Law**

Availability of other sites

Zoning and Planning

Sexually-oriented businesses;nudity

District court reasonably determined that there were eight available sites in city for adult entertainment establishments, in suit challenging zoning ordinances as violating plaintiff's First Amendment rights by preventing him from opening establishment on property zoned as industrial without providing adequate opportunity elsewhere; while plaintiff challenged one site because it required relocation of access drive and tear-down of existing structure and other sites as requiring subdivision, these were economic arguments that court was not required to consider in its constitutional analysis, and, contrary to plaintiff's contention, access drives could have been constructed so that buildings on one parcel would satisfy ordinance's 50–foot setback requirement and accommodate six sites. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] **Constitutional Law**

Availability of other sites

Under the *Renton* scheme for analyzing a First Amendment challenge to zoning that limits adult businesses, if a zoning code passes muster as a time, place, and manner regulation, if it is content neutral, and if it advances a substantial governmental interest, the question remaining is whether it leaves reasonable means of commercial adult activity as an alternative to its restrictions. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[6] **Constitutional Law**

Availability of other sites

Determination as to whether a zoning ordinance, challenged under the First Amendment, leaves reasonable means of commercial adult activity as an alternative to its restrictions does not ask whether a degree of curtailment of speech exists, but rather whether the remaining communicative avenues are adequate. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[7] **Constitutional Law**

Availability of other sites

In determining whether a zoning ordinance, challenged under the First Amendment, leaves reasonable means of commercial adult activity as an alternative to its restrictions, the reviewing court looks to multiple factors, including the percentage of acreage within the zone for adult business use compared with the acreage available to commercial enterprises and the number of sites available to adult entertainment businesses, with no single dispositive evaluative consideration. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[8] **Constitutional Law**

Availability of other sites

Zoning and Planning

Sexually-oriented businesses;nudity

City's zoning ordinances provided plaintiff with reasonable means of commercial adult activity as alternative to their restrictions, precluding his First Amendment challenge to those ordinances; ordinances did not restrict 28.53 acres of city's 11,783 developable acres, or 0.24%, on 8 separate sites, and court appropriately considered city's urban nature and larger land mass. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

***67** Brian R. Cunha, with whom Brian Cunha & Associates, P.C. was on brief, for appellant.

Elizabeth Sousa, with whom the Office of the Corporation Counsel was on brief, for appellees.

Before LYNCH, Chief Judge, SOUTER,* Associate Justice, and SELYA, Circuit Judge.

* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

Opinion

SOUTER, Associate Justice.

Appellant, Gary Lund, contends that the City of Fall River's zoning ordinances violate the First Amendment by preventing him from opening an adult entertainment establishment on land zoned industrial without providing an adequate opportunity elsewhere. The district court rejected his claim, and we affirm.

I

By the terms of a Fall River ordinance, intending providers of adult entertainment must obtain a "special permit," *see* Revised Code of Ordinances of the City of Fall River, Mass., Rev. Ordinances § 86–85, which may be granted only if the applicant meets a variety of zoning conditions, *see id.* §§ 86–88, 86–201. So far as it matters here, § 86–88 mandates a minimum amount of parking proportional to the size of the building to be used and requires it to be surrounded by a four-foot, landscaped perimeter. All parking and loading structures must be at least 50 feet from any street and 750 feet from any residence. Section 86–201 forbids adult entertainment on a site within an "Industrial District."

Lund applied for a special permit to open "Club Martinique" at 139 Front Street, even though he conceded that his proposal failed to comply with the ordinance. *See* J.A. 17. 139 Front Street is within an Industrial District and is thus disqualified as a site for adult entertainment by § 86–201, and beyond that his proposal would have violated § 86–88 owing to the presence of parking spaces closer than 50 feet to the street and the absence of landscaping. When the City denied his application, Lund appealed to the Zoning Board of Appeals for variances from the ordinances, which the Board denied, noting the unequivocal language of §§ 86–88 and 86–201. *See, e.g., id.* § 86–88 ("Any building ... containing an adult use shall meet the setback requirements...."); *id.* § 86–201 ("In an Industrial District, no structure shall be used except for one of the following uses: Existing mill buildings may be used for art use, except adult use as defined in ***68** section 86–81 is prohibited." (ellipses omitted)).

Lund then went to the Superior Court of the Commonwealth of Massachusetts for declaratory and injunctive relief, as well as compensatory damages, alleging that the City's ordinances violate the First Amendment. He contended that sections 86–88 and 86–201, individually and in combination, "den[y him] a reasonable opportunity and accommodation to open and operate, within the City, an adult entertainment club." J.A. 21. The City removed the case to the district court, *see* 28 U.S.C. § 1441(a), which had jurisdiction under 28 U.S.C. § 1331.

There, the scope of disagreement narrowed substantially after an evidentiary hearing on Lund's request for preliminary injunction, in which he and the City offered expert testimony about the amount of legally available land in the City. At the close of evidence, Lund's counsel stated, "I don't think that there's any facts (sic) in dispute here. And I know I said at the beginning just a preliminary injunction, but I don't see why ... you can't make a summary judgment decision as well. I don't think

there's any factual dispute ... between the two experts. There are different scenarios that they've presented....” Evidentiary Hearing Tr. 59, June 3, 2010. The district court responded that the disputed question was fairly discrete, as addressing the last of the conditions to be met by adult commerce regulation subject to intermediate scrutiny under *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986): whether the ordinances blocking the proposed adult use provide reasonable alternative means for Lund to conduct his adult entertainment business.

> THE COURT: If that's the framing of the issue ... then I think we have all the evidence we need to decide the merits of the case one way or the other.
>
> MR. CUNHA [plaintiff's counsel]: And I don't disagree.
>
> THE COURT: Does the [C]ity disagree with that?
>
> MS. PEREIRA [defendants' counsel]: No, your Honor.

Evidentiary Hearing Tr. 60, June 3, 2010; *see also Lund v. City of Fall River,* No. 10–10310, 2012 WL 1856947, at *2 (D.Mass. May 22, 2012) (“Lund conceded that the sole question presented here is whether sections 86–88 and 86–201 provide reasonable alternative avenues of communication.”).

After consideration, the district court entered judgment for the City on the authority of *Renton. See Lund,* 2012 WL 1856947, at *2–6. The court found that out of the City's 11,783 developable acres, 28.53 acres (or 0.24%), on 8 separate sites, are available as adult entertainment venues. *Id.* at *5–7. The court thus rejected Lund's objections that he could not have adequate space within that acreage without combining multiple parcels and undertaking costly redevelopment to comply with the ordinances; the district court declined to declare any of the 28.53 acres unavailable due to such “economic” considerations. *See id.* at *7–11. Finally, the court held that 0.24% of the City provided Lund with reasonable room to exercise his protected expressive right, *id.* at *9–11, relying upon our decision in *D.H.L. Associates, Inc. v. O'Gorman,* 199 F.3d 50, 60 (1st Cir.1999), which found no constitutional deprivation in municipal zoning that left only 0.09% of developable land available for adult entertainment.

This timely appeal followed, there being no question of our jurisdiction under 28 U.S.C. § 1291.

***69** II

The standard of review that we apply turns on the character of the proceeding in the period after the case was submitted to the court at the end of the colloquy just quoted. Lund's counsel expressly proposed treating his motion for a preliminary injunction as a motion for summary judgment, which would leave it to the court to draw fair inferences from the undisputed material facts and determine whether Lund was entitled to judgment as a matter of law. *See Jirau–Bernal v. Agrait,* 37 F.3d 1, 3 (1st Cir.1994). Presumably he intended the court to act as if cross-motions for summary judgement were before him, and so to grant judgment for the City if it was entitled to it as a matter of law. Looked at this way, the case here would present only issues of fair inference and legal entitlement, which we would review de novo, as on a conventional appeal from summary judgment. *See Shafmaster v. United States,* 707 F.3d 130, 135 (1st Cir.2013).

[1] But the colloquy did not end with simple assent to proceed on summary judgment. The court's response spoke of “hav[ing] all the evidence we need to decide the merits of the case one way or the other,” and each counsel went on record as having no disagreement. This sounds more like an agreement for plenary submission of the case to the judge as fact-finder, and this is what the judge ultimately understood. His order here on appeal begins with citation to Federal Rule of Civil Procedure 65, subsection (a)(2) of which authorizes a court to “advance the trial on the merits and consolidate it with the hearing” on a motion for preliminary relief. This also seems to be what Lund's counsel understood he had agreed to, for his appeal addresses the merits of the ruling, not the procedural propriety of the route to reaching it. Accordingly, we think the better view is to see the order appealed not as one of summary judgment, but as the product of the procedural crawl that then-Judge Breyer described in *Federacion de Empleados del Tribunal Gen. de Justicia v. Torres,* 747 F.2d 35 (1st Cir.1984).

> [W]here, in a nonjury case, ‘the basic dispute between the parties concerns the factual inferences ... that one might draw from the more basic facts to which the parties have drawn the court's attention,’ where

> '[t]here are no significant disagreements about those basic facts,' and where neither party has 'sought to introduce additional factual evidence or asked to present witnesses'.... the standard for appellate oversight shifts from de novo review to clear-error review.

EEOC v. Steamship Clerks Union, Loc. 1066, 48 F.3d 594, 603 (1st Cir.1995) (quoting *Federacion de Empleados del Tribunal Gen. de Justicia,* 747 F.2d at 36). It follows that our review standard is for clear error on all issues not purely legal, though we will be candid to say that the result would be the same if the examination were de novo.

III

Lund's exceptions to the district court's ruling boil off at two. He contends it was error to find that 28.53 acres on 8 sites were "available" for adult entertainment, and he argues that the available land does not provide him a reasonable opportunity to open an adult business.

A

After testimony and evidence from both parties' experts, the district court adopted the City's contention that the ordinances left 28.53 acres for adult entertainment, being 0.24% of the City's developable land, comprising 8 sites. The court found that ***70** Lund's contrary assertions "lack[ed] evidentiary support, whereas the City's figure [was] well-supported by the testimony and exhibits presented." *Lund,* 2012 WL 1856947, at *3. Lund argues the contrary on three grounds.

[2] First, despite his concession in the district court that no further trial proceedings were necessary, he says now that a remand is needed to determine the effect of the § 86–88 limitation that "[p]arking and loading facilities ... be set back a minimum of ... 750 feet from any structure used ... for residential purposes." He concedes that the district court correctly considered § 86–88's 750–foot buffer requirement with respect to parking but argues that it failed to assess the impact of applying it to loading facilities. But the answer is that Lund never raised this claim below. Save for his quotation of the ordinance in a footnote, the word "loading" does not appear in his motion for a preliminary injunction, and he did not make this argument at the hearing. That is the end of the matter here. *See McCoy v. Massachusetts Institute of Technology,* 950 F.2d 13, 22 (1st Cir.1991) ("[T]heories not raised squarely in the district court cannot be surfaced for the first time on appeal.").

[3] Second, Lund points out that excluding sites covered by long-term leases or requiring costly redevelopment would greatly diminish the quantity of land "available," and he contends that declining to weigh the consequences of these leases and costs in figuring the quantity of available land in the City was error. The district court rejected this claim as "primarily one of economic impact upon his speech-related business," a consideration that the Supreme Court "has cautioned against considering in First Amendment analyses." *Lund,* 2012 WL 1856947, at *3.

The district court was correct. The proper enquiry looks to restrictions imposed by the government, not to the market effects of other people's commerce or the economics of site clearance. Even if we credit Lund's representation that sites identified by the district court are subject to long-term leases, the fact that other competing private parties got ahead of him is not alone of any moment in the constitutional analysis, and the cost of development is nothing more than a business consideration for Lund to weigh. As the *Renton* Court put it, "That [plaintiffs] must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." 475 U.S. at 54, 106 S.Ct. 925; *accord D.H.L. Associates,* 199 F.3d at 60. Hence, whether it makes sense for Lund to finance a costly redevelopment or to pay what current tenants would demand to break their leases are simply private business considerations.[1] It is worth noting that our sister circuits have been quick to reject similar arguments. *See, e.g., David Vincent, Inc. v. Broward Cnty., Fla.,* 200 F.3d 1325, 1334 (11th Cir.2000) ("[T]he economic feasibility of relocating to a site is not a First Amendment concern."); *Ambassador Books & Video, Inc.* ***71** *v. City of Little Rock, Ark.,* 20 F.3d 858, 864–65 (8th Cir.1994) ("[T]he cost factor is unimportant in determining whether the ordinance satisfies the standards of the First Amendment."); *World Wide Video of Wash., Inc. v. City of Spokane,* 368 F.3d 1186, 1199–200 (9th Cir.2004).

1 It is true, as Lund notes, that we said in *D.H.L. Associates* that the case would have been "entirely different" if the land had been encumbered by restrictive covenants precluding its use for adult entertainment. Appellant's Br. 32–33 (quoting 199 F.3d at 60 n. 6). Lund argues that *D.H.L. Associates* makes clear that restrictive covenants are, therefore, relevant to the availability determination. Maybe so. But restrictive covenants are substantive land-use restrictions enforceable by the governmental power of the courts, and, in any case, Lund failed to offer any evidence credited by the district court on that issue. The closest he comes to suggesting otherwise is in a reference to an affidavit that speaks of "restrictions" without further detail. J.A. 73.

[4] Third, Lund assigns error to the district court's finding of 8 sites available for adult use. He argues that treating parcel C–11–7 as a possible site for more than one adult business was incorrect because its access drive would need to be relocated and the existing structure torn down. He argues that parcels D–19–1, D–19–91, and D–19–93 could not accommodate 6 sites, as the district court found, because the lots would require sub-division. But Lund gives us no reason to see these as anything more than further economic arguments that the district court rightly declined to consider.

Lund also contends that parcels D–19–1, D–19–91, and D–19–93 could not meet § 86–88's requirement of a 50–foot setback from the street, contrary to evidence introduced by the City. Its expert testimony, which the district court credited, was that access drives could be constructed from William S. Canning Boulevard that would permit the buildings to be located 50 feet from the road and thus allow for 6 adult sites. *See* Evidentiary Hearing Tr. 46–47, June 3, 2010. We have reviewed the maps submitted by the parties, along with the relevant testimony, and see no error in the district court's acceptance of the City's testimony that these parcels could have accommodated 6 sites. Lund's argument about the potential of these parcels therefore fails to discredit the district court's conservative estimate that 8 sites were available overall. *See Lund,* 2012 WL 1856947, at *5 n. 10 ("The actual number available is surely greater.").

* * *

In sum, we find no error in the district court's calculation of available land and now turn to the constitutional question.

B

[5] That calculation prefaces the last of the questions to be addressed under the *Renton* scheme for analyzing a First Amendment challenge to zoning that limits adult businesses. If a zoning code passes muster as a time, place, and manner regulation, if it is content neutral, and if it advances a substantial governmental interest, the question remaining is whether it leaves reasonable means of commercial adult activity as an alternative to its restrictions. [2] *See Renton,* 475 U.S. at 46–54, 106 S.Ct. 925; *see also City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 433–34, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality op.) (discussing the *Renton* framework); *D.H.L. Associates,* 199 F.3d at 58–59 (same). Lund has conceded that the ordinances survive *Renton*'s first two enquiries and that the City's interest is substantial, *Lund,* 2012 WL 1856947, at *2, leaving only the issue of whether the district court correctly concluded that the land available under the ordinances allows for "reasonable alternative avenues of communication." *Renton,* 475 U.S. at 50, 106 S.Ct. 925; *see also id.* at 54, 106 S.Ct. 925 ("[T]he First Amendment requires only that Renton refrain from effectively ***72** denying respondents a reasonable opportunity to open and operate an adult theatre....").

2 In the district court, Lund argued that the only issue was the sufficiency of space and sites to qualify as reasonable opportunity. *See supra* p. 68. In his brief here, he has suggested in passing that the complete ban on adult business in the industrial zone removes the ordinances from the category of time, place, and manner regulations, so as to entail more demanding scrutiny. He is obviously mistaken and in any event waived the point in the district court.

[6] **[7]** In *D.H.L. Associates,* we explained that this enquiry does not ask " 'whether a degree of curtailment' of speech exists, but rather 'whether the remaining communicative avenues are adequate.' " 199 F.3d at 59 (quoting *Nat'l Amusements, Inc. v. Town of Dedham,* 43 F.3d 731, 745 (1st Cir.1995)). A reviewing court looks to "multiple factors," including "the percentage of acreage within the zone [for adult business use] compared [with] the acreage available to commercial enterprises" and "[t]he number of sites available to adult entertainment businesses," *D.H.L. Associates,* 199 F.3d at 59–60, there

being "no single dispositive evaluative consideration." *Id.* at 60.

This comprehensive canvas accords with the approaches of other circuits, which have understood the final *Renton* prong as calling for a general assessment of whether the ordinances "afford a reasonable opportunity to locate and operate such a business." *TJS of N.Y., Inc. v. Town of Smithtown,* 598 F.3d 17, 22 (2d Cir.2010); *see also Isbell v. City of San Diego,* 258 F.3d 1108, 1112 (9th Cir.2001) ("whether [the number of sites] ... afford[s] ... a reasonable opportunity"); *Big Dipper Entm't, L.L.C. v. City of Warren,* 641 F.3d 715, 719 (6th Cir.2011) (whether "a 'reasonable opportunity' to open"); *accord BZAPS, Inc. v. City of Mankato,* 268 F.3d 603, 606 (8th Cir.2001) (rejecting similar challenge because "numerous locations ... remain available"); *Ctr. for Fair Pub. Policy v. Maricopa County, Arizona,* 336 F.3d 1153, 1170 (9th Cir.2003) (statute survives "unless the government enactment will foreclose an entire medium of public expression [in] a particular community" (internal quotation marks omitted)). The enquiry is necessarily "fact-intensive," *Big Dipper Entertainment, L.L.C.,* 641 F.3d at 719, and the issue of reasonable opportunity "must be resolved on a case-by-case basis," *Fly Fish, Inc. v. City of Cocoa Beach,* 337 F.3d 1301, 1310 (11th Cir.2003) (internal quotation marks omitted).

[8] Here, we think the ordinances provide Lund the opportunity required. This conclusion claims substantial support from *D.H.L. Associates,* where we found no First Amendment violation in a Town's restriction of all but 0.09% of developable land from adult entertainment purposes. The percentage available here is more than twice as great, with 8 sites available in the City, as compared with the 5 that we held sufficient in *D.H.L. Associates.* Lund cannot break free of the gravitational pull of that case. [3]

3 There are cases from some circuits that would proceed differently if presented with evidence of strong competition from other adult entertainment companies vying for scarce real estate in the City. *See Fly Fish, Inc.,* 337 F.3d at 1309 (contrasting cases that adopt a bright-line rule in which an ordinance can survive only if "there are more reasonable sites available than businesses with demand for them" with cases that adopt a more contextual supply-and-demand test (internal quotation marks and citations omitted)). We express no opinion on this question because, as the district court noted, "neither party has presented evidence that anyone other than Lund has opened or has sought to open an adult entertainment business under these ordinances." *Lund,* 2012 WL 1856947, at *5.

Lund calls *D.H.L. Associates* a distinguishable case and faults the district court for not dealing with the differences between the Town of Tyngsboro (the defendant in *D.H.L. Associates*) and the City of Fall River. Lund cites the City's urban character, its larger land mass, the comparatively small number of parcels available for sale, the lack of an "adult overlay ***73** district" (in contrast to Tyngsboro), the ban on adult entertainment in the City's Industrial District, and the City's lack of an explanation for banning adult entertainment there. *See* Appellant's Br. 38–44.

But the district court made just the comparison Lund stresses, in contrasting rural Tyngsboro with Fall River, "one of the largest industrial cities in Massachusetts," *Lund,* 2012 WL 1856947, at *5, while recognizing that "*D.H.L. Associates, Inc.* teaches only that a somewhat higher level of available land might be necessary to assure reasonable alternative locations in a developed urban environment than in an undeveloped rural one," *id.* The court's conclusion thus rested on explicit consideration of the City's urban nature, and the City's larger land mass was fully acknowledged in evaluating the percentage of available land. The number of parcels available for sale is an economic consideration that has no role in the constitutional analysis, and if the City chooses to allow adult businesses in shopping centers but not in factory districts, there is nothing obviously suspect in the choice. In sum, the differences Lund identified between this case and *D.H.L. Associates* fail to render the precedent inapt or the district court's analysis inadequate.

Lund's remaining points touching on § 86–201 are essentially policy differences with the City, which do not rise to the level of First Amendment significance. Because the City has provided Lund with a reasonable opportunity for conduct protected by the First Amendment, we affirm the district court's judgment.

It is so ordered.

All Citations

714 F.3d 65

612 F.3d 736
United States Court of Appeals,
Fourth Circuit.

IMAGINARY IMAGES, INCORPORATED, d/b/a Paper Moon; BTF3, L.L.C., d/b/a Paper Moon; Papermoon–Springfield, Incorporated, d/b/a Paper Moon, Plaintiffs–Appellants,
v.
Pamela O'Berry EVANS, in her official capacity as Chair of the Virginia Alcohol Beverage Control Board; Susan R. Swecker, in her official capacity as Member of the Virginia Alcohol Control Board; Esther H. Vassar, in her official capacity as Member of the Virginia Alcohol Control Board, Defendants–Appellees.

No. 09–1199.
|
Argued: May 13, 2010.
|
Decided: July 15, 2010.

Synopsis

Background: Adult entertainment establishments brought action against members of the Virginia Alcohol Beverage Control Board, challenging revisions to liquor licensing statutes and regulations that prohibited such establishments from serving mixed alcoholic beverages. The United States District Court for the Eastern District of Virginia, James R. Spencer, Chief Judge, 593 F.Supp.2d 848, granted in part and denied in part establishments' motion for preliminary injunction. Establishments appealed.

Holdings: The Court of Appeals, Wilkinson, Circuit Judge, held that:

[1] statutes and regulations had minimal effect on expressive interests protected by First Amendment;

[2] Board fairly supported its policy banning mixed alcoholic beverages at sexually oriented businesses;

[3] statutes and regulations materially advanced state's substantial interest in reducing negative secondary effects;

[4] establishments failed to rebut Board's justification for policy;

[5] statutes were not impermissibly vague under First Amendment; and

[6] statutes and regulations were not facially overbroad under First Amendment.

Affirmed.

West Headnotes (23)

[1] Constitutional Law
Secondary effects

Regulations of sexually oriented entertainment receive intermediate scrutiny if they are not premised on a desire to suppress the content of such entertainment, but rather to address the harmful secondary effects it produces, such as higher crime rates, lower property values, and unwanted interactions between patrons and entertainers such as public sexual conduct, sexual assault, and prostitution. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] Constitutional Law
Sexually Oriented Businesses;Adult Businesses or Entertainment

Constitutional Law
Secondary effects

Under the intermediate scrutiny standard, the government must show that its regulation of sexually oriented entertainment materially advances its substantial interest in reducing negative secondary effects and that reasonable alternative avenues of communication remain available. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[3] **Public Amusement and Entertainment**
Sexually Oriented Entertainment

While the government must "fairly support" its policy of regulating sexually oriented entertainment, it need not settle the matter beyond debate or produce an exhaustive evidentiary demonstration.

1 Cases that cite this headnote

[4] **Constitutional Law**
Sexually Oriented Businesses;Adult Businesses or Entertainment
Constitutional Law
Secondary effects

Government's policy expertise in regulating sexually oriented entertainment is entitled to deference on First Amendment challenge, and it may demonstrate the efficacy of its method of reducing secondary effects by appeal to common sense, rather than empirical data. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[5] **Constitutional Law**
Sexually oriented businesses

In order for policy regulating sexually oriented entertainment to fail intermediate scrutiny analysis under the First Amendment there must be some greater showing than some loss of revenue by complainant. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] **Constitutional Law**
Freedom of Speech, Expression, and Press

A law may result in a mild and incidental diminution of speech without running afoul of the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[7] **Constitutional Law**
Prohibition against intoxicating liquors in adult establishments
Intoxicating Liquors
Licensing and regulation

Virginia liquor licensing statutes and regulations prohibiting adult entertainment establishments featuring erotic dancers who offered striptease routines from serving mixed alcoholic beverages had minimal effect on expressive interests protected by First Amendment; acts affected by laws were removed from First Amendment's core concerns, laws pertained only to businesses where performers gave strip shows or exposed their buttocks or breasts and did not prohibit all alcohol at sexually oriented businesses, and exception existed for conduct with serious artistic or literary merit. U.S.C.A. Const.Amend. 1; West's V.C.A. §§ 4.1–226(2)(i), 4.1–325(12, 13); 3 VAC 5–50–140(B, C).

Cases that cite this headnote

[8] **Constitutional Law**
Sexually Oriented Businesses;Adult Businesses or Entertainment

Society's interest in protecting sexually oriented entertainment under the First Amendment is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Prohibition against intoxicating liquors in adult establishments
Intoxicating Liquors
Licensing and regulation

Virginia Alcoholic Beverage Control Board fairly supported its justifications for policy banning mixed alcoholic beverages at sexually oriented businesses, namely, to curtail adverse

secondary effects of such businesses, for purposes of First Amendment challenge to policy, even though Board did not produce empirical studies showing that policy would reduce negative secondary effects of such businesses; Board's policy was supported by over 40 studies documenting negative secondary effects associated with adult entertainment establishments, deleterious effects spawned by bars and clubs featuring nude or topless dancing were well established, and Board could reasonably conclude that higher level of alcohol in mixed beverages would result in higher level of intoxication and thus higher levels of negative secondary effects in surrounding community. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[10] Constitutional Law

Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors

Licensing and regulation

Virginia liquor licensing statutes and regulations banning mixed alcoholic beverages at sexually oriented business materially advanced state's substantial interest in reducing negative secondary effects of such businesses, as required to withstand First Amendment challenge, since sexually oriented businesses were capable of producing harmful secondary effects, such as higher crime rates and lower property values, public sexual conduct, sexual assault, and prostitution, intoxication would exacerbate those effects, more intoxication would result in more exacerbation, and mixed beverages, with stronger alcoholic content, could lead to more intoxication. U.S.C.A. Const.Amend. 1; West's V.C.A. §§ 4.1–226(2)(i), 4.1–325(12, 13); 3 VAC 5–50–140(B, C).

1 Cases that cite this headnote

[11] Constitutional Law

Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors

Licensing and regulation

Expert testimony that, based on crime data, there was no increase in crime near plaintiff's strip clubs after they had obtained mixed alcoholic beverage licenses, and that sexually oriented businesses in community were generally not "hot spots" for crime, was insufficient to rebut Virginia Alcoholic Beverage Control Board's justification for imposing secondary effects regulation banning mixed alcoholic beverages in sexually oriented businesses; expert's analysis focused only on plaintiff's clubs, rather than sexually oriented businesses as a category, study was based on only nine months of data, and data sets used by expert were suspect. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[12] Constitutional Law

Secondary effects

Evidence rebutting the government's justification for a secondary effects regulation of sexually oriented entertainment must do more than challenge the government's rationale; it must convincingly discredit the foundation upon which the government's justification rests. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[13] Constitutional Law

Determination of Facts

Municipal Corporations

Police power and regulations

Statutes

Recitals and findings

As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments made by lawmakers; a local policymaking body knows the streets better than the courts do, it is entitled to rely on that knowledge, and if its inferences appear

reasonable, the court should not say there is no basis for its conclusion.

Cases that cite this headnote

[14] **Constitutional Law**
Statutes in general

In assessing a statutory vagueness challenge, a court must ask whether the government's policy is set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with.

5 Cases that cite this headnote

[15] **Constitutional Law**
Vagueness

While laws that regulate expression are subjected to stricter standards, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[16] **Constitutional Law**
Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors
Licensing and regulation

Virginia liquor licensing statutes prohibiting mixed alcoholic beverages at establishments that host "stripteasing," or that allow "any striptease act on the licensed premises," were not impermissibly vague under First Amendment right to freedom of expression, since terms "striptease" and "stripteasing" had straightforward definitions, and terms were of common usage. U.S.C.A. Const.Amend. 1; West's V.C.A. §§ 4.1–226(2)(i), 4.1–325(12, 13).

1 Cases that cite this headnote

[17] **Constitutional Law**
Nudity in general

Intoxicating Liquors
Licensing and regulation

Virginia liquor licensing statute providing that mixed alcoholic beverage licensee was prohibited from allowing "persons connected with the licensed business to appear nude or partially nude" was not impermissibly vague under First Amendment right to freedom of expression, since term "nudity," as matter of everyday speech, referred to absence of clothing covering those parts of the body commonly denominated "private," and thus "partial nudity" referred to partial exposure of the private parts. U.S.C.A. Const.Amend. 1; West's V.C.A. § 4.1–325(12, 13).

Cases that cite this headnote

[18] **Constitutional Law**
Nudity in general

Intoxicating Liquors
Licensing and regulation

Virginia liquor licensing statute prohibiting mixed alcoholic beverages at establishments that had "employees who are not clad both above and below the waist" was not impermissibly vague under First Amendment right to freedom of expression, since meaning of phrase, namely that employees may not dance "topless" or "bottomless," was apparent. U.S.C.A. Const.Amend. 1; West's V.C.A. § 4.1–226(2)(i).

Cases that cite this headnote

[19] **Constitutional Law**
Freedom of Speech, Expression, and Press

Constitutional Law
Criminal Law

The First Amendment overbreadth doctrine allows a party to challenge a statute on its face because it also threatens others not before the court, namely, those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[20] **Constitutional Law**
Use as last resort;sparing use

The First Amendment overbreadth doctrine is "strong medicine" to be applied sparingly and only as a last resort. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[21] **Constitutional Law**
Substantial impact, necessity of

A court properly holds a law facially invalid on First Amendment overbreadth grounds only where its overbreadth is substantial when judged in relation to the statute's plainly legitimate sweep. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[22] **Constitutional Law**
Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors
Licensing and regulation

Virginia liquor licensing statutes and regulations prohibiting mixed alcoholic beverages at strip clubs, which contained exemption for conduct with serious artistic or literary merit, were not facially overbroad under First Amendment right to freedom of expression, even if majority of establishments licensed to sell mixed beverages in state would not come within exception for cultural venues, since state's prohibition was within statutes' legitimate sweep, and ordinary bar was unlikely to have its employees strip or otherwise expose their breasts or buttocks for expressive purposes. U.S.C.A. Const.Amend. 1; West's V.C.A. §§ 4.1–226(2)(i), 4.1–325(12, 13); 3 VAC 5–50–140(B, C).

1 Cases that cite this headnote

[23] **Constitutional Law**
Overbreadth in General

Statutory perfection is not required to survive a First Amendment overbreadth challenge; a statute that shields most protected activity is permissible. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

*740 **ARGUED:** J. Michael Murray, Berkman, Gordon, Murray & Devan, Cleveland, Ohio, for Appellants. Mikie F. Melis, Office of the Attorney General, Richmond, Virginia, for Appellees. **ON BRIEF:** Steven D. Shafron, Berkman, Gordon, Murray & Devan, Cleveland, Ohio, for Appellants. William C. Mims, Attorney General of Virginia, Stephen R. McCullough, Solicitor General of Virginia, Catherine Crooks Hill, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellees.

Before TRAXLER, Chief Judge, WILKINSON, Circuit Judge, and SAMUEL G. WILSON, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Judge WILKINSON wrote the opinion, in which Chief Judge TRAXLER and Judge WILSON joined.

OPINION

WILKINSON, Circuit Judge:

Plaintiffs are three nightclubs where women give erotic dance performances wearing only g-strings and pasties. The clubs brought First Amendment, vagueness, and overbreadth challenges to Virginia's alcohol licensing program, which allows the clubs to serve beer and wine but not mixed beverages. Under the standard of intermediate scrutiny applicable to policies aimed at the harmful secondary effects of sexually oriented entertainment, Virginia's policy passes constitutional muster. The public interest served by the policy is substantial, the restriction on the clubs mild and the burden on First Amendment values slight. Moreover, legislatures must have some leeway to draw a regulatory middle ground and Virginia's

is a policy of moderation. Judicial invalidation of carefully drawn distinctions risks chasing lawmakers from the paths of compromise and into absolutes. We thus decline to overturn the classifications here, and accordingly affirm the judgment of the district court.

***741** I.

The sale and consumption of alcohol within the Commonwealth of Virginia is governed by the comprehensive regulatory scheme established by the Alcoholic Beverage Control ("ABC") Act, Va.Code §§ 4.1–100, *et seq.*, and by regulations adopted by the ABC Board, the regulatory body created by the Act. *See* Va.Code §§ 4.1–101, –103. Under this regime, establishments where performers offer striptease routines may obtain licenses to sell beer, wine, or both. Such facilities are not eligible, however, for mixed beverage licenses, which permit the sale of distilled spirits. *See* Va.Code §§ 4.1–226(2)(i), –325(12), (13); 3 Va. Admin. Code § 5–50–140.

The current shape of these provisions stems in part from earlier litigation. In *Giovani Carandola, Ltd. v. Bason,* 303 F.3d 507 (4th Cir.2002) ("*Carandola I* "), this court struck down as overbroad certain North Carolina limitations on the availability of alcohol at establishments hosting sexually oriented performances. The offending provisions were then amended and the court upheld the revised scheme against overbreadth and vagueness challenges. *See Giovani Carandola, Ltd. v. Fox,* 470 F.3d 1074 (4th Cir.2006) ("*Carandola II* "). At the time, the Virginia ABC statutes and relevant ABC regulation used language similar to that which *Carandola I* had invalidated, leading to an injunction in 2007 against enforcement of certain portions of the Virginia program. *See Norfolk 302, LLC v. Vassar,* 524 F.Supp.2d 728, 742 (E.D.Va.2007). The Virginia General Assembly promptly amended the challenged statutes to bring them into compliance and the ABC Board similarly amended its regulation, after which this court issued an order dismissing the ABC Board's pending appeal and vacating the injunction as moot.

During the period when Virginia's rules were suspended, mixed beverage licenses were issued to the plaintiffs in this case. Plaintiffs are three Virginia nightclubs belonging to the Papermoon chain—two in Richmond and one in Springfield—where dancers perform wearing only g-strings and pasties. In June 2008, with the revised licensing program about to take effect and their mixed beverage licenses in jeopardy, plaintiffs, whom we shall refer to as Papermoon, sued the ABC Board's members to block enforcement. Papermoon argued that the scheme violated the First Amendment, was unconstitutionally vague, and was facially overbroad.

An evidentiary hearing was held a few months later at which the ABC Board offered the testimony of W. Curtis Coleburn, its chief operating officer. Coleburn testified that he and the Board had reviewed at least forty-two studies and numerous cases dealing with the negative effects on the surrounding community of sexually oriented businesses. He explained that Virginia's decision to limit establishments offering sexually oriented entertainment to beer and wine reflected the fact that distilled spirits more readily lead to intoxication because of their higher alcohol content. He also stated that Virginia's policy had been modified to incorporate the teachings of the *Carandola* decisions.

In response, Papermoon offered various evidence meant to show that its clubs did not produce secondary effects. This consisted chiefly of testimony from its expert, Professor Daniel Linz of the University of California at Santa Barbara. Linz explained that he had reviewed crime data for the Papermoon locations and found that there was no increase in crime near the clubs after they obtained mixed beverage licenses and that sexually oriented businesses in Richmond generally were not "hot spots" for crime.

In December 2008, the district court rejected the bulk of Papermoon's claims, ***742** holding, with exceptions not relevant here, that Virginia's policy prohibiting distilled spirits at establishments like the Papermoon clubs was constitutional. *See Imaginary Images, Inc. v. Evans,* 593 F.Supp.2d 848, 863 (E.D.Va.2008). Papermoon now appeals.

II.

[1] **[2]** Although it is a far cry from political speech, "nude dancing is not without its First Amendment protections." *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). Regulations of sexually oriented entertainment "receive

intermediate scrutiny if they are not premised on a desire to suppress the content of such entertainment, but rather to address the harmful secondary effects" it produces—higher crime rates, lower property values, and unwanted interactions between patrons and entertainers such as public sexual conduct, sexual assault, and prostitution. *Carandola I,* 303 F.3d at 513. Under this standard, the government must show that its regulation materially advances its substantial interest in reducing negative secondary effects and that reasonable alternative avenues of communication remain available. *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 434, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality); *Carandola I,* 303 F.3d at 515; *see also Ward v. Rock Against Racism,* 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (government must show its interest "would be achieved less effectively absent the regulation.").

[3] **[4]** But while the government must "fairly support" its policy, it need not settle the matter beyond debate or produce an exhaustive evidentiary demonstration. *Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728 (plurality); *see also id.* at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) ("[V]ery little evidence is required."). [1] Moreover, its policy expertise is entitled to "deference," and it may demonstrate the efficacy of its method of reducing secondary effects "by appeal to common sense," rather than "empirical data." *Id.* at 439–40, 122 S.Ct. 1728 (plurality); *see also id.* at 451–52, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment). It may also rely on the experiences of other jurisdictions and on findings expressed in other cases. *See City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 51–52, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Once the government makes this showing, the matter is at an end unless the plaintiff "produces clear and convincing evidence" to rebut it. *Carandola I,* 303 F.3d at 516.

1 Justice Kennedy's separate opinion in *Alameda Books* accepted the four-member plurality's holding on the evidentiary standard that governs the secondary effects inquiry. *See Alameda Books,* 535 U.S. at 449, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) ("The plurality ... gives the correct answer" to the question "how much evidence is required?"); *see also Carandola I,* 303 F.3d at 516.

Papermoon argues that Virginia's policy is unconstitutional because a ban on mixed beverages at its clubs is pointless when beer and wine are still allowed. It asserts that the ABC Board produced no studies to support such a restriction, while Papermoon offered social science evidence undermining it. In assessing Papermoon's challenge, we first examine the nature of the regulation and its burden on expressive interests. We next consider whether the ABC Board sufficiently demonstrated the necessary relationship between the mixed beverage restriction and its interest in reducing negative secondary effects. Finally, we turn to Papermoon's rebuttal evidence.

***743** A.

We begin by noting that Virginia's policy regarding alcohol at erotic dancing locales is about as tame as one could imagine. Virginia "has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *California v. LaRue,* 409 U.S. 109, 118, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972); *see also Carandola I,* 303 F.3d at 513 n. 2 & 519.

Indeed, Virginia does not even prohibit all alcohol at sexually oriented businesses, only mixed beverages. Wine and beer are as available at the Papermoon clubs as at any other Virginia bar. And as Papermoon itself notes, beer remained the drink of choice for its patrons even during the period when it sold mixed beverages. Given that the First Amendment has been held to permit banning *any* alcohol where dancers strip to g-strings and pasties, Virginia's policy is hardly censorious. *See Daytona Grand, Inc. v. City of Daytona Beach,* 490 F.3d 860, 886 (11th Cir.2007); *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 728 (7th Cir.2003).

[5] **[6]** A mixed beverage license may well be a moneymaker—Papermoon offered uncontradicted evidence that it was—but in order to fail intermediate scrutiny there must be some greater showing than some loss of revenue. *See Renton,* 475 U.S. at 54, 106 S.Ct. 925. Indeed, the Court recognizes that a law may result in a mild and incidental diminution of speech without running afoul of the First Amendment. *See Ward,* 491 U.S. at 799–800, 109 S.Ct. 2746. And here, it must be said, there is no indication that expression is being curtailed at all. Although one of the three Papermoon clubs initially decided to keep its mixed beverage license and have its dancers wear extra clothes, it evidently thought better of that decision and returned to pasties and g-strings.

From aught that appears, Papermoon dancers continue to express themselves after reinstatement of the regulation without diminution of inhibition—the performance went on as before.

B.

[7] Not only does Virginia's policy regulate with the lightest of touches, but the degree to which it trenches upon First Amendment values is minimal at best. The First Amendment's pride of place in our constitutional order is a reflection of how essential the institution of free speech is to a democratic society. *See Eu v. San Francisco County Democratic Cent. Comm.,* 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989); *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). But that principle also provides a limitation: activities that have little to do with advocacy, deliberation, or the exposition of ideas have correspondingly little to do with the First Amendment. *See City of Erie v. Pap's A.M.,* 529 U.S. 277, 294, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). Here the kind of acts affected by the laws Papermoon assails are removed from the First Amendment's core concerns.

The challenged provisions pertain only to businesses where performers give strip shows or otherwise expose their buttocks or breasts. *See* Va.Code §§ 4.1–226(2)(i), –325(12), (13); 3 Va. Admin. Code § 5–50–140(B). And the policy does not even purport to reach all such displays. Sexual entertainment "expressing matters of serious literary, artistic, scientific, or political value" offered in "establishments that are devoted primarily to the arts or theatrical performances" is entirely exempt. Va.Code §§ 4.1–226(2), –325(C); 3 Va. Admin. Code § 5–50–140(C). In other words, the policy primarily, if not exclusively, applies to bars offering performances ***744** partaking more of "sexuality than of communication." *LaRue,* 409 U.S. at 118, 93 S.Ct. 390.

[8] Sexual expression and depictions can and do play an important role both in democratic and artistic discourse, and it is thus crucial to our ruling that Virginia has taken care to narrow its regulatory focus here to the particular context of sexually oriented entertainment at bars. As to this, we are simply not at liberty to ignore the Supreme Court's emphasis upon the relatively greater protections afforded many other forms and outlets for artistic speech. The Court has instructed that nude dancing is "only marginally" of First Amendment value, *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), and "only within the outer ambit of the First Amendment's protection." *Pap's A.M.,* 529 U.S. at 289, 120 S.Ct. 1382. For quite simply, "it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Id.* at 294, 120 S.Ct. 1382 (quoting *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 70, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)). In the context of a restriction as mild as the one to which Papermoon has been subjected, "[t]he impairment of First Amendment values is slight to the point of being risible, since the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a modest social value." *Blue Canary Corp. v. City of Milwaukee,* 251 F.3d 1121, 1124 (7th Cir.2001). And even here, it bears reminding, Virginia has not asked Papermoon to stop the show or even to cease serving all alcoholic beverages in conjunction with it.

C.

1.

[9] With these considerations in mind, we assess the ABC Board's justifications for the challenged policy. Notwithstanding the policy's minimal effect on expressive interests, Papermoon requests that we strike it down because the ABC Board did not produce empirical studies showing that a ban on only mixed beverages at sexually oriented businesses will reduce secondary effects—"higher crime rates and lower property values," and "public sexual conduct, sexual assault, and prostitution." *Carandola I,* 303 F.3d at 513. In making this claim, however, Papermoon asks us to subject the ABC Board to a more stringent standard than is compatible with the Supreme Court's teachings or the appropriate relationship between courts and policymakers.

For starters, Papermoon's argument takes an ironic turn, namely that the Virginia regulation should be struck because it is too mild to be effective. But in *Pap's A.M.,* the Supreme Court rejected the idea that the government's rationale could be impeached because its regulation was not as effective as a more restrictive alternative—in that case because the government combated the problems of

totally nude dancing by requiring only that dancers wear pasties and g-strings. *See Pap's A.M.,* 529 U.S. at 300–01, 120 S.Ct. 1382; *see also id.* at 310, 120 S.Ct. 1382 (Scalia, J., concurring) ("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...."). It is one thing to challenge the government's rationale as pretextual or to argue its restriction advantages certain speakers or ideas to the detriment of others. *See City of Ladue v. Gilleo,* 512 U.S. 43, 50–52, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). [2] But ***745** when the government's policy is not "a covert attack on speech," invalidating a regulation because it is *too* permissive does First Amendment freedoms no favors. *Alameda Books,* 535 U.S. at 447, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment).

2 Papermoon's reliance on *Joelner v. Village of Washington Park,* 508 F.3d 427 (7th Cir.2007), is accordingly misplaced. The policy there at issue, "prospectively banning alcohol in strip clubs opened in the future," "was adopted to stifle competition with current license holders," not to combat secondary effects, and was subjected to strict scrutiny. *Id.* at 429, 431, 433.

Even setting this objection aside, however, the ABC Board's position that prohibiting mixed beverages at establishments like Papermoon will curtail adverse secondary effects was hardly unsupported. The Board considered more than forty studies documenting the negative secondary effects associated with establishments like Papermoon, and at any rate, it is well established that "bars and clubs that present nude or topless dancing" have "a long history of spawning deleterious effects." *Carandola I,* 303 F.3d at 516 (citation omitted).

Nor can there be any controversy over the proposition that intoxication aggravates such secondary effects. "Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *N.Y. State Liquor Auth. v. Bellanca,* 452 U.S. 714, 718, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (quoting N.Y. State Legis. Annual 150 (1977)). "Liquor and sex are an explosive combination." *Blue Canary,* 251 F.3d at 1124. Common sense equally indicates that more intoxication will likely translate into more of the unwanted effects intoxication produces.

The remaining link in the chain of reasoning underlying Virginia's policy, and the one Papermoon devotes its energies to attacking, is the assumption that allowing mixed beverages to be served will likely produce more intoxication. Paper-moon notes that the ABC Board's own website instructs that an ounce-and-a-half shot of eighty-proof liquor contains the same amount of alcohol as a twelve-ounce beer or five-ounce glass of wine. How then, asks Papermoon, could mixed beverages lead to more drunkenness?

This argument, however, trips on itself. By Papermoon's own calculations, mixed beverages contain a higher concentration of alcohol in a smaller volume. The fact that there is as much alcohol in a shot of whiskey as there is in a serving of beer more than six times that volume illustrates how much more concentrated distilled spirits are. A state is thus entitled to conclude, as the Commonwealth has: "Distilled spirits used in mixed beverages have higher alcohol content per volume than beer or wine. As a result, patrons drinking straight shots of liquor or mixed beverages can become intoxicated with less volume consumed, and, therefore, in less time and more easily, than patrons drinking beer or wine." Appellee's Br. at 17.

Virginia could certainly conclude that this higher level of intoxication from mixed beverages translates into higher levels of secondary effects in the surrounding area —namely sexual assaults, prostitution, and a generally higher disorderly conduct rate. Virginia could certainly take notice of the fact that people will visit these clubs throughout the hours of the clubs' operation and that patrons will stay for varying lengths of time. For those at a club a relatively short period of time, a state of intoxication can be reached more quickly with distilled spirits. For those there a longer time, the degree of intoxication will be much greater with mixed beverages than it would be for a person drinking beer or wine over the same period. Of course, all of these assumptions will be subject to individual variations dependent upon a variety ***746** of factors. But legislatures can pass laws dealing with what will normally happen without making exceptions for individual particularities.

In sum, Virginia has a legitimate interest in reducing the chances of a person leaving a strip club intoxicated by eliminating the sale of distilled spirits and it could further legitimately believe that this modest step could

reduce the harmful secondary effects surrounding such establishments.

2.

[10] The particular risks of distilled spirits are reflected in the fact that Virginia in a variety of ways saddles them with special burdens. Distilled spirits are taxed more heavily than beer and wine. *See* Va.Code §§ 4.1–234, –236. Unlike beer and wine, they generally can only be purchased for home consumption in ABC stores. *See id.* §§ 4.1–119(A), –210; *see also id.* § 4.1–221(A). And they may only be served in establishments with full restaurant facilities where at least forty-five percent of gross receipts come from the sale of food or other beverages. *See id.* § 4.1–210(A)(1). Papermoon argues that because these additional safeguards are in place, there is no need for further restricting the availability of mixed beverage licenses at its clubs. But one sensible precaution does not obviate the need for others. As Coleburn testified, "Our whole system, as well as that of every state in the United States, is designed to discourage people from drinking distilled spirits in favor of the less intoxicating beer and wine."

Virginia has long favored less potent varieties of drink. The original ABC Act established a policy of "discouraging the consumption of hard liquor by making it harder to obtain while encouraging the consumption of light fermented beverages, such as beers and wines by making them easier to obtain." *Bolick v. Roberts,* 199 F.Supp.2d 397, (E.D.Va.2002) (internal quotation omitted) (vacated as moot by *Bolick v. Danielson,* 330 F.3d 274 (4th Cir.2003)). Indeed, support for such an approach is literally of early vintage. Thomas Jefferson argued that "[n]o nation is drunken where wine is cheap; and none sober, where the dearness of wine substitutes ardent spirits as the common beverage." Letter from Thomas Jefferson to Jean Guillaume, Baron Hyde de Neuville (Dec. 13, 1818), in *A Jefferson Profile as Revealed in His Letters* 301 (Saul K. Padover ed., 1956).

And in identifying distilled spirits as a matter of special regulatory concern, Virginia is anything but unique. Like Virginia, most states adopted ABC statutes that "placed more stringent requirements on interests dealing in distilled spirits ... since distilled spirits, of course, contain a significantly higher alcoholic content than beer and wine." *California Beer Wholesalers Ass'n v. Alcoholic Bev. Control Appeals Bd.,* 5 Cal.3d 402, 96 Cal.Rptr. 297, 487 P.2d 745, 749 (1971). Taxes are higher on distilled liquor than on beverages with lower concentrations of alcohol—indeed, one state's highest court held it a violation of the state constitution to tax beverages whose alcoholic content was no greater than that of wine at the much higher rates applicable to distilled spirits, finding it "impossible to ignore this natural progression in alcoholic content by volume." *See Federated Distributors, Inc. v. Johnson,* 125 Ill.2d 1, 125 Ill.Dec. 343, 530 N.E.2d 501, 509 (1988).

Similarly, licenses allowing the sale of mixed beverages are often costlier than licenses allowing only drinks with lower alcoholic contents, reflecting the fact "either that the legislature believed that a restaurant selling all liquors would ordinarily do a different kind of business or ***747** that it was contemplated that it would cost more to police it." *JPM Inv. Group, Inc. v. Brevard County Bd. of County Comm'rs,* 818 So.2d 595, 599 (Fla.Dist.Ct.App.2002) (quoting *Salerni v. Scheuy,* 140 Conn. 566, 102 A.2d 528, 530 (1954)). Widespread legislative recognition of the special need to regulate mixed beverages stands as an empirical demonstration of its own.

The prevalence and durability of Virginia's distinction in no way render it wrong, at least not where a state is exercising its "inherent police powers" "to prohibit the sale of alcoholic beverages in inappropriate locations." *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 515, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). The provisions at issue comprise part of Virginia's "long-established alcohol control law" and represent but one facet of the comprehensive regulatory approach the Commonwealth has adopted. *Carandola I,* 303 F.3d. at 514. Those provisions appear alongside a variety of other measures minimizing secondary effects and plainly related to preserving public order, and they "are most naturally viewed as companion provisions, also intended to prevent such societal ills." *Id.* at 515; *see* Va.Code § 4.1–325(20).

Courts have no warrant to supplant a state's policy preferences with our own. We have no trouble concluding that Virginia's "inferences appear reasonable." *Alameda Books,* 535 U.S. at 452, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment). That businesses like Papermoon are capable of producing harmful secondary effects, that intoxication exacerbates those effects, that

more intoxication means more exacerbation, and that mixed beverages may lead to more intoxication are propositions whose sensible nature would lead to a Supreme Court slap of any hand that invalidated them. Taken together, they provide "fair[ ] support" for the Commonwealth's policy, and the ABC Board carried its burden. *Id.* at 438, 122 S.Ct. 1728 (plurality).

D.

[11] **[12]** Virginia has thus demonstrated the necessary relationship between its mixed beverage restriction and its substantial interest in reducing negative secondary effects. We turn therefore to Papermoon's rebuttal of the ABC Board's showing. Evidence rebutting the government's justification for a secondary effects regulation, however, must do more than challenge the government's rationale; it must convincingly discredit the foundation upon which the government's justification rests. *See Carandola I,* 303 F.3d at 516. Papermoon largely relied on the study produced by its expert, Professor Daniel Linz, and that evidence falls short of the "clear and convincing" standard necessary to sustain its challenge. *Id.*

For a start, Linz's before-and-after analysis focused only on Papermoon. But officials "need not show that each individual adult establishment actually generates the undesired secondary effects." *Independence News, Inc. v. City of Charlotte,* 568 F.3d 148, 156 (4th Cir.2009). Since the Virginia policy could be sustained if sexually oriented businesses "as a category" produce secondary effects when mixed beverages are served, Linz's study hardly undermined the government's case. *Richland Bookmart, Inc. v. Knox County,* 555 F.3d 512, 532 (6th Cir.2009). Moreover, the study was based on only nine months of data, yet as Linz candidly acknowledged, a study of crime rates should be based on at least three years of information. And more generally, there was reason to be skeptical about how well his conclusions about Papermoon matched the governing legal standard since Linz has sought to debunk altogether the idea that ***748** sexually oriented businesses generate secondary effects as a "legal myth."

The Commonwealth also contests the data sets he used. The Richmond data he obtained referred to "founded" incidents of crime but he acknowledged that the term is "not defined further by the police department" and that he had "found no other definition." He also admitted that he did not know whether the addresses included with the crime data always referred to the place where a crime was committed, and in any event he did not account for crime that may be linked to Papermoon but that actually occurred outside the narrow zone of geographic proximity he had designated. His Springfield data, meanwhile, did not include many relevant crimes, including disorderly conduct, drunkenness, driving under the influence, homicide, interference with police, prostitution, threatening bodily harm, various weapons offenses, and so on. So while the Linz study and others may well be of interest to legislatures or those formulating policy, it does not provide the kind of "clear and convincing" evidence needed to rebut the government's showing and invalidate the regulation.

E.

[13] We need not dwell further on the particulars of the ABC Board's showing or the problems with Papermoon's rebuttal, however, for there is a simpler principle to be respected. The notion that the decisions of democratically accountable bodies must be set aside because of an absence of some unspecified quantum of social science support or the presence of a conflicting study commissioned by a litigant is one we must approach with skepticism. "As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments" made by lawmakers. *Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment). A local policymaking body "knows the streets ... better than we do. It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion." *Id.* at 452, 122 S.Ct. 1728 (citation omitted).

Papermoon insists, however, that there is no evidence in the record showing that people drinking liquor at strip clubs cause more problems than people drinking beer or wine. We agree with Papermoon that no empirical study has been presented that correlates criminal activity to the particular alcoholic beverage consumed, but we disagree that empirical support is needed for the perfectly sensible legislative proposition that someone drinking liquor at a strip club will get more intoxicated than someone drinking beer or wine over the same amount of time and hence be more likely to cross permissible lines. Of course there will

be many occasions when legislators will wish to consult empirical work. But much in life is not easily reduced to data sets, and there are limits on how much lawmakers' judgment can be subjected to the argumentative rounds and elusive requirements of statistical validation.

Policymakers "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Renton,* 475 U.S. at 52, 106 S.Ct. 925 (quotation marks omitted). Legislative bodies have the advantage both of commonsense practicality and constituent accountability. And "appeal to common sense," *Alameda Books,* 535 U.S. at 439, 122 S.Ct. 1728 (plurality), and "common experience," *id.* at 452, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment), are what the Supreme Court has approved. We risk violence, then, to democratic principles and to prudent and innovative governance when we make the validity of legislation turn on wars of competing studies. There remains a place in the legislative process for the exercise of simple reason and ***749** sound judgment, just as there remains a place in the judicial process for the exercise of some restraint.

These considerations are particularly salient where, as here, lawmakers have sought a middle ground that balances competing demands. Courts often are not equipped to craft such compromises and must take special care not to hamstring those who are. Where compromise embodies invidious distinctions, special scrutiny is demanded. But the distinction between beer and wine on the one hand and distilled spirits on the other is anything but invidious, and to strike down such classifications risks pushing lawmakers away from compromise and toward more polar postures.

It bears repeating that more severe policies, under which alcohol is completely forbidden at establishments like Paper-moon, have been repeatedly upheld in the face of constitutional challenge. *See Daytona Grand,* 490 F.3d at 886 ("[A]ny artistic or communicative elements present in such conduct are not of a kind whose content or effectiveness is dependent upon being conveyed where alcoholic beverages are served.") (quoting *Grand Faloon Tavern, Inc. v. Wicker,* 670 F.2d 943, 948 (11th Cir.1982)); *Ben's Bar,* 316 F.3d at 726 ("The First Amendment does not entitle Ben's Bar, its dancers, or its patrons, to have alcohol available during a 'presentation' of nude or semi-nude dancing."). Were we to invalidate a policy restricting only distilled spirits, the Commonwealth's response might well be to ban alcohol at sexually oriented businesses outright. The First Amendment does not demand that we distort the political process in such a fashion.

None of this is to say that Virginia's policy is unassailable or even right. But the primary means to challenge legislative misconceptions is through the channels of representative government: hearings, speeches, conversations, debates, the whole clamorous drama of democracy that leads to the enactment of the given law. In the First Amendment context, those affected by restrictions designed to combat secondary effects may of course demonstrate that the justification for a particular restriction rests on "shoddy data or reasoning." *Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728 (plurality). But to invoke the power of the judiciary to set the policy aside, such evidence must be sufficiently convincing to "prove[ ] unsound" the government's justification for its policy. *See id.* at 453, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment). Here the evidence is not.

III.

Papermoon also challenges portions of the Virginia ABC statutes as unconstitutionally vague and unconstitutionally overbroad. As with its substantive First Amendment claim, we find these objections to be without merit.

A.

[14] **[15]** We begin with Papermoon's vagueness challenge. In assessing a vagueness challenge, a court must ask whether the government's policy is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *Carandola II,* 470 F.3d at 1079 (citation omitted). While laws that regulate expression are subjected to "stricter standards," *Smith v. California,* 361 U.S. 147, 151, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward,* 491 U.S. at 794, 109 S.Ct. 2746.

[16] Two different sections of the ABC Act prohibit mixed beverages at establishments ***750** like Papermoon. The first requires that the ABC Board suspend the mixed

beverage license of any establishment hosting "what is commonly called stripteasing, topless entertaining, and the like, or which has employees who are not clad both above and below the waist, or who uncommonly expose the body." *See* Va.Code § 4.1–226(2)(i); *see also id.* § 4.1–223(3)(i). The second provides that a mixed beverage licensee may not allow "any striptease act on the licensed premises" or "persons connected with the licensed business to appear nude or partially nude." *See id.* §§ 4.1–325(12), (13). Papermoon argues that the terms "stripteasing" and "striptease," and the phrases "clad both above and below the waist" and "partially nude" are unconstitutionally vague because it is unclear how much clothing has to be worn to satisfy their requirements.

We find this argument unpersuasive. As the district court noted, "striptease" is defined straightforwardly as "a burlesque act in which a performer removes clothing piece by piece." Merriam–Webster's Collegiate Dictionary 1166 (10th ed.1999); *see also Barnes,* 501 U.S. at 581, 111 S.Ct. 2456 (Souter, J., concurring in the judgment) (describing a striptease as "a dancer's acts in going from clothed to nude ... integrated into the dance and its expressive function."). The term is clearly one of common usage and given the erotic fashion in which clothes are removed, "a 'striptease' performance, we think, speaks for itself." *City of New Orleans v. Kiefer,* 246 La. 305, 164 So.2d 336, 339 (1964).

[17] **[18]** Nor do we think that in this context the term "partially nude" is vague. Nudity, as a matter of everyday speech, refers to the absence of clothing, exposing those parts of the body commonly denominated "private." Partial nudity would thus refer to the partial exposure of the private parts. Not surprisingly, that is precisely what the ABC regulation governing mixed beverage licenses provides, forbidding "less than a fully-opaque covering of the genitals, pubic hair or buttocks, or any portion of the breast below the top of the areola." 3 Va. Admin. Code § 5–50–140(B). This language tracks the definition of "nudity" elsewhere in Virginia law. *See* Va.Code § 18.2–390(2); *see also, e.g.,* Iowa Code § 709.21(2)(a); Md.Code Ann., Crim. Law § 11–203(a)(6); Mass. Gen. Laws ch. 272, § 105(a); Mo.Rev.Stat. § 565.250(1); 18 Pa. Cons.Stat. § 7507.1(e); Utah Code Ann. § 76–5a–2(6); W. Va.Code § 61–8–28(a)(1); Wis. Stat. § 942.08(1)(a). The meaning of the phrase "clad both above and below the waist" is similarly apparent: Papermoon's dancers may not dance "topless" or "bottomless." Again, the regulations make it clear that if mixed beverages are to be served, g-strings, pasties, and other such fig leaves will not do, as Papermoon itself well understands.

Quite frankly, Papermoon's vagueness challenge depends on wishful thinking. It is clear what conduct the ABC mixed beverage policy reaches—and that what it reaches is what Papermoon's dancers do. The risk that dancers at clubs like Papermoon will be "chilled" into donning more clothing than the law requires is slim indeed.

B.

[19] **[20]** **[21]** Finally, we consider Papermoon's overbreadth challenge. The overbreadth doctrine allows a party to "challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." ***751** *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.,* 482 U.S. 569, 574, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987) (internal quotation marks omitted). Accordingly, the overbreadth doctrine is "strong medicine" to be applied "sparingly and only as a last resort." *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). A court properly holds a law facially invalid on overbreadth grounds only where its overbreadth is "substantial ... judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S.Ct. 2908.

[22] **[23]** As discussed, Virginia's prohibition on mixed beverages at venues like Papermoon is within the statutes' legitimate sweep. And cultural venues offering "matters of serious literary, artistic, scientific, or political value" are properly exempted. Va.Code §§ 4.1–226(2), –325(C); 3 Va. Admin. Code § 5–50–140(C). Papermoon stresses that the overwhelming majority of establishments licensed to sell mixed beverages in Virginia are not "adult entertainment establishments" and still would not come within the exception for cultural venues. But that is beside the point since an ordinary bar is unlikely to have its employees strip or otherwise have their breasts or buttocks exposed (much less for expressive purposes). And one that did allow such displays might plausibly be linked to the secondary effects Virginia has targeted. Perfection is not required to survive an overbreadth challenge—a statute that shields "most protected activity" is permissible. *Carandola II,* 470 F.3d

at 1085. Here, we see few, if any, likely applications of the policy that would be forbidden by the Constitution.

Indeed, the matter should be beyond debate since the exception for cultural venues Virginia adopted uses word-for-word the same language that cured North Carolina's over-breadth problem in *Carandola II*. *See Carandola II,* 470 F.3d at 1083–84. Papermoon attempts to distinguish the case, arguing that the policy *Carandola* addressed only prohibited outright nudity while Virginia's additionally prohibits even the near-nudity of g-strings and pasties where mixed beverages are served. We do not see, however, how this additional requirement is likely to inflict further collateral damage on protected expression. The range of expressive activities dependent upon exposing the buttocks or breasts pretty well coincides with the range of those dependent on exposing the genitals. And if, as Papermoon strenuously urges, *Carandola II's* conclusion that the statutes there at issue were not overbroad depended on the mildness of the restriction they imposed, then we must point out once again that a policy merely forbidding mixed beverages where erotic performances take place is likewise anything but draconian.

IV.

Where governmental action is involved, a constitution exists in part to prune extremes. Where intermediate scrutiny is concerned, it is not wrong for moderation in the political process to find a constitutional home. The Commonwealth has demonstrated moderation in its efforts to balance the expressive value in erotic dancing with the unwanted encouragement of secondary effects. That courts should not be turned into appellate legislatures should go without saying, but it is particularly true where the political process has not sought to push the constitutional envelope and where lawmakers have responded conscientiously to prior opinions of this and other courts. For the foregoing reasons, the judgment is

AFFIRMED.

All Citations

612 F.3d 736

Footnotes

289 F.3d 358
United States Court of Appeals,
Fifth Circuit.

LLEH, INC., Etc.; et al., Plaintiffs,
LLEH, Inc., doing business as Babe's;
April Cooper; Anita Jackson; Sarah
Blackstock, Plaintiffs–Appellees,
v.
WICHITA COUNTY, TEXAS, Defendant–Appellant.

No. 00–11220.
|
April 22, 2002.

Operator of sexually oriented business, and its employees, sued county under § 1983, challenging on First Amendment grounds county regulations governing operations of such businesses in unincorporated areas of county. Following bench trial, the United States District Court for the Northern District of Texas, Jerry L. Buchmeyer, Chief Judge, 121 F.Supp.2d 513, entered judgment for plaintiffs, and awarded attorney fees. County appealed. The Court of Appeals, Rhesa Hawkins Barksdale, Circuit Judge, held that: (1) location provision of regulations did not violate First Amendment's free speech guarantee; (2) operating requirements that called for six-foot buffer zone between patrons and performers, and for performers to be on stages at least 18 inches above floor, were constitutional; (3) provision of regulations requiring six-foot buffer zone to be clearly demarcated was constitutional; (4) provisions requiring that such businesses be configured so as to give inspecting law enforcement personnel an unobstructed view, and allowing injunctive relief, were valid; and (5) award of attorney fees would be vacated and matter remanded for reconsideration.

Affirmed in part, reversed in part, vacated in part, and remanded.

West Headnotes (19)

[1] **Federal Courts**
Questions of Law in General

Federal Courts
"Clearly erroneous" standard of review in general

Following a bench trial, findings of fact are reviewed for clear error, while legal issues are reviewed *de novo*.

3 Cases that cite this headnote

[2] **Federal Courts**
Grounds for sustaining decision not relied upon or considered

Court of Appeals may affirm judgment entered following a bench trial for reasons other than those relied upon by the district court.

20 Cases that cite this headnote

[3] **Federal Courts**
Constitutional rights, civil rights, and discrimination in general

Whether free speech rights protected by First Amendment have been infringed is a mixed question of law and fact, subject to *de novo* review. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[4] **Constitutional Law**
Nude dancing in general

While nonobscene nude dancing is protected by the First Amendment's free speech guarantee, even if only marginally so, the government can regulate such activity. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] **Constitutional Law**
Secondary effects

Zoning and Planning

Sexually-oriented businesses;nudity

Location provision of county regulations governing sexually oriented businesses located in unincorporated areas of county, under which such businesses could not be located within 1,500 feet of a child care facility, school, dwelling, park, or place of religious worship, or within one mile of a penal institution, was designed to serve a substantial government interest in combatting secondary effects of such businesses, and did not violate First Amendment's free speech guarantee; while county was largely rural and had relied on studies of effects in such business in urban areas, relied-upon studies were reasonably believed to be relevant to county's desire to avoid problems during its growth and development. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[6] **Constitutional Law**

Secondary effects

A local government's interest in preserving the quality and character of neighborhoods and urban centers can, if properly set forth, support restrictions on adult entertainment that is protected under First Amendment's free speech guarantee, and in setting forth this interest, a local government may place great weight upon the experiences of, and studies conducted by, other local governments, as well as opinions of courts from other jurisdictions. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[7] **Constitutional Law**

Secondary effects

First Amendment's free speech guarantee does not require that a city, before enacting an ordinance regulating sexually oriented businesses, conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[8] **Constitutional Law**

Freedom of Speech, Expression, and Press

Constitutional Law

Time, Place, or Manner Restrictions

Regulations that burden speech incidentally or control the time, place, and manner of expression must be evaluated under First Amendment in terms of their general effect U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[9] **Constitutional Law**

Exercise of police power;relationship to governmental interest or public welfare

First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**

Proximity of performers to patrons

Public Amusement and Entertainment

Dancing and other performances

Operating requirement contained in county regulations governing sexually oriented businesses located in unincorporated areas of county, under which persons performing either partially or totally nude at such businesses could only do so if they were at least six feet from the nearest patron, had no greater incidental restriction on First Amendment freedoms than was essential to furtherance of county's legitimate interest in deterring sexual contact and touching in such businesses, and thus was constitutional. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[11] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

An incidental burden on protected speech is no greater than is essential, and therefore is permissible under First Amendment, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[12] **Constitutional Law**
Narrow tailoring

Incidental burdens on protected speech are not invalid under First Amendment simply because there is some imaginable alternative that might be less burdensome on speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] **Constitutional Law**
Exercise of police power;relationship to governmental interest or public welfare

Validity under First Amendment of incidental burdens on protected speech does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests, nor does it turn on the degree to which those interests should be promoted. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[14] **Constitutional Law**
Physical layout and staging requirements
Public Amusement and Entertainment
Dancing and other performances

Operating requirement contained in county regulations governing sexually oriented businesses located in unincorporated areas of county, under which persons performing either partially or totally nude at such businesses could only do so if they were at least 18 inches above floor level, had no greater incidental restriction on First Amendment freedoms than was essential to furtherance of county's legitimate interest in deterring sexual contact and touching in such businesses, and thus was constitutional. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[15] **Constitutional Law**
Proximity of performers to patrons
Public Amusement and Entertainment
Dancing and other performances

Demarcation provision contained in county regulations governing sexually oriented businesses located in unincorporated areas of county, under which owners of such business were required to clearly demarcate six-foot buffer zone between patrons and any person who performed partially or totally nude at such an establishment that was called for under regulations, simply manifested and furthered same substantial government interests as buffer provision, which was itself constitutional, and thus did not violate First Amendment. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[16] **Constitutional Law**
Physical layout and staging requirements
Public Amusement and Entertainment
Sexually Oriented Entertainment

Unobstructed-view provision of county regulations governing sexually oriented businesses located in unincorporated areas of county, under which interior of such a business was required to be configured in such a manner that inspecting law enforcement personnel would have an unobstructed view of every area of the premises from every other area, excluding restrooms, was a content-neutral regulation that furthered important

governmental interest in protecting against illegal and unsanitary sexual activity, and had no greater incidental restriction on First Amendment freedoms than necessary, and thus was constitutional. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[17] Constitutional Law

Sexually Oriented Businesses;Adult Businesses or Entertainment

Injunction

Sexually-oriented businesses;obscenity

Injunction provision of county regulations governing sexually oriented businesses located in unincorporated areas of county, which stated that any person violating regulations was subject to a suit to enjoin operation of business, and that district attorney was authorized to bring suit to enjoin violations, was not unconstitutionally overbroad, where speech and activity that could give rise to a violation of regulations was properly regulated under First Amendment, so that any overbreadth in injunction provision was not substantial in relation to provision's plainly legitimate sweep. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[18] Civil Rights

Results of litigation;prevailing parties

A plaintiff prevails in suit under § 1983, and may recover attorney fees under § 1988, when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. 42 U.S.C.A. §§ 1983, 1988.

2 Cases that cite this headnote

[19] Federal Courts

Reversal or Vacation of Judgment in General

Federal Courts

Determination of damages, costs, or interest;remittitur

District court's award of attorney fees under § 1988 to operator of sexually oriented business, who had prevailed in district court in § 1983 action challenging constitutionality of county regulations governing such business, would be vacated, with matter remanded for reconsideration, after Court of Appeals' disposition of matter made it questionable as to whether operator could any longer be deemed to have prevailed in action. 42 U.S.C.A. §§ 1983, 1988.

Cases that cite this headnote

Attorneys and Law Firms

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***362** Douglas L. Baker (argued), Wichita Falls, TX, for Defendant–Appellant.

Appeal from the United States District Court for the Northern District of Texas.

Before DAVIS, WIENER, and BARKSDALE, Circuit Judges.

Opinion

RHESA HAWKINS BARKSDALE, Circuit Judge:

Regarding the regulations by Wichita County, Texas, for sexually oriented businesses (SOBs), primarily at issue is whether, for the regulations' location restriction, studies of secondary effects for cities are relevant to such non-urban areas. Among other things, the regulations govern location, stage height, and layout, as well as mandate information disclosure and dancer-to-patron distance. Claiming the regulations pass First Amendment muster, the County appeals a bench trial judgment in favor of LLEH, Inc., and its employees. JUDGMENT ON THE MERITS AFFIRMED in PART and REVERSED in PART; JUDGMENT AWARDING ATTORNEY'S FEES and EXPENSES VACATED; REMANDED.

I.

In June 1999, William Essary, LLEH's sole owner, purchased from Pearl Carter property outside the city limits of Wichita Falls, in an unincorporated area of Wichita County, Texas. LLEH planned to open Babe's BYOB, a SOB, on the property. Learning of LLEH's plans after it had purchased the property and begun construction, the County decided to enact regulations governing the operation and location of SOBs in the County's unincorporated area. (The County attributes its late discovery to LLEH's failure to comply with Texas law, effective 1 September 1999, requiring certain intending SOB operators to post public notice of such intent.)

The County requested the District Attorney to investigate the requirements to formulate regulations. The District Attorney obtained, and considered, studies compiled by other jurisdictions detailing their reasons for, and experiences in, implementing SOB regulations. Those jurisdictions included: Cleburne and Houston, Texas; Garden Grove, California; Oklahoma City, Oklahoma; Newport News, Virginia; Bellevue, Washington; St. Croix County, Wisconsin; and Minnesota. (The County also considered a report prepared for the American Center for Law and Justice.)

Between October and December 1999, the County held public hearings on its intent to adopt the regulations. Among those participating were law enforcement officers, County citizens, a real estate appraiser, and LLEH (with counsel).

Babe's began doing business in early October 1999. On 6 December, the County enacted Order No. 99–12–579, entitled "The Regulations for Sexually Oriented Businesses in the Unincorporated Areas of Wichita County, Texas" (the Order), with a 10 December effective date. The Order requires a SOB to obtain a permit (SOBP) in order to conduct business in that part of the County covered by the Order. Additionally, in pertinent part, the Order provides:

> SECTION IX—SOBP APPLICATION [*location provision*]
>
> ....
>
> (e) Applicants for a SOBP shall ... provide:
>
> ....
>
> (4) A certification that the proposed enterprise will be located:
>
> ***363** (a) *a minimum of one thousand five hundred (1,500) feet* from any child care facility, school, *dwelling,* hospital, public building, public park, or church or place of religious worship[;]
>
> (b) a minimum of one (1) mile from a penal institution[.]
>
> ....
>
> SECTION X—EMPLOYEE IDENTIFICATION BADGE APPLICATION [*disclosure provision*]
>
> (a) Any person who is employed in any capacity at an enterprise ... is required to make application with and obtain from the County Sheriff an employee identification badge.... The individual applicant shall ... *provide the following information to the County Sheriff:*
>
> ....
>
> (3) the city, county, and state of each of the applicant's residences for the three (3) years immediately preceding the date of the application, indicating the dates of each residence and *including the present mailing address of the applicant.*
>
> ....
>
> SECTION XXIV—OPERATING REQUIREMENTS FOR ENTERPRISES [*buffer, stage-height, demarcation, and unobstructed-view provisions*]
>
> (a) The following shall be violations of these regulations....
>
> ....
>
> (13) for any person performing partially nude or totally nude at an enterprise to do so *less than six (6) feet from the nearest patron and on a stage less than eighteen (18) inches above floor level;*
>
> (14) for the owner or operator of an enterprise to allow any location within the enterprise to be

used for the purpose of partially nude or totally nude live exhibitions *unless it is marked with clear indications of the six (6) foot zone. The absence of this demarcation* will create a presumption that there have been violations of these regulations during performances in unmarked areas[.]

....

(c) Except as otherwise provided herein[,] the interior of an enterprise shall be configured in such a manner that *inspecting law enforcement personnel have an unobstructed view* of every area of the premises from any other area of the premises, excluding restrooms, to which any patron is allowed access for any purpose.

(Emphasis added.)

The Order also confers authority upon the District Attorney to seek to have enjoined violations of the Order.

SECTION VIII—INJUNCTION [*injunction provision*]

(a) *A person who violates these regulations* is subject to a suit to enjoin operation of the enterprise pursuant to Section 243.010 of the Texas Local Government Code and is also subject to prosecution for criminal violations.

(b) The Criminal District Attorney is hereby authorized to file suit *to enjoin violation of these regulations.* A suit may be initiated upon information received from private citizens or any law enforcement agency.

(Emphasis added.)

Babe's was in violation of the 1500 feet minimum distance from a dwelling (three ***364** houses). (Two of those houses are owned by Pearl Carter, who had sold the property to Essary.) Shortly after the Order's enactment, and because Babe's was already in operation, the Sheriff notified LLEH it would be given a 60–day grace period before the Order was enforced against it.

In February 2000, and apparently still within the grace period, LLEH filed an application under the Order's *contingent* SOBP provisions, designed to permit *existing* SOBs not in conformity with the Order's location provision to continue operating during an amortization period in order to recoup their investments. LLEH sought a contingent SOBP for an approximate eight-year period.

A series of checks by law enforcement officials during March and April 2000 revealed, however, that Babe's dancers were not complying with a number of the Order's provisions. The Sheriff obtained warrants for the arrest of dancers for, and management for allowing, violation of the buffer provision. On 30 March, the Sheriff's Office notified LLEH its SOBP application had been denied, citing numerous violations of the Order.

Earlier that March, LLEH filed this action, requesting injunctive and declaratory relief with respect to a number of the Order's provisions. During a 10 April conference with the district court, the County agreed not to enforce the Order until a 25 April hearing on LLEH's preliminary injunction request. At that hearing, enforcement of the buffer provision was preliminarily enjoined.

That May, the County heard the appeal of LLEH's SOBP denial. Later that month, the County agreed to both waive the location provision and reduce the buffer provision from six to three feet until November 2002—the point, according to the County, by which LLEH could recoup its initial investment. (As noted, LLEH maintained it needed a much longer period in which to do so.)

A bench trial was held in July, with judgment entered that September (2000). Relevant to this appeal, the district court: (1) held that the location, buffer, stage-height, demarcation, unobstructed-view, and disclosure provisions violated the First Amendment, failing the tests established in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and/or *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); (2) amended the buffer provision from six to three feet; and (3) held the injunction provision unconstitutionally overbroad. *LLEH, Inc. v. Wichita County, Texas,* 121 F.Supp.2d 513 (N.D.Tex.2000) (*LLEH*).

Post-judgment, LLEH sought attorney's fees and expenses (fees). Approximately $43,000 was awarded.

II.

The County challenges most of the rulings against the Order, as well as the fees award.

A.

[1] **[2]** Following a bench trial, findings of fact are reviewed for clear error; legal issues, *de novo. E.g., Joslyn Mfg. Co. v. Koppers Co., Inc.,* 40 F.3d 750, 753 (5th Cir.1994). "[W]e may affirm for reasons other than those relied upon by the district court". *Id.* (citing *Ballard v. United States,* 17 F.3d 116, 118 (5th Cir.1994)).

[3] "Whether ... free speech rights have been infringed is a mixed question of law and fact." *Int'l Soc'y for Krishna Consciousness of New Orleans, Inc. v. Baton Rouge,* 876 F.2d 494, 496 (5th Cir.1989) (citing ***365** *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n. 8 (5th Cir.1983), *cert. denied,* 467 U.S. 1259, 104 S.Ct. 3553 (1984)). Accordingly, our "review is *de novo* ". *Id.* (quoting *Dunagin*, 718 F.2d at 748 n. 8).

[4] "While it is now beyond question that nonobscene nude dancing is protected by the First Amendment, even if 'only marginally so,' it is also clear that the government can regulate such activity." *J&B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 369 (5th Cir.1998) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); internal citations omitted). The test for reviewing such regulations, however, is not as clear: the test for time, place, or manner regulations, described in *Renton,* 475 U.S. at 47, 106 S.Ct. 925; or the four-part test for incidental limitations on First Amendment freedoms, established in *O'Brien*, 391 U.S. at 376–77, 88 S.Ct. 1673.

Under *Renton*, "zoning ordinances designed to combat the undesirable *secondary effects* of [SOBs] are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations". 475 U.S. at 49, 106 S.Ct. 925 (emphasis added). "[Such] regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication". *Id.* at 47, 106 S.Ct. 925. Additionally, they must be narrowly tailored to achieve the government's interest. *See id.* at 52, 106 S.Ct. 925. "A content-neutral time, place, or manner restriction must (1) be justified without reference to the content of the regulated speech; (2) be narrowly tailored to serve a significant or substantial governmental interest; and (3) preserve ample alternative means of communication." *TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705, 707 (5th Cir.1994). Along the same line, *O'Brien* provides:

> [A] government regulation [of expressive conduct] is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377, 88 S.Ct. 1673.

Our court has reviewed SOB licensing and location provisions under the *Renton* test. *See, e.g., Woodall v. City of El Paso,* 49 F.3d 1120, 1122–27 (5th Cir.) (1000–foot location provision), *cert. denied,* 516 U.S. 988, 116 S.Ct. 516, 133 L.Ed.2d 425 (1995); *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1069–70 (5th Cir.1994) (per curiam) (1000–foot location provision); *TK's Video, Inc.,* 24 F.3d at 707–11 (licensing, information disclosure, and internal layout provisions); *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1257–60 (5th Cir.1992) (250–foot/1000–foot location and light-industrial zoning provisions), *cert. denied,* 507 U.S. 1030, 113 S.Ct. 1845, 123 L.Ed.2d 469 (1993).

We have subsequently reviewed a public nudity ordinance and "no touch" provision under the *O'Brien* test. *See J&B Entm't, Inc.,* 152 F.3d at 369–78; *Hang On, Inc. v. City of Arlington,* 65 F.3d 1248, 1253–55 (5th Cir.1995).

Clark v. Community for Creative Non–Violence, 468 U.S. 288, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), noted the tests' similarities: "[*O'Brien's*] four-factor standard ... for validating a regulation of expressive conduct ... is little, if any, different from the standard applied to time, place, or manner restrictions". In fact, in ***366** *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), concerning a challenge to a public indecency law brought by two nude dancing establishments, a plurality of the Court suggested the tests are interchangeable:

> The "time, place, or manner" test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a "public forum," although we have on at least one occasion applied it to conduct occurring on private property. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 [(1986)]. In *Clark* we observed that this test has been interpreted to embody much the same standards as those set forth in *United States v. O'Brien*, and we turn, therefore, to the rule enunciated in *O'Brien*.

Id. at 566, 111 S.Ct. 2456 (plurality opinion; internal citations omitted).

The district court apparently applied *Renton* in reviewing the location provision; for the others, *O'Brien*. Because neither side takes issue with the particular test applied to each of the respective provisions, we will proceed as did the district court. In any event, our holding for each provision is the same under either test.

1.

[5] The district court held the location provision unconstitutional for want of relevant evidence of secondary effects: "Although the County relie [d] upon many studies of secondary effects of other *cities,* none of the studies [has] any relevance to the problem faced by Wichita County" in an unincorporated, rural area with few residential dwellings. *LLEH,* 121 F.Supp.2d at 521 (emphasis added).

[6] **[7]** The County's interest, as identified in the Order's preambulary language, concerns combating SOBs' deleterious effects and protecting the health, safety, and welfare of SOB patrons and County citizens. "A local government's interest in preserving the quality and character of neighborhoods and urban centers can, if properly set forth, support restrictions on ... adult entertainment." *J&B Entm't, Inc.*, 152 F.3d at 371 (citing *Renton*, 475 U.S. at 50, 106 S.Ct. 925). "In setting forth this interest, a local government may place great weight upon the experiences of, and studies conducted by, other local governments, as well as opinions of courts from other jurisdictions." *Id.* (citing *Renton*, 475 U.S. at 51, 106 S.Ct. 925).

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*

Renton, 475 U.S. at 51–52, 106 S.Ct. 925 (emphasis added).

The district court held, and LLEH maintains, that the County's reliance on studies of secondary effects in urban areas is rendered irrelevant by the rural characteristics of the County's unincorporated areas, particularly the low population and dearth or absence of residences, schools, daycare centers, churches, and playgrounds in the area around Babe's.

[8] **[9]** To the extent the district court focused on the area in Babe's immediate vicinity, the court erred. "Regulations that burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their *general* effect." *United States v. Albertini,* 472 U.S. 675, 688–89, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) (emphasis added). Moreover, "[t]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely ***367** because a party contends that allowing an exception *in the particular case* will not threaten important government interests." *Id.* at 688, 105 S.Ct. 2897 (emphasis added; citing *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 296–297, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)).

Even if the area immediately surrounding Babe's were the only area in question, the studies relied upon by the County were still relevant. The secondary effects that urban areas have experienced (well documented in the relied-upon studies) are precisely what the County is attempting to *avoid.* This is evinced by the Order's preambulary language. For example, the County sought

to "minimize and *control* ... adverse effects" and "*deter* the spread of *urban and rural* blight". (Emphasis added.)

Accordingly, it is logical that the County would: (1) review the experiences of urban areas, as discussed in the studies; (2) consider what measures those areas have employed to combat secondary effects; and (3) tailor those corrective measures to the County's needs. By so doing, the County may, *in its continued growth and development,* successfully sidestep many of the problems encountered by urban areas. In this respect, the relied-upon studies are "reasonably believed to be relevant" to the problems the County seeks to address. *See Renton,* 475 U.S. at 51, 106 S.Ct. 925.

2.

[10] The district court held the six-foot buffer and 18–inch stage height provisions violated *O'Brien's* fourth prong: "incidental restriction on ... First Amendment freedoms [can be] no greater than is essential to the furtherance of that interest". *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673.

LLEH stipulated that the Order satisfies the first and second *O'Brien* prongs; and, the district court held these two provisions satisfied the third. *See LLEH,* 121 F.Supp.2d at 522–23. (The district court also held these provisions, along with the demarcation provision discussed *infra,* void for vagueness because they apply to "partially nude" performances without defining that term. The County does not contest this holding. The district court suggested that "the County can remedy this simply by defining the phrase, 'Partially Nude' as it has already done with 'Nudity or State of Nudity' and 'Semi-nude[,]' ", *id.* at 524; the County stated, at oral argument, that it intends to do so.)

a.

Concerning the buffer provision and *O'Brien's* fourth prong, the district court stated: "[T]he regulation must go *only so far as is required* to achieve the stated interest of deterring sexual contact and touching". *Id.* at 523–24 (emphasis added). It determined: the provision "would effectively close the club", *id.* at 523 n. 19; and, accordingly, only a less restrictive, *three*-foot buffer would be constitutional, *id.* at 524.

[11] **[12]** **[13]** The district court's analysis runs contrary to the principle that "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, *so long as* the neutral regulation promotes a substantial government interest *that would be achieved less effectively absent the regulation* ". *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897 (emphasis added); *see also Ward v. Rock Against Racism,* 491 U.S. 781, 798–99, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). "[S]uch regulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech". *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897. Moreover, "[t]he validity of such regulations does not turn on a judge's agreement with the responsible decision ***368** maker concerning the most appropriate method for promoting significant government interests". *Id.* Nor does it turn on "the degree to which those interests should be promoted". *Ward*, 491 U.S. at 800, 109 S.Ct. 2746.

In addition, the district court's finding that the six-foot buffer would effectively close Babe's is not controlling. "The [provision] does not ban all [partially or totally nude dancing], but instead focuses on the source of the evils the [County] seeks to eliminate ... and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Id.* at 800 n. 7, 109 S.Ct. 2746. The six-foot buffer may have a significant impact on Babe's; but, as noted *supra,* "[r]egulations that burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their *general* effect". *Albertini,* 472 U.S. at 688–89, 105 S.Ct. 2897 (emphasis added; internal citation omitted); *see also DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir.1997) (reviewing a similar six-foot buffer requirement and noting that, to the extent economic impact is considered in determining whether a regulation is sufficiently narrow, "we consider the economic effects of the ordinance in the aggregate, not at the individual level; if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment, but not if it merely has adverse effects on the individual theater"). In this light, the buffer provision satisfies *O'Brien's* narrow tailoring prong.

b.

[14] The district court held the 18–inch stage-height provision did not satisfy *O'Brien's* fourth prong: "The interest of deterring sexual contact and touching has already been satisfied with the three foot buffer zone [substituted by the district court for the Order's six-foot zone]. Accordingly, this requirement is arbitrary and does not serve the interest of the County in light of the three foot buffer zone". *LLEH,* 121 F.Supp.2d at 524.

Again, it is not within a court's province to base its ruling on its determination of "the most appropriate method for promoting [the] government interest[ ]". *Albertini,* 472 U.S. at 689, 105 S.Ct. 2897. Because the County's interests would be achieved less effectively absent the stage-height provision, that provision satisfies *O'Brien's* fourth prong.

3.

[15] The district court held the demarcation provision fails to satisfy two of the *O'Brien* prongs: the second, for want of "evidence of secondary effects that this rule is *intended* to ameliorate", *LLEH,* 121 F.Supp.2d at 524 (emphasis added); and the fourth, because it is not "narrow enough ... when [the court-substituted] three-foot buffer zone is already in place", *id.* at 525.

"Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring) (citing *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)). (As noted, LLEH stipulated that the Order *satisfies* the second prong.)

The demarcation provision is simply a manifestation of the buffer provision; it furthers the same substantial interests and merely gives definition to the buffer provision. Accordingly, it imposes no further ***369** restriction on speech. *O'Brien's* second and fourth prongs are satisfied.

4.

[16] The district court held the unobstructed-view provision is not sufficiently narrow to satisfy *O'Brien's* fourth prong. Our court has upheld similar provisions. At issue in *TK's Video, Inc.*, 24 F.3d at 705, was, *inter alia,* a provision that provided:

> The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms.... The view required in this subsection must be by direct line of sight from the manager's station.

Id. at 723. After explaining that the provision was relevant to an interest in protecting against "illegal and unsanitary sexual activity", we held: "The design and layout regulations narrowly respond to a substantial governmental interest". *Id.* at 711*; see also FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, 1304 (5th Cir.1988) ("[I]n accordance with the prevailing view, ... the first amendment does not prohibit the City of Dallas from requiring that viewing booths in adult theatres be open".).

The district court focused on the particular hardships that might arise out of compliance with the unobstructed-view provision. After discussing how costly compliance would prove, the court noted LLEH had voluntarily installed surveillance cameras with a monitor at the Babe's manager's station. The district court reasoned that, if LLEH installed two additional cameras, along with additional monitors at the manager's station, the County's interest in law enforcement could be served. Consequently, it concluded, the provision was not sufficiently narrow to satisfy *O'Brien's* fourth prong.

Again, a regulation with incidental burdens on speech is not invalid "simply because there is some imaginable alternative that might be less burdensome on speech". *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897. Such a regulation satisfies *O'Brien's* fourth prong "so long as the neutral regulation promotes a substantial government interest *that would be achieved less effectively absent the regulation* ". *Id.* at 689, 105 S.Ct. 2897 (emphasis added).

At trial, the County asserted "that cameras can be manipulated and the[ir] images [can be] misleading". *LLEH*, 121 F.Supp.2d at 528. The court dismissed this point because the County "fail[ed] to show the Court how a view from one side of a crowded room, 'with the naked eye,' can be any less misleading". *Id.* We conclude, however, that the County's interest would be achieved less effectively absent the unobstructed view provision.

Moreover, as noted, the "[r]egulations that burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their *general* effect". *Albertini,* 472 U.S. at 688–89, 105 S.Ct. 2897 (emphasis added; internal citation omitted). The district court erred to the extent it focused on the impact the unobstructed view provision had on Babe's alone.

5.

The disclosure provision held violatiave of *O'Brien's* fourth prong requires that, in order to obtain the necessary employee identification badge to work at a SOB, the applicant provide certain information to the Sheriff, including, *inter alia,* "the city, county, and state of each of the applicant's residences for the three (3) years immediately preceding the date of the application, indicating the dates of each residence *and* ***370** *including the present mailing address* of the applicant". (Emphasis added.) The application form used by the Sheriff to collect the information employs that same language, then provides spaces to list the date and applicant's address.

At trial, a Sheriff's representative answered "yes" when asked if the application form requests "the current *residential* address of the applicant". Without explanation, the district court determined the disclosure provision and/or the application itself required the applicant to list not only the "current address *[but also] phone information* " and held that the requirement to list such information "is not narrowly tailored to advance the County's interest". *LLEH*, 121 F.Supp.2d at 525 (emphasis added). (LLEH maintains the district court also held the provision unconstitutionally overbroad. The court ruled solely on the *O'Brien* narrowness prong. *Id.* at 525 n. 23.)

Neither the provision nor the application form requests a telephone number. As to the address, the County has repeatedly conceded that applicants should *not* have to list their current residential address. Moreover, counsel for the County confirmed at oral argument here that the County plans to amend the provision in this regard. In the light of these concessions, it is *not* clear why the County raised the disclosure provision as an issue on appeal. In any event, we need *not* review this aspect of the district court's opinion. We understand the district court's holding as pertaining *only* to a current *residential* address and telephone number.

6.

[17] The injunction provision held unconstitutionally overbroad states: "A person who *violates* [the Order] is subject to a suit to enjoin operation of the enterprise". (Emphasis added.) The provision authorizes the District Attorney "to file suit to enjoin violation of [the Order]". Relying on *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 168–73 (5th Cir.1978), the district court held the provision overbroad because it "authorizes a suit to enjoin free speech" or "to enjoin ... protected activity". *LLEH*, 121 F.Supp.2d at 527.

Universal Amusement concerned a statute that provided:

> The habitual use ... of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:
>
> ....
>
> (3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material[.]

587 F.2d at 165 n. 11. Our court held the provision "unconstitutional insofar as it authorizes injunctions against the future exhibition of unnamed films[,] ... for it amounts to a prior restraint on materials *not yet declared obscene* ". *Id.* at 169 (emphasis added).

Universal Amusement is inapposite. The provision at issue here authorizes suit to enjoin "violations" of the provisions upheld in this appeal. In the light of our above holdings, the risk of actions seeking to enjoin "free speech"

or "protected activity" is substantially diminished, if not eliminated, because we have concluded that the "speech" and "activity" at issue in the provisions is properly regulated. Any overbreadth in the injunction provision is not "substantial ... in relation to the [provision's] plainly legitimate sweep". *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

B.

Approximately $43,000 was awarded pursuant to 42 U.S.C. § 1988(b), which ***371** provides: "In any action or proceeding to enforce a provision of section [1983] of this title, the court, in its discretion, may allow the *prevailing party* ... a reasonable attorney's fee as part of the costs...." (Emphasis added.) The County requests that we either vacate the award or remand for reconsideration.

[18] **[19]** "[A] plaintiff 'prevails' when actual relief on the merits of his claim *materially alters* the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff". *Farrar v. Hobby*, 506 U.S. 103, 111–12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (emphasis added). In the light of our disposition of this appeal, the only points on which LLEH *might* be considered to have "prevailed" are: (1) in having the term "partially nude" adjudged vague (it is unclear whether the County conceded this at trial); (2) in having it adjudged that the County may not request a current residential address, which it conceded pre-trial; and (3) in having a provision (not at issue here) pertaining to on-premises alcohol consumption adjudged preempted by Texas law, which the County also apparently conceded pre-trial. Because the district court is better suited to determine both whether LLEH is a prevailing party in the light of our resolution of this appeal and what, if any, fees would be reasonable, we vacate the award and remand for reconsideration.

III.

For the foregoing reasons, we REVERSE the district court's holdings as to the Order's location, buffer, stage-height, demarcation, unobstructed-view, and injunction provisions. We do not reach its holdings on either the vagueness of the term "partially nude" or the disclosure provision. We VACATE the fees and expenses award. This case is REMANDED for further proceedings consistent with this opinion, including entry of judgment on the merits and reconsideration of fees.

JUDGMENT ON THE MERITS AFFIRMED in PART, REVERSED in PART; JUDGMENT AWARDING ATTORNEY'S FEES and EXPENSES VACATED; REMANDED.

All Citations

289 F.3d 358

354 S.W.3d 187
Supreme Court of Missouri,
En Banc.

Michael OCELLO, et al., Appellants,
v.
Chris KOSTER, in his official capacity as Missouri Attorney General, Respondent.

No. SC 91563.
|
Nov. 15, 2011.

Synopsis

Background: Sexually oriented businesses, owners of businesses, and residents filed suit against Missouri Attorney General, challenging constitutional validity of Regulation of Sexually Oriented Businesses Act, which contained provisions concerning touching of dancers by patrons, buffer zones around dancers, the banning of nudity in their establishments, alcohol and hours restrictions, and requirements that booths for viewing books and films be open to view. The Circuit Court, Cole County, Jon E. Beetem, J., granted Attorney General's motion for judgment on pleadings, and plaintiffs appealed.

Holdings: The Supreme Court, Laura Denvir Stith, J., held that:

[1] failure by joint committee on legislative research to conduct hearing on legislator's written request for hearing related to fiscal note accompanying proposed legislation for regulation of sexually oriented businesses did not render Act unconstitutionally invalid;

[2] Act was content-neutral restriction subject to intermediate scrutiny;

[3] legislature relied on evidence it reasonably believed was relevant to establish connection between restrictions requiring open booths for viewing sexually oriented books and films and prohibiting patrons from touching or coming within six feet of dancers, and negative secondary effects of sexually oriented speech that such restrictions were designed to address;

[4] plaintiffs' evidence did not cast direct doubt on evidence relied upon by legislature in enacting open-booth and dancer-access restrictions;

[5] nudity ban served substantial government interest;

[6] provisions of Act banning alcohol in such businesses and which restricted hours of operation were permissible content-neutral restrictions on speech;

[7] plaintiffs' evidence did not cast direct doubt on evidence that legislature reasonably relied on in enacting restrictions banning alcohol and limiting hours of operation to address secondary negative effects of higher crime and reduced property values; and

[8] content-neutral restrictions on speech in Act did not disproportionately reduce amount of protected sexual expression protected under First Amendment.

Affirmed.

West Headnotes (39)

[1] Appeal and Error
Cases Triable in Appellate Court

Supreme Court reviews the constitutional validity of a statute de novo.

5 Cases that cite this headnote

[2] Constitutional Law
Presumptions and Construction as to Constitutionality

A statute is presumed valid, and the Supreme Court will uphold it unless it clearly and undoubtedly conflicts with the constitution.

5 Cases that cite this headnote

[3] Constitutional Law
Doubt

The Supreme Court resolves all doubt in favor of a statute's validity.

5 Cases that cite this headnote

[4] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from

In reviewing grant of a motion for judgment on the pleadings, the appellate court must decide whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.

Cases that cite this headnote

[5] **Pleading**
Matters not admitted

In considering a motion for judgment on the pleadings, the court will not blindly accept the legal conclusions drawn by the pleaders from the facts.

Cases that cite this headnote

[6] **Pleading**
Well pleaded facts, admission of

The well-pleaded facts of the non-moving party's pleading are treated as admitted on motion for judgment on the pleadings.

Cases that cite this headnote

[7] **States**
Committees

Failure by joint committee on legislative research to conduct hearing on legislator's written request for hearing related to fiscal note accompanying proposed legislation for regulation of sexually oriented businesses did not violate state constitutional provision for permanent joint committee on legislative research, which "shall meet when necessary to perform the duties, advisory to the general assembly, assigned to it by law," and thus, failure to conduct hearing did not render Regulation of Sexually Oriented Businesses Act constitutionally invalid; constitution required only that committee be formed, that it meet, and that it perform its advisory role, constitution did not require hearing or preparation of fiscal note, constitution did not require legislature to adopt committee's advice, and statute governing proposal of legislation did not provide that failure to conduct hearing on legislator's request relating to fiscal note provided no penalty for such failure. V.A.M.S. Const. Art. 3, § 35; V.A.M.S. § 23.140.

Cases that cite this headnote

[8] **Constitutional Law**
Nature and scope in general

States
Committees

Joint Committee on Legislative Research has only the power granted it by the constitutional provision that creates it, and the General Assembly cannot increase the authority of the Committee beyond the powers set forth in the constitution. V.A.M.S. Const. Art. 3, § 35.

Cases that cite this headnote

[9] **Constitutional Law**
Sexual Expression

If restrictions on sexually oriented speech are content-neutral, they will be reviewed under an intermediate scrutiny standard. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**
Content-Neutral Regulations or Restrictions

Under an intermediate scrutiny standard, content-neutral legislation is examined to determine whether: (1) it is aimed at the negative secondary effects associated with the restricted activity and not the content of the restricted speech; (2) it is a time, place and manner restriction and not a total ban on speech; and (3) it is designed to serve a substantial government interest and leaves open alternative avenues of communication. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[11] **Constitutional Law**
Secondary effects

Regulation of Sexually Oriented Businesses Act was content-neutral, and not content-based restriction, and therefore, was subject to intermediate scrutiny, in suit brought by numerous sexually oriented businesses and others based on claim that Act violated First Amendment right of free speech; stated purpose of Act was to establish "reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the state," Act did not ban sexually oriented businesses of any type, but instead sought to reduce negative secondary effects associated with such businesses, including detrimental health and sanitary conditions, prostitution and drug-related crimes, and deterioration of surrounding neighborhoods, and Act stated that its purpose was to provide content-neutral time, place and manner or comparable restrictions on these businesses so as to limit their secondary negative effects. U.S.C.A. Const.Amend. 1; V.A.M.S. § 573.525 et seq.

1 Cases that cite this headnote

[12] **Constitutional Law**
Secondary effects

Although legislation regulating sexually oriented conduct nominally looks at the content of the speech in the sense that it is aimed at sexually oriented conduct, it is nevertheless "content-neutral," and therefore, subject to intermediate scrutiny review, if the predominate concerns motivating it are with the secondary effects caused by the speech, and not with the content of the speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] **Constitutional Law**
Strict or exacting scrutiny;compelling interest test

Content-based restrictions on speech are subject to strict scrutiny. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[14] **Constitutional Law**
Strict or heightened scrutiny;compelling interest

Under strict scrutiny, legislation is presumptively invalid and will be declared unconstitutional unless it is narrowly tailored to serve a compelling government interest.

1 Cases that cite this headnote

[15] **States**
Police power

The legislature is not required to undertake comparative studies before enacting health and safety laws; to the contrary, a legislative body may choose which evil to regulate first and need not strike at all evils at the same time or in the same way.

Cases that cite this headnote

[16] **Constitutional Law**
Secondary effects

Public Amusement and Entertainment
Sexually Oriented Entertainment

Statutes
Motives, Opinions, and Statements of Legislators

One legislator's comments disparaging sexually oriented businesses would not be imputed to entire General Assembly, for purposes of determining whether Regulation of Sexually Oriented Businesses Act was content-neutral restriction on speech subject to intermediate scrutiny. U.S.C.A. Const.Amend. 1; V.A.M.S. § 573.525 et seq.

Cases that cite this headnote

[17] **Constitutional Law**
Motive

A court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive; what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for the Supreme Court to eschew guesswork.

Cases that cite this headnote

[18] **Constitutional Law**
Freedom of speech, expression, and press

In determining whether time, place, and manner restrictions on speech are designed to serve a substantial government interest, the government has the initial burden of showing that it relied on evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[19] **Constitutional Law**
Freedom of speech, expression, and press

Little evidence is required to meet the government's initial burden of showing that it relied on evidence reasonably believed to be relevant for demonstrating a connection between a time, place or manner restriction on speech and a substantial, independent government interest; the evidence does not need to be directly related to the government's rationale, as long as it fairly supports the rationale. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[20] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

In determining whether a content-neutral restriction on speech was designed to serve a substantial independent government interest, the government need not conduct new studies or produce evidence independent of that already generated by other government entities to demonstrate the problem of secondary effects of the speech, so long as whatever evidence the government relies upon is reasonably believed to be relevant to the problem that the government addresses, and if the government finds it is reasonable to rely on prior judicial opinions that uphold similar restrictions and those opinions fairly support its enactments, that is sufficient to meet this standard. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[21] **Constitutional Law**
Secondary effects

In reviewing the government's evidence of secondary negative effects of sexually oriented businesses, for the purposes of determining whether a content-neutral restriction on speech addresses those effects, courts must show deference to the legislature's superior knowledge of the negative secondary effects caused by sexually oriented businesses. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[22] **Constitutional Law**
Freedom of speech, expression, and press

In a First Amendment challenge to a content-neutral restriction on speech, the government cannot rely on shoddy data or reasoning to satisfy its initial burden of showing that it relied on evidence it reasonably believed was relevant to demonstrate the secondary negative effects of sexually oriented speech that its content-neutral restriction was designed to address. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[23] **Constitutional Law**
Freedom of speech, expression, and press

In a First Amendment challenge to the constitutionality of a content-neutral restriction on speech, if the government meets its initial burden of showing that it relied on evidence it reasonably believed was relevant to demonstrating a connection between the restriction on speech and the secondary negative effects the restriction served to address, the burden shifts to the challenger to cast direct doubt on the government's rationale, either [1] by demonstrating that the government's evidence does not support its rationale or [2] by furnishing evidence that disputes the government's factual findings; this type of direct doubt must be cast on every rationale the government used to justify its restrictions. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[24] **Constitutional Law**
Reasonableness

In reviewing a First Amendment challenge to a content-neutral restriction on speech under intermediate scrutiny, in determining whether the government has made the showing that it relied on evidence that it reasonably believed to be relevant to establish a connection between its restriction and the suppression of negative secondary effects, neither the Supreme Court nor any court has the right to reweigh the evidence relied on by the legislature. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[25] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

In reviewing a First Amendment challenge to a content-neutral restriction on speech under intermediate scrutiny, the court will not look to see whether the challenger has shown an issue of fact exists as to whether the statute's provisions will limit the secondary negative effects of the speech; to the contrary, the question is whether the challenger has cast direct doubt on the government's rationale for the restriction, either by demonstrating that the evidence does not support its rationale that the restrictions will limit secondary effects or by demonstrating that, while it appears to do so, the evidence is faulty and does not in fact support the legislature's factual findings. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[26] **Constitutional Law**
Particular claims

Constitutional Law
Freedom of speech, expression, and press

In reviewing a First Amendment challenge to a content-neutral restriction on speech under intermediate scrutiny, challengers cannot simply make conclusory generalized allegations in their pleadings that the restrictions are invalid or are aimed at speech; they must discredit all rationales offered by the government, and unsystematic or anecdotal evidence, or evidence that merely attacks one type of evidence, would not be enough to cast direct doubt on the government's evidence. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[27] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

If the challenger fails to cast direct doubt on the government's evidence that it reasonably believed to be relevant to establish a connection between a content-neutral restrictions and the suppression of negative secondary effects, the intermediate scrutiny test governing review of a content-neutral restriction on speech is satisfied, and the government will have established that the restriction is designed to serve a substantial government interest. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[28] **Constitutional Law**
Freedom of speech, expression, and press

In reviewing a First Amendment challenge to a content-neutral restriction on speech under intermediate scrutiny, only if the challenger succeeds in casting direct doubt on the government's evidence that it believed was relevant to establish a connection between the restriction and the suppression of negative secondary effects does the burden shift back to the government to supplement the record with evidence renewing support for a theory that justifies its restriction. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[29] **Constitutional Law**
Sexually Oriented Businesses;Adult Businesses or Entertainment

Public Amusement and Entertainment
Dancing and other performances

Public Amusement and Entertainment
Motion pictures, videos and games

In enacting Regulation of Sexually Oriented Businesses Act, legislature relied on evidence it reasonably believed was relevant to establish connection between regulations requiring that booths for viewing sexually oriented books and films be open to view from central location and prohibiting patrons from touching or coming within six feet of dancers, and negative secondary effects of sexually oriented speech that such restrictions were designed to address, for purposes of claim by sexually oriented businesses that Act was unconstitutional restriction on speech under First Amendment; Arizona study documented dozens of samples obtained from closed booths in ten different sexually oriented businesses, more than 88% of which contained semen, Missouri health department officials noted that people infected with sexually transmitted diseases, including HIV, frequented these businesses and often engaged in unprotected sex, and other judicial opinions noted findings that closed booths and touching of or close proximity of patrons to dancers led to unsanitary conditions and spread of disease. U.S.C.A. Const.Amend. 1; V.A.M.S. § 573.525 et seq.

Cases that cite this headnote

[30] **Constitutional Law**
Secondary effects

Public Amusement and Entertainment
Dancing and other performances

Public Amusement and Entertainment
Motion pictures, videos and games

University professor's challenge as to whether legislature had chosen best method of attacking negative secondary effects of sexually oriented businesses by enacting Regulation of Sexually Oriented Businesses Act, together with professor's testimony that alleged deleterious effects of sexually oriented businesses on crime and property values were overblown or unsupported, did not cast direct doubt on evidence that legislature reasonably relied on that was relevant to establish connection between regulations within Act requiring that booths for viewing sexually oriented books and films be open to view from central location and prohibiting patrons from touching or coming within six feet of dancers, and negative secondary effects, namely unsanitary and unhealthy conditions, potential for spread of disease, and safety that restrictions were designed to address, for purposes of determining whether content-neutral restrictions served substantial government interest, under intermediate scrutiny review. U.S.C.A. Const.Amend. 1; V.A.M.S. § 573.525 et seq.

Cases that cite this headnote

[31] **Constitutional Law**
Sexually Oriented Businesses;Adult Businesses or Entertainment

Public Amusement and Entertainment
Dancing and other performances

Public Amusement and Entertainment
Motion pictures, videos and games

Affidavits from various dancers and owners of sexually oriented businesses, which merely provided alternative views as to whether sexually oriented businesses presented health or safety concerns, did not cast direct doubt on evidence that legislature reasonably relied on that was relevant to establish connection between regulations within Regulation of Sexually Oriented Businesses Act requiring that booths for viewing sexually oriented books and films be open to view from central location and prohibiting patrons from touching or coming within six feet of dancers, and negative secondary effects, namely unsanitary and unhealthy conditions, potential for spread of disease, and safety that restrictions were designed to address, for purposes of determining whether content-neutral restrictions served substantial government interest, under intermediate scrutiny review. U.S.C.A. Const.Amend. 1; V.A.M.S. § 573.525 et seq.

Cases that cite this headnote

[32] **Constitutional Law**
Nudity in general

Public Amusement and Entertainment
Dancing and other performances

Provision of Regulation of Sexually Oriented Businesses Act that "[n]o person shall knowingly or intentionally, in a sexually oriented business, appear in a state of nudity," served substantial government interest, and thus, was not unreasonable restriction on speech under First Amendment; legislature relied on numerous judicial opinions upholding nudity bans similar to instant ban, which opinions found connection between sexually oriented businesses and negative secondary effects, legislature reviewed anecdotal evidence describing health concerns related to nude dancing, including testimony of former dancer who explained that dancers constantly rubbed against stripper poles and lay on floor, and that performing these actions while completely nude left their bodies exposed to bacteria, and sexually oriented businesses did not offer any evidence casting direct doubt on evidence or judicial opinions relied upon by legislature that it deemed relevant to establish connection between ban and negative effects that ban was intended to address. U.S.C.A. Const.Amend. 1; V.A.M.S. § 573.531(3).

Cases that cite this headnote

[33] **Constitutional Law**
Nudity in general

A nudity ban is a restriction on expressive conduct, for the purposes of First Amendment review, in the form of a total ban on nudity in sexually oriented businesses, rather than a time, place or manner restriction on such nudity. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[34] **Constitutional Law**
Hours of operation

Constitutional Law
Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors
Licensing and regulation

Public Amusement and Entertainment
Sexually Oriented Entertainment

Provisions of Regulation of Sexually Oriented Businesses Act banning sale of alcohol in such business, and which restricted hours of operation, served substantial government interest in preventing crime, and thus, were permissible content-neutral restrictions on speech under First Amendment; legislature relied on numerous judicial opinions relating to similar restrictions, which found that alcohol and late hours were associated with higher crime, it relied on anecdotal evidence of conditions inside businesses, including firsthand experiences of dancers who recounted drug use, prostitution, and sexual abuse they frequently faced, businesses presented no evidence to cast direct doubt on those judicial opinions and anecdotal evidence, and while businesses presented alternative anecdotal evidence that sexually

oriented businesses did not increase crime but offered high paying, stable jobs and helped maintain safe communities, such evidence suggesting that different conclusion was reasonable did not cast direct doubt on legislature's reliance on evidence it reasonably believed established connection between restrictions and negative secondary effects restrictions were designed to address. U.S.C.A. Const.Amend. 1; V.A.M.S. § 573.525 et seq.

Cases that cite this headnote

[35] **Constitutional Law**
Freedom of speech, expression, and press

In determining whether the legislature relied on evidence it reasonably believed was relevant to establish a connection between the content-neutral restriction on speech and a negative secondary effect that the restriction is designed to address, the government does not bear the burden of providing evidence that rules out every theory that is inconsistent with its own. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[36] **Constitutional Law**
Secondary effects

Intoxicating Liquors
Licensing and regulation

Public Amusement and Entertainment
Sexually Oriented Entertainment

University professor's studies and affidavit challenging provisions of Regulation of Sexually Oriented Businesses Act which banned consumption of alcohol in sexually oriented businesses and which limited businesses' hours of operation, based on professor's belief that businesses did not contribute to increase in crime or reduce property values because studies relied on by legislature lacked empirical foundation, did not cast direct doubt on evidence that legislature reasonably relied on that was relevant to establish connection between regulations and negative secondary effects of crime and reduction in property values, and thus, restrictions were reasonable content-neutral restrictions on speech, under intermediate scrutiny review, where comparative studies were not necessary to establish connection between sexually oriented businesses and secondary negative effects, and to extent that professor's studies and criticisms were valid, they at best showed only that legislature could have reached different conclusion about connection between businesses and crime and property values. U.S.C.A. Const.Amend. 1; V.A.M.S. § 573.525 et seq.

Cases that cite this headnote

[37] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

The government does not need to conclusively prove that its content-neutral restrictions on speech will reduce negative secondary effects, in determining whether the restriction serves a substantial government interest, under intermediate scrutiny review, but only that the evidence fairly supports the rationale for the legislation. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[38] **Constitutional Law**
Sexually Oriented Businesses;Adult Businesses or Entertainment

Intoxicating Liquors
Licensing and regulation

Public Amusement and Entertainment
Sexually Oriented Entertainment

Content-neutral restrictions on speech in Regulation of Sexually Oriented Businesses Act, which contained provisions requiring open booths for viewing sexually oriented books and films, which prohibited patrons from touching or coming within six feet of dancers, which banned nude dancing and alcohol, and which restricted hours of operation, did not disproportionately reduce amount of protected sexual expression

protected under First Amendment; economic impact of restrictions on sexually oriented businesses was not relevant to whether restrictions reduced protected speech, restrictions left quantity and quality of speech substantially intact, operating hours restriction still left ample time for businesses to convey speech, and other restrictions placed no intrinsic limitations on speech but instead restricted opportunities for conduct that did not enjoy First Amendment protection. U.S.C.A. Const.Amend. 1; V.A.M.S. § 573.525 et seq.

Cases that cite this headnote

[39] Constitutional Law
Content-Neutral Regulations or Restrictions

The concern of the proportionality test applied in determining whether a content-neutral restriction on speech leaves the quantity and accessibility of speech substantially intact is not with the economic impact of a statute, but rather any intrinsic limitations on speech embodied in the statute. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

***195** J. Michael Murray, Raymond V. Vasvari Jr., Berkman, Gordon, Murray & DeVan, Cleveland, James B. Deutsch, Mark H. Ellinger, Thomas W. Rynard, Blitz, Bardgett & Deutsch LC, Jefferson City, Richard T. Bryant, Kansas City, H. Louis Sirkin, Jennifer Kinsley, Sirkin Kinsley, Cincinnati, for Missouri residents and adult entertainment businesses.

Ronald Holliger, General Counsel, Mark E. Long, Emily Dodge, Attorney General's Office, Jefferson City, Scott D. Bergthold, Chattanooga, for the State.

Opinion

LAURA DENVIR STITH, Judge.

Michael Ocello, Passions Video Inc., Genova's Chestnut Lounge Inc., and certain other Missouri residents and businesses (collectively "the businesses") appeal the circuit court's grant of judgment on the pleadings against them in their challenge to the validity of sections 573.525 to 573.540, RSMo Supp.2010 [1] ("the Act"), which regulate sexually oriented businesses in Missouri. They argue that the limitations contained in these statutes concerning touching of dancers by patrons, buffer zones around dancers, the banning of nudity in their establishments, alcohol and hours restrictions, and requirements that booths for viewing books and films be open to view violate their freedom of speech as protected by the First Amendment to the United States Constitution. They also assert that, prior to the Act's adoption, the General Assembly violated an aspect of section 23.140, RSMo 2000, regarding a bill's fiscal note and that this violation voids the Act.

1 Unless otherwise specified, all subsequent statutory references are to RSMo Supp.2010.

For the reasons set forth below, this Court finds that the restrictions are not content-based limitations on speech but rather are aimed at limiting the negative secondary effects of sexually oriented businesses on the health, welfare and safety of Missouri residents. Applying the intermediate level of review that *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437–39, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality opinion), states is appropriate for use in such cases, this Court finds that the statutes are reasonable time, place and manner or comparable restrictions and that the legislature relied on evidence it "reasonably believed to be relevant" to establish a connection between the statutory provisions under attack and the suppression of negative secondary effects of sexually oriented businesses. Accordingly, the Act does not unconstitutionally limit speech. This Court also rejects the argument that any failure to follow statutory procedures governing preparation of a fiscal note amounts to a failure to follow the Missouri Constitution and thereby voids the legislation. The Missouri Constitution does not require fiscal notes or address how they should be prepared. The judgment is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

Sections 573.525 to 573.540 (the "Act"), adopted by the Missouri legislature in 2010, regulates certain aspects of

sexually oriented businesses by: (1) banning nude dancing in public; (2) requiring that semi-nude dancers not touch or come within six feet of customers; (3) prohibiting alcohol in sexually oriented businesses; (4) requiring sexually oriented businesses to close between midnight and 6 a.m.; and (5) requiring viewing booths in sexually oriented ***196** businesses to be visible from a central operating station.

Before the legislature passed the Act, legislative committees heard extensive testimony and received reports and other evidence from police officers, health officials, dancers, and concerned citizens and business owners related to the connection between sexually oriented businesses and a variety of detrimental secondary effects, including crimes such as prostitution and drug use, health and sanitation problems, and decreased property values.

In addition, the legislature heard from experts such as Dr. Richard McCleary, a professor of social ecology at the University of California–Irvine. Dr. McCleary testified that based on his extensive research—much of which, including numerous scientific studies, was provided to the legislature—sexually oriented businesses increase crime, drug use and other negative effects.

The legislature also reviewed dozens of judicial opinions as well as studies conducted by municipalities and states around the country concerning problems associated with sexually oriented businesses, including increased crime inside and outside those establishments, unsanitary and unhealthy conditions inside the establishments, and the deleterious effect of such businesses on property values and neighborhoods.

The legislature also considered evidence offered by opponents of the legislation. This included: (1) testimony from police officers and business owners who believed that sexually oriented businesses did not cause crime, blight or other negative secondary effects in their neighborhoods; (2) the testimony of Dr. Daniel G. Linz, a professor of communication, law and society at the University of California–Santa Barbara, who disputed the validity of many of the studies relied upon by proponents of the legislation; and (3) studies stating there is little correlation between sexually oriented businesses and crime and other negative secondary effects in the surrounding communities.

After holding these hearings, the legislature adopted the Act. On August 10, 2010, shortly before the effective date of the Act, the businesses filed a two-count petition in the Cole County circuit court challenging its validity. In Count I, the businesses claim that the Act is void because the General Assembly failed to hold a hearing regarding the accuracy of a fiscal note assessing the expected cost of the Act as required by section 23.140 and article III, section 35 of the Missouri Constitution. In Count II, the businesses claim that the Act restricts sexually oriented speech in violation of the First Amendment to the United States Constitution because the evidence that the General Assembly relied on to show that sexually oriented businesses cause negative secondary effects was constitutionally inadequate.

The State filed an answer in which it denied that the Act is unconstitutional or that the manner of its adoption was improper or rendered it void. It attached to its answer and incorporated by reference the legislative record upon which the Act was adopted, including the judicial opinions, crime, health and land use studies and reports, expert testimony, and anecdotal evidence offered by both proponents and opponents of the legislation. It then filed a motion for judgment on the pleadings, arguing that the General Assembly followed proper legislative procedures in passing the Act, that any deviations did not affect the validity of the legislation, and that the General Assembly reasonably had relied on evidence establishing a connection between sexually oriented businesses and negative secondary effects. The State's motion was granted as to both ***197** counts. [2] The businesses appeal. Because they challenge the constitutional validity of section 23.140, appeal is directly to this Court. Mo. Const. art. V, § 3.

2 Judgment was granted as to Count I regarding the fiscal note in November 2010 and, as to Count II regarding the alleged First Amendment violation, in January 2011.

II. STANDARD OF REVIEW

[1] [2] [3] This Court reviews the constitutional validity of a statute *de novo*. *In re Brasch,* 332 S.W.3d 115, 119 (Mo. banc 2011). A statute is presumed valid, and the Court will uphold it unless it "clearly and undoubtedly" conflicts with the constitution. *Prokopf v. Whaley,* 592 S.W.2d 819, 824 (Mo. banc 1980). This Court "resolve[s]

all doubt in favor of the [statute's] validity." *Westin Crown Plaza Hotel Co. v. King,* 664 S.W.2d 2, 5 (Mo. banc 1984).

[4] **[5]** **[6]** In reviewing grant of a motion for judgment on the pleadings, this Court must decide "whether the moving party is entitled to judgment as a matter of law on the face of the pleadings." *RGB2, Inc. v. Chestnut Plaza, Inc.,* 103 S.W.3d 420, 424 (Mo.App.2003). This Court will not "blindly accept the legal conclusions drawn by the pleaders from the facts." *Westcott v. City of Omaha,* 901 F.2d 1486, 1488 (8th Cir.1990). "The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion." *Eaton v. Mallinckrodt, Inc.,* 224 S.W.3d 596, 599 (Mo. banc 2007). Exhibits attached to the pleadings are incorporated therein and will be considered in determining whether judgment on the pleadings should have been granted. *Rule* 55.12.

III. FAILURE TO HOLD A FISCAL NOTE HEARING DID NOT INVALIDATE THE ACT

[7] The businesses first challenge the process by which the Missouri General Assembly adopted the Act. The businesses' argument is grounded on article III, section 35 of the Missouri Constitution, which states in pertinent part:

> There shall be a permanent joint committee on legislative research, selected by and from the members of each house as provided by law.... The committee shall meet when necessary to perform the duties, *advisory to the general assembly,* assigned to it by law.

(emphasis added).

The businesses focus the Court's attention on the requirement of article III, section 35 that the joint committee on legislative research (the "Committee") "*shall meet when necessary to perform the duties,* ***advisory to*** *the general assembly, assigned to it by law.*" Mo. Const. art. III, § 35 (emphasis added). They argue that because the constitution requires the creation of the Committee, any failure to properly and fully carry out duties assigned to the Committee by the legislature constitutes a failure to fulfill a constitutional duty and, necessarily, voids any legislation so passed.

The businesses suggest that this argument has particular application here. They note that section 23.140 requires that "[l]egislation, with the exception of appropriation bills, introduced into either house of the General Assembly shall, before being acted upon, be submitted to the oversight division of the committee on legislative research for the preparation of a fiscal note," § 23.140.1, and that, once prepared, a fiscal note must "accompany [a] bill throughout its course of passage." § 23.140.3. It is undisputed for purposes of this appeal that initial preparation of the fiscal note was procedurally proper.

Section 23.140 also states that a legislator may challenge or seek to amend the ***198** contents of a fiscal note by so indicating "in writing ... to the chairman of the legislative research committee and a hearing before the committee or subcommittee shall be granted as soon as possible." § 23.140.3. It is uncontested that a legislator wrote a letter to the chairman of the Committee requesting a hearing related to the Act's fiscal note but that no hearing was held. The businesses argue that this was a deviation from the provisions of section 23.140.3, and that this deviation constituted an inherent violation of article III, section 35 of the constitution, because holding hearings is one of the duties "assigned to [the Committee] by law" pursuant to article III, section 35. The businesses argue that the Act, therefore, is unconstitutional and void.

The businesses' argument fails. Article III, section 35 of the constitution merely requires that the Committee be formed, that it meet and that it perform an advisory role to the General Assembly. The constitution itself does not set out any specific requirements for the Committee, require hearings or establish any specific duties for the Committee. And, importantly here, article III, section 35 does not require preparation of fiscal notes, nor does it mandate hearings related thereto.

[8] Of course the legislature has established, in section 23.140, requirements for writing fiscal notes and has set forth methods for challenging and amending them. But the Committee "has only the power granted it by the constitutional provision that creates it." *Thompson v. Comm. on Legislative Research,* 932 S.W.2d 392, 395 (Mo. banc 1996). The General Assembly cannot increase the authority of the Committee beyond the powers set forth in the constitution. *Id.* Article III, section 35 does not state that the legislature must follow the advice

of the Committee or that the Committee's failure to correctly carry out its duties as to a particular piece of legislation voids that legislation. The constitution says that the Committee is merely *advisory* to the General Assembly; therefore, the legislature would not have the authority to give the Committee effective veto power over legislation merely by failing to hold a particular hearing. "To hold otherwise would permit the legislature to amend the constitution with a statute." *Thompson,* 932 S.W.2d at 395.

Nor has the legislature attempted to give the Committee such veto power here. While section 23.140 sets out duties the Committee shall perform, it contains no penalty for non-compliance and says nothing about the effect of failing to follow the procedures outlined therein. Neither does it purport to give the Committee power to delay or quash otherwise validly enacted legislation should the Committee fail to fulfill each of its assigned duties completely or timely. The absence of such provisions does not preclude finding that the provision is mandatory when other circumstances and rules of construction so indicate, *see, e.g., State v. Teer,* 275 S.W.3d 258, 261 (Mo. banc 2009), but in the absence of such circumstances the lack of sanctions for failure to comply has been found to mean that the provision is directory only, *see, e.g., State v. Parkinson,* 280 S.W.3d 70, 76 (Mo. banc 2009); *State v. Tisius,* 92 S.W.3d 751, 770 (Mo. banc 2002); *Farmers & Merchants Bank & Trust Co. v. Dir. of Revenue,* 896 S.W.2d 30, 32–33 (Mo. banc 1995).

The businesses submit that while the statute here does not provide a sanction for failure to follow it, it should nonetheless be held mandatory because it involves a failure by the General Assembly to follow applicable procedural rules when enacting a statute. They argue that, in such a case, the resulting statute is constitutionally defective and, therefore, void, even in ***199** the absence of a specifically codified penalty, citing *Hammerschmidt v. Boone Cnty.,* 877 S.W.2d 98 (Mo. banc 1994).

Reliance on *Hammerschmidt* is misplaced. The Court there deemed a bill void after finding a violation of a *constitutional requirement,* contained in article III, section 23, that no bill shall contain more than one subject. *Id.* at 104–05. By contrast, article III, section 35 does not require a fiscal note, much less does it set forth any procedural requirements related to the fiscal note process. Neither does the constitution elsewhere provide that a failure to follow procedural requirements in passing legislation automatically shall void any bill so enacted. [3]

3 Indeed, article III, section 30 of the constitution provides, in relevant part:

> No bill shall become a law until it is signed by the presiding officer of each house in open session, who first shall suspend all other business, declare that the bill shall now be read and that if no objection be made he will sign the same. If in either house any member shall object in writing to the signing of a bill, the objection shall be noted in the journal and annexed to the bill to be considered by the governor in connection therewith.

By so providing, the constitution offers members of the General Assembly a mechanism by which to challenge perceived violations such as the Committee's failure to hold a fiscal note hearing and to ensure that the governor is made aware of the objection prior to enactment of the legislation. In this case, the record demonstrates that no such objection was lodged. This Court is not called on to address whether other remedies also may be constitutionally permissible.

In sum, the constitution merely requires that the Committee be established, that it meet and that it undertake *an advisory role* to the General Assembly. Neither article III, section 35 nor section 23.140 require this Court to invalidate the Act on the basis of a procedural error in regard to the fiscal note for the bill in question.

IV. THE ACT IS CONTENT–NEUTRAL AND SUBJECT TO INTERMEDIATE RATHER THAN STRICT SCRUTINY

The businesses also allege that the Act is a content-based restriction on speech subject to strict scrutiny because the purpose of the Act is the suppression of sexually oriented speech. Alternatively, the businesses argue that even were the purpose of the Act not to limit speech, it fails to pass intermediate scrutiny because its provisions reduce protected speech and do not serve the substantial government interest in reducing the negative secondary effects of sexually oriented businesses.

[9] In *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the United States Supreme Court held that the level of

scrutiny used to determine whether restrictions on sexually oriented speech are constitutional depends on whether the statutory provisions at issue are considered content-based or content-neutral. *Id.* at 46–48, 106 S.Ct. 925. If restrictions on sexually oriented speech are content-neutral, they will be reviewed under an intermediate scrutiny standard. *Id.*

[10] Under an intermediate scrutiny standard, legislation is examined to determine whether: (1) it is aimed at the negative secondary effects associated with the restricted activity and not the content of the restricted speech; (2) it is a time, place and manner restriction and not a total ban on speech; and (3) it is designed to serve a substantial government interest and leaves open alternative avenues of communication. *Renton,* 475 U.S. at 50, 106 S.Ct. 925.

***200** *A. The Act is Content Neutral and Aimed at Negative Secondary Effects of Speech*

[11] **[12]** Legislation that is focused on reducing the secondary effects of sexually oriented businesses long has been considered "content-neutral." This is because, although the legislation nominally looks at the content of the speech in the sense that it is aimed at sexually oriented conduct, it is nevertheless "content-neutral" if the " 'predominate concerns' motivating [it] '[are] with the secondary effects [caused by the speech], and not with the content of [the speech].' " *Alameda Books, Inc.,* 535 U.S. at 440–41, 122 S.Ct. 1728 (plurality opinion), *quoting, Renton,* 475 U.S. at 47, 106 S.Ct. 925. [4]

4 Justice Kennedy's *Alameda Books* concurrence explains that calling restrictions on sexually oriented speech content-neutral is a legal fiction because such restrictions clearly target speech based on content; they simply do so for the permissible purpose of regulating the secondary effects of the speech rather than the speech itself. 535 U.S. at 448–49, 122 S.Ct. 1728 (*Kennedy, J., concurring*). While believing the "content-neutral" label thus was a misnomer, he agrees with the plurality that intermediate scrutiny, as defined in *Renton* and *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), is still the proper standard of review because the restrictions are justified based on the secondary effects caused by the speech not the content of the speech itself. *Id.* For ease of understanding this opinion continues to call such time, place and manner restrictions on sexually oriented speech "content-neutral."

[13] **[14]** By contrast, content-based restrictions are subject to strict scrutiny. *Id. at* 434, 122 S.Ct. 1728. An example of a content-based law would be legislation prohibiting sexually oriented speech based on a desire to suppress the speech itself. *Renton,* 475 U.S. at 46–48, 106 S.Ct. 925. Under strict scrutiny, legislation is presumptively invalid and will be declared unconstitutional unless it is "narrowly tailored to serve a compelling government interest." *Pleasant Grove City v. Summum,* 555 U.S. 460, 467, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009).

This Court applies these principles here to determine whether the Act is subject to intermediate or strict scrutiny. The express purpose of the Act is set out in its preamble:

> [T]o regulate sexually oriented businesses *in order to promote the health, safety, and general welfare of the citizens of this state, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the state.* The provisions of sections 573.525 to 573.537 have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of sections 573.525 to 573.537 to restrict or deny access by adults to sexually oriented materials protected by the [F]irst [A]mendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of sections 573.525 to 573.537 to condone or legitimize the distribution of obscene material.

§ 573.525.1 (emphasis added).

In keeping with these stated purposes, the Act does not ban sexually oriented businesses of any type. Rather, it seeks to reduce negative secondary effects associated with such businesses, including detrimental health and sanitary conditions, prostitution and drug-related crimes both inside and outside these locations, as well as deterioration of the surrounding neighborhoods, by prohibiting nude dancing in ***201** public; requiring no contact and a six-foot buffer between dancers and patrons; banning alcohol in and restricting the operating hours of sexually oriented businesses; and banning the use of closed booths for viewing sexually oriented films or books.

The preamble to the Act also states that the General Assembly found that:

> Sexually oriented businesses, as a category of commercial enterprises, are associated with a wide variety of adverse secondary effects, including but not limited to personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation.

§ 573.525.2(1). For these reasons, section 2(3) of the preamble continues by stating that the General Assembly also finds that:

> Each of the foregoing negative secondary effects constitutes a harm which the state has a substantial interest in preventing or abating, or both. Such substantial government interest in preventing secondary effects, which is the state's rationale for sections 573.525 to 573.537, exists independent of any comparative analysis between sexually oriented and nonsexually oriented businesses. Additionally, the state's interest in regulating sexually oriented businesses extends to preventing future secondary effects of current or future sexually oriented businesses that may locate in the state.

§ 573.525.2(3). The Act states that its purpose is to provide "content-neutral" time, place and manner or comparable restrictions on sexually oriented businesses so as to limit their secondary effects; therefore, it is subject to intermediate rather than strict scrutiny.

The businesses assert, however, that the second of the three sentences of section 2(3) of the Act's preamble, just quoted, reveals that the true purpose of the Act is not to regulate but rather to suppress sexually oriented speech. That sentence states that the government's "substantial interest in suppressing the secondary effects [associated with sexually-oriented businesses], which is the state's rationale for sections 573.525 to 573.537, exists independent of any comparative analysis between sexually oriented and nonsexually oriented businesses." § 573.525.2(3). The businesses argue that this is an admission that the Act is intended to suppress sexually oriented speech.

The businesses misread the above sentence. It does not state that the legislature adopts the Act regardless of whether it will reduce secondary effects. The sentence is in a series of paragraphs in which the legislature specifically finds that sexually oriented businesses do have negative secondary effects, in which it lists such effects, and in which it says the purpose of the enactment is to reduce such secondary effects.

In the sentence in question, the legislature makes clear that the State's substantial interest in reducing these secondary effects is sufficient to support the legislation. In so doing, it rejects the position of opponents of the legislation that to regulate sexually oriented businesses it must show that such businesses have more substantial secondary effects than do other businesses. Regardless of whether other businesses also have secondary effects, the legislature said, it found that negative secondary effects are associated with sexually oriented businesses and a desire to reduce those effects is the basis for this legislation.

[15] **[16]** This determination was within the General Assembly's legislative prerogative. ***202** A legislature is free to and does regulate all sorts of businesses through all sorts of health and safety laws. Indeed, such laws take up

many chapters of the Missouri statutes. [5] The legislature is not required to undertake comparative studies before enacting such laws. To the contrary, it is well-settled that a legislative body may choose which evil to regulate first and "need not strike at all evils at the same time or in the same way." *Semler v. Oregon State Bd. of Dental Examiners,* 294 U.S. 608, 610, 55 S.Ct. 570, 79 L.Ed. 1086 (1935). In large part for this reason, numerous cases have recognized that the fact that other, less-regulated businesses may also have negative secondary effects does not make regulating sexually oriented businesses "arbitrary, discriminatory, or unreasonable." *Peek–A–Boo Lounge of Bradenton, Inc. v. Manatee Cnty.,* No. 8:05–CV–1707, 2009 WL 4349319, *6 (M.D.Fla. Nov. 25, 2009), *aff'd* 630 F.3d 1346 (11th Cir.2011); *accord, Flanigan's Enterprises, Inc. v. Fulton Cnty.,* 596 F.3d 1265, 1281 (11th Cir.2010). This Court agrees.

5 *See, e.g., chapter 311, Liquor Control Laws; chapter 292, Health and Safety of Employees; chapter 196, Food, Drugs, and Tobacco; chapter 572, Gambling.*

[17] The businesses also argue that certain statements of a member of the General Assembly disparaging sexually-oriented businesses demonstrate the legislature's intent to suppress sexually oriented speech. This contention ignores the well-settled principle that "[a court] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.... What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *United States v. O'Brien,* 391 U.S. 367, 384, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Therefore, assuming one member of the General Assembly sought to suppress sexually oriented speech based on its content, that motive cannot be imputed to the legislature.

For the foregoing reasons, the Act properly is reviewed as a content-neutral restriction on speech; therefore, it is subject to intermediate scrutiny.

B. Test for Determining Whether the Act Places Reasonable Time, Place and Manner Restrictions on Speech

Having determined that the legislative restrictions on sexually oriented businesses in question are aimed at the negative secondary effects associated with sexually oriented activity rather than on restricting the speech itself, this Court turns to whether the restrictions meet the other two requirements of *Renton,* 475 U.S. at 46–48, 106 S.Ct. 925, by determining whether they constitute time, place and manner restrictions rather than a total ban on protected speech and whether they are designed to serve a substantial government interest and leave open alternative avenues of communication.

The restrictions that the businesses ask this Court to strike down are: (1) a no-contact requirement; (2) a six-foot buffer requirement; (3) a ban on nude dancing in public; (4) an alcohol ban; (5) an hours-of-operation restriction; and (6) an open-booth requirement. *See* § 573.531.

These restrictions, except for the nudity ban, are all on their face time, place and manner restrictions. [6] While the nudity ban bars nudity entirely, for reasons discussed further below, the United States ***203** Supreme Court has held that bans on nudity are to be examined under the same evidentiary standard as that applied to time, place and manner restrictions. *City of Erie v. Pap's A.M.,* 529 U.S. 277, 297, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). Therefore, the validity of all of these restrictions will rise or fall based on whether the government has reasonably relied on evidence establishing the restrictions are designed to serve a substantial government interest.

6 Further, the businesses do not allege that the restrictions are a total ban on speech.

[18] **[19]** **[20]** The United States Supreme Court clarified the method for determining whether restrictions on sexually oriented businesses meet this standard in *Alameda Books,* 535 U.S. at 437–39, 122 S.Ct. 1728 (plurality opinion). The government has the initial burden of showing that it relied on "evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Id.* at 438, 122 S.Ct. 1728, *quoting Renton,* 475 U.S. at 51–52, 106 S.Ct. 925. Little evidence is required to meet this initial burden. *Id.* at 451, 122 S.Ct. 1728 (*Kennedy, J., concurring*). The evidence does not need to be directly related to the government's rationale as long as it "fairly supports" the rationale. *Alameda Books,* 535 U.S. at 438–39, 122 S.Ct. 1728 (plurality opinion). Furthermore, the government "need not 'conduct new studies or produce evidence independent of that already generated by [other government entities]' to demonstrate the problem of secondary effects, 'so

long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.' " *Pap's A.M.,* 529 U.S. at 296–97, 120 S.Ct. 1382, *quoting, Renton,* 475 U.S. at 51–52, 106 S.Ct. 925. If the government finds it is reasonable to rely on prior judicial opinions that uphold similar restrictions and those opinions fairly support its enactments, that is sufficient to meet this standard. *Id.*

[21] **[22]** In addition, in reviewing the government's evidence, courts must show deference to the legislature's superior knowledge of the negative secondary effects caused by sexually oriented businesses. *Alameda Books,* 535 U.S. at 451–52, 122 S.Ct. 1728 (plurality opinion) ("[t]he Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion"). Finally, although the initial burden is slight and the government's findings are entitled to deference, the government cannot rely on "shoddy data or reasoning" to satisfy its burden. *Id.* at 437–39, 122 S.Ct. 1728.

[23] If the government meets its initial burden, the burden shifts to the challenger to "cast *direct doubt* on [the government's] rationale, either [1] by demonstrating that the [government's] evidence does not support its rationale or [2] by furnishing evidence that disputes the [government's] factual findings." *Id.* (emphasis added). This type of direct doubt must be cast on every rationale the government used to justify its restrictions. *SOB, Inc. v. Cnty. of Benton,* 317 F.3d 856, 863 (8th Cir.2003); *World Wide Video of Washington, Inc. v. City of Spokane,* 368 F.3d 1186, 1196 (9th Cir.2004).

This is a heavy burden. To understand it better, it is helpful to understand what the test does *not* require and what evidence is *not* sufficient to meet the challenger's burden. It is not the usual burden-shifting test used by courts to determine which side will prevail under a preponderance of the evidence test. This is because the issue for First Amendment purposes is not whether a court would find the challenger's evidence on this issue ***204** more persuasive than that relied on by the legislature. The government has to show only that the legislature relied on evidence "reasonably believed to be relevant" to establish a connection between its restrictions and the suppression of negative secondary effects. *Alameda Books,* 535 U.S. at 437–39, 122 S.Ct. 1728 (plurality opinion).

[24] **[25]** **[26]** In determining whether the government has made such a showing, neither this Court nor any court has the right to reweigh the evidence relied on by the legislature. *G.M. Enterprises, Inc. v. Town of St. Joseph,* 350 F.3d 631, 639–40 (7th Cir.2003). The court will not look to see whether the challenger has shown an issue of fact exists as to whether the statute's provisions will limit secondary effects. To the contrary, the question is whether the challenger has cast *direct doubt* on the government's rationale—here the prevention of secondary effects—either by demonstrating that the evidence does not support its rationale that the restrictions will limit secondary effects or by demonstrating that, while it appears to do so, the evidence is faulty and does not in fact support the legislature's factual findings. *Alameda Books,* 535 U.S. at 437–39, 122 S.Ct. 1728 (plurality opinion). To meet this burden, challengers cannot simply make conclusory generalized allegations in their pleadings that the restrictions are invalid or are aimed at speech. They must discredit all rationales offered. Unsystematic or anecdotal evidence, or evidence that merely attacks one type of evidence (such as a lack of controlled studies), would not be enough to cast direct doubt on the government's evidence. *Richland Bookmart, Inc. v. Knox Cnty.,* 555 F.3d 512, 527–28 (6th Cir.2009).

[27] **[28]** If the challenger fails to cast direct doubt on the government's evidence, the intermediate scrutiny test of *Renton* and *Alameda Books* is satisfied and the government will have established that the legislation is designed to serve a substantial government interest. *Alameda Books,* 535 U.S. at 438–39, 122 S.Ct. 1728 (plurality opinion). In such cases, there is no need for an evidentiary hearing such as the businesses say was required here. Only if the challenger succeeds in casting direct doubt on the government's evidence in either manner described above does "the burden shift [ ] back to the [government] to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439, 122 S.Ct. 1728.

The Court thus turns to the issues of whether the government met its initial burden and whether the challenger businesses cast direct doubt on the government's rationale.

C. Reliance by Legislature on Evidence Reasonably Believed to be Relevant

The legislature based its adoption of the provisions now under attack on evidence introduced at legislative hearings. At those hearings, proponents and opponents of the legislation presented voluminous evidence supporting their disparate positions. The State attached to and incorporated in its pleadings the full legislative record of evidence offered both by those supporting and opposing adoption of the Act. That evidentiary record included: (1) judicial opinions; (2) crime, land use and health impact reports; (3) expert testimony; and (4) anecdotal evidence. All of this evidence was appropriately before the trial court for consideration in determining whether the government met its initial burden and whether the challengers undercut it. Rule 55.12; *Gould v. Missouri State Bd. of Registration for Healing Arts,* 841 S.W.2d 288, 290 (Mo.App.1992).

This Court has reviewed this evidence (as well as additional evidence offered in ***205** the trial court below), in determining whether the government met its burden of showing that the legislature relied on evidence "reasonably believed to be relevant" to reducing negative secondary effects of sexually oriented businesses in enacting the provisions now challenged and whether the businesses have cast direct doubt on the government's evidence so as to preclude the entry of judgment on the pleadings. [7]

7 The businesses did not attach any evidence to their initial petition; however, they did attach additional evidence to motions submitted to the trial court. Although this evidence was included in the appellate record, the parties disagree as to whether the evidence was properly before the trial court and included in the record. *See Castle v. Castle,* 642 S.W.2d 709, 711 (Mo.App.1982). Because this Court finds that consideration of the evidence offered by the businesses in the trial court does not change this Court's resolution of the issues before it, this Court need not resolve the parties' disagreement as to whether this evidence was properly before the trial court.

In so doing, this Court looks at the evidence supporting and casting direct doubt on the particular provisions under attack, rather than taking the challengers' invitation to determine simply whether this Court believes that the challengers have shown that there may be equal or better ways to regulate secondary effects in general. This follows from the fact, noted above, that a challenger of a statute regulating sexually oriented businesses must cast direct doubt on every rationale the government used to justify each separate challenged provision. *SOB, Inc.,* 317 F.3d at 863; *World Wide Video,* 368 F.3d at 1196.

Here, the legislature believed that the approaches it adopted would assist the State in ameliorating the negative secondary effects caused by sexually oriented businesses including, "personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation." § 573.525.2(1). Therefore, this Court will look at each restriction and determine whether the legislature reasonably relied on evidence establishing a connection between the restriction and one or more of these negative secondary effects.

1. The challengers failed to cast direct doubt on evidence the legislature reasonably relied on regarding negative secondary effects of the open-booth, no-touch and six-foot buffer restrictions.

[29] The government relied on a number of types of evidence to support the provisions of the Act requiring open booths and establishing a requirement that patrons not touch or come within six feet of the dancers. [8] This evidence included a ***206** study from Tucson, Arizona, documenting the unsanitary conditions in closed booths. The Tucson study found that of the dozens of samples collected from closed booths in ten different sexually oriented businesses more than 88 percent contained semen. The government also relied on testimony from health department officials in Missouri describing the health problems associated with sexually oriented businesses. Among other issues, the officials discussed that people infected with sexually transmitted diseases, including HIV, frequent sexually oriented businesses, and often engage in anonymous and unprotected sex.

8 Section 573.531 states in regard to these restrictions:

No employee shall knowingly or intentionally, in a sexually oriented business, appear in a semi-nude condition unless the employee, while semi-nude, shall be and remain on a fixed stage at least six feet from all patrons and at least eighteen

> inches from the floor in a room of at least six hundred square feet.
>
> No employee, who appears in a semi-nude condition in a sexually oriented business, shall knowingly or intentionally touch a patron or the clothing of a patron in a sexually oriented business.
>
> A sexually oriented business, which exhibits on the premises, through any mechanical or electronic image-producing device, a film, video cassette, digital video disc, or other video reproduction, characterized by an emphasis on the display of specified sexual activities or specified anatomical areas shall comply with the following requirements:
>
> (1) The interior of the premises shall be configured in such a manner that there is an unobstructed view from an operator's station of every area of the premises, including the interior of each viewing room but excluding restrooms, to which any patron is permitted access for any purpose;
>
> (2) An operator's station shall not exceed thirty-two square feet of floor area;
>
> (3) If the premises has two or more operator's stations designated, the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the operator's stations;
>
> (4) The view required under this subsection shall be by direct line of sight from the operator's station;
>
> (5) It is the duty of the operator to ensure that at least one employee is on duty and situated in an operator's station at all times that any patron is on the portion of the premises monitored by such operator station; and
>
> (6) It shall be the duty of the operator and of any employees present on the premises to ensure that the view area specified in this subsection remains unobstructed by any doors, curtains, walls, merchandise, display racks, or other materials or enclosures at all times that any patron is present on the premises.

In addition to studies and testimony, the government relied on judicial opinions, including *Bamon Corp. v. Dayton,* 923 F.2d 470, 473 (6th Cir.1991), and *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 410–11 (6th Cir.1997). These opinions found, based on testimony from police officers and other government officials, that closed booths and touching or close proximity between dancers and patrons led to unsanitary conditions and the spread of disease.

The United States Supreme Court has held that in meeting its initial evidentiary burden a legislature may reasonably rely on studies, anecdotal evidence and judicial opinions of the type relied on by the Missouri legislature in adopting restrictions on sexually oriented businesses. *Alameda Books,* 535 U.S. at 434–39, 122 S.Ct. 1728 (plurality opinion); *Pap's A.M.,* 529 U.S. at 296–97, 120 S.Ct. 1382. This is true regardless of whether, as here, some of the evidence concerned other locations and other statutes in other states. The legislature "need not 'conduct new studies or produce evidence independent of that already generated by [other government entities]' to demonstrate the problem of secondary effects, 'so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.' " *Id., quoting Renton,* 475 U.S. at 51–52, 106 S.Ct. 925. As a result, this Court finds the State met its initial burden and the burden shifted to the businesses to cast direct doubt on the government's evidence about closed booths, no-touch policies and buffer zones.

[30] To support their challenge to the Act generally, the businesses principally relied on Dr. Linz. Dr. Linz's testimony and studies concerned whether the legislature had chosen the best method of attacking negative secondary effects, and argued that the alleged deleterious effects of sexually oriented businesses on crime and property values are overblown or unsupported, and that such businesses cause no more crime in surrounding areas than do ***207** various other types of businesses.[9] But, even had the legislature given credit to Dr. Linz's views, the evidence in support of its open-booth, buffer zone and no-touching requirements was equally based on evidence that such restrictions would improve sanitation and health within sexually oriented businesses and reduce opportunities for prostitution and other crimes in those businesses. Dr. Linz's views and studies about crime and property values in surrounding areas were not directed toward these issues and could not and did not cast direct doubt on the government's evidence related to health concerns.

9 Dr. Linz's testimony and studies are discussed thoroughly below in section IV.B.3.

[31] The businesses also offered various affidavits from dancers and business owners. While some of this anecdotal evidence provided alternative views as to whether sexually oriented businesses present health or safety concerns, they simply offered an alternative viewpoint that at best would have supported an alternative conclusion. As set out above, that is not enough. The businesses needed to cast direct doubt on all of the legislature's rationales for adopting these provisions. *See SOB, Inc.,* 317 F.3d at 863. Their evidence largely failed to address, much less cast direct doubt on, the government's rationale for believing that there were health and safety issues that could reasonably be ameliorated by the open-booth, no-touch and six-foot buffer provisions of the Act. As a result, the challengers failed to meet their burden of proof of casting "direct doubt" to shift the burden of proof back to the government. *Alameda Books,* 535 U.S. at 437–40, 122 S.Ct. 1728. The trial court did not err in granting judgment on the pleadings as to these provisions.

2. *The nudity ban is valid under the evidentiary standard from* Renton *and* Alameda Books.

[32] **[33]** The nudity ban, unlike the others provisions in the Act at issue on this appeal, is a restriction on expressive conduct in the form of a total ban on nudity in sexually oriented businesses rather than a time, place or manner restriction on such nudity. [10] The United States Supreme Court held in *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673, that such a restriction on expressive conduct is valid if: "[1] it is within the constitutional power of the [g]overnment; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

10 The nudity ban states, "No person shall knowingly or intentionally, in a sexually oriented business, appear in a state of nudity." *§ 573.531.3.*

Thereafter, in 1986, the Supreme Court in *Renton* adopted a slightly different test, for time, place and manner restrictions. As described above, that test, as modified by *Alameda Books,* requires the government to show initially that the legislature reasonably relied on evidence that the legislative restrictions would serve the substantial government interest in suppressing the negative secondary effects caused by sexually oriented businesses. *Alameda Books,* 535 U.S. at 437–39, 122 S.Ct. 1728 (plurality opinion). If the government meets this requirement, the burden then shifts to the challengers and, unless they can cast direct doubt on the government's evidence, the evidentiary standard from *Renton* is met. *Id.*

In ***208** *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), the Supreme Court held that because both tests focus on whether the legislation furthers an important governmental interest, the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." *Ward,* 491 U.S. at 797–98, 109 S.Ct. 2746, *quoting Clark v. Cmty. for Creative Non–Violence,* 468 U.S. 288, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). Then, in *Pap's A.M.,* 529 U.S. at 296–97, 120 S.Ct. 1382, the Supreme Court held that because of the similarities between the tests, the evidentiary test from *Renton* controls in the case of nudity bans, as it does in the case of time, place and manner restrictions. *Accord, Peek–A–Boo Lounge,* 630 F.3d at 1354–55. As a result, this Court will apply the evidentiary standard from *Renton* to the nudity ban in this case.

In the present case, the legislature principally relied on Supreme Court decisions, as well as numerous federal courts of appeals decisions, upholding nudity bans similar to the one at issue in this case, including *Pap's A.M.,* 529 U.S. at 289–90, 120 S.Ct. 1382. In *Pap's A.M.,* the Supreme Court ruled that nude dancing is a form of expressive conduct, but that it "falls only within the outer ambit of the First Amendment's protection." 529 U.S. at 289, 120 S.Ct. 1382. Therefore, while a public nudity ban "has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, [dancers] are free to perform wearing pasties and G-strings [and][a]ny effect on the overall expression is *de minimis.*" *Id.* at 294, 120 S.Ct. 1382.

The Supreme Court went on to uphold the ban. To support its judgment, it relied almost entirely on citations to its prior opinions in *Renton, Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), which found a

connection between sexually oriented businesses and negative secondary effects. *Pap's A.M.*, 529 U.S. at 296–97, 120 S.Ct. 1382. *Pap's A.M.* also credited the city of Erie's reliance on its city council's first-hand knowledge of the negative secondary effects associated with nude dancing in public. *Id.* at 297–98, 120 S.Ct. 1382. The Court found it inconsequential that *Renton* and *American Mini Theatres* dealt with zoning ordinances rather than a nudity ban, holding that "*it was reasonable for Erie to conclude that ... nude dancing was likely to produce the same secondary effects.* And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres.*" *Id.* (emphasis added).

Other cases decided by the Supreme Court and numerous federal courts of appeals similarly have affirmed nudity bans in reliance on *Pap's A.M.* and the cases it cited. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *Daytona Grand Inc. v. City of Daytona Beach,* 490 F.3d 860, 873–76 (11th Cir.2007); *Peek–A–Boo Lounge,* 630 F.3d at 1355–56. This makes sense, for once the Supreme Court has determined that a nudity ban is a reasonable exercise of government authority in this area, it would be pointless to require governments to relitigate this issue in individual cases. *See Alameda Books,* 535 U.S. at 451–53, 122 S.Ct. 1728 (*Kennedy, J., concurring*).

The legislature also reviewed anecdotal evidence describing the health concerns related to nude dancing. For instance, the legislature heard from a former dancer who explained that dancers constantly rub against stripper poles and lay on the floor and that performing these actions while completely nude leaves their bodies exposed ***209** to bacteria, contributing to the spread of disease. This testimony may have caused particular concern in light of a report from Jefferson County, Missouri, in which a health worker discussed the high and increasing incidence of hepatitis, a virus that often is spread through contact with the body fluids of others.

As the analysis above shows, in enacting the nudity ban, the legislature relied on precedent from the Supreme Court and numerous United States courts of appeals as well as anecdotal evidence describing the health concerns related to nude dancing. The businesses did not offer any evidence casting direct doubt on *Pap's A.M.* or any of the other cases relied on by the State, nor did they cast doubt on the government's anecdotal evidence concerning the health problems associated with nude dancing. As a result, the businesses failed to meet their burden of casting direct doubt on the government's evidence; therefore, the trial court properly granted judgment on the pleadings as to this statutory provision.

3. Ban on Alcohol Use and Restriction on Hours of Operation.

[34] The government relied on a variety of evidentiary sources to justify the alcohol ban and hours-of-operation restrictions on sexually oriented businesses,[11] including numerous United States courts of appeals opinions upholding both alcohol bans and hours restrictions. For example, in *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702 (7th Cir.2003), the challenger claimed that the government did not meet its evidentiary burden because it failed to provide reports showing that serving alcohol aggravated the secondary effects associated with sexually oriented businesses. *Id.* at 724–26. The Seventh Circuit relied on *LaRue,* 409 U.S. 109, 93 S.Ct. 390, in rejecting the challenger's claim.[12] *LaRue* found that it was reasonable for the government to conclude that alcohol and erotic dancing should not be combined. *Id.* at 118, 93 S.Ct. 390. *Ben's Bar* explained that the government reasonably could rely on *LaRue* in determining that "barroom nude dancing was likely to produce adverse secondary effects at the local level, even in the absence of specific studies on the matter." 316 F.3d at 725–26.

11 The restrictions state, "No operator shall allow or permit a sexually oriented business to be or remain open between the hours of 12:00 midnight and 6:00 a.m. on any day. No person shall knowingly or intentionally sell, use, or consume alcoholic beverages on the premises of a sexually oriented business." *§§ 573.531.8–9.*

12 Although *LaRue* upheld the liquor ban using a rational basis analysis, a later Supreme Court case dealing with restrictions on advertising alcohol, *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), referenced *American Mini Theatres* and *Barnes,* which dealt with adult entertainment restrictions analyzed under intermediate scrutiny. Numerous United States courts of appeals cases have held that *Liquormart's* reference to the earlier cases "makes clear that the [Supreme] Court is of the opinion that adult

> entertainment liquor regulations, like the ones at issue in *LaRue,* will pass constitutional muster even under the heightened intermediate scrutiny tests outlined in [*American Mini Theatres* and *Barnes*]." *Ben's Bar,* 316 F.3d at 712–713; *Giovani Carandola Ltd. v. Bason,* 303 F.3d 507, 513 n. 2 (4th Cir.2002).

The legislature also relied on *Schultz v. City of Cumberland,* 228 F.3d 831 (7th Cir.2000), to support its hours-of-operation restriction. *Schultz* upheld a far more restrictive provision requiring sexually oriented business to close between midnight and 10 a.m. Monday through Saturday and all day Sunday. *Id.* at 846. The Seventh Circuit held that the restriction was valid because the government reasonably relied on secondary effects studies showing a ***210** connection between sexually oriented businesses and crime as well as legislative research suggesting that operating sexually oriented businesses at night strained the limited overnight resources of the local police. *Schultz,* 228 F.3d at 846; *see also Flanigan's,* 596 F.3d 1265 (upholding alcohol ban); *BZAPS, Inc. v. City of Mankato,* 268 F.3d 603 (8th Cir.2001) (same); *Andy's Restaurant & Lounge, Inc. v. City of Gary,* 466 F.3d 550 (7th Cir.2006) (upholding hours restriction); *Sensations, Inc. v. City of Grand Rapids,* 526 F.3d 291 (6th Cir.2008) (same).

As with the nudity ban, in deciding to enact its alcohol and hours-of-operation limitations, the legislature was entitled to and did rely on prior cases finding alcohol and late hours of operation are associated with negative secondary effects.

The legislature also relied on extensive anecdotal evidence of conditions inside sexually oriented businesses that the legislature could find would be improved by its restrictions. In addition to the evidence already noted, this included evidence from the firsthand experiences of dozens of strippers and former strippers who recounted the drug use, prostitution and sexual abuse they frequently faced inside of sexually oriented businesses. For instance, strippers described how men grabbed their breasts, buttocks and genitals in the sexually oriented businesses and how some of their bosses would force them to engage in prostitution with the customers.

The businesses did nothing to challenge the government's reliance on the above cases and anecdotal evidence. Accordingly, it stands unchallenged.

Instead, the businesses attacked the government's additional reliance on dozens of studies showing a connection between sexually oriented businesses and increased crime and lower property values. Some of these studies also found that alcohol and late-night operating hours contributed to these negative secondary effects. For instance, a study from Dallas, Texas, found that operating late at night contributed to the crime risk by encouraging loitering, which attracted prostitutes. In another study, conducted by the American Center for Law and Justice, researchers found that alcohol service increased the negative secondary effects associated with sexually oriented businesses. The government also relied on expert testimony from Dr. McCleary, who found that criminological theory predicted alcohol would increase crime at sexually oriented businesses by lowering patrons' inhibitions, thereby making them more susceptible to predatory criminals.

The businesses sought to cast direct doubt on this evidence in a number of ways. First, they submitted affidavits from Missouri residents, and even from a former agent of the Missouri Division of Alcohol and Tobacco Control, recounting their beliefs that sexually oriented businesses do not cause harmful secondary effects. In addition, they offered affidavits from other dancers, sexually oriented business owners and neighboring residents, who said they believed that sexually oriented businesses provide high-paying, stable jobs and help maintain well-kept safe communities.

[35] The legislature was free to rely on the businesses' anecdotal evidence in deciding whether to adopt one or more of the proposed restrictions on sexually oriented businesses, but it found the contrary evidence more persuasive. This it was entitled to do. As the Sixth Circuit noted in *Richland Bookmart,* simply offering conflicting anecdotal evidence cannot meet the challenger's burden of casting direct doubt on the government's evidence because ***211** such evidence "suggests merely that the [legislature] 'could have reached a different conclusion during its legislative process' with regard to the need to regulate ... sexually oriented businesses." 555 F.3d at 527–28, *quoting, Daytona Grand,* 490 F.3d at 881. "[E]vidence suggesting that a different conclusion is also reasonable does not prove that the [legislature's findings] were impermissible or its rationale unsustainable." *Id.* This is because the government "does not bear the burden of providing evidence that rules out every theory ... that

is inconsistent with its own." *Alameda Books,* 535 U.S. at 437, 122 S.Ct. 1728 (plurality opinion). It merely has to show that it relied on evidence "reasonably believed to be relevant" to establishing a connection between the Act and the suppression of negative secondary effects. *Id.* at 437–38, 122 S.Ct. 1728.

[36] The businesses also relied on testimony, studies and an affidavit from Dr. Linz to try to cast direct doubt on the government's evidence about the need to ban alcohol in and restrict the hours of sexually oriented businesses. Dr. Linz claimed that many of the studies were not scientifically sound because they were not based on empirical studies comparing the incidence of crime and the change in property values between areas with sexually oriented businesses and areas with other types of late-night businesses. He believes that such empirical studies are necessary to get a true picture of the effect of sexually oriented businesses, and he says that his studies show that other businesses cause at least as much crime and lowering of property values as do sexually oriented businesses. Similarly, Dr. Linz also argues that, while the studies relied on by the State do show a correlation between sexually oriented businesses and crime and reduced property values in the areas surrounding sexually oriented businesses, the correlation is not significant and it is unclear that sexually oriented businesses caused these negative effects because the studies used improper control groups, limited measuring times and non-random surveys. Basically, he argues that the studies did not meet the standards required of controlled scientific studies.

While it is evident that Dr. Linz would require such empirical and controlled studies before adopting statutory provisions similar to those in the Act, the legislature made it clear in the very sentence discussed in section IV.A. above that it rejected Dr. Linz's belief that such comparative studies are necessary, stating:

> [the government's] substantial interest in suppressing the secondary effects [associated with sexually oriented businesses], which is the state's rationale for sections 573.525 to 573.537, exists independent of any comparative analysis between sexually oriented and nonsexually oriented businesses.

§ 573.525.2(3). This the legislature was free to do, for the United States Supreme Court itself has stated that such empirical or scientific studies are simply unnecessary. It rejected a similar suggestion that empirical evidence that a particular approach will work must be offered before the legislature may enact restrictions on sexually oriented businesses, stating "[the dissent] asks the [government] to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully [reduce secondary effects]. *Our cases have never required [the government] to make such a showing* ...." *Alameda Books,* 535 U.S. at 439–40, 122 S.Ct. 1728 (plurality opinion) (emphasis added).

[37] The Supreme Court's refusal to require empirical studies follows from its belief that the government should be given ***212** a "reasonable opportunity to experiment with solutions" to the problems caused by sexually oriented businesses. *Renton,* 475 U.S. at 52, 106 S.Ct. 925. Such experimentation is not possible if the government first must study empirical data and make controlled comparisons before it can even undertake the experiment. Therefore, the Supreme Court has held that it is reasonable for a legislature to enact a statute that is supported merely "by appeal to common sense." The government does not need to conclusively prove that its restrictions will reduce negative secondary effects, but only that the evidence "fairly supports" the rationale for the legislation. *Alameda Books,* 535 U.S. at 437–40, 122 S.Ct. 1728 (plurality opinion).

The Eleventh Circuit relied on these principles in *Peek–A–Boo Lounge.* It found insufficient the challenger's criticisms of the government's studies based on allegedly inadequate control groups, sample sizes, length of data study and lack of empirical data, stating that the government is not precluded from relying on studies that do not use the scientific method. *Peek–A–Boo Lounge,* 630 F.3d at 1359.

In addition to criticizing the government's studies, Dr. Linz also presented his own studies that he believed affirmatively showed little or no correlation between sexually oriented businesses and increased crime. While the legislature was free to accept this evidence, the fact that Dr. Linz so firmly believes it to be true does not mean the legislature also must accept it. For instance, Dr. McClearly noted that many of Dr. Linz's studies just measure the number of 911 calls originating from different

areas and conclude that sexually oriented businesses did not cause an increase in such calls. The crimes caused by sexually oriented businesses, however, are often so-called victimless crimes such as prostitution and drug dealing. These crimes rarely are reported because there is no "victim" to report the crime. *See Daytona Beach,* 490 F.3d at 882–83 (questioning experts' studies that relied on 911 call data because "many crimes do not result in calls to 911 ... especially ... for crimes, such as lewdness and prostitution"). Therefore, a lack of additional 911 calls would not necessarily mean such "victimless" crimes were not occurring, particularly in the face of the substantial anecdotal evidence and other studies mentioned earlier showing there was such a connection.

To the extent that Dr. Linz's studies and criticisms were valid, they at best show that the legislature could have reached a different conclusion about the connection between sexually oriented businesses and crime and property values. As repeatedly noted, however, this is not sufficient to cast direct doubt on the government's evidence because "evidence suggesting that a different conclusion [about the relationship between the government's restriction and negative secondary effects] is also reasonable does not prove that the [government's] findings were impermissible or its rationale unsustainable." *Richland Bookmart,* 555 F.3d at 527–28.

This principle has particular application here, for Dr. Linz's criticisms and studies addressed only his belief that sexually oriented businesses do not lead to greater neighborhood crime or to a loss of property value. His evidence did not address and so did not cast direct doubt on the legislature's adoption of such measures to attack crime, health, prostitution and drug issues within the businesses themselves based on the prior cases, anecdotal reports and specific studies relied on by the legislature. The trial court did not err in granting judgment on the pleadings as to ***213** the alcohol and hours-of-operation restrictions.

4. Proportionality Test

[38] Finally, the businesses argue that even if the government met its evidentiary burden under *Renton* and *Alameda Books,* the Act is nevertheless unconstitutional under the proportionality test established by Justice Kennedy's controlling concurrence in *Alameda Books.* [13]

13 Justice Kennedy's concurrence provided the crucial fifth vote in *Alameda Books,* and because it was the narrowest opinion, it is controlling *under Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). *Ctr. for Fair Pub. Policy v. Maricopa Cnty.,* 336 F.3d 1153, 1161 (9th Cir.2003).

The proportionality test arose from Justice Kennedy's concern that the plurality's analysis in *Alameda Books* did "not address how speech will fare under the [statute]." 535 U.S. at 449–50, 122 S.Ct. 1728 (*Kennedy, J., concurring*). Justice Kennedy explained that the government is not permitted to reduce secondary effects by the simple expedient of reducing the amount of protected speech that occurs, even though it may be logical to assume that fewer sexually oriented businesses will mean fewer customers and so fewer secondary effects. *Id.* Therefore, courts should look to whether the statutes in question leave "the quantity and accessibility of speech substantially intact." *Id.*

The businesses claim that the Act violates this principle because its restrictions have caused sexually oriented businesses' revenue to decline, forcing many to close, thereby substantially reducing the quantity of sexually oriented speech. The businesses' overread Justice Kennedy's concurring opinion. He did not state that the government could not adopt any statute that reduced patronage of sexually oriented businesses or affected their income. He said that a legislature could not adopt statutes that were effective in reducing secondary effects *only because* they reduced the opportunities for speech, such as by barring more than a certain number of businesses from locating in a community without there being alternative locations for such speech. For this reason, some courts have questioned whether Justice Kennedy's proportionality test has any logical application at all where, as here, the restrictions at issue do not relate to zoning but instead pertain to the clothing and activities within the business itself. *See, e.g., Fantasy Ranch, Inc. v. City of Arlington,* 459 F.3d 546, 562 (5th Cir.2006); *Ctr. for Fair Pub. Policy v. Maricopa Cnty.,* 336 F.3d 1153, 1162 (9th Cir.2003).

In any event, even if applicable, it is evident that Justice Kennedy's concern was with protecting opportunities to engage in the protected aspects of speech at issue in sexually oriented businesses, not with protection of the economic interests of adult businesses in and of themselves

by permitting unprotected conduct to occur at the location of the expressive speech.

[39] Indeed, at least since *Renton,* the Supreme Court has held that the "economic impact" of a statute regulating sexually oriented businesses is not relevant in determining whether the statute is valid under the First Amendment. 475 U.S. at 54, 106 S.Ct. 925, *quoting Young,* 427 U.S. at 78, 96 S.Ct. 2440 (*Powell, J., concurring*). The proportionality test does not affect this principle. Its concern is not with the economic impact of a statute but rather any intrinsic limitations on speech embodied in the statute. *Spokane Arcade, Inc. v. City of Spokane,* 75 F.3d 663, 667 (9th Cir.1996); *Ben's Bar,* 316 F.3d at 726–27 (upholding alcohol ban even though many ***214** businesses would not be viable without the ability to serve alcohol).

In this case, the restrictions in question reduce negative secondary effects while "leaving the quantity and quality of speech substantially intact." *Alameda Books,* 535 U.S. at 449–50, 122 S.Ct. 1728 (*Kennedy, J., concurring*). The only restrictions that place intrinsic limitations on speech are the nudity ban and the hours-of-operation restriction. As previously noted, the Supreme Court has specifically stated that even if a nudity ban "has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, [dancers] are free to perform wearing pasties and G-strings [and][a]ny effect on the overall expression is *de minimis.*' " *Pap's A.M.,* 529 U.S. at 294, 120 S.Ct. 1382. This statement makes clear that the Supreme Court believes that nudity bans reduce negative secondary effects while placing a minimal burden on speech. The nudity ban at issue in this case is valid under the proportionality test.

Based on the evidence discussed above, the legislature reasonably determined that the overnight hours are a particularly troublesome time for sexually oriented businesses to operate; so, closing the businesses at night should substantially reduce negative secondary effects. Forcing sexually oriented businesses to close overnight, however, will not substantially reduce the quantity and availability of sexually oriented speech because such businesses still will have an ample amount of time, 18 hours a day, to convey their erotic message. *84 Video/ Newsstand, Inc. v. Sartini,* 455 Fed.Appx. 541, ——, No. 09–3920, 2011 WL 3904097, at *13 (6th Cir. Sept. 7, 2011) (finding a midnight to 6 a.m. hours restriction left open ample time to convey sexually-oriented speech when the secondary effects are less severe). Because the hours-of-operation restriction, like the nudity ban, only places a minimal burden on protected speech it is valid under Justice Kennedy's proportionality analysis.

The other restrictions in the Act place no intrinsic limitations on protected speech but instead restrict opportunities for conduct that *does not* receive First Amendment protection. Challengers concede there is no First Amendment right to touch or sit within a few feet of erotic dancers, to read books and watch movies in a closed booth, or to drink alcohol throughout the night while so doing. Instead the protected First Amendment right is to dance expressively, to read books and to view videos. The legislation does not restrict the right to engage in these protected activities directly, and its hours and nudity restrictions are minimal and reasonable for the reasons noted above. It simply prohibits such illegal and unsanitary conduct as touching dancers, sexual conduct with or without clothes, and use of closed booths for masturbation or for sex between those in adjoining booths.

As such, to the extent that the no-touch, six-foot buffer, alcohol ban and open-booth restrictions reduce patronage at sexually oriented businesses, it is not because the restrictions unduly reduce speech but because they reduce the very types of secondary effects that the government is entitled to and intends to reduce. That this reduction in secondary effects may make these businesses less appealing to some of their former patrons is not the result of the government restricting free speech but simply demonstrates that it was not speech that drew those customers to the establishments.

Protecting the economic security of these establishments by allowing its customers to engage in non-speech related activities is not protected by the First Amendment and the unprotected activities ***215** are subject to reasonable government restrictions of the type at issue here. The Act places only minimal restrictions on speech and does not disproportionately limit speech.

V. CONCLUSION

As the Supreme Court stated, it is not the judiciary's "function to appraise the wisdom of [the government's] decision to [regulate] adult theaters" or other adult businesses based on such evidence. *Renton,* 475 U.S. at 52,

106 S.Ct. 925. Instead the question is limited to (1) whether the government reasonably relied on evidence fairly supporting its rationale for regulating sexually oriented businesses; and (2) whether the challenger succeeded in casting direct doubt on the government's evidence.

In the present case, the government reasonably relied on a plethora of evidence. While the businesses attacked and sought to undermine some of this evidence, they failed to cast direct doubt on other evidence or on the government's rationale of trying to limit the negative secondary effects within the establishments themselves. For these reasons, this Court finds that the government presented at least some evidence to support the legislature's reasonable belief that the restrictions in question are designed to serve the substantial government interest in minimizing the negative secondary effects caused by sexually oriented businesses. Under the test set out by the United States Supreme Court in *Renton* and *Alameda Books,* this is sufficient to justify the legislation. As such, the Act does not violate article III of the Missouri Constitution or the First Amendment to the United States Constitution. Accordingly, the judgment of the trial court is affirmed.

TEITELMAN, C.J., RUSSELL, BRECKENRIDGE, FISCHER and PRICE, JJ., and FRANCIS, Sp.J., concur.

DRAPER, J., not participating.

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This case was not selected for
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See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

84 VIDEO/NEWSSTAND, INC., dba 84 Video/Newsstand; Vine Street News, Inc., dba Adult Mart; NU Philly Video/News, Inc.; Mile, Inc., dba Lion's Den; American Pride, Inc., dba Lion's Den; Midwest Pride II, Inc., dba Lion's Den; Entertainment U.S.A. of Cleveland, Inc., dba Christie's Cabaret; Gold Restaurant, Inc., dba Gold Horse; Donna and Bato, LLC, dba Expressions; Calpal, LLC, dba Dreamgirls; NL Corp Inc., dba Diamonds Cabaret; Buckeye Association of Club Executives, Inc., Plaintiffs–Appellants,

v.

Thomas SARTINI, in his official capacity as Ashtabula County Prosecutor; Ross Cirincione, in his official capacity as Law Director of the City of Bedford Heights; David A. Lambros, in his official capacity as Law Director of the City of Brookpark; Robert Triozzi, in his official capacity as Law Director of the City of Cleveland; William Mason, in his official capacity as Cuyahoga County Prosecutor; Tony Geiger, in his official capacity as Law Director for the City of Lima; Jeurgen Waldick, in his official capacity as Allen County Prosecutor; Mike Minniear, in his official capacity as Law Director for the City of Milford; Robin Piper, in his official capacity as Butler County Prosecutor; Matthew E. Crall, in his official capacity as Law Director of the City of Bucyrus; Stanley E. Flegm, in his official capacity as Crawford County Prosecutor; David Kiger, in his official capacity as Law Director of the City of Jeffersonville; David B. Bender, in his official capacity as Fayette County Prosecutor; Richard C. Pfeiffer, Jr., in his official capacity as Columbus City Attorney; Ron O'Brien, in his official capacity as Franklin County Prosecutor; Donnette Fisher, in his official capacity as Law Director for the City of Franklin; Rachel A. Hutzel, in his official capacity as Warren County Prosecutor; Daniel G. Padden, in his official capacity as Guernsey County Prosecutor; David A. Hackenberg, in his official capacity as Law Director of the City of Findlay; Mark C. Miller, in his official capacity as Hancock County Prosecutor; Joseph T. Deters, in his official capacity as Hamilton County Prosecutor; Joseph R. Klammer, in his official capacity as Law Director of the City of Eastlake; Charles E. Coulson, in his official capacity as Lake County Prosecutor; Richard S. Bindley, in his official capacity as Law Director of the City of Heath; Douglas Sassen, in his official capacity as Law Director for the City of Newark; Kenneth W. Oswalt, in his official capacity as Licking County Prosecutor; John T. Madigan, in his official capacity as Law Director of the City of Toledo; Paul S. Goldberg, in his official capacity as Law Director for the City of Oregon; Julia R. Bates, in her official capacity as Lucas County Prosecutor; Iris Torres Guglucello, in her official capacity as Law Director of the City of Youngstown; Paul J. Gains, in his official capacity as Mahoning County Prosecutor; Kenneth Fisher, in his official capacity as Law Director of the City of Brunswick; Dean Holman, in his official capacity as Medina County Prosecutor; Patrick Bonfield, in his official capacity as Law Director of the City of Dayton; Lori E. Kirkwood, in her official capacity as Law Director for the City of West Carrollton; Mathew Heck, in his official capacity as Montgomery County Prosecutor; Charles Howland, in his official capacity as Morrow County Prosecutor; Dave Remy, in his official capacity as Law Director for the City of Mansfield; James Mayer, in his official capacity as Richland County Prosecutor; Toni Eddy, in his official capacity as Law Director of the City of Chillicothe; Michael M. Ater, in his official capacity as Ross County Prosecutor; Andrew L. Zumbar, in his official capacity as Law Director of the City of Alliance; Joseph Martuccio, in his official capacity as Law Director of the City of Canton; John Ferrero, in his official capacity as Stark County Prosecutor; Max Rothal, in his official capacity as

Law Director for the City of Akron; Penelope Taylor, in her official capacity as Law Director for the City of Tallmadge; Sherri Bevan Walsh, in her official capacity as Summit County Prosecutor; Joseph T. Dull, in his official capacity as Law Director for the City of Niles; Dennis Watkins, in his official capacity as Trumbull County Prosecutor; Mike Johnson, in his official capacity as Law Director for the City of New Philadelphia; Amanda K. Spies, in her official capacity as Tuscarawas County Prosecutor; Russ Leffler, in his official capacity as Huron County Prosecutor; Derek Diveine, in his official capacity as Seneca County Prosecutor; Terry S. Shilling, in his official capacity as Law Director for the City of Elyria; Dennis Will, in his official capacity as Lorain County Prosecutor; Martin Frantz, in his official capacity as Wayne County Prosecutor; Scott Hillis, in his official capacity as Law Director for the City of Zanesville; D. Michael Haddox, in his official capacity as Muskingum County Prosecutor; Stephen A. Schumaker, in his official capacity as Clark County Prosecutor; Neal M. Jamison; Peter M. Kostoff, Law Director, Defendants–Appellees, The State of Ohio, Defendant–Intervenor.

No. 09–3920.
|
Sept. 7, 2011.

Synopsis

Background: Ohio sexually oriented businesses brought action against state and law directors and county prosecutors for cities, villages, and counties throughout Ohio, challenging certain regulations of their businesses as violative of the First Amendment. The United States District Court for the Northern District of Ohio granted summary judgment to defendants, and businesses appealed.

[Holding:] The Court of Appeals, Helene N. White, Circuit Judge, held that statute did not violate First Amendment.

Affirmed.

West Headnotes (5)

[1] Constitutional Law
Hours of operation
Public Amusement and Entertainment
Sexually Oriented Entertainment

Ohio statute regulating the operation of sexually oriented businesses, which required that sexually oriented businesses close for six hours each day, did not violate First Amendment; legislature properly relied on the secondary-effects evidence before it, and such evidence was sufficient to support the hours–of–operation restriction, the restriction was unrelated to the suppression of speech, and posed only an incidental burden on First Amendment freedoms that was no greater than is essential to further the government interest in substantially reducing secondary effects. U.S.C.A. Const.Amend. 1; ; Ohio R.C. § 2907.40.

7 Cases that cite this headnote

[2] Constitutional Law
Sexually oriented businesses
Public Amusement and Entertainment
Sexually Oriented Entertainment

Definition of "adult bookstore" in Ohio statute regulating the operation of sexually oriented businesses was not unconstitutionally overbroad on its face in violation of First Amendment; definition included not just businesses that had a "significant or substantial portion of [their] stock in trade or inventory in" adult materials, but also those that "maintain[ ] a substantial section of [their] sales or display space for" such articles. U.S.C.A. Const.Amend. 1; Ohio R.C. § 2907.40(A)(1) .

Cases that cite this headnote

[3] Constitutional Law
Sexually oriented businesses
Public Amusement and Entertainment

Sexually Oriented Entertainment

Definition of "adult cabaret" in Ohio statute regulating the operation of sexually oriented businesses was not unconstitutionally overbroad on its face in violation of First Amendment; under statutory definition, it was not enough that a venue regularly feature entertainment including nudity or sexual activity in the sense that they presented such material recurrently, rather, it had to be presented "consistent[ly]" and such entertainment had to constitute a substantial proportion of the venue's overall offerings. U.S.C.A. Const.Amend. 1; Ohio R.C. § 2907.40(A)(1) .

Cases that cite this headnote

[4] **Constitutional Law**
Sexually oriented businesses

Public Amusement and Entertainment
Dancing and other performances

No-touch provision of Ohio statute regulating the operation of sexually oriented businesses, which prohibited entertainers who were nude or semi-nude from touching each other during the course of a performance, was not unconstitutionally overbroad on its face in violation of First Amendment. U.S.C.A. Const.Amend. 1; Ohio R.C. § 2907.40(C)(2) .

Cases that cite this headnote

[5] **Public Amusement and Entertainment**
Sexually Oriented Entertainment

Public Amusement and Entertainment
Motion pictures, videos and games

Hours-of-operation restriction in Ohio statute regulating the operation of sexually oriented businesses applied to adult bookstores and adult video stores; statute defined sexually oriented businesses to mean an adult bookstore, adult video store, adult cabaret, adult motion picture theater, sexual device shop, or sexual encounter center, but did not include a business solely by reason of its showing, selling, or renting materials that may depict sex. Ohio R.C. § 2907.40(A)(15).

Cases that cite this headnote

***544** Before: KETHLEDGE and WHITE, Circuit Judges; and BECKWITH [*], Senior District Judge.

[*] Judge Sandra S. Beckwith, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

Opinion

HELENE N. WHITE, Circuit Judge.

****1** Plaintiffs 84 Video/Newsstand, Inc. et al. (Plaintiffs) appeal the district court's grant of summary judgment to Defendants Thomas Sartini, et al., (Defendants), law directors and county prosecutors for cities, villages, and counties throughout Ohio, and Defendant–Intervenor State of Ohio, in this action challenging certain regulations of sexually oriented businesses in Ohio as violative of the First Amendment. We **AFFIRM.**

I

On May 16, 2007, the Ohio General Assembly adopted Substitute Senate Bill 16 ("S.B. 16"), codified at Ohio Rev.Code Ann. § 2907.40 (West 2010) ("the Law" or "§ 2907.40"), to regulate the operation of sexually oriented businesses. Section 2907.40 imposes two substantive restrictions on sexually oriented businesses. First, § 2907.40(B) limits hours of operation:

> No sexually oriented business shall be or remain open for business between 12:00 midnight and 6:00 a.m. on any day, except that a sexually oriented business that holds a liquor permit ... may remain open until the hour specified in that permit if it does not conduct, offer, or allow sexually oriented entertainment activity in which the performers appear nude.

Ohio Rev.Code Ann. § 2907.40(B). [1] Second, § 2907.40(C) adopts a so-called "no-touch" provision, limiting physical contact with and between nude or semi-nude performers:

1 Businesses that hold liquor permits in Ohio are required to close at 2:30 A.M. Therefore, a sexually oriented business with a liquor license may remain open until 2:30 only if all nude performances cease at midnight.

> (1) No patron who is not a member of the employee's immediate family shall knowingly touch any employee while that employee is nude or seminude or touch the clothing of any employee while that employee is nude or seminude.
>
> (2) No employee who regularly appears nude or seminude on the premises of a sexually oriented business, while on the premises of that sexually oriented business and while nude or seminude, shall knowingly touch a patron ... or another employee ... or the clothing of a patron ... or another employee ... or allow a patron ... or another employee ... to touch the employee or the clothing of the employee.

Id. § 2907.40(C) (ellipses in subsection (C)(2) refer to exceptions for members of employee's immediate family). Violation of § 2907.40(B) is a first-degree misdemeanor. *Id.* § 2907.40(D). Violation of § 2907.40(C) is a first-degree misdemeanor if the violation is achieved by touching a "specified anatomical area" [2] or clothing covering such area, and is a fourth-degree ***545** misdemeanor if achieved by touching any other part of the body. *Id.* § 2907.40(E).

2 Section 2907.40(A)(16) defines "specified anatomical areas" as "human genitals, pubic region, and buttocks and the human female breast below a point immediately above the top of the areola."

Subsection (A) of the Law defines relevant terms, including "sexually oriented business":

> an adult bookstore, adult video store, adult cabaret, adult motion picture theater, sexual device shop, or sexual encounter center, but does not include a business solely by reason of its showing, selling, or renting materials that may depict sex.

Id. § 2907.40(A)(15). Each individual type of sexually oriented business is also defined. In particular, "adult bookstore" or "adult video store"

> means a commercial establishment that has as a significant or substantial portion of its stock in trade or inventory in, derives a significant or substantial portion of its revenues from, devotes a significant or substantial portion of its interior business or advertising to, or maintains a substantial section of its sales or display space for the sale or rental, for any form of consideration, of books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, slides, or other visual representations, that are characterized by their emphasis upon the exhibition or description of specified sexual activities or specified anatomical areas. [3]

3 "Characterized by" is defined as "describing the essential character or quality of an item." Ohio Rev.Code Ann. § 2907.40(A)(4).

****2** *Id.* § 2907.40(A)(1). Section 2907.40(A)(2) originally provided its own definition of "adult cabaret." It was later amended to replace the original definition with a reference to the definition contained in § 2907.39. That section provides:

> "Adult cabaret" means a nightclub, bar, juice bar, restaurant, bottle club, or similar commercial establishment, whether or not alcoholic beverages are served, that regularly features any of the following:
>
> (a) Persons who appear in a state of nudity or seminudity;
>
> (b) Live performances that are characterized by the exposure of specified anatomical areas or specified sexual activities;

> (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions that are distinguished or characterized by their emphasis upon the exhibition or description of specified sexual activities or specified anatomical areas.

Id. § 2907.39(A)(3).

The stated purpose of S.B. 16 was to address the adverse secondary effects of sexually oriented businesses. The bill included legislative findings that:

> [s]exually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to lewdness, public indecency, prostitution, potential spread of disease, illicit drug use and drug trafficking, personal and property crimes, negative impacts on surrounding properties, blight, litter, and sexual assault and exploitation.

S.B. 16, 127th Gen. Assem., Reg. Sess. (Ohio 2007), § 3768.03(B)(1).[4] Prior to passage of S.B. 16, the House Judiciary Committee of the Ohio General Assembly heard testimony for and against the bill ***546** and received considerable documentary evidence regarding the secondary effects of sexually oriented businesses. The Senate State and Local Government and Veterans Affairs Committee also considered the legislation. The Ohio General Assembly relied on a variety of sources, including: presentations providing anecdotal accounts of the adverse secondary effects of sexually oriented businesses; summaries and full texts of studies and reports showing that adult businesses cause secondary effects; a critique of the study of one researcher who concluded that adult businesses do not cause adverse secondary effects; legal opinions from the Sixth Circuit and elsewhere upholding regulations addressing secondary effects of adult businesses; and other testimony in favor of the bill. The Legislature also heard testimony from opponents.

[4] These findings were included in the version of S.B. 16 initially passed by the Ohio General Assembly. The final legislation enacted by the Assembly that included the current language of § 2907.40 was a substitute bill. The above legislative findings do not appear in the version of Substitute S.B. 16 enacted into law.

On October 17, 2007, the day § 2907.40 went into effect, the twelve Plaintiffs filed suit seeking a temporary restraining order (TRO), preliminary injunction, permanent injunction, and declaratory judgment. The district court described the parties to the suit:

> Plaintiffs consist of three groups: (1) businesses throughout Ohio that sell adult books, magazines, videos, and DVDs ("bookstore Plaintiffs"); (2) businesses throughout Ohio that present nude or seminude adult performances to patrons ("cabaret Plaintiffs"); and (3) the Buckeye Association of Club Executives ("BACE"), a not-for-profit trade group that promotes and protects the rights of member adult bookstores and cabarets throughout Ohio.
>
> ****3** Defendants consist of two groups: (1) law directors for cities and villages throughout Ohio in which Plaintiffs and BACE members are located; and (2) county prosecutors for the counties throughout Ohio in which Plaintiffs and BACE members are located. Defendants have the authority to prosecute violations of § 2907.40. Plaintiffs also served the Ohio Attorney General, pursuant to Federal Rule of Civil Procedure 5.1, because the case involves a question of Ohio constitutional law.

The State of Ohio intervened as a defendant on October 26, 2007.

The district court denied the motion for a TRO on October 18. The court then held a preliminary injunction hearing. At the hearing, Plaintiffs called five witnesses, including two experts: Dr. Daniel Linz, an expert on secondary-effects studies, who testified that sexually oriented businesses do not cause appreciable secondary effects and critiqued existing studies showing secondary effects; and Dr. Judith Hanna, an expert on exotic dance, who testified regarding the expressive aspects of exotic dance. Plaintiffs also offered testimony from individuals with experience operating sexually oriented businesses and submitted the declaration of Dr. Lance Freeman, in which he summarized the findings of a study concluding that the presence of an adult bookstore or adult cabaret in proximity to residential property did not depress property values.

Defendants called three witnesses who testified that sexually oriented businesses cause secondary effects, including crime: Julie Taylor Schmatz, a former exotic dancer; Louis Gentile, a private investigator; and Dr. Richard McCleary, an expert on secondary-effects studies.

The court denied Plaintiffs' motion for a preliminary injunction on August 8, 2008. [5]

[5] Plaintiffs appealed the denial of a preliminary injunction to this court. While the appeal was pending, the district court granted summary judgment for Defendants and entered final judgment on all claims, and Plaintiffs filed the instant appeal. This court subsequently dismissed the preliminary injunction appeal on the ground of mootness and because "[t]he denial of injunctive relief has merged into the final judgment." *84 Video/Newsstand, Inc. v. Sartini,* No. 08–4559 (6th Cir. filed Nov. 4, 2009).

***547** While the district court proceedings were ongoing, the Ohio General Assembly amended the definition of "adult cabaret" contained in § 2907.40(A)(2), replacing the original definition with a provision incorporating by reference the definition of "adult cabaret" found in § 2907.39 of the Revised Code. Sub. S.B. No. 183, 2008 Ohio Laws 101. Plaintiffs moved for a TRO or preliminary injunction to bar implementation of this amendment. The court denied that motion in an order dated January 5, 2009. Defendants then moved for summary judgment on all Plaintiffs' claims, which the court granted on June 22, 2009. Plaintiffs timely appealed.

II

This court reviews a district court's grant of summary judgment *de novo. Binay v. Bettendorf,* 601 F.3d 640, 646 (6th Cir.2010). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see also Binay,* 601 F.3d at 646. This court must draw all reasonable inferences and view all evidence in favor of the non-moving party. *Binay,* 601 F.3d at 646; *Wuliger v. Manufacturers Life Ins. Co.,* 567 F.3d 787, 792 (6th Cir.2009).

****4** Plaintiffs raise a number of issues on appeal, arguing that: S.B. 16 was based on insufficient evidence that sexually oriented businesses cause certain secondary effects and is not narrowly tailored; the law's definitions of "adult bookstore or video store" and "adult cabaret" are unconstitutionally overbroad; the no-touching restriction independently violates the First Amendment; and adult bookstores and adult video stores are actually excluded from regulation by the plain language of the law. We address these arguments in order.

III

Plaintiffs first assert that Ohio Rev.Code Ann. § 2907.40 violates the First Amendment because the evidence relied on by the Ohio General Assembly in passing the statute was insufficient to survive intermediate scrutiny. They further argue that the law is not narrowly tailored because it suppresses a substantial amount of speech.

A. Applicable Law

It is beyond doubt that "[n]ude dancing is a form of expressive conduct protected by the First Amendment." *Sensations, Inc. v. City of Grand Rapids,* 526 F.3d 291, 298 (6th Cir.2008); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson Cnty.,* 274 F.3d 377, 391 (6th Cir.2001); *see also City of Erie v. Pap's A.M.,* 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion) ("Nude dancing ... is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection."). Other forms of erotic entertainment are similarly protected by the First Amendment. *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46–47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (affirming that adult theaters are protected by the First Amendment); *Richland Bookmart, Inc. v. Knox Cnty. (Richland Bookmart II),* 555 F.3d 512, 520 (6th Cir.2009) ("[S]exually explicit but non-obscene speech, such as adult publications and adult videos" are within a "protected category of speech").

We treat regulations targeting the "secondary effects" of sexually oriented businesses as content-neutral, and assess them under intermediate scrutiny. [6] *Richland* ***548** *Bookmart II,* 555 F.3d at 521 & n. 2; *729, Inc. v. Kenton Cnty. Fiscal Court,* 515 F.3d 485, 490–91 (6th Cir.2008).

Where a law specifically targets the secondary effects of adult businesses, this court applies the test set out in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), as interpreted by *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). *Richland Bookmart II,* 555 F.3d at 523–24 ("[W]e find it prudent to conduct our analysis in terms set forth in *Renton* and *Alameda Books*—or, equivalently, to apply the *O'Brien* test, incorporating evidentiary standards articulated in *Renton* and its progeny.").

6 As this court has noted, "to some extent, the classification of restrictions on sexually explicit establishments as content-neutral is a legal fiction—but one that has been generally followed." *Richland Bookmart II,* 555 F.3d at 521 n. 2. "Although five members of the Court abandoned the premise that such restrictions are content-neutral ... in *City of Los Angeles v. Alameda Books,* [535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002),] the Court continued to apply intermediate scrutiny to laws targeting 'secondary effects.' " *Id.* (quoting *729, Inc.,* 515 F.3d at 490–91).

Under the *O'Brien* test, courts must determine whether the legislature enacted a challenged law "(1) within its constitutional power, (2) to further a substantial governmental interest that is (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an 'incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest.' " *Sensations,* 526 F.3d at 298. On the second prong of the *O'Brien* test, this Circuit further applies the plurality opinion in *Alameda Books,* which announced a three-step burden-shifting analysis applicable to secondary-effects cases. *Richland Bookmart II,* 555 F.3d at 525. Under *Alameda Books,*

> ****5** [first,] a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. [Second, if] plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.* [Third, if] plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

535 U.S. at 438–39, 122 S.Ct. 1728 (plurality opinion) (citations omitted); *see also Sensations,* 526 F.3d at 297 n. 5. Further, the legislature's evidentiary burden is slight:

> [W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners.... [The government] is entitled to rely on [its local] knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion.

535 U.S. at 451–52, 122 S.Ct. 1728 (Kennedy, J., concurring) (citations omitted). Indeed, state and local governments "need not conduct their own studies demonstrating that adverse secondary effects result from the operation of sexually oriented businesses or that the measures chosen ***549** will ameliorate these effects." *Richland Bookmart II,* 555 F.3d at 524; *see also Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion); *id.* at 451, 122 S.Ct. 1728 (Kennedy, J., concurring); *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925. However, "a city may not attack secondary effects indirectly by attacking speech." *Alameda Books,* 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring). The regulation must be aimed at secondary effects, and the government "must advance

some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 449, 122 S.Ct. 1728.

B. Section 2907.40 Survives Scrutiny Under the *O'Brien* Test

1. Passage of § 2907.40 Was Within the Power of the Ohio General Assembly

[1] The first question under the *O'Brien* test is whether enacting § 2907.40 was within the state's constitutional power. The parties do not dispute that the Ohio General Assembly had such power. This court has held that "regulating sexually oriented businesses to reduce negative secondary effects lies within the scope of a [government's] authority under the *O'Brien* test." *Sensations,* 526 F.3d at 298. Therefore, the first prong of the *O'Brien* test is satisfied.

2. Section 2907.40 Furthers a Substantial Government Interest

****6** The second step of the *O'Brien* test asks whether the legislature enacted the law "to further a substantial government interest." *See Sensations,* 526 F.3d at 298. Under the *Alameda Books* burden-shifting framework, Defendants must first show that the Ohio General Assembly relied on "evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion). "It is now recognized that governments have a substantial interest in controlling adverse secondary effects of sexually oriented establishments, which include violent, sexual, and property crimes as well as blight and negative effects on property values." *Richland Bookmart II,* 555 F.3d at 524. Thus, our inquiry hinges on the evidence the Ohio General Assembly relied on when it passed § 2907.40. This court has held that a wide variety of sources may form a sufficient evidentiary basis at this stage, including land-use studies, prior judicial opinions, surveys of relevant professionals (such as real-estate appraisers), anecdotal testimony, police reports, and other direct and circumstantial evidence. *See, e.g., Richland Bookmart II,* 555 F.3d at 525; *729, Inc.,* 515 F.3d at 491–92; *J.L. Spoons, Inc. v. Dragani,* 538 F.3d 379, 381 (6th Cir.2008); *see also City of Erie v. Pap's A.M.,* 529 U.S. 277, 296, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (noting that the City of Erie was permitted to rely on prior judicial decisions and that "it was reasonable for Erie to conclude that ... nude dancing was likely to produce the same secondary effects" found in the prior decisions).

In the instant case, the Ohio General Assembly gathered a range of evidence demonstrating that sexually oriented businesses cause harmful secondary effects, including a combination of anecdotal evidence from live testimony and other submissions, press reports, land-use studies, expert reports, and prior judicial opinions. The evidence consists both of studies and cases from other jurisdictions, and of studies, cases, press reports, and anecdotal evidence from Ohio. This evidence is sufficient to demonstrate a reasonable belief on behalf of the General Assembly that sexually oriented businesses cause negative secondary effects, including certain ***550** types of crime, decreased property values, and health risks, and that the proposed statute would address such effects. The burden thus shifts to Plaintiffs to show either that the evidence does not fairly support the General Assembly's rationale for the law—to combat secondary effects—or that the factual findings relied on by the General Assembly were incorrect. *Alameda Books,* 535 U.S. at 438–39, 122 S.Ct. 1728.

The Sixth Circuit has previously upheld regulations similar or identical to those enacted in § 2907.40. *See Richland Bookmart II,* 555 F.3d at 519 (upholding, without discussion, an hours-of-operation restriction); *Entm't Prods., Inc. v. Shelby Cnty.,* 588 F.3d 372, 393–94 (6th Cir.2009) (upholding, against overbreadth challenge, a no-touching and six-foot buffer-zone requirement between entertainers and customers and between entertainers and other entertainers); *Sensations,* 526 F.3d at 299 (upholding no-touching rule between performers and audience members and hours-of-operation restriction); *729, Inc.,* 515 F.3d at 490–93 (upholding requirement that entertainers must "maintain a minimum distance of five ... feet from ... customers, for a minimum of one ... hour after the entertainer appears semi-nude on the establishment's premises"); *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.,* 411 F.3d 777, 789–91 (6th Cir.2005) (en banc) (upholding an hours-of-operation limitation); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.,* 274 F.3d 377, 396 (6th Cir.2001) (upholding regulation prohibiting physical contact between customers and entertainers); *Richland Bookmart, Inc. v. Nichols* (*Richland Bookmart I*), 137 F.3d

435, 440–41 (6th Cir.1998) (upholding hours-of-operation restriction); *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 408–13 (6th Cir.1997) (upholding a regulation prohibiting "entertainers from approaching within six feet of customers, employees, or other entertainers during a performance").

**7 Nonetheless, Plaintiffs make two main attacks on the evidence underlying § 2907.40. First, they argue that testimony by their own expert, Dr. Daniel Linz, casts sufficient doubt on the secondary-effects studies relied on by the General Assembly to create a genuine issue of material fact requiring a trial. Second, Plaintiffs argue that the General Assembly's evidence of secondary effects does not support the hours-of-operation restriction in § 2907.40(B).

i. Plaintiffs' Expert Fails to Cast Doubt on the Evidence Relied on by the Ohio General Assembly

Plaintiffs argue that studies and analyses conducted by Dr. Linz substantially undermine the evidence relied on by the General Assembly At the preliminary injunction hearing, Linz testified regarding studies he conducted in cities around the country and in Toledo, Cleveland, Columbus, and Dayton, Ohio. He concluded in all these studies that sexually oriented businesses do not increase adverse secondary effects, namely crime, in surrounding areas. He also testified, as to studies conducted by other researchers, that "the methods are either so flawed or the studies so poorly conducted, that they do not, in fact, demonstrate an adverse secondary effect." Plaintiffs additionally submitted a declaration from Dr. Lance Freeman, accompanied by a study of property values in Ohio he co-authored, concluding that "the presence of an adult bookstore or adult cabaret in proximity to residential property did not lead to a decrease in property values."

Defendants offered testimony by Dr. McCleary. McCleary discussed secondary-effects studies he conducted, and explained that "in every instance, [he] ha[s] *551 been able to corroborate the theory" that sexually oriented businesses cause secondary effects. Based on his own and other researchers' studies, he testified that "it is a scientific fact that sexually-oriented businesses have crime-related secondary effect [sic], that they pose public safety hazards to their immediate environments." McCleary also directly criticized the validity of the findings of Linz's study of four Ohio cities, arguing that the underlying data did in fact demonstrate secondary effects. Linz and McCleary primarily disagreed about study methodology, including: the appropriate criteria for judging the validity of secondary-effects studies; the best way to measure the incidence of crime; the proper geographic area surrounding a sexually oriented business within which to measure crime; and the period of time a study must analyze in order to be valid.

The evidence proffered by Plaintiffs—testimony and reports of qualified experts—is indeed the type of evidence that may appropriately be used to cast doubt on the Legislature's evidence. *See Richland Bookmart II,* 555 F.3d at 526 (commenting that plaintiffs' evidence "is of dubious substantive import" because, "[u]nlike most plaintiffs challenging similar regulations, Plaintiffs do not introduce their own expert findings or studies" (citation omitted)); *J.L. Spoons,* 538 F.3d at 381–82 (describing expert testimony offered by plaintiffs at preliminary injunction hearing). The question, then, is whether the testimony of Drs. Linz and Freeman is sufficient to create a genuine issue of material fact as to the accuracy of the evidence relied on by the Legislature.

**8 This court has repeatedly held that governments are not "required to demonstrate empirically that [their] proposed regulations will or are likely to successfully ameliorate adverse secondary effects." *Richland Bookmart II,* 555 F.3d at 524. "[E]vidence suggesting that a different conclusion [by the legislature] is also reasonable does not prove that the [government's] findings were impermissible or its rationale unsustainable." *Id.* at 527. Under *Alameda Books,* the touchstone is whether the legislature "reasonably believed [the evidence it relied on] to be reasonable" and whether the evidence "fairly support[s] the [legislature's] rationale" for the law. 535 U.S. at 438, 122 S.Ct. 1728. A mere difference of opinion about the conclusions to be drawn from a body of evidence cannot invalidate the legislature's decision.

This court has twice decided secondary-effects cases where Dr. Linz's testimony or reports were discussed on appeal. *Sensations,* 526 F.3d at 295 (upholding Grand Rapids, Michigan, ordinance regulating sexually oriented businesses); *J.L. Spoons,* 538 F.3d at 382–83 (upholding Ohio Liquor Commission Rule restricting nude dancing and sexual contact at establishments holding Liquor Control Commission permits). But neither of these cases gave more than cursory mention to Linz's testimony, and

neither specifically discussed whether or to what extent Linz's evidence cast doubt on the evidence relied on by the legislature. Secondary effects cases in other circuits where Linz's testimony was introduced have split regarding the weight to be afforded that evidence. A majority of decisions have held that testimony and studies by Linz were insufficient to invalidate the legislative body's evidence. *See, e.g., Imaginary Images, Inc. v. Evans,* 612 F.3d 736, 747–48 (4th Cir.2010); *Doctor John's v. Wahlen,* 542 F.3d 787, 791–93 (10th Cir.2008); *Fantasyland Video, Inc. v. Cnty. of San Diego,* 505 F.3d 996, 1002 (9th Cir.2007); *G.M. Enters., Inc. v. Town of St. Joseph,* 350 F.3d 631, 635–36, 640 (7th Cir.2003); *see also Galardi v. City of* ***552** *Forest Park,* No. 1:09–CV–965–RWS, 2011 WL 111586, at *6 (N.D.Ga. Jan.13, 2011).

Plaintiffs rely mainly on two recent Seventh and Tenth Circuit cases that credited Linz's testimony with casting doubt on the evidence supporting the government regulations. *Annex Books, Inc. v. City of Indianapolis,* 581 F.3d 460, 461–65 (7th Cir.2009) (concluding that a showing that the city's evidence was not germane to the restrictions it enacted *in combination with* the presentation of a study by Linz raised a genuine issue of material fact and required remand for an evidentiary hearing); *Abilene Retail No. 30, Inc. v. Bd. of Comm'rs of Dickinson Cnty.,* 492 F.3d 1164, 1187 (10th Cir.2007) (Ebel., J., concurring; concurrence joined by full panel as alternative ground of decision) (crediting Dr. Linz's studies and testimony with undermining the county's evidence, both by presenting five studies conducted by Linz that found no adverse secondary effects from sexually oriented businesses, and by offering testimony and a peer-reviewed article "challenging the validity of the County's studies").

****9** In this case, Linz's evidence is of two types: studies Linz conducted finding that sexually oriented businesses do not cause adverse secondary effects, and criticism of the validity of studies by other researchers that do find such effects. Linz's study of four Ohio cities is directly relevant to the central issue in this case and, if accurate, does tend to cast doubt on the Ohio General Assembly's evidence. McCleary's testimony, in turn, casts doubt on Linz's study.

We conclude that the Linz evidence in the record before us is insufficient to create a genuine issue of material fact requiring remand. This is for two reasons. First, Linz's testimony and studies fail to cast doubt on the entire body of evidence relied on by the General Assembly, including those secondary-effects studies not discussed by Linz and the significant quantity of other types of evidence relied on by the Legislature with which Linz does not engage, including prior court decisions, news reports, and anecdotal testimony by law enforcement officials and others. The legislature's evidentiary burden to justify a regulation targeted at secondary effects is slight. Here, Plaintiffs' testimony and exhibits do not show the body of that evidence as a whole to be so questionable as to undermine support for the restrictions in § 2907.40. Second, to the extent that the Linz evidence does "dispute [ ] the [government's] factual findings" at step two of the *Alameda Books* burden shifting test, 535 U.S. at 438–39, 122 S.Ct. 1728, the testimony and reports by Dr. McCleary introduced at the preliminary injunction hearing were sufficient "to supplement the record with evidence renewing support for a theory that justifies" the Ohio law in satisfaction of *Alameda Books* step three. *Id.* at 439, 122 S.Ct. 1728. The Linz and McCleary testimony amounts to a battle of experts who primarily disagree about study methodology. The General Assembly had before it studies by McCleary as well as a paper by McCleary critiquing Linz's methodology. The General Assembly was entitled to credit McCleary's findings as providing reasonable support for the restrictions it enacted. Even assuming that Linz's evidence, by itself, casts doubt on the Legislature's evidence, McCleary's testimony renews support for Ohio's theory of secondary effects. Thus, no genuine issue of material fact remains as to whether the Legislature properly relied on the secondary-effects evidence before it.

ii. Whether the Ohio General Assembly's Evidence was Sufficient to Support the Hours–of–Operation Restriction in § 2907.40(B)

Plaintiffs also argue that the General Assembly's evidence of secondary effects ***553** does not support the hours-of-operation restriction in § 2907.40(B). This court has upheld restrictions on the hours of operations of sexually oriented businesses in several cases. *See Richland Bookmart II,* 555 F.3d at 519 (upholding, but not discussing, an hours-of-operation restriction); *Sensations,* 526 F.3d at 294, 299 (upholding prohibition against sexually oriented businesses operating between 2:00 AM and 7:00 AM); *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.,* 411 F.3d 777, 789–91 (6th Cir.2005) (en banc) (upholding regulation requiring sexually oriented businesses to close at midnight); *Richland Bookmart, Inc. v. Nichols* (*Richland Bookmart I*), 137 F.3d 435, 438, 440–

41 (6th Cir.1998) (upholding requirement that sexually oriented businesses close between midnight and 8:00 AM Monday through Saturday and all day on Sunday). Those cases gave significant deference to legislative bodies, finding that " '[r]educing crime, open sex and solicitation of sex and preserving the aesthetic and commercial character of the neighborhoods surrounding adult establishments is a substantial government interest.... It is not unreasonable to believe that such regulation of hours [of operation] ... would tend to deter prostitution' and other negative secondary effects." *Deja Vu of Cincinnati,* 411 F.3d at 790 (quoting *Richland Bookmart I,* 137 F.3d at 440) (alterations in original).

**10 In this case, the General Assembly considered evidence specifically relevant to the conclusion that closing sexually oriented businesses during the early morning hours could ameliorate negative secondary effects, including prior court cases upholding such restrictions and testimony at the legislative committee hearing by a police officer with experience investigating crime at sexually oriented businesses and by a former manager of adult-entertainment establishments.[7] To rebut these legislative findings, Dr. Linz testified in district court that one of his own studies had found no support for the theory that sexually oriented businesses attract more crime during the late-night or early-morning hours than at other times. Dr. McCleary, in turn, testified that, although he knows of no studies correlating the severity of secondary effects of adult businesses to their hours of operation, there has been a significant amount of research supporting the more general proposition that "[c]rime risks for any business that's at risk goes up" at night.

7 Captain Chuck Adams of the Troy Police Department testified that most illegal activity at a strip club he had investigated occurred after midnight. That activity included open alcoholic containers in a public place, drug possession, DUIs, assault, and prostitution. David Sherman, a former regional manager of a strip-club chain, described how the incidence of illegal activity at strip clubs, including "drug dealing, solicitation, and illegal dances," increased late at night as employees and customers became more intoxicated and disinhibited.

Most of the evidence before the General Assembly that supports an hours-of-operation restriction discussed the late-night secondary effects of live-entertainment establishments, not adult bookstores and adult video stores. Nonetheless, proponents of S.B. 16 presented the General Assembly with several decisions by courts of appeals upholding such restrictions as applied to adult bookstores and video stores, including *Center for Fair Public Policy v. Maricopa County,* 336 F.3d 1153 (9th Cir.2003), from the Ninth Circuit and *Richland Bookmart I* from this circuit. *Center for Fair Public Policy,* in particular, provides support for the restriction, as it canvassed evidence, including testimony and studies from other jurisdictions, that indicated a link between secondary effects and the hours of operation of non-live- ***554** entertainment adult businesses. Additionally, this circuit's opinion in *Sensations, Inc.* upheld a municipal ordinance limiting the hours of operation of all sexually oriented businesses, including book stores and video stores. 526 F.3d at 294, 298–99. The Ohio General Assembly relied on sufficient evidence to support passage of the law.

3. § 2097.40 is Unrelated to the Suppression of Speech

The third prong of the *O'Brien* test requires this court to determine whether the challenged law is in fact "unrelated to the suppression of speech." *Sensations,* 526 F.3d at 298. The parties do not argue that it is not. Targeting the secondary effects of sexually oriented businesses is permissible under *O'Brien*. *See, e.g., Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 585–86, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring) ("[O]n its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression."). Because the stated and unchallenged purpose of § 2907.40 is to address such secondary effects, the law survives *O'Brien*'s third prong.

4. § 2907.40 Poses Only an Incidental Burden on First Amendment Freedoms that is No Greater than is Essential to Further the Government Interest

**11 The fourth prong of the *O'Brien* test asks whether the restrictions "pose only an 'incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest.' " *Sensations,* 526 F.3d at 298. Justice Kennedy's concurrence in *Alameda Books* sharpens this inquiry, requiring that a government "must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." 535 U.S. at 449, 122 S.Ct. 1728 (Kennedy, J., concurring). In other words, "the

necessary rationale for applying intermediate scrutiny is the promise that [regulations] may reduce the costs of secondary effects without substantially reducing speech." *Id.* at 450, 122 S.Ct. 1728. Justice Kennedy's concurrence thus requires a proportionality analysis: a government may not seek to reduce secondary effects by reducing speech on a one-to-one basis. As he put it, "[i]t is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional reduction does not suffice. Content-based taxes could achieve that, yet these are impermissible." *Id.* at 451, 122 S.Ct. 1728. This court has held that Kennedy's discussion on this point is binding. *729, Inc.,* 515 F.3d at 491 ("Although the *Alameda Books* plurality did not discuss [this] requirement, Justice Kennedy expressly said that consideration of this issue was required for his concurrence in the judgment. Justice Kennedy's opinion binds us on this point.").

Plaintiffs assert that the hours-of-operation restriction fails under this proportionality analysis because it directly reduces a substantial amount of speech. We disagree. Plaintiffs' argument proceeds in two steps: First, they posit that there is insufficient evidence that closing sexually oriented businesses between midnight and 6:00 AM would significantly curtail adverse secondary effects. Second, they argue that they have demonstrated that the hours-of-operation restriction will cause a "massive reduction in speech." Therefore, they argue, § 2907.40 seeks to reduce secondary effects by reducing the amount of speech—measured in hours of operation of the adult businesses—in direct proportion to any secondary effects ameliorated.

***555** On the first point, the General Assembly did consider some evidence, including prior court cases, reports and studies from other jurisdictions and anecdotal testimony, that secondary effects of adult businesses are greater during the late night hours. As discussed above, this evidence provides sufficient basis, even if not overwhelming, to conclude that sexually oriented businesses cause secondary effects late at night that are different in severity or scope from those caused at other times of day. This conclusion is significantly bolstered by this Circuit's prior cases upholding hours-of-operation restrictions. *See Richland Bookmart II,* 555 F.3d at 519; *Sensations,* 526 F.3d at 294, 299; *Deja Vu of Cincinnati,* 411 F.3d at 789–91; *Richland Bookmart I,* 137 F.3d at 438, 440–41.

****12** On the second point, Plaintiffs offered testimony at the preliminary injunction hearing about the quantity of speech that the hours-of-operation provision would suppress, arguing that it amounts to a "massive reduction." They measured this in terms of economic effect of the law by explaining that prior to passage of § 2907.40, adult bookstores in Ohio did a significant amount of business, measured in millions of dollars per year, during the hours they will now be required to remain closed. Plaintiffs also offered evidence that "juice bars"—establishments that provides nude dancing but do not sell alcoholic beverages—generate the majority of their revenues between 11:00 P.M. to 4:00 A.M., and so may become unprofitable if subject to the law.

Evidence of a regulation's economic impact is not directly relevant to the First Amendment inquiry. *See Deja Vu of Nashville,* 274 F.3d at 397 ("[T]he relevant inquiry is not whether the Ordinance will cause any economic impact on the sexually oriented businesses. Although ... compliance with the Ordinance will cut into the plaintiffs' profits, the plaintiffs have failed to introduce any evidence showing that they will not have a reasonable opportunity to operate their establishments."); *DLS, Inc.,* 107 F.3d at 413 ("[T]he inquiry for First Amendment purposes is not concerned with economic impact. In our view, the First Amendment requires only that [the city] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city." (quoting *Renton,* 475 U.S. at 54, 106 S.Ct. 925)). Plaintiffs assert, however, that the evidence of lost sales during the early morning hours is *indicative* of the quantity of speech suppressed, and is not offered to prove loss of profits, per se. We assess this claim under Justice Kennedy's proportionality analysis laid out in *Alameda Books.*[8] *729, Inc.,* 515 F.3d at 491. Under the *729, Inc.* approach, this ***556** court must ask whether the restriction leaves the "quantity and accessibility of protected speech substantially intact," *id.* at 492 (quoting *Alameda Books,* 535 U.S. at 449–50, 122 S.Ct. 1728), and must ensure that it "is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little." *Id.* at 493, 122 S.Ct. 1728 (quoting *Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring)).

8 The district court relied on *Center for Fair Public Policy v. Maricopa County,* 336 F.3d 1153 (9th Cir.2003), which upheld an hours-of-operation

> restriction against a challenge similar to that at issue here. There, the Ninth Circuit decided that the hours-of-operation restriction was constitutional because it left open "ample alternative channels for communication." *Id.* at 1170 (citation omitted). The Ninth Circuit concluded that Justice Kennedy's proportionality analysis, which was adopted in the context of a case involving zoning restrictions on sexually oriented businesses, was not applicable in a challenge to hours-of-operation restrictions. The court reasoned that "the application of Justice Kennedy's proportionality analysis to this particular type of secondary effects law would invalidate all such laws, and we are satisfied that he never intended such a result. His proportionality requirement was simply not designed with this particular type of restriction in mind." *Id.* at 1163.
>
> The Ninth Circuit's reasoning is foreclosed in this Circuit by *729, Inc v. Kenton County Fiscal Court,* which held that Justice Kennedy's proportionality analysis is binding law in secondary effects cases. 515 F.3d at 491. Thus, the district court's reliance on *Center for Fair Public Policy* was misplaced.

The hours-of-operation restriction requires that sexually oriented businesses close for six hours each day (42 hours per week), leaving 18 hours per day (126 hours per week) when the businesses may remain open. This is less restrictive than the hours-of-operation restriction upheld in *Richland Bookmart I,* which required closure between midnight and 8:00 AM Monday through Saturday and all day on Sunday, amounting to 72 hours per week (leaving 96 hours per week when the businesses could remain open). 137 F.3d at 438, 440–41. Similarly, in *Deja Vu of Cincinnati,* this court upheld a regulation allowing such businesses to remain open for just "twelve hours a day, six days a week." 411 F.3d at 791; *see also Sensations,* 526 F.3d at 294, 299 (upholding prohibition on sexually oriented businesses operating between 2:00 AM and 7:00 AM). Under these precedents, § 2907.40 does leave the quantity of speech substantially intact.

****13** Plaintiffs argue, however, that once Justice Kennedy's proportionality analysis is correctly applied, the hours-of-operation restriction cannot be sustained because the reduction in secondary effects is small while the diminution in the availability of speech is large. With regard to the adult bookstores, this argument fails. To the extent that the secondary effects of sexually oriented businesses, including adult bookstores, are more serious late at night, the closure of those businesses between midnight and 6:00 AM addresses those effects while leaving ample time—18 hours per day-when that speech remains available. Plaintiffs have not established that the hours-of-operation restriction will block a significant amount of access to speech. Individuals seeking to take advantage of these stores may do so during their remaining open hours, when the asserted secondary effects are less severe. Further, at oral argument Plaintiffs' counsel conceded that none of the adult bookstores in Ohio closed down as a result of the hours of operation restriction, indicating that the effect of the law is not as dire as feared. Plaintiffs fail to distinguish the instant case from prior Sixth Circuit cases upholding hours-of-operation restrictions, except insofar as they argue that proportionality analysis requires a different outcome on the record presented here. The record does not support such a finding.

Proportionality analysis also fails to invalidate the law with respect to adult cabarets. Plaintiffs argue that "[t]he statute destroys the juice bars' business model by forcing them to close during the very hours that the vast majority of their patrons attend the constitutionally protected performances presented at them." It is true that the premise of the law must not be that the affected businesses will close. *See Alameda Books,* 535 U.S. at 450–51, 122 S.Ct. 1728 (Kennedy, J., concurring). On the other hand, the First Amendment is not concerned with economic effects. *See City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 78, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (Powell, J., concurring). Juice bars are able to offer nude entertainment for 18 hours per day or, alternatively, to offer non-nude entertainment for 24 hours per day. It is not clear that if following passage of § 2907.40 juice bars can no longer successfully market their business model, the ***557** overall quantity of erotic speech will have diminished. *See DLS, Inc.,* 107 F.3d at 413 ("[W]e consider the economic effects of the ordinance in the aggregate, not at the individual level; if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment, but not if it merely has adverse effects on the individual theater."); *see also Deja Vu of Nashville,* 274 F.3d at 397 ("Although we do not doubt that compliance with the Ordinance will cut into the plaintiffs' profits, the plaintiffs have failed to introduce any evidence showing that they will not have a reasonable opportunity to operate their establishments."). If juice bars close, erotic dancing will be able to shift more heavily toward alcohol-serving establishments providing

nude and semi-nude entertainment until midnight and scantily clad entertainment after midnight. Thus, under the proportionality analysis, the restriction "is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little." *729, Inc.*, 515 F.3d at 493. This court has upheld hours-of-operation restrictions on juice bars in cases decided after *Alameda Books,* and Plaintiffs do not successfully distinguish the present case. *See Deja Vu of Cincinnati,* 411 F.3d at 789–91.

IV

A

****14** Plaintiffs argue that the definitions of "adult bookstore [and] adult video store" and "adult cabaret" contained in § 2907.40(A)(1) and (A)(2) are unconstitutionally overbroad on their face. A law is unconstitutionally overbroad, and thus must be invalidated, when it "prohibits a substantial amount of protected speech both in an absolute sense and relative to the statute's plainly legitimate sweep." *Entm't Prods., Inc. v. Shelby Cnty.,* 588 F.3d 372, 379 (6th Cir.2009) (quoting *Connection Distrib. Co. v. Holder,* 557 F.3d 321, 336 (6th Cir.2009) and *United States v. Williams,* 553 U.S. 285, 293, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008)). "Overbreadth doctrine exists to allay the concern that the threat of enforcement of an overbroad law may deter or chill constitutionally protected speech." *J.L. Spoons, Inc. v. Dragani,* 538 F.3d 379, 383 (6th Cir.2008). Facial invalidation of a law under the overbreadth doctrine should be sparing and careful however, *Richland Bookmart, Inc. v. Knox Cnty. (Richland Bookmart II),* 555 F.3d 512, 522 (6th Cir.2009), because "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." *Virginia v. Hicks,* 539 U.S. 113, 120, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003). For this reason, "the Supreme Court has 'vigorously enforced the requirement that a statute's overbreadth be substantial.' " *Entm't Prods.,* 588 F.3d at 379 (quoting *Williams,* 553 U.S. at 292, 128 S.Ct. 1830). Thus, for a law to be judged facially overbroad, Plaintiffs must "demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally." *Id.* (quoting *N.Y. State Club Ass'n v. City of New York,* 487 U.S. 1, 14, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988)).

Although this standard sets a high bar, this Circuit "has not shied away from invalidating a regulatory scheme in its entirety when the threat of impermissible applications and the consequent chilling effect unambiguously warranted this remedy." *Id.* at 380. Such invalidation of a law on overbreadth grounds is appropriate when the language of the law is not "readily susceptible to a limiting construction." *Odle v. Decatur Cnty.,* 421 F.3d 386, 396 (6th Cir.2005). If a law's language lends ***558** itself to an interpretation that avoids unconstitutional applications, it may be upheld. However, this court will "not rewrite statutes to create constitutionality," *Triplett Grille, Inc. v. City of Akron,* 40 F.3d 129, 136 (6th Cir.1994), and so will not "accept a construction where to do so would amount to rewriting state or local law—an enterprise the federal courts are not empowered to undertake." *Odle,* 421 F.3d at 397 (citing *Virginia v. American Booksellers Ass'n, Inc.,* 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988)).

B. The Definition of "Adult Bookstore" Is Not Unconstitutionally Overbroad

Section 2907.40(A)(1) defines " '[a]dult bookstore' or 'adult video store' " to mean

> a commercial establishment that has as a significant or substantial portion of its stock in trade or inventory in, derives a significant or substantial portion of its revenues from, devotes a significant or substantial portion of its interior business or advertising to, or maintains a substantial section of its sales or display space for the sale or rental, for any form of consideration, of books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, slides, or other visual representations, that are characterized by their emphasis upon the exhibition or description

> of specified sexual activities or specified anatomical areas.

****15** Plaintiffs argue that this definition sweeps up businesses that deal only partially in sexually oriented materials but do not produce secondary effects, including neighborhood video stores that rent X-rated films, businesses like Borders that a have section devoted to the sale of romance novels, and drug stores, grocery stores and other retail establishments that sell adult-oriented materials such as pornographic magazines. This is so, they argue, because all of these businesses "have 'sections of [their] sales or display space' of adult materials that can easily be characterized as 'substantial.' "

[2] Plaintiffs urge that *Executive Arts Studio, Inc. v. City of Grand Rapids,* 391 F.3d 783 (6th Cir.2004), dictates the result in the instant case. There, this court struck down as overbroad the following definition of adult bookstore:

> An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals [and media] which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," as defined herein, or an establishment with *a segment or section* devoted to the sale or display of such material.

Id. at 787–88 (emphasis added). It did so, however, on the basis that "establishment[s] with a segment or section devoted to the sale or display of [adult] materials" included "multiple establishments which would never be defined as adult bookstores in everyday English, such as a Walden's or Borders." *Id.* at 796 (emphasis added). Because there was no evidence that such businesses produced secondary effects, the definition was overbroad.

The definition in § 2907.40 is distinguishable from that at issue in *Executive Arts* because it does not contain the "*a* segment or section" language. Rather, it limits all four sub-parts of the definition with the modifier "substantial" and three sub-parts with the alternative modifier "significant." The question here, then, is whether a significant number of establishments that do not produce secondary effects (like major bookstore chains or neighborhood video stores) have a "*significant or substantial portion* of [their] stock in trade or inventory in, derive[ ] a *significant or substantial portion* of [their] revenues ***559** from, devote[ ] a *significant or substantial portion* of [their] interior business or advertising to, or maintain[ ] a *substantial section* of [their] sales or display space for" materials characterized by nudity or sexual activities. Ohio Rev.Code Ann. § 2907.40(A)(1) (emphasis added).

Courts have upheld "significant or substantial" language against overbreadth challenges in First Amendment cases. *See World Wide Video of Washington, Inc. v. City of Spokane,* 368 F.3d 1186, 1198–99 (9th Cir.2004) ("Cases directly addressing the phrase 'significant or substantial' in this context have upheld its validity. Moreover, this phrase is readily susceptible to a narrowing construction." (citations omitted)); *Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 996–97 (7th Cir.2002) (upholding definition of "Adult Bookstore, Adult Novelty Store, and Adult Video Store as commercial establishments that, inter alia, 'derive [ ] a significant or substantial portion or [their] revenues' from Media 'characterized by the depiction or description of' nudity or sexual activities." (some internal quotation marks omitted) (alterations in original)). Courts, including this one, have also held that laws that include "significant" or "substantial" language are not unconstitutionally *vague.* [9] *See 511 Detroit St., Inc. v. Kelley,* 807 F.2d 1293, 1295–96 (6th Cir.1986); *VIP of Berlin, LLC v. Town of Berlin,* 593 F.3d 179, 187–88 (2d Cir.2010); *Z.J. Gifts D–4, L.L.C. v. City of Littleton,* 311 F.3d 1220, 1229–30 (10th Cir.2002), overruled on other grounds, 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004).

9 Although doctrinally distinct, the Supreme Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines." *Kolender v. Lawson,* 461 U.S. 352, 358 n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *see also Entm't Prods.,* 588 F.3d at 379 ("The void-for-vagueness doctrine and the overbreadth doctrine vindicate overlapping values in First Amendment jurisprudence.... When a law implicates First Amendment freedoms, vagueness poses the same risk as overbreadth, as vague laws may chill citizens from exercising their protected rights.").

****16** None of these cases, however, dealt with a definition of adult bookstore or adult video store quite

the same as that adopted by the State of Ohio.[10] Section 2907.40 includes not just businesses that have a "significant or substantial portion of [their] stock in trade or inventory in" adult materials, but also those that "maintain[ ] a substantial section of [their] sales or display space for" such articles. Although the term "significant or substantial" is readily susceptible to a limiting construction, prior cases do not squarely address whether the display-space clause of § 2907.40(A)(1) is sufficiently narrow in its reach. Plaintiffs argue that major bookstores with sections of their floor space devoted to romance novels, drugstores with sections "devoted to magazines like Playboy and Penthouse" or general-interest video stores with "a separate section of adult X rated tapes" all fall within this definition. Although the record does not provide evidence regarding whether a significant number of such establishments could fairly be considered to devote a significant portion of their floor space to sexually oriented materials, a common-sense reading of the terms "significant" and "substantial" should exclude these businesses from regulation.[11]

10 State cases cited by Defendants that find "substantial or significant" language not to be overbroad similarly deal with statutory definitions somewhat narrower than Ohio's.

11 The definition at issue here is further limited by the proviso that the printed matter or visual representations featured by these businesses must be "*characterized by* their emphasis upon the exhibition or description of specified sexual activities or specified anatomical areas." Ohio Rev.Code Ann. § 2907.40(A)(1) (emphasis added). The statute defines "characterized by" as "describing the essential character or quality of an item." *Id.* § 2907.40(A)(4). Thus, the definition can be construed to exclude businesses that make available printed or visual media where nudity or sexual activities are not a central element. The Seventh Circuit has upheld a similar restriction against an overbreadth challenge on this reasoning. *See Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 996–97 (7th Cir.2002). The "characterized by" clause in § 2907.40(A)(1) defines the contents of the printed or visual media sold, not the nature of the businesses themselves. It thus narrows the reach of § 2907.40 but does not necessarily save it from overbreadth, as it is possible that "specified sexual activities" or "specified anatomical areas" could constitute the "essential character" of X-rated videos in a neighborhood video store, romance novels, or pornographic magazines.

***560** Further, to be overturned, a "statute's overbreadth [must] be substantial.' " *Entm't Prods.,* 588 F.3d at 379 (quoting *Williams,* 553 U.S. at 292, 128 S.Ct. 1830). Plaintiffs have not "demonstrate[d] from the text of [the statute] and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally." *Id.* (quoting *N.Y. State Club Ass'n v. City of New York,* 487 U.S. 1, 14, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988)). Therefore, the definition of "adult bookstore or adult video store" is not facially overbroad. Should a business like Borders or a general-interest video store (businesses that do not cause secondary effects) become subject to regulation under the law, it may challenge its regulation on an as-applied basis. *See New York v. Ferber,* 458 U.S. 747, 773–74, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) ("Under these circumstances, [the law] is not substantially overbroad and ... whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [the law's] sanctions, assertedly, may not be applied." (citation and internal quotation marks omitted) (some alterations in original)).

C. The Definition of "Adult Cabaret" Is Not Unconstitutionally Overbroad

[3] Section 2907.40(A)(2) states that "[a]dult cabaret has the same meaning as in section 2907.39 of the Revised Code." Section 2907.39(A)(3) provides:

> "Adult cabaret" means a nightclub, bar, juice bar, restaurant, bottle club, or similar commercial establishment, whether or not alcoholic beverages are served, that *regularly features* any of the following:
>
> (a) Persons who appear in a state of nudity or seminudity;
>
> (b) Live performances that are characterized by the exposure of specified anatomical areas or specified sexual activities;
>
> ****17** (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions that are distinguished or characterized by their emphasis upon the exhibition or description of specified sexual activities or specified anatomical areas.

Ohio Rev.Code Ann. § 2907.39(A)(3) (emphasis added). "Regularly features" is defined to mean "a consistent or substantial course of conduct, such that the films or performances exhibited constitute a substantial portion of the films or performances offered as a part of the ongoing business of the adult entertainment establishment." *Id.* § 2907.39(A)(11). Plaintiffs argue that this definition is overbroad because it applies to "liquor permit premises and non-liquor establishments, dinner theaters and 'similar establishments' that might present serious plays and shows that involve mere depictions of sexual activity[, as well as] nightclubs of all kinds, including comedy clubs, that might include ***561** performances with nudity or semi-nudity in them."

This court has upheld similar definitions of "adult cabaret" against overbreadth challenges. *Entm't Prods.*, 588 F.3d at 381–83 (upholding definition of "adult cabaret" limited to "establishment[s] that feature as a *principal use of [their] business,* [employees who are nude or semi-nude]" (emphasis added)); *Sensations, Inc. v. City of Grand Rapids,* 526 F.3d 291, 300 (6th Cir.2008) (in context of ordinance nearly identical to Ohio's law, upholding "a regulation banning total nudity in sexually oriented businesses" because it is "far narrower than a similar regulation [of nudity] applicable to the general public" outside the context of sexually oriented businesses that had been struck down in another case); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.,* 466 F.3d 391, 397–98 (6th Cir.2006) (upholding ordinance defining sexually oriented business as one that "regularly depict[s] material which is distinguished or characterized by an emphasis on matter depicting [nudity or sexual activity]"). Consistent with these cases, the "regularly features" clause of the "adult cabaret" definition in § 2907.40 limits the statute so that it does not reach a substantial number of constitutionally-protected performances. Plaintiffs have failed to raise a genuine issue of material fact as to whether businesses that do not cause secondary effects, such as dinner theaters or comedy clubs, ever "regularly feature" regulated entertainment in the sense that they present it as a "consistent or substantial course of conduct, such that the films or performances exhibited constitute a substantial portion of the films or performances offered as a part of the ongoing business of the adult entertainment establishment." Ohio Rev.Code Ann. § 2907.39(A)(11). Under this definition, it is not enough that a venue regularly feature entertainment including nudity or sexual activity in the sense that they present such material recurrently. Rather, it must be presented "consistent[ly]" *and* such entertainment must constitute a substantial proportion of the venue's overall offerings. This definition is sufficiently limited that it is unlikely to reach a large number of establishments that do not cause secondary effects, and thus that may not be constitutionally regulated by the law. The definition of adult cabaret is not facially overbroad.

V

****18** **[4]** Plaintiffs also challenge § 2907.40(C)(2) to the extent that it prohibits entertainers who are nude or semi-nude from touching each other during the course of a performance. Although Plaintiffs' brief is unclear as to the First Amendment theory under which they seek to challenge the no-touch provision, their counsel clarified at oral argument that we should analyze their argument as an overbreadth challenge.

The statute states:

> No employee who regularly appears nude or seminude on the premises of a sexually oriented business, while on the premises of that sexually oriented business and while nude or seminude, shall knowingly touch a patron ... or another employee ... or the clothing of a patron ... or another employee ... or allow a patron ... or another employee ... to touch the employee or the clothing of the employee.

Ohio Rev.Code Ann. § 2907.40(C)(2). The law thus prohibits any performer who is nude or seminude from touching or being touched by another performer, whether the second performer is clothed or not.

This court has twice upheld similar prohibitions on erotic performers touching each other. In *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403 (6th Cir.1997), this court upheld an ordinance providing that:

> ***562** No entertainer, employee or customer shall be permitted to have any physical contact with any other [sic] on the premises during any

> performance and all performances shall only occur upon a stage at least eighteen inches (18 [#]) above the immediate floor level and removed at least six feet (6#) from the nearest entertainer, employee and/or customer.

Id. at 406 (first alteration in original). The court construed the plaintiffs' argument to be that the buffer-zone requirement violated the O'Brien test. It thus did not discuss whether the ordinance violated the overbreadth doctrine. The court also did not discuss the constitutionality of the ordinance as applied to banning contact between entertainers, but rather focused on the ban on contact between entertainers and customers.

More recently, in *Entertainment Productions, Inc. v. Shelby County,* 588 F.3d 372 (6th Cir.2009), we addressed an overbreadth challenge to a similar statute. The statute at issue in *Entertainment Productions* provided: " 'No entertainer, employee, or customer shall be permitted to have any physical contact with any other on the premises during any performance,' and to that effect, 'all performances shall only occur ... removed at least six feet (6#) from the nearest entertainer, employee, or customer.' " *Id.* at 393 (alteration in original). The plaintiffs' overbreadth challenge asserted that the statute unconstitutionally interfered with performers' ability to convey their erotic messages through dance. We rejected this challenge, concluding that the plaintiffs failed to demonstrate a "substantial number of unconstitutional applications" of the restriction. *Id.* at 394.

****19** We find no meaningful basis on which to distinguish the instant case from *Entertainment Productions.* Although Plaintiffs here offered evidence that some physical contact between performers communicates a message and constitutes expression within the meaning of the First Amendment, the plaintiffs in *Entertainment Productions* made the same argument and presented proofs as well. [12] Plaintiffs here made no greater showing of a "substantial number of unconstitutional applications" of the restriction than did the plaintiffs in *Entertainment Productions,* and thus their overbreadth challenge must fail.

12 Dr. Judith Hanna, an expert in dance and the communicative aspects of dance, testified about the messages that exotic dance performances communicate. Joseph Hall, who works with adult cabarets, also described communicative touching between performers, including in the course of skits entered into a national competition. Dr. Hanna testified in *Entertainment Productions* as well.

VI

[5] Plaintiffs argue that the plain language of § 2907.40 excludes adult bookstores and video stores from the hours-of-operation restriction. The hours-of-operation restriction applies to all "sexually oriented businesses." Ohio Rev.Code Ann. § 2907.40(B). The definition of "sexually oriented business," found at § 2907.40(A)(15), includes adult bookstores and adult video stores. But that definition also includes language that, Plaintiffs argue, excludes bookstores and video stores from the statute's reach: " 'Sexually oriented business' means an adult bookstore, adult video store, adult cabaret, adult motion picture theater, sexual device shop, or sexual encounter center, *but does not include a business solely by reason of its showing, selling, or renting materials that may depict sex.*" *Id.* § 2907.40(A)(15) (emphasis added).

The definition of adult bookstore and adult video store, located at ***563** § 2907.40(A)(1), identifies adult bookstores and video stores by the contents of the materials they sell or rent: materials "characterized by their emphasis upon [sexual activities] or [nudity]." Plaintiffs thus point to a conflict: These businesses are defined in terms of their selling or renting materials that depict sex in § 2907.40(A)(1), but are apparently excluded from the definition of sexually oriented business on the same grounds in § 2907.40(A)(15).

"In all cases of statutory construction, the starting point is the language employed by [the legislature]." *Pittsburgh & Conneaut Dock Co. v. Dir., Office of Workers' Comp. Programs,* 473 F.3d 253, 266 (6th Cir.2007). "Reliance on the literal language of the statute is not justified, however, if it leads to an interpretation which is inconsistent with the legislative intent or to an absurd result." *Appleton v. First Nat'l Bank of Ohio,* 62 F.3d 791, 801 (6th Cir.1995). Importantly, "[c]ourts generally construe statutes in a way to avoid making provisions meaningless." *Sakarapanee v. Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs.,* 616 F.3d 595, 600 (6th Cir.2010); *see also Duncan v. Walker,* 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d

251 (2001) ("It is [this Court's] duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)).

Adopting Plaintiffs' reading of the statute would render § 2907.40(A)(1) meaningless by excepting from regulation all those businesses it purports to encompass. Because the plain language of the statute bears another meaning, however, this outcome can be avoided. Section 2907.40(A)(1) defines adult bookstores and adult video stores as commercial establishments whose inventory, revenues, interior business or advertising, or display space consists in "*significant or substantial* " part of materials "*characterized by* their emphasis upon the exhibition or description of specified sexual activities or specified anatomical areas." Thus, it is not just any business that shows, sells, or rents materials depicting sex that is subject to regulation, but rather only those substantially or significantly devoted to providing materials whose "essential character or quality" is to depict sex or nudity. *See* § 2907.40(A)(4) (defining "characterized by"). Establishments whose business consists of selling less than a significant or substantial amount of regulated material do not fall within the law. By this reading, § 2907.40(A)(15) *reinforces* the "significant or substantial" and "characterized by" language of § 2907.40(A)(1) by further clarifying that merely dealing in small amounts of adult material does not bring a business within the definition. Indeed, it would be strange for the Ohio General Assembly to enact a regulation on the hours of operation of adult bookstores and video stores, and in the same regulation exempt all such businesses.

****20** We therefore affirm the district court's rejection of this argument.

VII

For the foregoing reasons, we **AFFIRM** the district court's grant of summary judgment.

All Citations

455 Fed.Appx. 541, 2011 WL 3904097

End of Document

877 N.E.2d 877
Court of Appeals of Indiana.

PLAZA GROUP PROPERTIES, LLC, Robert W. Allen, and Fuel in Dale, LLC, Appellants–Defendants,
v.
SPENCER COUNTY PLAN COMMISSION and Spencer County Board of Commissioners, Appellees–Plaintiffs.

No. 74A01–0703–CV–145.
|
Dec. 13, 2007.
|
Transfer Denied April 30, 2008.

Synopsis

Background: County brought action against property owner for injunction, requesting that the trial court enter a temporary restraining order, preliminary injunction, and permanent injunction against owner because it failed to apply for and obtain a building permit before renovating its property and violated ordinances by not applying for and obtaining a sexually oriented business permit. Owner counterclaimed alleging that ordinance violated the First Amendment. The Spencer Circuit Court, Wayne A. Roell, J., granted county summary judgment. Property owner appealed.

Holdings: The Court of Appeals, Baker, C.J., held that:

[1] owner was required to obtain a building permit prior to renovating building;

[2] owner was not entitled to operate sexually oriented business as a nonconforming use;

[3] ordinance prohibiting sexually oriented business within 1000 feet of residence did not violate First Amendment; and

[4] county was entitled to permanent injunction preventing owner from operating sexually oriented business.

Affirmed.

West Headnotes (22)

[1] Zoning and Planning
Nonconforming Uses

A "nonconforming" use of property is a use that lawfully existed prior to the enactment of a zoning ordinance and continues after the ordinance's effective date even though it does not comply with the ordinance's restrictions.

1 Cases that cite this headnote

[2] Courts
Decisions of United States Courts as Authority in State Courts

Whether a business has a right to maintain a nonconforming use is an issue of state law.

1 Cases that cite this headnote

[3] Health
Buildings, structures, and building components

Property owner was required to obtain a building permit prior to renovating building, where the renovations exceeded $5,000.

Cases that cite this headnote

[4] Zoning and Planning
Existence of use in general

The burden of proving a nonconforming use rests upon the party asserting its existence.

Cases that cite this headnote

[5] Zoning and Planning
Legality or illegality of use

Owner of property that was in violation of building permit ordinance when zoning ordinance regarding sexually oriented businesses was enacted was not entitled

to operate sexually oriented business as a nonconforming use.

2 Cases that cite this headnote

[6] **Constitutional Law**
Clearly, positively, or unmistakably unconstitutional

When the constitutionality of a county ordinance is challenged, the enactment stands before the court clothed with a presumption of constitutionality until clearly overcome by a contrary showing.

Cases that cite this headnote

[7] **Constitutional Law**
Doubt

Constitutional Law
Burden of Proof

The party challenging the constitutionality of an ordinance bears the burden of proof and all doubts are resolved against that party.

Cases that cite this headnote

[8] **Appeal and Error**
Cases Triable in Appellate Court

Court of Appeals reviews de novo the question of whether a municipal ordinance violates the United State Constitution.

1 Cases that cite this headnote

[9] **Constitutional Law**
Sexually Oriented Businesses;Adult Businesses or Entertainment

The First Amendment does not require a city, before enacting an ordinance regulating sexually oriented businesses, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to the relevant to the problem that the city addresses. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**
Secondary effects

Zoning and Planning
Sexually-oriented businesses;nudity

County zoning ordinance governing location of sexually oriented businesses, under which such businesses could not be located within 1,000 feet of a residence, was designed to serve a substantial government interest in combatting secondary effects of such businesses, and did not violate First Amendment's free speech guarantee; while county was largely rural and had relied on studies of effects in such business in urban areas, relied-upon studies were reasonably believed to be relevant to county's desire to avoid negative secondary effects of sexually oriented businesses. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[11] **Constitutional Law**
Time, Place, or Manner Restrictions

A time, place, and manner restriction that indirectly affects speech must be narrowly tailored and leave ample alternative channels for communication. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[12] **Constitutional Law**
Sexually Oriented Businesses;Adult Businesses or Entertainment

The First Amendment requires only that municipalities refrain from effectively denying sexually oriented businesses a reasonable opportunity to open and operate within the city. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] **Constitutional Law**

Time, Place, or Manner Restrictions

The requirement of narrow tailoring of a time, place, and manner restriction that indirectly affects speech is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation, and so long as the means chosen are not substantially broader than necessary to achieve the government's interest; however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[14] **Courts**

Decisions of United States Courts as Authority in State Courts

While federal district court decisions may be persuasive, they are not binding authority on state courts.

4 Cases that cite this headnote

[15] **Constitutional Law**

Availability of other sites

Zoning and Planning

Sexually-oriented businesses;nudity

County zoning ordinance that restricted sexually oriented businesses from operating within 1000 feet of a residence allowed for reasonable alternative avenues of communication, and thus, it did not violate the First Amendment's free speech guarantee; there were at least 34 alternative sites in county on which business operator could operate a sexually oriented business and comply with the 1,000 foot restriction. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[16] **Appeal and Error**

Injunction

Appeal and Error

Refusing injunction

Injunction

Discretionary Nature of Remedy

The granting or denying of an injunction is within the discretion of the trial court, and appellate review is limited to the determination of whether or not the trial court clearly abused that discretion.

Cases that cite this headnote

[17] **Injunction**

Nature of remedy in general

Injunction

Nature of remedy in general

The difference between a preliminary and permanent injunction is procedural; a "preliminary injunction" is issued while an action in pending, whereas a "permanent injunction" is issued upon a final determination.

1 Cases that cite this headnote

[18] **Injunction**

Grounds in general;multiple factors

Generally, the trial court considers four factors when determining whether to grant injunctive relief: (1) whether plaintiff's remedies at law are inadequate; (2) whether the plaintiff can demonstrate a reasonable likelihood of success on the merits; (3) whether the threatened injury to the plaintiff outweighs the threatened harm a grant of relief would occasion upon the defendant; and (4) whether the public interest would be disserved by granting relief.

1 Cases that cite this headnote

[19] **Injunction**

Irreparable injury

Injunction

Presumptions and burden of proof

The party seeking the injunction carries the burden of demonstrating an irreparable injury; however, when the acts sought to be

enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of the hardships in his favor.

1 Cases that cite this headnote

[20] Injunction

Specificity, vagueness, overbreadth, and narrowly-tailored relief

Permanent injunctions are limited to prohibiting injurious interference with rights and must be narrowly tailored so that its scope is not more extensive than is reasonably necessary to protect the interests of the party in whose favor it is granted.

1 Cases that cite this headnote

[21] Zoning and Planning

Injunctive and Other Equitable or Affirmative Relief

In seeking an injunction for a zoning violation, the moving party must prove the existence of a valid ordinance and a violation of that ordinance.

1 Cases that cite this headnote

[22] Zoning and Planning

Other particular uses

County was entitled to a permanent injunction against property owner to prevent owner from operating sexually oriented business, where operation of such a business was in violation of zoning ordinance.

1 Cases that cite this headnote

Attorneys and Law Firms

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OPINION

BAKER, Chief Judge.

The parties' dispute requires us to determine the constitutionality of portions of Spencer County's sexually oriented business ordinances. While there is an abundance of caselaw addressing the constitutionality of similar ordinances, discerning the relevant precedent has been compared to "reading the tea leaves." *Triplett Grille, Inc. v. City of Akron,* 40 F.3d 129, 134 (6th Cir.1994).

Appellants-defendants Plaza Group Properties, LLC, Robert W. Allen, and Fuel in Dale, LLC (collectively, Plaza), appeal the trial court's grant of summary judgment in favor of appellees-plaintiffs Spencer County Plan Commission and Spencer County Board of Commissioners (collectively, the County). Plaza first argues that it was lawfully using the property when the County enacted the sexually oriented business ordinances; thus, it is ***880** entitled to continue its lawful use even though the newly enacted ordinances prohibit it from operating a sexually oriented business on the property. Alternatively, if we find that Plaza's use was nonconforming at the time the ordinances were enacted, Plaza urges us to find the sexually oriented business ordinances unconstitutional pursuant to the First Amendment to the United States Constitution.

Because we conclude that there is not a genuine issue of material fact that Plaza made more than $5,000 of renovations to the property without receiving a building permit, Plaza is not entitled to lawful nonconforming use status on the property. And because we determine that the portions of the sexually oriented business ordinances at issue do not unconstitutionally burden protected speech, we reject Plaza's argument that the challenged ordinances are unconstitutional. Therefore, we conclude that the trial court properly granted summary judgment in favor of the County and it was within the trial court's discretion to enter a permanent injunction prohibiting Plaza from

operating a sexually oriented business on the property. Thus, we affirm the judgment of the trial court.

FACTS[1]

[1] We held oral argument in Indianapolis on November 2, 2007. We commend counsel for their excellent oral presentations and we thank the Carmel High School students and staff who attended the argument.

Plaza purchased a truck stop (the property) in Spencer County on October 21, 2005. The property consists of a main building, a motel, and a convenience store and is located "off a highway interchange in an extremely rural area with only one residence within a mile." Appellants' Br. p. 22. Without receiving a building permit, Plaza began remodeling the main building in late October.

After learning about the remodeling, the County issued a stop-work order for the property on November 16, 2005. On December 8, 2005, the County filed a complaint for an injunction against Plaza, alleging that Plaza was violating the County's building and zoning ordinances. The trial court issued a temporary restraining order based on Plaza's failure to comply with the County's building ordinances and enjoined Plaza from using the main building to conduct, maintain, or continue to operate a sexually oriented business.

Theresa Cail, the County Administrator, attests that Plaza is the first sexually oriented business to seek operation in Spencer County in the past twenty years. Appellants' App. p. 210.[2] Prior to Plaza's purchase of the property, the County's zoning ordinances required sexually oriented businesses to obtain a special exception permit but did not specifically regulate businesses of this nature. Thus, the County Plan Commission held a public hearing on November 10, 2005, and formally adopted ordinance 2005–10 on November 28, 2005, which provides, in relevant part, that "[n]o person shall operate or maintain an Adult Organization[3] within 1000 feet ***881** of any church, school, daycare center or preschool, or residence [in Spencer County]" (the 1,000–foot restriction). *Id.* at 145–46. The ordinance also limits an adult organization's hours of operation and prohibits nudity as provided in Indiana Code section 35–45–4–1.[4]

[2] Plaza's appendices do not include the County's complaint, Plaza's answer and counterclaims, or numerous other relevant documents that the County submitted to the trial court during the underlying litigation. We direct counsel's attention to Indiana Appellate Rule 50(A)(2)(f), which requires that the appellant include in the appendix "pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal...." It is inappropriate for an appellant to include only its own documents in the appendix; instead, it must include *all* relevant documents, including those filed by the opposing party.

[3] The ordinance defines "Adult Organization" as an "adult bookstore, adult motion picture theater, adult mini motion picture theatre, adult motion picture arcade, adult cabaret, adult drive-in theater, adult live entertainment arcade or adult service establishment." Appellants' App. p. 143.

[4] Indiana Code section 35–45–4–1 provides that a person who knowingly or intentionally, in a public place, "appears in a state of nudity with the intent to arouse the sexual desires of the person or another person ... commits public indecency, a Class A misdemeanor." Ordinance 2005–11 defines nudity or the state of nudity as "the showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering or the showing of the female breast with less than a fully opaque covering of any part of the nipple." Appellants' App. p. 154.

On December 28, 2005, the County adopted ordinance 2005–11, which details additional licensing requirements for sexually oriented businesses in the County and also contains the 1,000–foot restriction. *Id.* at 167. Specifically, the ordinance provides that "[i]t shall be unlawful for any person to operate a sexually oriented business in Spencer County without a valid sexually oriented business license." *Id.* at 157.

It is undisputed that Plaza seeks to run a sexually oriented business and that its property is within 1,000 feet of a residence. On January 4, 2006, the County filed an amended complaint for injunction, requesting that the trial court enter a temporary restraining order, preliminary injunction, and permanent injunction against Plaza because Plaza had failed to apply for and obtain a building permit before renovating its property. Additionally, the County alleged that Plaza had violated

ordinances 2005–10 and 2005–11 by not applying for and obtaining a sexually oriented business permit.

Plaza and the County entered into an agreed preliminary injunction order on January 25, 2006, which enjoined Plaza from occupying the property's main building before obtaining a building permit. Furthermore, the parties agreed that Plaza would not "operat[e] a sexually oriented business, as defined in Spencer County Ordinance No.2005–11, on any of the [property]." *Id.* at 172.

Plaza answered the County's complaint on January 30, 2006, and filed a counterclaim, alleging that ordinances 2005–10 and 2005–11 are unconstitutional on their face and as applied pursuant to the First Amendment to the United States Constitution and "related provisions of the Indiana Constitution." Appellees' App. p. 52–53. The underlying litigation has focused exclusively on the ordinances' constitutionality pursuant to the federal constitution.

The County moved for summary judgment on May 8, 2006. [5] Plaza filed a cross-motion for summary judgment on June 15, 2006. The trial court held a hearing on the parties' motions for summary judgment on February 20, 2007, and entered partial summary judgment in the County's favor on March 9, 2007, finding as follows:

5 The County also filed a motion to show cause on November 1, 2006, alleging that Plaza was in contempt of court for operating a sexually oriented business in violation of the parties' agreed preliminary injunction order and the County's sexually oriented business regulations. The trial court held a hearing and found Plaza to be in contempt of court, fining Plaza $30,000 and awarding the County attorney fees.

> The Court will first address the constitutionality of Spencer County Ordinances 2005–8, 2005–9, 2005–10, 2005–11. Some matters are beyond dispute. Hours of ***882** operation restrictions for adult businesses, many of which are more restrictive than those in question, have been upheld as constitutional in numerous federal appellate decisions. Similarly, federal appellate courts have upheld interior configuration operational requirements as a valid means of preventing illegal sexual behavior in adult business. And stripper-patron buffers have passed constitutional muster.
>
> The ordinances contain procedural safeguards. That is, the licensing requirements provide for a relatively quick decision and allow for prompt judicial review of that decision. The county ordinances allow for alternative sites. And there has been no real argument that the ordinances are in any way vague, overbroad or violative of anyone's equal protection rights.
>
> In passing the ordinances cited above, the County relied on numerous studies, reports and appellate cases. The defendants argued that these reports must be significantly tailored to the locality in question. The Court rejects this argument.
>
> In adopting regulations, the [United States] Supreme Court in [*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)] said that the County may rely upon evidence "reasonably believed to be relevant" to the secondary effects of sexually oriented businesses. The County's reliance satisfied this requirement.
>
> Finally, the defendants rely on the *New Albany II* case for the proposition that the County ordinances are not narrowly tailored as to the location requirements. [*New Albany DVD, LLC v. City of New Albany*, 362 F.Supp.2d 1015, 1022 (S.D.Ind.2005).] That case was the decision of a [federal district] court. This Court rejects the reasoning in that decision. The fact that there may be imagined less-restrictive alternatives does not negate the fact that the ordinances provide reasonable alternative avenues of communication. Adult businesses have not been denied a reasonable opportunity to open and operate. The regulations restricting operations within 1,000 feet of a residence are valid.
>
> Based on the above, the Court concludes that the ordinances in question are constitutional.
>
> The Court will next address the building ordinance/building permit issue. Spencer County Ordinance 2005–02 is a valid ordinance requiring owners of real property to apply for and obtain a building permit prior to the alteration or remodeling of any building or structure the cost of which exceeds $5,000. The Court is eliminating any costs for painting or carpeting or anything that might be considered redecorating. Even in doing so, the evidence is overwhelming through affidavits and photographs of

the many alterations done to the main building that the reasonable cost of those alterations far exceeded $5,000. The affidavits of the [County] identify many and numerous alterations and the estimated cost therefore which were totally ignored by [Plaza's] affidavits.

The evidence before the Court can only lead to the conclusion that the defendant began extensive alterations and remodeling of the main building without first obtaining the required building permit. Any use of the main building was unlawful and thus the defendants have not lawfully used the main building as a sexually oriented business.

* * *

When the motel was first operated as a motel after [Plaza] acquired the property ***883** is in question. There are competing affidavits on that question. The answer to that question could very well be dispositive of the issue. However, the evidence is not so clear on either side which would allow this Court to find that there are undisputed facts. Summary judgment is inappropriate with regard to the motel. A short evidentiary hearing will be necessary.

The Court finds that summary judgment is not appropriate with regard to fines. An evidentiary hearing will be necessary at which time the defendants may have the opportunity to give any evidence which might mitigate potential fines. It is the Court's preference that this matter be held in abeyance until any appellate activity in this cause is concluded.

IT IS THEREFORE ORDERED that the [County] received a summary judgment that the Spencer County ordinances in question are constitutional.

IT IS FURTHER ORDERED that the [County] receive a summary judgment that [Plaza has] violated the County building code and a summary judgment that [Plaza has] not established any lawful, non-conforming sexually oriented business at the main building.

* * *

IT IS FURTHER ORDERED THAT the [County is] entitled to a summary judgment granting a permanent injunction against [Plaza] from operating a sexually oriented business at the main store or the [convenience store].

IT IS FURTHER ORDERED THAT either party may request an evidentiary hearing with regard to the operation of the motel.

IT IS FURTHER ORDERED that [Plaza's] Cross Motion for Summary Judgment be denied.

IT IS FINALLY ORDERED that there is no just reason for delay and the Court directs entry of judgment on all of the issues rule upon by this Court.

Appellants' App. p. 9–12. [6] Plaza now appeals.

[6] The trial court entered an order on June 18, 2007, to "correct the widely reported misconceptions about its prior ruling." Appellees' App. p. 170. The trial court emphasized that it "did *not* order [Plaza to] cease all operations" but, instead, "grant[ed] a permanent injunction against [Plaza] from operating a sexually oriented business." *Id.* (emphasis in original). The trial court noted that Plaza was free to operate a "commercial establishment" on the property as long as it complied with the local ordinances. *Id.*

DISCUSSION AND DECISION

I. Jurisdiction

Plaza appeals the trial court's order granting partial summary judgment in favor of the County. While the parties agreed to a preliminary injunction more than a year before the summary judgment hearing, the trial court's partial summary judgment order also permanently enjoined Plaza from operating a sexually oriented business in the property's main store or convenience store. Because the trial court specifically provided that there is no just reason for delay regarding the ruled-upon issues, our court has jurisdiction pursuant to Trial Rule 54(B).

II. Summary Judgment

Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). A party seeking

summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled ***884** to judgment as a matter of law. *Tack's Steel Corp. v. ARC Constr. Co., Inc.,* 821 N.E.2d 883, 888 (Ind.Ct.App.2005). A factual issue is "genuine" if it is not capable of being conclusively foreclosed by reference to undisputed facts. *Am. Mgmt., Inc. v. MIF Realty, L.P.,* 666 N.E.2d 424, 428 (Ind.Ct.App.1996). Although there may be genuine disputes over certain facts, a fact is material when its existence facilitates the resolution of an issue in the case. *Id.*

When we review a trial court's entry of summary judgment, we are bound by the same standard that binds the trial court. *Id.* We may not look beyond the evidence that the parties specifically designated for the motion for summary judgment in the trial court. *Best Homes, Inc. v. Rainwater,* 714 N.E.2d 702, 705 (Ind.Ct.App.1999). We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. *Shambaugh & Son, Inc. v. Carlisle,* 763 N.E.2d 459, 461 (Ind.2002). However, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity on appeal. *Sizemore v. Erie Ins. Exch.,* 789 N.E.2d 1037, 1038 (Ind.Ct.App.2003). A party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous. *Id.* at 1038–39.

Where, as here, the trial court enters specific findings of fact and conclusions of law, they do not bind us but merely aid our review by providing us with a statement of reasons for the trial court's actions. *Crawford County Cmty. Sch. Corp. v. Enlow,* 734 N.E.2d 685, 689 (Ind.Ct.App.2000). A grant of summary judgment may be affirmed upon any theory supported by the designated evidence. *Bernstein v. Glavin,* 725 N.E.2d 455, 458 (Ind.Ct.App.2000).

III. Lawful Nonconforming Use

A. Applicable Law

[1] **[2]** A nonconforming use of property is a use that lawfully existed prior to the enactment of a zoning ordinance and continues after the ordinance's effective date even though it does not comply with the ordinance's restrictions. *Metro. Dev. Comm'n of Marion County v. Pinnacle Media, LLC,* 836 N.E.2d 422, 425 (Ind.2005). Whether a business has a right to maintain a nonconforming use is an issue of state law. *DeKalb Stone, Inc. v. County of DeKalb,* 106 F.3d 956, 959 (11th Cir.1997). Our Supreme Court has summarized the doctrine as follows:

> The general rule is that a nonconforming use may not be terminated by a new zoning enactment. In these situations, it is often said that the landowner had a "vested right" in the use of the property before the use became nonconforming, and because the right was vested, the government cannot terminate it without implicating the Due Process or Takings Clauses of the Fifth Amendment of the federal constitution, applicable to the states through the Fourteenth Amendment.
>
> A relatively frequent subject of land use litigation is whether a developer can have a "vested interest" in a nonconforming use that is only intended—construction has not yet begun at the time of the new enactment—such that the government cannot terminate it.... [M]any courts, including ours, have been presented with cases where a developer encounters a zoning change after embarking on a project but before beginning construction.... As a general proposition, the courts have been willing to hold that the developer acquires a "vested right" such that a new ordinance does not apply retroactively if, but only if, the developer (1) relying in good faith, ***885** (2) upon some act or omission of the government, (3) has made substantial changes or otherwise committed himself to his substantial disadvantage prior to a zoning change.
>
> * * *
>
> But where no work has been commenced, or where only preliminary work has been done without going ahead with the construction of the proposed building, there can be no vested rights. The fact that ground had been purchased and plans had been made for the erection of the building before the adoption of the zoning ordinance prohibiting the kind of building contemplated, is held not to exempt the property from the operation of the zoning ordinance. Structures in the course of construction at the time of the enactment or

the effective date of the zoning law are exempt from the restrictions of the ordinance.

Pinnacle Media, 836 N.E.2d at 425–26 (citations omitted).

B. Cost of Renovations

[3] It is undisputed that Plaza renovated the property after purchasing it. However, the parties disagree about the extent and cost of those renovations. Ordinance 2005–02 (the building permit ordinance), which was adopted on March 15, 2005, requires property owners in Spencer County to apply for and obtain a building permit before "[b]eginning any addition, alteration, remodeling or repair of any building or structure the cost of which exceeds $5,000." Appellants' App. p. 124. Because Plaza did not obtain a building permit, the County contends that if the renovations cost more than $5,000, Plaza was not engaged in a lawful use of the property when ordinance 2005–10 was enacted on November 28, 2005. Under that scenario, the County argues that ordinance 2005–10 prohibits Plaza from operating a sexually oriented business on the property because it is located within 1,000 feet of a residence.

After evaluating the parties' arguments regarding the cost of Plaza's renovations, the trial court concluded that

> [t]he Court is eliminating any costs for painting or carpeting or anything that might be considered redecorating. Even in doing so, the evidence is overwhelming through affidavits and photographs of the many alterations done to the main building that the reasonable cost of those alterations far exceeded $5,000. The affidavits of [the County] identify many and numerous alterations and the estimated cost[s,] which were totally ignored by [Plaza's] affidavits.
>
> The evidence before the Court can only lead to the conclusion that [Plaza] began extensive alterations and remodeling of the main building without first obtaining the required building permit. Any use of the main building was unlawful and thus [Plaza has] not lawfully used the main building as a sexually oriented business.

Id. at 11. Based on this conclusion, the trial court entered summary judgment in favor of the County because Plaza "had not established any lawful, non-conforming sexually oriented business at the main building." *Id.* at 12.

Richard Allen, a Plaza representative, attested that he purchased fifty mirrors, two used brass decorative entrance doors, twenty-five slat boards, thirty-five fiberglass reinforced panels (FRP), thirty sheets of birch paneling, forty feet of brass pipe, miscellaneous pipe fittings, 5/8 firecore drywall, and ceiling tiles for $3,150. *Id.* at 361. John Cox, Plaza's attorney, prepared an expense report providing, in ***886** part,[7] that Plaza spent an additional $850 for pegboard and roof repairs. Appellees' App. p. 112. Thus, Plaza admits that it spent $4,000 renovating the property.

7 Cox's list also includes an additional $7,125 in expenses for painting, carpeting, and mirrors. Because Allen's affidavit includes the cost of mirrors and the trial court disregarded the costs of paint and carpeting because it considered those expenses to be permissible redecorating, we will not include these amounts in our calculation.

Ralph Pund is a registered professional engineer who is "well familiar with the layout and structural features of [the property,] ... having been in that facility over four hundred times over the past twenty years." Appellants' App. p. 221. The County designated two of Pund's affidavits as evidence, the second of which lists items and materials that Pund determined were installed as part of the remodeling project "but were *not* listed in the affidavits of [Plaza's representatives]." Appellees' App. p. 64 (emphasis added). The list of omitted items totals $25,837[8] and includes hollow wood doors, wood studs for furring and walls, oak paneling for the vestibule, a three-bowl bar sink, insulated embossed steel doors, wood baseboard and chair rail, a suspended acoustical ceiling, wood frames for mirrors, steel furring channels, wood stage framing, plastic laminate for bars and stage surfaces, fixed bar stools, fluorescent emergency lights, and electric wire and boxes. *Id.* at 64–65. Pund attached photographs of the renovated property to his first affidavit and the wood mirror frames, plastic bar and stage laminate, fixed bar stools, and fluorescent lights are pictured in the photographs. Appellants' App. p. 226–27. Thus, the photographic evidence confirms that, at the very least, Plaza omitted these items from its cost calculation—items that Pund valued at $10,490. Appellees' App. p. 64–65.

8 We arrive at this amount after subtracting the costs of carpeting, painting, and "miscellaneous material"

that Pund included in his calculation. Appellees' App. p. 65.

While we are mindful that we must construe the evidence in favor of Plaza during our review of the trial court's grant of summary judgment in favor of the County, the photographs confirm that Plaza omitted various items and materials used in its renovation to arrive at its $4,000 estimate. And we have previously held that we will not permit a party's contradictory, self-serving testimony to create a genuine issue of material fact for purposes of summary judgment. *Miller v. Martig,* 754 N.E.2d 41, 46 (Ind.Ct.App.2001). As the trial court found, "the evidence is overwhelming through affidavits and photographs of the many alterations done to the main building that the reasonable cost of those alterations far exceeded $5,000." Appellants' App. p. 11. Because Plaza admits that it made $4,000 of renovations and the photographs show substantial renovations not included in that amount, we find that there is not a genuine issue of material fact that Plaza's renovations exceeded $5,000.

C. Plaza's Use of the Property

[4] **[5]** Because Plaza's renovations exceeded $5,000, it should have applied for a building permit pursuant to the County's building permit ordinance before renovating the property. Notwithstanding Plaza's violation of the building permit ordinance, Plaza argues that its use of the property is entitled to lawful nonconforming use status because the building permit ordinance is not a zoning ordinance. Phrased another way, Plaza argues that it was in compliance with the County's zoning ordinances when the sexually oriented business ordinances were enacted; thus, it is entitled to operate a sexually oriented business on the ***887** property. The burden of proving a nonconforming use rests upon the party asserting its existence. *Wesner v. Metro. Dev. Comm'n of Marion County,* 609 N.E.2d 1135, 1138 (Ind.Ct.App.1993).

The County draws our attention to section 21(d) of ordinance 2005–11, which provides that "[n]otwithstanding anything to the contrary in any Spencer County ordinances, a nonconforming sexually oriented business, lawfully existing *in all respects under law* prior to the effective date of this ordinance, may continue to operate...." Appellants' App. p. 168 (emphasis added). The ordinance does not distinguish between zoning ordinances and other ordinances—such as the building permit ordinance—and, instead, provides that the sexually oriented business must have lawfully existed "in all respects" prior to the enactment of ordinance 2005–11.

Furthermore, we have previously held that a landowner who failed to obtain a required building permit did not acquire lawful nonconforming use status when a subsequent zoning regulation was enacted. *Bird v. Delaware Muncie Metro. Plan Comm'n,* 416 N.E.2d 482, 488 (Ind.Ct.App.1981).[9] Specifically, the landowner in *Bird* did not obtain a building permit before moving two structures onto his land, and the county later enacted a zoning regulation that rendered the structures unlawful. Because the structures were "not [ ] a preexisting legal use" since the landowner had not obtained a building permit, we held that the landowner did "not acquire lawful status as [a] legal nonconforming use[ ]." *Id.* at 488.

9 While Plaza relies on our opinion in *Board of Zoning Appeals v. Leisz* to rebut *Bird,* the *Leisz* opinion was vacated when the Supreme Court granted transfer and reversed our decision. 686 N.E.2d 935 (Ind.Ct.App.1997), *rev'd on other grounds by Board of Zoning Appeals v. Leisz,* 702 N.E.2d 1026 (Ind.1998).

Plaza argues that *Bird* is distinguishable because the building permit ordinance in that case was contained in the county's zoning ordinances, unlike the building permit ordinance at issue herein. However, in *Wesner,* we held that an adult business failed to prove it was a lawful nonconforming use because, in part, it had illegally operated as a house of prostitution. 609 N.E.2d at 1138–39. We emphasized that "penal statutes are but one method of promoting the public welfare. Zoning ordinances are another." *Id.* at 1141. Based on the reasoning of *Bird* and *Wesner,* we hold that Plaza was not entitled to lawful nonconforming use status on the property because it was in violation of the building permit ordinance when the sexually oriented business ordinances were enacted. There is no evidence that the building permit ordinance was enacted or enforced for any reason other than general public safety and welfare. Thus, Plaza's argument fails and we hold that the trial court properly found as a matter of law that Plaza was not entitled to lawful nonconforming use status on the property.

IV. Constitutionality of County Ordinances

Although Plaza was not entitled to lawful nonconforming use status on the property, we still must address the constitutionality of the County's sexually oriented business ordinances. In other words, if Plaza successfully challenges the constitutionality of the ordinances, it would no longer be restrained from operating a sexually oriented business on the property and the trial court's entry of summary judgment would be improper.

[6] **[7]** **[8]** Plaza argues that ordinances 2005–10 and 2005–11 unconstitutionally burden speech that is protected by the First Amendment to the United States ***888** Constitution. When the constitutionality of a county ordinance is challenged, the enactment stands before us "clothed with a presumption of constitutionality until clearly overcome by a contrary showing." *Dvorak v. City of Bloomington,* 796 N.E.2d 236, 237–38 (Ind.2003). The party challenging the constitutionality bears the burden of proof and all doubts are resolved against that party. *Id.* at 238. However, we review de novo the question of whether a municipal ordinance violates the United State Constitution. *Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 995 (7th Cir.2002).

A. Legal Framework

The Seventh Circuit Court of Appeals has summarized the current state of the law pertaining to sexually oriented business regulations:

> In *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Supreme Court applied a three-step analysis in reviewing the First Amendment validity of a municipal zoning ordinance that regulated adult movie theaters. The *Renton* analysis instructs courts reviewing regulations of adult entertainment establishments to consider: (1) whether the regulation constitutes an invalid total ban or merely a time, place, and manner regulation, (2) whether the regulation is content-based or content-neutral, and accordingly, whether strict or intermediate scrutiny is to be applied, and (3) if content-neutral, whether the regulation is designed to serve a substantial government interest and allows for reasonable alternative channels of communication.
>
> In upholding a ban on multiple-use adult establishments, the plurality opinion in *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), adhered to the *Renton* framework. However, in his concurrence, Justice Kennedy joined the four dissenters, *id.* at 455–56, 122 S.Ct. 1728, in eschewing the content-neutral "fiction" of adult entertainment zoning ordinances. *Id.* at 448, 122 S.Ct. 1728 ("These ordinances are content based and we should call them so."). Generally, content based restrictions on speech are analyzed with the strictest scrutiny, but Justice Kennedy explained that content based zoning regulations can be exceptions to that rule. In so concluding, he agreed with the plurality that "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728. Whatever the label, *Renton's* second step is best conceived as an inquiry into the purpose behind an ordinance rather than an evaluation of an ordinance's form. *See Alameda Books,* 535 U.S. at 440–41, 122 S.Ct. 1728 (plurality opinion) (explaining *Renton's* second step "requires courts to verify that the *predominant concerns motivating* the ordinance were with the secondary effects of adult [speech]") (emphasis added). As we noted in *Ben's Bar [v. Village of Somerset,* 316 F.3d 702, 721 n. 26 (7th Cir.2003)], "while the label has changed, the substance of *Renton's* second step remains the same."
>
> Accordingly, only after confirming that a zoning ordinance's purpose is to combat the secondary effects of speech do we employ *Renton's* intermediate scrutiny test. Under this test, zoning regulations are constitutional "so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *Renton,* 475 U.S. at 47, 106 S.Ct. 925. At this stage, courts are ***889** "required to ask 'whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.' " *Ben's Bar,* 316 F.3d at 724 (quoting *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728). In other words, simply stating that an ordinance is designed to combat secondary effects is insufficient to survive intermediate scrutiny. The governmental interest of regulating secondary effects may only be upheld as substantial if a connection can be made between the negative effects and the regulated speech. In evaluating the sufficiency of this connection, courts must "examine evidence concerning regulated speech and secondary

effects." *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728. According to the *Alameda Books* plurality, the evidentiary requirement is met if the evidence upon which the municipality enacted the regulation "is reasonably believed to be relevant for demonstrating a connection between [secondary effects producing] speech and a substantial, independent government interest." 535 U.S. at 438, 122 S.Ct. 1728.

* * *

In sum, *Alameda's* plurality opinion along with Justice Kennedy's concurrence establish that in order to justify a content-based time, place, and manner restriction, a municipality must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, (i.e., is designed to serve or furthers a substantial or important government interest), while leaving the quantity and accessibility of speech substantially intact (i.e., the regulation is narrowly tailored and does not unreasonably limit alternative avenues of communication). *Ben's Bar,* 316 F.3d at 725.
R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402, 407–09 (7th Cir.2004) (various citations omitted) (emphasis in original).

B. Substantial Government Interest

Plaza first argues that the County did not meet its burden of establishing that it enacted the sexually oriented business ordinances to further a substantial government interest. Specifically, Plaza attacks the evidence the County cited to support adopting the ordinances and argues that the evidence does not fairly support the County's purported rationale for the ordinances.

[9] The United States Supreme Court has held that a municipality can rely on "any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728 (quoting *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925). However, the Supreme Court emphasized that

> *[t]his is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.* If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

***890** *Alameda Books,* 535 U.S. at 438–439, 122 S.Ct. 1728 (emphasis added). Furthermore, the First Amendment "does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to the relevant to the problem that the city addresses." *Andy's Rest. & Lounge, Inc. v. City of Gary,* 466 F.3d 550, 555 (7th Cir.2006) (citing *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925). And the Supreme Court has "consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required." *Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring).

[10] Section 1(a) of ordinance 2005–11 provides that the purpose of the ordinance is "to promote the health, safety, moral, and general welfare of the citizens of the County." Appellants' App. p. 149. As support, section 1(b) cites twenty-six court decisions and twenty case studies concerning the adverse secondary effects that occur in and around sexually oriented businesses. *Id.* at 150. Based on these cases and studies, the County Board of Commissioners found that

> (1) Sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effect including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency....
>
> (2) Sexually oriented businesses should be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other sexually oriented business, to minimize the secondary effects associated with such uses and prevent an unnecessary concentration of sexually oriented businesses in one area.

> (3) Each of the foregoing negative secondary effects constitutes a harm which the County has a substantial government interest in preventing and/or abating. This substantial government interest in preventing secondary effects, which is the County's rationale for this ordinance, exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses. Additionally, the County's interest in regulating sexually oriented businesses extends to preventing future secondary effects of either current or future sexually oriented businesses that may locate in the County. The County finds that the cases and documentation relied on in this ordinance are reasonably believed to be relevant to said secondary effects.

Appellants' App. p. 151.

Plaza argues that "the studies supposedly relied upon by the County all analyzed the effects of such businesses in residential communities and near other businesses, and which were located in large metropolitan areas." Appellants' Br. p. 22. Plaza contends that the rural location of its property distinguishes it from the cited reports. As Plaza's attorney argued at the summary judgment hearing,

> If you go out there and you take a look, there's nothing there. It's off the highway. There's a single residence. Nobody has ever put forth any evidence anywhere in any of the material that that particular person was complaining about it. To say that it would have secondary effects, an increase in crime, it would be a blight, it would deplete the property values and all that, that's all farmland around there. *There's nothing there at all for any of these studies.*

Tr. p. 37 (emphasis added).

When challenging the constitutionality of sexually oriented business ordinances, ***891** litigants have relied on the rural/urban evidence distinction with varied success. In *LLEH, Inc. v. Wichita County,* the Fifth Circuit Court of Appeals reversed a trial court's holding that a local ordinance was unconstitutional because the county only relied on studies addressing the secondary effects of adult businesses in urban areas. 289 F.3d 358, 366–67 (5th Cir.2002). Although Wichita County was located in an unincorporated, rural area with few residential dwellings, the *LLEH* court held that

> [t]he secondary effects that urban areas have experienced (well documented in the relied-upon studies) are precisely what the County is attempting to avoid.... By [enacting the regulations], the County may, in its continued growth and development, successfully sidestep many of the problems encountered by urban areas. In this respect, the relied-upon studies are "reasonably believed to be relevant" to the problems the County seeks to address.

Id. at 367 (emphases omitted).

Recently, in *Abilene Retail No. 30 v. Board of Commissioners of Dickinson County*, the Tenth Circuit Court of Appeals reversed a district court's decision granting summary judgment in favor of a county based on the rural county's reliance on studies from urban areas. 492 F.3d 1164, 1175–76 (10th Cir.2007). The *Abilene Retail* court held that

> [a]ll of the studies relied upon by the Board examine the secondary effects of sexually oriented businesses located in urban environments; none examine businesses situated in an entirely rural area. To hold that legislators may reasonably rely on those studies to regulate a single adult bookstore, located on a highway pullout far from any business or residential area within the County, would be to abdicate our independent judgment entirely. Such a holding would require complete deference to a local government's reliance on prepackaged secondary effects studies from other jurisdictions

> to regulate any single sexually oriented business, of any type, located in any setting. Our review is deferential, but the evidentiary basis for the [ordinance] must establish some minimal connection to the secondary effects attendant to Dickinson County's existing sexually oriented business(es). Based on the record before us, we conclude that a material dispute of fact exists as to whether the Board has established such a connection.

Id. at 1175–76 (footnotes omitted).

Although not addressing the urban/rural evidence distinction, the Seventh Circuit Court of Appeals has provided insight into the amount of evidence a city must cite to support its substantial government interest. In *R.V.S.,* the Seventh Circuit Court of Appeals noted that the City of Rockford "does not identify *any* studies, judicial opinions, or experience-based testimony that it considered in adopting the Ordinance." 361 F.3d at 411 (emphasis added). In fact, the court noted that Rockford

> produced little evidence of harmful secondary effects connected to Exotic Dancing Nightclubs beyond the assumption that such effects exist. While it is true that common experience may be relied upon to bolster a claim that a regulation serves a current governmental interest, the experience in this case falls short of satisfying the minimal evidentiary showing of *Alameda Books.* Indeed, while courts may credit a municipality's experience, such consideration cannot amount to an acceptance of an "if they say so" standard.

Id. While the *R.V.S.* court acknowledged that "courts should not be in the business of second-guessing-fact-bound empirical ***892** assessments of city planners," it concluded that Rockford had not satisfied the *Alameda Books* requirement that municipalities rely upon evidence reasonably believed to be relevant when enacting sexually oriented business ordinances. *Id.* at 412.

While Plaza urges us to follow the *Abilene Retail* court's rationale, as the *R.V.S.* court cautioned, we should not be in the business of second-guessing the empirical assessment of municipalities enacting sexually oriented business ordinances. Instead, if the municipality's evidence fairly supports the municipality's rationale for its ordinance and the adult business fails to cast direct doubt on that rationale, the municipality has met the standard set forth in *Renton. Alameda Books,* 535 U.S. at 438–39, 122 S.Ct. 1728.

As the County notes in its brief, Plaza "has not furnished any evidence to dispute the County's factual findings about the secondary effects, and [Plaza] has not demonstrated in any way that the legislative record does not support the County's rationale." Appellees' Br. p. 32. Instead of citing probative evidence supporting its argument that the County's record is insufficient, Plaza merely directs us to the conclusory statement made at the summary judgment hearing that "there's nothing there" around the property and "[t]here's nothing there at all for any of these studies." Tr. p. 37. However, if we allow Plaza's bare assertion that the County's evidence is not reasonably believed to be relevant because of geographical distinctions between Spencer County and the cited evidence, we would, in effect, be adopting an "if they say so" standard for adult businesses making this kind of challenge. This could not have been what the Supreme Court intended when it provided that plaintiffs must cast "*direct doubt* " on the municipality's purported rationale "either by *demonstrating* that the municipality's evidence does not support its rationale or by *furnishing evidence* that disputes the municipality's factual findings" in order to trigger the burden to "shift[ ] back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Alameda Books,* 535 U.S. at 438–39, 122 S.Ct. 1728 (emphases added).

Based on this reasoning, we find that Plaza has failed to cast direct doubt on the County's rationale and, therefore, the burden does not shift to the County to supplement the record with evidence renewing support for its substantial government interest. Because the evidence the County relied upon is reasonably believed to be relevant to the secondary effects it sought to address with the sexually oriented business ordinances, Plaza's challenge fails on these grounds.

C. Breadth of Ordinances

Plaza next argues that the County was not entitled to summary judgment because the sexually oriented business zoning ordinances are not narrowly tailored. Specifically, Plaza argues that the trial court erroneously rejected the Southern District of Indiana's reasoning in *New Albany DVD, LLC v. City of New Albany,* 362 F.Supp.2d 1015, 1022 (S.D.Ind.2005) (*New Albany II*), appeal pending, and upheld the constitutionality of the ordinance banning sexually oriented businesses from operating within 1,000 feet of a residence "without any real analysis." Appellants' Br. p. 24.

[11] [12] [13] A time, place, and manner restriction that indirectly affects speech must be narrowly tailored and leave ample alternative channels for communication. *Ben's Bar,* 316 F.3d at 725. "[T]he First Amendment requires only that [municipalities] refrain from effectively denying [sexually oriented businesses] a reasonable opportunity to open and operate ... within ***893** the city." *Renton,* 475 U.S. at 54, 106 S.Ct. 925. The requirement of narrow tailoring is satisfied

> so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.... So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.

Ward v. Rock Against Racism, 491 U.S. 781, 799–800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *see also Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 1002 (7th Cir.2002) (holding that narrow tailoring does not require the restrictions to be the least restrictive means of serving the municipality's content-neutral interests).

Before addressing *New Albany II,* we note that County Administrator Cail attested that she has

> identified at least 34 sites in the B1, B2, I1, and I2 zoning districts which are more than 1,000 feet from any parcel occupied by a sexually oriented business or by a business licensed [ ] to sell alcohol at the premises, and which are more than 1,000 feet from any parcel occupied by any church, public or private elementary or secondary school, daycare center or preschool, public park, or any residence.

Appellees' App. p. 96. Therefore, while Plaza's current location violates the County's ordinances because it is within 1,000 feet of a residence, there are at least thirty-four other sites in Spencer County where Plaza could lawfully operate a sexually oriented business. Plaza does not challenge this evidence.

Plaza argues that the trial court erroneously rejected the reasoning in *New Albany II.* In that decision, the Southern District of Indiana held that "[t]he 'narrowly tailored' test is an effort to ensure that, given a genuine nexus between the purpose of an Ordinance that regulates First Amendment speech and the Ordinance itself, the law not be broader than necessary to achieve the City's goal." 362 F.Supp.2d at 1022. Plaza directs us to the court's holding that

> ostensibly to prevent criminal activity in neighborhoods, the Ordinance broadly restricts adult businesses from locating near dwellings, but not specifically *occupied* dwellings, which would clearly be a more narrowly tailored restriction. Further, rather than impose a wholesale ban on adult bookstores located near houses of worship, the Ordinance would better satisfy the "narrowly tailored" requirement if it were to restrict the bookstores' hours of operation to exclude Sundays or such other times when the nearby religious establishments are frequented by worshipers.

> We reference these more narrowly tailored restrictions for the reason that if the city is concerned with limiting criminal activity as an adverse secondary effect of adult businesses, and chooses to deal with the problem through zoning restrictions, then it must draw those regulations sufficiently narrowly to address the feared harm but without burdening unduly the protected activity. As it currently stands, these restrictions apply to the only existing adult bookstore in New Albany, which obviously ***894** means that the constitutionally protected speech will be substantially burdened since there are no alternative channels for the sale and rental of adult materials by an avowedly adult entertainment business.

Id. at 1022–23 (emphasis in original).

Plaza analogizes the facts at issue herein to the statutes construed in *New Albany II.* Specifically, Plaza notes that it is the only sexually oriented business seeking to operate in Spencer County and that the County's sexually oriented business ordinances also do not limit the 1,000–foot restriction to occupied dwellings. Therefore, Plaza argues that we should follow the *New Albany II* court's reasoning and deem the challenged statutes unconstitutional.

[14] As a preliminary matter, we note that while federal district court decisions may be persuasive, they are not binding authority on state courts. *Reuille v. E.E. Brandenberger Constr., Inc.,* 873 N.E.2d 116, 120 n. 1 (Ind.Ct.App.2007).[10] Therefore, the trial court was not bound to apply the *New Albany II* holding to the facts of this case. Furthermore, the *New Albany II* court was addressing an adult business's motion for preliminary injunction; therefore, the district court was evaluating the *likelihood* that the plaintiff's constitutional claim would succeed on the merits. The court did not actually determine the constitutionality of the challenged ordinances.

10 In fact, the only federal court decisions that bind state courts are those of the United States Supreme Court. *Doe v. Pryor,* 344 F.3d 1282, 1286 (11th Cir.2003).

Turning to the merits of the *New Albany II* decision, the district court based its holding on alternative ordinance constructions that it found "would clearly be [ ] more narrowly tailored." 362 F.Supp.2d at 1022. While it will almost always be possible to imagine a more narrowly tailored ordinance when assessing a constitutional challenge, the Supreme Court has held that such an analysis is not appropriate. Instead, as noted above, the Supreme Court has provided that "the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward,* 491 U.S. at 800, 109 S.Ct. 2746. So long as the means chosen "are *not substantially broader* than necessary to achieve the government's interest," the regulation is valid. *Id.* (emphasis added). As the Seventh Circuit Court of Appeals noted, "*Ward* thus expressly rejected the argument that the government must choose the 'least restrictive means' or the 'least restrictive alternative' in order to meet the definition of narrowly tailored." *Matney v. County of Kenosha,* 86 F.3d 692, 696 (7th Cir.1996).

The Supreme Court's holding in *Ward* compels us to shift our focus away from whether a less restrictive ordinance can be construed and, instead, concentrate on whether or not the chosen means are substantially broader than necessary to achieve the government's interest. Therefore, we cannot conclude that it was error for the trial court to reject the reasoning of the *New Albany II* court.

[15] Plaza specifically attacks the 1,000–foot restriction contained in the County's ordinances because Plaza is prohibited from operating a sexually oriented business on the property, as it is located within 1,000 feet of a residence. However, similar restrictions have been deemed constitutional. *See, e.g., Renton,* 475 U.S. at 52–56, 106 S.Ct. 925 (upholding the constitutionality of city's zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential ***895** zone, church, park, or school); *Ill. One News, Inc. v. City of Marshall,* 477 F.3d 461, 464 (7th Cir.2007) (upholding the constitutionality of a small city's 1,000–foot–restriction, which limited adult businesses to approximately four percent of the city's land).

Furthermore, Plaza has repeatedly emphasized the rural nature of Spencer County. Because of its rural setting, two buildings in Spencer County that are located within 1,000 feet of each other would be considered to be in extremely close proximity to one another. Moreover, as noted above, there are at least thirty-four alternative sites in Spencer County on which Plaza could operate a sexually oriented business and comply with the 1,000–foot restriction.

Appellees' App. p. 96. Therefore, in light of the number of alternative avenues of communication available to Plaza in Spencer County, we find the ordinances' 1,000–foot restriction to be constitutional.

D. Conclusion

In sum, the County's sexually oriented business ordinances are designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication. Plaza has failed to cast direct doubt on the County's rationale for the ordinances, and the evidence relied upon by the County is reasonably believed to be relevant to the secondary effects the County seeks to address. The evidence shows that there are at least thirty-four alternative sites in the Spencer County on which Plaza could operate a sexually oriented business and comply with the 1,000–foot restriction. Therefore, because the ordinances are designed to serve a substantial government interest while allowing for reasonable alternative avenues of communication, the dictates of the First Amendment are satisfied and Plaza's challenge fails. [11] Consequently, the trial court properly granted summary judgment in favor of the County.

[11] County ordinances 2005–10 and –11 are lengthy regulations comprising twenty-six pages of the record. Appellants' App. p. 143–69. We emphasize that we have only analyzed the portions of the ordinances that Plaza has specifically challenged and our holding regarding the ordinances' constitutionality does not apply to the portions of the ordinances not specifically addressed herein.

V. Permanent Injunction

Although the appellants' case summary lists the trial court's permanent injunction as an "anticipated issue on appeal," neither party specifically addresses that issue. However, the gravamen of Plaza's argument is that it should be allowed to operate a sexually oriented business on the property. Thus, contained within its argument is the presumption that the trial court erred by granting the County injunctive relief. Therefore, we will briefly address the propriety of the trial court's entry of injunctive relief.

[16] **[17]** The granting or denying of an injunction is within the discretion of the trial court, and our review is limited to the determination of whether or not the trial court clearly abused that discretion. *Stuller v. Daniels,* 869 N.E.2d 1199, 1208 (Ind.Ct.App.2007). A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances or if it misinterprets the law. *Id.* The difference between a preliminary and permanent injunction is procedural: a preliminary injunction is issued while an action in pending, whereas a permanent injunction is issued upon a final determination. *City of Gary v. Enter. Trucking & Waste Hauling,* 846 N.E.2d 234, 242 (Ind.Ct.App.2006).

***896** **[18]** **[19]** **[20]** Generally, the trial court considers four factors when determining whether to grant injunctive relief:

> (1) whether plaintiff's remedies at law are inadequate; (2) whether the plaintiff can demonstrate a reasonable likelihood of success on the merits; (3) whether the threatened injury to the plaintiff outweighs the threatened harm a grant of relief would occasion upon the defendant; and (4) whether the public interest would be disserved by granting relief.

Ferrell v. Dunescape Beach Club Condos., 751 N.E.2d 702, 712 (Ind.Ct.App.2001). The party seeking the injunction carries the burden of demonstrating an irreparable injury; however, when the acts sought to be enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of the hardships in his favor. *Id.* Permanent injunctions are limited to prohibiting injurious interference with rights and must be narrowly tailored so that its scope is not more extensive than is reasonably necessary to protect the interests of the party in whose favor it is granted. *Id.*

[21] **[22]** In seeking an injunction for a zoning violation, the moving party must prove the existence of a valid ordinance and a violation of that ordinance. *Saurer v. Bd. of Zoning Appeals,* 629 N.E.2d 893, 896 (Ind.Ct.App.1994). We have already upheld the constitutionality of the challenged portions of the County's sexually oriented business ordinances. And Plaza violates the ordinances by operating a sexually oriented business on the property in violation of the 1,000–foot restriction. Thus, the County has proven the existence

of a valid zoning ordinance and Plaza's violation thereof. We conclude that this evidence is sufficient to sustain the injunction on appeal, given our discretionary review of the trial court's entry of injunctive relief. *See Dierckman v. Area Planning Comm'n of Franklin County,* 752 N.E.2d 99, 104–05 (Ind.Ct.App.2001) (holding that the trial court's issuance of an injunction was not an abuse of discretion because the defendants violated a zoning ordinance).

As previously noted, the trial court issued an order on June 18, 2007, emphasizing that while the permanent injunction enjoins Plaza from unlawfully operating a sexually oriented business on the property, Plaza is free to operate a commercial establishment that complies with the County's ordinances. We find the injunction to be narrowly tailored and conclude that the trial court's entry of injunctive relief in favor of the County was not an abuse of discretion.

The judgment of the trial court is affirmed.

MAY, J., and CRONE, J., concur.

All Citations

877 N.E.2d 877

596 F.3d 1265
United States Court of Appeals,
Eleventh Circuit.

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, a Georgia corporation d.b.a. Mardi Gras, 6420 Roswell Rd., Inc., a Georgia corporation d.b.a. Flashers, et al., Plaintiffs–Appellees–Cross Appellants,
v.
FULTON COUNTY, GA., Defendant–Appellant–Cross Appellee.

No. 08–17035.
|
Feb. 16, 2010.

Synopsis

Background: Strip club owners sued county under § 1983, challenging constitutionality of ordinance prohibiting sale, possession, and consumption of alcohol in adult entertainment establishments. The United States District Court for the Northern District of Georgia, No. 01-03109-CV-RLV-1, Robert L. Vining, Jr., J., 2006 WL 2927532, entered summary judgment for owners. County appealed.

[Holding:] The Court of Appeals, Marcus, Circuit Judge, held that ordinance furthered government interest.

Reversed and remanded.

West Headnotes (22)

[1] Federal Courts
Constitutional rights, civil rights, and discrimination in general

The Court of Appeals' constitutional responsibility to conduct an independent review of constitutional claims when necessary in a free speech case cannot be delegated to the trier of fact. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] Federal Courts
Constitutional rights, civil rights, and discrimination in general

Federal Courts
"Clearly erroneous" standard of review in general

Ordinarily, the Court of Appeals reviews district court factfindings only for clear error, but First Amendment issues are not ordinary, and where the Free Speech Clause is involved its review of the district court's findings of constitutional facts, as distinguished from ordinary historical facts, is *de novo*. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[3] Federal Courts
Constitutional rights, civil rights, and discrimination in general

Federal Courts
Presumptions

Federal Courts
"Clearly erroneous" standard of review in general

"Historical facts" are facts about the who, what, where, when, and how of the controversy, and the Court of Appeals reviews them for clear error, but, by contrast, under the assumptions about the law that the Court of Appeals makes for purposes of deciding a free speech case, it must determine the "why facts" itself; those are the core constitutional facts that involve the reasons the government body took the challenged action. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] Federal Courts
Constitutional questions in general

In a free speech case, the Court of Appeals finds the core constitutional facts, i.e., the "why" facts, as though the district court

had never made any findings about them. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[5] **Constitutional Law**
Nude dancing in general

Nude dancing is a form of expression protected by the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] **Constitutional Law**
Nude dancing in general

To determine what level of scrutiny applies to a challenge to an ordinance regulating nude dancing, the Court of Appeals must decide whether the state's regulation is related to the suppression of expression; if the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy intermediate scrutiny. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[7] **Constitutional Law**
Nude or semi-nude dancing

A city ordinance prohibiting nude dancing in establishments licensed to sell liquor is content-neutral and therefore subject to intermediate scrutiny. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[8] **Constitutional Law**
Prohibition against intoxicating liquors in adult establishments

County ordinance prohibiting sale, possession, and consumption of alcohol in adult entertainment establishments was subject to intermediate review in free speech action, since it was content neutral and its enactment was unrelated to suppression of speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Exercise of police power;relationship to governmental interest or public welfare

Under intermediate review, an ordinance subject to a free speech challenge is valid if: (1) it serves a substantial interest within the power of the government; (2) the ordinance furthers that interest; (3) the interest served is unrelated to the suppression of free expression; and (4) there is no less restrictive alternative. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[10] **Constitutional Law**
Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors
Licensing and regulation

County ordinance prohibiting sale, possession, and consumption of alcohol in adult entertainment establishments served substantial interest within power of government, as required for ordinance to withstand free speech challenge by strip club owners under intermediate scrutiny, where it was passed out of concern over secondary effects of alcohol and live nude dancing on community, specifically increased criminal activity, decreased property values, and urban blight and decay generally. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[11] **Constitutional Law**
Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors
Licensing and regulation

County ordinance prohibiting sale, possession, and consumption of alcohol in adult entertainment establishments served interest unrelated to suppression of free expression, as required for ordinance to

withstand free speech challenge by strip club owners under intermediate scrutiny, in that it focused on secondary effects associated with both alcohol and live nude dancing, and board of commissioners said that it was not its intent deny free speech. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[12] Constitutional Law
Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors
Licensing and regulation

County ordinance prohibiting sale, possession, and consumption of alcohol in adult entertainment establishments was least restrictive alternative, as required for ordinance to withstand free speech challenge by strip club owners under intermediate scrutiny, in that it did not prohibit all nude dancing, but only restricted nude dancing in those locations where unwanted secondary effects arose. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[13] Constitutional Law
Prohibition against intoxicating liquors in adult establishments

For an ordinance prohibiting alcohol in adult entertainment establishments to further a governmental interest, as required for the ordinance to withstand a free speech challenge under intermediate scrutiny, a municipality must have some factual basis for the claim that adult entertainment in establishments serving alcoholic beverages results in increased criminal activity and other undesirable community conditions. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[14] Constitutional Law
Prohibition against intoxicating liquors in adult establishments

For an ordinance prohibiting alcohol in adult entertainment establishments to further a governmental interest, as required for the ordinance to withstand a free speech challenge under intermediate scrutiny, the government must show that the municipality's articulated concern had more than merely speculative factual grounds, and that it was actually a motivating factor in the passage of the legislation. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[15] Constitutional Law
Prohibition against intoxicating liquors in adult establishments

For an ordinance prohibiting alcohol in adult entertainment establishments to further a governmental interest, as required for the ordinance to withstand a free speech challenge under intermediate scrutiny, a city need not conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[16] Constitutional Law
Prohibition against intoxicating liquors in adult establishments

Although a municipality must rely on at least some pre-enactment evidence in order for an ordinance prohibiting alcohol in adult entertainment establishments to further a governmental interest, as required for the ordinance to withstand a free speech challenge under intermediate scrutiny, such evidence can consist of a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[17] Constitutional Law

Prohibition against intoxicating liquors in adult establishments

For purposes of determining whether an ordinance prohibiting alcohol in adult entertainment establishments furthers a governmental interest, as required for the ordinance to withstand a free speech challenge under intermediate scrutiny, governments are empowered to rely on their own wisdom and common sense, and common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[18] Constitutional Law

Prohibition against intoxicating liquors in adult establishments

While a governmental entity need not support its regulations with voluminous data in order for an ordinance prohibiting alcohol in adult entertainment establishments to further a governmental interest, as required for the ordinance to withstand a free speech challenge under intermediate scrutiny, the entity may not rely on shoddy data or reasoning, and its evidence must fairly support its rationale; nevertheless, anecdotal evidence is not shoddy per se. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[19] Constitutional Law

Prohibition against intoxicating liquors in adult establishments

To establish that secondary effects pose a threat, such that an ordinance prohibiting alcohol in adult entertainment establishments furthers a governmental interest, as required for the ordinance to withstand a free speech challenge under intermediate scrutiny, a city need not conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses; however, if the entity does perform empirical studies, it cannot later ignore the results. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[20] Constitutional Law

Prohibition against intoxicating liquors in adult establishments

Ultimately, the test for whether an ordinance prohibiting alcohol in adult entertainment establishments furthers a governmental interest, as required for the ordinance to withstand a free speech challenge under intermediate scrutiny, hinges on the reasonableness of the government regulation in light of the available evidence. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[21] Constitutional Law

Prohibition against intoxicating liquors in adult establishments

The test for whether an ordinance prohibiting alcohol in adult entertainment establishments furthers a governmental interest, as required for the ordinance to withstand a free speech challenge under intermediate scrutiny, requires deference to the reasoned judgment of a governmental entity; a city must have latitude to experiment, at least at the outset, and very little evidence is required. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[22] Constitutional Law

Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors

Licensing and regulation

County ordinance prohibiting sale, possession, and consumption of alcohol in adult entertainment establishments furthered government interest, as required for ordinance to withstand free speech challenge by strip club owners under intermediate scrutiny, notwithstanding report indicating that crime

was greater problem at county bars without nude dancing, where county relied on voluminous evidence, including report recounting crime occurring around county's strip clubs and describing impact of clubs on county's youth, studies detailing effects of strip clubs in 30 other jurisdictions, and testimony of chief of police and chief judge of juvenile court. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

Attorneys and Law Firms

***1268** Vincent D. Hyman, Kaye Woodard Burwell, Steven E. Rosenberg, William Shannon Sams, Atlanta, GA, for Plaintiffs–Appellees–Cross Appellants.

Cary Stephen Wiggins, Irma I. Espino, Cook, Youngelson & Wiggins, Atlanta, GA, James N. Cline, Toswell, GA, for Plaintiffs–Appellees–Cross Appellants.

Appeals from the United States District Court for the Northern District of Georgia.

Before BLACK, MARCUS and HIGGINBOTHAM, * Circuit Judges.

* Honorable Patrick E. Higginbotham, United States Circuit Judge for the Fifth Circuit, sitting by designation.

Opinion

MARCUS, Circuit Judge:

Defendant Fulton County, Georgia, concerned about the secondary effects on its communities of the mixture of alcohol and live nude dancing, passed an ordinance in ***1269** 2001 prohibiting the sale, possession, and consumption of alcohol in adult entertainment establishments. Plaintiffs Flanigan's Enterprises, Inc., owner and operator of the Mardi Gras strip club, and other owners and operators of strip clubs in Fulton County brought this First Amendment challenge to the ordinance, arguing that the ordinance infringed on their right to free speech. The district court, concluding that the ordinance failed to further an important governmental interest, granted summary judgment and awarded damages to Flanigan's. The County now appeals the judgment and Flanigan's cross-appeals on several issues not reached by the district court.

This is the second time that we have been asked to consider a First Amendment challenge to a Fulton County ordinance proscribing the sale of alcohol at adult clubs. The County had passed a similar ordinance in 1997, but this Court struck it down, reasoning that the County had ignored the most relevant evidence in enacting the regulation. *See Flanigan's Enters., Inc. of Ga. v. Fulton County, Ga.,* 242 F.3d 976, 986 (11th Cir.2001). This case is different. This time around, the County relied on ample statistical, surveillance, and anecdotal evidence, the live testimony of the chief of police and the chief judge of the juvenile court, among others, and dozens of foreign studies, all of which support the County's efforts to curb the negative secondary effects of alcohol and live nude dancing in its communities. We are satisfied that the County's reliance on this factual foundation was reasonable, and because we determine that the ordinance furthers an important governmental interest, we reverse.

I.

A.

The essential facts presented in this summary judgment record are these: the plaintiffs in this consolidated action—Flanigan's Enterprises, Inc. ("Flanigan's"); 6420 Roswell Road, Inc. ("Roswell"); Harry Freese; Fannies, Inc.; William H. Parks, Jr.; and Ceeda Enterprises, Inc. ("Ceeda") (collectively, "the clubs")—are owners and operators of strip clubs in Fulton County, Georgia. The clubs they operate include Mardi Gras, Flashers, Fannies, and Riley's Restaurant and Lounge ("Riley's"). These clubs sell and serve alcohol, and feature live nude dancing on the premises.

In 1997, Fulton County began to investigate the impact of strip clubs within its borders on crime and property values in the surrounding communities. The County board of commissioners directed the police department to study the issue, which the department did. The resulting police investigation, which considered two and a half years of statistical data, revealed no relationship between alcohol, nude dancing, and crime. In fact, the report suggested that crime was a greater problem in and around bars

which did not feature live nude dancing. In response to the County's investigation, the strip clubs commissioned a study of their own, which revealed that there was no relationship between the strip clubs and reduced property values in Fulton County.

The County's investigation continued. It, too, commissioned a study on property values in the area, which confirmed the finding of the clubs' study—that the clubs had no impact on the property values in the surrounding areas. The County also directed its staff to collect a number of studies on the impact of strip clubs in other American cities. These so-called foreign studies, which considered the impact of clubs in Austin, Indianapolis, Minneapolis, and Los Angeles, concluded that strip clubs were indeed a blight on the surrounding communities.

***1270** The County held two public meetings to review the results of its investigation. Despite the three local and recent studies indicating no relationship between the clubs, crime, or reduced property values, the County relied on the foreign studies indicating a correlation. As a result, on December 17, 1997, the board of commissioners passed an ordinance forbidding the service and consumption of alcohol in facilities featuring adult entertainment.

The strip clubs sued, and a panel of this Court determined that the ordinance violated the First Amendment of the U.S. Constitution. Relying on *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), the Court observed that the County was "not required to perform empirical studies," but, "having done so, the Board [could not] ignore the results." *Flanigan's Enters., Inc. of Ga. v. Fulton County, Ga.,* 242 F.3d 976, 986 (11th Cir.2001) (internal citation omitted).

After this Court struck down the first ordinance, the board commissioned two more studies. The first of these studies, called "Adult and Non–Adult Entertainment Establishments Statist[i]cal Analysis From 1/1/98 To 12/31/00," conducted by the Fulton County police department, and completed in March 2001 ("March 2001 report" or "Adult and Non–Adult Entertainment Establishments Statistical Analysis"), reviewed police data from January 1998 to December 2000. It found "that adult entertainment establishment[s which] served alcoholic beverages did not have a significant impact on the police department as it relates to an increase in calls for police service, nor an increase in crime as a secondary [e]ffect." Moreover, the March 2001 report concluded that bars without nude dancing had higher crime rates than those bars with nude dancing.

The second of the studies commissioned by the County was completed in July 2001 ("July 2001 report"), made a variety of findings, and reached a different result. Titled "Report on Fulton County Adult Entertainment Businesses," it described "Operation Summit Up," a fourteen-day sweep conducted by the Fulton County police department in September 1998. The sting operation, which focused on an industrial area in which the strip clubs Fannies, Riley's and Babes were located, resulted in 167 arrests and 166 convictions. Of the 221 total charges filed, ninety-three were for prostitution and other sex-related crimes, and thirty-four were for drug-related crimes.

The report featured photographic evidence chronicling the same industrial area, and stated that the area was marked by dilapidated buildings, streets in disrepair, and cheap hotels catering to prostitutes and johns. An affidavit from Patrick Stafford, executive director of the Fulton Industrial Business Association, further described the hotels, stating that "[t]hey rent locally, engage in cash transactions with customers, and rent hourly or for portions of days," and that their exteriors are characterized by "out-of-code parking lots, lack of lighting in parking lots, lack of security in parking lots, pandering and general unsafe conditions."

Notably, the July 2001 report contained an extensive discussion of South Fulton Precinct beats 21 and 23, and, in particular, a one square-mile of land within them called grid B43. Grid B43 contains three of the nude clubs, Fannies, Riley's, and Babes. The report stated that, from 1998 to 2000, beats 21 and 23 accounted for a disproportionately high amount of crime within the South Fulton Precinct, and that grid B43 contributed to more than its fair share of crime within those two beats. The report noted that beats 21 and 23 saw an increase in crime during the evening hours, even though most businesses in the area operated during standard business hours. The report also compared incident ***1271** data from six strip clubs, five of which served alcohol and one of which did not (but allowed customers to bring their own) ("the BYOB club"). It showed that, from 1998 to 2000, the

BYOB club accounted for only fifteen of the 362 reported incidents, or 4.1%.

The report described in great detail the results of surveillance operations conducted by the Fulton County police during May and June of 2001. The surveillance conducted at the adult clubs which served alcohol revealed a number of criminal violations and arrests. [1] The report states, however, that no violations were observed, and no arrests were made, at the BYOB club.

1 On two occasions, undercover officers videotaped dancers and patrons at the strip clubs, concluding that the "videotapes evidence gross violations of the ordinance governing such establishments as they graphically depict contact between dancers and patrons openly and, in some incidences, behind closed-in areas." An analysis of approximately two hours of tape revealed thirty-nine violations of law, which included fondling, caressing, tips other than hand to hand, and dancing someplace other than a fixed stage. *See* Fulton County, Ga., Code § 18–79(8–10) (2001) (prohibiting those activities). The tape also revealed violations of the Georgia criminal law against masturbation for hire. *See* O.C.G.A. § 16–6–16(a) ("A person, including a masseur or masseuse, commits the offense of masturbation for hire when he erotically stimulates the genital organs of another, whether resulting in orgasm or not, by manual or other bodily contact exclusive of sexual intercourse or by instrumental manipulation for money or the substantial equivalent thereof."); *see also id.* § 16–6–16(b) (defining masturbation for hire as a misdemeanor). Non-video surveillance revealed the same unlawful behavior and described a number of arrests. One passage reads this way:

> At *Flasher's* two undercover officers observed a dancer dancing for a customer. After getting entirely naked, she pushed her breasts together and rotated them, making contact with the customer's face. This dancer then turned around, squatted and rotated her body into the customer's groin area. The customer later passed an undetermined amount of money to the dancer. A second dancer at Flasher's was observed by the officers committing the same acts with another customer—pushing her breasts into the customer's face, grinding into his groin area then receiving money. *Both of these dancers were arrested and charged with masturbation for hire* ....
>
> The underlying documentation recounted a number of similar scenes.

The report also presented what it described as anecdotal evidence. An affidavit from the Honorable Nina R. Hickson, presiding judge for the Juvenile Court of Fulton County, described how some of the girls who had appeared before her in her two years as presiding judge had worked in the adult clubs and had performed sexual acts in their parking lots. Some of these girls got work at private parties, where they performed sexual acts. Judge Hickson also reported her "belief that adult entertainment clubs are a burden on the juvenile justice system." The July 2001 report also contained excerpts from a number of newspaper articles from 1998 to 2001 describing the strip clubs and their negative impact on the community. The articles discuss the clubs, crime, child prostitution, and the prosecution at the Gold Club, an area club of ill repute now closed.

Appended to the July 2001 report were a number of foreign studies, which considered data from and the experiences of a variety of American cities. In particular, the July 2001 report included a summary produced by the National Law Center for Children and Families ("NLC") of studies of the negative secondary effects of sexually oriented businesses across America. [2] ***1272** The studies tended to show that sexually-oriented businesses, including strip clubs and adult book stores, had harmful secondary effects on their surrounding communities. Specifically, the foreign studies documented increased crime rates and reduced property values in the neighborhoods near strip clubs. In fact, of the twenty-eight studies discussed in the NLC report—studies that had not been presented to this Court when we reviewed the County's earlier ordinance in *Flanigan's Enterprises, Inc. of Georgia v. Fulton County, Georgia,* 242 F.3d 976 (11th Cir.2001)—thirteen of them suggested that there was a correlation between adult clubs and depressed property values. [3]

2 The jurisdictions studied were: (1) Phoenix, Ariz., (2) Tuscon, Ariz., (3) Garden Grove, Cal., (4) Los Angeles, Cal., (5) Whittier, Cal., (6) Adams County, Colo., (7) Manatee County, Fla., (8) Indianapolis, Ind., (9) Minneapolis, Minn., (10) St. Paul, Minn., (11) Las Vegas, Nev., (12) Ellicottville, N.Y., (13) Islip, N.Y., (14) New York, N.Y., (15) Times Square, N.Y., (16) New Hanover County, N.C., (17) Cleveland, Ohio, (18) Oklahoma City, Okla.,

(19) Oklahoma City, Okla. (a second study), (20) Amarillo, Tex., (21) Austin, Tex., (22) Beaumont, Tex., (23) Cleburne, Tex., (24) Dallas, Tex., (25) El Paso, Tex., (26) Houston, Tex., (27) Houston, Tex. (a second study), (28) Newport News, Va., (29) Bellevue, Wash., (30) Des Moines, Wash., (31) Seattle, Wash., and (32) St. Croix County, Wis.

[3] The studies positing such a correlation were these: (1) Garden Grove, (2) Whittier, (3) St. Paul, (4) Las Vegas, (5) New York, (6) Times Square, (7) Oklahoma City, (8) Dallas, (9) El Paso, (10) Houston, (11) Newport News, (12) Des Moines, and (13) Seattle. Of these thirteen studies, six relied on some sort of statistical evidence (Whittier, St. Paul, Las Vegas, New York, Times Square, and El Paso), while the rest premised their findings on anecdotal evidence, for instance, telephone surveys of real estate appraisers or community residents (Garden Grove, Oklahoma City, Dallas, Newport News, and Des Moines), public complaints filed by local citizens (Seattle), or live testimony (Houston).

For instance, the NLC report summarized the results of a 1988 study of sexually oriented businesses in Adams County, Colo. It "concluded that there was a clearly demonstrated rise in crime and violence, and an increase in the attraction to transients to the area as a result of nude entertainment establishments." In particular, the Adams County crime statistics showed that, in one area featuring two adult establishments, 83% of all crimes occurring in 1987 were linked to the adult businesses, and half involved alcohol. In another area featuring five adult businesses, 65% of crimes committed in 1987 involved alcohol.

A 1979 study of sexually oriented businesses in Phoenix, Ariz., found that "the number of sex offenses was 506% greater in neighborhoods where sexually oriented businesses were located." These sex crimes included indecent exposure, rape, lewd and lascivious behavior, and child molestation. Property crimes and violent crimes were elevated as well (43% and 4%, respectively). A 1994 study conducted in New York "showed that concentration of [sexually oriented businesses] had resulted in significant negative impacts, including economic decline, decreased property values, and deterrence of customers, and significantly increased crime incidence." Likewise, the Newport News study, conducted in 1996, drew this conclusion: "When adjusted for population differences, the study area had 57% higher police calls and 40% higher crimes than the control area."

The July 2001 report also reproduced two foreign studies in their entirety, both of which had been summarized in the NLC report. The first of these studies considered Houston in 1997 and made a variety of findings. It stated that "lewd behavior [and] sexual contact" was occurring at adult entertainment establishments, but that much of the criminal activity was obscured by secluded areas, dim lighting, and private rooms. Moreover, the Houston police had difficulty investigating crime in ***1273** the clubs because the refusal of undercover vice officers to "engage in inappropriate behavior (such as removing their clothing)" led strip club employees to assume that they were dealing with the police, thereby curtailing any ongoing or pending criminal behavior.

The other complete foreign study considered Ellicottville, N.Y. Ellicottville did not have any adult businesses in 1998, but the town decided to take a "preemptive approach" to try to "maintain[ ] the character of the community as a family oriented recreation destination" and stave off the negative secondary effects associated with adult businesses. After surveying a variety of other jurisdictions,[4] the Ellicottville study concluded that the negative secondary effects of adult businesses "include[d] crime, decreased market values, public resentment, a general blighting of the commercial district and a negative influence upon community character." The report recommended adopting zoning amendments in order to keep the adult businesses out.

[4] The Ellicottville study considered foreign studies from (1) New York, N.Y., (2) Islip, N.Y., and (3) Hyde Park, N.Y.

On July 18, 2001, Fulton County held another public hearing at which it received the 337–page July 2001 report, and heard live testimony. George Coleman, the chief of police, testified, largely summarizing the criminal findings contained in the July 2001 report. He concluded: "Investigation conducted by the Fulton County Police Department ha[s] resulted in the documentation of various criminal activities occurring both inside and in the outer vicinity of the adult entertainment establishments located within unincorporated Fulton County." Judge Hickson likewise summarized material from the report, concluding, "we are seeing a number of our children involved in the illicit activities through the adult entertainment industry where there is alcohol served and that it does have a negative impact upon the juveniles that I'm seeing in my court on a regular basis." Patrick Stafford

testified about the impact of the clubs on the business district. He said of the strip clubs,

> They are not productive. They aren't helping us. The alcoholic beverages served in those establishments lead to secondary approaches to those folks going and doing criminal activity. Those folks moving on and doing things in hotels that accept lots of cash. Stop those predators. Help our image. Help the existing businesses. Help enhance the area of economic vitality. Help this County by passing this resolution.

The County then heard testimony from two County residents in support of the ordinance. Eva Galantos stated that she had "lived with an abomination of one of these clubs in the heart of Sandy Springs for more years than I care to recall," and Graddie Tucker said that the proposed ordinance was "a long time coming." Two lawyers from a pair of clubs (one of which is a plaintiff in this action) then spoke out against the ordinance.

The County, on August 15, 2001, passed a resolution to adopt the adult entertainment establishment ordinance at issue today. The resolution contained a number of findings. It stated "that nudity and sexual conduct and depiction thereof, coupled with alcohol in public places, encourages undesirable behavior and is not in the interest of public health, safety and welfare." Elaborating, the County found "that public nudity and depictions thereof, under certain circumstances, begets criminal behavior and tends to create undesirable community conditions such as community blight and property deterioration." ***1274** In support of this proposition, it cited the testimony received at the public hearing, the July 2001 report, the findings incorporated in a number of court cases, [5] and the "experience of other urban counties and municipalities." The board further found that, included

> among the undesirable community conditions identified with live nude entertainment are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, [and] an increased burden on the judicial system as a consequence of the criminal behavior.

The board adopted the ordinance, which provided, among other things, that "[n]o alcoholic beverages of any kind shall be sold, possessed or consumed on the premises of an adult entertainment establishment." Fulton County, Ga., Code § 18–79(17) (2001). [6]

[5] The cases cited were *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); and *Blue Canary Corp. v. City of Milwaukee,* 251 F.3d 1121 (7th Cir.2001).

[6] The ordinance defined "adult entertainment establishment" to

> mean[ ] the premises of any facility upon which an adult entertainment business or adult bookstore operates or upon which such defined activities occur. The definition of an adult entertainment establishment shall not apply to nor prohibit the live performance of legitimate plays, operas, ballets, or concerts at a concert house, museum, or educational institution or facility holding an alcoholic beverage license, which derives less than 20 percent of its gross receipts from the sale of alcoholic beverages.

Fulton County, Ga., Code § 18–78(3) (2001). It further stated that

> "Adult entertainment" means the permitting, performing, or engaging in live acts:
>
> a. Of touching, caressing, or fondling of the breasts, buttocks, anus, vulva, or genitals;
>
> b. Of displaying of any portion of the areola of the female breast or any portion of his or her pubic hair, cleft of the buttocks, anus, vulva, or genitals;
>
> c. Of displaying of pubic hair, anus, vulva, or genitals; or
>
> d. Which simulate sexual intercourse (homosexual or heterosexual), masturbation, sodomy, bestiality, oral copulation, or flagellation.

Id. § 18–78(2).

B.

On November 21, 2001, Flanigan's, Roswell, Freese, Fannies, and Parks sued the County and its commissioners in the Northern District of Georgia under 42 U.S.C. § 1983, seeking injunctive relief, a declaratory

judgment, damages, and fees. They asserted that this ordinance, like the earlier version, violated their rights under the First and Fourteenth Amendments of the U.S. Constitution. Ceeda sued the County as well, and the cases were consolidated in February of 2002.

The defendant commissioners moved for summary judgment, asserting absolute and qualified immunity. The court determined that the commissioners were entitled to absolute legislative immunity (without reaching the question of qualified immunity) and granted the motion. *See* Order at 4, *Flanigan's Enters., Inc., of Ga. v. Fulton County, Ga.,* No. 1:01–CV–3109–RLV (N.D.Ga. Dec. 3, 2002).

The defendant County also moved for summary judgment, and in an order on April 7, 2004, the district court denied the motion. Relying on *Flanigan's* and *O'Brien,* it held that the ordinance did not further an important governmental interest. *See* Order at 18, ***1275** *Flanigan's Enters., Inc., of Ga. v. Fulton County, Ga.,* No. 1:01–CV–3109–RLV (N.D.Ga. Apr. 7, 2004). Specifically, it found that the March 2001 report, which found no relationship between the clubs and crime, was "[t]he most probative evidence regarding the secondary effects of adult entertainment establishments." *Id.* at 15–16. The court noted, conversely, that the July 2001 report was filled with "extensive anecdotal evidence." *Id.* at 17. It therefore concluded "that it was unreasonable to ignore the most relevant local study in favor of a less comprehensive study and foreign studies." *Id.* at 17–18. Because the court denied the defense motion under *O'Brien,* it did "not address the plaintiffs' other arguments as to why the ordinance is unconstitutional." *Id.* at 18.

The district court also criticized the behavior of the County. It stated, "the court is somewhat skeptical of these self-serving investigations in which the police officers are no doubt aware of the defendant's desired result. It is unclear whether the police investigations on the two dates in May and June 2001 were conducted only after the March 2001 [study] failed to achieve the desired result." *Id.* at 17. It further chastised the County for its failure to disclose the March 2001 report: "The court is somewhat troubled by the fact that it appears that this report was withheld from the plaintiffs until less than one week prior to the date on which the vote on the ordinance was scheduled." *Id.* at 16.

The plaintiffs subsequently moved for summary judgment, and the district court, stating that it saw no reason to change its view of the case, granted the motion. *See* Order at 6–7, *Flanigan's Enters., Inc., of Ga. v. Fulton County, Ga.,* No. 1:01–CV–3109–RLV, 2006 WL 2927532 (N.D.Ga. Oct. 12, 2006). It again said that it would not address the plaintiff's other arguments as to why the ordinance was unconstitutional. *See id.* at 9–10. The court subsequently awarded damages to the clubs. Order at 2, *Flanigan's Enters., Inc., of Ga. v. Fulton County, Ga.,* No. 1:01–CV–3109–RLV (N.D.Ga. Nov. 13, 2008).

The County timely appealed and the clubs timely cross-appealed.

II.

"We review a district court's grant of summary judgment *de novo,* applying the same standards as the district court." *Flanigan's Enters., Inc. of Ga. v. Fulton County, Ga.,* 242 F.3d 976, 982 (11th Cir.2001) (emphasis added) (citing *Harris v. H&W Contracting Co.,* 102 F.3d 516, 518 (11th Cir.1996)). "We will affirm the district court if the record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citing *Fernandez v. Bankers Nat'l Life Ins. Co.,* 906 F.2d 559, 564 (11th Cir.1990)).

[1] This Court and the Supreme Court have "explained that 'the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection.' " *ACLU of Florida, Inc. v. Miami–Dade County Sch. Bd.,* 557 F.3d 1177, 1205 (11th Cir.2009) (quoting *Hurley v. Irish–Am. Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 567, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995)).

> Therefore, the conclusion of law as to a Federal right and [the] finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. In such cases, the Supreme Court has instructed us to make an independent examination of the whole record, and has recognized

> our ultimate power ... to conduct an independent review of constitutional claims when necessary.

***1276** *Id.* at 1206 (quotation marks and internal citations omitted) (alterations in original) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 506, 508 & n. 27, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)). This "constitutional responsibility ... cannot be delegated to the trier of fact." *Id.* (quoting *Bose,* 466 U.S. at 501, 104 S.Ct. 1949); *see also Flanigan's,* 242 F.3d at 986–87 ("[O]ur decision today appears to result in constitutional fact finding.... However, we have no choice.").

[2] Our review of the district court's factfinding is, accordingly, mixed. "Ordinarily, we review district court factfindings only for clear error, but First Amendment issues are not ordinary. Where the First Amendment Free Speech Clause is involved our review of the district court's findings of 'constitutional facts,' as distinguished from ordinary historical facts, is *de novo.*" *ACLU v. Miami–Dade,* 557 F.3d at 1203 (citing *CAMP Legal Def. Fund, Inc. v. City of Atlanta,* 451 F.3d 1257, 1268 (11th Cir.2006)) (additional citations omitted).

[3] **[4]** Historical facts "are facts about the who, what, where, when, and how of the controversy," *id.* at 1206, and we review them for clear error. "By contrast, under the assumptions about the law that we [make] for purposes of deciding this case, we must determine the 'why' facts. Those are the core constitutional facts that involve the reasons the [defendant] took the challenged action." *Id.* at 1206; *see also Daytona Grand, Inc. v. City of Daytona Beach, Fla.,* 490 F.3d 860, 870–71 (11th Cir.2007) ("[T]he district court's methodology in making that calculation —such as whether a particular site is 'available' and provides a reasonable avenue for communicating an adult business's erotic message—is a legal determination that we review *de novo.*"). We find these core constitutional facts—the "why" facts—"as though the district court had never made any findings about them." *ACLU v. Miami–Dade,* 557 F.3d at 1207.

III.

[5] **[6]** Nude dancing is a form of expression protected by the First Amendment. *See Krueger v. City of Pensacola,* 759 F.2d 851, 854 (11th Cir.1985); *Flanigan's,* 242 F.3d at 985 n. 12. "To determine what level of scrutiny applies, we must decide whether the State's regulation is related to the suppression of expression. If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy intermediate scrutiny under *O'Brien.*" *Flanigan's,* 242 F.3d at 983 (citing *City of Erie v. Pap's A.M.,* 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000)).

[7] "[A] city ordinance prohibiting nude dancing in establishments licensed to sell liquor is content-neutral and therefore, subject to review under the *O'Brien* test." *Id.* (citing *Sammy's of Mobile, Ltd. v. City of Mobile,* 140 F.3d 993, 996 (11th Cir.1998), *cert. denied,* 529 U.S. 1052, 120 S.Ct. 1553, 146 L.Ed.2d 459 (2000)). This is the case because the goal of such regulation is not the curtailment of protected expression: "regulations targeting undesirable secondary effects of adult entertainment establishments that serve alcoholic beverages are unrelated to the suppression of the erotic message conveyed by nude dancing." *Id.* at 984 (citing *Artistic Entm't, Inc. v. City of Warner Robins,* 223 F.3d 1306, 1309 (11th Cir.2000)). Rather, these ordinances attempt to insulate the communities surrounding the adult entertainment establishments from the undesirable elements that tend to accompany those businesses. They are, at their core, social and economic regulations aimed at improving communities and promoting health, safety and welfare.

***1277** **[8]** **[9]** The Fulton County ordinance considered today does not prohibit nude dancing. Rather, it prohibits the sale, possession and consumption of alcoholic beverages "on the premises of an adult entertainment establishment." Fulton County, Ga., Code § 18–79(17) (2001). The ordinance is content neutral and its enactment is unrelated to the suppression of speech. We, therefore, subject it to intermediate review under *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). "Under *O'Brien,* an ordinance is valid if: (1) it serves a substantial interest within the power of the government; (2) the ordinance furthers that interest; (3) the interest served is unrelated to the suppression of free expression; and (4) there is no less restrictive alternative." *Flanigan's,* 242 F.3d at 984 (citing *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673).

[10] Three of the four prongs of the *O'Brien* test are not at issue in this case. The first prong—a substantial

interest within the power of government—is easily met here. "It has been by now clearly established that reducing the secondary effects associated with adult businesses is a substantial government interest 'that must be accorded high respect.' " *Daytona Grand, Inc. v. City of Daytona Beach, Fla.,* 490 F.3d 860, 873–74 (11th Cir.2007) (quoting *City of L.A. v. Alameda Books, Inc.,* 535 U.S. 425, 444, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring in the judgment))[7]; *see also Flanigan's,* 242 F.3d at 984 ("Such interests are substantial government interests that satisfy the first part of the *O'Brien* test.") (emphasis added) (citing *Pap's,* 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265).

7 Justice Kennedy's concurrence in *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), is considered to be the holding in the case. *See Daytona Grand, Inc. v. City of Daytona Beach, Fla.,* 490 F.3d 860, 874 n. 20 (11th Cir.2007) (citing *Peek–A–Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.,* 337 F.3d 1251, 1264 (11th Cir.2003)).

In their resolution to adopt the ordinance, the board of commissioners eleven times discussed the negative secondary effects of live nude dancing.[8] Moreover, the ordinance itself states its purpose in the preamble:

8 The board used different phrasing at different junctures. Its references to the secondary effects were: (1) "undesirable behavior," (2) "disturbances," (3) "undesirable secondary effects," (4) "undesirable secondary effects," (5) "negative secondary effects," (6) "criminal behavior and ... undesirable community conditions," (7) "criminal behavior and ... undesirable community conditions," (8) "undesirable community conditions," (9) "crime and ... property values," (10) "undesirable secondary effects," and (11) "undesirable secondary effects."

> The purpose of this Article is to regulate adult entertainment establishments with the intention that, through this ordinance, many types of criminal activities frequently engendered by such businesses and the adverse effect on property values and on the public health, safety, and welfare of the County, and on its citizens and property, and on the character of its neighborhoods and development, will be curtailed and/or prevented.... This Article is intended to represent a balancing of competing interests: reduced criminal activity and protection of neighborhoods and development through the regulation of adult entertainment establishments versus any legally protected rights of adult entertainment establishments and patrons.
>
> Fulton County, Ga., Code § 18–76. Without question, Fulton County passed this ordinance out of a concern over the secondary effects of alcohol and live nude dancing on the community. These effects ***1278** are, specifically, increased criminal activity, decreased property values, and urban blight and decay generally. It is undeniable that the government has a substantial interest in curtailing such effects.

[11] The third prong of the *O'Brien* test—regulation unrelated to the suppression of free expression—is easily met. Both this Court and "the Supreme Court have expressly held that an ordinance focusing on the secondary effects associated with the combination of nude dancing and alcohol consumption is unrelated to the suppression of free expression." *Flanigan's,* 242 F.3d at 984 (citing *Pap's,* 529 U.S. at 293, 120 S.Ct. 1382, and *Wise Enters., Inc. v. Unified Gov't of Athens–Clarke County, Ga.,* 217 F.3d 1360, 1364 (11th Cir.2000)). As the prior analysis demonstrates, this ordinance focuses on the secondary effects associated with alcohol *and* live nude dancing. Moreover, the board of commissioners said that it was not its intent "to deny to any person the right to speech or expression protected by the United States or Georgia Constitutions, nor [is it] the intent to deny or restrict the rights of any adult to obtain or view any sexually oriented performance or materials protected by the United States or Georgia Constitutions." The ordinance itself states: "This Article is not intended as a de facto prohibition of legally protected forms of expression." Fulton County, Ga., Code § 18–76. The ordinance is, therefore, unrelated to the suppression of free expression.

[12] The fourth prong—the least restrictive means—is easily met as well. Because the ordinance targets only adult entertainment establishments where alcohol is consumed, it is sufficiently narrow to meet the *O'Brien* test: "The ordinance does not prohibit all nude dancing, but only restricts nude dancing in those locations where the unwanted secondary effects arise." *Wise Enters.,* 217 F.3d at 1365 (cited in *Flanigan's,* 242 F.3d at 984–85).

[13] **[14]** We focus our analysis, then, on the second prong of the *O'Brien* test—whether the ordinance furthers the governmental interest. To meet the furtherance prong,

a municipality "must have 'some factual basis for the claim that [adult] entertainment in establishments serving alcoholic beverages results in increased criminal activity' and other undesirable community conditions." *Flanigan's,* 242 F.3d at 985 (alteration in original) (quoting *Grand Faloon Tavern, Inc. v. Wicker,* 670 F.2d 943, 949 (11th Cir.1982)). "The government must ... show that the articulated concern had more than merely speculative factual grounds, and that it was actually a motivating factor in the passage of the legislation." *Krueger,* 759 F.2d at 855 (citations omitted).

[15] **[16]** **[17]** The factual basis may come from a number of places. "[A] city need not 'conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.' " *Daytona Grand,* 490 F.3d at 875 (quoting *Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment)). "Although a municipality 'must rely on at least some pre-enactment evidence,' such evidence can consist of 'a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion.' " *Id.* (quoting *Peek–A–Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.,* 337 F.3d 1251, 1268 (11th Cir.2003)); *see also City of Erie v. Pap's A.M.,* 529 U.S. 277, 296–97, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion) (discussing the role of prior legal opinions in an *O'Brien* analysis). Governments are also ***1279** empowered to rely on "their own wisdom and common sense," *Sammy's of Mobile, Ltd. v. City of Mobile,* 140 F.3d 993, 997 (11th Cir.1998), *cert. denied,* 529 U.S. 1052, 120 S.Ct. 1553, 146 L.Ed.2d 459 (2000), and "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Id.* (alteration in original) (quoting *N.Y. State Liquor Auth. v. Bellanca,* 452 U.S. 714, 718, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981)).

[18] While a governmental entity need not support its regulations with voluminous data, it may not "rely on 'shoddy data or reasoning' and its 'evidence must fairly support [its] rationale.' " *Peek–A–Boo Lounge,* 337 F.3d at 1269 (alteration in original) (citing *Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion)); *see also Daytona Grand,* 490 F.3d at 880. Nevertheless, "[a]necdotal evidence is not 'shoddy' per se." *Daytona Grand,* 490 F.3d at 881.

[19] In order to establish that "secondary effects pose a threat, the city need not 'conduct new studies or produce evidence independent of that already generated by other cities ... so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.' " *Flanigan's,* 242 F.3d at 985 (alteration in original) (quoting *Pap's,* 529 U.S. at 296, 120 S.Ct. 1382). However, if a governmental entity does perform empirical studies, it cannot later "ignore the results." *Id.* at 986.

[20] **[21]** Ultimately, the test hinges on the reasonableness of the government regulation in light of the available evidence: "Our own cases demonstrate that we require some reasonable justification for legislation which suppresses, albeit incidentally, protected expression." *Id.* at 985 (citing *Sammy's,* 140 F.3d at 997, and *Wise Enters.,* 217 F.3d at 1364). The test requires deference to the reasoned judgment of a governmental entity: "a city must have latitude to experiment, at least at the outset, and ... very little evidence is required." *Daytona Grand,* 490 F.3d at 880 (quoting *Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment)).

A plurality of the Supreme Court has directed that local legislatures receive this latitude because deference

> is the product of a careful balance between competing interests. On the one hand, we have an obligation to exercise independent judgment when First Amendment rights are implicated. On the other hand, we must acknowledge that the [governmental entity] is in a better position than the Judiciary to gather and evaluate data on local problems.

Alameda Books, 535 U.S. at 440, 122 S.Ct. 1728 (plurality opinion) (citations and quotation marks omitted). As Justice Kennedy stated in the controlling opinion, "[t]he Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion." *Id.* at 451–52, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (citations omitted). In the end, "[o]ur review is designed to determine whether *the City's* rationale was a reasonable one, and even if [the plaintiff] demonstrates that another conclusion was also reasonable, we cannot

simply substitute our own judgment for the City's." *Daytona Grand,* 490 F.3d at 882.

[22] With these legal principles in mind, and affording proper deference to the County's expertise on the nature of problems confronting its communities and its citizens, we consider the constitutionality of the Fulton County ordinance. We conclude that it was reasonable for the County to rely on the voluminous evidence ***1280** before it—including the many findings of the July 2001 report, the numerous foreign studies appended to it, and the live testimony of the chief of police and the chief judge of the juvenile court—and that the ordinance therefore survives intermediate scrutiny.

The report was full of evidence of crime occurring around the County's strip clubs. Thus, for example, Operation Summit Up, described in the report, established that the areas surrounding the strip clubs are rife with sex and drug crimes. Over a three-week period in 1998, County police made 167 arrests. These arrests arose from 221 total charges, including ninety-three for sex-related crimes and thirty-four for drug-related crimes. And from the 167 arrests, prosecutors secured 166 convictions. Similarly, the report's discussion of beats 21 and 23 shows that those beats accounted for a disproportionate amount of crime in the precinct, and that grid B43, which contains three of the strip clubs, made for a disproportionate amount of crime in those two beats. Moreover, the surveillance operations suggest strongly that crime did occur at the clubs themselves.

The report also described the impact of the clubs on the County's youth. The Hickson affidavit discussed how many prostituted girls worked in the clubs and performed sex acts for money around the clubs and at private parties. The strip clubs, according to Judge Hickson, in addition to contributing to the sexual exploitation of these underage girls, also imposed a burden on the judicial system when the girls were brought before the juvenile court.

The report also addressed the negative secondary effects of the clubs in a non-criminal context. The Stafford affidavit, along with the accompanying photographs, suggest that the areas around the clubs are indeed blighted. The image created is one of deterioration and neglect, an urban landscape dominated by cheap hotels catering to the sex trade. The newspaper articles further portrayed adult entertainment establishments as a drag on property values, neighborhood development, and community safety.

Completing the July 2001 report were the foreign studies. All told, Fulton County considered the experiences of thirty American jurisdictions. These foreign studies, summarized by the NLC and in two cases reproduced in their entirety by the County, painted a moribund picture of the adult business and the communities surrounding them. They told of crime, disease, violence, blight, and depressed property values.

The plaintiff clubs argue, nevertheless, that the principal thesis of the July 2001 report—that the mixture of alcohol and nude dancing leads to crime—is undercut by the March 2001 report, which found that crime was a greater problem at bars without nude dancing. Yet the clubs—and the district court—misapprehend the nature of our inquiry. We cannot simply survey the vast field of literature and declare unconstitutional any ordinance which fails to conform with our own sense of that course which is most prudent. *See Daytona Grand,* 490 F.3d at 881 ("[D]emonstrating the possibility of such an alternative does not necessarily mean that the City was barred from reaching other reasonable and different conclusions."). Rather, we consider the evidence the municipality relied on in passing the ordinance, and determine whether such reliance was reasonable. *See id.* at 882. Because the July 2001 report established negative secondary effects both criminal and urban, we hold that it was reasonable for the County to rely on it.

Moreover, the March 2001 report championed by the clubs has its own infirmities. ***1281** The principal finding of the March 2001 report is that, for a three-year period, bars without nude dancing generated more 911 calls than bars with nude dancing. Yet as the County argues, and as this Court has already noted, sex-related offenses often do not prompt a call to the police:

> The experts' studies are based solely on CAD data, which, in lay terms, is essentially 911 emergency call data. Relying on such data to study crime rates is problematic, however, because many crimes do not result in calls to 911, and, therefore, do not have corresponding records in the City's CAD data. This is especially true for crimes[ ] such as lewdness and prostitution....

> Such crimes are often "victimless," in the sense that all of those involved are willing participants, and, therefore, they rarely result in calls to 911.... [A]n encounter between a prostitute and a "john" rarely leads to a 911 call. By contrast, the City's "anecdotal" evidence may be a more accurate assessment of such crimes because it is not based on a data set that undercounts the incidents of such "victimless" crimes.

Id. at 882–83 (citation omitted).

It was not unreasonable for the County to credit the July 2001 report, which portrayed in great detail the criminal activity that occurs in and around the clubs, over a March 2001 study which relied on police call data, a method notoriously unreliable under these circumstances. *See id.* at 883 n. 33 ("We also note that at least three other circuits have rejected, for similar reasons, attempts by plaintiffs to use studies based on CAD data to cast direct doubt on an ordinance that the municipality supported with evidence of the sort relied upon by the City of Daytona Beach here." (citing *Gammoh v. City of La Habra,* 395 F.3d 1114, 1126–27 (9th Cir.2005), *G.M. Enters., Inc. v. Town of St. Joseph, Wis.,* 350 F.3d 631, 639 (7th Cir.2003), and *SOB, Inc. v. County of Benton,* 317 F.3d 856, 863 & n. 2 (8th Cir.2003))).

We note other drawbacks to the March 2001 report as well. First and foremost, its scope is much narrower than that of the July 2001 report. In focusing exclusively on calls for police service, the March 2001 report fails to cast any doubt on the evidence of community blight, urban decay, exploitation of minors, and increased burdens on the judicial system documented in the July 2001 report. *Cf. id.* at 875–76. Next, the March 2001 report comes with a disclaimer that its findings are indeed limited: "The data does not address other secondary factors that may influence the calls for services at either type of establishment." Moreover, the March 2001 report makes no attempt to distinguish between types of crime. There is no way to tell from the report, for instance, whether masturbation for hire and other sex crime is lower or higher in and around the adult establishments—we are told, simply, that the non-adult bars generate more calls for service. Even if we were to accept that crime is greater in and around the non-adult establishments—and the record is hotly disputed on this point—a municipality would still be empowered to act in order to check a class of crime it found to be particularly troublesome. [9]

9 The County also argues that a police moratorium on enforcement of the 1997 adult entertainment establishment ordinance reduced the number of 911 calls. We find this argument unpersuasive, as it presupposes that a violation of the ordinance—a prohibited lap dance, for example—would likely give rise to a police call for service. The County next asserts that victims of or witnesses to crime, embarrassed to have been at an adult establishment, are reluctant to call the police from a strip club, so they move off-site before dialing 911. This argument further underscores the unreliability of police call data as an accurate measure of crime rates.

***1282** The plaintiff clubs offer the affidavit of Robert Bruce McLaughlin, who criticizes the foreign studies cited in the July 2001 report and challenges the reliability of the report itself. We are aware that there are some shortcomings in the July 2001 report. Some of the statistics are offered here without adequate controls, and when the report does engage in statistical comparison, its methodology begins to fray. For instance, the report notes that the BYOB club accounted for only 4% of the incidents reported at six Fulton County strip clubs. However, the report reveals later that the BYOB club is only open three days a week. If the report reconciles its conclusion with this fact, nowhere does it say so.

These arguable defects, however, when considered alongside the entirety of the record the County considered, do not yield constitutional infirmity. We are called upon today only to consider the constitutionality of an ordinance targeting the incidental effects of expressive activity protected by the Constitution. The foundation upon which the County relied need not be perfect; it need only be reasonable. We emphasize that, in this context, the County need not offer advanced statistical evidence, nor refute every conceivable interpretation of the data, even if those interpretations may be more compelling than the one reached by the municipality. It need only show that it acted reasonably, and here, Fulton County has met this burden.

Plainly, we are not faced here with the same situation we confronted the first time these parties came before this Court. It is one thing to compare foreign studies (in that case, four foreign studies) in support of an ordinance to a chorus of local studies decrying the wisdom of the ordinance. *See Flanigan's Enters., Inc. of Ga. v. Fulton County, Ga.,* 242 F.3d 976, 986 (11th Cir.2001)

(holding that it was unreasonable "to ignore relevant local studies and rely instead upon remote foreign studies"). It is quite another thing entirely to compare a wide-ranging set of statistical, observational, and anecdotal evidence, bolstered by many foreign studies, in support of an ordinance to one study of at least arguable empirical merit in contravention of that ordinance.

While the evidence offered has limitations, it certainly creates a vivid image of a County in which strip clubs that served alcohol played a prominent and unwelcome role. Sex and drug crimes occurred in and around the clubs and the neighborhood's cheap hotels, and required law enforcement and the judiciary (the juvenile court, at least) to invest resources in combating the secondary effects. Moreover, the neighborhoods themselves were dilapidated and in need of repair. It was not unreasonable for the County to rely on this data when passing an ordinance forbidding the sale, consumption, and possession of alcohol in adult entertainment establishments.

We do not share the skepticism of the district court regarding the motives of Fulton County. It is undisputed that the County wished to reduce the secondary effects of alcohol and adult entertainment within its borders: it had passed a similar ordinance, for similar reasons, in 1997, and its board of commissioners ordered a new investigation into the problem just as soon as this Court struck down the 1997 ordinance in 2001. That Fulton County sought to compile empirical evidence of a problem it believed to exist—evidence it assumed was necessary under the law of this Circuit—does not somehow divest the project of all legitimacy.

Moreover, we are not alarmed that the County continued its investigation into the subject after March 2001, when it received the Adult and Non–Adult Entertainment Establishments Statistical Analysis. Local ***1283** problems are often complex. They may require careful study and patient resort to sources whose messages are sometimes inconsistent. County commissioners are not bound to abide by the conclusions of the first reports to cross their desks, no matter how clumsy or incomplete. Rather, a county may consider an issue of local governance so that it fully understands the contours of the problem, and the most efficacious ways to combat it. That the County's investigation of the clubs continued after the delivery of the March 2001 report does not render nugatory the totality of what it learned later.

We have explained that the evidence relied on by a municipality in support of an ordinance may not be shoddy, and the process by which it investigates a perceived problem may not be a sham. *See Daytona Grand,* 490 F.3d at 880. The defendant clubs suggest that the fix was in from the start, but we are satisfied that Fulton County's concern for the health and safety of its communities is real, and that its reliance on the evidence it offers is not unreasonable.

Because the challenged ordinance survives intermediate scrutiny, damages should not have been awarded to the clubs, and we need not determine whether the amounts awarded were proper. We express no opinion, however, about the remaining issues in the case—whether the ordinance allows for reasonable alternative channels of communication, whether it imposes an impermissible prior restraint, and whether it unlawfully imposes a tax on conduct protected under the First Amendment —which were raised by the clubs in their cross-appeal but were never reached by the district court. These are best addressed in the first instance by the district court. Accordingly, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

REVERSED and REMANDED.

All Citations

596 F.3d 1265, 22 Fla. L. Weekly Fed. C 530

588 F.3d 360
United States Court of Appeals,
Sixth Circuit.

EAST BROOKS BOOKS, INC., Plaintiff-Appellant,
v.
SHELBY COUNTY, TENN.,
et al., Defendants-Appellees,
Robert E. Cooper, Jr., State of Tennessee Attorney General, Intervenor Defendant-Appellee.

No. 08-5958.
|
Argued: April 20, 2009.
|
Decided and Filed: Nov. 25, 2009.

Synopsis

Background: Bookstore that sold sexually-oriented material brought action challenging constitutionality of Tennessee's Adult-Oriented Establishment Registration Act, which regulated adult bookstores. The United States District Court for the Western District of Tennessee, S. Thomas Anderson, J., 2008 WL 2558005, denied bookstore's motion for preliminary injunction. Bookstore appealed.

Holdings: The Court of Appeals, Boggs, Circuit Judge, held that:

[1] Act was rationally related to state's legitimate interest in reducing adverse secondary effects;

[2] provision of Act, requiring revocation of adult establishment's license if it served or sold intoxicating beverages on the premises, was not overbroad facially, or as applied to adult bookstore;

[3] Act did not violate Due Process Clause by imposing strict liability upon owner for violations by employees; and

[4] penalty provision of Act was not invalid prior restraint on speech.

Affirmed.

Karen Nelson Moore, Circuit Judge, filed opinion, concurring in the judgment only.

West Headnotes (17)

[1] Constitutional Law
Rational Basis Standard; Reasonableness

Under the rational basis standard, a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[2] Constitutional Law
Rational Basis Standard; Reasonableness

A law will be sustained against an equal protection challenge under the rational basis standard if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[3] Constitutional Law
Differing levels set forth or compared

The rational basis standard for evaluating an equal protection challenge permits a court to hypothesize interests that might support legislative distinctions, whereas the heightened scrutiny standard limits the realm of justification to demonstrable reality. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[4] Constitutional Law
Public amusement and entertainment

Public Amusement and Entertainment

Sexually Oriented Entertainment

Tennessee's Adult-Oriented Establishment Registration Act, which regulated adult bookstores and defined such bookstores as those restricting admission to adults, was rationally related to state's legitimate interest in reducing the adverse secondary effects of such bookstores targeted by the Act, and thus, did not violate the Equal Protection Clause; although the Act arguably exempted bookstores that did not restrict admission to adults, any bookstore selling adult material that admitted minors ran risk of violating Tennessee law that prohibited the display of such material anywhere minors were lawfully admitted, and Act allowed counties to implement gradual reform to ameliorate adverse secondary effects. U.S.C.A. Const.Amend. 14; West's T.C.A. §§ 7-51-1102(1), 39-17-914.

Cases that cite this headnote

[5] **Constitutional Law**

Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors

Licensing and regulation

Public Amusement and Entertainment

Sexually Oriented Entertainment

Provision of Tennessee's Adult-Oriented Establishment Registration Act, requiring revocation of adult establishment's license if it served or sold intoxicating beverages on the premises, was not overbroad facially, or as applied to adult bookstore, as would violate the First Amendment protection of free speech; there was no showing that any adult bookstores intended to seek a liquor license, that the threat of license revocation for alcohol use would deter adult bookstore owners from offering adult fare in their establishments, or that the prohibition on the consumption of alcohol would keep out customers wishing to exercise their right to peruse adult-oriented materials offered by such bookstores, and evidence reasonably established that availability of alcohol on the premises of any adult-oriented establishment would magnify adverse secondary effects of such establishments. U.S.C.A. Const.Amend. 1; West's T.C.A. § 7-51-1109.

Cases that cite this headnote

[6] **Constitutional Law**

Substantial impact, necessity of

A law is overbroad under the First Amendment if it reaches a substantial number of impermissible applications relative to the law's legitimate sweep. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[7] **Constitutional Law**

Overbreadth

Overbroad laws warrant invalidation to prevent the chilling of future protected expression, and thus, any law imposing restrictions so broad that it chills speech outside the purview of its legitimate regulatory purpose will be struck down. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] **Constitutional Law**

Freedom of Speech, Expression, and Press

While the traditional requirements of standing are relaxed in the context of a facial challenge to a restriction on expression on overbreadth grounds, a plaintiff must show that it suffered an injury that is fairly traceable to the allegedly unconstitutional statute. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[9] **Constitutional Law**

Narrow tailoring requirement; relationship to governmental interest

In the context of content-neutral time, place, or manner regulations, narrow tailoring under the First Amendment does not require that the

chosen measures be the least speech-restrictive means of advancing the government's interests. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**
Narrow tailoring

The narrow tailoring requirement for a restriction on expression is satisfied if the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[11] **Constitutional Law**
Secondary effects

In selecting the means to advance the legitimate interest in controlling adverse secondary effects of adult entertainment, to satisfy the narrow-tailoring requirement for a restriction on expression, governments are entitled to rely on evidence reasonably believed to be relevant to the problem. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[12] **Constitutional Law**
Public amusement and entertainment

Intoxicating Liquors
Licensing and regulation

Public Amusement and Entertainment
Sexually Oriented Entertainment

Provision of Tennessee's Adult-Oriented Establishment Registration Act, requiring revocation of adult establishment's license if it served or sold intoxicating beverages on the premises, did not violate Due Process Clause by imposing strict liability upon owner for violations by employees; a violation by an employee did not imperil the owner's license unless the owner knew or should have known of the violation, and authorized, approved, or failed to take reasonable efforts to prevent the violation. U.S.C.A. Const.Amend. 14; West's T.C.A. § 7-51-1109.

Cases that cite this headnote

[13] **Constitutional Law**
Licenses and permits in general

Public Amusement and Entertainment
Sexually Oriented Entertainment

Penalty provision of Tennessee's Adult-Oriented Establishment Registration Act, specifying that an operator of an adult-oriented establishment whose license was revoked was disqualified from receiving an adult-oriented establishment license for five years, was not an invalid prior restraint on future protected expression; the Act provided for prompt final judicial review of a license revocation, and it provided for maintenance of the status quo pending the final outcome of judicial proceedings concerning the revocation decision. U.S.C.A. Const.Amend. 1; West's T.C.A. §§ 7-51-1109, 7-51-1110.

Cases that cite this headnote

[14] **Constitutional Law**
Licenses

One has standing to challenge a statute as an unconstitutional prior restraint on speech on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[15] **Constitutional Law**
Prior Restraints

Constitutional Law
Time limits for grant or denial

Constitutional invalidity of prior restraints on speech may result from one or both of two evils:(1) the risk of censorship associated with the vesting of unbridled discretion in

government officials, and (2) the risk of indefinitely suppressing permissible speech when a licensing law fails to provide for the prompt issuance of a license. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[16] Constitutional Law
Prior Restraints

Prior restraints on speech are not unconstitutional per se. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[17] Constitutional Law
Availability of judicial review

Where license issuance is based on explicit and objective criteria, a licensing scheme passes constitutional muster, as a valid prior restraint against speech, when it guarantees applicants a prompt final judicial decision on the merits of a license denial and preservation of the status quo while an application or judicial review of a license denial is pending. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

***362 ARGUED:** Frierson M. Graves, Jr., Baker, Donelson, Bearman, Caldwell & Berkowitz, Memphis, Tennessee, for Appellant. Robert B. Rolwing, Assistant County Attorney, Shelby County Government, ***363** Memphis, Tennessee, Steven A. Hart, Office of The Tennessee Attorney General, Nashville, Tennessee, for Appellees. **ON BRIEF:** Michael F. Pleasants, Sr., Pleasants Law Firm, Memphis, Tennessee, for Appellant. Robert B. Rolwing, Assistant County Attorney, Shelby County Government, Memphis, Tennessee, Steven A. Hart, Office Of The Tennessee Attorney General, Nashville, Tennessee, Thomas Roane Waring III, City Attorney's Office, Memphis, Tennessee, for Appellees.

Before: BOGGS, MOORE, and SUTTON, Circuit Judges.

BOGGS, J., delivered the opinion of the court, in which SUTTON, J., joined. MOORE, J. (p. 371-72), delivered a separate opinion concurring only in the judgment.

OPINION

BOGGS, Circuit Judge.

This is the second of two related actions challenging Tennessee's Adult-Oriented Establishment Registration Act of 1998, Tenn.Code Ann. § 7-51-1101 *et seq.*, (the "Act" or "Tennessee Act"), a county-option law adopted by Shelby County, Tenn. Plaintiff-Appellant East Brooks Books, Inc. ("Plaintiff") operates two bookstores that sell non-obscene sexually oriented material and restrict admission to adults only. On February 14, 2008, Plaintiff filed suit in the United States District Court for the Western District of Tennessee, naming Shelby County and the City of Memphis as defendants, seeking preliminary and permanent injunctions, as well as a declaratory judgment, on the grounds that the Act is unconstitutional on its face and as applied to Plaintiff. The Attorney General of Tennessee was granted leave to intervene to defend the constitutionality of the Act. Plaintiff's motion for a preliminary injunction was denied. Plaintiff appeals from the denial of its motion for a preliminary injunction. We now affirm the district court's denial of the preliminary injunction.

I

The Tennessee Act is described in detail in the related action challenging its constitutionality, *Entertainment Prod., Inc. v. Shelby County, Tenn.*, No. 08-5494, 588 F.3d 372, 2009 WL 4061704 (6th Cir.2009). This Plaintiff challenges the Tennessee Act on six grounds, some of which duplicate the substance of the claims made by the plaintiffs in *Entertainment Productions.* Here we address only those claims that were not resolved by our opinion in that case.

II

A

Plaintiff's first argument is that the definition of "adult bookstore" violates the Equal Protection Clause. The Tennessee Act regulates "adult-oriented establishments," which include "adult bookstore[s]":

> "Adult bookstore" means a business that [1] *offers, as its principal or predominate stock or trade, sexually oriented material,* devices, or paraphernalia, whether determined by the total number of sexually oriented materials, devices or paraphernalia offered for sale or by the retail value of such materials, devices or paraphernalia, specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live, *and* [2] *that restricts or purports to restrict admission to adults or to any class of adults.* The definition specifically includes items sexually oriented in nature, regardless of how labeled or sold, such as adult novelties, risqué gifts or marital aids;

Tenn.Code Ann. § 7-51-1102(1) (emphasis and numeration added). A bookstore will ***364** be deemed "adult" under the Act only if, first, its "principal or predominate stock" consists of sexually oriented or adult materials, and second, if it "restricts or purports to restrict" its premises to adults. Plaintiff argues that the second criterion makes the Act under-inclusive, in violation of the Equal Protection Clause. While a bookstore with a predominantly adult stock that excludes minors from its premises is subject to the Act, an identical bookstore that does not so restrict admission-by, for example, setting up a "small front room" containing its insignificant stock of non-adult materials-is not subject to the Act. Plaintiff argues that distinguishing between these two types of bookstores constitutes unequal treatment without a rational basis. The rational basis for the distinction is absent, Plaintiff maintains, because both types of bookstores are equally likely to produce the adverse secondary effects targeted by the Act, and no rationale supports exempting from regulation adult bookstores that admit minors. Appellant's Br. at 21-22.

Equal protection of the laws guaranteed by the Fourteenth Amendment "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans,* 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (citations omitted). The Supreme Court has stated that courts will "uphold the legislative classification," if "a law neither burdens a fundamental right nor targets a suspect class, ... so long as it bears a rational relation to some legitimate end." *Ibid.*

[1] **[2]** In this case, no "suspect class" is targeted. Nor does Plaintiff argue that a fundamental right associated with the freedom of expression is burdened. [1] Plaintiff concedes that this classification needs only a rational basis to survive constitutional scrutiny. Appellant's Br. at 21-22. "Under the rational basis standard, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' " *Richland Bookmart v. Nichols,* 278 F.3d 570, 576 (6th Cir.2002) (quoting *Tuan Anh Nguyen v. INS,* 533 U.S. 53, 77, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001)). "[A] law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer,* 517 U.S. at 632, 116 S.Ct. 1620.

1 Nor could it be successfully argued that a fundamental right is implicated in this context, notwithstanding the fact that the Act obviously regulates expressive activity. This court has explained that:

> Although in some cases the First Amendment is violated because "the underinclusiveness of a law-i.e., the failure of the government to regulate other, similar activity-may give rise to a conclusion that the government has in fact made an impermissible distinction on the basis of the content of the regulated speech," such a conclusion is not possible where the content of the differently regulated speech is "virtually identical."

Richland Bookmart v. Nichols, 278 F.3d 570, 575 (6th Cir.2002) (quoting *DLS v. City of Chattanooga,* 107 F.3d 403, 412 n. 7 (6th

> Cir.1997)). Since Plaintiff's claim is predicated on the assumption that the regulated and the unregulated "speech"-i.e., adult merchandise-is "virtually identical," there can be no risk of government's invidious discrimination against particular content of speech.

As an initial matter, we note that the bookstores allegedly advantaged by an exemption from the Act are probably few in number, if any such establishments exist at all. Tennessee law prohibits the display of adult material "anywhere minors are lawfully admitted." ***365** Tenn.Code Ann. § 39-17-914; *Davis-Kidd Booksellers v. McWherter,* 866 S.W.2d 520 (Tenn.1993). Any bookstore "principally or predominantly" devoted to adult merchandise that wishes to avoid regulation as an "adult-oriented establishment" and sets up a small general-merchandise section, to which minors are admitted, runs a high risk of violating this law and incurring criminal penalties. [2] It is unsurprising, therefore, that Plaintiff does not identify any actual bookstores in Shelby County that meet the first, but not the second, criterion of an "adult bookstore" under the Act.

> 2 To be sure, a "high risk" is not a certainty: a store that sells some adult materials and admits minors to its premises may avoid sanctions if the adult material is made inaccessible to minors as specified § 39-17-914(b) (*e.g.,* by taking "[r]easonable steps ... to prevent minors from perusing the material," or by locating the adult material in "an area restricted to adults"). While Defendants may be exaggerating when they assert that such stores do not exist, it does seem difficult for a store that sells enough adult materials to constitute a "principal or predominate" share to take the necessary "reasonable steps" to prevent minors from seeing that material. A bookstore that seeks to avoid the Tennessee Act would find it difficult to comply with § 39-17-914-and in this light, such a bookstore is not truly advantaged by comparison with a similar store that is subject to the Act but does not run a high risk of criminal penalties under § 39-17-914.

[3] Even if the kinds of bookstores Plaintiff describes exist, or, as Plaintiff suggests, will come into existence as operators "scramble to establish a small front room of some minor amount of non-adult materials" into which minors are admitted, Appellant's Br. at 23, the "classification" does not lack a rational basis. "Th[e] [rational-basis] standard permits a court to hypothesize interests that might support legislative distinctions, whereas heightened scrutiny limits the realm of justification to demonstrable reality." *Nguyen,* 533 U.S. at 77, 121 S.Ct. 2053. We can readily hypothesize the state's interest in confining regulation to bookstores that meet both definitional criteria. As a matter of practice, sexually oriented businesses, including bookstores, commonly restrict admission to adults. Moreover, only those businesses that cater to adults would restrict access in this manner. Restricted access is thus a reliable indicator that the goods offered or displayed on the premises are of an adult or explicit nature. A prominent display advertising an establishment as an "adult store," moreover, is a more objective indicator that the store is of the kind the Act aims to regulate, than the mere share of its stock or trade comprised of adult materials. Hence, it is not irrational for the legislature to use the access restriction as a means of identifying those bookstores that are likely to produce adverse secondary effects targeted by the Act.

[4] Our court has adjudicated an analogous challenge to a restriction of business hours, which applied to adult establishments offering live entertainment but excepted those offering "nonlive entertainment." *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.,* 411 F.3d 777, 792 (6th Cir.2005). We explained that so long as a regulation "furthers a substantial government interest ... and there is no evidence of an impermissible motive on the part of" the legislature, such an exception "is not a cause for concern under rational-basis review because a government may implement its program of reform by gradually adopting regulations that only partially ameliorate a perceived evil." *Ibid.* (internal quotation marks and citations omitted); *see also Richland Bookmart,* 278 F.3d at 577-78 (holding that exempting live cabarets from operating-hour restrictions applicable to adult bookstores was ***366** rational because the legislature took a legitimate and "plausible step-by-step approach" to combating secondary effects). The same reasoning is pertinent to this case: even if Plaintiff is correct that the exempted bookstores are as liable to produce pernicious secondary effects as the regulated bookstores, Tennessee and Shelby County are permitted to implement a gradual and incomplete solution "that only partially ameliorate[s]" such effects.

Thus, we hold that the district court did not err in determining that Plaintiff has not shown a substantial

likelihood of succeeding on the merits of the challenge to the "adult bookstore" definition.

B

[5] Plaintiff further claims that the prohibition on the sale, use, or consumption of alcoholic beverages is overbroad and/or not narrowly tailored, and violates the Due Process Clause. While alcohol is not explicitly prohibited in the "Prohibited activities" section of the Act, its sale or use is a specified ground for a revocation, suspension or annulment of a license:

> (a) The board shall revoke, suspend or annul a license or permit for any of the following reasons:
>
> ...
>
> (5) Any intoxicating liquor or malt beverage is served or consumed on the premises of the adult-oriented establishment, when an operator, employee, entertainer, or escort knew, or should have known, of the violation and authorized, approved, or, in the exercise of due diligence, failed to take reasonable efforts to prevent the violation;

Tenn.Code Ann. § 7-51-1109. Plaintiff conflates its claims that the provision is overbroad and that it is not narrowly tailored as applied to adult bookstores. While banning alcohol at adult cabarets that present live entertainment is justified by the secondary effects resulting from the "explosive combination of nude dancing and alcohol consumption," Plaintiff argues, there is no evidence connecting alcohol consumption on the premises of an adult bookstore to the targeted secondary effects. Appellant's Br. at 51.

[6] **[7]** A challenge to this provision on the basis of overbreadth is without merit. "A law is overbroad under the First Amendment if it 'reaches a substantial number of impermissible applications' relative to the law's legitimate sweep." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 274 F.3d 377, 387 (6th Cir.2001) (citations omitted). Overbroad laws warrant invalidation "to prevent the chilling of future protected expression," and thus, "any law imposing restrictions so broad that it chills speech outside the purview of its legitimate regulatory purpose will be struck down." *Ibid.* A proscription on alcohol is not in itself a prohibition on any protected expression. Thus, to be persuaded by the claim that prohibiting alcohol in adult bookstores "reaches a substantial number of impermissible applications," we need to believe that the threat of license suspension for alcohol use will deter bookstore owners from offering adult fare in their establishments, or that the prohibition on the consumption of alcohol will keep out customers wishing to exercise their protected right to peruse adult-oriented materials offered by the bookstores. Neither prospect is probable, in view of the likely fact that the primary purpose of adult bookstores is to sell adult materials, and the primary purpose of an average customer in such an establishment is to purchase or view said materials. Plaintiff makes no effort to show that extending the prohibition on alcohol to adult bookstores actually ***367** and substantially chills protected expression.

[8] While the traditional requirements of standing are relaxed in the context of a facial challenge on overbreadth grounds, Plaintiff must show that it suffered an injury that is "fairly traceable" to the allegedly unconstitutional statute for the purposes of its claim that the alcohol prohibition is not narrowly tailored as applied to Plaintiff. *Prime Media, Inc. v. City of Brentwood,* 485 F.3d 343, 348-49 (6th Cir.2007) (citations omitted). Since no provision of the Tennessee Act has been enforced against Plaintiff's bookstores at this time, no injury to Plaintiff is apparent. Plaintiff has not even established that it has or intends to seek a liquor license, or given this court any other reason to suppose that Plaintiff is likely to lose an adult-establishment license on account of its employees' or customers' consumption of alcoholic beverages on the bookstores' premises. Even assuming, *arguendo,* that standing requirements do not bar the claim that the Act is not narrowly tailored, Plaintiff did not demonstrate a substantial likelihood of success on the merits.

[9] **[10]** **[11]** In the context of content-neutral time, place, or manner regulations, narrow tailoring does not require that the chosen measures be "the least speech-restrictive means of advancing the Government's interests." *Turner Broad. Sys. v. FCC,* 512 U.S. 622, 662, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). This requirement is satisfied if the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ibid.* (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). It requires, "in other

words, that the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests." *Ibid.* (internal quotation marks omitted). Moreover, in selecting the means to advance the legitimate interest in controlling adverse secondary effects of adult entertainment, governments are entitled to rely on evidence "reasonably believed to be relevant to the problem." *729, Inc. v. Kenton County Fiscal Court,* 515 F.3d 485, 491 (6th Cir.2008) (citing *Renton v. Playtime Theatres,* 475 U.S. 41, 51-52, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *City of L.A. v. Alameda Books,* 535 U.S. 425, 438-39, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality); *id.* at 449, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment)).

Both Tennessee and Shelby County relied on numerous reports, studies and judicial decisions with regard to the deleterious secondary effects of adult-oriented establishments. In the Ordinance that adopts the Act in the county, Shelby County notes that the County reviewed, among other evidentiary materials, "a report regarding the adverse health effects of activity commonly occurring in adult bookstores." *Ibid.* In view of this evidence, which Plaintiff does not call into doubt, Shelby County may "reasonably believe" that the availability of alcohol on the premises of *any* adult-oriented establishment-not just those that offer live or nude dancing-would magnify the adverse effects. As this court held in *Richland Bookmart*, "[i]n finding that sexually oriented businesses *as a category* are associated with numerous adverse secondary effects, the County reasonably relied on a number of prior judicial decisions finding sufficient evidence to support the connection between adverse effects and adult entertainment when combined with alcohol consumption." *Richland Bookmart, Inc. v. Knox County, Tenn.,* 555 F.3d 512, 532 (6th Cir.2009) (emphasis added).

Moreover, this prohibition does not burden *substantially* more speech than necessary ***368** to advance legitimate state interests, if it can be said to burden *speech* at all. As the Seventh Circuit explained in upholding a ban on alcohol in adult cabarets:

> The regulation has no impact whatsoever on the tavern's ability to offer nude or semi-nude dancing to its patrons; it seeks to regulate alcohol and nude or semi-nude dancing without prohibiting either. The citizens ... may still buy a drink and watch nude or semi-nude dancing. They are not, however, constitutionally entitled to do both at the same time and in the same place. The deprivation of alcohol does not prevent the observer from witnessing nude or semi-nude dancing, or the dancer from conveying an erotic message.

Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 728 (7th Cir.2003) (citation omitted). Likewise, the deprivation of alcohol does not prevent a bookstore employee from offering sexually explicit materials for sale, nor does it prevent customers from enjoying all the merchandise such businesses have to offer.

[12] Plaintiff claims that the prohibition is unconstitutional for yet another reason: it violates the Due Process Clause because it allegedly imposes strict liability on the owner for any violations by employees or customers. The Act states that a license or permit will be revoked "when an operator, employee, entertainer, or escort knew, or should have known, of the violation and authorized, approved, or, in the exercise of due diligence, failed to take reasonable efforts to prevent the violation." Plaintiff asserts that an *establishment's* license will be revoked if an *employee* "whose knowledge cannot be imputed to the business itself" fails to take a reasonable effort to prevent alcohol use on the premises. Appellant's Br. at 52 (quoting *Wal Juice Bar, Inc. v. City of Oak Grove, Kentucky,* No. 5:02CV-252-R, 2008 WL 1730293, at *10 (W.D.Ky.2008)). While the district court did not address this argument, its interpretive premise is without merit. As Shelby County explains, "[a] violation by an employee imperils that *employee*'s permit," but "does not imperil the *operator's license,* unless [the operator] 'knew, or should have known of the violation and authorized, approved, or, in the exercise of due diligence, failed to take reasonable efforts to prevent the violation.' " Appellees' Br. at 38-39 (citations omitted; emphasis in original). We agree, as this interpretation of the challenged provision is also compelled by the general standard for revocation of operator's licenses and employees' permits. The Act provides for a revocation or suspension of an operator's license on the basis of an employee's actions only if an operator "has a duty to supervise conduct on the premises," and "knew, or should have known, of the violation and authorized, approved, or, in the

exercise of due diligence, failed to take reasonable efforts to prevent the violation." Tenn.Code Ann. § 7-51-1109(a)(2). Because the Act does not punish operators of adult establishments on the basis of strict liability, we affirm the district court's determination that no substantial likelihood of success on the merits of this claim was demonstrated.

C

[13] Finally, Plaintiff challenges the Act's provision on "[p]enalties for violation of part," which states:

> (a) (1) A violation of this part shall, for a first offense, be a Class B misdemeanor, punishable by a fine only of five hundred dollars ($500), and shall result in the suspension or revocation of any license.
>
> (2) A second or subsequent violation of this part is a Class A misdemeanor, ***369** and shall result in the suspension or revocation of any license.
>
> (b) Each violation of this part shall be considered a separate offense, and any violation continuing more than one (1) hour of time shall be considered a separate offense for each hour of violation.

Tenn.Code Ann. § 7-51-1119. Section 7-51-1109 specifies that an operator whose license is revoked is disqualified from receiving an adult-oriented establishment license for five years. Plaintiff argues that a punitive revocation of a license on the basis of past violations of this Act constitutes an unconstitutional prior restraint on future protected expression.

[14] The district court declined to consider this claim on the merits because it determined that Plaintiff, who has not applied for a license nor had a license revoked, lacked standing to challenge the penalty provision. Plaintiff protests that it need not wait for a license revocation to bring a facial challenge on overbreadth grounds. Appellant's Br. at 54-55. "[I]t is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884, 889 (6th Cir.2000) (quoting *Freedman v. Maryland,* 380 U.S. 51, 56, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)); *see also Odle v. Decatur County,* 421 F.3d 386, 389 n. 2 (6th Cir.2005). Plaintiff does not exactly articulate a challenge on the grounds of overly broad or unbridled *discretion.* However, the essence of Plaintiff's claim is that the allegedly unconstitutional applications of this provision are substantial relative to legitimate applications because punitive revocation suppresses future protected speech "unconnected to the negative secondary effects cited as legislative justification," *Schultz v. City of Cumberland,* 228 F.3d 831, 849 (7th Cir.2000). Treating Plaintiff's arguments charitably, we hold that Plaintiff does have standing to bring this facial challenge to the Act on the basis of its penalty provision.

[15] **[16]** **[17]** Constitutional invalidity of prior restraints may result from one or both of "two evils ...: (1) the risk of censorship associated with the vesting of unbridled discretion in government officials; and (2) 'the risk of indefinitely suppressing permissible speech' when a licensing law fails to provide for the prompt issuance of a license." *Nightclubs, Inc.,* 202 F.3d at 889 (quoting *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 225-27, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990)). The Tennessee Act's licensing scheme is a prior restraint on protected expression. *Odle,* 421 F.3d at 389; *see also Belew, et al. v. Giles County Adult-Oriented Establishment Board, et al.,* No. 1-01-0139, 2005 WL 6369661 (M.D.Tenn. Sept. 30, 2005). Prior restraints are not unconstitutional per se. *Richland Bookmart, Inc.,* 555 F.3d at 533 (citing *Odle,* 421 F.3d at 389). Where license issuance is based on explicit and objective criteria, a licensing scheme passes constitutional muster when it "guarantee[s] applicants a prompt final judicial decision on the merits of a license denial and preservation of the status quo while an application or judicial review of a license denial is pending." *Odle,* 421 F.3d at 389 (citing *Freedman,* 380 U.S. at 58, 85 S.Ct. 734; *FW/PBS, Inc.,* 493 U.S. at 229-30, 110 S.Ct. 596; *City of Littleton v. Z.J. Gifts D-4, LLC,* 541 U.S. 774, 779-80, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004)). Logically, the same procedural guarantees required for license denials are required for license *revocations.* Furthermore, "[s]ystems of prior restraint ... [must] also pass [ ] the appropriate level of scrutiny." *Deja Vu of* ***370** *Nashville, Inc.,* 274 F.3d at 391(citing *Freedman,* 380 U.S. at 58-59, 85 S.Ct. 734).

In *Odle,* we held that the provisions regarding license *denial* of this very Act are not unconstitutional because they comply with the procedural requirements of prompt

judicial review and maintenance of status quo. 421 F.3d at 390-91. Punitive revocation of a license under § 7-51-1119 likewise complies with the two requirements. The Tennessee Act provides for a prompt final judicial decision on the merits of a license revocation: an entity whose license or permit is to be revoked or suspended is given 10 days to request a hearing before the adult-oriented establishment board ("board") to contest the revocation, § 7-51-1109(b)(2), which shall be held within 15 days of the receipt of the request, and a final decision will be rendered by the board within 22 days of the initial notice of revocation, § 7-51-1109(b)(3). If the revocation or suspension is affirmed, "the county attorney for such county shall institute suit for declaratory judgment in a court of record in such county, within five (5) days of the date of any such affirmation." § 7-51-1109(c)(1). Finally, "[t]he applicant shall be entitled to judicial determination of the issues within two (2) days after joinder of issue, and a decision shall be rendered by the court within two (2) days of the conclusion of the hearing." § 7-51-1109(c)(3). [3] The Act also complies with the second requirement as it provides for the maintenance of the status quo "pending the final outcome of judicial proceedings to determine whether such license or permit has been properly revoked or suspended under the law." § 7-51-1109(b)(2).

[3] We note that the Act provides adopting counties with a choice: a county has the option of making subsection § 7-51-1109(d) applicable in the county, rather than subsection (c). The salient difference between the two sections resides in the identity of the party who initiates judicial review of the administrative action and bears the burden of proof with respect to the revocation; however, the guarantee that a judicial decision will be rendered within two days of the judicial determination on license denial or revocation appears only in subsection (c). Neither party to this lawsuit indicates which section is applicable in Shelby County. Because there is no allegation or affirmative representation that subsection (d) was elected by Shelby County, and (c) appears to be the default option, we will assume that (c) is the applicable standard and express no opinion with regard to subsection (d).

Plaintiff asserts that it is not challenging the constitutionality of the licensing scheme on the grounds of inadequate procedural protections for license revocation. See Appellant's Rep. Br. at 19, 21-22. At the same time, Plaintiff does not appear to attack the substantive grounds for revocation: Plaintiff does not argue, for example, that the criteria for revocation are insufficiently objective and delegate unbridled authority to officials, or that the criteria for revocation are too numerous to be narrowly tailored to the state interest at stake. Instead, Plaintiff argues in general and opaque terms that the Act is unconstitutional because it employs punitive revocation to control protected future expression rather than to punish violators "in the ordinary sense." Appellant's Rep. Br. at 22.

Insofar as we are able to discern a legal theory behind Plaintiff's constitutional attack on the penalty provision, it rests on a misinterpretation of the Tennessee Act. Plaintiff appears to think that the procedural safeguards applicable to license revocations generally, which are set forth in § 7-51-1109, do not apply to a punitive license revocation under § 7-51-1119. Because § 7-51-1119 states that a violation "*shall* " be a misdemeanor and "*shall* ***371** result in the suspension or revocation of any license," (emphasis added), Plaintiff seems to conclude that a revocation under this section is permanent and not contestable. However, this is not a sustainable reading of the Tennessee Act. Although § 7-51-1119 does not state that the punitive revocation of a license is temporary or subject to the procedural protections required of prior-restraint schemes, the temporal and procedural limitations are clearly spelled out in § 7-51-1109. The latter section lists several grounds for license revocation, including violations of the Act's provisions-the consequences of which are addressed further in § 7-51-1119. Section 7-51-1109 explicitly states that the procedural safeguards governing license revocation contained therein apply "[n]otwithstanding anything in this part to the contrary." § 7-51-1109(b)(1). Thus, it is implausible to maintain that the procedures governing revocations generally are not applicable to punitive revocations for violations of the Act under § 7-51-1119.

We are unable to glean any alternative logic to support Plaintiff's claim that the Act is an unconstitutional prior restraint because it is not "punishment in the ordinary sense." Thus, we hold that the district court did not err in finding that Plaintiff did not show a substantial likelihood of success on the merits of this claim.

D

Plaintiff raises other grounds for its facial attack on the Act, all of which are waived and/or addressed by our opinion in the companion case. Plaintiff's claim that the definition of "adult cabaret," § 7-51-1102(2), renders the Act unconstitutionally overbroad was found to lack merit in *Entertainment Productions.* Plaintiff's claims that the definition of "specified sexual activities," § 7-51-1102(27), and the prohibition on "fondling," § 7-51-1114(d)(1)(D), are overbroad and/or not narrowly tailored are waived. While Plaintiff identifies these claims in its initial complaint, they are not presented in its Memorandum in Support of Motion for a Preliminary Injunction, and were therefore not addressed by the district court.[4] Lastly, Plaintiff's claim that the prohibition on touching and the buffer-zone requirement are overbroad and/or not narrowly tailored is also waived because it was not presented in its Memorandum in Support of Motion for a Preliminary Injunction and was not addressed by the district court. In any case, we rejected this claim on the merits in *Entertainment Productions.*

[4] Even if considered on the merits, however, these challenges would fail. Plaintiff misconceives the role that the definition of "specified sexual activities" plays in the Act, treating the term, which is employed in the definition of "adult entertainment," as a prohibition. The claim that the prohibition on fondling in § 7-51-1114(d)(1)(D) unconstitutionally burdens expression would also fail on the merits for the same reasons that the challenge to the no-touching provisions did not succeed in *Entertainment Productions.* The prohibition on "fondling genitals" is surely less burdensome and easier to justify than the broader, more intrusive provisions challenged by the plaintiffs in *Entertainment Productions.*

III

For the foregoing reasons, we affirm the district court's denial of the preliminary injunction.

KAREN NELSON MOORE, Circuit Judge, concurring only in the judgment.

I believe that the district court did not abuse its discretion by denying the plaintiffs' motion for a preliminary injunction. I do not join the majority's opinion, and I concur solely in the judgment affirming the district court's judgment that the plaintiffs have not satisfied the requirements ***372** for a preliminary injunction of the challenged provisions.

It is important to emphasize that plaintiff waived any challenge at this time to Tennessee Code Annotated § 7-51-1114(d)(1)(D)'s prohibition on self-touching by not raising the issue in its preliminary-injunction motion or supporting memorandum. Thus, any discussion regarding the merits of a hypothetical challenge to that provision is premature.

All Citations

588 F.3d 360

588 F.3d 372
United States Court of Appeals,
Sixth Circuit.

ENTERTAINMENT PRODUCTIONS, INC., et al., Plaintiffs–Appellants,
v.
SHELBY COUNTY, TENN., et al., Defendants–Appellees,
Robert E. Cooper, Jr., Attorney General, Intervenor Defendant–Appellee.

No. 08–5494.
|
Argued: April 20, 2009.
|
Decided and Filed: Nov. 25, 2009.
|
Rehearing and Rehearing En Banc Denied Mar. 2, 2010.

Synopsis

Background: Operator of adult-oriented entertainment establishment brought action challenging constitutionality of state law regulating such establishments. The United States District Court for the Western District of Tennessee Bernice B. Donald, J., 545 F.Supp.2d 734, denied a motion for a preliminary injunction against enforcement of the statute. Operator appealed.

Holdings: The Court of Appeals, Boggs, Circuit Judge, held that:

[1] definition of "adult cabaret" was not overbroad;

[2] definitions of "Adult-oriented establishment" and "Adult entertainment" were not facially overbroad;

[3] prohibition on encouraging contact was not overbroad;

[4] spatial requirements were not overbroad; and

[5] definitions were not impermissibly vague.

Affirmed.

Karen Nelson Moore, Circuit Judge, filed an opinion concurring only in the judgment.

West Headnotes (25)

[1] **Federal Courts**
Injunction

District court's denial of injunctive relief is normally reviewed for an abuse of discretion.

Cases that cite this headnote

[2] **Injunction**
Grounds in general;multiple factors

District court considers and balances four factors in making its decision concerning preliminary injunctive relief; (1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief.

3 Cases that cite this headnote

[3] **Civil Rights**
Preliminary Injunction

Substantial likelihood or probability of success on the merits, as required to entitle a plaintiff to preliminary injunctive relief, is crucial in First Amendment cases because public interest and harm to the parties largely depend on the constitutionality of the challenged law. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[4] **Federal Courts**
Preliminary injunction;temporary restraining order

On appeal from a district court's denial of preliminary injunctive relief, whether a

plaintiff established a substantial likelihood or probability of success on the merits is a purely legal question of whether the district court improperly applied governing law or used an erroneous legal standard, which Court of Appeals reviews de novo.

1 Cases that cite this headnote

[5] **Constitutional Law**
Sexual Expression
Constitutional Law
Sexually Oriented Businesses;Adult Businesses or Entertainment
Constitutional Law
Secondary effects

Restrictions on sexually explicit expression are constitutionally permissible if they further a substantial governmental interest unrelated to the suppression of free expression, specifically, the amelioration of adverse secondary effects associated with adult establishments; they are narrowly tailored; and they do not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[6] **Constitutional Law**
Invalidation of all enforcement

When a law prohibits a substantial amount of protected speech both in an absolute sense and relative to the statute's plainly legitimate sweep, the overbreadth doctrine dictates wholesale invalidation. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[7] **Constitutional Law**
Secondary effects

As to adult-oriented business regulations, overbreadth doctrine guards against the suppression of protected speech unconnected to the negative secondary effects cited as legislative justification. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] **Constitutional Law**
Facial invalidity
Constitutional Law
Facial challenges;facial invalidity

Facial invalidation of a law is strong medicine, as substantial social costs are incurred by preventing the application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Prohibition of substantial amount of speech

Only if a plaintiff demonstrates from the text of the statute and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally as to free speech, is facial invalidation on overbreadth grounds appropriate. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[10] **Constitutional Law**
Statutes in general
Constitutional Law
Statutes

Generally, vague laws fail to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, risk trapping the innocent, and create a danger of arbitrary and discriminatory enforcement.

Cases that cite this headnote

[11] **Constitutional Law**
Vagueness in General

When a law implicates First Amendment freedoms, vagueness poses the same risk as overbreadth, as vague laws may chill

citizens from exercising their protected rights. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[12] **Constitutional Law**
Performers
Public Amusement and Entertainment
Dancing and other performances

Reference to nudity as "a principal use" of business, within definition of adult cabaret under Tennessee statute restricting degree of nudity and imposing other limitations on performances at adult cabarets, did not expand the statute's regulatory reach to multi-use and mainstream establishments, as would render the statute facially overbroad in violation of free expression; common definition of term "principal" as most important diminished the significance of the preceding indeterminate article which seemingly included mainstream dramatic or artistic venues, and even if provision was read to include establishments with several principal uses of equal importance, nudity in the course of a performance did not necessarily describe "a principal use" of theatrical, musical, or similar mainstream artistic venues. U.S.C.A. Const.Amend. 1; West's T.C.A. § 7–51–1102(2).

Cases that cite this headnote

[13] **Constitutional Law**
Performers
Public Amusement and Entertainment
Dancing and other performances

Definition of "adult cabaret," under Tennessee statute restricting degree of nudity and imposing other limitations on performances at adult cabarets, which listed exotic dancers, strippers, male or female impersonators, or similar entertainers, as kind of entertainment that may fit the definition of an adult cabaret, did not render statute facially overbroad in violation of free expression, even though some performances by entertainers listed bore no relation to the secondary effects that statute sought to control; read naturally, statute included the listed examples as adult cabaret performances only if the entertainment by the performers was a principal use of the business and if their attire exposed specified anatomical areas. U.S.C.A. Const.Amend. 1; West's T.C.A. § 7–51–1102(2).

Cases that cite this headnote

[14] **Constitutional Law**
Performers
Public Amusement and Entertainment
Dancing and other performances

Provision of Tennessee statute defining an adult cabaret and imposing limitations on performances at adult cabarets, including by entertainers who were distinctly not nude but clad in "bikinis, swimsuits, and other materials which, while opaque, do not completely cover the entire buttocks, or all portions of the breast below the topmost portion of the areola," did not facially violate free expression, on overbreadth grounds, by regulating performances by "clothed" dancers which were unconnected to adverse secondary effects the statute purported to address. U.S.C.A. Const.Amend. 1; West's T.C.A. § 7–51–1102(2).

2 Cases that cite this headnote

[15] **Constitutional Law**
Performers in general
Constitutional Law
Nudity in general
Public Amusement and Entertainment
Dancing and other performances

Definition of "Adult-oriented establishment" and "Adult entertainment," within Tennessee statute restricting degree of nudity and imposing other limitations on performances at such establishments, was not facially overbroad in violation of free expression; specific language made the statute readily susceptible to meaning that "adult entertainment" would make an establishment

"adult-oriented" only if entertainment was conducted in some kind of compartments separated from common area, thereby reducing the alleged regulatory burden on mainstream artistic performances, since they were not commonly conducted on premises. U.S.C.A. Const.Amend. 1; West's T.C.A. § 7–51–1102(6).

2 Cases that cite this headnote

[16] **Constitutional Law**
Consideration of limiting construction

Facial invalidation is inappropriate if the statute is readily subject to a narrowing construction by the state courts.

1 Cases that cite this headnote

[17] **Constitutional Law**
Consideration of limiting construction

Constitutional Law
Rewriting to save from unconstitutionality

Key to application of the narrowing construction principle as to a facial challenge is that the statute must be readily susceptible to the limitation; courts will not rewrite a state law to conform it to constitutional requirements.

Cases that cite this headnote

[18] **Constitutional Law**
Limitations of Rules and Special Circumstances Affecting Them

Municipal Corporations
Presumptions and burden of proof

While courts will not rewrite a state or local law to narrow construction on a facial challenge, neither will they assume that state courts would broaden the reach of a statute by giving it an expansive construction.

Cases that cite this headnote

[19] **Constitutional Law**
Performers in general

Constitutional Law
Nudity in general

Public Amusement and Entertainment
Dancing and other performances

Inclusion within definition of "adult entertainment," under Tennessee statute restricting degree of nudity and imposing other limitations on performances at adult-oriented establishments, of "pantomime," "modeling," or "any other personal service offered customers," did not render statute facially overbroad in violation of free expression; the phrases when read in context of entire definition clearly pertained and was limited to entertainment which included actual or simulated performance of specified sexual activities or exhibition and viewing of specified anatomical areas. U.S.C.A. Const.Amend. 1; West's T.C.A. § 7–51–1102(6).

Cases that cite this headnote

[20] **Constitutional Law**
Nude dancing in general

Constitutional Law
Semi-nude dancing in general

A content-neutral time, place, or manner regulation may burden nude or nearly nude dancing so long as the burden is no greater than necessary to advance a legitimate government objective, and does not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[21] **Constitutional Law**
Nudity in general

A ban on nudity does not effect a complete ban on expression, but merely, and not unreasonably, limits one particular means of expressing the kind of erotic message being disseminated. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[22] **Constitutional Law**
Contact between performers and patrons
Public Amusement and Entertainment
Dancing and other performances

Provision of Tennessee statute barring owners and operators of adult-oriented entertainment establishments from encouraging or permitting persons on the premises from contact with listed anatomical areas of any entertainer, was not facially overbroad in violation of free expression; prohibition was a prophylactic measure reasonably believed to be necessary to achieve the goal of preventing prohibited contact under the statute. U.S.C.A. Const.Amend. 1; West's T.C.A. § 7–51–1114(b).

Cases that cite this headnote

[23] **Constitutional Law**
Proximity of performers to patrons
Constitutional Law
Contact between performers and patrons
Public Amusement and Entertainment
Dancing and other performances

Provision of Tennessee statute barring contact with entertainers within adult-oriented entertainment establishments and requiring that entertainers and dancers perform at least six feet from nearest entertainer, employee, or customer, was not facially overbroad in violation of free expression; provision enacted a single mandate, the spatial requirements ensuring that no contact occurred between a performer and any other person during a performance. U.S.C.A. Const.Amend. 1; West's T.C.A. § 7–51–1114(c).

2 Cases that cite this headnote

[24] **Constitutional Law**
Performers
Public Amusement and Entertainment
Dancing and other performances

Definition of term "adult cabaret" as including entertainment of an erotic nature, under Tennessee statute restricting degree of nudity and imposing other limitations on performances therein, was not impermissibly vague in violation of free expression, even though statute, in listing examples of adult cabarets, did not define entertainment of an "erotic nature." U.S.C.A. Const.Amend. 1; West's T.C.A. § 7–51–1102(2).

Cases that cite this headnote

[25] **Constitutional Law**
Performers in general
Constitutional Law
Nudity in general
Public Amusement and Entertainment
Dancing and other performances

Definition of "adult entertainment" as any exhibition that had as principal theme the actual or simulated performance of specified sexual activities, removal of clothes, or appearing unclothed, under Tennessee statute regulating nudity within adult-oriented entertainment establishments, was not impermissibly vague in violation of free expression rights; under a narrow construction all questions as to conduct prohibited by statute, including what garments were included, were readily answered. U.S.C.A. Const.Amend. 1; West's T.C.A. § 7–51–1102(6).

Cases that cite this headnote

Attorneys and Law Firms

***376 ARGUED:** J. Michael Murray, Berkman, Gordon, Murray & DeVan, Cleveland, Ohio, for Appellants. Robert B. Rolwing, Assistant County Attorney, Shelby County Government, Memphis, Tennessee, Steven A. Hart, Office of the Tennessee Attorney General, Nashville, Tennessee, for Appellees. **ON BRIEF:** J. Michael Murray, Raymond V. Vasvari, Jr., Berkman, Gordon, Murray & DeVan, Cleveland, Ohio, for Appellants. Robert B. Rolwing, Assistant County Attorney, Shelby County Government, Memphis, Tennessee, Steven A. Hart, Office of the Tennessee

Attorney General, Nashville, Tennessee, Thomas Roane Waring III, City Attorney's Office, Memphis, Tennessee, for Appellees.

Before: BOGGS, MOORE, and SUTTON, Circuit Judges.

BOGGS, J., delivered the opinion of the court, in which SUTTON, J., joined. MOORE, J. (p. 395–96), delivered a separate opinion concurring only in the judgment.

OPINION

BOGGS, Circuit Judge.

Plaintiffs–Appellants Entertainment Productions, Inc., et al. filed suit to challenge the constitutionality of the Tennessee Adult–Oriented Establishment Registration Act ("Act" or "Tennessee Act") on First Amendment grounds. Plaintiffs appeal from a district court's denial of a preliminary injunction against the enforcement of the Tennessee Act in Shelby County. Plaintiffs claim that the Tennessee Act is unconstitutional on four grounds. First, Plaintiffs contend that the definitions of "adult cabaret," "adult-oriented establishment," and "adult entertainment" render the Act unconstitutionally overbroad, and second, that these definitions are vague. Third, Plaintiffs argue that prohibitions on certain kind of physical contact on the premises of an adult-oriented establishment are overbroad. Fourth, Plaintiffs claim that the Tennessee Act will substantially diminish the availability of adult speech in Memphis, Shelby County. Plaintiffs conclude that the district court erred in determining both that Plaintiffs did not demonstrate a substantial likelihood of success on the merits of their claims and that the balancing of equities disfavored a preliminary injunction. We affirm the district court's denial of the preliminary injunction.

I

This case presents a constitutional challenge to the Tennessee Adult–Oriented Establishment Registration Act of 1998, Tenn.Code Ann. § 7–51–1101 *et seq.* The Tennessee Act is a county-option state law, enacted to address the recognized negative secondary effects associated with "adult" or sexually oriented businesses, including crime, spread of sexually transmitted diseases, lowering of property values, and other related public welfare and safety issues. The Act sets up a licensing scheme for sexually oriented businesses, prohibits certain activities on the premises of such businesses, and regulates the manner in which entertainment may be presented therein. The Act enters into effect in a particular county after "a two-thirds (2/3) vote of the county legislative body adopting this part." Tenn.Code Ann. § 7–51–1120. On September 13, 2007, Shelby County's Ordinance 344 ("Ordinance") adopted the Tennessee Act in Shelby County. The Ordinance relied on Tennessee's ***377** legislative findings of "deleterious secondary effects commonly associated with adult-oriented establishments, including but not limited to an increase in crime, the spread of sexually-transmitted diseases, the downgrading of property values, and other public health, safety, and welfare issues." Pursuant to the Ordinance, the Act entered into effect in Shelby County on January 1, 2008, but provided a 120–day "grace period" to allow businesses and employees to obtain licenses required by the Act.

The Act regulates all establishments that conform to a statutory definition of "adult-oriented establishment" in two general ways. First, all businesses subject to the Act, as well as their employees and entertainers, must obtain a license or a permit. Second, the Act regulates the manner in which entertainment may be provided by adult-oriented establishments: it prohibits nudity, certain sexual activities, certain kinds of physical contact, and requires that all performances take place on a stage at least 18 inches above floor level and that all performers stay at least six feet away from customers, employees and other performers.

Plaintiffs operate a "substantial fraction" of the nightclubs in Memphis, Shelby County. On January 25, 2008—prior to the expiration of the 120–day grace period for obtaining licenses—Plaintiffs filed suit in the United States District Court for the Western District of Tennessee against Shelby County and the City of Memphis, seeking injunctive relief and a declaratory judgment. Tennessee's Attorney General, Robert E. Cooper, Jr., was granted leave to intervene to defend the constitutionality of the Act (Shelby County, the City of Memphis, and the Attorney General are collectively referred to as "Defendants"). After a preliminary injunction hearing, the district court denied the requested injunction on the basis that Plaintiffs did not demonstrate a substantial likelihood of success on

the merits of their claims.[1] Plaintiffs now appeal from that decision.

[1] However, the district court granted Plaintiffs' subsequent motion for an injunction pending this appeal.

II

A

[1] [2] [3] [4] A district court's denial of injunctive relief is normally reviewed for an abuse of discretion. *Hamilton's Bogarts, Inc. v. Michigan,* 501 F.3d 644, 649 (6th Cir.2007). The district court considers and balances four factors in making its decision: "(1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief." *Ibid.* (quoting *City of Littleton v. Z.J. Gifts D–4, L.L.C.,* 541 U.S. 774, 784, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004)). The first factor is crucial in First Amendment cases because public interest and harm to the parties largely depend on the constitutionality of the challenged law. The first factor presents a "purely legal question of whether the district court improperly applied governing law or used an erroneous legal standard," which we review *de novo. Ibid.* (internal quotation marks and citations omitted).

B

[5] This court has repeatedly faced challenges to the constitutionality of state ***378** and local regulations of sexually or adult-oriented establishments. We recognize that such regulations tend to abridge the opportunities for the communication and reception of "at least two protected categories of speech: first, sexually explicit but non-obscene speech, such as adult publications and adult videos, and second, 'symbolic speech' or 'expressive conduct,' such as nude [or nearly nude] dancing." *Richland Bookmart, Inc. v. Knox County, Tenn.,* 555 F.3d 512, 520 (6th Cir.2009); *see also Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 274 F.3d 377, 396 (6th Cir.2001). Notwithstanding the protection accorded to erotic expression by the First Amendment, the Supreme Court has held that governments may adopt measures intended to ameliorate the adverse secondary effects of such expression, so long as the restrictions placed on expression survive intermediate scrutiny as set forth in *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and *City of Renton v. Playtime Theatres,* 475 U.S. 41, 47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Restrictions on sexually explicit expression are constitutionally permissible if: they further a substantial governmental interest "unrelated to the suppression of free expression," *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673—specifically, the amelioration of adverse secondary effects associated with adult establishments; they are narrowly tailored; and they "do not unreasonably limit alternative avenues of communication," *Renton,* 475 U.S. at 47, 106 S.Ct. 925. *See Richland Bookmart,* 555 F.3d at 520–22.

In accordance with *O'Brien, Renton*, and their progeny, we have declined to uphold particular regulatory measures, for which no substantial governmental interest unrelated to the suppression of speech was proffered, that burdened more speech than necessary in a manner unconnected to the interest in controlling secondary effects, and/or which unreasonably limited the avenues of communication for adult-oriented speech. *See, e.g., Hamilton's Bogarts, Inc.,* 501 F.3d at 654; *Exec. Arts Studio, Inc. v. City of Grand Rapids,* 391 F.3d 783, 798–99 (6th Cir.2004); *see also 729, Inc. v. Kenton County Fiscal Court,* 515 F.3d 485, 504 (6th Cir.2008).

In the present case, Plaintiffs do not argue that the application of the Tennessee Act to their establishments does not satisfy intermediate scrutiny under *O'Brien* and *Renton.*[2] Indeed, because the Act has not yet been enforced against Plaintiffs, they challenge key provisions of the Act as overly broad and/or vague, and maintain that nothing short of facial invalidation will remedy the chilling effect created by the threat of its unconstitutional applications.

[2] Nor would such a claim be likely to meet with success, in light of the decision of the Tennessee Court of Appeals in *American Show Bar Series, Inc. v. Sullivan County,* 30 S.W.3d 324 (Tenn.Ct.App.2000), *app. denied,* 2000 Tenn. LEXIS 543 (Tenn. Sept. 25, 2000), which held that the Act was constitutional as applied to similarly situated plaintiffs. That court determined that the Act is a content-neutral

time, place, and manner regulation of adult-oriented establishments, *id.* at 334, and that a number of challenged provisions survived intermediate scrutiny under *O'Brien,* including the provisions regarding prohibited activities, to which present Plaintiffs now bring a facial challenge on overbreadth grounds. *Id.* at 338–39.

[6] **[7]** In the context of the First Amendment, the chief evil of overly broad laws consists in the chilling effect they produce on protected expression. For this reason, the Supreme Court has relaxed the traditional rules of standing: plaintiffs are permitted "to challenge a statute not because their own rights of free expression ***379** are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Prime Media, Inc. v. City of Brentwood,* 485 F.3d 343, 348 (6th Cir.2007) (internal quotation marks omitted) (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). Thus, when a law " 'prohibits a substantial amount of protected speech' both 'in an absolute sense' and 'relative to the statute's plainly legitimate sweep,' " the overbreadth doctrine dictates wholesale invalidation. *Connection Distrib. Co. v. Holder,* 557 F.3d 321, 336 (6th Cir.2009) (quoting *United States v. Williams,* 553 U.S. 285, 128 S.Ct. 1830, 1838, 170 L.Ed.2d 650 (2008)). In the context of adult-oriented business regulations, "the overbreadth doctrine guards against the suppression of protected speech unconnected to the negative secondary effects cited as legislative justification." *Schultz v. City of Cumberland,* 228 F.3d 831, 849 (7th Cir.2000) (citing *Tunick v. Safir,* 209 F.3d 67, 83 (2d Cir.2000); *see also Triplett Grille, Inc. v. City of Akron,* 40 F.3d 129, 135 (6th Cir.1994)).

[8] **[9]** Facial invalidation of a law is, as the Supreme Court and this court repeatedly noted, "strong medicine," as " '[s]ubstantial social costs' are incurred by preventing the 'application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct.' " *Richland Bookmart, Inc.,* 555 F.3d at 532 (quoting *Virginia v. Hicks,* 539 U.S. 113, 119, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003)). Therefore, the Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be substantial," *Williams,* 128 S.Ct. at 1838, and cautioned that invalidation for overbreadth be deployed sparingly and "only as a last resort," *Broadrick,* 413 U.S. at 613, 93 S.Ct. 2908. Only if a plaintiff demonstrates "from the text of [the statute] and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally," is facial invalidation on overbreadth grounds appropriate. *Richland Bookmart, Inc.,* 555 F.3d at 532 (alteration in original) (quoting *N.Y. State Club Ass'n v. City of New York,* 487 U.S. 1, 14, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988)).

[10] **[11]** The void-for-vagueness doctrine and the overbreadth doctrine vindicate overlapping values in First Amendment jurisprudence. In general, vague laws fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," risk "trapping the innocent," and create a danger of "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). When a law implicates First Amendment freedoms, vagueness poses the same risk as overbreadth, as vague laws may chill citizens from exercising their protected rights. Accordingly, the Supreme Court has indicated that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech." *Smith v. California,* 361 U.S. 147, 151, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). "Although ordinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,' we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." *Williams,* 128 S.Ct. at 1845 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494–95 & nn. 6 & 7, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)).

***380** This court has not shied away from invalidating a regulatory scheme in its entirety when the threat of impermissible applications and the consequent chilling effect unambiguously warranted this remedy. *See Odle v. Decatur County,* 421 F.3d 386, 395, 399 (6th Cir.2005) (holding that a Decatur County ordinance, which prohibited, *inter alia,* nudity and the performance of arguably sexually suggestive acts in any place where liquor was sold, served or consumed, was overbroad because "it reache[d] a wide swath of public places likely to present performances not usually attended by harmful secondary effects"); *Triplett Grille,* 40 F.3d at 136 (holding that the Akron public indecency

ordinance was unconstitutionally overbroad because it prohibited nudity in all public places, without excepting "live performances with serious literary, artistic, or political value"). Our decisions are also in harmony with other circuits' disposition of similar challenges. *See, e.g., Conchatta Inc. v. Miller,* 458 F.3d 258, 266 (3d Cir.2006) (holding that a Pennsylvania regulation prohibiting "lewd" entertainment is unconstitutionally overbroad because it applied to all venues holding liquor licenses as well as those "operat[ing] in connection" with the licensed premises, sweeping in "a variety of performances that are entitled to the full protection of the First Amendment"); *Giovani Carandola, Ltd. v. Bason,* 303 F.3d 507, 510, 516 (4th Cir.2002) (holding that plaintiffs are likely to succeed in their overbreadth challenge to a North Carolina secondary-effects regulation because it applied to all establishments licensed to sell alcohol, "sweep[ing] far beyond bars and nude dancing establishments" and reaching "much other mainstream entertainment," with no evidence offered to connect the proscribed activities in mainstream venues to adverse secondary effects); *Ways v. City of Lincoln,* 274 F.3d 514, 519 (8th Cir.2001) (holding that an ordinance is unconstitutionally overbroad because it reached beyond adult entertainment establishments to regulate conduct in "any business or commercial establishment," including "theater performances, ballet performances, and many other forms of live entertainment" not recognized to cause harmful secondary effects).

The facial attacks in *Odle, Triplett Grille, Conchatta, Carandola*, and *Ways* succeeded because the challenged statutes purported to regulate public venues that stage mainstream performances of artistic value, as well as venues that stage adult-oriented performances. In these cases, the "strong medicine" of facial invalidation was warranted because casting so wide a regulatory net would certainly chill protected artistic expression that was not shown to produce the same adverse secondary effects associated with adult entertainment. Moreover, the challenged statutes were not "readily susceptible" either to a narrowing construction that would limit the regulatory scope to adult-oriented establishments or to a limitation by severance of problematic provisions. *See Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988). To demonstrate a substantial likelihood of success on the merits of the present claims, therefore, the Plaintiffs must establish that the allegedly unconstitutional provisions of the Tennessee Act result in a real and substantial number of impermissible applications that chill protected expression, that the statutory language is not readily susceptible to a limiting construction, and that any problematic provisions may not be severed because they are "an integral part of the [Act] viewed in its entirety," *Schultz,* 228 F.3d at 853.

C

In their first argument, Plaintiffs assert unconstitutional overbreadth on the basis ***381** of the three definitions that identify the set of establishments to which the Act applies. The licensing and other regulations contained in the Act apply to "adult-oriented establishments," which include "adult cabarets." Moreover, Plaintiffs claim that the category of "adult-oriented establishments" also includes *any* establishment that is open to the public and presents "adult entertainment" for profit. The three definitions—"adult-oriented establishment," "adult cabaret," and "adult entertainment"—render the Act overbroad, according to Plaintiffs, because they serve to prohibit and regulate expression "not only within adult establishments, but also in a wide variety of venues with neither an actual nor an alleged link to the adverse secondary effects attributed to adult expression." Appellants' Br. at 13.

Our "first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams,* 128 S.Ct. at 1838. We proceed, therefore, to construe each term challenged by Plaintiffs.

"Adult Cabaret"

An "adult cabaret" is an "adult-oriented establishment" subject to licensing and regulation under the Act, and is separately defined as follows:

> "Adult cabaret" means an establishment that features as a principal use of its business, entertainers, waiters, or bartenders who expose to public view of the patrons within such establishment, at any time, the bare female breast below a point immediately above the top of the areola,

> human genitals, pubic region, or buttocks, even if partially covered by opaque material or completely covered by translucent material, including swim suits, lingerie, or latex covering. "Adult cabaret" includes a commercial establishment that features entertainment of an erotic nature, including exotic dancers, strippers, male or female impersonators, or similar entertainers;

Tenn.Code Ann. § 7–51–1102(2). Plaintiffs identify three reasons why the set of establishments swept into the Act's regulatory scheme by this definition results in overbreadth.

[12] First, Plaintiffs argue that the statutory reference to "*a* principal use," rather than "*the* principal use," expands the Act's regulatory reach to multi-use and mainstream establishments. Appellants' Br. at 34. "Adult cabarets," on Plaintiffs' reading, include cabarets that have several uses, of which presentation of semi-nude entertainment is just one, as well as mainstream dramatic or artistic venues. The latter venues will fall within the definition of "adult cabaret," Plaintiffs insist, because "substantial runs of a drama, music or dance program ...—which contain nudity and thus can make the venue in which they are performed into an adult cabaret—go on for long periods, turning that performance into a substantial, and thus a principal use of the venue." Appellants' Br. at 35.

While article choice ought not be ignored in statutory interpretation, the chosen article is not the only or overriding signal of a statute's meaning. In this case, the common definition of the succeeding term ("principal") diminishes the significance of the indeterminate article. As the district court noted, "principal" means "*most* important, consequential, or influential." (quoting *Webster's Third New International Dictionary* 1802 (3d ed.1993) (emphasis added)).[3] In light of this definition, ***382** the substantive import of the alleged distinction between "*the most* important" and "*a most* important" use of a business is negligible.

[3] Unlike a number of other statutes we have encountered, the Tennessee Act does not define "principal use," which leaves its interpretation to the common definition of the term. *Cf. Richland Bookmart, Inc. v. Knox County, Tenn.*, 555 F.3d 512, 519 (6th Cir.2009) (scrutinizing an ordinance that defined "principal business purpose" to mean, *inter alia,* 35% or more of displayed merchandise or its value, revenues, or interior business space).

Even if this provision is read to include establishments with several "principal uses" of equal importance, we are not persuaded that entertainers' exposure of specified anatomical areas in the course of a performance would ever plausibly describe "a principal use" of theatrical, musical or similar mainstream artistic venues. A "run" of a performance, however long, that contains nudity, does not transform such a venue into an adult cabaret because no *specific* play, opera or ballet is commonly deemed to be "a principal use" of a venue.[4] With regard to establishments that are devoted to multiple uses of equal importance, one of which is admittedly adult entertainment, their inclusion under the Act's regulatory scheme would not violate the First Amendment. Neither this court nor the Supreme Court has required that regulatory efforts to address secondary effects of sexually oriented businesses must be confined to establishments that accord unequivocal priority to adult entertainment over all other business uses. The crucial inquiry in determining the permissible reach of such regulations is whether the government relied on evidence reasonably believed to be relevant in identifying the set of businesses that generate adverse secondary effects. Given the documented evidence of such effects examined by Tennessee, Shelby County, as well as other jurisdictions, it is not unreasonable to conclude that an establishment with more than one principal use—for instance, semi-nude dancing and food service—is as liable to produce negative externalities as an establishment wholly devoted to presenting semi-nude dancing.[5]

[4] It would be odd to say that a presentation of *Salomé,* rather than operatic performances generally, is a principal use of an opera house.

[5] We have previously upheld various regulations applicable to similarly defined establishments, even if we did not confront an identical challenge to the definition. In *DLS, Inc. v. City of Chattanooga,* for instance, this court upheld a similar licensing and regulation scheme that applied to "establishment[s] which feature[ ] as a principle [sic] use of its business" entertainers or employees who expose the same

anatomical areas specified in the provision at bar. 107 F.3d 403, 406 (6th Cir.1997).

[13] Second, Plaintiffs argue that "the sorts of entertainment listed in the second sentence of § 7–51–1102(2) are intended to augment, and not exemplify, the first," which sweeps in mainstream establishments without requiring that "entertainment of an erotic nature" be their principal use. Appellants' Rep. Br. at 6–7, 35. We disagree. The second sentence merely lists examples of the kind of entertainment that may fit the definition set forth in the first sentence. Plaintiffs object that the list of entertainers in the second sentence "may or may not exemplify the first": "There is no requirement, rule or practice which says that a female impersonator will appear, for example, in lingerie or with bare breasts, or that a bared buttock [ ] is a necessary element of entertainment 'of an erotic nature'." Appellants' Rep. Br. at 7.

It is probably true that some performances by the entertainers listed in the second sentence bear no relation to the secondary effects the Act seeks to control. This, however, presents no difficulties of interpretation of the kind Plaintiffs evoke. Read naturally, a "commercial establishment ***383** that features entertainment of an erotic nature" by any of the listed performers is an "adult cabaret" under the Act *only* if entertainment by these performers is a principal use of the business *and* if their attire exposes the anatomical areas specified in the first sentence. Read in this manner, the Act does not burden a substantial amount of protected expression unrelated to secondary effects. [6]

6 Because we find that the second sentence does not augment the complete definition of "adult cabaret" contained in the first sentence, we find it unnecessary to address Plaintiffs' further arguments about the inadequacy of the word "feature" as an alternative source of a limiting construction. See Appellants' Rep. Br. at 8.

[14] Third, Plaintiffs claim that the Act impermissibly regulates erotic dance performances by "clothed" dancers, which are unconnected to the adverse secondary effects the Act purports to address. *Id.* at 39. By "clothed," Plaintiffs mean entertainers who are distinctly not nude, but are clad in "bikinis, swimsuits, and other materials which, while opaque, do not completely cover the entire buttocks, or all portions of the breast below the topmost portion of the areola." *Id.* at 40. The theory that underlies this claim—that burdening performances put on by entertainers so attired constitutes an unconstitutional application of a secondary-effects regulation—was addressed and rejected by this court in *Richland Bookmart,* 555 F.3d at 529–30.

In that case, we explained that in view of the evidence of secondary effects relied on by Knox County, as well as numerous other local and state governments promulgating similar regulations, " 'it was reasonable for the City to conclude that establishments featuring performers in attire more revealing than bikini tops pose the same types of problems associated with other [sexually oriented businesses].' " 555 F.3d at 529 (quoting *Baby Dolls Topless Saloons, Inc. v. City of Dallas,* 295 F.3d 471, 482 (5th Cir.2002)) (alteration in original). We held that the regulation of adult cabarets featuring "semi-nude" performers [7] survived intermediate scrutiny because it did not impose a "substantial portion of the regulatory burden on protected speech without advancing the goals of the Ordinance." *Id.* at 530. Thus, imposing comparable burdens on a substantially overlapping set of cabarets cannot form a basis for a successful facial challenge. We are persuaded that the term "adult cabaret" does not render the Act overly broad.

7 The Knox County Ordinance applied to establishments that "regularly feature[ ] persons who appear semi-nude," where "semi-nudity" meant "the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part." *Richland Bookmart,* 555 F.3d at 519.

"Adult-oriented establishment" and "Adult entertainment"

[15] Next, Plaintiffs argue that the definitions of "adult entertainment" and "adult-oriented establishment" jointly render the Act unconstitutionally overbroad in its scope. "Adult-oriented establishment" is given a long, tripartite definition:

> "Adult-oriented establishment" includes, but is not limited to, an adult bookstore, adult motion picture theater, adult mini-motion picture establishment,

adult cabaret, escort agency, sexual encounter center, massage parlor, rap parlor, sauna;

***384** further, "adult-oriented establishment" means any premises to which the public patrons or members are invited or admitted and that are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purpose of viewing adult-oriented motion pictures, or wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, when such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect.

"Adult-oriented establishment" further includes, without being limited to, any adult entertainment studio or any premises that is physically arranged and used as such, whether advertised or represented as an adult entertainment studio, rap studio, exotic dance studio, encounter studio, sensitivity studio, model studio, escort service, escort or any other term of like import;

§ 7–51–1102(6) (line breaks added). An establishment that conforms to the terms of any one of the three parts is subject to the Act's provisions.

Plaintiffs' complaint centers on the second part of this definition. Plaintiffs contend that a grammatically correct reading requires treating the clause beginning with "or wherein" as a modifier for "any premises to which the public patrons or members are invited or admitted." Appellants' Rep. Br. at 16. This reading breaks up the provision as follows:

Further, "adult-oriented establishment" means [1] any premises to which the public patrons or members are invited or admitted and

[2A] that are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purpose of viewing adult-oriented motion pictures,

or [2B] wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, when such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect.

So construed, either [1] & [2A] *or* [1] & [2B] suffice to make an establishment an adult-oriented one. That means that "[a]ny place which presents adult entertainment is, by virtue of that fact an adult-oriented establishment and subject to the full force of the act...." Appellants' Br. at 36.

Under this interpretation, the definition of "adult entertainment" becomes crucial to determining the scope of the Act. Broken up into its logical components, that definition reads:

"Adult entertainment" means [1] *any exhibition of any* adult-oriented motion picture, live performance, display or dance of any type,

[A] that has as a principal or predominant theme, emphasis, or portion of such performance,

[i] any actual or simulated performance of specified sexual activities [8] or

[8] "Specified sexual activities" are further defined to mean:
(A) Human genitals in a state of sexual stimulation or arousal;
(B) Acts of human masturbation, sexual intercourse or sodomy; or
(C) Fondling or erotic touching of human genitals, pubic region, buttocks or female breasts.
Tenn.Code Ann. § 7–51–1102(27).

[ii] exhibition and viewing of specified anatomical areas, [9]

[9] "Specified anatomical areas" are further defined to mean:
(A) Less than completely and opaquely covered:
(i) Human genitals;
(ii) Pubic region;
(iii) Buttocks; and
(iv) Female breasts below a point immediately above the top of the areola; and
(B) Human male genitals in a discernibly turgid state, even if completely opaquely covered;
Tenn.Code Ann. § 7–51–1102(24).

***385** [iii] removal of articles of clothing or appearing unclothed,

[iv] pantomime,

[v] modeling, *or*

[vi] any other personal service offered customers;

§ 7–51–1102(3) (line breaks, numeration, and emphasis added). Plaintiffs point to two problems within this definition that, they claim, render the Act unconstitutionally overbroad when combined with the definition of "adult-oriented establishment."

First, there is no explicit requirement that adult entertainment be *regularly* presented by or constitute *a principal use* of an establishment, in order for an establishment to be subject to the Act under the second part of the "adult-oriented establishment" definition. An establishment is subject to the Act if it "invites or admits" "public patrons or members" onto its premises, "wherein an entertainer provides adult entertainment," § 7–51–1102(6), defined as "*any* exhibition of any adult-oriented motion picture, live performance, display or dance of any type, that has as a principal or predominant theme" *any one* of the six listed activities [i]—[vi], § 7–51–1102(3). On Plaintiffs' reading, an establishment that offers "any" *single* performance, whose principal theme involves, for instance, the exhibition of specified anatomical areas, would be subject to the Act's requirements.

Second, Plaintiffs point out that a wide range of expressive conduct suffices to bring a performance or display within the scope of "adult entertainment." Appellants' Br. at 39. The themes that bring a performance under the umbrella of "adult entertainment," Plaintiffs insist, include those that do not describe erotic adult entertainment exclusively but are also characteristic of mainstream artistic expression. At the preliminary injunction hearing, Plaintiffs presented the testimony of Dr. Judith Hanna, a cultural anthropologist at the University of Maryland, who testified that there are "unlimited numbers" of "recognized performances" outside the adult-entertainment setting, whose predominant themes include nudity, simulated sex, and erotic touching between performers, and therefore, fit the definition of "adult entertainment." [10] Plaintiffs further submit that each of the expressive activities listed—including "pantomime," "modeling," or "any other personal services offered customers"—suffices *on its own* to classify a performance as adult entertainment, so long as that activity constitutes a principal or predominant theme of the performance. Entertainment would ***386** be "adult," they argue, even if the removal of some articles of clothing, pantomime act, or modeling at issue did not involve "specified sexual activities" or the exhibition of "specified anatomical areas."

10 Dr. Hanna offered numerous examples of ballet, dance, dramatic, and operatic performances, whose predominant themes conform to the principal or predominant themes listed in the definition of "adult entertainment," such as nudity, simulated sex, and touching between performers. In addition to performances frequently cited in similar law suits such as *Oh, Calcutta!, Salomé,* and *Hair,* Dr. Hanna identified and described, *inter alia,* the following: George Balanchine's *Prodigal Son* ballet, which culminates in "an erotic encounter ... that's portrayed on stage," involving "touching of the body"; Balanchine's *Bugak[u],* whose main theme is erotic, and which culminates in a consummation of marriage; a ballet, *Mutations,* and dance performances, *Map Me* and *Untitled,* that are performed in the nude; as well as a number of others.

In sum, Plaintiffs argue that the *content* of *an individual performance* determines whether or not the Act is applicable to an *establishment* staging that performance. As a consequence, numerous mainstream artistic venues that contemplate including in their program even a single film, opera, ballet, or dance performance that fits the letter of the "adult entertainment" definition, are likely to be chilled from engaging in protected expression.

Were Plaintiffs' performance-based interpretation of the Act's scope the only plausible reading, the Act would be overly broad on its face. If "adult entertainment" sweeps in mainstream artistic performances *and* if the presentation of a single performance suffices to subject an establishment to the Tennessee Act, then the Act applies to precisely the set of establishments that doomed the statutes noted earlier, which were invalidated by this and other circuit courts. *See Odle,* 421 F.3d at 399; *Triplett Grille,* 40 F.3d at 136; *Conchatta Inc.,* 458 F.3d at 266; *Carandola, Ltd.,* 303 F.3d at 516; *Ways,* 274 F.3d at 519. [11]

11 As noted *supra* at 380 and as we explained in *Odle,* a law is overbroad because it fails to "except 'mainstream' artistic or entertainment venues," where protected expression that is "unlikely to spawn harmful secondary effects" is presented—not because it fails to except *other* public places where no protected expression is featured. 421 F.3d at 396;

> *see also Giovani Carandola, Ltd. v. Bason,* 303 F.3d 507, 516 (4th Cir.2002) (explaining that a North Carolina statute was overbroad not because it applied to *many* sites "far beyond bars and nude dancing establishments," but because it applied specifically to sites where mainstream artistic expression commonly takes place). Thus, the fact that the Act now before us purports to apply only to public venues that provide "adult entertainment"—and not to all public places or all venues that sell liquor—does not mean that this Act threatens fewer potentially impermissible applications than did the statutes in *Odle* or *Carandola.*

[16] **[17]** **[18]** Facial invalidation is still inappropriate, however, if the statute is "readily subject to a narrowing construction by the state courts," *Erznoznik v. Jacksonville,* 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). "The key to application of th[e] [narrowing construction] principle is that the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements." *American Booksellers Ass'n,* 484 U.S. at 397, 108 S.Ct. 636. While we will not rewrite a state or local law, neither will we "assume that state courts would broaden the reach of a statute by giving it an 'expansive construction.' " *Richland Bookmart v. Nichols,* 137 F.3d 435, 441 (6th Cir.1998). And, as we noted in the context of a related Tennessee statute, the presumption that state courts will favor the narrower of two plausible constructions "is consistent with Tennessee law that provides that such regulation of speech should be construed narrowly." *Ibid.* (citing *Davis–Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520, 526 (Tenn.1993)).

Defendants put forth an alternative construction of the challenged provisions and reject Plaintiffs' claim that the Act sets up a performance-based standard for regulating adult-oriented businesses. The second part of the "adult-oriented establishment" definition, Defendants argue, should not be read to mean that an isolated presentation of "adult entertainment" suffices to subject a business to the Act's regulation. Instead, the last clause, beginning with "or wherein" should be read as modifying ***387** "booths, cubicles, rooms, compartments or stalls," rather than "premises." Appellees' Br. at 28–9. Shelby County would read the provision as follows:

> Further, "adult-oriented establishment" means [1] any premises to which the public patrons or members are invited or admitted and that are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises
>
> [2A] for the purpose of viewing adult-oriented motion pictures,
>
> or [2B] wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, when such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect.

That is, providing "adult entertainment" [2B] will only make an establishment "adult-oriented" if entertainment is conducted in some kind of compartments separated from the common area [1]. This reading considerably reduces, if not completely eliminates, the alleged regulatory burden on mainstream artistic performances, since such are not commonly conducted on premises with the specified interior arrangement.

We have noted that a limiting or narrowing construction of statutory language is sustainable when "an express exception in the law's text or *other specific language* made the law 'readily susceptible' " to such a construction. *Odle,* 421 F.3d at 396–97 (emphasis added). This Act does not have an "express exception" for performances that have serious artistic value or establishments devoted principally to offering such performances. *Cf. Farkas v. Miller,* 151 F.3d 900, 902 (8th Cir.1998). However, the Act does contain "specific language" that lends itself to two meanings. We agree with Plaintiffs that Defendants' narrowing construction is the less grammatical of the two plausible interpretations of the language. We disagree, however, with the proposition that grammatical inelegance makes an interpretation unfair or unsustainable. Nor does the proposed narrowing construction require this court to trample on the principles of federalism by "rewriting" a state law. On the contrary, principles of federalism lead us to take seriously the declaration of Tennessee courts that regulations of speech are to be construed narrowly. *See Richland Bookmart,* 137 F.3d at 441(citing *Davis–Kidd Booksellers, Inc.,* 866 S.W.2d at 526). We have explained that it would "be improper for this Court to *supply* limiting language ... in order to preserve [a law's] constitutionality." *Triplett Grille,* 40 F.3d at 136 (emphasis added). The Tennessee Act does not compel us to "supply" limiting language. At most, it requires that we treat the comma between "pictures" and "or wherein" as a drafting oversight, of the

kind that would normally be remedied by enclosing it in brackets and denoting it with "sic." [12] Absent any other textual signals that the comma was intended to broaden the reach of the Act, there is no rule of law that compels us to assert the strictest tenets of English grammar over the demonstrable intent of the legislators. [13]

12 As we do with statutory language routinely. *See, e.g., DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 406 (6th Cir.1997); *Cobb v. Contract Transp., Inc.,* 452 F.3d 543, 558 (6th Cir.2006).

13 Indeed, established principles of statutory construction counsel that "the strict language" of a statute yields to "the intention of the drafters," should that intention be "demonstrably at odds" with the results obtained by strict interpretation. *United States v. Ron Pair Enters.,* 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)).

***388** The central inquiry in overbreadth analysis is whether protected expression will be burdened by the actual enforcement of the Act or chilled by virtue of its sheer presence on the books. With regard to the former, we are persuaded that the risk of *actual* enforcement of the Act against mainstream artistic establishments is quite low: unlike the lawmakers of Akron in *Triplett Grille,* 40 F.3d at 131, and Decatur County in *Odle,* 421 F.3d at 396, who conceded that their regulatory schemes applied to mainstream artistic performances, Tennessee and Shelby County disavow such a broad reading of this Act, *see* Appellees' Br. at 38–39. [14] With regard to the latter risk, we seriously doubt that operators of any mainstream artistic venue are likely to scrutinize the provisions of a regulatory scheme aimed at "*adult-oriented* businesses," conclude that the scheme will require their venues to obtain a license if certain performances are offered, and be thereby deterred from staging *Salomé, Prodigal Son,* or *Bugaku*—on the basis of a single comma.

14 Cases of overzealous enforcement against mainstream artistic venues, moreover, would and should invite litigation by the affected parties on an as-applied basis. *New York v. Ferber,* 458 U.S. 747, 773–74, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (stating that when overbreadth is not substantial, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [a law's] sanctions, assertedly, may not be applied") (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)); *see also N.Y. State Club Ass'n v. City of New York,* 487 U.S. 1, 14, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988).

We think that the definition of "adult-oriented establishment" is "readily susceptible" to the narrowing construction that Defendants advocate. We recognize that this does not automatically address the second problem with the definition of "adult entertainment"—the apparent self-sufficiency of a predominant emphasis on "pantomime," "modeling," or "any other personal service offered customers" to transform a performance or exhibition into "adult entertainment." "[T]he risk that this definition might chill a range of protected speech" may have led us "to find it unconstitutionally overbroad *if it stood alone.*" *Deja Vu of Nashville, Inc.,* 274 F.3d at 388 (emphasis added). If we read "adult entertainment" in conjunction with the narrowly construed definition of "adult-oriented establishment," the hypothesized unconstitutional applications dwindle in number, if not disappear. One cannot readily imagine a non-adult modeling session or non-erotic pantomime performance taking place in individualized booths anymore than one can imagine Balanchine's ballets screened routinely in such a setting.

[19] The domain of expressive activities triggering the "adult entertainment" label may be limited in yet another manner. In two decisions analyzing the Tennessee Act, a federal district court found that the definition of "adult entertainment" is not overbroad when the clause "any other personal service offered customers" is read in context. "The phrase read in context of the entire definition clearly *pertains* and is *limited to* that entertainment 'which has a significant or substantial portion of such performance, any actual or simulated performance of specified sexual activities or exhibition and viewing of specified anatomical areas.' " *Belew, et al. v. Giles County Adult–Oriented Establishment Board, et al.,* No. 1–01–0139, 2005 WL 6369661, slip op. at *66 (M.D.Tenn. Sept. 30, 2005) (emphasis added); *Friedman, et al. v. Giles County Adult–Oriented Establishment Board, et al.,* No. 1–00–0065 (M.D.Tenn. Sept. 29, 2005). We find that this is a sensible way to interpret all of the expressive activities contained in the "adult entertainment" ***389** definition, which may appear devoid of sexually explicit content in isolation (*i.e.,* removal of indeterminate articles of clothing, pantomime, modeling, or other personal

services). Following "the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated," *Williams,* 128 S.Ct. at 1839, these activities constitute "adult entertainment" only when they implicate "specified sexual activities" or "specified anatomical areas." [15]

15 The same "commonsense canon" serves to make more precise the meaning of "rooms" in the challenged portion of the "adult-oriented establishment" definition. At oral argument, Plaintiffs attempted to argue that even if Defendants' narrowing construction is accepted, the Act is still overbroad because it applies to establishments "so physically arranged as to provide ... rooms ... separate from the common areas of the premises," wherein adult entertainment is presented. Plaintiffs argued that the several separate auditoria in mainstream movie theaters, for example, are such "rooms." We disagree, and find that "rooms" must be interpreted by reference to the neighboring terms (*i.e.,* booths, cubicles, compartments, and stalls). *See Williams,* 128 S.Ct. at 1839 (narrowing the meaning of "promotes" and "presents" to activities with a "transactional connotation," by reference to the other verbs in the series—"advertises," "distributes," and "solicits").

We find that the Tennessee Act is readily susceptible to a narrowing construction that would clearly except mainstream artistic venues from the licensing and regulatory scheme. Because we find it improbable that any performances of serious artistic value qualifying as "adult entertainment" would be staged in individualized booths, the number of ostensibly impermissible applications of the Act is negligible and does not rise to the level of real and substantial overbreadth. The district court did not err, therefore, in denying the preliminary injunction on the basis that Plaintiffs did not demonstrate a substantial likelihood of success in their challenges to the definitions of "adult cabaret," "adult-oriented establishment," and "adult entertainment."

D

Plaintiffs' second challenge is to some of the activities prohibited by the Act. The Act contains the following prohibitions:

> (a) No operator, entertainer or employee of an adult-oriented establishment, either on the premises or in relation to the person's role as an operator, entertainer, or employee of an adult-oriented establishment, shall permit to be performed, offer to perform, perform, or allow patrons to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia.
>
> (b) No operator, entertainer or employee of an adult-oriented establishment shall encourage or permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any operator, entertainer or employee.
>
> (c) No entertainer, employee, or customer shall be permitted to have any physical contact with any other on the premises during any performance and all performances shall only occur upon a stage at least eighteen inches (18#) above the immediate floor level and removed at least six feet (6#) from the nearest entertainer, employee, or customer.
>
> (d)(1) No employee or entertainer, while on the premises of an adult-oriented establishment, may:
>
> (A) Engage in sexual intercourse;
>
> (B) Engage in deviant sexual conduct;
>
> (C) Appear in a state of nudity; or
>
> (D) Fondle such person's own genitals or those of another.
>
> ***390** (2) For the purpose of this section, "nudity" means the showing of the human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

Tenn.Code Ann. § 7–51–1114. Plaintiffs contend that the prohibitions contained in § 7–51–1114(b) and § 7–51–1114(c) are overbroad, especially in the context of the other prohibitions in § 7–51–1114. The prohibitions are allegedly overbroad because they apply to mainstream performances of artistic value—on Plaintiffs' reading of the Act's "adult-oriented establishment" definition—and would effectively prohibit all the performances about

which Dr. Hanna testified. Since we determine that the Act is susceptible to a narrowing construction that excepts mainstream artistic venues from its reach, this line of argument is unavailing.

Further, Plaintiffs claim that the prohibitions are overbroad even if applied only to adult-oriented venues such as their own adult cabarets because the breadth of physical contact prohibited goes beyond what is necessary to address secondary effects and "impermissibly limits the expressive palette available to [erotic] performers." Appellants' Rep. Br. at 14. In particular, § 7–51–1114(b) is allegedly overbroad because it prohibits a performer's "touching" or "caressing" herself or himself in the course of her or his performance. Such restrictions, Plaintiffs assert, "directly circumscribe[ ] the potential message" inherent in erotic dancing: Dr. Hanna testified that, for example, a prohibition on "plac[ing] hands on the person's hip [or] buttocks ... would be silencing part of their artistic expression," as would a prohibition on "calling attention to [one's] body parts ... [by] plac[ing] hands down the sides of [one's] breasts or cup[ping] them." Appellants' Br. at 24. Similarly, the prohibition on any contact, no matter how innocent, between performers during a performance contained in § 7–51–1114(c), ("[n]o entertainer ... shall be permitted to have any physical contact with any other on the premises during any performance"), is alleged to be overbroad for the same reasons. The impact of these measures is claimed to be all the more burdensome because "[n]othing in the Act limits the application of these restrictions to only those occasions when performers are scantily clad": a performer "may not touch a fellow dancer in a beekeeper's suit." Appellants' Rep. Br. at 12. So burdening the expressive elements of erotic dance, Plaintiffs urge, is unrelated to the Act's stated purposes and needlessly suppresses protected erotic expression.

[20] We have consistently recognized that "nude or nearly nude dancing conveys an endorsement of erotic experience, and is a protected form of expression[,] in the absence of some contrary clue." *Richland Bookmart, Inc.,* 555 F.3d at 528 (quoting *DLS, Inc.,* 107 F.3d at 409) (internal quotation marks omitted). Nonetheless, a content-neutral time, place, or manner regulation may burden this form of expression so long as the burden is no greater than necessary to advance a legitimate government objective, *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673, and does not unreasonably limit alternative avenues of communication, *Renton,* 475 U.S. at 47, 106 S.Ct. 925. Since the challenge to these provisions is brought on the grounds of overbreadth, we must also determine whether the impermissible applications—*i.e.,* those that are unnecessary to advance the interests at hand and/or that excessively limit alternative avenues —are substantial in number, absolutely and relative to permissible applications.

***391 [21]** Considering the constitutionality of nudity bans in adult establishments, we have invoked the Supreme Court's determination that "nudity itself is not essential to the eroticism that brings dancing under the protection of the First Amendment." *Richland Bookmart, Inc.,* 555 F.3d at 530. Therefore, a ban on nudity does not effect a "complete ban on expression," but "merely," and not unreasonably, "limits one particular means of expressing the kind of erotic message being disseminated." *Ibid.* (internal quotation marks and citation omitted); *see also City of Erie v. Pap's A.M.,* 529 U.S. 277, 292–93, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000).

The district court, relying on the Tennessee Court of Appeals' decision in *American Show Bar Series, Inc. v. Sullivan County,* 30 S.W.3d 324 (Tenn.Ct.App.2000), suggested that both nudity and the prohibited touching are "beyond the 'expressive scope of dancing itself' and ... not protected by the First Amendment." (citing *Hang On, Inc. v. City of Arlington,* 65 F.3d 1248, 1253 (5th Cir.1995)). In other words, the district court and the Tennessee Court of Appeals deemed these restrictions to be constitutional because the expressive elements in the prohibited physical contact are so minor as to be negligible, and do not interfere with a performer's communication of eroticism to its audience. Whatever modicum of expressive conduct is proscribed, "nothing in constitutional jurisprudence ... suggest[s] that patrons are entitled under the First Amendment to the maximum erotic experience possible." *American Show Bar,* 30 S.W.3d at 340 (quoting *Threesome Entertainment v. Strittmather,* 4 F.Supp.2d 710, 724 (N.D.Ohio 1998)).

Plaintiffs contest this characterization of the prohibited activities and invoke the Seventh Circuit's reasoning in *Schultz.* 228 F.3d 831. In that case, the Seventh Circuit determined that a prohibition on the "*depiction* of specified sexual activities" [16] burdened the protected elements of erotic expression much more than a minimal-attire requirement imposed by a nudity ban. *Schultz,* 228 F.3d at 847–48 (emphasis added). While requiring dancers

to wear pasties and G-strings "is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message," "restricting the particular movements and gestures of the erotic dancer ... unconstitutionally burdens protected expression[,]" because it "deprives the performer of a repertoire of expressive elements with which to craft an erotic, sensual performance and thereby interferes substantially with the dancer's ability to communicate her erotic message." *Schultz,* 228 F.3d at 847.

16 Defined to include " 'the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts,' sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, masturbation, or sodomy[,] and excretory functions in connection with sexual activity." 228 F.3d at 836–37.

[22] Before we determine whether and to what extent the challenged prohibitions interfere with the communication of an erotic message, however, we need to identify with greater care what exactly is prohibited. *See Williams,* 128 S.Ct. at 1838 ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers."). Reading § 7–51–1114 as a whole, we are not persuaded that § 7–51–1114(b) must be interpreted in the manner Plaintiffs proffer. The provision prohibits an "operator, entertainer or employee" from "*encourag[ing] or permit[ting]* any person upon the premises to touch, caress or fondle" the listed anatomical areas of "any operator, ***392** entertainer or employee." (emphasis added). If the drafters intended to prohibit self-touching, the chosen construction is ill-fitted to the task: to forbid an entertainer from touching herself, one would not commonly direct her not to "*encourage or permit* " herself "to touch or fondle" herself. A straight-forward way to formulate such a prohibition is to mandate, for example, that "no employee or entertainer ... may[ ] [f]ondle such person's own genitals" or other anatomical areas—as the drafters of the Act did in § 7–51–1114(d). The latter section illustrates that the drafters knew how to formulate an unambiguous prohibition on touching or fondling oneself and others. Moreover, there is no good reason to suppose that the direct and unambiguous prohibitions in § 7–51–1114(d) are not exhaustive.

We read the challenged section 1114(b) as an enactment of vicarious liability for operators or employees who *encourage or permit* patrons or entertainers to touch *other* entertainers, perhaps without the latter's explicit consent. All the provisions in section 1114 that concern touching or physical contact are intended to further one goal: the elimination of the kind of sexual contact that is typically attended by adverse secondary effects, such as disease or prostitution. The Act advances that goal in more than one way: first, it explicitly prohibits employees and entertainers from certain kind of touching of self and others, § 7–51–1114(d)(1)(D) (no "fondling" of one's "own genitals or those of another"), § 7–51–1114(d)(1)(B) (no engaging in "deviant sexual conduct"), § 7–51–1114(a) (no performing "sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia"). Second, the Act also includes prophylactic measures that diminish the opportunities for the occurrence of prohibited sexual contact. The six-foot buffer zone is one such measure: it obviously makes it difficult for any contact to occur between persons separated by that distance, but does not in itself prohibit contact. *See DLS, Inc.,* 107 F.3d at 411.

The prohibition on "encouraging or permitting" physical contact is another such measure: it makes it difficult for operators and employees to circumvent the ban on sexual contact by encouraging patrons to initiate sexual contact with entertainers or other employees without the latter's explicit complicity. Section 7–51–1114(b) does not effect any additional prohibitions on physical contact beyond what is already prohibited in other sections. It merely spells out that an employee will be in violation of the Act for encouraging prohibited conduct even if the employee did not engage in it himself, mirroring the general statement of responsibility for violations of the Act. *See* § 7–51–1113(d) (making an operator responsible for failure to "exercise due diligence in taking reasonable efforts to prevent acts or omissions of any entertainers or employees constituting a violation" of the Act).

That the prohibition on encouraging or permitting contact applies to more anatomical areas than the direct prohibitions on contact in other sections is not problematic: it is no different from "*the addition* of a buffer zone to the ban on contact" we addressed in *DLS, Inc.,* 107 F.3d at 411 (emphasis added). Both prophylactic measures are reasonably believed to be "necessary to achieve" the goal of preventing prohibited contact, "given the repeated violations of the no-contact rule," and the "difficult[y] [of] determin [ing] ... who was responsible" for the violations. *Ibid.* It is not unreasonable to require

that an operator refrain from encouraging a patron to touch a performer's breast, for example, because that action is likely to lead to the kinds of sexual contact that is explicitly ***393** prohibited.[17] Because we do not interpret this provision as creating any additional constraints on a performer's own movements, we do not think it "regulat[es] nude dancing with such stringent restrictions that the dance no longer conveys eroticism nor resembles adult entertainment," *Schultz,* 228 F.3d at 847, and is thus distinguishable from the provision considered in *Schultz.*

17 It is also possible—although not necessary—to read the provision as directing *third parties* (*i.e.,* operators or non-performing employees) not to encourage or permit an entertainer to touch *herself* in the course of her performance, even in a manner that the entertainer herself is not directly prohibited from doing. We think that common sense counsels against such an interpretation. Here too, however, any possible unreasonable enforcement of the provision should invite litigation by the affected parties on an as-applied basis. "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [a law's] sanctions, assertedly, may not be applied." *Ferber,* 458 U.S. at 773–74, 102 S.Ct. 3348 (citation omitted).

[23] The second prohibition Plaintiffs challenge also warrants more careful construction: "No entertainer, employee, or customer shall be permitted to have any physical contact with any other on the premises during any performance," and to that effect, "all performances shall only occur ... removed at least six feet (6') from the nearest entertainer, employee, or customer." § 7–51–1114(c). This provision should be read in the same manner as we read a similarly-worded provision in *Deja Vu of Nashville*[18] that concerned entertainer-customer contact:

18 The provision in question read:

> No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer.

Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 274 F.3d 377, 396 (6th Cir.2001).

Rather than reading the provision as enacting two separate requirements, we read it as a *single mandate,* with the "no touch" portion setting forth a broad policy statement that no contact between dancers and customers shall occur during performances, and the "buffer zone" rule showing the specific way to implement that policy by prohibiting clubs from allowing customers within three feet of the stage during dances. Therefore, the provision places a duty not on the entertainer to avoid touching customers, but on the owners and operators of clubs to protect entertainers from being touched by customers by requiring customers to stay three feet away from the stage.... It would simply be nonsensical for [the government] to put the onus of customer control on the entertainer who is already removed at least three feet from the customer, is engaged in live entertainment, and is, by definition, incapable of preventing an approaching customer from touching her without engaging in the prohibited touching herself.

Deja Vu of Nashville, Inc., 274 F.3d at 397–98 (emphasis added). Likewise, the provision before us requires only that a six-foot distance between an entertainer and any other entertainer, employee, or customer be assured during performances, and that performances take place on an eighteen-inch stage. These spatial requirements ensure that no contact occurs between a performer and any other person ***394** during a performance.[19] Analogous to § 7–51–1114(b), the six-foot buffer-zone and eighteen-inch elevation rules spell out what "due diligence" requires of operators to prevent violations of the explicit prohibitions of the Act. Because the first clause does not impose additional prohibitions or duties beyond the buffer and height requirements contained in the second clause, this provision is identical to the one we upheld in the context of an as-applied challenge in *DLS, Inc.* 107 F.3d at 413.

19 We do not think the provision intends to prohibit all contact *among customers* or *non-performing employees* beyond what is explicitly prohibited in other sections, as an exceedingly literal reading may suggest. In any case, neither Plaintiffs nor Defendants address the possibility that the County may penalize adult establishments for casual contact among their customers or non-performing employees during a

> performance. Accordingly, we do not consider this hypothetical possibility sufficiently "actual" to weigh in our overbreadth analysis, and leave any contentious applications of this provision to as-applied adjudication.

Plaintiffs' efforts to distinguish our decision in *DLS, Inc.* on the basis that we did not adjudicate an overbreadth challenge, Appellants' Rep. Br. at 15, are unpersuasive. In that case, we found that Chattanooga's six-foot buffer requirement survived intermediate scrutiny under *O'Brien* and *Renton:* it furthered important content-neutral state interests of crime and disease-prevention, the evidence relied on by Chattanooga made it "reasonable to conclude that the six-foot rule would further the state interests," and it was "sufficiently narrowly tailored to be [a] valid regulation under the First Amendment." *DLS, Inc.,* 107 F.3d at 410–3. Since Chattanooga's buffer-zone requirement did not impermissibly burden expression in adult cabarets similar to Plaintiffs', such a requirement cannot form a basis for a successful overbreadth attack —at least not without a demonstration of a "substantial number" of unconstitutional applications beyond those considered in *DLS, Inc. See Richland Bookmart, Inc.,* 555 F.3d at 532; *see also 729, Inc.,* 515 F.3d at 492 (holding that a requirement "that an entertainer stay at least five feet away from areas being occupied by customers for at least one hour after the entertainer performs semi-nude on stage" survives intermediate scrutiny); *Deja Vu of Nashville, Inc.,* 274 F.3d at 396 (holding that a prohibition on customer-entertainer contact during performances and a three-foot buffer zone survives intermediate scrutiny).

Plaintiffs do not bring to our attention any other allegedly unconstitutional applications beyond those deemed insufficient to prevail on an as-applied challenge in *DLS, Inc.* Therefore, the district court did not err in finding that Plaintiffs did not establish a substantial likelihood of prevailing on the merits of their overbreadth challenge to § 7–51–1114(b) and § 7–51–1114(c).

E

[24] Next, Plaintiffs claim that the definitions of "adult cabaret" and "adult entertainment" render the Act unconstitutionally vague. Plaintiffs complain that they cannot "ascertain[ ] where the outer boundaries of the Act lie," such that they may "shape their conduct so as to avoid them." Appellants' Br. at 48. The complaints of vagueness are coterminous with Plaintiffs' complaints of overbreadth. The definition of "adult cabaret" is vague, Plaintiffs allege, because there is nothing in the Act "to explain[ ] or cabin the phrase 'entertainment of an erotic nature.' " Appellants' Br. at 50. Because we found that the definition of "adult cabaret" is not overbroad, we can readily supply the explanatory or "cabining" language that ***395** Plaintiffs assert is wanting. Establishments that "feature entertainment of an erotic nature, including exotic dancers, strippers," and so on, are merely examples, and do not augment the reasonably clear meaning of "adult cabaret" offered in the first sentence of that definition. It is therefore unnecessary to ask the questions to which Plaintiffs intimate there are no answers (*e.g.,* "What is an exotic dancer?"). *Ibid.*

[25] The definition of "adult entertainment" is the next target of a vagueness charge. Recalling that this term means "any exhibition ... that has as a principal or predominant theme ... any actual or simulated performance of specified sexual activities[,] ... removal of articles of clothing or appearing unclothed," Plaintiffs intend to demonstrate vagueness by posing questions based on that definition: "Would an adult nightclub be subject to the Act if dancers there began their performances in street clothes or evening gowns and stripped to bikini bathing suits?"; "Is it adult entertainment ... [t]o remove one's coat and hat on stage? To shed an outer garment?" Appellants' Br. at 51.

Under the narrowing construction to which the Act is readily susceptible, all these questions are readily answered. If the "stripping to bikini bathing suits" is taking place in "booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises" and is staged for profit "direct or indirect," then the establishment is subject to the Act. In sum, a narrowing construction sufficiently clarifies the parts of this Act allegedly contaminated by vagueness. Thus, the district court did not err in holding that a vagueness challenge is not likely to succeed on the merits.

F

Plaintiffs' last claim—that the Act's requirements will result in a drastic reduction in the "quantity and accessibility of speech," Appellants' Br. at 53—is also predicated on the acceptance of Plaintiffs' overbreadth

and vagueness claims. Since we do not accept Plaintiffs' overly literal and expansive reading of the Act's terms, we are equally unpersuaded that the Act's provisions are "so onerous" as to cause the majority of Memphis's nightclubs to "cease presenting adult entertainment entirely."

Finally, Plaintiffs contend that the district court erred in its determination that the balance of equities disfavored a temporary injunction in their favor. Because the district court correctly determined that Plaintiffs have not demonstrated a likelihood of success on the merits of their claim, the issue of balancing equities is moot. *See Hamilton's Bogarts, Inc.,* 501 F.3d at 649 ("[I]n a First Amendment case, the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because, as in this case, the issues of the public interest and harm to the respective parties [i.e. balancing equities] largely depend on the constitutionality of the statute" (internal quotation marks and citation omitted)).

III

For the foregoing reasons, we AFFIRM the district court's denial of a preliminary injunction.

KAREN NELSON MOORE, Circuit Judge, concurring only in the judgment.

I believe that the district court did not abuse its discretion by denying the plaintiffs' motion for a preliminary injunction. I do not join the majority's opinion, and I concur solely in the judgment affirming the district court's judgment that the plaintiffs have not satisfied the requirements ***396** for a preliminary injunction of the challenged provisions, Tennessee Code Annotated § 7–51–1114(b) & (c).

All Citations

588 F.3d 372

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526 F.3d 291
United States Court of Appeals,
Sixth Circuit.

SENSATIONS, INC.; Lady Godiva's, Inc., and Litle Red Barn Adult Theatre & Bookstore, Inc., Plaintiffs–Appellants,
v.
CITY OF GRAND RAPIDS; Michigan Decency Action Council, Inc.; Judy Rose; Dar Vander Ark; Black Hills Citizens for a Better Community, Inc., Defendants–Appellees.

Nos. 06–2168, 06–2508, 06–2510, 07–1504.
|
Argued: Jan. 30, 2008.
|
Decided and Filed: May 20, 2008.
|
Rehearing and Rehearing En Banc Denied Aug. 14, 2008.

Synopsis

Background: Sexually oriented businesses brought separate actions against city and others alleging that ordinance regulating sexually oriented businesses had infringed on their First Amendment rights. Following consolidation, the United States District Court for the Western District of Michigan at Kalamazoo, Robert Holmes Bell, Chief Judge, 2006 WL 2504388, denied businesses' motion for preliminary injunction, granted defendants' motion for judgment on the pleadings, and, 2007 WL 851268, awarded attorney fees to non–city defendants. Businesses appealed.

Holdings: The Court of Appeals, Karen Nelson Moore, Circuit Judge, held that:

[1] district court did not convert motion for judgment on the pleadings into summary judgment motion;

[2] businesses were not entitled to conduct discovery on issue of negative secondary effects of such businesses;

[3] ordinance did not infringe the First Amendment rights of businesses;

[4] ordinance id not violate businesses' right to freedom of association;

[5] ordinance was not unconstitutionally overbroad;

[6] ordinance was not unconstitutionally vague; but

[7] award of attorney fees was not warranted.

Affirmed in part and reversed in part.

West Headnotes (14)

[1] Federal Courts
Judgment on the pleadings

Motions for judgment on the pleadings are analyzed under the same de novo standard as motions to dismiss for failure to state a claim. Fed.Rules Civ.Proc.Rule 12(b)(6), (c), 28 U.S.C.A.

147 Cases that cite this headnote

[2] Federal Courts
Preliminary injunction;temporary restraining order

Court of Appeals reviews the district court's denial of motion for a preliminary injunction for abuse of discretion.

7 Cases that cite this headnote

[3] Federal Civil Procedure
Matters considered

Federal Civil Procedure
Motion

Legislative record of city ordinance regulating sexually oriented businesses was not a "document outside the pleadings" of consolidated actions brought by such businesses alleging that ordinance infringed their First Amendment rights, and, thus, by considering the legislative record attached to motion for judgment on the pleadings brought by city and other defendants,

district court did not convert their motion into a motion for summary judgment; by attaching the ordinance to the complaint, business also incorporated the legislative record into the pleadings, given that ordinance incorporated the legislative record. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rules 10(c), 12(c), 56, 28 U.S.C.A.

70 Cases that cite this headnote

[4] Federal Civil Procedure

Determination of Motion

Sexually oriented businesses that had brought action alleging that city ordinance regulating their businesses infringed their First Amendment rights were not entitled to conduct discovery that might have yielded evidence enabling them to disprove negative secondary effects of such businesses, which formed city's justification for ordinance, prior to the district court's entering judgment on the pleadings for city and other defendants. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] Courts

Number of judges concurring in opinion, and opinion by divided court

A panel of Court of Appeals cannot overturn the decision of a prior panel.

1 Cases that cite this headnote

[6] Constitutional Law

Nude dancing in general

Nude dancing is a form of expressive conduct protected by the First Amendment. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[7] Constitutional Law

Sexually Oriented Businesses;Adult Businesses or Entertainment

Public Amusement and Entertainment

Dancing and other performances

City ordinance regulating sexually oriented businesses by banning total nudity, imposing six-foot distance requirement and prohibiting touching between performer and audience members, requiring open-booths, and limiting hours of operation, did not infringe the First Amendment rights of such businesses; regulating sexually oriented businesses to reduce negative secondary effects was within the scope of city's constitutional powers, secondary effects which city desired to reduce were undeniably important government interests, city aimed at suppressing the secondary effects associated with sexually oriented businesses and not the speech communicated by those businesses, and ordinance was narrowly tailored to the reduction of secondary effects. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[8] Constitutional Law

Sexually Oriented Businesses;Adult Businesses or Entertainment

When determining whether regulations on the operation of sexually oriented businesses violate the First Amendment, the court must determine whether municipality enacted the ordinance:(1) within its constitutional power, (2) to further a substantial governmental interest that is (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[9] Constitutional Law

Freedom of Association

Public Amusement and Entertainment

Dancing and other performances

City ordinance regulating sexually oriented businesses which imposed six-foot distance requirement and prohibited touching between

performer and audience members did not violate businesses' right to freedom of association. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[10] Constitutional Law
Sexually oriented businesses
Public Amusement and Entertainment
Dancing and other performances

City ordinance banning total nudity in sexually oriented businesses was not unconstitutionally overbroad; ban was narrower than a similar regulation applicable to the general public. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[11] Constitutional Law
Sexually oriented businesses
Public Amusement and Entertainment
Dancing and other performances

City ordinance regulating sexually oriented businesses by banning total nudity but allowing semi-nudity was not unconstitutionally vague, since ordinance's definition of semi-nudity clearly stated what parts of the female breast could be exposed, provided adequate notice, established standards that would guide enforcement, and did not inhibit First Amendment freedoms. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[12] Civil Rights
Awards to defendants;frivolous, vexatious, or meritless claims

Award of attorney fees was not warranted for citizens who advocated for city ordinance regulating sexually oriented business and who offered and provided funds to defend it against litigation following district court's grant of judgment on the pleadings for citizens and city in action brought by such businesses alleging that ordinance infringed their First Amendment rights; businesses' claim that symbiotic relationship existed between citizens and city, such that citizens were state actors for purposes of § 1983 liability, was neither frivolous nor unreasonable. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. §§ 1983, 1988.

Cases that cite this headnote

[13] Federal Courts
Costs and attorney fees

Court of Appeals reviews a district court's award of attorneys fees in a civil rights action based on an abuse of discretion standard. 42 U.S.C.A. § 1988.

7 Cases that cite this headnote

[14] Civil Rights
Awards to defendants;frivolous, vexatious, or meritless claims

A prevailing defendant in a civil rights action should only recover attorney fees upon a finding by the district court that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith; in applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. 42 U.S.C.A. § 1988.

5 Cases that cite this headnote

Attorneys and Law Firms

***293 ARGUED:** Michael L. Donaldson, Livonia, Michigan, J. Michael Southerland, J. Michael Southerland, P.C., for Appellants. Scott D. Bergthold, Law Office of Scott D. Bergthold, P.L.L.C., Chattanooga, Tennessee, James R. Wierenga, David & Wierenga, P.C., Grand Rapids, Michigan, for Appellees. **ON BRIEF:** Michael L. Donaldson, Livonia, Michigan, J. Michael Southerland, J. Michael Southerland, P.C., Plymouth,

Michigan, for Appellants. Scott D. Bergthold, Law Office of Scott D. Bergthold, P.L.L.C., Chattanooga, Tennessee, James R. Wierenga, David & Wierenga, P.C., Grand Rapids, Michigan, Catherine M. Mish, City Attorney's Office, Grand Rapids, Michigan, for Appellees.

Before: MERRITT, DAUGHTREY, and MOORE, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge.

This case concerns a consolidated appeal by Sensations, Inc. et al. ("Sensations") ***294** and Little Red Barn Adult Theatre & Bookstore, Inc. ("Little Red Barn") (collectively "Plaintiffs–Appellants"), from the grant of a judgment on the pleadings to the City of Grand Rapids ("Grand Rapids") and various private citizens and citizens' groups (collectively "Defendants"). These private citizens and citizens' groups include Michigan Decency Action Council, Inc., Judy Rose, Dar Vander Ark, and Black Hills Citizens for a Better Community (collectively "Non–City Defendants–Appellees"). Plaintiffs–Appellants filed a complaint in the United States District Court for the Western District of Michigan, seeking a preliminary injunction against an ordinance regulating sexually oriented businesses on the ground that the ordinance violated Plaintiffs–Appellants' First Amendment and Due Process rights. The district court denied Plaintiffs–Appellants' motion for a preliminary injunction, granted Defendants' motion for judgment on the pleadings, and awarded attorney fees to Non–City Defendants–Appellees to be paid by Little Red Barn.

I. FACTS AND PROCEDURE

After learning that a local businessman was planning to open a sexually oriented business in downtown Grand Rapids, Non–City Defendants–Appellees mobilized in favor of a regulatory ordinance. When the Grand Rapids City Council expressed initial reluctance to pass such an ordinance because of the potential costs of defending it against litigation, Non–City Defendants–Appellees promised that they would fund any necessary legal defense with personal and privately raised monies. On April 25, 2006, the Grand Rapids City Council passed Ordinance 2006–23 ("the Ordinance"), entitled Conduct in Sexually Oriented Businesses. Grand Rapids justified the Ordinance on the basis of the negative secondary effects associated with sexually oriented businesses.

Pursuant to the Ordinance, a sexually oriented business means "any adult motion picture theater, adult bookstore, adult novelty store, adult video store, adult cabaret or semi-nude model studio as defined in Section 5.284 of [the Grand Rapids] Code." Joint Appendix ("J.A.") at 45 (Ordinance at § 2(5)). The Ordinance contains the following major provisions: (1) a prohibition on total nudity; (2) the requirement that semi-nude adult-entertainment performers maintain a six-foot distance from patrons, on a stage at least eighteen inches from the floor, in a room of at least six-hundred square feet; (3) the configuration of any room where "any mechanical or electronic image-producing device ... display[s] ... specified sexual activities or specified anatomical areas ... in such a manner that there is an unobstructed view from an operator[']s station of every area of the premises"; (4) a 180–day compliance allowance; (5) a no-touching rule between sexual performers and audience members; (6) a prohibition on the operation of a sexually oriented business between the hours of two A.M. and seven A.M. J.A. at 45–46 (Ordinance at § 3).

The Ordinance provides the following definitions:

> "Nudity," "nude," or "state of nudity" means the knowing or intentional live display of a human genital organ or anus with less than a fully opaque covering or a female's breast with less than a fully opaque covering of the nipple and areola. Nudity, as used in this section, does not include a woman's breast-feeding of a baby whether or not the nipple or areola is exposed during or incidental to the feeding....
>
> "Semi-nudity," "semi-nude," or in a "semi-nude condition" means the showing of the female breast below a horizontal line across the top of the areola and ***295** extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part.

J.A. at 44–45 (Ordinance at §§ 2(b)(ii), 2(b)(iv)).

Co-plaintiffs Sensations, Inc. and Lady Godiva's, Inc. filed a complaint in the United States District Court for the Western District of Michigan, alleging that Grand Rapids had infringed on their First Amendment rights in violation of 42 U.S.C. § 1983. The district court consolidated the case filed by Sensations with a suit filed by Little Red Barn against both Grand Rapids and Non–City Defendants–Appellees. Little Red Barn filed a motion for a continuation of a stay of enforcement or for a preliminary injunction, in which Sensations joined. Grand Rapids filed a motion for judgment on the pleadings, as did Non–City Defendants–Appellees. Sensations filed a brief in opposition supported by twenty-six exhibits. Little Red Barn filed its Response and Brief in Opposition and attached the affidavit of Dr. Daniel Linz and supporting documents.

The district court denied the motion for a continuation of a stay or for a preliminary injunction. Little Red Barn filed a timely notice of appeal. The district court later issued an opinion granting the Defendants' motion for judgment on the pleadings. Little Red Barn filed a timely notice of appeal, as did Sensations. The district court awarded attorney fees to Non–City Defendants–Appellees to be paid by Little Red Barn, and Little Red Barn filed a timely notice of appeal.

II. ANALYSIS

A. Standard of Review

[1] **[2]** Motions for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) are analyzed under the same de novo standard as motions to dismiss pursuant to Rule 12(b)(6). *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.,* 399 F.3d 692, 697 (6th Cir.2005). We review the district court's denial of Plaintiffs–Appellants' motion for a preliminary injunction for abuse of discretion. *Am. Civil Liberties Union of Ohio, Inc. v. Taft,* 385 F.3d 641, 645 (6th Cir.2004). In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Supreme Court explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.... Factual allegations must be enough to raise a right to relief above the speculative level...." *Id.* at 1964–65 (internal citations omitted). In *Erickson v. Pardus,* 550 U.S. ——, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007), decided two weeks after *Twombly,* however, the Supreme Court affirmed that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Id.* at 2200 (quoting *Twombly,* 127 S.Ct. at 1964). The opinion in *Erickson* reiterated that "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Id.* (citing *Twombly,* 127 S.Ct. at 1965). We read the *Twombly* and *Erickson* decisions in conjunction with one another when reviewing ***296** a district court's decision to grant a motion to dismiss for failure to state a claim or a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12. [1]

[1] We have previously "noted some uncertainty concerning the scope of" *Twombly. Commercial Money Ctr., Inc. v. Illinois Union Ins. Co.,* 508 F.3d 327, 337 n. 4 (6th Cir.2007). In particular, we have taken note of the Second Circuit's interpretation of *Twombly* as enacting a "plausibility standard [which] did not significantly alter notice pleading or impose heightened pleading requirements for all federal claims[, and] [i]nstead, ... require[d] more concrete allegations only in those instances in which the complaint, on its face, does not otherwise set forth a plausible claim for relief." *Weisbarth v. Geauga Park Dist.,* 499 F.3d 538, 542 (6th Cir.2007) (citing *Iqbal v. Hasty,* 490 F.3d 143, 157–58 (2d Cir.2007)).

B. Did the District Court Err by Converting a Rule 12(c) Motion into a Rule 56 Motion?

[3] Plaintiffs–Appellants argue that by considering the legislative record attached to Defendants' motion the district judge improperly converted a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) into a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. Federal Rule of Civil Procedure 10(c) provides that "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." [2] We have previously held that a district court converts a Rule 12(c) motion into a Rule 56 motion when the district judge merely "fail[s]

to exclude presented outside evidence." *Max Arnold & Sons, LLC v. W.L. Hailey & Co.*, 452 F.3d 494, 503 (6th Cir.2006). Thus the question before us is whether the legislative record comes within the scope of Rule 10(c) or is "outside evidence" under *Max Arnold*.

2 This language became effective December 1, 2007. The new language represents a stylistic change from the former language of Fed.R.Civ.P. 10(c), which provided that: "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." We may apply the new language to proceedings pending as of the effective date insofar as the application is practicable and just. 28 U.S.C. § 2074(a).

In the instant case, we hold that the district court did not convert Defendants' Rule 12(c) motion into a Rule 56 motion. Certainly, the district judge accepted as evidence of secondary effects the legislative record, which Defendants attached to their motion for judgment on the pleadings. Were the legislative record to constitute a document outside the pleadings, then the district judge would have converted a motion for judgment on the pleadings into a motion for summary judgment. The legislative record did not constitute such an external document, however.[3] Sensations attached a copy of the Ordinance to its complaint as Exhibit A; under Rule 10(c), therefore, we treat the Ordinance as ***297** part of the pleadings. The Ordinance, in turn, states that "[t]he City hereby adopts and incorporates herein its stated findings and legislative record related to the adverse secondary effects of sexually oriented businesses, including the judicial opinions and reports related to such secondary effects." J.A. at 43 (Ordinance at § 1(a)). By attaching the Ordinance to the complaint, therefore, Sensations also incorporated the legislative record into the pleadings. Because Sensations had notice via its own actions that the legislative record formed part of the pleadings, the district judge acted fairly when he considered the Ordinance and legislative record as part of the pleadings, while excluding outside evidence including the Linz affidavit. The district judge in this case appropriately excluded additional affidavits presented by both sides that went beyond the legislative record; therefore, he did not convert Defendants' motion for judgment on the pleadings into a motion for summary judgment.

3 Little Red Barn argues that the affidavits and articles contained within the legislative record are not properly considered part of that record because Grand Rapids City Council members received the materials on the day they adopted Ordinance 23 and could not have discussed the materials prior to passage of the Ordinance. It is not within our province, however, to speculate as to how quickly or carefully the Council members might have read the documents that comprise the legislative record. Little Red Barn is correct to point out that Article 37 in the record was published in May 2006, one month after the passage of the Ordinance. At oral argument, counsel for Grand Rapids clarified that the City Council obtained an advance copy of the article, which it included in the legislative record. Counsel for Little Red Barn did not dispute this explanation, which satisfies any concerns we might have had regarding whether the City Council actually could have relied on the evidence it included in the legislative record.

C. Did the District Court Err in Denying Plaintiffs–Appellants' Request to Conduct Discovery?

[4] The crux of this case is whether Plaintiffs–Appellants were entitled to discovery that might have yielded evidence enabling them to disprove negative secondary effects at the local level. In *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville*, 466 F.3d 391, 398 (6th Cir.2006) *(Deja Vu of Nashville III)*[4], *cert. denied*, 549 U.S. 1339, 127 S.Ct. 2088, 167 L.Ed.2d 765 (2007), we held that the plaintiff adult-entertainment business Deja Vu was "not entitled to discovery regarding secondary effects." Plaintiffs–Appellants argue that *Deja Vu of Nashville III* can be distinguished from the instant case on the basis of its procedural history; that the critical statement regarding discovery amounted to dicta; and, if not, that the Sixth Circuit's decision violates the Supreme Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002).[5]

4 The district court opinion refers to this case as *Deja Vu II*. We have labeled it *Deja Vu of Nashville III* because of the existence of an intervening decision between it and *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville (Deja Vu of Nashville I)*, 274 F.3d 377 (6th Cir.), *cert. denied*, 535 U.S. 1073, 122 S.Ct. 1952, 152 L.Ed.2d 855 (2002). The intervening decision, which the Sixth Circuit in *Deja Vu of Nashville III* refers to as *Deja Vu II*, was *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville*, 421 F.3d 417 (6th Cir.2005), *cert. denied*,

547 U.S. 1206, 126 S.Ct. 2916, 165 L.Ed.2d 917 (2006).

5 In *Alameda Books,* a plurality (rather than a majority) of the Supreme Court set forth a burden-shifting framework governing the evidentiary standard in secondary-effects cases. The framework involves three steps: (1) the city must put forth evidence of the nexus between the challenged regulation and the reduction of secondary effects; (2) plaintiffs may "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings"; and (3) "[i]f plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.,* 535 U.S. at 438–39, 122 S.Ct. 1728.

[5] We find Plaintiffs–Appellants' arguments unconvincing and conclude that *Deja Vu of Nashville III* forecloses their argument regarding entitlement to discovery. In neither *Deja Vu of Nashville III* nor the instant case did plaintiffs receive a trial on the merits. *See Deja Vu of Nashville III,* 466 F.3d at 394, 398 (noting that in *Deja Vu* a trial on the merits was unnecessary because there were no unresolved issues of fact and that plaintiff was not entitled to discovery regarding localized secondary effects). Moreover, the ***298** *Deja Vu* litigation involved a magistrate judge's order insulating the defendant government from discovery regarding secondary effects, an order which the district court never reviewed. *Id.* at 398. Thus, the procedural history of the *Deja Vu* case is analogous to the current controversy, where the district court entered judgment on the pleadings without allowing Plaintiffs–Appellants to conduct discovery. In addition, the opinion in *Deja Vu of Nashville III* did not present its conclusion regarding discovery as dicta but rather stated it was "fundamental[ ]" to the holding of the case. *Id.* Plaintiffs–Appellants' third contention—that *Deja Vu of Nashville III* is incorrect under *Alameda Books*—is similarly unpersuasive. As the district court correctly determined, *Deja Vu of Nashville III* is a binding interpretation of *Alameda Books. Sensations, Inc. v. City of Grand Rapids,* No. 1:06–CV–300, No. 4:06–CV–60, 2006 U.S. Dist. Lexis 77159, at *25–*26 (W.D.Mich. Oct. 23, 2006). Because this panel cannot overturn the decision of a prior Sixth Circuit panel, we must conclude that the district court did not err in denying Plaintiffs–Appellants the opportunity for further discovery before entering judgment on the pleadings. *See Salmi v. Sec'y of Health & Human Servs.,* 774 F.2d 685, 689 (6th Cir.1985); 6th Cir. R. 206(c) (a later panel cannot overrule a prior panel's published opinion).

D. Did the District Court Err in Determining that the Ordinance Satisfies the *O'Brien* test Applicable to the Regulation of Sexually Oriented Businesses?

[6] Nude dancing is a form of expressive conduct protected by the First Amendment. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville (Deja Vu of Nashville I),* 274 F.3d 377, 391 (6th Cir.), *cert. denied,* 535 U.S. 1073, 122 S.Ct. 1952, 152 L.Ed.2d 855 (2002). Nevertheless, in accordance with Supreme Court precedent, the Sixth Circuit treats laws such as the Ordinance, which regulate adult-entertainment businesses, as if they were content neutral. *Richland Bookmart, Inc. v. Nichols,* 137 F.3d 435, 438–39 (6th Cir.1998). We have applied the test first set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), to regulations on the operation of sexually oriented businesses. *See, e.g., Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.,* 411 F.3d 777, 789–90 (6th Cir.2005) (en banc) (applying the *O'Brien* test to an hours-of-operation provision); *Deja Vu of Nashville I,* 274 F.3d at 396 (applying the *O'Brien* test to a regulation requiring a specified buffer zone between the performer and audience); *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 410 (6th Cir.1997) (same). J.A. at 43–44 (Ordinance at § (1)).

[7] **[8]** The *O'Brien* test requires us to determine whether Grand Rapids enacted the Ordinance "(1) within its constitutional power, (2) to further a substantial governmental interest that is (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an 'incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest.' " *Deja Vu of Nashville I,* 274 F.3d at 393. First, Plaintiffs–Appellants argue that Grand Rapids did not have the authority to pass the Ordinance because the city did not show a nexus between the regulations and a reduction in secondary effects. But arguing that the evidentiary basis is weak avoids the question we must decide, which is whether the city enacted the Ordinance within its constitutional powers. We have previously held that regulating sexually oriented businesses to reduce negative secondary effects lies within the scope of a city's authority under the *O'Brien* test. *Id.* at 393–94; *see also DLS, Inc.,* 107 F.3d at 410. Second, the

secondary effects ***299** which Grand Rapids desires to reduce are "undeniably important" government interests. *Deja Vu of Cincinnati,* 411 F.3d at 790 (quoting *City of Erie v. Pap's A.M.,* 529 U.S. 277, 296, 300, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion)). Third, Grand Rapids aimed at suppressing the secondary effects associated with sexually oriented businesses and not the speech communicated by those businesses. J.A. at 43–44 (Ordinance at § 1).

Finally, the district court offered sound reasons why the Ordinance is narrowly tailored to the reduction of secondary effects. The prohibition of full nudity has been viewed as having only a de minimis effect on the expressive character of erotic dancing. *See City of Erie,* 529 U.S. at 301, 120 S.Ct. 1382; *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 572, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion). A plurality of the Supreme Court in *Pap's A.M.* rejected the argument that a ban on total nudity "enacts a complete ban on expression" and instead found that the ban "ha[d] the effect of limiting one particular means of expressing the kind of erotic message being disseminated." 529 U.S. at 292–93, 120 S.Ct. 1382. In addition, the Sixth Circuit has upheld every one of the other regulatory provisions contained in the Ordinance: the six-foot distance requirement between performer and audience members and the no-touching rule; the open-booth requirement; and the limitation on hours of operation. *See Deja Vu of Cincinnati,* 411 F.3d at 789–91 (upholding an hours-of-operation limitation on adult businesses); *Deja Vu of Nashville I,* 274 F.3d at 396 (upholding a three-foot buffer/no-touching regulation); *Richland Bookmart,* 137 F.3d at 440–41 (upholding limitations on the hours and days that an adult-entertainment business could operate); *DLS, Inc.,* 107 F.3d at 408–13 (upholding a six-foot buffer/no-touching regulation); *Bamon Corp. v. City of Dayton,* 923 F.2d 470, 474 (6th Cir.1991) (upholding an open-booth requirement). Given the overwhelming weight of precedent against their case, we asked Plaintiffs–Appellants at oral argument which specific provisions of the Ordinance allegedly violated the First Amendment. Plaintiffs–Appellants could offer no answer except to argue that the sum of the Ordinance's parts placed such a significant burden on speech as to violate the First Amendment, even though each individual provision is constitutional. This argument is unavailing.

Plaintiffs–Appellants also argue that cameras in booths would be a less-restrictive means of reducing illicit sexual activities and that a buffer requirement is not necessary for peep shows. The Supreme Court, however, has found that a regulation narrowly tailored to achieve a government interest "need not be the least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism,* 491 U.S. 781, 798, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).[6] We therefore affirm the decision of the district court that the Ordinance satisfies the O'Brien test and is thus constitutional.

6 This statement of the standard for a narrowly tailored regulation applies both to cases analyzed under *O'Brien* and time, place, or manner regulations. *Ward,* 491 U.S. at 798, 109 S.Ct. 2746 ("[W]e have held that the *O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.' " (quotation omitted)).

E. Did the District Court Err in Concluding that the Ordinance does Not Violate the Rights to Free Association or Due Process, and is Not Unconstitutionally Overbroad or Vague?

[9] **[10]** **[11]** We also affirm the district court's well-reasoned explanation why the ***300** Ordinance does not violate Plaintiffs–Appellants' right to freedom of association and is neither overbroad, nor vague, nor a violation of due process. Plaintiffs–Appellants' freedom-of-association claim is foreclosed by our prior holding that a mandatory buffer between performer and audience and a no-touching rule do not violate the right to free association. *Deja Vu of Nashville I,* at 396–97. In support of their overbreadth claim, Plaintiffs–Appellants cite *Odle v. Decatur County,* 421 F.3d 386, 399 (6th Cir.2005), in which the Sixth Circuit found overbroad a general public-nudity ordinance. But a regulation banning total nudity in sexually oriented businesses is far narrower than a similar regulation applicable to the general public. The overbreadth doctrine is, moreover, "manifestly, strong medicine" and should be employed "only as a last resort." *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). In the instant case, there does not exist "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Plaintiffs–Appellants' claim that the Ordinance is vague fails because the Ordinance's definition of semi-nudity, which clearly states what parts of the female breast

may be exposed, provides adequate notice, establishes standards that may guide enforcement, and does not inhibit First Amendment freedoms. *See Deja Vu of Cincinnati,* 411 F.3d at 798. Finally, Plaintiffs–Appellants do not challenge the reasoning of the district court regarding why the Ordinance is not an unconstitutional taking and does not violate procedural or substantive due process. [7]

7 Plaintiffs–Appellants argue only that Grand Rapids needed to consider more evidence regarding secondary effects, citing *Flanigan's Enterprises, Inc. v. Fulton County,* 242 F.3d 976 (11th Cir.2001), *cert. denied,* 536 U.S. 904, 122 S.Ct. 2356, 153 L.Ed.2d 178 (2002). However, *Flanigan's Enterprises* actually supports a conclusion that the passage of the Ordinance did not violate due process. In that case, the Eleventh Circuit held that although a county ordinance failed the *O'Brien* test because the county had not relied on evidence relevant to asserted secondary effects, the passage of the ordinance had not violated plaintiffs' procedural due process rights. *Id.* at 987–89.

F. Did the District Court Abuse Its Discretion by Awarding Attorney Fees to Non–City Defendants–Appellees?

[12] By affirming the district court's conclusion that the Ordinance is constitutional, we also necessarily affirm the dismissal of claims against both Grand Rapids and Non–City Defendants–Appellees. Despite dismissing the claims against Non–City Defendants–Appellees, we conclude that the District Court abused its discretion by awarding attorney fees to Non–City Defendants–Appellees and, therefore, we reverse the award of these fees.

In reaching this conclusion, we acknowledge that the question of whether the district court abused its discretion by awarding attorney fees is a close one. The difficulty in resolving the fees issue lies primarily in the fact that even had we found the Ordinance unconstitutional, we might well have dismissed the § 1983 claims against Non–City Defendants–Appellees. We would be required to dismiss these claims if we found that the actions of these private citizens and citizens' groups are not " 'fairly attributable to the state.' " *Chapman v. Higbee Co.,* 319 F.3d 825, 833 (6th Cir.2003) (en banc) (quoting *Lugar v.* ***301** *Edmondson Oil Co.,* 457 U.S. 922, 947, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)), *cert. denied,* 542 U.S. 945, 124 S.Ct. 2902, 159 L.Ed.2d 827 (2004).

On appeal, Little Red Barn contends that a symbiotic relationship existed between the city of Grand Rapids and the citizens who advocated for the Ordinance and who offered and provided funds to defend it against litigation. As we have observed, "The Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test." *Id.* Little Red Barn argues that the citizens' actions fell within the scope of the third test because the private citizens usurped the government's obligation to propose legislation as well as the government's power to tax and raise money. In *Chapman,* we held that "[u]nder the symbiotic or nexus test, a section 1983 claimant must demonstrate that there is a sufficiently close nexus between the government and the private party's conduct so that the conduct may be fairly attributed to the state itself." *Id.* at 834. The inquiry proceeds on a case-by-case basis and is fact-specific. *Id.*

As a categorical matter, the cooperative relationship between Grand Rapids and the Non–City Defendants–Appellees that arose solely as a result of the citizens' non-monetary mobilization in support of the Ordinance could not rise to the level of a "symbiotic relationship" as defined in *Chapman.* Merely petitioning a local government to pass specific legislation is the kind of political speech at the heart of First Amendment protection. Furthermore, if advocacy for a piece of legislation established a symbiotic relationship between citizens and the state, then citizen activists would automatically be vulnerable to § 1983 suits arising from constitutionally unsound legislation they supported. This would seriously chill citizen advocacy and burden our democracy, a cornerstone of which is citizen engagement in the legislative process.

The more difficult question is whether in offering to pay for the defense of the Ordinance, and indeed here in actually making substantial payments, Non–City Defendants–Appellees created a symbiotic relationship to the state. We conclude that the offer by private citizens to fund the defense of an ordinance, and acceptance by a local governing body, does not necessarily establish a symbiotic relationship for purposes of a § 1983 claim. [8] We caution, however, that the admonition in *Chapman* to evaluate the existence or absence of symbiotic relationship on a case-by-case and factually specific basis remains

true in the context of an offer by private citizens to fund the defense of legislation and an acceptance by a governmental entity. In the instant case, because we found the Ordinance constitutional we do not need definitively to resolve the question whether by funding the defense of the Ordinance, Non–City Defendants–Appellees created a symbiotic relationship with Grand Rapids.

8 At oral argument, counsel for Non–City Defendants–Appellees stated that they would not dispute evidence submitted by Little Red Barn demonstrating that Grand Rapids had indeed accepted the offer made by Non–City Defendants–Appellees to cover the expense of defending the Ordinance.

We find it important, however, as a precursor to our discussion of whether the district court erred in awarding attorney fees, to show that arguments exist on both sides of the issue respecting the existence of a symbiotic relationship. On the one hand, the idea of citizens being able, effectively, to buy particular ordinances and ***302** statutes in service of their private interests, or their own unique vision of the public interest, offends our national ideal of legislators serving the public as a whole. On the other hand, as one judge suggested at oral argument, the reality of our political process already falls far from that ideal. Non–City Defendants–Appellees' offer of funds does not differ significantly from the offer of campaign donations routinely made by lobbyists favoring certain pieces of legislation and opposing others. Furthermore, the Supreme Court has held that government funding of private entities via contracts does not create a symbiotic relationship. *Rendell–Baker v. Kohn,* 457 U.S. 830, 843, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) ("Here the school's fiscal relationship with the State is not different from that of many contractors performing services for the government. No symbiotic relationship ... exists here.") As a corollary, private funding offered in defense of a government ordinance would similarly not create a symbiotic relationship. Although Non–City Defendants–Appellees' offer of funding may have tipped the balance toward passage of the Ordinance, ultimately members of the Grand Rapids City Council and not Non–City Defendants–Appellees made the decision to pass the Ordinance. In the circumstances of this case, therefore, even had we found the Ordinance unconstitutional, we might well have dismissed the claims against Non–City Defendants–Appellees.

[13] **[14]** Nevertheless, we reverse the district court's award of attorney fees to Non–City Defendants–Appellees. "We review a district court's award of attorneys fees under 42 U.S.C. § 1988 based on an abuse of discretion standard." *Wilson–Simmons v. Lake County Sheriff's Dep't,* 207 F.3d 818, 823 (6th Cir.2000). " '[A] prevailing *defendant* should only recover upon a finding by the district court that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.' " *Wolfe v. Perry,* 412 F.3d 707, 720 (6th Cir.2005) (quoting *Wayne v. Village of Sebring,* 36 F.3d 517, 530 (6th Cir.1994), *cert. denied,* 514 U.S. 1127, 115 S.Ct. 2000, 131 L.Ed.2d 1001 (1995)). "In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg Garment Co.v. Equal Employment Opportunity Comm'n,* 434 U.S. 412, 421–22, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). We conclude that the district court abused its discretion because Little Red Barn's claim against Non–City Defendant–Appellees was neither frivolous nor unreasonable.

Little Red Barn sought not only injunctive relief from Grand Rapids but also other forms of relief from Non–City Defendants–Appellees. Most significantly, Little Red Barn sought monetary damages from Non–City Defendants–Appellees to compensate for "emotional and financial injury." J.A. at 69–70 (LRB Compl. at ¶ 56). In addition, Little Red Barn sought declaratory relief that the "City's relationship with the remaining defendants is constitutionally impermissible." J.A. at 68 (LRB Compl. at ¶ 50). Such a declaration would apply to both Grand Rapids and Non–City Defendants–Appellees and would deter both the City Council and private citizens from entering into a similar relationship in the future.

When Little Red Barn brought suit, neither the Supreme Court nor the Sixth Circuit had addressed the question of whether private citizens' offer of funding to defend a statute, were it to pass, creates a symbiotic relationship with the state. ***303** The Sixth Circuit affirms awards of attorney fees only when plaintiffs relitigated already-settled legal matters, and we reverse the award of attorney fees when issues of law remained unresolved or when a "plaintiff ha[d] an arguable basis for pursuing his or her claim." *Smith v. Smythe–Cramer Co.,* 754 F.2d 180, 183–84 (6th Cir.), *cert. denied,* 473 U.S. 906, 105 S.Ct.

3530, 87 L.Ed.2d 654 (1985). Therefore, even if we were to conclude that a financial relationship, such as the one between Grand Rapids and Non–City Defendants–Appellees, could never create a symbiotic relationship for purposes of § 1983 claims, we must reverse the award of attorney fees because Little Red Barn could not have known of this hypothetical legal conclusion in advance. Penalizing Little Red Barn for bringing a claim, when Little Red Barn was not on notice that such a claim could not succeed in district court, would be inequitable. "[W]hen a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.... A successful defendant seeking counsel fees ... must rely on quite different equitable considerations." *Christiansburg,* 434 U.S. at 418–19, 98 S.Ct. 694. For these reasons, we reverse the district court's award of attorney fees against Little Red Barn.

III. CONCLUSION

For the reasons explained above, we **AFFIRM** the district court's denial of Plaintiffs–Appellants' motion for a preliminary injunction as well as the district court's grant of Defendants' motion for judgment on the pleadings for both Grand Rapids and Non–City Defendants–Appellees. However, we **REVERSE** the district court's award of attorney fees to Non–City Defendants–Appellees.

All Citations

526 F.3d 291

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368 F.3d 1186
United States Court of Appeals,
Ninth Circuit.

WORLD WIDE VIDEO OF WASHINGTON, INC., Plaintiff-Appellant,
v.
CITY OF SPOKANE, Defendant-Appellee.

No. 02-35936.
|
Argued and Submitted Jan. 7, 2004.
|
Filed May 27, 2004.
|
As Amended on Denial of Rehearing and Rehearing En Banc July 12, 2004.

Synopsis

Background: Adult-oriented retail business brought § 1983 suit against city, challenging constitutionality of zoning ordinance preventing their location in close proximity to certain land use categories and reasonableness of amount of time allowed for relocation. The United States District Court for the Eastern District of Washington, 227 F.Supp.2d 1143, Alan A. McDonald, Senior District Judge, entered summary judgment for city, and adult-oriented business appealed.

Holdings: The Court of Appeals, Tallman, Circuit Judge, held that:

[1] ordinance was subject to intermediate scrutiny;

[2] ordinance was narrowly tailored to promote significant government interest in reducing undesirable secondary effects of adult stores;

[3] ordinance was not facially overbroad; and

[4] amortization provision in ordinance requiring relocation within one year was constitutional.

Affirmed.

West Headnotes (9)

[1] Constitutional Law
Secondary effects

Laws aimed at controlling the secondary effects of adult businesses are deemed content neutral, thus meriting intermediate scrutiny in determining their constitutionality under First Amendment. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[2] Constitutional Law
Exercise of police power;relationship to governmental interest or public welfare
Constitutional Law
Narrow tailoring

An ordinance aimed at combating the secondary effects of a particular type of speech survives intermediate scrutiny if it is designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[3] Constitutional Law
Secondary effects
Constitutional Law
Availability of other sites
Zoning and Planning
Sexually-oriented businesses;nudity

Zoning ordinances prohibiting adult-oriented businesses from operating near certain land use categories and allowing one year for relocation were narrowly tailored to serve city's substantial interest in reducing the undesirable secondary effects of adult stores, and thus survived intermediate scrutiny under First Amendment; ordinance provided adequate alternative locations and thus did not substantially reduce speech by forcing stores to close. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[4] **Constitutional Law**
Secondary effects
Zoning and Planning
Sexually-oriented businesses;nudity

Evidence of pornographic litter and public lewdness, and fact that these secondary effects were inexorably intertwined with protected speech, standing alone, were sufficient to show that zoning ordinance that prohibited operation of adult-oriented businesses near certain land uses promoted substantial government interest in eliminating secondary effects of adult-oriented businesses. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[5] **Constitutional Law**
Narrow tailoring

A law is narrowly tailored, for purposes of First Amendment intermediate scrutiny, if it promotes a substantial government interest that would be achieved less effectively absent the regulation. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[6] **Constitutional Law**
Secondary effects
Zoning and Planning
Sexually-oriented businesses;nudity

Adult-oriented business's claim that citizen complaints were biased and unscientific was insufficient to cast direct doubt on testimonial evidence of secondary effects caused by proximity to adult-oriented retail stores, including litter, harassment of female employees, vandalism, and decreased business, and thus to challenge conclusion that city's enactment of ordinance prohibiting such stores near certain land uses was narrowly tailored to substantial government interest in eliminating those effects. U.S.C.A. Const.Amend. 1.

13 Cases that cite this headnote

[7] **Constitutional Law**
Zoning and land use in general
Zoning and Planning
Sexually-oriented businesses;nudity

Zoning ordinance imposing restrictions on location of adult-oriented businesses was not unconstitutionally facially overbroad by reason of its definition of adult retail establishment as one devoting "significant or substantial" portion its stock to adult-oriented merchandise. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[8] **Constitutional Law**
Availability of other sites
Zoning and Planning
Sexually-oriented businesses;nudity

Amortization provision in zoning ordinance prohibiting adult retail stores near certain other uses, which required non-conforming adult-oriented businesses to relocate within one year, was not violative of First Amendment because there were sufficient relocation sites in city, and thus adequate alternative avenues of communication. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[9] **Zoning and Planning**
Nonconforming Uses

Municipalities may, consistent with federal constitution, require non-conforming uses to close, change their business, or relocate within a reasonable time period.

3 Cases that cite this headnote

Attorneys and Law Firms

***1188** Gilbert H. Levy, Seattle, WA, on behalf of the plaintiff-appellant.

Stephen A. Smith, Todd L. Nunn, Preston Gates & Ellis, LLP, Seattle, WA, on behalf of the defendant-appellee.

Appeal from the United States District Court for the Eastern District of Washington; Alan A. McDonald, District Judge, Presiding. D.C. No. CV-02-00074-AAM.

Before GRABER, TALLMAN, and CLIFTON, Circuit Judges.

Opinion

TALLMAN, Circuit Judge.

This appeal raises two questions. First, whether the City of Spokane's ordinances regulating the location of adult-oriented retail businesses ("adult stores") are constitutional. Second, whether an amortization period is required in this context and, if so, whether a reasonable amount of time was allotted for World Wide Video of Washington, Inc. ("World Wide"), to either relocate its stores or change the nature of its retail operations. Because the record reveals no genuine issue of material fact regarding either of these issues, we affirm the district court's summary judgment for Spokane.

I

In the late 1990s, city leaders in Spokane grew concerned with the opening of several adult stores in residential areas. To develop a legislative response to this situation, the City compiled information-specifically, studies from other municipalities, relevant court decisions, and police records-documenting the adverse secondary effects of adult stores.

On November 29, 2000, Spokane's Plan Commission held a public hearing to consider amending the Municipal Code to combat these documented secondary effects. At this hearing, the City Attorney's office presented the legislative record and gave the Commission an overview of the effect of adult stores on the community. Although a number of citizens testified in favor of amending the Code, World Wide presented no evidence, testimonial or otherwise, at this hearing.

On December 13, 2000, after considering public comments and the legislative record, the Plan Commission voted unanimously to recommend that the City Council amend the Code. Before the vote at this meeting, two individuals testified against the proposed amendment. Once again, however, World Wide did not participate.

On January 29, 2001, the Spokane City Council heeded the Plan Commission's recommendation and unanimously passed Ordinance C-32778.[1] Under Ordinance C-32778, adult stores are subject to Spokane's set-back requirements, which prevent ***1189** them from opening in close proximity to certain land use categories.[2] Ordinance C-32778 also amended the Code to provide adult stores with an amortization period of one year either to relocate or change the nature of their operations. *See* SMC § 11.19.395. A procedure was included whereby the owner of a business could seek an extension of this deadline. *See id.*

[1] The Code as amended by Ordinance C-32778 reads:

> A. An "adult retail use establishment" is an enclosed building, or any portion thereof which, for money or any other form of consideration, devotes a significant or substantial portion of stock in trade, to the sale, exchange, rental, loan, trade, transfer, or viewing of "adult oriented merchandise".
>
> B. Adult oriented merchandise means any goods, products, commodities, or other ware, including but not limited to, videos, CD Roms, DVDs, computer disks or other storage devices, magazines, books, pamphlets, posters, cards, periodicals or non-clothing novelties which depict, describe or simulate specified anatomical area, as defined in Section 11.19.0355, or specified sexual activities, as defined in Section 11.19.0356.

Spokane Mun.Code ("SMC") § 11.19.03023.

[2] Specifically, the Spokane Municipal Code provides:

> 1. An adult retail use establishment [or] an adult entertainment establishment may not be located or maintained within seven hundred fifty feet, measured from the nearest building of the adult retail use establishment or of the adult entertainment establishment to the

nearest building of any of the following pre-existing uses:
a. public library,
b. public playground or park,
c. public or private school and its grounds, from kindergarten to twelfth grade,
d. nursery school, mini-day care center, or day care center,
e. church, convent, monastery, synagogue, or other place of religious worship,
f. another adult retail use establishment or an adult entertainment establishment, subject to the provisions of this section.
2. An adult retail use establishment or an adult entertainment establishment may not be located within seven hundred fifty feet of any of the following zones:
a. agricultural,
b. country residential,
c. residential suburban,
d. one-family residence,
e. two-family residence,
f. multifamily residence (R3 and R4),
g. residence-office.

SMC § 11.19.143(D).

Subsequently, Spokane determined that it needed to establish more sites for the relocation of adult stores. Following four Plan Commission meetings on the issue, on March 18, 2002, Spokane enacted Ordinance C-33001, which increased the number of land use categories permitted to accommodate the operation of adult stores.

Because Ordinance C-32778 became effective on March 10, 2001, all non-conforming uses were required to terminate by March 10, 2002. World Wide applied to Spokane's Planning Director for an extension of the amortization period and was granted an additional six months. World Wide appealed this decision to the city's Hearing Examiner, arguing that a six-month extension was insufficient. The Hearing Examiner affirmed the extension, but held that it would run from the date of his May 15, 2002, decision. World Wide was therefore required to close or change the nature of its businesses by November 15, 2002. [3] Although we were informed at oral argument that the configuration of World Wide's retail services has changed somewhat, the businesses remain open in their original locations.

[3] World Wide appealed the Hearing Examiner's ruling to Spokane County Superior Court under Washington's Land Use Petition Act, RCW 36.70C.005, *et seq.*

On February 27, 2002, World Wide filed a § 1983 civil rights action in the United States District Court for the Eastern District of Washington alleging, *inter alia,* that Ordinances C-32778 and C-33001 (hereinafter, "the Ordinances") violate the ***1190** First Amendment. At the close of discovery, Spokane moved for summary judgment. In support of its motion, the City tendered

(1) more than 1,500 pages of legislative record related to the Ordinances, including studies from other municipalities concerning the adverse secondary effects associated with adult businesses, [4] police reports, relevant court decisions, and evidence submitted by Spokane residents;

[4] Spokane relied on studies from New York City (1994); Garden Grove, California (1991); a coalition of several municipalities in Minnesota (1989); St. Paul, Minnesota (1987); Austin, Texas (1986); Indianapolis, Indiana (1984); Amarillo, Texas (1977); and Los Angeles (1977).

(2) the minutes of the Plan Commission and City Council meetings concerning the Ordinances;

(3) a report from a real estate appraiser stating that hundreds of parcels of land zoned for adult retail remained available; [5] and

[5] When Ordinance C-32778 went into effect, there were a total of seven affected adult stores, six of which were required to relocate. By the time Spokane moved for summary judgment, one affected business had already reopened at a new site. Spokane's appraiser found that 326 properties were available for relocation of adult stores; that 161 of the 326 were best suited for commercial uses; and that 63 of the 161 were actively listed for sale or lease. Applying the set-back requirements of the Ordinances, Spokane determined that 32 of these 63 sites were particularly well-suited to accommodate adult stores.

(4) the declarations of several citizens detailing the secondary effects of the existing adult stores. [6]

[6] Specifically, these declarants stated that they had witnessed various criminal acts in and around World Wide's stores, including prostitution, drug transactions, public lewdness, harassment of citizens

by World Wide's clientele, and pervasive litter, including used condoms, empty liquor bottles, and video packaging featuring graphic depictions of sexual acts.

In opposition to Spokane's motion for summary judgment, World Wide offered

(1) the declaration of land use planner Bruce McLaughlin, who opined that the studies relied on by Spokane provided no valid basis for the Ordinances because none dealt exclusively with secondary effects produced by retail-only uses and concluded that adult stores in Spokane neither contributed to the depreciation of property values nor resulted in increased calls for police service;

(2) police reports and call summaries intended to corroborate McLaughlin's conclusion;

(3) the report of a private investigator containing interviews of citizens who claimed that there were no problems related to the adult stores in their neighborhoods; [7]

[7] We note that World Wide's investigator indicated in his deposition that he was instructed not to include information in his report that was unhelpful to his client's legal position.

(4) the declaration of a real estate broker stating that there were only 26 available properties and only one was a plausible relocation site for an adult store; [8] and

[8] Spokane tendered a supplemental declaration from its appraiser with its summary judgment reply, asserting that World Wide's broker ignored 92 qualifying parcels, which were sufficient to allow simultaneous operation of 18 adult stores, and that, even accepting the data contained in World Wide's broker's report, there were sufficient locations to operate 14 adult stores.

Moreover, although World Wide hired a second land use expert, it declined to submit his opinion to the court. World Wide's second expert concluded that there were more than enough possible relocation sites (*i.e.,* 60) for the six stores that needed to move.

***1191** (5) evidence that two of World Wide's stores were subject to long-term leases that their landlord was unwilling to dissolve.

Additionally, World Wide suggested in its statement of facts that the citizens who provided declarations in support of Spokane's motion were motivated by their disagreement with the content of World Wide's speech rather than by a desire to combat secondary effects.

On September 11, 2002, the district court granted Spokane's motion for summary judgment. World Wide timely appealed.

II

We review de novo the district court's grant of summary judgment. *See Coszalter v. City of Salem,* 320 F.3d 968, 973 (9th Cir.2003). Viewing the evidence in the light most favorable to World Wide, we must decide whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.*

A

[1] To determine whether Spokane's Ordinances violate the First Amendment, we must first answer the threshold question of whether they are content based, thus meriting strict scrutiny, or content neutral, thus meriting intermediate scrutiny. Under *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), laws aimed at controlling the secondary effects of adult businesses are deemed content neutral. *See id.* at 48-49, 106 S.Ct. 925. [9]

[9] It merits noting that in the Supreme Court's most recent foray into the law of the First Amendment and secondary effects, *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), Justice Kennedy assailed this categorization as a "fiction," asserting that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Id.* at 448, 122 S.Ct. 1728 (Kennedy, J., concurring). Nevertheless, Justice

> Kennedy ultimately agreed that a "zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny," reasoning that "the zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional." *Id.* at 448-49, 122 S.Ct. 1728; *accord G.M. Enters., Inc. v. Town of St. Joseph,* 350 F.3d 631, 637 (7th Cir.2003) ("In light of [*Alameda Books*], we need not decide whether the ordinances are content based or content neutral, so long as we first conclude that they target not 'the activity, but ... its side effects,' and then apply intermediate scrutiny.' ") (citation omitted).

Here, the challenged Ordinances are explicitly intended to combat the secondary effects of adult stores' speech, not to suppress the speech itself. The district court ruled that the purpose of the Ordinances is to regulate the harmful secondary effects associated with sexually oriented businesses. *World Wide Video of Washington, Inc. v. City of Spokane*, 227 F.Supp.2d 1143, 1150-51 (E.D.Wash.2002). The summary judgment record permits no other conclusion as to the purpose of the Ordinances. *See e.g.*, Ordinance C-33001, Preamble/Findings, (4)(k) ("It is not the intent of the proposed zoning provisions to suppress any speech activities protected by the First Amendment ..., but to propose content neutral legislation which addresses the negative secondary impacts of adult retail use and entertainment establishments [.]"). Accordingly, we apply intermediate ***1192** scrutiny. *See Renton,* 475 U.S. at 49, 106 S.Ct. 925.

B

[2] An ordinance aimed at combating the secondary effects of a particular type of speech survives intermediate scrutiny "if it is designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication." *Center for Fair Pub. Policy v. Maricopa County,* 336 F.3d 1153, 1166 (9th Cir.2003) (citing *Renton,* 475 U.S. at 50, 106 S.Ct. 925 and *Colacurcio v. City of Kent,* 163 F.3d 545, 551 (9th Cir.1998)), *cert. denied,* 124 S.Ct. 1879 (2004). World Wide does not appeal the district court's determination that the Ordinances leave open adequate alternative avenues of communication. The issue before us is thus limited to whether the Ordinances are narrowly tailored to serve a substantial government interest.

In *Alameda Books,* the Supreme Court "clarif[ied] the [*Renton*] standard for determining whether an [adult-use] ordinance serves a substantial government interest." 535 U.S. at 433, 122 S.Ct. 1728 (plurality opinion). Thus, the proper starting point for evaluating World Wide's appeal is close consideration of *Renton* and *Alameda Books.* Our analysis is also informed by *Maricopa County,* this court's sole interpretation and application of the *Renton* / *Alameda Books* standard to date.

1

The challenged ordinance in *Renton* prohibited adult movie theaters from locating within 1,000 feet of various zones, such as those intended for schools and churches. An adult theater owner sued, arguing, *inter alia,* that because the City of Renton improperly relied on another city's experiences with the secondary effects of adult theaters rather than undertaking its own study, the city had failed to establish that its ordinance served a substantial government interest. *Renton,* 475 U.S. at 50, 106 S.Ct. 925.

We agreed and held in favor of the theater owner, but the Supreme Court reversed. Noting that "a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect," the Court concluded that we had imposed "an unnecessarily rigid burden of proof." *Id.* (internal quotation marks omitted). The Court held that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." *Id.* at 51-52, 106 S.Ct. 925.

2

Like *Renton, Alameda Books* originated in this circuit. In 1977, the City of Los Angeles conducted a study to assess the secondary effects of adult land uses. *See Alameda Books,* 535 U.S. at 430, 122 S.Ct. 1728. Because that study discovered increased crime in areas with high concentrations of adult businesses, Los Angeles enacted an ordinance regulating their locations. *See id.*

It soon came to light, however, that there was a loophole in the law: multiple adult businesses could congregate in a single building. *See id.* at 431, 122 S.Ct. 1728. Accordingly, Los Angeles amended its ordinance to prohibit more than one adult business from operating under the same roof. *See id.* Two bookstores sued, alleging that the ordinance violated the First Amendment. *See id.* at 432, 122 S.Ct. 1728.

The district court granted summary judgment in favor of the stores. *See id.* at 433, 122 S.Ct. 1728. We affirmed, concluding that Los Angeles "failed to present ***1193** evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments [was] designed to serve the city's substantial interest in reducing crime." *Id.* (internal quotation marks omitted).

In the Supreme Court, *Alameda Books* produced four opinions: a plurality opinion by Justice O'Connor (joined by the Chief Justice, Justice Scalia, and Justice Thomas), a brief concurring statement by Justice Scalia, a concurrence in the judgment by Justice Kennedy, and a dissent by Justice Souter (joined by Justices Stevens and Ginsburg and joined in part by Justice Breyer). A five justice majority-the plurality plus Justice Kennedy-reversed our decision.

Given the fractured nature of the Court's disposition, it is difficult to glean a precise holding from *Alameda Books.* However, under *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), since Justice Kennedy's concurrence was the narrowest opinion joining the Court's judgment, it controls. *See Maricopa County,* 336 F.3d at 1161; *see also Fly Fish, Inc. v. City of Cocoa Beach,* 337 F.3d 1301, 1310 n. 19 (11th Cir.2003); *Ben's Bar, Inc. v. Vill. of Somerset,* 316 F.3d 702, 722 (7th Cir.2003). Thus, we are bound by the plurality opinion, but only insofar as its conclusions do not expand beyond Justice Kennedy's concurrence.

All five Justices in the *Alameda Books* majority affirmed *Renton's* core principle that local governments are not required to conduct their own studies in order to justify an ordinance designed to combat the secondary effects of adult businesses. *See Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion); *id.* at 451, 122 S.Ct. 1728 (Kennedy, J., concurring). Further, the majority of the Court stressed the paramount role of local experimentation in developing legislative responses to secondary effects, given local governments' superior understanding of their own problems. *See id.* at 440, 122 S.Ct. 1728 (plurality opinion) ("[W]e must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems."); *id.* at 451-52, 122 S.Ct. 1728 (Kennedy, J., concurring) ("The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion.") (citations omitted).

Most importantly, Justice Kennedy did not disagree with the key innovation announced by the *Alameda Books* plurality. To wit:

> The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39, 122 S.Ct. 1728 (plurality opinion). Announcement of this burden shifting approach fulfilled the *Alameda Books* Court's stated intention in granting certiorari: it "clarif[ied] the standard for determining whether an ordinance serves a substantial government interest." *Id.* at 433, 122 S.Ct. 1728.

At its heart, the limiting principle that Justice Kennedy's concurrence imposes on the plurality opinion concerns the importance of determining and evaluating a ***1194** city's "rationale" behind a particular ordinance. While Justice Kennedy did not dispute the plurality's burden-shifting gloss on *Renton,* he stressed that a city's rationale for

passing an ordinance aimed at controlling the secondary effects of adult stores "cannot be that when [the ordinance] requires businesses to disperse (or to concentrate), it will force the closure of a number of those businesses, thereby reducing the quantity of protected speech." *Maricopa County,* 336 F.3d at 1163. Justice Kennedy thus concurred with the *Alameda Books* plurality with the following cautionary caveat: "It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech." 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring). A secondary-effects ordinance must be designed to leave "the quantity of speech ... substantially undiminished, and [the] total secondary effects ... significantly reduced." *Id.* at 451, 122 S.Ct. 1728.

3

Our recent decision in *Maricopa County* differs slightly from the case before us in that it concerned the constitutionality of a "time" rather than a "place" restriction on adult businesses. *See* 336 F.3d at 1159. In *Maricopa County,* operators of a variety of adult businesses, including "sellers of sexually-related magazines and paraphernalia," *id.* at 1158, challenged an Arizona statute that prohibited them from operating in the early morning hours. The district court upheld the statute and the businesses appealed. Applying *Alameda Books*-which we described as "reaffirm[ing] the *Renton* framework," *id.* at 1159-a divided panel of this court affirmed. [10]

10 In dissent, Judge Canby opined that Arizona's statute could not survive Justice Kennedy's requirement that the quantity of speech remain undiminished because it required adult businesses to close down during certain parts of the day-*i.e.,* it *stopped* speech-unlike a "dispersal" regulation, which merely *moves* speech. *Maricopa County,* 336 F.3d at 1172 (Canby, J., dissenting). Spokane's Ordinances are dispersal ordinances; consequently, Judge Canby's concern does not arise here.

As in the instant case, the legislative record in *Maricopa County* included both documentary and testimonial evidence. *See id.* at 1157. For example, the Arizona legislature heard testimony describing problems with pornographic litter and prostitution related to the operation of adult businesses adjacent to a residential area. *Id.* at 1157-58. The *Maricopa County* legislative record also included letters discussing reports detailing similar problems in Denver and Minnesota. *Id.* at 1158. We concluded that the state provided a sufficient basis for the challenged statute, noting that the evidence was "hardly overwhelming, but it does not have to be." *Id.* at 1168. Because the Arizona legislature relied on evidence "reasonably believed to be relevant" to the targeted problem, we determined that the statute was presumptively constitutional. *Id.*

Having made this determination, we continued: "Under *Alameda Books,* the burden now shifts to [the businesses] to cast direct doubt on [the state's] rationale, either by demonstrating that the [state's] evidence does not support its rationale or by furnishing evidence that disputes the[state's] factual findings." *Id.* (internal quotation marks omitted; first alteration added). Essentially, the *Maricopa County* businesses argued that "the evidence before the Arizona legislature consisted of 'irrelevant anecdotes' and 'isolated' incidents, and that testimonial evidence is not 'real' evidence." *Id.* Rejecting this contention as explicitly foreclosed by *Alameda Books,* we concluded that the businesses had "failed to cast doubt on the state's ***1195** theory, or on the evidence the state relied on in support of that theory," and affirmed the district court's decision upholding the statute. *Id.*

C

[3] Like the statute challenged in *Maricopa County,* Spokane's Ordinances satisfy the *Renton* standard as clarified in *Alameda Books.* We hold that the Ordinances are narrowly tailored to serve Spokane's substantial interest in reducing the undesirable secondary effects of adult stores.

1

Turning first to the substantial interest issue, per Justice Kennedy's *Alameda Books* concurrence, the initial question is "how speech will fare" under the Ordinances. 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring); *see also R.V.S., L.L.C. v. City of Rockford,* 361 F.3d 402, 408 (7th Cir.2004) (noting that under Justice Kennedy's *Alameda Books* concurrence "[i]t is essential ... to consider the impact or effect that the ordinance will have on

speech"). Conceptually, this question dovetails with the requirement that an ordinance must leave open adequate alternative avenues of communication. Again, World Wide does not appeal the district court's conclusion that the Ordinances left open sufficient relocation sites. Given that each of the six remaining affected stores has the opportunity to relocate, it is likely that the Ordinances will reduce secondary effects-by moving the stores from sensitive areas-without substantially reducing speech by forcing stores to close. *See Alameda Books,* 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring).

The next step is to determine whether the Ordinances survive the burden-shifting regime announced by the *Alameda Books* plurality. They do. World Wide does not contend that Spokane failed to satisfy its initial burden of producing evidence that "fairly supports" the Ordinances. Rather, World Wide argues that when it provided contrary evidence the burden shifted back to Spokane, and the City failed to supplement the record.

However, in order to shift the burden back to Spokane, World Wide was required to *succeed* in "cast[ing] direct doubt" on the rationale behind the Ordinances, either by showing that the City's evidence does not support it or by supplying its own contrary "*actual and convincing* evidence." *Id.* at 438-39, 122 S.Ct. 1728 (plurality opinion) (emphasis added). Like the businesses in *Maricopa County,* World Wide failed to satisfy this requirement. World Wide's arguments and evidence against the Ordinances were insufficient to trigger the burden shifting contemplated in *Alameda Books.*

[4] We reach this conclusion primarily because World Wide did not effectively controvert much of Spokane's evidence through McLaughlin's report or otherwise. In holding that the Ordinances promoted a substantial governmental interest, the district court stressed that Spokane only needed " 'some' evidence to support its Ordinances," and correctly concluded that the "elimination of pornographic litter, by itself, represents a substantial governmental interest, especially as concerns protection of minors." *World Wide Video,* 227 F.Supp.2d at 1157-58. The citizen testimony concerning pornographic litter and public lewdness, standing alone, was sufficient to satisfy the "very little" evidence standard of *Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring) (citing *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925). *Accord Maricopa County,* 336 F.3d at 1168; *cf. Stringfellow's of N.Y., Ltd. v. City of New York,* 91 N.Y.2d 382, 400, 671 N.Y.S.2d 406, 694 N.E.2d 407, 417 (N.Y.1998) ("[A]necdotal evidence and reported experience can be as telling as statistical ***1196** data and can serve as a legitimate basis for finding negative secondary effects...."). [11]

11 In *Tollis Inc. v. San Bernardino County,* 827 F.2d 1329 (9th Cir.1987), San Bernardino County determined that a single showing of an adult movie was sufficient to subject a theater to regulation under an adult-use zoning ordinance. *Id.* at 1331. Because the County "presented *no* evidence that a single showing of an adult movie would have any harmful secondary effects on the community," *id.* at 1333 (emphasis added), we affirmed an injunction against enforcement of the ordinance. Although *Tollis* predates *Alameda Books,* the decisions are consistent; the principle remains that a local government must reasonably rely on at least *some* evidence. Here, Spokane clearly satisfied this requirement.

The relevant question is "whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728 (plurality opinion). Here, the protected speech and the secondary effects described in the citizen testimony are inexorably intertwined: the sexual images in the magazines and on the packaging of the videos sold by adult stores may be protected, but if the stores' products are consistently discarded on public ground, municipal regulation may be-and, in this case, is-justified.

Our conclusion concerning the nature of the post-*Alameda Books* evidentiary burden is in line with the weight of federal authority. For example, in *SOB, Inc. v. County of Benton,* 317 F.3d 856 (8th Cir.), *cert. denied,* 540 U.S. 820, 124 S.Ct. 104, 157 L.Ed.2d 38 (2003), the Eighth Circuit noted that the adult business's evidence in opposition to Benton County's zoning regulations

> addressed only two adverse secondary effects, property values and crime in the vicinity of an adult entertainment establishment.... [The challenged ordinance], on the other hand, may address other adverse secondary effects, such as the likelihood that an establishment

> whose dancers and customers routinely violate long-established standards of public decency will foster illegal activity such as drug use, prostitution, tax evasion, and fraud.

Id. at 863. Just so here. Granted, the evidence tendered by World Wide in opposition to Spokane's motion for summary judgment purported to contradict some of the City's secondary effects evidence. Again, however, World Wide failed to present an effective rebuttal to an entire category of evidence: the public testimony. World Wide attempted to counter the citizens' stories by charging bias. However, this tactic is insufficient to defeat summary judgment. *See Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.,* 701 F.2d 95, 97 (9th Cir.1983). This failure to cast doubt on Spokane's justification for the Ordinances dooms World Wide's challenge.

2

[5] We also conclude that the Ordinances are narrowly tailored. A law is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." ***1197** *United States v. Albertini,* 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985); *accord Ward v. Rock Against Racism,* 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Here, as in *Maricopa County,* it is self-evident that Spokane's asserted interest would be achieved less effectively absent the Ordinances. *See* 336 F.3d at 1169.

The crux of World Wide's argument is that, because Spokane's studies do not deal exclusively with retail-only stores, the City impermissibly relied on "shoddy data[and] reasoning" to justify the Ordinances. *Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion). World Wide relies principally on *Encore Videos, Inc. v. City of San Antonio,* 330 F.3d 288 (5th Cir.) (per curiam), *cert. denied,* 540 U.S. 982, 124 S.Ct. 466, 157 L.Ed.2d 372 (2003), to support its argument. The *Encore Videos* court, noting that "[a] time, place, and manner regulation meets the narrow tailoring standard if it 'targets and eliminates no more than the exact source of the evil it seeks to remedy,' " *id.* at 293 (quoting *Frisby v. Schultz,* 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)), found San Antonio's re-zoning of adult stores unconstitutional because the studies on which the city relied "either entirely exclude[d] establishments that provide only take-home videos and books ... or include[d] them but [did] not differentiate the data collected from such businesses from evidence collected from enterprises that provide on-site adult entertainment," *id.* at 294-95. [12] Hoping to repeat Encore Videos' success, World Wide presented the district court with an extensive study concluding that problems with increased crime rates and decreased property value were limited to the neighborhood around a store that has preview booths for on-site viewing.

12 The Fifth Circuit recently clarified its *Encore Videos* opinion, stating that "the ordinance at issue was found not to be narrowly tailored because of both its failure to make an on-site/off-site distinction *and* its low 20% inventory requirement [*i.e.,* the fact that it covered all stores with at least 20% 'adult' merchandise]." *Encore Videos, Inc. v. City of San Antonio,* 352 F.3d 938, 939 (5th Cir.2003) (emphasis added).

[6] Notwithstanding its proffer, World Wide's reliance on *Encore Videos* is misplaced. In *Encore Videos,* San Antonio apparently relied *only* on other cities' studies to justify its ordinance. *See id.* at 295. Here, Spokane relied on a wide variety of evidence, including studies, police records, and citizen testimony. Further, in this case we can assume, but need not decide, that the distinction between retail-only stores and stores with preview booths is constitutionally relevant. The Ordinances still survive World Wide's challenge because much of the citizen testimony concerned retail-only stores. To take just one example, a pedodontist working in a building less than a block away from a retail-only store complained of pornographic litter, harassment of female employees, vandalism, and decreased business, all resulting from his proximity to the retail-only store. As *Maricopa County* teaches, World Wide's claim that citizen complaints such as these are biased and unscientific is insufficient to cast direct doubt on the Spokane's testimonial evidence. *Maricopa County,* 336 F.3d at 1168 (rejecting the plaintiffs argument "that testimonial evidence is not 'real' evidence").

Among the secondary effects that Spokane sought to curb by enacting the Ordinances are the "economic and aesthetic impacts upon neighboring properties and the community as a whole." Ordinance C-33001, pmbl. at 3. Through testimonial evidence, Spokane has shown

that retail-only stores generate these secondary effects and therefore that its interests in enacting ***1198** the Ordinances "would be achieved less effectively absent the regulation." *Albertini,* 472 U.S. at 689, 105 S.Ct. 2897. World Wide has offered no evidence that meaningfully challenges that conclusion. We thus conclude that the Ordinances are narrowly tailored.

D

In sum, *Alameda Books* "does not affect [a municipality's] ability to rely on secondary effects studies and certainly does not mandate a trial in every case where a municipality does so." *Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery County,* 256 F.Supp.2d 385, 393-94 (D.Md.2003). The evidence relied on by Spokane "is both reasonable and relevant," *Maricopa County,* 336 F.3d at 1168, and the City's regulatory regime "is likely to cause a significant decrease in secondary effects" at the cost of "a trivial decrease in the quantity of speech," *Alameda Books,* 535 U.S. at 445, 122 S.Ct. 1728 (Kennedy, J., concurring). Therefore, we hold that Spokane's reliance on this evidence was proper and that the Ordinances are narrowly tailored to address the City's legitimate concerns.

III

[7] We must next decide whether the amended Code-specifically, the language added by Ordinance C-32778-is overbroad.[13] Because "the First Amendment needs breathing space ... [,] statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma,* 413 U.S. 601, 611-12, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Nonetheless, the Supreme Court has "repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Osborne v. Ohio,* 495 U.S. 103, 112, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (internal quotation marks omitted); *see also United States v. Adams,* 343 F.3d 1024, 1034 (9th Cir.2003), *cert. denied,* 542 U.S. 921, 124 S.Ct. 2871, 159 L.Ed.2d 779 (2004) (No. 03-9072).

13 World Wide waived its claim that Ordinance C-32778's definition of "adult retail establishment" is unconstitutionally vague by failing to present it to the district court. *See United States v. Flores-Payon,* 942 F.2d 556, 558 (9th Cir.1991). This is not a purely legal issue. Had World Wide raised it below, Spokane could have presented evidence in support of its position that the definition is sufficiently precise. *Cf. id.* (noting that an argument not presented to the district court can still be raised on appeal under certain limited circumstances, including when "the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court") (internal quotation marks omitted).

Spokane defines an "adult retail establishment" as

> an enclosed building, or any portion thereof which, for money or any other form of consideration, devotes a significant or substantial portion of its stock in trade, to the sale, exchange, rental, loan, trade, transfer, or viewing of "adult oriented merchandise".

SMC § 11.19.03023(A). World Wide claims that this definition is unconstitutional on its face. We disagree.

Cases directly addressing the phrase "significant or substantial" in this context have upheld its validity. *See, e.g., Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50, 53 n. 5, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Alameda Books,* 535 U.S. at 431, 122 S.Ct. 1728. Moreover, this phrase is readily ***1199** susceptible to a narrowing construction. "[L]anguage similar to the 'significant or substantial' language used in this ordinance has been interpreted previously by state courts in a sufficiently narrow manner to avoid constitutional problems." *Z.J. Gifts D-4, L.L.C. v. City of Littleton,* 311 F.3d 1220, 1229 (10th Cir.2002) (collecting cases), *cert. granted in part,* 540 U.S. 944, 124 S.Ct. 383, 157 L.Ed.2d 274 (2003). We agree and hold that the inclusion of this phrase in Ordinance C-32778 does not render it unconstitutionally overbroad.

World Wide also takes issue with Spokane's "any portion thereof" wording, arguing that as a result of its

inclusion the ordinance covers any store with a "portion" that is "significantly" or "substantially" comprised of adult materials. For example, under World Wide's interpretation, a store with a rack of postcards comprising 1% of its stock, 5% of which qualifies as adult material, would fall under the purview of Ordinance C-32778. We read this ordinance differently. The "any portion thereof" clause plainly means that the ordinance is intended to cover stores that occupy only a portion of an enclosed building-*e.g.,* one store in a shopping mall-as distinct from the entire building. This language has nothing to do with the determination whether adult material constitutes a "significant or substantial" portion of a store's stock. [14]

14 World Wide relies on *Executive Arts Studio, Inc. v. City of Grand Rapids,* 227 F.Supp.2d 731 (W.D.Mich.2002), where the court found overbroad an ordinance that encompassed stores with a "section or segment" of sexually-explicit magazines. *See id.* at 748. However, that holding was based on a state court's refusal to adopt a limiting construction. *See id.* No Washington state court has so construed Ordinance C-32778.

Accordingly, mindful that the facial overbreadth doctrine is "strong medicine" that should be employed "sparingly and only as a last resort," *Broadrick,* 413 U.S. at 613, 93 S.Ct. 2908, we affirm the district court's rejection of World Wide's claim that Ordinance C-32778 is overbroad.

IV

[8] The final issue before us is the adequacy of the amortization provision. This provision reads, in pertinent part: "Any adult retail use establishment located within the City of Spokane on the date this provision becomes effective, which is made a nonconforming use by this provision, shall be terminated within twelve (12) months of the date this provision becomes effective." SMC § 11.19.395. The Ordinance allows for the extension of a business's termination date "upon the approval of a written application filed with the Planning Director no later than [one] (1) month prior to the end of such twelve (12) month amortization period." *Id.*

Although World Wide applied for and was granted a six-month extension, and received an extra two months via administrative grace, it claims that we should remand for trial because there remains a question of fact whether its hardship outweighs the benefit to the public to be gained from termination of the non-conforming use. *See Ebel v. City of Corona,* 767 F.2d 635, 639 (9th Cir.1985) (per curiam) (adopting the balancing test set out in *Northend Cinema, Inc. v. City of Seattle,* 585 P.2d 1153, 1159-60 (Wash.1978)). Given the length of its leases and various other alleged impediments to relocation-*e.g.,* restrictive covenants, the unwillingness of landlords to rent or sell to an adult store, and the prohibitive cost-World Wide claims that it can prevail under *Ebel's* balancing test.

[9] We are not convinced. Nothing in the Constitution forbids municipalities from requiring non-conforming uses to close, change their business, or relocate ***1200** within a reasonable time period. Here, as in *Baby Tam & Co. v. City of Las Vegas,* 247 F.3d 1003 (9th Cir.2001), World Wide "furnishes no authority for the proposition that a zoning ordinance may not prohibit a use in existence before its enactment," *id.* at 1006. As a general matter, an amortization period is insufficient only if it puts a business in an impossible position due to a shortage of relocation sites. This issue is conceptually indistinguishable from the First Amendment requirement of alternative avenues of communication. *See Jake's, Ltd. v. City of Coates,* 284 F.3d 884, 889 (8th Cir.) (holding that application of an amortization provision is constitutional as long as it complies with *Renton*), *cert. denied,* 537 U.S. 948, 123 S.Ct. 413, 154 L.Ed.2d 292 (2002). Because the district court held that there are sufficient relocation sites in Spokane and World Wide does not appeal that factual determination, we hold that the amortization provision is not unconstitutional.

Finally, in attempting to extend its right to operate at its present locations, World Wide was afforded-and has availed itself of-the full panoply of due process rights. World Wide requested an extension and received eight months; it appealed this decision to Spokane's Hearing Examiner, claiming the extension was too short, and lost. World Wide then filed a land use action in Spokane County Superior Court challenging the denial of its amortization appeal. We conclude that World Wide received all the process it was due.

V

As conceded by World Wide, municipalities are allowed to "keep the pig out of the parlor" by devising regulations

that target the adverse secondary effects of sexually-oriented adult businesses. This is precisely what Spokane did when it enacted the Ordinances. The district court properly entered summary judgment upholding them.

AFFIRMED.

All Citations

368 F.3d 1186, 04 Cal. Daily Op. Serv. 4570, 2004 Daily Journal D.A.R. 8411

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630 F.3d 1346
United States Court of Appeals,
Eleventh Circuit.

PEEK–A–BOO LOUNGE OF BRADENTON, INC., a Florida Corporation d.b.a. Peek–A–Boo Lounge, Plaintiff–Appellant,
v.
MANATEE COUNTY, FLORIDA, a political subdivision of the State of Florida, Defendant–Appellee.

No. 09–16438.
|
Jan. 21, 2011.

Synopsis

Background: Adult dancing establishments brought action alleging that county ordinance regulating sexually oriented businesses violated First Amendment. The United States District Court for the Middle District of Florida, No. 05-01707-CV-T-27TBM, James D. Whittemore, J., 2009 WL 4349319, granted summary judgment in favor of county. Establishment appealed.

[Holding:] The Court of Appeals, Marcus, Circuit Judge, held that ordinance did not violate First Amendment.

Affirmed.

West Headnotes (10)

[1] Federal Courts
Summary judgment

Federal Courts
Summary judgment

The Court of Appeals reviews a district court's order granting summary judgment *de novo*, applying the same standard that bound the district court and viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party.

82 Cases that cite this headnote

[2] Federal Courts
Statutes, regulations, and ordinances, questions concerning in general

The constitutionality of a statute is a question of law the Court of Appeals reviews *de novo*.

Cases that cite this headnote

[3] Constitutional Law
Sexually Oriented Businesses;Adult Businesses or Entertainment

Zoning ordinances that regulate the conditions under which sexually oriented businesses may operate are evaluated under First Amendment as time, place, and manner regulations, following a three-part test set forth by the Supreme Court in *City of Renton*. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[4] Constitutional Law
Public nudity or indecency

Content-neutral public nudity ordinances involve expressive conduct and must therefore be measured against a four-part test set forth in *United States v. O'Brien*. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[5] Zoning and Planning
Sexually-oriented businesses;nudity

Under the *Renton* test applicable to zoning ordinances regulating sexually oriented businesses, a reviewing court must determine: (1) whether the ordinance amounts to a total ban, presumptively invalid, or merely a time, place, and manner regulation, (2) if it is a time, place, and manner regulation, the court must decide whether the ordinance is subject to strict or intermediate scrutiny, and (3) if it is subject to intermediate scrutiny, then the court must determine whether it is designed to serve a substantial government interest and

allows for reasonable alternative channels of communication.

2 Cases that cite this headnote

[6] **Constitutional Law**
Public nudity or indecency
Zoning and Planning
Sexually-oriented businesses;nudity

Under the *O'Brien-Barnes* test for public nudity ordinances, a reviewing court must determine whether: (1) the government acted within the bounds of its constitutional power in enacting the ordinance, (2) the ordinance furthers a substantial government interest, (3) the government interest is unrelated to the suppression of free expression, and (4) the ordinance restricts First Amendment freedoms no more than is essential to further the government's interest. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[7] **Zoning and Planning**
Regulations in general

In determining whether zoning ordinance regulating sexually oriented businesses is reasonably designed to serve a substantial government interest, the county or municipality first bears the initial burden of producing the evidence that it has relied on to reach the conclusion that the ordinance furthers its interest in reducing secondary effects.

2 Cases that cite this headnote

[8] **Zoning and Planning**
Regulations in general

In determining whether zoning ordinance regulating sexually oriented businesses was reasonably designed to serve a substantial government interest, if the governmental entity has produced evidence that it reasonably believed to be relevant to its rationale for enacting the ordinance, then the burden shifts to the plaintiff to cast direct doubt on this rationale, either by showing that the evidence does not support its rationale or by producing evidence disputing the local government's factual findings; if the plaintiff sustains its burden, the burden shifts back to the government to supplement the record with evidence renewing support for a theory that justifies the ordinance.

1 Cases that cite this headnote

[9] **Zoning and Planning**
Validity of regulations in general

While a county cannot rely on shoddy data or reasoning in enacting a zoning ordinance, it is not required to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the county relied upon is reasonably believed to be relevant to the problem that the county addresses.

Cases that cite this headnote

[10] **Constitutional Law**
Secondary effects
Zoning and Planning
Sexually-oriented businesses;nudity

County zoning ordinance regulating sexually oriented businesses furthered county's interest in reducing secondary effects, and thus did not violate First Amendment; in adopting ordinance, county relied on substantial body of evidence which it reasonably believed was relevant to its rationale for enacting ordinance, including vast legislative record that included judicial opinions, reports and studies that had been prepared for other municipalities, testimony from expert witnesses, affidavits from private investigator who visited sexually oriented businesses in county, and newspaper articles. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

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Appeal from the United States District Court for the Middle District of Florida.

Before HULL and MARCUS, Circuit Judges, and COOKE,[*] District Judge.

[*] Honorable Marcia G. Cooke, United States District Judge for the Southern District of Florida, sitting by designation.

Opinion

MARCUS, Circuit Judge:

At issue today is the constitutionality of an ordinance that the Manatee County, ***1348** Florida Board of County Commissioners ("the Board") adopted to regulate sexually oriented businesses in Manatee County ("the County"). Peek–a–Boo Lounge of Bradenton, Inc. ("Peek–a–Boo"), an adult dancing establishment in Manatee County, along with two similar establishments,[1] sued the County claiming that the ordinance violated the First Amendment. Peek–a–Boo appeals the district court's grant of summary judgment in favor of the County. After thorough review of the ordinance and the extensive record surrounding its codification, we agree with the district court that the County's ordinance was reasonably designed to serve a substantial government interest—reducing the negative secondary effects associated with sexually oriented businesses. Accordingly, we affirm.

[1] The other two adult dancing establishments, M.S. Entertainment, Inc. and G.T. Management, Inc., originally joined the appeal but abandoned it before the case came before us.

I.

The story begins in 1987, when Manatee County adopted an "Adult Entertainment Code," Ordinance 87–07 (not at issue today), which rendered then-existing adult dancing establishments Peek–a–Boo and M.S. Entertainment, Inc. ("M.S.") nonconforming. Peek–a–Boo and M.S. filed suit in the United States District Court for the Middle District of Florida challenging the ordinance's constitutionality under the First Amendment. But in 1989, the parties settled their dispute, allowing the two establishments to continue running and enjoining the County from enforcing the ordinance against them for the way they then operated.

In November 1998, the County amended the Adult Entertainment Code, this time enacting a zoning ordinance, Ordinance 98–46 (also not at issue today), which set forth specific physical requirements for the premises of adult dancing establishments. Peek–a–Boo and M.S. again found themselves in violation of the Adult Entertainment Code. Four months later, the County also adopted a generally applicable public nudity ordinance, Ordinance 99–18. This ordinance defined "nudity" broadly, to include the wearing of any opaque swimsuit or lingerie covering less than one-third of the buttocks or one-fourth of the female breast. The ordinance also specifically prohibited erotic dancers and others from appearing in public in "G-strings, T-backs, dental floss, and thongs."

Peek–a–Boo and M.S. again sued the County, challenging the constitutionality of both ordinances on First Amendment grounds. The district court concluded that the ordinances were constitutional and granted summary judgment in favor of the County. A panel of this Court, however, reversed, holding that the zoning ordinance violated the First Amendment and that there were genuine issues of material fact concerning whether the public nudity ordinance furthered the County's interest in curbing the negative secondary effects associated with adult entertainment. *Peek–a–Boo Lounge of Bradenton, Inc. v. Manatee Cnty.*, 337 F.3d 1251, 1268–69, 1274 (11th Cir.2003) ("*Peek–a–Boo I*"). Essential to our finding that the ordinance was unconstitutional, we observed that the Board "failed to rely on any evidence whatsoever that might support the conclusion that the ordinance was narrowly tailored to serve the County's interest in combating secondary effects." *Id.* at 1266. We also found that, while the County relied on some evidence to meet its initial ***1349** burden in adopting Ordinance 99–18, the public nudity ordinance, the plaintiffs had then met their burden of submitting evidence sufficient to "cast

direct doubt" on the County's rationale. *Id.* at 1271–72. Accordingly, we remanded the case to the district court for a determination of whether there remained credible evidence upon which the County could reasonably rely to support its stated rationale for the public nudity ordinance. *Id.* at 1274–75.

After the *Peek–a–Boo I* decision, the County completely overhauled its Adult Entertainment Code. It enacted Ordinance 05–21[2]—the ordinance at issue today—renaming the code the "Sexually Oriented ***1350** Business Code," and establishing a different set of regulations to govern the manner in which sexually oriented businesses operate in the County. The new ordinance contains both zoning and public nudity provisions.[3] The zoning provisions include physical requirements for the premises of sexually oriented businesses, restrictions on their hours of operation, and a prohibition on serving alcoholic beverages. Manatee County, Fla., Code of Ordinances §§ 2–2.5–4—2–2.5–18 (2005). The nudity provisions include an across-the-board ban on appearing in a "state of nudity," *id.* § 2–2.5–18(a), defined as "the showing of the human male or female genitals, pubic area, vulva, or anus with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola," *id.* § 2–2.5–2. The ordinance allows employees of sexually oriented businesses to appear "semi-nude," *id.* § 2–2.5–18(b), defined as "a condition in which a person is not nude, but is showing a majority of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or is showing the majority of the male or female buttocks," *id.* § 2–2.5–2. Employees appearing semi-nude, however, must "remain[ ] at least six (6) feet from any patron or customer and on a stage that is at least eighteen (18) inches from the floor and in a room of at least one thousand (1,000) square feet." *Id.* § 2–2.5–18(b). Employees are prohibited from touching customers or customers' clothing. *Id.* § 2–2.5–18(c).

2 The relevant portions of the ordinance provide:

> Sec. 2–2.5–2. Definitions.
>
> ....
>
> "*Nude,*" "*Nudity*" or "*State of Nudity*" means the showing of the human male or female genitals, pubic area, vulva, or anus with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola.
>
> ....
>
> "*Semi–Nude*" or "*State of Semi–Nudity*" means a condition in which a person is not nude, but is showing a majority of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or is showing the majority of the male or female buttocks.
>
> ....
>
> "*Sexually Oriented Business*" means an "adult bookstore," an "adult video store," an "adult cabaret," an "adult motel," an "adult motion picture theater," a "semi-nude model studio," a "sexual device shop," or a "sexual encounter center."
>
> ....
>
> Sec. 2–2.5–13. Hours of Operation.
>
> No sexually oriented business, other than an adult motel, shall be or remain open for business between 2:00 a.m. and 6:00 a.m. on any day.
>
> ....
>
> Sec. 2–2.5–16. Penalties and enforcement.
>
> (a) A person who knowingly violates, disobeys, omits, neglects, or refuses to comply with any of the provisions of this chapter shall, upon conviction, be punished by a fine in an amount not less than $250.00 and not to exceed $500.00, or imprisonment, in the County Jail for a period not to exceed sixty (60) days, or both. Each day a violation is committed, or permitted to continue, shall constitute a separate offense and shall be penalized as such.
>
> ....
>
> Sec. 2–2.5–17. Applicability to existing businesses.
>
> (a) All existing sexually oriented businesses and sexually oriented business employees are hereby granted a *De Facto* Temporary License to continue operation or employment for a period of ninety (90) days following the effective date of this ordinance. Compliance with this ordinance shall not be required during said ninety (90) days, but by the end of said ninety (90) days, all sexually oriented businesses and sexually oriented business employees must conform to and abide by the requirements of this chapter.
>
> (b) Notwithstanding any language in Manatee County Ordinance No. 99–18 to the contrary, sexually oriented businesses shall be subject to this ordinance and shall not be subject to Ordinance No. 99–18.

> Sec. 2–2.5–18. Prohibited activities.
> It is unlawful for a sexually oriented business licensee to knowingly violate the following regulations or to knowingly allow an employee or any other person to violate the following regulations.
> (a) It shall be a violation of this ordinance for a patron, employee, or any other person to knowingly or intentionally, in a sexually oriented business, appear in a state of nudity.
> (b) It shall be a violation of this ordinance for a person to knowingly or intentionally, in a sexually oriented business, appear in a semi-nude condition unless the person is an employee who, while semi-nude, remains at least six (6) feet from any patron or customer and on a stage that is at least eighteen (18) inches from the floor and in a room of at least one thousand (1,000) square feet.
> (c) It shall be a violation of this ordinance for any employee who regularly appears semi-nude in a sexually oriented business to knowingly or intentionally, in a sexually oriented business, touch a customer or the clothing worn by a customer.
> (d) It shall be a violation of this ordinance for any person to sell, use, or consume alcoholic beverages on the premises of a sexually oriented business. A sexually oriented business currently licensed to sell alcoholic beverages on the premises shall not be required to comply with this requirement until expiration of its current annual alcoholic beverage license.
> A sign in a form to be prescribed by the County Administrator's Office and summarizing the provisions of Subsections (a), (b), (c), and (d) of this Section, shall be posted near the entrance of the sexually oriented business in such a manner as to be clearly visible to patrons upon entry.

[3] The new ordinance replaced the previous zoning ordinance, Ordinance 98–46, and exempted sexually oriented businesses from the generally applicable public nudity ordinance, Ordinance 99–18, rendering the prior action—*Peek-a-Boo I*—moot.

Unlike when the County adopted Ordinances 98–46 and 99–18, this time the County relied on a voluminous record that included judicial opinions; multiple secondary-effects reports, including land-use studies and crime reports; affidavits from a local private investigator and from local police; newspaper articles; and other materials. The County conducted a four-hour public hearing at which experts testified both for and against the ordinance. In support of the County's proposal, Richard McCleary, Ph.D., a professor of criminology, and Shawn Wilson, a real estate appraiser, testified about the adverse secondary effects associated with sexually oriented businesses. In opposition, the Plaintiffs offered the testimony of four experts: Randy D. Fisher, Ph.D., an associate professor of psychology; Terry A. Danner, Ph.D., a professor of criminal justice; Judith Lynne Hanna, Ph.D., a scholar of anthropology and dance; and Richard Schauseil, a licensed real estate agent. We detail the evidential foundation at some length because it stands at the heart of whether the County relied on a sufficient record.

Dr. McCleary testified that much of the evidence supported the County's rationale. ***1351** He explained that the formal criminological literature revealed consistent findings of significant crime-related hazards caused by sexually oriented businesses. These findings led him to conclude that "the relationship between crime and sexually oriented businesses is ... a scientific fact." One reason, he offered, is that sexually oriented businesses attract "soft targets," meaning patrons who are easy crime targets because they often come from far away, do not know the neighborhood, try to remain anonymous, and are less likely to report crimes of borderline seriousness because they do not want anyone to know that they are patronizing such businesses. Another reason Dr. McCleary offered is that features of the physical layout of these businesses—including private rooms and narrow corridors—strongly inhibited surveillance and policing.

Dr. McCleary also explained that there were between one and two dozen studies establishing a correlation between sexually oriented businesses and negative secondary effects that were "scientific to some degree." Dr. McCleary highlighted two such studies that supported the County's findings that sexually oriented businesses cause negative secondary effects. In the first one from Garden Grove, California, Dr. McCleary and a colleague examined locations where new sexually oriented businesses had opened up and compared the crime rates one year before and one year after they opened, using existing sexually oriented businesses as controls. They found a far greater increase in crime during that time period surrounding the new sexually oriented businesses than surrounding the existing similar businesses. In the second study drawn from Greensboro, North Carolina, even though the study's authors concluded that sexually oriented

businesses did not cause negative secondary effects, Dr. McCleary said that another look at their data showed significantly higher rates of crime in neighborhoods with sexually oriented businesses.

Shawn Wilson, a real estate appraiser, testified about the negative effects of sexually oriented businesses on property value. Ms. Wilson explained that she had examined studies drawn from other cities on the secondary effects associated with sexually oriented businesses and that all of the studies addressing the value of real estate concluded that there were, in fact, negative secondary effects. Ms. Wilson also looked at the deeds in her own files, spoke with market participants, and met with other real estate appraisers. Although she acknowledged that these conversations amounted to anecdotal evidence, she concluded that there was a palpable fear in the marketplace that sexually oriented businesses, like other undesirable businesses such as flea markets and bowling alleys, would drive away potential customers and adversely affect business.

Dr. Fisher, an associate professor of psychology, testified on behalf of the Plaintiffs that the foreign studies on which the County had relied were flawed. He said that five of the studies were not empirically grounded, six did not actually find evidence of negative secondary effects, and two involved samples that were too small to be considered. He conceded that five of the foreign studies supported the hypothesis that sexually oriented businesses caused negative secondary effects, but he suggested that each of them contained methodological flaws that rendered the results "virtually uninterpretable." Finally, he critiqued two studies Dr. McCleary had personally conducted—the Garden Grove study, as well as a 2004 study of Centralia, Washington. Dr. Fisher argued that Dr. ***1352** McCleary was not actually measuring crime increases surrounding *new* sexually oriented businesses, because some of these new businesses had opened near *existing* sexually oriented businesses.

Dr. Danner, a criminal justice professor, testified that a study he conducted concluded that Manatee County's sexually oriented businesses did not cause increases in crime. He evaluated two kinds of crime data in the County: (1) calls for police service, and (2) crimes known to police. He compared crime data for the neighborhoods surrounding Peek–a–Boo Lounge and Cleopatra's (the name of the adult dancing establishment of the former Plaintiff M.S.) with crime data from other parts of the County. He found that Cleopatra's had significantly fewer incidents of the categories of crime he studied compared to the average for Manatee County, and that Peek–a–Boo had significantly more incidents of those crimes compared to the average. Because Peek–a–Boo had more crime than the County average and Cleopatra's had less crime than the County average, and because he found that other kinds of businesses are also correlated with negative secondary effects, Dr. Danner argued that sexually oriented businesses were not "uniquely criminogenic."

Dr. Hanna, an anthropology and dance scholar, also spoke on the Plaintiffs' behalf. She opined that the ordinance was not content neutral and would suppress speech by depriving dancers of "artistic choice." She offered that nudity and the touching of patrons are essential components of adult dance and that the ordinance "stigmatizes women."

Next, Mr. Schauseil, a real estate agent, testified about a study he had conducted regarding property value. He found that from 2000 to 2004, the majority of businesses in the neighborhood of Cleopatra's and Peek–a–Boo Lounge saw no change in traffic pattern and the traffic volume had, in fact, increased.

Finally, Robert Miller, a Manatee County resident who had worked at Cleopatra's for two years and at Peek–a–Boo Lounge for eleven years, testified. He claimed that Peek–a–Boo did not tolerate drugs, prostitution, or violence; that there had been few "legal incidents"; that Peek–a–Boo was in good standing with the community; and that the establishment contributed significantly to the economy.

Based on the evidence and testimony, the Board concluded that sexually oriented businesses were correlated with a variety of negative secondary effects, including personal crimes, property crimes, prostitution and other illicit sexual activity, spread of disease, drug use and drug trafficking, sexual assault and exploitation, negative impacts on surrounding properties, and litter. Manatee County, Fla., Code of Ordinances § 2–2.5–1(b)(1). The Board found that the County had a substantial interest in preventing and abating these secondary effects, and therefore adopted the ordinance "to regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of the County, and to

establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the County." *Id.* § 2–2.5–1(a).

On September 12, 2005, three adult dancing establishments filed the instant action: the two plaintiffs from the previous action, Peek–a–Boo and M.S., and G.T. Management, Inc. ("G.T."). Again, the Plaintiffs claimed that the ordinance was unconstitutional on its face and as applied to them. The County moved for summary ***1353** judgment, submitting six volumes of evidence, which included the testimony and reports of Dr. McCleary, Shawn Wilson, and the Plaintiffs' witnesses; twenty-five judicial opinions; twenty studies from other jurisdictions; deposition testimony; affidavits; and post-enactment evidence. In particular, the County submitted affidavits from Tom McCarren, who visited Peek–a–Boo Lounge, Paper Moon,[4] and Pandora's Box[5] and described in detail illegal activity taking place in these establishments.[6]

4 The name of the adult dance establishment of the former Plaintiff G.T.

5 The new name of the adult dance establishment of the former Plaintiff M.S., formerly Cleopatra's.

6 At Pandora's Box, Mr. McCarren was able to pay a dancer for a private dance, during which the dancer removed the tape over one of her nipples and allowed Mr. McCarren to touch her breast, buttocks, and genital area. At Paper Moon, Mr. McCarren was able to pay a dancer to go into a back room with him, where she removed all clothing except her G-string and allowed Mr. McCarren to touch her breasts.

The County also submitted an affidavit from Detectives Evelio Perez and Dave Ackerson of the County Sheriff's Office, who conducted an undercover operation at Cleopatra's. They averred that the sting revealed several liquor violations, including serving alcohol after hours, dealing in stolen property, and vending goods with a counterfeit trademark. The County also submitted newspaper articles about stings in North Miami Beach and Pasco County. These articles detailed the illegal acts purportedly taking place in the adult clubs, including exposure of bodily organs on stage, simulation of sexual acts, and drug possession. The County also submitted a report about erotic dancers' experiences in adult clubs, which claimed that there was evidence of physical abuse, sexual abuse, verbal abuse, stalking, and sexual exploitation. In response, the Plaintiffs offered affidavits from the four witnesses whose testimony had been presented to the Board, and argued that their evidence "cast direct doubt" on the County's rationale for the ordinance. Ultimately, the district court granted final summary judgment for the County. All the Plaintiffs timely appealed, and the County cross appealed from the district court's refusal to strike the Plaintiffs' affidavits on the grounds that they contained legal argument and previously undisclosed expert opinion. Two of the Plaintiffs (M.S. and G.T.) have since dropped their appeal, leaving only Peek–a–Boo as a party Plaintiff.

II.

[1] **[2]** We review a district court's order granting summary judgment *de novo,* "applying the same standard that bound the district court and viewing the evidence and all reasonable inferences in the light most favorable to" the non-moving party. *Rodriguez v. Sec'y for Dep't of Corr.,* 508 F.3d 611, 616 (11th Cir.2007). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The moving party bears the burden of production. *Fickling v. United States,* 507 F.3d 1302, 1304 (11th Cir.2007). The constitutionality of a statute is a question of law we review *de novo. Peek–a–Boo I,* 337 F.3d at 1255.

[3] **[4]** **[5]** **[6]** In *Peek–a–Boo I,* a panel of this Court comprehensively summarized the Supreme Court's jurisprudence on the ***1354** First Amendment right to freedom of expression in the context of adult entertainment. *Id.* at 1255–64. Among other things, we held that adult entertainment zoning ordinances and generally applicable public nudity ordinances "must be distinguished and evaluated separately" according to the respective standards established by the Supreme Court. *Id.* at 1264. Zoning ordinances that regulate the conditions under which sexually oriented businesses may operate are evaluated as time, place, and manner regulations, following a three-part test set forth by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46–50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) and reaffirmed in *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 448, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002).[7] Content-neutral public nudity ordinances, by contrast, involve expressive conduct and must therefore

be measured against a four-part test set forth in *United States v. O'Brien,* 391 U.S. 367, 376–77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and applied in the context of adult entertainment in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 567, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), and in *City of Erie v. Pap's A.M.,* 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). Manatee County Ordinance 05–21 contains provisions that regulate zoning and portions that are generally applicable public nudity restrictions. In this case, however, it's unnecessary to analyze these provisions separately because Peek–a–Boo challenges on appeal only whether the ordinance is "designed to serve a substantial government interest."[8] Therefore, we measure the zoning and nudity ***1355** portions of the ordinance against the same standard: is the ordinance reasonably designed to serve a substantial government interest?

7 There was no majority opinion in *Alameda Books,* but because Justice Kennedy's concurrence reached the judgment on the narrowest grounds, his opinion represents the Supreme Court's holding in that case. *See Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds" (internal quotation marks omitted)).

8 Under the *Renton* test applicable to *zoning ordinances,* a reviewing court must determine: (1) whether the ordinance amounts to a total ban (presumptively invalid) or merely a time, place, and manner regulation; (2) if it is a time, place, and manner regulation, the court must decide whether the ordinance is subject to strict or intermediate scrutiny; and (3) if it is subject to intermediate scrutiny, then the court must determine whether it is "designed to serve a substantial government interest" and allows for reasonable alternative channels of communication. *Peek–a–Boo I,* 337 F.3d at 1264 (citing *Renton,* 475 U.S. at 46–50, 106 S.Ct. 925; *Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment)). But under the *O'Brien-Barnes* test for *public nudity ordinances,* a reviewing court must determine whether: (1) the government acted within the bounds of its constitutional power in enacting the ordinance; (2) the ordinance furthers a "substantial government interest"; (3) "the government interest is unrelated to the suppression of free expression"; and (4) the ordinance restricts First Amendment freedoms no more than is essential to further the government's interest. *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673; *Barnes,* 501 U.S. at 567, 111 S.Ct. 2456 (quoting *O'Brien,* 391 U.S. at 376–77, 88 S.Ct. 1673). We have concluded that the same standard is used to determine whether an ordinance "is designed to serve" the government's interest (*Renton* step 3) or "furthers" the government's interest (*O'Brien* step 2). *Peek–a–Boo I,* 337 F.3d at 1264–65. On appeal, Peek–a–Boo only disputes whether the County satisfies *Renton* step 3; notably, Peek–a–Boo does not deny that combating negative secondary effects associated with adult entertainment is a substantial government interest. Because Peek–a–Boo only challenges the requirement that is common to both tests, there is no need to analyze the zoning and nudity portions of the ordinance separately.

[7] **[8]** In determining whether the ordinance meets this standard, the county or municipality first bears the initial burden of producing the evidence that it has relied on to reach the conclusion that the ordinance furthers its interest in reducing secondary effects. *Daytona Grand, Inc. v. City of Daytona Beach,* 490 F.3d 860, 875 (11th Cir.2007) (citing *Peek–a–Boo I,* 337 F.3d at 1269). If the governmental entity has produced "evidence that it reasonably believed to be relevant to its rationale for enacting the ordinance," then the burden shifts to the plaintiff to "cast direct doubt on this rationale," either by showing that the evidence does not support its rationale or by producing evidence disputing the local government's factual findings. *Id.* at 875–76 (internal quotation marks omitted). If the plaintiff sustains its burden, the burden shifts back to the government to supplement the record with evidence renewing support for a theory that justifies the ordinance. *Id.* at 876.

[9] On this record, we are satisfied that the County has met its initial burden and that Peek–a–Boo has failed to cast direct doubt. While the County "cannot rely on shoddy data or reasoning," *Peek–a–Boo I,* 337 F.3d at 1269, it is not required to "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the [County] relie[d] upon is reasonably believed to be relevant to the problem that the [County] addresses," *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925. Nor was the County required to produce empirical evidence or scientific studies as long as it "advance[d] some basis to show that its regulation has

the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Alameda Books,* 535 U.S. at 449, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment). Here, the County relied on a vast legislative record that included judicial opinions, reports and studies that had been prepared for other municipalities, testimony from expert witnesses, affidavits from a private investigator who visited sexually oriented businesses in Manatee County, and newspaper articles. It is undeniable that the County has made a substantial showing, relying on as thorough a record as we have seen in these cases, and far more than the "very little evidence" required under *Alameda Books*. 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment). Moreover, Peek–a–Boo has failed to cast direct doubt on the totality of the County's evidence.

A. The County's Initial Burden

[10] To begin with, Manatee County has produced a substantial body of evidence, which it reasonably believed to be relevant to combating negative secondary effects. The County explained that its rationale was to reduce a variety of negative secondary effects associated with sexually oriented businesses:

> Sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, public safety risks, prostitution, potential spread of disease, lewdness, public indecency, illicit sexual activity, illicit drug use and drug trafficking, undesirable and criminal behavior associated with alcohol consumption, ***1356** negative impacts on surrounding properties, litter, and sexual assault and exploitation .... Each of the foregoing negative secondary effects constitutes a harm which the County has a substantial government interest in preventing and/or abating in the future.

Manatee County, Fla., Code of Ordinances § 2–2.5–1(b)(1)–(2). In support of its rationale, the County first has cited to the findings and interpretations of eight Supreme Court decisions and seventeen other federal and state court decisions.[9] Many of the cases upheld ordinances containing restrictions similar to those found in Ordinance 05–21, and many of them accepted legislative findings concerning the negative secondary effects of adult businesses. *See, e.g., Barnes,* 501 U.S. at 572, 111 S.Ct. 2456 (upholding requirement that dancers in adult establishments wear pasties and a G-string); *California v. LaRue,* 409 U.S. 109, 118–19, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) (upholding prohibitions on nude dancing in establishments that serve alcohol); *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358, 1365–66 (11th Cir.1999) (upholding a requirement that adult establishments have an area of at least 1,000 square feet). Indeed, the Supreme Court has suggested in *Pap's A.M.* that a municipality may meet its initial burden solely by relying on relevant Supreme Court cases. 529 U.S. at 296–97, 120 S.Ct. 1382.

9 Manatee County has specifically referenced these cases: *City of Littleton v. Z.J. Gifts D–4, L.L.C.,* 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004); *Alameda Books,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670; *Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265; *Barnes,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504; *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); *Renton,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29; *Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972); *Gammoh v. City of La Habra,* 395 F.3d 1114 (9th Cir.2005); *World Wide Video of Wash., Inc. v. City of Spokane,* 368 F.3d 1186 (9th Cir.2004); *Peek–a–Boo I,* 337 F.3d 1251; *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702 (7th Cir.2003); *Gary v. City of Warner Robins,* 311 F.3d 1334 (11th Cir.2002); *BZAPS, Inc. v. City of Mankato,* 268 F.3d 603 (8th Cir.2001); *Artistic Entm't, Inc. v. City of Warner Robins,* 223 F.3d 1306 (11th Cir.2000); *Wise Enters. v. Unified Gov't of Athens–Clarke Cnty.,* 217 F.3d 1360 (11th Cir.2000); *Ward v. Cnty. of Orange,* 217 F.3d 1350 (11th Cir.2000); *David Vincent, Inc. v. Broward Cnty.,* 200 F.3d 1325 (11th Cir.2000); *Boss Capital, Inc. v. City of Casselberry,* 187 F.3d 1251 (11th Cir.1999); *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358 (11th Cir.1999); *Sammy's of Mobile, Ltd. v. City of Mobile,* 140 F.3d 993 (11th Cir.1998); *Int'l Food & Beverage Sys. v. City of Ft. Lauderdale,* 794 F.2d 1520 (11th Cir.1986);

Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir.1982); *Lady J. Lingerie, Inc. v. City of Jacksonville,* 973 F.Supp. 1428 (M.D.Fla.1997); and *Bd. of Cnty. Comm'rs v. Dexterhouse,* 348 So.2d 916 (Fla.Dist.Ct.App.1977).

Here, however, the County has also relied on twenty studies (many of which were empirical) conducted in other cities, again examining the nexus between sexually oriented businesses and negative secondary effects.[10] The studies found, among other things: a higher incidence of ***1357** arrests for sex offenses in neighborhoods surrounding sexually oriented businesses as compared with control areas (Phoenix, Arizona 1979); a higher incidence of sex-related crimes near sexually oriented businesses as compared with control areas (Indianapolis, Indiana 1984; Austin, Texas 1986); a real association between sexually oriented businesses and elevated crime levels (Minneapolis, Minnesota 1980; Indianapolis, Indiana; Amarillo, Texas 1977; Whittier, California 1978; Seattle, Washington 1989); a correlation between sexually oriented businesses and lower property values (Seattle, Washington); survey data from real estate appraisers who opined that sexually oriented businesses would have a negative effect on property values (Los Angeles, California 1977; Oklahoma City, Oklahoma 1986; Dallas, Texas 1997); and testimony from citizens who were afraid to walk the streets in areas with a high concentration of sexually oriented businesses (Los Angeles, California).

10 These studies were conducted in Phoenix, Arizona 1979; Minneapolis, Minnesota 1980; Houston, Texas 1997; Indianapolis, Indiana 1984; Amarillo, Texas 1977; Garden Grove, California 1991; Los Angeles, California 1977; Whittier, California 1978; Austin, Texas 1986; Seattle, Washington 1989; Oklahoma City, Oklahoma 1986; Dallas, Texas 1997; Newport News, Virginia 1996; New York, New York 1994; Phoenix, Arizona 1995–1998; Centralia, Washington 2004; Greensboro, North Carolina 2003; Houston, Texas 1983; Louisville, Kentucky 2004; and the State of Minnesota 1989.

The County also referenced findings that dancers at sexually oriented businesses experience physical and sexual abuse, drawn from a paper entitled "Stripclubs According to Strippers: Exposing Workplace Sexual Violence" by Kelly Holsopple, the Program Director of the Freedom and Justice Center for Prostitution Resources in Minneapolis, Minnesota; the affidavits of Tom McCarren, detailing illegal activity taking place inside sexually oriented businesses in Manatee County, including illegal touching in private rooms; an affidavit from Detectives Evelio Perez and Dave Ackerson of the Manatee County Sheriff's Office, who conducted an undercover operation at Cleopatra's revealing several liquor violations, including serving alcohol after hours, dealing in stolen property, and vending goods with a counterfeit trademark; and newspaper articles about stings conducted in North Miami Beach and Pasco County, which detailed a variety of illegal acts taking place in sexually oriented businesses. This ample foundation is more than enough to sustain the County's initial burden under the second prong of the *O'Brien* test and the third prong of the *Renton* test.

B. Peek–a–Boo's Burden to Cast Direct Doubt

Since the County has produced evidence that it reasonably believed to be relevant to its rationale, the burden shifts to Peek–a–Boo to cast direct doubt on the County's rationale, either by showing that the County's evidence does not actually support its rationale or by producing evidence disputing the County's factual findings. *Daytona Grand,* 490 F.3d at 875. Peek–a–Boo has not met this burden.

In the first place, Peek–a–Boo argues that it was "extremely problematic" to use judicial opinions as evidence because of "the unreliability of judicial decisions as proof of facts," citing to *Lawrence v. Texas,* 539 U.S. 558, 570, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), as well as a Fifth Circuit decision, *H & A Land Corp. v. City of Kennedale,* 480 F.3d 336 (5th Cir.2007), which Peek–a–Boo claims misstated a fact regarding a study it had cited. But the suggestion that the County may not reasonably rely on judicial opinions as evidence has been squarely rejected by this Court in *Peek–a–Boo I,* where we held that "any evidence ... including a municipality's own findings, evidence gathered by other localities, *or* evidence described in a judicial opinion—may form an adequate predicate to the adoption of a secondary effects ordinance." 337 F.3d at 1268 (emphasis added).

***1358** Second, Peek–a–Boo faults the County for omitting pages from two of the documents it submitted. However, Peek–a–Boo has raised this argument only for the first time on appeal. We generally do not consider arguments raised for the first time on appeal, and we

decline to do so here. *Harrison v. Benchmark Elecs. Huntsville, Inc.,* 593 F.3d 1206, 1215 n. 8 (11th Cir.2010).

Third, Peek–a–Boo claims that four of the studies prepared for other cities—those conducted in Indianapolis in 1984, Austin in 1986, Oklahoma City in 1986, and Los Angeles in 1977—contained opinion surveys and were "problematic, if not inadmissible before the Courts." Peek–a–Boo does not explain this, however, only citing to a 1978 Third Circuit opinion, *Pittsburgh Press Club v. United States,* 579 F.2d 751, 759 (3d Cir.1978), and a 1963 opinion from the Southern District of New York, *Zippo Manufacturing Co. v. Rogers Imports, Inc.,* 216 F.Supp. 670, 681–82, 684 (S.D.N.Y.1963). We remain unpersuaded. There is no precedent that bars a county from relying on studies that are not empirical in nature. *See Daytona Grand,* 490 F.3d at 881 ("[Plaintiff's argument] essentially asks this Court to hold today that the City's reliance on anything but empirical studies based on scientific methods is unreasonable. This was not the law before *Alameda Books,* and it is not the law now.") What's more, the cases Peek–a–Boo cites are inapposite because they address the admissibility in court of opinion polls under the hearsay rule. *See Pittsburgh Press Club,* 579 F.2d at 759–60; *Zippo Mfg. Co.,* 216 F.Supp. at 681–84. In this case, the question is whether the County reasonably believed the evidence to be relevant to its rationale in adopting the ordinance. *Cf. Peek–a–Boo I,* 337 F.3d at 1268.

The heart of Peek–a–Boo's attack is found in the affidavits proffered by its experts Dr. Fisher, Dr. Danner, and Mr. Schauseil. Dr. Fisher's affidavit claimed that the foreign studies on which the County relied are defective. Dr. Fisher, however, only challenged the findings of seventeen of the foreign studies. Neither Dr. Fisher nor any of the Plaintiff's experts say anything about three foreign studies—namely, Houston, Texas 1983; the State of Minnesota 1989; and Louisville, Kentucky 2004. The 1983 Houston report details the findings the Houston City Council reached after a total of eight public hearings. The City Council found that sexually oriented businesses were associated with negative secondary effects such as a detrimental effect on property value and quality of life, increased prostitution in at least one area, intrusive signage, and ancillary criminal activity. The State of Minnesota report includes the findings of an empirical study conducted in St. Paul in 1978 of sexually oriented businesses and businesses serving alcohol. The study found a statistically significant correlation between the location of these types of businesses and neighborhood deterioration, as well as an association with higher crime rates and reduced housing values. Minnesota's working group on sexually oriented businesses also heard testimony that neighborhoods with a concentration of sexually oriented businesses suffered adverse effects such as finding pornographic materials and condoms in the streets, sex acts with prostitutes occurring in plain view of families and children, and harassment of neighborhood residents, including the propositioning of young girls and women on their way to school and work. Finally, the study from Louisville included police reports about prostitution and the promotion of prostitution, and the ***1359** possession of methamphetamines, marijuana, and unknown white pills at or about adult entertainment establishments.

Beyond failing to challenge these studies at all, neither Dr. Fisher nor the Plaintiff's other experts has directly addressed the twenty-five judicial opinions relied upon by the County. Nor do the Plaintiff's experts attempt to cast any direct doubt on the affidavits submitted by the private investigator and two police officers detailing illegal activities found in the County's sexually oriented businesses, or comment at all about the report detailing sexual violence against dancers in sexually oriented businesses. Finally, the Plaintiff's experts have not addressed the newspaper articles regarding stings at Florida strip clubs. In short, a substantial body of evidence remains wholly unaddressed by the Plaintiff.

Moreover, Dr. Fisher's criticism of seventeen studies neither invalidates them nor renders the County's reliance on them unreasonable. Dr. Fisher criticizes some of the studies (Phoenix, Whittier, Austin, and Dallas) for not matching the control area closely enough to the study area in demographic terms. This does not undermine the County's ability to rely on them, inasmuch as we have rejected the argument that a municipality may only rely on studies employing the scientific method. *See Daytona Grand,* 490 F.3d at 881. For this reason, we are also unpersuaded by Dr. Fisher's criticism that some of the studies have small sample sizes (Indianapolis; Oklahoma City), only measure data over the course of one or two years (Phoenix; Austin), or lack empirical data (Houston 1997; Amarillo; Seattle). *See id.* [11]

11 Indeed, in Dr. McCleary's opinion, none of these criticisms is sufficient to wholly invalidate any of the studies, and taken together, they constitute "a very, very compelling literature that shows a consistent consensus finding; sexually oriented businesses pose crime-related secondary effects."

Dr. Fisher also pointed out that a few of the studies offer some findings that are inconclusive. Again, we are unpersuaded because these studies still draw other findings that are conclusive. We repeat that "[a]lthough the burden lies with the municipality, a court should be careful not to substitute its own judgment for that of the municipality" and should remember that "the municipality's legislative judgment should be upheld provided that it can show that its judgment is still supported by credible evidence, upon which it reasonably relies." *Daytona Grand,* 490 F.3d at 876 (internal quotation marks omitted). At best, Dr. Fisher has pointed to *some* problems with *some* of the studies, but on this ample record this is not enough to carry the day.

Dr. Danner's affidavit, also filed on behalf of Peek–a–Boo, attempts to cast direct doubt on the County's case by undermining the County's rationale for adopting the ordinance, which, among other things, is that sexually oriented businesses cause increases in crime rates. Dr. Danner examined crime rates in the County based on crimes known to police in the following offense categories: rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft. He also tracked calls for police service, comparing two sexually oriented businesses with twelve non-adult businesses in the same area. Dr. Danner opined that the evidence was insufficient to conclude that the two adult establishments caused crime-related secondary effects "beyond what would be normally expected" for non-adult alcohol-serving establishments.

Dr. Danner's affidavit, however, did not address the County's findings regarding ***1360** the correlation between sexually oriented businesses and other crimes, such as prostitution, lewdness, public indecency, illicit sexual activity, illicit drug use, and drug trafficking. What's more, there are serious methodological problems with Dr. Danner's findings. This Court has found that wholesale reliance on data based on crimes that are reported to the police may lead to an underestimation of the total number of crimes, since certain crimes, such as lewdness and prostitution, are rarely reported. *See Daytona Grand,* 490 F.3d at 882–83. Likewise, there are methodological problems with estimating crime rates simply based on calls for police services: Dr. McCleary opined that there are far more calls than there are actual incidents of crimes, and most crimes do not in fact come to the attention of the police through calls from victims or witnesses.

There are also problems with Richard Schauseil's affidavit, which avers that the County's sexually oriented businesses do not negatively affect commercial property value. First, Mr. Schauseil measured the assessed value of properties, and the County's expert Shawn Wilson cautioned that assessed values are far less accurate than appraisal values. Second, Ms. Wilson observed that Mr. Schauseil's study drew a comparison of listing prices, which may not be closely related to market value at all. Third, Mr. Schauseil's study analyzed the difference between sale and resale value, which may be explained by generally rising neighborhood property values or improvements to the property itself. Without knowing what improvements took place, it would not be proper to assume that a higher resale value meant that property values in the neighborhood were rising.

The bottom line is that the County has presented a substantial body of evidence to support its rationale for adopting the ordinance. Peek–a–Boo has failed even to address much of that evidence at all, and it has failed to show that the County's rationale or this body of evidence was unreasonable.

III.

Peek–a–Boo also claims that in deciding *Daytona Grand* and *Flanigan's Enterprises, Inc. of Georgia v. Fulton County,* 596 F.3d 1265 (11th Cir.2010) ("*Flanigan's II*"), this Court impermissibly overruled *Krueger v. City of Pensacola,* 759 F.2d 851 (11th Cir.1985), *Flanigan's Enterprises, Inc. of Georgia v. Fulton County,* 242 F.3d 976 (11th Cir.2001) ("*Flanigan's I*"), and *Peek–a–Boo I*. We are bound to follow our precedent, and we have done so in *Daytona Grand* and *Flanigan's II*. Cases involving the regulation of sexually oriented businesses are of necessity fact-specific, and the answer in each one is largely driven by the nature of the record.

Thus, for example, in *Krueger,* we found that a Pensacola ordinance banning topless dancing was unconstitutional

because the city produced no evidence that crime was a problem at topless bars in the city. 759 F.2d at 854–55. In *Flanigan's I*, we found it unreasonable for the county to rely on foreign studies concerning secondary effects when the county had conducted its own empirical studies that conclusively undermined its reliance on the foreign studies' findings. 242 F.3d at 986. In contrast, in *Daytona Grand,* the city of Daytona Beach relied on a significant record of evidence in adopting its ordinance. This record included police reports of criminal activity in and around adult theaters; undercover reports finding violations of city ordinances; specific documentation from the police chief of criminal ***1361** activity in and around the theaters; data from police dispatchers regarding police calls; expert testimony; studies conducted for other cities that found that adult businesses tend to increase urban blight; studies of urban blight in Daytona Beach itself; controlled laboratory studies of the connection between alcohol and sexual conduct; anecdotal accounts from local business owners of increased crime; and newspaper articles. 490 F.3d at 882.

Similarly, in *Flanigan's II*, Fulton County relied on the findings of a 337–page report describing a fourteen-day sting operation of strip clubs in the county that resulted in 167 arrests and 166 convictions. 596 F.3d at 1280. The report also included affidavits regarding the impact of the strip clubs on young people in the county; affidavits regarding the clubs' non-criminal negative secondary effects, such as urban blight; and foreign studies. *Id.* The facts addressed in *Daytona Grand* and *Flanigan's II* were significantly different than those found in *Krueger* and *Flanigan's I,* so not surprisingly, the outcomes in these cases were different, although the legal principles were the same. [12]

12 Peek–a–Boo is also wrong in suggesting that the tool of summary judgment is always inappropriate when analyzing ordinances that attempt to regulate adult dancing establishments. We rejected summary judgment in *Peek–a–Boo I* because the plaintiffs had met their burden of casting direct doubt on the evidence the County had presented in support of its public nudity ordinance. 337 F.3d at 1271–72.

The County has produced a very substantial body of evidence, which it reasonably believed was relevant to its rationale for enacting the ordinance, and Peek–a–Boo has failed to cast direct doubt on this rationale.

Accordingly, the district court's grant of summary judgment in favor of the County is AFFIRMED.

All Citations

630 F.3d 1346, 22 Fla. L. Weekly Fed. C 1703

KeyCite Yellow Flag - Negative Treatment
Disagreed With by TJS of New York, Inc. v. Town of Smithtown, 2nd Cir.(N.Y.), March 10, 2010

490 F.3d 860
United States Court of Appeals,
Eleventh Circuit.

DAYTONA GRAND, INC., a Florida corporation doing business as Lollipop's Gentlemen's Club, Miles Weiss, Plaintiffs-Appellants Cross-Appellees,
v.
CITY OF DAYTONA BEACH, FLORIDA, a municipal corporation, Defendant-Appellee Cross-Appellant.

No. 06-12022.
|
June 28, 2007.

Synopsis

Background: Owners and operators of an adult theater sued the city claiming that zoning and public nudity ordinances violated the First Amendment. The United States District Court for the Middle District of Florida, No. 02-01469-CV-ORL-28-KRS, John Antoon, II, J., 410 F.Supp.2d 1173, upheld the zoning ordinances, but struck down the nudity ordinances, and parties cross-appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

[1] zoning ordinance limiting the locations where adult businesses may be located provided for a constitutionally sufficient number of sites to satisfy requirements of First Amendment, and

[2] public nudity ordinances did not violate First Amendment.

Affirmed in part, reversed in part, and remanded.

West Headnotes (9)

[1] Constitutional Law
Zoning and land use in general

Constitutional Law
Availability of other sites

Zoning ordinances limiting the locations where adult businesses may be located are evaluated under First Amendment under the three-part test for time, place, and manner regulations established in *City of Renton;* under that test, a new zoning regime must leave adult businesses with a reasonable opportunity to relocate, and the number of sites available for adult businesses under the new zoning regime must be greater than or equal to the number of adult businesses in existence at the time the new zoning regime takes effect. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[2] Constitutional Law
Zoning and land use in general

Simply because adult businesses must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not establish that a zoning ordinance limiting the locations where adult businesses may be located violates First Amendment. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[3] Constitutional Law
Availability of other sites

Zoning and Planning
Sexually-oriented businesses;nudity

Zoning ordinance limiting the locations where adult businesses could be located provided for a constitutionally sufficient number of sites to satisfy requirements of First Amendment; twenty-four sites in the district were available for First Amendment purposes, notwithstanding that all of the land in the district was owned by a single private landowner who could be reluctant or unwilling to develop or sell the land, and it was not constitutionally significant that the land was mostly vacant where the city had provided sufficient infrastructure for a private developer to commence development,

including a paved road, telephone and power lines, and water and sewer lines. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[4] **Zoning and Planning**
Nonconforming Uses

Constitution does not require a "grandfathering" provision for existing nonconforming adult businesses, and any vested right to continue operating as a lawful nonconforming use derives from state law.

Cases that cite this headnote

[5] **Constitutional Law**
Zoning and land use

Zoning and Planning
Legality or illegality of use

Adult business failed to establish a vested right under Florida law to continue operating under new zoning ordinance as a lawful nonconforming use; when business began operating, it violated the zoning ordinances as then written, and consequently it could not have relied on existing law because it began operating plainly in contravention of that law, and there was no evidence of bad faith or arbitrary behavior by the city.

2 Cases that cite this headnote

[6] **Constitutional Law**
Public nudity or indecency

Public nudity ordinances that incidentally impact protected expression should be upheld under First Amendment if they (1) are within the constitutional power of the government to enact; (2) further a substantial governmental interest; (3) are unrelated to the suppression of free expression; and (4) restrict First Amendment freedoms no greater than necessary to further the government's interest. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[7] **Constitutional Law**
Secondary effects

For purposes of First Amendment analysis, reducing the secondary effects associated with adult businesses is a substantial government interest that must be accorded high respect. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[8] **Constitutional Law**
First Amendment in General

In showing that an ordinance challenged under First Amendment furthers a substantial, independent government interest, a city need not conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses; although a municipality must rely on at least some pre-enactment evidence, such evidence can consist of a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[9] **Constitutional Law**
Theaters in general

Constitutional Law
Performers

Intoxicating Liquors
Licensing and regulation

Public Amusement and Entertainment
Dancing and other performances

Public nudity ordinances, which required at least G-strings and pasties in all adult theaters regardless of location, and which required slightly more modest clothing at establishments that either served alcohol or were located within 500 feet of an establishment that served alcohol, did not violate First Amendment; city showed that nudity ordinances furthered its interest in reducing the negative secondary effects

associated with adult theaters, the ordinances were narrowly tailored, and police calls for service (CAD) data relied on by business owners could have substantially undercounted incidents of many of the types of crime that the city sought to reduce. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

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Appeals from the United States District Court for the Middle District of Florida.

Before HULL and MARCUS, Circuit Judges, and BARZILAY, [*] Judge.

[*] Honorable Judith M. Barzilay, Judge, United States Court of International Trade, sitting by designation.

Opinion

MARCUS, Circuit Judge:

At issue today is the constitutionality of several zoning and public nudity ordinances adopted by the City of Daytona Beach ("the City") to regulate adult theaters. The owners and operators of Lollipop's Gentlemen's Club ("Lollipop's"), an adult theater in Daytona Beach, sued the City claiming that these ordinances violate the First Amendment. The district court upheld the zoning ordinances, finding that the City had provided a constitutionally sufficient number of available sites for adult theaters, and also denied Lollipop's claim that it was "grandfathered in" under Florida law. However, the district court struck down the nudity ordinances, concluding that they did not further the substantial government interest in reducing negative secondary effects associated with adult theaters.

After thorough review, we affirm the district court's determination that the zoning ordinances pass constitutional muster, as well as its ruling that, under Florida law, Lollipop's is not entitled to grandfather status. But as for the nudity ordinances, we conclude that the City has indeed carried its evidentiary burden of establishing their constitutionality because ***863** the ordinances further substantial government interests, and, accordingly, we reverse and remand for further proceedings consistent with this opinion.

I. *Background*

A. Zoning Ordinances

In 1981, after years of increasing urban blight and economic decline, the City of Daytona Beach adopted various zoning ordinances in an effort to reduce the perceived secondary effects of adult businesses by limiting the locations where they could open and operate.[1] Among other things, the zoning ordinances permitted adult theaters[2] to open only in the City's Business Automotive ("BA") zoning districts, and even there prohibited them from locating within certain distances of churches, schools, parks, playgrounds, or other adult businesses.[3]

1 *See* Daytona Beach, Fla., Ordinance 81-292 (Sept. 16, 1981); *see also* Daytona Beach, Fla., Ordinance 82-67 (Feb. 17, 1982) (amending the definition of "adult theater").

2 The zoning ordinances define "adult theater," in relevant part, as "[a] use which exhibits any motion picture, exhibition, show, live show, representation, or other presentation which, in whole or in part, depicts nudity, sexual conduct, [or] sexual excitement." Daytona Beach, Fla., Ordinance 82-67 § 1 (Feb. 17, 1982), *codified at* Daytona Beach, Fla., Land Dev.Code art. II, § 3.1 (2001).

3 Ordinance 81-292 added new provisions to and amended existing provisions of the City's zoning ordinances then in effect in order "[t]o reduce the adverse impacts of adult bookstores and adult theaters upon the City's neighborhoods." Ordinance 81-292 § 4. The Ordinance added definitions for "adult theater" and "adult bookstore," amended various provisions of the existing zoning ordinances for consistency, and, most importantly, added new sections to limit the locations where these adult businesses could open and operate. Those sections provided:

> 51.2.1 Adult bookstores and adult theaters shall be permitted as a matter of right in BA, BA-1, and BA-2 Districts. These adult uses shall not pyramid into or be allowed within the BW Districts.
>
> 51.2.2 It shall be unlawful to locate any adult theater and adult bookstore within 400 feet of any area of the City zoned R-1aa, R-1a, R-1a(1), R-1b, R-1c, R-2, R-2a, RA, R-2b, RP, R-3, PUD, T-1 or T-2.
>
> 51.2.3 It shall be unlawful to locate any adult bookstore and adult theater within 1,000 feet of any other such adult bookstores or adult theaters.
>
> 51.2.4 It shall be unlawful to locate any adult bookstore and adult theater within 400 feet of any church, school, public park or playground, or any other public or semi-public place or assembly where large numbers of minors regularly travel or congregate.
>
> 51.2.5 Distances in 51.2.3 and 51.2.4 shall be measured from property line to property line, without regard to the route of normal travel.

Ordinance 81-292 § 4. The Ordinance also limited adult businesses' use of outside advertising signs, prohibited them from painting their buildings in "garish colors," and required that all windows and doors be "blacked or otherwise obstructed" to block visibility of the inside from outside. *Id.*

In the mid-1980s, the zoning ordinances were challenged on various grounds in *Function Junction, Inc. v. City of Daytona Beach,* 705 F.Supp. 544 (M.D.Fla.1987), *aff'd,* 864 F.2d 792 (11th Cir.1988) (table). Gerald Langston, the City's Director of Planning and Redevelopment and a key participant in formulating the zoning ordinances, testified in that case as an expert in urban planning and about the legislative process that led to their enactment. Langston said that, before enacting the zoning ordinances, the City had conducted a local study of urban blight and decay that identified two blighted areas: the old downtown and the beachside. Langston explained that the identification of these areas as blighted was based on characteristics such as: "a significant percentage of deteriorating structures; a large number of small ... lots, which did not allow cars; ***864** a notable parking problem; a high incidence of crime, particularly, on the beachside; and a large percentage of antiquated, underground utility systems, such as drainage, water and sewer systems." *Id.* at 547. Langston testified that the blight deterred investment-hotel development ceased in 1975, and in the late 1970's, Daytona Beach was denominated the "City of Sleaze." *Id.*

Langston explained that the City of Daytona Beach then created a Redevelopment Design and Review Board to deal with the blight problem. *Id.* Langston worked with the Board and testified that it "considered studies of blight in Boston and Detroit by the American Society of Planning Officials in 1979-1980. These studies show strong evidence that the central location of adult uses, like the 'Combat Zone' in Boston, causes the blighted area to grow and creates blight in fringe areas." *Id.* Langston also opined, "[b]ased upon his education, experience, knowledge of blight in Daytona Beach and his participation in drafting the subject ordinance," that live nude and seminude entertainment businesses "promote and perpetuate urban decay" and that "adult businesses have impacted on crime in the area surrounding Daytona Beach." *Id.*

David Smith, an assistant state attorney who had prosecuted drug and prostitution offenses in Daytona Beach, also testified that " 'most definitely' there were more drug and prostitution offenses in topless bars than in other bars." *Id.* at 548. Based in part on this testimony by Langston and Smith, the district court in *Function Junction* upheld the zoning ordinances. *Id.* at 552.

In 1993, the City enacted several amendments to the zoning ordinances that, among other things, required adult theaters to obtain pre-approval from a Technical Review Committee before being able to open and operate in the BA districts. In a First Amendment challenge brought by several adult theaters, the United States District Court for the Middle District of Florida entered a preliminary injunction preventing the City from enforcing the 1993 amendments because, the court found, the plaintiffs were likely to prevail at trial on their claims. *Red-Eyed Jack, Inc. v. City of Daytona Beach,* 165 F.Supp.2d 1322, 1330 (M.D.Fla.2001) [hereinafter *Red-Eyed Jack I*].

While the *Red-Eyed Jack* litigation was still pending, the City amended its zoning ordinances still again to eliminate the constitutional infirmities identified by the district court. [4] Relevant here, the City once ***865** again allowed adult theaters to open in the BA districts without pre-approval. [5] The City also created a new zoning district category, the M-5 Heavy Industrial Zoning District ("M-5"), [6] and ultimately applied it to 210 acres in the western part of the City. [7] Within this new M-5 district, adult theaters were permitted to open without the distance requirements that applied in BA districts. Although the M-5 district consisted mostly of undeveloped land, the City ensured that telephone and power lines were installed in the district's interior, the county paved a previously dirt road through it, and the City approved a preliminary plat for a fifty-five-acre subdivision straddling that road. [8] As a result of these changes, the district court concluded that the zoning ordinances were constitutional. *Red-Eyed Jack, Inc. v. City of Daytona Beach,* 322 F.Supp.2d 1361, 1362 (M.D.Fla.2004) [hereinafter *Red-Eyed Jack II*]. The court found that twenty-four new sites were available in the M-5 district and that, in concert with one site already found to be available in the BA district, this created a constitutionally sufficient number of sites for the ten adult businesses that were operating or seeking to operate in Daytona Beach at that time. *Id.* at 1375.

4 Daytona Beach, Fla., Ordinance 01-367 § 1 (Sept. 5, 2001). Ordinance 01-367 enacted the substantive provisions that are currently in force in the BA districts:

> Adult bookstores and adult theaters are permitted as of right in BA districts. The purpose of the conditions is to reduce the adverse impacts of adult bookstores and adult theaters upon neighborhoods by avoiding the concentration of uses which cause or intensify physical and social blight; improving visual appearance of adult uses; reducing negative impacts of adult uses upon other business uses, neighborhood property values, residential areas, and public and semi-public uses; insuring that adult uses do not impede redevelopment and neighborhood revitalization efforts; and avoiding adult uses in heavily used pedestrian areas. The following conditions must be met:
>
> (a) It shall be unlawful to locate any adult bookstore or adult theater within 400 feet of any residential, R-PUD, T-1, or T-2 district.
>
> (b) It shall be unlawful to locate any adult bookstore or adult theater within 1,000 feet of any other adult theater or adult bookstore.
>
> (c) It shall be unlawful to locate any adult bookstore or adult theater within 400 feet of any church, school, public park, or playground, or any other public or semi-public place of assembly where large numbers of minors regularly travel or congregate.
>
> (d) Distances shall be measured from property line to property line, without regard to the route of normal travel.
>
> (e) Outside advertising shall be limited to one identification sign, not to exceed 20 square feet. Advertisements, displays, or other promotional materials shall not be shown or exhibited to be visible to the public from a pedestrian sidewalk or walkway or from other public or semi-public areas; and such displays shall be considered signs.
>
> (f) Buildings shall not be painted in garish colors or such other fashion as will effectuate the same purpose as a sign. All windows, doors, and other apertures shall be blacked or otherwise obstructed so as to prevent viewing of the interior of the establishment from without.

Daytona Beach, Fla., Land Dev.Code art. XI, § 3.2 (2001).

5 The distance requirements between adult theaters and churches, schools, parks, playgrounds, and other adult businesses remain in effect.

6 Daytona Beach, Fla., Ordinances 01-456 & 01-457 (Oct. 17, 2001).

7 Initially, the City zoned twenty acres as M-5, but after the district court entered still another injunction based on its finding that the City still did not provide a sufficient number of sites where adult theaters could open and operate, the City zoned as M-5 an additional 190 acres adjacent to the original twenty acres. Daytona Beach, Fla., Ordinance 03-195 (May 7, 2003); *see also Red-Eyed Jack, Inc. v. City of Daytona Beach,* 322 F.Supp.2d 1361, 1364-65 (M.D.Fla.2004).

8 Daytona Beach, Fla., Ordinance 03-196 (May 7, 2003).

B. Nudity Ordinances

In conjunction with the zoning ordinances adopted in 1981, the City enacted Ordinance 81-334 to prohibit nudity and sexual conduct in establishments that serve alcohol.[9] Specifically, in any establishment ***866** that deals in alcoholic beverages, Ordinance 81-334 prohibits: the "expos[ure] to public view [of a] person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks"; the "expos[ure] to public view [of] any portion of [a woman's] breasts below the top of the areola"; a wide variety of sexual activities; and any "simulation" or "graphic representation, including pictures or the projection of film, which depicts" any of the conduct prohibited by the Ordinance. In addition, Ordinance 81-334 provides that no person "maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit" any of the proscribed conduct.

[9] In relevant part, Ordinance 81-334 provides:

> (a) No person shall expose to public view such person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereof in an establishment dealing in alcoholic beverages.
>
> (b) No female person shall expose to public view any portion of her breasts below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages.
>
> (c) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any person to expose to public view such person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or simulation thereof within the establishment dealing in alcoholic beverages.
>
> (d) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any female person to expose to public view any portion of her breasts below the top of the areola or any simulation thereof within the establishment dealing in alcoholic beverages.
>
> (e) No person shall engage in and no person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any sexual intercourse; masturbation; sodomy; bestiality; oral copulation; flagellation; sexual act which is prohibited by law; touching, caressing or fondling of the breasts, buttocks, anus or genitals; or the simulation thereof within an establishment dealing in alcoholic beverages.
>
> (f) No person shall cause and no person maintaining, owning or operating an establishment dealing in alcoholic beverages shall suffer or permit the exposition of any graphic representation, including pictures or the projection of film, which depicts human genitals; pubic area; vulva; anus; anal cleft or cleavage; buttocks; female breasts below the top of the areola; sexual intercourse; masturbation; sodomy; bestiality; oral copulation; flagellation; sexual act prohibited by law; touching, caressing or fondling of the breasts, buttocks, anus, or genitals; or any simulation thereof within any establishment dealing in alcoholic beverages.

Daytona Beach, Fla., Ordinance 81-334 § 1 (Oct. 21, 1981), *codified at* Daytona Beach, Fla., Code § 10-6 (2001). Section 2 of Ordinance 81-334, although not codified in the City's Code of Ordinances, provides the City's rationale for Ordinance 81-334's enactment:

> It is hereby found that the acts prohibited in Section 1 above encourage the conduct of prostitution, attempted rape, rape, murder, and assaults on police officers in and around establishments dealing in alcoholic beverages, that actual and simulated nudity and sexual conduct and the depiction thereof coupled with alcohol in public places begets undesirable behavior, that sexual, lewd, lascivious, and salacious conduct among patrons and employees within establishments dealing in alcoholic beverages results in violation of law and dangers to the health, safety and welfare of the public, and it is the intent of this ordinance to prohibit nudity, gross sexuality, and the simulation and depiction thereof in establishments dealing in alcoholic beverages.

Id. § 2.

By 2001, the City of Daytona Beach became concerned that some bars were exploiting a loophole in Ordinance 81-334 by separating alcohol and nudity within a single structure but allowing for ready access between the two areas. The City also became increasingly concerned that lewd and lascivious conduct within adult theaters was increasing and that nudity in streets, parks, and other public places was especially a problem during events such as Spring Break and Black College Reunion.

Motivated by these perceived concerns, the City enacted Ordinance 02-496 to reduce "lewd and lascivious

behavior, prostitution, sexual assaults and batteries, ... other criminal activity, ... [the] degradation of women, and ... activities which break down family structures and values." [10] In fact, Ordinance 02-496 was enacted as a general public nudity ordinance and prohibited any person over ten years of age from "recklessly, knowingly, or intentionally" ***867** appearing in any public place with "anything other than a full and opaque covering" over the following areas: "[t]he male or female genitals, pubic area, or anal cleavage"; "[t]he nipple and areola of the female breast"; "at least one-half of that outside surface area of the breast located below the top of the areola, which area shall be reasonably compact and contiguous to the areola"; "[o]ne-third of the male or female buttocks centered over the cleavage of the buttocks for the length of the cleavage"; and, even if covered, the "male genitals in a discernibly turgid state." [11] Ordinance 02-496 also provided a non-exhaustive list of items of clothing that are *not* sufficient to comply with its provisions: "items commonly known as G-strings, T-backs, dental floss, and thongs." [12]

10 Daytona Beach, Fla., Ordinance 02-496 § 5 (Oct. 2, 2002).

11 Daytona Beach, Fla., Code § 62-183(a), (b), *enacted by* Ordinance 02-496 § 14.

12 Daytona Beach, Fla., Code § 62-183(c), *enacted by* Ordinance 02-496 § 14. Ordinance 02-496 added Article VI, "Public Nudity," to Chapter 62 of the City's Code of Ordinances. Article VI first states the City's purpose for adding a public nudity prohibition to the City's Code of Ordinances:

> (a) It is the intent of this article to protect and preserve the health, safety and welfare of the people of The City of Daytona Beach by prohibiting any person from recklessly, knowingly, or intentionally appearing nude in a public place, or recklessly, knowingly, or intentionally causing or permitting another person to appear nude in a public place within the City, subject to the exceptions provided in § 62-[184].
>
> (b) The City Commission has further expressed its intent and findings in Ordinance 02-496, adopting this article.

Daytona Beach Code § 62-181. After defining the terms "breast," "buttocks," "public place provided or set apart for nudity," and "public place," *see id.* § 62-182, Article VI then lists the following substantive prohibitions:

> (a) It shall be unlawful for any person ten years of age or older to recklessly, knowingly, or intentionally appear in a public place, or to recklessly, knowingly, or intentionally cause or permit another person ten years of age or older to appear in a public place in a state of dress or undress such that any of the following body parts or portions thereof are exposed to view or are covered with anything other than a full and opaque covering which completely covers all of the described area:
>
> (1) The male or female genitals, pubic area, or anal cleavage.
>
> (2) The nipple and areola of the female breast; and in addition at least one-half of that outside surface area of the breast located below the top of the areola, which area shall be reasonably compact and contiguous to the areola.
>
> (3) One third of the male or female buttocks centered over the cleavage of the buttocks for the length of the cleavage. This area is more particularly described as that portion of the buttocks which lies between the top and bottom of the buttocks, and between two imaginary straight lines, one on each side of the anus and each line being located one-third of the distance from the anus to the outside perpendicular line defining the buttocks, and each line being perpendicular to the ground and to the horizontal lines defining the buttocks.
>
> (b) It shall be unlawful for any person to recklessly, knowingly, or intentionally appear in a public place, or to recklessly, knowingly, or intentionally cause or permit another person to appear in a public place in a manner as to show or display the covered male genitals in a discernibly turgid state.
>
> (c) Attire which is insufficient to comply with these requirements includes but is not limited to those items commonly known as G-strings, T-backs, dental floss, and thongs.
>
> (d) Body paint, body dye, tattoos, latex, tape, or any similar substance applied to the skin surface, any substance that can be washed off the skin, or any substance designed to simulate or which by its nature simulates the appearance of the anatomical area beneath it, is not full and opaque covering as required by this section.

Id. § 62-183. Article VI then provides that "[t]he offense of public nudity or exposure as set forth

in section 62-183 shall not occur in any of the following instances:"

(1) When a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

(2) When the conduct of being nude cannot constitutionally be prohibited by this section because it constitutes a part of a bona fide live communication, demonstration, or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain; or

(3) When the conduct of being nude cannot constitutionally be prohibited by this section because it is otherwise protected by the United States Constitution or the Florida Constitution.

Id. § 62-184(a) (citations omitted).

***868** In July 2003, less than a year after the City enacted Ordinance 02-496, a panel of this Court decided *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County,* 337 F.3d 1251 (11th Cir.2003). That decision suggested that an ordinance that does not leave an erotic dancer "free to perform wearing pasties and G-strings" would violate the First Amendment because it would significantly affect the dancer's "capacity to convey [an] erotic message." *Id.* at 1274 (quotation marks omitted). About five weeks later, the City enacted Ordinance 03-375, which amended Ordinance 02-496 to allow erotic dancers to wear G-strings and pasties "within a fully enclosed structure legally established as an adult theater" that is more than 500 feet from an establishment that serves alcohol. [13] Within 500 feet of an alcohol-serving establishment, however, Ordinance 02-496 applies and, as described above, requires clothing somewhat more modest than G-strings and pasties. [14]

13 Daytona Beach, Fla., Ordinance 03-375 § 9 (Aug. 20, 2003), *codified at* Daytona Beach, Fla., Code § 62-184(b). Ordinance 03-375 added the following exception to the City's Code of Ordinances:

(1) In the course of the presentation of erotic dance or other artistic expression which is entitled to first amendment protection within a fully enclosed structure legally established as an adult theater as defined in the Land Development Code:

a. The breast covering required by subsection 62-183(a)(2) shall not be required, except that nipples and areolae shall be covered.

b. The buttocks covering required by subsection 62-183(a)(3) shall not be required, and subsection 62-183(c) shall not apply.

Daytona Beach Code § 62-184(b)(1), *enacted by* Ordinance 03-375 § 9.

14 Specifically, the more modest clothing requirements apply to an adult theater that:

a. is located in the same structure as an establishment dealing in alcoholic beverages ... unless the closest point of the premises of the alcoholic beverage establishment is more than 500 feet from the boundary line of the adult theater use; or

b. is located under the same roof as an establishment dealing in alcoholic beverages ... unless the closest point of the premises of the alcoholic beverage establishment is more than 500 feet from the boundary line of the adult theater use; or

c. shares any wall, floor, or ceiling with an establishment dealing in alcoholic beverages ...; or

d. shares an entry area with an establishment dealing in alcoholic beverages ...; or

e. provides for or permits the interior passage of customers directly or indirectly between it and an establishment dealing in alcoholic beverages ..., whether or not a separate cover or admission fee is charged; or

f. is located adjacent or next door to an establishment dealing in alcoholic beverages ...; or

g. is located within 500 feet of an establishment dealing in alcoholic beverages ..., measured from property line of one use to property line of the other use, including parking areas and other appurtenances associated with each use; or

h. is not legally authorized to operate as an adult theater.

Daytona Beach Code § 62-184(b)(2), *enacted by* Ordinance 03-375 § 9.

***869** *C. Lollipop's Lawsuit*

On December 10, 2003, Lollipop's brought this suit challenging the constitutionality of the zoning ordinances

and of Ordinances 81-334, 02-496, and 03-375. First, Lollipop's claimed that the zoning ordinances do not offer reasonable alternative venues for adult theaters to communicate their erotic message because an insufficient number of sites are available for adult theaters. Alternatively, Lollipop's claimed that it was "grandfathered in" as a lawful nonconforming use under Florida law. The district judge, who also presided over the *Red-Eyed Jack* litigation, granted summary judgment to the City of Daytona Beach on both claims, noting that the City had made no changes to the zoning ordinances since his decision in *Red-Eyed Jack II* and that Lollipop's provided no evidence that warranted a departure from the earlier decision.

Second, Lollipop's challenged Ordinances 81-334, 02-496, and 03-375, urging that they neither further a substantial government interest nor are narrowly tailored. The district court granted final summary judgment to the City on Lollipop's narrow tailoring claim, but concluded that there was a genuine issue of material fact about whether the three nudity ordinances furthered a substantial government interest. Thereafter, at a six-day bench trial, Lollipop's presented expert testimony in an effort to cast direct doubt on the City's rationale for enacting the nudity ordinances. The experts explained at trial that they had conducted two empirical studies using data provided by the City. They concluded based on the data they examined that adult theaters in Daytona Beach had no statistically significant effect on crime rates, and that the City's evidence offered to the contrary was "shoddy" and "meaningless."

The district court agreed and concluded that Lollipop's evidence cast direct doubt on the City's rationale for enacting the nudity ordinances:

> Plaintiffs have succeeded in their attempt to cast direct doubt on the City's rationales for its ordinances. As persuasively demonstrated by Plaintiffs' expert studies, the City's pre-enactment evidence consists either of purely anecdotal evidence or opinions based on highly unreliable data. Most notably, the City's evidence lacks data which would allow for a comparison of the rate of crime occurring in and around adult entertainment establishments with the rate of crime occurring in and around similarly situated establishments. Absent the context that such a comparison might provide, the City's data is, as Plaintiffs assert, "meaningless."

The court also determined that the additional evidence provided by the City in an effort to renew support for the ordinances was similarly flawed. The district court, therefore, held that Ordinances 81-334, 02-496, and 03-375 did not further a substantial government interest and declared that they violated the First Amendment. In fact, the district court struck all three nudity ordinances in their entirety, except for subsection 10-6(e) of the Daytona Beach Code (enacted by Ordinance 81-334) because that subsection regulates non-expressive conduct.

These appeals followed: Lollipop's argued that the district court had improvidently entered summary judgment for the City on its challenge to the zoning ordinances, as well as on its claim to grandfather status. The City, in turn, cross-appealed the court's determination that the three nudity ordinances were unconstitutional. ***870** Lollipop's also appealed from the grant of final summary judgment to the City on its claim that the nudity ordinances are not narrowly tailored. [15]

15 Lollipop's also claimed in the district court that it is exempt from Ordinance 02-496 by its own terms, but the district court had no occasion to rule on this claim because it declared Ordinance 02-496 unconstitutional. Because Lollipop's does not raise this argument on appeal, the claim is deemed abandoned. *See Access Now, Inc. v. Southwest Airlines Co.,* 385 F.3d 1324, 1330 (11th Cir.2004).

II. *Zoning Ordinances*

The City's zoning ordinances do not ban adult theaters altogether but do restrict them to the BA and M-5 zoning districts and, in the BA districts, impose distance requirements between adult theaters and churches, schools, parks, playgrounds, and other adult businesses. [16] We review the constitutionality of a city ordinance *de novo. See Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County,* 337 F.3d 1251, 1255 (11th Cir.2003).

16 In BA districts, an adult theater must be located at least 400 feet from "any residential, R-PUD, T-1, or T-2 district," 400 feet from any church, school, park, playground, or "any other public or semi-public place of assembly where large numbers of minors regularly travel or congregate," and 1000 feet from other adult businesses. Daytona Beach, Fla., Land Dev.Code art. XI, § 3.2 (2001).

[1] It is by now well-established that zoning ordinances limiting the locations where adult businesses may be located are evaluated under the three-part test for time, place, and manner regulations established in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and reaffirmed in *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). *Peek-A-Boo Lounge,* 337 F.3d at 1264; *see also David Vincent, Inc. v. Broward County,* 200 F.3d 1325, 1333 (11th Cir.2000). We have summarized the *Renton* framework this way:

> first, the court must determine whether the ordinance constitutes an invalid total ban or merely a time, place, and manner regulation; second, if the ordinance is determined to be a time, place, and manner regulation, the court must decide whether the ordinance should be subject to strict or intermediate scrutiny; and third, if the ordinance is held to be subject to intermediate scrutiny, the court must determine whether it is designed to serve a substantial government interest and allows for reasonable alternative channels of communication.

Peek-A-Boo Lounge, 337 F.3d at 1264; *see also Renton,* 475 U.S. at 46-50, 106 S.Ct. 925. Because neither party disputes that the first two prongs have been satisfied or that the zoning ordinances serve a substantial government interest, our analysis under *Renton* focuses solely on whether the zoning ordinances provide adult theaters with reasonable alternative channels of communication. We hold that they do.

A new zoning regime must leave adult businesses with a "reasonable opportunity to relocate," and "the number of sites available for adult businesses under the new zoning regime must be greater than or equal to the number of adult businesses in existence at the time the new zoning regime takes effect." *Fly Fish, Inc. v. City of Cocoa Beach,* 337 F.3d 1301, 1310-11 (11th Cir.2003) (quoting *David Vincent,* 200 F.3d at 1337 n. 17). Although a district court's calculation of the number of sites that a zoning ordinance makes available for adult businesses is a factual finding that we review only for clear error, the district court's methodology in making that calculation-such as whether a particular ***871** site is "available" and provides a reasonable avenue for communicating an adult business's erotic message-is a legal determination that we review *de novo. David Vincent,* 200 F.3d at 1333; *see also Fly Fish,* 337 F.3d at 1309.

[2] We have enumerated several "general rules" to aid in deciding whether a particular site is available for First Amendment purposes:

> First, the economic feasibility of relocating to a site is not a First Amendment concern. Second, the fact that some development is required before a site can accommodate an adult business does not mean that the land is, *per se,* unavailable for First Amendment purposes. The ideal lot is often not to be found. Examples of impediments to the relocation of an adult business that may not be of a constitutional magnitude include having to build a new facility instead of moving into an existing building; having to clean up waste or landscape a site; bearing the costs of generally applicable lighting, parking, or green space requirements; making [do] with less space than one desired; or having to purchase a larger lot than one needs. Third, the First Amendment is not concerned with restraints that are not imposed by the government itself or the physical characteristics of the sites designated for adult use by the zoning ordinance. It is of no import under *Renton* that the real estate market may be tight and sites currently unavailable for sale or

> lease, or that property owners may be reluctant to sell to an adult venue.

David Vincent, 200 F.3d at 1334-35. As the Supreme Court explained in *Renton,* simply because adult businesses "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." 475 U.S. at 54, 106 S.Ct. 925.

[3] Here, the district court relied on its earlier finding in *Red-Eyed Jack II* that twenty-five sites-twenty-four in the M-5 district and one in the BA district-are available for adult theaters. 322 F.Supp.2d at 1372-75. Because the *Red-Eyed Jack II* court found that, at most, ten adult theaters were operating or seeking to operate in the City of Daytona Beach, *id.* at 1367, it held that the zoning ordinances provide for a constitutionally sufficient number of sites, *id.* at 1375. In the instant case, the district court concluded that Lollipop's had presented no evidence to warrant a departure from its earlier ruling in *Red-Eyed Jack II.*

Lollipop's vigorously disagrees, contending that the M-5 district is no more than "unimproved industrial property" and that, therefore, the twenty-four lots in the M-5 district cannot count as being "available" under *Renton.* The undisputed historical facts concerning the M-5 district are these: (1) telephone and power lines extend through the interior of the M-5 district along a now-paved road; (2) water and sewer lines have been installed up to the boundary of the M-5 district; (3) a preliminary plat has been approved for fifty-five acres of the M-5 district that would create at least twenty-four one-acre sites fronting the now-paved road; and (4) the entire M-5 district is owned by a single private landowner, not by the City. *Id.* at 1372, 1374.

Under the applicable case law, these undisputed facts yield the conclusion that the twenty-four sites in the M-5 district are available for First Amendment purposes. It is irrelevant for our purposes that all of the land in the M-5 district is owned by a single private landowner who may be reluctant or unwilling to develop or sell the land. *See* ***872** *David Vincent,* 200 F.3d at 1335 (holding that "[i]t is of no import under *Renton* that the real estate market may be tight and sites currently unavailable for sale or lease, or that property owners may be reluctant to sell to an adult venue," and finding sites available even though there was "no evidence that any of the land is for sale"). Nor is it constitutionally significant that the land is mostly vacant where, as here, the City has provided sufficient infrastructure for a private developer to commence development, including a paved road, telephone and power lines, and water and sewer lines. *See id.* at 1334 ("Examples of impediments to the relocation of an adult business that may not be of a constitutional magnitude include having to build a new facility instead of moving into an existing building....").

Although we have acknowledged that "the physical characteristics of a site or the character of current development could render relocation by an adult business unreasonable," examples of such unavailable sites are "land under the ocean, airstrips of international airports, and sports stadiums." *Id.* at 1335. Here, the land in the M-5 district is hardly comparable to such sites, where relocation is, for all practical purposes, untenable. Finally, the City has removed the legal obstacles that might have prevented adult theaters from relocating to the M-5 district, and has gone so far as to approve a preliminary plat for a fifty-five-acre subdivision straddling the main road in the M-5 district. *Cf. id.* at 1335 ("[T]he First Amendment is not concerned with restraints that are not imposed by the government itself...."). In short, we agree with the district court that the twenty-four sites in the M-5 district are available under *Renton.* And because the record shows that no more than ten adult theaters are operating or seeking to operate in Daytona Beach, the zoning ordinances are constitutional; reasonable alternative channels of communication are available.

[4] Lollipop's also claims that, even if the zoning ordinances are constitutional, Lollipop's is otherwise "grandfathered in" under Florida law.[17] Lollipop's argument is grounded on the contention that the zoning ordinances were unconstitutional at the time that Lollipop's began operating as an adult theater. Although the City may now have cured the earlier constitutional defects, Lollipop's argues that no valid law made Lollipop's unlawful when it opened. Thus, according to Lollipop's, its right to operate at its current location "vested" at that time, and it may continue to operate there despite any subsequent changes to the zoning ordinances that rendered it a nonconforming use.[18] The district court granted summary judgment to the City on this claim too, and we review the district

court's determination *de novo*. See *Reserve, Ltd. v. Town of Longboat Key,* 17 F.3d 1374, 1377 (11th Cir.1994).

17 The Constitution does not require a "grandfathering" provision for existing nonconforming adult businesses, *David Vincent,* 200 F.3d at 1332, and any vested right to continue operating as a lawful nonconforming use derives from state law, *see Coral Springs St. Sys., Inc. v. City of Sunrise,* 371 F.3d 1320, 1333 (11th Cir.2004).

18 Lollipop's is located at 639 Grandview Avenue in Daytona Beach, Florida, and has been operating as an adult theater there since October 2000. Although the City disputes when Lollipop's began operating as an adult theater, Lollipop's claim to grandfather status was decided in the district court on the City's motion for summary judgment, and therefore we construe the record in the light most favorable to Lollipop's.

[5] "Not surprisingly, vested rights are not created easily" under ***873** Florida law. *Coral Springs St. Sys., Inc. v. City of Sunrise,* 371 F.3d 1320, 1333 (11th Cir.2004). "The overarching pattern in Florida's case law is that vested rights can be created ... only in two circumstances." *Id.* at 1334. The first occurs "when a party has reasonably and detrimentally relied on existing law, creating the conditions of equitable estoppel," while the second occurs "when the defendant municipality has acted in a clear display of bad faith." *Id.* Here, neither circumstance applies. It is undisputed that when Lollipop's began operating as an adult theater, it violated the zoning ordinances as then written. As a matter of logic, then, Lollipop's cannot have relied on existing law because it began operating plainly in contravention of that law. Nor is there any record evidence of bad faith or arbitrary behavior by the City. Therefore, on this record, the district court correctly concluded that Lollipop's has failed to establish a vested right to continue operating as a lawful nonconforming use.

III. *Nudity Ordinances*

[6] We analyze the three nudity ordinances challenged here under the four-part test for expressive conduct set forth by the Supreme Court in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and employed in *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). As we have explained:

> According to this test, public nudity ordinances that incidentally impact protected expression should be upheld if they (1) are within the constitutional power of the government to enact; (2) further a substantial governmental interest; (3) are unrelated to the suppression of free expression; and (4) restrict First Amendment freedoms no greater than necessary to further the government's interest.

Peek-A-Boo Lounge, 337 F.3d at 1264. Here, our analysis focuses on the second and fourth prongs because there is no dispute between the parties as to the first and third prongs.

A. Substantial Government Interest

[7] Under *O'Brien* 's second prong, a city must establish that the challenged ordinance furthers a substantial government interest. *Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion).[19] It has ***874** been by now clearly established that reducing the secondary effects associated with adult businesses is a substantial government interest "that must be accorded high respect." *City of L.A. v. Alameda Books, Inc.,* 535 U.S. 425, 444, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring in the judgment) (quotation marks omitted);[20] *see also Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) ("[C]ombating the harmful secondary effects associated with nude dancing [is] undeniably important."); *Ctr. for Fair Pub. Policy v. Maricopa County,* 336 F.3d 1153, 1166 (9th Cir.2003) ("It is beyond peradventure at this point in the development of the doctrine that a state's interest in curbing the secondary effects associated ***875** with adult entertainment establishments is substantial.").

19 In *Pap's A.M.,* like some of the Supreme Court's other decisions in this area, there was no majority opinion on the First Amendment issue before the Court. Justice O'Connor wrote a plurality opinion, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, which upheld under *O'Brien* the constitutionality of the nudity ordinance at issue. *Pap's A.M.,* 529 U.S. at 289-302, 120 S.Ct. 1382 (plurality opinion). Relevant here, the plurality

concluded that *O'Brien* 's second prong was satisfied because "[t]he asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important," and because the evidence that the city produced established that "it was reasonable for [the city] to conclude that ... nude dancing was likely to produce the[se] secondary effects." *Id.* at 296-97, 120 S.Ct. 1382. Justice Scalia wrote a separate opinion, joined by Justice Thomas, concurring in the judgment. They agreed that the ordinance should be upheld, "not because it survives some lower level of First Amendment scrutiny [i.e., *O'Brien*], 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 307-08, 120 S.Ct. 1382 (Scalia, J., concurring in the judgment) (quotation marks omitted). Justice Souter concurred in part and dissented in part. He agreed with the plurality that the nudity ordinance at issue should be analyzed under *O'Brien. Id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part). But he dissented from the judgment because, unlike the plurality, he concluded that the city failed to carry its evidentiary burden to show that its ordinance furthered a substantial government interest. *Id.* at 313-17, 120 S.Ct. 1382. Justice Stevens also wrote a dissenting opinion, joined by Justice Ginsburg.

For our purposes, a majority of the Court-the four-Justice plurality along with Justice Souter-held that nudity ordinances that are designed to combat the secondary effects associated with nude dancing are analyzed under the *O'Brien* framework. *See id.* at 289-91, 120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part). As for the Court's judgment that the ordinance at issue was constitutional-supported by the plurality and by Justices Scalia and Thomas's concurrence in the judgment-no rationale explaining that result gained the support of a majority of the Court. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quotation marks omitted). In *Pap's A.M.,* the plurality upheld the ordinance on the rationale that it survived First Amendment scrutiny under the *O'Brien* framework, and although the votes of Justices Scalia and Thomas were necessary for the judgment, their grounds for concurring in the judgment were far broader than the plurality's, namely, that the First Amendment did not apply "at all." *See Pap's A.M.,* 529 U.S. at 307-08, 120 S.Ct. 1382 (Scalia, J., concurring in the judgment). As such, the plurality's holding with respect to the *application* of *O'Brien* is the narrowest ground supporting the judgment in *Pap's A.M.* and, therefore, represents the holding of that case under *Marks. Peek-A-Boo Lounge,* 337 F.3d at 1261-62; *accord Heideman v. S. Salt Lake City,* 348 F.3d 1182, 1198 (10th Cir.2003); *SOB, Inc. v. County of Benton,* 317 F.3d 856, 862 n. 1 (8th Cir.2003); *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 719 (7th Cir.2003).

20 *Alameda Books* addressed the constitutionality of a zoning ordinance under the *Renton* framework, rather than a public nudity ordinance under the *O'Brien* framework. We have explained, however, that the third step of the *Renton* analysis, which asks whether an ordinance "is designed to serve" a substantial government interest, is "virtually indistinguishable" from the second prong of the *O'Brien* test, which asks whether an ordinance "furthers" a substantial government interest. *Peek-A-Boo Lounge,* 337 F.3d at 1264-65. Therefore, although we are addressing the constitutionality of the City's nudity ordinances under *O'Brien,* our analysis also relies on cases that addressed the constitutionality of zoning ordinances under *Renton.*

There was no majority opinion in *Alameda Books.* Justice O'Connor wrote a plurality opinion, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, that applied *Renton* and concluded that the zoning ordinance at issue was constitutional. *Alameda Books,* 535 U.S. at 429-43, 122 S.Ct. 1728 (plurality opinion). Justice Kennedy wrote a separate opinion concurring in the judgment. He agreed with the plurality that the zoning ordinance at issue should be analyzed under *Renton,* but he concurred in the judgment because he believed that "the plurality's application of *Renton* might constitute a subtle expansion, with which [he did] not concur." *Id.* at 445, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment). Justice Souter dissented, and his opinion was joined by Justices Stevens, Ginsburg, and, in part, Breyer. *Id.* at 453-66, 122 S.Ct. 1728 (Souter, J., dissenting). Because Justice Kennedy concurred in the judgment in *Alameda Books* on the narrowest grounds, his opinion represents the Supreme

Court's holding in that case under *Marks.* *Peek-A-Boo Lounge,* 337 F.3d at 1264; *accord* *SOB, Inc.,* 317 F.3d at 862 n. 1; *Ben's Bar, Inc.,* 316 F.3d at 722.

[8] As for whether an ordinance "furthers" this interest, a city bears the initial burden of producing evidence that it relied upon to reach the conclusion that the ordinance furthers the city's interest in reducing secondary effects. *Peek-A-Boo Lounge,* 337 F.3d at 1269. To that end, a city need not "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925); *see also id.* at 438, 122 S.Ct. 1728 (plurality opinion) ("[A] municipality may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest." (quotation marks omitted)); *Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) (quoting *Renton* 's "reasonably believed to be relevant" language). Although a municipality "must rely on at least *some* pre-enactment evidence," such evidence can consist of "a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion." *Peek-A-Boo Lounge,* 337 F.3d at 1268; *see, e.g., Pap's A.M.,* 529 U.S. at 300, 120 S.Ct. 1382 (plurality opinion) (finding sufficient that "the city council relied on this Court's opinions detailing the harmful secondary effects caused by [adult] establishments ..., as well as on its own experiences"); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in the judgment) [21] (permitting a municipality to rely on prior judicial opinions); *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925 (holding that the city was entitled to rely on the experiences of other cities and on a judicial opinion).

21 Just as in *Alameda Books* and *Pap's A.M.,* a majority of the Court in *Barnes* did not support a single rationale explaining the result. The plurality opinion written by Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, upheld the regulation under the *O'Brien* framework. *Barnes,* 501 U.S. at 569-72, 111 S.Ct. 2456 (plurality opinion). Relevant here, the plurality found *O'Brien* 's second prong satisfied by evidence that the regulation at issue "furthers a substantial government interest in protecting order and morality," which the plurality considered to be an interest "unrelated to the suppression of free expression." *Id.* at 569-70, 111 S.Ct. 2456. Justice Scalia concurred in the judgment because, in his view, a general public nudity prohibition "is not subject to First Amendment scrutiny at all." *Id.* at 572, 111 S.Ct. 2456 (Scalia, J., concurring in the judgment). Justice Souter also concurred in the judgment. Unlike Justice Scalia, he agreed with the plurality that the regulation should be analyzed under *O'Brien.* But Justice Souter "[wrote] separately to rest [his] concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments." *Id.* at 582, 111 S.Ct. 2456 (Souter, J., concurring in the judgment). As we have explained, "[b]ecause Justice Souter provided the narrowest grounds for the judgment of the Court in *Barnes,* his concurrence constitutes the holding of that case" under *Marks.* *Peek-A-Boo Lounge,* 337 F.3d at 1260; *accord* *Heideman,* 348 F.3d at 1197-98.

Once a city has provided evidence that it reasonably believed to be relevant to its rationale for enacting the ordinance, plaintiffs must be given the opportunity to "cast direct doubt on this rationale," either by demonstrating that the city's evidence does not support its rationale or by furnishing evidence that disputes the city's factual findings. *Peek-A-Boo Lounge,* 337 F.3d at 1265 (quoting ***876** *Alameda Books,* 535 U.S. at 438-39, 122 S.Ct. 1728 (plurality opinion)); *see, e.g., Pap's A.M.,* 529 U.S. at 298, 120 S.Ct. 1382 (plurality opinion) (rejecting claim when plaintiff "never challenged the city council's findings or cast any specific doubt on the validity of those findings"). "If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Alameda Books,* 535 U.S. at 439, 122 S.Ct. 1728 (plurality opinion) (citing *Pap's A.M.,* 529 U.S. at 298, 120 S.Ct. 1382 (plurality opinion)); *see also* *Peek-A-Boo Lounge,* 337 F.3d at 1269.

Although the burden lies with the municipality, a court "should be careful not to substitute its own judgment for that of the [municipality,]" and the municipality's "legislative judgment should be upheld provided that [it] can show that its judgment is still supported by credible evidence, upon which [it] reasonably relies." *Peek-A-Boo Lounge,* 337 F.3d at 1273.

[9] Here, the City of Daytona Beach plainly carried its initial burden to show that the three challenged nudity ordinances furthered its interest in reducing the negative secondary effects associated with adult theaters. The City has produced a substantial body of evidence that it reasonably believed to be relevant to combating those problems. Ordinance 81-334 prohibits nudity and sexual conduct in establishments that serve alcohol. As the Ordinance itself says, the City's rationale was to reduce the negative secondary effects associated with adult theaters:

> It is hereby found that the acts prohibited in [this ordinance] encourage the conduct of prostitution, attempted rape, rape, murder, and assaults on police officers in and around establishments dealing in alcoholic beverages, that actual and simulated nudity and sexual conduct and the depiction thereof coupled with alcohol in public places begets undesirable behavior, that sexual, lewd, lascivious, and salacious conduct among patrons and employees within establishments dealing in alcoholic beverages results in violation of law and dangers to the health, safety and welfare of the public....

Ordinance 81-334 § 2. To support this rationale, Ordinance 81-334 cites two Supreme Court decisions, *New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (per curiam), and *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), both of which upheld prohibitions on nude dancing in establishments that serve alcohol. *See Bellanca,* 452 U.S. at 718, 101 S.Ct. 2599 (upholding statute where the legislature had found that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior"); *LaRue,* 409 U.S. at 118-19, 93 S.Ct. 390 ("The ... conclusion ... that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one.").

Although the City's reliance on these cases may be sufficient to carry the City's initial burden, *see Pap's A.M.,* 529 U.S. at 296-97, 120 S.Ct. 1382 (plurality opinion) (suggesting that a city can carry its initial burden by relying solely on relevant Supreme Court cases), the legislative history of Ordinance 81-334 shows that the City also relied on its own experiences to support its rationale. That legislative history includes: a document describing the difficulties faced by law enforcement in arresting and successfully prosecuting crimes relating to prostitution and pornography and listing arrests for prostitution and other crimes that occurred in or near many Daytona ***877** Beach adult businesses; a short memorandum written by the City's police chief that provides "a partial list of situations, offenses and incidents which have occurred within the areas of topless bar establishments .... [that] can be substantiated by police reports and testimony of various police officers"; police dispatch records of calls for service ("CAD data"[22]) from areas around adult businesses from November 1980 to July 1981, which were attached to the police chief's memorandum; police reports of eighty-three prostitution arrests; police reports of seven arrests for assault and battery of a police officer in or near an adult theater; and the minutes of a public hearing summarizing local business owners' firsthand accounts of criminal activity in and around adult businesses.

22 "CAD" stands for Computer Automated Dispatch.

This legislative history supporting the enactment of Ordinance 81-334 is more than sufficient to carry the City's initial burden under *O'Brien* 's second prong. *See, e.g., Alameda Books,* 535 U.S. at 452, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (concluding that the city carried its initial burden with "a single study and common experience"); *Pap's A.M.,* 529 U.S. at 297-98, 120 S.Ct. 1382 (plurality opinion) (holding that the city's legislative findings were sufficient because "city council members, familiar with [the city's] commercial downtown ..., are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments"); *see also Peek-A-Boo Lounge,* 337 F.3d at 1269-70.

As for Ordinances 02-496 and 03-375, the City likewise carried its initial burden of proof. Ordinance 02-496 was enacted as a general public nudity ordinance "to protect and preserve the health, safety and welfare" of the City's residents. Daytona Beach, Fla., Code § 62-181(a), *enacted by* Ordinance 02-496 § 14. The Ordinance sets forth the following findings: "The appearance of persons in the nude in public places ... increases incidents

of lewd and lascivious behavior, prostitution, sexual assaults and batteries, attracts other criminal activity to the community, encourages degradation of women, and facilitates other activities which break down family structures and values." Ordinance 02-496 § 5. To support these findings, the City relied on, among other things, newspaper articles describing incidents of public nudity and other criminal activity during Spring Break and Black College Reunion,[23] narrative reports by undercover detectives describing instances of sexual conduct, nudity, and violations of Ordinance 81-334 by ***878** dancers at adult theaters,[24] and the Supreme Court's decisions in *Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382, and *Barnes,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504. As with Ordinance 81-334, the pre-enactment evidence for Ordinance 02-496 is sufficient for the City to carry its initial burden under *O'Brien*'s second prong.

23 *See* Henry Frederick, *Police Chief: Spring Break, BCR Hurt Family Tourism,* Daytona Beach News-Journal, Apr. 16, 2002 (" 'Youth-oriented street festivals like BCR and Spring Break keep family tourism away.' "); Anne Geggis, *Barter on the Beach: Beads for Breasts,* Daytona Beach News-Journal, Mar. 24, 2002 ("Daytona Beach police confirm they've been seeing more than usual this year-and issuing more $104 tickets for exposure of female breasts than at previous Spring Breaks.... 'Even the chief this (past) weekend witnessed it and moved to make an arrest of a mother and daughter on Atlantic Avenue,' says [a] spokesman for the Daytona Beach police." ... "Some are concerned the atmosphere is ripe for an incident like the New York City 'wilding' of 2000 during which women's clothes were torn off their bodies."); Audrey Parente, *BCR "Shocking" for Pennsylvania Sisters,* Daytona Beach News-Journal, Apr. 15, 2002, at 6A (" 'I saw guys exposing themselves,' Miller said. Schubert said she saw '... women in small clothes-thongs and very exposing bras....' Worse than the exposure, she said she saw drug use and drug sales. 'I saw a young man in a car in front of me smoking a joint and passing it from car to car. They were walking around on the road.' ").

24 For example, on March 8, 2002, several undercover investigators went to Lollipop's "to conduct a covert inspection of the activities" there:

> During this inspection, alcoholic beverages were being sold and consumed.... This writer observed bare breasted dancers performing "lap" dances involving simulated intercourse by the female dancer [who placed] her buttocks in the lap of the patron and began to manipulate her hips back and forth and up and down. While engaged in the previous activities, dancers would rub their bare breasts in the faces of the patrons and allow the patrons to lick and suck the breasts.... This writer observed every dancer to be in violation of the exposed breasts ordinance while alcohol was being served and consumed.

Daytona Beach Police Department, *Florida Offense/Incident Report No. 0203103,* at 1-2 (Mar. 11, 2002).

Ordinance 03-375 amended Ordinance 02-496 to allow erotic dancers to wear G-strings and pasties within an adult theater located more than 500 feet from an establishment that serves alcohol, but Ordinance 02-496's somewhat more restrictive clothing requirements[25] remain applicable within 500 feet of such an establishment. Daytona Beach, Fla., Code § 62-184(b), *enacted by* Ordinance 03-375 § 9. In support of Ordinance 03-375, the City relied on Mr. Langston's and Mr. Smith's testimony from *Function Junction, Inc.,* 705 F.Supp. 544.[26] As we have noted, Langston testified that live nude and seminude entertainment businesses "promote and perpetuate urban decay" and that "adult businesses have impacted on crime in the area surrounding Daytona Beach." *Id.* at 547. Smith, who as an assistant state attorney had prosecuted drug and prostitution offenses in Daytona Beach, concurred that "there were more drug and prostitution offenses in topless bars than in other bars." *Id.* at 548.

25 *See supra* note 12.

26 Although *Function Junction* was a challenge to the City's zoning ordinances, 705 F.Supp. at 545, the City relied on testimony from that case in support of Ordinance 03-375.

The City also relied on several controlled studies conducted by Dr. William George about the relationship between drinking alcohol and sexual conduct. Thus, for example, one study found that exposure to erotica led male subjects to drink more alcohol than did exposure to non-erotic materials.[27] Another study found that young men who believed they had consumed alcohol-regardless of whether they had in fact done so-displayed greater interest in viewing violent and/or erotic images and reported increased sexual arousal than young men who believed they had not consumed alcohol.[28] Still

another study found that study participants perceived a woman they believed had consumed alcohol as being "significantly more aggressive, impaired, sexually available, and as significantly more likely to engage in foreplay and intercourse" than a woman whom study participants believed had not consumed alcohol.[29] ***879** Finally, Ordinance 03-375 expressly incorporates all of the evidence that the City previously had relied on to support Ordinances 81-334 and 02-496. The City's pre-enactment evidence for Ordinance 03-375 is sufficient to carry the City's initial burden under *O'Brien*'s second prong.

27 William H. George et al., *The Effects of Erotica Exposure on Drinking,* 1 Annals Sex Res. 79 (1988).

28 William H. George & G. Alan Marlatt, *The Effects of Alcohol and Anger on Interest in Violence, Erotica, and Deviance,* 95 J. Abnormal Psych. 150 (1986).

29 William H. George et al., *Perceptions of Postdrinking Female Sexuality: Effects of Gender, Beverage Choice, and Drink Payment,* 1988 J. Applied Soc. Psych. 1295, 1295.

Because the City carried its initial burden, the district court properly gave Lollipop's the opportunity to "cast direct doubt" on the City's rationale, either by demonstrating that the City's evidence does not support its rationale or by furnishing evidence that disputes the City's factual findings. *See Pap's A.M.,* 529 U.S. at 298, 120 S.Ct. 1382 (plurality opinion); *Peek-A-Boo Lounge,* 337 F.3d at 1265; *see also Alameda Books,* 535 U.S. at 438-39, 122 S.Ct. 1728 (plurality opinion). To this end, as we have noted, two expert witnesses testified that the City's pre-enactment evidence consisted of "shoddy," "meaningless," and "unreliable" data and that its reasoning was equally "shoddy." The experts explained that the City provided no empirical data to support the conclusion that prostitution and other crimes occurred more frequently in and around adult theaters than elsewhere, and that the CAD data and police reports lacked reliability because they did not cover all of the areas where adult theaters are located in Daytona Beach and contained no comparison data from other areas of the City against which the incidents occurring in and around adult theaters could be measured. Similarly, Lollipop's experts said that the narrative reports of undercover law enforcement and the testimony from *Function Junction* about urban blight and crime being found around adult theaters lacked comparative data, did not cover a sufficient period of time to rule out momentary fluctuations, and were merely the result of stepped-up law enforcement. (Experts' Report 62-63, 161-63.) The experts also observed that Dr. George's studies were conducted in controlled laboratory settings, and, therefore, the experts opined, the studies' conclusions could not be generalized to the "real world situation of alcoholic beverage consumption in an adult nightclub that features topless or nude entertainment." (*Id.* at 167-68.)

To buttress their critique of the City's evidence, Lollipop's experts conducted two empirical studies. The first study analyzed CAD data provided by the City for the forty-four months preceding Ordinance 81-334's enactment "to examine the relationship between the presence of adult cabarets in areas and the rates of crime in those areas." (*Id.* at 3.) The experts compared CAD data from areas that had adult theaters to control areas that did not and "found no statistically significant differences in overall rates of crime between study and control areas." (*Id.* at 4.) They concluded that their empirical study "cast grave doubt on the findings of the City Commission that the combination of nude (topless) dancing and alcohol increase[s] 'rape, attempted rape, murder, and assaults on police officers.' " (*Id.* at 2 (quoting Ordinance 81-334 § 2).)

The second empirical study focused on the City's rationale for Ordinances 02-496 and 03-375 and examined CAD data from March 1999 to April 2003. This study compared the presence of an adult theater to other "demographic variables previously used by criminologists and found to be related to criminal activity, such as a local area's population, age structure (especially the presence of young adults)," "race/ethnic composition," "housing vacancies," "female-headed households," and "the number of alcohol retail sale establishments." (*Id.* at 56; *see also id.* at 186.) Based on their statistical analysis, Lollipop's experts concluded that these other variables "were statistically strongly related to crime events," whereas the presence of an adult ***880** theater "accounted for an insubstantial amount" of crime in the relevant area. (*Id.* at 56 (emphasis omitted); *see also id.* at 186-87.) The experts concluded that only 1-3.5% of the criminal activity within a 1000-foot radius of adult theaters could be attributed to the theaters, and that adult theaters accounted for zero or near-zero percent of the sex crime activity in their near vicinity. (*Id.* at 57.)

The district court agreed with Lollipop's experts that the City's pre-enactment evidence for all three

nudity ordinances was "shoddy" and "meaningless." It concluded that Lollipop's had succeeded in casting direct doubt on the City's rationale for each ordinance and declared all three nudity ordinances unconstitutional. The district court said that Lollipop's experts' "scientific" studies cast direct doubt on the City's "anecdotal" evidence primarily because the court read the Supreme Court's decision in *Alameda Books* and our opinion in *Peek-A-Boo Lounge* to have "raised the bar somewhat" on *Renton* 's "reasonably believed to be relevant" standard. (Dist. Ct. Am. Order 9-10.)

In *Alameda Books,* the plurality explained the *Renton* standard this way:

> In *Renton,* we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest.

Alameda Books, 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion) (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925). But the plurality then warned: "This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *Id.* Although Justice Kennedy's opinion, not the plurality, is the holding in *Alameda Books,* we quoted the plurality's "shoddy data" and "fairly supports" language several times in *Peek-A-Boo Lounge*, 337 F.3d at 1262-63, 1265, 1266, 1269.

We do not agree, however, with Lollipop's claim that either *Alameda Books* or *Peek-A-Boo Lounge* raises the evidentiary bar or requires a city to justify its ordinances with empirical evidence or scientific studies. Justice Kennedy's *Alameda Books* concurrence, which all parties agree states the holding of that case under the rationale explained in *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), emphasized that the evidentiary standard announced in *Renton* remained sound:

> [W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*"

Alameda Books, 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925 (emphasis added)). [30]

30 Even if the plurality had constituted the actual holding in *Alameda Books,* the plurality also reaffirmed *Renton* 's continued validity and explicitly refused to raise cities' evidentiary burden. To the contrary, the plurality *criticized* Justice Souter's dissent for "rais [ing] the evidentiary bar" by "ask[ing] the city to demonstrate, not merely by appeal to common sense, *but also with empirical data,* that its ordinance will successfully lower crime." *Alameda Books,* 535 U.S. at 439-41, 122 S.Ct. 1728 (plurality opinion) (emphasis added). The plurality explicitly rejected this requirement because it "would go too far in undermining our settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Id.* at 439, 122 S.Ct. 1728.

***881** Our opinion in *Peek-A-Boo Lounge* is consistent with Justice Kennedy's concurrence in *Alameda Books* and with *Renton.* There, a panel of this Court held that "[t]o satisfy *Renton,* any evidence 'reasonably believed to be relevant'-including a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion-may form an adequate predicate to the adoption of a secondary effects ordinance," *Peek-A-Boo Lounge,* 337 F.3d at 1268, and we remanded that case with specific instructions to uphold the ordinance "provided that the County['s] ... judgment is still supported by credible evidence, *upon which [it] reasonably relies,*" *id.* at 1273 (emphasis added).

Here, Lollipop's argument that the City's evidence is flawed because it consists of "anecdotal" accounts rather than "empirical" studies essentially asks this Court to hold today that the City's reliance on anything but empirical

studies based on scientific methods is unreasonable. This was not the law before *Alameda Books,* and it is not the law now. *See Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (reiterating that a city need not "conduct new studies or produce evidence independent of that already generated by other cities" (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925)); *Pap's A.M.,* 529 U.S. at 300, 120 S.Ct. 1382 (plurality opinion) (criticizing the dissent for "ignor[ing] Erie's actual experience and instead requir[ing] ... an empirical analysis"). Rather, the City of Daytona Beach could reasonably rely upon "[c]ommon sense," *see Bellanca,* 452 U.S. at 718, 101 S.Ct. 2599, "its own experiences," *see Pap's A.M.,* 529 U.S. at 300, 120 S.Ct. 1382 (plurality opinion), "the experiences of ... other cities," *Renton,* 475 U.S. at 51, 106 S.Ct. 925, or city officials' local knowledge, *see Alameda Books,* 535 U.S. at 451-52, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) ("The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge ...." (citations omitted)); *see also Pap's A.M.,* 529 U.S. at 297-98, 120 S.Ct. 1382 (plurality opinion).

To be sure, as the *Alameda Books* plurality admonished, the City cannot "get away with shoddy data or reasoning," and its evidence must "fairly support" its rationale. *See* 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion). But this is simply another way of saying that the City's reliance on evidence supporting its rationale must be *reasonable.* Anecdotal evidence is not "shoddy" *per se.* At most, Lollipop's experts' studies suggest that the City *could* have reached a different conclusion during its legislative process about the relationship between adult theaters and negative secondary effects. But demonstrating the possibility of such an alternative does not necessarily mean that the City was barred from reaching other reasonable and different conclusions. *See G.M. Enters., Inc. v. Town of St. Joseph,* 350 F.3d 631, 639 (7th Cir.2003) ("Although this evidence shows that the [town] might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the [town's] legislative process."); *see also Alameda Books,* 535 U.S. at 437, 122 S.Ct. 1728 ***882** (plurality opinion) (noting that a city "does not bear the burden of providing evidence that rules out every theory ... that is inconsistent with its own").

Our review is designed to determine whether *the City's* rationale was a reasonable one, and even if Lollipop's demonstrates that another conclusion was also reasonable, we cannot simply substitute our own judgment for the City's. *See Peek-A-Boo Lounge,* 337 F.3d at 1273; *see also Barnes,* 501 U.S. at 583, 111 S.Ct. 2456 (Souter, J., concurring in the judgment) ("At least as to the regulation of expressive conduct, '[w]e decline to void [a statute] essentially on the ground that it is unwise legislation ....' " (quoting *O'Brien,* 391 U.S. at 384, 88 S.Ct. 1673 (alterations in original))); *Renton,* 475 U.S. at 52, 106 S.Ct. 925 ("It is not our function to appraise the wisdom of [the city's] decision to [regulate] adult theaters ...." (second alteration added and quotation marks omitted)); *cf. Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) ("[C]ourts should not be in the business of second-guessing fact-bound empirical assessments of city planners.").

The City of Daytona Beach relied on, among other things, the Supreme Court's decisions in *Bellanca, LaRue, Barnes,* and *Pap's A.M.;* numerous police reports of criminal activity-including prostitution and assaults on police officers-in and around adult theaters; undercover police investigations that revealed numerous violations of City ordinances by adult theaters; the City's police chief's documentation of criminal activity in and around adult theaters; CAD data showing calls-for-service to police dispatchers from areas near adult theaters; extensive testimony taken in *Function Junction,* 705 F.Supp. at 547-48; studies conducted by Boston and Detroit showing that adult businesses tend to increase urban blight; studies of urban blight and decay in Daytona Beach; controlled laboratory studies showing a correlation between alcohol and sexual conduct; anecdotal accounts from local business owners about increased crime in and around adult theaters; and newspaper articles describing increases in problems related to nudity and alcohol surrounding events such as Spring Break and Black College Reunion. Because Lollipop's has failed to cast direct doubt on the aggregation of evidence that the City reasonably relied upon when enacting the challenged ordinances, we hold that the ordinances further a substantial government interest under *O'Brien.*

Moreover, a close examination of Lollipop's experts' studies calls into question their stated conclusion that they "cast grave doubt" on the City's evidence that adult theaters increase crime, and, equally important,

the studies do not even purport to address the City's evidence that adult theaters tend more generally to perpetuate urban blight and decay. First, one underlying methodological problem with both studies suggests that they cast little or no doubt on the City's evidence that nudity in establishments that serve alcohol encourages "prostitution, ... undesirable behavior ..., [and] sexual, lewd, lascivious, and salacious conduct among patrons and employees ... in violation of law and [en]dangers ... the health, safety and welfare of the public." *See* Ordinance 81-334 § 2. The experts' studies are based solely on CAD data, which, in lay terms, is essentially 911 emergency call data. Relying on such data to study crime rates is problematic, however, because many crimes do not result in calls to 911, and, therefore, do not have corresponding records in the City's CAD data. [31] This is especially true ***883** for crimes, such as lewdness [32] and prostitution, that the City sought to reduce by enacting the challenged ordinances. *See* Ordinance 02-496 § 5 (seeking to reduce "lewd and lascivious behavior, prostitution, sexual assaults and batteries, ... other criminal activity, [and the] degradation of women"); Ordinance 81-334 § 2 (seeking to reduce "prostitution, ... undesirable behavior, ... [and illegal] sexual, lewd, lascivious, and salacious conduct among patrons and employees" of adult theaters); *see also* Ordinance 03-375 § 4 (relying on legislative record for Ordinances 81-334 and 02-496).

31 *See* Richard McCleary & James W. Meeker, *Do Peep Shows "Cause" Crime? A Response to Linz, Paul, and Yao,* 43 J. Sex Res. 194, 196 ("Modern criminologists do *not* use CFSs [i.e., calls for service or CAD data,] to measure crime or crime risk. In 2000-2004, the official journals of the two national criminology professional associations, *Criminology* and *Justice Quarterly,* published 245 articles. Of the 100 that analyzed a crime-related statistic, ... [only] two analyzed CFSs, but even in these two cases, CFSs were not used to measure crime or crime risk.").

32 Under Florida law, lewdness is at least a second-degree misdemeanor. *See* Fla. Stat. § 796.07.

Such crimes are often "victimless," in the sense that all of those involved are willing participants, and, therefore, they rarely result in calls to 911. College students on Spring Break are unlikely to call 911 after a wild night out on the town despite having participated in exactly the sort of activity that the City's nudity ordinances were enacted to reduce. Likewise, an encounter between a prostitute and a "john" rarely leads to a 911 call. By contrast, the City's "anecdotal" evidence may be a more accurate assessment of such crimes because it is not based on a data set that undercounts the incidents of such "victimless" crimes. *Cf. World Wide Video of Wash., Inc. v. City of Spokane,* 368 F.3d 1186, 1195-96 (9th Cir.2004) ("Anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects." (citation and alteration omitted)). [33]

33 We also note that at least three other circuits have rejected, for similar reasons, attempts by plaintiffs to use studies based on CAD data to cast direct doubt on an ordinance that the municipality supported with evidence of the sort relied upon by the City of Daytona Beach here. *See Gammoh v. City of La Habra,* 395 F.3d 1114, 1126-27 (9th Cir.2005); *G.M. Enters., Inc.,* 350 F.3d at 639; *SOB, Inc.,* 317 F.3d at 863 & n. 2. Interestingly, Daniel Linz, one of the experts hired by Lollipop's, also co-authored the studies found to be insufficient in two of these cases. *See G.M. Enters., Inc.,* 350 F.3d at 635-36, 639; *SOB, Inc.,* 317 F.3d at 863.

A second problem with Lollipop's experts' studies is that, even if the underlying CAD data fully reflected all of the conduct that Daytona Beach sought to reduce, the experts appear to draw conclusions that overstate the underlying data. For example, the study that focuses on Ordinance 81-334 concludes that "crimes against persons, crimes against property, and sex crimes, including both rape and prostitution[,] are not more common in areas with adult businesses than they are in similar control areas." (Experts' Report 2.) But the experts' own underlying data suggests otherwise-for three of the six pairs of study and control areas that the experts examined, "the study areas [i.e., areas with adult theaters,] *do show significantly higher rates of crime* than the control areas." (*Id.* at 29-30 (emphasis added).)

The experts attempt to explain away this result by pointing to the other three pairs-two show no "significant" difference between study and control areas, and one shows a significantly higher crime rate in the control area than the study area. The ***884** experts assert, without much discussion, that "[t]his mixed pattern" shows that "factors other than the presence of a nude cabaret are affecting rates of crime." (*Id.* at 30.) The experts are no doubt correct that factors other than the

presence of adult theaters affect crime rates in Daytona Beach; crime is plainly caused by many factors. But that does little to undermine the City's conclusion that adult theaters *also* affect crime rates, especially when the experts' own analysis shows a statistically significant correlation between adult theaters and increased crime in half of the areas in the study. [34]

34 In addition to crimes against persons, crimes against property, and sex crimes, the study that focused on Ordinance 81-334 also analyzed "miscellaneous incidents that share in common that they involve violations of social norms ...., includ[ing] drunkenness, disorderly conduct, drug offenses, liquor law violations, and weapons complaints." (Experts' Report 27.) The study found a statistically significant increase in these so-called "norm violations" in areas with adult theaters compared to control areas, (*id.* at 33-34), which could be read to support part of the City's rationale for Ordinance 81-334. *See* Ordinance 81-334 § 2 (seeking to reduce "undesirable behavior" and "dangers to the health, safety and welfare of the public"). Similarly, the study that focused on Ordinance 02-496 found a statistically significant increase in drug related offenses in areas with adult theaters compared to control areas. (Experts' Report 80, 105 tbl.10.)

Finally, both studies focus only on criminal activity and do not even purport to address the connection between adult theaters and urban blight. Ordinance 03-375, which amended Ordinance 02-496, was supported by testimony from *Function Junction* that adult theaters promote and perpetuate urban blight, which in Daytona Beach was characterized by "a significant percentage of deteriorating structures; a large number of small ... lots, which did not allow cars; a notable parking problem; a high incidence of crime, particularly, on the beachside; and a large percentage of antiquated, underground utility systems, such as drainage, water and sewer systems." 705 F.Supp. at 547. Lollipop's experts' studies examine only one of these conditions-high crime rates-and, notably, do not address at all the City's evidence that adult theaters tend to perpetuate these other features of urban blight. Although Lollipop's experts argue that the testimony provided in *Function Junction* was based on unreliable data and methodologically unsound analysis, we repeat that the City's reliance on such evidence need only have been *reasonable,* and it was.

In short, the CAD data relied on by both studies may substantially undercount incidents of many of the types of crime that the City sought to reduce; the data that the studies did analyze show some statistically significant correlations between adult theaters and increased criminal activity; and the studies completely fail to address evidence of increased urban blight and decay that the City reasonably relied on when enacting Ordinance 03-375. Thus, Lollipop's has failed to cast direct doubt on all of the evidence that the City reasonably relied on when enacting the challenged ordinances. *See Peek-A-Boo Lounge,* 337 F.3d at 1268 (noting that "the government must rely on at least *some* pre-enactment evidence" (emphasis in original)); *Wise Enters., Inc. v. Unified Gov't of Athens-Clarke County,* 217 F.3d 1360, 1364 (11th Cir.2000) (noting that a municipality "must have *some* factual basis" for its rationale (emphasis in original) (quotation marks omitted)); *see also World Wide Video,* 368 F.3d at 1195 (explaining that a city needs only "some" evidence to support its ordinances); *Baby Dolls Topless Saloons, Inc. v. City of Dallas,* 295 F.3d 471, 481 (5th Cir.2002) ("*Renton* teaches us that the government must produce *some* evidence ***885** of adverse secondary effects ...." (emphasis in original) (citation omitted)). Accordingly, we hold that Ordinances 81-334, 02-496, and 03-375 further a substantial government interest under *O'Brien.* [35]

35 Inasmuch as the district court concluded that Lollipop's had cast direct doubt on the City's evidence, it allowed the City to present post-enactment evidence in an effort to renew support for a theory justifying its ordinances. But because we have concluded that Lollipop's failed to cast direct doubt on the City's evidence, there is no need to consider the City's post-enactment evidence. *See Alameda Books,* 535 U.S. at 438-39, 122 S.Ct. 1728 (plurality opinion) ("If plaintiffs fail to cast direct doubt on [the city's] rationale ..., the municipality meets the standard set forth in *Renton.*").

B. Narrow Tailoring

Under the fourth prong of the *O'Brien* test, an ordinance that imposes a reasonable time, place, or manner restriction on nudity must be "no greater than is essential to the furtherance of the government interest." *Pap's A.M.,* 529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion). The Supreme Court has made clear, however, that *O'Brien* does not impose strict scrutiny's familiar "least restrictive means" requirement:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

Ward v. Rock Against Racism, 491 U.S. 781, 798-99, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (footnote and citation omitted) (alteration in original); *see also Pap's A.M.,* 529 U.S. at 301-02, 120 S.Ct. 1382 (plurality opinion) (noting that "least restrictive means analysis is not required" under *O'Brien*).

Here, the combined effect of Ordinances 81-334, 02-496, and 03-375 is that at least G-strings and pasties are required in all adult theaters regardless of location, and that Ordinance 02-496's slightly more modest clothing requirements apply at establishments that either serve alcohol or are located within 500 feet of an establishment that serves alcohol. Lollipop's argues that requiring more than G-strings and pasties at establishments that serve alcohol imposes a greater restriction than is necessary to further the City's substantial interest in reducing negative secondary effects:

> Appellants are claiming, *at a minimum,* that adults have a right to perform in pasties and G-strings where alcohol is served. Appellants further argue that the City's ordinances are unduly restrictive because they should allow pasties and G-strings at more locations. Appellants' claim should be understood in the broadest terms: government simply has no business telling adults what they can and cannot wear beyond a simple prohibition against nudity.

(Appellants'/Cross Appellees' Resp. & Reply Br. 22-23 (emphasis in original).)

We break no new ground in rejecting Lollipop's argument. It is well-established that a nudity ordinance that imposes a minimum requirement of G-strings and pasties is narrowly tailored under *O'Brien. See Pap's A.M.,* 529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion) ("The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey ***886** the dancer's erotic message."); *Barnes,* 501 U.S. at 587, 111 S.Ct. 2456 (Souter, J., concurring in the judgment) ("Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message."); *id.* at 572, 111 S.Ct. 2456 (plurality opinion) ("Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose."); *cf. Peek-A-Boo Lounge,* 337 F.3d at 1274 (suggesting that the ordinance at issue, which did not leave erotic dancers free to perform wearing G-strings and pasties in any location in the county, was not narrowly tailored).

So too, the First Amendment does not prevent a city from limiting the venues where dancers may communicate their erotic message. An ordinance that "does not prohibit all nude dancing, but only restricts nude dancing in those locations where the unwanted secondary effects arise," is narrowly tailored. *Wise Enters.,* 217 F.3d at 1365. And an ordinance that defines those locations by reference to the presence of establishments that serve alcohol does not unduly restrict the ability to communicate an erotic message. *See Grand Faloon Tavern, Inc. v. Wicker,* 670 F.2d 943, 948 (11th Cir.1982) ("[N]ude entertainment necessarily involves a substantial degree of conduct, and ... any artistic or communicative elements present in such conduct are not of a kind whose content or effectiveness is dependent upon being conveyed where alcoholic beverages are served."). Thus, both the requirement that dancers wear G-strings and pasties in all adult theaters, and the additional requirement of clothing somewhat more modest [36] within 500 feet of establishments that serve alcohol, are narrowly tailored under *O'Brien.*

36 Lollipop's characterizes the additional required clothing as a "modest bikini," (Appellant's Initial Br. 46), or a "full bathing suit [ ]" (Appellant's Reply Br. 23). The City disputes this characterization, observing that "[a] 'modest bikini' certainly does not expose half of the lower female breast and two thirds of the

buttocks." (Appellee's Initial Br. 52-53.) Regardless of whether the term "modest" accurately describes Ordinance 03-375's precise requirements, which are quoted above, *see supra* note 12, the City of Daytona Beach could impose those requirements within 500 feet of establishments that serve alcohol.

IV. *Conclusion*

Accordingly, we hold that all of the City's ordinances challenged in this lawsuit are constitutional. We AFFIRM the district court's decision upholding the City's zoning ordinances; we REVERSE the district court's decision striking down Ordinances 81-334, 02-496, and 03-375; and we REMAND for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

All Citations

490 F.3d 860, 20 Fla. L. Weekly Fed. C 778

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Predator Intern., Inc. v. Gamo Outdoor USA, Inc., D.Colo., October 22, 2009

348 F.3d 1182
United States Court of Appeals,
Tenth Circuit.

Flona M. HEIDEMAN; Mariea M. Berryman; Crystal Dieringer; Heather R. Liljenquist; Jennifer Goff; Amber Blanke; Stacy Lamb; Bobbie Gleason; Amy Woods; Janeen Bickerstaff, Plaintiffs–Appellants,
v.
SOUTH SALT LAKE CITY, A Utah Municipal Corporation, Defendant–Appellee.

No. 02–4030.
|
Nov. 4, 2003.

Dancers brought action raising First Amendment challenge to ordinance banning nudity within sexually oriented businesses. The United States District Court for the District of Utah, Bruce S. Jenkins, J., denied their application for preliminary injunctive relief against enforcement of ordinance, and they appealed. The Court of Appeals, McConnell, Circuit Judge, held that: (1) ordinance was not subject to strict scrutiny under First Amendment, and (2) dancers failed to show a likelihood of success on the merits of their First Amendment challenge.

Affirmed.

West Headnotes (12)

[1] **Federal Courts**
Preliminary injunction;temporary restraining order

District court's decision to deny a preliminary injunction is reviewed for abuse of discretion; court's factual findings are examined for clear error and its legal determinations are reviewed de novo. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

11 Cases that cite this headnote

[2] **Injunction**
Extraordinary or unusual nature of remedy

Injunction
Entitlement to Relief

Preliminary injunction is an extraordinary remedy, and it should not be issued unless the movant's right to relief is clear and unequivocal. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

45 Cases that cite this headnote

[3] **Injunction**
Evidence

Injunction
Hearing procedure

Federal Rules of Evidence do not apply to preliminary injunction hearings. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

22 Cases that cite this headnote

[4] **Injunction**
Irreparable injury

To constitute irreparable harm warranting preliminary injunction, an injury must be certain, great, actual and not theoretical. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

200 Cases that cite this headnote

[5] **Injunction**
Irreparable injury

Injunction
Recovery of damages

Simple economic loss usually does not, in and of itself, constitute irreparable harm warranting preliminary injunction since such losses are compensable by monetary damages. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

68 Cases that cite this headnote

[6] **Civil Rights**
Preliminary Injunction

Requirement that dancers wear pasties and G-strings while challenging ordinance banning nudity within sexually oriented businesses was sufficient loss of First Amendment freedom to constitute irreparable harm for purposes of their application for preliminary injunctive relief against enforcement of ordinance during the pendency of the litigation. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

88 Cases that cite this headnote

[7] **Civil Rights**
Preliminary Injunction

Loss of First Amendment freedoms, for even minimal periods of time, constitutes irreparable injury for purposes of application for preliminary injunctive relief. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

37 Cases that cite this headnote

[8] **Injunction**
Injunctions Against Enforcement of Laws and Regulations

Ability of a city to enact and enforce measures it deems to be in the public interest is an equity to be considered in balancing hardships for purposes of ruling on an application for preliminary injunctive relief against enforcement of ordinance. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

6 Cases that cite this headnote

[9] **Constitutional Law**
Content neutrality

Ordinance banning nudity within sexually oriented businesses was not subject to strict scrutiny under First Amendment as a "content-based" restriction on speech; prohibition was on a form of conduct, and applied to all "sexually oriented businesses," including establishments such as "adult motels" and "adult novelty stores," which were not engaged in expressive activity. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[10] **Constitutional Law**
Exercise of police power;relationship to governmental interest or public welfare

Where expressive activities are not singled out for special regulation, *O'Brien*'s intermediate scrutiny applies in determining validity of alleged restriction on First Amendment freedom of speech. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[11] **Civil Rights**
Preliminary Injunction

Dancers failed to show a likelihood of success on the merits of their First Amendment challenge to ordinance banning nudity within sexually oriented businesses, and were therefore not entitled to preliminary injunctive relief against enforcement of ordinance during the pendency of the litigation; dancers failed to show that ban did not served a substantial governmental interest, that government interest was not unrelated to the suppression of free expression, and that restriction was greater than essential to the furtherance of the government interest, since requirement that dancers wear "G-strings" and "pasties" had a "de minimis " effect on their ability to communicate their message. U.S.C.A. Const.Amend. 1.

23 Cases that cite this headnote

[12] **Constitutional Law**
Nudity in general

Public Amusement and Entertainment
Dancing and other performances

City did not have to produce new studies and was permitted to rely on the evidentiary foundation in earlier cases in establishing that its ban on nudity within sexually oriented businesses served a substantial governmental

interest, and thus did not restrict freedom of speech in violation of First Amendment. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

Attorneys and Law Firms

***1184** W. Andrew McCullough, McCullough & Associates, LLC, Midvale, UT, for Plaintiffs–Appellants.

Scott D. Bergthold, Law Office of Scott D. Bergthold, P.L.L.C., Scottsdale, AZ (and David M. Carlson and Janice Frost, South Salt Lake, UT, with him on the briefs), for Defendant–Appellee.

Before LUCERO, HARTZ and McCONNELL, Circuit Judges.

Opinion

McCONNELL, Circuit Judge.

South Salt Lake City is a municipality of some 9,800 people, located immediately south of Utah's capital. The City's main artery, State Street or U.S. Highway 89, was the primary north-south highway in the area prior to construction of Interstate–15. State Street is the locus of a virtually uninterrupted string of gas stations, retail outlets, fast food restaurants, pawn shops, used car dealerships, old-fashioned drive-up motels, and the like; much of the City is occupied by light industry and the remaining area by modest single-family residences and apartments. The City's Chamber of Commerce touts the municipality as "Utah's Center of Industry." [1] Almost hidden among the warehouses and workshops of light industrial South Salt Lake City are—or were—three establishments featuring nude dancing.

1 South Salt Lake Chamber of Commerce, *at* http://www.southsaltlakechamber.com.

The City Council recently enacted an ordinance prohibiting nudity within sexually oriented businesses. South Salt Lake City, Utah, Ordinance No.2001–04 (the "Ordinance") (effective May 7, 2001) (codified as South Salt Lake City, Utah, Code, ch. 5.56 (the "Code")). Under the Ordinance, dancers at the establishments mentioned above may no longer drop the last stitch. *Id.* § 5.56.3100.

The Plaintiffs–Appellants in this case, female dancers who object to the requirement of wearing "G-strings" and "pasties" during their performances, brought suit to enjoin the enforcement of the Ordinance, and filed a motion for a preliminary injunction in district court.

The district court denied their request for a preliminary injunction, commenting:

> The specific proposition stated by Plaintiffs, that nude dancing is a protected form of expression not subject to any limitation, has not been passed upon by the 10th Circuit Court of Appeals. It is this Court's opinion that if and when they consider this proposition, the modest limitations imposed by the ordinance will not be considered a burden on expression of erotic dancing in a sexually oriented business.

Order Upon Pls.' Mot. for Prelim. Inj. and Def.'s Mot. to Dismiss ("Order"), at 2 (Jan. 29, 2002), App. at 191. In response to a question from Plaintiffs' counsel regarding what issues would be open in the litigation on the merits, the district court declined to provide guidance beyond what was said in the ruling on the preliminary injunction.

The district court's reluctance to elaborate the law applicable to nude dancing is understandable. Twice in the past fifteen years, the United States Supreme Court has considered the constitutionality of ordinances banning commercial nude dancing under the Free Speech Clause, and both times the Court produced fractured decisions with no majority opinion and no clear statement of controlling doctrine. ***1185** *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). This is because, as discussed below, it is far from clear how prohibitions of nude dancing "fit" within the conceptual structure of First Amendment law. [2] Despite the theoretical uncertainties, however, the results themselves in these cases have been consistent: the practitioners of nude dancing have lost and the ordinances have been upheld.

2 The best account of the theoretical difficulties may be found in Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 *Wm. & Mary L.Rev.* 611 (1992).

In their briefs and arguments in this Court, the Plaintiffs devote much of their attention to issues beyond the propriety of the denial of a preliminary injunction. In particular, they argue that they are entitled to trial on certain of their claims, which the Defendants stoutly deny. The procedural posture of this case, however, is not a direct challenge to the Ordinance or even a motion for summary judgment. It is an appeal from the district court's denial of a preliminary injunction against enforcement of the Ordinance. Our appellate review is limited by this posture. *See, e.g., Hawkins v. City & County of Denver,* 170 F.3d 1281, 1292 (10th Cir.1999) (emphasizing narrow scope of appellate review of denial of a motion for preliminary injunction); *Southwest Voter Reg. Educ. Project v. Shelley,* 344 F.3d 914, 917–18 (9th Cir.2003) (en banc) (noting that appellate review of the denial of a preliminary injunction is "limited and deferential"). The proper means for testing whether a trial is required is for one or both parties to move for summary judgment or judgment on the pleadings. No such motion has been made. The issue before us is simply whether the district court abused its discretion in denying a motion for preliminary relief on this record. The answer to that question is no.

Background

Under South Salt Lake City's prior Sexually Oriented Business Ordinance, originally enacted in February, 1991, commercial nude dancing was permitted, subject to regulation and licensing. The three establishments at which Plaintiffs work, or wish to work, provided nude entertainment for more than ten years under this licensing scheme. Around 1999, the City Council became concerned about what are called "negative secondary effects"—such as crime, prostitution, and lowered property values—thought to be associated with sexually oriented businesses. For approximately a year, City officials gathered police reports and studies from around the country regarding the connection between sexually oriented commercial business and these secondary effects.

The Ordinance was amended on January 10, 1996, and, after the studies, again on May 2, 2001. As currently formulated, the Ordinance forbids employees of such businesses[3] to "[a]ppear in a state of nudity before a patron on the premises of a sexually oriented business." Code § 5.56.310, 310(G).[4] The Ordinance also forbids patrons ***1186** of these establishments to "[a]ppear in a state of nudity before another person on the premises of a sexually oriented business." Code § 5.56.320, 320(C). The Ordinance continues to permit semi-nude commercial dancing; dancers may perform wearing "pasties" and "G-strings." Plaintiffs maintain that these new restrictions violate their freedom of expression under the First Amendment, as applied to state and local governments through the Fourteenth Amendment.

3 The Code defines a "Sexually oriented business" as "an adult arcade, adult bookstore, adult motion picture theater, adult novelty store, adult theater, adult video store, adult cabaret, and adult motel[,]" each of which is defined in the Code's "Definitions" section. Code § 5.56.050.

4 The Code defines "[n]udity or state of nudity" as "the showing of the human male or female genitals, pubic area, vulva, anus, or anal cleft with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple." Code § 5.56.050.

Plaintiffs originally filed this action in the Third Judicial District Court for Salt Lake County, Utah. It was removed to federal district court on May 7, 2001. In their Complaint, filed April 30, 2001, and by motion, Plaintiffs requested a temporary restraining order and preliminary injunction against the enforcement of the Ordinance. The City filed a motion to dismiss on the pleadings.

The City argued that the Ordinance is justified by the City's interest in curtailing what it found to be the negative secondary effects of establishments featuring totally nude dancing. The targeted secondary effects the City identified included: venereal disease, prostitution, general poor sanitation, criminality, and offenses against minors, among others. *See* Preamble to Ordinance; Ordinance, "Purpose and Findings," (1)-(25). The City based its findings and conclusions on a number of sources cited in the Ordinance, including findings incorporated in decisions of the Supreme Court and this Court, as well as numerous other studies and statistics from the City police department and other municipalities.[5]

5 The cases and studies on which the City relied include the following:

City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v. American Mini Theatres, [Inc.],* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *California v. La Rue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972); *O'Connor v. City and County of Denver,* 894 F.2d 1210 (10th Cir.1990); *Z.J. Gifts D–2, L.L.C. v. City of Aurora,* 136 F.3d 683 (10th Cir.1998); *Dodger's Bar & Grill, Inc. v. Johnson County,* 98 F.3d 1262 (10th Cir.1996); *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Com'rs,* 32 F.3d 1436 (10th Cir.1994); *American Target Advertising, Inc. v. Giani,* 199 F.3d 1241 (10th Cir.2000); *MS News Co. v. Casado,* 721 F.2d 1281 (10th Cir.1983); *Cortese v. Black,* 87 F.3d 1327, (10th Cir.1996); *Salt Lake City v. Wood,* 1999 Utah App. 323, 991 P.2d 595 (Utah Ct.App.1999); *Salt Lake City v. Roberts,* 7 P.3d 789 (Utah Ct.App.2000); *United States v. Freedberg,* 724 F.Supp. 851 (D.Utah 1989); reports of the South Salt Lake Police Department; and documents concerning the secondary effects occurring in and around sexually oriented businesses, including, but not limited to, Phoenix, Arizona—1984; Minneapolis, Minnesota—1980; Houston, Texas—1997; Indianapolis, Indiana—1984; Amarillo, Texas; Garden Grove, California—1991; Los Angeles, California—1977; Whittier, California—1978; Austin, Texas—1986; Seattle, Washington—1989; Oklahoma City, Oklahoma—1986; Cleveland, Ohio—; and Dallas, Texas—1997; St. Croix County, Wisconsin—1993; Bellevue, Washington—1998; Newport News, Virginia—1996; New York Times Square study—1994; Phoenix, Arizona—1995–98; and also on findings from the paper entitled "Stripclubs According to Strippers: Exposing Workplace Sexual Violence," by Kelly Holsopple, Program Director, Freedom and Justice Center for Prostitution Resources, Minneapolis, Minnesota, and from "Sexually Oriented Businesses: An Insider's View," by David Sherman, presented to the Michigan House Committee on Ethics and Constitutional Law, Jan. 12, 2000; crime statistics of the City of South Salt Lake for the past seven years; and the Report of the Attorney General's Working Group On The Regulation Of Sexually Oriented Businesses, (June 6, 1989, State of Minnesota). Ordinance, sec. I(B) ("Findings").

***1187** The district court held a hearing on January 3, 2002, on the Plaintiffs' motion for preliminary injunctive relief and the City's motion to dismiss. The only evidence before the district court at the time of the hearing was the Ordinance itself, the preamble of which contained citations to the studies and reports on which the City relied, and affidavits and testimony of four of the Plaintiffs regarding their perceptions of future economic harm that they would suffer absent an injunction. Although the nude dancing establishments, represented by Plaintiffs' counsel, had presented certain contrary studies and evidence to the City Council during its deliberations, Plaintiffs did not submit this or any other evidence contrary to the City's findings to the district court for consideration on their motion for a preliminary injunction.

In denying both motions from the bench, the district court observed:

> I'll deny the motion for a preliminary injunction....
>
> It would appear to me that the modest effort at limitations provided by the ordinance as enacted by South Salt Lake City requiring the use of G strings and pasties in no way in my opinion limits expression. It would appear to me that expression allowed is at the outer limits that counsel has referred to and that the modest requirements set forth in the ordinance as to semi-nude vers[u]s nude is an appropriate exercise of municipal power.
>
> I think that the issue presented, I hate to say the naked proposition but the specific proposition asserted by counsel for plaintiffs does indeed present an interesting question. That specific proposition as far as I know has never been passed on by the Tenth Circuit but my opinion is that if and when they consider it that the modest limitations imposed by the ordinance will not be considered a burden on expression of erotic dancing in a sexually oriented business establishment.
>
> It would appear to me that the justification set forth in the ordinance as to the secondary questions are legitimate questions for a city to be concerned with and that the modest limitations imposed in no way deprive

> the artist, the performer, the dancer from expression which is violative of the First Amendment....

Tr. of Hearing dated Jan. 3, 2002 ("Tr."), at 102–04, App. at 184–86.

After the hearing, the district court entered a short order memorializing its observations from the bench. Four of these observations are relevant to our review here:

4. The South Salt Lake City ordinance requiring the use of G strings and pasties in sexually oriented businesses does not limit expression.

5. The modest requirement of the ordinance permitting semi-nudity and prohibiting nudity in sexually oriented businesses is an appropriate exercise of municipal power.

6. The specific proposition stated by Plaintiffs, that nude dancing is a protected form of expression not subject to any limitation, has not been passed upon by the 10th Circuit Court of Appeals. It is this Court's opinion that if and when they consider this proposition, the modest limitations imposed by the ordinance will not be considered a burden on expression of erotic dancing in a sexually oriented business.

7. The secondary harmful effects of nudity in a sexually oriented business are concerns that a municipality may legitimately address.

Order at 2, App. at 191. After making these findings, the order memorialized the ***1188** denial of the motion for preliminary injunction which the district court had made from the bench.

Analysis

I. Standards of Review

[1] We review the district court's decision to deny a preliminary injunction for abuse of discretion. *Utah Licensed Beverage Ass'n v. Leavitt,* 256 F.3d 1061, 1065 (10th Cir.2001). In doing so, we examine the district court's factual findings for clear error and review its legal determinations de novo. *Davis v. Mineta,* 302 F.3d 1104, 1111 (10th Cir.2002); *see also Prairie Band of Potawatomi Indians v. Pierce,* 253 F.3d 1234, 1243 (10th Cir.2001); *Tri–State Generation & Transmission Ass'n v. Shoshone River Power, Inc.,* 805 F.2d 351, 354 (10th Cir.1986). The abuse of discretion standard commands that

> we give due deference to the district court's evaluation of the salience and credibility of testimony, affidavits, and other evidence. We will not challenge that evaluation unless it finds no support in the record, deviates from the appropriate legal standard, or follows from a plainly implausible, irrational, or erroneous reading of the record.

United States v. Robinson, 39 F.3d 1115, 1116 (10th Cir.1994) (citation omitted).

[2] It is well settled that a preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is "clear and unequivocal." *Kikumura v. Hurley,* 242 F.3d 950, 955 (10th Cir.2001); *see also SCFC ILC, Inc. v. Visa USA, Inc.,* 936 F.2d 1096, 1098 (10th Cir.1991).

> But while the standard to be applied by the district court in deciding whether a [party] is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance [or denial] of the injunction, in light of the applicable standard, constituted an abuse of discretion.

Doran v. Salem Inn, Inc., 422 U.S. 922, 931–32, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

[3] We must be mindful, therefore, as the Supreme Court has cautioned, that "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *University of Texas v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). A hearing for preliminary injunction is generally a restricted proceeding, often conducted under pressured time constraints, on limited evidence and expedited briefing schedules. The Federal Rules of Evidence do not apply to preliminary injunction hearings. *See, e.g., SEC v. Cherif,* 933 F.2d 403, 412 n. 8 (7th Cir.1991); *Asseo v. Pan Am. Grain Co.,* 805 F.2d 23, 25–26 (1st Cir.1986); *United*

States v. O'Brien, 836 F.Supp. 438, 441 (S.D.Ohio 1993). Thus, as a prudential matter, it bears remembering the obvious: that when a district court holds a hearing on a motion for preliminary injunction it is not conducting a trial on the merits.

II. Preliminary Injunction Factors

Before a preliminary injunction may be entered pursuant to Fed.R.Civ.P. 65, the moving party must establish that:

> (1) [the movant] will suffer irreparable injury unless the injunction issues; (2) the threatened injury ... outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits.

Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1198 (10th Cir.1992); *Kikumura,* 242 F.3d at 955. It is the movant's burden to ***1189** establish that each of these factors tips in his or her favor. *Id.* However, "[t]he Tenth Circuit has adopted the Second Circuit's liberal definition of the 'probability of success' requirement." *Otero Sav. & Loan Ass'n v. Federal Reserve Bank,* 665 F.2d 275, 278 (10th Cir.1981). Accordingly, we have held that where the moving party has established that the three "harm" factors tip *decidedly* in its favor, the "probability of success requirement" is somewhat relaxed. *Prairie Band,* 253 F.3d at 1246; *Continental Oil Co. v. Frontier Ref. Co.,* 338 F.2d 780, 781–82 (10th Cir.1964) (same); *see also, e.g., Boucher v. School Bd.,* 134 F.3d 821, 825 n. 5 (7th Cir.1998). In such cases, "[t]he movant need only show 'questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation.' " *Resolution Trust,* 972 F.2d at 1199 (citing *Tri–State,* 805 F.2d at 358); *Otero,* 665 F.2d at 278. However, the Second Circuit has held, and we agree, that "[w]here ... a preliminary injunction 'seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme,' the less rigorous fair-ground-for-litigation standard should not be applied." *Sweeney v. Bane,* 996 F.2d 1384, 1388 (2d Cir.1993) (quoting *Plaza Health Labs. v. Perales,* 878 F.2d 577, 580 (2d Cir.1989)). With this in mind, we consider whether the district court abused its discretion in the present case.

III. Application of Preliminary Injunction Factors: The Equities

A. Irreparable Harm

[4] **[5]** To constitute irreparable harm, an injury must be certain, great, actual "and not theoretical." *Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C.Cir.1985); *accord Prairie Band,* 253 F.3d at 1250. Irreparable harm is not harm that is "merely serious or substantial." *Prairie Band,* 253 F.3d at 1250 (quoting *A.O. Smith Corp. v. FTC,* 530 F.2d 515, 525 (3d Cir.1976)). "[T]he party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (emphasis in original) (brackets, citations, and internal quotation marks omitted). It is also well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm; such losses are compensable by monetary damages. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2948.1, at 152–53 (2d ed.1995).

[6] The Plaintiffs presented no evidence that enforcement of the Ordinance during the time it will take to litigate this case in district court will have an irreparable effect in the sense of making it difficult or impossible to resume their activities or restore the status quo ante in the event they prevail. *See, e.g., Greater Yellowstone Coalition v. Flowers,* 321 F.3d 1250 (10th Cir.2003) (irreparable harm found when there was danger of actual death of eagles and destruction of their breeding grounds if developer were allowed to proceed); *Ohio Oil Co. v. Conway,* 279 U.S. 813, 814, 49 S.Ct. 256, 73 L.Ed. 972 (1929) (irreparable harm found in payment of an allegedly unconstitutional tax when state law did not provide a remedy for its return should the statute ultimately be adjudged invalid). At oral argument, Plaintiffs' counsel asserted that at least one of the establishments had been forced out of business, but no such evidence was presented in district court. In the absence of evidence to the contrary, we assume that Plaintiffs will be able to resume their nude dancing in the event they prevail on the merits. The only question, then, is whether the requirement that they wear pasties and G-strings in the meantime is sufficient injury to warrant preliminary injunctive relief.

***1190** **[7]** The Supreme Court has made clear that "the loss of First Amendment freedoms, for even minimal

periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality op.); *see also Utah Licensed Beverage,* 256 F.3d at 1076 (noting presumption when infringement of First Amendment rights is alleged); *Homans v. City of Albuquerque,* 264 F.3d 1240, 1243 & n. 2 (10th Cir.2001); *ACLU v. Johnson,* 194 F.3d 1149, 1163 (10th Cir.1999); *Community Communications Co. v. City of Boulder,* 660 F.2d 1370, 1380 (10th Cir.1981). It is necessary, however, to consider the specific character of the First Amendment claim. The Supreme Court has observed that the requirement that dancers wear G-strings and pasties "is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message." *Pap's,* 529 U.S. at 301, 120 S.Ct. 1382 (plurality op.); *id.* at 294, 120 S.Ct. 1382 ("Any effect on the overall expression [on account of requiring dancers to wear pasties and G-strings] is *de minimis.*"). In reliance on *Pap's,* the district court found that the "modest limitations" of requiring G-strings and pasties, would "not be considered a burden on expression of erotic dancing." Tr. at 103, lns. 14–16, App. at 185. Thus, while the harm to the Plaintiffs may arguably be imminent and irreparable, it is not "great" or "substantial."

For First Amendment purposes, the important point is that the Plaintiffs are able to convey their chosen message —not that they are able to do so in a state of undress. Appearing nude is not a First Amendment interest in the abstract, but only insofar as nudity is a means by which some message is conveyed. *See Pap's,* 529 U.S. at 289, 120 S.Ct. 1382 (plurality op.) ("Being 'in a state of nudity' is not an inherently expressive condition."). The Supreme Court has held—and it stands to reason—that there are "ample" alternative means by which the Plaintiffs' erotic message might be conveyed.

But to say that a harm is "minimal" is not to say it is nonexistent. In the realm of performance art—to which the activity here is at least a distant cousin—the manner of presentation is part of the artistic enterprise. To tell Mahler he could not convey the message of thunder using the kettle drum might leave open ample alternative means for communicating the desired message, but no one would say that the restriction was of no artistic consequence. Because our precedents dictate that we treat alleged First Amendment harms gingerly, we find that this element tips slightly in favor of the Plaintiffs. *See, e.g., Kikumura,* 242 F.3d at 963; *Utah Licensed Beverage,* 256 F.3d at 1076.

B. Balance of Harms

[8] To be entitled to a preliminary injunction, the movant has the burden of showing that "the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction." *Kikumura,* 242 F.3d at 955. The record is nearly devoid of any finding by the district court regarding the injury to the City of not enforcing the Ordinance during the pendency of the litigation. Presumably, however, the court's conclusion that the harmful secondary effects of nudity in a sexually oriented business are concerns that a municipality may legitimately address has application to the short run as well as the long. Assuming for sake of argument that the Ordinance serves legitimate purposes and ultimately will be sustained, the interests of the City would be injured by postponing the day of its enforcement. In the context of constitutional challenges to Acts of Congress, Chief Justice Rehnquist has stated: "The presumption ***1191** of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors,* 468 U.S. 1323, 1324, 105 S.Ct. 11, 82 L.Ed.2d 908 (1984) (Rehnquist, J., in chambers); *Bowen v. Kendrick,* 483 U.S. 1304, 1304, 108 S.Ct. 1, 97 L.Ed.2d 787 (1987) (Rehnquist, C.J., in chambers). Although the presumption of constitutionality accorded a municipal ordinance is less than that accorded an Act of Congress, especially in a case involving an explicitly enumerated constitutional right, the ability of a city to enact and enforce measures it deems to be in the public interest is still an equity to be considered in balancing hardships. *See Plaza Health Labs.,* 878 F.2d at 580–83.

As with Plaintiffs' claim of hardship, however, the City's interest is less than substantial. Much of the City's professed concern about negative secondary effects arises from sexually oriented businesses in general rather than commercial nude entertainment in particular. The City offers no specific evidence that the requirement of pasties and G-strings will produce a significant incremental improvement with respect to the negative secondary effects. Moreover, the City has tolerated nude dancing establishments for many years, and even after embarking on a different policy took over a year to put the

restrictions into effect. This invites skepticism regarding the imperative for immediate implementation.

Thus, the balance of hardships in this case is fairly even: neither party has shown that it will suffer grievous harm if it loses on the preliminary injunction motion.

C. Public Interest

A movant also has the burden of demonstrating that the injunction, if issued, is not adverse to the public interest. *Kikumura,* 242 F.3d at 955. The Plaintiffs cite the public's interest in ensuring that freedom of expression is not unconstitutionally curtailed. They also argue that there is a historic value to the businesses where the Plaintiffs work, in which, they contend, the public also has an interest. On the other hand, the democratically elected representatives to the City Council are in a better position than this Court to determine the public interest with respect to questions of social and economic policy. The courts' peculiar function is to say what the law is, not to second-guess democratic determinations of the public interest. In this case, where the Plaintiffs' claim of the public interest is largely a restatement of their own constitutional interest, and the City's claim of public interest is largely a restatement of its own interest in regulating the conduct in question, the "public interest" prong of the preliminary injunction inquiry is nothing more than a restatement of the "balance of hardships" prong. This factor, therefore, also favors neither party.

IV. Application of Preliminary Injunction Standards: Likelihood of Success on the Merits

The final question before the district court was whether Plaintiffs demonstrated that they were likely to meet their burden of showing that the City's ordinances are facially unconstitutional infringements on their First Amendment rights to expression.

A. Constitutional Standards: The Appropriate Level of Scrutiny

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the ***1192** press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I. Since *Gitlow v. New York,* 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925), the Supreme Court has held that the liberty of expression which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action.

The Supreme Court has held that nude dancing "falls only within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.,* 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality op.); *see also Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality op.) (nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so"). The Court has been less clear about the reasons why this is the case. It has not treated nude dancing as among the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," such as bribery, obscenity, and fighting words, which play "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

Rather, the Supreme Court's analysis of restrictions on nude dancing combines two lines of First Amendment doctrine that, while in principle distinct, have become effectively merged. The first line of doctrine rests on the distinction between "speech" and "conduct." While the Court has recognized that conduct is often expressive in character—burning a flag or sitting in at a segregated lunch counter are well-known examples of expressive conduct—the state has broad latitude to regulate expressive conduct if its interest in doing so is "unrelated to the suppression of free expression," if the regulation furthers "an important or substantial government interest," and if the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States*

v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). This line of cases applies here because, as the Court has explained, "[b]eing 'in a state of nudity' is not an inherently expressive condition," yet nude dancing is expressive conduct. *Pap's,* 529 U.S. at 289, 120 S.Ct. 1382. The Court has held that a general prohibition on nudity is "unrelated to the suppression of free expression" because such a law prohibits a class of conduct, the act of appearing nude in public, without reference to any element of expression. *Barnes,* 501 U.S. at 566, 570–71, 111 S.Ct. 2456.

The second line of doctrine rests on the distinction between the prohibition of certain messages based on their content and the enforcement of reasonable time, place, or manner restrictions—such as requiring that street demonstrations occur at times other than rush hour, that billboards be located away from scenic highways, or that sound trucks not exceed a certain decibel level. *See Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); *Kovacs v. Cooper,* 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949). Such regulations warrant relatively relaxed, or "intermediate," scrutiny not only if they are "content neutral" in the classic sense, but ***1193** also if the government's regulatory purpose is not based on the communicative impact of the speech. *See City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 445–47, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring).

In *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Court noted that a zoning ordinance which attempted to locate theaters featuring "adult" films was "content based" to the extent that it identified the regulated activity by the content of the films shown. *Id.* at 47, 106 S.Ct. 925. Focusing on the purpose of the regulation, however, the Court determined that it merely aimed to impose time, place, or manner restrictions on account of the theaters' "secondary effects," meaning effects other than communicative impact on the audience. *Id.* "The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views." *Id.* at 48, 106 S.Ct. 925 (internal quotation marks and brackets omitted). The Court thus carved out a category of speech regulations that are "content-neutral" not because they apply to conduct on a generally applicable basis without regard to expressive content, but because the *regulatory purpose* is unrelated to that content. In *Ward v. Rock Against Racism*, the Court stated that "[t]he principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). This Court has held that restrictions based on the negative secondary effects of sexually oriented businesses are "content-neutral" in this sense. *Z.J. Gifts D–2, L.L.C. v. City of Aurora,* 136 F.3d 683, 686 (10th Cir.1998).

The principal conceptual distinction between the two lines of doctrine is that the former—the "*O'Brien* test"—applies to generally applicable regulations of both non-expressive and expressive conduct, not targeting or singling out expressive conduct, while time, place, or manner regulations can be directed specifically at expression (such as billboards or street demonstrations), so long as the governmental purpose is unrelated to disagreement with the message and there are adequate alternative channels of communication.

In *Pap's,* a majority of the Court held that general prohibitions on public nudity, including commercial nude dancing, are subject to scrutiny "under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech." 529 U.S. at 289, 120 S.Ct. 1382 (plurality op. per O'Connor, J., joined by Rehnquist, C.J., and Kennedy and Breyer, JJ.); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring). The Court also, however, relied heavily on the *Renton* line of cases. *Id.* at 295–96, 120 S.Ct. 1382 (plurality op.); *id.* at 312–13, 120 S.Ct. 1382 (Souter, J., concurring). The resulting doctrine thus seems to be a combination of the two lines of cases.

This case does not involve a general prohibition on public nudity, like that in *Barnes* and *Pap's.* Rather, it is a more narrowly tailored ban on nudity of either employees or patrons within sexually oriented businesses. Accordingly, it might be argued that the case is most accurately analyzed as a "manner" regulation. This would seem to have been the Court's point in *Pap's* when it noted: "The public nudity ban certainly has the effect of limiting one means of expressing the erotic message being disseminated

at Kandyland. But simply to define what is being banned as the 'message' is to assume the conclusion." ***1194** 529 U.S. at 292–93, 120 S.Ct. 1382. *See also Fly Fish, Inc. v. City of Cocoa Beach,* 337 F.3d 1301, 1308 (11th Cir.2003) (applying *Pap's* and treating the G-string and pasties requirement as a "manner" restriction). Nudity, after all, is not a message in itself, but is a mode of conveying any number of different messages. It can be humorous (as when "Hotlips" Houlihan is exposed in the movie *M*A*S*H*); it can be dehumanizing (as in the registration scene in *Schindler's List*); it can be an act of self-affirmation (as in *The Full Monty*); it can symbolize unrighteousness (as in the Book of *Hosea*); it can symbolize innocence (as in Botticelli's *Birth of Venus*), or the loss of innocence (as in the movie *The Last Picture Show*); it can convey cruelty or disgust or freedom or —as Plaintiffs claim as their message—eroticism. [6] Often nudity is not communicative at all. By banning nudity in sexually oriented businesses, South Salt Lake City has not precluded the expression of any particular set of ideas, but has prohibited one particular manner of conveying those ideas, which the City Council is convinced has negative secondary effects.

6 We are not troubled by the fact that this reasoning runs counter to Marshall McLuhan's iconic dictum that "the medium is the message." Marshall McLuhan, *Understanding the Media: The Extensions of Man* 23–35 (1964). Whatever might have been its merits in its own pop cultural context, McLuhan's dictum is incompatible with the basic thrust of modern First Amendment law, in which distinctions based on content ("the message") are subject to a different mode of analysis than distinctions based on time, place, or manner ("the medium"). *See* Geoffrey R. Stone, *Content–Neutral Restrictions,* 54 *U. Chi. L.Rev.* 46 (1987); *Content Regulation and the First Amendment,* 25 *Wm. & Mary L.Rev.* 189 (1983). That would be nonsensical if the medium really were the message. Other scholars have long maintained that media, or modes of expression, do not inherently convey a particular meaning, but generate meaning through the way they are used in particular settings. *See, e.g.,* John Dewey, *Art as Experience* 60–64 (Perigree, 1980) (1934); Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* 317–18 (1980); Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* 119 (1983) ("It is, after all, not just statues (or poems or paintings) that we have to do with but the factors that cause these things to seem important-that is, affected with import-to those who make or possess them, and these are as various as life itself.").

In one important sense, the South Salt Lake Ordinance is less constitutionally problematic than the general public nudity bans upheld in *Barnes* and *Pap's:* it is more narrowly tailored. In *Barnes* and *Pap's,* there was dispute regarding the applicability of the prohibitions to legitimate theater or dance involving nudity, such as the plays *Equus* or *Hair* or the ballet *Salome.* The broad sweep of the public nudity prohibition seemed to present a dilemma: either the prohibition would apply to such performances and thus appear overbroad, or it would not apply and thus appear to be administered in a content-discriminatory manner. By limiting its nudity ban to sexually oriented businesses—a classification that itself is "content-neutral" within the meaning of this Court's cases, *see Z.J. Gifts,* 136 F.3d at 686–87—the City here has avoided both horns of the dilemma.

We turn now to Plaintiffs' arguments that the district court abused its discretion in finding that they had not demonstrated a likelihood of success on the merits.

B. Plaintiffs' Arguments for Heightened Scrutiny

[9] Plaintiffs argue against application of the relatively relaxed standard of review employed in *Barnes* and *Pap's.* They point out that *Barnes* and *Pap's* involved general prohibitions on public nudity, while the South Salt Lake Ordinance bans nudity only within sexually oriented businesses. ***1195** Accordingly, they argue that the South Salt Lake Ordinance is subject to strict scrutiny as a "content-based" restriction on speech. Their argument finds some support in two district court decisions, *Nakatomi Investments, Inc. v. City of Schenectady,* 949 F.Supp. 988, 998–99 (N.D.N.Y.1997), and *Books, Inc. v. Pottawattamie County,* 978 F.Supp. 1247, 1257 (S.D.Iowa 1997). But the argument—or at least the ultimate conclusion—has also been rejected by the only two courts of appeals to consider it. *Schultz v. City of Cumberland,* 228 F.3d 831, 846–47 (7th Cir.2000); *Fly Fish, Inc. v. City of Cocoa Beach,* 337 F.3d 1301, 1306–10 (11th Cir.2003).

[10] We reject Plaintiffs' argument for two independent reasons. First, the narrower scope of the South Salt Lake Ordinance, as compared with the general public nudity prohibitions of *Barnes* and *Pap's,* does not necessarily

make the Ordinance "content-based." The prohibition is still on a form of conduct, and unless the category of businesses to which it applies is defined by their expressive content, the Ordinance remains "unrelated to the suppression of free expression." *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673. Plaintiffs inform us that "[t]he ordinance at issue here applies only to adult businesses featuring nude dancing as expressive conduct," Appellants' Br. at 16, but they point to nothing in the Ordinance that supports that interpretation. On its face, the Ordinance applies to all "sexually oriented businesses," which include establishments such as "adult motels" and "adult novelty stores," which are not engaged in expressive activity. Although the "sexually oriented business" category certainly encompasses some expressive activities—adult cabarets and theaters, for example—this does not mean that the Ordinance targets them. The nudity ban applies across the board to all sexually oriented businesses, expressive and non-expressive alike. It is typical of conduct restrictions evaluated under *O'Brien* to include some expressive, as well as some non-expressive, activities within their reach. Where, as here, expressive activities are not singled out for special regulation, *O'Brien* applies. *See Alameda Books,* 535 U.S. at 447, 122 S.Ct. 1728 (Kennedy, J., concurring) (justifying application of lesser scrutiny to an ordinance that "is not limited to expressive activities [but] extends, for example, to massage parlors"); *Z.J. Gifts,* 136 F.3d at 686–87 (holding that an ordinance restricting sexually oriented business is content-neutral within the meaning of *Renton*).

Second, even if the South Salt Lake Ordinance must be distinguished from that in *Barnes* and *Pap's,* and cannot be justified as a generally applicable regulation of conduct, it still is subject to no more than intermediate scrutiny under the *Renton* line of cases, because the governmental purpose is based on the secondary effects of nudity in sexually oriented businesses rather than on disagreements with the content of the message. *Schultz,* 228 F.3d at 845–46. To be sure, as Plaintiffs point out, the ordinance upheld in *Renton* was a restriction on the locations within the city in which the sexually oriented businesses could locate, rather than, as here, a restriction on the manner in which they are permitted to operate. But we think Plaintiffs are wrong to characterize this as a "total ban" on the speech. Plaintiffs are not prohibited from communicating their supposedly erotic message through dance; they are merely prohibited from doing so in a state of total nudity. *See Fly Fish,* 337 F.3d at 1307–08.

In *Pap's,* the plurality explicitly rejected the dissent's characterization of a nudity prohibition as a "complete ban on expression." 529 U.S. at 292, 120 S.Ct. 1382 (plurality op.). The plurality explained: "The public nudity ban certainly has the ***1196** effect of limiting one particular means of expressing the kind of erotic message being disseminated.... But simply to define what is being banned as the 'message' is to assume the conclusion." *Id.* at 292–93, 120 S.Ct. 1382. Indeed, the plurality found that "[a]ny effect on the overall expression is *de minimis.*" *Id.* at 294, 120 S.Ct. 1382. Thus, far from being a "complete ban," the plurality found that the prohibition on nudity had a "*de minimis* " effect on the performers' ability to convey their desired message. *Id.; see also Schultz,* 228 F.3d at 847 (concluding that a requirement that dancers in sexually oriented businesses wear pasties and G-strings does not violate the First Amendment).

The fallacy in Plaintiffs' argument is to assume that the "adequate alternative avenues of expression" required under the *Renton* line of cases refers exclusively to location. Time, place, or manner regulations all are partial limitations, but each is partial in a different way. "Place" limitations require alternative locations; "time" limitations require alternative times; and "manner" limitations require alternative ways in which a message may be communicated. A ban on nudity within sexually oriented businesses is a "manner" regulation, *Fly Fish,* 337 F.3d at 1308–09, and Plaintiffs have provided no reason to believe that there do not exist other ways to get their message across. *See Pap's,* 529 U.S. at 301, 120 S.Ct. 1382 ("the requirement that dancers wear pasties and G-strings ... leaves ample capacity to convey the dancer's erotic message."); *Schultz,* 228 F.3d at 847 (same). While "there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message, that is not the case here." *Pap's,* 529 U.S. at 293, 120 S.Ct. 1382; *Fly Fish,* 337 F.3d at 1308.

C. Plaintiffs' Argument Regarding Evidence of Secondary Effects and the Record Before the District Court

Plaintiffs complain vigorously regarding the supposed inadequacy of the factual record in this case to support the City's claim that the Ordinance is justified by the need to control the negative secondary effects of commercial nude dancing. Indeed, they assert that "[t]here is no evidence that such effects have occurred, or are in imminent danger of occurring, in South Salt Lake. Plaintiffs believe that

all evidence is to the contrary." Appellants' Br. at 24. However, as counsel conceded at oral argument before this Court, at the hearing in the district court on their motion for preliminary injunctive relief, the Plaintiffs did not present any evidence in support of their position. In their briefs in this Court, Plaintiffs refer to various studies that they submitted to the City Council, but did not trouble to present to the district court, and to other evidence that they submitted in unrelated litigation in state court, but likewise did not see fit to introduce below. *See* Appellants' Br. at 24–26. Under these circumstances, it is obvious that the district court did not abuse its discretion in denying their motion. Plaintiffs simply had not met their burden of showing that their right to relief was "clear and unequivocal." *Kikumura,* 242 F.3d at 955.

[11] We turn, nevertheless, to the four elements of intermediate scrutiny, as set forth in *O'Brien,* [7] to determine whether ***1197** the district court abused its discretion in concluding, on this one-sided record, that Plaintiffs did not have a substantial likelihood of success on the merits. Under intermediate scrutiny, a restriction on speech must: (1) be within the constitutional power of government to adopt; (2) further an important or substantial governmental interest; which (3) is unrelated to the suppression of expression; and (4) be no greater restriction on First Amendment freedom than is essential to furtherance of the government's purpose. *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673; *Pap's,* 529 U.S. at 296, 301, 120 S.Ct. 1382.

7 The elements of intermediate scrutiny for time, place, or manner regulations are only slightly different. In such a case, we ask simply whether the regulation is "narrowly tailored to serve a significant governmental interest, and

... leave[s] open ample alternative channels for communication of the information." *Clark,* 468 U.S. at 293, 104 S.Ct. 3065.

There is no doubt that the Ordinance is within the lawful powers of South Salt Lake City. *See Pap's,* 529 U.S. at 296, 120 S.Ct. 1382 (the city's "efforts to protect public health and safety are clearly within the city's police powers").

[12] The second factor is probably the most important and contested. To survive intermediate scrutiny, the government must be able to demonstrate that the challenged speech restriction serves a "substantial governmental interest." *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673. The burden of proof is on the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). [8] On the other hand, the Court has repeatedly emphasized that "municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Alameda Books,* 535 U.S. at 439, 122 S.Ct. 1728, *quoting Renton,* 475 U.S. at 52, 106 S.Ct. 925, *quoting Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality op.) (internal quotation marks omitted). The standards for the quantity and nature of the empirical evidence needed to uphold a city ordinance based on the negative secondary effects of sexually oriented speech in general, or nude dancing in particular, are continuing to evolve.

8 It is not obvious that intermediate scrutiny cases from other contexts are necessarily applicable to nude dancing or other sexually oriented speech, in light of the Court's position that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Barnes,* 501 U.S. at 584, 111 S.Ct. 2456 (Souter, J., concurring) (quoting *Young,* 427 U.S. at 70, 96 S.Ct. 2440). Nonetheless, the Court's recent decisions in the context of sexually explicit speech confirm that the government bears the burden of providing evidence of secondary effects, where it relies on those secondary effects as the justification for restricting speech. *See Alameda Books,* 535 U.S. at 437, 122 S.Ct. 1728 (plurality op.).

In *Renton,* a six-Justice majority of the Supreme Court held that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." 475 U.S. at 51–52, 106 S.Ct. 925. Accordingly, it is common in these cases for cities to cite and rely on seemingly pre-packaged studies, as well as the findings of courts in other cases. Here, South Salt Lake invoked a typical set of such studies and findings in support of its Ordinance.

In *Barnes,* the three-Justice plurality (Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy)

sustained a prohibition on public nudity, as applied to nude dancing, on the basis of the "substantial government interest in protecting order and morality," without the need for any empirical evidence regarding secondary effects. ***1198** *Barnes,* 501 U.S. at 569, 111 S.Ct. 2456 (plurality op.). Justice Scalia concurred on the ground that a general public nudity prohibition "is not subject to First Amendment scrutiny at all." *Id.* at 572, 111 S.Ct. 2456 (Scalia, J., concurring). The decisive fifth vote was cast by Justice Souter, whose opinion is controlling under the rule of *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)). Justice Souter concluded, contrary to the plurality, that the city was required to show secondary effects of the sort canvassed in *Renton,* and not merely an interest in order and morality. *Barnes,* 501 U.S. at 583–86, 111 S.Ct. 2456 (Souter, J., concurring). But he maintained that it was not necessary for cities to "litigate this issue repeatedly in every case," and thus that previous court findings in *Renton* and other cases provided sufficient evidentiary support. *Id.* at 584, 111 S.Ct. 2456.

In *Pap's,* a four-Justice plurality (Justice O'Connor, joined by the Chief Justice, Justice Kennedy, and Justice Breyer) voted to uphold a general public nudity ban almost identical to that upheld in *Barnes,* but did so on the basis of secondary effects. The Court emphasized that the city did not have to produce new studies and was permitted to rely on the evidentiary foundation in earlier cases. *Pap's,* 529 U.S. at 296–97, 120 S.Ct. 1382. The Court also treated the judgments of city council members regarding the need for the ordinance as evidence. "The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects." *Id.* at 297–98, 120 S.Ct. 1382. Indeed, the Court observed that "*O'Brien,* of course, required no evidentiary showing at all that the threatened harm was real." *Id.* at 299, 120 S.Ct. 1382; *see also id.* at 298, 120 S.Ct. 1382 ("On this point, *O'Brien* is especially instructive. The Court there did not require evidence that the integrity of the Selective Service System would be jeopardized...."). The plurality also noted that the plaintiffs had "ample opportunity to contest the council's findings about secondary effects—before the council itself, throughout the state proceedings, and before this Court," but had failed to do so. *Id.* at 298, 120 S.Ct. 1382. "In the absence of any reason to doubt it," the plurality stated, "the city's expert judgment should be credited." *Id.*

Two Justices concurred on the ground that a regulation of conduct is unconstitutional only where the "government prohibits conduct precisely because of its communicative attributes," making it unnecessary to inquire into the empirical basis for the secondary effects justification (about which these Justices were skeptical). *Id.* at 310, 120 S.Ct. 1382 (Scalia, J., joined by Thomas, J., concurring). Accordingly, under the rule of *Marks,* the plurality opinion constitutes the holding of the Court. This suggests that the City's initial burden to present empirical support for its conclusions is minimal, but that plaintiffs must have an opportunity to present their own evidence, to which the city is then entitled to respond.

In *Alameda Books,* the Court granted certiorari to "clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton.*" 535 U.S. at 433, 122 S.Ct. 1728. Again, however, the Court failed to produce a majority opinion. The four-Justice ***1199** plurality (Justice O'Connor, joined by the Chief Justice, Justice Scalia, and Justice Thomas) reaffirmed the basic approach taken in *Renton* and *Barnes.* The Court explained that "the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects," but it did not require the city to "bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own." *Id.* at 437, 122 S.Ct. 1728. The plurality distinguished between two parts of the *Renton* intermediate scrutiny framework: whether an ordinance is content-neutral and whether it serves a substantial governmental interest while leaving open alternative avenues of communication. Only with regard to the latter would the courts "examine evidence concerning regulated speech and secondary effects." *Id.* at 440–41, 122 S.Ct. 1728.

Even as to that connection, the plurality reiterated that the Court had "refused to set such a high bar for

municipalities that want to address merely the secondary effects of protected speech." *Id.* at 438, 122 S.Ct. 1728. It stated that cities are entitled to rely, in part, on "appeal to common sense," rather than "empirical data," at least where there is no "actual and convincing evidence from plaintiffs to the contrary." *Id.* at 439, 122 S.Ct. 1728. In so holding, the *Alameda* plurality provided the following observation regarding the deference properly accorded to legislative findings under the second prong of the *O'Brien* test:

> This is not to say that the municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438–39 (citing *Pap's,* 529 U.S. at 298, 120 S.Ct. 1382). The plurality described its "deference to the evidence presented by the city" as "the product of a careful balance between competing interests." *Alameda,* 535 U.S. at 440, 122 S.Ct. 1728. On the one hand, courts have an obligation to exercise independent judgment in First Amendment cases, but on the other hand the plurality acknowledged "that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems." *Id.*

Justice Kennedy concurred separately. However, he did not criticize the plurality's approach to the evidence necessary to support a secondary effects justification. If anything, Justice Kennedy's comments on that issue appear somewhat more deferential to the cities: "As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." *Id.* at 451, 122 S.Ct. 1728 (Kennedy, J., concurring). "The Los Angeles City Council knows the streets of Los Angeles better than we do.... It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion." *Id.* at 452, 122 S.Ct. 1728.

Applying these precedents, we cannot say that the district court abused its discretion in concluding that the Plaintiffs failed to show a likelihood of success on the merits. The evidentiary record compiled by South Salt Lake City is similar to ***1200** the record on which the Court affirmed the ordinance in *Pap's.* Presumably, the City Council of South Salt Lake is entitled to as great a degree of deference as that of any other. The Plaintiffs failed to submit any evidence in district court that might call the City's empirical judgments into question. Without "actual and convincing evidence from plaintiffs to the contrary," *Alameda Books,* 535 U.S. at 439, 122 S.Ct. 1728 (plurality op.), there was no reason for the district court to inquire any further.

The third *O'Brien* factor, that the government interest is unrelated to the suppression of free expression, follows from the second. As explained above, from *Renton* onward, the Court has consistently held that the control of negative secondary effects, such as those invoked by South Salt Lake City, is unrelated to the suppression of free expression.

Finally, the district court did not abuse its discretion in concluding that the Ordinance satisfies the fourth and final *O'Brien* factor—that the restriction is no greater than is essential to the furtherance of the government interest—for the same reason that factor was satisfied in *Pap's:* the requirement that dancers wear "G-strings" and "pasties" has a "*de minimis* " effect on their ability to communicate their message. *Pap's,* 529 U.S. at 301, 120 S.Ct. 1382 ("The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message."). Plaintiffs evidently disagree with that conclusion, but offer no basis for distinguishing the Supreme Court's conclusion.

In summary, as the case is now postured, the Plaintiffs put on no evidence before the district court to establish a

likelihood that *O'Brien* factors two, three and four favored their case on the merits. Because they failed to put on such evidence, the Plaintiffs have not demonstrated a substantial likelihood of success on the merits.

Conclusion

For the foregoing reason, the decision of the district court denying the Plaintiffs' motion for preliminary injunction is AFFIRMED. However, because the record before us is very limited, we note specifically that we express no opinion on the ultimate merits of this case. Plaintiffs' motion to supplement the record with materials not before the district court is DENIED.

All Citations

348 F.3d 1182

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Reliable Consultants, Inc. v. Earle, 5th Cir.(Tex.), February 12, 2008

478 F.3d 1316
United States Court of Appeals,
Eleventh Circuit.

Sherri WILLIAMS, B.J. Bailey, Alice Jean Cope, Jane Doe, Deborah L. Cooper, Benny Cooper, Dan Bailey, Jane Poe, Jane Roe, Plaintiffs–Appellants,
Betty Faye Haggermaker, et al., Plaintiffs,
v.
Tim MORGAN, in his official capacity as the District Attorney of the County of Madison Alabama, Defendant,
Troy King, in his official capacity as the Attorney General of Alabama, Defendant–Appellee.

No. 06–11892.
|
Feb. 14, 2007.

Synopsis

Background: Civil liberties group, on behalf of various individual users and vendors of sexual devices, brought action challenging constitutionality of Alabama statute prohibiting commercial distribution of any device primarily used for stimulation of human genitals. Following remand, 378 F.3d 1232, the United States District Court for the Northern District of Alabama, No. 98-01938-CV-5, C. Lynwood Smith, Jr., J., 420 F.Supp.2d 1224, entered summary judgment for State of Alabama. Civil liberties group appealed.

[Holding:] The Court of Appeals, Wilson, Circuit Judge, held that *Lawrence v. Texas*, holding that Texas sodomy statute was unconstitutional, was distinguishable from instant action, and thus could not overcome law of the case in instant action.

Affirmed.

West Headnotes (8)

[1] Constitutional Law
Sex and Procreation

Because there was no fundamental right to sexual privacy, rational basis scrutiny would be applied to challenge to constitutionality of Alabama statute prohibiting commercial distribution of any device primarily used for stimulation of human genitals. Ala.Code 1975, § 13A-12-200.2a(1).

5 Cases that cite this headnote

[2] Constitutional Law
Reasonableness or rationality

Rational basis review is a highly deferential standard that proscribes only the very outer limits of a legislature's power.

Cases that cite this headnote

[3] Constitutional Law
Reasonableness or rationality

A statute is constitutional under rational basis scrutiny so long as there is any reasonably conceivable state of facts that could provide a rational basis for the statute.

2 Cases that cite this headnote

[4] Constitutional Law
Constitutional Rights in General

Constitutional Law
Overbreadth in General

State legislatures are allowed leeway to approach a perceived problem incrementally, even if its incremental approach is significantly over-inclusive or under-inclusive.

Cases that cite this headnote

[5] Federal Courts
Former decision as law of the case

Federal Courts

Effect of Decision in Lower Court

Under the law-of-the-case doctrine, the findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal.

1 Cases that cite this headnote

[6] Courts

Previous Decisions in Same Case as Law of the Case

When deciding an issue of law, the only means by which the law-of-the-case doctrine may be overcome is if: (1) the prior decision resulted from a trial where the parties presented substantially different evidence from the case at bar; (2) subsequently released controlling authority dictates a contrary result; or (3) the prior decision was clearly erroneous and would work manifest injustice.

2 Cases that cite this headnote

[7] Courts

Previous Decisions in Same Case as Law of the Case

Lawrence v. Texas, holding that Texas sodomy statute furthered no legitimate state interest that could justify its intrusion into personal and private life of the individual, was distinguishable from holding of subsequent action that Alabama statute prohibiting commercial distribution of devices primarily used for stimulation of human genitals did not violate Fourteenth Amendment privacy rights, and, thus, *Lawrence* could not overcome law of the case in subsequent action, inasmuch as Texas statute criminalized private sexual conduct, while Alabama statute criminalized commerce in sexual devices, which was inherently public activity. U.S.C.A. Const.Amend. 14; Ala.Code 1975, § 13A-12-200.2a(1).

5 Cases that cite this headnote

[8] Constitutional Law

Privacy and Sexual Matters

Obscenity

Physical articles deemed obscene, possession and sale of

Alabama statute prohibiting commercial distribution of devices primarily used for stimulation of human genitals did not violate Fourteenth Amendment privacy rights, inasmuch as public morality provided rational basis for statute. U.S.C.A. Const.Amend. 14; Ala.Code 1975, § 13A-12-200.2a(1).

6 Cases that cite this headnote

Attorneys and Law Firms

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Kevin Christopher Newsome, Winfield J. Sinclair, Montgomery, AL, Amy Louise Herring, Huntsville, AL, for King.

Appeal from the United States District Court for the Northern District of Alabama.

Before DUBINA and WILSON, Circuit ***1318** Judges, and HODGES,* District Judge.

* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

Opinion

WILSON, Circuit Judge:

This case comes to us for the third time, arising from a constitutional challenge to a provision of the Alabama Code prohibiting the commercial distribution of devices "primarily for the stimulation of human genital organs." Ala.Code § 13A–12–200.2(a)(1). The only question remaining before us is whether public morality remains a sufficient rational basis for the challenged statute after the Supreme Court's decision in *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d

508 (2003). The district court distinguished *Lawrence* and held, following our prior precedent in this case, *Williams v. Pryor,* 240 F.3d 944 (11th Cir.2001) (*Williams II*), that the statute survives rational basis scrutiny. Because we find that public morality remains a legitimate rational basis for the challenged legislation even after *Lawrence,* we affirm.

BACKGROUND

The American Civil Liberties Union ("ACLU")[1] filed suit on behalf of individual users and vendors of sexual devices[2] to enjoin enforcement of Ala.Code § 13A–12–200.2(a)(1), which prohibits the distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs."[3] Plaintiffs in this case include both married and unmarried users of prohibited sexual devices, as well as vendors of sexual devices operating both in typical retail storefronts and in "tupperware"-style parties where sexual aids and novelties are displayed and sold in homes. The stipulated facts establish that sexual devices have many medically and psychologically therapeutic uses, recognized by healthcare professionals and by the FDA. The statute exempts sales of sexual devices "for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose." § 13A–12–200.4. Also, there are a number of other sexual products, such as ribbed condoms and virility drugs, that are not prohibited by the statute. The statute does not prohibit the use, possession, or gratuitous distribution of sexual devices. *See* § 13A–12–200.2 ("for anything of pecuniary value").

1 "The ACLU" will be used to refer collectively to appellants, as that organization was "the driving force" behind this litigation. *Williams v. Att'y Gen. of Ala.,* 378 F.3d 1232, 1233 n. 1 (11th Cir.2004) (*Williams IV*)

2 We will use the shorthand term "sexual device" in place of the phrase "any device designed or marketed as useful primarily for the stimulation of the human genital organs."

3 The statute reads in pertinent part: "It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value." Ala.Code § 13A–12–200.2(a)(1).

The ACLU has argued throughout this litigation that the statute burdens and violates sexual-device users' right to privacy and personal autonomy under the Fourteenth Amendment. Alternatively, it has argued that there is no rational relationship between a complete ban on the sale of sexual devices and a proper legislative purpose.

Our second opinion in this case (*Williams IV*) provides a thorough summary of the procedural history of the case:

> ***1319** Following a bench trial, the district court concluded that there was no currently recognized fundamental right to use sexual devices and declined the ACLU's invitation to create such a right. *Williams v. Pryor,* 41 F.Supp.2d 1257, 1282–84 (N.D.Ala.1999) (*Williams I*). The district court then proceeded to scrutinize the statute under rational basis review. *Id.* at 1284. Concluding that the statute lacked any rational basis, the district court permanently enjoined its enforcement. *Id.* at 1293.
>
> On appeal, we reversed in part and affirmed in part. [*Williams II,* 240 F.3d 944.] We reversed the district court's conclusion that the statute lacked a rational basis and held that the promotion and preservation of public morality provided a rational basis. *Id.* at 952. However, we affirmed the district court's rejection of the ACLU's *facial* fundamental-rights challenge to the statute. *Id.* at 955. We then remanded the action to the district court for further consideration of the *as-applied* fundamental-rights challenge. *Id.* at 955.
>
> On remand, the district court again struck down the statute. *Williams v. Pryor,* 220 F.Supp.2d 1257 (N.D.Ala.2002) (*Williams III*). On cross motions for summary judgment, the district court held that the statute unconstitutionally burdened the right to use sexual devices within private adult, consensual sexual relationships. *Id.* After a lengthy discussion of the history of sex in America, the district court announced a fundamental right to "sexual privacy," which, although unrecognized under any existing Supreme Court precedent, the district court found to be deeply rooted in the history and traditions of our nation. *Id.* at 1296. The district court further found that this right "encompass[es] the right to use sexual devices like the vibrators, dildos, anal beads, and artificial vaginas" marketed by the vendors involved in this case. *Id.*

The district court accordingly applied strict scrutiny to the statute. *Id.* Finding that the statute failed strict scrutiny, the district court granted summary judgment to the ACLU and once again enjoined the statute's enforcement. *Id.* at 1307.

Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1234 (11th Cir.2004) (*Williams IV*).

In *Williams IV* we again reversed the judgment of the district court, holding that there was no *pre-existing,* fundamental, substantive-due-process right to sexual privacy triggering strict scrutiny. *Id.* at 1238. In so holding, we determined that *Lawrence*, which had been decided after the district court's decision in *Williams III*, did not recognize a fundamental right to sexual privacy. *Id.* Furthermore, we declined to recognize a *new* fundamental right to use sexual devices. *Id.* at 1250. With strict scrutiny off the table, we remanded the case for further proceedings consistent with the opinion. *Id.* We advised that on remand, the district court should "examine whether our holding in *Williams II* that Alabama's law has a rational basis (e.g., public morality) remains good law" after *Lawrence* overruled *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). *Id.* at 1238 n. 9 (internal quotations omitted); *see also id.* at 1259 n. 25 (Barkett, J., dissenting) ("On remand, the district court must consider whether our holding in *Williams II* ... remains good law now that *Bowers* has been overruled."). We thus "save[d] for a later day" the question of whether public morality still serves as a rational basis for legislation after *Lawrence*. *Id.* at 1238 n. 9.

***1320** On remand, the district court decided "not to invalidate the Alabama law in question here simply because it is founded on concerns over public morality." *Williams v. King,* 420 F.Supp.2d 1224, 1250 (N.D.Ala.2006) (*Williams V*). In so concluding, the district court opined: "To hold that public morality can *never* serve as a rational basis for legislation after *Lawrence* would cause a 'massive disruption of the social order,' one this court is not willing to set into motion." *Id.* at 1249–50 (quoting *Lawrence,* 539 U.S. at 590, 123 S.Ct. at 2491 (Scalia, J., dissenting)). The district court also addressed "whether this case fits squarely within the mold of *Lawrence,* such that *Lawrence*'s holding—that public morality was not a sufficiently rational basis to support the Texas [sodomy statute]—applies to strike down the Alabama law here." *Id.* at 1250. The district court concluded that the cases are distinguishable, and *Lawrence* does not compel striking down the Alabama law in this case. [4] *Id.* at 1253–54

4 The district court distinguished this case from *Lawrence* in part on the basis that *Lawrence* implicates equal protection concerns—the Texas statute targeted a "discrete and insular minority," while this statute does not. *Williams V,* 420 F.Supp.2d at 1250–53. We need not address whether the district court is correct that *Lawrence* employs an equal protection analysis. Here, we apply a substantive due process analysis and distinguish *Lawrence* on other grounds.

The ACLU now appeals the district court's decision in *Williams V* granting the State's summary judgment motion and denying the ACLU's summary judgment motion.

STANDARD OF REVIEW

We review a summary judgment decision *de novo* and apply the same legal standard that bound the district court. *Cruz v. Publix Super Markets, Inc.,* 428 F.3d 1379, 1382 (11th Cir.2005).

DISCUSSION

[1] In *Williams IV* we held that the Supreme Court in *Lawrence* "declined the invitation" to recognize a fundamental right to sexual privacy, which would have compelled us to employ strict scrutiny in assessing the constitutionality of the challenged statute. *Williams IV,* 378 F.3d at 1236. Thus, because there is no fundamental right at issue, we apply rational basis scrutiny to the challenged statute. *See Romer v. Evans,* 517 U.S. 620, 631, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the [law] so long as it bears a rational relation to some legitimate end."). For the reasons stated below, we find that the State's interest in preserving and promoting public morality provides a rational basis for the challenged statute.

[2] **[3]** **[4]** Rational basis review is "a highly deferential standard that proscribes only the very outer limits of a legislature's power." *Williams II,* 240 F.3d at 948. A statute is constitutional under rational basis scrutiny so

long as "there is *any reasonably conceivable state of facts* that could provide a rational basis for the [statute]." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993) (emphasis added). Furthermore, the Supreme Court has held:

> On rational-basis review, ... a statute ... comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Moreover, because we never require a ***1321** legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.

Id. at 314–15, 113 S.Ct. at 2101–02 (internal quotation marks and citations omitted). In addition, state legislatures are "allowed leeway to approach a perceived problem incrementally, even if its incremental approach is significantly over-inclusive or under-inclusive." *Williams II,* 240 F.3d at 948 (internal quotation marks omitted).

We previously addressed the constitutionality of the challenged Alabama law under rational basis scrutiny and held that "[t]he State's interest in public morality is a legitimate interest rationally served by the statute." *Id.* at 949. We noted that "[t]he crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny." *Id.* at 949; *see also Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 569, 111 S.Ct. 2456, 2462, 115 L.Ed.2d 504 (1991) (citing *Bowers,* 478 U.S. at 196, 106 S.Ct. at 2846; *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446 (1973); *Roth v. United States,* 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957)). Further, we held that "a statute banning the commercial distribution of sexual devices is rationally related to this interest." *Williams II,* 240 F.3d at 949.

[5] **[6]** **[7]** Ordinarily, we would be bound by our holding in *Williams II* according to the law-of-the-case doctrine. Under the law-of-the-case doctrine, "the findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal." *This That & The Other Gift And Tobacco, Inc. v. Cobb County, Ga.,* 439 F.3d 1275, 1283 (11th Cir.2006) (per curiam) (internal quotation marks omitted). When deciding an issue of law, the only means by which the law-of-the-case doctrine may be overcome is if "(1) our prior decision resulted from a trial where the parties presented substantially different evidence from the case at bar; (2) subsequently released controlling authority dictates a contrary result; or (3) the prior decision was clearly erroneous and would work manifest injustice." *Alphamed, Inc. v. B. Braun Med., Inc.,* 367 F.3d 1280, 1286 (11th Cir.2004); *see also This That & The Other,* 439 F.3d at 1283. The ACLU impliedly argues that *Lawrence* is controlling authority that compels a contrary result, because it dictates that public morality no longer constitutes a rational basis for government intrusion on private decisions about sexual intimacy—which is precisely what it argues the Alabama statute does. [5]

5 Judge Barkett expressly makes the argument that the law-of-the-case doctrine does not apply to *Williams II* because *Lawrence* is subsequently released controlling authority dictating a contrary result. *See Williams IV,* 378 F.3d at 1259 n. 25 (Barkett, J., dissenting); *see also id.* at 1259 (Barkett, J., dissenting) ("*Williams II* ... rel[ied] on the now defunct *Bowers* to conclude that public morality provides a legitimate state interest .... Obviously now that *Bowers* has been overruled, this proposition is no longer good law and we must, accordingly, revisit our holding in *Williams II*.").

In *Lawrence* the Supreme Court held that the Texas sodomy statute challenged in that case "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual." ***1322** 539 U.S. at 578, 123 S.Ct. at 2484. In so holding, the *Lawrence* majority relied on Justice Stevens's analysis in his *Bowers* dissent: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice ...." *Id.* at 577, 123 S.Ct. at 2483 (quoting *Bowers,* 478 U.S. at 216, 106 S.Ct. at 2857 (Stevens, J. dissenting)). The Court applied Justice Stevens's analysis in overruling *Bowers* and in holding that the Texas sodomy statute was unconstitutional.

The ACLU argues that the Alabama statute at issue in this case, like the Texas sodomy statute at issue in *Lawrence,* intrudes into personal and private decisions about sexual intimacy. It argues that "this law intrudes just as deeply into the sphere of individual decision-making about sexuality as the law struck down in *Lawrence.*" Appellant's Br. 29. Thus, the ACLU argues, this case is indistinguishable from *Lawrence*—just as in that case, in this case there is no legitimate state interest, including public morality, that supports the challenged Alabama statute. Therefore, it argues that the statute cannot survive constitutional scrutiny under *Lawrence.*

However, while the statute at issue in *Lawrence* criminalized *private* sexual conduct, the statute at issue in this case forbids *public, commercial* activity. To the extent *Lawrence* rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is *both* private *and* non-commercial. *Lawrence,* 539 U.S. at 578, 123 S.Ct. at 2484 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. *It does not involve public conduct* or prostitution.") (emphasis added). Unlike *Lawrence,* the activity regulated here is *neither* private *nor* non-commercial. [6]

6 The ACLU emphasizes language in *Williams IV* where we stated that "for purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item." 378 F.3d at 1242. However, the *Williams IV* court connected the sale of sexual devices with their use only in the limited context of framing the scope of the liberty interest at stake under the fundamental rights analysis of *Washington v. Glucksberg,* 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). *Williams IV,* 378 F.3d at 1242. We were clear in *Williams IV*, that the challenged statute did not implicate private or consensual activity. *Id.* at 1237 n. 8, 1241.

This statute targets *commerce* in sexual devices, an inherently public activity, whether it occurs on a street corner, in a shopping mall, or in a living room. As the majority in *Williams IV* so colorfully put it: "There is nothing 'private' or 'consensual' about the advertising and sale of a dildo." 378 F.3d at 1237 n. 8; *see also id.* at 1241. The challenged statute does not target possession, use, or even the gratuitous distribution of sexual devices. In fact, plaintiffs here continue to possess and use such devices. States have traditionally had the authority to regulate commercial activity they deem harmful to the public. *See, e.g., Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 456, 98 S.Ct. 1912, 1919, 56 L.Ed.2d 444 (1978) ("[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."). Thus, while public morality was an insufficient government interest to sustain the Texas sodomy statute, because the challenged statute in this case does not target private activity, but public, commercial activity, the state's interest in promoting ***1323** and preserving public morality remains a sufficient rational basis.

Furthermore, we do not read *Lawrence,* the overruling of *Bowers,* or the *Lawrence* court's reliance on Justice Stevens's dissent, to have rendered public morality altogether illegitimate as a rational basis. The principle that "[t]he law ... is constantly based on notions of morality," *Bowers,* 478 U.S. at 196, 106 S.Ct. at 2846, was not announced for the first time in *Bowers* and remains in force today. As we noted in *Williams IV*, the Supreme Court has affirmed on repeated occasions that laws can be based on moral judgments. *Williams IV,* 378 F.3d at 1238 n. 8; *see Barnes,* 501 U.S. at 569, 111 S.Ct. at 2462 (upholding a public indecency statute, stating, "[t]his and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation."); *id.* (noting that "a legislature could legitimately act ... to protect 'the social interest in order and morality' "); *Gregg v. Georgia,* 428 U.S. 153, 183, 96 S.Ct. 2909, 2930, 49 L.Ed.2d 859 (1976) (upholding the death penalty, noting that "capital punishment is an expression of society's moral outrage at particularly offensive conduct"); *Paris Adult Theatre I,* 413 U.S. at 61, 93 S.Ct. at 2637 (holding that Georgia had a legitimate interest in regulating obscene material because the legislature "could legitimately act ... to protect 'the social interest in order and morality' ") (quoting *Roth,* 354 U.S. at 485, 77 S.Ct. at 1309); *United States v. Bass,* 404 U.S. 336, 348, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971) (noting that "criminal punishment usually represents the moral condemnation of the community").

Also, we have discussed the post-*Lawrence* viability of public morality as a rational basis for legislation with approval. *See Lofton v. Sec'y of the Dept. of Children and*

Family Servs., 358 F.3d 804, 819 n. 17 (2004). In *Lofton,* upholding a law prohibiting homosexual couples from adopting, we indicated that public morality likely remains a constitutionally rational basis for legislation:

> Florida also asserts that the statute is rationally related to its interest in promoting public morality both in the context of child rearing and in the context of determining which types of households should be accorded legal recognition as families. Appellants respond that public morality cannot serve as a legitimate state interest .... [I]t is unnecessary for us to resolve the question. We do note, however, the Supreme Court's conclusion that there is not only a legitimate interest, but a substantial government interest in protecting order and morality, and its observation that [i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.

Id., 358 F.3d at 819 n. 17 (internal quotations and citations omitted). We have also noted: "One would expect the Supreme Court to be manifestly more specific and articulate than it was in *Lawrence* if now such a traditional and significant jurisprudential principal has been jettisoned wholesale ...." *Williams IV,* 378 F.3d at 1238 n. 8.

[8] Accordingly, we find that public morality survives as a rational basis for legislation even after *Lawrence,* and we find that in this case the State's interest in the preservation of public morality remains a rational basis for the challenged statute. By upholding the statute, we do not endorse the judgment of the Alabama legislature. As we stated in *Williams II*:

> ***1324** However misguided the legislature of Alabama may have been in enacting the statute challenged in this case, the statute is not constitutionally irrational under rational basis scrutiny because it is rationally related to the State's legitimate power to protect its view of public morality. "The Constitution presumes that ... improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley,* 440 U.S. 93, 97, 99 S.Ct. 939, 942–43, 59 L.Ed.2d 171 (1979). This Court does not invalidate bad or foolish policies, only unconstitutional ones; we may not "sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976).

Williams II, 240 F.3d at 952.

CONCLUSION

For the foregoing reasons, we reaffirm our holding in *Williams II* that the challenged statute is constitutional and we affirm the judgment of the district court.

AFFIRMED.

All Citations

478 F.3d 1316, 20 Fla. L. Weekly Fed. C 333

635 F.3d 1266
United States Court of Appeals,
Eleventh Circuit.

JACKSONVILLE PROPERTY RIGHTS ASSOCIATION, INC., a Florida non-profit corporation, Horton Enterprises, Inc., a Florida corporation d.b.a. The New Solid Gold, Hartsock Enterprises, Inc., a Florida corporation d.b.a. Doll House, Plaintiffs–Appellants Cross–Appellees,

v.

CITY OF JACKSONVILLE, FL, a Florida municipal corporation, Defendant–Appellee Cross–Appellant.

No. 09–15629.
|
March 25, 2011.

Synopsis

Background: Operators of adult entertainment establishments brought § 1983 action against city, alleging that the city's adult zoning scheme violated their right under the First Amendment to present nude dancing. The United States District Court for the Middle District of Florida, No. 05-01267-CV-J-34-JRK, Marcia M. Howard, J., granted in part and denied in part both parties' motions for summary judgment. Both parties appealed.

[Holding:] The Court of Appeals, Tjoflat, Circuit Judge, held that the parties' appeals were moot.

Appeals dismissed; vacated, and remanded with instructions to dismiss.

West Headnotes (5)

[1] Federal Courts
Available and effective relief

If events that occur subsequent to the filing of a lawsuit deprive the court of the ability to give the plaintiff meaningful relief, then the case is "moot" and must be dismissed.

2 Cases that cite this headnote

[2] Federal Courts
Voluntary cessation of challenged conduct

The voluntary cessation of challenged conduct will only moot a claim when there is no reasonable expectation that the accused litigant will resume the conduct after the lawsuit is dismissed.

3 Cases that cite this headnote

[3] Federal Courts
Weight and sufficiency

Generally, the party asserting mootness bears the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again.

Cases that cite this headnote

[4] Federal Courts
Presumptions and burden of proof

In asserting mootness, government actors enjoy a rebuttable presumption that the objectionable behavior will not recur.

1 Cases that cite this headnote

[5] Federal Courts
Particular cases

In § 1983 action brought by operators of adult entertainment establishments against city, alleging that the city's adult zoning scheme was an invalid time, manner, and place restriction under the First Amendment because it did not leave the operators with adequate alternative avenues for their protected activities, appeals from district court order granting in part and denying in part both parties' motions for summary judgment were moot, after the city deleted the provisions from the zoning scheme that the operators claimed foreclosed their ability

to relocate. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

Cases that cite this headnote

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Appeals from the United States District Court for the Middle District of Florida.

Before TJOFLAT, HILL and ALARCÓN, [*] Circuit Judges.

[*] Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Opinion

TJOFLAT, Circuit Judge:

This appeal stems from a city's attempt to control the location of nude dancing establishments operating within its borders. While both the city and the nude dancing establishments appeal the district court's order granting in part and denying in part both parties' motions for summary judgment, [1] the city has, during the pendency of this appeal, legislatively removed the two provisions underlying the dancing clubs' claims. Based on this subsequent action, we cannot entertain the merits of the parties' arguments.

[1] The district court's order was a final judgment, and we have jurisdiction under 28 U.S.C. § 1291.

I.

A.

Horton Enterprises, Inc. and Hartstock Enterprises, Inc. (collectively, the "Plaintiffs") [2] operate adult entertainment establishments in Jacksonville, Florida. Horton has operated its club, "The New Solid Gold," since 1982, and Hartstock has operated "The Doll House" since 1986. These two establishments constitute two of Jacksonville's ***1268** three fully nude dancing establishments.

[2] Jacksonville Property Rights Association (the "Association") is the third plaintiff in this case. This group is an association of businesses providing live entertainment in Jacksonville with one or more members who want to establish adult establishments in Jacksonville. All references to the Plaintiffs apply to the Association as well.

To lawfully operate in the City of Jacksonville (the "City"), a business's physical location must satisfy three separate zoning criteria: (1) geographic zoning district; (2) land-use designation (i.e., commercial or heavy industrial); and, for certain establishments, such as adult businesses, (3) minimum distances—termed "buffer" restrictions—from other locations, such as churches and schools.

The City creates these zoning criteria in two ways. First, the City's Comprehensive Plan (the "Plan") acts as the zoning "constitution" [3]; the Plan is an overarching planning document that is not easily changed and with which all subsequent zoning and land-use legislation must comply. [4] Second, the City passes zoning ordinances that amend its municipal code; these ordinances and the municipal code enforce—and must be consistent with—relevant portions of the Plan.

[3] *See Citrus Cnty. v. Halls River Dev., Inc.*, 8 So.3d 413, 420–21 (Fla. 5th Dist.Ct.App.2009).

[4] The general procedures for amending a comprehensive plan are found in Fla. Stat. § 163.3184. Larger cities, such as Jacksonville, may also amend their comprehensive plans under a pilot program providing limited State oversight. *See id.* § 163.32465; *see also infra,* note 18. As described in part I.C, *infra,* the City used these pilot procedures to amend the Plan in 2010.

Prior to 2005, the Plan permitted adult establishments like those operated by the Plaintiffs to operate in the Commercial/Community General–2 zoning district

("CCG–2") and, within CCG–2 districts, only on plots designated for Heavy Industrial land use ("HI"). Adult establishments must also comply with various buffer restrictions established by the City and the State of Florida.[5] The Plaintiffs' locations did not comply with some of these requirements, but were allowed to operate as lawful non-conforming uses because their use predated the restrictions.

5 The specific buffer restrictions for adult entertainment business can be found in the Jacksonville Municipal Code § 656.1103(a), which requires adult businesses to be at least (1) 1,000 feet from another adult entertainment business; (2) 500 feet from the boundary of a residential district; (3) 1,000 feet from a school or a church; and (4) 500 feet from any business licensed to serve liquor. Florida state law also prohibits an adult business from locating within 2,500 feet of an elementary school, a middle school, or a secondary school unless given prior approval by the relevant county or city government. Fla. Stat. § 847.0134(1).

The City's adult zoning scheme[6]—as written—also subjected adult entertainment businesses to another regulatory wrinkle. A section of the City's municipal code—not the Plan—required adult businesses to obtain discretionary exceptions from the local sheriff before commencing operations. Jacksonville Municipal Code § 656.725(a)-(j). Thus, as written, the City's adult zoning scheme did not permit adult businesses to relocate or commence operations in any area—even the CCG–2 district zoned for HI—as of right.[7] Similar discretionary exceptions imposed by the City, though not the exceptions in § 656.725(a)-(j), were declared unconstitutional by this court in *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358 (11th Cir.1999), where we held that adult businesses must be permitted some areas ***1269** in which they could operate as of right. *Id.* at 1361–63.[8] The City has never enforced the § 656.725(a)-(j) exceptions, however. It has not received a new business permit for an adult entertainment establishment in over a decade and therefore has had no occasion to enforce the provisions.

6 We refer to the City's various land use regulations for adult businesses as the "adult zoning scheme."

7 In the zoning context, "as of right" means that, provided the land owner meets all other criteria, the local government administering the zoning scheme must permit a land owner to operate without seeking any discretionary exceptions.

8 The City removed the offending exceptions at issue in *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358 (11th Cir.1999). A 2007 ordinance amended the City's municipal code to classify "adult entertainment" as a "permitted" use in the CCG–2 zoning district.

In 2005, the City altered its adult zoning scheme in two ways. First, it amended the Plan to remove references to adult entertainment in the description of HI land use. Prior to 2005, the description of HI included the following language: "[a]dult entertainment facilities are allowed by right." The 2005 amendments deleted this passage and placed a similar reference in the description of Community/General Commercial land use ("C/GC"): "[a]dult entertainment facilities are allowed by right only in Zoning District CCG–2." The implication of this change was that adult entertainment would be permitted in all CCG–2 districts, not just those districts with HI land use designations.

However, the City left in place a statement under the broader description of "commercial" uses, which preceded the more specific description of C/GC: "Adult entertainment facilities are allowed by right in the heavy industrial land use category, but not in commercial." The reference to "commercial" included the C/GC land use designation. Until February 2009, the City interpreted the Plan as permitting adult entertainment only in CCG–2 zoned for HI. J. Final Pre–Trial Statement 14.

Second, the City passed Ordinance 2005–743–E (the "Ordinance"), amending Jacksonville's Municipal Code. Pertinent to this appeal, the Ordinance included a mandatory amortization provision requiring any adult business that did not conform to the City's adult zoning scheme—i.e., the Plaintiffs—to cease operation at that non-conforming location by November 10, 2010. Jacksonville Municipal Code § 656.725(k). If the Plaintiffs wished to continue operating, they would have to move to a new location in compliance with the adult zoning scheme. Neither of these changes eliminated the discretionary exceptions found in § 656.725(a)-(j), and those provisions remained on the books.

B.

The Plaintiffs sued the City in the United States District Court for the Middle District of Florida on December 14, 2005.[9] After over two years of settlement negotiations, the Plaintiffs filed an amended complaint on May 28, 2008. The amended complaint sought relief under 42 U.S.C. § 1983, alleging that the City's adult zoning scheme violated their right under the First Amendment to present nude dancing.[10]

9 The initial complaint challenged a number of other provisions regulating adult businesses which are not at issue in this appeal. That complaint also included two additional plaintiffs: E.M.R.O Corp., a Florida corporation also operating a fully nude dancing establishment; and Simone Kelcher, an individual who works as a nude dancer regulated under Jacksonville's adult business laws. Neither party appears in the amended complaint and they presumably have abandoned their claims.

10 *See Barnes v. Glen Theatre Inc.,* 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."). Here, the Plaintiffs only alleged that the City's adult zoning scheme violated the First Amendment. Thus, anytime we refer to something as "unconstitutional," we are referring to the First Amendment and no other provision of the United States Constitution.

***1270** The Plaintiffs alleged that the City's adult zoning scheme was an invalid time, manner and place restriction because it did not leave the Plaintiffs with adequate alternative avenues for their protected activities as required by *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 50, 53–54, 106 S.Ct. 925, 930, 932, 89 L.Ed.2d 29 (1986).[11] They argued that, although the amortization provision would force them to move, the City's adult zoning scheme did not provide any locations where they could relocate as of right.

11 Under *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), content-neutral laws that infringe on speech are acceptable as "time, manner, and place" regulations if "they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47, 106 S.Ct. at 928.

The Plaintiffs pointed to two provisions establishing the violation. First, § 656.725(a)-(j)'s requirements that adult businesses receive discretionary zoning exceptions rendered any available locations effectively unavailable for the purpose of counting alternative locations. *See Lady J,* 176 F.3d at 1361–63. Second, the Plaintiffs argued that the combined effect of the Plan and various buffer restrictions completely foreclosed all alternative locations. For this second theory, the Plaintiffs pointed to the Plan's requirements that adult businesses locate in CCG–2 districts zoned for HI land use. According to the Plaintiffs, none of the locations satisfying these criteria also complied with the various buffer restrictions.[12] Therefore, the City's adult zoning scheme effectively zoned adult businesses out of existence.

12 The Plaintiffs also alleged that the City's zoning scheme—particularly the mandatory amortization provision—was unconstitutional for three other reasons. First, the City's "constant changes" to its adult business regulations "effectively denie[d] anyone considering the establishment or relocation of an adult entertainment business of the 'reasonable opportunity' to do so." Am. Compl. ¶ 40. Second, "the primary purpose of amortization of the plaintiffs' businesses is content-based, and such changes [to the City's zoning scheme] and amortizations are not driven by predominantly content-neutral reasons." *Id.* ¶ 45. Third, the amortization provision impermissibly discriminated against the Plaintiffs' businesses because the City imposed the mandatory amortization only on adult entertainment businesses. *Id.* ¶ 47. These three arguments were not raised on appeal.

The allegations described above and in the text constituted only Count One of the two counts brought in the amended complaint. Count Two was brought by the Association, which alleged that one or more of its members "wish[ed] to acquire and establish a new site in Jacksonville for operation of an adult entertainment establishment" but, because of the violations described above, were "both chilled and directly prevented from doing so." *Id.* ¶ 60. Because this argument requires the same analysis as does the Plaintiffs' arguments detailed in the text, we will not independently discuss Count Two.

To remedy these violations, the Plaintiffs requested a declaratory judgment that the City's adult zoning scheme—including the mandatory amortization provision—was unconstitutional. They also sought a permanent

injunction barring the City from either enforcing the amortization provision against the Plaintiffs at their current locations or preventing them from moving to new locations. [13]

13 The Plaintiffs' request for injunctive relief against prohibitions on "new location[s]" for adult entertainment businesses was directed primarily at the Association's Count Two claim for relief on behalf of one or more of its members. *Id.* Prayer for Relief ¶ 2. The Plaintiffs also requested attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

***1271** The City's amended answer asserted that the City's adult zoning scheme provided the Plaintiffs with available sites to which they could relocate. First, the City denied that the exception requirements in § 656.725(a)-(j) were enforceable or had been enforced. Am. Answer ¶ 30. It claimed that, because the Plan permitted adult businesses "as of right" in CCG–2 districts, the exception requirements were invalid as to locations within CCG–2 districts. Second, the City admitted that the adult zoning scheme confined adult businesses to CCG–2 districts zoned for HI, but it denied that these requirements left no permissible locations for adult businesses. *Id.* ¶ 53(b)(3)-(8).

In January 2009, both sides filed cross-motions for summary judgment under Federal Rule of Civil Procedure 56. The City's motion maintained that the adult zoning scheme—locating adult businesses within CCG–2 districts zoned for HI—permitted 372 alternative sites, which provided sufficient alternative locations under *Renton*'s time, manner and place requirements.

However, on February 17, 2009, the City completely changed its theory of the case. In its response to the Plaintiffs' motion for summary judgment, the City asserted for the first time that the Plan allowed adult businesses to locate in CCG–2 districts zoned for C/GC and not in areas zoned for HI. This new interpretation produced ninety-one available locations to which the Plaintiffs could relocate; again, the City argued that these sites satisfied the time, manner, and place test.

Noting the confused issues, the district court ordered the parties to re-file their motions for summary judgment, and each again filed cross-motions for summary judgment. In this round of briefing, the parties agreed that the only issue for the district court was whether the City's adult zoning scheme permitted an adequate number of alternative sites for the Plaintiffs' businesses.

The City argued that the adult zoning scheme provided sufficient alternative locations for adult businesses. It pointed to the Plan's C/GC land use designation, which states that adult uses are permitted as of right in the CCG–2 zoning district. Emphasizing this point, the City noted that, within the Plan's section describing HI land use, adult businesses are nowhere mentioned; the 2005 amendment eliminated the requirement that adult businesses locate in HI zones. The remaining reference to HI under the general description of "commercial" uses was a "clerical oversight" and the City asked the court to treat it as such. To prove this point, the City pointed to legislative history demonstrating that the 2005 amendments to the Plan were intended to remove the HI requirement for adult businesses. Regarding the exception requirement, the City argued that the Plan explicitly permitted adult establishments in CCG–2 districts as of right; the provisions requiring exceptions, § 656.725(a)-(j), conflicted with the Plan and were thus unenforceable.

The Plaintiffs maintained that the Plan required adult businesses to locate in CCG–2 districts zoned for HI and that no such locations also satisfied the various buffer requirements. [14] Reading the Plan as the City did, the Plaintiffs argued, violated Florida's norms of statutory construction because it would "render a nullity" the Plan's statement that "[a]dult entertainment facilities are allowed by ***1272** right in the heavy industrial land use category, but not in commercial." Regarding the exceptions, the Plaintiffs maintained that their existence rendered all otherwise permissible locations unavailable for the purpose of time, manner, and place regulations.

14 The City stipulated that there were no sites within the CCG–2 district zoned for HI that also met the buffer restrictions.

The Plaintiffs did not ask the court to strike down the obstacles prohibiting their relocation. They instead argued that, because the adult zoning scheme provided no available locations, the amortization provision was unconstitutional. They took a similar tact when discussing the zoning exceptions. The Plaintiffs argued that the zoning exception requirements created no available locations, rendering the amortization provision unconstitutional. It was only in the alternative that the

Plaintiffs asked the district court to declare the exceptions unconstitutional under *Lady J.*

On September 30, 2009, the district court granted in part and denied in part each side's motion. The court accepted the parties' main stipulations: (1) the City's adult zoning scheme should be reviewed as a time, manner, and place restriction under *Renton*; and (2) the only issue under *Renton* was whether the adult zoning scheme—the conflicting sentences within the Plan and § 656.725(a)-(j)'s exception requirements—actually permitted the Plaintiffs to relocate to any of the ninety-one sites the City claimed were available.

Regarding the Plan, the district court agreed with the City and found that the Plan did not require adult businesses to locate in HI zones and that the Plan permitted adult businesses to operate as of right in CCG–2 districts zoned for C/CG. To reach this conclusion, the court first found that the Plan was ambiguous on its face. The Plan's statement that adult businesses must locate in HI zones conflicted with its subsequent statement that adult businesses may locate as of right in CCG–2 districts. The two statements were, in the court's view, irreconcilable.

To solve this ambiguity, the court turned to the legislative history of the 2005 amendments to the Plan. According to the district court, the 2005 amendments were designed to change the land use designation from HI to C/GC. The prior version of the Plan mentioned adult entertainment businesses in the section dealing with HI land usage; the 2005 revisions deleted those provisions and inserted the relevant text under the C/GC section. The remaining reference to HI was, the court agreed, a scrivener's error. That language arose in a general description of commercial land uses and, in the court's view, the most likely explanation for this error was that the City Council simply overlooked this reference while it focused narrowly on the relevant land use categories.

Regarding the exceptions, the district court found the provisions invalid under two alternative theories. First, the provisions requiring an exception conflicted with the Plan's pronouncement that adult businesses were permitted as of right in CCG–2 districts. Because the Plan is akin to a constitution, the conflicting ordinance provisions, § 656.725(a)-(j), were invalid. Second, the court determined that, if the Plan did not invalidate the exception requirements, those provisions were unconstitutional under *Lady J.* To remedy those failings, the court found the exception provisions severable from the rest of the City's zoning scheme.

With these rulings in place, the district court found that the amortization requirement was constitutional. The Plaintiffs would be required to move to one of the ninety-one available locations in a CCG–2 district zoned for C/GC land use. None of those ninety-one sites would be subject to the exception requirements. The district ***1273** court entered judgment to that effect on October 5, 2009, declaring the exception requirements unconstitutional under the First Amendment and upholding the remainder of the City's adult zoning scheme.

Both parties appealed the judgment. The Plaintiffs appealed the district court's ruling upholding the mandatory amortization provision. They argued that the district court violated Florida's norms of statutory construction by essentially deleting the Plan's references to HI. In the alternative, the Plaintiffs claimed that the district court did not have jurisdiction to render an "authoritative" reading of the Plan, and therefore could not "rewrite" the Plan in the manner it did; the court's only choice was to declare the entire scheme unconstitutional and permit the Plaintiffs to remain at their locations. The City also appealed the district court's ruling declaring the exceptions unconstitutional and enjoining their enforcement.[15] To preserve the status quo, the district court enjoined enforcement of the amortization provision until the resolution of this appeal.

15 During the briefing to this court, the Plaintiffs moved for leave to file a surreply to the City's reply brief in its cross-appeal, or in the alternative to strike the City's reply brief. This motion was carried with the case. Having considered the arguments, the Plaintiffs' motion is denied.

C.

While this appeal remained pending, the City passed legislation consistent with their legal position. First, the City amended § 656.725(a)-(j) to remove all references to discretionary exceptions; this amendment became law on November 30, 2009.[16]

16 The amendment was passed as Ordinance No. 2009–835–E. It passed the Jacksonville City Council on November 24, 2009, and was approved by the mayor on November 30, 2009.

Second, the City passed an amendment to the Plan on February 26, 2010, deleting the remaining suggestion that adult businesses must locate in HI zones.[17] This enactment did not automatically take effect, however.[18] The Plaintiffs challenged the amendments in a state administrative hearing, alleging that the amendments failed to comply with various procedural and substantive requirements. On January 11, 2011, the administrative law judge found no such errors and ruled that the amendment to the Plan was in compliance ***1274** with Florida law. The amendments took effect on February 21, 2011 when the Florida Department of Community Affairs issued its order accepting the administrative law judge's recommendations.[19]

17 The amendment was passed as Ordinance 2010–35–E. It passed the City Council on February 23, 2010, and was approved by the mayor on February 26, 2010.

18 As stated above, *supra,* note 4, the City amended the Plan pursuant to Florida's pilot program for larger cities, Fla. Stat. § 163.32465. This pilot program applies to all amendments to these cities' comprehensive plans unless the amendments concern one of several enumerated topics. *See id.* § 163.32465(3)(b)-(e). Under the pilot program, a city must first hold a public hearing on the amendment and then pass the proposed amendment through its legislative body. After passage, the city must transmit the proposed changes to the relevant State agency for comment, which the agency must provide to the city within thirty days. *Id.* § 163.32465(4)(a)-(b). After holding a second hearing and again receiving approval from the city's legislative body, *see id.* § 163.32465(5)(a), the amendment will become final in thirty-one days, *id.* § 163.32465(6)(g), unless an "affected person" or a State planning agency requests a formal hearing before an administrative law judge to determine whether the amendments comply with relevant state laws, *id.* § 163.32465(6)(a)-(b). If the judge approves the plan, then the State planning agency has thirty days to: (1) approve the plan, *id.* § 163.32465(6)(f)(2); or (2) refer the amendment to a separate State agency if the State planning agency finds the amendment not in compliance, *id.* § 163.32465(6)(f)(1).

19 Although the Plaintiffs have appealed this decision to Florida's First District Court of Appeal, the Plaintiffs acknowledge that the Department of Community Affairs's approval means that the City's amendments to the Plan are now in effect. Their March 2, 2011 letter to this court implies, however, that this approval might not affect our jurisdiction: "it will not be clear until after that appeal is resolved whether [the amendment] will *remain* in effect." Whatever the outcome of the appeal, the Plaintiffs have acknowledged that the City completed its effort to amend the Plan to remove the conflicting passages.

II.

A.

[1] This subsequent legislation impacts this court's jurisdiction. Under Article III of the Constitution, federal courts may only hear live "cases" and "controversies." U.S. Const. art. III, § 2. " 'If events that occur subsequent to the filing of a lawsuit ... deprive the court of the ability to give the plaintiff ... meaningful relief, then the case is moot and must be dismissed.' " *Sheely v. MRI Radiology Network, P.A.,* 505 F.3d 1173, 1183 (11th Cir.2007) (quoting *Troiano v. Supervisor of Elections,* 382 F.3d 1276, 1281–82 (11th Cir.2004)) (omissions in original).

[2] "The doctrine of voluntary cessation provides an important exception to the general rule" of mootness. *Troiano,* 382 F.3d at 1282. "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' " *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 708, 145 L.Ed.2d 610 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289, 102 S.Ct. 1070, 1074, 71 L.Ed.2d 152 (1982)). "Otherwise, a party could moot a challenge to a practice simply by changing the practice during the course of the lawsuit, and then reinstate the practice as soon as the litigation was brought to a close." *Jews for Jesus, Inc. v. Hillsborough Cnty. Aviation Auth.,* 162 F.3d 627, 629 (11th Cir.1998). Accordingly, the voluntary cessation of challenged conduct will only moot a claim when there is no "reasonable expectation" that the accused litigant will resume the conduct after the lawsuit is dismissed. *Id.*

[3] **[4]** Generally, the "party asserting mootness" bears the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Laidlaw,* 528 U.S. at 189, 120 S.Ct. at 708 (internal citations and alteration omitted). We also recognize, however, that "government actor[s enjoy] a rebuttable presumption that the objectionable behavior will *not* recur." *Troiano,* 382 F.3d at 1283 (emphasis in original); *see also Harrell v. The Fla. Bar,* 608 F.3d 1241, 1266 (11th Cir.2010) ("[W]e have applied a 'rebuttable presumption' in favor of governmental actors ...."); *Sheely,* 505 F.3d at 1184 ("[G]overnment actors receive the benefit of a rebuttable presumption that the offending behavior will not recur."). Hence, "the Supreme Court has held almost uniformly that voluntary cessation [by a government defendant] moots the claim." *Beta Upsilon Chi Upsilon Chapter v. Machen,* 586 F.3d 908, 917 (11th Cir.2009) (citations omitted) (collecting cases). And "this Court has consistently held that a challenge to government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy ***1275** will be reinstated if the suit is terminated." *Troiano,* 382 F.3d at 1285.

[5] Here, the City has removed § 656.725's exceptions and deleted from the Plan the provisions the Plaintiffs claim foreclose their ability to relocate. Therefore, the district court's order enjoining enforcement of the exceptions currently enjoins nothing and the Plaintiffs appeal the district court's interpretation of a sentence in the Plan that no longer exists.

After reviewing the record, we are satisfied that the City has not passed this legislation to manipulate our jurisdiction. Regarding the § 656.725(a)-(j) exceptions, the City maintained throughout the litigation that these provisions were inapplicable, and the district court based its ruling in part on the conflict between these provisions and the Plan's insistence that adult businesses belonged in CCG–2 districts as of right. Combined with the fact that this court has already declared similar exceptions unconstitutional, *see Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358, 1361–63 (11th Cir.1999), we see nothing in the record suggesting that the City will re-enact the discretionary exceptions.

We are similarly convinced that the City will not re-insert the HI reference into the Plan. First, this amendment is consistent with the City's—albeit brand new—position in the district court. The City argued that the Plan's reference to HI should have been deleted in the 2005 amendments and remained merely as a scrivener's error; deleting the provision legislatively treats it as such. Second, amending the Plan is a time-consuming endeavor that requires approval of a State agency—in this case, the Florida Department for Community Affairs. The City is unlikely to jump through those bureaucratic hoops again in order to re-insert a provision—the HI reference—that it claims remained on the books in error. These appeals are therefore moot and the parties' appeals must be dismissed. *See Thomas v. Bryant,* 614 F.3d 1288, 1294 (11th Cir.2010) ("Where a case becomes moot after the district court enters judgment but before the appellate court has issued a decision, the appellate court must dismiss the appeal, vacate the district court's judgment, and remand with instructions to dismiss as moot." (citation and internal quotations omitted)). [20]

20 Pending in the district court are the Plaintiffs' motions for attorneys' fees under 42 U.S.C. § 1988. We note that our decision to dismiss each parties' appeal, vacate the judgment, and instruct the district court to dismiss the case will not deprive the Plaintiffs of the opportunity to seek those § 1988 attorneys' fees. *See Thomas v. Bryant,* 614 F.3d 1288, 1294 (11th Cir.2010) (" '[W]hen plaintiffs clearly succeeded in obtaining the relief sought before the district court and an intervening event rendered the case moot on appeal, plaintiffs are still "prevailing parties" for the purposes of attorney's fees for the district court litigation.' " (quoting *Diffenderfer v. Gomez–Colon,* 587 F.3d 445, 454 (1st Cir.2009))); *Kimbrough v. Bowman Transp., Inc.,* 929 F.2d 599, 599 (11th Cir.1991) (vacating the judgment and instructing the district court to dismiss the case following the parties' settlement, but remanding to determine attorneys' fees).

B.

Our decision above does not address fully the Plaintiffs' concerns. They argue that they are entitled to a declaration that, from November 2005 to February 17, 2009, their businesses constituted lawful conforming uses under the City's zoning laws. This time range refers to the period between the date the Ordinance took effect, thereby imposing the mandatory amortization provision, and the date that City interpreted the Plan to allow adult businesses in CCG–2 districts zoned for C/GC uses. The

Plaintiffs' argument is not intuitive ***1276** and requires explanation before it can be disposed of.

The Plaintiffs' argument proceeds as follows. First, the City's position until February 2009 was that the Plaintiffs must relocate to CCG–2 districts zoned for HI. Second, the parties agree that no such locations existed that also complied with various buffer restrictions. Third, these conditions made the entire scheme unconstitutional because the City was forcing the Plaintiffs to cease their constitutionally protected conduct at their current locations while offering no alternate means of communication. *See City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 50, 106 S.Ct. 925, 930, 89 L.Ed.2d 29 (1986) (holding that governments may regulate the location of adult entertainment, which is protected under the First Amendment, provided that the zoning ordinances "serve a substantial government interest and allow[ ] for reasonable alternative avenues of communication"). Fourth, because the adult zoning scheme was unconstitutional during those three and a half years, the Plaintiffs' property could not be non-conforming because, as the Plaintiffs say, "non-conformity can [not] be created by non-compliance with an unconstitutional law." Appellant's Opening Br. 43. Finally, this declaration could be useful to the Plaintiffs because, as they claim, "it is not entirely clear that the amortization ordinance would apply (or that the City would even attempt to enforce it) if the City were told that the plaintiffs' uses did not become non-conforming until long after enactment of the amortization ordinance." *Id.* at 43–44. In short, the declaration might prevent the City from forcing the Plaintiffs to move.

While this argument is conceptually interesting, two defects prohibit us from deciding this issue. First, it is not clear that the Plaintiffs' argument presents us with a live case or controversy. The Plaintiffs argue that a declaration *might* affect their rights because the mandatory amortization provision *might* not apply, or the City *might* choose not to enforce the amortization provision, against uses that became non-conforming in 2009. In short, the Plaintiffs ask this court to issue a declaration on an issue that might never impact their substantive rights. They therefore ask this court either to issue an impermissible advisory opinion, *see Massachusetts v. EPA,* 549 U.S. 497, 516, 127 S.Ct. 1438, 1452, 167 L.Ed.2d 248 (2007) (citing *Hayburn's Case,* 2 U.S. (2 Dall.) 408, 1. L.Ed. 436 (1792)), or to decide a case that is not yet ripe for decision, *see Mulhall v. UNITED HERE Local 355,* 618 F.3d 1279, 1291 (11th Cir.2010) ("The function of the ripeness doctrine is to 'protect[ ] federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes.' " (quoting *Harrell,* 608 F.3d at 1257–58) (alteration in original)). Neither doctrine permits us to opine on the merits of the Plaintiffs' argument.

Alternatively, the Plaintiffs waived this argument because they never raised this issue in the district court. Their motion for summary judgment reads:

> Because the City's adult zoning scheme is, in its entirety, a facially unconstitutional prior restraint on expression, the businesses of plaintiffs Horton and Hartsock cannot properly be deemed non-conforming uses, as they are in conformance with all constitutional zoning restrictions. Consequently, these plaintiffs seek a declaration that their uses are fully conforming uses and are not subject to the restrictions and amortization provisions otherwise applicable to non-conforming uses.

Pls.' New Mot. for Summ. J. 13–14. Although this passage refers to a declaratory ***1277** judgment, it did not present the more esoteric argument pressed on appeal. Notwithstanding their claims to the contrary, *see* Appellants' Reply/Cross–Appellees' Br. 17 n.9, the Plaintiffs were aware that they might require this peculiar form of relief. The City changed its interpretation to the Plan during the first round of summary judgment briefing; the Plaintiffs therefore knew that the district court was being asked to, in the Plaintiffs' words, "re-write" the Plan. During the revised summary judgment briefing, the Plaintiffs could have requested this more specific relief.

III.

For the foregoing reasons, the parties' appeals are DISMISSED, the judgment is VACATED, and the case is REMANDED to the district court with instructions to dismiss this action.

SO ORDERED.

All Citations

635 F.3d 1266, 22 Fla. L. Weekly Fed. C 1915

480 F.3d 336
United States Court of Appeals,
Fifth Circuit.

H AND A LAND CORP.; et al., Plaintiffs,
Reliable Consultants, Inc., doing business as Dreamer's, Intervenor Plaintiff-Appellee,
v.
CITY OF KENNEDALE, TEXAS, Defendant-Intervenor Defendant-Appellant.

Nos. 05-11474, 06-10304.
|
Feb. 22, 2007.

Synopsis

Background: Sexually-oriented store brought action against city, challenging ordinance regulating sexually-oriented businesses. The United States District Court for the Northern District of Texas, Terry R. Means, J., granted store's motion for permanent injunction, and city appealed.

[Holding:] The Court of Appeals, Benavides, Circuit Judge, held that evidence upon which city relied for ordinance was not shoddy, and thus, it was evidence city could have reasonably believed was relevant.

Reversed.

West Headnotes (3)

[1] Constitutional Law
Zoning and Land Use in General
Constitutional Law
Secondary Effects

Zoning regulations restricting the location of adult entertainment businesses are considered time, place, and manner restrictions if they do not ban adult-entertainment businesses throughout the whole of a jurisdiction and are designed to combat the undesirable secondary effects of such businesses rather than to restrict the content of their speech per se. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[2] Constitutional Law
Time, Place, or Manner Restrictions

Time, place, and manner restrictions on speech violate the First Amendment unless they are content-neutral, are designed to serve a substantial governmental interest, do not unreasonably limit alternative avenues of communication, and are narrowly tailored. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[3] Constitutional Law
Geographic Restrictions in General
Public Amusement and Entertainment
Sexually Oriented Entertainment

Evidence upon which city relied for ordinance regulating sexually-oriented businesses was not shoddy, and thus, it was evidence city could have reasonably believed was relevant, for purposes of determination of whether ordinance was narrowly tailored, as required to avoid violation of right to free speech; although seven of the nine studies of harmful secondary effects of sexually-oriented businesses upon which city relied failed to differentiate between on-site and off-site businesses, two studies included surveys of real estate appraisers that focused strictly on adult bookstores, and overwhelming majority of survey respondents in both studies predicted that presence of adult bookstore would negatively affect real estate value in surrounding area. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

Attorneys and Law Firms

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Appeals from the United States District Court for the Northern District of Texas.

Before SMITH, BENAVIDES and PRADO, Circuit Judges.

Opinion

BENAVIDES, Circuit Judge:

Kennedale, Texas, appeals the district court's grant of summary judgment. We reverse and remand.

I. *FACTUAL BACKGROUND AND PROCEDURAL HISTORY*

This appeal raises a single question: Does the evidence offered by the city of Kennedale sufficiently support its ordinance regulating sexually oriented businesses?

In 1999, Kennedale annexed land that included multiple sexually oriented businesses, thereby subjecting those businesses to the city's ordinances. The ordinances prohibit the operation of sexually oriented businesses within 800 feet of churches, schools, residences, day care centers, parks, and other sexually oriented businesses, as well as within specified overlay districts. Additionally, the ordinances require sexually oriented businesses to obtain a license to operate. In justifying its ordinances, Kennedale relied on (1) studies from nine other cities, (2) an opinion survey of land use appraisers conducted by the city's attorney, and (3) citizen commentary from public meetings, all regarding the harmful secondary effects of sexually oriented businesses on surrounding land uses.

***338** Following annexation, the ordinances allowed affected businesses three years to recoup their investments and relocate. Following criticism that the regulations failed to leave a sufficient number of alternative locations for already existing sexually oriented businesses, the city amended the ordinances to identify specific parcels of land upon which sexually oriented businesses may locate.

Reliable Consultants, Inc., d/b/a "Dreamers" (hereinafter "Reliable") is an off-site store, meaning that it sells video tapes, DVD's, magazines, and other print materials, but that none of the materials can be viewed or consumed on the premises, and the store offers no live entertainment, viewing booths, or theaters. [1]

[1] Originally, there were five affected sexually oriented businesses/plaintiffs, but all but one settled during the course of litigation, leaving Reliable as the lone plaintiff-appellee.

After finding the ordinances were content neutral, the district court relied on *Encore Videos, Inc. v. City of San Antonio,* 330 F.3d 288 (5th Cir.2003), to find that the City's evidence of secondary effects failed to show that the ordinances were narrowly tailored to further a substantial government interest. The court declined to consider additional evidence Kennedale offered, and granted Reliable's motion for a permanent injunction. Kennedale appealed.

II. *STANDARD OF REVIEW*

We review a district court's summary judgment ruling and other legal issues *de novo. N.W. Enters. Inc. v. City of Houston,* 352 F.3d 162, 172 (5th Cir.2003). We review a district court's factual findings for clear error. *Kona Tech. Corp. v. S. Pac. Transp. Co.,* 225 F.3d 595, 601 (5th Cir.2000). The Supreme Court's admonition that cities not justify ordinances by relying on "shoddy data or reasoning," *City of Los Angeles v. Alameda Books,* 535 U.S. 425, 438, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality opinion), requires factual findings, but turns on the legal interpretation of what the Supreme Court meant by "shoddy." Therefore, we review a district court's findings as to the existence of a city's evidence for clear error, but we review *de novo* whether that evidence falls within the Supreme Court's admonition.

III. *DISCUSSION*

[1] **[2]** "Zoning regulations restricting the location of adult entertainment businesses are considered time, place, and manner restrictions ... if they do not ban [adult-entertainment] businesses throughout the whole of a jurisdiction and are 'designed to combat the undesirable secondary effects of such businesses' rather than to restrict the content of their speech per se." *Encore Videos,* 330 F.3d at 291 (quoting *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)) (citing *Lakeland Lounge v. Jackson,* 973 F.2d

1255, 1257-58 (5th Cir.1992)). Time, place, and manner restrictions on speech violate the First Amendment unless they are content-neutral, are designed to serve a substantial governmental interest, do not unreasonably limit alternative avenues of communication, and are narrowly tailored. *See Encore Videos,* 330 F.3d at 291-92.

Kennedale's ordinances meet the narrow tailoring standard if they "target [ ] and eliminate[ ] no more than the exact source of the evil [they] seek [ ] to remedy." *Encore Videos,* 330 F.3d at 293; *Frisby v. Schultz,* 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Thus, an ordinance meant to deter property depreciation may only regulate businesses for which a connection to property depreciation can be demonstrated.

***339** To show that an ordinance advances its goals, a city "may rely on any evidence that is 'reasonably believed to be relevant.' " *Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728. However, "[t]his is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *Id.* at 438, 122 S.Ct. 1728. [2]

2 Though this was a plurality opinion, a review of the concurrences and dissent demonstrates that the Court would unanimously support this admonishment.

On-site businesses (i.e., adult theaters or strip clubs) pose a greater threat of secondary effects than off-site sexually oriented businesses (i.e., adult bookstores). [3] Therefore, a city that enforces an ordinance meant to prevent harmful secondary effects associated with the operation of an off-site business must rely on evidence showing that off-site businesses, rather than the broader category of sexually oriented businesses that includes on-site businesses, cause harmful secondary effects. *Encore Videos,* 330 F.3d at 295 (requiring city to "provide at least some substantial evidence of secondary effects specific to adult businesses that sell books or videos solely for off-site entertainment" to meet narrow tailoring requirement).

3 *See Encore Videos,* 330 F.3d at 295 ("Off-site businesses differ from on-site ones, because it is only reasonable to assume that the former are less likely to create harmful secondary effects. If consumers of pornography cannot view the materials at the sexually oriented establishment, they are less likely to linger in the area and engage in public alcohol consumption and other undesirable activities.")

In *Encore Videos,* we invalidated San Antonio's ordinance regulating sexually oriented businesses because the city failed to present adequate evidence showing a connection between off-site businesses and harmful secondary effects. San Antonio's evidence consisted of three studies conducted in other cities showing a connection between sexually oriented businesses, without isolating off-site businesses and secondary effects. *Encore Videos,* 330 F.3d at 294-95. Those studies did not provide any information exclusive to off-site businesses, so a substantial portion of the ordinance's burden on speech did not serve to advance its goals, and it failed the narrow tailoring prong. *Id.* at 295.

[3] This case differs from *Encore Videos* because Kennedale, unlike San Antonio, offers evidence that purports to show a connection between purely off-site businesses, or "bookstores," and harmful secondary effects. To determine whether the ordinance at issue is narrowly tailored, we must determine whether Kennedale could reasonably believe that the evidence is relevant to show the requisite connection to harmful secondary effects. *Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728. In other words, we ask whether that evidence "fairly support[s] the [city's] rationale for its ordinance." *Id.* Applying our holding from *Encore Videos,* Kennedale cannot reasonably believe its evidence is relevant unless it sufficiently segregates data attributable to off-site establishments from the data attributable to on-site establishments. *Encore Videos,* 330 F.3d at 294-95.

Kennedale's evidence consisted of studies from nine cities, as well as an opinion survey of land use appraisers conducted by the city's attorney, and citizen commentary from public meetings. Seven of Kennedale's nine studies from other cities fail to differentiate between on-site and off-site businesses. The 1984 Indianapolis and 1986 Oklahoma City studies, however, included surveys of real estate appraisers that focused strictly on "adult bookstores." The overwhelming majority of survey respondents ***340** in both studies predicted that the presence of an adult bookstore would negatively affect real estate value in the surrounding area. The Indianapolis survey, conducted by the City of Indianapolis in conjunction with Indiana University School of Business, Division of Research, polled 20% of the national membership of the American Institute of Real Estate

Appraisers.[4] Eighty percent of the respondents predicted that an adult bookstore would negatively impact residential property values, and seventy-two percent believed commercial property value would also be negatively effected. The Oklahoma City study, which surveyed one hundred Oklahoma City real estate appraisers, produced similar results: Seventy-four percent predicted a negative impact on real estate value in the surrounding area.

4 In the Indianapolis study, 1527 questionnaires were mailed, and 507 (33%) were returned.

Appellee Reliable argues that the term "bookstore," used in both surveys, is a term of art and does not sufficiently specify off-site premises. They argue instead that adult bookstores often include peep shows, arcades, and other forms of on-site entertainment, rendering them on-site establishments. However, the Supreme Court has previously used the term "bookstore" as distinguishable from "adult video arcades." *Alameda Books,* 535 U.S. at 442, 122 S.Ct. 1728 (discussing city's prohibition on "combination of adult bookstores and arcades"). This was a survey sent to and completed by real estate appraisers, and so what matters is how those appraisers would have understood the survey's reference to an adult bookstore.

Standing alone, it is reasonable to infer that the survey respondents interpreted "bookstore" as signifying an off-site establishment. Webster's Dictionary defines "bookstore" as "a place of business where books are the chief stock in trade." WEBSTER'S NEW INT'L DICTIONARY 253 (3d ed.1981). There is no reason to expect that simply adding the word "adult" to the term would completely transform the nature of the business activity described. Moreover, the Indianapolis survey also asked respondents to explain their prediction that an adult bookstore would negatively impact property value: 29% believed such an establishment would attract "undesirables" to the neighborhood, 14% felt it would create a bad image of the area, and 15% felt that it offended prevailing community attitudes. These reasons are equally applicable to an on-site or off-site establishment, and are distinguishable from the problems we have found to be unique to on-site businesses. *See Encore Videos,* 330 F.3d at 295 ("If consumers of pornography cannot view the materials at the sexually oriented establishment, they are less likely to linger in the area and engage in public alcohol consumption ...."). It is reasonable for Kennedale to believe that the appraisers responding to the survey understood the term "adult bookstore" to mean off-site businesses, such as that operated by the plaintiff-appellee.

Kennedale's ordinances purport to protect against harmful secondary effects. The Indianapolis and Oklahoma City studies support the belief that off-site sexually oriented businesses cause harmful secondary effects to the surrounding area in the form of decreased property value. So long as they are not relying on shoddy data or reasoning, we afford substantial deference to cities with regards to the ordinances they enact. *See Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring) (noting that "a city must have ***341** latitude to experiment" and "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners"). The Indianapolis survey, in particular, was drafted by experts, pretested, and administered to a large, national pool of respondents. It is not "shoddy." We therefore find that Kennedale has produced evidence that it could have reasonably believed was relevant, and thus could have properly relied upon. The ordinances are narrowly tailored to advance a substantial governmental interest.

The other evidence produced by Kennedale to justify its ordinance-an opinion survey of land use appraisers conducted by the city's attorney, and citizen commentary from public meetings-has also been hotly debated by the parties. Given our findings above, however, we need not reach that additional evidence. Similarly, our finding moots the question of whether the district court erred in excluding additional evidence of secondary effects.

By finding that Kennedale's ordinances were not narrowly tailored, the district court never reached the final element of the time, place, and manner analysis: whether the ordinances unreasonably limit alternative avenues of communication. We therefore remand this case to the district court to make those findings.

IV. *CONCLUSION*

For the foregoing reasons, we REVERSE the district court's summary judgment and remand for findings as to whether the ordinances leave open sufficient alternative channels of communication.

All Citations

480 F.3d 336

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by DFW Vending, Inc. v. Jefferson County, Tex., E.D.Tex., January 7, 1998

65 F.3d 1248
United States Court of Appeals,
Fifth Circuit.

HANG ON, INC., d/b/a Hardbody's of Arlington, Plaintiff–Appellant,
v.
CITY OF ARLINGTON, Defendant–Appellee.

No. 94–10959.
|
Sept. 20, 1995.

Topless bar sued city, alleging that city ordinance's "no touch" provision, which prohibited touching between nude performers and customers in adult cabarets, violated First, Fourth, and Fourteenth Amendments to United States Constitution, Equal Rights Amendment of Texas Constitution, and Texas Alcohol Beverage Code. After city removed case to federal court, the United States District Court for the Northern District of Texas, John H. McBryde, J., granted city's motion for summary judgment. Bar appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) bar had standing to assert its employees' and patrons' rights; (2) ordinance did not criminalize accidental or inadvertent touching; (3) ordinance did not violate equal protection by criminalizing touching in adult cabarets but not in other adult entertainment establishments; (4) ordinance did not violate Equal Rights Amendment by excluding male breasts from its definition of nudity; and (5) ordinance did not violate Alcoholic Beverage Code.

Affirmed.

West Headnotes (12)

[1] **Constitutional Law**
Freedom of Speech, Expression, and Press

Topless bar had standing to challenge city ordinance's "no touch" provision as violating First Amendment rights of bar's employees and customers; bar's employees and customers could encounter practical difficulties in asserting their own rights, which, at minimum, reinforced close relationship prerequisite to surrogate standing. U.S.C.A. Const.Amend. 1; Arlington, Tx., Ordinance No. 92–117.

8 Cases that cite this headnote

[2] **Federal Civil Procedure**
Rights of third parties or public

Assuming that case or controversy requirements of Article III are met, Constitution does not universally forbid party from asserting rights of others; rather, general rule prohibiting such surrogate claims is prudential. U.S.C.A. Const. Art. 3, § 1 et seq.

2 Cases that cite this headnote

[3] **Constitutional Law**
Labor and Employment

Topless bar had standing to assert its employees' rights with respect to claim that city ordinance's "no touch" provision violated Equal Rights Amendment of Texas Constitution by excluding male breasts from definition of nudity; there was no suggestion that bar's dancers did not wish litigation to go forward and no indication that bar's interest in litigation diverged from that of its dancers, and city could not dispute that its ordinance had direct financial impact on bar, as well as bar's employees. Vernon's Ann.Texas Const. Art. 1, § 3a; Arlington, Tx., Ordinance No. 92–117.

5 Cases that cite this headnote

[4] **Federal Civil Procedure**
Particular Cases

Claims that ordinance is facially invalid are better candidates for summary disposition than claims that ordinance was unconstitutionally applied. U.S.C.A. Const.Amend. 1.

10 Cases that cite this headnote

[5] **Constitutional Law**
Contact between performers and patrons

City ordinance's "no touch" provision, which prohibited touching between nude performer and customer, was not unconstitutionally overbroad in violation of First Amendment; such contact was beyond expressive scope of dancing itself, patrons had no First Amendment right to touch nude dancer, and even though ordinance applied to all employees in state of nudity, not just dancers, employees not engaged in expressive conduct such as dancing had no First Amendment right to appear in nude. U.S.C.A. Const.Amend. 1; Arlington, Tx., Ordinance No. 92–117.

41 Cases that cite this headnote

[6] **Constitutional Law**
Performers

Topless-bar patrons have no First Amendment right to touch nude dancer. U.S.C.A. Const.Amend. 1.

13 Cases that cite this headnote

[7] **Constitutional Law**
Nudity in general

Nonperforming nude employees of topless bar could not claim First Amendment protection solely by virtue of their nudity. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[8] **Constitutional Law**
Performers

City ordinance's "no touch" provision, which prohibited touching between nude performer and customer, did not burden more protected expression than was essential to further city's interest in preventing prostitution, drug dealing, and assault, and ordinance was thus not unconstitutionally overbroad, despite topless bar's claim that, because ordinance did not specify requisite mental state, it criminalized accidental or inadvertent touching; under Texas law, ordinance required culpable mental state and, thus, did not criminalize inadvertent or negligent touching. U.S.C.A. Const.Amend. 1; V.T.C.A., Penal Code § 6.02(b, c); Arlington, Tx., Ordinance No. 92–117.

4 Cases that cite this headnote

[9] **Constitutional Law**
Public amusement and entertainment

Public Amusement and Entertainment
Dancing and other performances

City ordinance's "no touch" provision, which prohibited touching between nude performer and customer, did not violate equal protection clause of Federal Constitution, even though it applied to adult cabarets but not to other adult entertainment establishments; city could rationally conclude that adult cabarets, which typically serve alcohol and attract large crowds, were more likely venue than nude modeling studios for evils of prostitution, drug dealing, and sexual violence that "no touch" provision sought to eliminate. U.S.C.A. Const.Amend. 14; Arlington, Tx., Ordinance No. 92–117.

12 Cases that cite this headnote

[10] **Constitutional Law**
Licenses in general

Intoxicating Liquors
Licensing and regulation

Municipal Corporations
Construction and operation

Municipal Corporations
Proceedings to determine validity of ordinances

City ordinance's "no touch" provision, which prohibited intentional touching between nude performer and customer, did not violate Equal Rights Amendment of Texas Constitution, even though ordinance excluded male breasts from its definition of nudity; evidence showed that city council considered physiological and sexual distinctions between female

and male breasts, and topless bar that challenged ordinance presented no evidence that ordinance discriminated against women solely on basis of gender. Vernon's Ann.Texas Const. Art. 1, § 3a; Arlington, Tx., Ordinance No. 92–117.

2 Cases that cite this headnote

[11] Intoxicating Liquors

Concurrent and conflicting regulations by state and municipality

City ordinance's "no touch" provision, which prohibited touching between nude performer and customer, did not violate Texas Alcoholic Beverage Code, even though "no touch" provision applied to adult cabarets which normally have alcoholic beverage licenses but not to nude modeling studios (which do not have such licenses); ordinance did not impose stricter standards on alcohol-related businesses than on nonalcohol-related businesses, as businesses with alcohol beverage licenses that did not qualify as adult cabarets were not subject to "no touch" provision, while adult cabarets not required to have alcoholic beverage licenses were still subject to ordinance. V.T.C.A., Alcoholic Beverage Code § 109.57; Arlington, Tx., Ordinance No. 92–117.

2 Cases that cite this headnote

[12] Searches and Seizures

Administrative inspections and searches; regulated businesses

Adult cabaret failed to show that city's enforcement of "no touch" ordinance, which precluded intentional touching between nude performer and customer, was conducted in harassing and offense manner in violation of its Fourth Amendment rights; although bar presented evidence of pattern or practice by city of conducting allegedly unconstitutional searches, bar failed to present any evidence that policy-making officials in city had any knowledge, actual or constructive, of police officers' actions during investigative searches of cabaret. U.S.C.A. Const.Amend. 4; Arlington, Tx., Ordinance No. 92–117.

1 Cases that cite this headnote

Attorneys and Law Firms

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Appeals from the United States District Court for the Northern District of Texas.

Before REYNALDO G. GARZA, KING and HIGGINBOTHAM, Circuit Judges.

Opinion

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Hang On, Inc. appeals from the judgment of the United States District Court dismissing Hang On's federal constitutional, state constitutional, and state law challenges to the City of Arlington's Adult Entertainment Ordinance No. 92–117.

I.

After amassing studies describing noxious secondary effects of adult entertainment establishments, the Arlington city council passed Ordinance No. 92–117 on November 17, 1992. The Ordinance's stated purpose was "to regulate Adult Entertainment Establishments ***1251** to promote the health, safety, morals and general welfare of the citizens of the City." The Ordinance expressly disclaimed intent to "restrict or deny access by adults to sexually oriented materials protected by the First Amendment or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market."

The Ordinance created a comprehensive regulatory scheme for adult entertainment establishments in the City of Arlington. Among its provisions, the Ordinance provided:

Section 5.01 *Additional Regulations for Adult Cabaret*

A. An employee of an adult cabaret, while appearing in a state of nudity, commits an offense if he touches a customer or the clothing of a customer.

B. A customer at an adult cabaret commits an offense if he touches an employee appearing in a state of nudity or clothing of the employee.

The Ordinance defined a "state of nudity" as a state of dress that fails to opaquely cover a human buttock, anus, male genitals, female genitals, or female breast.

On December 17, 1993, Hang On, which operates a topless bar in Arlington, filed suit against Arlington in Texas state court pursuant to 42 U.S.C. § 1983, alleging that the Ordinance violates the First, Fourth, and Fourteenth Amendments to the United States Constitution. In particular, Hang On charged that the Ordinance's "no touch" provision is unconstitutionally overbroad because it criminalizes casual or inadvertent touching and unconstitutionally vague because it does not define "touches". In addition, Hang On argued that Arlington's enforcement of the Ordinance had been conducted in a harassing and discriminatory manner. Finally, Hang On alleged that the Ordinance's exclusion of male breasts from the definition of nudity violates the Equal Rights Amendment of the Texas Constitution, Tex. Const. art. I, § 3a, and that the Ordinance violates the Texas Alcoholic Beverage Code by discriminating against business with alcoholic beverage licenses. Tex.Alco.Bev.Code Ann. § 109.57.

Arlington removed the case to the United States District Court for the Northern District of Texas. On September 21, 1994, the district court granted summary judgment for Arlington on all of Hang On's claims and awarded costs and attorney's fees to Arlington. Hang On has timely appealed, and we now affirm the judgment of the district court.

II.

We first examine whether Hang On has standing to bring these claims. "The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.' " *United States v. Hays,* 515 U.S. 737, ——, 115 S.Ct. 2431, 2435, 132 L.Ed.2d 635 (1995) (quoting *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 607, 107 L.Ed.2d 603 (1990) (citations omitted)).

A party seeking to enlist the court's jurisdiction "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Hang On asserts that the intrusive searches by the Arlington police have violated its own right to be free from unreasonable searches. Similarly, Hang On asserts its own rights when it claims that Arlington's ordinance violates the Texas Alcoholic Beverage Code. Its standing to assert these two claims is plain.

Hang On's claim that the "no touch" provision violates the First Amendment implicates the general requirement that a litigant assert its own rights. Hang On does not claim any denial of its own First Amendment rights. The specific prohibition of the ordinance at issue in this case is part of a general regulation of adult cabarets, including Hang On, but the "no touch" provision regulates dancers and customers, not the bar itself.

[1] **[2]** Assuming that the case or controversy requirements of Article III are met, the Constitution does not universally forbid a party from asserting the rights of others. Rather, the general rule prohibiting such surrogate claims is prudential. ***1252** *Whitmore v. Arkansas,* 495 U.S. 149, 161 n. 2, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). Accordingly, we examine exceptions to this general rule. One exception allows a litigant to assert the rights of individuals with whom she has a close relationship. *See Pierce v. Society of the Sisters,* 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (holding that organization's interest in preserving its own business permitted it to assert rights of patrons). The history of this exception is checkered. *Compare McGowan v. Maryland,* 366 U.S. 420, 429–30, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) *with Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) *and Secretary of State of Md. v. Joseph H. Munson Co., Inc.,* 467 U.S. 947, 954–58, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). Ordinarily, a business like Hang On may properly assert its employees' or customers' First Amendment rights where the violation of those rights adversely affects the financial interests or patronage of the business. That Hang On's employees and customers

could encounter practical difficulties in asserting their own rights may place this case within a distinct exception; at minimum, this fact reinforces the close relationship prerequisite to surrogate standing here. *See Spiegel v. City of Houston,* 636 F.2d 997, 1001 (5th Cir. Unit A Feb. 1981); *Gajon Bar & Grill, Inc. v. Kelly,* 508 F.2d 1317, 1322 (2d Cir.1974) (upholding standing of corporation to assert First Amendment rights of its employees and patrons); *Black Jack Distributors, Inc. v. Beame,* 433 F.Supp. 1297, 1303 (S.D.N.Y.1977) (upholding vendor's standing to assert First Amendment right of patrons' to purchase sexually explicit material). We are persuaded that this exception is applicable and that Hang On has standing to challenge the "no touch" provision as violative of the First Amendment rights of its employees and customers.

[3] We are also persuaded that Hang On may assert its employees' rights under the Texas Equal Rights Amendment. Tex. Const. art. I, § 3A. We are cognizant of our holding in *MD II Entertainment, Inc. v. City of Dallas, Tex.,* 28 F.3d 492, 497 (5th Cir.1994), that a dance hall did not have standing to raise its employees' rights under the Texas Equal Rights Amendment to challenge a municipal ordinance that excluded male breasts from its definition of "seminudity" and "simulated nudity". In *MD II,* we distinguished *SDJ, Inc. v. City of Houston,* 837 F.2d 1268 (5th Cir.), *reh'g denied,* 841 F.2d 107 (5th Cir.1988), *cert. denied,* 489 U.S. 1052, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989), on the ground that *SDJ* did not purport to hold that club owners "*must* be allowed to raise their dancer's rights." *MD II,* 28 F.3d at 498 (emphasis added). Prudential considerations such as the failure of MD II to explain the absence of its dancers from the litigation led us in *MD II* to conclude that "[g]ranting standing to MD II may, however, result in the unnecessary litigation of a question those parties most immediately affected may not dispute." *Id.* at 497.

Here, unlike in *MD II,* there is no suggestion that Hang On's dancers do not wish this litigation to go forward, and there is no indication that Hang On's interest in this litigation diverges from that of its dancers. *See* 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3531.9, at 579 (arguing that employers may assert rights of their employees where there is "a congruence rather than conflict of interests"); *see also Craig v. Boren,* 429 U.S. at 195, 97 S.Ct. at 456 (noting "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function"). Significantly, Arlington cannot dispute that its ordinance has a direct financial impact on Hang On, as well as Hang On's employees. Injury is essential to meeting the threshold case or controversy requirement of Article III, and injury of this type is usually a component of a relationship sufficiently "close" to meet prudential standing requirements.

By contrast, the causal link between the injury to the club owners in *MD II* and the Dallas ordinance's exclusion of male breasts from its definition of semi-nudity was attenuated at best. It was difficult to see any injury to MD II from the underinclusive character of the challenged regulations. The asserted defect was a failure to regulate the exposure of male breasts. We are persuaded that Hang On has standing to assert its ***1253** dancers' First Amendment and state constitutional rights.

There is much to be said for shifting the analysis from judicial justifications for asserting the rights of others to a direct inquiry into the rights of the plaintiffs in those relationships, but we do not reach those questions today. *See* Henry P. Monaghan, "Third Party Standing," 84 *Colum.L.Rev.* 277, 299 (1984).

III.

Hang On urges that summary judgment was inappropriate because facial constitutional challenges "require a review of the application of a statute to the conduct of the party before the court" and this review "is a fact question for the trier of fact to evaluate at time of trial." We disagree.

[4] We note that claims that an ordinance is facially invalid are better candidates for summary disposition than claims that an ordinance was unconstitutionally applied. Claims of facial invalidity do not depend upon the development of a "complex and voluminous" factual record. *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 493, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). The essence of a facial challenge usually is that the statute *on its face*—without regard to how it affects the particular litigants—violates the law. *See, e.g., Johnson v. American Credit Co. of Georgia,* 581 F.2d 526, 533 (5th Cir.1978).

Likewise, Hang On's argument that further discovery and trial are necessary to permit it to develop its claims of facial invalidity misses the mark. Claims of statutory overbreadth like that alleged by Hang On do not present fact disputes regarding the effects of an allegedly overbroad statute on a plaintiff. *See Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 634, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (affirming summary judgment on overbreadth challenge while noting that such a challenge was "a question of law that involved no dispute about the characteristics of [the plaintiff]"). Hang On does not tell us how further time and proceedings are necessary to the adjudication of its facial challenges.

A.

[5] Hang On argues that the "no touch" provision is unconstitutionally overbroad in violation of the First Amendment. *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991), held that nude dancing *itself* "is expressive conduct within the outer perimeters of the First Amendment." It does not inevitably follow, however, that touching between a nude performer and a customer is protected expression.

We recognize that the theater of expressive dancing may be limited only by the art and creativity of the performers. "It is possible to find some kernel of expression in almost every activity a person undertakes ... but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin,* 490 U.S. 19, 25, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989). This said, intentional contact between a nude dancer and a bar patron is conduct beyond the expressive scope of the dancing itself. The conduct at that point has overwhelmed any expressive strains it may contain. That the physical contact occurs while in the course of protected activity does not bring it within the scope of the First Amendment. *Cf. Barnes,* 501 U.S. at 577, 111 S.Ct. at 2466 (Scalia, J., concurring in the judgment) (noting that the Court has "never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes").

[6] Similarly, *patrons* have no First Amendment right to touch a nude dancer. *Cf. Geaneas v. Willets,* 911 F.2d 579, 586 (11th Cir.1990) (holding that bar patrons have no First Amendment right to wear revealing clothing), *cert. denied,* 499 U.S. 955, 111 S.Ct. 1431, 113 L.Ed.2d 484 (1991); *Dodger's Bar & Grill, Inc. v. Johnson Cty. Bd. of Comm'rs,* 32 F.3d 1436, 1443 (10th Cir.1994) (same).

[7] Hang On's argument that the "no touch" provision is overbroad because it applies ***1254** to all employees in a state of nudity, not just dancers, is without merit. It is true that dancers possess First Amendment rights, and we have discussed their limits. Nonperforming nude employees, however, cannot claim First Amendment protection solely by virtue of their nudity. Rather, "nudity is protected as speech only when combined with some mode of expression which itself is entitled to first amendment protection." *South Florida Free Beaches, Inc. v. City of Miami, Fla.,* 734 F.2d 608, 610 (11th Cir.1984) (alteration and internal quotes omitted). Since employees not engaged in expressive conduct such as dancing have no First Amendment right to appear in the nude, applying the "no touch" provision to non-performing nude employees does not make it overbroad.

[8] Even if intentional contact between a topless dancer and a customer is not inevitably and always beyond the umbrella of the First Amendment, Arlington's "no touch" provision is not facially overbroad. The First Amendment "does not guarantee the right to [engage in protected expression] at all times and places or in any manner that may be desired." *Heffron v. International Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 647, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981). The Court held in *Barnes* that content-neutral regulations of time, place, or *manner* are permissible where the regulations satisfy the four-part test announced in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The regulation is valid "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien,* 391 U.S. at 377, 88 S.Ct. at 1679.

Hang On does not dispute nor is there any doubt that Arlington possessed the authority to enact the "no touch" provision as part of its adult entertainment ordinance. *See MJR's Fare of Dallas, Inc. v. City of Dallas,* 792 S.W.2d 569, 576 (Tex.App.—Dallas 1990, writ denied) (holding municipality's police power encompassed authority to

enact ordinance regulating sexually oriented businesses). Similarly, there is no dispute that the "no touch" provision furthers a substantial governmental interest and is unrelated to the suppression of free expression. Although the Arlington city council did not make specific legislative findings regarding the "no touch" provision, it now suggests that the Ordinance serves to prevent prostitution, drug dealing and assault. These justifications were offered for a similar "no touch" provision upheld in *Kev, Inc. v. Kitsap County,* 793 F.2d 1053 (9th Cir.1986), and Hang On does not suggest that any alternative, content-oriented interest motivated Arlington. To the contrary, the Ordinance disclaims any intent to infringe upon protected expression.

The essence of Hang On's overbreadth claim appears to be that Arlington's "no touch" provision is unconstitutionally overbroad because the ordinance criminalizes accidental or inadvertent touching and, therefore, burdens more protected expression than is necessary to further the city's interest in preventing prostitution, drug dealing, and assault. This argument rests on a premise that we reject, namely that Arlington's "no touch" provision criminalizes any contact between nude employees and customers. The State of Texas has provided that "[i]f the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element." Tex.Penal Code Ann. § 6.02(b). Texas law further provides that "[i]f the definition of an offense does not prescribe a culpable mental state but one is nevertheless required [under the foregoing provision], intent, knowledge, or recklessness suffices to establish criminal responsibility." Tex.Penal Code Ann. § 6.02(c). The Arlington ordinance does not specify a requisite mental state, but the Ordinance does not dispense with any mental element. Under Texas law, the Ordinance requires a culpable mental state and, therefore, does not criminalize inadvertent or negligent touching. *See Pollard v. State,* 687 S.W.2d 373, 374 (Tex.App.—Dallas 1985, writ ref'd) (applying § 6.02 to city ordinance that ***1255** did not specify a required mental state). No evidence suggests that the City of Arlington has sought to enforce the Ordinance against persons unintentionally touching one another.

Given the limiting construction imposed by Texas law, [1] we conclude that Arlington's "no touch" provision does not burden more protected expression than is essential to further substantial governmental interests. [2] We perceive no material difference between Arlington's "no touch" provision and the "no touch" provision upheld against a similar attack in *Kev, Inc. v. Kitsap County,* 793 F.2d 1053 (9th Cir.1986). In *Kitsap County,* the Ninth Circuit upheld an ordinance that, in addition to prohibiting topless dancers and customers from fondling or caressing one another, required dancers to remain at least ten feet from the customers and prohibited patrons from tipping dancers. Referring to the "no touch" provision, the court concluded that "because of the County's legitimate and substantial interest in preventing the demonstrated likelihood of prostitution occurring in erotic dance studios, the County may prevent dancers and patrons from sexually touching each other while the dancers are acting in the scope of their employment." *Id.* at 1061 n. 11. Arlington's "no touch" provision does not criminalize more conduct than Kitsap County's. We are persuaded that Arlington's ordinance burdens no more protected expression than is essential to further Arlington's interest in preventing prostitution, drug dealing, and assault.

1 We express no opinion on the constitutionality of an ordinance prohibiting *all* touching between patrons and nude dancers. We do not offer narrowing interpretations of a state regulation. That is the task of the state courts. *See Gooding v. Wilson,* 405 U.S. 518, 520, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972); *United States v. Thirty–Seven Photographs,* 402 U.S. 363, 369, 91 S.Ct. 1400, 1404–1405, 28 L.Ed.2d 822 (1971). We parse no words or otherwise engage in the interpretive enterprise. Rather, we simply apply all the relevant statutes. *See also City of Houston, Tex. v. Hill,* 482 U.S. 451, 462 n. 10, 468, 107 S.Ct. 2502, 2510 n. 10, 96 L.Ed.2d 398 (1987) (holding, without prior state court decisions for guidance, that provision of state criminal code preempts parts of city ordinance).

2 In *Ward v. Rock Against Racism,* 491 U.S. 781, 798–99, 109 S.Ct. 2746, 2757, 105 L.Ed.2d 661 (1989), the Court noted that a time, place, or manner restriction "need not be the least restrictive or least intrusive means" of serving the government's interest. Rather, the restriction is no greater than essential where the governmental interest "would be achieved less effectively absent the regulation." *Id.* at 799, 109 S.Ct. at 2758 (internal quotation marks omitted).

B.

Hang On's contention that Arlington's "no touch" provision is void for vagueness is without merit. Hang On has not specified which terms in Arlington's ordinance are vague. Hang On appears to claim that Arlington's ordinance is unconstitutionally vague because it fails to define "dancer", which the Kitsap County ordinance did define. The significance of this allegation eludes us, particularly given that Arlington's ordinance criminalizes touching between a customer and an "employee", which includes dancers.

C.

[9] Hang On argues that Arlington's decision to criminalize touching in adult cabarets but not in other adult entertainment establishments renders the ordinance unconstitutional on its face. Hang On does not specify whether this feature of the ordinance violates state or federal law.

To the extent that Hang On relies upon equal protection rights guaranteed by the state constitution, its argument is without merit. The Texas Court of Appeals in *2300, Inc. v. City of Arlington, Tex.,* 888 S.W.2d 123, 129 (Tex.App.—Fort Worth 1994, no writ), held that Arlington's decision to apply the "no touch" provision only to adult cabarets did not violate the cabarets' equal protection rights guaranteed by the state constitution. Tex. Const. art. I, § 3.

The district court did not address the merits of this argument because Hang On failed to include it in its complaint and raised this claim for the first time in its response to Arlington's motion for summary judgment. Although Hang On renews this allegation on appeal, we agree with the district court that, because Hang On did not raise the state constitutional claim in its complaint nor provide ***1256** any authority for its allegation, we should not address its merits.

To the extent that Hang On asserts a violation of the Fourteenth Amendment, it has failed to demonstrate that Arlington's decision to apply the "no touch" provision only to adult cabarets is an invidious classification or burdens a fundamental right. Here, Arlington could rationally conclude that adult cabarets, which typically serve alcohol and attract large crowds, are a more likely venue than nude modeling studios for the evils of prostitution, drug dealing, and sexual violence that the "no touch" provision seeks to eliminate.

Nor does the Equal Protection Clause require Arlington to prohibit touching between nude employees and customers in every field in which it occurs. *Cf. SDJ, Inc. v. City of Houston,* 837 F.2d 1268, 1279 (5th Cir.) (rejecting similar underinclusive argument), *reh'g denied,* 841 F.2d 107 (5th Cir.1988), *cert. denied,* 489 U.S. 1052, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989). Rather, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955).

IV.

A.

[10] Hang On contends that excluding male breasts from the ordinance's definition of nudity violates the Equal Rights Amendment of the Texas Constitution. [3] Under Texas law, we must first determine whether the ordinance discriminates against one sex "simply on the basis of gender." *Williams v. City of Fort Worth,* 782 S.W.2d 290, 296 (Tex.App.—Fort Worth 1989, writ denied).

[3] "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." Tex. Const. art. I, § 3a.

In *MJR's Fare of Dallas v. City of Dallas,* 792 S.W.2d 569, 575 (Tex.App.—Dallas 1990, writ denied), the Texas Court of Appeals held that the exclusion of male breasts from the definition of nudity did not constitute discrimination against women "solely on the basis of gender." The court noted that the city introduced evidence showing that physiological and sexual distinctions exist between male and female breasts; that female breasts differ internally and externally from male breasts; and that the female breast, unlike the male breast, is a mammary gland. *Id.* The court concluded that the definition of nudity excluded male breasts on grounds other than simply gender.

Similarly, Arlington presented evidence to the district court showing that the Arlington city council considered the physiological and sexual distinctions between the

female and male breasts. In sworn testimony presented to the city council, Dr. J. Douglas Crowder concluded that distinguishing between male and female breasts in defining nudity is "certainly consistent with what we know medically about human sexual response." Moreover, the preamble of the Ordinance itself proclaimed that the city council reviewed "[c]onvincing documented evidence regarding the physiological and sexual distinctions between male and female breasts." By contrast, Hang On presented no evidence to the district court that Arlington's ordinance discriminated against women solely on the basis of gender.

Hang On relies heavily on the Texas Court of Appeals' holding in *Williams* that the exclusion of male breasts from the definition of nudity discriminated against women solely on the basis of gender. In *Williams* the court of appeals noted that the plaintiff successfully carried its burden of proof to show that the definition discriminated against women solely on account of gender because the city offered "no evidence about the differences in physical characteristics or how such differences relate to the ordinance's goal of preventing secondary neighborhood effects." 782 S.W.2d at 296 n. 2. Hang On's failure to offer any evidence regarding Arlington's decision to exclude male breasts from the definition of nudity, coupled with Arlington's introduction of evidence showing that Arlington's decision was not motivated by gender ***1257** animus, distinguishes this case from *Williams.*

We cannot let pass without comment the energy expended in the "trial" of such issues. Courts need no evidence to prove self-evident truths about the human condition—such as water is wet. Nor should they tarry long with such foolishness and, in the process, trivialize constitutional values intrinsic to our society. The district court correctly concluded that Arlington's definition of nudity did not discriminate against women solely on the basis of gender.

B.

[11] Hang On also claims that the application of the "no touch" provision to adult cabarets violates § 109.57 of the Texas Alcoholic Beverage Code because Arlington's "no touch" provision applies to adult cabarets, which normally have alcoholic beverage licenses, but does not apply to nude modeling studios, which do not have such licenses. Holding that Hang On never presented evidence to substantiate its claim, the district court granted summary judgment to Arlington on this issue. We agree that Arlington is entitled to summary judgment, not because Hang On failed to produce any evidence indicating a genuine issue of material fact, but because Hang On's legal theory is without merit.

In *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas,* 852 S.W.2d 489, 492 (Tex.1993), the Texas Supreme Court held that § 109.57 preempted a municipal ordinance prohibiting the sale of alcoholic beverages within 300 feet of a residential area. The court was quick to point out that municipalities retained the power to regulate businesses with alcoholic beverage licenses as long as those regulations did not discriminate against such businesses. The court explained:

> [A]n ordinance requiring all businesses with the same kind of premises to have a fire extinguisher on their premises would not violate section 109.57(a). On the other hand, an ordinance requiring an alcohol related business to have two fire extinguishers and only requiring a non-alcohol related business with the same kind of premises to have one fire extinguisher would violate section 109.57(a).

Id. at 492 n. 5.

Arlington's "no touch" provision does not run afoul of § 109.57(a) because, unlike the fire extinguisher example from *Dallas Merchants,* its coverage of the set of businesses with alcoholic beverage licenses is both underinclusive and overinclusive. Application of Arlington's "no touch" provision to adult cabarets is underinclusive in that there are many businesses with alcoholic beverage licenses that do not qualify as adult cabarets and, therefore, are not subject to the "no touch" provision. The scope of Arlington's "no touch" regulation is also overinclusive in that adult cabarets not required to have alcoholic beverage licenses are still subject to Arlington's "no touch" provision. This loose fit between the regulatory scope of the "no touch" provision and businesses serving alcohol leads us to conclude that Arlington's ordinance does not impose stricter standards on alcohol-related businesses than it does on non-alcohol related businesses. Indeed, this loose fit is a far cry from

the Dallas ordinance invalidated in *Dallas Merchants,* which regulated businesses *if and only if* they were in the business of selling alcohol. Arlington's decision to limit the application of the "no touch" provision to adult cabarets does not violate § 109.57(a) of the Texas Alcoholic Beverage Code. [4]

4 Arlington's reliance on § 109.57(d) is unavailing since that provision only permits a municipality to regulate the *location* of a sexually oriented business. It does not purport to permit the regulation of the *manner* in which a sexually oriented business operates.

V.

[12] Finally, Hang On argues that Arlington's enforcement of the Ordinance has been conducted in a harassing and offensive manner in violation of its Fourth Amendment rights. The district court rejected Hang On's claim, holding that Hang On presented no evidence that it was the policy of Arlington to enforce the Ordinance in a manner that violates Hang On's constitutional rights. We review the district court's grant of summary ***1258** judgment *de novo,* viewing the evidence in the light most favorable to Hang On. *Richardson v. Oldham,* 12 F.3d 1373, 1376 (5th Cir.1994).

Hang On does not claim that it is the official policy of Arlington to harass adult cabarets and their patrons. Indeed, Arlington's ordinance expresses the exact opposite policy. "[I]t is not the intent nor effect of this Chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market." Instead, Hang On claims that Arlington's policy may be inferred from the police officers' repeated visits on a nightly basis.

Although the district court found that Hang On had presented evidence of a pattern or practice by Arlington of conducting the allegedly unconstitutional searches, the court correctly concluded that Hang On failed to present any evidence that policy-making officials in Arlington had any knowledge, actual or constructive, of the police officers actions during the investigative searches of Hang On's cabaret. The only evidence presented by Hang On to rebut Arlington's motion for summary judgment was the affidavit of Andy Anderson, alleging that "defendant's agents" have entered its business "on multiple occasions" and that the officers' manners and actions became "more disruptive and abusive". [5] Mr. Anderson's affidavit noticeably omits any allegation that the principal of the "defendant's agents," i.e., the City of Arlington, had any knowledge of the action and behavior of its "agents". We find no record evidence that Arlington knew of and was deliberately indifferent to its police officers' conduct.

5 The district court did not rule on Arlington's numerous objections to the Anderson affidavit. On appeal, Arlington renews its objections. Given our disposition of the matter, we do not reach the issue whether the district court abused its discretion in considering the Anderson affidavit.

Hang On responds that the district court's grant of summary judgment to Arlington dismissing Hang On's harassment claim was erroneously based on the heightened pleading requirement invalidated in *Leatherman v. Tarrant County Narcotics Unit,* 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Hang On fails to grasp the difference between a motion to dismiss and a motion for summary judgment.

VI.

We agree with the district court that Hang On's facial challenges to Arlington's "no touch" provision are without merit and that there was no genuine issue of material fact. We AFFIRM the judgment of the district court, including its award of costs and attorney's fees to Arlington.

All Citations

65 F.3d 1248

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459 F.3d 546
United States Court of Appeals,
Fifth Circuit.

FANTASY RANCH INC., doing business as Fantasy Ranch, Plaintiff–Appellant,
Cowtown Exposition, Inc., doing business as X.T.C. Tan; Tazz Man Inc., doing business as Hardbody's of Arlington, Texas, doing business as Peep–N–Tom's; Harry Freeman, doing business as Flash Dancer, Intervenor–Plaintiffs–Appellants,
v.
CITY OF ARLINGTON, TEXAS, Theron Bowman, Chief of Police, Defendants–Appellees.

No. 04–11337.
|
Aug. 2, 2006.

Synopsis

Background: Sexually oriented businesses (SOBs) brought action against city and its police chief, challenging several provisions of city's sexually oriented business ordinance as an unconstitutional restriction of their expressive liberties. The parties filed cross-motions for summary judgment. The United States District Court for the Northern District of Texas, Jerry L. Buchmeyer, J., 2004 WL 1779014, granted defendants' motion and denied plaintiffs' motion. Plaintiffs appealed.

Holdings: The Court of Appeals, Garwood, Circuit Judge, held that:

[1] an ordinance regulating SOBs is content-neutral, and will be subjected to intermediate rather than strict scrutiny, so long as its predominant concern is for secondary effects;

[2] in the case at bar, the ordinance's proximity provisions targeted secondary effects and so were entitled to intermediate scrutiny;

[3] the ordinance's proximity provisions satisfied the *O'Brien* test for content-neutral restrictions on symbolic speech;

[4] the ordinance's license-revocation provision did not impose an unconstitutional prior restraint on speech;

[5] plaintiff's due-process challenge to the pre-amendment ordinance was moot; and

[6] plaintiff's due-process challenge to the post-amendment ordinance was moot.

Affirmed.

West Headnotes (18)

[1] Federal Courts
Summary judgment

Court of Appeals reviews the district court's grant of summary judgment *de novo*, applying the same legal standard as the district court.

Cases that cite this headnote

[2] Constitutional Law
Nude dancing in general

While nonobscene nude dancing is protected by the First Amendment, even if only marginally so, the government can regulate such activity. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[3] Constitutional Law
Nude dancing in general

Nude dancing falls only within the outer ambit of the First Amendment's protection. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[4] Constitutional Law
Public nudity or indecency

Level of scrutiny applicable to government restrictions on public nudity depends on whether the government's predominate purpose in enacting the regulation is related to the suppression of expression itself; if

the government's interest is related to the suppression of content, then that regulation of symbolic speech is subject to strict scrutiny, but if the government's predominate purpose is unrelated to the suppression of expression, such that the regulation can be justified without reference to the content of the regulated speech, then intermediate scrutiny applies. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[5] **Constitutional Law**
Content neutrality

Ordinance regulating sexually oriented businesses is "content-neutral," and will be subjected to intermediate rather than strict scrutiny, so long as its predominant concern is for secondary effects. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[6] **Constitutional Law**
Performers in general

Constitutional Law
Proximity of performers to patrons

Public Amusement and Entertainment
Sexually Oriented Entertainment

Public Amusement and Entertainment
Dancing and other performances

Proximity provisions of city's sexually oriented business (SOB) ordinance, including buffer zone, stage height, and tipping requirements, were predominantly targeted to the prevention of secondary effects, not to the suppression of symbolic expression, and so were content-neutral restrictions entitled to intermediate scrutiny, where stated purpose of provisions was to better enforce city's previously enacted "no touch" rule at SOBs, that rule itself targeted the same negative secondary effects that continued to trouble city, including prostitution, assault, and drug dealing, and ordinance attempted to control secondary effects while leaving the quantity and accessibility of speech substantially intact. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[7] **Constitutional Law**
Proximity of performers to patrons

Public Amusement and Entertainment
Sexually Oriented Entertainment

Public Amusement and Entertainment
Dancing and other performances

Proximity provisions of city's sexually oriented business (SOB) ordinance satisfied the *O'Brien* test for content-neutral restrictions on symbolic speech; ordinance was aimed at protecting the health and safety of citizens and so fell within city's police powers, city expert's report, studies, and findings concerning ineffectiveness of city's prior "no touch" ordinance demonstrated connection between dancer-patron touching and unsavory secondary effects, city's substantial, independent interest in enacting ordinance was in targeting negative secondary effects and was unrelated to the suppression of free expression, ordinance's six-foot buffer zone, 18-inch stage height, and six-foot tipping requirements were no greater than were essential to furtherance of city's interest, and provisions' effect on overall expression was *de minimis*, as city only muted that expression that occurred when six-foot line was crossed while leaving the erotic message largely intact. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[8] **Constitutional Law**
Public nudity or indecency

Under the Supreme Court's *O'Brien* test, a public nudity ordinance that incidentally impacts protected expression should be upheld if: (1) it is within the constitutional power of the government, (2) it furthers an important or substantial government interest, (3) the governmental interest is unrelated to the suppression of free expression, and (4) the incidental restriction on First Amendment freedoms is no greater than is essential to

the furtherance of that interest. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[9] **Municipal Corporations**
Public safety and welfare
Municipal Corporations
Public health

Ordinances aimed at protecting the health and safety of citizens are squarely within a city's police powers.

Cases that cite this headnote

[10] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

Pursuant to the *Renton* evidentiary standard, a municipality may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest, as required under the second prong of the *O'Brien* test for content-neutral restrictions on symbolic speech. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[11] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

To satisfy the second prong of the *O'Brien* test for content-neutral restrictions on symbolic speech, which requires a regulation to further an important or substantial governmental interest, a municipality's evidence must fairly support the municipality's rationale. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[12] **Constitutional Law**
Content-Neutral Regulations or Restrictions

If party challenging a municipality's content-neutral restrictions on symbolic speech fails to cast direct doubt on municipality's rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the evidentiary standards set forth in *Renton*, but if the party succeeds in casting doubt on the municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

Under the second prong of the *O'Brien* test for content-neutral restrictions on symbolic speech, which requires a regulation or statute to further an important or substantial governmental interest, court's appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature but, rather, the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[14] **Constitutional Law**
Licenses and permits in general
Constitutional Law
Secondary effects
Public Amusement and Entertainment
Sexually Oriented Entertainment

License-revocation provision of city's sexually oriented business (SOB) ordinance did not impose an unconstitutional prior restraint on speech; SOB was not prohibited from obtaining another license, for another location, during the pendency of any license suspension or revocation, the revocation was

not related to an advance determination that the contents of SOB's speech would be prohibited, but to the adverse secondary effects generated by SOB at its particular extant location, and any burden on SOB's expressive liberties was justified, as ordinance contained all three applicable safeguards, providing for a stay of suspension pending the appeals process and a hearing before an administrative law judge with an appeal to a Texas district court, as well as placing the burden of proof on the city. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[15] Federal Courts

Voluntary cessation of challenged conduct

Court may conclude that voluntary cessation has rendered a case moot if the party urging mootness demonstrates that there is no reasonable expectation that the alleged violation will recur, and that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

Cases that cite this headnote

[16] Federal Courts

Change in law

Statutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.

1 Cases that cite this headnote

[17] Constitutional Law

Mootness

Sexually oriented business's (SOB's) due-process challenge to city's pre-amendment SOB ordinance was moot where city's amended ordinance addressed all the issues raised by SOB's pre-amendment complaint, leaving SOB only with the claim that city council might one day amend the ordinance to reenact the offending provisions.

Cases that cite this headnote

[18] Constitutional Law

Mootness

Sexually oriented business's (SOB's) due-process challenge to city's post-amendment SOB ordinance, specifically, its provision for revoking an SOB license after four suspensions, was moot where, although SOB already had one pre-amendment suspension in its name, city promised in open court to neither enforce that three-day suspension imposed under the pre-amendment scheme, nor apply it toward the four total that were necessary to revoke an SOB license, and SOB's counsel agreed that this satisfied its concerns.

Cases that cite this headnote

Attorneys and Law Firms

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Thomas Phillip Brandt (argued), Robert Harris Fugate, Stephen Douglas Henninger, Joshua Alan Skinner, Fanning, Harper & Martinson, Dallas, TX, for Defendants–Appellees.

Paul J. Cambria, Jr., Roger W. Wilcox, Jr. (argued), Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, Buffalo, NY, for Fantasy Ranch, Inc. and Harry Freeman.

Appeals from the United States District Court for the Northern District of Texas.

Before GARWOOD, BENAVIDES and OWEN, Circuit Judges.

Opinion

GARWOOD, Circuit Judge:

Appellants challenge the City of Arlington's recently enacted Sexually Oriented Business Ordinance as an unconstitutional restriction of their expressive liberties. We affirm the trial court's judgment sustaining the ordinance.

FACTS AND PROCEEDINGS BELOW

A. Plaintiff-appellant Fantasy Ranch, Inc. ("Fantasy Ranch"), and intervenor plaintiffs-appellants, Cowtown Exposition, Inc., Tazz Man Inc., and Harry Freeman, are sexually oriented businesses ("SOBs") that feature topless dancing and operate under renewable licenses granted by defendant-appellee the City of Arlington, Texas ("the City"). Defendant-appellee Theron Bowman is the City's Chief of Police; as such, he is charged with enforcing the ordinances that the Arlington SOBs claim violate the Constitution. In October 2002, Bowman, acting pursuant to the City's Sexually Oriented Business Ordinance ("the SOB Ordinance") as it then-existed, notified Fantasy Ranch by letter of his intent to suspend its license to operate as a SOB for three days. According to the letter, Fantasy Ranch's license was subject to a temporary suspension under § 4.05 of the SOB Ordinance, which at that time required suspension of a SOB's license if "the [City's] Chief of Police determine[d] that [a SOB] licensee, operator or an employee ... ha[d] ... on five (5) or more occasions within any one (1) year period of time, violated [the City's prohibition on touching between topless dancers and patrons] and ha[d] been convicted or placed on deferred adjudication or probation for the violations." Although Fantasy Ranch requested and received a hearing on the proposed suspension, its objections failed, and in December 2002 the Deputy Chief of Police (before whom the hearing was conducted) ordered that the three-day license suspension go forward beginning January 26, 2003. Before the suspension took effect, Fantasy Ranch filed this lawsuit in the Northern District of Texas.

B. The City's Sexually Oriented Business Ordinance

Like many cities, Arlington maintains a series of ordinances that regulate SOBs ***550** through a combination of zoning restrictions, licensing requirements, and criminal laws. The appellants' claims focus on two groups of provisions in the City's current SOB Ordinance: (1) the "Proximity Provisions," which consist of (a) a buffer zone and stage height provision, (b) a floor demarcation provision, and (c) a tipping provision; and (2) the "Licensing Provisions," which define the procedure and substance governing suspension and revocation of a SOB's business license.

1. The Proximity Provisions

First among the Proximity Provisions are buffer zone and stage height requirements, which prohibit a "licensee, operator or employee" of a SOB from:

> "knowingly allow[ing], in a Sexually Oriented Business another to appear in a state of nudity, unless the person is an employee [of the SOB] who, while in a state of nudity, is on a stage (on which no customer is present) at least eighteen (18) inches above the floor, and is: (1) at least six (6) feet from any customer ...; or (2) physically separated from customers by a solid clear transparent unbreakable glass or plexiglass wall with no openings that would permit physical contact with customers."

Arlington, Tex., Ordinance 03–044, § 6.03(B) (April 15, 2003). Second is the SOB Ordinance's demarcation provision, which mandates that a "licensee, operator or employee [of a SOB] ... prominently and continuously display a two inches wide glow-in-the-dark line on the floor of the [SOB] marking a distance of six feet from each unenclosed stage on which an employee in a state of nudity may appear." *Id.* § 6.04(B). Third, the SOB Ordinance regulates the tipping of nude dancers by prohibiting customers or patrons from tipping a nude SOB employee "directly" but permitting tipping of a nude SOB employee through either "a tip receptacle, located more than six (6) feet from the nearest point of the performance stage where [the SOB] employee is in a state of nudity, or ... an employee that is not in a state of nudity, as part of the customer's bill." *Id.* § 6.03(C).

The City contends that the Proximity Provisions are designed to alleviate the negative secondary effects that flow from violations of its no-touch ordinance, which has long prohibited touching between nude SOB employees and SOB customers. According to the City's

findings listed in the ordinance enacting the Proximity Provisions, the no-touch provision, standing alone, did not effectively prevent touching between nude SOB employees and their customers. The City explains that the Proximity Provisions were intended to address the no-touch provision's inadequacy by further limiting activities that allow and often result in a close proximity between nude SOB employees and their customers. In support of the Proximity Provisions, the City amassed the following evidentiary record which included: (1) references respecting the Proximity Provisions to (a) judicial decisions addressing similar ordinances from other cities and discussing the adverse secondary effects addressed by those ordinances, and (b) studies conducted in other jurisdictions on the adverse secondary effects of SOBs; (2) reports of numerous no-touch violations at SOBs within the City; (3) testimony regarding the effectiveness of stage height requirements in enforcing a no-touch rule; and (4) a report prepared by the City's expert witness, Dr. Goldsteen, concluding that the Proximity Provisions would effectively prevent touching between nude employees and patrons.

2. The Licensing Provisions

The Licensing Provisions set out the procedural and substantive scheme governing ***551** suspension and revocation of a SOB's license to do business. *See* Arlington, Tex., Sexually Oriented Business Ordinance § 4.01. It is the alleged procedural and substantive invalidity of these provisions that originally prompted this lawsuit. Since initiation of this case, however, the City has amended the Licensing Provisions significantly. Because of these amendments, the district court concluded that all of Fantasy Ranch's challenges to the previous Licensing Provisions are moot. To review the district court's judgment on this point, then, requires an understanding of how the pre-amendment version of the Licensing Provisions compares with the post-amendment version.

a. The Pre-amendment Licensing Provisions

Prior to their amendment by the City, and at the time that Fantasy Ranch originally filed this suit, the Licensing Provisions required that a SOB's license be temporarily suspended

> "if the [City's] Chief of Police determine[d] that a licensee(s), operator(s), or employee(s) of a licensee ha[d] ... [o]n five (5) or more occasions within any one (1) year period of time, violated [the no-touch] provisions [of the SOB Ordinance] and ha[d] been convicted or placed on deferred adjudication or probation for the violations."

Arlington, Tex., Sexually Oriented Business Ordinance § 4.05(A)(1), *amended by* Arlington, Tex. Ordinance 03–041, § 4.05(A)(1) (April 1, 2003). Following the fourth such temporary suspension, the pre-amendment Licensing Provisions required that the City revoke the SOB's license. *Id.* § 4.06(A)(1). Once a SOB received notice that the Chief of Police had determined that its license was subject to a temporary suspension for five no-touch violations, the pre-amendment Licensing Provisions granted the SOB the right to challenge that notice of suspension either in writing to the City's "Chief of Police" or by requesting a hearing before the "Chief of Police"—a term that the Licensing Provisions defined to include, *inter alia,* the "Deputy Chief of Police." *Id.* § 4.07. The pre-amendment Licensing Provisions did not define the procedural or substantive rules and standards according to which the Chief of Police (or his deputy) was to render his decision. If the Chief of Police ordered a temporary suspension of the SOB's license to proceed, the pre-amendment Licensing Provisions permitted that SOB to appeal the suspension to a Texas state court, and the suspension would not go into effect until after the conclusion of that appeal. *Id.* §§ 4.05(A), 4.09.

b. The Post-amendment Licensing Provisions

On April 1, 2003, after Fantasy Ranch filed this lawsuit to challenge the constitutionality of the SOB Ordinance's pre-amendment Licensing Provisions, the City enacted Ordinance No. 03–041, which significantly amended the Licensing Provisions to incorporate more substantive and procedural protections for SOBs. Specifically, under the post-amendment Licensing Provisions, the Chief of Police could suspend a SOB's license because of that SOB's employees having been convicted of five violations within any one year of the no-touch or Proximity Provisions *only* if the SOB had been given notice of the citations for those violations within three business days following the issuance of the citation. Arlington, Tex., Ordinance 03–041, § 4.05(A)(1). In addition, the amended Licensing Provisions created an affirmative defense for SOBs faced with such a possible license suspension: "It shall be an

affirmative offense [sic] to [a] suspension [arising out of five violations of the no-touch or Proximity provisions] if [the SOB] ***552** shows by a preponderance of the evidence that it was powerless to prevent [the no-touch or Proximity] violation[s]." *Id.* § 4.05(B). Moreover, the post-amendment Licensing Provisions more clearly delineate the procedural and substantive rules governing the Chief of Police's resolution of a SOB's challenge to a notice of suspension. Specifically, the amended Licensing Provisions (1) provide for an evidentiary hearing before an administrative law judge (rather than before the Chief of Police or his deputy) and grant that judge the responsibility of ruling on procedural and evidentiary questions that arise during the hearing; and (2) define what evidence the Chief of Police may consider when deciding whether to suspend the SOB's license. *Id.* §§ 4.07. Finally, certain aspects of the Licensing Provisions were unaffected by Ordinance No. 03–041. Namely, the post-amendment Licensing Provisions continue to permit an aggrieved SOB to appeal its license suspension to state court, and the provisions still provide that the license suspension is stayed pending the outcome of that appeal. *Id.* § 4.09. In addition, under the post-amendment Licensing Provisions, four temporary license suspensions still result in revocation of a SOB's license on the fifth violation. *Id.* § 4.06(A)(1).

C. Procedural History

In January 2003, after Fantasy Ranch's administrative challenge to the City's proposed suspension of its license failed, but before the three-day suspension ordered by Chief Bowman was to go into effect, Fantasy Ranch filed suit in the Northern District of Texas seeking declaratory judgment that the license suspension and revocation scheme created by the pre-amendment Licensing Provisions (1) violated the First Amendment by (a) operating as a prior restraint, and (b) failing to satisfy the requirements for content-neutral speech-inhibiting regulations set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); and (2) violated the procedural component of the Due Process Clause. Two months later, in March 2003, Fantasy Ranch moved for summary judgment on all of these claims.

On April 1, 2003, before the City responded to Fantasy Ranch's motion for summary judgment, the City enacted the first of four amendments to the SOB Ordinance that directly impact this case. The City first enacted Ordinance No. 03–041, which, as explained *supra,* amended the Licensing Provisions by enhancing the procedural and substantive protections afforded to SOBs during the license suspension and revocation process. Based on these enhanced protections, the City filed its first amended answer to Fantasy Ranch's original complaint, asserting that Ordinance No. 03–041's changes to the Licensing Provisions rendered all of Fantasy Ranch's claims challenging the pre-amendment Licensing Provisions moot. In addition, the City's first amended answer asserted that it would not ever enforce the temporary suspension of Fantasy Ranch's license that it had ordered under the pre-amendment Licensing Provisions. [1]

1 During oral argument before this court, the City repeated this promise, and also expressly agreed that it would not only not try to enforce this suspension but also that it would not ever try to use it as one of the four predicate temporary suspensions necessary under the ordinance to permanently suspend an SOB's license.

On April 15, 2003, just two weeks after enacting Ordinance No. 03–041, the City again amended its SOB Ordinance by enacting Ordinance No. 03–044. That amendment established the above described Proximity Provisions of which the Arlington SOBs now complain. Prior to the enactment of the ordinance, the City's ***553** SOB Ordinance only (1) prohibited touching between nude dancers and their customers, and (2) required that signs be placed at the entrances to SOBs informing customers of the no-touch rule. Arlington, Tex., Ordinance 03–044, §§ 6.03(B)-(C), 6.04(B). As discussed *supra,* the City found the additional Proximity Provisions to be necessary because the existing no-touch and signage rules did not effectively prevent touching between nude dancers and patrons. Specifically, the City, in enacting these additional provisions, expressly found that SOBs "have not complied with the 'no touch' provisions, [and] have flagrantly disregarded them and/or encouraged employees and customers to violate the 'no touch' provision." *Id.* § 1.03 ¶ 29. Moreover, according to these formal findings of the City, "[c]ompelling signage at the entrances of [SOBs] has not been effective in halting 'no touch' violations." *Id.* § 1.03 ¶ 31.

On May 1, 2003, in response to the amendment of the Licensing Provisions and the addition of the Proximity Provisions, Fantasy Ranch filed an amended complaint in which it (1) disputed the City's assertion that all of its claims attacking the pre-amendment Licensing

Provisions were moot, and (2) asserted new claims challenging the post-amendment Licensing Provisions, arguing essentially that those provisions suffer from the same constitutional infirmities as the pre-amendment Licensing Provisions. The next month, on June 23, 2003, Fantasy Ranch filed a supplemental complaint in which it again asserted new claims, this time challenging the Proximity Provisions, arguing that those provisions violate the First Amendment.

With the enactment of the Proximity Provisions, other SOBs became interested in the litigation and, on June 27, 2003, the district court granted intervenor Plaintiffs–Appellants Tazz Man, Inc., Cowtown Exposition, Inc., and Harry Freeman leave to intervene. The intervenor SOBs limited their challenges to the constitutionality of the Proximity Provisions and, therefore, are not parties to Fantasy Ranch's due process and related First Amendment challenges to the Licensing Provisions.

When the dust settled, the district court had before it constitutional claims challenging the pre- and post-amendment Licensing Provisions and the Proximity Provisions.[2] Fantasy Ranch alone challenged the pre-amendment Licensing Provisions, arguing (1) that those provisions (a) effected a prior restraint in violation of the First Amendment, and (b) prior to Fantasy Ranch's license being temporarily suspended, failed to provide Fantasy Ranch with the process it was constitutionally due; and (2) that its claims were not mooted by either the City's amendment of the Licensing Provisions or the City's pledge not to enforce its temporary suspension of Fantasy Ranch's license. Also alone, Fantasy Ranch challenged the post-amendment Licensing Provisions, essentially arguing that those provisions failed for the same reasons as the pre-amendment Licensing Provisions. Finally, all of the Arlington SOBs challenged the Proximity Provisions, arguing that those provisions are unconstitutional restrictions on symbolic speech.

2 Other claims by the Arlington SOBs were also before the district court, but those claims are not relevant to this appeal.

In February 2004, the Arlington SOBs moved for summary judgment on all of their claims, and in March 2004 the City cross-moved for summary judgment. Five months later, in August 2004, the district ***554** court issued a memorandum opinion and order granting summary judgment to the City, denying the Arlington SOBs' motion for summary judgment, and holding the Proximity Provisions constitutional. The district court's August 2004 opinion did not, however, address Fantasy Ranch's constitutional claims directed at the pre- and post-amendment versions of the Licensing Provisions; rather, the district court waited until its final judgment, which was issued in September 2004, to resolve those claims. In that judgment, the court held (without further elaboration) that "[i]n regards to ... Fantasy Ranch's causes of action attacking the Constitutionality of § 4.05 and § 4.07 [the Licensing Provisions], as set forth in its pleadings ..., the claims are moot and ... the statutory provisions at issue are Constitutional."

DISCUSSION

I. The Proximity Provisions

We first address the appellants' First Amendment challenge to the ordinance's Proximity Provisions, and hold that those provisions satisfy the four-part test set forth in *O'Brien* for content-neutral restrictions on symbolic speech.

[1] We review the district court's grant of summary judgment *de novo,* applying the same legal standard as the district court. *Vela v. City of Houston,* 276 F.3d 659, 666 (5th Cir.2001). "Summary judgment is appropriate only if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' when viewed in the light most favorable to the non-movant, 'show that there is no genuine issue as to any material fact.' " *TIG Ins. Co. v. Sedgwick James of Washington,* 276 F.3d 754, 759 (5th Cir.2002) (quoting *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

[2] **[3]** "While it is now beyond question that nonobscene nude dancing is protected by the First Amendment, even if 'only marginally so,' it is also clear that the government can regulate such activity." *LLEH, Inc. v. Wichita County, Texas,* 289 F.3d 358, 365 (5th Cir.2002) (citations omitted). Indeed, nude dancing falls only "within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265 (2000) (plurality opinion); *see also Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion).

A. Strict or Intermediate Scrutiny

[4] We must first determine, then, what level of scrutiny applies, a question that depends on whether the government's predominate purpose in enacting the regulation is related to the suppression of expression itself. *Pap's A.M.,* 120 S.Ct. at 1391 (plurality opinion). If the government's interest is indeed related to the suppression of content, then that regulation of symbolic speech is subject to strict scrutiny. *See Texas v. Johnson,* 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). If, however, the government's predominate purpose is unrelated to the suppression of expression, such that the regulation can be "justified without reference to the content of the regulated speech," then intermediate scrutiny applies. *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); *see also O'Brien.*

The City of Arlington contends that its ordinance is "content neutral," arguing that it targets only negative secondary effects of speech, not content. The appellants counter that the ordinance is "content based," arguing that the ordinance's ***555** predominate interest is, in fact, the suppression of their erotic message, a message which, they further contend, has never been shown by the City to produce any negative secondary effects.

[5] Courts routinely apply *intermediate* scrutiny to government regulation of sexually oriented businesses, and we again do so today. *See Pap's A.M.,* 120 S.Ct. at 1391 ("government restrictions on public nudity ... should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech."); *see also N.W. Enterprises Inc. v. City of Houston,* 352 F.3d 162, 173 (5th Cir.2003); *LLEH v. Wichita County, Tex.,* 289 F.3d 358, 364 (5th Cir.2002); *Encore Videos, Inc. v. City of San Antonio,* 330 F.3d 288, 291 (5th Cir.2003). In *LLEH v. Wichita County,* for example, this court applied *O'Brien*'s intermediate scrutiny to a public lewdness ordinance that was nearly identical to the one at issue here, reversing the district court's bench-trial judgment in favor of a sexually oriented business, and holding that a six-foot buffer requirement, an 18–inch stage height requirement, and a demarcation requirement were all constitutional under *O'Brien.* [3] And, in *Pap's A.M.,* a divided Supreme Court upheld an ordinance that banned all public nudity and, as a consequence, required the City's erstwhile nude dancers to wear pasties and g-strings during their performances. 120 S.Ct. at 1383 (2000). In deciding to apply *O'Brien*'s intermediate scrutiny, the Court reasoned that the ordinance was "on its face a general prohibition on public nudity," and noted that the City of Erie's "asserted interest in combating the negative secondary effects associated with adult entertainment establishments ... is unrelated to the suppression of the erotic message conveyed by nude dancing." *Id.* at 1391–92, 1394.

3 We acknowledge that in *LLEH* none of the parties challenged on appeal the *O'Brien* intermediate scrutiny standard applied by the district court. *Id.,* 289 F.3d at 366.

We acknowledge that in *Pap's A.M.* the Court was persuaded of the ordinance's content neutrality by two related considerations, only one of which is present here. First, the Court noted that "the ordinance ... is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments ... and not at suppressing the erotic message conveyed by this type of nude dancing," a consideration which is also present here, since, as we discuss below, the City of Arlington's ordinance is also aimed predominately at secondary effects. The second consideration relied upon in *Pap's A.M.,* however, was that the City of Erie's ordinance banned "all public nudity," and that the ordinance was therefore *content neutral* because it was *facially neutral. Pap's A.M.,* 120 S.Ct. at 1391 ("The ordinance here ... is on its face a general prohibition on public nudity.... It does not target nudity that contains an erotic message."); *see also Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 2461, 115 L.Ed.2d 504 (1991) ("Indiana's public indecency statute ... predates barroom nude dancing and was enacted as a general prohibition."). By this second consideration, facial neutrality, the City of Arlington's ordinance is not content neutral, because it targets only sexually oriented businesses.

We understand, of course, that the City of Arlington's targeted ordinance "might simply reflect the fact that [Arlington] had recently been having a public nudity problem not with streakers, sunbathers or hot dog vendors ... but with lap dancers." *Pap's A.M.,* 120 S.Ct. at 1401 (Scalia, J. concurring). Indeed, it would seem mere pretext if the City of Arlington, in the ***556** name of facial neutrality, also required nude-ballet buffer zones, thereby invoking and eradicating a non-existent public nuisance.

We therefore hold that an ordinance such as the one before us is content neutral so as long as the ordinances's predominate concern is for secondary effects, a holding supported by our sister circuits and a careful reading of a fractured Court.[4] The Sixth and Ninth Circuits, for example, while upholding buffer-zone and stage-height requirements similar to the one here, have classified such provisions as content neutral. In *Deja Vu, Inc. v. Nashville*, the Sixth Circuit held that a three-foot buffer zone and an eighteen-inch stage-height requirement were subject to intermediate scrutiny, explaining that "[w]e have previously recognized that ordinances aimed at regulating adult entertainment businesses constitute content-based regulations, but that 'a distinction may be drawn between adult [businesses] and other kinds of [businesses] without violating the government's paramount obligation of neutrality' when the government seeks to regulate only the secondary effects of erotic speech, and not the speech itself.". 274 F.3d 377, 391 (6th Cir.2001) (citations omitted). Likewise, in *Kev, Inc. v. Kitsap County*, the Ninth Circuit held that (1) a ten-foot buffer zone, (2) a two-foot stage-height requirement, and (3) a no tipping rule were all subject to intermediate scrutiny, explaining that "[t]he stated purpose of the County's ordinance is to alleviate undesirable social problems that accompany erotic dance studios, not to curtail the protected expression—namely, the dancing.... Thus, we conclude that the ordinance is content-neutral because it is justified without 'reference to the content of the regulated speech.' " 793 F.2d 1053, 1059 (9th Cir.1986).

4 In *City of Los Angeles v. Alameda Books,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), at least five Justices acknowledged that SOB zoning ordinances were actually content based, yet nevertheless applied intermediate scrutiny, explaining, in Justice Kennedy's concurrence, that "the ordinance is not so suspect that we must employ the usual rigorous analysis that content-based laws demand in other instances." The reasons given for the ordinance there being "not so suspect," however, may be unique to zoning regulations. *See Alameda Books,* 122 S.Ct. at 1740–41 (explaining that zoning regulations merit a presumption of validity since they have historically targeted secondary effects, not content). *Cf. G.M. Enterprises, Inc. v. Town of St. Joseph,* 350 F.3d 631, 637 (7th Cir.2003) (suggesting that intermediate scrutiny might apply to similar content-based restrictions on symbolic speech).

Indeed, *Pap's A.M.* itself provides support for this approach. For although the court there emphasized that "Erie's ordinance is *on its face* a content-neutral restriction on conduct," the plurality also remarked, "Even if the City thought that nude dancing ... constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing." *Pap's A.M.,* 120 S.Ct. at 1394. (emphasis added). And, in a separate concurrence, Justice Scalia, joined by Justice Thomas, made a similar point, noting that "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 ... that is was the communicative character of nude dancing that prompted the ban." *Pap's A.M.,* 120 S.Ct. at 1402 (Scalia, J. concurring). Finally, while discussing the secondary effects doctrine in the context of zoning ordinances, ***557** Justice Kennedy has explained, "The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects...." *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 1742, 152 L.Ed.2d 670 (2002). *See also R.A.V. v. City of St. Paul,* 505 U.S. 377, 112 S.Ct. 2538, 2546, 120 L.Ed.2d 305 (1992) (noting that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with ... 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the ... speech.' ").

[6] Applying this result to our case, we agree with the district court's ruling that because the City of Arlington's SOB ordinance is predominately targeted to the prevention of secondary effects, not to the suppression of symbolic expression, it is entitled to intermediate scrutiny. The purpose of Ordinance No. 03–044, even as the appellant sees it,[5] is to better enforce the City's previously enacted "no touch" rule, a rule that itself targeted the very same secondary effects that continue to trouble the City today—prostitution, assault, drug dealing, and even the touching itself. The content of the erotic speech affected by this ordinance (that message which is allegedly conveyed by dancing nude within six feet of a person) is, according to the appellant's expert, a message of "comfort/support, friendliness, trust, inclusion, immediacy, humanity, play, affection,

sensuality, desirability, [and] love." It is easy to imagine a regulation that might directly target such a message, especially when it is communicated between strangers for a fee; however, this particular ordinance's stated purpose is to eradicate certain negative secondary effects that flow from this particular form of symbolic speech,[6] particularly the physical contact between dancer and patron that we have already held to be unprotected by the First Amendment, *see Hang On, Inc. v. City of Arlington,* 65 F.3d 1248 (5th Cir.1995), and the crimes which that touching encourages and facilitates. As the *Pap's A.M.* plurality explained, "If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based." *Pap's A.M,* 120 S.Ct. at 1394. Here, the ordinance attempts to control secondary effects while leaving the "quantity and accessibility of speech substantially intact." *Alameda Books,* 122 S.Ct. at 1742.[7]

5 The appellants argue in their brief to this court that "[t]he predominate concern of Ordinance No. 03–044 was, and remains today, the conduct-generated adverse effects of touching."

6 *See* Arlington, Tex., Ordinance 03–044, § 1.02 ("*Purpose and Intent* It is the purpose of this Chapter to regulate Sexually Oriented Businesses to promote the health, safety, morals and general welfare of the citizens of the City.... The provisions of this Chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials ...."); *see also id.* § 1.03 ("*Findings* Based on evidence concerning the adverse secondary effects of Sexually Oriented Businesses on the community....").

7 As proof of the City's content-based motives, appellants draw our attention to the ordinance as originally enacted, which included a provision allowing City officials to ban particular dance movements. We disagree that such a provision suffices as to proof of illicit motive of the later enacted ordinance. The provision in question was ultimately rejected. Moreover, the provision might have been understood as an attempt to enforce the "no-touch" rule through the elimination of dance movements that might result in incidental contact between dancer and patron. More importantly, "this [c]ourt will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Pap's A.M.,* 120 S.Ct. at 1392; *see also Barnes,* 111 S.Ct. at 2469 ("At least as to the regulation of expressive conduct, 'we decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.' ") (Souter, J., concurring) (quoting *O'Brien,* 88 S.Ct. at 1683). For example, the *O'Brien* court ignored the following legislative history which, if credited, may have called into question the relevant statute's content neutrality: "The [Senate] committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies." *O'Brien,* 88 S.Ct. at 1673, 1684 (1968) (appendix).

***558** The appellants urge, however, that because the alleged secondary effects result only from actual physical contact, not from mere proximity, the City could not realistically hope to eradicate them by going, literally, above and beyond the "no-touch" rule and enacting buffer zone and stage-height requirements.

The appellants' argument is flawed. This stage of the analysis—whether there is content neutrality—is simply the wrong place to dispute either the *existence* of the secondary effects or the *efficacy* of the challenged ordinance. Presently, we are concerned only with the ordinance's stated purpose; if the government's interest is unrelated to expression, then intermediate scrutiny applies. *See Pap's A.M.,* 120 S.Ct. at 1396 ("*O'Brien,* of course, required no evidentiary showing at all that the threatened harm was real."). Application of *O'Brien*'s intermediate scrutiny, however, gives those challenging the ordinance an opportunity to convince the court that the ordinance does not actually further any substantial government interests, or, relatedly, that no substantial government interests exist. *See N.W. Enterprises,* 352 F.3d at 176 ("[T]he constitutional standard of review depends only upon the City's predominate legislative concern, not its pre-enactment proof that the ordinance would work....").

B. Applying *O'Brien*

[7] **[8]** Because we conclude that Ordinance No. 03–044 is content neutral, it is a constitutional restriction on symbolic speech if it satisfies the four factor test from *O'Brien.* Applying the *O'Brien* standard here, we

conclude that the City of Arlington's ordinance passes the test. A public nudity ordinance that incidentally impacts protected expression should be upheld if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on first amendment freedoms is no greater than is essential to the furtherance of that interest.

[9] The first prong of *O'Brien,* which is unchallenged by appellants, is whether the ordinance is within the constitutional power of the Arlington City Council. Even if challenged, this prong would easily be satisfied, since ordinances aimed at protecting the health and safety of citizens are squarely within the City's police powers. *Pap's A.M.,* 120 S.Ct. at 1395. The second prong of *O'Brien* is whether the regulation furthers an important or substantial government interest. The Court has identified two distinct questions packaged within this second prong. *See Pap's A.M.,* 120 S.Ct. at 1397 (describing the two questions as, first, "whether there is a substantial government interest ... *i.e.* whether the threatened harm is real," and, second, ***559** "whether the regulation furthers that interest"). The appellants challenge the ordinance on both grounds, arguing first that a question of material fact exists as to whether "prostitution transactions, narcotics transactions, and assault result from proximity between dancer and patron during performances," and second that, even if these do exist, a question of material fact exists as to whether Ordinance No. 03–044 will ameliorate the problem.

[10] **[11]** **[12]** Both of these challenges raise questions of evidence that we evaluate using the standard described in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), as modified by *Alameda Books. See Pap's A.M.,* 120 S.Ct. at 1395 ("[T]he evidentiary standard described in *Renton* controls here...."); *Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 1733, 152 L.Ed.2d 670 ("We granted certiorari to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton.*") (citations omitted). The *Renton* evidentiary standard, as reaffirmed in *Alameda Books,* provides that "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books,* 122 S.Ct. at 1736 (quoting *Renton,* 106 S.Ct. at 931); *see also N.W. Enterprises Inc. v. City of Houston,* 352 F.3d 162, 180 (5th Cir.2003). Justice Kennedy's concurrence noted that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities...." *Alameda Books,* 122 S.Ct. at 1743 (quoting *Renton,* 106 S.Ct. at 931).[8] However, the plurality cautioned that the government cannot rely on "shoddy data or reasoning," explaining that:

> "the municipality's evidence must fairly support the municipality's rationale.... If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standards set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."
>
> *Alameda Books,* 122 S.Ct. at 1736 (plurality opinion) (citing *Pap's A.M.,* 120 S.Ct. at 1395–96); *see also Alameda Books,* 122 S.Ct. at 1742–44 (Kennedy, J., concurring).

The City of Arlington's summary-judgment evidence fairly supports its rationale by demonstrating a connection between speech and a substantial, independent government interest. The record before us includes a report by the City's expert, Dr. Joel B. Goldsteen; several studies, conducted both within the City of Arlington and in other communities; as well as data cited in numerous courts opinions, all of which demonstrate a connection between dancer-patron touching and unsavory secondary effects. Also in the record are findings that the City's prior "no touch" ordinance had been consistently flouted and that attempts to enforce it had been costly and not adequately effective.

Faced with the "no touch" ordinance's failure to achieve its purpose, the City enacted the current version of the Ordinance, ***560** including proximity provisions,

8 In *Pap's A.M.,* the Court held that a municipality's own findings and "reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing" were a sufficient evidentiary basis. 120 S.Ct. at 1395.

demarcation requirements, and a no tipping rule, which the City believes are necessary to insure compliance with the "no touch" rule and to thereby eliminate the secondary effects that it targets. The City supports this belief with a Los Angeles Police Department study of criminal acts that are associated with close proximity between dancer and patron. Indeed, the appellants' own expert, Dr. Hanna, admits the very fact upon which the City's inference rests, noting that "[c]loseness and interaction between a performer and an individual patron permit the dancer to show special interest in the patron.... This occurs through eye contact, pupil dilation and ... *incidental touch* ...." (emphasis added).

The appellants respond, however, that the ordinance's *pre-enactment* record contains no empirical support for the City's alleged link between proximity and the targeted secondary effects. They point to their deposition of the City's expert, Dr. Goldsteen, who conceded that, pre-enactment, he was unaware of "any empirical studies which gauge the level of secondary effects which occur inside a gentlemen's club which is correlated to the distance between dancer and patron," and that he had not read "any report ... of that nature prior to [his] report to the city council...." Further, appellants note that their own expert, Bruce McLaughlin, concluded that "[n]othing in Goldsteen's report or in the materials which he could have examined establishes a correlation between dancer-patron proximity, let alone a causal relationship between such proximity, and adverse secondary effects." Echoing the appellant's concern for *pre-enactment* justification, McLaughlin concluded, "The Arlington City Council had before it nothing whatsoever with respect to proximity of dancers and patrons other than Goldsteen's conjecture and speculation."

[13] The appellant's focus on the City Council's pre-enactment rationale is misplaced, since "[o]ur appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a *current governmental interest* in the service of which the challenged application of the statute may be constitutional." *LLEH,* 289 F.3d at 368 (emphasis added) (quoting *Barnes v. Glen Theatre,* Inc., 501 U.S. 560, 111 S.Ct. 2456, 2469, 115 L.Ed.2d 504 (1991) (Souter, J., concurring)); *see also N.W. Enterprises,* 352 F.3d at 175 ("[T]he City need not demonstrate that the City Council actually relied upon evidence of negative secondary effects.... A local government can justify a challenged ordinance based both on evidence developed prior to the ordinance's enactment and that adduced at trial.").

The appellants further argue, in the alternative, that the *post-enactment* rationale offered by the City is "shoddy," and contend that even if the City has met its burden of demonstrating a rationale for regulating proximity, they've cast sufficient doubt upon that rationale, as described in *Alameda Books,* to shift the burden back to the City to supplement the record and thereby preclude summary judgment. *See, e.g., Peek–A–Boo Lounge v. Manatee County,* 337 F.3d 1251, 1270–71 (11th Cir.2003) (reversing a summary judgment in favor of the County because the Peek–A–Boo Lounge had "successfully cast doubt on the County's rationale by placing into the record substantial and unanswered factual challenges."). In support of this claim, the appellants point to an affidavit by their expert, Joe Morris, who, after collecting data from open records requests to the Arlington police department and the municipal court, reported that there were no arrests, citations, or police calls for prostitution, solicitation, assault, or narcotics at any of the City of ***561** Arlington's adult cabarets from July 1, 2002 through July 1, 2003.

We find this evidence, even when viewed in a light most favorable to the plaintiff, plainly insufficient to preclude summary judgment. Indeed, "[a]lthough this evidence shows that [the City] might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the [City's] legislative process." *G.M Enterprises, Inc. v. Town of St. Joseph,* 350 F.3d 631, 639 (7th Cir.2003) (affirming summary judgment in favor of the Town's five-foot buffer and eighteen-inch stage-height requirement despite meaningful countervailing evidence presented by the plaintiffs). At best, Joe Morris's report suggests that no *arrests* at strip clubs had occurred for prostitution, drugs, or assault, a fact that is likely of little comfort to the City of Arlington, which passed this ordinance at least in part because dancer-patron proximity in a dimly-lit room made such crimes difficult to police. Ultimately, we are not empowered by *Alameda* to second-guess the empirical assessments of a legislative body, nor are we expected to submit such assessments to a jury for re-weighing; instead, the relevant "material fact" that must be placed at issue is whether the ordinance is supported by evidence that can be "*reasonably* believed to be relevant to the problem." *See*

Renton, 106 S.Ct. at 931 (emphasis added); *see also N.W. Enterprises,* 352 F.3d at 180; *Alameda Books,* 122 S.Ct. at 1743 (Kennedy, J., concurring) ("[T]he Los Angeles City Council knows the streets of Los Angeles better than we do."). Because no such issue of material fact exists, we hold that Ordinance No. 03–044 satisfies the second prong of *O'Brien.*

The Ordinance also satisfies the third prong of *O'Brien* because, as discussed *supra,* the City's interest is unrelated to the suppression of free expression. *See Pap's A.M.,* 120 S.Ct. at 1397.

The fourth and final prong of *O'Brien* is also satisfied here, since the restriction on expressive conduct is no greater than is essential to the furtherance of the City's interest. In reaching this conclusion, we are largely bound by (and in any event agree with) our prior opinion in *LLEH,* in which we held that an ordinance with identical buffer-zone, stage-height, and demarcation requirements satisfied *O'Brien*'s fourth prong. The *LLEH* court explained that "such regulations are not invalid simply because there is some imaginable alternative that might be less burdensome on speech" so long as the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *LLEH,* 289 F.3d at 367 (quoting *United States v. Albertini,* 472 U.S. 675, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985)) (emphasis omitted). The only relevant difference between this ordinance and the one at issue in *LLEH* is that the Arlington ordinance also contains a six-foot tipping restriction. This restriction also satisfies prong four, however, because it "is simply a manifestation of the buffer provision; it furthers the same substantial interests.... [I]t imposes no further restriction on speech." *LLEH,* 289 F.3d at 368–69 (discussing the demarcation requirement).

Appellants respond, first, that *LLEH* 's narrow-tailoring standard was overruled by Justice Kennedy's concurrence in *Alameda Books,* and, second, that under either standard the ordinance is unconstitutional, since it *completely* bans a unique form of expression, proximate nude dancing.

***562** We disagree with the appellants' contention that *LLEH* is no longer good law. The question of narrow tailoring was not before the Court in *Alameda Books;* rather, the Court "granted certiorari to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton.*" *Alameda Books,* 122 S.Ct. at 1733 (citations omitted). That question is relevant only to issues discussed above respecting *O'Brien* prongs two and three.

But even if Justice Kennedy's concurrence has tightened the narrow tailoring standard of *Renton,* [9] it is not clear that this purportedly new standard, which was formulated for zoning cases, would apply here, in a symbolic-speech case. Indeed, only two years before *Alameda Books,* in a symbolic-speech case, a plurality that included Justice Kennedy applied the very same "loose" narrow-tailoring requirement that we do today, holding "[t]he fourth *O'Brien* factor [is] that the restriction is no greater than is essential to the furtherance of the government interest," and concluding "since this is a content-neutral restriction, least restrictive means analysis is not required." *Pap's A.M.,* 120 S.Ct. at 1386, 1397. In any event, the ordinance before us satisfies even the more strict standard proposed by appellants.

9 The appellants refer to the following language from Justice Kennedy's concurrence: "[A] city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact.... [A] city may not attack secondary effects indirectly by attacking speech." *Alameda Books,* 122 S.Ct. at 1742.

Thus we also disagree with the appellants' second argument, presented through their expert witness, Dr. Hanna, that the ordinance enacts a *complete* ban on *proximate* nude dancing. [10] The Supreme Court rejected a very similar argument when it was made by the dissenters in *Pap's A.M.,* who argued that a pasties and G-string requirement completely silenced the erotic message associated with fully nude dancing. The plurality responded, "[S]imply to define what is being banned as the 'message' is to assume the conclusion.... Any effect on the overall expression is *de minimis.*" *Pap's A.M,* 120 S.Ct. at 1393. Moreover, in *Colacurcio,* the Ninth Circuit rejected an identical argument, made through the very same Dr. Hanna, while holding that a ten-foot buffer zone, a two-foot stage-height requirement, and a tipping ban were all sufficiently narrow-tailored. *Colacurcio v. City of Kent,* 163 F.3d 545, 555–57 (9th Cir.1998), *cert. denied,* 529 U.S. 1053, 120 S.Ct. 1553, 146 L.Ed.2d 459 (2000).

10 Dr. Hanna's "proximate nude dancing" theory could presumably *not* validly preclude a touching ban, as such bans having been universally upheld, but *would* (in appellants' view) preclude *any* distance restriction, so that nude dancers could not constitutionally be forbidden from coming within even an inch (or less) from patrons so long as they did not actually touch them.

Here too we hold that the effect on the overall expression is *de minimis,* as the City of Arlington has muted only that portion of the expression that occurs when the six-foot line is crossed, while leaving the erotic message largely intact. Indeed, in *Barnes,* all nine members of the Supreme Court agreed that a buffer zone would meet narrow tailoring requirements. Writing for the dissent, Justice White argued that the ordinance at issue, which banned all public nudity, was "not narrowly drawn." *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 2475, 115 L.Ed.2d 504 (1991). The dissenters continued, "If the State is genuinely concerned with prostitution and associated evils ... it can adopt restrictions that *do not* ***563** *interfere* with the expressiveness of nonobscene nude dancing performances. For instance, the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators...." *Id.* (emphasis added). Accordingly, we hold that the proximity provisions of the challenged ordinances satisfy all four prongs of *O'Brien,* and thus are a constitutional regulation of symbolic speech.

II. Prior Restraint

[14] Fantasy Ranch also contends that the ordinance's license-revocation provision is incompatible with the First Amendment because it imposes a prior restraint on symbolic speech. In *Universal Amusement Co., Inc. v. Vance*, this court held that a Texas nuisance statute, which authorized the one-year revocation of an adult theater's license on the basis of a prior finding of obscenity, constituted an impermissible prior restraint, "since the state would be enjoin[ing] the future operation of [a business] which disseminates presumptively First Amendment protected materials solely on the basis of the nature of the materials which were sold ... in the past." 587 F.2d 159, 166 (5th Cir.1978) (*en banc*) (internal quotations omitted). [11]

11 *See also, e.g., Entertainment Concepts, Inc. III v. Maciejewski,* 631 F.2d 497, 506 (7th Cir.1980).

The license revocation provision in this case differs from a prior restraint in two respects. "First, the [revocation] would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their ... business at another location, even if such locations are difficult to find," and, "second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed, the imposition of the closure order has nothing to do with any expressive conduct at all." *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 106 S.Ct. 3172, 3177 n. 2, 92 L.Ed.2d 568 (1986).

Unlike the provision in *Vance,* which prohibited the showing of any film for one year, Fantasy Ranch is not prohibited from obtaining another SOB license (for another location) during the pendency of any license suspension or revocation. This is because Fantasy Ranch's license revocation would have been related, not to an advance determination that the content of its speech would be prohibited, but to the adverse secondary effects generated by Fantasy Ranch at its particular extant location.

To the extent that the license revocation provision does burden Fantasy Ranch's expressive liberties, we find that burden justified. In *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the Supreme Court established three procedural safeguards to protect against the suppression of constitutionally protected speech by a censorship board. "First, any restraint before judicial review occurs can be imposed only for a specified brief period during which the status quo must be maintained; second, prompt judicial review of that decision must be available; and third, the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof in court." *N.W. Enterprises,* 352 F.3d at 193–94 (citing *Freedman,* 85 S.Ct. at 739).

The Arlington Ordinance contains all three safeguards, first, providing for a stay of suspension pending the appeals process, §§ 4.07(B)(3), 4.09; second, providing a hearing before an administrative law judge ***564** with an appeal to a Texas district court, §§ 4.07(B)(5), 4.09; and third, placing the burden of proof on the City, § 4.07(A). In fact, by this last provision, the City has provided for more procedural protection than our case law requires. Indeed, in *N.W. Enterprises* we held that the burden of proof need not be placed upon the City in cases where the

licensing involved "the ministerial, nondiscretionary act of reviewing the general qualifications of license applicants" and not the "presumptively invalid direct censorship of expressive material." 352 F.3d at 194 (citing *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion)); *see also Encore Videos, Inc. v. City of San Antonio,* 310 F.3d 812, 823 (5th Cir.2002); *TK's Video, Inc. v. Denton County, Texas,* 24 F.3d 705 at 707, 708 (5th Cir.1994); *MacDonald v. City of Chicago,* 243 F.3d 1021, 1035–36 (7th Cir.2001). The presumption of censorship does not apply here because the City of Arlington's revocation procedures do not require it to pass judgment on the content of an SOB's speech; rather, the procedures enumerate non-speech related criminal violations on which a license revocation or suspension must be predicated. Arlington, Tex., Ordinance 03–044, § 4.06.

Moreover, these enumerated violations are " 'plainly correlated with the side effects that can attend [adult] businesses, the regulation of which was the legislative objective ... [E]nds and means are substantially related [,] ... assur[ing] a level of scrutiny appropriate to the protected character of the activities and sluic[ing] regulation away from content, training it on business offal.' " *N.W. Enterprises,* 352 F.3d at 196 (quoting *TK's Video,* 24 F.3d at 710). Accordingly, we hold that the Ordinance's license revocation provision does not impose an unconstitutional prior restraint on speech.

III. Due Process

[15] Fantasy Ranch appeals the district court's dismissal as moot of its due process claims against the City's pre-amendment ordinance. A court may conclude that voluntary cessation has rendered a case moot if the party urging mootness demonstrates that "there is no reasonable expectation ... that the alleged violation will recur," and that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis,* 440 U.S. 625, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979).

[16] **[17]** The City's amended ordinance addresses all the issues raised by Fantasy Ranch's pre-amendment complaint, leaving Fantasy Ranch only with the claim that the Arlington City Council might one day amend the ordinance to reenact the offending provisions. As the Fourth Circuit has noted, however, "statutory changes that discontinue a challenged practice are 'usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.' " *Valero Terrestrial Corp. v. Paige,* 211 F.3d 112, 116 (4th Cir.2000) (quoting *Native Village of Noatak v. Blatchford,* 38 F.3d 1505, 1510 (9th Cir.1994)); *see also National Black Police Ass'n v. District of Columbia,* 108 F.3d 346, 349 (D.C.Cir.1997) ("the mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists"). We hold, therefore, that Fantasy Ranch's challenge to the pre-amendment ordinance is moot.

[18] Fantasy Ranch also challenges the post-amendment ordinance, specifically, its provision for revoking an SOB license after four suspensions, because that revocation provision does not expressly exclude ***565** from its four-suspension limit any suspensions that were imposed under the pre-amendment ordinance. Indeed, Fantasy Ranch notes that it already has one (and only one) such pre-amendment suspension in its name. However, in open court, the City has promised to neither enforce that three-day suspension imposed under the pre-amendment scheme, nor apply it toward the four total that are necessary to revoke an SOB license, and Fantasy Ranch's counsel agreed that this satisfied its concerns in that particular respect. We accordingly also hold that this due-process challenge to the post-amendment ordinance is likewise moot. To the extent that Fantasy Ranch makes other due process challenges to the post-amendment ordinance we reject them, essentially for the reasons stated in part II above. [12]

12 We also note that Fantasy Ranch has identified nothing in the ordinance that deprives them of notice or a hearing, although they allege, incorrectly, that the ordinance provides no notice to the club when a dancer has been cited for a violation. In fact, the ordinance provides that "[t]he City shall send to a Sexually Oriented Business written notice of each citation issued to an operator or employee of the business.... The notice will be sent within three (3) business days of the issuance of the citation...." Arlington, Tex., Ordinance 03–044, § 7.02. Moreover, contrary to Fantasy Ranch's claim, the ordinance provides an adequate tribunal, consisting of a hearing before an administrative law judge and an appeal before a Texas district court. Arlington, Tex., Ordinance 03–044, §§ 4.07, 4.09. *See also* part B2b above (The Post–Amendment Licensing Provisions).

The judgment of the district court is accordingly

AFFIRMED.

All Citations

459 F.3d 546

555 F.3d 512
United States Court of Appeals,
Sixth Circuit.

RICHLAND BOOKMART, INC. d/b/a Town and Country Bookstore; Knoxville Adult Video Superstore, Inc.; and Greg Turner, d/b/a Raymond's Place, Plaintiffs-Appellants/Cross-Appellees,
v.
KNOX COUNTY, TENNESSEE,
Defendant-Appellee/Cross-Appellant.

Nos. 07-6469, 08-5036.
|
Argued: Dec. 11, 2008.
|
Decided and Filed: Feb. 12, 2009.
|
Rehearing and Rehearing En Banc Denied April 23, 2009.

Synopsis

Background: Three sexually-oriented businesses filed suit to challenge the constitutionality of a county ordinance that established licensing requirements and regulations for sexually-oriented businesses. Upon motions by both parties, the United States District Court for the Eastern District of Tennessee, Thomas W. Phillips, J., 529 F.Supp.2d 868, granted summary judgment in favor of county and denied in part and granted in part businesses' motion for partial summary judgment. Businesses appealed and county cross-appealed.

Holdings: The Court of Appeals, Boggs, Chief Judge, held that:

[1] ordinance was a content-neutral time, place, and manner regulation of First Amendment expression;

[2] ordinance served substantial government interest of combating harmful secondary effects of sexually-oriented business establishments;

[3] ordinance's definition of adult cabaret, insofar is it incorporated ordinance's definition of semi-nudity, was sufficiently narrowly tailored under free speech clause;

[4] ordinance's definition of prohibited nudity was sufficiently narrowly tailored under free speech clause;

[5] definitions of semi-nudity and nudity did not unreasonably limit alternative avenues of communication to engage in protected expression;

[6] prohibition on sale or consumption of alcohol on premises of sexually-oriented businesses in ordinance was sufficiently narrowly tailored under free speech clause;

[7] ordinance's licensing scheme was not an unconstitutional prior restraint on speech; and

[8] state law did not preempt ordinance's limitation on hours of operation for sexually-oriented businesses.

Summary judgment affirmed in part and reversed in part.

West Headnotes (30)

[1] Constitutional Law
Sexually Oriented Businesses;Adult Businesses or Entertainment

A regulation of sexually-oriented businesses implicates at least two constitutionally-protected categories of speech: first, sexually explicit but non-obscene speech, such as adult publications and adult videos, and second, symbolic speech or expressive conduct, such as nude dancing. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[2] Constitutional Law
Time, Place, or Manner Restrictions

Time, place, and manner regulations of constitutionally-protected speech will survive constitutional scrutiny so long as they are content neutral, designed to serve a substantial governmental interest and do not

unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[3] **Constitutional Law**
Content-Neutral Regulations or Restrictions

Unlike content-based regulations of speech that are subject to the most exacting scrutiny under free speech clause, regulations unrelated to the content of speech are subject to an intermediate level of scrutiny. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[4] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

The kind of evidence required to establish that a content-neutral regulation of First Amendment expression furthers a substantial government interest depends on the character of the interest. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

Constitutional Law
Selective service and the draft

Constitutional Law
Public nudity or indecency

A content-neutral regulation of conduct, such as the prohibition on public nudity or on the destruction of draft cards, requires no evidentiary showing that the harm threatened is real in order to establish that the regulation furthers a substantial government interest, as required under free speech clause. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[6] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

The initial evidentiary burden on the government to establish the connection between a content-neutral time, place, and manner regulation of First Amendment expression and its purported impact on harmful secondary effects is not a heavy one: government must have had a reasonable evidentiary basis for concluding that its regulation would have the desired effect. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[7] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

Although not extraordinarily high, the evidentiary burden on the government to establish the connection between a content-neutral time, place, and manner regulation of First Amendment expression and its purported impact on harmful secondary effects requires that the government show that the evidence upon which it relied was reasonably believed to be relevant to the problem that the government sought to address. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[8] **Constitutional Law**
Secondary effects

Public Amusement and Entertainment
Sexually Oriented Entertainment

County ordinance, which regulated sexually-oriented businesses by means of licensing scheme and other regulations, and which prohibited certain activities in such establishments, was a content-neutral time, place, and manner regulation of First Amendment expression; ordinance's stated aim was to prevent the deleterious secondary effects of sexually oriented businesses within the county and did not attempt to regulate a general category of conduct. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[9] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

The First Amendment does not require a city, before enacting a content-neutral ordinance regulating the time, place, and manner of First Amendment expression, to conduct new studies or produce evidence independent of that already generated by other cities to demonstrate the adverse secondary effects of such expression, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[10] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

Local governments are not required to demonstrate empirically that proposed content-neutral ordinances regulating the time, place, and manner of First Amendment expression will or are likely to successfully ameliorate adverse secondary effects from such expression. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[11] **Constitutional Law**
Freedom of speech, expression, and press

Constitutional Law
Narrow tailoring requirement; relationship to governmental interest

If plaintiffs challenging a content-neutral ordinance regulating the time, place, and manner of First Amendment expression fail to cast direct doubt on a municipality's rationale that such restriction will ameliorate the harmful secondary effects of such expression, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets its burden of establishing that the ordinance serves a substantial government interest; if plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[12] **Constitutional Law**
Secondary effects

Constitutional Law
Bookstores

Constitutional Law
Video Stores

Public Amusement and Entertainment
Sexually Oriented Entertainment

County's content-neutral time, place, and manner ordinance, which regulated sexually-oriented businesses by means of licensing scheme and other regulations including prohibition of certain activities in such establishments, served substantial government interest of combating harmful secondary effects of such establishments, and therefore did not violate free speech clause, despite claim that evidence of secondary effects cited in ordinance was not germane to off-site consumption bookstores or video stores and combination adult-mainstream stores; cumulative evidence of secondary effects documented in ordinance, including lower property values and higher crime rates, supported county's rationale in regulating sexually-oriented businesses. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[13] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

Evidence suggesting that a different conclusion is also reasonable does not prove that a local government's findings were

impermissible or its rationale unsustainable, in the government's adoption of a content-neutral ordinance regulating the time, place, and manner of First Amendment expression in the interest of combating harmful secondary effects of that expression. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[14] Constitutional Law

Time, Place, or Manner Restrictions

"Narrow tailoring" in the context of time, place, and manner regulations of protected speech means that the government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals, but it does not require that the means chosen be the least restrictive or least intrusive means of serving its goals. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[15] Constitutional Law

Time, Place, or Manner Restrictions

The requirement of "narrow tailoring" in the context of time, place, and manner regulations of protected speech is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[16] Constitutional Law

Performers

Public Amusement and Entertainment

Dancing and other performances

Definition of adult cabaret, insofar is it incorporated the definition of semi-nudity in county's content-neutral time, place, and manner ordinance regulating sexually-oriented businesses, was narrowly tailored to serve substantial government purpose of limiting adverse secondary effects from semi-nude dancing, and therefore ordinance did not violate free speech clause, despite claim that ordinance unreasonably imposed licensing and regulatory requirements on businesses whose performers wore more than pasties and g-strings; county's legislative determination that regular semi-nude performances were as liable to produce unwanted secondary effects as other sexually-oriented businesses was reasonable in view of the secondary-effects evidence the county examined, and ordinance did not impose substantial regulatory burden on protected speech without advancing goal of limiting secondary effects. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[17] Constitutional Law

Performers

Public Amusement and Entertainment

Dancing and other performances

Definition of prohibited "nudity" in county's content-neutral time, place, and manner ordinance regulating sexually-oriented businesses, which definition included the showing of male of female genitals or anus or the showing of the female breast with less than a fully opaque covering of the nipple and areola, was narrowly tailored to county's objective of limiting harmful secondary effects of nude dancing, and therefore did not violate free speech clause, as claimed by adult cabaret, where county consistently maintained that pasties and G-strings constituted sufficient covering to take a performer out of the state of nudity as defined in ordinance. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[18] Constitutional Law

Nudity in general

While erotic dancing, whether performed in the nude or nearly so, is a protected expressive activity under the First Amendment, the state of nudity itself is not inherently expressive. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[19] **Constitutional Law**
Public nudity or indecency

Because nudity itself is not essential to the eroticism that brings dancing under the protection of the First Amendment, a ban on public nudity merely limits a particular means of expressing the kind of erotic message being disseminated. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[20] **Constitutional Law**
Performers

Public Amusement and Entertainment
Dancing and other performances

Definitions of semi-nudity and nudity in county's content-neutral time, place, and manner ordinance regulating sexually-oriented businesses did not unreasonably limit alternative avenues of communication to engage in protected expression embodied in erotic dance, and therefore ordinance did not violate free speech clause, as claimed by adult cabaret; ordinance left ample means of conveying the message contained in erotic dancing by giving adult cabaret choice to opt for pasties and g-strings for dancers and compliance with reasonable restrictions of ordinance, or to outfit dancers in sufficient cloth to escape regulation altogether. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[21] **Constitutional Law**
Prohibition against intoxicating liquors in adult establishments

Intoxicating Liquors
Licensing and regulation

Prohibition on the sale or consumption of alcohol on the premises of sexually-oriented businesses in county's content-neutral time, place, and manner ordinance was a reasonable restriction narrowly tailored to limit the secondary effects of crime, and therefore ordinance did not violate free speech clause, as claimed by adult cabaret; county's finding that sexually-oriented businesses as a category were associated with numerous adverse secondary effects reasonably relied on a number of prior judicial decisions finding sufficient evidence to support the connection between adverse effects and adult entertainment when combined with alcohol consumption. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[22] **Constitutional Law**
Prohibition of substantial amount of speech

A law that is overly broad proscribes a substantial amount of constitutionally protected speech judged in relation to the statute's plainly legitimate sweep. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[23] **Constitutional Law**
Overbreadth

Overbroad laws warrant the dramatic remedy of invalidation to allay the concern that the threat of enforcement of such a law may deter or chill constitutionally protected speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[24] **Constitutional Law**
Prohibition of substantial amount of speech

To succeed in a facial-overbreadth challenge on First Amendment speech grounds, plaintiffs must demonstrate from the text of the statute and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[25] **Constitutional Law**

Sexually Oriented Businesses;Adult Businesses or Entertainment

Constitutional Law

Licenses and permits in general

Public Amusement and Entertainment

Sexually Oriented Entertainment

County ordinance that established licensing requirements and regulations for sexually-oriented businesses was not unconstitutionally overbroad on its face, as claimed by three such businesses, in absence of any arguments or evidence in support of overbreadth claims beyond those proffered in support of businesses' unsuccessful as-applied free speech challenges. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[26] **Constitutional Law**

Licenses and permits in general

Public Amusement and Entertainment

Sexually Oriented Entertainment

County's licensing scheme for sexually-oriented businesses and their employees was a prior restraint on protected First Amendment expression, where ordinance prohibited license to applicant convicted of specified criminal activity, and provided for revocation of business's license if business knowingly hired someone who committed specified crime within previous five years. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[27] **Constitutional Law**

Prior Restraints

Prior restraints on protected expression are not unconstitutional per se. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[28] **Constitutional Law**

Licenses and permits in general

Public Amusement and Entertainment

Sexually Oriented Entertainment

Prior restraint on speech imposed by county ordinance's licensing scheme for sexually-oriented businesses, which restraint consisted of license prohibition or revocation in relation to prior crime by an applicant, did not violate free speech clause, where ordinance provided for prompt judicial review of a revoked license and also provided for the preservation of the status quo while a license application was pending and while an appeal from a revocation of the license was pending. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[29] **Counties**

Legislative control of acts, rights, and liabilities

Public Amusement and Entertainment

Preemption

State adult-oriented establishment statute did not preempt county ordinance's limitation on hours of operation for sexually-oriented businesses; statute clearly allowed county to enact and enforce restrictions concerning business operations of adult-oriented establishments and sexually-oriented businesses. West's T.C.A. §§ 7-51-1402(b), 7-51-1406.

1 Cases that cite this headnote

[30] **Public Amusement and Entertainment**

Sexually Oriented Entertainment

Sexually-oriented businesses lacked standing to challenge civil disability provisions of county ordinance which prohibited applicant from receiving sexually-oriented business license if applicant had been convicted of specified criminal activity, where none of businesses or anyone affiliated with them were ever convicted of any of the specified crimes.

Cases that cite this headnote

Attorneys and Law Firms

***517 ARGUED:** Frierson M. Graves, Baker, Donelson, Bearman, Caldwell & Berkowitz, Memphis, Tennessee, for Appellants. Scott D. Bergthold, Law Office of Scott D. Bergthold, Chattanooga, Tennessee, for Appellee. **ON BRIEF:** Frierson M. Graves, Baker, Donelson, Bearman, Caldwell & Berkowitz, Memphis, Tennessee, Michael F. Pleasants, Sr., Pleasants Law Firm, Memphis, Tennessee, Joseph J. Levitt, Jr., Knoxville, Tennessee, for Appellants. Scott D. Bergthold, Bryan Allen Dykes, Law Office of Scott D. Bergthold, Chattanooga, Tennessee, for Appellee.

Before: BOGGS, Chief Judge; KETHLEDGE, Circuit Judge; and THAPAR, District Judge. [*]

[*] The Honorable Amul R. Thapar, United States District Judge for the Eastern District of Kentucky, sitting by designation.

***518 OPINION**

BOGGS, Chief Judge.

Three sexually oriented businesses, Richland Bookmart, Inc., Adult Video Superstore, Inc., and Raymond's Place filed suit to challenge the constitutionality of a Knox County Ordinance that establishes licensing requirements and regulations for sexually-oriented businesses. Plaintiffs attacked several provisions of the Ordinance, on the theory that the Ordinance is unconstitutional as applied to them and on its face. Upon motions by both parties, the district court granted summary judgment in favor of Knox County and denied Plaintiffs' motion for partial summary judgment, with one small exception: the court ordered the severance of two crimes, "racketeering" and "dealing in controlled substances," from the list of crimes that triggered the Ordinance's civil disability provision. Plaintiffs' appeal raises four main issues. First, Plaintiffs claim that the Ordinance is an unconstitutional infringement on First Amendment freedoms that is not justified by adequate evidence that local sexually oriented businesses produce adverse "secondary effects" or that the Ordinance is designed to remedy such effects. Second, Plaintiffs claim that the definitions of "nudity," "semi-nudity," and "adult motel," as well as the prohibition on the sale and consumption of alcohol are not narrowly tailored and are unconstitutionally overbroad. Third, they claim that the Ordinance enacts an unconstitutional prior restraint. Fourth, they claim that the Ordinance's regulation of business hours is preempted by Tennessee law. Knox County cross-appeals, arguing that the district court erroneously ordered the severance of "racketeering" and "dealing in controlled substances" from the Ordinance's civil disability provision. With regard to the issues presented by Plaintiffs' appeal, we affirm the district court's decision; with regard to the cross-appeal, we reverse the order to sever.

I

Richland Bookmart, Inc. ("Richland") and Adult Video Superstore, Inc. ("Adult Video") are adult stores that sell and rent books, magazines and videos to adults. Both Richland and Adult Video are "off-site consumption" or "retail only" businesses-they do not operate on-site facilities for viewing of films or for other adult entertainment. Richland has operated for over twenty years; Adult Video opened in 2004. Greg Turner operates Raymond's Place ("Raymond's"), an adult cabaret that provides "adult entertainment to consenting adults," including female dancers performing in the nude or clad in pasties and g-strings.

In the fall of 2004, the Knox County Commission ("County") began to update its regulation of sexually oriented businesses, culminating in Ordinance O-05-2-102 ("Ordinance"). The Ordinance enacted licensing requirements and other regulations applicable to "sexually oriented businesses," which include adult arcades, adult bookstores or adult video stores, adult cabarets, adult motels, adult motion picture theaters, semi-nude model studios, sexual device shops, and sexual encounter centers.

An "adult bookstore or adult video store" is defined as "a commercial establishment which, as one of its principal business purposes, offers for sale or rental for any form of consideration any one or more of the following: books or [visual representations] which are characterized by their emphasis upon the display of 'specified sexual activities' or 'specified anatomical ***519** areas'." In reaction to a June 29, 2005 decision by the Tennessee Supreme Court, which invalidated a zoning ordinance on the basis of its vague definition of "adult bookstore," *see City of*

Knoxville v. Entertainment Resources, LLC, 166 S.W.3d 650 (Tenn.2005), the County amended its definition of adult bookstore or video store. The amended Ordinance specifies that a "principal business purpose" is defined to mean 35% or more of any one of the following: (a) displayed merchandise, (b) wholesale or (c) retail value of the displayed merchandise, (d) revenues derived from sale or rental, or (e) interior business space (we shall refer to this provision as the "35% threshold"). In addition, (f) a business that "regularly features" the "specified sexual activities" or "anatomical areas" and "prohibits access by minors, because of age, to the premises, and advertises itself as offering 'adult' or 'xxx' or 'x-rated' or 'erotic' or 'sexual' or 'pornographic' material on signage visible from a public right of way," is also defined to have the principal business purpose sufficient to bring it within the scope of the Ordinance.

An adult cabaret is defined as "a nightclub, bar, juice bar, restaurant, bottle club, or similar commercial establishment, whether or not alcoholic beverages are served, which regularly features persons who appear semi-nude." "Semi-nude or state of semi-nudity" is further defined to mean "the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part." [1]

[1] The word "bikini" was added into the definition at the same time as the definition of "adult bookstore or adult video store" was amended.

The Ordinance regulates sexually oriented businesses in three general ways: it requires that such businesses and all employees thereof be licensed on an annual basis, Secs. 4-12; it regulates business hours, the manner in which sexually explicit films or videos may be exhibited, and interior configuration requirements, Secs. 13-15; and it prohibits certain activities, Sec. 18. With regard to licensing, the Ordinance provides that a license "shall" be issued to both businesses and employees unless one of the specified conditions is met. One such condition is the applicant's conviction, a plea of guilty or of nolo contendere to a "specified criminal activity," namely "rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure," "dealing in controlled substances," or "racketeering." Sec. 5(a)(6), (b)(5). A business can also lose its license if it knowingly hires someone who committed one of these specified crimes within the previous five years. Sec. 10.

The Ordinance prohibits nudity and the "sale, use or consumption" of alcoholic beverage on the premises of a sexually oriented business. "Nudity or a state of nudity" is defined to mean "the showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola."

In May 2005, Richland and Adult Video filed suit seeking a preliminary injunction, a permanent injunction, and declaratory judgment against the Ordinance. After ***520** the Ordinance was amended as noted above and Raymond's motion to intervene was granted, the court denied the County's motion to dismiss. Plaintiffs moved for partial summary judgment, arguing that four provisions of the Ordinance are overbroad and not narrowly tailored, and the County moved for summary judgment in November 2007. On December 17, 2007, the district court denied Plaintiffs' motion and granted the County's motion for summary judgment with one exception: the court ordered that "racketeering" and "dealing in controlled substances" be severed from the Ordinance's definition of "specified criminal activity."

II

We review a district court's grant of summary judgment de novo. *Trustees of the Mich. Laborers' Health Care Fund v. Gibbons,* 209 F.3d 587, 590 (6th Cir.2000). The decision below may be affirmed only if the pleadings, affidavits, and other submissions show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In determining whether a genuine issue of material fact exists, we draw all reasonable inferences in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

III

Plaintiffs' first argument attacks the relevance and sufficiency of the evidence relied on by the County to justify the regulation of adult stores selling for off-site consumption only and of stores barely meeting the 35% threshold. Furthermore, Plaintiffs claim to have produced their own evidence that puts the County's factual findings and rationale in sufficient doubt to render summary judgment for the County inappropriate. In order to evaluate the merits of Plaintiffs' first claim, we must first determine how much and what kind of evidence is required to justify a regulation such as the present Ordinance, and how much and what kind of evidence is required to mount a successful challenge thereto.

A

[1] **[2]** A regulation of sexually oriented businesses, such as the Knox County Ordinance, implicates at least two protected categories of speech: first, sexually explicit but non-obscene speech, such as adult publications and adult videos, and second, "symbolic speech" or "expressive conduct," such as nude dancing. The Supreme Court has held that a restriction on protected speech is "sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Similarly, "time, place, and manner" regulations of protected speech will survive constitutional scrutiny "so long as they are [content neutral,] designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres,* 475 U.S. 41, 47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

The Supreme Court has indicated that "the [*O'Brien*] standard for judging the validity of restrictions on expressive conduct ... in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." ***521** *Ward v. Rock Against Racism,* 491 U.S. 781, 797-98, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (internal quotation marks and citation omitted); *see also Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) ("In *Clark [v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984),] we observed that this [time, place, or manner] test has been interpreted to embody much the same standards as those set forth in *United States v. O'Brien* ...."). Accordingly, we have previously treated the two standards as sufficiently similar to be applied interchangeably. *See, e.g., Sensations, Inc. v. City of Grand Rapids,* 526 F.3d 291, 299 n. 6 (6th Cir.2008); *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 410 n. 6 (6th Cir.1997). Yet, the two formulations were penned in different contexts and employ different language; neither the Supreme Court nor this court has made explicit whether and when the differences have any legal significance. We continue to adhere to the position that the *O'Brien* and *Renton* inquiries "embody much the same standards," *Barnes,* 501 U.S. at 566, 111 S.Ct. 2456. *DLS, Inc.,* 107 F.3d at 410 n. 6. At the same time, a clear resolution of Plaintiffs' first claim is aided by an understanding of the difference between *O'Brien* and its progeny and *Renton* and its progeny.

[3] Unlike content-based regulations that are subject to the "most exacting scrutiny," regulations "unrelated to the content of speech are subject to an intermediate level of scrutiny." *Turner Broad. Sys. v. FCC,* 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). In *O'Brien,* the Supreme Court set out the intermediate scrutiny standard for the constitutionality of content-neutral regulations of expression and applied it to a regulation of general conduct (a prohibition on the destruction of Selective Service draft cards) that incidentally burdened "symbolic speech" or "expressive conduct" (the burning of a draft card to protest the war). 391 U.S. at 376-77, 88 S.Ct. 1673. In *Renton,* the Supreme Court confronted another kind of content-neutral law: a time, place, or manner regulation aimed at negative "secondary effects" of protected speech. [2]

[2] We have acknowledged that, to some extent, the classification of restrictions on sexually explicit establishments as content-neutral is a legal fiction-but one that has been generally followed. *Richland Bookmart v. Nichols,* 137 F.3d 435, 440 (6th Cir.1998). As we have noted, "[a]lthough five members of the Court abandoned the premise that such restrictions are content-neutral sixteen years later in *City of Los*

> *Angeles v. Alameda Books,* [535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002)] the Court continued to apply intermediate scrutiny to laws targeting 'secondary effects.' " *729, Inc. v. Kenton County Fiscal Court,* 515 F.3d 485, 490-91 (6th Cir.2008).

In *Renton,* the Supreme Court reformulated the requirements of the *O'Brien* test and made them more specific as applied to the subset of content-neutral regulations then before the Court. *Renton*'s standard applies to time, place, and manner regulations rather than to prohibitions of speech, thereby limiting its application to laws that satisfy *O'Brien*'s first requirement that regulations be within the government's constitutional power. *Renton* closely mirrors *O'Brien*'s second requirement that the regulation "further" a substantial government interest by requiring that it be "designed to serve" the same. *Renton* requires that such regulations be content-neutral, thereby satisfying *O'Brien*'s third requirement that the interest be unrelated to the suppression of speech.

O'Brien's final demand that a restriction be "no greater than is essential to the furtherance" of the government interest is a requirement that the law be narrowly ***522** tailored. *See Turner Broad. Sys.,* 512 U.S. at 662, 114 S.Ct. 2445 (stating that a law needs to be narrowly tailored to satisfy the *O'Brien* standard, and that narrow tailoring "in this context requires ... that the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests." (internal quotation marks and citation omitted)). While *Renton* does not explicitly require narrow tailoring, we agree with the Seventh Circuit that a narrow-tailoring requirement is implicit in the *Renton* standard. *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 714 n. 16 (7th Cir.2003). That circuit noted that "the Supreme Court does not always spell out the 'narrowly tailored' step as part of its standard for evaluating time, place, and manner restrictions." *Ibid.* However, "a close examination of *Renton* reveals that the Court did consider whether the zoning ordinance at issue was narrowly tailored," *ibid.* (citing *Renton,* 475 U.S. at 52, 106 S.Ct. 925), and that the Court has required narrow tailoring in other cases involving time, place, and manner regulation. *See Ward,* 491 U.S. at 791, 109 S.Ct. 2746 (holding that to pass constitutional scrutiny, time, place, or manner restrictions must be " 'justified without reference to the content of the regulated speech, ... narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information' ") (quoting *Clark,* 468 U.S. at 293, 104 S.Ct. 3065). *Renton*'s final requirement that alternative avenues of communication are not to be unreasonably restricted is the only one that finds no reflection in *O'Brien:* it may fairly be said that this additional requirement exists to guard against the peculiar risks of time, place, and manner regulations that are not presented by general-conduct regulations.

[4] **[5]** The choice between the *O'Brien* and *Renton* doctrines takes on some significance mainly when we must determine what evidence is sufficient to satisfy the substantially equivalent intermediate-scrutiny standards. *See also Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County,* 337 F.3d 1251, 1264-65 (11th Cir.2003). Importantly, the kind of evidence required to establish that a regulation furthers a substantial government interest depends on character of the interest. A content-neutral regulation of conduct, such as the prohibition on public nudity or on the destruction of draft cards, "require[s] *no evidentiary showing* at all that the threatened harm was real." *City of Erie v. Pap's A.M.,* 529 U.S. 277, 299, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (emphasis added). It was enough, for example, that Congress took "official notice, as it were, that draft card destruction would jeopardize the [Selective Service] system," and no further evidence or studies were required. *Ibid.* (citing *O'Brien,* 391 U.S. at 378-80, 88 S.Ct. 1673). *See also Barnes,* 501 U.S. at 567-68, 111 S.Ct. 2456. However, as the Supreme Court cautioned, "[t]he fact that this sort of leeway is appropriate in a case involving *conduct* says nothing whatsoever about its appropriateness in a case involving *actual regulation of First Amendment expression*." *Ibid.* (emphasis added); *see also Schad v. Mount Ephraim,* 452 U.S. 61, 73, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (holding that plaintiffs' convictions for violation of a zoning ordinance prohibiting all live entertainment in the Borough of Mount Ephraim ran afoul of the First and Fourteenth Amendments, because "*the Borough has presented no evidence* ... that live entertainment poses problems ... more significant than those associated with various permitted uses" (emphasis added)).

***523** **[6]** **[7]** The burden governments must carry to establish the connection between "actual regulation of First Amendment expression" and its purported impact on secondary effects was further elaborated in *Alameda Books,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670. The initial evidentiary burden on the government is not

a heavy one: the entity issuing the regulation "must have had a reasonable evidentiary basis for concluding that its regulation would have the desired effect. Although not extraordinarily high, this evidentiary burden requires that the entity show that the evidence upon which it relied was 'reasonably believed to be relevant to the problem' that the entity sought to address." *729, Inc.,* 515 F.3d at 491 (citing *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925; *Alameda Books,* 535 U.S. at 438, 439, 122 S.Ct. 1728 (plurality); *Id.* at 449, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment)). No comparable "evidentiary basis" has been demanded to establish that a general-conduct regulation further such an interest. *See Pap's A.M.,* 529 U.S. at 298-99, 120 S.Ct. 1382 ("The Court [in *O'Brien*] did not require evidence that the integrity of the Selective Service System would be jeopardized by the knowing destruction or mutilation of draft cards.... There was no study documenting instances of draft card mutilation or the actual effect of such mutilation on the Government's asserted efficiency interests."). For this reason, our first step is to determine whether the Knox County Ordinance purports to be a regulation of conduct that incidentally burdens expression (as in *O'Brien*), a time, place, or manner regulation targeting secondary effects (as in *Renton*), or a regulation comprising both (as in *Pap's A.M.*). [3]

3 It is, of course, possible that the government interest comprises both a regulation of general conduct and control of secondary effects:

> While the doctrinal theories behind "incidental burdens" and "secondary effects" are, of course, not identical, there is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity-nude erotic dancing-is particularly problematic because it produces harmful secondary effects.

Pap's A.M., 529 U.S. at 295, 120 S.Ct. 1382; *see also Clark,* 468 U.S. at 294, 104 S.Ct. 3065 (agreeing with petitioners' justification of a regulation forbidding sleeping in a park "either as a time, place, or manner restriction or as a regulation of symbolic conduct").

[8] The Knox County Ordinance is a content-neutral time, place, and manner regulation. Its stated aim is to "prevent the deleterious secondary effects of sexually oriented businesses within the County." Sec. 1(a). To combat the secondary effects identified in the Preamble to the Ordinance, the County chose to regulate sexually oriented businesses by means of a licensing scheme and other regulations that are applicable to such establishments only, and a prohibition on only certain activities in such establishments. The County does not attempt to regulate a general category of conduct as in *O'Brien* or *Barnes;* instead, it expressly seeks to regulate protected expression in order to ameliorate adverse secondary effects. *Cf. Pap's A.M.,* 529 U.S. at 289-90, 120 S.Ct. 1382 (holding that Erie's ordinance is on its face a general prohibition on public nudity that does not target expressive nude dancing). Thus, we find it prudent to conduct our analysis in terms set forth in *Renton* and *Alameda Books*-or, equivalently, to apply the *O'Brien* test, incorporating evidentiary standards articulated in ***524** *Renton* and its progeny. [4]

4 This is in accord with our prior decisions, in which we have applied the *O'Brien* test and required that regulations meet the evidentiary burden set forth in *Renton. E.g., Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.,* 411 F.3d 777, 789, 791 (6th Cir.2005) (en banc).

B

The next question is whether the Ordinance serves a substantial government interest. It is now recognized that governments have a substantial interest in controlling adverse secondary effects of sexually oriented establishments, which include violent, sexual, and property crimes as well as blight and negative effects on property values. *E.g., Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382; *Richland Bookmart,* 137 F.3d at 440. Plaintiffs argue that the Ordinance does not advance that admittedly important interest and that summary judgment in favor of the County was improper because Plaintiffs adduced facts demonstrating that at least a subset of the businesses regulated by the Ordinance has not in fact generated any adverse secondary effects in Knox County. Under *Renton,* the County had to provide "a reasonable evidentiary basis for concluding that its regulation would have the desired effect." *729, Inc. v. Kenton County Fiscal Court,* 515 F.3d 485, 491 (6th Cir.2008). Plaintiffs submit that the County failed to carry its initial evidentiary burden, "however slight," because the evidence cited in the Ordinance is not "germane" to at least two categories of adult businesses in Knox

County-namely, "off-site consumption" bookstores or video stores such as Richland and Adult Video, and "combination" adult-mainstream stores that barely meet the Ordinance's 35% threshold. Appellants' Br. at 22, 26.

[9] **[10]** The Supreme Court and this court have repeatedly held that local governments need not conduct their own studies demonstrating that adverse secondary effects result from the operation of sexually oriented businesses or that the measures chosen will ameliorate these effects. *Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion); *id.* at 451, 122 S.Ct. 1728 (Kennedy, J., concurring); *Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382; *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925; *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 466 F.3d 391, 398 (6th Cir.2006); *Deja Vu of Cincinnati, L.L.C. v. Union Twp.,* 411 F.3d 777, 791 (6th Cir.2005) (en banc). "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is *reasonably believed to be relevant* to the problem that the city addresses." *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925 (emphasis added). Nor are local governments required to demonstrate empirically that its proposed regulations will or are likely to successfully ameliorate adverse secondary effects. *Alameda Books,* 535 U.S. at 439, 122 S.Ct. 1728. Thus, insofar as Plaintiffs merely dispute the relevance of "foreign" and outdated studies, they fail to create a genuine issue of material fact to survive summary judgment.

[11] This is not to say that, provided that the now-standard list of studies and judicial opinions is recited, no plaintiff could ever successfully challenge the evidentiary basis for a secondary-effects regulation. Albeit light, the burden on the government is not non-existent, and a ***525** plaintiff may put forth sufficient evidence to further augment that burden:

> This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Alameda Books, 535 U.S. at 438-39, 122 S.Ct. 1728. As we have recently noted, the *Alameda Books* plurality thus "set forth a burden-shifting framework governing the evidentiary standard in secondary-effects cases." *Sensations, Inc. v. City of Grand Rapids,* 526 F.3d 291, 297 n. 5 (6th Cir.2008). [5]

5 Because Justice Kennedy concurred in the judgment of the Court on the narrowest grounds, his concurrence represents the Court's holding in *Alameda Books. 729, Inc.,* 515 F.3d at 491. Justice Kennedy's concurrence seems to endorse the evidentiary standard set forth by the plurality, and departs from the plurality on a different point. *See* 535 U.S. at 451, 453, 122 S.Ct. 1728 (Kennedy, J., concurring) (stating that "very little evidence" is required to justify a secondary effects regulation "at least at the outset," but that the regulation may not withstand intermediate scrutiny if the evidentiary "assumptions" are later "proved unsound").

[12] Plaintiffs contend that not only has the County failed to carry its initial burden, but that they have "raised the doubt required by *Alameda,*" Appellants' Br. at 31, shifting the burden back to the County to proffer further evidence in support of its rationale, which makes summary judgment for the County at this stage improper. As an initial matter, Plaintiffs are incorrect to suggest that the County cited no findings relevant to the secondary effects of the contested types of businesses (off-site and combination stores). In fact, the Ordinance relied on a number of judicial decisions, which held that evidence of secondary effects produced by off-site or retail-only sexually oriented businesses was sufficient to justify their regulation. For example, in *H & A Land Corp. v. City of Kennedale,* the Fifth Circuit stated that the City of Kennedale "cannot reasonably believe its evidence [of secondary effects] is relevant unless it sufficiently

segregates data attributable to off-site establishments from the data attributable to on-site establishments." 480 F.3d 336, 339 (5th Cir.2007). That Circuit considered the evidence offered by the City and found that a 1984 Indianapolis study and a 1986 Oklahoma City study indeed isolated the effects of off-site establishments on property values, which sufficiently "support[ed] the belief that off-site sexually oriented businesses cause harmful secondary effects." *Ibid.* Similarly, in *World Wide Video of Wash., Inc. v. City of Spokane,* the Ninth Circuit upheld Spokane's regulation of retail-only stores on the basis of testimonial evidence from residents complaining of a variety of negative effects associated with this category of businesses. 368 F.3d 1186, 1197 (9th Cir.2004). The Indianapolis and Oklahoma studies relied on by Kennedale and the testimonial evidence relied on by Spokane were also included among the findings made by the County in enacting the Ordinance.

While some courts have presumed that the distinction between off- and on-site ***526** consumption may be constitutionally relevant, *H & A Land Corp.,* 480 F.3d at 339, it is difficult to maintain the same about Plaintiffs' suggested distinction between "combination" stores that just barely meet one of the 35% thresholds and those that meet it by some larger margin. Requiring local governments to produce evidence of secondary effects for all categories created by every articulable distinction is a misapprehension of the Supreme Court's holding that governments may rely on any evidence "reasonably believed to be relevant." *Alameda Books,* 535 U.S. at 438-39, 122 S.Ct. 1728 (stating that the city need not demonstrate that "adult department stores" produce the same secondary effects as "adult minimalls"); *see also G.M. Enters. v. Town of St. Joseph,* 350 F.3d 631, 639 (7th Cir.2003) ("The plurality [in *Alameda Books*] did not require that a regulating body rely on research that targeted the exact activity it wished to regulate, so long as the research it relied upon reasonably linked the regulated activity to adverse secondary effects."). While the 35% threshold may be arbitrarily chosen, and it very well may be that this threshold sweeps in some relatively benign establishments, it is not for us to decide that some higher, equally arbitrary percentage would lessen the burden on expression without compromising the efficacy of the Ordinance in controlling secondary effects. *See DLS, Inc.,* 107 F.3d at 413 ("The City Council determined that a six-foot zone struck the appropriate balance; while it is probable that each marginal foot of the buffer zone achieves each of these goals somewhat less efficiently, it is not for us to say that a seven-foot zone or a five-foot zone would strike a better balance."). Thus, we find that the cumulative evidence of secondary effects documented in the preamble to the Ordinance "fairly supports" the County's rationale in regulating off-site and combination establishments, along with other sexually oriented businesses, as required by *Alameda Books.*

Because we find that the County met its initial evidentiary burden, only if Plaintiffs succeed in casting "direct doubt" on the County's rationale or factual findings would the County need additional support for its decision to regulate the contested business categories. We conclude that Plaintiffs' efforts to cast such doubt are unsuccessful. Assuming for the sake of argument that the evidence offered by the Plaintiffs is not inadmissible on summary judgment, as the County argues it is, Appellee's Br. at 36-38, it is of dubious substantive import. Unlike most plaintiffs challenging similar regulations, *e.g., J.L. Spoons, Inc. v. Dragani,* 538 F.3d 379, 381-82 (6th Cir.2008), Plaintiffs do not introduce their own expert findings or studies, but rely on a private investigator and their own or their attorney's summaries of police incident reports and property value assessments. Even if we were to accept this information as authoritative, its probative value is minimal because elementary rules of logic and empirical inference preclude the conclusions Plaintiffs urge.

Plaintiffs argue that an affidavit signed by their attorney contains evidence that no decrease in property values was caused by some of the businesses. The affidavit contains property values set by the Knox County Tax Assessor for properties around Richland and Raymond's, and for properties around "various establishments which provide and distribute adult videos as well as provide adult dancing" for years 1997, 2001, and 2005. However, we are told nothing about how the 13% increase in property values over the period of eight years around Richland and Raymond's shown in the affidavit compares to the changes in property values elsewhere in Knox County. An absolute increase in property values says nothing about Richland's ***527** or Raymond's impact on those property values, because we do not observe the counterfactual (i.e., what those values would be if Richland were not located there), nor do we observe the changes in property values in similar locations, or in any location, not near a sexually oriented business. Nor can we conclude anything about the trends in property values prior to 1997-and Plaintiff

Richland has been in operation at its present site for over twenty years, operating as an off-site consumption establishment since about 1990. Appellants' Br. at 6. Likewise, we cannot know whether the proffered "various establishments which provide and distribute adult videos as well as provide adult dancing" are representative of all such establishments in Knox County, and therefore, we can conclude nothing about the impact on property values of the whole category of businesses.

Further, Plaintiffs submit a summary of "[p]olice incident reports from the period January 1, 2000 through May 2005 of video stores with large adult sections of sexually explicit videos described in the Affidavit of [Plaintiffs'] investigator to demonstrate the lack of any negative secondary effects on [sic] video stores with as little as 35% [of inventory consisting of sexually-explicit materials] as defined in the Ordinance." Appellants' Br. at 11. The affidavit composed by a private investigator hired by Plaintiffs contains only general descriptions of the businesses, such as would be readily observable by a customer. There is little in the affidavit that allows us to conclude that all or most businesses selected meet any one of the 35% thresholds in the Ordinance or whether each or any of them barely clears, or vastly exceeds, the 35% threshold. Merely stating that a video store had an inventory of "approximately 4,000 sexually explicit videos," for example, says nothing about the percentage of the total inventory these videos comprise.

[13] It is unnecessary for us to go through every piece of evidence Plaintiffs offer in an attempt to cast doubt on the County's findings and rationale. While the County may rely on evidence from other locations and anecdotal evidence, Plaintiffs' burden is heavier and cannot be met with unsound inference or similarly anecdotal information. Giving Plaintiffs' evidence the most charitable treatment, it suggests merely that the County "could have reached a different conclusion during its legislative process" with regard to the need to regulate some categories of sexually oriented businesses. *See Daytona Grand, Inc. v. City of Daytona Beach,* 490 F.3d 860, 881 (11th Cir.2007). As the district court and the County point out, evidence suggesting that a different conclusion is also reasonable does not prove that the County's findings were impermissible or its rationale unsustainable. *Ibid.; Turner Broad. Sys.,* 520 U.S. at 211, 117 S.Ct. 1174 (stating that in the context of intermediate scrutiny, conflicting evidence should not lead the court to "re-weigh the evidence de novo"); *G.M. Enters.,* 350 F.3d at 639 ("Although this evidence shows that the [town government] might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the ... legislative process."). While Plaintiffs claim to have produced evidence disproving that their establishments are associated with lower property values or higher crime rates, the Ordinance is supported by evidence to the contrary. For example, contra Plaintiffs' claim that Raymond's cabaret is not associated with higher crime, the County relied on several studies and judicial decisions attesting to such an association: *e.g.,* a 1997 Houston study, a 1977 Los Angeles study, police investigations ***528** of crimes and unsanitary conditions at adult cabarets in nearby Chattanooga, and judicial findings of prostitution at same, *DLS, Inc. v. City of Chattanooga,* 894 F.Supp. 1140, 1146 (E.D.Tenn.1995), aff'd 107 F.3d 403. Contra Plaintiffs' claim that Richland and Adult Video produce no adverse secondary effects, the County relied on several studies and testimonial evidence, such as those we noted above. Plaintiffs' unsystematic and eclectic collection of information is insufficient to cast direct doubt on the relevance of the evidence relied on by the County, or the County's rationale in enacting the Ordinance. For these reasons, we conclude Plaintiffs did not meet their burden of casting direct doubt on the factual findings or rationale underlying the County's Ordinance.

C

Plaintiffs' second argument combines an as-applied and a facial challenge to the Ordinance's regulatory reach. Plaintiffs challenge the definition of "semi-nudity," which is part of the definition of "adult cabaret," the definition of "nudity," the prohibition on the sale or consumption of alcohol, and the definition of "adult motel" as not narrowly tailored and/or overbroad.

[14] **[15]** As we discussed above in section III.A, time, place, and manner regulations of speech must be narrowly tailored to serve the government's legitimate, content-neutral interests. Narrow tailoring means that the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals," but it does not require

that the means chosen "be the least restrictive or least intrusive means" of serving its goals. *Ward,* 491 U.S. at 799, 109 S.Ct. 2746. "Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *DLS, Inc.,* 107 F.3d at 412 (quoting *Ward,* 491 U.S. at 799, 109 S.Ct. 2746).

[16] Adult Cabaret. Plaintiffs argue that the definition of "adult cabaret," insofar is it incorporates the definition of "semi-nudity," is not narrowly tailored, and that the district court erred in denying their motion for partial summary judgment on this issue. Plaintiff Raymond's is an adult cabaret under the Ordinance and has standing to challenge this provision.

Plaintiffs claim that the definition of "semi-nudity" unreasonably subjects to the licensing and regulatory requirements businesses, whose performers wear more than pasties and g-strings. Plaintiffs explain that pasties show "the female breast below a horizontal line across the top of the areola" and a g-string shows buttocks, which makes a pasties-and-g-string ensemble insufficient to avoid the definition of semi-nudity-and thus, the regulatory reach of the Ordinance. Appellants' Br. at 41. Subjecting such performances to regulation, Plaintiffs argue, does not serve the government's legitimate interest in controlling secondary effects and needlessly abridges the erotic expression communicated by the performers.

We recognize that "nude or nearly [nude]" dancing conveys "an endorsement of erotic experience," and is a protected form of expression "in the absence of some contrary clue." *DLS, Inc.,* 107 F.3d at 409 (quoting *Barnes,* 501 U.S. at 581, 111 S.Ct. 2456 (Souter, J., concurring in the judgment)). We need not adopt the district court's determination that "the Ordinance goes no further than regulating businesses in which dancers wear pasties and g-strings," in order to conclude that the Ordinance is narrowly tailored.

***529** We have previously upheld various time, place, and manner regulations of businesses featuring performers clad in revealing garments that nonetheless cover more than the pubic area and areolae. In *DLS, Inc.,* this court considered a Chattanooga City ordinance that defined "adult cabaret" in a similar, if not even more far-reaching manner:

> an establishment which features as a principle [sic] use of its business, entertainers and/or waiters and/or bartenders who expose to public view of the patrons within said establishment, at any time, *the bare female breast below a point immediately above the top of the areola,* human genitals, pubic region, *or buttocks, even if partially covered by opaque material or completely covered by translucent material;* including swim suits, lingerie or latex covering. Adult cabarets shall include commercial establishments which feature entertainment of an erotic nature including exotic dancers, strippers, male or female impersonators, or similar entertainers.

DLS, Inc., 107 F.3d at 406 (emphasis added). In *Sensations, Inc.,* this court upheld a Grand Rapids regulation of sexually oriented businesses that restricted the activities of semi-nude performers, where semi-nudity was defined in terms identical to the ones under consideration. 526 F.3d at 294. True, the plaintiffs in those cases did not emphasize the same argument Plaintiffs here make-namely, that "adult cabarets should be allowed to decide whether they want to be licensed and offer dancers wearing g-strings and pasties," or "be free of licensing requirements and the other regulations in the Ordinance ... by wearing slightly more clothing." Appellants' Br. at 43. However, in the course of validating licensing and other regulations, we necessarily affirmed the constitutionality of burdening establishments that feature similarly defined "semi-nude" erotic dancing. *DLS, Inc.,* 107 F.3d 403 (upholding a licensing requirement and a requirement of a "six-foot buffer zone" between performers of adult cabarets and customers, employees, or other entertainers); *Sensations, Inc.,* 526 F.3d at 294 (upholding, inter alia, a "six-foot buffer zone," a "no-touching" rule between performers and audience, and a limitation on business hours).

Plaintiffs' proposition that the County cannot constitutionally regulate expressive conduct involving performers who wear more cloth than pasties and g-strings

is unsupported. Plaintiffs' appeal to *R.V.S., L.L.C. v. City of Rockford* is misplaced. 361 F.3d 402 (7th Cir.2004). *R.V.S.* is distinguishable on a number of grounds: there, the court invalidated a zoning and licensing regulation of establishments featuring "clothed" exotic dancers. Moreover, the ordinance before that court did not rely on any evidence, local or not, and it did not contain any legislative findings or reasoning to support the connection between "exotic dancing nightclubs," as distinct from sexually oriented businesses, and secondary effects. *Id.* at 411. By contrast, the County relied on, inter alia, our decision in *DLS, Inc.* and a Fifth Circuit decision that considered a challenge to a zoning ordinance as applied to an adult cabaret whose dancers performed semi-nude-wearing more than nothing, but less than a bikini. *Baby Dolls Topless Saloons, Inc. v. City of Dallas,* 295 F.3d 471 (5th Cir.2002). That court determined that in view of the secondary effects studies relied on by Dallas-and now by Knox County, "it was reasonable for the City to conclude that establishments featuring performers in attire more revealing than bikini tops pose the same types of problems associated with other [sexually oriented businesses]." *Id.* at 482. Similarly, the County's legislative determination that regular semi-nude performances (as defined ***530** by the Ordinance) are as liable to produce unwanted secondary effects as other sexually oriented businesses was reasonable, in view of the secondary effects evidence the County examined. Because that determination is reasonable, the regulation of cabarets featuring semi-nude performers does not impose a "substantial portion of the [regulatory] burden" on protected speech without advancing the goals of the Ordinance; on the contrary, the Ordinance promotes a substantial government interest that would be achieved less effectively absent the regulation.

Finally, Plaintiffs' invocation of the Supreme Court's jurisprudence regarding public nudity and nude dancing is inapposite: both *Barnes* and *Pap's A.M.* upheld bans on "nudity" and the concomitant requirement that erotic performers wear *at least* pasties and g-strings, reasoning that this limitation effected a minimal restriction on the erotic expression contained in nude dancing. Neither case may be read to suggest the unconstitutionality of regulating semi-nude performances as defined by the Ordinance, or to suggest that pasties and g-strings are the most intrusive requirement that may be constitutionally imposed.

[17] **Nudity.** Next, Plaintiffs claim that the definition of prohibited "nudity" is not narrowly tailored because, in their interpretation of the Ordinance's terms, a person wearing only a g-string and pasties would violate that prohibition. Appellants' Br. at 48-49. Plaintiff Raymond's is an adult cabaret that has featured nude dancing in the past, and therefore has standing to challenge this provision.

[18] **[19]** We have previously upheld a similar, if not identically-worded, prohibition on nudity in sexually oriented establishments. In *Sensations, Inc.,* we upheld a prohibition on nudity defined as "the knowing or intentional live display of a human genital organ or anus with less than a fully opaque covering or a female's breast with less than a fully opaque covering of the nipple and areola." 526 F.3d at 294. This court explained that "[t]he prohibition of full nudity has been viewed as having only a de minimis effect on the expressive character of erotic dancing." *Id.* at 299 (citing *Pap's A.M.,* 529 U.S. at 301, 120 S.Ct. 1382; *Barnes,* 501 U.S. at 572, 111 S.Ct. 2456 (plurality opinion)). While erotic dancing, whether performed in the "nude or nearly so," is a protected expressive activity, the state of nudity itself is not inherently expressive. *See DLS, Inc.,* 107 F.3d at 409. Because nudity itself is not essential to the eroticism that brings dancing under the protection of the First Amendment, the plurality in *Pap's A.M.* rejected Justice Stevens's position that a ban on public nudity effects a "complete ban on expression" by incidentally banning nude dancing. *Sensations,* 526 F.3d at 299 (quoting *Pap's A.M.,* 529 U.S. at 292-93, 120 S.Ct. 1382). Instead, it merely "limit[s] one particular means of expressing the kind of erotic message being disseminated." *Ibid.*

Because the City of Erie justified its ordinance both as a regulation of general conduct incidentally restricting expression and as a restriction of expression aimed at its secondary effects, the Supreme Court scrutinized both rationales. The Court conceded that banning nudity and nude dancing may not be the most effective or the least restrictive means of combating secondary effects of adult establishments, but that the Constitution requires neither to survive intermediate scrutiny. *Pap's A.M.,* 529 U.S. at 301-02, 120 S.Ct. 1382 (holding that the "restriction is no greater than is essential to the furtherance of the government interest," and that it "leaves ample capacity to convey the dancer's erotic ***531** message," even if it is not the least restrictive means to address the problem).

Plaintiffs seem to suggest that the definition of nudity in the Ordinance is broader than constitutionally permissible because donning a g-string, which they claim does not cover the "anal cleft," does not take a performer out of the state of nudity. The County on the other hand, "has consistently maintained that pasties and G-strings ... constitute sufficient covering to comply" with the Ordinance. Appellee's Br. at 51. We need not weigh in on the dispute between the parties as to the amount of fabric required to cover the "anal cleft"; however, we see no reason not to accept the County's limiting construction of its own regulation and we presume that the County will continue to abide by its stated interpretation in its enforcement efforts.[6] We are unconvinced that defining nudity in terms of exposing the "anus, anal cleft or cleavage," however anatomically or linguistically awkward, takes us beyond the territory controlled by our holding in *Sensations.* Moreover, the Erie ordinance upheld by the Supreme Court contained an even broader definition of nudity. *Pap's A.M.,* 529 U.S. at 284, 120 S.Ct. 1382 (Ordinance defined nudity to mean, inter alia, "the showing of the human male or female genital [sic], pubic hair or *buttocks with less than a fully opaque covering.*" (emphasis added)).[7] We conclude that the prohibition on "nudity" in sexually oriented establishments, as defined in the Ordinance, does not burden substantially more expression than necessary to advance the County's objective, and is thus narrowly tailored.

6 It is worth noting that a rigidly literal interpretation may be stretched unreasonably-and surely beyond what the County intends. For example, it could be extended to keep out patrons who are wearing the currently commonplace low-rise jeans that tend to reveal the top of the "anal cleft or cleavage" in a seated position, not to mention an occasional plumber. We do not intend to approve such an interpretation of the regulation.

7 It is also worth noting that notwithstanding a comparatively broad definition of nudity that applies whenever "buttocks" are uncovered, the plurality in *Pap's A.M.* interpreted the ordinance narrowly-as the County and the district court do in the present case-to allow performances in pasties and g-strings. *Pap's A.M.,* 529 U.S. at 294, 120 S.Ct. 1382 (stating that "dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings").

[20] Moreover, the provisions involving semi-nudity and nudity survive intermediate scrutiny because they do not serve to restrict unreasonably the capacity to engage in the protected expression embodied in erotic dance. Under the Ordinance, adult cabarets have a choice: establishments may opt for pasties and g-strings, which the Supreme Court has described as having a minimal effect on the message conveyed by completely nude dancing, *Pap's A.M.,* 529 U.S. at 301, 120 S.Ct. 1382, and comply with the reasonable restrictions of the Ordinance. Or, establishments may outfit their employees in sufficient cloth to cover "the female breast below a horizontal line across the top of the areola" and the buttocks-which appears to be easily accomplished by most bikinis-and escape regulation altogether. This choice leaves adult cabarets with ample means of conveying the message contained in erotic dancing, even if it is not the least restrictive means to target adverse secondary effects.

Adult motel. Plaintiffs also challenge the definition of "adult motel" as not narrowly tailored. However, none of the Plaintiffs have standing to bring an as-applied challenge to this provision.

[21] **Prohibition on the sale or consumption of alcohol.** Finally, Plaintiffs ***532** argue that the prohibition on the sale, use or consumption of alcohol on the premises of sexually oriented businesses is not narrowly tailored. The County submits that Plaintiffs also lack standing to challenge this prohibition because the record does not establish that any of them have a liquor license or intend to seek a liquor license. Assuming without deciding that Raymond's, being representative of most adult cabarets, has standing to challenge this provision, we agree with the district court's conclusion that this prohibition is "a reasonable restriction narrowly tailored to limit the secondary effects of crime." In finding that sexually oriented businesses as a category are associated with numerous adverse secondary effects, the County reasonably relied on a number of prior judicial decisions finding sufficient evidence to support the connection between adverse effects and adult entertainment when combined with alcohol consumption. *E.g., Ben's Bar, Inc.,* 316 F.3d at 725 (holding that prohibition of alcohol in adult entertainment venues "is, as a practical matter, the least restrictive means of furthering the Village's interest in combating the secondary effects resulting from the combination of adult entertainment and alcohol consumption").

[22] [23] [24] [25] Facial Challenge on Overbreadth Grounds. Plaintiffs next challenge the Ordinance on grounds that any one or combination of the same provisions attacked as not narrowly tailored render the Ordinance unconstitutionally overbroad. A law that is overly broad "proscribe[s] a 'substantial' amount of constitutionally protected speech judged in relation to the statute's plainly legitimate sweep." *J.L. Spoons, Inc.,* 538 F.3d at 383 (quoting *Virginia v. Hicks,* 539 U.S. 113, 118-19, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003)). Overbroad laws warrant the dramatic remedy of invalidation to "allay the concern that the threat of enforcement of [such a] law may deter or chill constitutionally protected speech." *Ibid.* However, the Supreme Court has been explicit that the overbreadth doctrine is not to be "casually employed." *United States v. Williams,* 553 U.S. 285, 128 S.Ct. 1830, 1838, 170 L.Ed.2d 650 (2008). "Substantial social costs" are incurred by preventing the "application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." *Hicks,* 539 U.S. at 119, 123 S.Ct. 2191. Thus, the Court has "vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams,* 128 S.Ct. at 1838. To succeed in a facial-overbreadth challenge, Plaintiffs must "demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally." *N.Y. State Club Ass'n v. City of New York,* 487 U.S. 1, 14, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988). This Plaintiffs fail to do. Plaintiffs offer no arguments or evidence in support of their overbreadth claims beyond those proffered in support of their as-applied challenges. Since we find that Plaintiffs failed to show that protected speech is impermissibly burdened by any of the provisions challenged as applied, these same provisions cannot form the basis for a successful overbreadth attack.

D

[26] [27] [28] Third, Plaintiffs argue that the Ordinance is an unconstitutional prior restraint because it "denies access in the future to non-obscene material based on a past conviction." Appellants' Rep. Br. at 38. A licensing scheme such as the Ordinance is indeed a prior restraint on protected expression. *FW/PBS, Inc. v. City* ***533** *of Dallas,* 493 U.S. 215, 225, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 554, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Odle v. Decatur County,* 421 F.3d 386, 389 (6th Cir.2005); *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville & Davidson County,* 274 F.3d 377, 400 (6th Cir.2001). However, prior restraints are not unconstitutional per se. *Odle,* 421 F.3d at 389. Where, as here, license issuance, suspension, and revocation are based on explicit and objective criteria, *see* Secs. 5(a), 9, 10, and are not left to unbridled discretion, a licensing scheme does "not present the grave dangers of a censorship system." *City of Littleton v. Z.J. Gifts D-4, L.L.C,* 541 U.S. 774, 783, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004) (internal quotation marks and citations omitted). We recently summarized the inquiry into the constitutionality of such regulations:

> The Supreme Court has long required prior restraint licensing schemes to guarantee applicants a prompt final judicial decision on the merits of a license denial and preservation of the status quo while an application or judicial review of a license denial is pending. *Freedman v. Maryland,* 380 U.S. 51, 58, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *FW/PBS, Inc.,* 493 U.S. at 229-30, 110 S.Ct. 596; *City of Littleton v. Z.J. Gifts D-4, LLC,* 541 U.S. 774, 779-80, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004). In the seminal *Freedman* decision, the Supreme Court suggested that a licensing scheme must place the burden of proof as to whether an applicant's form of expression is protected on the government. 380 U.S. at 58, 85 S.Ct. 734. However, it now appears that *prompt judicial review* and *preservation of the status quo* are the only constitutionally indispensable procedural safeguards. *FW/PBS, Inc.,* 493 U.S. at 228, 110 S.Ct. 596; *Deja Vu of Nashville,* 274 F.3d at 400-401....

Odle, 421 F.3d at 389-90 (emphasis added) (parallel citations omitted). The Ordinance satisfies both

requirements. The Ordinance provides for prompt judicial review of a revoked license. Sec. 11. The Ordinance also provides for the preservation of the status quo while a license application is pending and while an appeal from a revocation of the license is pending: Sec. 5(a) states that a Temporary License shall be issued to an applicant within 24 hours, valid until a decision to grant or deny a license has been made, which is to occur within 20 days of application; and Sec. 11(b) states that a Provisional License shall be issued to any business initiating court action to challenge a license denial, suspension or revocation. Even if we presume that Plaintiffs have standing to challenge the standards for license revocation or suspension, their challenge fails. We affirm the district court's determination that the Ordinance is not an unconstitutional prior restraint.

E

[29] Fourth, Plaintiffs argue that the limitation on hours of operation enacted by the Ordinance is preempted by state law. The Ordinance provides that sexually oriented businesses cannot do business before 8 a.m. or after midnight Monday through Saturday, and they cannot do business on Sundays or legal holidays. The Tennessee Adult-Oriented Establishments statute ("Tennessee Statute") sets identical business-hour limitations, Tenn.Code Ann. § 7-51-1402, but exempts "establishment[s] that offer[ ] only live, stage adult entertainment in a theatre, adult cabaret, or dinner show type setting," § 7-51-1405. The Tennessee Statute also allows local ordinances to further limit opening hours but disallows local ordinances that "extend" business hours. § 7-51-1402(b). ***534** Plaintiffs argue that because adult cabarets were exempted from the state limitations on business hours, the County cannot nullify that exemption by enacting its Ordinance. Plaintiffs' argument is without merit. Prior to July 1, 2007, the Tennessee Statute, in a section entitled "Local laws not preempted," stated:

> Nothing in this chapter shall preempt or prevent political subdivisions in this state from enacting and enforcing other lawful and reasonable restrictions, regulations, licensing, zoning and other civil or administrative provisions concerning the location, configuration, code compliance or other business operations or requirements of adult-oriented establishments and sexually-oriented businesses. [8]

[8] The 2007 amendments to this section do not alter the provision in a manner material to the issue.

§ 7-51-1406. The Tennessee statute clearly allows the County to enact and enforce restrictions concerning business operations of "adult-oriented establishments and sexually-oriented businesses." Plaintiffs' reading of "other lawful and reasonable restrictions" and "other civil or administrative provision" to mean "[other than] local restrictions on hours of operations for adult cabarets," Appellants' Br. at 50, is untenable, as it twists a non-preemption clause into a preemption clause. We affirm the conclusion of the district court that the County Ordinance is consistent with and is not preempted by the Tennessee Statute.

IV

[30] On cross-appeal, the County argues that the district court erroneously ordered the severance of two crimes from the civil disability provisions of the Ordinance. The court held that the denial of a license to persons convicted of dealing in controlled substances and racketeering is unjustified because these crimes "are not related to the crime-control intent of the Ordinance which is to reduce crimes of a sexual nature."

The County argues that Plaintiffs lack standing to challenge the civil disability provisions of the Ordinance because none of the Plaintiffs were ever convicted of any of the specified crimes. Plaintiffs make no allegations to the contrary; in fact, Plaintiffs themselves state that no one affiliated with them has been convicted of any of the specified crimes. Appellants' Rep. Br. at 8. Because this claim was litigated and adjudicated as an as-applied challenge, we conclude that the County's argument is sound. *See FW/PBS, Inc.*, 493 U.S. at 235, 110 S.Ct. 596 (concluding that "no petitioner has shown standing to challenge ... the civil disability provisions" of an ordinance regulating sexually oriented businesses, and that therefore, "the courts below lacked jurisdiction to adjudicate petitioners' claims with respect to those

provisions"); *Deja Vu of Cincinnati, L.L.C.,* 411 F.3d at 794-95 (holding that plaintiffs cannot challenge a civil disability provision of an Ohio licensing scheme for sexually oriented businesses because they have not alleged sufficient injury in fact to establish standing). For these reasons, we reverse the district court's decision as to the severance of the two crimes from the civil disability provision.

V

Therefore, we AFFIRM the district court's grant of summary judgment in favor of the County, and REVERSE the grant of partial summary judgment in favor of Plaintiffs.

All Citations

555 F.3d 512

137 F.3d 435
United States Court of Appeals,
Sixth Circuit.

RICHLAND BOOKMART, INC., d/b/
a Town and Country, Plaintiff–Appellee,
v.
Randall E. NICHOLS, Defendant–Appellant.

No. 96–6472.
|
Argued Dec. 1, 1997.
|
Decided Feb. 27, 1998.
|
Rehearing and Suggestion for Rehearing
En Banc Denied April 23, 1998.

Adult bookstore operator brought action challenging Tennessee Adult-Oriented Establishment Act, alleging violation of First Amendment and equal protection clause. The United States District Court for the Eastern District of Tennessee, Leon Jordan, J., permanently enjoined enforcement of statute, and county attorney appealed. The Court of Appeals, Merritt, Circuit Judge, held that: (1) statute, which limited hours and days that adult entertainment establishments could be open was not subject to strict scrutiny even though it was content-based; (2) statute did not violate First Amendment; and (3) statute was not impermissibly vague.

Vacated and remanded.

West Headnotes (6)

[1] **Constitutional Law**
Hours of operation

Constitutional Law
Physical layout and staging requirements

Public Amusement and Entertainment
Sexually Oriented Entertainment

Statute which limited hours and days that adult entertainment establishments could be open, and required such establishments to eliminate closed booths, was content-based regulation, for purpose of First Amendment challenge, as law singled out certain establishments for regulation based only on type of literature they distributed. U.S.C.A. Const.Amend. 1; West's Tenn.Code, § 7–51–1401 et seq.

17 Cases that cite this headnote

[2] **Constitutional Law**
Sexual Expression

First Amendment offers nonobscene, sexually-explicit speech protection of wholly different, and lesser magnitude than other types of speech. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[3] **Constitutional Law**
Print Publications

Erotic or sexually-explicit literature is in unique category, category unto itself that may be regulated without subjecting regulation to so-called "strict scrutiny" with its accompanying presumption of unconstitutionality. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[4] **Constitutional Law**
Sexual Expression

Question in reviewing First Amendment challenge to regulation of nonobscene, sexually-explicit speech is one of reasonableness; appropriate inquiry is whether law is designed to serve substantial government interest and allows for alternative avenues of communication. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[5] **Constitutional Law**
Hours of operation

Constitutional Law
Secondary effects

Public Amusement and Entertainment

Sexually Oriented Entertainment

Statute which limited hours and days that adult entertainment establishments could be open did not violate First Amendment, as reducing crime, open sex, and solicitation of sex and preserving aesthetic and commercial character of neighborhoods surrounding adult establishments was "substantial government interest," statute was reasonable means of furthering that interest, and statute left open alternative avenues of communication. U.S.C.A. Const.Amend. 1; West's Tenn.Code, § 7–51–1401 et seq.

21 Cases that cite this headnote

[6] Constitutional Law
Sexually oriented businesses

Public Amusement and Entertainment
Sexually Oriented Entertainment

Statute which limited hours and days of operation for establishments having, as their principal or predominant stock or trade, sexually-oriented materials, devices, or paraphernalia, and which restricted admission to adults only, was not impermissibly vague as to adult book store, which clearly fell within purview of statute, and was not vague generally, as terms used in statute were understandable common terms. West's Tenn.Code, § 7–51–1401 et seq.

9 Cases that cite this headnote

Attorneys and Law Firms

***436** Frierson M. Graves, Jr. (argued and briefed), Baker, Donelson, Bearman & Caldwell, Memphis, TN, for Plaintiff–Appellee.

Steven A. Hart (argued and briefed), Office of the Attorney General, Criminal Justice Division, Michael J. Fahey, II (briefed), Asst. Atty. Gen., Office of the Attorney General, Nashville, TN, for Defendant–Appellant.

Before: MERRITT, BATCHELDER, and FARRIS,* Circuit Judges.

* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

OPINION

MERRITT, Circuit Judge.

The defendant below, Randall E. Nichols, District Attorney for Knox County, Tennessee, ***437** appeals a permanent injunction entered by the district court against enforcement of statutory amendments to the Tennessee Adult–Oriented Establishment Act. The new statute limits the hours and days during which adult entertainment establishments can be open and requires such establishments to eliminate the closed booths in which patrons watch sexually-explicit videos or live entertainment.

The injunction was entered after plaintiff, Richland Bookmart, Inc., an adult bookstore in Knox County, Tennessee, challenged the constitutionality of the state law on the grounds that it violates the First Amendment and the Equal Protection Clause of the United States Constitution. The district court held that although the statute was content-neutral, the hours and days limitation violated the First Amendment because it was not narrowly tailored to address the stated goal of the statute—the alleged deleterious "secondary effects" on neighborhoods and families caused by the presence of adult establishments. Having decided the case on the First Amendment ground, the district court did not reach plaintiff's equal protection argument. For the reasons stated below, the judgment of the district court is reversed and the case is remanded to the district court with instructions to vacate the permanent injunction.

I. The Statute in Question

On June 26, 1995, plaintiff, Richland Bookmart, Inc., a seller of sexually-explicit books, magazines and videos, filed a complaint for preliminary injunction, permanent injunction and declaratory judgment requesting that

the district court declare Tennessee's Adult Oriented Establishment Act (1995 Tenn. Pub. Act 421, codified at Tenn.Code Ann. §§ 7–51–1401 *et seq.*) to be unconstitutional on its face or as applied to plaintiff. After a hearing on the preliminary injunction, the district court issued a preliminary injunction enjoining enforcement of the act. The injunction was made permanent on September 26, 1996, and defendant, District Attorney General for Knox County Randall Nichols, appealed to this Court.

Presumably in anticipation of expected First Amendment challenges, the act contains a lengthy preamble. Because the district court carefully summarized the long preamble, we will highlight only relevant portions here.

The preamble discusses the need to outlaw closed video booths because these booths are often used by patrons to stimulate themselves sexually, creating a public health problem. This provision does not apply to plaintiff. It does not have closed booths on its premises. Plaintiff sells adult books and magazines and sells and rents adult videos for off-premises viewing only. The preamble also lists detrimental health, safety and welfare problems caused by shops selling graphic sexual material—the so-called "secondary effects," of the establishments on the communities that surround them—and cites specific land-use studies done by other cities on the subject. The "secondary effects" identified include "increased crime, downgrading of property values and spread of sexually transmitted and communicable diseases."

The preamble continues with a list of "unlawful and/or dangerous sexual activities" associated with adult-oriented establishments and ends with a list of citations to judicial decisions supporting such legislation.

The act defines "adult-oriented establishment" as "any commercial establishment ... or portion thereof" selling as its "predominant stock or trade ... sexually oriented material." [1]

[1] The complete definition is as follows:

> any commercial establishment, business or service, or portion thereof, which offers, as its principal or predominant stock or trade, sexually oriented material, devices, or paraphernalia or specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live and which restricts or purports to restrict admission to adults or to any class of adults.

Chapter 421, Section 2(4).

"Sexually-oriented material" is defined as any publication "which depicts sexual activity ... or which exhibits uncovered human genitals or pubic region in a lewd or lascivious manner or which exhibits human male genitals ***438** in a discernibly turgid state, even if completely covered." [2]

[2] The complete definition of "sexually oriented material" is as follows:

> any book, article, magazine, publication or written matter of any kind, drawing, etching, painting, photograph, motion picture film or sound recording, which depicts sexual activity, actual or simulated, involving human beings or human beings and animals, or which exhibits uncovered human genitals or pubic region in a lewd or lascivious manner or which exhibits human male genitals in a discernibly turgid state, even if completely covered.

Chapter 421, Section 2(10).

Section 3 prohibits adult-oriented establishments from opening before 8 a.m. or after midnight Monday through Saturday, and from being open at all on Sundays or the legal holidays listed in the Tennessee Code Annotated.

Section 4 prevents the use of private booths, stalls or partitioned rooms for sexual activity. Because plaintiff here does not have any private booths, the district court did not address this portion of the act.

Section 5 describes the criminal penalties under the act. A first offense for a violation is a Class B misdemeanor punishable by a fine of $500. Subsequent violations are Class A misdemeanors with no penalty specified in the statute. The Tennessee Code provides that Class A misdemeanors carry a penalty for a fine not to exceed $2500, imprisonment not to exceed 11 months and 29 days or both, unless the statute provides otherwise. Tenn.Code Ann. § 40–35–111.

Section 6 states that live stage shows, adult cabaret and dinner theatre are excepted from the closing hours requirement. Section 7 allows local governments to impose other "lawful and reasonable" restrictions on adult-oriented establishments.

Plaintiff contends that the law violates both its First Amendment rights through the closing hours requirement and its equal protection rights by exempting certain other establishments that sell or trade in adult-oriented goods or services as at least part of their business.

The district court granted a preliminary injunction, later made permanent, against enforcement of the act, finding that the closing hours restrictions violate the First Amendment. The district court concluded that plaintiff was likely to succeed on the merits of its constitutional challenge because the act (1) goes beyond what is necessary to further the state's legitimate interest in regulating the secondary effects described in the act's preamble, (2) is overbroad and (3) is vague. The district court did not reach plaintiff's equal protection argument.

II. Analysis of Facial Validity of the Statute

This case arises from the tension between two competing interests: free speech protection of erotic literature and giving communities the power to preserve the "quality of life" of their neighborhoods and prevent or clean up "skid-rows." The tension arises because the First Amendment offers some protection for "soft porn," *i.e.,* sexually-explicit, nonobscene material—although "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate...." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976). The Supreme Court most recently restated this view that "porn-type" speech is generally afforded less-than-full First Amendment protection in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing).

[1] The normal starting point for a discussion of the facial validity of statutory regulation of speech requires an analysis of the so-called "content-neutrality" of the regulation. Here, the bookstore contends that the act is a "content-based" regulation and therefore presumptively unconstitutional and subject to "strict scrutiny." The defendant prosecutor argues that the act is content-neutral and that the closing requirements are permissible "time, place and manner" regulation subject to the less exacting "intermediate scrutiny."

We agree with plaintiff that the legislation at issue here is obviously not content-neutral. The statute focuses on and regulates only ***439** "sexually-explicit" or porn-type speech. This is no more content neutral than a statute designed to regulate only political campaign advertising, newspaper want ads or computer graphics. The law singles out certain establishments for regulation based only on the type of literature they distribute. *But see Barnes,* 501 U.S at 585, 111 S.Ct. at 2470 (Souter, J., concurring) and *Mitchell v. Commission on Adult Entertain. Estabs.,* 10 F.3d 123 (3d Cir.1993) (describing regulation of such sex literature as content neutral because it is designed to counter bad behavior in the neighborhood where it is sold).

[2] The fact that such regulation is based on content does not necessarily mean that regulation of nonobscene, sexually-explicit speech is invalid. The law developed under the First Amendment offers such speech protection "of a wholly different, and lesser magnitude." *Young v. American Mini Theatres,* 427 U.S. at 70, 96 S.Ct. at 2452. In *American Mini Theatres,* the Court expressly ruled that the City of Detroit may legitimately use the content of adult motion pictures as the basis for treating them differently from other motion pictures. In order to prevent and clean up skid-rows, the ordinance confined theatres showing sex movies to a few areas of the city. A plurality of the Court upheld a content-based zoning ordinance restricting the location of adult movie theatres. The Court held that even though such sexually-explicit literature, unlike obscenity, is protected from total suppression, "the State may use the content of these materials as the basis for placing them in a different classification from other motion pictures." *Id.* at 70–71, 96 S.Ct. at 2452. Justice Steven's opinion is straightforward and clear. It says that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." *Id.* at 61, 96 S.Ct. at 2448. The Court concluded that the classification made by the City of Detroit was justified by the City's interest in preserving its neighborhoods from deterioration—the now so-called "secondary effects" of erotic speech. The ordinance was upheld because it did not unduly suppress access to lawful speech. *American Mini Theatres* recognized that regulation based on content may be necessary to protect other legitimate interests. The Court did not try to maintain that the ordinance *was,* in fact, content-neutral; it stated only that it might be *treated*

as if it were content-neutral because, like commercial speech, it is less than fully protected.

[3] Justice Powell, concurring in *American Mini Theatres,* elaborated on the special circumstances presented when reviewing regulation of erotic or sexually-explicit speech:

> Moreover, even if this were a case involving a special government response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated.

American Mini Theatres, 427 U.S. at 82 n. 6, 96 S.Ct. at 2458 n. 6 (cases omitted). Justice Powell specifically pointed out that sexually-explicit speech is different from other kinds of speech and, although protected to a certain degree, is offered less protection because other important social interests are at stake when sexually-explicit speech is at issue. Erotic or sexually-explicit literature is in a unique category, a category unto itself that the Supreme Court has decided may be regulated without subjecting the regulation to so-called "strict scrutiny" with its accompanying presumption of unconstitutionality.

Many have severely criticized the holding and rationale of *American Mini Theatres,*[3] ***440** including initially the four dissenters led by Justice Stewart, but a majority of the Court has adhered to its view allowing anti-skidrow, content-based regulation of establishments selling pornographic literature, movies, dancing and other hard-core erotic material. In a subsequent case, *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Court upheld a content-based zoning ordinance enacted by the City of Renton, Washington, that prohibited adult motion picture theatres from locating within 1,000 feet of family dwellings, churches, parks or schools.

[3] Criticism of the analysis used in *American Mini Theatres* and later in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), is extensive in the legal literature. For a representative sample, *see, e.g.,* Laurence Tribe, *American Constitutional Law* § 12–3 (2d ed.1988); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis,* 85 Cal. L.Rev. 297, 351–53 (1997); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine,* 63 U. Chi. L.Rev. 413, 483–91 (1996); Marjorie Heins, *Viewpoint Discrimination,* 24 Hastings Const. L.Q. 99, 125–28 & n.137 (1996); Robert Post, *Recuperating First Amendment Doctrine,* 47 Stan. L.Rev. 1249, 1265–67 (1995); Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court,* 80 Iowa L.Rev. 51, 68–70 (1994); Geoffrey R. Stone, *Content–Neutral Restrictions,* 54 U. Chi. L.Rev. 46, 104, 114–17 (1987).

The intervening years had reduced the number of dissenters on the Court from four to two. Now it was only Justices Brennan and Marshall in dissent. Relying primarily on *American Mini Theatres,* the Court in *Renton* analyzed the ordinance as a form of time, place and manner regulation, although recognizing that a law that focuses on such films is obviously not content neutral. The Court acknowledged candidly that both ordinances treated adult theatres differently than other types of theatres, the traditional touchstone of content-based legislation.

The Court went on in *City of Renton* to explain that the ordinance did not contravene the fundamental principles that underlie concerns about content-based speech regulations because its stated purpose is to curb the "secondary effects" of adult establishments. Accordingly, the Court in *City of Renton,* like the Court in *American Mini Theatres,* decided that the zoning ordinances at issue could be reviewed under the standard applicable to content-neutral regulations, even though the ordinances were plainly content-based. The stated rationale is that a distinction may be drawn between adult theatres and other kinds of theatres "without violating the government's paramount obligation of neutrality in its regulation of protected communication" because it is seeking to regulate the secondary effects of speech, not the speech itself. *City of Renton,* 475 U.S. at 49, 106 S.Ct. at 929–30 (quoting *American Mini Theatres,* 427 U.S. at 70, 96 S.Ct. at 2452).

Over the last decade, some courts reviewing these type of regulations started simply referring to them as content-neutral without explaining, as the Supreme Court carefully did in both *American Mini Theatres* and *City of Renton,* that they are in fact content-based but are to be *treated* like content-neutral regulations for some

purposes. *See, e.g., North Ave. Novelties, Inc. v. City of Chicago,* 88 F.3d 441, 444 (7th Cir.1996), *cert. denied,* 519 U.S. 1056, 117 S.Ct. 684, 136 L.Ed.2d 609 (1997); *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.,* 58 F.3d 988, 995 (4th Cir.1995); *ILQ Investments, Inc. v. City of Rochester,* 25 F.3d 1413, 1416 (8th Cir.1994); *TK's Video, Inc. v. Denton County, Tx.,* 24 F.3d 705, 707 (5th Cir.1994); *Mitchell v. Commission on Adult Entertain. Estabs.,* 10 F.3d 123, 128–31 (3d Cir.1993). Thus, in some cases, a kind of legal fiction has been created that calls regulation of such literature "content neutral" when what is meant is only that the regulation is constitutionally valid.

[4] Under present First Amendment principles governing regulation of sex literature, the real question is one of reasonableness. The appropriate inquiry is whether the Tennessee law is designed to serve a substantial government interest and allows for alternative avenues of communication. Does the law in question unduly restrict "sexually explicit" or "hard-core" erotic expression?

[5] Reducing crime, open sex and solicitation of sex and preserving the aesthetic and commercial character of the neighborhoods surrounding adult establishments is a "substantial government interest." The Tennessee legislature reasonably relied on the experiences of other jurisdictions in restricting the hours of operation. It is not unreasonable to believe that such regulation of hours of shops selling sex literature would tend to deter prostitution in the neighborhood at night or the creation of drug "corners" on the surrounding streets. By deterring ***441** such behavior, the neighborhood may be able to ward off high vacancy rates, deteriorating store fronts, a blighted appearance and the lowering of the property values of homes and shopping areas. Such regulation may prevent the bombed-out, boarded-up look of areas invaded by such establishments. At least that is the theory, and it is not unreasonable for legislators to believe it based on evidence from other places.

The legislation leaves open alternative avenues of communication. Access to adult establishments is not unduly restricted by the legislation. Adult establishments may still be open many hours during the week.

III. Overbreadth and Vagueness

[6] Plaintiff contends, and the district court agreed, that the act is also unconstitutionally vague in that certain terms are not defined. We believe the terms are sufficiently defined so that a reasonable person would understand them.

Specifically, the district court found that the act's alleged vagueness may have a "chilling effect" on erotic literature that has "literary, artistic or political value." It also found that the word "paraphernalia" as used in the act might include places such as lingerie shops.

First, the plaintiff's establishment here clearly falls within the purview of the statute. In *American Mini Theatres,* the Court found that it was unnecessary to consider vagueness when an otherwise valid ordinance indisputably applies to the plaintiff—when there is no vagueness as to him. 427 U.S. at 58–59, 96 S.Ct. at 2446–47. *See also City of Renton,* 475 U.S. at 55 n. 4, 106 S.Ct. at 933 n. 4. Plaintiff is clearly an "adult-oriented establishment" as defined in the act. Any element of vagueness in the act does not affect this plaintiff.

Second, the law is not as vague as the bookstore contends. To be included within the purview of the act, an establishment must (1) have as its "principal or predominant stock or trade" sexually-oriented materials, devices or paraphernalia and (2) restrict admission to adults only. The terms used in the act are understandable common terms. Most buyers, sellers and judges know what such materials are and who are adults and who are children.

The Supreme Court examined overbreadth in detail in *New York v. Ferber,* 458 U.S. 747, 773–74, 102 S.Ct. 3348, 3363–64, 73 L.Ed.2d 1113 (1982). In *Ferber,* the Court refused to find as unconstitutionally overbroad a state statute prohibiting persons from knowingly promoting sex by children under 16 by selling such material. The Court held that the mere possibility that some protected expression, some erotic literature, could arguably be subject to the statute was insufficient reason to find it unconstitutionally overbroad. The Court said that we should not assume that state courts would broaden the reach of a statute by giving it an "expansive construction." This is consistent with Tennessee law that provides that such regulation of speech should be construed narrowly. *Davis–Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520, 526 (Tenn.1993).

* * *

Plaintiff also contends that the act violates its equal protection rights because the act exempts from regulation establishments offering "only live, stage adult entertainment in a theatre, adult cabaret, or dinner show type setting." The district court did not reach this issue and did not issue an injunction on this ground. We express no opinion on whether the act violates plaintiff's equal protection rights because this argument has not been fully developed or reviewed in the district court.

Accordingly, the preliminary injunction issued by the district court is vacated and set aside and the case remanded for further proceedings consistent with this opinion.

All Citations

137 F.3d 435, 1998 Fed.App. 0070P

75 F.3d 663
United States Court of Appeals,
Ninth Circuit.

SPOKANE ARCADE, INC.; and World Wide Video of Washington, Inc., Plaintiffs–Appellants,
v.
CITY OF SPOKANE, Defendant–Appellee.

No. 94–35931.
|
Argued and Submitted Dec. 7, 1995.
|
Decided Jan. 24, 1996.

Adult entertainment businesses brought action against city, alleging that city ordinances which required that interior of adult video arcade booths be visible to employees in adjacent public room and that at least one employee be situated in that room whenever customer was present were invalid restrictions on manner in which protected speech could be expressed. The United States District Court for the Eastern District of Washington, Wm. Fremming Nielsen, Chief Judge, rejected claim that ordinances were unconstitutional. Businesses appealed. The Court of Appeals, D.W. Nelson, Circuit Judge, held that ordinances were constitutional since they did not prohibit adult entertainment businesses from engaging in that protected speech which would allow them to compete in adult entertainment market, but merely provided that costs of doing so might increase.

Affirmed.

West Headnotes (4)

[1] **Federal Courts**
Credibility and impeachment

Federal Courts
"Clearly erroneous" standard of review in general

Following bench trial, judge's findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given opportunity of trial court to judge credibility of witnesses.

8 Cases that cite this headnote

[2] **Federal Courts**
Questions of Law in General

District court's conclusions of law are reviewed de novo.

2 Cases that cite this headnote

[3] **Constitutional Law**
Booths

Adverse economic impact caused to adult entertainment business as result of complying with city ordinances, which required that interior of adult video arcade booths be visible to employees in adjacent public room and that at least one employee be situated in that room whenever customer was present, was irrelevant in determining whether ordinances were invalid restrictions on manner in which protected speech could be expressed but, rather, issue was whether challenged ordinances prohibited entry into adult entertainment market. U.S.C.A. Const.Amend. 1; Spokane, Wash., Code §§ 10.08.100(D), 10.08.110(A).

18 Cases that cite this headnote

[4] **Constitutional Law**
Booths

City ordinances, which required that interior of adult video arcade booths be visible to employees in adjacent public room and that at least one employee be situated in that room whenever customer was present, did not unconstitutionally prohibit adult entertainment business from engaging in that protected speech which would allow it to compete in adult entertainment market, but merely provided that costs of doing so might increase. U.S.C.A. Const.Amend. 1; Spokane, Wash., Code §§ 10.08.100(D), 10.08.110(A).

11 Cases that cite this headnote

Attorneys and Law Firms

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Patricia Connolly Walker, Assistant City Attorney, Spokane, Washington, for defendant-appellee City of Spokane.

Appeal from the United States District Court for the Eastern District of Washington.

Before: D.W. NELSON and JOHN T. NOONAN, Jr., Circuit Judges, and TANNER, District Judge [*].

[*] The Honorable Jack E. Tanner, Senior District Judge for the Western District of Washington, sitting by designation.

Opinion

D.W. NELSON, Circuit Judge:

Appellants Spokane Arcade and World–Wide Video ("World Video") brought this action against Appellee City of Spokane, alleging that ordinances promulgated by the city which regulated adult arcades were invalid restrictions on the manner in which protected speech may be expressed. World Video maintains that in order to comply with the ordinances it will have to hire more employees, thus increasing its payroll expenses and decreasing its profits; it contends that because of this alleged inability to make an adequate profit, it will in effect be denied access to the adult entertainment market. The district court, however, rejected its claim, and held that in determining whether the First Amendment had been violated, the relevant inquiry turned on whether the plaintiffs were free to engage in their protected speech and not on whether the regulation at issue resulted in decreased profits. We affirm.

BACKGROUND

Appellants Spokane Arcades and World Wide Video ("World Video") operate adult arcades in the City of Spokane. In the arcades, patrons enter booths and insert tokens or coins to watch sexually explicit videos. World Video also sells sexually explicit books, videotapes, magazines and novelties; these materials are located in a retail room off the entrance of the stores, while the viewing booths are in a video viewing room in the back. There is only one clerk on duty at a time, and s/he is stationed in the retail room.

In the spring of 1993, the Mayor of Spokane appointed a task force to study the problems associated with adult arcades, some of which included drug usage and sexual conduct between patrons in the video booths. These problems were compounded by the fact that police officers were unable to conduct walk-through inspections due to safety concerns. The Task Force presented evidence to the City Council that the configuration of the arcades and the lack of adequate ***665** staffing "creat[ed] the risk of officers encountering in progress criminal activity." Moreover, the Task Force maintained that "due to the maze-type design currently in place, it would be difficult for officers to tactically retreat should the need arise."

The Task Force suggested that a clear view into the arcades and doorways that opened into an adjacent public room would reduce the potential for crime. Accordingly, the city promulgated ordinances which provided, *inter alia,* that all arcade booths be "open to an adjacent public room so that the area inside is visible by direct line of sight to persons in the adjacent public room," and that "[t]here must be at least one employee on duty and situated in the public room adjacent to the adult arcade stations or booths at all times that any patron ... is present inside the premises." S.M.C. §§ 10.08.100(D), 10.08.110(A).

World Video challenged the ordinances in the district court, alleging that under the test enunciated by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), *reh'g denied,* 475 U.S. 1132, 106 S.Ct. 1663, 90 L.Ed.2d 205 (1986), they were invalid restrictions on the manner in which speech may be expressed. The challenge relevant to this appeal centered on those sections of the ordinances which required that the interior of the booths be visible to employees in an adjacent public room and that at least one employee be situated in that room whenever a customer was present. World Video maintained that it would have to hire additional employees in order to ensure that the booths were visible to employees in the adjacent room, and argued that because of the revenue that would be lost

as a result of the open booth requirement, the additional payroll expense would severely decrease the arcades' profitability and would unduly restrict World Video's ability to engage in protected expression. The district court disagreed, effectively dismissing World Video's economic impact arguments as it held that the ordinances did not deny World Video reasonable alternative avenues of communication.

STANDARD OF REVIEW

[1] **[2]** Following a bench trial, the judge's findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of the witnesses. Fed.R.Civ.P. 52(a). *See Price v. United States Navy,* 39 F.3d 1011, 1021 (9th Cir.1994); *Saltarelli v. Bob Baker Group Medical Trust,* 35 F.3d 382, 384 (9th Cir.1994). The district court's conclusions of law are reviewed de novo. *Price,* 39 F.3d at 1021.

DISCUSSION

As an initial matter, we take note of the fact that World Video's contention that additional employees would have to be hired in order to comply with the ordinances is not well-supported by the record. Except for the requirement that "[t]here must be at least one employee on duty and situated in the public room adjacent to the adult arcade stations or booths at all times that any patron ... is present," S.M.C. § 10.08.110(A), the ordinances do not regulate the number of employees that must be present in an establishment. In addition, the city presented evidence that there were design options available to World Video which would permit it to conduct retail sales and arcade viewing in the same room.

[3] Even if World Video demonstrated that the hiring of additional employees was unavoidable, the adverse economic impact it posits is irrelevant to First Amendment analysis. Addressing the constitutionality of a municipal zoning ordinance which strictly regulated the establishment of adult businesses, this court in *Topanga Press Inc. v. City of Los Angeles,* 989 F.2d 1524 (9th Cir.1993), *cert. denied,* 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190 (1994), discussed the extent to which economic considerations could inform the analysis of time, place and manner restrictions. The appellants in *Topanga,* a group of adult businesses, argued that the city provided an insufficient number of sites for the businesses and that enforcement of the ordinance would thus cause irreparable ***666** injury. We held that the relevant inquiry was whether the government denied the businesses the opportunity to open and operate their establishments, and suggested that in order to so determine, it was appropriate "to consider economics when evaluating whether a particular relocation site is in fact part of the real estate market." *Id.* at 1530. However, we emphasized that a "question of purely economic injury is not relevant to the issue of whether a moving party faces hardship if a restrictive zoning ordinance is enforced." *Id.* at 1528. We thus made the important distinction between "consideration of economic impact *within* an actual business real estate market and consideration of cost to determine whether a specific relocation site *is part* of the relevant market," *id.,* noting that only the latter was permissible in the examination of alleged First Amendment violations.

[4] Accordingly, the *Topanga* test requires an examination of whether a challenged provision prohibits entry into a market where the aggrieved party might exercise her rights, and distinguishes this inquiry from any examination of success within the market at issue. A review of the restrictions in this matter demonstrates that they do not serve as such an absolute bar to market entry. The ordinances do not prohibit World Video from engaging in that protected speech which will allow it to compete in the adult entertainment market, but merely provide that the costs of doing so may increase. This type of "injury," however, should not inform First Amendment analysis: in *Topanga,* we cautioned against inquiring into the costs of continued market participation, and limited the scope of permissible economic analysis to an examination of whether one is permitted to enter or participate in the market in the first instance.

World Video attempts to distinguish the instant matter from this court's holding in *Kev, Inc. v. Kitsap County,* 793 F.2d 1053, 1061 (9th Cir.1985), where we held that an ordinance which required that exotic dancers perform at least 10 feet away from patrons, and on a stage raised at least 2 feet from the floor, did not deny the dancers "reasonable access to their market." *Id.* at 1061. Unlike the ordinance there at issue, World Video contends that

the contested provisions in this case will deny it access to the adult entertainment market "by making it totally unprofitable for them to operate their businesses."

Not only does this argument erroneously assume that the only determinant of profitability is payroll costs, an assumption we will not indulge, but it also reflects a deep misunderstanding of the market access/market success distinction articulated in *Topanga.* In *Topanga,* we maintained that in the absence of any absolute bar to the market (in that case, relocation to a site that would deny a business the opportunity to open and operate), it is irrelevant whether "[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business." 989 F.2d at 1531. *See also Walnut Properties v. City of Whittier,* 861 F.2d 1102, 1109 (9th Cir.1988), *cert. denied,* 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 157 (1989), (distinguishing between intrinsic limitations and limitations resulting from the imposition of market forces). Thus, an absolute bar in this matter would be a regulation that prohibited arcade owners from engaging in their protected speech, and not one that merely prohibited them from realizing the profits to which they were accustomed.

Furthermore, World Video attempts to rely upon the Supreme Court's recent opinion in *United States v. National Treasury Employees Union,* 513U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) in support of its economic impact argument. In *Treasury Employees,* the Court held that § 501(b) of the Ethics in Government Act of 1978, which prohibited the receipt of honoraria by government employees, violated the First Amendment. The court held that the prohibition on compensation unduly burdened "expressive activity": "Publishers compensate authors because compensation provides a significant incentive toward more expression. By denying respondents that incentive, the honoraria ban induces them to curtail their expression if they wish to continue working ***667** for the government." *Id.* at ——, 115 S.Ct. at 1014.

Treasury Employees, however, is entirely consistent with the test articulated by this court in *Topanga* and can be distinguished easily from the instant matter. The prohibition at issue in *Treasury Employees* had the effect of not merely reducing the value of the employees' speech, but rather of barring them from the market in which that speech might be expressed. That they could have engaged in such acts of expression without compensation was irrelevant; *Treasury Employees* suggests that they must not be denied *the opportunity* to enter into a market where they might be compensated for such expression. *See also Topanga,* 989 F.2d at 1529 ("The test for determining whether the Adult Businesses' First Amendment rights are threatened is whether a local government has 'effectively den[ied] [them] a reasonable opportunity to open and operate.' ")

The ordinances promulgated by the city in this case do not deny World Video the opportunity to operate its establishments, but merely (or rather, allegedly) increase the costs of its doing so. Even if the costs of compliance were so great that World Video would be forced out of business, the ordinances do not pose any intrinsic limitation on the operation of the arcades, but merely increase World Video's vulnerability to such market forces as the increased costs of labor and the decreased or stagnant demand for pornography. Accordingly, we hold that the ordinances constitute valid manner restrictions.

The judgement of the district court is AFFIRMED.

All Citations

75 F.3d 663, 24 Media L. Rep. 1475, 96 Cal. Daily Op. Serv. 490, 96 Daily Journal D.A.R. 797

92 Wash.App. 660
Court of Appeals of Washington,
Division 2.

DCR, INC., a Washington corporation;
and Kathy T. Johnson, Appellants.
v.
PIERCE COUNTY, Respondent.

No. 21416-4-II.
|
Oct. 2, 1998.

Operator of erotic dance studio, and dancer at studio, brought action challenging constitutionality of county ordinance regulating such studios, which contained provision requiring dancers to be at least ten feet away from any patron while performing dances. The Superior Court, Pierce County, Thomas R. Sauriol, J., granted county's motion for summary judgment. Plaintiffs appealed, and the Court of Appeals, Hunt, J., held that: (1) physical proximity of erotic dancer to viewers of dance is not an expressive component of erotic dance entitled to constitutional protection; (2) ordinance thus did not violate First Amendment or State Constitution, and was not impermissible prior restraint; (3) ordinance was valid time, place, and manner restriction on protected speech; (4) ordinance did not violate due process clause; and (5) provisions of ordinance governing administrative review of adverse decisions satisfied constitutional requirements.

Affirmed.

Armstrong, J., dissented and filed opinion.

West Headnotes (32)

[1] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from

On review of summary judgment, appellate court determines whether affidavits, facts, and record have created issue of fact, and if so, whether it is material.

Cases that cite this headnote

[2] **Appeal and Error**
Cases Triable in Appellate Court

Construction of an ordinance is a question of law, which is reviewed de novo.

Cases that cite this headnote

[3] **Appeal and Error**
Cases Triable in Appellate Court

Whether certain conduct is constitutionally protected is a question of law which is reviewed de novo.

Cases that cite this headnote

[4] **Constitutional Law**
Presumption of Invalidity

Governmental attempt to restrict content of future speech, which is deemed a "prior restraint", bears a heavy presumption against its constitutional validity under First Amendment, and is unconstitutional per se under State Constitution. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 5.

1 Cases that cite this headnote

[5] **Constitutional Law**
Prior Restraints

Regulation of constitutionally protected speech may not rise to the level of impermissible prior restraint, for purposes of First Amendment and State Constitution, if it merely restricts the time, place, or manner of expression. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 5.

1 Cases that cite this headnote

[6] **Constitutional Law**
Nudity in General

Constitutional Law
Public Nudity or Indecency

Constitutional Law
Nude Dancing in General

Nude dancing receives constitutional protection under free speech guarantees of First Amendment and State Constitution, although nudity itself is conduct subject to police powers of State. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 5.

Cases that cite this headnote

[7] **Constitutional Law**
Nude Dancing in General
Constitutional Law
Semi-Nude Dancing in General

State Constitution does not provide greater constitutional protection in context of sexually explicit nude and seminude dancing than does First Amendment to Federal Constitution. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 5.

Cases that cite this headnote

[8] **Constitutional Law**
Nude Dancing in General

Nude dancing is afforded lesser protections under First Amendment and State Constitution than other types of speech, such as political speech, and is expression that clings to the edge of constitutional protection. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 5.

Cases that cite this headnote

[9] **Constitutional Law**
Performers

Although arguably "expressive," illegal conduct associated with nude or semi-nude table dancing, such as customers' digital penetration of dancers, oral copulation, and insertion of tips into dancers' orifices, falls outside edge of constitutional protection under free speech guarantees of First Amendment and State Constitution. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 5.

Cases that cite this headnote

[10] **Constitutional Law**
Proximity of Performers to Patrons

Physical proximity of erotic dancer to viewers of dance is not an expressive component of erotic dance entitled to protection under free speech guarantees of First Amendment and State Constitution. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 5.

2 Cases that cite this headnote

[11] **Constitutional Law**
Performers
Public Amusement and Entertainment
Dancing and Other Performances

County ordinance requiring dancers at erotic dance studios to be at least ten feet away from any patron while performing dances did not infringe on component of expressive activity which was protected under First Amendment, or State Constitution; while distance requirement diminished erotic experience, because patrons could not smell breath, perfume, or scent of dancer's body, or touch dancer, rule did not restrict expressive conduct of dance itself. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 5.

2 Cases that cite this headnote

[12] **Constitutional Law**
Nude Dancing in General
Constitutional Law
Semi-Nude Dancing in General

With respect to governmental regulations on nude or semi-nude dancing, there is no entitlement under First Amendment, or State Constitution, to the "maximum erotic experience possible." U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 5.

Cases that cite this headnote

[13] **Constitutional Law**
Prior Restraints

"Prior restraint" is an administrative or judicial order forbidding communications prior to their occurrence. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 5.

Cases that cite this headnote

[14] **Constitutional Law**
Prior Restraints

Simply stated, a prior restraint prohibits future speech, as opposed to punishing past speech. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 5.

1 Cases that cite this headnote

[15] **Constitutional Law**
Proximity of Performers to Patrons
Public Amusement and Entertainment
Dancing and Other Performances

County ordinance requiring dancers at erotic dance studios to be at least ten feet away from any patron while performing dances did not infringe on protected expression, and thus was not impermissible prior restraint under State Constitution. West's RCWA Const. Art. 1, § 5.

Cases that cite this headnote

[16] **Constitutional Law**
Content-Neutral Regulations or Restrictions
Constitutional Law
Narrow Tailoring Requirement; Relationship to Governmental Interest
Constitutional Law
Existence of Other Channels of Expression

Government may impose reasonable time, place, and manner restrictions on speech that are (1) content neutral, (2) narrowly tailored to serve substantial governmental interest, and (3) leave open alternative channels for communication, without violating First Amendment's free speech guarantee. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[17] **Constitutional Law**
Secondary Effects

Ordinance which regulates protected speech is content-neutral, and thus may potentially be valid under First Amendment as time, place, and manner restriction on protected speech, if its predominant purpose is the amelioration of deleterious secondary effects of sexually explicit businesses. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[18] **Constitutional Law**
Content-Neutral Regulations or Restrictions

In determining whether ordinance with regulates protected speech is content-neutral, and thus may qualify as valid time, place, and manner restriction under First Amendment, court considers all objective indicators of statutory intent from face of statute, effect of statute, comparison to prior law, facts surrounding enactment of statute, its stated purpose, and record of hearings concerning its enactment. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[19] **Constitutional Law**
Proximity of Performers to Patrons
Public Amusement and Entertainment
Dancing and Other Performances

County ordinance requiring dancers at erotic dance studios to be at least ten feet away from any patron while performing dances was valid time, place, and manner restriction on protected speech under First Amendment; distance requirement was content-neutral, as primary purpose was amelioration of secondary effects of erotic dancing, ordinance was narrowly tailored to serve substantial

government interest of prohibiting public sexual contact, and dancers, who could perform same dance ten feet away from customers, had alternative channels of communication, even though requirement might cause decrease in profitability of such activities. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[20] Constitutional Law
Time, Place, or Manner Restrictions

Ordinance which restricts protected speech is "narrowly tailored", and thus may constitute valid time, place, and manner restriction under First Amendment, if it promotes a substantial government interest that would be achieved less effectively absent the ordinance. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[21] Constitutional Law
Time, Place, or Manner Restrictions

Ordinances restricting protected speech are not invalid, on basis that they are not narrowly tailored and thus do not constitute valid time, place, and manner restriction, simply because there is some imaginable alternative that might be less burdensome on speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[22] Courts
Dicta

Statements in case that do not relate to issue before court and are unnecessary to decide case constitute "obiter dictum", and need not be followed.

9 Cases that cite this headnote

[23] Constitutional Law
Sexually Oriented Businesses;Adult Businesses or Entertainment

Only a denial of access to the market for adult businesses constitutes unconstitutional elimination of alternative channels of communications, and where government actions have not overtly denied adult businesses ability to open and to operate, but have merely made it more difficult to earn profit, there has been no governmental elimination of alternative channels, and consequently, no denial of First Amendment right of free speech or expression. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[24] Constitutional Law
Public Amusement and Entertainment

Public Amusement and Entertainment
Dancing and Other Performances

County ordinance requiring dancers at erotic dance studios to be at least ten feet away from any patron while performing dances did not violate due process rights of owner and dancers; ordinance was aimed at achieving legitimate public purpose and used means reasonably related to achieve that purpose, and was not unduly oppressive, even though less burdensome measures might theoretically be available. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[25] Constitutional Law
Sexually Oriented Businesses

Public Amusement and Entertainment
Dancing and Other Performances

County ordinance requiring dancers at erotic dance studios to be at least ten feet away from any patron while performing dances was not overbroad; no danger existed that ordinance would be used to criminalize innocent dances, as it was clear that ordinance applied only to "erotic dance" that "seeks to arouse or excite the patrons." U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[26] Constitutional Law
Performers

Public Amusement and Entertainment

Dancing and Other Performances

County ordinance which prohibited patrons at erotic dance studios from giving direct tips to dancers, and prevented dancers from soliciting tips directly from patrons, was not impermissible prior restraint on expressive activity in violation of First Amendment; ordinance did not prohibit indirect receipt of tips, and did not give county unfettered discretion in determining what constitutes "direct" tip, as it provided narrow, objective, and definite standards for its application. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[27] **Municipal Corporations**

Proceedings to Determine Validity of Ordinances

Court has duty, if possible, to construe ordinance so as to uphold its constitutionality.

Cases that cite this headnote

[28] **Constitutional Law**

Time Limits for Grant or Denial

First Amendment requires that governmental license to engage in expressive activity must be issued within a reasonable period of time, because undue delay results in suppression of protected speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[29] **Constitutional Law**

Time Limits for Grant or Denial

Governmental licensing scheme for expressive activity that fails to provide definite time limitations for decision is constitutionally infirm, because delay compels speaker's silence, in violation of First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[30] **Constitutional Law**

Cabarets, Discotheques, Dance Halls, and Nightclubs in General

Public Amusement and Entertainment

Dancing and Other Performances

County ordinance under which auditor was required to issue erotic dance studio license within 30 days of receipt of properly completed application and fee, and upon finding that business complied with applicable codes, placed reasonable and definite time limit on decision to issue license, and thus was not impermissible restriction on protected speech in violation of First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[31] **Constitutional Law**

Cabarets, Discotheques, Dance Halls, and Nightclubs in General

Public Amusement and Entertainment

Dancing and Other Performances

Provision of county ordinance governing licensing of erotic dance studios which granted right to appeal from adverse determination, under which filing of appeal by applicant would stay action of county auditor, provided for stay during appeal of hearing examiner's decision, as required to comply with First Amendment; appeal from hearing examiner's decision stays decision, as well as action of county auditor that is subject of both hearing and appeal. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[32] **Constitutional Law**

Cabarets, Discotheques, Dance Halls, and Nightclubs in General

Public Amusement and Entertainment

Dancing and Other Performances

Fact that county ordinance governing licensing of erotic dance studios did not place time limit for hearing examiner to issue decision with respect to action by county auditor under ordinance did not result in violation of First Amendment rights of applicants, since ordinance provided for stay

of adverse administrative decision during pendency of appeal, and thus preserved status quo. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

HUNT, Judge.

An adult entertainment corporation and a dancer challenge the constitutionality of a Pierce County (the County) ordinance regulating erotic dance studios. DCR, Inc., and table dancer Kathy Johnson (DCR) appeal the trial court's dismissal of their lawsuit on the County's *666 motion for summary judgment. Finding no unconstitutional restraint on protected expressive conduct, we affirm.

I

BACKGROUND

A. The Current Ordinance

Pierce County, Wash. Ordinance 94-5 (1994), codified as Pierce County Code (PCC) sec. 5.14 (1994) (the Ordinance), regulates erotic dance studios, managers, dancers, and employees. Its stated purpose is to eliminate the "historical" and regular occurrence of "prostitution, narcotics, breaches of the peace, and the presence within the industry of individuals with hidden ownership interests and outstanding arrest warrants." Ordinance 94-5.

Section 5.14.010(D) defines "erotic dance studio" and thus determines which businesses must comply with the Ordinance.[1] Sections 5.14.030 through .090 establish licensing requirements for operators. Sections 5.14.100 through .170 establish licensing requirements for managers and dancers. Sections 5.14.220 and .230 establish standards for denial and revocation of licenses. Section 5.14.190(H) requires all dancing to occur on a platform raised at least 18 inches from the floor and no closer than 10 feet to any patron. Sections 5.14.190(K) and (L) prohibit direct tipping. Section 5.14.250 imposes penalties for violations of the Ordinance.

1 PCC sec. 5.14.010(D) states: " 'Erotic dance studio' means a fixed place of business which emphasizes and seeks, through one or more dancers, to arouse or excite the patrons' sexual desires."

B. Enforcement Problems with Former Ordinance

The County presented evidence that law enforcement authorities conducted investigations in 1992 and 1993, which revealed erotic dance studio[2] problems with prostitution, narcotics transactions, and sexual contact. The sexual *667 contact included: mutual fondling; dancers sitting on customers' laps while simulating intercourse; dancers rubbing customers' faces, legs, and genitalia with their own genitalia and breasts; customers orally contacting the dancers' breasts and genitalia, including inserting monetary tips **385 into the dancers' vaginas by mouth; and customers digitally penetrating the dancers' vaginas. With the club owners' knowledge, prostitution occurred between dancers and customers both inside and outside the premises. Narcotics transactions were prevalent and included the sale of cocaine and methamphetamines.

2 Fox's, New Players, Deja Vu, RB's Show Bar, and another business now known as Lipstix.

The County also presented evidence that erotic dance studio operators and performers ignored the former ordinance's prohibition of physical contact between dancers and customers, because such contact was lucrative and courts were lenient. Narcotics violations were difficult to curb because police could not find dancers willing to work undercover, for fear of retribution from club owners.

C. Summary Judgment

DCR, Inc., which operates an erotic dance studio called Fox's, and one of Fox's employees, dancer Kathy Johnson, filed suit to have the current Ordinance declared unconstitutional, to enjoin the County from enforcing the Ordinance, and to obtain damages. The County moved for summary judgment dismissal.

In support of its motion for summary judgment, the County presented a transcript of the Pierce County Council public hearing. At this hearing, law enforcement officers testified concerning sexual contact between patrons and dancers at adult nightclubs in Pierce County. In a declaration, Pierce County Sheriff's Lieutenant Larry Gibbs stated that he had personally observed the occurrence of sexual contact in adult entertainment studios and that the 10-foot setback between entertainers and patrons "will greatly reduce the number of occurrences of illegal sexual conduct."

The County presented a video tape depicting sexual contact ***668** at two adult nightclubs in Pierce County. It also presented crime statistics indicating the number of occasions on which entertainers had been charged with violating the existing adult entertainment ordinance. The County presented arrest reports and police reports documenting such violations.

DCR presented evidence that many adult nightclubs throughout the country, including Fox's, feature nude or semi-nude dancing on stage and on tables. The clubs charge an admission fee and sell non-alcoholic drinks. The dancers are not employees of the business but instead pay rent to the business for using space on the dance floor. Table dancers are paid directly by the customers. Dancers testified that the Ordinance would deprive them of the ability to earn a living. The business derives some revenue from entrance fees and the sale of beverages, but the primary source of revenue is rent from the dancers.

DCR presented the declaration of Steve Fueston, part owner of Papagayo's, an adult nightclub in the City of Bellevue. Fueston stated that after his business began complying with Bellevue's four-foot minimum distance restriction for adult cabarets,[3] entertainers were no longer willing to work there and the business was forced to close. DCR also presented the declaration of Paul Bem, comptroller for the Deja Vu nightclub in Federal Way, which began operating at a loss once it complied with Federal Way's four-foot separation requirement for adult entertainment.

[3] The Bellevue ordinance imposes a four-foot distance requirement for clothed individual table dances, but requires all nude or semi-nude dances to be performed at least eight feet from customers on an 18-inch raised platform. *Ino Ino v. City of Bellevue,* 132 Wash.2d 103, 110-11, 937 P.2d 154 (1997), *cert. denied*, 522 U.S. 1077, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998).

To support its contention that the Ordinance will destroy the market for alcohol-free erotic dance clubs, DCR submitted Richard Wilson's declaration that prohibition of table dancing will eliminate the market for such clubs. Wilson is an attorney who has represented several adult nightclubs across the United States. He has been a legal and business consultant for several adult entertainment companies, is ***669** familiar with the business format of many clubs featuring live adult entertainment, and has spent considerable time in such clubs. His declaration states:

> Based on my experience in the industry, as well as my personal knowledge, it is my opinion and belief that table dancing is the ****386** primary entertainment activity provided by adult nightclubs, and that attracts customers to the clubs. Without table dances, entertainers would not be able to earn a living, and adult nightclubs would suffer seere financial losses and be forced to close, thus terminating their presentation of entertainment which is protected by the First Amendment.

The Pierce County Superior Court held the Ordinance constitutional as a matter of law, granted summary judgment to the County, and dismissed the case.

D. Appeal

On appeal, DCR and Johnson claim the trial court erred in summarily dismissing their case, because there are genuine issues of material fact concerning the constitutionality

of Pierce County Ordinance 94-5, involving the First, Fifth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 3 and 5, of the Washington Constitution. Specifically they argue that: (1) the 10-foot rule will force all erotic dance clubs out of business; and (2) a rule that thus destroys the market for erotic dancing is unconstitutional.

II

ANALYSIS

A. Summary Judgment

[1] **[2]** **[3]** A trial court may dismiss a case on summary judgment if the moving party establishes that there are no genuine issues of material fact. *Olympic Fish Prods., Inc. v. Lloyd,* 93 Wash.2d 596, 602, 611 P.2d 737 (1980). On review, we determine whether the affidavits, facts, and record have created an issue of fact and, if so, whether it is material. ***670** *Seven Gables Corp. v. MGM/UA Entertainment Co.,* 106 Wash.2d 1, 12, 721 P.2d 1 (1986). We view the evidence and offers of proof in the light most favorable to the non-moving party. *Wilson v. Steinbach,* 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). Construction of an ordinance [4] and whether certain conduct is constitutionally protected are questions of law, [5] which we review de novo.

4 *Rettkowski v. Department of Ecology,* 128 Wash.2d 508, 515, 910 P.2d 462 (1996); *Trueax v. Ernst Home Ctr., Inc.,* 70 Wash.App. 381, 853 P.2d 491 (1993), rev'd on other grounds, 124 Wash.2d 334, 878 P.2d 1208 (1994).

5 *Dicomes v. State,* 113 Wash.2d 612, 624, 782 P.2d 1002 (1989).

B. Regulation of Distance Between Dancer and Patron

Pierce County Code Section 5.14.190(H) requires all erotic dancers to perform on a stage 18 inches high and 10 feet from the closest patron. [6] DCR contends that this restriction violates free speech rights and infringes on its right to substantive due process. More specifically, DCR argues that: (1) the 10-foot rule effectively bans table dancing and does not leave open "practically available" alternative avenues of communication; (2) allowing dancers to perform on stage is not a comparable alternative; and (3) no one will pay to see erotic dancers on a stage 10 feet away, as compared to nearby on table tops. DCR contends that the Ordinance thus constitutes an unconstitutional prior restraint, the effect of which will be eradication of the erotic dance studio market.

6 "All dancing shall occur on a platform intended for that purpose which is raised at least eighteen inches from the level of the floor and no closer than ten feet to any patron." PCC sec.5.14.190(H).

[4] **[5]** A governmental attempt to restrict the content of future speech, deemed "prior restraint," bears "a heavy presumption against its constitutional validity" under the First Amendment to the federal constitution, and unconstitutional per se under Article I, Section 5, of the state constitution. *JJR Inc. v. City of Seattle,* 126 Wash.2d 1, 6 n. 4, 891 P.2d 720 (1995) (quoting ***671** *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 1963)). But "a regulation may not rise to the level of a prior restraint if it merely restricts the time, place, or manner of expression." *Ino Ino, Inc. v. City of Bellevue,* 132 Wash.2d 103, 126, 937 P.2d 154 (1997), cert. denied, 522 U.S. 1077, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998) (citing *State v.* ****387** *Coe,* 101 Wash.2d 364, 373, 679 P.2d 353 (1984)). The threshold question here is whether table dancing is constitutionally protected expressive conduct.

1. *Dance as Expression*

In an abstract sense, all conduct "expresses" something. That alone cannot justify treating all conduct as speech. As the Supreme Court explained in *City of Dallas v. Stanglin,* [490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989)], while freedom of speech "means more than simply the right to talk and to write," it does not embrace all human activity. "It is possible," the Court observed, "to find some kernel of expression in almost every activity a person undertakes for example, walking down the street, or meeting one's friends at a shopping mall but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." 1 Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech, sec. 11.3, at 11-5 (3d Ed.1997) (footnotes omitted).

[6] **[7]** **[8]** **[9]** Nude dancing "receives constitutional protection, although nudity itself is conduct subject to the police powers of the state." *Ino Ino,* 132 Wash.2d at 125, 937 P.2d 154. Contrary to DCR's position, the Washington Supreme Court recently held that "the differences in texts of art. I sec. 5, [of the state Constitution] and the First Amendment" do not "justif[y] greater state constitutional protection in the context of sexually explicit nude and seminude dancing." [7] ***672** *Ino Ino,* 132 Wash.2d at 119-20, 937 P.2d 154. Courts have acknowledged that "[n]ude dance ... is afforded lesser protections than other types of speech, such as political speech." *See DFW Vending, Inc. v. Jefferson County,* 991 F.Supp. 578, 590 (E.D.Tex., 1998) (citations omitted). Rather nude dancing is expression that " 'clings to the edge of constitutional protection.' " *Ino Ino,* 132 Wash.2d at 116, 937 P.2d 154 (quoting *JJR,* 126 Wash.2d at 9, 891 P.2d 720). Although arguably "expressive," illegal conduct associated with table dancing, such as customers' digital penetration, oral copulation, and insertion of tips into dancers' orifices, [8] falls outside this edge of constitutional protection.

7 In reaching this conclusion, the court first analyzed the *Gunwall* factors relative to nude dancing. *State v. Gunwall,* 106 Wash.2d 54, 61-62 720 P.2d 808, 76 A.L.R.4th 517 (1986), cited in *Ino Ino,* 132 Wash.2d 103, 937 P.2d 154. Its *Gunwall* analysis did not cause the court to change its view of nude dancing in the context of free speech protections. After weighing the *Gunwall* factors, the court concluded that greater protection was not warranted under the state constitution. *Ino Ino,* 132 Wash.2d at 116-22, 937 P.2d 154.

Specifically, the first *Gunwall* factor, the text of Article I, Section 5, did not require greater protection of nude dancing because nude dancing is "expression" and the Constitution's text refers only to speech and writing. *Ino Ino,* 132 Wash.2d at 117, 937 P.2d 154. Nor did the fourth factor, preexisting state law, require greater protection because our state has a history of outlawing or severely restricting nude dancing. *Ino Ino,* 132 Wash.2d at 120-21, 937 P.2d 154. For the same reason, i.e., historically strict local regulation, the sixth factor, local concern, did not warrant greater protection under our state constitution. *Ino Ino,* 132 Wash.2d at 122, 937 P.2d 154.

8 DCR has not asserted that such activities have an "expressive" element. In any case, even if these pernicious secondary-effects had expressive elements, "intentional contact between a nude dancer and a bar patron is conduct beyond the expressive scope of the dancing itself." *Hang On, Inc. v. City of Arlington,* 65 F.3d 1248, 1253 (5th Cir.1995). "The conduct at that point has overwhelmed any expressive strains it may contain." *Hang On,* 65 F.3d at 1253 (upholding "no touch" ordinance in nude dancing establishment).

[10] **[11]** The issue here is whether proximity of the erotic dance, as contrasted to the movements of the dance, constitutes *communicative* "expression" in the nature of constitutionally protected speech, or whether it is unprotected mere conduct. The evidence adduced by the County established that proximity of table dancers to customers promotes lucrative illegal conduct, and that a predecessor ordinance prohibiting such illegal conduct in adult entertainment businesses was ineffective.

The majority in *Ino Ino* noted that Bellevue's four-foot rule "does regulate expression" but did not squarely address whether table dancing near customers is constitutionally ****388** protected conduct, differing materially from more distant stage dancing. [9] *Ino Ino,* 132 Wash.2d at 125, 937 P.2d 154. But the ***673** court did note that the "eight-foot requirement limits only proximity and does not restrict the expressive aspect of stage dancing...." *Ino Ino,* 132 Wash.2d at 132, 937 P.2d 154. Thus the court implies that the proximity component of dancing is mere conduct that is *not* constitutionally protected. *Ino Ino,* 132 Wash.2d at 132, 937 P.2d 154. The court rejected a prior restraint analysis and instead found the four-foot distance requirement between dancer and patron to be a reasonable time, place, and manner restriction. The court ruled that the four-foot rule does not ban the expression of table dancing, but rather "allows dancers to engage in all types of movement, with the exception of pure sexual conduct, in order to convey eroticism." *Ino Ino,* 132 Wash.2d at 130, 937 P.2d 154.

9 The Bellevue ordinance at issue in Ino Ino included two distance requirements: (1) a four-foot distance between dancers and patrons during individual performances (such as table dancing); and (2) an eight-foot distance between stage dancers and patrons. Moreover, all nude or partially nude dancing was required to be at least eight feet from the nearest member of the public on a stage at least 18 inches above the floor. *Ino Ino,* 132 Wash.2d at 132 n. 8, 937 P.2d 154 (citing BCC sec. 5.08.070(A)(1), (6) (1995)).

This reading of *Ino Ino* conforms to federal constitutional law, which *Ino Ino* acknowledges is consistent with state constitutional law regarding the extent to which free speech protection applies to sexually explicit or nude dancing. For example, Chief Justice Rehnquist, writing for the plurality in *Barnes v. Glen Theatre,* reasoned that requiring nude dancers to wear pasties and G-strings does not deprive the dance of is erotic message, but rather "simply makes the message slightly less graphic." *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 571, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Similarly in *Colacurcio v. City of Kent,* 944 F.Supp. 1470 (W.D.Wash.1996),[10] a local federal court noted that ***674** table dancing provides customers with a "more intense, more personal, more erotic" experience because the customer can see and hear the dancer more clearly and has better opportunity to smell the "breath, perfume and the scent of the body." *Colacurcio,* 944 F.Supp. at 1476. Nevertheless, the court ruled that "there is nothing in [federal] constitutional jurisprudence to suggest that patrons are entitled under the First Amendment to the maximum erotic experience possible." *Colacurcio,* 944 F.Supp. at 1476.

10 In *Colacurcio v. City of Kent,* 944 F.Supp. 1470, 1476-77 (W.D.Wash.1996), an adult entertainment corporation contended that a 10-foot setback was unconstitutional because it banned table dancing. The federal district court agreed that the 10-foot setback baned table dancing, but nevertheless concluded that the ban did not violate the First Amendment of the federal constitution because it left open alternative avenues of communication: It still allowed dancers to perform on stage.

> The court noted that the proper focus is not on the customer's experience but on the dancer's ability to express herself. The court found that the rule did "not prevent the dancers from performing their erotic dance, or limit the manner in which the dancers may express themselves." *Colacurcio,* 944 F.Supp. at 1477. Since dancers could still perform their erotic dances, the court analyzed the regulation as a reasonable time, place, and manner restriction. *Colacurcio,* 944 F.Supp. at 1477.
>
> Similarly, in upholding a 10-foot setback and direct tipping prohibition in *Kev, Inc. v. Kitsap County,* 793 F.2d 1053 (9th Cir.1986), the Ninth Circuit Court of Appeals focused on the dancer's ability to express herself rather than on the customer's erotic experience, noting: "While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired." *Kev,* 793 F.2d at 1061.

[12] Here, the 10-foot distance requirement diminishes the erotic experience because customers cannot smell the breath, perfume, and scent of the body or touch the dancer's body so intensely as they can with close-quarters table dancing. The 10-foot rule minimizes opportunity for illegal activities, which are not protected conduct. But the 10-foot rule does not restrict expressive content of the dance itself: The dancer can perform the same dance 10 feet away. "Indeed, that distance is closer than distances at which artistic dance performances at theaters and concert halls generally are viewed. An eighteen-inch elevated platform only enhances visibility." ****389** *DFW Vending,* 991 F.Supp. at 594. Reiterating *Colacurcio,* there is no constitutional entitlement to the "maximum erotic experience possible." *Colacurcio,* 944 F.Supp. at 1476.

We therefore hold that proximity is not an expressive component of erotic dance entitled to protection under either the First Amendment or the State Constitution.

Having found that proximity of table dancing is not constitutionally protected expression, aside from performance of the dance itself, we need not address DCR's prior restraint argument. Nevertheless, because *Ino Ino* considered a prior restraint analysis before rejecting it and because the Ordinance does regulate the place or manner ***675** of erotic dance by controlling the distance between dancer and patron, we present the following additional analysis.

2. *Prior Restraint*

[13] **[14]** "A prior restraint is an administrative or judicial order forbidding communications prior to their occurrence. Simply stated, a prior restraint prohibits future speech, as opposed to punishing past speech." *Soundgarden v. Eikenberry,* 123 Wash.2d 750, 764, 871 P.2d 1050, 30 A.L.R. 5th 869 (1994) (citation omitted). If an ordinance constitutes a "prior restraint" on protected speech, the Washington Constitution confers greater protection than the Federal Constitution. *Ino Ino,* 132 Wash.2d at 122, 937 P.2d 154. But "[i]n the context of adult entertainment ... the court has declined to afford the full protection of art. I, sec. 5" to "expressive conduct or sexually explicit dance." *Ino Ino,* 132 Wash.2d at 117, 937 P.2d 154.

[15] DCR contends that the 10-foot setback is a prior restraint under the Washington Constitution, arguing that Article I, Section 5 offers greater protection to nude table dancing. The Washington Supreme Court majority has specifically rejected this argument with respect to Bellevue's fourfoot setback for erotic dance: "[A]rt. I, sec. 5 mentions only the right to speak, write and publish. In the absence of language relating to expressive conduct, we do not find that the text of art. I, sec. 5 justifies extending greater protection to the adult performances at issue here." *Ino Ino,* 132 Wash.2d at 117, 937 P.2d 154.

The Washington State Supreme Court has held that Bellevue's requirement, that individual table dancers perform at least four-feet from customers, does not rise to the level of a prior restraint. *Ino Ino,* 132 Wash.2d at 127, 937 P.2d 154. Because we have held that proximity of a dance is not protected expression, the County's 10-foot regulation similarly does not constitute a prior restraint.

3. *Time, Place, and Manner Restriction*

The United States Supreme Court has noted that the *O'Brien* [11] test for regulation of expressive conduct " 'in the ***676** last analysis is little, if any, different from the standard applied to time, place, and manner restrictions.' " *Ward v. Rock Against Racism,* 491 U.S. 781, 798, 109 S.Ct. 2746, 2757, 105 L.Ed.2d 661 (1989) (quoting *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 298, 104 S.Ct. 3065, 3071, 82 L.Ed.2d 221 (1984)). See also *Barnes,* 501 U.S. at 566, 111 S.Ct. 2456. We examine the regulation here at issue under the time, place, and manner test enunciated in *Ward,* 491 U.S. at 791, 109 S.Ct. 2746. [12]

11 *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

12 Both parties here assert that the 10-foot rule should be analyzed as a time, place, and manner restriction. We agree, though we note that we would reach the same result under the *O'Brien* test used by the majority in *Ino Ino.* Both tests require a content-neutral regulation (prong 1 of the *Ward* test, prong 3 of the *O'Brien* test), which is supported by a significant government interest (prong 2 of the *Ward* test, prong 2 of the *O'Brien* test), and which is narrowly tailored to further that interest (prong 2 of the *Ward* test, prong 4 of the *O'Brien* test). In addition, the *Ward* test requires that regulations leave open ample alternative channels for communication of the expression.

> Commentators and courts have noted that, in establishing the *O'Brien* test, the United States Supreme Court specifically addressed the test to general regulations on conduct that have the *incidental* effect of restricting expression. SMOLLA, supra sec. 9:13 at 9-14; sec. 11:7 at 11-16. See also *Collin v. Smith,* 578 F.2d 1197, 1209 (7th Cir.1978). *See, e.g.*, *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673 (general ban on mutilation/destruction of draft cards applied to expressive burning of draft card); *Barnes,* 501 U.S. at 566, 111 S.Ct. 2456 (general ban on public nudity applied to expressive exotic dancing). The present case, however, does not involve a statute of general applicability that has an incidental effect on speech, but rather a statute that was specifically drafted to limit the place and manner of expressive conduct. As such, the *Ward* test is best suited to our analysis. But see *DFW Vending,* 991 F.Supp. at 593 n. 14.

****390** **[16]** Government may impose reasonable time, place, and manner restrictions on speech that are (1) content neutral, (2) narrowly tailored to serve a substantial governmental interest, and (3) leave open alternative channels for communication. *Ward,* 491 U.S. at 791, 109 S.Ct. 2746 (citing *Clark,* 468 U.S. at 293, 104 S.Ct. 3065). As explained above, in electing to apply federal constitutional law, the Washington Supreme Court has ruled that "sexually explicit dance" does not warrant "application of the more protective time, place, and manner analysis developed under art. I, sec. 5 of the state constitution." *Ino Ino,* 132 Wash.2d at 122, 937 P.2d 154.

a. *Content Neutral*

[17] **[18]** An ordinance is content-neutral if its predominant purpose is the amelioration of deleterious secondary effects of sexually explicit businesses. *City of Renton v. Playtime* ***677** *Theatres, Inc.,* 475 U.S. 41, 49, 106 S.Ct. 925, 929-30, 89 L.Ed.2d 29 (1986). Expressive conduct, such as dance, is more likely than "pure" speech to "become ensnared by contentneutral regulations passed for reasons unrelated to the suppression of expression." Smolla, supra sec. 11:7 at 11-16. A court considers all objective indicators of statutory intent from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, its stated purpose, and the record of hearings concerning its

enactment. *City of Las Vegas v. Foley,* 747 F.2d 1294, 1297 (9th Cir.1984).

[19] Pierce County Ordinance No. 94-5 states that its purpose is to curb "significant criminal activity" that has "historically and regularly occurred in the adult entertainment industry." Thus, it shows a legitimate purpose on its face. The County conducted a public hearing, studied the secondary effects of table dancing, and relied on the results to formulate the 10-foot distance requirement. The County concluded that regulation of the distance between dancer and patron was necessary to prevent significant criminal activity that has historically and regularly occurred in adult entertainment establishments, including prostitution, narcotics transactions, breaches of the peace, and organized crime.

The County produced ample evidence that its predominant purpose in enacting the Ordinance was the amelioration of deleterious secondary effects of erotic dancing.[13] The Ordinance neither prohibits nor circumscribes the content of erotic dancing. It merely regulates distance between dancer and patron. Moreover, the distance is not so great as to obscure the dance; on the contrary, audiences for many other dance performances are generally seated more than 10 feet back from a stage. *DFW Vending,* 991 F.Supp. at 594. Thus the Ordinance is content neutral.

13 See *Bolser v. Washington State Liquor Control Bd.,* 90 Wash.2d 223, 228, 580 P.2d 629 (1978) (upholding confinement of topless dancing to elevated platform six feet from customers in order to prevent secondary effects, similar to those involved here: "The goal of the regulation is not censorship of expression, but the prevention of crime and disorderly conduct which is concomitant with the consumption of liquor in such situations.").

***678** b. *Narrowly Tailored To Serve a Substantial Government Interest*

i. Substantial Government Interest

The law is well settled that government has a substantial interest in eliminating deleterious secondary effects of nude dancing. The Supreme Court in *Ino Ino,* affirmed that "the governmental interest in preventing illegal contact is a rational basis for extending the minimum distance to eight feet," citing an experiment performed by the City of Bellevue that "a very tall customer could reach a nude stage dancer with only a separation of six feet." *Ino Ino,* 132 Wash.2d at 132-33, 937 P.2d 154. As in *Ino Ino,* the distance restriction here "facilitates the detection of public sexual contact and discourages ****391** contact from occurring in the first place." *Ino Ino,* 132 Wash.2d at 128, 937 P.2d 154. Thus the County has satisfied the substantial governmental interest requirement. See also *Barnes,* 501 U.S. 560 at 582, 111 S.Ct. 2456, 115 L.Ed.2d 504 (Souter, J., concurring).

ii. Narrowly Tailored

[20] **[21]** The United States Supreme Court explained the meaning of "narrowly tailored" in *Ward.* An ordinance is narrowly tailored if it promotes a substantial government interest that would be achieved less effectively absent the ordinance. *Ward,* 491 U.S. at 799, 109 S.Ct. 2746 (citing *United States v. Albertini,* 472 U.S. 675, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985)). Ordinances are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Ward,* 491 U.S. at 797, 109 S.Ct. 2746 (citing *Albertini,* 472 U.S. at 675, 105 S.Ct. 2897).

The County has also satisfied the requirement that the Ordinance is narrowly tailored to promote a governmental interest: It produced a factual record of narcotics and prostitution transactions and other substantial evidence to support its conclusion that separation of more than an arm's length between dancer and customer is necessary to control these secondary effects. The County's previous, narrower attempt to curb secondary effects, with an ordinance declaring them illegal, proved ineffective.

Moreover, the law is clear that a regulation need not be ***679** the minimum restriction conceivable in order to meet the "narrowly tailored" prong. In *Ward,* the United States Supreme Court held that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that *it need not be the least restrictive or least intrusive means of so*." *Ward,* 491 U.S. at 798, 109 S.Ct. 2746 (emphasis added). Here the County's 10-foot rule is narrowly tailored because the prevention of illegal sexual conduct, prostitution, and narcotics transactions would be achieved less effectively absent this restriction.

c. *Alternative Channels of Communications*

Under the third pron, the burden is on the government to show that the Ordinance leaves open practical and available alternative channels of communication. *Ward,* 491 U.S. at 791, 109 S.Ct. 2746. That dancing 10 feet away might not be as lucrative as dancing closer to patrons (a likely result of proximity's opportunity for illegal contact) [14] does not mean that an alternative locus for the protected expression of the dance is unavailable. To the contrary, alternatives for the protected expressive content of table dancing are available under the Ordinance: Dancers may perform the identical dance on a stage 10 feet away from the customers and 18 inches off the floor, closer to their audience than many other dancers engaged in artistic performances in theaters and concert halls. *DFW Vending,* 991 F.Supp. at 594. But alternatives for constitutionally unprotected components of table dancing, e.g., illegal sexual contact and narcotics transactions, are appropriately constrained by the Ordinance.

14 In *Ino Ino,* the Supreme Court noted: "Decreased opportunity for illegal sexual contact could be one cause of customers' dissatisfaction," resulting in lower revenues for dancers. *Ino Ino,* 132 Wash.2d at 131, 937 P.2d 154.

We have held that the proximity element of erotic dance does not constitute protected expression. Thus, the focus for examining availability of alternative avenues of expression here is not close-by erotic dance confined to table tops, but rather erotic dance in general.

***680** i. Ban on Table Dancing; Inevitable Destruction of Business

Supported by expert testimony, DCR claims that enforcement of the 10-foot rule will eliminate table dancing, which will render erotic dance clubs so unprofitable that all such businesses will inevitably fail. DCR thus argues that marketplace response to the 10-foot rule will eliminate all alternative avenues for the constitutionally protected expression that is erotic dance. Dicta in *Ino Ino* suggests that, under such circumstances, ****392** as DCR contends, "the distance requirement would be unconstitutional." *Ino Ino,* 132 Wash.2d at 130, 937 P.2d 154 (citing *Gomillion v. Lightfoot,* 364 U.S. 339, 340-41, 81 S.Ct. 125, 126-27, 5 L.Ed.2d 110 (1960)).

But *Gomillion* does not support this dicta. Rather *Gomillion* is a voting rights case involving redistricting, alleged to have the " 'inevitable effect' of depriving a racial group of their constitutional right to vote." *Ino Ino,* 132 Wash.2d at 130-31, 937 P.2d 154. Not all speech and conduct are constitutionally protected; rather there is a continuum of First Amendment protection, ranging from the most highly protected political speech and speech-like conduct (e.g. the flag-burning cases) [15] to the least protected expressive conduct of nude dancing, which " 'clings to the edge' " of constitutional protection. *Ino Ino,* 132 Wash.2d at 117, 937 P.2d 154 (quoting *JJR,* 126 Wash.2d at 9, 891 P.2d 720). See also *Barnes,* 501 U.S. at 566, 111 S.Ct. 2456; *DFW Vending,* 991 F.Supp. at 590.

15 *United States v. Eichman,* 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990); *Texas v. Johnson,* 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

Yet *Ino Ino* also acknowledges that federal court decisions, especially those of the United States Supreme Court, are controlling on the issue of constitutionally protected free speech and expressive conduct. But the federal courts have ruled contrary to *Ino Ino*'s dicta when addressing economic impacts relative to nude or erotic dance and alternative venues.

ii. Diminished Commercial Viability Without Limiting Alternatives

Although raised in the context of a zoning case, the ***681** Supreme Court's analysis in *Playtime Theatres,* 475 U.S. at 54, 106 S.Ct. 925, is applicable here. Both *Playtime Theatres* and the instant case involve the issue of whether government regulations that diminish commercial viability of a business would thereby eliminate alternative avenues of protected communication. In *Playtime Theatres,* the United States Supreme Court held that the action of the market does *not* limit alternative avenues of communication; only government's *prevention of entry into the market* can be characterized as eliminating such alternatives. See also *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 413 (6th Cir.1997) ("if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment") (emphasis added); *DFW Vending,* 991 F.Supp. at 595 (summarizing economic impact cases in the context of the "narrow tailoring" element of the *O'Brien* test).

In *Playtime Theatres* the United States Supreme Court confronted zoning regulations that forced certain adult establishments to relocate. While there was a sufficient quantity of sites available to provide "alternative avenues of communication," the respondents argued that these sites did not provide real alternatives because the sites were not "commercially viable," because either the land was already owned and developed or the undeveloped land was not for sale. The argument, in essence, was that the prohibitive cost of relocating adult businesses effectively foreclosed all alternative avenues of communication.

The Supreme Court rejected this argument, stating,

> That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related ***682** businesses for that matter, will be able to obtain sites at bargain prices. ("The inquiry for First Amendment purposes is not concerned with economic impact.") In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city....

Playtime Theatres, 475 U.S. at 54, 106 S.Ct. 925 (citations omitted).

****393** Similarly, in the context of adult businesses, lower federal courts have consistently rejected financial feasibility as a consideration in determining whether alternative avenues of expression are available. See, e.g., *Spokane Arcade, Inc. v. City of Spokane,* 75 F.3d 663, 665-66 (9th Cir.1996) (an ordinance requiring open booths for viewing sexually explicit material did not violate the First Amendment, even though it reduced profitability).

> Ultimately, all of plaintiff's arguments boil down to a complaint that the ordinance reduces their audience and adversely affects profits. To the extent they claim the ordinance denies them total access to their market, this contention is rejected. More likely, however, plaintiffs argue that the ordinance reduces their market from an economic perspective that it will no longer be profitable as before the ordinance. Whether or not this proves to be the case, it does not show lack of narrow tailoring.

DFW Vending, 991 F.Supp. at 595. The only relevant inquiry is whether the plaintiffs are politically free to engage in protected speech, not whether the regulation will cause a decrease in profits. *See also Mitchell v. Commission on Adult Entertainment Establishments,* 10 F.3d 123, 132 n. 10 (3d Cir.1993) (finding that the First Amendment does not guarantee anyone a profit); *International Food & Beverage Sys. v. City of Fort Lauderdale,* 794 F.2d 1520, 1526 (11th Cir.1986), aff'd, 838 F.2d 1220 (11th Cir.1988); *Movie & Video World, Inc. v. Board of County Comm'rs,* 723 F.Supp. 695, 700 (S.D.Fla.1989).

***683** iii. Controlling Precedent

[22] **[23]** Paramount to the dicta in *Ino Ino,* [16] we must apply the economic effects analysis of the United States Supreme Court in the *Playtime Theatres,* as followed by the Ninth Circuit in *Spokane Arcade.* DCR argues that the 10-foot rule will render unprofitable, and thereby force closure of, all Pierce County adult dancing establishments, thus effectively eliminating all avenues of communication for constitutionally protected erotic dancing. But only a denial of *access to the market* constitutes an unconstitutional elimination of alternative channels. [17] Where government actions have not overtly denied adult businesses the ability to open and to operate, but have merely made it more difficult to earn a profit, there has been no governmental elimination of alternative channels, and consequently, no denial of the First Amendment right of free speech or expression. *See Spokane Arcade,* 75 F.3d at 664-65; *Mitchell,* 10 F.3d at 132; *International Food & Beverage Sys.,* 794 F.2d at 1526; *Movie & Video World,* 723 F.Supp. at 700.

16 "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." *State v. Potter,* 68 Wash.App. 134, 150, 842 P.2d 481 (1992) (citation omitted). Dicta

is not controlling precedent. *Noble Manor v. Pierce County,* 133 Wash.2d 269, 289, 943 P.2d 1378 (1997) (concurring opinion).

17 Denial of access to the market would also most likely be viewed as a prior restraint.

Here, the Ordinance restricts only the place and manner of the dance, but not its content. Rather, it restricts the opportunity for illegal activity that proximity enhances; such illegal activity is not sheltered by the First Amendment simply because it is incorporated into a dance that is otherwise entitled to such protection. [18] Accordingly, in restricting the location of erotic dance performance, the County's 10-foot rule meets the *Ward* time, place, and manner test.

18 See *Hang On,* 65 F.3d at 1253 ("That the physical conduct occurs while in the course of protected activity does not bring it within the scope of the First Amendment.").

C. Due Process; Overbreadth

[24] DCR's additional due process and overbreadth challenges ***684** to the Ordinance's constitutionality are essentially duplicative of their other arguments and fail for similar reasons. As already explained, the distance regulation is aimed at achieving a legitimate public purpose; it uses means that are reasonably related to achieve that purpose; and it is not unreasonably oppressive to DCR. *Sintra, Inc. v. City of Seattle,* 119 Wash.2d 1, 829 P.2d 765 (1992) (due process). The fact that less burdensome measures, such as higher fines, might be theoretically available to control the deleterious secondary effects of ****394** erotic dancing, does not render the Ordinance violative of due process. *Ward,* 491 U.S. at 800, 109 S.Ct. 2746.

[25] "Application of the overbreadth doctrine is strong medicine ... and should be employed by a court sparingly and only as a last resort." *State v. Halstien,* 122 Wash.2d 109, 122, 857 P.2d 270 (1993) (citations omitted). We do not find convincing DCR's argument that the Ordinance is overbroad, especially in light of *Ino Ino*'s (1) refusal to extend to sexually explicit dancing the Washington Constitution's generally lower tolerance for overly broad restrictions on speech, and (2) rejection of an analogous overbreadth claim as applied to Bellevue's similar four-foot rule. *Ino Ino,* 132 Wash.2d at 117-20, 937 P.2d 154.

DCR argues that the Ordinance sweeps too broadly and could encompass other types of dance not shown to be accompanied by deleterious secondary effects. We faced and rejected an analogous argument in *State v. Stephenson,* 89 Wash.App. 794, 800, 950 P.2d 38 (1998),

> Although it is possible to conceive of circumstances in which application of the statute would be unreasonable, that alone will not render it unconstitutional. *Members of City Council v. Taxpayers* [*for Vincent*], 466 U.S. 789, 800, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984). Unless there is a realistic danger that the statute will significantly compromise recognized First Amendment protections of parties not before the court, we will not declare it facially invalid on overbreadth grounds. *Taxpayers,* [466 U.S. at 801, 104 S.Ct. 2118]. We do not see that danger here.

Stephenson, 89 Wash.App. at 804, 950 P.2d 38 (emphasis added). Similarly, we see no danger ***685** here that the Ordinance will be used to criminalize innocent dance of the type DCR hypothesizes. Although PCC 5.14.190 subsection Huses the term "all dancing," the surrounding subsections, as well as Pierce County's Adult Entertainment Ordinance read as a whole, PCC chapter 5.14, clearly apply only to "erotic dance" that "seeks to arouse or excite the patrons' sexual desires." PCC 5.14.010(B), (D); 5.14.020.

D. Tipping Restrictions

DCR next challenges the constitutionality of the Ordinance's restrictions on tipping. Section (K) of PCC sec. 5.14.190 prevents patrons from giving direct tips to dancers. Section (L) prevents dancers from soliciting tips directly from patrons. DCR contends the tipping rules are prior restraints because (1) they prevent dancers from earning compensation, and (2) they give County officials unbridled discretion to decide what constitutes a direct tip. [19]

19 DCR analogizes the instant case to *United States v. National Treasury Employees Union,* 513 U.S. 454, 115 S.Ct. 1003, 1014, 130 L.Ed.2d 964 (1995), in which the Court held that Congress had enacted an unconstitutional prior restraint when it precluded federal employees from accepting honoraria for their speeches. The Supreme Court distinguished *National Treasury* by noting that distance regulations do not place "restrictions on the amount of payment dancers may receive and thus, does not effectively foreclose a reasonable means of earning a living." *Ino Ino,* 132 Wash.2d at 131, 937 P.2d 154.

[26] DCR produced evidence that the industry practice is for dancers to pay the studio for the opportunity to dance; the dancer's sole compensation is direct tips. The tipping restriction does not prohibit erotic dancers from working, from receiving tips indirectly, or from being compensated by customers or dance studio operators for their work. Rather, the Ordinance merely halts the current practice of customers paying dancers directly,[20] resulting in lessened opportunity for prostitution and other illegal activity that has contributed to the profitability of table dancing.

20 The record reflects many abuses of direct tipping in erotic dance studios.

[27] DCR also argues that the tipping restriction is a prior restraint ***686** because it vests the County with unfettered discretion to decide what constitutes a "direct" tip.[21] ****395** We have a duty, if possible, to construe an ordinance so as to uphold its constitutionality. *State ex rel. Herron v. Browet, Inc.,* 103 Wash.2d 215, 219, 691 P.2d 571 (1984). Here it is possible to construe the tipping portion of the Ordinance to uphold its constitutionality.

21 A licensing scheme containing vague terms gives the government unfettered discretion to issue or to deny a license and thus presents a danger that the decision maker may exercise its judgment to suppress speech based on content. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 225-26, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990).

The Ordinance does not give County officials unfettered discretion to decide what constitutes a direct tip. "Direct" is defined as "proceeding from one point to another in time or space without deviation or interruption." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1969). This construction satisfies DCR's vagueness concerns by eliminating any inappropriate discretion that might have been vested in the County official. As so construed, the Ordinance rovides narrow, objective, and definite standards for application and thus, passes constitutional muster.

E. Licensing Scheme

DCR contends that the licensing scheme constitutes an unconstitutional prior restraint on its freedom of expression because: (1) it gives the auditor unlimited time in which to issue a licensing decision; (2) it gives the hearing examiner unlimited time to decide an appeal of an adverse auditor's decision; and (3) it does not provide for a stay of an adverse auditor's decision pending judicial review. We analyze each contention in turn.

1. *Time Limit on Licensing Decision*

DCR contends PCC sec. 5.14.070 is unconstitutional. It reads as follows: "The Auditor shall issue an erotic dance studio license within thirty days of receipt of both a properly-completed application and application fee, and upon finding that the business complies with all applicable fire, building, ***687** and zoning codes." DCR argues that the Ordinance infringes on its free speech rights because it allows the auditor to delay indefinitely a licensing decision as follows: Even though the Ordinance requires the auditor to issue a license within 30 days of finding that the applicant complies with health, fire, and building codes, the auditor has unlimited time in which to make such a finding.

[28] **[29]** A license must be issued within a reasonable period of time, because undue delay results in the suppression of protected speech. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 227, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). A licensing scheme that fails to provide definite time limitations for a decision is constitutionally infirm because the delay compels the speaker's silence. *Riley v. National Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 802, 108 S.Ct. 2667, 2680, 101 L.Ed.2d 669 (1988).

[30] Again, we must construe an ordinance to uphold its constitutionality, if possible. *Browet,* 103 Wash.2d at 219, 691 P.2d 571. Although the above language is not a model of clarity, the only logical construction is that the Ordinance requires the auditor to make a

licensing decision within 30 days of receipt of a complete application and fee, where it is readily ascertainable that the business complies with safety codes and zoning restrictions. But where, for example, the building or proposed seating arrangements violate the fire code, then the license would issue within 30 days after such violations were shown to have been corrected. Similarly, if the complete application proposed an erotic dance studio in a zone in which such business was prohibited or restricted, the auditor would issue a license within 30 days after either removal of the zoning restriction or a change in location to a zone in which this type of business is a permitted use. Such construction renders the Ordinance constitutional.

Accordingly, we hold that the Ordinance's licensing scheme is constitutional because it provides a reasonable and definite time limit on the County's discretion to issue a license to an erotic dance studio.

***688** 2. *Stay Pending Judicial Review*

[31] DCR next argues that Section 5.14.240 does not provide for a stay of an adverse hearing examiner's decision pending judicial review, as required by *JJR,* 126 Wash.2d at 10, 891 P.2d 720. We disagree.

The pertinent section of the Ordinance is set forth below:

> ****396** [PCC Section] 5.14.240. **Appeal and Hearing.**
>
> A. Any applicant/licensee that has had a license denied, revoked or suspended by the Auditor shall have the right to appeal such action to the Pierce County Hearing Examiner, by filing a notice of appeal with the Auditor within ten working days after receiving notice of the action. The matter shall be heard within ninety days by the Hearing Examiner, unless the parties agree otherwise.
>
> B. The filing of an appeal by an applicant/licensee shall stay the action of the Auditor, pending a resolution of the matter.
>
> C. The decision of the Hearing Examiner shall be based upon a preponderance of the evidence.
>
> D. The burden of proof shall be on the Auditor.
>
> E. The decision of the Hearing Examiner shall be final unless appealed to Superior Court within ten working days from the date the decision is entered by filing an appropriate action and serving all necessary parties.

Section B provides that an appeal stays an auditor's action "pending resolution of the matter." Since a matter is not resolved until the appeal process is completed, it follows that an appeal from a hearing examiner's decision stays an appealed hearing examiner's decision, as well as the auditor's action that is the subject of both hearing examiner and judicial review. In light of our duty to construe the Ordinance to uphold its constitutionality, we interpret the Ordinance as providing for a stay during the appeal of a hearing examiner's decision.

3. *Time Limit on Appeal*

[32] DCR next objects that the Ordinance gives the hearing examiner unlimited time in which to issue a decision. ***689** Because the Ordinance provides for a stay of an adverse administrative decision, it assures that an applicant's ability to exercise constitutionally protected rights of expression are not unreasonably restrained. By thus preserving the status quo, DCR is not harmed by an adverse decision. See *FW/PBS,* 493 U.S. at 228, 110 S.Ct. 596. See also *National Socialist Party of America v. Village of Skokie,* 432 U.S. 43, 44, 97 S.Ct. 2205, 2206, 53 L.Ed.2d 96 (1977). It is therefore irrelevant that the Ordinance does not place a time limit on the hearing examiner's decision.

F. Attorney Fees

We deny DCR's request for attorney fees.

CONCLUSION

We hold the Ordinance constitutional and affirm the trial court.

HOUGHTON, C.J., concurs.

ARMSTRONG, Judge (dissenting).

I respectfully dissent. DCR presented the trial court with the declarations of two experts. One testified that: "It is my professional opinion that requiring dancers to maintain such distance [10 feet] directly and unmistakably effects (sic) the content of the erotic message sought

to be conveyed by the performer." [22] The other expert concluded that distance is an expressive component of the dance, and that requiring a 10-foot separation between a dancer and a patron regulates the content of the dance. [23]

22 Clerk's Papers, at 383 (Declaration of Dr. Judith Hanna).

23 Clerk's Papers, at 320-21 (Declaration of Edward Donnerstein).

In the face of this, the majority holds as a matter of law that the "proximity" of the dance is not an element of the "content" of the dance. This is not only contrary to the ***690** rules of summary judgment, but inconsistent with *Ino Ino, Inc. v. City of Bellevue,* 132 Wash.2d 103, 937 P.2d 154 (1997), cert. denied, 522 U.S. 1077, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998), which treated the issue as one of fact. [24]

24 *Ino Ino* stood in a different procedural posture than the present case. *Ino Ino* came before the Washington Supreme Court after a trial on the merits, which was tried in the King County Superior Court. The trial court found that "distance restrictions did not prevent patrons from perceiving the eroticism of the dancers' performance" and "that a dancer can convey eroticism from a distance of four feet from the patron's torso." *Ino Ino,* 132 Wash.2d at 113-14, 937 P.2d 154. These findings of fact were upheld by the Supreme Court as supported by substantial evidence. *Ino Ino,* 132 Wash.2d at 114, 937 P.2d 154.

****397** DCR also presented the trial court with the declaration of Richard L. Wilson, an attorney and business consultant for adult entertainment establishments in several states. [25] Wilson testified that: "Without table dances, entertainers would not be able to earn a living, and adult nightclubs would suffer severe financial losses and be forced to close, thus terminating their presentation of entertainment which is protected by the First Amendment." [26]

25 DCR also presented the declarations of Steve Fueston, a general partner in the corporation which ran the Papagayos adult club in Bellevue which was the subject of the *Ino Ino* case, and the declaration of Paul E. Bern, the Director of Operations for the management company of the Deja-Vu adult nightclub located in Federal Way. The principal thrust of both declarations was that regulation of the distance between the dancers and the patrons caused the establishments to operate at a loss, caused dancers to cease their dancing at establishments covered by distance regulations, and caused these clubs to sustain economic losses which had, or would, result in their closure.

26 Clerk's Papers, at 413 (Declaration of Richard L. Wilson).

DCR thus presents us with the proposition, which we must accept on summary judgment, that enforcement of the 10-foot rule will inevitably close the businesses and stop the dancing. In *Ino Ino,* the Washington Supreme Court said, "[i]f such a failure [of the adult cabarets] was inevitable, then the distance requirement would be unconstitutional." *Ino Ino,* 132 Wash.2d at 130, 937 P.2d 154. *Ino Ino* cited *Gomillion v. Lightfoot,* 364 U.S. 339, 340-41, 81 S.Ct. 125, 126-27, 5 L.Ed.2d 110 (1960), for the proposition. But the majority believes it is not bound by this because the statement ***691** is "dicta," [27] and because *Gomillion* does not support the statement. I disagree. Although *Gomillion* was a voting rights case, not a nude dancing case, the Supreme Court cited it for the proposition that any ordinance that totally deprives one of a constitutionally guaranteed right must fail. I agree. It is not an answer to attempt to distinguish nude dancing from voting rights because nude dancing is "the least protected expressive conduct" as the majority does. [28] If nude dancing is entitled to *some* First Amendment protection, then any ordinance that totally eliminates the dancing is unconstitutional. *Ino Ino,* 132 Wash.2d at 130, 937 P.2d 154. DCR is entitled to a hearing on whether enforcement of the 10-foot rule will inevitably close the business and thus prevent any dancing. If the trial court finds such failure inevitable, then the Ordinance is unconstitutional.

27 Majority Opinion at 393.

28 Majority Opinion at 392.

I also question the majority's conclusion, under its time, place, and manner analysis that ample alternative avenues of communication remain. If the dancers are correct that the Ordinance will stop them from dancing, clearly no alternative channels of communication will be open.

I further disagree with the majority's discussion of the economic impact of the ordinance. The majority relies

primarily upon *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and *Spokane Arcade, Inc. v. City of Spokane,* 75 F.3d 663 (9th Cir.1996). Neither case faced the issue we have here: The validity of an ordinance that will totally stop the dancing. *Playtime Theatres* dealt with a zoning ordinance and the trial court found that under the challenged ordinance, the adult theaters had "ample, accessible real estate," on which to put their theaters. *Playtime Theatres,* 475 U.S. at 53, 106 S.Ct. 925. The Supreme Court concluded that the city had not effectively denied "respondents a reasonable opportunity to open and operate an adult theater within the city...." *Playtime Theatres,* 475 U.S. at 54, 106 S.Ct. 925. But the court reiterated its concern ***692** about any zoning regulation that had "the effect of suppressing, or greatly restricting access to, lawful speech...." *Playtime Theatres,* 475 U.S. at 54, 106 S.Ct. 925. Here, if the dancers are correct, the Ordinance will totally suppress their protected expression.

****398** In *Spokane Arcade,* the court discussed the appropriate consideration to be given to the economic impact of a regulation. The court distinguished between an impact that prevents entry into the market place and one that only makes success in the market more difficult. *Spokane Arcade,* 75 F.3d at 666. Only the former, according to *Spokane Arcade* is an appropriate consideration in a First Amendment challenge. The court upheld the ordinances in question because they "do not deny World Video the opportunity to operate its establishments, but merely (or rather, allegedly) increase the costs of its doing so." *Spokane Arcade,* 75 F.3d at 667. I find no meaningful distinction between an ordinance that prohibits entry to the market and one that allows entry, but dooms the business to inevitable failure. But assuming such a distinction to exist, here, if the dancers are correct, the ordinance will close the present dance clubs and prevent the opening of new clubs, thus denying the dancers access to the market.

In short, DCR and the dancers have raised issues of material fact as to whether proximity is part of the content of their dance and whether the ordinance will inevitably cause economic failure and, thus, closing of the clubs. They are entitled to a hearing on these issues.

All Citations

92 Wash.App. 660, 964 P.2d 380

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505 F.3d 996
United States Court of Appeals,
Ninth Circuit.

FANTASYLAND VIDEO, INC., Plaintiff–Appellant,
v.
COUNTY OF SAN DIEGO, Defendant–Appellee.
Fantasyland Video, Inc., Plaintiff–Appellant,
and
Tollis, Inc.; 1560 N. Magnolia Avenue, LLC, Plaintiffs,
v.
County of San Diego, Defendant–Appellee.

Nos. 05–56026, 07–55033.
|
Argued and Submitted July 11, 2007.
|
Submission Withdrawn Aug. 7, 2007.
|
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|
Filed Oct. 15, 2007.

Synopsis

Background: Operators of two adult entertainment establishments sued county for declaratory and injunctive relief, alleging that amendments to county ordinances regulating adult entertainment businesses violated their state and federal constitutional rights. The United States District Court for the Southern District of California, Larry A. Burns, J., 373 F.Supp.2d 1094, granted in part and denied in part cross-motions for summary judgment, and denied one operator's motion for relief from judgment. Operators appealed, and, after certifying question, 496 F.3d 1040, the Court of Appeals, 505 F.3d 935, 2007 WL 2937012, affirmed in part, reversed in part, and remanded case in appeal by one operator.

Holdings: Addressing appeal of second operator, the Court of Appeals, Silverman, Circuit Judge, held that:

[1] ordinance's hours-of-operation restriction withstood intermediate scrutiny, as required to be valid under California Constitution;

[2] ordinance prohibiting doors or other obstructions at entrances to peep show booths served substantial county interests unrelated to expression;

[3] county established requisite nexus between its ordinance imposing open-door requirement for peep show booths and its interest in curtailing sexual activity at adult entertainment establishments;

[4] open-door requirement for peep show booths was not substantially broader than necessary to curtail targeted sexual activity within such booths; and

[5] relief from judgment was not warranted.

Affirmed.

West Headnotes (13)

[1] Federal Courts
Altering, amending, modifying, or vacating judgment or order;proceedings after judgment

Court of Appeals reviews denial of motion for relief from judgment for an abuse of discretion. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

7 Cases that cite this headnote

[2] Constitutional Law
Sexually Oriented Businesses;Adult Businesses or Entertainment

To be valid regulation of adult entertainment businesses under First Amendment, ordinance cannot be a complete ban on protected expression, must be content-neutral or, if content-based with respect to sexual and pornographic speech, must have as its predominate concern secondary effects of such speech in community, and must pass intermediate scrutiny, in that it must serve a substantial government interest, be narrowly tailored to serve that interest, and allow for reasonable alternative avenues of communication. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[3] **Constitutional Law**
Secondary effects

To enact secondary effects ordinance regulating adult entertainment businesses that is valid under First Amendment, municipality must rely on evidence that demonstrates connection between speech regulated and the secondary effects which motivated adoption of ordinance; any material that is reasonably believed to be relevant can be used. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[4] **Constitutional Law**
Secondary effects

Federal Civil Procedure
Civil rights cases in general

To avoid summary judgment in action asserting free speech challenge to ordinance regulating secondary effects of adult entertainment businesses, after municipality has demonstrated connection between speech regulated and secondary effects motivating adoption of ordinance, plaintiffs must cast direct doubt on municipality's rationale for ordinance, either by demonstrating that municipality's evidence does not support its rationale or by furnishing evidence that disputes municipality's factual findings; such evidence must be actual and convincing, and if plaintiffs are successful, burden shifts back to municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[5] **Constitutional Law**
Secondary effects

Public Amusement and Entertainment
Sexually Oriented Entertainment

Operator of adult entertainment establishment failed to cast direct doubt on county's rationale for barring operation of adult entertainment businesses between 2:00 and 6:00 a.m., which was to regulate secondary effects of those businesses, including crime, disorderly conduct, traffic, and noise during late-night hours, and therefore ordinance imposing hours-of-operation restriction withstood intermediate scrutiny, as required to be valid under California Constitution's free speech provision, given that county relied on studies and reports, reported court decisions, and anecdotal testimony to establish correlation between adult establishments and targeted secondary effects, and that operator's expert did not rebut county's evidence with regard to noise and traffic. West's Ann.Cal. Const. Art. 1, § 2(a).

1 Cases that cite this headnote

[6] **Constitutional Law**
Physical layout and staging requirements

Public Amusement and Entertainment
Dancing and other performances

County ordinance prohibiting doors or other obstructions at entrances to peep show booths at adult entertainment establishments served substantial county interests unrelated to expression, as required for ordinance to be valid restriction on speech under First Amendment intermediate scrutiny, inasmuch as ordinance served objectives of reducing instances of prostitution and solicitation at such businesses, preventing certain private sexual acts occurring within booths, including activities constituting lewd conduct under state law, and addressing sanitary concerns raised by rampant masturbation at commercial properties open to the public. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Penal Code § 647(a).

Cases that cite this headnote

[7] **Constitutional Law**
Physical layout and staging requirements

Public Amusement and Entertainment

Dancing and other performances

County established nexus between its ordinance prohibiting doors or other obstructions at entrances to peep show booths at adult entertainment establishments and its interest in curtailing sexual activity at such establishments, as required for ordinance to be valid restriction on speech under First Amendment intermediate scrutiny, given county's reliance, in enacting ordinance, upon anecdotal reports of sexual activity occurring within peep show booths of other jurisdictions and findings from court decisions pertaining to open-booth ordinances adopted by other municipalities in response to drug use and sexual conduct by booth patrons, and given operator's failure to cast direct doubt on county's conclusions. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] **Constitutional Law**

Booths

Public Amusement and Entertainment

Dancing and other performances

As required to be valid restriction on speech under First Amendment intermediate scrutiny, county ordinance imposing open-booth requirement for peep show booths at adult entertainment establishments was not substantially broader than necessary to curtail targeted sexual activity within such booths, notwithstanding declaration submitted by establishment operator indicating that peep show patronage generally declined by 60 percent after removal of booth doors, inasmuch as there was no evidence showing that such decline was unconnected to secondary effects being targeted by ordinance, and ordinance, which did not limit content of videos being displayed, number of booths available for viewing videos, or availability of videos, did not restrict protected speech occurring within booths. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**

Narrow tailoring

Narrow tailoring requirement of intermediate scrutiny of restrictions on speech is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation and the means chosen are not substantially broader than necessary to achieve the government's interest. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[10] **Federal Civil Procedure**

Further evidence or argument

Declaration in which vice president for operator of adult entertainment business indicated that peep show business had declined by 91 percent since operator had begun complying with county ordinance prohibiting doors or other obstructions at entrances to peep show booths was not "newly discovered evidence," since declaration discussed evidence that was not in existence at time of judgment, and thus did not support relief from judgment upholding ordinance under First Amendment. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 60(b)(2), 28 U.S.C.A.

3 Cases that cite this headnote

[11] **Federal Civil Procedure**

Judgments satisfied, released, or discharged;prospective application no longer equitable

Judgment upholding, under First Amendment, county ordinance prohibiting doors or other obstructions at entrances to peep show booths lacked prospective application, precluding relief from judgment under provision of rule allowing for such relief when it was no longer equitable for judgment to have prospective application. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

2 Cases that cite this headnote

[12] Federal Civil Procedure
Catch-all provisions

Catch-all provision of rule governing motions for relief from judgment is to be used only when extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

12 Cases that cite this headnote

[13] Federal Civil Procedure
Catch-all provisions

Relief from judgment upholding, under First Amendment, county ordinance prohibiting doors or other obstructions at entrances to peep show booths was not required, pursuant to catch-all provision of rule governing motions for relief from judgment, to prevent manifest injustice or due to extraordinary circumstances which prevented operator of adult entertainment establishment from taking timely action to prevent or correct erroneous judgment, notwithstanding declaration in which operator's vice president indicated that peep show business had declined by 91 percent since operator had begun complying with ordinance. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

10 Cases that cite this headnote

Attorneys and Law Firms

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Scott D. Bergthold, Chattanooga, TN, for the amicus.

Appeal from the United States District Court for the Southern District of California; Larry A. Burns, District Judge, Presiding. D.C. No. CV–02–01909–LAB.

Before: BARRY G. SILVERMAN, W. FLETCHER, and RICHARD R. CLIFTON, Circuit Judges.

Opinion

SILVERMAN, Circuit Judge:

In June 2002, the San Diego County Board of Supervisors adopted a comprehensive zoning ordinance to govern the operation of adult entertainment businesses within its jurisdiction, which covers the unincorporated portions of the county. The ordinance restricts the hours in which such businesses can operate, requires the removal of doors on peep show booths, and limits adult entertainment establishment to areas of the county zoned for industrial use. San Diego County's stated rationale for the ordinance was to combat negative secondary effects—crime, disorderly conduct, blight, noise, traffic, property value depreciation, and unsanitary behavior—that concentrate in and around adult businesses.

The two adult entertainment establishments presently operating in the unincorporated portions of San Diego County filed suit. (The City of San Diego and the other incorporated municipalities in the County are not governed by this ordinance.) In this appeal, the operator of one of the establishments, Fantasyland Video, Inc., appeals the district court's decision to uphold the ordinance's hours restriction and open-booth requirement. In its briefing to us, Fantasyland also contended that the hours of operation restriction violated both the First Amendment and the California Constitution. After oral argument, we certified to the California Supreme Court the question of what the proper standard of review is under the California Constitution. *Fantasyland Video, Inc. v. County of San Diego,* 496 F.3d 1040, 1041 (9th Cir.2007). The California Supreme Court responded that hours-of-operation ordinances for adult businesses are subject to intermediate scrutiny. *Fantaemail received-Thank yousyland Video, Inc. v. County of San Diego,* No. 05–56026, S155408 (Cal. Sept. 25, 2007) (order denying request to decide a question of California law). In the meantime, Fantasyland advised us of its decision to withdraw its claim that the hours of operation restriction violates the First Amendment, while retaining its claim under the California Constitution. The federal

issue has thus been taken off the table regarding the hours restriction, but it remains a basis for the challenge to the open-booth requirement.

We affirm the district court's decision to uphold the ordinance's hours-of-operation restriction as surviving intermediate scrutiny under the California Constitution. ***1000** Fantasyland fails to cast direct doubt on the County's rationale for the hours restriction. With respect to the open-booth requirement, we affirm the district court's ruling that the County's requirement of open booths at peep shows does not violate the First Amendment. Similar to the ordinances in other cases upholding open-booth requirements, the County's open-booth ordinance is supported by evidence of the nexus between closed booths and adverse secondary effects such as prostitution and pandering, matters in which the County has a substantial interest in regulating. Further, the ordinance is narrowly tailored. The content, number, and availability of peep shows are untouched; the ordinance deals only with the doors. We further reject Fantasyland's argument that the provision is invalid under Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). That concurrence is not applicable to open-booth requirements.

I. Background

In June 2002, citing to concerns about the surrounding neighborhood, the County Board of Supervisors adopted a comprehensive set of regulations and licensing procedures governing adult entertainment establishments within its jurisdiction. Among these regulations, the County prohibited any "door, curtain, or obstruction of any kind [to] be installed within the entrance to a peep show booth." San Diego County, Cal., Ordinance No. 9479, § 21.1816 (June 19, 2002). In addition, the County made it unlawful "for any owner, operator, manager or employee of an adult entertainment establishment to remain open for business between the hours of 2:00 a.m. and 6:00 a.m. of any day excepting herefrom an adult hotel/ motel." San Diego County Ordinance No. 9479, § 21.1809. The ordinance took effect the following month.

Fantasyland operates an adult arcade, bookstore, novelty shop, and video store. It initiated federal and state constitutional challenges against the new ordinance, seeking declaratory and injunctive relief.

The district court granted summary judgment to the County, upholding the ordinance's requirement that adult establishments close between the hours of 2:00 a.m. and 6:00 a.m. and its restriction on doors at the entranceway to private peep show booths.[1] *See Fantasyland Video, Inc. v. County of San Diego,* 373 F.Supp.2d 1094, 1106–1116(S.D.Cal.2005). Later, Fantasyland filed a Rule 60(b) motion for relief from judgment, which the district court denied.

1 The other adult establishment in the unincorporated portion of the County, Déjà Vu, appealed the district court's judgment on other grounds not relevant to this appeal. *Tollis Inc. v. County of San Diego,* 505 F.3d 935, No. 05–56300, 2007 WL 2937012 (9th Cir. Oct. 2, 2007).

These timely appeals followed.

II. Jurisdiction

The district court had subject matter jurisdiction over Fantasyland's constitutional claims under 28 U.S.C. §§ 1331, 1343(a), and over its state claims under 28 U.S.C. § 1367(a). We have jurisdiction under 28 U.S.C. § 1291.

III. Standard of Review

[1] We review de novo the district court's grant of summary judgment and, viewing the evidence in a light most favorable to the non-moving party, determine whether there are any genuine issues of material fact for trial. *See* ***1001** *Gammoh v. City of La Habra,* 395 F.3d 1114, 1122 (9th Cir.2005). We review the district court's denial of Fantasyland's Rule 60(b) motion for an abuse of discretion. *See United States v. Asarco, Inc.,* 430 F.3d 972, 978 (9th Cir.2005).

IV. Discussion

[2] The constitutionality of the challenged provisions is governed by the framework announced in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and refined in the plurality opinion of *Alameda Books,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670. As recounted by *Center for Fair Public Policy v. Maricopa County,* 336 F.3d 1153 (9th Cir.2003), the *Renton* inquiry proceeds in three steps: First, the ordinance cannot be a complete ban on the protected expression. *Id.* at 1159. Second, the ordinance must be content-neutral or, if content-based with respect to

sexual and pornographic speech, its predominate concern must be the secondary effects of such speech in the community. *Id.* at 1159, 1161. Third, the regulation must pass intermediate scrutiny. It must serve a substantial government interest, be narrowly tailored to serve that interest, and allow for reasonable alternative avenues of communication. *Id.* at 1159.

[3] With respect to this third step, the Supreme Court has adopted a specialized burden-shifting framework. When enacting a secondary effects ordinance, the municipality must rely on evidence that "demonstrate[s] a connection between the speech regulated ... and the secondary effects that motivated the adoption of the ordinance." *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728 (plurality). Any material that is "reasonably believed to be relevant" can be used. *Id.* at 438, 122 S.Ct. 1728(quoting *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925).

[4] To avoid summary judgment, the plaintiffs must then "cast direct doubt on [the municipality's] rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings." *Id.* at 438–39, 122 S.Ct. 1728. Such evidence must be "actual and convincing." *Id.* at 439, 122 S.Ct. 1728. If successful, "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.*

A. Hours–of–Operation Restriction

[5] Fantasyland argues that the hours-of-operation restriction should be invalidated under the California Constitution based on *People v. Glaze,* 27 Cal.3d 841, 166 Cal.Rptr. 859, 614 P.2d 291 (1980), which struck down a similar hours-of-operation restriction under a test that was stricter than what the First Amendment requires. Indeed, as noted above, Fantasyland formally dropped its claim against this provision under the First Amendment and limited its challenge to the California Constitution. However, the California Supreme Court indicated in its response to our certified question that hours-of-operation restrictions are reviewed under intermediate scrutiny as applied by the United States Supreme Court. *See Fantasyland Video, Inc. v. County of San Diego,* No. 05–56026, S155408 (Cal. Sept. 25, 2007) (order denying request to decide a question of California law). That is the same standard identified in *Renton,* and the response to our certified question, including its citations to *Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th 352, 357, 364, 93 Cal.Rptr.2d 1, 993 P.2d 334 (2000); *City of National City v. Wiener,* 3 Cal.4th 832, 841–43, 12 Cal.Rptr.2d 701, 838 P.2d 223 (1992); and ***1002** *People v. Superior Court (Lucero),* 49 Cal.3d 14, 26, 259 Cal.Rptr. 740, 774 P.2d 769 (1989), suggests to us that the standard under the California Constitution is the same in this situation as that applied by the United States Supreme Court in *Renton.* Under *Renton,* Fantasyland failed to supply sufficient evidence to "cast direct doubt" on the County's asserted secondary-effects rationale. We conclude that the challenge under the California Constitution fails for the same reason.

At the legislative stage, the County relied on studies and reports, reported court decisions, and anecdotal testimony to establish a correlation between adult establishments and negative secondary effects. [2] Based on this evidence, the County could reasonably infer that restricting the hours of operations for adult businesses would have the purpose and effect of reducing crime, disorderly conduct, traffic, and noise during late-night hours. Fantasyland's attempt to cast doubt on the County's conclusions fails as a matter of law because its expert, Daniel Linz, Ph.D., a professor in the Department of Communication's Law and Society Program at the University of California Santa Barbara, did not rebut the County's evidence with regard to noise and traffic. The evidence presented by Dr. Linz addressed only late night crime and property values. The County considered these factors, but its purported rationale for requiring adult businesses to close from 2:00am to 6:00am also included combating increased noise and traffic. Fantasyland's failure to address these considerations is fatal under the second step of the *Renton* intermediate scrutiny analysis. *See Alameda Books, Inc.,* 535 U.S. at 438–39, 122 S.Ct. 1728. With regard to noise and traffic, Fantasyland failed as a matter of law "to cast direct doubt on [the County's] rationale ... by demonstrating that the [County's] evidence does not support its rationale or by furnishing evidence that disputes [its] factual findings." *Id.* Thus, the County's hours-of-operation ordinance withstands intermediate scrutiny and Fantasyland's challenge under the California Constitution fails.

2 Fantasyland conceded that this evidence satisfied the County's initial evidentiary burden. *See Fantasyland,* 373 F.Supp.2d at 1107.

B. Open–Booth Requirement

Fantasyland argues that San Diego County Ordinance No. 9479 is invalid under several facets of *Renton* intermediate scrutiny and under Justice Kennedy's concurring opinion in *Alameda Books,* 535 U.S. at 444–53, 122 S.Ct. 1728. [3] Fantasyland alleged that the ordinance violated both the First Amendment and the California Constitution.

[3] Justice Kennedy did not join the plurality opinion in *Alameda Books.* As "his concurrence is the narrowest opinion joining in the judgment of the Court," it is the controlling opinion. *Ctr. for Fair Pub. Policy,* 336 F.3d at 1161.

We have previously upheld open-booth requirements similar to the one adopted by the County. *Spokane Arcade, Inc. v. City of Spokane,* 75 F.3d 663 (9th Cir.1996); *Ellwest Stereo Theatres, Inc. v. Wenner,* 681 F.2d 1243 (9th Cir.1982). In both *Spokane Arcade* and *Ellwest* we found that the open-booth requirements were narrowly tailored to a substantial interest. *See Spokane Arcade,* 75 F.3d at 666–67; *Ellwest,* 681 F.2d at 1246–47. Other circuits have also upheld such ordinances, concluding that the alternatives would less effectively serve the municipality's substantial interest in deterring sexual activity in peep-show booths. *See Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 1003–04 (7th Cir.2002); *Mitchell* ***1003** *v. Comm'n on Adult Entm't Establishments,* 10 F.3d 123, 141–44 (3d Cir.1993); *Bamon Corp. v. City of Dayton,* 923 F.2d 470, 473–74 (6th Cir.1991); *Doe v. City of Minneapolis,* 898 F.2d 612, 617–19 (8th Cir.1990); *Wall Distributors, Inc. v. City of Newport News,* 782 F.2d 1165, 1169–70(4th Cir.1986).

1. Renton Analysis

a. Substantial interest unrelated to expression

[6] Fantasyland first contends that the County has no substantial governmental interest under *Renton* in preventing private sexual conduct within an enclosed booth. We disagree.

The conduct at issue is not private at all. It is occurring at a retail establishment. The "curtailing [of] public sexual criminal offenses" is a significant state interest. *Ellwest,* 681 F.2d at 1246. The County's objective in reducing instances of prostitution and solicitation at businesses that operate peep show booths is valid. Furthermore, the County has a substantial interest in preventing certain private sexual acts occurring within peep show booths, notably the use of so-called "glory holes"—the placement of a peep show patron's genitals through holes or gaps in the wall partition between the booths. Such activities constitute lewd conduct under California Penal Code § 647(a). *See People v. Rylaarsdam,* 181 Cal.Rptr. 723, 727–28 (App. Dep't Super. Ct.1982).

Moreover, there is no requirement under *Renton* that the asserted secondary effects be criminal. *See, e.g., Ctr. for Fair Pub. Policy,* 336 F.3d at 1166(reducing late night noise and traffic). One may therefore accept Fantasyland's proposition that masturbation in a fully-enclosed booth is legal in California and still find a substantial governmental interest in curtailing the activity. Rampant masturbation at a commercial property open to the public may rationally trigger sanitation concerns and impair the right of other patrons to view their materials or read the accompanying articles in peace. *See Deluxe Theater & Bookstore, Inc. v. City of San Diego,* 175 Cal.App.3d 980, 221 Cal.Rptr. 100, 102 (Ct.App.1985) (finding that city had an interest in regulating peep show booths due to the potential for unlawful, offensive, and unsanitary behavior).

b. Nexus between the speech and secondary effects

[7] Fantasyland next suggests that the County failed to show a nexus between the peep show booths and its interest in curtailing sexual activity.

When enacting the open-booth requirement, the County Board of Supervisors referenced anecdotal reports of sexual activity occurring within peep show booths of other jurisdictions. The County also incorporated the findings from *Spokane Arcade,* 75 F.3d at 664–65, and *Deluxe Theater & Bookstore,* 221 Cal.Rptr. at 102, where municipalities enacted open-booth ordinances in response to drug use and sexual conduct by booth patrons. Reliance on the experiences of other jurisdictions is sufficient to satisfy the County's minimal burden at the legislative stage. *See Renton,* 475 U.S. at 50–52, 106 S.Ct. 925.

To avoid summary judgment, Fantasyland must produce contrary evidence that casts direct doubt on the County's conclusions. It offered the lone declaration of John M. Goldenring, a medical doctor and public health expert. In his declaration, Dr. Goldenring stated that infection from sexually transmitted diseases could only occur through

sexual contact, and not through seminal fluid left on the surfaces of the peep show booths.

***1004** The district court correctly found that Dr. Goldenring's declaration was insufficient as a matter of law. *See Fantasyland,* 373 F.Supp.2d at 1114–15. The County did not adopt the open-booth requirement to curtail the transmission of disease through bodily fluids left in the booths. Rather, it enacted the requirement to reduce the instances of sexual activity, solicitation, and pandering occurring within those spaces. Nothing in Dr. Goldenring's declaration challenges the County's evidentiary conclusions regarding the prevalence of those activities. [4]

4 Fantasyland also references the declaration of its vice president, who speculated that the open-booth requirement would facilitate contact between customers "culminating in relatively anonymous sexual encounters *after they leave* the business" (emphasis added). This declaration does nothing to cast doubt on the County's rationale to curb sexual activity occurring *inside* the business.

c. Narrowly tailored

[8] Finally, Fantasyland suggests that there are far less drastic means of accomplishing the County's stated objective. They include reducing the size of the booth, requiring that there be a space between the floor and the bottom of the door to allow verification that only one person is in the booth, and monitoring the spaces around the booths.

[9] The issue is not whether Fantasyland can posit less restrictive alternatives. The narrow tailoring requirement "is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation' " and "the means chosen are not substantially broader than necessary to achieve the government's interest." *Ward v. Rock Against Racism,* 491 U.S. 781, 799–800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citation omitted, omission in original).

Fantasyland has not shown that the open-booth requirement is substantially broader than necessary to curtail the targeted sexual activity. It did present a declaration that peep show patronage generally declines by 60% after removal of the doors. However, such decline in business, standing alone, is not determinative.

Fantasyland has not produced any evidence showing that the decline was unconnected to the County's asserted secondary effects—*i.e.,* that the 60% were there just to watch the movie. *See Ellwest,* 681 F.2d at 1247(finding nothing in the record to substantiate plaintiff's "suggestion that, because of the open booth requirement, potential viewers forgo their right to watch films of their choice").

Furthermore, the ordinance does not restrict protected speech occurring in the booths. The ordinance does not in any way limit the content of the videos, the number of booths available for viewing the videos, or the availability of the videos. The videos are as available as ever.

2. Justice Kennedy's Alameda Books Concurrence

To justify a content-based zoning ordinance that restricts sexual and pornographic speech, Justice Kennedy wrote in *Alameda Books* that "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." 535 U.S. at 449, 122 S.Ct. 1728. The city must have some basis to think that its ordinance will suppress secondary effects, but not also the speech associated with those effects. *Id.* at 449–50, 122 S.Ct. 1728.

***1005** We have said that Justice Kennedy's concurrence did nothing "to precipitate a sea change in this particular corner of First Amendment law." *Ctr. for Fair Pub. Policy,* 336 F.3d at 1162. Furthermore, we determined that his proportionality language was designed for "a classic erogenous zoning ordinance whereby the city was restricting certain land uses," and that it was never intended to apply to an hours-of-operation ordinance. *Id.* at 1163(noting that the proportionality analysis, if applied to a time restriction, would invalidate all such laws).

We now hold that Justice Kennedy's concurrence is also inapplicable to an open-booth requirement. Under the County's rationale, the patron watching a private peep show often seeks to masturbate, solicit sexual acts, or engage in sexual acts while in the booth. Any regulation that deters these activities will necessarily make the forum for the speech less attractive, but only because the speech and sexual acts originate with the same person and occur

at the same time. The overall quantity of the protected expression must be reduced, but only because the patron is chilled from also contemporaneously engaging in the unprotected behavior. Justice Kennedy's proportionality language was not designed for situations where the protected speech and the unprotected conduct merge in the same forum.

Fantasyland is of course entitled to cast doubt on the County's reasoning. It could attempt to prove an absence of the asserted unlawful or illicit sexual activity in the booths, thereby defeating the County's inference of correlation between the speech at issue and the secondary effects. Alternatively, Fantasyland could produce evidence that the open-booth requirement does little to deter the sexual activity while, at the same time, substantially chills the protected speech. It has done neither here.

The County's open-booth requirement is valid under prevailing Ninth Circuit authority and nothing in *Alameda Books* undermines that conclusion. As a result, the district court correctly granted summary judgment to the County on this claim.

C. Rule 60(b) Appeal

On June 16, 2006, Fantasyland filed a motion for relief from the district court's judgment pursuant to Federal Rule of Civil Procedure 60(b). The motion referenced a declaration by Fantasyland's vice president stating that peep show business had declined by 91% since Fantasyland began complying with the County's open-booth restriction.

[10] **[11]** There was no abuse of discretion in the district court's decision to deny the motion. The declaration is not "newly discovered evidence" under Rule 60(b)(2) because it discusses evidence that was not in existence at the time of the judgment. *See Corex Corp. v. United States,* 638 F.2d 119, 121 (9th Cir.1981). Further, the district court's judgment did not have any prospective application, thereby precluding relief under Rule 60(b)(5). *See Maraziti v. Thorpe,* 52 F.3d 252, 254 (9th Cir.1995).

[12] **[13]** Finally, Rule 60(b)(6)'s catch-all provision is unavailable. This rule "has been used sparingly as an equitable remedy to prevent manifest injustice" and "is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *United States v. Alpine Land & Reservoir Co.,* 984 F.2d 1047, 1049 (9th Cir.1993). That standard has not been satisfied.

AFFIRMED.

All Citations

505 F.3d 996, 07 Cal. Daily Op. Serv. 12,216, 2007 Daily Journal D.A.R. 15,758

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98 S.Ct. 1635
Supreme Court of the United States

William M. SEWELL
v.
State of GEORGIA

No. 76-1738
|
April 24, 1978

On appeal from the Supreme Court of Georgia.

Facts and opinion, 238 Ga. 495, 233 S.E.2d 187.

Appellant, William M. Sewell, appeals from a judgment of the Supreme Court of Georgia which affirmed his conviction on a one-count accusation framed under the Georgia obscenity statute, Ga.Code § 26-2101 (1975). In July 1975, a police officer bought a magazine, "Hot and Sultry," and a device said to be an "artificial vagina," from appellant, an employee of the Stewart Avenue Adult Book Store. Shortly after this sale, the officer, joined by two others, entered the store, arrested appellant, and seized various vibrators, rubber devices shaped like penises, and other items alleged to be devices for sexual stimulation. After attempting unsuccessfully to have the seized material suppressed, appellant was convicted by a jury of selling the magazine and artificial vagina and of possessing the other material and was sentenced to 12 months in jail and a fine of $4,000.

Opinion

The appeal is dismissed for want of a substantial federal question.

****1636** Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissenting.

Georgia Code § 26-2101(a) provides that
"A person commits the offense of distributing obscene materials when he sells . . . or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowing,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material."

Sections 26-2101(b) through 26-2101(d) define the term "obscene materials" used in § 26-2101(a). Section 26-2101(b) covers published material alleged to be obscene and generally tracks the guidelines set out in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Section 26-2101(c) states that, in addition to material covered in subsection (b), "any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section."

The jury was instructed that it should determine the obscenity ***984** of "Hot and Sultry" under the standards set out in §§ 26-2101(a) and 2101(b) and that the sale of the artificial vagina and the possession of the other material should be considered under §§ 26-2101(a) and 26-2101(c). The trial judge further charged the jury on the meaning of "knowing" in the words set out in § 26-2101(a). A general verdict of guilty was returned.

In this Court, appellant raises constitutional objections to a number of features of § 26-2101. First, he argues that an obscenity statute which defines scienter in a manner which authorizes obscenity convictions on mere "constructive" knowledge impermissibly chills the dissemination of materials protected under the First and Fourteenth Amendments. Jurisdictional Statement 3. Second, he argues that there is no rational basis for § 26-2101(c) and, in addition, that it is unconstitutionally vague. *Id.*, at 3, 9-10. Third, appellant contends that "Hot and Sultry" is not obscene as a matter of law. *Id.*, at 3. And, finally, appellant challenges the warrantless mass seizure of the sexual devices on First, Fourth, and Fourteenth Amendment grounds. *Id.*, at 3, 17.

This is an appeal and I cannot agree with the Court that the first and second questions presented can be dismissed as not presenting substantial federal questions. [1]

[1] Although I agree with my Brother STEWART, *post*, at 1639, that § 26-2101 is unconstitutional as applied to the magazine involved in this case, I recognize

that a majority of this Court does not agree with this view and, accordingly, I would hear argument on the scienter issue.

**1637 I

In *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978), we granted certiorari to consider, but did not reach, the precise scienter issue now raised by appellant. See Pet. for Cert. in *Ballew v. Georgia*, O.T.1977, No. 76-761, p. 2. I see no basis for concluding that a federal constitutional question sufficiently substantial *985 to be granted review on certiorari is now so insubstantial as not to require exercise of our mandatory appellate jurisdiction in this case. Moreover, even if others do not agree that the void-for-vagueness issue is substantial, the fact that appellant might have been convicted for sale or possession of the seized devices is irrelevant to consideration of the obscenity issue. As we said in *Stromberg v. California*, 283 U.S. 359, 367-368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931):

"The verdict against the appellant was a general one. It did not specify the ground upon which it rested. . . . [I]t is impossible to say under which clause of the statute the conviction was obtained. . . . It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld."

See also *Bachellar v. Maryland*, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970).

II

Appellant's second argument, that § 26-2101(c) is void for vagueness, also raises a substantial federal question-one of first impression in this Court-even though appellant fundamentally misapprehends the reach of the First Amendment in his argument that the protections of that Amendment extend to the sexual *devices* involved in this case. [2] As we said in *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972):

[2] Even if devices might in some circumstances be protected by the First and Fourteenth Amendments, this is not the case here since no claim is made that the devices are in any way expressive or that their possession and sale is in any way related to appellant's right to speak.

"It is a basic principle of due process that an enactment *986 is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (Footnotes omitted.)

See also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146 (1927); *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

Section 26-2101(c) at least arguably offends both principles enunciated in **1638 *Grayned*. Even conceding that a jury could properly infer from the shapes of the seized devices that some could be used for sexual stimulation, the fact that some people might use the devices for that purpose scarcely suffices to show that they are designed or marketed *primarily* for sexual stimulation. As one commentator has noted, statutes couched in such terms of "judgment and degree" contain seeds of "inherent discontrol" over the law enforcement process and have been "virtually [the] exclusive target of void-for-vagueness nullification." Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67, 92-93 (1960). Moreover, "it is in this realm, where the equilibrium between the individual's claims of freedom and society's demands upon him is left to be struck *ad hoc* on the basis of a subjective evaluation, . . . that there exists the risk of continuing irregularity *987 with which the vagueness cases have been concerned." *Id.*, at 93. [3]

[3] Moreover, the facial vagueness of § 26-2101(c) is enhanced by its interpretation by law enforcement personnel. Although § 26-2101(c) by its terms applies only to devices that are "designed or marketed

> as useful primarily for the stimulation of human genital organs," the accusation against appellant nonetheless charged appellant with possession of "3 anal stimulators." Clark's Transcript, at 3. So far as I know, no dictionary includes the human anus among the *genital* organs. See also *Balthazar v. Superior Court*, 573 F.2d 698 (CA1 1978). The packaging of another item states quite clearly on the back that the item is a "doggy dong." Whether this item, in the shape of a rubber candlestick, is to be used with dogs or humans-or simply as a "novelty," for whatever ribald humor it may give rise to-it is impossible to discover how appellant or a jury could conclude that this item is *primarily* used for stimulation of *human* genitals.

In addition, although vague statutes may be saved from constitutional infirmity if they require specific intent as an element of an offense, see *Papachristou v. City of Jacksonville, supra*, 405 U.S. at 163, 92 S.Ct. 839, the constructive scienter requirement of § 26-2101(a), at least as applied in appellant's trial, provides no reasonable assurance that persons will know or ought to know when they are likely to violate § 26-2101(c).

The record here is very clear: Appellant was convicted solely on the basis of the *guesses* and *assumptions* of the single witness at trial-a policeman who had never used the devices, Reporter's Transcript, at 24, never seen them used, *id.*, at 25, and who knew of no one who used them for sexual stimulation, *id.*, at 26-that the seized devices were used primarily for the stimulation of human genitals. See *id.*, at 22, 24. In explaining how he had reached his guesses and assumptions notwithstanding a total lack of personal familiarity with the seized devices, that witness stated that he had seen, in the course of his investigations, "newspapers that are printed and catalogs that are sent out to different people pertaining to these things." *Id.*, at 32. No catalogs were introduced into evidence and no evidence was given to show that the unidentified ***988** catalogs would likely have been sent to appellant. Thus, how the proverbial "reasonable man," or even a "reasonable clerk in an adult book store," would have been put on notice of the *primary* use to which the seized devices would be put is simply not apparent.

It is therefore hard to imagine a more stark prima facie case of a "vague law [which] impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Grayned v. City of Rockford, supra*, 408 U.S. at 108, 92 S.Ct. 2294. In a society where the rule of law is paramount, it simply will not do to allow persons, however ****1639** ignoble their trade-or perhaps because their trade is ignoble, cf. *Papachristou v. City of Jacksonville, supra* -to be convicted of crimes solely because policemen and juries, encouraged by the State can conjure up scenes of sexual stimulation in which devices play a major role.

For the reasons set out above, I would set this case for argument.

Mr. Justice STEWART, dissenting.

The appellant stands convicted of the single crime of distributing obscene material in violation of Ga.Criminal Code § 26-2101. Cf. *Robinson v. State*, 143 Ga.App. 37, 237 S.E.2d 436, 438, vacated and remanded on other grounds, *post*. The one-count indictment charged that he had sold both sexual devices, alleged to be obscene material as defined in § 26-2101(c), and a magazine, alleged to be obscene under the definition in § 26-2101(b).

While the appellant does not claim that the definition of obscenity in subsection (b) is unconstitutional, he does ask this Court to examine the magazine in question and to determine that it is constitutionally protected as a matter of law. I continue to believe that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the state and ***989** federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 113, 93 S.Ct. 2628, 37 L.Ed.2d 446 (BRENNAN, J., dissenting). I therefore believe that the appellant's conviction cannot constitutionally rest on the sale of an allegedly obscene magazine.

Because it cannot be determined that the jury in this case did not convict the appellant on the basis of the magazine sale alone, I would reverse the judgment of the Supreme Court of Georgia. [*] See *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117.

[*] Like my Brother BRENNAN, *ante*, at 1637 n. 1, I recognize that a majority of the Court does not share this view, and since I also agree with Part I of his dissenting opinion, I would alternatively note probable jurisdiction and hear argument in this case on the scienter issue, if three other Members of the Court were like-minded.

All Citations

435 U.S. 982, 98 S.Ct. 1635 (Mem), 56 L.Ed.2d 76, 3 Media L. Rep. 2161

238 Wis.2d 842
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of Wisconsin.

EAST OF THE RIVER ENTERPRISES II, L.L.C., Plaintiff-Appellant, Melissa Soman and Donald Busch, Plaintiffs,
v.
CITY OF HUDSON, Defendant-Respondent.

No. 99-2667.
|
Aug. 1, 2000.

Appeal from a judgment of the circuit court for St. Croix County: Eric J. Lundell, Judge. Affirmed.

Before CANE, C.J., HOOVER, P.J., AND PETERSON, J.

Opinion

PER CURIAM.

***1** East of the River Enterprises II(ERE) appeals a declaratory judgment rejecting its First Amendment challenge to a city ordinance that regulates sexually oriented businesses. ERE operates Centerfolds Cabaret, a business featuring live nude dance entertainment. The ordinance prohibits physical contact between the dancers and patrons, requires all performances to occur on a stage or table at least eighteen inches above floor level, creates a five-foot buffer zone between the dancers and patrons, and restricts the operating hours, requiring the cabaret to close at 2 a.m. on week days, 2:30 a.m. on Saturdays and Sundays.

¶ 2 ERE argues that (1) no contact and five-foot buffer regulations constitute content-based censorship; (2) even if the regulations were content-neutral, they constitute an unlawful prior restraint on freedom of expression because they would have the effect of totally suppressing a distinct medium of communication; (3) the regulations are not narrowly tailored to prevent adverse secondary effects; and (4) the hours of restriction cannot be justified as content-neutral time, place and manner regulations under the First Amendment. We reject these arguments and affirm the judgment.

¶ 3 After the parties submitted their briefs in this appeal, the United States Supreme Court issued its decision in ***City of Erie v. Pap's A.M.***, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), reiterating and clarifying First Amendment principles as they apply to nude entertainment. The Court upheld an ordinance prohibiting public nudity, the effect of which was to require exotic dancers to wear, at a minimum, pasties and a G-string. The Court reiterated that nude dancing is expressive conduct that falls only within the "outer ambit" of the First Amendment's protection. *See* ***id.*** at 1391. To determine the level of scrutiny that applies to an ordinance, the courts must consider whether the regulation relates to the suppression of expression. *See* ***id.*** If the governmental purpose is unrelated to the suppression of expression, such as combating negative secondary effects, the regulation need only satisfy the less stringent standard set out in ***United States v. O'Brien***, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).[1] *See* ***id.*** Even if the regulation has some minimal effect on the erotic message by muting a portion of the expression, the regulation is not deemed unconstitutional if it has merely a *de minimis* or incidental effect. *See* ***id.*** at 1393-94.

1 The four-factor test set out in ***O'Brien*** requires that: (1) the regulation is within the constitutional power of the government to enact, such as protecting public health or safety and deterring crime; (2) the regulation must further an important or substantial government interest, although the municipality need not conduct new studies or produce independent evidence to demonstrate the problem of secondary effects and is allowed a reasonable opportunity to experiment with solutions; (3) the government interest must be unrelated to the suppression of free expression; and (4) the restriction must be no greater than is essential to further the governmental interest. *See* ***City of Erie v. Pap's A.M.***, 120 S.Ct. at 1394-97.

¶4 The City of Hudson's ordinance does not prohibit nude dancing or any expression of eroticism arising from the

dance. Therefore, it is deemed a content-neutral regulation measured by intermediate scrutiny, and subject to the traditional time, place and manner doctrine. *See* ***Turner Broadcasting System v. F.C.C.***, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

¶ 5 The ordinance satisfies the ***O'Brien*** test. Its stated intent and the City's legislative findings show that the ordinance is aimed at the undesirable secondary effects of sexually oriented business, particularly crime, decreased property values and public health risks. The City has the constitutional power to pass ordinances that relate to these traditional police powers. *See* ***Erie***, 120 S.Ct. at 1386. The regulation furthers the City's interest in combatting crime. [2] It is supported by numerous studies that establish undesirable secondary effects that arise from the nude dancing industry. Affidavits of police officers presented to the city counsel establish that contact between the dancers and patrons during the performance entailed either acts of prostitution or sexual assault. Requiring a five-foot buffer assists law enforcement in determining whether the dancer or the patron initiated the contact. *See* ***DLS Inc. v. City of Chattanooga***, 107 F.3d 403, 411 (6th Cir.1997). Further, maintaining a five-foot buffer only minimally interferes with any expression or communication. The no touching and five-foot buffer restrictions do not have the effect of banning individual, patron-focused exotic dance. Therefore, the ordinance is sufficiently narrowly tailored to achieve the municipality's legitimate interest in preventing crime.

2 Because the ordinance furthers the government's interest in combatting crime, we need not review its other stated intentions of protecting property values and promoting public health.

2** ¶ 6 The restrictions on the cabaret's operating hours do not infringe on ERE's First Amendment rights. Similar and more restrictive restrictions have been upheld in numerous other cases. *See, e.g.,* ***Richland Bookmart, Inc. v. Nicols, 137 F.3d 435 (6th Cir.1998); ***Star Satellite, Inc. v. City of Biloxi***, 779 F.2d 1074 (5th Cir.1986); ***Schultz v. City of Cumberland***, 26 F.Supp.2d 1128 (W.D.Wis.1998). Restricting the hours of operation can promote public safety by permitting local law enforcement to focus its limited resources on other matters. *See* ***Schultz***, 26 F.Supp.2d at 1145. Operating hours may be restricted during times when people are generally sleeping and when peaceful enjoyment of the home is most important. *See* ***Tee & Bee, Inc. v. City of West Allis***, 936 F.Supp. 1479, 1492 (E.D.Wis.1996).

¶ 7 ERE argues that all of the restrictions have the effect of destroying its business and excluding nude dancing in the city. The test for determining whether a sexually oriented business's First Amendment rights are threatened is whether the City has effectively denied the business a reasonable opportunity to open and operate within the city. *See* ***City of Renton v. Playtime Theatres, Inc.***, 475 U.S. 41, 54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Patron-focused erotic performances are allowed in the City of Hudson 127 hours per week. The City is not obligated to design its attack on the secondary effects of nude entertainment in a manner that insures the business's economic viability. *See* ***id.***

By the Court.-Judgment affirmed.

***3** This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b) 5.

All Citations

238 Wis.2d 842, 618 N.W.2d 274 (Table), 2000 WL 1116372, 2000 WI App 214

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Amended on Denial of Rehearing by Gammoh v. City of La Habra, 9th Cir.(Cal.), April 1, 2005

395 F.3d 1114
United States Court of Appeals,
Ninth Circuit.

Bill Badi GAMMOH, dba Taboo Theater aka Pelican Theater; Leslie West; Armine Michelle Bedrosian; Christine Johanna Fener; Charbonesse Garrett; Heather Eloise Elam; Stacy Joy Andre; Meghann Lara Ann Onselen, Plaintiffs–Appellants,
v.
CITY OF LA HABRA, Defendant–Appellee.

No. 04–56072.
|
Argued and Submitted Nov. 1, 2004.
|
Filed Jan. 26, 2005.

Synopsis

Background: Owner of adult entertainment club and dancer-employees brought action challenging constitutionality of city ordinance that required adult cabaret dancers to remain two feet away from patrons during performances. The United States District Court for the Central District of California, Gary L. Taylor, J., dismissed certain claims, and granted summary judgment in favor of city on others. Plaintiffs appealed.

Holdings: The Court of Appeals, Tallman, Circuit Judge, held that:

[1] ordinance was not void for vagueness;

[2] ordinance was not overbroad;

[3] plaintiffs failed to demonstrate that ordinance violated Takings Clause;

[4] ordinance was not complete ban on protected expression;

[5] ordinance regulated expression that was sexual or pornographic in nature, as would support application of the intermediate scrutiny standard, for purpose of First Amendment challenge;

[6] secondary effects of adult cabarets were city's primary concern in enacting ordinance, as would support application of the intermediate scrutiny standard;

[7] ordinance was narrowly tailored to serve substantial government interest of preventing secondary effects of adult businesses; and

[8] ordinance did not violate First Amendment guarantee of freedom of expression.

Affirmed.

West Headnotes (22)

[1] Federal Courts
Statutes, regulations, and ordinances, questions concerning in general

Court of Appeals reviews the district court's ruling on the constitutionality of a city ordinance de novo.

3 Cases that cite this headnote

[2] Constitutional Law
Rules and regulations

To survive a vagueness challenge, a regulation must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

1 Cases that cite this headnote

[3] Constitutional Law
Vagueness in General

Constitutional Law
Ordinances

A greater degree of specificity and clarity is required in the language of a municipal ordinance when First Amendment rights are

at stake than would otherwise be required to survive a vagueness challenge. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[4] **Constitutional Law**
Performers
Public Amusement and Entertainment
Dancing and other performances

City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, and defining "adult cabaret dancer" as a dancer performing at an adult cabaret, who was sexually-oriented dancer, exotic dancer, stripper, or similar dancer, who focused the performance on or emphasized the dancer's breasts, genitals, or buttocks, on a regular and substantial basis, was not void for vagueness; although some terms were subjective, the definition used a combination of terms, which provided sufficient clarity, to give dancers notice as to who qualified as an "adult cabaret dancer," for purpose of determining application of the two-foot rule.

5 Cases that cite this headnote

[5] **Constitutional Law**
Performers
Public Amusement and Entertainment
Dancing and other performances

City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, and defining "adult cabaret dancer" as a dancer performing at an adult cabaret, who was sexually-oriented dancer, exotic dancer, stripper, or similar dancer, who focused the performance on or emphasized the dancer's breasts, genitals, or buttocks, on a regular and substantial basis, was not overbroad; performances occurring outside of an adult cabaret or that did not have a sexual emphasis were unaffected by ordinance, and there was no realistic danger that ordinance would significantly compromise rights protected under the First Amendment. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[6] **Constitutional Law**
Statutes in general

The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.

Cases that cite this headnote

[7] **Eminent Domain**
Property and Rights Subject of Compensation

In order to state a claim under the Takings Clause, a plaintiff must first demonstrate that he possesses a property interest that is constitutionally protected. U.S.C.A. Const.Amend. 5.

7 Cases that cite this headnote

[8] **Eminent Domain**
Property and Rights Subject of Compensation

Owner of adult entertainment club and club dancers failed to demonstrate that city ordinance requiring adult cabaret dancers to remain two feet away from patrons during performances violated the Takings Clause, absent identification of a property interest with which the ordinance interfered. U.S.C.A. Const.Amend. 5.

3 Cases that cite this headnote

[9] **Federal Courts**
Summary judgment
Federal Courts
Summary judgment

Court of Appeals reviews the district court's decision to grant summary judgment de novo, viewing the evidence in the light most

favorable to the nonmoving party. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

13 Cases that cite this headnote

[10] Constitutional Law
Performers
Public Amusement and Entertainment
Dancing and other performances

City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, was not a complete ban on protected expression, for purpose of determining if ordinance violated First Amendment's guarantees of freedom of speech and expression; ordinance required that dancers project their erotic message from a slight distance, but did not ban erotic dancing altogether. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[11] Constitutional Law
Strict or exacting scrutiny;compelling interest test

Content-based regulations are normally subject to strict scrutiny, for purpose of determining if regulations violate the First Amendment's guarantee of freedom of expression. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[12] Constitutional Law
Content neutrality
Constitutional Law
Secondary effects

Content-based regulations may be analyzed under intermediate scrutiny, rather than strict scrutiny, for purpose of determining violation of the First Amendment's guarantee of freedom of expression, if two conditions are met: (1) the ordinance regulates speech that is sexual or pornographic in nature, and (2) the primary motivation behind the regulation is to prevent secondary effects. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[13] Constitutional Law
Performers

City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, and defining "adult cabaret dancer" as a dancer performing at an adult cabaret, who was sexually-oriented dancer, exotic dancer, stripper, or similar dancer, who focused the performance on or emphasized the dancer's breasts, genitals, or buttocks, on a regular and substantial basis, regulated expression that was sexual or pornographic in nature, as would support application of the intermediate scrutiny standard, rather than the strict scrutiny standard, for purpose of First Amendment challenge to ordinance; although dancers wore minimal clothing when performing for individual patrons off stage, dancers performed nude on stage, and the focus of the performance was sexual. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[14] Constitutional Law
Secondary effects

Court of Appeals generally accepts that the purpose of a regulation on adult businesses is to combat secondary effects, as would warrant application of intermediate scrutiny standard for purpose of First Amendment challenge, if the enactment can be justified without reference to speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[15] Constitutional Law
Sexually Oriented Businesses;Adult Businesses or Entertainment

To determine the purpose of a municipal ordinance regulating adult businesses, in order to decide whether to apply strict scrutiny

or intermediate scrutiny, the Court of Appeals looks to objective indicators of intent.

Cases that cite this headnote

[16] Constitutional Law
Performers

Secondary effects of adult businesses were city's primary concern in enacting ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, as would support application of the intermediate scrutiny standard, rather than the strict scrutiny standard, for purpose of First Amendment challenge to ordinance; ordinance stated that it was necessary for protection of the welfare of the public, as result of potential negative secondary effects, including crime, protection of retail trade, and maintenance of property values, and the two-foot rule was logically linked to preventing such secondary effects. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[17] Constitutional Law
Exercise of police power;relationship to governmental interest or public welfare
Constitutional Law
Narrow tailoring

A statute will survive intermediate scrutiny, in a First Amendment challenge, if it: (1) is designed to serve a substantial government interest, (2) is narrowly tailored to serve that interest, and (3) leaves open alternative avenues of communication. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[18] Constitutional Law
Performers
Public Amusement and Entertainment
Dancing and other performances

City demonstrated connection between its ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, and the secondary effects that the ordinance was intended to address, including crime, protection of retail trade, maintenance of property values, demonstrating that ordinance was designed to serve substantial government interest, for purpose of intermediate scrutiny analysis of First Amendment challenge; city was presented with 17 studies on secondary effects of adult businesses, declarations from vice officers, interviews with nude dancers, and a presentation on the harmful effects of pornography, and there was no requirement that city rely only on evidence targeting the exact problem of exotic dancing. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[19] Constitutional Law
Secondary effects

So long as whatever evidence the city relies upon to demonstrate that an ordinance regulating adult businesses serves substantial government interests is reasonably believed to be relevant to the problem that the city addresses, it is sufficient to support the ordinance, for purpose of First Amendment challenge under intermediate scrutiny standard. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[20] Constitutional Law
Proximity of performers to patrons
Public Amusement and Entertainment
Dancing and other performances

City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, was narrowly tailored to serve substantial government interest of preventing secondary effects of adult businesses, including crime, protection of retail trade, maintenance of property values, for purpose of intermediate scrutiny analysis of First Amendment challenge; ordinance would prevent exchange of money

or drugs and touching of patrons. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[21] Constitutional Law
Performers
Public Amusement and Entertainment
Dancing and other performances

City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, left open alternative avenues of expression, for purpose of determining if ordinance violated First Amendment's guarantees of freedom of speech and expression, under intermediate scrutiny standard; dancers could still convey their erotic message from a slight distance. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[22] Constitutional Law
Performers
Public Amusement and Entertainment
Dancing and other performances

City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, did not violate First Amendment guarantee of freedom of expression; ordinance was thoroughly researched and narrowly-tailored to address substantial government interest of preventing secondary effects of adult businesses, such as crime, and ordinance left alternative channels of communication open by allowing dancers to perform at slight distance. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

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Scott D. Bergthold, Chattanooga, TN, for Amicus Curiae League of California Cities.

Appeal from the United States District Court for the Central District of California; Gary L. Taylor, District Judge, Presiding. D.C. No. CV–03–00911–GLT.

Before: TASHIMA, FISHER, and TALLMAN, Circuit Judges.

Opinion

TALLMAN, Circuit Judge.

This case involves constitutional challenges to a city ordinance requiring "adult cabaret dancers" to remain two feet away from patrons during performances. The district court rejected these challenges by dismissing some of the Appellants' claims on the pleadings and granting summary judgment as to other claims. We denied emergency motions for a stay of enforcement of the Ordinance pending appeal and now affirm.

I

The City of La Habra's (City's) Municipal Ordinance 1626 ("Ordinance") regulates adult businesses. The first section of the Ordinance contains extensive findings that adult businesses generate crime, economic harm, and the spread of sexually transmitted diseases. These findings are based on studies and police declarations from other jurisdictions, federal and state judicial opinions, and public health data from surrounding southern California counties. Ordinance, § 1. Other sections of the Ordinance contain regulations purporting to address the secondary effects described in the first section, including a prohibition of physical contact between patrons and performers (the "no-touch rule") and a requirement that adult cabaret dancers perform at least two feet away from their patrons (the "two-foot rule"). Ordinance, §§ 4, 7. The Appellants are Bill Badi Gammoh, the owner of an adult establishment in the City, several dancers at Gammoh's club, and a dancer who has been offered employment at Gammoh's club but has not yet accepted it. Gammoh's establishment, which does not serve alcoholic beverages, features entertainment by dancers who perform nude on

stage and then dress in minimal clothing before offering one-on-one offstage dances.[1] The Appellants do not challenge the provisions of the Ordinance governing on-stage dancing and other aspects of the ***1119** operation of an adult cabaret; they challenge only the two-foot rule.

[1] Early in this litigation before the district court the Appellants used the term "lap dance" to refer to these performances. They later distanced themselves from this term, preferring "clothed proximate dancing" instead. We reference these individual, close-up performances using the term "offstage dancing" because the City regulates nude on-stage performances separately from partially-clothed offstage performances and it is the latter set of regulations that are challenged here.

Three weeks after the City Council passed the Ordinance, the Appellants filed their constitutional challenge in the Superior Court of California for Orange County. The case was subsequently removed to the United States District Court for the Central District of California. The Appellants were unsuccessful before the district court. In addition to other rulings that the Appellants do not challenge on appeal, the district court dismissed the Appellants' overbreadth argument and part of their vagueness challenge with prejudice, and entered summary judgment in favor of the City on their regulatory takings claim, a First Amendment challenge, and the remaining vagueness argument. The Appellants pursue their vagueness, overbreadth, takings, and free speech and expression claims on appeal.

II

[1] The Ordinance's two-foot rule applies exclusively to "adult cabaret dancers." The Ordinance defines an "adult cabaret dancer" as:

> any person who is an employee or independent contractor of an "adult cabaret" or "adult business" and who, with or without any compensation or other form of consideration, performs as a sexually-oriented dancer, exotic dancer, stripper, go-go dancer or similar dancer whose performance on a regular and substantial basis focuses on or emphasizes the adult cabaret dancer's breasts, genitals, and or buttocks, but does not involve exposure of "specified anatomical areas" or depicting or engaging in "specified sexual activities." Adult cabaret dancer does not include a patron.

Ordinance, § 4. The district court rejected the Appellants' assertion that this definition is vague and overbroad because it contains subjective terms. We review the district court's ruling *de novo*. *See United States v. Rodriguez,* 360 F.3d 949, 953 (9th Cir.2004); *United States v. Linick,* 195 F.3d 538, 541 (9th Cir.1999).

A

[2] **[3]** To survive a vagueness challenge, a regulation must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *see also United States v. Adams,* 343 F.3d 1024, 1035 (9th Cir.2003), *cert. denied,* 542 U.S. 921, 124 S.Ct. 2871, 159 L.Ed.2d 779 (2004). A greater degree of specificity and clarity is required when First Amendment rights are at stake. *Kev, Inc. v. Kitsap County,* 793 F.2d 1053, 1057 (9th Cir.1986).

The Appellants argue that the subjective language used to define an "adult cabaret dancer" makes the definition, and thus the Ordinance, unconstitutionally vague. *Cf. City of Chicago v. Morales,* 527 U.S. 41, 56–64, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (holding a provision criminalizing loitering, which is defined as "to remain in any one place with no apparent purpose," void for vagueness because the provision was "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene"); *Tucson Woman's Clinic v. Eden,* 379 F.3d 531, 554–55 (9th Cir.2004) (holding a statute requiring physicians to treat patients "with consideration, respect, and full recognition of the patient's dignity and individuality" void for vagueness because it "subjected physicians to sanctions based not on their own objective behavior, but on the subjective viewpoint of others") (internal quotation and citation

omitted); *Free Speech Coalition v. Reno,* 198 F.3d 1083, 1095 (9th Cir.1999), *aff'd sub nom. Ashcroft* ***1120** *v. Free Speech Coalition,* 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (holding a provision that criminalized sexually explicit images that "appear[ ] to be a minor" or "convey the impression" that a minor is depicted unconstitutionally vague because it was unclear "whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution").

Several of the terms within the Ordinance's definition of "adult cabaret dancer"—"sexually oriented dancer," "exotic dancer," "similar dancer," "regular basis," and "focuses on or emphasizes"—are unarguably subjective. However, two main factors distinguish the Ordinance from cases such as *Morales, Tucson Woman's Clinic,* and *Free Speech Coalition,* where the regulations were held to be too subjective to give notice to ordinary people or guidance to law enforcement: 1) the subjective terms in the Ordinance are used in combination with other terms, and 2) the subjective terms do not define prohibited conduct.

[4] This circuit has previously recognized that otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity. *See Kev,* 793 F.2d at 1057 (holding that an ordinance prohibiting dancers from "caressing" and "fondling" patrons was not vague "in the context of the other definitions provided in the ordinance" at issue). In this case, the district court recognized that the two-foot rule applies only to "adult cabaret dancers" who meet the following five qualifications: 1) the individual must perform at an "adult cabaret";[2] 2) the performer must perform as a sexually-oriented dancer, exotic dancer, stripper, or similar dancer; 3) the performance must focus on or emphasize the performer's breasts, genitals, and/or buttocks; 4) the performance must have this focus or emphasis on a regular basis; and 5) the performance must have this focus or emphasis on a substantial basis. Thus, an "adult cabaret dancer" is defined by a combination of features, not by any one subjective term. The combined terms outline the performer, the place of the performance, and the type of performance. Each of the five limitations provides context in which the other limitations may be clearly understood. The definition as a whole gives notice to performers and ample guidance to law enforcement officers as to who is and who is not an "adult cabaret dancer."

2 The City of La Habra Code defines "adult cabaret" as:

> a nightclub, bar or other establishment (whether or not serving alcoholic beverages) which features live performances by topless and/or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainers, and where such performances are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas."

City of La Habra Code § 18.60.010.

Furthermore, although the definition of an "adult cabaret dancer" contains subjective terms, the prohibited conduct is defined objectively. It is not illegal to be an adult cabaret dancer; only to be an adult cabaret dancer performing within two feet of a patron. This distinction introduces additional objectivity into the Ordinance because the act that is prohibited—being within two feet of a patron—is certainly not vague.[3]

3 The appellant dancers argue that they will not relinquish their proximity to patrons, and thus need to know how not to be "adult cabaret dancers." In other words, they assert that they need to know how to continue their sexually expressive performances within two feet of their patrons. This, however, is exactly what the Ordinance prohibits. The fact that the regulation will necessarily alter the dancers' conduct does not make it vague.

***1121** Vagueness doctrine cannot be understood in a manner that prohibits governments from addressing problems that are difficult to define in objective terms. *See Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("we can never expect mathematical certainty from our language"). In this case, a combination of subjective and objective terms is used to give a clear picture of an "adult cabaret dancer" and the conduct prohibited of such a dancer is defined objectively. Thus, the definition of "adult cabaret dancer" is sufficiently clear to give notice to performers and guidance to law enforcement. *See Cal. Teachers Ass'n v. State Bd. of Educ.,* 271 F.3d 1141, 1150 (9th Cir.2001) ("perfect clarity is not required even when a law regulates protected speech").

B

[5] The Appellants claim that the definition of "adult cabaret dancer" is overbroad because it could apply to mainstream or avant-garde performances as well as adult entertainment. The Supreme Court and this circuit have emphasized that "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *World Wide Video of Washington, Inc. v. City of Spokane,* 368 F.3d 1186, 1198 (9th Cir.2004) (quoting *Osborne v. Ohio,* 495 U.S. 103, 112, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (internal quotations omitted)). In this case, potentially overbroad applications of the Ordinance are minimal because performances occurring outside of an adult cabaret are unaffected by the Ordinance, and those occurring in an adult cabaret and containing the sexual emphasis that defines an "adult cabaret dancer" are within the Ordinance's legitimate sweep.

The Appellants were unable to cite any example of a performance that would fall within the Ordinance to which application of the Ordinance's restrictions would be overbroad. The examples proffered—including a duet, a tango, and an Elvis impersonator—are unpersuasive. A *pas de deux,* a ballroom dance, and an impersonation of the King each escapes the two-foot limitation unless performed in an establishment which features live performances by "topless and/or bottomless dancers, go-go dancers, exotic dancers, strippers or similar entertainers" characterized by an emphasis on " 'specified sexual activities' or 'specified anatomical areas.' " *See supra* note 2 (quoting City of La Habra Code § 18.60.010(C)). However, if they occur within an adult cabaret and the performer meets all five prongs of the definition of "adult cabaret dancer," these performances fall within the statute's legitimate sweep.

Regardless of whether the dance is a tango or more typical adult entertainment, requiring a two-foot separation between dance partners in this highly-charged sexual atmosphere may reasonably advance the City's legitimate goal of reducing secondary effects of adult entertainment. The two-foot rule may, for example, provide a line of sight for enforcement of the "no touch" rule and prevent exchanges of money and drugs. When performed in an adult cabaret, these performances, even if done in an Elvis costume, are thus within the statute's legitimate reach.

[6] Even if the Appellants were able to identify performances that fulfill all aspects of an "adult cabaret dancer" but are not tied to the secondary effects the statute is designed to address, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City* ***1122** *Council of City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 800, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Although we recognize that "the First Amendment needs breathing space," *World Wide Video,* 368 F.3d at 1198, in this situation there is no "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Taxpayers for Vincent,* 466 U.S. at 801, 104 S.Ct. 2118. If an overbroad application of the Ordinance exists, it is insubstantial when "judged in relation to the statute's plainly legitimate sweep." *See Broadrick v. Oklahoma,* 413 U.S. 601, 612–15, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

III

The district court dismissed the Appellants' regulatory takings claim on summary judgment. We review this decision *de novo. Cal. First Amend. Coalition v. Calderon,* 150 F.3d 976, 980 (9th Cir.1998). We "must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Id.*

[7] **[8]** The takings clause of the Fifth Amendment protects *private property* from being taken for public use without just compensation. U.S. CONST. amend. V (emphasis added). "In order to state a claim under the Takings Clause, a plaintiff must first demonstrate that he possesses a 'property interest' that is constitutionally protected." *Schneider v. Cal. Dep't Corr.,* 151 F.3d 1194, 1198 (9th Cir.1998) (internal citation omitted). The Appellants have not here pointed to a "property interest" interfered with by the City of La Habra's regulation of the dancers' conduct.[4] The district court thus properly dismissed the Appellants' takings claim.

4 Certainly Mr. Gammoh and the dancers may suffer economic losses if patrons are unwilling to pay for dances that must be at least two feet away from customers. Their claim of right to this stream of income was essentially the basis of the vested rights argument that the Appellants made before the district court. The district court rejected this argument on summary judgment, and Appellants did not appeal that ruling.

IV

[9] The Appellants argue that the Ordinance violates the First Amendment's guarantees of freedom of speech and expression. The district court evaluated the Ordinance under intermediate scrutiny and determined that the Appellants' First Amendment rights had not been violated. We review the district court's decision to grant summary judgment *de novo,* viewing the evidence in the light most favorable to the Appellants and looking for genuine issues of material fact. *See Calderon,* 150 F.3d at 980.

A

[10] First, we must determine whether the Ordinance is a complete ban on protected expression. *See Ctr. for Fair Pub. Policy v. Maricopa County,* 336 F.3d 1153, 1164 (9th Cir.2003) (plurality opinion) (citing *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 434, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), and *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). We conclude that it is not.

The two-foot rule merely requires that dancers give their performances from a slight distance; it does not prohibit them from giving their performances altogether. The rule limits the dancers' freedom to convey their erotic message but does not prohibit them from performing erotic one-on-one-dances for patrons. *See* ***1123** *Renton,* 475 U.S. at 46, 106 S.Ct. 925. Because the dancers' performances may continue, albeit from a slight distance, this case stands in sharp contrast to our recent decision in *Dream Palace v. County of Maricopa,* where we applied strict scrutiny to an ordinance regulating adult businesses because even the county conceded that the ordinance was a complete ban on nude and semi-nude dancing. 384 F.3d 990, 1018 (9th Cir.2004). Here, the Ordinance prescribes where offstage dancing can occur (at least two feet away from patrons) but it does not ban any form of dance.

The Appellants argue that close propinquity to patrons is a key element of the dancers' expressive activity, and that the Ordinance is therefore a complete ban on a form of expression: "proximate dancing." This argument has been made and rejected in this circuit. *See Colacurcio v. City of Kent,* 163 F.3d 545, 549, 555 (9th Cir.1998) (rejecting the argument that because "table dancing" is a unique form of dancing requiring proximity, a ten-foot separation requirement is a complete ban on this form of expression). It is true that if the dancers' expressive activity is considered "erotic dance within two feet of patrons" and not merely "erotic dance," this activity is completely banned. However, virtually no ordinance would survive this analysis: the "expression" at issue could always be defined to include the contested restriction. *See id.* at 556 (rejecting the idea that the applicable "forum" for a table dance is the area within ten feet of the performer). Protected expression is not so narrowly defined. *See Dream Palace,* 384 F.3d at 1019–20 (recognizing that the regulations in *Renton* and its progeny did not "proscribe absolutely certain types of adult entertainment" and instead enacted regulations that "avoid[ed] a total ban on protected expression").

"While the dancer's erotic message may be slightly less effective from [two] feet, the ability to engage in the protected expression is not significantly impaired." *Kev,* 793 F.2d at 1061. We hold that the Ordinance is not a complete ban on a protected form of expression.

B

Next, we must determine what level of scrutiny properly applies. *See Ctr. for Fair Pub. Policy,* 336 F.3d at 1164. Traditionally, the Court has utilized a distinction between content-based and content-neutral regulations to determine the appropriate level of scrutiny. *See e.g., Renton,* 475 U.S. at 46–47, 106 S.Ct. 925. Time, place, and manner restrictions on adult businesses were considered content-neutral. *Id.* at 48, 106 S.Ct. 925.

[11] Recently, however, the Supreme Court has recognized that virtually all regulation of adult businesses is content-based. *See Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring); *see*

also Ctr. for Fair Pub. Policy, 336 F.3d at 1161 (recognizing Justice Kennedy's opinion in *Alameda Books* as controlling because it is the narrowest opinion joining the plurality's judgment). Content-based regulations are normally subject to strict scrutiny. *See Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.,* 502 U.S. 105, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (describing the "necessary to serve a compelling state interest" strict scrutiny test).

[12] However, designating regulation of adult establishments as content-based does not end the inquiry as to the appropriate standard of review. Content-based regulations may be analyzed under intermediate scrutiny if two conditions are met: 1) the ordinance regulates speech that is sexual or pornographic in nature; and 2) the primary motivation behind the regulation is to prevent secondary effects. *Ctr. for Fair Pub. Policy,* 336 F.3d at 1164–65 ***1124** (citing *Alameda Books,* 535 U.S. at 434, 448, 122 S.Ct. 1728).

1

[13] The Appellants differ from plaintiffs in previous cases regarding the regulation of adult businesses in that they wear minimal clothing for their offstage performances (although they perform nude on stage). The Appellants argue that the dancers' expressive activity is not sexual or pornographic because the dancers are "fully clothed." However, the appellant dancers testified that their outfits for offstage dancing include bikinis and g-strings, sometimes paired with a sheer skirt or top; at the very least, these accouterments stretch the term "fully-clothed." The dancers do cover their breasts and genitalia, but their argument that this removes their performances from the sphere of "sexual speech" ignores the context in which their offstage performances occur —in an adult cabaret, minutes after the dancers have performed nude on stage. *See Kev,* 793 F.2d at 1061 n. 12 (noting that "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved") (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness,* 452 U.S. 640, 650–51, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)).

There is certainly a point along the continuum where suggestive speech no longer falls within the "sexual or pornographic" exception to the requirement of strict scrutiny. We are mindful that this case pushes us closer to that point than those cases where performers are nude or topless. "Sexual speech" has never been explicitly defined, but the appellant dancers' performances, which "focus[ ] on or emphasize[ ] ... breasts, genitals, and or buttocks," occur in adult establishments, are conducted by dancers who also perform nude, and involve minimal clothing, are certainly within the limits of "sexual speech." We therefore review the Ordinance as a regulation of "sexual or pornographic speech" and proceed to consider whether reducing the secondary effects of adult establishments is the Ordinance's primary purpose.

2

[14] We generally accept that a regulation's purpose is to combat secondary effects if the enactment can be justified without reference to speech. *See Colacurcio,* 163 F.3d at 551–52 (citing *Kev,* 793 F.2d at 1058–59). We have recognized that "so long as the regulation is designed to combat the secondary effects of [adult] establishments on the surrounding community, namely[ ] crime rates, property values, and the quality of the city's neighborhoods ... then it is subject to intermediate scrutiny." *Ctr. for Fair Pub. Policy,* 336 F.3d at 1164–65 (internal citation and quotation omitted); *see also Colacurcio,* 163 F.3d at 551 (9th Cir.1998) (noting that an ordinance is subject to intermediate scrutiny if its "predominant purpose" is combating secondary effects). For plaintiffs, this is "a difficult standard to overcome." *Colacurcio,* 163 F.3d at 552.

[15] **[16]** To determine the purpose of the Ordinance, we look to "objective indicators of intent." *Id.* at 552; *see also Ctr. for Fair Pub. Policy,* 336 F.3d at 1165. In this case we have the materials that the City Council considered in determining whether to enact the Ordinance and the Ordinance itself. These indicators demonstrate that secondary effects were the City Council's concern.

The record indicates that the City Council was presented with several volumes of materials prior to enacting the Ordinance. These included studies of secondary effects, declarations from police officers, reports on sexually transmitted diseases, and ***1125** various other evidence.

In a report to the City Council, the City Attorney recommended action to address the secondary effects reported in these resources: "[i]n reviewing the City's existing regulations and in light of the extensive existing case law and supporting studies, we conclude that this Ordinance is necessary to reduce and/or preclude these secondary effects." Our review of the materials that the City Council considered indicates that concern about secondary effects, as opposed to the content of the dancers' expression, motivated the challenged Ordinance.

The Ordinance itself also demonstrates that the City Council's purpose was to combat secondary effects. The Ordinance states that it is:

> necessary for the protection of the welfare of the people, as a result of the potential negative secondary effects of adult businesses, including crime, the protection of the city's retail trade, the prevention of blight in neighborhoods and the maintenance of property values, protecting and preserving the quality of the city's neighborhoods and the city's commercial districts, the protection of the city's quality of life, the increased threat of the spread of sexually transmitted diseases, and the protection of the peace, welfare and privacy of persons who patronize adult businesses.

Ordinance, § 1(A). This statement of purpose is supported by regulatory provisions that are logically linked to the secondary effects, such as solicitation of prostitution and drug transactions, that the City identified: the Ordinance forbids contact between patrons and performers and, to make this rule enforceable, requires a two-foot separation between patrons and performers. Both the two-foot rule and the no-touching rule are reasonably linked to the secondary effects that the City identifies as its purpose in enacting the Ordinance.

We are not persuaded by the Appellants' argument that a speech-reducing motive is demonstrated by the fact that proximity between patrons and dancers is allowed when the dancers are not performing. The City may reasonably have decided that such regulations were impractical or unnecessary. The Appellants presented no evidence to support their speculation that the City chose only to regulate dancers when they are performing because it wished to regulate the performances' expressive content.

We are also unpersuaded by the Appellants' argument that a speech-reducing motive is demonstrated by a City employee's testimony that he overheard someone in staff meetings say that they wanted to drive appellant Gammoh out of business. The Appellants presented no evidence that the person who made these comments was on the City Council or affected the Council's decision to pass the Ordinance. Nothing connects this testimony to the process by which the Ordinance was passed. The testimony therefore does not create a genuine issue of material fact as to whether the City's stated goal of preventing secondary effects of adult businesses was its true purpose in enacting the Ordinance.

The Appellants have not raised a genuine issue as to the City's motivation in enacting the Ordinance. As Justice Kennedy wrote in *Alameda Books,* "[t]he ordinance may be a covert attack on speech, but we should not presume it to be so." 535 U.S. at 447, 122 S.Ct. 1728. The objective indicators of the City's intent demonstrate a desire to combat secondary effects, and the Appellants have adduced no evidence that draws this motivation into question. The Ordinance must therefore be evaluated using intermediate scrutiny.

C

[17] A statute will survive intermediate scrutiny if it: 1) is designed to serve a ***1126** substantial government interest; 2) is narrowly tailored to serve that interest; and 3) leaves open alternative avenues of communication. *Ctr. for Fair Pub. Policy,* 336 F.3d at 1166; *see also Renton,* 475 U.S. at 50, 106 S.Ct. 925.

1

Reducing the negative secondary effects of adult businesses is a substantial governmental interest. *See Ctr. for Fair Pub. Policy,* 336 F.3d at 1166 ("It is beyond peradventure at this point in the development of the doctrine that a state's interest in curbing the secondary effects associated with adult entertainment establishments

is substantial."). The Appellants concede that preventing secondary effects is a substantial government interest, but argue that the City's evidence of secondary effects is flawed and inapplicable. We disagree.

[18] The pre-enactment record in this case is substantial. *Cf. id.* at 1167–68 (describing the record as "a slim one" and "hardly overwhelming" but concluding that the studies and public hearings relied on by the legislature were sufficient to demonstrate a connection between the regulated activity and secondary effects). The City Council was presented with, *inter alia,* seventeen studies on secondary effects of adult businesses, a summary of some of these studies, the 1986 Attorney General's Report on Pornography, declarations from investigating vice officers, an interview with nude dancers, a presentation on the harmful effects of pornography in nearby Los Angeles, numerous reports on AIDS and other sexually transmitted diseases, and thirty-nine judicial decisions in the area of regulation of adult businesses. These studies and reports meet the City's burden to produce evidence demonstrating a connection between its regulations and the secondary effects that the Ordinance is intended to address. *See Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728; *Ctr. for Fair Pub. Policy,* 336 F.3d at 1166.

Because the City has met this burden, "[i]f plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.*" *Alameda Books,* 535 U.S. at 438–39, 122 S.Ct. 1728, *cited in Ctr. for Fair Pub. Policy,* 336 F.3d at 1160. The Appellants attempt to cast doubt by arguing that the studies on which the City relies are flawed and irrelevant.

[19] The Appellants' proffered expert declared that the City's evidence was flawed because "systematically collecting police call-for-service information" and adhering to the Appellants' suggested methodological standards were "the only reliable information" that could have supported the City's concern. This is simply not the law. "[S]o long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses [,]" it is sufficient to support the Ordinance. *Renton,* 475 U.S. at 51–52, 106 S.Ct. 925. [5] While we do not ***1127** permit legislative bodies to rely on shoddy data, we also will not specify the methodological standards to which their evidence must conform. *See id.* at 51, 106 S.Ct. 925; *see also Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring) ("As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners."). The Appellants have failed to create a genuine issue of material fact as to the reliability of the collection of evidence upon which the City relied.

5 The Seventh Circuit has succinctly explained why clear proof of secondary effects is not required:

> A requirement of *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)]—quality evidence would impose an unreasonable burden on the legislative process, and further would be logical only if *Alameda Books* required a regulating body to prove that its regulation would—undeniably—reduce adverse secondary effects. *Alameda Books* clearly did not impose such a requirement.

G.M. Enters., Inc. v. Town of St. Joseph, Wis., 350 F.3d 631, 640 (7th Cir.2003).

The Appellants also argue that even if the City's evidence is reliable, it is irrelevant because it does not measure the secondary effects of *clothed* performances. No precedent requires the City to obtain research targeting the exact activity that it wishes to regulate: the City is only required to rely on evidence "reasonably believed to be relevant" to the problem being addressed. *Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728. The studies upon which the City relied evaluate the secondary effects of a variety of adult businesses—a category encompassing any business that would be affected by the Ordinance—and are therefore unquestionably relevant.

The presence or absence of minimal clothing is not relevant to whether separation requirements fulfill the stated purpose of the Ordinance. This circuit recognizes that municipalities may reasonably find that separation requirements serve the interest of reducing the secondary effects of adult establishments. "Buffers" between patrons and performers prevent the exchange of money for prostitution or drug transactions and allow enforcement of "no touching" provisions, which would otherwise be virtually unenforceable. *See Colacurcio,* 163 F.3d at 554. There is no reason to believe that minimal clothing obviates the need for these measures when the atmosphere is equally charged—money exchanges and touching are no

more difficult if the dancer is wearing minimal clothing than if she is partially or fully nude. [6]

6 The City Council was presented with a report documenting an interview with former adult dancers from another jurisdiction in which the dancers indicated that solicitations for sexual favors occurred "whether the club is nude or not" and that drugs were frequently passed during tipping.

The Appellants have not presented evidence sufficient to create a genuine issue of material fact as to whether the two-foot rule is designed to serve a substantial governmental interest in preventing the secondary effects of adult establishments. The Ordinance therefore survives the first prong of the *Renton* test.

2

[20] Our next consideration is whether the City's two-foot rule is narrowly tailored to address the problem of secondary effects from adult entertainment. *See Ctr. for Fair Pub. Policy,* 336 F.3d at 1166. The Ordinance's two-foot separation requirement is more narrow than other separation requirements that the Ninth Circuit has upheld. *See Colacurcio,* 163 F.3d at 553–54 (upholding a ten-foot separation requirement); *BSA, Inc. v. King County,* 804 F.2d 1104, 1110–11 (9th Cir.1986) (upholding a six-foot separation requirement); *Kev,* 793 F.2d at 1061–62 (upholding a ten-foot separation requirement). These earlier cases involved nude or topless dancing, and therefore differ from the case before us. Nonetheless, they guide us in now holding that in the context of a club that features on-stage nude dancing and offstage minimally clothed dancing, the City's two-foot separation requirement is narrowly tailored to prevent the exchange of money ***1128** or drugs and to allow enforcement of the "no touching" provisions.

3

[21] Finally, we consider whether the Ordinance leaves open alternative avenues of communication. *See Ctr. for Fair Pub. Policy,* 336 F.3d at 1166. This inquiry is analogous to that in Section IV(A), *supra,* which concluded that the Ordinance is not a complete ban on protected expression. The challenged Ordinance leaves dancers free to convey their erotic message as long as they are two feet away from patrons. Although the message may be slightly impaired from this distance, it cannot be said that a dancer's performance "no longer conveys eroticism" from two feet away. *Dream Palace,* 384 F.3d at 1021 (internal citation and quotation omitted). Because the dancer's erotic message may still be communicated from a slight distance, the Ordinance survives this final prong of the *Renton* analysis.

[22] As detailed above, the Ordinance's two-foot rule is narrowly tailored to address the City's concerns about the secondary effects of adult establishments and leaves alternate channels of communication open by allowing dancers to perform at a two-foot distance. The Ordinance survives intermediate scrutiny.

V

The Ordinance was thoroughly researched and narrowly tailored to combat the negative side-effects of adult businesses that the City's research identified. Regulating adult businesses will always place the City's concerns in tension with First Amendment protections. In this case, however, the City of La Habra designed an Ordinance that falls within what has previously been accepted as constitutional in this circuit, despite the minimal amount of clothing that the appellant dancers wear when performing. The Ordinance is not vague or overbroad, and the Appellants have raised no genuine issue of material fact regarding their takings or First Amendment claims. The judgment of the district court is therefore **AFFIRMED.**

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