Date: August 16, 2017

To: Wisconsin Rapids Planning Commission

From: Tim Schwecke, AICP

Subject: Wisconsin Rapids zoning code rewrite project - Adult-oriented establishments and secondary effects

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Like the City's current zoning code, the proposed zoning code includes development standards related to adult-oriented establishments.

Without going into a lot of detail, we've included legislative findings and purposes statements in the zoning code to set the legal foundation for the development standards. They are included below. Under subsection (a)(1) we cite four court cases that focus on the secondary effects of adult uses.

(a) Legislative findings. The Common Council makes the following legislative findings regarding adult-oriented establishments:

1. Negative secondary effects associated with adult, sexually-oriented establishments have been confirmed by the United States Supreme Court in its decisions in, for example, *City of Renton v. Playtime Theatres, Inc.* (475 U.S. 41 (1986)) and by the United States Court of Appeals in its decisions in, for example, *Hang On, Inc. v. City of Arlington* (65 F.3d 1248 (5th Cir., 1995)), *Fantasy Ranch v. City of Arlington Texas* (459 F.3d 546 (5th Circuit, 2006)), and *Andy's Restaurant & Lounge, Inc. v. City of Gary* (466 F.3d 550 (7th Cir., 2006)) and such negative secondary effects include, for example, personal and property crimes, prostitution, lewd behavior, assault, public indecency, obscenity, illicit drug use and drug trafficking, potential spread of disease, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation.

2. The decisions issued by the appellate courts constitute reliable sources of information that may be reasonably relied upon by the Common Council.

3. Each of the foregoing negative secondary effects constitutes a harm that the City has a substantial governmental interest in preventing and/or abating.

4. Continued regulation of adult-oriented establishments is necessary to limit the aforementioned negative secondary effects associated with adult-oriented establishments and thereby promote the health, safety, and welfare of the City of Wisconsin Rapids.

5. The Common Council intends, via this chapter, to establish reasonable regulations on adult-oriented establishments, while preserving free speech pursuant to the First Amendment to the United States Constitution and Article I, Section 3 of the Wisconsin Constitution.

(b) Purpose. This section is intended to regulate adult-oriented establishments in order to promote the health, safety, and general welfare of citizens of the City, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of adult-oriented establishments within the City. The provisions of this section have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually-oriented materials. Similarly, it is neither the intent nor effect of this section to restrict or deny access by adults to sexually-oriented materials protected by the First Amendment of the United States Constitution, or to deny access by the distributors and exhibitors of adult-oriented entertainment to their intended market. Neither is it the intent nor effect of this section to condone or legitimize the distribution of obscene material.

Because the Planning Commission will be making a recommendation to adopt the zoning code, it is important that you become familiar with these and in particular the secondary effects observed in other municipalities. If you have any questions in this regard, please feel free to contact me.

Attachments:

1. Andy's Restaurant and Lounge Inc v City of Gary
2. City of Renton v Playtime Theatres Inc
3. Fantasy Ranch Inv v City of Arlington, Texas
4. Hang On Inc v City of Arlington

KeyCite Yellow Flag - Negative Treatment
Distinguished by BBL, Inc. v. City of Angola, N.D.Ind., January 2, 2014

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)6 Zoning and Land Use
92k1790 In general
(Formerly 92k90.1(1))
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2187 Public nudity or indecency
(Formerly 92k90.4(1))
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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2204 In general
(Formerly 92k90.4(1))
315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(1) In general
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

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(1) In general

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2204 In general
(Formerly 92k90.4(1))

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 Secondary effects
(Formerly 92k90.4(1))

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

92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1237 Sex and Procreation
92k1244 Sexually oriented businesses
(Formerly 92k82(10))

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

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(D) Presentation and Reservation in Lower Court of Grounds of Review

170BXVII(D)1 In General
170Bk3391 In general; necessity
(Formerly 170Bk611)
Arguments not raised in the district court are waived on appeal.

5 Cases that cite this headnote

Attorneys and Law Firms

***551** Edward J. Wartman, McHie, Myers, McHie & Enslen, Hammond, IN, Richard P. Busse, Valparaiso, IN, for Plaintiffs–Appellants.

Scott D. Bergthold (argued), Chattanooga, TN, for Defendant–Appellee.

Deidre Baumann (argued), Baumann, Shuldiner, Chicago, IL, Intervenors/Appellants.

Donald W. Wruck, III, Giorgi & Associates, Crown Point, IN, for Intervenor–Appellant.

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, 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

End of Document

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
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2224 Motion Pictures and Videos
92k2227 Zoning and land use
(Formerly 92k90.4(4))

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.

815 Cases that cite this headnote

[2] Constitutional Law
Zoning and land use
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2224 Motion Pictures and Videos
92k2227 Zoning and land use
(Formerly 92k90.4(4))

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.

761 Cases that cite this headnote

[3] Constitutional Law
Theaters in general
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2219 Theaters in general
(Formerly 92k90.4(4), 92k90.1(4))

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.

543 Cases that cite this headnote

[4] Zoning and Planning

Sexually-oriented businesses; nudity

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Particular Matters
414k1112 Sexually-oriented businesses; nudity
(Formerly 414k76)

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.
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> "[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.
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> "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 Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require

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 ...").

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 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.

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.

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

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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
170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3576 Procedural Matters
170Bk3604 Judgment
170Bk3604(4) Summary judgment
(Formerly 170Bk776, 170Bk766)
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
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2201 Nude dancing in general
(Formerly 92k90.4(3))
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
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(Y) Sexual Expression
92k2201 Nude dancing in general
(Formerly 92k90.4(3))

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2187 Public nudity or indecency
(Formerly 92k90.4(2))

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2212 Content neutrality
(Formerly 92k90.4(1))

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2205 Performers in general
(Formerly 92k90.4(3))
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2217 Proximity of performers to patrons
(Formerly 92k90.4(3))
315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(1) In general
315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(2) 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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2217 Proximity of performers to patrons (Formerly 92k90.4(3))
315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(1) In general
315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(2) 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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2187 Public nudity or indecency (Formerly 92k90.4(2))

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

268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k595 Public safety and welfare
268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k597 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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1514 Narrow tailoring requirement; relationship to governmental interest
(Formerly 92k90(3))

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1514 Narrow tailoring requirement; relationship to governmental interest
(Formerly 92k90(3))

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 In general
(Formerly 92k90(3))

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1514 Narrow tailoring requirement; relationship to governmental interest
(Formerly 92k90(3))

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2208 Licenses and permits in general
(Formerly 92k90.4(1))
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 Secondary effects
(Formerly 92k90.4(1))
315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(1) In general

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

170B Federal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2108 Mootness
170Bk2114 Voluntary cessation of challenged conduct
(Formerly 170Bk12.1)

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

170B Federal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2108 Mootness
170Bk2115 Change in law
(Formerly 170Bk12.1)

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

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k977 Mootness
(Formerly 92k46(1))

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

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k977 Mootness
(Formerly 92k46(1))

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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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*

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.

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, 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

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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
92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)9 Freedom of Speech, Expression, and Press
92k855 In general
(Formerly 92k42.1(6))

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
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.4 Rights of third parties or public
(Formerly 92k42(1))

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.

1 Cases that cite this headnote

[3] Constitutional Law
Labor and Employment
92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)11 Equal Protection
92k927 Labor and Employment
92k928 In general
(Formerly 92k42.2(2))

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

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2481 In general

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2218 Contact between performers and patrons
(Formerly 92k90.4(5))

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2236 Intoxicating Liquors
92k2240 Performers
92k2240(1) In general
(Formerly 92k90.4(5))

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2236 Intoxicating Liquors
92k2239 Nudity in general
(Formerly 92k90.4(5))

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

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2236 Intoxicating Liquors
92k2240 Performers
92k2240(1) In general
(Formerly 92k90.4(5))

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

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)12 Trade or Business
92k3681 Licenses and Regulation
92k3698 Public amusement and entertainment
(Formerly 92k230.3(6))
315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(2) Dancing and other performances
(Formerly 92k230.3(6))

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

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3403 Trade or Business
92k3405 Licenses in general
(Formerly 92k224(2))
223 Intoxicating Liquors
223II Constitutionality of Acts and Ordinances
223k15 Licensing and regulation
268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k120 Construction and operation
268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k121 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

223 Intoxicating Liquors
223I Power to Control Traffic
223k9 Delegation of Powers
223k11 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

349 Searches and Seizures
349I In General
349k79 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

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