The ABCs of SOBs: Drafting and Defending Constitutionally Sound Sexually Oriented Business Regulations

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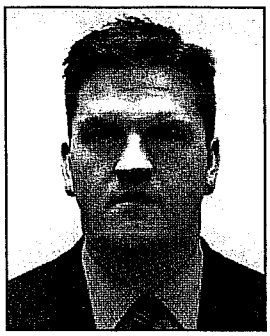

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The legal fundamentals of adult business regulation are relatively well-settled: a local government cannot ban sexually oriented businesses, but may regulate the time, place, and manner of their operations. As with many other statements of the law, however, myriad cases make principles that are simple in concept turn out to be complicated in their application. This article will attempt to set forth the general framework for regulating adult businesses in various communities, and will give some specific guidelines for drafting and defending local ordinances seeking to regulate those businesses. Given that most challenges to adult business ordinances are filed in federal court to vindicate ostensible First Amendment protections, this article cites primarily to the decisions of the U.S. Supreme Court and U.S. Court of Appeals for the Fifth Circuit.

General Framework

Municipalities taking a comprehensive - rather than piecemeal - approach to the adult business issue generally adopt a "place," or zoning regulation, governing where adult uses may locate as well as a licensing ordinance governing the "time" (hours of operation) and "manner" (interior layout, and conduct of employees, etc.) of adult business operations.

Courts have upheld both,[1] and have done so applying an "intermediate" scrutiny under the First Amendment. Intermediate scrutiny, in this context, has two origins. The first is *United States v. O'Brien*,[2] the draft-card-burning case from the Vietnam era which established a four-part test for evaluating regulations of expressive conduct. The second is *City of Renton v. Playtime Theatres, Inc.*,[3] the seminal adult business case which applied a three-part inquiry born of the longstanding time, place, and manner doctrine. Practitioners generally need not get bogged down in the distinctions between these two tests, however, because the Supreme Court has "held that the *O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'"[4]

Both tests ask, essentially, whether the government's interest is unrelated to the suppression of the content of protected speech (*i.e.*, is the regulation content-neutral), and whether the regulation is narrowly tailored (*i.e.*, not substantially broader than necessary) to serve the government's interest. Generally, the burden is on the government to demonstrate both that its purpose is to ameliorate the negative "secondary effects" of adult businesses (crime, adverse impacts on surrounding properties, *etc.*), and that the regulation is narrowly tailored to serve that interest.[5]

Establishing Content-Neutrality

Establishing content-neutrality is not difficult, but it must be done, or adult business regulations may be subjected to and invalidated under the weight of strict constitutional scrutiny. Courts have inferred a content-neutral purpose from the nature of the challenged regulations,[6] but the much-preferred course is to not make them do so.[7] Instead, the local legislative body should, in either the preamble or the codified ordinance itself, incorporate a clear statement that the purpose of regulation is to address the secondary effects of, not the content of, adult speech. That purpose statement should be followed by legislative findings

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[1] *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding adult theater zoning ordinance); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004) (upholding comprehensive licensing ordinance for adult businesses); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (upholding local prohibition on public nudity as applied to nude dancing establishment); *see also Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (7th Cir. 2006) (upholding detailed licensing regulation with conduct rules such as a 6-ft. buffer and a "no-touch" rule between erotic dancers and patrons); *Star Satellite, Inc. v. City of Biloxi, Miss.*, 779 F.2d 1074 (5th Cir. 1986) (upholding hours of operation regulation for adult businesses).

[2] 391 U.S. 367 (1968).

[3] 475 U.S. 41 (1986).

[4] *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984)).

[5] *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 311 (5th Cir. 2007) ("Because the statute is reviewed for intermediate scrutiny, the State has the burden of justifying the challenged statute.").

[6] *See Illusions-Dallas, supra* note 6, at 310 (inferring content-neutral purpose from statutory context of alcohol regulation and rejecting argument that "a legislative record or statutory preamble is required to discern a content-neutral predominant purpose"); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 449 (2002) (Kennedy, J., concurring in judgment) ("[Z]oning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use.").

[7] *Illusions-Dallas*, 482 F.3d at 310 ("The Clubs are correct that this court's previous cases have relied on a legislative record or a preamble to reveal a predominant purpose.").

concerning the negative secondary effects that the legislation is intended to address.[8]

These sections of the proposed ordinance serve two important purposes. First, they lay out the legislative record for the ordinance and establish the necessary content-neutral (*unrelated to speech*) justifications for the city's regulations. Second, they preempt several arguments that might be raised in litigation. Comprehensive purpose statements explain to a reviewing court the extensive amount of "homework" performed by the legislative body and the types of evidence (land-use studies, police reports, judicial opinions, etc.) that it relied upon in coming to its conclusions. Those conclusions, or findings, are explicitly spelled out and are later referenced when refuting challenges to the ordinance based on the motives or subjective intent of the governing body. A city council's (or other legislative body's) findings are entitled to great deference, as the members of the council are considered "experts" on how best to address the specific needs of their community.[9]

Thus, "secondary effects" findings not only demonstrate the content-neutrality of the regulation, but also provide the initial defense against a secondary effects challenge, *i.e.*, a challenge that the ordinance does not serve a substantial government interest.

Demonstrating a Substantial Government Interest

In its most recent sexually oriented business case, the Fifth Circuit explained that "[t]he inquiry into whether a statute furthers a substantial governmental interest is divided into two parts. First, a substantial governmental interest must actually exist. Second, the statute must further that interest."[10] Both parts of the inquiry involve evidentiary questions: the first deals with whether the government proffers any secondary effects interest; the second addresses the relationship between that evidence and the regulations adopted.

Challenges under these aspects of the substantial government interest inquiry are evaluated under the *Renton* framework as modified by *City of Los Angeles v. Alameda Books, Inc.*, which explained that plaintiffs can challenge the municipality's legislative rationale by showing that the municipality's evidence does not support its rationale, or by furnishing its own evidence disputing the municipality's findings.[11]

Fortunately, these cases provide a deferential standard for municipalities seeking to regulate the negative secondary effects of sexually oriented businesses. Specifically, the government "may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest."[12] This includes evidence from a wide range of sources, including previous judicial opinions, land use studies, or anecdotal reports that recognize the harm targeted or the solution employed to address secondary effects.[13] The secondary effects involved can include a diverse set of problems, including negative impacts on surrounding properties, crime, and illicit and/or illegal sexual conduct or behavior.[14] Contrary to the adult business industry's common argument, secondary effects evidence need not be local,[15] and need not consist of empirical data or a specific community based scientific study.[16] Indeed, the courts have held that local governments can rely on common sense in reaching and defending their legislative judgments.[17]

Under Fifth Circuit precedent, a city can "meet its burden of introducing evidence to justify the challenged ordinance either by developing evidence of secondary effects prior to the enactment or *by adducing such evidence at trial*."[18] Two recent Fifth Circuit cases demonstrate, however, that the local government should compile its secondary effects evidence *prior* to the enactment of any of its adult business regulations.

In *Illusions-Dallas Private Club, Inc. v. Steen*,[19] adult businesses challenged a Texas alcohol regulation that prohibited sexually oriented businesses in "dry" areas (*i.e.*, areas that do not allow alcohol sales) from receiving special "private club" permits to sell alcohol. The State of Texas was unable to demonstrate that it had any pre-enactment legislative evidence to support its secondary effects rationale. At summary judgment, the State attached several land use studies to support this rationale, but the district court excluded them on hearsay grounds. Nevertheless, based on prior cases upholding similar regulations, the district court upheld the Texas regulation.

On appeal, the Fifth Circuit reversed.[20] The court concluded that while a secondary effects purpose could be gleaned from the statutory context of the

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[8] *See, e.g., J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 378 (5th Cir. 1998) (concluding that a statute was content-neutral by looking to its preambulatory clause, which indicated a secondary effects purpose); *Fantasy Ranch*, 459 F.3d at 556-57 (applying intermediate scrutiny to an ordinance concerning behavior restrictions at SOBs where the statute's stated purpose was to combat secondary effects); *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162, 174 (5th Cir.2003) (applying intermediate scrutiny to zoning ordinances where the ordinances' preamble contained findings concerning secondary effects); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1273 (5th Cir.1988) (relying on the City of Houston's findings as to a secondary effects purpose to justify intermediate scrutiny).

[9] See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000) ("The council members, familiar with downtown Erie, are the individuals who would likely have had first-hand knowledge of what took place at and around nude dancing establishments there, and can make particularized, expert judgments about the resulting harmful secondary effects.")

[10] *Illusions-Dallas*, 482 F.3d at 312.

[11] *Id.*; *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-439 (2002) (plurality opinion) (laying out procedure for challenging legislative rationale).

[12] *Alameda Books, Inc.*, 535 U.S. at 438 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)).

[13] *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (plurality opinion).

[14] *Fantasy Ranch*, 459 F.3d at 559 (noting that city relied on studies and numerous court opinions, "all of which demonstrate a connection between dancer-patron touching and unsavory secondary effects").

[15] *City of Renton*, 475 U.S. at 51-52.

[16] *Alameda*, 535 U.S. at 438-39 (rejecting "empirical data" requirement); *City of Erie*, 529 U.S. at 300 (plurality opinion) (noting that the Court has "flatly rejected" the notion that empirical analysis trumps local legislative judgments); *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1195-96 (9th Cir. 2004) (quoting *Stringfellow's of N.Y., Ltd. v. City of New York*, 694 N.Y.2d 401, 417 (N.Y. 1998) for the proposition that "[a]necdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects....").

[17] *Alameda*, 535 U.S. at 439; *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1199 (10th Cir. 2003) ("*Heideman I*").

[18] *BGHA, LLC v. City of Universal City*, 340 F.3d 295, 299 (5th Cir. 2003) (emphasis in original).

[19] *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir. 2007).

[20] *Id.* at 303.

regulation,[21] this did not relieve the government of its minimal burden of adducing at least some evidence of the negative secondary effects the regulation was intended to curb.[22] Because the government had not met this burden, the court reversed and remanded the case, noting that the government's burden on remand is light.[23]

A different result obtained in *Fantasy Ranch, Inc. v. City of Arlington*,[24] where the city compiled a substantial pre-enactment legislative record supporting its secondary effects rationale for imposing a six-foot buffer between erotic dancers and patrons.[25] Although plaintiffs retained multiple experts to challenge this legislative record, their reports were insufficient under *City of Los Angeles v. Alameda Books, Inc.*, to "cast direct doubt" on the city's legislative rationale and shift the burden of proof back to the city.[26]

In affirming summary judgment for the city, the Court explained:

> 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 [162] at 180 [5th Cir. 2003)]; *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*.

Other cases from the Fifth Circuit are in accord in holding that plaintiffs face a heavy burden when challenging the legislative rationale for an adult business regulation, especially where the municipality has developed a strong legislative record for the enactment.[27]

> That being said, even where a city has developed a thorough secondary effects record, the regulation must still be narrowly tailored to serve the "secondary effects" interest identified in that record. In other words, there must be a link between the secondary effects evidence upon which the municipality relies and the regulation it has adopted. This issue is addressed next.

Narrowly Tailor Definitions and Regulations to Serve the Interest

As many cities have learned, accurately defining "adult businesses" is no easy undertaking. Fortunately, those cities' learning experiences have provided a detailed roadmap that gives more than ample direction on how to draft enforceable adult business definitions.

The goal is to cast the net wide enough to encompass a broad range of adult business models and at the same time to narrowly tailor the language to "affect only that category of [businesses] shown to produce the unwanted secondary effects."[28] This can be done through language that shows that the ordinance will be applied only to establishments whose substantial and regular fare is sexual in nature.

For example, the definition of "adult motion picture theater" in a local ordinance included any "commercial establishment which excludes minors from the showing of one of every four consecutive exhibitions." This is problematic in that it would technically cover movie theaters that show R-rated movies and properly exclude minors from those shows by reason of age. Even if this is not how the city would apply the definition, the relaxed standing rules applicable to First Amendment cases would permit a business to raise such an argument in a facial constitutional challenge.[29]

Similarly, some legitimate, non-sexually oriented establishments—not associated with the secondary effects of sex businesses—occasionally perform works that contain incidental nudity or semi-nudity. Examples of such works postulated by the adult industry lawyers include Hair, Dance of the Seven Veils, and Oh! Calcutta. To avoid being overly broad, the definition of adult cabaret should apply only to establishments that "*regularly* feature" performances characterized by an emphasis on nudity or semi-nudity (depending on whether nudity is prohibited by ordinance or state law).[30] Moreover, the term "regularly features"

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[21] *Id.* at 310.

[22] *Id.* at 311.

[23] *Id.* at 315 n.11 ("We emphasize that our holding is a narrow one. Considering the light evidentiary burden borne by the State, the outcome could potentially have been different had the land-use studies excluded by the district court remained in the record.").

[24] 459 F.3d 546 (5th Cir. 2006).

[25] *Id.* at 559 ("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.").

[26] *Id.* at 561 ("We find this evidence, even when viewed in a light most favorable to the plaintiff, plainly insufficient to preclude summary judgment.").

[27] *See, e.g. Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002) (holding that city's evidence was sufficient to meet *Renton* standard); *BGHA, LLC v. City of Universal City*, 340 F.3d 295 (5th Cir. 2003) (same); *N.W. Enters., Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003) (rejecting, in an extensive decision, a litany of constitutional challenges to adult business regulations); *LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002) (holding that rural jurisdiction may rely on urban studies documenting negative secondary effects); *but see Abilene Retail #30, Inc. v. Bd. of Comm'rs of Dickinson County*, 492 F.3d 1164 (10th Cir. 2007) (disagreeing with *LLEH* and holding that rural county could not rely on urban studies).

[28] *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53 (1986).

[29] *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

[30] *See Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000) (reversing district court's invalidation of ordinance on overbreadth grounds because the definition of "adult cabaret" included the "regularly features" limitation).

should also be defined.[31] Limiting language such as this often helps cities to diffuse plaintiffs' arguments that mainstream theatrical venues will be regulated.

Two recent Fifth Circuit cases concerning the regulation of adult bookstores highlight the difficulty cities sometimes face in regulating adult uses. In *Encore Videos, Inc. v. City of San Antonio*,[32] the city defined an "adult bookstore, adult novelty store, or adult video store" to include an establishment that devotes over 20% of its inventory or floor space to sexually explicit materials.[33] The Court held that because the ordinance applied to establishments that did not have "peep show booths" for *on-premises* viewing of the sexually explicit material, and because a 20% threshold could allegedly sweep within its ambit "many garden-variety book or music stores with restricted adult sections," the city had not met its burden—notwithstanding an extensive legislative record—of showing a sufficient connection to secondary effects.[34]

More recently, however, the Fifth Circuit upheld a similar ordinance—without the 20% threshold language—that regulated, among other sexually oriented businesses, so-called "off-premises only"[35] adult bookstores. In *H & A Land Corp. v. City of Kennedale*,[36] the court held that land use studies from Indianapolis and Oklahoma City—contained in the city's legislative record—established the city's interest in regulating such adult bookstores. The court stated:

> Moreover, the Indianapolis survey also asked respondents to explain their prediction that an adult bookstore would negatively impact property value: 29% believed such an establishment would attract "undesirables" to the neighborhood, 14% felt it would create a bad image of the area, and 15% felt that it offended prevailing community attitudes. These reasons are equally applicable to an on-site or off-site establishment, and are distinguishable from the problems we have found to be unique to on-site businesses.

The lesson of these cases is that cities should not only compile relevant "secondary effects" documents such as land use studies, but should also endeavor to include evidence documenting harms from a wide variety of sexually oriented land uses. This breadth of legislative evidence will serve the municipality's interest in defending its adult business regulations.

Conclusion and a Lesson from a Local Case

The time to ensure that your local government's sexually oriented businesses are properly drafted and up to date is now. A recent Mississippi case illustrates the point. Two adult cabarets (*a.k.a.* strip clubs) filed applications for special zoning permits from a Mississippi county, which were denied under an ordinance that did not set forth specific requirements and procedures for such uses. While pursuing their administrative appeals, the adult businesses filed suit in federal court. Fortunately, the county was able to adopt a comprehensive ordinance shortly before the administrative appeals were to be heard.

The county moved to dismiss the lawsuit on mootness grounds, claiming that the plaintiffs' claims for declaratory and injunctive relief were no longer justiciable. The federal court agreed, and dismissed most of the lawsuit with prejudice. The remaining portion of the lawsuit—the plaintiffs' request for damages—was dismissed without prejudice on ripeness grounds.

The plaintiffs appealed and, after oral argument, the Fifth Circuit affirmed the district court's decision in a *per curiam* opinion.[37] While the plaintiffs never pursued their as-applied damages claim, that is likely attributable to the fact that the county was particularly hard-hit by Hurricane Katrina. In any event, the county may have avoided significant litigation by having up-to-date ordinances in place before the issue arose.

The courts have developed a detailed roadmap to follow for drafting and defending adult use regulations. Local governments that carefully follow that roadmap are serving their citizens' interests by proactively regulating to minimize the adverse secondary effects of sexually oriented enterprises. Quite often, some influential Federal Circuit, including the Fifth, will annually hand down several opinions that affect the contours of the regulation of sexually oriented businesses. Governmental entities, especially municipalities, would be wise to re-visit their legislative ground rules and modify, as necessary. Simply adopting a contemporary ordinance, good today, will not immunize a city from an attack tomorrow, contending unconstitutionality of the legislative restriction. Any attorney having any influence over the local governmental mandate (such as a city or county attorney), would be wise to determine the protection that its agency now enjoys, if any, and whether their current legislative scheme affords maximum or desired protection from the adult oriented business industry. If not, the political and economic consequences can be significant. ■

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[31] Examples of how to define the phrase are found in several cases. *See Shultz, supra* note 31; *see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 259-260 (1990) (Scalia, J., concurring in part and dissenting in part); *Fantasyland Video, Inc. et al. v. County of San Diego*, 373 F. Supp. 2d 1094, 1126 (S.D. Cal. 2005), *aff'd, Fantasyland Video, Inc. et al. v. County of San Diego*, Nos. 05-56026, 07-55033, 2007 WL 2983710 (9th Cir., Oct. 15, 2007).

[32] 330 F.3d 288 (5th Cir. 2003).

[33] *Id.* at 294.

[34] *Id.* at 294-95.

[35] The notion that sexually explicit images are viewed only "off-premises" at such stores is a fallacy created by the adult business industry. Adult bookstores of all varieties typically have thousands of hard-core videos and DVDs on display. The box covers and display cases of these items regularly show graphic sexual scenes of the variety contained in the enclosed media. Thus, even where "peep show booths" do not operate, customers can view hundreds, if not thousands, of sexually explicit scenes.

[36] 480 F.3d 336 (5th Cir. 2007).

[37] *Magnolia I, Inc., et al. v. Hancock County, Miss.*, No. 05-60570, 199 Fed. Appx. 398 (5th Cir., Sept. 11, 2006) (*per curiam*). The author served as counsel for Hancock County along with MDLA Immediate Past President William E. Whitfield, III of Bryant, Dukes & Blakeslee, P.L.L.C., in Gulfport, and Ronnie Artigues, County attorney for the Hancock County Board of Supervisors-also a partner at the Bryant Dukes firm.