EFFECTIVE REGULATION OF ADULT BUSINESSES: UPDATE FROM THE FEDERAL COURTS OF APPEAL

Presented By

Scott D. Bergthold
Community Defense Counsel
11000 N. Scottsdale Rd.
Suite 144
Scottsdale, Arizona 85254

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INTRODUCTION

A few years ago, observers were surmising that the availability of sexually graphic fare on the Internet would cause typical sexually oriented businesses (SOBs) to slowly disappear from the American landscape. It doesn't seem to be happening. In fact, just the opposite may be occurring. According to the June 14, 1999 issue of *Forbes*, one leading strip club chain (Déją Vu) posted profits of $75 million from its more than 50 locations in 1998. Similarly, the editor of *Stripper* magazine was recently quoted as saying that the number of clubs had doubled in recent years. Many of these businesses are opening in cities with no SOB ordinance. *See Governing Magazine*, October, 1997.

There are several potential reasons for the growth of the SOB industry concurrent with that of the Internet. First, there is an alarming growth in sexual addiction cases related to the Internet. According to a recent survey of more than 9,000 MSNBC.com readers, at least 8% of the 20 million people that visit sex sites each month are at risk of developing problems with relationships or at work - including a great many of whom did not suffer from sexual addictions before they logged on. *See* Charlene Laino, *MSNBC Users Click and Tell: Thousands Faces Problems Due to Dalliances with Online Erotica*, <http://www.msnbc.com/news/376204.asp>. As more people become addicted to sexually graphic fare, the market demand for physical locations that will "put some flesh" on those appetites will continue to grow. And while a wide range of sexually explicit material is available online, only SOBs offer "lap dances" and "couch dances."

Economics also play a part. Competition on the Internet is stiff, and a handful of first-to-market players control a large number of the very profitable sites. For others, it is difficult to capture a distinct share of the market. Conversely, a physical business near the highway in a small town has a definite geographic market and fairly predictable traffic. This helps explain why many small towns are now facing adult business battles.

All this means that cities and towns have an increasing need to protect their neighborhoods from the adverse effects of adult businesses while at the same time implementing regulations that adequately safeguard First Amendment rights.

It is noted at the outset that this paper is not intended to be a comprehensive discussion of adult business regulatory issues. Instead, this paper will discuss recent federal court developments in a few areas of SOB regulation. For a full treatment of the time, place, and manner regulation of adult businesses, please consult our firm's manual entitled *Protecting Communities from Sexually Oriented Business.* Additionally, IMLA offers an excellent resource entitled "An Up-to-Date Primer on Controlling Strip Joints and Other Adult Uses Through Licensing and Zoning Regulations," by Peter M. Friedman of Burke, Weaver & Prell in Chicago, Illinois. Ongoing SOB legal updates may also be obtained online at www.communitydefense.org.

PART I: *Pap's A.M. v. City of Erie* and the Future of Public Nudity Bans

A. *Barnes* and Its Progeny

In 1991, the Supreme Court in *Barnes v. Glen Theatre* upheld Indiana's public indecency statute as applied to prohibit nude dancing in sexually oriented businesses. 501 U.S. 560 (1991). The *Barnes* decision produced three opinions agreeing on the judgment: the plurality opinion authored by Chief Justice Rehnquist, in which Justices Kennedy and O'Connor joined, a concurring opinion filed by Justice Scalia, and a concurrence filed by Justice Souter. Each of the Justices supporting the judgment agreed that the Indiana statute could not be characterized as relating to the suppression of free expression.

Justice Scalia took the broadest view, opining that any rationale basis would support the ban on public nudity. "Since the Indiana regulation is a general law not specifically targeted at expressive conduct, its application to such conduct does not in my view implicate the First Amendment." 501 U.S. at 576 (Scalia, J., concurring).

The plurality took a narrower view of what was necessary to justify the statute. Concluding that nude dancing is conduct at the outer perimeter of protected expression, the plurality required, under *U.S. v. O'Brien*, that the statute advance a "substantial" or "important" government interest. This they found in the state's substantial interest in promoting societal order and morality.

Justice Souter took the narrowest view. Also concluding that the plaintiffs' nude dancing was entitled to a degree of protection, Justice Souter upheld the statute because it furthered the State's substantial interest in preventing the negative secondary effects (prostitution, sexual assault, and other criminal activity) of nude dancing at sexually oriented businesses. In a footnote, however, he issued a caveat: "It is enough, then to say that the secondary effects rationale on which I rely here would be open to question if the State were to seek to enforce the statute by barring expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in Renton v. Playtime Theatres, Inc. 475 US 41, 89 L Ed 2d 29, 106 S Ct 925 (1986)." 501 U.S. at 584, n.2 (Souter, J., concurring). In this vein, it is important to remember that the statute at issue in *Barnes* had previously been narrowly construed by the Indiana Supreme Court to prevent overbreadth problems.

Adult business operators continually attempt to undermine *Barnes* because it was a plurality opinion, which by definition indicates that there were different opinions expressed by the justices concurring in the judgment. Nevertheless, the federal courts of appeal have consistently applied the *Marks* rule to conclude that Justice Souter's position - that the prevention of secondary effects justifies prohibiting public nudity in sex businesses - is the holding of *Barnes*. Public nudity bans have generally been upheld as applied to nude dancing in sex businesses

regardless of whether they are general in their application (with certain exceptions for breastfeeding, etc.) or specific in their application to only "adult" businesses. *See Déją Vu v. Metro Gov't (In re Tennessee Pub. Indecency Statute)*, 1999 U.S. App. LEXIS 535 (6th Cir. Jan. 13, 1999); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 408 (6th Cir. 1997); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994); *Farkas v. Miller*, 151 F.3d 900, 904 (8th Cir. 1998) (nudity prohibited at sexually oriented businesses); *J & B Entertainment v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998); *International Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157, 1160-61 (1991).

Recently, in *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998), the Eighth Circuit Court of appeals reviewed an Iowa statute which banned nudity at adult establishments, thus requiring erotic dancers to wear G-strings and pasties during their performances. Citing *Marks*, the Eighth Circuit concluded that Justice Souter presented the narrowest resolution of the issues in *Barnes*:

> **The plaintiffs advance numerous arguments that seek to refute Justice Souter's reasoning and conclusions. Regardless of their strength or weakness, these arguments are unavailing, because we are not free to disregard Supreme Court precedent. We must apply the Barnes analysis as expounded by Justice Souter unless we find that this case is somehow distinguishable.**
>
> ***Farkas*, 151 F.3d at 904.**

In many ways, the attacks made against the City of Erie ordinance raise the same disagreements with Justice Souter's analysis. Nevertheless, the Pennsylvania Supreme Court came to a very different conclusion than that reached by the various federal courts of appeal.

B. Pap's A.M. v. City of Erie

1. Background

In 1994, the City of Erie, Pennsylvania passed a public indecency law modeled after the statute upheld in *Barnes*. Pap's A.M., a corporation that operated a nude dance establishment ("Kandyland"), brought suit to enjoin enforcement of the suit on the grounds that ordinance violated the business's First Amendment rights. The Court of Common Pleas entered a permanent injunction and the City appealed.

On appeal, the Pennsylvania Commonwealth Court reversed. Relying on *Marks v. United States*, 430 U.S. 188 (1977), the court found that Justice Souter's concurrence constituted the holding in *Barnes* and, finding that *Barnes* was directly on point, upheld the ordinance as constitutional.

2. The Pennsylvania Supreme Court's Circumvention of *Barnes*

The Pennsylvania Supreme Court reversed the Commonwealth Court and held that the City's ordinance was unconstitutional. Disagreeing with the lower court, the Pennsylvania Supreme Court found that no binding precedent could be discerned among the various opinions issued by the U.S. Supreme Court in *Barnes*. The court took a very narrow view of the narrowest-grounds test laid out in *Marks* and found the test proposed by Justice Souter did not command the five votes necessary to be considered binding precedent.

The Pennsylvania Supreme Court interpreted *Marks* to require that, in order to constitute binding precedent, a rationale expressed by a Justice must be a "subset of ideas expressed by a majority of other members of the Court." Based on its application of this rule, the Pennsylvania court concluded that Justice Scalia's vote did not support Justice Souter's rationale because the rationale of Justice Scalia differed too greatly from that of Justice Souter. Justice Scalia had voted to reverse the decision of the Court of Appeals for the Seventh Circuit because he believed that the regulation was a "general law regulating conduct and not specifically directed at expression, [thus it was] not subject to First Amendment scrutiny at all." The Pennsylvania Supreme Court held that Justice Scalia's opinion did not encompass and was not consistent with Justice Souter's opinion, although both had voted to reverse the lower court. This finding is somewhat surprising, considering that Justice Scalia stated that his conclusions did not "differ greatly" from those of the plurality and that the plurality's conclusions had been very similar to those of Justice Souter. The only point of agreement in *Barnes*, according to the Pennsylvania court, was that nude dancing enjoyed "some First Amendment protection."

Having decided that it was not bound by any precedent set by *Barnes*, the Pennsylvania Supreme Court independently examined the City of Erie ordinance and found it unconstitutional because it was content-based and did not pass the strict scrutiny test. The court relied on one of the opinions in the *Barnes* decision in reaching this holding: Justice White's dissenting opinion. Despite having found nothing on which to rely in the three opinions that supported the Court's judgment in *Barnes*, the Pennsylvania Supreme Court relied extensively on the one opinion that did not support the Court's judgment.

In doing so, the Pennsylvania Supreme Court made two clear errors regarding the *Barnes* decision. First, the court stated that the *only* proposition that a majority of the justices agreed on was that nude dancing is entitled to First Amendment protection. This resulted in the court's misapplication of the *Marks* rule to conclude that there was no binding opinion in *Barnes*. Second, after concluding that *Barnes* was not binding, the court concluded that the law was content-based, applied strict scrutiny, and adopted a rationale explicitly rejected in Justice Souter's opinion.

a. Agreement in *Barnes* and the *Marks* Rule

The Pennsylvania Supreme Court concluded the only point of agreement of a majority in *Barnes* was that nude dancing is protected speech. However, to come to this conclusion, the court first had to disregard the agreement that clearly existed among the Chief Justice and Justices Scalia, O'Connor, Kennedy, and Souter. In a separate opinion, Justice Castille of the Pennsylvania Supreme Court (who concurred on state law grounds), noted the majority's mistake:

> **I believe that the majority herein strains to find discord in Barnes where none exists. In so doing, the majority circumvents binding United States Supreme Court precedent.**
>
> **My disagreement with the majority centers on the fact that five Justices, and thus a majority, voted to uphold the ordinance in Barnes on the basis that the ordinance at issue in Barnes could not be characterized as relating to the suppression of free expression for purposes of the First Amendment. Therefore, a five-Justice majority declined to apply the strict scrutiny test.**
>
> ***Pap's*, 719 A.2d at 282 (Castille, J., concurring).**

All five Justices agreed upon the major premise that the Indiana statute was directed at conduct, not expression. They differed as to the minor premise, i.e., the impact of this finding. Justice Scalia concluded that such a finding meant that the law did not implicate the First Amendment at all. The plurality concluded the First Amendment was implicated because Indiana's regulation of conduct had incidental limitations on expressive activity, but that the State's interest in protecting societal order and morality justified those incidental limitations. Justice Souter agreed with the plurality as to the applicability of the First Amendment, but wrote separately to concur in the judgment based upon the State's substantial justification in preventing the documented, negative secondary effects of nude dance establishments.

Justice Souter's holding that prevention of negative secondary effects justified the regulation is a coherent subset of principles upon which five Justices agreed. The fact that four of the five did not believe that such a justification *was necessary* to uphold the law does not alter this conclusion. Three opined that something less -- a broader interest in protecting morality and societal order -- is enough to justify the statute. And one opined that because of the major premise on which all five agree, i.e., that the law is unrelated to the suppression of free expression, that the First Amendment was not involved and an even broader range of government interests -- any rational basis -- would justify the law. As the even more pronounced disagreement discussed in the *Marks* case makes clear, disagreement as to the minor premise among those concurring in the judgment does not prevent Justice Souter's concurrence from being the law.

b. Content Neutrality of Prohibiting Nude Conduct

After dispensing with *Barnes*, the Pennsylvania Supreme Court conducted its own independent analysis of the Erie ordinance. The court looked specifically at the preamble to the Erie ordinance, which stated that the ordinance was adopted for the "purpose of limiting a recent increase in live nude entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects."

This should have clarified the City's position that the ordinance was directed at the secondary effects that attend nude conduct on the premises of adult businesses -- just as footnote two of Justice Souter's opinion in *Barnes* seems to require. The preamble provides the substantial justification *Barnes* requires and helps the ordinance to avoid overbreadth issues in the absence of a narrowing construction from the state court.

Instead of giving a favorable construction, the Pennsylvania court cited the preamble prior to striking the ordinance down -- not on overbreadth grounds, but based on the conclusion that the ordinance was *content-based*.

Specifically, the court quoted the portion of Justice White's dissent where he stated:

> **It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating such thoughts and ideas in the minds of the spectators may lead to increased prostitution**…
> ***Barnes*, 501 U.S. at 592 (White, J., dissenting).**

However, in relying on Justice White's statements, the Pennsylvania court failed to mention that this argument was addressed by each of three opinions concurring in the *Barnes* judgment. In fact, Justice Souter quoted the same portion of Justice White's dissent and responded that the secondary effects associated with nude dancing are not necessarily the result of any "persuasive" effect the nude dancing may have:

> **It is possible, for example, that the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities, or from the simple viewing of nude bodies regardless of whether those bodies are engaged in expression or not. In neither case would chain of causation run through the persuasive effect of the expressive component of nude dancing.**

Id. **at 586 (Souter, J., concurring)**

The majority of the Pennsylvania circumvented *Barnes* without either attempting to distinguish it or to answer this argument. Moreover, the court gave no factual basis for finding that, in addition to the purpose of preventing secondary effects, the Erie ordinance had "an unmentioned purpose" to impact negatively on the erotic message of nude dancing. *Pap's*, 719 A.2d at 279.

For these reasons, it is likely that the Supreme Court will reverse the Pennsylvania Supreme Court and reinforce its holding in *Barnes*. However, at oral argument, Justice Souter indicated that he would be willing to revisit *Barnes* or possibly to draw a distinction based on the preamble in the Erie ordinance. 1999 WL 1075161, at 10. This would not bode well for the numerous cities that have passed laws based upon *Barnes* or those many others that seek to prevent the negative secondary effects of adult businesses.

C. The *Barnes* Vortex and the Content Neutral Solution

To comply with *Barnes*, cities drafting ordinances to prevent adult business harms must enact nudity prohibitions that are both generally applicable (i.e., content neutral) and narrowly tailored (i.e., not overly broad). Thus, the law must not be targeted at suppressing any particular expression, but also must be sufficiently targeted to address negative secondary effects.

In the author's opinion, the best way to accomplish this is not through a general public indecency ordinance, though these have been upheld on numerous occasions. Instead, it is better to draft a prohibition of public nudity that applies only on the premises of sexually oriented businesses. This is the approach already taken by many cities and the approach suggested in the model ordinances available from IMLA, our firm, and various leagues of cities. Simply prohibiting nudity (by any person) in SOBs meets the requirements of being content-neutral as well as being narrowly tailored to address secondary effects.

First, it is not a prohibition of *nude dancing*, but of nudity in general on the part of any performer, employee, patron, or any person on the premises of an SOB. Thus, the law cannot be said to be targeting any particular message or "persuasive effect" conveyed through dancing. For while the law would certainly prohibit complete nudity of dancers and performers on stage, the law would also be violated if a patron exposed himself to a dancer while soliciting a lap dance. It would also be violated if a patron in an adult bookstore exposed himself while in a peep show booth. In these latter examples, no protected expression is taking place.

In this vein, it may be advisable to avoid -- in the preamble or otherwise -- a reference to "live nude entertainment," even if that phrase occurs in the context of a secondary effects statement as it did in the Erie ordinance. Instead, it would better

serve the city to mention the adult *establishments* or *businesses* as being empirically associated with negative secondary effects.

Another benefit is that this approach avoids what one might call the "Boos v. Barry" problem. In *Boos v. Barry,* 485 U.S. 312 (1988), the Supreme Court invalidated a law in the District of Columbia that prohibited the display of signs critical of a foreign country within 500 feet of the country's embassy. The government attempted to bring the display provision within *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) by arguing that the law prevented a secondary effect -- offending the dignity of foreign diplomats, which effect was disfavored under international law.

In drawing a distinction the Court said this:

> **But while the regulation in Renton applied only to a particular category of speech, its justification had nothing to do with that speech…. Instead, the ordinance was aimed at … effects that are almost unique to theatres featuring sexually explicit films, i.e., prevention of crime, maintenance of property values….**
>
> **Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of "secondary effects" we referred to in Renton. To take an example factually close to Renton, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate.**
>
> **485 U.S. at 320-21.**

Thus it is clear that cities' regulations of public nudity must be addressed to the associated secondary effects, and must do so without running through any chain of causation stemming from the psychological or emotional (or perhaps even physical) impact of sexual expression.

Second, applying the ban only to adult businesses satisfies Justice Souter's requirement that the law be justified by a substantial government interest. Failure to so confine the reach of a prohibition on public nudity to SOBs has caused overbreadth problems that can jeopardize an ordinance. *See, e.g., Triplett Grille v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) (noting that "the City has failed to demonstrate a link between nudity in non-adult entertainment and secondary effects…").

The provision suggested in the model ordinances mentioned above would apply only to that class of establishments commonly associated with negative secondary effects such as prostitution, drug activity, and urban blight. It would not

apply to theatrical performances that adult business attorneys routinely suggest in their overbreadth challenges. Incidental nudity and the now-infamous examples of high-brow art that contain nudity (*Hair, Equus, and Oh! Calcutta*) would not be affected if not performed on the premises of a sexually oriented business where secondary effects justify regulating the establishment as a whole.

D. Conclusion

The ability to regulate conduct -- including conduct which arguably contains expressive elements -- is an important function of local governments. It is likely that the Supreme Court will reinforce that ability in *Pap's A.M. v. City of Erie*. In any event, the Court's decision will clarify the extent to which municipalities can take proactive measures to better protect their communities from the negative effects of adult businesses.

PART II: Needed: A Prompt Answer to the "Prompt Judicial Review" Question

A. Freedman, FW/PBS, and Following

In *Freedman v. Maryland*, 380 U.S. 51 (1965), a state censorship statute required that before public showing, all films be first submitted to the "Maryland State Board of Censors" for prior approval and licensing. Because the censor's business is to eliminate expression of certain material or ideas, the *Freedman* Court acknowledged a danger that the censor may be "less responsive than a court - part of an independent branch of government - to the constitutionally protected interests of free expression." *Id.* at 57-58.

The Court in *Freedman* determined that, in order for a censorship scheme to pass constitutional muster, the following three procedural safeguards must be present: 1) any restraint prior to judicial review can be imposed only for a specified brief period when the status quo must be maintained; 2) prompt judicial review of that decision must be available; and 3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Id.* at 58-60.

Although *Freedman* provided this three-part analysis regarding necessary procedural safeguards in a statute that authorized censorship of the content of expression, a 1990 Supreme Court decision relaxed this standard for regulations that license individuals to engage in sexually oriented business. In *FW/PBS v. City of Dallas*, the Court reviewed a licensing scheme that required adult business operators to apply for a license and prohibited individuals convicted of certain crimes from obtaining a license. 493 U.S. 215 (1990) (plurality opinion).

In an opinion by Justice O'Connor, three Justices opined that the licensing scheme was "significantly different from the censorship scheme examined in *Freedman*." *Id.* at

228. Although the censorship requirement in *Freedman* was "presumptively invalid" because it permitted direct censorship of expressive conduct, Justice O'Connor explained that a licensing scheme does not require individuals to judge the content of the speech. Instead, "the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Id.* Since a license is distinguishable from a censorship program, Justice O'Connor held that the three-part *Freedman* test may be relaxed and still maintain the needed protection against suppression of ideas:

> **Because of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court. Limitations on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the "principle that the freedoms of expression must be ringed about with adequate bulwarks.**
>
> ***Id.* at 240 (quoting Bantam Books v. Sullivan, 372 U.S. 58, 66 (1963)).**

In a concurring opinion, Justices Brennan, Marshall, and Blackmun opined that all three procedural safeguards should apply to the Dallas licensing scheme as well as to the censorship statute. Further, Justice Brennan characterized the right of prompt judicial review as one of "prompt judicial determination."

The difference between Justice O'Connor's and Justice Brennan's views of the right to prompt judicial review has led to a split in the circuits. The Fourth and Sixth Circuits have previously held that a prompt judicial determination must be assured, whereas the First, Fifth, and Seventh Circuits have held that for licensing ordinances, "prompt judicial review" means only access to prompt judicial review. *See Jews for Jesus v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993); *TK's Video v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993); *but see, 11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995).

B. The Split Grows

In recent months, cases decided in the Sixth, Ninth, and Eleventh Circuits have caused the split in the federal appellate courts to widen.

1. Sixth Circuit - *Nightclubs, Inc. v. City of Paducah*

In *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 2000 U.S. App. LEXIS 1245 (6th Cir., Feb. 2, 2000), the City of Paducah's ordinance provided that an applicant, or licensee whose license had been suspended or revoked, could seek a review of the City's decision "in any court of competent jurisdiction." *Id.* at *19.

Under Kentucky law, the aggrieved applicant or licensee could appeal the City's decision by filing "an original action" in state court. The Sixth Circuit noted that Kentucky law does not "in any way limit the time for furnishing transcripts, conducting a court hearing, or rendering a judicial decision." *Id.*

The court invalidated the licensing scheme for, *inter alia*, failing to provide for prompt judicial review. The court found that, "This procedure for judicial review contains an even greater potential for indefinite delays than the Memphis scheme this Court found unconstitutional in *East Brooks Books*." Unlike in that case, where a delay of five months was held to be constitutionally infirm, "Kentucky law fails to guarantee judicial review of Paducah's licensing decisions within any particular time, let alone within five months." *Id.* at *20.

The Sixth Circuit's opinion expressed a somewhat troubling view of state courts' sensitivity to First Amendment concerns:

> **While we trust state courts to exercise due diligence, we cannot be sure that a state judge, who often is elected and toiling under a busy docket, will conduct a hearing and render a decision in a prompt manner.**
>
> ***Id.* at *21.**

Despite contrary authority in the other Circuits, the court reiterated its position that Justice O'Connor's plurality opinion should not be read "as relaxing Freedman's requirement of 'a prompt judicial decision.'" *Id.* at *24 (quoting *Freedman*, 380 U.S. at 59).

2. Ninth Circuit - *Baby Tam & Co. v. City of Las Vegas*; *4805 Convoy, Inc. v. City of San Diego*

Similarly, the Ninth Circuit Court of Appeals has recently issued a series of opinions that articulate exacting standards for the licensing of sexually oriented businesses. *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) ("Baby Tam I"); *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999); *Baby Tam & Co. v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000).

In *Baby Tam I*, the Ninth Circuit reiterated the requirement that a prior restraint must contain certain procedural safeguards. Finding that *FW/PBS* "did not overrule *Freedman*," the court held that an ordinance which, under Nevada law, allowed for a writ of mandamus as an assurance of prompt judicial review is inadequate under *Freedman*. The court compared the split in the circuits and determined that "prompt judicial review" means an "opportunity for a prompt hearing and a prompt decision by a judicial officer." 154 F.3d 1097, 1101 (9th Cir. 1998). The court found:

The phrase "judicial review" compels this conclusion. The phrase necessarily has two elements - (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless.

***Id.* at 1101-1102.**

The court concluded its decision to impose a requirement of judicial determination by holding that a judicial officer should make the final decision denying a license rather than a state censor. *Id.* at 1102.

Shortly after *Baby Tam I* was decided, the Ninth Circuit extended its holding in the case of *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999). In *Convoy*, the court stated the policy behind the prompt judicial determination standard is that of preventing undue delay that could lead to the suppression of protected speech. The court explained that, "[I]n pursuing this goal, we conclude that we must extend *Baby Tam's* requirement of an opportunity for a prompt hearing and decision by a judicial officer in license denial cases to license suspensions or revocations as well." *Id.* at 1115.

Nevertheless, the court found that "the City's ordinance and the California statutory scheme contain no express time limits or guarantee of a prompt hearing or decision…" *Id.* The court went on to enjoin the City from enforcing the "license suspension or revocation for ninety days after an administrative appeal becomes final, the time allowed for filing a writ of administrative mandamus under the California statutory scheme." *Id.* at 1116. After that, the court ordered, the "City will be enjoined from enforcing a suspension or revocation until there is a decision by a judicial officer." *Id.* (citing *Baby Tam*, 154 F.3d at 1102).

The court did note, however, that in the suspension and revocation context, the safeguard against undue delay "may also be met by the preservation of the status quo even if there is no provision for a prompt judicial hearing and decision." *Id.* In other words, a municipality could avoid the prompt judicial review problem during suspension and revocation actions by providing, for example, an automatic stay pending the judicial decision.

Earlier this year, in the second round of *Baby Tam* litigation, the Ninth Circuit had occasion to revisit the issue of prompt judicial review. 199 F.3d 1111, 2000 U.S. App. LEXIS 477 (9th Cir. 2000) (*Baby Tam II*). After *Baby Tam I*, the City of Las Vegas set out to correct the problems that the Ninth Circuit identified in its ordinance and in the Nevada statutory scheme. The City not only amended its ordinance to provide for a temporary license if the state district court fails to render a decision within 30 days, but the City also secured amendments to the Nevada Revised Statutes and the local court's rules of practice - all to satisfy the Ninth Circuit's requirements.

Pursuant to these fixes, the City sought and received from the federal district court a dissolution of the permanent injunction. *Baby Tam II*, 199 F.3d at 1113-14.

The Ninth Circuit affirmed that these fixes solved the prompt judicial review problems in the Las Vegas ordinance. Nevertheless, the court found a separate, but related problem that cities must be mindful of.

The court noted that the prompt judicial review question was not the only issue raised by the plaintiffs in *Baby Tam I*. 154 F.3d 1097, 1102 (9th Cir. 1998) ("Having resolved [the prompt judicial review] issue, it is unnecessary for us to decide the other issues Baby Tam raises."). The *Baby Tam II* court explained that, "by winning the case on the first appeal, Baby Tam did not abandon it other constitutional objections to the facial invalidity of the municipal ordinance." 199 F.3d at 1114.

The court concluded that the Las Vegas ordinance - like the Dallas ordinance in *FW/PBS* - was defective in that it failed to provide a reasonable time limit in which the licensor must make a decision. Section 6.06A.025 of the Las Vegas ordinance provided that:

> **(A) The Director shall issue or deny the bookstore license to the applicant within thirty days from receipt of a complete application and fees upon compliance with the requirements of this Section and any applicable provisions of Title 6 of this Code.**
>
> **(B) Failure of the Director to approve or deny the license application within the thirty days shall result in the license being granted.**

To most observers, this provision clearly provides for a reasonable time limit within which the licensor must make a decision. But the court said:

> **Section (B) defines the Director's duty to act "within the thirty days." The use of the definite article "the" identifies this period as the thirty days just referred to in (A). Under (A) the thirty days begin to run "from receipt of a complete application and fees upon compliance with the requirements of this Section and any applicable provisions of Title 6 of this Code." Other applicable provisions of the Code include "the standards of the health, zoning, fine and safety laws of the State of Nevada and ordinances of the City of Las Vegas applicable thereto." LVMC § 6.06A.020. No time limit is set within which satisfaction of these requirements must be found. The time is as indefinite as in the invalid Dallas ordinance. The thirty days within which the Director must act may be indefinitely postponed. The ordinance fails to meet the requirements of the First and Fourteenth**

Amendments.

***Baby Tam II*, 199 F.3d at 1115.**

Clearly, in light of these decisions, cities must explicitly provide for non-enforcement of licensing denials, suspensions, and revocations pending a judicial decision. They must also set short time limits specifically for inspections and compliance inquiries to be made during the licensing process.

3. Eleventh Circuit - *Boss Capital, Inc. v. City of Casselberry*

Cities in Eleventh Circuit jurisdictions should be heartened by that court's recent opinion in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). In *Boss Capital*, the court sided with the First, Fifth, and Seventh Circuits in holding that O'Connor's requirement of "the possibility of prompt judicial review" is satisfied with access to a judicial officer. *Id.*

The adult business argued that, in addition to vesting unbridled discretion in the licensor, the licensing ordinance failed to provide the prompt judicial review required in *Freedman*. *Id.* at 1255. The court dismissed the unbridled discretion argument as not having been preserved for appeal, and commenced with discussing the differing views of prompt judicial review that exist among the circuits. After reviewing the split in the circuits, the court concluded:

> ***Boss Capital* makes a good argument that *Freedman* requires prompt judicial resolution of censorship decisions, but in the end we conclude that access to prompt judicial review is sufficient for licensing decisions. *Freedman* itself unmistakably requires "a prompt judicial decision" . . . *Freedman*'s progeny also require an assurance of a prompt judicial decision . . .**
>
> **Still, none of these pre-*FW/PBS* cases involved a licensing ordinance for adult entertainment establishments. Instead they involved censorship.**
>
> ***Id.***

In its opinion, the Eleventh Circuit pointed out the critical difference between licensing and censorship, noting that "[u]nlike censors, who pass judgment on the *content* of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license." *Id.* The court quoted *FW/PBS* for the proposition that licensors in adult business regulations look at "the general qualifications of each licensing applicant, a ministerial action that is not presumptively invalid." *FW/PBS*, 493 U.S. at 229. Because no content-based

censorhsip is taking place, the *Boss Capital* court held that access to an independent judicial review effectively safeguards freedom of expression.

C. Potential Solutions

Obviously, the "prompt judicial decision" interpretation presents unique problems for municipalities. In recent months, a few solutions and suggested alternatives have emerged in various jurisdictions.

1. Statewide Legislation Mandating Prompt Judicial Review

As the Sixth Circuit noted in *Nightclubs, Inc.*, "[o]nly a state legislature has the power to pass legislation requiring state courts to resolve certain types of cases in a particular period of time." 2000 U.S. App. LEXIS 1245, * 27, n10. Thus, a potential solution, the court suggested, is for cities to petition their state legislatures to enact legislation mandating short time periods in which state courts must resolve administrative appeals. *Id.* at 28. Though this may raise separation of powers issues, it may be the most effective solution to the judicial review problem.

Several cities have been successful in getting such measures passed by their state legislatures. As noted in *Baby Tam II*, above, Las Vegas secured amendments to the Nevada Revised Statutes to allow for prompt judicial review of claims of prior restraint. 199 F.3d at 1113. Similarly, in 1999 the California Assembly amended the California Code of Civil Procedure to mandate a prompt judicial decision in cases alleging prior restraint of speech or expressive conduct. Cal. Code Civ. P. § 1094.8 (See Appendix).

Tennessee's Adult Oriented Establishment Act, passed in 1998, also makes provisions for prompt judicial review. Tenn. Code Ann. § 7-51-1110(d). And currently, the state of Michigan is considering a comprehensive package of SOB regulations that would provide an expedited procedure for reviewing First Amendment claims brought by adult business operators. Securing legislative solutions such as these can be burdensome, but in the end may prove to be a cost-effective measure to prevent litigation of the prompt judicial review issue.

2. Provisional Licenses During Litigation

In addition to statewide legislation, the Sixth Circuit also suggested changes to municipal ordinances. *Nightclubs, Inc.*, 202 F.3d 884, 2000 U.S. App. LEXIS 1245, *26-28. To provide for prompt judicial review, cities will have to go beyond just maintaining the status quo and permit the operation of the business until a decision is rendered on the validity of the licensing scheme. Logistically, there are a couple of ways to do this.

The city's ordinance could provide that a license shall issue if the court fails to render a decision within a specified brief period of time. *Id*. at 26. Alternatively, the ordinance could provide that when a license applicant seeks judicial review of a license denial, the business (or individual) will be granted a provisional license until the court renders its decision. This places the burden of going to court on the applicant and relieves the city from having to file a declaratory action or similar motion. As an additional measure to ensure prompt judicial review, the ordinance may provide that the "administrative transcript must be submitted to a court within a brief, specified period of time." *Id*. at 28.

Since a court will likely grant a preliminary injunction after an adverse decision to a licensing applicant - and the business will be allowed to operate anyway - the suggestions above may be helpful for cities in jurisdictions requiring a prompt judicial decision.

The split in the circuits indicates that the prompt judicial review problem is a ripe issue for the Supreme Court to revisit. The opinions of *FW/PBS* have caused enough confusion for the Supreme Court to hear an appeal and clarify the law.

D. Unanswered Questions and the Need for Supreme Court Clarification

The most obvious question that the Supreme Court must answer is whether "prompt judicial review," *in the context of sexually oriented business licensing*, requires a prompt judicial decision. The Court's answer to this question will turn on whether a majority of the justices recognize the distinction between censorship, which involves decisions based on the content of expression, and applicant licensing, which involves the substantial government interest in preventing recidivism by those convicted of sex-related crimes.

Moreover, this question will ask the Court to define the relationship between content-based prior restraint and the secondary effects doctrine. The Eleventh Circuit, like the First, Fifth, and Seventh Circuits, implicitly recognized the validity of secondary effects analysis in the context of licensing this class of establishments that has empirically fostered crime and other harmful effects in communities. By allowing the government to pass on the general qualifications of a license applicant, the courts recognize that local governments have a substantial interest in preventing crime and its attendant urban blight. This is the substantive issue the Court must address - an issue it sidestepped in *FW/PBS* when it found that the petitioners did

not have standing to challenge civil disability provisions that are now commonplace in municipal ordinances.

CALIFORNIA PROMPT JUDICIAL REVIEW STATUTE

CAL. CODE CIV. P. § 1094.8:

§ 1094.8. Review of First Amendment permit or entitlement decision (a) Notwithstanding anything to the contrary in this chapter, an action or proceeding to review the issuance, revocation, suspension, or denial of a permit or other entitlement for expressive conduct protected by the First Amendment to the United States Constitution shall be conducted in accordance with subdivision (d). (b) For purposes of this section, the following definitions shall apply: (1) The terms "permit" and "entitlement" are used interchangeably. (2) The term "permit applicant" means both an applicant for a permit and a permit holder. (3) The term "public agency" means a city, county, city and county, a joint powers authority or similar public entity formed pursuant to Section 65850.4 of the Government Code, or any other public entity authorized by law to issue permits for expressive conduct protected by the First Amendment to the United States Constitution. (c) A public agency may, if it so chooses, designate the permits or entitlements to which this section applies by adopting an ordinance or resolution which contains a specific listing or other description of the permits or entitlements issued by the public agency which are eligible for expedited judicial review pursuant to this section because the permits regulate expressive conduct protected by the First Amendment to the United States Constitution. (d) The procedure set forth in this subdivision, when applicable, shall supersede anything to the contrary set forth in this chapter. (1) Within five court days after receipt of written notification from a permit applicant that the permit applicant will seek judicial review of a public agency's action on the permit, the public agency shall prepare, certify, and make available the administrative record to the permit applicant. (2) Either the public agency or the permit applicant may bring an action in accordance with the procedure set forth in this section. If the permit applicant brings the action, the action shall be in the form of a petition for writ of mandate pursuant to Section 1085 or 1094.5, as appropriate. (3) The party bringing the action pursuant to this section shall file and serve the petition on the respondent no later than 21 calendar days following the public agency's final decision on the permit. The title page of the petition shall contain the following language in 18-point type: "ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND SUBJECT TO THE EXPEDITED HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE." (4) The clerk of the court shall set a hearing for review of the petition no later than 25 calendar days from the date the petition is filed. Moving, opposition, and reply papers shall be filed as provided in the California Rules of Court. The petitioner shall lodge the administrative record with the court no later than 10 calendar days in advance of the hearing date. (5) Following the conclusion of the hearing, the court shall render its decision in an expeditious manner consistent with constitutional requirements in view of the particular facts and circumstances. In no event shall the decision be rendered later than 20 calendar days after the matter is submitted or 50 calendar days after the date the petition is filed pursuant to paragraph (4), whichever is earlier. (e) If the presiding judge of the court in which the action is filed determines that, as a result of either the press of other court business or other factors, the court will be unable

to meet any one or more of the deadlines provided within this section, the presiding judge shall request the temporary assignment of a judicial officer to hear the petition and render a decision within the time limits contained herein, pursuant to Section 68543.8 of the Government Code. Given the short time period involved, the request shall be entitled to priority. (f) In any action challenging the issuance, revocation, suspension, or denial of a permit or entitlement, the parties to the action shall be permitted to jointly waive the time limits provided for herein.