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Adult Entertainment: Ordinance Prohibiting Nude Dancing Within Proximity of Residences Allows for Adequate Alternative Channels of Communication

BBL, Inc. v. City of Angola, No. 14-1199 (7th Cir. Dec. 7, 2015).

SUMMARY: An Angola, Indiana zoning provision has withstood a First Amendment challenge by an adult entertainment business which could not operate at a particular location where other areas of the city were available for that purpose.

FACTS: Alva and Sandra Butler bought a property in Angola, Indiana that was, at the time, appropriately located for an adult entertainment business. Under the auspices of their company, BBL, Inc. they were going to open "Showgirl," a mix of a lounge and bar with live nude dancing. Before closing the Butlers contacted the city attorney to make sure the property could house the adult entertainment business, a call that prompted quick Town Council action and the zoning administrator sending a letter denying the use because the property was 1,000 feet from a "public gathering place," which the ordinance prohibited. When pressed on what the "public meeting place" was, it was identified as a multi-use trail that would pass the property when built a year later in 2013. Thinking this legal theory must be mistaken, the Butler's company, BBL, finalized the purchase. Angola responded by amending the sexually oriented business ordinance to prohibit such businesses within 750 feet of any residence, a new rule the Butler property did not meet, and requiring an Improvement Location Permit before making any change in land use.

BBL, having now invested about $500,000 into the project, applied for its license to operate and was denied. They appealed the decision and were denied again. BBL then

filed suit, listing seven claims, among which were charges that the Angola ordinance violated its First Amendment rights to freedom of expression and that the permit requirement constituted an unlawful prior restraint. BBL also filed a preliminary-injunction motion, which became the basis for the appeal at hand. The district court denied this motion, prompting BBL to file an interlocutory appeal.

HELD: The Seventh Circuit affirmed the lower court, denying the preliminary injunctive relief.

DISCUSSION: To obtain a preliminary injunction, BBL had to establish that it would suffer irreparable harm pending final resolution of its claims; that traditional legal remedies would be inadequate; and that it would likely succeed on the merits of its First Amendment case. To determine the likelihood of success on the merits, the Court used the *Renton* and *Alameda Books* test*,* under which the government must show that the ordinance "(1) is designed to serve a substantial governmental interest and is narrowly tailored to serve that interest; and (2) allows for reasonable alternative avenues of communication."

In order to show that the challenged ordinance served a substantial interest and was narrowly tailored to promote that interest, Angola had to establish that the ordinance addressed the allegedly adverse secondary effects of sexually-oriented businesses. The City had identified these effects when enacting the ordinance:

> (1) Sexually oriented businesses ... are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation.
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> (2) Sexually oriented businesses should be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other sexually oriented businesses, to minimize the secondary effects associated with such uses and to prevent an unnecessary concentration of sexually oriented businesses in one area.
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> (3) Each of the foregoing negative secondary effects constitutes a harm which the City has a substantial government interest in preventing and/or abating. ... [T]he City's interest in regulating sexually oriented businesses extends to preventing future secondary effects of either current or future sexually oriented businesses that may locate in the City. The City finds that the cases and documentation relied on in this ordinance are reasonably believed to be relevant to said secondary effects.

Interestingly, BBL made a calculated tactical decision not to contest Angola's secondary effects arguments and reserved the right to do so later in the litigation. Thus in order to win preliminary-injunction motion, BBL had to prove that the ordinance did not leave open adequate alternative channels of communication. The issue became a battle of statistics: Angola's expert noted that the ordinance left 41 parcels and 5.34% of the city

limits available for these businesses, while BBL argued that no such parcels were available. Given the conflicting evidence, the lower court had refused to issue the preliminary injunction. The Circuit Court found no error with the lower court's determination and affirmed.

RELATIONSHIP TO *REED*: Because the ordinance was not content-focused but addressed instead the secondary effects of the Showgirl's presence in the community, it presumably would survive *Reed* scrutiny. In a footnote, the Court discussed the case in light of *Reed*, postulating that *Reed* "does not upend" the standards for evaluating sexually-explicit entertainment.

> In its recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015), the Supreme Court clarified the concept of "content-based" laws, which are presumptively unconstitutional and get strict scrutiny. The Court held that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. We don't think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 292, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (plurality opinion).

LINK (last accessed Jan. 6, 2016)

Education: ADA Claim Alleging School's Failure to Relocate Student After Harassment Should Have Been Resolved via Administrative Remedies Under IDEA

M.S. v. Marple Newtown School District, No. 15-1277 (3d Cir. Dec. 22, 2015).

SUMMARY: Where a student brought an action under the Americans with Disabilities Act (ADA) and the Rehabilitation Act after suffering harassment and seeking relocation within the school, she had not exhausted her administrative remedies under the IDEA--which include relocation--and the district court did not have jurisdiction.

FACTS: M.S. was in high school when her sister was assaulted by a boy at the school. For three years the family sought to have M.S. placed in separate classes from the boy and his brother, but to no avail. Finally, she withdrew from classes and was homeschooled. M.S. was subsequently diagnosed with PTSD and an anxiety disorder. M.S. and her family brought claims against the school district and its board under the Rehabilitation Act and the Americans with Disabilities Act. The district court dismissed the case, holding M.S. failed to exhaust her remedies under the Individuals with Disabilities Education Act (IDEA). M.S. appealed.

HELD: The Third Circuit vacated the lower court, holding a failure to exhaust remedies under the IDEA deprived the court of jurisdiction and thus it could not render a decision in the case.

DISCUSSON: The IDEA requires that plaintiffs exhaust the administrative remedies provided therein in actions brought under that Act, and also "in non-IDEA actions where the plaintiff seeks relief that can be obtained under the IDEA." The policy prevents plaintiffs from rearguing claims properly brought under the IDEA merely by repackaging them under a different statute. A claim is subject to the Act's exhaustion requirement if it "relates[s] to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."
Plaintiffs first argued that the school failed to accommodate M.S.'s disabilities by failing to separate her from the antagonists that harassed her. The Court found this intrinsically related to her "educational placement" by its plain language--resolution of the issue depended on where the school placed M.S., quite literally. The second claim, for retaliation, fell victim to the same issue. The complaint argued that M.S. mother's strident efforts to separate the girl from the harassing boys resulted in retaliation from the school – including disciplining M.S. at school and circulating a report about M.S. and her sister that included personal details. Since the behavior that instigated the retaliation was about educational placement, the Court easily found the argument fell within the ambit of the IDEA.

The plaintiffs proffered several counterarguments, including that the Court should overrule the precedent relied upon for the holding and that their accommodation claim could not have been redressed by the IDEA since the problem emanated from the school's failure to address bullying, but all were rejected. The Court thus agreed with the lower court's determination that exhaustion of administrative remedies was required—and the failure to exhaust such remedies deprived the district court of jurisdiction to hear the case.

LINK (last accessed Jan. 6, 2016)

Guns: Illinois Requirement that 18 to 21 Year Olds Must Obtain Parental Consent on Gun Permit Application Does Not Violate Second Amendment

Horsley v. Trame, No. 14-2846 (7th Cir. Dec. 14, 2015).

SUMMARY: The Seventh Circuit has upheld an Illinois statute requiring 18 to 21 year olds to obtain parental consent on firearm permit applications as a legitimate exercise of the State's substantial interest maintaining safety, noting that the registration process allows for appeals where parental consent isn't obtained.

FACTS: Tempest Horsley was 18 years old when she sought her Firearm Owner's Identification Card (FOID) from the State of Illinois. Her application was returned to her with a notation that it was incomplete because it lacked a parent or guardian's signature – a necessary element for FOID applicants in Illinois between 18 and 21. Horsley instantly filed a lawsuit against Jessica Trame in her official capacity as the Chief of the Illinois State Police Firearms Services Bureau. She contended that she wanted a double-barrel shotgun for self-defense in her home, that her parents refused to sign the application and that the State's rejection of her application on this basis violated her Second Amendment rights. The district court granted Trame's motion for summary judgment and Horsley appealed.

HELD: The provision of Illinois law requiring those between 18 and 21 years old to obtain a parent or guardian signature on their application for a firearm does not violate the Second Amendment.

DISCUSSION: The Illinois law at issue provides that an applicant under age 21 must submit evidence that s/he "has the written consent of his or her parent or legal guardian to possess and acquire firearms . . . provided, however, that such parent or guardian is not an individual prohibited from having a Firearm Owner's Identification Card . . . ."

Any person whose application for a gun permit is denied may appeal to the Director of State Police and have a hearing on the matter. In the case of a person under 21, the Director may grant the application as long as the applicant shows that s/he "has not been convicted of a forcible felony within a certain number of years, . . . will not be likely to act in a manner dangerous to public safety, and granting relief would not be contrary to the public interest or to federal law."

Trame and the State first argued the case was not ripe for review, since Horsley had not exhausted her administrative remedies and seek review of her denial. On this issue, the Court disagreed, noting there is no general duty to exhaust administrative remedies before seeking § 1983 relief. The Court identified the two exceptions to this rule, which are takings claims and prisoner suits, neither of which applied here.

Trame's second argument on the merits was more fruitful. The Circuit identified the question presented as whether a scheme under which 18 to 21 year-olds must undergo a different procedure for gun ownership than the process for full-fledged adults violates the Second Amendment. The Court found no such violation.

Trame's primary argument was that the Second Amendment, under the Supreme Court's interpretation, codifies a pre-existing right, and since during the founding era those under 21 were considered "infants" or "minors" who lacked such rights, these individuals do not have a Second Amendment right to gun possession. Trame highlighted Thomas Cooley's 1883 Treatise on Constitutional Limitations for this proposition and a more recent Fifth Circuit case. Horsley, for her part, started with more recent history, noting that until recently the age of majority was considered 18, not 21, and then pointed out that the First Militia Act of the 1792 Congress included 18-year-old

men as part of its ranks. The Court, though it highlighted these interesting historical footnotes, found it need not determine the issue; even if 18 to 21 year-olds are protected by the Second Amendment, the regulation passes means-ends scrutiny.

Under means-ends scrutiny the Court "evaluate[d] the regulatory means the government has chosen and the public-benefits end it seeks to achieve. [It then applied t]he level of scrutiny . . . depend[ing] on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." The Court focused on the fact that, though Horsley treated the regulation as an all-out ban on those under 21 from possessing a firearm, the truth was an appeal process is in place for those that lack a parental or guardian signature. This process distinguished the case from *Heller.*

It also found the law did not impose a severe burden, but only a modest one. As for the public-benefits end, the Court found Illinois has a compelling interest in citizen safety and that it supported the link to this interest law with studies showing that those under 21 commit violent gun crimes more frequently than those over 21. Furthermore, the Court was provided with information about brain development through early adulthood that it found persuasive. The Court ultimately found a sufficient means-end relationship between the law and the government interest and upheld the scheme.

LINK (last accessed Jan. 6, 2016)

Speech: Florida Law Restricting Physicians From Maintaining Records About Patients' Ownership of Firearms Does Not Violate First Amendment

Wollschlaeger v. Governor of Florida, No. 12-14009 (11th Cir. Dec. 14, 2015).

SUMMARY: The Eleventh Circuit, reversing a lower court, has found that a Florida law limiting physicians and medical facilities from inquiring about and maintaining records about patients' ownership or use of firearms unless "relevant" to their medical treatment or the safety of others, was not void for vagueness or overbroad, was not an impermissible content-based limitation on their speech rights and advanced the State's compelling interests in protecting Second Amendment rights and patient privacy.

FACTS: In 2011 Florida Governor Rick Scott signed into law the Florida Firearm Owners Privacy Act (Act), responding to complaints from constituents that medical personnel were asking unwelcome questions about firearm ownership, and that constituents faced harassment or discrimination if they refused to answer such questions--or simply because they were gun owners.

The Act provides that licensed healthcare practitioners and facilities "may not intentionally enter" data about a patient's ownership of firearms into the patient's

medical record that the practitioner knows is "not relevant to the patient's medical care or safety, or the safety of others." Practitioners and facilities must respect the patient's right to privacy, and should not ask about gun ownership absent a good faith belief that the information is “relevant to the patient's medical care or safety, or the safety of others." They may not discriminate against or harass patients based on firearm ownership. Violations of the Act will result in sanctions.

In 2012, the District Court permanently enjoined enforcement of the Act’s provisions regarding inquiry, record-keeping, discrimination and harassment, holding that they facially violated the First Amendment by imposing a content-based restriction of speech, and that the inquiry, record-keeping, and harassment provisions of the Act were void for vagueness. The District Court found that the State had failed to provide any evidence that the confidentiality of information regarding patients' firearm ownership was at risk, noting that a patient may simply decline to provide such information, and that state and federal laws pertaining to the confidentiality of medical records provide adequate protection to patients. It also found that the Act was not the least restrictive means of achieving the State's interests. Florida appealed.

HELD: Reversed. The Act does not violate the free speech rights or due process rights of medical practitioners or facilities.

DISCUSSION: The Circuit Court first examined the issue of vagueness and its due process implications. Plaintiffs had argued that the prohibition against record-keeping unless “relevant” was fatally vague. The Eleventh Circuit disagreed:

> [W]e think the record-keeping provision stands for the simple proposition that a physician may not record a patient's firearm-ownership status unless the physician believes that—because of some particularized information about the individual patient, for example, that the patient is suicidal or has violent tendencies—the patient's firearm-ownership status pertains to the patient's medical care or safety, or the safety of others. The record-keeping provision is sufficiently clear that a person of common intelligence need not guess as to what it prohibits.

Assessing the First Amendment issue, the Circuit Court found that the challenged provisions were not merely laws regulating professional conduct, with incidental restrictions on speech—but directly restricted a “significant amount” of speech. Citing *Reed,* it noted that “The First Amendment does not suffer content-based restrictions of speech lightly. They are presumptively invalid and generally subject to strict scrutiny.” However, it noted, certain types of content-based speech restrictions have traditionally received less-demanding judicial scrutiny. For example, limits on commercial speech receive lesser scrutiny because "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 (1980).

Here, the conversation between the medical professional and patient was within, and relating to, the doctor-patient relationship—in other words, professional speech.

> The status of professional speech is murkier. The Supreme Court has never precisely addressed the proper level of scrutiny for professional speech. Plaintiffs here contend that even if the First Amendment's waters were previously murky, the Supreme Court's recent decision in *Reed v. Town of Gilbert* makes clear that all content-based restrictions on speech are subject to strict scrutiny. As explained below, there was ample evidence before *Reed* that professional speech also received, at most, intermediate scrutiny and it is hardly clear that anything has changed.

The court noted that the State's regulation of professional speech is a means of safeguarding the public, ancillary to the State's police powers to license and regulate practitioners to protect the public health and well-being generally, which would imply a lesser standard of scrutiny. But it declined to analyze which level of scrutiny applied here, because the Act survived even strict scrutiny analysis: the State clearly had a compelling interest in protecting the fundamental Second Amendment rights of its citizens to keep and bear arms. This included maintaining the secrecy of who owns guns: "[W]e hold that protecting the privacy of patients' status as firearm owners by prohibiting physicians from inquiring about and recording medically irrelevant information about firearm ownership is also a compelling state interest."

This conclusion required the State to demonstrate that the restriction against record-keeping about firearms was "narrowly tailored." The court noted that the law does not prohibit inquiry into other sensitive areas of discussion, evidencing the Act's narrow focus on protecting the single, identified compelling interest: the right to privacy in the exercise of one's Second Amendment rights. There were other factors evidencing a narrow approach: "The Act actually prohibits record-keeping about firearm ownership only when the physician knows such information to be irrelevant…, inquiry about firearm ownership only when the physician lacks a good-faith belief that the information is relevant…., and harassment about firearm ownership only when the physician does not believe it necessary."

In sum, the Act was a narrowly-tailored means of advancing Florida's compelling interest in protecting Second Amendment rights:

> Though the Act applies in only a small number of circumstances, when it does apply it plays an extremely important role in protecting patients. The Act is not a legislative revolution, but it does not need to be. It narrowly protects patients in a focused manner in order to advance the State's compelling interest in protecting the Second Amendment's guarantee to keep and bear arms and patients' privacy rights in their medical records, exactly the sort of tailoring strict scrutiny requires. Those are rights that must always be protected in ways big and small.

LINK (last accessed Jan. 12, 2016)

Statutory Construction: HHS Definition of "Metropolitan Area" for Purposes of Allocating AIDS Funding Conforms to Congressional Mandates

Municipio Autonomo De Ponce v. United States Office of Management and Budget, No. 14-2287 (1st Cir. Dec. 22, 2015).

SUMMARY: The First Circuit has reversed a lower court, finding that Health and Human Services properly applied standards defining the "metropolitan area" for Ponce, Puerto Rico—which resulted in Ponce becoming ineligible for further AIDS funding.

FACTS: The Ryan White Comprehensive AIDS Resources Emergency Act (Act) was passed in 1990 and directs the Department of Health and Human Services (HHS) to disburse AIDS funding in cities afflicted with a specified number of individuals infected by AIDS. Municipio Autonomo De Ponce (Ponce) in Puerto Rico received such funding for numerous years. However, the city lost the funding after HHS determined it no longer had enough individuals suffering from AIDS to be eligible. Ponce filed suit, claiming HHS unfairly drew the boundaries of its metropolitan area, which ultimately determined how many people there had AIDS, and thus illegitimately withdrew funding. The district court agreed with Ponce and held funding should be reinstated because the United States government was discriminatory in drawing the metropolitan boundaries, specifically using a different method for Puerto Rico.

HELD: The First Circuit held the district court erred and that HHS correctly drew the city boundaries in accordance with Congressional direction, and thus reversed.

DISCUSSION: This case revolves around how a metropolitan area is delineated. The Court therefore assessed whether HHS followed its statutory mandate in performing this task. First, the Court noted that Congress required HHS use the CDC's "HIV/AIDS Surveillance Report" to delineate metropolitan areas. Whether known or unknown to Congress, the CDC uses OMB's Metropolitan Statistical Areas (MSAs) as its metropolitan areas for that report. As a result, the AIDS funding is actually tied to OMB's geographical delineation (until, if ever, the CDC changes its own report). In 1993, the year HHS first provided funding to Puerto Rico, OMB divided Puerto Rico into four metropolitan areas. Ponce and five other communities around it accounted for one of those areas and the city thus had enough AIDS cases to be eligible for the funding.

In 2006, Congress amended the Act, and, among other things, froze the boundaries of all municipal areas receiving funding. By this time Ponce did not have enough AIDS cases to be eligible for the funding because of another amendment, but kept receiving funds under a new provision – the "transitional grant areas" – and was so categorized as one of these areas. The hitch for Ponce's argument came under the boundary scheme. Under the scheme for freezing metropolitan boundaries, if an area was already

eligible before fiscal year 2006 the boundaries had to be those in effect for the area in 1994, but if a city became eligible after fiscal year 2006, the boundaries would be those used when the city first became eligible. The amendment said nothing about a place like Ponce, e.g. one that was initially eligible but then only received funding as a transitional grant area. HHS, lacking clear direction on this issue, applied the former rule, reasoning that since every transitional grant area was eligible before 2006, the 1994 boundary should control.

The Court held this was a reasonable way for HHS to comply with the competing congressional mandates. On one hand, it applied Congress' order that HHS use the CDC's delineation of metropolitan areas to provide funding, and recognized that it lacked control of CDC to dictate where that number came from (which was ultimately OMB). On the other hand, Congress ordered that HHS freeze the boundary of municipalities to match that which was being used when it became eligible. While the Court recognized that Ponce, as a Puerto Rican city, lacks representation in Congress, the Court found HHS did follow its congressional mandate. It found the lower court simply erred in finding that somehow Ponce was discriminated against or that HHS applied a different standard to that city than others. The lower court was thus reversed.

LINK (last accessed Jan. 14. 2016)