

## U.S. SUPREME COURT UPHOLDS LIMITED NUDE DANCING REGULATION

The United States Supreme Court recently handed cities and towns a victory in regulating nude dancing. *City of Erie v. Pap's A.M.*, No. 98-1161 (March 29, 2000). Pap's operated a nude dancing establishment in Erie, Pennsylvania. The City enacted an ordinance banning public nudity, where "nudity" was defined very specifically so that the female dancers were required to wear at least "pasties" and a "G-string." The case reached the Pennsylvania Supreme Court, which decided that the nudity ban violated Pap's right to freedom of expression under the First Amendment to the U.S. Constitution. Pap's then appealed to the U.S. Supreme Court.

In analyzing the case, the Court first noted that although being in a "state of nudity" is not expression, nude dancing is expressive conduct and deserves some protection. But the Court then asked whether the Erie regulation was related to the *suppression* of expression, and concluded that it was not. The regulation is "content neutral;" in other words it regulates conduct alone and does not specifically target nudity that contains an erotic message. In fact, the main purpose of the ordinance is to combat the "secondary effects" related to adult entertainment establishments, such as crime and sexually transmitted diseases.

The Court then analyzed whether the ordinance satisfied the four-factor test set out in the case of *United States v. O'Brien*, 391 U.S. 367 (1968), and concluded that it did. The first factor, whether the regulation is within the constitutional power of the government, was satisfied on the basis of Erie's power to protect public health and safety under its general "police power." The second factor, whether the regulation furthers an important governmental interest, was satisfied due to the important interests of combating the harmful secondary effects associated with nude dancing. Notably, the Court did not require Erie to provide independent evidence of those secondary effects. It was sufficient that the City had relied on the experience of other cities with nude dancing establishments, as described in court opinions. (Erie also relied on its own findings, namely the fact that the City Council had, at various previous times, found that lewd and immoral activities carried on in public places are detrimental to the public health, safety and welfare.) The third factor – that the government interest must be unrelated to the suppression of free expression – was satisfied as described above. Finally, the fourth factor, that the restriction must be no greater than what is essential to further the government interest, was satisfied. The ordinance does not require that the dancers be fully clothed, so any incidental impact that it has on the expressive element of nude dancing is very small ("de minimis").

This decision is welcome news for cities and towns that wish to regulate nudity in adult entertainment establishments. So long as your regulations are "content neutral" and are drafted to deal with secondary effects that you reasonably anticipate to result from those establishments, they should pass constitutional muster.

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