



# UPC | UTAH PROSECUTION COUNCIL

Training and Serving Utah Prosecutors Since 1990

Bob Church  
Director



# Constitutional Law Case Law and Statutes

UGH!!!

Just Kill Me Now and Get it Over With!!!

# Constitutional Law Case Law and ~~Statutes~~

UGH!!!

Just Kill Me Now and Get it Over With!!!

Constitutional

Law

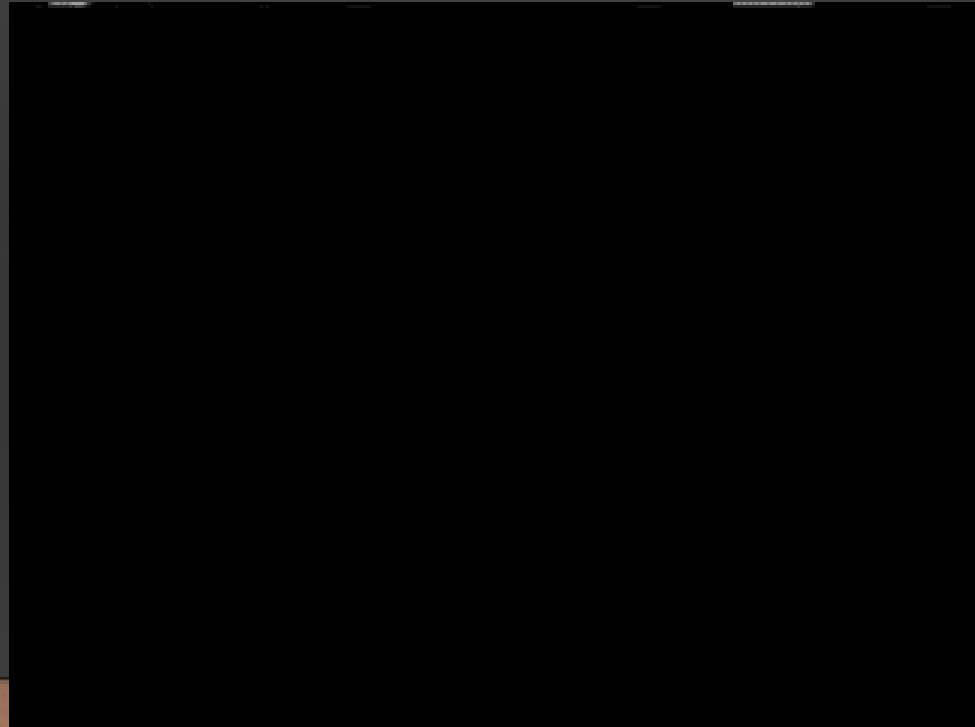
Case Law



AM I RIGHT?

You want to be  
problem  
solvers...not  
problem  
creators!!

# PROBLEM SOLVERS OR PROBLEM CREATORS



Do you know  
your attorney or  
the office staff?



# CHANT THE MANTRA WITH ME...



- My City Attorney is my Friend!! (Hero?)
- My City Attorney is my Friend!!!
- My City Attorney is my Friend!!!





# USE OUR EXPERTISE!

- Don't make the difficult decisions on your own, let us help you.
- If we don't know the answer, we can usually find it.
- At least let us help you stay out of trouble.
- But if you don't want to stay out of trouble, please don't take us down with you!!!



**Due Process**

DUE

PROCES

## DUE PROCESS

- ▶ 5<sup>th</sup> AND 14<sup>th</sup> Amendments
- ▶ Government operate within the law and provide fair procedures.

No one shall  
be "deprived  
of...

Life,  
Liberty, or  
Property  
Without due  
process of law."



# How do you afford due process rights?

Issuing business licenses?

Revoking business licenses?

Failing to afford “due process” rights is what gets government officials in trouble.



# True or False?

- ▶ Government officials cannot refuse to issue a business license if the petitioner has met all requirements.



If you re  
what re  
have?



# Writ of Mandamus

er



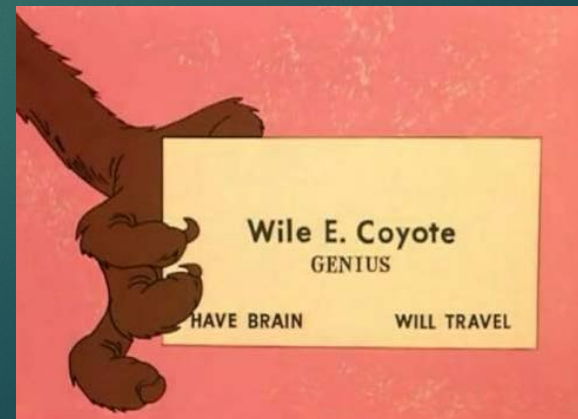
# *Writ of Mandamus*

- ▶ *Writ* is a Court order
- ▶ Commanding the municipality to perform one of its required duties.
  - i.e. issue a properly petitioned-for license.
- Requires compliance with non-discretionary acts.



# But what about...

- ▶ Unpaid fees or fines, multiple complaints, etc. NOT enough to deny new application.
- ▶ Shoddy, disreputable business entities will just find ways to get around this.
  - ▶ Incorporate under different name, entity, etc.





*Pigs R Us, LLC v. Compton Township*, 770 N.W.2d 212(2009)

- ▶ Building permit for swine facility had been previously granted, but later revoked.
- ▶ Second application filed but not processed.
- ▶ The township passed an interim zoning ordinance that required Pigs-R-Us to have a special use permit.
- ▶ Owner filed suit.
- ▶ Court ordered the township to issue the permit because the permit was in order at the time it was filed.

THOU  
SHALT...

So, remember, if no  
discretion and  
everything else is in  
order, you must  
perform the action.



# *Monroe v. Pape*

(365 U.S. 167 (1961)).

# Facts of *Monroe*

That really is Detective Pape.



- ▶ Murder investigation.
- ▶ Detective Pape and 12 other officers broke into Monroe's home early one morning.
- ▶ Humiliated his entire family by making them stand naked in the living room.
- ▶ Ransacked every room of his home looking for evidence.

## Facts of *Monroe*

- ▶ Monroe was taken to the police station.
- ▶ Held for 10 hours without arraignment.
- ▶ Not allowed to contact an attorney.
- ▶ He was ultimately released with no charges ever being filed against him.



# Monroe Issue and Findings

**YES!!!**

- ▶ Question: Could the state be liable because of the actions of the police officers, even though the conduct was obviously not authorized by the government?





# But how?

▶ You ask...



# The Civil Rights Act of 1871, Section 1983



- ▶ “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”



# The Civil Rights Act



- ▶ In order to establish a Section 1983 cause of action against a public official, a plaintiff must prove:
  - ▶ The public official acted under “color of state law”; AND
  - ▶ Plaintiff was deprived of federal constitutional or statutory rights.

# "Under Color of State Law"

- ▶ *Monroe v. Pape* (365 U.S. 167 (1961)).
  - ▶ U.S. Supreme Court decision that defined the meaning of "under color of state law."
- ▶ "Misuse of power that is possessed by virtue of state law, is action taken under color of state law."

# Monroe Issue and Findings

- ▶ The Court found:
  - ▶ Actions taken by an officer in his official capacity;
  - ▶ Are deemed to have occurred under color of state law;
  - ▶ Even if they are not pursuant to an official state policy, or
  - ▶ Even if those actions violate state law.

# Monroe Issue and Findings

- ▶ The stated “misuse of power” possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken “under color of state law.”

# *Monroe* Issue and Findings

- ▶ In other words,
  - ▶ No uniforms and no badges;
  - ▶ Could not have gone into Monroe's home without incurring both civil liability and criminal sanctions.



**HELLO**  
my name is

Your Local Business  
Licensing Official



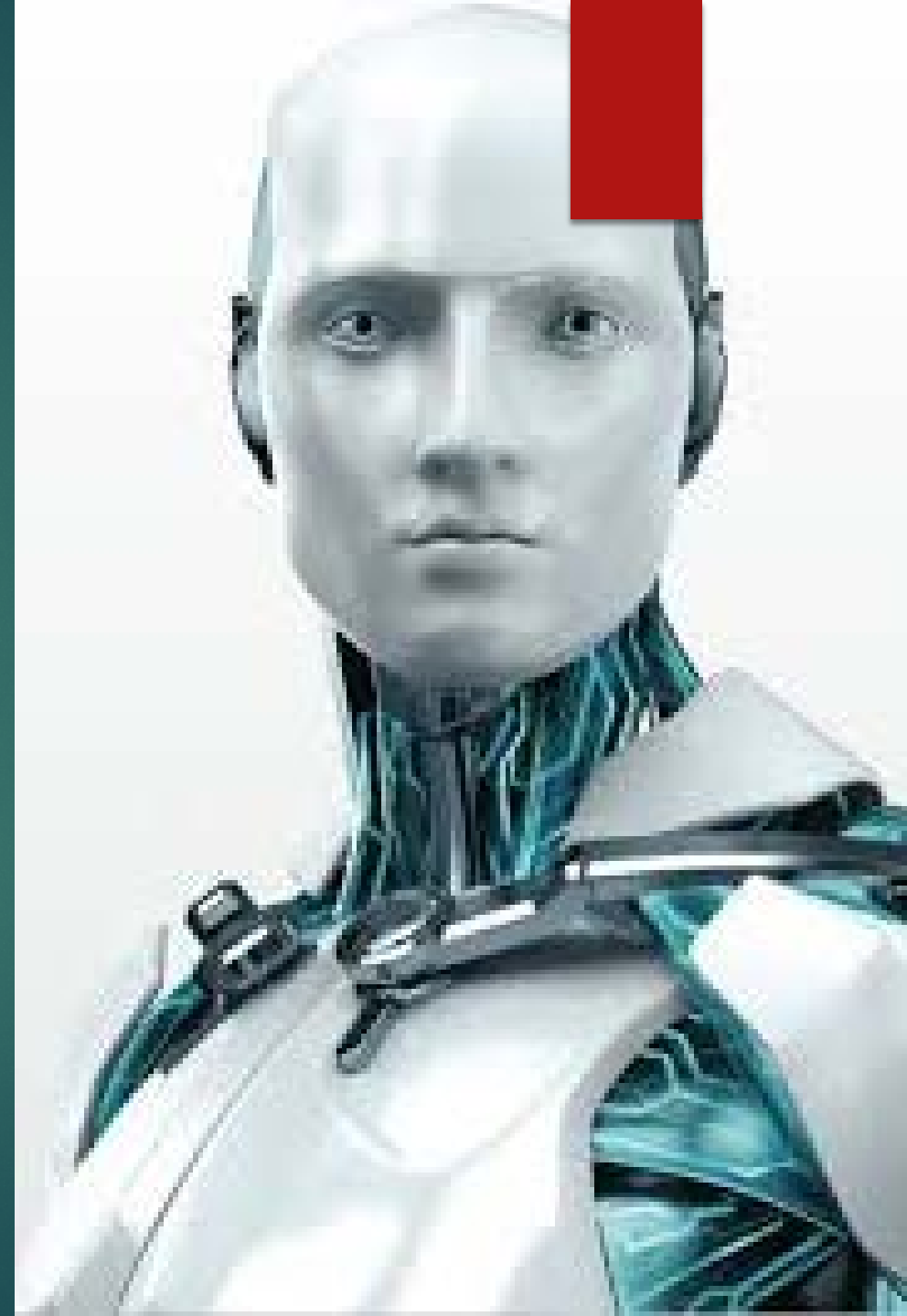


# Monroe Issue and Findings

- ▶ In other words,
  - ▶ No uniforms and no badges;
  - ▶ Could not have gone into Monroe's home without incurring both civil liability and criminal sanctions.
- ▶ Therefore, they should not be able to violate Monroe's Constitutional rights merely because they work for a governmental entity.

# Monroe Issue and Findings

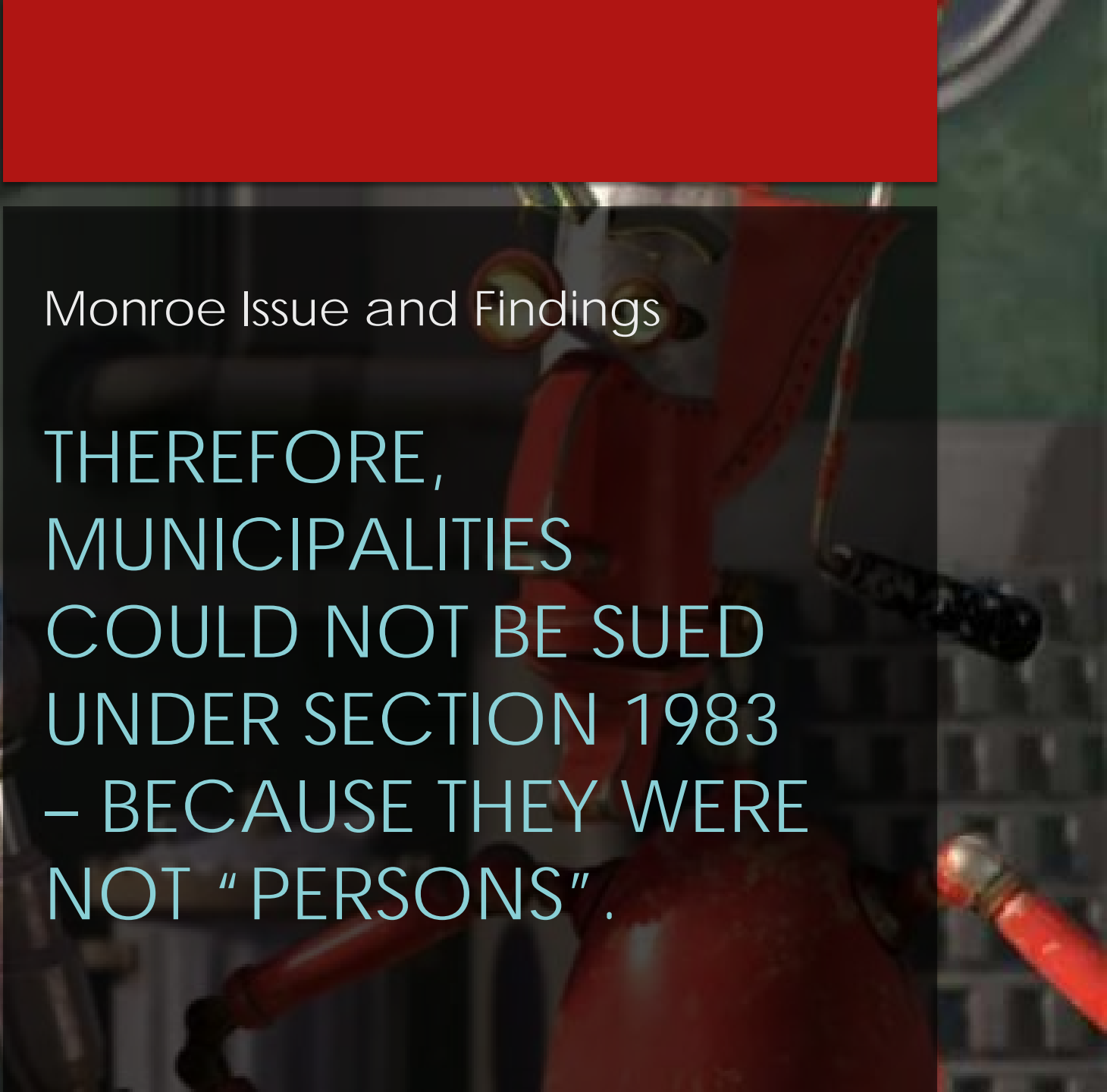
- ▶ But...
- ▶ *Monroe* held that municipalities were not “persons” under the meaning of the statute.
- ▶ Remember...
  - ▶ “Every person who, under color of any statute...”





Monroe Issue and Findings



THEREFORE,  
MUNICIPALITIES  
COULD NOT BE SUED  
UNDER SECTION 1983  
– BECAUSE THEY WERE  
NOT “PERSONS”.



# Establishing Municipal Liability

- ▶ The definition of “persons” was modified in a subsequent US Supreme Court case.
  - ▶ Municipalities still not “persons” but...
- ▶ Municipalities could NOW be held liable for unconstitutional actions, but with limitations.





- 
- 
- ▶ The US Supreme Court limited the liability of municipalities to certain situations.
    - ▶ Municipal governments could only be sued for its own unconstitutional or illegal policies.
  - ▶ It can NOT be sued for the unconstitutional or illegal activities of its employees.

Orem liable for its own unconstitutional actions, decisions, activities.



Orem not liable for Lori's unconstitutional actions, decisions, activities.



- 
- 
- ▶ The U.S. Supreme Court also stated:
  - ▶ No municipal liability based on the principle of *respondeat superior*.
    - ▶ Supervisor (municipality) not liable for negligent actions of its employees.



# *Respondeat Superior*





# *Respondeat Superior*



- 
- 
- ▶ Remember...
  - ▶ No liability based on the principle of *respondeat superior*.
    - ▶ Supervisor (municipality) not liable for negligent actions of its employees.



▶ To prevail on a 1983 Action, the plaintiff must establish:

▶ Conduct of municipal employee was pursuant to an official policy or custom;

AND

▶ The conduct was the cause of the constitutional violation.

# Establishing Municipal Liability through Policy or Custom

1. An officially adopted policy or decision that deprives a person of their federal constitutional or statutory rights.
  - ▶ Is this you?
  - ▶ Who?
    - ▶ "Only persons who have "final policymaking authority" may subject the government to Section 1983 liability."

## Establishing Municipal Liability through Policy or Custom

2. In the absence of a written policy, a single action by the official local legislative body may constitute official policy.

Establishing  
Municipal  
Liability  
through  
Policy or  
Custom

2. A pattern of “persistent and widespread” practices resulting in a deprivation of rights; or
  - That’s how we’ve always done it.

Establishing  
Municipal  
Liability  
through  
Policy or  
Custom

4. Official inaction  
reflecting  
“deliberate  
indifference” to  
protected rights;  
or

Establishing  
Municipal  
Liability  
through  
Policy or  
Custom

4. Failing to  
adequately  
train and  
supervise; or



# Establishing Municipal Liability through Policy or Custom

6. Failing to respond to repeated complaints regarding the unconstitutional conduct.
  - ▶ If it reflects a deliberate and conscious choice.



# The Civil Rights Act: §1983

## Violation of Due Process

- ▶ Plaintiff must show an intentional denial of due process rights.
- ▶ Negligent deprivation of due process rights is a losing argument.
  - ▶ “deprive” indicates more than mere negligence.



Is there any  
protection if I get  
sued?



# IMMUNITY – Qualified / Good Faith



- ▶ Most municipal officials have a qualified, or good faith, immunity from liability under Section 1983.
  - ▶ “Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

# What is a discretionary function?

dis·cre·tion – də'skreʃH(ə)n/

The freedom to decide what should be done in a particular situation.

"it is up to local authorities to **use their discretion** in setting the charges"

# IMMUNITY – Qualified / Good Faith

- ▶ Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.



# IMMUNITY – Qualified or Good Faith

- ▶ In other words...
  - Discretionary, unconstitutional actions are generally free from liability unless a “reasonable” person would know the actions were unconstitutional.

# IMMUNITY Cont'd

- ▶ While YOU may be protected by qualified or good faith immunity...
  - ...municipalities are not.
- ▶ The Supreme Court held that local governments are liable for their constitutional violations from actions taken in good faith.
  - ▶ i.e. We didn't realize we were violating your rights.



# IMMUNITY Cont'd

## ► So...

- The entity that enacted/adopted the unconstitutional regulation or ordinance is absolutely liable.
  - But...
- If you were acting pursuant to an official city regulation, guideline, ordinance, etc., you may be immune, even though the regulation, etc. may be unconstitutional.
  - *Owen v. City of Independence* 445 U.S. 622 (1980)

# Utah's Governmental Immunity Statute UCA 63G-7-101 *et.al.*

## ▶ Section 201(4)

- ▶ A governmental entity, its officers, and its employees are immune from suit and immunity is not waived, for any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment, if the injury arises out of or in connection with, or results from:
  - (a) The exercise or performance, or the failure to exercise or perform, a discretionary function, whether or not the discretion is abused;
  - (b) ...
  - (c) **The issuance, denial, suspension, or revocation of, or the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization;**

# Utah's Governmental Immunity Statute UCA 63G-7-101 *et.al.*

## ▶ Section 201(4)

- ▶ A governmental entity, its officers, and its employees are immune from suit and immunity, for any injury proximately caused by the act or omission of an employee within the scope of employment, if the injury arises in connection with, or results from:

(a) The exercise of discretion, or the failure to exercise or perform, a discretionary function, whether or not the discretion is abused;

(b) The issuance, denial, suspension, or revocation of, or the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization;

**Negligently Made a Decision**

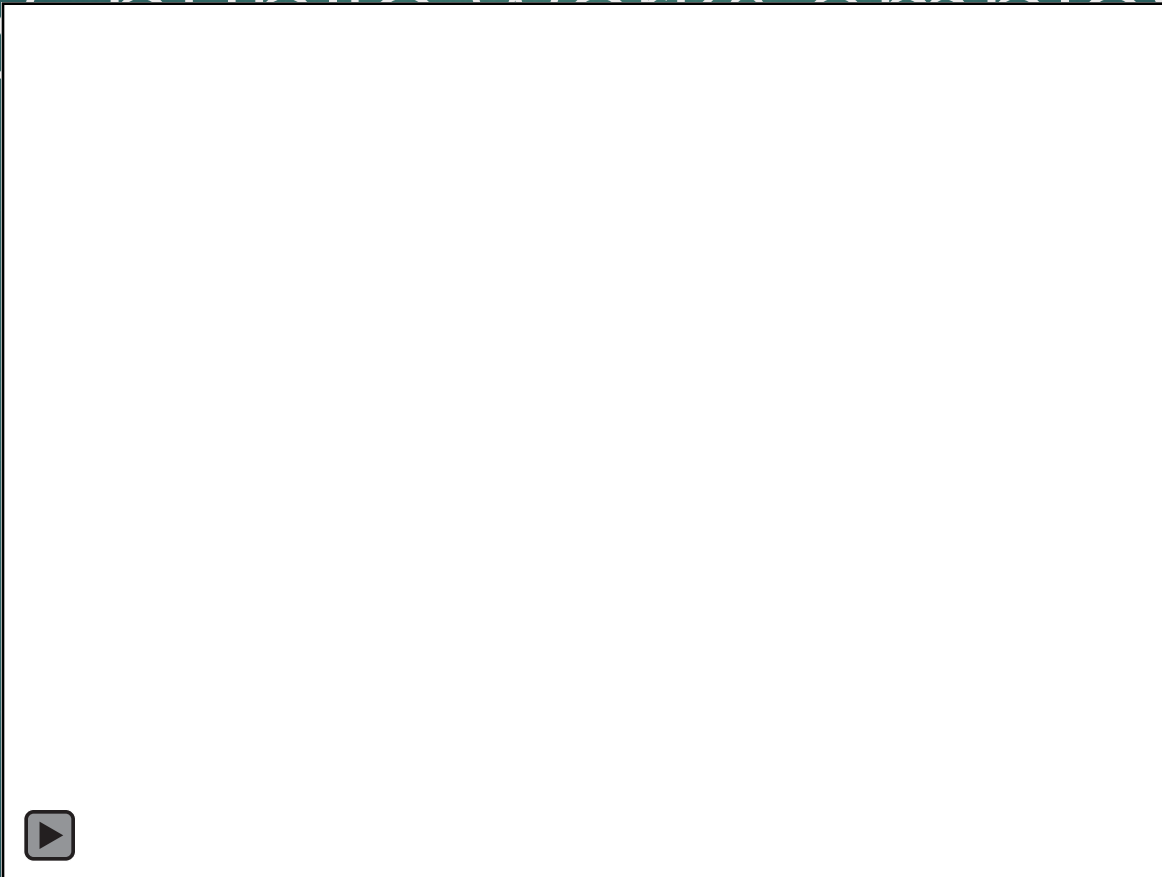
# Back to *Pigs R Us*

- ▶ The township acted arbitrarily in passing the new ordinance.
  - Was a ploy to prevent the issuance of the permit.
- ▶ The township officials claimed immunity.
  - ▶ The Court disagreed.
- ▶ The Municipal Tort Claims Act applied only to tortious negligence actions and not *mandamus* actions.
  - ▶ They had no choice but to issue the permit.
- ▶ Remanded to determine if damages should be awarded.



# Scope of Employment

Eddy, public works employee



Immunity statute is not a license to do stupid things.



# Constitutional Standards of Review

Rational Basis

Intermediate Scrutiny

Strict Scrutiny



# Constitutional Standard of Review

- ▶ Rational Basis
  - Rationally related to a legitimate government interest.
    - Licensing
    - Ordinances
    - Health, safety, welfare






# Constitutional Standard of Review

- ▶ Intermediate Scrutiny
  - ▶ Law must be substantially related to a legitimate government interest.
    - ▶ “quasi-suspect” classifications
      - ▶ Gender
    - ▶ Content-neutral
    - ▶ Time, place, manner



# Constitutional Standard of Review

- ▶ Strict Scrutiny
  - ▶ Statute must be narrowly tailored to address a compelling state interest.
    - ▶ Bill of Rights
    - ▶ Due Process
    - ▶ 14<sup>th</sup> Amendment



Business license ordinances can be subject to each level of scrutiny, depending on the language and enforcement of the ordinance.



# SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION



- ▶ Fairness of laws
  - ▶ Substantive due process guarantees that laws will be reasonable and not arbitrary.
  - ▶ Equal protection guarantees that similarly situated persons will be treated alike.
- ▶ Both guarantees require the Court to review the **substance of the law** rather than the procedures employed.

# How the Equal Protection Clause Affects Business Licensing.

## Facial Validity



## Discriminatory Enforcement



# Facial Validity

- ▶ Facial Validity
  - On its face, the words of a statute are valid.
  - Absent some discriminatory intent, the law should stand.



# Discriminatory Enforcement

Looks not at the face of the law to see if it's discriminatory, but how it is applied.

San Francisco ordinance prohibits the operation of hand laundries in wooden buildings, except by consent of the Board.

Board denied all applicants of Chinese origin.


*Yick Wo v. Hopkins* 118 U.S. 356 (1886)



# How to Avoid Discriminatory Enforcement


- ▶ Apply code evenhandedly
  - ▶ Waive for one, waive for all
- ▶ Written policies
  - ▶ Any exceptions should be noted
- ▶ Citizen Complaints
  - ▶ Follow up to make sure no appearance of intentional ignorance.





Applying the law  
to the facts.

AKA: CASE LAW

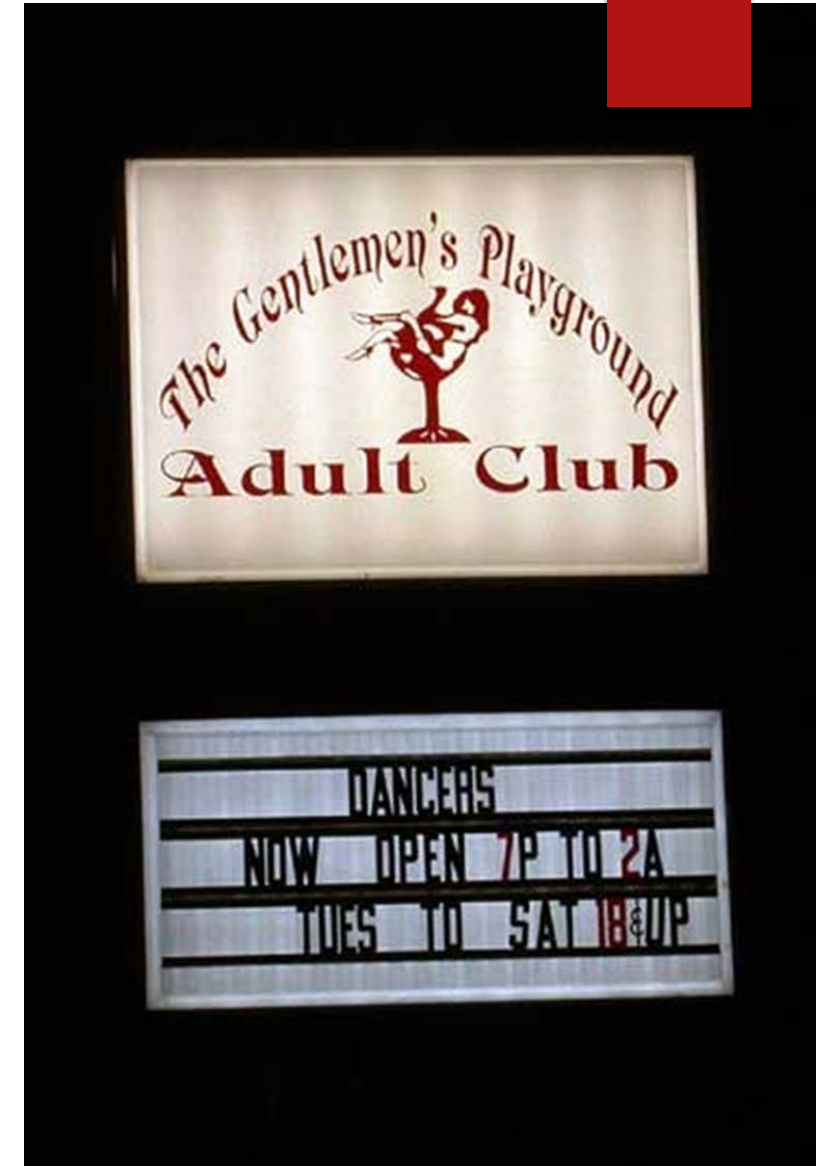


American Entertainers  
d.b.a. "Gentlemen's  
Playground v.  
City of Rocky Mount,  
North Carolina

888 F.3D 707, 2018, 4<sup>TH</sup> CIRCUIT COURT OF APPEALS

# Rocky Mount Facts

- ▶ American Entertainer's (AE) operated Gentlemen's Club within Rocky Mount since 2002
- ▶ Exotic dancers
  - ▶ "scant attire" varied through the years and subject to various disputes
- ▶ 2014 police investigation found Gentlemen's Club was providing "adult entertainment"
- ▶ Rocky Mount then sought to enforce their sexually oriented business ordinance against AE



# City Ordinance Stated

- ▶ Sexually oriented businesses have serious objectionable characteristics.
- ▶ Studies and experiences of other municipalities showed:
  - ▶ Decrease in property values;
  - ▶ Increase in crime.
- ▶ City council found that regulation was:
  - ▶ Necessary to insure adverse actions did not contribute to blight of neighborhood;
  - ▶ Regulate against actions that threaten health, safety, welfare, peace, dignity of the city.

# City Ordinance Stated

- ▶ Goal is to balance the legitimate ends of the community.
- ▶ Require any sexually oriented business “to carry its share of financing the administrative and enforcement activities” of the city.

# Ordinance Language

- ▶ Sexually explicit content includes “cabaret”
- ▶ “adult cabaret” includes:
  - ▶ retail buy
  - ▶ club that serves beverages
  - ▶ Available for viewing “adult live entertainment”



# Definitions

- ▶ Adult Entertainment
  - ▶ Any performance of or involving the actual presence of real people which exhibits *specified sexual activities* or specified anatomical areas
- ▶ Sexual Activities
  - ▶ The fondling or other erotic touching of human genitals, pubic regions, buttocks or female breasts.



The background of the slide is a photograph of a grand, ornate theater interior. The view is from the audience's perspective, looking towards the stage. The theater has a high ceiling with intricate architectural details, including arches and columns. The stage is framed by a large, decorative archway. The seats are arranged in a semi-circle, and the overall atmosphere is one of classic elegance and grandeur.

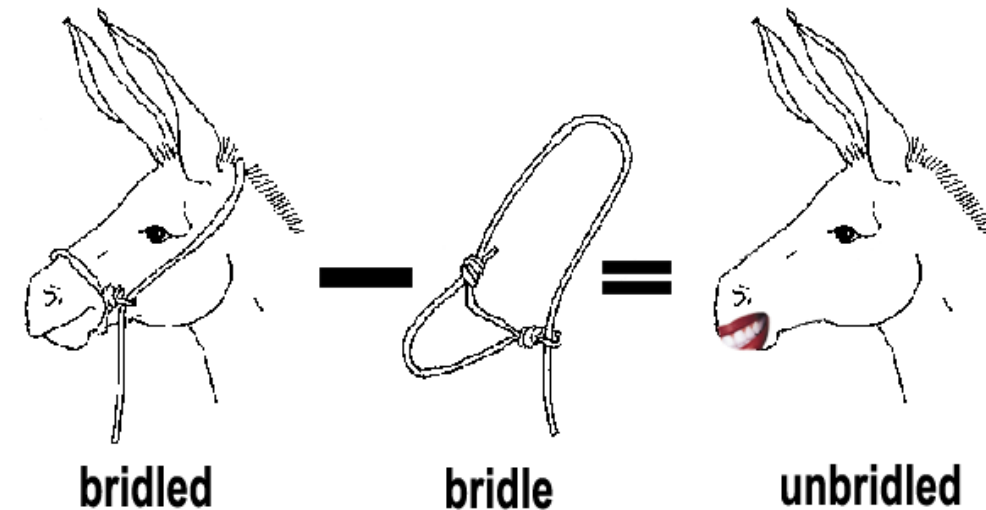
## American Entertainment Claims §1983 Action

- ▶ The entire ordinance violates the 1<sup>st</sup> Amendment as being overbroad.
  - ▶ May potentially require licensure of venues that display “mainstream” performances such as ballets, concerts and theatrical productions.



# American Entertainment Claims §1983 Action

- ▶ In the alternative:
  - ▶ One of the denial provisions constitutes an unconstitutional “prior restraint.” – 1<sup>st</sup> Amendment
    - ▶ Gives “unbridled” discretion to a government official.
  - ▶ Another provision violates the Equal Protection clause by barring 18-21 year old’s from owning “sexually oriented businesses.” – 14<sup>th</sup> Amendment



# Overbroad Claim

- ▶ Ordinance defines “sexually oriented business” and “adult cabaret” in terms that do not limit these businesses to just nude entertainment or alcoholic beverage establishments.
- ▶ The ordinance is so broad that it encompasses conventional mainstream arts and entertainment.





# Overbreadth Analysis

- ▶ A law is overbroad if it reaches a substantial number of impermissible applications.
- ▶ Level of scrutiny depends on the purpose of the regulation.
  - ▶ If purpose is to regulate conduct or the time, place and manner in which expression takes place – intermediate scrutiny.

A hand in a dark suit sleeve is shown from the left, holding a black pen and writing the word "AGREEMENT" in large, black, hand-drawn capital letters on a white surface. A horizontal line is drawn across the surface, passing through the middle of the word.

# AGREEMENT

American Entertainers does not dispute that the city adopted the ordinance to regulate the deleterious secondary effects of adult entertainment.

# “deleterious secondary effects”

(say that 10 times fast)

- ▶ Court recognized “deleterious secondary effects”
  - ▶ Lower property values
  - ▶ Blight
  - ▶ Increase in crime: Assault, Sexual Assault, Prostitution, Drugs, Alcohol Related Offense, Theft. Etc.
  - ▶ Decrease in general health, safety, welfare and dignity of city.

# Intermediate Scrutiny

- ▶ Does the regulation materially advance an important or substantial interest by redressing past harms or preventing future ones?
- ▶ Is the regulation narrowly tailored to serve that interest?

# Important or Substantial Government Interest

Lower property values

Increased crime rates

Drug dealing

Prosecution

Shootings

\$100 licensing fee subsidizes  
increased law enforcement costs.

No license to anyone convicted  
of certain criminal offenses

Sexual Violence

Drugs

Weapons



Important  
Substantial  
Government  
Interest

yes

Lower property values

Increased crime rates

Drug dealing

subsidizes  
enforcement costs.

one convicted  
offenses







# Narrowly Tailored

Does not burden  
substantially more  
speech than  
necessary.

# Traditional Overbreadth Challenges a.k.a. “Not Narrow Enough” Include...

- Ordinances that:
  - Prohibits “mainstream” entertainment
  - Restricts serving alcohol depending on the type of conduct, attire and type of entertainment
- Zoning restrictions
  - 1,000 feet
  - No more than 1 SOB in a building
  - No SOB’s in certain areas

# American Entertainment's Overbreadth Challenge

- ▶ Venues that put on ballets, concerts, or theatrical productions that incorporate erotic components or that are not specifically sexual in nature, would be subject to the City's ordinance.

# Court Rejected that Argument

- ▶ No evidence that the regulation imposed any significant burden on speech.
- ▶ Could Rocky Mount have more clearly defined “sexually oriented businesses” that did not include ballets, concerts and theatrical performances?
  - ▶ YES
- ▶ But, no requirement a city choose the most closely tailored regulation.
- ▶ The challenged ordinance does NOT meaningfully burden speech.



FREE SPEECH

FREE SPEECH

FREE SPEECH

FREE SPEECH

FREE SPEECH



**FREE SPEECH**

**FREE SPEECH**

**FREE SPEECH**

**FREE SPEECH**



City Wins...

...at least on that issue.

This really is Rocky Mount, NC

## Prior Restraint Claim

Police Chief may deny a license if:

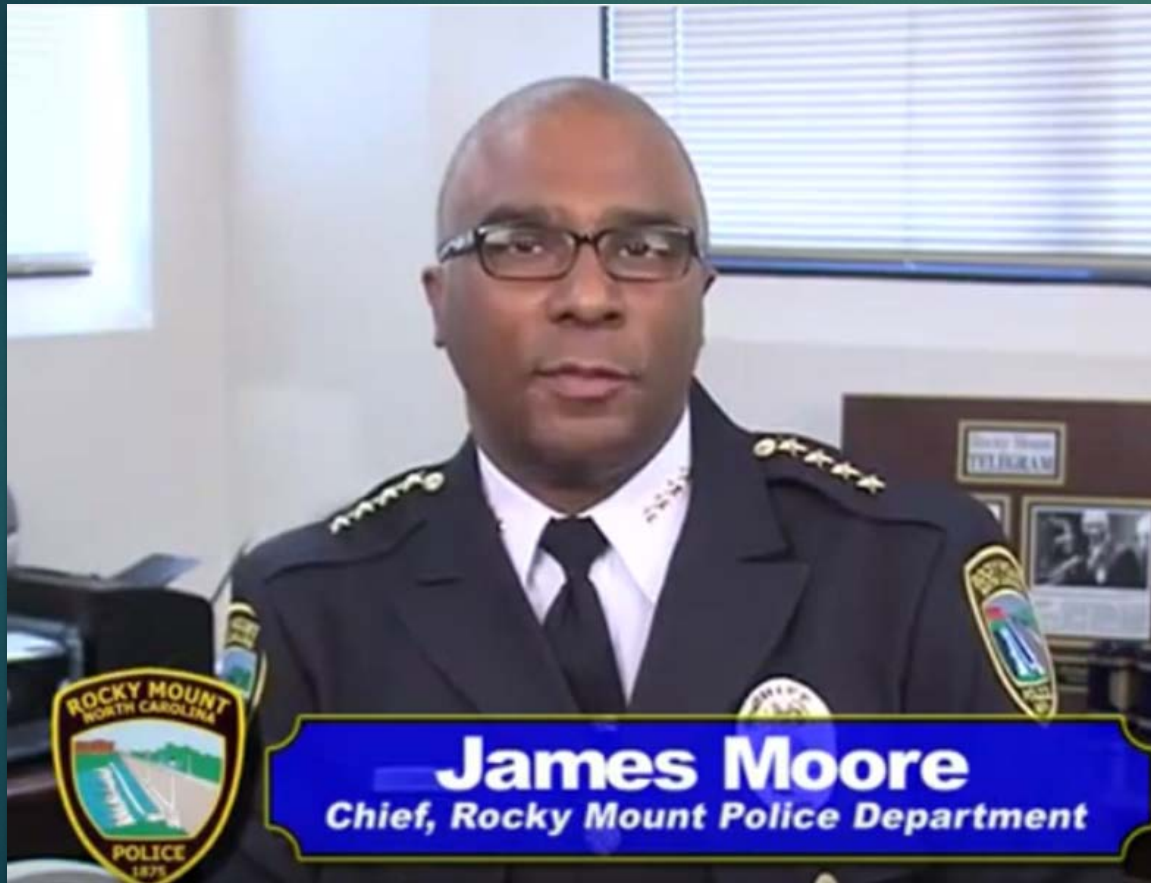
the operation of the sexually oriented business would not comply with all applicable laws, including, but not limited to, the city's building, zoning and health regulations.





Thoughts?

# Police Chief Denial Provision is Unconstitutional Prior Restraint



- ▶ Two evils that will NOT be tolerated in licensing schemes:
  1. Placing unbridled discretion in the hands of government official or agency that could result in censorship;
  2. Failing to place limits on the time within which the decisionmaker must issue the license.

(not at issue here)

# Unbridled Discretion

“ A licensing scheme confers too much discretion on a governmental decisionmaker when it allows the decisionmaker to deny an application based solely on the decisionmaker’s “ own ideas of ‘public welfare, peace, safety, health, decency, good order, morals, or convenience.’ ”

# Unbridled Discretion

“ A licensing scheme is valid when ‘concrete standards guide the decision-maker’s discretion,’ such as limits placed by ‘textual incorporation, binding judicial or administrative construction, or well-established practice. To survive constitutional scrutiny, a licensing regulation must therefore provide ‘narrow, objective, and definite standards to guide the licensing official.’ ”

# Unbridled Discretion

The ordinance implies the Chief can look at municipal, state, federal and common law, as well as building, zoning, health codes.

- ✓ Unrealistic to examine entire body of municipal law within required 15 days.
  - ✓ Much less, other bodies of law.
- ✓ Chief would have to choose, case by case basis, which laws to examine.
- ✓ Therefore, NOT narrowly tailored.

A photograph of a city street at dusk. On the left is a two-story brick building with a sign that reads "DOUGLAS HILLS". In the foreground, a utility structure stands on a concrete pad. A red SUV and a white sedan are parked on the street. A street lamp is visible on the right. The text "City loses on this argument." is overlaid in yellow on a dark horizontal band across the middle of the image.

City loses on this argument.

# Equal Protection

Ordinance says  
license may be  
denied if:

any license  
applicants or other  
specified business  
principals are not  
over the age of  
twenty-one years.



# AE's Claim

Under 21 Limitation Infringes  
on Equal Protection and the  
1<sup>st</sup> Amendment Right of  
Adults to Free Expression.



Agree or disagree?

# 18 – 21 year olds

- ▶ While no precedent that prohibits 18 - 21 year old's to own, manage and operate an adult business, the court **DECLINED** to recognize such a right.



# 18 – 21 year olds

- ▶ Age restriction ensures that sexually oriented business owners are of legal drinking age.



# City Wins Equal Protection

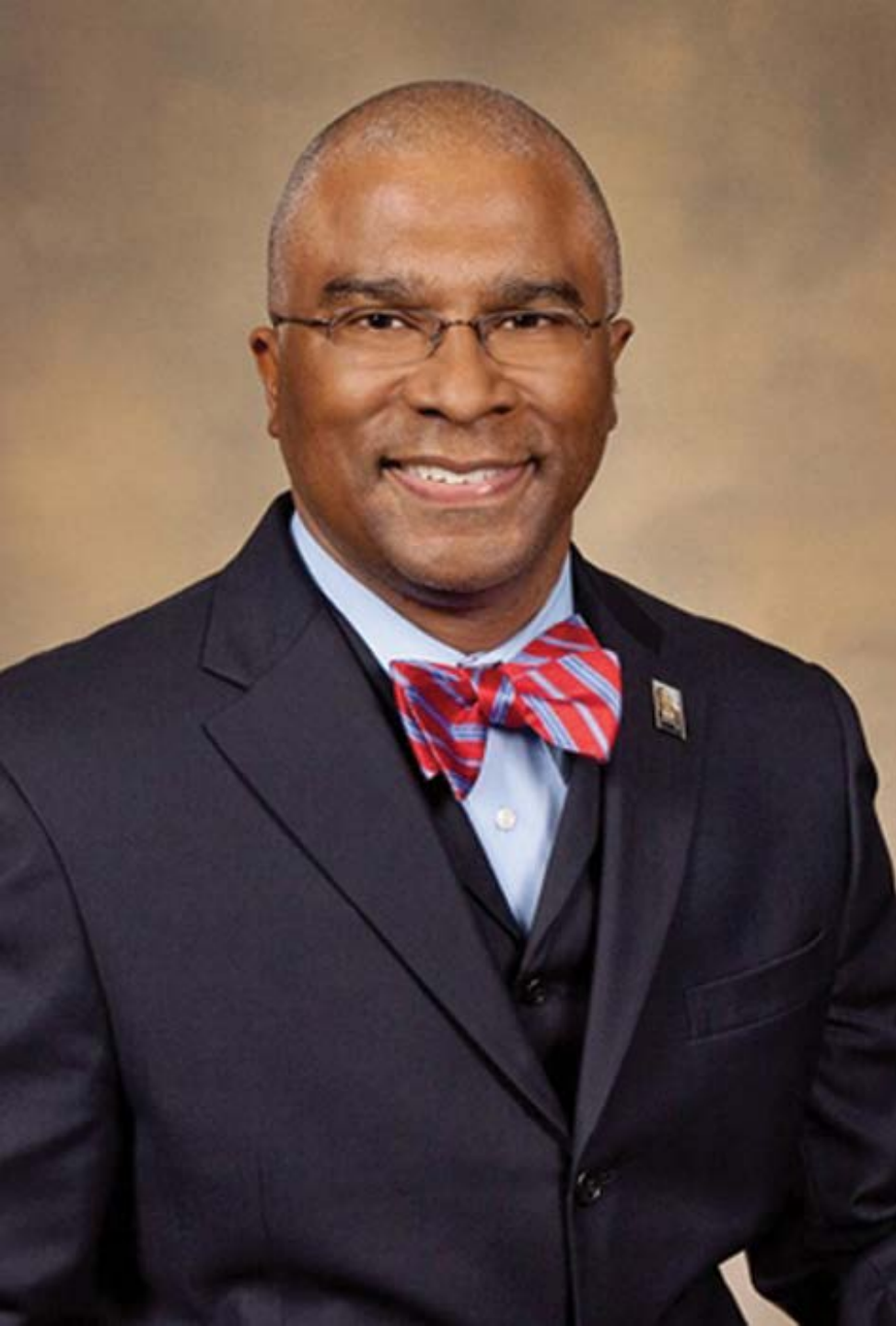


# The US Court of Appeals, 4<sup>th</sup> Circuit held:

Ordinance narrowly tailored to prevent the deleterious secondary effects of SOB's.

That part of ordinance survives.





## The US Court of Appeals, 4<sup>th</sup> Circuit held:

Police chief denial authority sweeps too broad and gives a constitutionally impermissible amount of discretion.

That part of the ordinance does NOT survive.

# The US Court of Appeals, 4<sup>th</sup> Circuit held:

The Constitution does not guarantee unrestricted privilege to engage in a business or to conduct it as one pleases.

Rocky Mount's age restriction is rationally related to a legitimate government interest.

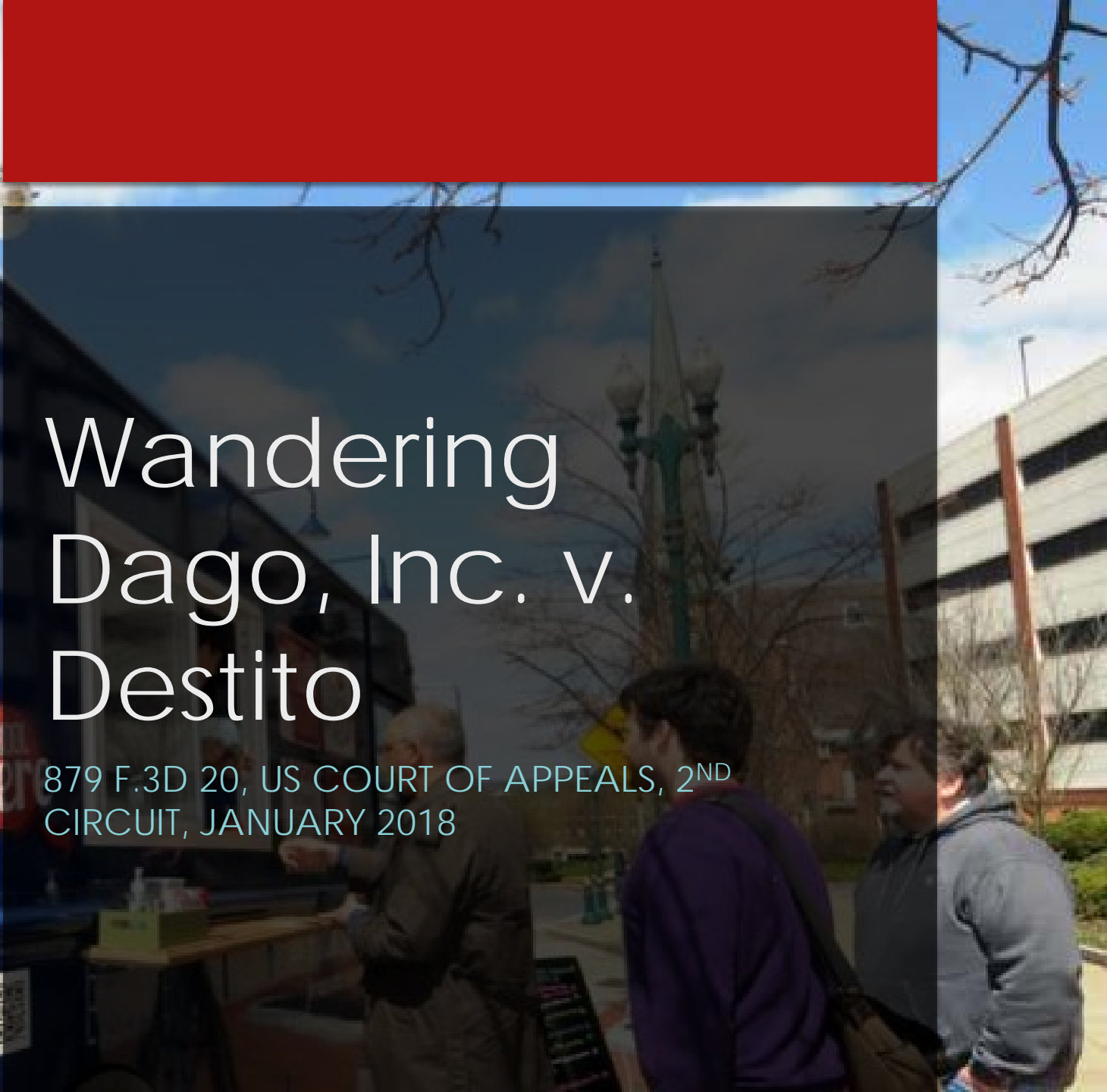
SURVIVE





# Wandering Dago, Inc. v. Destito

879 F.3D 20, US COURT OF APPEALS, 2<sup>ND</sup>  
CIRCUIT, JANUARY 2018





WAMULE



“Dago” is an ethnic slur.

Directed towards Italians, Spaniards and Portuguese

DASO

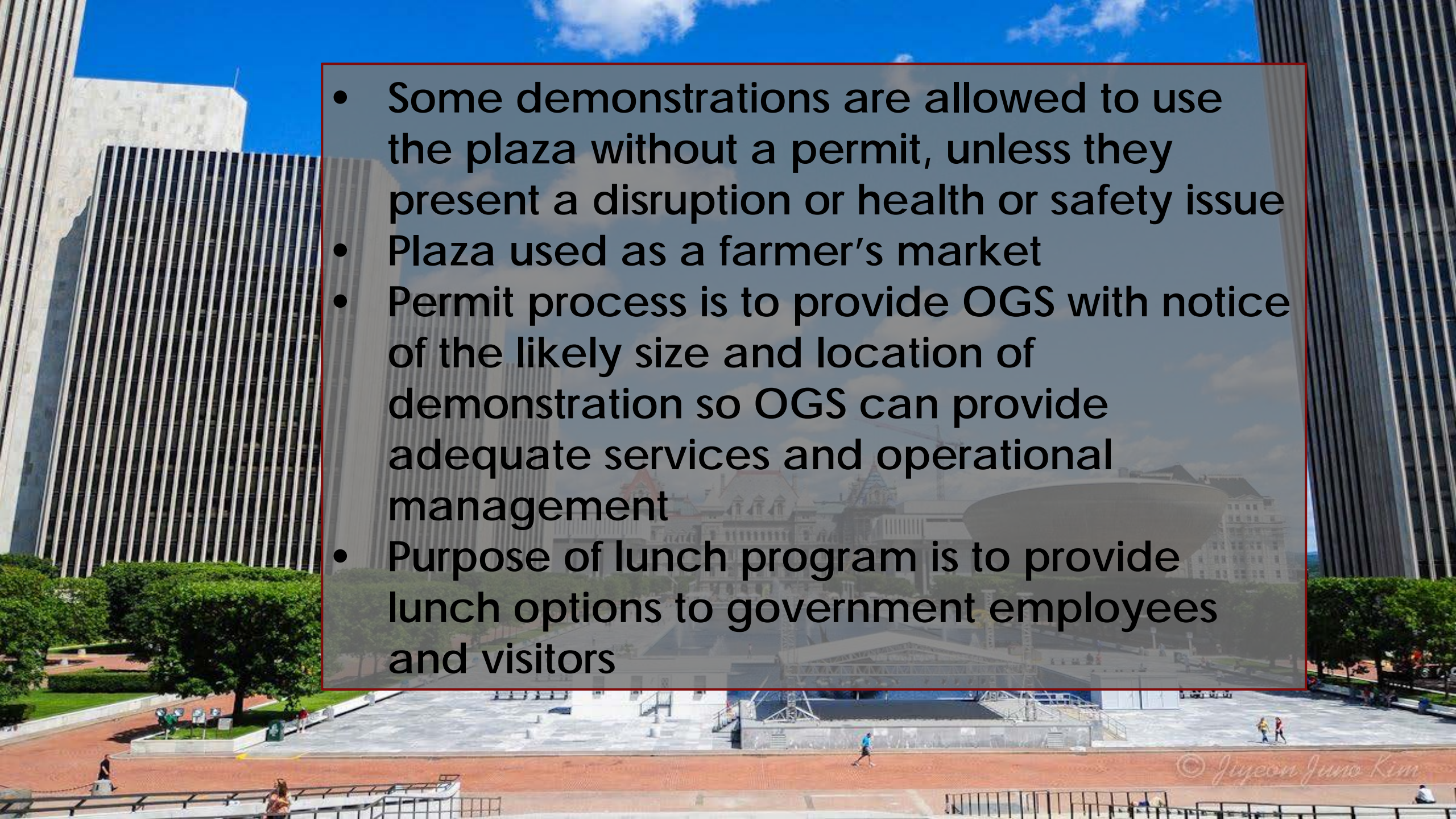
## New York State Office of General Services (OGS)

- Organizes a program called "Summer Outdoor Lunch Program (lunch program) that runs from May 20 - October 4
- Takes place in the city of Albany New York in the Empire State Plaza (plaza)
- The plaza is owned by state of New York and run by OGS
- Use of the plaza is subject to permitting and used for state-organized events as well as by private groups
- The plaza is surrounded by state capitol and other government buildings
- At least 11,000 government employees work there



*Empire State Plaza*

*Albany, N.Y.*

- 
- Some demonstrations are allowed to use the plaza without a permit, unless they present a disruption or health or safety issue
  - Plaza used as a farmer's market
  - Permit process is to provide OGS with notice of the likely size and location of demonstration so OGS can provide adequate services and operational management
  - Purpose of lunch program is to provide lunch options to government employees and visitors

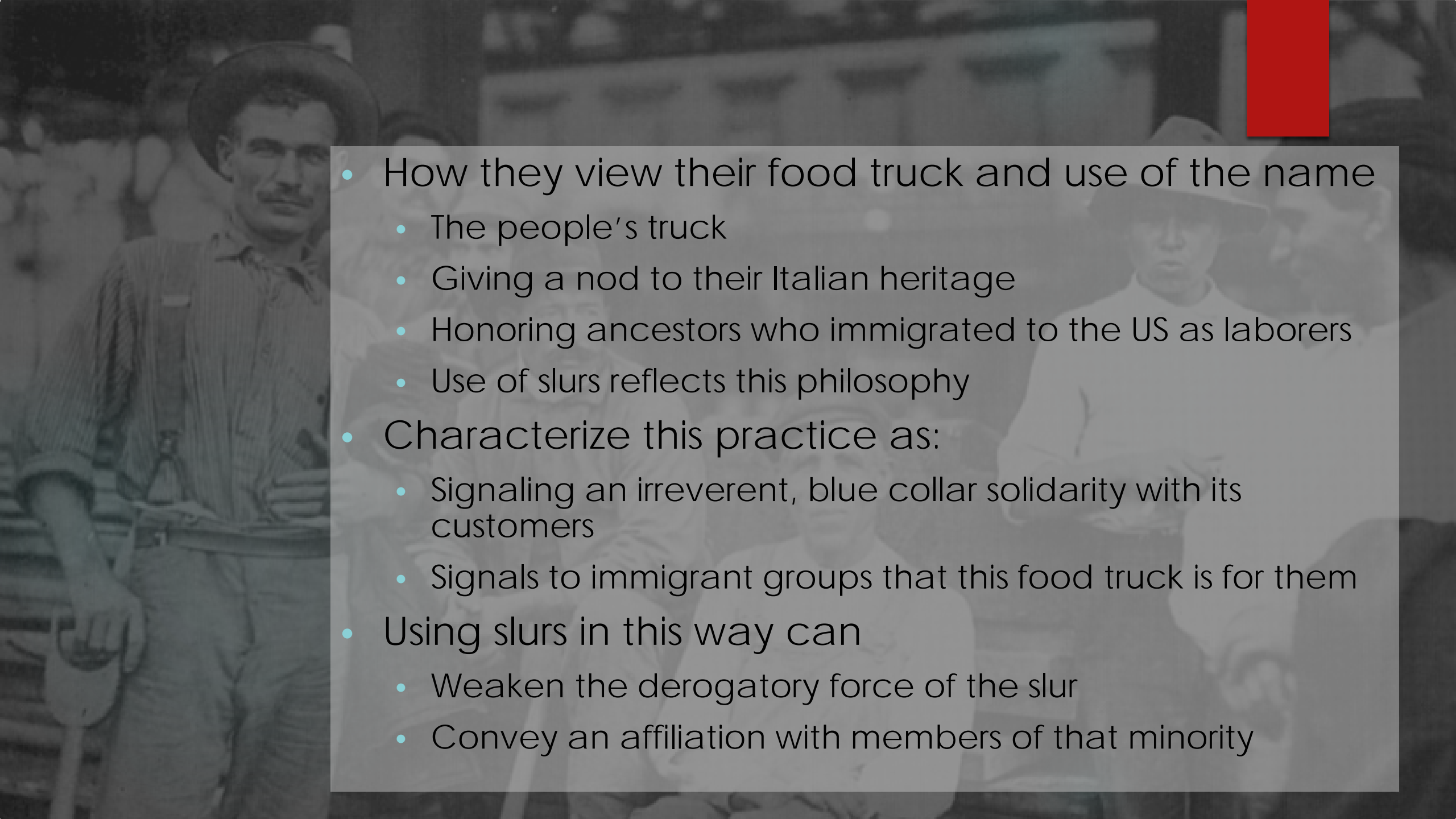
- Application specifics
  - \$1500 fee to sell 5-days a week
  - \$1000 fee to sell 2-days a week
  - Fees and applications due May 10
  - Vendors allowed to sell from 9 a.m. - 2 p.m.
  - OGS reserves the right to prohibit sale...of certain items, if in its sole opinion, these items may reasonably cause concern for public safety

- OGS advertises the lunch program on:
  - A closed-circuit TV system located throughout the plaza concourses, but without disclosing names of vendors
  - Promotes it on its FB page and other social media websites
  - Publicized on a food critic's blog
- OGS claims a consistent policy of allowing only family-friendly events



# Wandering Dago


- WD is a New York corporation owned by Andrea Loguidice and Brandon Snooks
- WD operates a food truck using the name "Wandering Dago"
  - Sell/serve food at variety of functions:
    - Catering
    - Events
    - Fairs
    - Festivals
    - Street-side lunch service

- 
- How they view their food truck and use of the name
    - The people's truck
    - Giving a nod to their Italian heritage
    - Honoring ancestors who immigrated to the US as laborers
    - Use of slurs reflects this philosophy
  - Characterize this practice as:
    - Signaling an irreverent, blue collar solidarity with its customers
    - Signals to immigrant groups that this food truck is for them
  - Using slurs in this way can
    - Weaken the derogatory force of the slur
    - Convey an affiliation with members of that minority




- Featured sandwiches include:
  - Dago
  - Castro
  - American Idiot
  - Goombah
  - Guido
  - Polack
  - El Guapo
  - KaShloppas



- 
- ▶ February 27, 2013 WD contacted OGS to ask about participating in 2013's lunch program
  - ▶ May 10, 2013, OGS left voicemail advising WD could apply
  - ▶ May 17, 2013 WD faxed application
  - ▶ Included proposed menu, name of sandwiches
  - ▶ Did NOT include required App B which contains vendor's contact information, tax ID number and description of type of vending operation, space required, applicant's electrical needs
  - ▶ 10 other vendors applied

**YOU**  
**DECIDE**




- 
- ▶ OGS officials approached Deputy Commissioner
  - ▶ Recognized “dago” as slur for Italians, Spaniards and Portuguese
  - ▶ Looked at WD’s webpage and saw other menu items contained derogatory terms
  - ▶ Undisputed that OGS denied application because of offensive terms
    - ▶ Not that the application was turned in late

- All other applicants were approved including
  - Late or incomplete applications
  - "Slidin' Dirty"
    - Slang reference to small hamburgers as well as driving while in possession of felony charge worth of illegal drugs and/or unregistered firearms
- Notified WD on May 20 of denial, citing the offensive name as well as the late filing
- However, OGS approved other late applications

et dirty

914 3614 9 First Street Troy, NY 12180 catering@slidindirty.com



WD filed federal civil  
rights §1983 action on  
August 27, 2013

VIOLATION OF FREE SPEECH

VIOLATION OF EQUAL PROTECTION



# *New & Improved*

Fall of 2013 OGS adopted a new procedure to assess applications of vendors to participate in events and programs

- Explicit criteria
- Scoring system with cutoffs, etc.



- May 5, 2014 WD filed timely and complete application
  - Reviewed by OGS employees and received score sufficient for acceptance
  - Nevertheless, application denied based on offensive names
- WD notified on May 16, 2014
- WD only denied application
- WD amended their federal complaint to include the 2014 rejection

# Court's Analysis – Free Speech

- ▶ Viewpoint discrimination
  - ▶ “Government discrimination against speech because of its message is presumed to be unconstitutional.”
    - ▶ OGS targeted the viewpoint of WD, based on the way they brand their truck and products with ethnic slurs.
  - ▶ “The government discriminates against viewpoints when it disfavors certain speech because of the ‘specific motivating ideology or the opinion or perspective of the speaker.’”



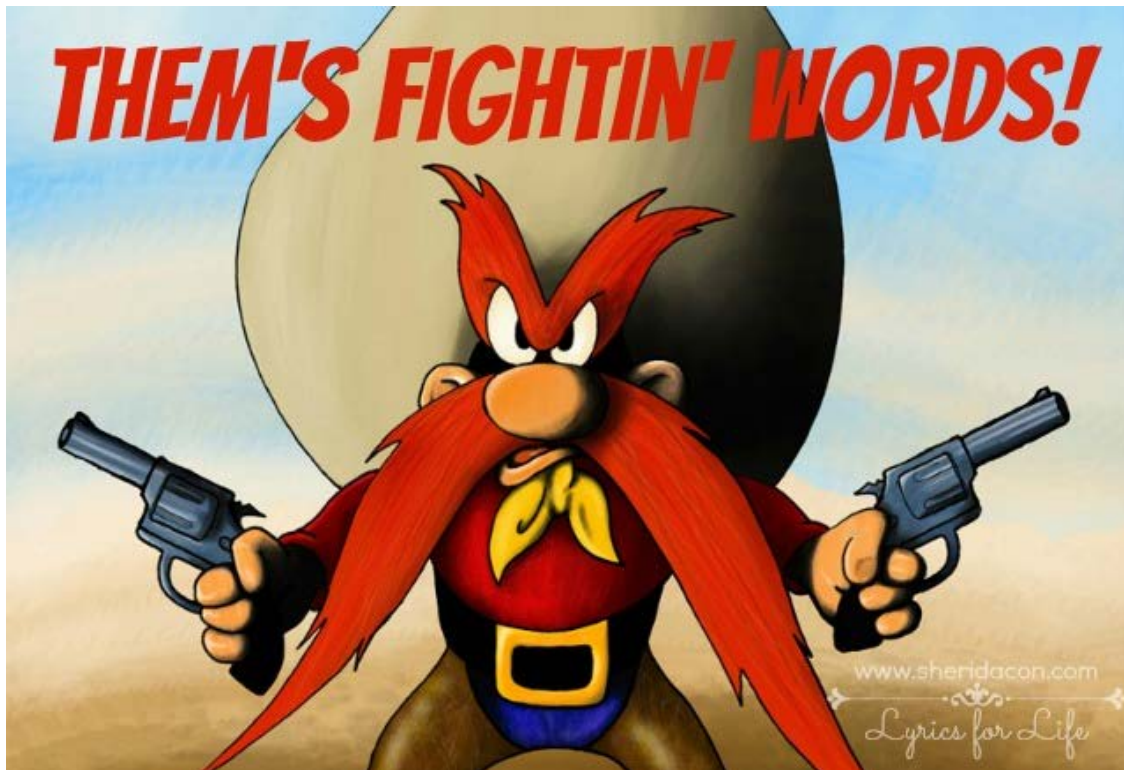
# Viewpoint Discrimination

- ▶ “ ‘Giving offense is a viewpoint’ when it comes to ethnic slurs, at least when giving ‘offense’ to an audience is the sole effect the government is targeting.” citing to *Matal v. Tam*, 137 S.Ct. 1744 (2017)
- ▶ Denial was not because government thought the object was to demean or offend but because the terms would offend some people. *Id.*

# Viewpoint Discrimination

- ▶ Government cannot insulate a law from charges of viewpoint discrimination by tying censorship to the expected reaction of the speaker's audience, rather than to the speaker's view or intentions. *Id.*
- ▶ A burden on speech based on audience reaction is simply governmental hostility and intervention in a "different guise." The speech is targeted, based on the government's disapproval of the speaker's choice of message. *Id.*

# Viewpoint Discrimination



- ▶ OGS did not argue that WD's speech fell into unprotected class
  - ▶ words that create "true threat" of violence
  - ▶ "harassment"
  - ▶ "fighting words" - so insulting in both content and delivery they are likely to provoke the listener to respond violently
- ▶ Court found that WD's use of ethnic slurs reflects a viewpoint about when and how such language should be used.

# Viewpoint Discrimination

Viewpoint discrimination against free speech violates the 1<sup>st</sup> Amendment unless it is narrowly tailored to achieve a compelling government interest.

The government's interest in preventing speech that expresses ideas that offend is not a sufficient "substantial" or compelling government interest. *Matal*.

Therefore, OGS unconstitutionally violated WD's right to free speech.

# Government Speech and Government Contractor Speech

- ▶ OGS' argument
  - ▶ Any viewpoint discrimination is inconsequential.
  - ▶ If they had granted WD's application, it could be seen that OGS was endorsing, or actually expressing WD's message. This would be improper government speech.
  - ▶ Or, WD could be viewed as a government contractor.
- ▶ Either way, the denial was appropriate.

# Government Speech and Go





# Government Speech

- ▶ Governments can clearly determine the content of its messages.
- ▶ Question: Is the speech by the vendors participating in the Lunch Program - an event that involves both the government and private individuals, a.k.a. government speech?
  - ▶ No
- ▶ Speech that is otherwise private does not become speech of the government merely because the government provides a forum for the speech or in some way allows or facilitates it.
- ▶ Court not persuaded that by OGS providing publicity, access to the Plaza as well as electricity and water, turns WD's message into government speech.

- ▶ Found it implausible to believe the public would view OGS providing these services as adopting WD's speech as its own.
- ▶ No evidence that OGS organized the Lunch Program for purpose of conveying a message.
  - ▶ The purpose was to provide casual outdoor lunch options to state employees and visitors.
- ▶ OGS accepted all applications, including the "Slidin' Dirty" truck.
- ▶ The government does have a legitimate interest in promoting family-friendly message - when it speaks directly, or through contractors and others - to the public.
  - ▶ But that's not what happened here.



# Government Contractor Speech

- ▶ WD not government contractors.
- ▶ Rather, private entity that pays access to the Plaza to engage in commercial venture with the public.





Equal  
Protection /  
Selective  
Enforcement



To prevail on a claim of selective enforcement WD must show:

1. That it was treated differently from other similarly situated businesses; and
2. That such differential treatment was based upon impermissible considerations, such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

WD claims that because all other applications were approved, including "Slidin' Dirty," their application was denied because of the exercise of their constitutional rights in the way their truck and products were branded.





What did the court say?



Yep.

REALLY



# Court agreed with WD finding:

- ▶ All other Lunch Program applicants were approved, including “Slidin’ Dirty”
- ▶ Late applications were approved
- ▶ Incomplete applications were approved

Court agreed with WD finding:

- ▶ All other Lunch Program applications were approved, including "Dirty"
- ▶ Late applications were approved
- ▶ Complete applications were approved

**!!Violation of Equal Protection!!!**

# Court's Final Order

- ▶ Remand back to district court with instructions for the court to enter an order that:
  - ▶ OGS' conduct violated WD's 1<sup>st</sup> Amendment rights;
  - ▶ Injunction against OGS' from denying WD's future applications;
  - ▶ OGS violated WD's equal protection rights.



# Take-aways

- ▶ When you don't like certain speech because of its motivating ideology or the opinion or perspective of the speaker, be cautious when making any kind of governmental decision about the speech.
  - ▶ Decision must be narrowly tailored to achieve a compelling government interest.
- ▶ The mere use of potentially offensive words that brand a company or product reflects a "viewpoint."
  - ▶ Any attempt to restrict will be subject to strict scrutiny.

# “Fighting Words” What are they?

- ▶ You can deny permits, regulate speech, that contain the use of slurs if they constitute a “true threat” of violence, “harassment,” or “fighting words.”
- ▶ So give me an example of fighting words.
  - ▶ I can't. And neither can the court.
  - ▶ It's like pornography. You'll know it when you see it.



Actor Zach Galifianakis Poses for Vanity Fair

# These are not “fighting words”

- ▶ A preacher calling a town marshal a “damned racketeer” and a “damned fascist.”
- ▶ Flag burning
- ▶ Wearing a jacket that said “F\*\*k the Draft” in the courthouse
- ▶ Burning a cross across the street from an African-American family
- ▶ Swearing at police officers, calling them pigs, etc.



# Take-aways

- ▶ Summer festivals
  - ▶ Government forum + Private Individuals  $\neq$  government speech.
  - ▶ Private vendors do NOT speak for the government.
- ▶ Treat similarly situated businesses equally, unless you have legal reason not to.
- ▶ If treated differently, make sure it is not based on:
  - ▶ Race
  - ▶ Religion
  - ▶ Intent to inhibit or punish the exercise of a constitutional right; or
  - ▶ Malicious or bad faith to injure a person.



## And...

- ▶ Don't say you won't accept
  - ▶ Late applications
    - ▶ Then do
  - ▶ Incomplete applications
    - ▶ Then do
- ▶ Then not accept a late or incomplete application of someone you really don't want to have to.
  - ▶ You have set a bad precedent!
- ▶ Have written policies or procedures...and follow them!



Separate, But  
Related Issue

Threatening  
Words



# Separate, But Related Issue

## Threatening Words

- ▶ Courts currently lack clarity in determining when rants and raves exceed the boundaries of protected speech and should be considered a real danger.
- ▶ Courts are faced with the challenge of determining when a threat is “true” versus hyperbole.
  - ▶ When does the language cross the line and become a crime is the question *du jour*.
  - ▶ Courts do not want to criminalize political and other types of hyperbole but recognize in today's increasingly violent world, where threatening speech is made via social media and other venues, that the line between constitutionally protected speech and true threats is drawing ever closer.

# Threatening Words

- ▶ Supreme Court set forth three factors to look at in distinguishing protected speech and threats.
  - ▶ Context of the statement;
  - ▶ Conditional nature of the statement;
  - ▶ Reaction of the listeners.
- ▶ Other factors courts look at:
  - ▶ How threat communicated.
  - ▶ Time and distance between the threat and parties.
  - ▶ Any prior communications or threats.

# Threatening Words

- ▶ Despite recent Supreme Court decision, we are still lacking in sufficient guidance as to what level of threat is required to subvert the presumption of 1<sup>st</sup> Amendment protection.



# Hodgepodge of Cases

- ▶ Convictions upheld for threatening words
  - ▶ Statement made to judicial officer, "Well, that deserves 180 pounds of lead between the eyes. Now I see why people shoot up court houses."
    - ▶ Supreme Court of South Dakota upheld conviction.
  - ▶ Statement made to an employee at a Social Security office, "If you "f\*\*k with my family, I'm going to f\*\*k with you."
    - ▶ Federal district court in Nebraska.
  - ▶ Statement made to brother, "If you go into the attic, I will hurt you."
    - ▶ Connecticut Supreme Court

# Hodgepodge of Cases



- ▶ Conviction overturned for threatening words
  - ▶ Voicemail left on public defender's phone, "There is not a day that goes by since I was sentenced at that courthouse that I have not dreamed about revenge and the utter hate I feel for the judge...There's not a day that goes by that I don't pray for the death and destruction upon the judge and upon every single person who sentenced me."
    - ▶ Illinois Court of Appeals

# If you get “that” call...

- ▶ Try to stay calm and not take it personally.
- ▶ Follow office protocol.
- ▶ Report it immediately.
- ▶ Document as much as you can.
- ▶ Recognize that your body will physically react in certain ways and you can't control it. It's normal.
  - ▶ Freeze
  - ▶ Dramatic mood swings – crying to laughing hysterically
  - ▶ Can't remember specific details or relate the event in a chronological order.
  - ▶ Feeling numb or “out of body” experience.
- ▶ Take every threat seriously.
- ▶ Be patient with the legal system.

# Essence, Inc. v. City of Federal Heights, 285 F.3d 1272

## Facts of the Case

### Federal Heights SOB ordinance

No one under 21 could get an employment license for nude dancing.

No mechanism:

To review the City Administrator's decision;

For public hearing before City Council after denial;

No authorization to appeal City Administrator's decision to a Colorado court





# Essence Facts

- ▶ Essence, Inc. d.b.a. The Bare Essence
  - ▶ Nude dancing establishment where alcohol served.
  - ▶ 2 Bare Essence employees, under 21, applied for licenses and were denied.



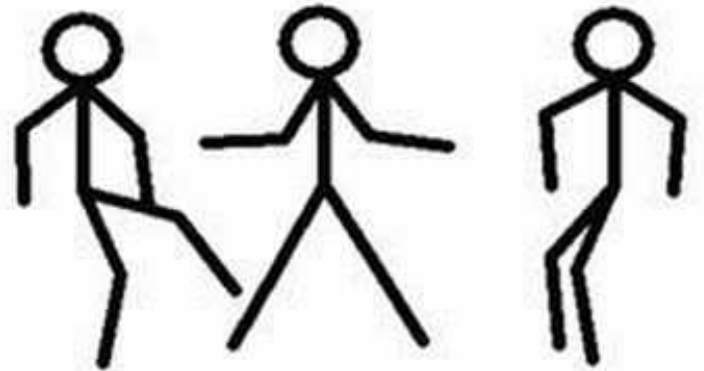
- ▶ Pertinent Issues on Appeal to 10<sup>th</sup> Circuit
  - ▶ SOB ordinance must further an important or substantial government interest, a.k.a. intermediate scrutiny.
  - ▶ Age restriction must further the city's interest
  - ▶ Due process claim – appeals procedure

# Intermediate Scrutiny

- ▶ A municipality has a substantial or important governmental interest in combating the harmful secondary effects of nude dancing if the effects are real, and the government must point to evidence of secondary effects;
  - ▶ At the time of the enactment;
  - ▶ Effects occurring years after the enactment.
- ▶ City does not need to conduct new studies or produce independent evidence but may rely on experience of other cities.
  - ▶ No requirement to wait until secondary effects actually exist.



- ▶ Evidence of secondary effects may include:
  - ▶ Supported preamble statements;
  - ▶ Studies and court decisions relied upon by the governing body;
  - ▶ Localized experience with crime or other secondary effects associated with nude dancing.
    - ▶ \*\*\*\*\* Remember this standard does not just apply to nude dancing.



## ▶ Harmful Secondary Effects

- ▶ Undeniable that city has interest in preventing harmful secondary effects.

- ▶ MUST demonstrate that the harms are real.

- ▶ Lower property values;

- ▶ Increased crime;

- ▶ Sexually transmitted diseases, etc.

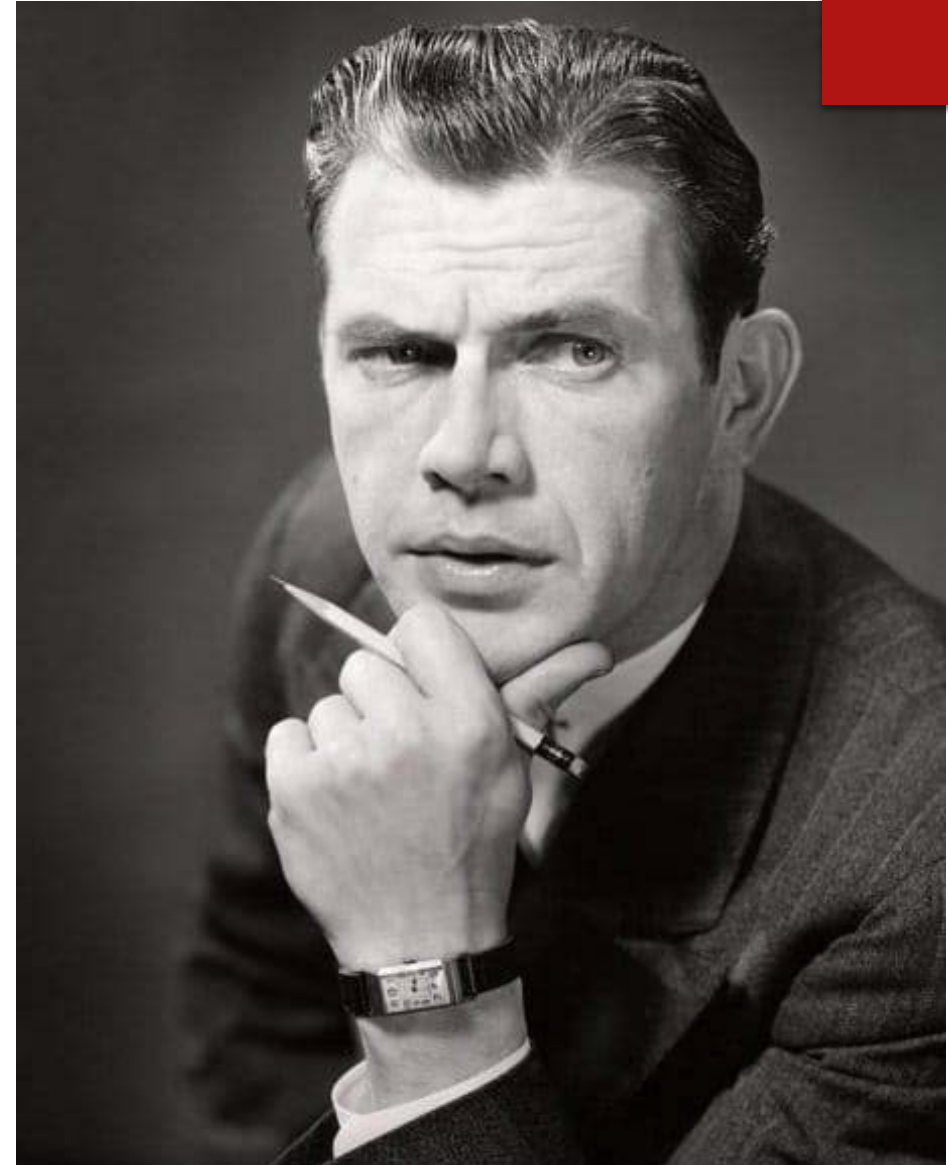
- ▶ City was able to meet that burden.



# Age Restriction Must Further the City's Interest

- ▶ Here the city failed – on what may seem a technicality.
- ▶ City must prove that the language of the ordinance will address the harmful secondary effects.
  - ▶ City ordinance did not ban nude dancing, instead banned those under 21 from being in nude dancing establishments.
  - ▶ City must be able to prove how banning those under 21 would meet the city's interests.
    - ▶ Banning nude dancing would meet those interests but that's not what the ordinance says or does.

- ▶ Evidence presented at original court proceeding
  - ▶ Affidavit of Mayor pro tem, opining, in a conclusory fashion, that the age restriction furthers the city's interest.
  - ▶ There was no evidence to support the conclusions.



Evidence presented after it was too late to submit new evidence

## Affidavit of former dancer, Ms. Weaver


Observed dancers under 21 drinking alcohol;

Told in employee meeting that it was acceptable for dancers under 21 to drink alcohol;

Observed customers bring alcohol into the club for under-age employees.

Had this evidence been produced timely, it is likely the court would have upheld this provision of the ordinance.






Because the only evidence properly before the 10<sup>th</sup> Circuit, affidavit of Mayor, was insufficient to meet intermediate scrutiny, that portion of the ordinance was struck down.

# Due Process – No Appellate Procedure

- ▶ Government may regulate SOB's so long as two evils are not present:
  - ▶ Placing unbridled discretion in the hands of government official or agency that could result in censorship; and
  - ▶ Failing to place limits on the time within which the decisionmaker must issue the license.
    - ▶ Courts have identified two procedures to avoid the "risk of indefinitely suppressing speech."
- ▶ Two procedural safeguards:
  - ▶ Government must make a decision within a specified and reasonable amount of time;
  - ▶ Prompt opportunity for judicial review of the denial of a license.

- 
- ▶ As we already know, no mechanism:
    - ▶ To review the City Administrator's decision;
    - ▶ For public hearing before City Council after denial;
    - ▶ No authorization to appeal City Administrator's decision to a Colorado court
  - ▶ That provision of statute struck down.

Take-aways

PROCEDURE

PROCEDURE

PROCEDURE

# Issues When Revoking Business License



# Judicial Review

- ▶ Judicial review of a business license revocation by municipalities is limited to determining whether the municipality acted:
  - ▶ Within its lawful authority, and
    - ▶ Examine at the language of the ordinance.
      - ▶ The best evidence of the legislature's intent is the plain language of the statute itself. *State v. Miller*, 193 P.3d 92
  - ▶ In a manner that is not arbitrary or capricious. *Dairy Prod. Servs., Inc. v. City of Wellsville*, 13 P.3d 581.
    - ▶ Arbitrary and capricious means there is no evidence in the record to support the decision. *14<sup>th</sup> St. Gym, Inc. v. Salt Lake City Corp.*, 2183 P.3d 262.

# Judicial Review

- ▶ Reviewing courts may not reweigh the evidence.
- ▶ Instead, the court must consider all the evidence in the record, both favorable and contrary, and determine whether a reasonable mind could reach the same conclusion as the city.



So, it's up to your city attorney to draft a constitutionally sufficient ordinance, but your input and assistance are appreciated.

I, at least, always appreciated the help.



A photograph of three people standing in a law library. On the left is a man with glasses wearing a light blue button-down shirt. In the center is a woman with blonde hair wearing a grey sweater. On the right is a man wearing a blue and white checkered shirt and a yellow and blue striped tie. The background consists of wooden bookshelves filled with law books. A blue arrow with a red outline points from the right towards the man on the left.

Steve Earle

Final Take-away  
WHEN IN DOUBT, ASK YOUR  
BRILLIANT DEPUTY CITY ATTORNEY.



# QUESTIONS?

Actually don't get to ask any more!

Really!!!

No, I'm serious!!

As a heart-attack!

Just kidding. Questions?