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NO. 94626-4

**SUPREME COURT OF THE
STATE OF WASHINGTON**

ERIC FORBES, et al., APPELLANTS

v.

PIERCE COUNTY, et al., RESPONDENTS

RESPONDENTS' ANSWERING BRIEF

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I. INTRODUCTION

At its core this case is about lap dancing and whether the County can effectively enforce regulations to prevent it. It is the latest round in a decades-long game of cat and mouse between the County and adult entertainers. The entertainers seek the greater profits derived from illegal activity. The County seeks to prevent that illegal activity. The entertainers in turn seek to circumvent the County's prevention efforts, or at least to render them unenforceable in practice.

To this end, the adult entertainers often seek to place their actions behind that bulwark of American democracy, the constitutional protection of free speech. Most often, though, those actions of the entertainers that are at issue do not fall within the ambit of that protected zone, and instead lurk outside its penumbra.

Up to the adoption of the 2012 adult entertainment ordinance, violations in Pierce County by adult entertainers were pervasive, with neither operators, managers, nor dancers making any apparent effort to comply with regulations or avoid unlawful conduct. The County came to the recognition that enforcement of violations via citations and revocations of dancer licensing was ineffective when applied only to the dancers because high dancer turnover meant that dancers would simply work in the County until caught and then move on to other locations outside the

County's jurisdiction. In 2012, the Pierce County Council sought to overcome the violations by adopting a licensing and regulatory scheme in which the club managers and operators, in addition to the dancers, were responsible for ensuring that entertainers only permitted lawful activity at the club. In doing so, the 2012 Ordinance largely left in place and relied upon the time, place, and manner restrictions that had previously been adopted and subsequently approved by the court.

As the record of the code violations at issue in this case reflects, the violations continued unabated. Thus, the County pursued enforcement actions.

The code provisions do not constitute an impermissible prior restraint on speech where sanctions and penalties are only applied post-violation. Any greater protection the Washington Constitution may afford to prior restraints on speech is inapplicable to this case, where the code provisions otherwise pass constitutional muster.

II. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

A. NO ASSIGNMENTS OF ERROR

Respondents assign no error to the ruling of the superior court.

B. STATEMENT OF ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR

Do the Pierce County Code adult entertainment regulations that

permit license suspension penalties for regulatory violations impose strict liability on adult entertainment licensees? No.

Do the Pierce County Code adult entertainment regulations that impose penalties for regulatory violations constitute a prior restraint on free speech? No.

Do the free speech protections of Art. I, § 5 of the Washington Constitution provide no greater protection than the First Amendment to adult entertainment license suspensions for violations where the violations do not constitute a prior restraint? No.

Does the criminal penalty provision of the Pierce County adult entertainment regulations violate the Washington Constitution where it imposes strict liability on licensees for violations by others? No.

Does any unconstitutionality of the criminal penalty provision for adult entertainment violations undermine other provisions in the adult entertainment chapter where the criminal provision is a separate section, and the code has a severability clause? No.

Do adult entertainment managers and studio licenses have the same level of standing as dancers to assert free speech violations where they are purveyors of the act but not performers themselves? No.

Do the adult entertainment regulatory provisions of the Pierce County Code violate the Washington Constitution? No.

III. STATEMENT OF THE CASE

This case was submitted to the superior court via cross motions for summary judgment based upon an agreed record. Respondents do not believe that between the parties there is any material dispute as to the facts of the case.

A. PROCEDURAL POSTURE

Chapter 5.14 PCC entitled "Adult Entertainment Industry Licensing and Regulation" is administered by the Pierce County Auditor's Office which reviews applications and issues licenses for erotic dancers, managers, and erotic dance studios in unincorporated Pierce County.[1] Dreamgirls at Fox's is located in the Parkland area and is the only erotic dance studio currently operating within the unincorporated areas of Pierce County.[2]

Pierce County Auditor staff conduct periodic compliance checks at Dreamgirls at Fox's and verify that the operational requirements pertaining to signage, lighting, and layout are met and that every dancer and manager at the club has a valid and current license from Pierce County.[3] The Pierce County Sheriff's Department conducts periodic undercover

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[1] PCC Chapter 5.14 refers to "erotic dance studios." The more modern term is "adult entertainment establishment." Members of the public will often refer to these businesses in the vernacular as "gentlemen's clubs" or "strip clubs."
[2] Blakeway & Richardson Report of Proceedings (RP) 18. [CP 369]
[3] Forbes Report of Proceedings (Forbes RP) 45, 46, 105. [CP 509, 510, 569]

operations at the club and focuses primarily on the conduct of the dancers and managers and any illegal activities that may be taking place.[4]

B. PLAINTIFF ERIC FORBES

On November 1, 2013, Eric Forbes (Forbes) applied for and received an erotic dance studio license from the Pierce County Auditor for Dreamgirls of Tacoma LLC, which operates Dreamgirls at Fox's.[5] On August 28, 2014, the Pierce County Auditor's Office issued a Notice and Order to Correct to Eric Forbes as the agent/licensee for Dreamgirls at Fox's.[6] The Notice and Order to Correct alleged several violations of the operational restrictions contained in PCC 5.14.190.[7] The Notice and Order was based upon violations observed during two license compliance inspections by the Auditor's Office staff and three undercover operations by the Pierce County Sheriff's Department during the 2014 calendar year.[8] The violations included dancers performing off the stage, dancers accepting money directly from the customers, dancers touching patrons with intent to arouse them, and managers not ensuring that the dancers or the club were in compliance with regulations set forth in PCC 5.14.190.[9]

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[4] Forbes RP 6. [CP 470]
[5] Forbes Administrative Record (Forbes AR) 42-47. [CP 117-122]
[6] Forbes AR 54, 55. [CP 129, 130]
[7] Forbes AR 54, 55. [CP 129, 130]
[8] Forbes AR 54. [CP 129]
[9] *Id*.

The Notice and Order listed several corrective actions that must be performed including: limit all dancing to the designated stages, ensure managers are aware of their responsibilities under PCC 5.14.180, and ensure dancers comply with PCC 5.14.190.[10] The Notice and Order to Correct did not suspend or revoke the erotic dance studio license and did not impose any fine.[11]

Dreamgirls of Tacoma LLC submitted a timely appeal to the Pierce County Hearing Examiner.[12] An evidentiary hearing took place on January 14, 2015.[13] The Hearing Examiner issued a decision on February 24, 2015, and upheld the Notice and Order to Correct, finding that "Pierce County has shown by a preponderance of evidence that Forbes and his business, Dreamgirls of Tacoma LLC, violated PCC 5.14.230 by permitting numerous, continuing violations of Chapter 5.14 to occur within the business."[14] The Hearing Examiner declined to issue any findings on the appellant's constitutional challenges because constitutional issues are beyond the scope of the Hearing Examiner's subject matter jurisdiction.[15]

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[10] Forbes AR 54,55. [CP 129, 130]
[11] *Id*.
[12] Forbes AR 60. [CP 135]
[13] Forbes AR 1. [CP 76]
[14] Forbes AR 16, ln. 12-15. [CP 91]
[15] Forbes AR 16, ln. 22 -17, ln. 4. [CP 91]

On March 12, 2015, Plaintiffs submitted a timely petition for writ of review and complaint for declaratory and injunctive relief in Pierce County Superior Court. An amended petition and complaint was filed on June 11, 2015. The petition alleged that the Hearing Examiner's factual findings were not supported by substantial evidence and that the Hearing Examiner committed an error of law by holding that the business owner was strictly liable for the conduct of the dancers and managers. The amended petition/complaint also included several Washington State constitutional challenges to selected provisions of PCC Chapter 5.14 and included two additional Plaintiffs who asserted these constitutional claims.

C. PLAINTIFFS ALEX HELGESON AND SABINA ZEMBAS

Plaintiff Alex Helgeson is a licensed adult entertainment manager, and Plaintiff Sabina Zembas is a licensed erotic dancer. Neither Helgeson nor Zembas were involved in Forbes' administrative appeal, but they were added as Plaintiffs on the constitutional claims in the amended complaint.

D. PLAINTIFF HEATHER BLAKEWAY

Plaintiff Heather Blakeway is a licensed erotic dancer.[16] On March 16, 2016, members of the Pierce County Auditor staff conducted a compliance inspection at Dreamgirls at Fox's.[17] While there, a staff

[16] Blakeway AR 37. [CP 253]
[17] Blakeway AR 29. [CP 245]

member observed dancer Heather Blakeway dancing off the stage and close to a patron in violation of PCC 5.14.190(h).[18] The Auditor's office issued a Notice and Order of Suspension which notified Blakeway of the violation and informed her that her dancer license will be suspended for 30 days.[19] A timely appeal was filed to the Pierce County Hearing Examiner.[20] An evidentiary hearing took place on July 21, 2016.[21] In his decision dated August 22, 2016, Deputy Hearing Examiner Michael McCarthy, upheld the Notice and Order of Suspension but reduced Blakeway's license suspension period to 10 days.[22] A petition for writ of review and complaint alleging violations of the Washington State Constitution was originally filed in Pierce County Superior Court under Cause No. 16-2-10834-8, but was subsequently consolidated into this case on October 21, 2016.

E. PLAINTIFF ASHLEY RICHARDSON

Plaintiff Ashley Richardson is a licensed adult entertainment manager.[23] During the same compliance inspection on March 16, 2016, an Auditor staff member observed a dancer performing off the stage in

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[18] Blakeway & Richardson RP 28-31. [CP 380-382]
[19] Blakeway AR 29. [CP 245]
[20] Blakeway AR 25. [CP 241]
[21] Blakeway AR 1. [CP 217]
[22] Blakeway AR 1-7. [CP 217-223]
[23] Richardson AR 41. [CP 298]

violation of PCC 5.14.190(h).[24] Shortly thereafter, staff members observed a patron sitting within 10 feet of the stage which is also a violation of PCC 5.14.190(h).[25] There were announcements being made in the club that "dancers were available for intimate one on one VIP time."[26] Manager Ashley Richardson was on duty, but did not stop the violations.[27] The Auditor's office issued a Notice and Order of Suspension which notified Richardson of the violations and informed her that her manager license will be suspended for 30 days.[28] A timely appeal was submitted to the Pierce County Hearing Examiner.[29] An evidentiary hearing took place on July 21, 2016.[30] In his decision dated August 22, 2016, Deputy Hearing Examiner Michael McCarthy upheld the Notice and Order of Suspension but reduced Richardson's license suspension period to 10 days.[31] A petition for writ of review and complaint alleging violations of the Washington State Constitution was originally filed in Pierce County Superior Court under Cause No. 16-2-10833-0, but was subsequently consolidated into this case on October 21, 2016.

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[24] Blakeway & Richardson RP 28-30. [CP 379-381]
[25] Richardson & Blakeway RP 20, 21, 31, 34. [CP 371, 372, 382, 385]
[26] Richardson & Blakeway RP 35. [CP 386]
[27] Richardson & Blakeway RP 20, 21. [CP 371, 372]
[28] Richardson AR 30, 31. [CP 287, 288]
[29] Richardson AR 26. [CP 283]
[30] Richardson AR 1. [CP 258]
[31] Richardson AR 1-7. [CP 258-264]

F. CONTESTED ISSUES

Through the course of this case, the contested issues have been narrowed substantially.

On December 12, 2016, the parties entered and the Court approved a Stipulation and Order for Voluntary Dismissal – Partial as to Some Claims and Legal Theories. The parties agreed to limit the litigation to two issues:

1. Whether the decision of the Hearing Examiner in each case was supported by sufficient evidence and/or contained an error of law on the following legal question only; and
2. Whether Chapter 5.14 of the Pierce County Code provides strict liability – civil and criminal – for owners, managers, and dancers. Assuming that it does, whether strict liability comports with the Washington Constitution.

CP 347-49.

The parties submitted cross-motions for summary judgment to the court. CP 615-639; 687-787; 788-804; 805-819. On May 15, 2017, the court issued its order, granting summary judgment in favor of Defendants Pierce County, et al., and denying the summary judgment motion of Plaintiffs. CP 820-828.

On June 7, 2017, Plaintiffs timely filed a notice of discretionary review. CP 829-40. Appellants petitioned for direct review to the Washington Supreme Court. CP 829-40. Respondents opposed direct review, instead arguing that the matter should first be heard at the court of appeals.

Appellants filed their brief. Appellants did not assign error to the court's conclusion that substantial evidence supported the Hearing Examiners' determinations.

Respondents now make this response.

G. ADDITIONAL PERTINENT FACTS

Pierce County adopted provisions regulating adult entertainment in 1987. In 1989 the Washington State court of appeals held that the regulation of adult entertainment by Pierce County was unconstitutional. *D.C.R. Entertainment, Inc. v. Pierce County*, 55 Wn. App. 505 (1989).

In response to continuing problems with unlawful activity, in 1994 Pierce County replaced its Code Chapter 5.14 that regulates adult entertainment. PC Ord. 94-5 (1994). Those provisions included requirements for licenses for erotic dance studios, managers, and dancers. The court of appeals upheld a challenge to portions of those amendments. *DCR, Inc. v. Pierce County*, 92 Wn. App. 660 (1998).

Pierce County, however, found that its revised regulations were ineffective at preventing violations. See, e.g., CP 714-87; PC Ord. 2015-51. In 2012 the County therefore adopted amendments to its provisions. See PC Ord. 2012-51 (2012). Among other things, the 2012 amendments imposed an affirmative responsibility on managers to ensure the studio is in compliance with the operation restrictions of PCC 5.14.190. See PC Ord. 2012-51 (2012) (amending PCC 5.14.180(D) and (E)).

IV. ARGUMENT

The Criminal Penalties Provision clearly provides that managers and licensees shall be strictly liable for violations of the code. That provision, however, is largely peripheral to the issues in this case where none of the Appellants were charged under the criminal provisions. See, e.g., *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1, 4 (1989). The license suspension and revocation provision, on the other hand, is a separate code section.

While Appellant challenges the constitutionality of the Pierce County code provisions governing adult entertainment. That challenge has been limited to the Washington Constitution only, and is not argued under the United States Constitution.

Given that the issue in this case is a constitutional challenge, it is telling that Appellants' argument begins not with a review of the County's

code provisions, nor with the Washington Constitution, but with an argument related to nomenclature, and Appellants' misplaced attempt to apply the concept of "strict liability" to the regulatory and licensing provisions in the adult entertainment chapter of the Pierce County Code.

Under a traditional free speech analysis, one of three different standards of review applies to this case. Appellants recognize that their best route to success is to have the Court apply a strict scrutiny standard of review. To that end, they argue that Art. I, § 5 of the Washington Constitution provides greater protection against prior restraint than does the First Amendment of the United States Constitution. They then make two additional arguments in an attempt to compel the Court to apply strict scrutiny to Pierce County's regulatory provisions.

First, they argue that the license suspension and revocation provisions of PCC 5.14.230 impose "strict liability" on club managers and studio licensees. That argument is misplaced.

Second, Appellants argue that strict liability penalties constitute a prior restraint on speech even though any penalties are imposed post-violation and are stayed pending the completion of the appeals process.

As explained in the arguments below, Appellants' arguments are without merit.

To the extent that Respondents' arguments made in Defendants' Motion for Summary Judgment (CP 687-787) and Defendants' Response to Plaintiffs' Motion for Summary Judgment (CP 788-804) are not already contained within this brief, Respondents incorporate those arguments by reference.

A. REVIEW AND INTERPRETATION OF THE RELEVANT CODE PROVISIONS

Appellants' constitutional arguments depend upon the language and the meaning of the particular Pierce County Code provisions at issue in this case. Therefore, as a preliminary matter it is necessary to review those provisions. A hyperlinked electronic version of the Pierce County Code Chapter 5.14, Adult Entertainment, is available at http://www.codepublishing.com/WA/PierceCounty/#!/PierceCounty05/PierceCounty0514.html#5.14. A print copy can be found in the record at CP 644-650.

1. Licensed Entities

The code establishes three types of licenses related to adult entertainment: erotic dance studio license (PCC 5.14.030, .040, .060, .070, .080, and .090); manager license (PCC 5.14.110, .120, .130, .150, .160, and .170); and dancer license (PCC 5.14.100, .120, .130 .150, .160, and .170).

The latter two licenses were added to the PCC in 1994.

2. <u>Manager Responsibilities and Operation Restrictions</u>

The Manager has a number of affirmative responsibilities. PCC 5.14.180. Subsections (D) and (E) make the manager responsible for ensuring the studio and all dancers comply with the operational restrictions. Those provisions were added in 2012. PC Ord. 2012-51.

> **5.14.180 Manager Responsibilities.**
> A. A licensed manager shall present be on the premises of an erotic dance studio at all times when open for business.
> B. It shall be the responsibility of the manager to verify that any dancer within the premises possesses a current and valid dancer's license.
> C. The manager shall, upon request by any law enforcement officer or business license inspector, make available for inspection the dancers' licenses required to be on the premises as described herein.
> <u>D. The manager shall be responsible for ensuring that the studio is in compliance with the operational restrictions set forth in PCC 5.14.190.</u>
> <u>E. The manager shall be responsible for ensuring that all dancers comply with the operational restrictions set forth in PCC 5.14.190.</u>
> (Ord. 2012-51 § 3 (part), 2012; Ord. 94-5 § 2 (part), 1994).

[Emphasis added.]

The Adult Entertainment chapter also contains a number of operation restrictions that limit conduct within the erotic dance studio.

> **5.14.190 Operation Restrictions – Unlawful Acts Designated.**

Violation of any subsection (A.-S.) shall be a separate and distinct offense.

A. No person, firm, partnership, corporation, or other entity shall advertise, or cause to be advertised, an erotic dance studio without a valid erotic dance studio license issued pursuant to this Chapter.
B. No later than March 1 of each year, an erotic dance studio licensee shall file a verified report with the Auditor showing the licensee's gross receipts and amounts paid to dancers for the preceding calendar year.
C. An erotic dance studio licensee shall maintain and retain for a period of two years the names, addresses, and ages of all persons employed as dancers by the licensee.
D. No erotic dance studio licensee shall employ as a dancer a person under the age of 18 years of age or a person not licensed pursuant to this Chapter.
E. No person under the age of 18 years shall be admitted into an erotic dance studio.
F. No erotic dance studio licensee shall serve, sell, distribute, consume, or possess any intoxicating liquor or controlled substance upon the premises of the licensee.
G. An erotic dance studio licensee shall conspicuously display the studio licenses required by this Chapter.
H. All dancing shall occur on a platform intended for that purpose which is raised at least 18 inches from the level of the floor and no closer than ten feet to any patron.
I. No dancer or employee shall fondle, caress, or touch any patron in a manner which seeks to arouse or excite the patrons' sexual desires.
J. No patron shall fondle, caress, or touch any dancer or employee in a manner which seeks to arouse or excite the patrons' sexual desires.
K. No patron shall pay or give any gratuity directly to any dancer.
L. No dancer shall solicit any pay or gratuity directly from any patron.
M. No dancer or employee shall expose their breasts below the top of the areola or expose any portion of the pubic

hair, vulva or genitals, anus and/or buttocks, except upon a stage at least 18 inches above the immediate floor level and removed at least 10 feet from the nearest patron.

N. The stage or the entire interior portion of cubicles, rooms, or stalls wherein adult entertainment is provided must be visible from the common areas of the premises. Visibility shall not be blocked or obscured by doors, curtains, drapes, or any other obstruction whatsoever.

O. No activity or dancing occurring on the premises shall be visible at any time from any public place.

P. No dancer shall be visible from any public place during the hours of their employment, or apparent hours of their employment on the premises.

Q. A 36" x 24" sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

THIS EROTIC DANCE STUDIO IS REGULATED BY PIERCE COUNTY.

1. ALL DANCING MUST OCCUR ON STAGE AND NO CLOSER THAN TEN FEET TO ANY PATRON.
2. DANCERS AND EMPLOYEES ARE NOT PERMITTED TO TOUCH, CARESS OR FONDLE ANY PATRON IN A MANNER WHICH SEEKS TO AROUSE OR EXCITE THE PATRONS' SEXUAL DESIRES.
3. PATRONS ARE NOT PERMITTED TO TOUCH, CARESS OR FONDLE ANY DANCER OR EMPLOYEE IN A MANNER WHICH SEEKS TO AROUSE OR EXCITE THE PATRONS' SEXUAL DESIRES.
4. NO MONEY OR GRATUITY MAY BE ACCEPTED OR SOLICITED BY ANY DANCER FROM A PATRON.

R. Dances/performances/exhibits that are obscene are not permitted. Obscene is defined as:

1. Whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; and

2. Whether applying those same contemporary community standards, the average person would find that the work depicts or describes in a patently offensive way, the following sexual conduct:
    a. ultimate sexual acts, normal or perverted, actual or simulated; or
    b. masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibitions of the genitals or genital area; or
    c. violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape, or torture; and
3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

S. The interior of the studio shall be sufficiently illuminated so that all objects are plainly visible at all times the premises is open for business. The minimum illumination level shall be 30 lux at 30 inches above the floor in all areas open to or used by customers.

T. This Chapter shall not be construed to prohibit:
1. Plays, operas, musicals, or other dramatic works which are not obscene;
2. Classes, seminars, and lectures held for serious scientific or educational purposes; or
3. Exhibitions or dances which are not obscene.

(Ord. 2012-51 § 3 (part), 2012; Ord. 94-5 § 2 (part), 1994).

The court of appeals previously held that many of these operational restrictions were lawful, content-neutral time, place, and manner restrictions. See *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 675-77 (1998). The court also held that while the 10-foot setback was a place or

manner restriction, it was not a prior restraint. *DCR, Inc.*, 92 Wn. App. 675.

The operational restrictions are content-neutral time, place, and manner restrictions that do not effect a prior restraint on speech.

3. <u>License Revocation and Suspension</u>

The code has a section that addresses the standards for revocation and suspension of licenses. It provides:

> **5.14.230 Standards for Revocation and Suspension of License.**
> A. The Auditor shall revoke or suspend, for a specified period of not more than one year, any erotic dance studio license if he/she determines that the licensee or applicant has: made a materially false statement in the application for a license which the applicant knows to be false; <u>or violated or permitted violation of any provisions of this Chapter</u>.
> B. The Auditor shall revoke or suspend, for a specified period of not more than one year, any dancer/manager license if he/she determines that the licensee or applicant has: made a materially false statement in the application for a license which the applicant knows to be false; <u>or violated or permitted violation of any provisions of this Chapter</u>.
> (Ord. 94-5 § 2 (part), 1994) [emphasis added].

The license suspension and revocation provision in PCC 5.14.230 is the crucial one with regard to Appellant's claims.

4. <u>The Criminal Penalties Provision</u>

The Criminal Penalty Section provides as follows:

> **5.14.250 Violation – Penalty.**

> In addition to or as an alternative to any other penalty provided herein or by law, any person, firm, or corporation violating any provision of this Chapter shall be guilty of a misdemeanor, and each such person, firm, or corporation shall be deemed guilty of a separate offense for each and every day during which any violation is committed, continued, or permitted, and upon conviction of any such violation such person, firm, or corporation shall be punished by a fine of not more than $1,000.00, or by imprisonment for not more than 90 days, or by both such fine and imprisonment; provided, no person shall be deemed guilty of any violation of this Chapter if acting in an investigative capacity pursuant to the request or order of the Sheriff or Prosecuting Attorney or duly appointed agent thereof. The manager on duty and/or licensee shall be held *strictly liable* for any violation of the requirements set forth in PCC 5.14.180 and/or 5.14.190.
> (Ord. 2012-51 § 3 (part), 2012; Ord. 94-5 § 2 (part), 1994) [emphasis added].

The Criminal Penalties Provision clearly provides that managers and licensees shall be strictly liable for violations of the code. That provision, however, is largely peripheral to the issues in this case for three reasons. First, none of the Appellants were charged under the criminal penalties provision so that it is not applicable to the violations found in this case. See, e.g., *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1, 4 (1989).

Second, the only provision that includes the 'strictly liable' language is the criminal penalty provision, which is in a separate code section (PCC 5.14.250) from the provisions that govern regulatory violations through license suspension and revocation (PCC 5.14.230).

Third, to the extent that there is any constitutional infirmity in the "strictly liable" language of the criminal penalty provision, the code chapter also contains a severability clause so that the validity of the criminal penalty provision, *vel non*, does not affect the validity of the regulatory provisions that are the central issue in this case.

This point of this section has been to familiarize the Court with the relevant code provisions. Further, legal argument as to why the Chapter 5.14 PCC is not unconstitutional is provided in subsequent sections.

B. THE LICENSE VIOLATION PROVISIONS IN PCC 5.14.230 DO NOT IMPOSE STRICT LIABILITY

Appellants claim that PCC 5.14.230 imposes strict liability on licensees. Br. App. at 18-20. Appellants' argument is misplaced because strict liability is a concept that applies to crimes and torts, both of which derive from shared common law roots in which they served to hold persons accountable for wrongful conduct. These concepts do not apply to administrative regulatory schemes, where violations relate to technical requirements that must be met in order for the activity to be permitted, and there is no concept of wrongfulness in the violation of these technical requirements.

Further, as the County argued in the Superior court, the code provision contains limiting language by its use of "… or permitted …." See CP 705.

The license suspension and revocation section does not impose strict liability, however, even if it did, that would not make it a prior restraint nor render it unconstitutional.

Other courts have upheld regulatory violations and penalties that are predicated on the conduct of another person.

The Oregon Court of Appeals upheld the cancellation of an adult business license where a dancer employed at the adult business engaged in prostitution with a patron. *DK Entertainment, LLC v. Oregon Liquor Control Com'n*, 249 Or. App. 659, (2012). The court upheld the license cancellation despite the fact that after the act of prostitution the manager removed the patron and told the dancer to leave.

The Nebraska Supreme Court upheld a 30-day suspension of the liquor license of an adult business because dancers performing on the premises violated a regulation that prohibited contact between performers and patrons. *DLH, Inc. v. Nebraska Liquor Control Com'n*, 266 Neb. 361 (2003). The court affirmed the regulatory penalty, holding the adult business licensee responsible for the conduct of the dancers despite the

fact that the dancers were employed by an outside corporation with which the adult business licensee had contracted.

Where a proprietor's liquor license was revoked for failing to prevent nudity by staff at their bar, and such nudity was prohibited at establishments that serve alcohol, the Idaho Supreme Court upheld the revocation of the liquor license. *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1, 4 (1989).

The sanctions provided for in the context of liquor licensing are not intended to punish the individual proprietors. They are part of an administrative system within the legitimate scope of the State's police power to protect the public health, safety, and morals. *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1, 4 (1989). Notably, like here, there was also a misdemeanor penalty provision that could have been applied, but it was not at issue in that case where, as the court noted, the appellants were not charged with a criminal offense.

C. APPELLANTS' ARGUMENT FAILS TO RECOGNIZE THE DIFFERENCE BETWEEN THE THREE REGULATORY STAGES

There are three different stages in the administrative regulation of an activity. First it must be licensed, second it is regulated by rules on conduct, and third, enforcement occurs with regard to any regulatory violations. Each of these stages is separate and distinct. These stages are

not all reviewed by this Court in the same way.

That is because denial of an adult entertainment license in the first place constitutes a prior restraint on speech. See, *Ino Ino, Inc*., 132 Wn.2d 103, 12-123 (1997). License denial receives the most stringent review, though even that does not fully rise to the level of strict scrutiny.

Regulation of adult entertainment activity is permissible so long as the regulations are related to the time, place, and manner of the activity, and they are content-neutral. When that is the case, they are not subject to strict scrutiny, but to the lowest level of rational basis review. See *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570 (2002).

Finally, when violations of the regulations occur and citations or penalties are imposed, those too should receive the lowest level of scrutiny because they are not a prior restraint, but rather an after-the-fact penalty for a violation.

D. THE FREE SPEECH PROTECTIONS OF THE WASHINGTON CONSTITUTION PROVIDE NO GREATER PRIOR-RESTRAINT PROTECTION TO ADULT ENTERTAINMENT THAN THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

Appellants argue that Art. I, § 5 provides greater protection against prior restraint in the context of adult entertainment than does the federal constitution. Appellants then undertake a *Gunwall* analysis. Appellants' analysis follows the *Gunwall* analysis undertaken in *Ino Ino, Inc. v. City of*

Bellevue, with one exception. Appellants' argument differs from that undertaken by the court in *Ino Ino, Inc.*, solely with regard to the factor of "Pre-existing Case Law."

Respondent provided a complete *Gunwall* analysis in its response to Plaintiff's Motion for Summary Judgment (CP 797-802). Respondent incorporates that analysis here. For purposes of this brief, however, it is only necessary to consider the analysis of pre-existing case law, as it is the one factor on which Appellants' *Gunwall* analysis differ from the court's in *Ino Ino, Inc*. Br. App. at 22ff.

Appellants rely upon three licensing cases. The first is *Seattle v. Bittner*, 81 Wash.2d 747 (1973). That case, however, is inapplicable because it pertained to denial of a license to open an adult theater in the first place. Because it did not involve regulatory enforcement, it is inapplicable under the facts of this case.

In *Ino Ino, Inc*., the court held that imposing a fourteen-day waiting period before the manager could receive their license was an improper prior restraint because the club could not operate without a manager. *Ino Ino, Inc*., 132 Wn.2d at 123.

Appellants also rely upon *JJR Inc, v. Seattle*, 126 Wn.2d 1 (1995). While that case involved a suspension penalty, it is also inapplicable under the facts of this case.

In *JJR, Inc.*, the court invalidated the suspension process because it did not provide for a stay of the suspension pending judicial review. The suspension therefore operated as a prior restraint because it imposed the suspension before it reached a final determination that it was valid. To the extent the suspension or revocation was effected prior to a final ruling, it would moot the court's authority and the role of appellate review. *JJR, Inc.*, 126 Wn.2d at 9. Such is not the case here, where all penalties have been stayed pending the completion of the appellate process. See PCC 5.02.120. None of the sanctions ordered by the Hearing Examiner have been effected yet in this case.

Thus, none of the licensing cases Appellants rely upon are applicable under the facts here, so that this case does not constitute a prior restraint.

Appellants also rely upon a series of criminal cases that are inapplicable here. Br. App. at 23-24. Those statutes are inapplicable to the license suspension and revocation provision because they are criminal. They do not pertain to administrative sanctions, but only crimes.

Appellants rely upon *Smith v. California*, 361 U.S. 147 (1959). There the court held that a California criminal statute that imposed strict liability upon book sellers that have any obscene or indecent writing or book in the place of business was unconstitutional. The court reasoned

that such a provision would cause book sellers to limit themselves to only selling those books the book seller has inspected. This would impose a restriction on protected material.

This Court relied on the opinion in *Smith* to invalidate a Washington statute that operated in a manner sufficiently similar to the California one. *State Ex Rel. Lally v. Gump*, 57 Wn.2d 224,228 (1960).

The analysis is substantially similar with regard to *Backpage.com LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012), upon which Plaintiffs also rely. There, Backpage, which sold online ads, would have had to review an unmanageable number of ads for prohibited content.

Those cases can be readily distinguished from this one because they involve crimes, not license suspensions. There is no protected speech that is chilled under the Pierce County ordinance. Those cases pertained to book sellers and advertising sellers. They did not involve the activity of nude dancing as adult entertainment. With that distinction, Appellants fail to identify any protected speech that is chilled by Pierce County's criminal code provision.

While managers and studio licensees are required to ensure dancers comply with the operational restrictions, that can be accomplished through a myriad of management techniques that are only limited by the breadth of the licensee's imagination. What licensees and managers

cannot do is engage in willful ignorance and turn a blind eye to violations.

Appellants' *Gunwall* analysis fails where only one factor differs from the analysis in *Ino Ino*, and the balance of factors weigh against greater protection under art. I, § 5.

Washington courts, including this Court, have held that art. I, § 5 generally provides no greater protection to adult entertainment than does the First Amendment. *DCR, Inc. v. Pierce County*, 92 Wn App. 660, 675 (1998) (quoting *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 117, 937 P.2d 154 (1997)). The cases Appellants cite regarding prior restraint in the regulatory context are inapplicable to the facts here. For that reason as well, Appellants' *Gunwall* analysis fails and the Court should not hold that the Washington Constitution, art. I, § 5 requires it to impose more stringent standards of analysis than the federal constitution. Prior restraint is not an issue in this case, where any suspension occur after a violation.

E. THE CRIMINAL PENALTIES PROVISION DOES NOT VIOLATE THE WASHINGTON CONSTITUTION

1. The Criminal Penalties Provision Does Not Violate Free Speech Protections

The strict liability language in the criminal provision does not constitute a violation of free speech protections.

In evaluating the constitutionality of the provision, the court applies the test found in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct.

1673, 20 L.Ed.2d 672 (1968). Under the *O'Brien* test, a content-neutral law that burdens expressive speech survives constitutional challenge when (1) it is within the government's constitutional power, (2) it furthers an important or substantial government interest, (3) the asserted governmental interest is unrelated to the suppression of free expression, and (4) any incidental restrictions on alleged First Amendment freedoms are no greater than essential. *O'Brien*, 391 U.S. at 376–377, 88 S.Ct. 1673, 20 L.Ed.2d 672.

Elements (1) and (2), of the *O'Brien* test are met. As established in *DCR, Inc*. several of the time, place, and manner regulations that are contained in PCC Chapter 5.14.190 have already been found to be constitutional. In *DCR, Inc.* the court stated: "Pierce County Ordinance No. 94-5 states that is purpose is to curb significant criminal activity that has historically and regularly occurred in the adult entertainment industry. Thus, it shows a legitimate purpose on its face." Likewise, Ordinance 2012-51 includes similar purposes as stated in findings of fact 3 and 4 (attached at the end of PCC Ord. 2012-51. As was the case in *DCR, Inc*., the legislative record of PC Ord. 2012-51 shows that the current management of Dreamgirls at Fox's and the former owners of Fox's failed to enforce the operational restrictions found in PCC 5.14.190 and the County's prior enforcement efforts have been ineffective.

Criminal prosecution against the individual dancers did not stop the code violations at the club. Enacting provisions which compel the dancers, managers, and operators to comply with constitutional time, place, and manner regulations is an important and substantial government interest.

Element (3) of the *O'Brien* test has also been met. There is nothing within Ordinance 2012-51 which demonstrates an intent to suppress free speech. Rather the text of Ordinance 2012-51 and the legislative record demonstrates an intent to compel the management at Dreamgirls at Fox's to enforce constitutionally upheld time, place, and manner restrictions within their own club.

Finally, element (4) is satisfied where any incidental restriction on protected expression is no greater than essential.

As the administrative and legislative records show, it was too easy for the manager on duty to turn a blind eye to the violations that occurred in the establishment because the manager on duty had no legal obligation under the PCC to stop the violation or to make any effort to prevent the violations from occurring.

There are an infinite possibility of ways in which an establishment might operate and manage its activities in order to ensure compliance with the regulations. Rather than restrict the studio licensee and manager to a

single method of operation and then micro-manage that method with a multitude of specific and detailed requirements, the strict code provision provides flexibility and wide discretion to the studio licensee and manager on duty as to how to they choose to operate the establishment in compliance with the requirements, while still holding them accountable for doing so.

Having regulatory requirements with the possibility of license suspension that make adult entertainment managers responsible to maintain compliance with the constitutionally permissible time, place, and manner restrictions is essential to further that substantial and important government interest and meets the *O'Brien* test, where it is narrowly drafted to achieve that effect. The Court should uphold the criminal strict liability provision.

By imposing strict criminal liability on the manager on duty and the studio licensee, PCC 5.14.230 obligates them to operate the club in a manner that complies with the time, place, and manner restrictions in the Pierce County Code, however, it does so in a manner that is no greater than essential.

Moreover, as to the criminal penalty provision in PCC 5.14.250, even strict liability crimes are not unconstitutional, they are merely disfavored as a matter of statutory interpretation so that a *mens rea* is

inferred from the statute absent an express intention to impose strict liability.

A number of other courts have upheld criminal penalty provisions that imposed liability for the conduct of others. The Eleventh Circuit held that criminal liability for the conduct of another is acceptable if the defendant is in a 'responsible relation' to the unlawful conduct or omission, but only if the penalty does not involve imprisonment. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999). See, also, *Genusa v. City of Peoria*, 619 F.2d 1203, 1221 (1980 7th Cir.).

The court seemed to have no problem with the fact that misdemeanor penalties were also provided for by the statute at issue in the court's holding in *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1, 4 (1989). Criminal penalties, however, were not at issue in that case because, like here, the business licensee was not charged with a crime.

If a particular construction would render the provision unconstitutional, the Court should apply a narrowing construction if possible. That could include inferring a *mens rea*, if possible, if doing so is necessary in order to uphold the criminal penalty provision. See, e.g., *Ino Ino, Inc.*, 132 Wn.2d at 129.

Further, even if the Court were to hold PCC 5.14.250 to be constitutionally defective, the ruling should be limited to the specific

overbroad language of the code. The Court should refrain from issuing a broad ruling that prevents Pierce County from imposing strict liability if it can be more narrowly and properly tailored to meet the County's purposes.

Finally, even if the Court were to hold the criminal penalties provision unconstitutional, the remainder of the adult entertainment chapter remains intact where the code includes a severability provision at PCC 5.14.260.

2. **The Criminal Penalties Provision Does Not Violate Due Process Protections**

As noted above, the only code provision involving strict liability is the criminal penalty provision.

Appellants cite to one federal district court case that follows an unpublished 6th Circuit decision for the proposition that it violates Due Process where a statutory provision that allowed for license revocation if the licensee or agent, servants, or employees receive any criminal conviction for any activity occurring on the premises. *Bright Lights, Inc. v. City of Newport*, 830 F.Supp. 378, 386-87 (1983). Moreover, respondent in that case conceded their ordinance was unconstitutional. *Bright Lights, Inc.*, 830 F. Supp. at 387. Pierce County makes no such concession.

It is also worth noting that here, the studio licensee, Forbes, merely

received a notice and order to correct the violation. No penalty was imposed as to him.

Respondents have cited above a number of cases in which courts have upheld license suspensions based upon the conduct of others. As is the case with every other business subject to regulation and to regulatory violations, the Constitution does not entitle them to ignore the requirement that they conduct their business in a manner compliant with the valid, lawful regulations. The Due Process clause does not serve to nullify the ability of government to regulate adult entertainment.

Where Appellants made no effort whatsoever to comply with their requirements under the code they cannot assert that their due process rights were violated by their affirmative duty to ensure conduct compliant with the requirements.

F. THE ADULT ENTERTAINMENT CODE PASSES CONSTITUTIONALITY REVIEW

1. Rational Basis Review

The regulatory requirements imposed on licensees are content-neutral time, place, and manner restrictions. They are subject to rational basis review. The enforcement of those provisions is similarly subject to rational basis review. See *Center for Fair Public Policy v. Maricopa County, Arizona*, 336 F.3d 1153, 1159 (9th cir. 2003). See, also, *Richland*

Bookmart, Inc. v. Nichols, 278 F.3d 570 (6th cir. 2002).

The provisions here meet rational basis review, so that Appellants' arguments fail.

2. <u>Mid-Level Scrutiny and Strict Scrutiny</u>

Even if the Court were to hold that mid-level review applies to the enforcement of the code provisions, Respondents still prevail. Under mid-level review, the means chosen must not be substantially broader than necessary to achieve the government's interest. *Ward v. Rock Against Racism*, 491 U.S. 781 (1984).

Here, the County already tried to require compliance with the regulatory provisions. It was an abject failure. The only issue in this case is the adoption of the requirement that studio licensees and managers are responsible for compliance and are subject to license revocation when dancers in their establishment do not comply with the requirements. Managers and studio licensees can no longer turn a blind eye, or even encourage violations. They are accountable for the compliance environment in their business.

The PCC nonetheless leaves it open to studio licensees and managers as to how they go about complying with those requirements to ensure compliant activity within their establishment. The provision puts the onus on the studios licensees and managers to ensure their business is

compliant, but leaves them free to decide how to best effect that. Under that circumstance, the County's approach is not substantially broader than necessary to achieve its interest. A regulation is not invalid simply because a court concludes that the government's interest can be served by some less-restrictive alternative. *Ward*, 491 U.S. at 799, 800.

Indeed, the County's provision imposing suspensions on studio licensees and managers for violations also passes strict scrutiny. The County adopted the 2012 ordinance because imposing restrictions on dancers was ineffective. Extending the consequences to managers and studio licensees is the least restrictive alternative that is effective. As such, the provisions satisfy strict scrutiny. The provisions are certainly not substantially broader than necessary to achieve the County's interest. Appellants fail to establish that PCC 5.14.230 is unconstitutional.

G. LEVEL OF PROTECTION AFFORDED TO MANAGERS AND STUDIO LICENSEES

The manager and studio licensee lack the standing that the dancers possess. See *Young v. American Mini Theaters, Inc*, 427 U.S. 50, 76-82 (1976) (Powell, J, concurring) (suggesting a distinction between speakers, who are entitled to more protection, and commercial purveyors of messages, who are entitled to less protection). See also, *IDK, Inc. v. Clark County*, 836 F.2d 1185 (9th Cir. 1988) (where expressive elements are

unimportant to the activity at issue it did not implicate a substantial First Amendment right and business had no standing to argue licensing scheme was unconstitutional); *Centaur, Inc. v. Richland County*, 301 S.C. 374 (1990). See, also, *Keepers, Inc. v. City of Milford, Conn.*, 2013 WL 1297839, *15-22 (D. Conn. 2013).

> While the requirement of standing is somewhat relaxed in a first amendment setting, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), a plaintiff must still have a direct stake in the outcome before there can be an article III 'cause or controversy.' *Genusa v. City of Peoria*, 619 F.2d 1203, 1210 (7th Cir. 1980).

Broadway Books, Inc. v. Roberts 642 F. Supp. 486, 494 (E.D. Tenn. 1986).

Here, the managers and the studio licensee, Forbes, do not engage in the expressive conduct. Further, Mr. Forbes suffered no penalty, but was merely issued a notice and order to correct the violations.

Moreover, neither they nor the dancers can show that any protected speech was impacted by the provisions. For this reason, the decision of the court below should be affirmed.

H. THE REGULATORY PROVISIONS DO NOT VIOLATE THE WASHINGTON CONSTITUTION

The County's regulatory provisions are not a prior restraint. They do not violate art. I, § 5. Nor do they violate due process. The County can require Appellants to conduct their business in a lawful way. Holding

managers and studio licensees accountable for failing to do so does not violate due process where licensees subject to a suspension are afforded the opportunity to challenge the penalty, and no sanction is imposed until the process is complete and a final determination is made.

V. CONCLUSION

The licensing regulations properly impose on managers a responsibility to ensure that the studio is in compliance with the operation restrictions, and that dancers comply with those restrictions. Imposing that affirmative responsibility does not subject managers to strict liability.

The criminal penalty provision, which does impose strict liability on managers and erotic dance studio licensees, is not a prior restraint and is not constitutionally infirm. Even if it were, it is severable, and therefore peripheral to the rest of the statutory scheme.

DATED this 19th day of December, 2017.

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CERTIFICATE OF SERVICE

On December 19, 2017, I hereby certify that I electronically filed the foregoing RESPONDENTS' ANSWERING BRIEF with the Clerk of the Court and I delivered a true and accurate copy via the Appellate Court's Secure Portal pursuant to the agreement of the parties to the following:

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