2015

State of Utah, Plaintiff/ Appellee, vs. Felicia Joyce Anderson, Defendant/ Appellee.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH, Plaintiff/Appellee, vs. FELICIA JOYCE ANDERSON, Defendant/Appellee.	:	Case No. 20150003-CA

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, UTAH, HON. BARRY G. LAWRENCE

REPLY BRIEF OF APPELLANT

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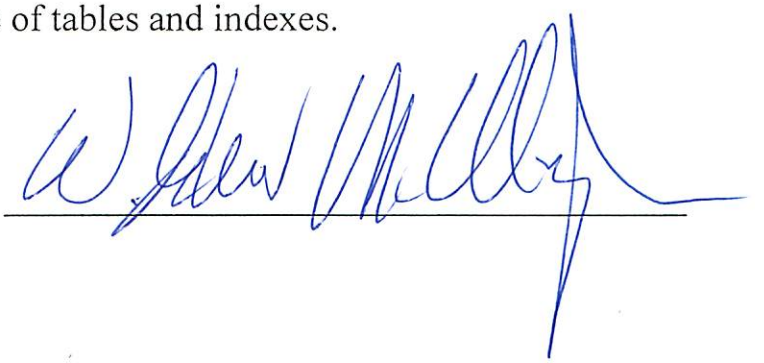
TABLE OF AUTHORITIES CITED
CASE AUTHORITY

STATUTES CITED

RULES CITED

CERTIFICATE OF WORD COUNT

Counsel for Appellant hereby certifies that the Brief contains 1236 words, as a function of Word Perfect, exclusive of tables and indexes.



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	:	REPLY BRIEF OF
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SUMMARY OF ARGUMENTS

Utah law is clear that a city may not generally require a business license of a business which is located in another city, but occasionally enters this city on business. Utah Code Ann. § 10-8-41.5 specifically grants authority to cities to single out licensed escorts for disparate treatment, requiring licenses in each of several cities through which they may pass on business, a requirement not shared with any other profession. This statute thus is an unconstitutional infringement on Defendant's First Amendment commercial speech rights. It is also an unconstitutional denial of Equal Protection of the Law, because it discriminates against this profession in a way

motivated by animus, and without a valid regulatory interest.

ARGUMENT

POINT I

SANDY CITY MOUNTED ONLY A PERFUNCTORY DEFENSE OF THE STATUTE AT ISSUE, AND DID NOT EFFECTIVELY DEFEND IT AS CONSTITUTIONAL.

This action involves a constitutional challenge to a Utah statute, Utah Code Ann. § 10-8-41.5. As required by Rule 24(d)(1) U.R.C.P., Appellant gave notice to the Attorney General of the constitutional issue in her Notice of Appeal and again in her Docketing Statement. In response, the Attorney General filed a letter with the Court, dated January 8, 2015, indicating that it:

> involves only a misdemeanor charge and was prosecuted by a Sandy City prosecutor. . . . .Therefore, all further pleadings should be served only on that office.

The Attorney General is charged by statute, Utah Code Ann § 67-5-1 (2) and (8), with defending the laws of the State, and with assisting a "city attorney in the discharge of his duties", when "required by the public service". It seems significant to Defendant that the Attorney General did not deem it important to participate in this case. The statute at issue was passed at the personal request of the former Salt Lake City police chief, who expressed concerns over escorts coming into his city without

ANY license from ANY city. The law, as passed was not responsive to the needs expressed by the former police chief; but instead it was punitive towards those who are indeed properly licensed to practice their profession. So, the State expresses little interest in the issue, and the cities pile on .

The City fails to respond to the citation of a number of District Court cases ruling that the City does not have an interest in regulating business located in neighboring cities, who happen to wander into their city once in a while. In fact, the District Court case of Sandy City v. Dickinson, Third District Case No. 121400713, was a recent failed attempt by this City to require a separate general business license for the escort licensed elsewhere. The City made all of the same policy arguments there, to no avail. The public policy arguments made by the City have repeatedly failed. The City's professed interests are not sufficient to license businesses in neighboring cities.

Instead, the City filed a brief repeating the mantra that this is a case involving intermediate scrutiny, as it is "content neutral". Because the City asserts, without support or authority, that licensing this Defendant serves an important interest of the City, the City asks the Court to determine that the statute survives intermediate scrutiny. The City further asserts that licensing this Defendant, who may venture into

their city only on a rare occasion for an hour or so, is important because they cannot assume that the neighboring City of Midvale will exercise the same level of scrutiny over a "Sexually Oriented Business Employee" as they would. It is the lack of a statewide standard for such licenses that bothers the City. The City does not respond to the evidence before the Court that Midvale City enforces essentially the same requirements as do they; nor does the City respond to the citation of the other twelve city licensing laws existing in the same county, all with essentially the same licensing requirements. Certainly, it would be possible for the State of Utah to provide for a statewide licensing law governing escort agencies. At one point, the State did go so far as to attempt to levy a tax on such agencies (ostensibly to ameliorate any harm they caused to society). That tax was stricken by the Utah Supreme Court in Bushco v. Utah State Tax Commission, 2009 UT 73, ¶ 57; 225 P.3d 153 (2009), for its failure to even adequately define the type of entity it sought to tax. No further attempt was made in this regard. Thus, we are left, not with one statewide licensing law, but 13 licensing laws within the same county. The cumulative effect of those laws is to create an extremely heavy burden on someone who properly obtains a regulatory license and attempts to follow all of the rules imposed on her by the City.

It is significant that the City fails to response to the argument that Defendant

has the right not to be subject to a system of licensing laws which serve no purpose other than harassment. See Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir. 2000). It seems obvious that the statute at issue has no purpose other than to provide for such harassment. More importantly, the City fails to respond to, or even mention, Pacific Frontier v. Pleasant Grove City, 414 F.3d 1221 (10th Cir. 2005), striking down a local ordinance on sales people here in Utah, on commercial speech grounds. That case authority forms the crux of the attacks on this statute and the licensing scheme it supports; and yet it receives not so much as a mention. Instead, despite recognizing that this is not a "secondary effects" case, the City cites the two best known such cases, Renton v. Playtime Theaters, 475 U.S. 41, 47 (1986); and Young v. American Mini Theaters, 96 S. Ct. 2440 (1996), in an attempt to show that "these kinds of businesses" are subject to "content neutral regulation". So, they are, in the place where they are doing business. The City's discussion of the need for regulating adult entertainment is generic in nature, and does not address the issue here of the multiplicity of duplicative regulations. Defendant has always conceded that the city in which the business is based may regulate that business, pursuant to Utah Code Ann. § 10-1-203(2). The City has made no showing that the licensing scheme does meet the asserted standards of intermediate scrutiny as outlined in United Sates v.

O'Brien, 391 U.S. 367 (1968). The City points out that a regulation passes such scrutiny when it "furthers a substantial government interest" and "any incidental restrictions it imposes on protected expression are not greater than is essential to further the interest." O'Brien, 391 U.S. at 377. But the City does not address or support its need to join 12 other cities in one county in regulating a single escort. There simply is no such "substantial government interest".

CONCLUSION

The State statute specifically allows cities to license this particular profession, as opposed to all others in the State, in such a way as to constitute a prohibition. Thus, it violates Defendant's First Amendment rights; and it denies Defendant the Equal Protection of the Law. The statute is unconstitutional, and it should be stricken.

DATED this 6th day of August, 2015.

W. ANDREW MCCULLOUGH, L.L.C.

W. Andrew McCullough
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 2015, I mailed two true and correct copies of the foregoing Reply Brief of Appellant, to Douglas Johnson, Attorney for Appellee, 10000 Centennial Pkwy., Sandy, UT 84070.