UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-1802

FW/PBS, INC., d/b/a PARIS
ADULT BOOKSTORE, II, ET AL.,

Plaintiffs-Appellants,

versus

THE CITY OF DALLAS, ET AL.,

Defendants-Appellees.

* * * * * * * *

JOHN RANDALL DUMAS, d/b/a
GENO'S,

Plaintiffs,

TEMPO TAMERS, INC., d/b/a
MILLION DOLLAR SALOON, ET AL.,

Plaintiffs-Appellants,

versus

CITY OF DALLAS, Etc.,

Defendant-Appellee.

Appeals from the United States District Court for the
Northern District of Texas
(CA-3-86-R c/w CA-3-86-1901 & CA-3-86-1915)

(October 7, 1994)

Before GARWOOD and DeMOSS, Circuit Judges, and DUPLANTIER,[*]

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[*]District Judge of the Eastern District of Louisiana sitting by

District Judge.

GARWOOD, Circuit Judge:[**]

Three groups of operators of sexually oriented businesses in Dallas brought First Amendment challenges against an ordinance regulating their businesses. They achieved partial success in the district court and before the Supreme Court, which on both occasions compelled the city to amend the ordinance. On remand to the district court, both sides agreed that the plaintiffs' claims for declaratory and injunctive relief were moot, but two of the groups of plaintiffs resisted dismissal on the ground that they were entitled to attorneys' fees, and one of them also sought monetary damages. The district court granted summary judgment against them, concluding that they were not "prevailing parties" under 42 U.S.C. § 1988 and that they had failed to demonstrate their entitlement to monetary damages. We affirm in part and reverse and remand in part.

Facts and Prior Proceedings

In June 1986, the City of Dallas (the City) enacted an ordinance regulating the licensing, zoning, and operation of sexually oriented businesses. The ordinance contained three general categories of provisions: (1) provisions requiring that a person wishing to operate a sexually oriented business apply for

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designation.

[**] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

and obtain a license from the chief of police, setting out the conditions under which the chief of police would approve the issuance of a license, and authorizing the suspension or revocation of a license under certain circumstances (licensing provisions); (2) provisions prohibiting the operation of a sexually oriented business within 1,000 feet of a church, an elementary or secondary school, a residential district, a public park, or another sexually oriented business (zoning provisions); and (3) provisions governing the lighting and physical layout of businesses that exhibited films or videos (configuration provisions). The ordinance also contained some special restrictions applicable to escort agencies, nude modeling studios, and adult motels.

Within a month, three lawsuits challenging the ordinance were filed in the Northern District of Texas by adversely affected businesses. One was brought by a group of businesses engaged in the sale and/or exhibition of adult books and videotapes (bookstore plaintiffs) (*FW/PBS, Inc., et al. v. City of Dallas, et al.*), another by operators of businesses featuring live performances (cabaret plaintiffs) (*Dumas d/b/a Geno's, et al. v. City of Dallas, et al.*), and the third by owners of adult motels (motel plaintiffs) (*Berry, et al. v. City of Dallas, et al.*). The suits challenged the constitutionality of all aspects of the ordinance and sought declaratory and injunctive relief and attorneys' fees. The cases were consolidated in the district court on August 4, 1986.

Addressing the claims on cross-motions for summary judgment, the district court on September 12, 1986, held the ordinance to be in accordance with the First Amendment except for four aspects of

the licensing scheme. *Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D. Tex. 1986). Section 41a-5(a) of the ordinance provided that the police chief was to approve issuance of a license to an applicant unless he found one of ten listed conditions to exist. The district court disapproved of the eighth condition in that list (section 41a-5(a)(8)), which was that an applicant "has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner." In calling for judgments of what constituted a "peaceful manner" and whether the applicant was "unable" to so operate his business, the court held, this provision lacked the type of "standards 'susceptible of objective measurement'" required by *Keyishian v. Board of Regents*, 87 S.Ct. 675, 684 (1967). *Dumas*, 648 F. Supp. at 1072. The other three defects identified by the district court all related to the tenth condition in the list (section 41A-5(a)(10)), the civil disability provision. This provision disqualified persons, and spouses of persons, who had been convicted of, or were under indictment or misdemeanor information for, specified crimes within a particular period in the past (either two or five years, depending on the severity of the offense). First, the court disapproved of the ordinance's scheme under which even an applicant whose prior conviction was more than the requisite number of years in the past could be granted a license only if the police chief determined that he was "*presently fit* to operate a sexually oriented business" (emphasis added). This provision also lacked the objective

standards required by *Keyishian*, the court held. *Id*. Second, the district court found that five of the some nineteen convictions enumerated in section 41A-5(a)(10)SQcontrolled substances act violations, bribery, robbery, kidnapping, and organized criminal activitySQwere not supported by findings showing that they were sufficiently related to the purpose of the ordinance. *Id*. at 1074. Finally, the district court struck down the requirement of the civil disability section that the police chief deny a license to an applicant who was under indictment or misdemeanor information; the court held that denying a license merely on the basis of an indictment or information, which is not evidence of guilt, was an overbroad preventive that could be replaced by a less restrictive provision. *Id*. at 1074-75.

The district court rejected the plaintiffs' contention that the licensing scheme lacked the procedural safeguards required by *Freedman v. Maryland*, 85 S.Ct. 734 (1965). *Freedman* held that a state law requiring submission of movies to a censorship board prior to public exhibition could comport with the First Amendment only if (1) the burden of proving that the film was unprotected expression was placed on the censor; (2) the censor was obligated, either by statute or authoritative judicial decision, to obtain a judicial determination in order to impose a valid final restraint, and could prior to such a determination impose only a brief restraint preserving the *status quo*; and (3) the procedure of administering the law assured a prompt final judicial decision. *Id*. at 739. The plaintiffs in this case argued that although the City's ordinance provided for an appeal from the police chief's

decision to a license and permit appeal board, it did not place upon the police chief the burden of promptly initiating judicial proceedings, did not contain any assurance that interim restraints pending a judicial determination would be brief, and did not guarantee swift final judicial action. The district court held simply that applicants were legally entitled to seek relief in court and therefore no express authorization was required. *Dumas*, 648 F.Supp. at 1075.

Thus, except for the above-mentioned four specific provisions in the licensing scheme, which the district court described as "minor exceptions" that were "severable . . . and may be cured by amendment," the district court found the ordinance to be constitutional. *Id*. at 1077. The district court entered judgment on September 12, 1986, enjoining the City from enforcing those four subsections but otherwise granting summary judgment against the plaintiffs. The plaintiffs filed notices of appeal to this Court. The City did not appeal, and on October 12, 1986, amended or deleted the four subsections so as to cure the constitutional defects found by the district court.[1]

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[1] To the subsection directing denial of a license to an applicant who had demonstrated that he was unable to manage a sexually oriented business in a "peaceful and law-abiding manner," the amendments added the phrase "thus necessitating action by law enforcement officers." The amendments deleted the provision permitting denial of a license based on a prior conviction even after the requisite length of time if the police chief determined the applicant was not "presently fit." The convictions that had not been shown to be related to the purpose of the ordinance (kidnapping, bribery, etc.) were stricken from the list in the civil disability provision. Finally, the amended ordinance permitted a license to be denied on the grounds of a past offense only if there had been an actual conviction for the offense.

On their appeal to this Court, the plaintiffs reasserted their wide-ranging attacks on all three aspects of the ordinance. The bookstore and cabaret plaintiffs challenged the licensing scheme as an unlawful content-based prior restraint that lacked the necessary *Freedman* protections, because it placed the burden of going to court on the licensee and did not ensure a prompt judicial determination. They also argued that the licensing officers were given unconstitutionally broad discretion in deciding to grant, suspend, or revoke licenses. The cabaret plaintiffs contended that the $500 annual fee called for by the licensing scheme was invalid as a tax on protected First Amendment activity. The bookstore and cabaret plaintiffs also challenged the zoning provisions, contending that they would force relocation of most businesses and, by not providing sufficient alternative sites, would result in the closing of many businesses. The bookstore plaintiffs challenged the configuration provisions as well. Finally, the cabaret and motel plaintiffs argued that the ordinance was invalid as to them because it was not supported by adequate findings showing that their types of businesses contributed to the problems that the ordinance sought to address.

This Court rejected all of their arguments and affirmed the district court's order. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). On the grounds that the ordinance was not content-based regulation but rather was primarily aimed at the secondary effects of sexually oriented business (crime, urban blight) and that it was regulating commercial enterprises rather than specific instances of expression (such as, in *Freedman*,

individual movies), we concluded that the *Freedman* procedural protections were not required and that both the licensing and zoning requirements were permissible time, place, and manner restrictions under *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986). *FW/PBS*, 837 F.2d at 1301-03. We also upheld the configuration provisions, *id*. at 1304, rejected the motel plaintiffs' challenge on the basis that the City's interest was self-evident and substantial, *id.*, sustained the denial of licenses to persons convicted of certain crimes because the convictions bore a substantial relationship to the evil sought to be prevented by the ordinance, *id.* at 1305, and concluded that the ordinance did not give the police chief impermissibly broad discretion in issuing, suspending, and revoking licenses. *Id*. at 1305-06.

This Court rejected the plaintiffs' motion to stay issuance of its mandate on April 5, 1988. On April 20, 1988, however, the plaintiffs obtained from the Supreme Court a temporary stay of the judgment and mandate of this Court. On May 6, 1988, the Supreme Court ordered that this Court's judgment, except for its approval of the zoning provisions, be stayed pending action on the plaintiffs' petitions for a writ of certiorari.[2] The Supreme Court granted certiorari on February 27, 1989, only with respect to issues concerning the licensing provisions and the issue of whether the City had justified coverage of adult motels.

In a decision dated January 9, 1990, the Supreme Court

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[2] Because the plaintiffs had never been granted an injunction against the City's enforcement of the ordinance, it is not clear what, if any, relief they obtained from the stay of this Court's mandate.

affirmed in part, reversed in part, vacated in part, and remanded. *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596 (1990). With regard to the *Freedman* procedural safeguards, the Supreme Court accepted this Court's reasoning only in part. It held that because the licensor was not passing judgment on the content of particular expressive material, but rather was reviewing the general qualifications of license applicants, applicants would have every incentive to pursue a license denial through court. Accordingly, requiring that the licensor have the burden of going to court and of justifying in court the denial of a license was not necessary. *Id*. at 607. However, the Court concluded that the other two *Freedman* protectionsSQrequiring that the licensor make a decision within a specified and reasonable time, and making expeditious judicial review availablesQremained mandatory, and that the licensing scheme was unconstitutional because of its failure to provide these two protections.[3] *Id.* at 606. The Court found that the former protection was lacking in the ordinance because although it contained a general requirement that the police chief approve an application within thirty days of receipt, he did not have to do so if the premises had not been approved by the health and fire departments, and the ordinance did not limit the time within which

[3] Though concluding that the ordinance was invalid for its failure to provide these two protections, the Court expressly declined to decide whether the ordinance was properly assessed as a content-neutral time, place, and manner restriction. *Id*. at 603. The view that only two of the *Freedman* protections were required of a prior restraint incident to a business-licensing scheme was adopted by three Justices. Three additional Justices concurred in the judgment on the ground that all three *Freedman* protections were necessary. Three Justices voted to affirm this Court's decision.

such inspections had to occur. *Id*. at 605. Prior to being raised in the cabaret plaintiffs' submissions to the Supreme Court, the time allowed for an initial licensing decision by the police chief had never been complained of by the plaintiffs in this litigation. The Court also found that the latter mandatory *Freedman* protection was absent, noting simply that the ordinance "fails to provide an avenue for prompt judicial review." *Id*. at 606. The Court remanded for a determination of the extent to which the licensing scheme was severable from the rest of the ordinance.

Having concluded that the licensing requirement was unconstitutional because of the lack of these procedural protections, the Supreme Court did not reach the plaintiffs' further challenges to it. *Id*. at 610 n.3. With regard to the civil disability provision and a provision disqualifying persons residing with individuals who had previously been denied licenses, however, the Court noted that it was declining to address the plaintiffs' arguments because the plaintiffs had not shown that they had standing to challenge those subsections.[4] *Id*. at 607. The Court vacated this Court's judgment as it pertained to those provisions and directed us to dismiss that portion of the suit for want of standing. *Id*. at 610. The Court rejected the motel plaintiffs' arguments that the ordinance could not be applied to them. *Id*. at 610-11.

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[4] In his concurrence, Justice Brennan noted that no challenge to the cohabitation provision had been directly raised by the parties, and that the issue had not been addressed by this Court or included among the questions on which certiorari was granted. *Id*. at 613 (Brennan, J., concurring in the judgment).

Fifteen days later, on January 24, 1990 (prior to the issuance of the Supreme Court's mandate on February 8), the City amended the ordinance in response to the Supreme Court's decision. The City deleted the requirement that an applicant's business be inspected and approved by the health and fire departments before a license could be granted, and added a provision granting a right of appeal to state district court from an adverse decision by the police chief, eliminating the provision for appeal to the review board. In addition, the City modified the ordinance in several respects not dictated by the Supreme Court's holding: it deleted the provision disqualifying licensing applicants who resided with persons who had been denied a license within the previous twelve months, and it deleted the subsection providing that an applicant could not be granted a new license within twelve months after the police chief had denied renewal of an old license, unless after ninety days the police chief found that the reason for denial had been remedied.

On February 28, 1990, following receipt of the remand order from the Supreme Court, this Court remanded the case to the district court for further proceedings consistent with the Supreme Court's opinion. On August 3, 1990, the City moved for summary judgment, arguing that its amendment of the ordinance to comply with the Supreme Court's decision rendered the controversy moot. The motion did not mention the matter of attorneys' fees or specifically address the plaintiffs' entitlement to monetary damages, though it did pray that "Plaintiffs take nothing."

On August 22, 1990, the bookstore plaintiffs filed a response.

They conceded that their claims for declaratory and injunctive relief against the licensing provisions were moot. They further conceded that their claims for declaratory and injunctive relief against the zoning provisions of the ordinance, which had not been addressed by the Supreme Court, were moot based on this Court's decision and on subsequent amendments to those portions of the ordinance. However, they argued that they had a claim for damages under 42 U.S.C. § 1983 for the closure of any of their establishments caused by the ordinance, and they noted that their as-yet-unfiled claim for attorneys' fees under 42 U.S.C. § 1988 remained to be determined by the district court. The following day, the cabaret plaintiffs filed a memorandum to the same effect regarding attorneys' fees, arguing that the City's request that plaintiffs "take nothing" should not be interpreted as a request to deny attorneys' fees. They pointed out that such a request would be premature, because under Local Rule 12.2 of the Northern District of Texas, the plaintiffs were required to (and fully intended to) file a request for attorneys' fees "within 30 days *after* judgment has been entered in the action" (emphasis added).[5] They requested that if the district court decided to address the plaintiffs' entitlement to a fee award in the context of the City's summary judgment motion, the court grant them a continuance under FED. R. CIV. P. 56(f) to prepare documentation for a fees request.

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[5] Local Rule 12.2 provides in full:

> "Unless otherwise directed by the Presiding Judge, all requests for attorney's fees which are taxable as costs in any action shall be filed within 30 days after judgment has been entered in the action."

On September 27, 1990, the district court entered an order dismissing with prejudice the claims of the third group of plaintiffs that had been involved in this suit, *i.e.*, the motel plaintiffs, and ruling that as between the City and the motel plaintiffs each party should bear its own costs and attorneys' fees.

On April 17, 1991, the district court granted summary judgment for the City against the bookstore and cabaret plaintiffs. As agreed by the parties, the court found all claims for injunctive and declaratory relief to be moot. It further found, however, that none of the bookstore plaintiffs had shown that they sustained an injury as a result of any part of the ordinance held unconstitutional in the litigation. Therefore, the district court denied their section 1983 claim for damages. Finally, the district court held that because the changes in the ordinance made in response to the court decisions were minor and did not significantly alter the legal relationship of the parties, the plaintiffs' success was *de minimis* and did not entitle them to recovery of attorneys' fees under section 1988 according to *Texas State Teachers Association v. Garland Independent School District*, 109 S.Ct. 1486, 1493 (1989) (*Garland*). The district court therefore denied attorneys' fees to both groups of plaintiffs. The bookstore plaintiffs filed a motion to amend the judgment to allow them an opportunity to pursue their claims for damages and attorneys' fees. The district court denied the motion on June 30, 1991. The bookstore and cabaret plaintiffs bring this appeal.

Discussion

I. Attorneys' Fees

Section 1988(b) provides that in suits brought under certain civil rights statutes including section 1983, a district court, "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."[6] In *Garland*, the Supreme Court clarified the proper test for determining if a fees applicant is the "prevailing party." The plaintiffs in that case were school teachers who had brought a section 1983 claim challenging a school district's policy prohibiting communications by or with teachers during the school day concerning employee organizations. In a decision that had been summarily affirmed by the Supreme Court, this Court had granted the plaintiffs partial relief. It had rejected their claim that the First Amendment required that the school district allow union representatives access to school facilities during school hours, but had found the policy

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[6] Although the wording of the statute leaves the decision of whether to award fees to the district court's discretion and makes no distinction between plaintiffs and defendants, the Supreme Court in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 98 S.Ct. 694 (1978), held that the almost identically worded 42 U.S.C. § 2000e-5(k) is not party-neutral and that district courts have little discretion to deny attorneys' fees when a plaintiff prevails. In *Christiansburg Garment*, the Court, applying section 2000e-5(k) (the Title VII attorneys' fees statute), held that while "in all but special circumstances" a prevailing plaintiff should be awarded fees, a losing plaintiff should not be assessed his opponent's fees "unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id*. at 698, 701. We have deemed these separate standards equally applicable to fee awards under section 1988. *See Coats v. Pierre*, 890 F.2d 728, 733 (5th Cir. 1989), *cert. denied*, 111 S.Ct. 70 (1990); *Lopez v. Aransas County Independent School District*, 570 F.2d 541, 545 (5th Cir. 1978). *See also Hensley v. Eckerhart*, 103 S.Ct. 1933, 1937 & n.2 (1983).

unconstitutional insofar as it prohibited discussion among teachers during the school day. In addition, this Court had held that the prohibition on teacher use of the internal mail and billboard facilities to discuss employee organizations was unconstitutional. On the subsequent application for attorneys' fees, this Court upheld the denial of fees because the plaintiffs had not prevailed on the central issue of their suitSQunion access to teachers and school facilities.

The Supreme Court reversed and rejected the "central issue" test, holding that plaintiffs crossed the threshold of entitlement to a fee award if they "succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.'" *Garland*, 109 S.Ct. at 1493 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). The Court indicated that the "floor" for the "prevailing party" standard was provided by *Hewitt v. Helms*, 107 S.Ct. 2672 (1987), in which the Court held that the plaintiff must receive "at least some relief on the merits" and must be able to point to a resolution that changes the legal relationship with the defendant. *Garland*, 109 S.Ct. at 1493. *See also id*. ("The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute."). As an illustration of the type of purely technical relief that would not suffice, the Court noted that in the *Garland* litigation the district court had found the requirement that meetings during nonschool hours be conducted only with prior approval from the school principal to be unconstitutionally vague,

but had characterized the issue as of minor significance and had pointed to no evidence that teachers had ever been denied permission. If this had been the plaintiffs' only success, the Court noted, it would not have rendered them prevailing parties. *Id*. As things stood, however, the *Garland* Court had no difficulty in concluding that the plaintiffs had materially altered the school district's policy, and that they were prevailing parties. *Id*. at 1494.

Garland was arguably clarified in *Farrar v. Hobby*, 113 S.Ct. 566 (1992). There the court held that in a lawsuit in which the only relief sought was $17 million damages and the only relief awarded was one dollar in nominal damages, the plaintiff was nevertheless "a prevailing party under § 1988," *id*. at 573, because "[a] judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay" and "the prevailing party inquiry does not turn on the magnitude of the relief awarded." *Id*. at 574. However, *Farrar* proceeds to hold, over the dissent of four Justices, that this Court, which had reversed the district court's award of attorneys' fees, had correctly held that the plaintiff was entitled to recover no attorneys' fees whatever. The Court explained that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Id*. (quoting from *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1941 (1983)). It went on to state:

> "In some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. . . . When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, see *Carey, supra*, at 256-257, 264, 98 S.Ct., at 1048-1049, 1052, the only reasonable fee is usually no fee at all." *Id*. at 575.

Justice O'Connor was one of the five votes to affirm this Court in *Farrar*. Her concurring opinion there explains *Farrar*'s holding as follows:

> "While *Garland* may be read as indicating that this *de minimis* or technical victory exclusion is a barrier to prevailing party status, the Court makes clear today that, in fact, it is part of the determination of what constitutes a reasonable fee. . . . And even if the exclusion's location is debatable, its effect is not: When the plaintiff's success is purely technical or *de minimis*, no fees can be awarded. Such a plaintiff either has failed to achieve victory at all, or has obtained only a pyrrhic victory for which the reasonable fee is zero." *Id*. at 576.

In the present case, there is no question that the plaintiffs' lawsuit served as the catalyst for the 1986 changes and two of the 1990 changes to the licensing provisions of the City's ordinance.[7] The issue is solely whether the changes were significant enough to constitute more than purely technical or *de minimis* success so as to render plaintiffs prevailing parties entitled to recover *some* attorneys' fees.[8] The plaintiffs do not claim that they prevailed

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[7] We discuss the other 1990 changes to the ordinance *infra*.

[8] Here, the facts relevant to this threshold determination are essentially undisputed. This is not, for example, a case in which such a determination turns on the district court's resolution of factual mattersSQsuch as whether the plaintiff's suit was the catalyst for the defendant's ameliorative actionSQthat this Court reviews only for clear error. *See, e.g., Associated Builders & Contractors of Louisiana, Inc. v. Orleans*

on any aspect of their suit other than the challenge to the licensing provisions, and they do not seek attorneys' fees for work other than that devoted to licensing issues.

The City contends that the changes to the ordinance were *de minimis* and did not materially alter the legal relationship of the parties; as before the suit, the City is now able to regulate through licensing the persons who may operate sexually oriented businesses. The plaintiffs counter by arguing that the Supreme Court found the entire licensing scheme to be unconstitutional and unenforceable. At least between the Supreme Court's decision on January 9, 1990, and the City's amendment of the ordinance on January 24, 1990, they argue, they had a legal right to operate a sexually oriented business without a license, and would have been entitled to an injunction against any efforts by the City to enforce the ordinance's licensing scheme in any manner. Thus, they contend, their suit effected a one hundred percent change in the

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Parish School Board, 919 F.2d 374, 378 (5th Cir. 1990).

In concluding in *Pierce v. Underwood*, 108 S.Ct. 2541 (1988), that district courts' determinations of the arguably analogous question of whether the government's position was "substantially justified" for purposes of the Equal Access to Justice Act (EAJA) should be reviewed for abuse of discretion, *id*. at 2546-49, the Supreme Court relied heavily on two considerations that are inapplicable here. First, the Court relied on language from the EAJASQstating that the court must *find* the position of the government to be substantially justifiedSQthat is not duplicated in 42 U.S.C. § 1988. Second, the Court observed that some of the elements that bear upon whether the government's position was substantially justified, such as evidentiary issues, may be known only to the district court. *Id*. at 2547. In comparison, a determination of "prevailing party" status and whether there has been "more than purely technical or *de minimis* success" such as the one in this case relies to a greater degree on the parties' pleadings, motions, and briefs and the courts' orders, which are equally accessible to an appellate court.

legal relationship of the parties.

Although the question is a close one, we conclude that both groups of plaintiffs have crossed the "prevailing party" achieving more than purely technical or *de minimis* success threshold, entitling them to an award of *some* fee. Their argument that they would have been entitled to relief in the immediate aftermath of the Supreme Court's decision, though mistaken in its specifics because the Supreme Court's mandate did not issue until after the amendment of the ordinance, is actually stronger than they make it appear. The Supreme Court's decision that the licensing scheme was constitutionally defective because of the lack of the *Freedman* safeguards necessarily means that it was *never* valid. The plaintiffs therefore could not be prosecuted or fined for violations of the ordinance that occurred at any time before it was amended on January 24, 1990. Also, we cannot ignore that the Supreme Court saw fit to address the plaintiffs' claims, a circumstance that weighs against a finding that the changes brought about by the suit were so unimportant as to be labeled *de minimis*. By forcing the City to amend the ordinance, the plaintiffs did obtain actual relief. Although the change eliminating the required health and fire department inspections alone might justly be characterized as *de minimis* because it had never before been identified by the plaintiffs as an objectionable aspect of the ordinance, the Supreme Court also upheld the plaintiffs' argument that the statute did not effectively limit the time in which administrative review of the police chief's decision would be completed, a matter that the plaintiffs had raisedSQalbeit only

cursorily and obliquelySQbefore this Court and the district court.[9]

We note that in our recent opinion on rehearing in *TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705, *on reh'g* ____ F.3d ___ (5th Cir. 1994), we determined that plaintiffs-appellants prevailed on a significant constitutional issue in their appeal, so as to be entitled to attorneys' fees for work on appeal. The only issue on which the *TK's Video* plaintiffs prevailed in their appeal, which contained many challenges to a county ordinance establishing a licensing scheme for "adult" entertainment businesses, was our ruling that as to a business in operation on the effective date of the ordinance, the status quo had to be maintained pending a final administrative decision on a license application. The general essentials of the ordinance, however, were sustained on appeal in *TK's Video*.

Moreover, the plaintiffs here did force four changes to the ordinance in 1986. Although none of these four changes concerned a particularly critical component of the overall ordinance, they did go somewhat beyond the example of technical, *de minimis* relief

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[9] At least, that is how we would interpret the Supreme Court's holding that the ordinance "fails to provide an avenue for prompt judicial review," *FW/PBS*, 110 S.Ct. at 606, based on the parties' briefs to the Supreme Court. The cabaret plaintiffs noted in their brief that although the permit and license appeal board was required to *hear* an appeal within sixty days, there was no requirement that it make a final determination within a specified period thereafter. The bookstore plaintiffs' brief similarly noted that "no provision is present mandating a prompt determination of the appeal." Before the district court and this Court, the plaintiffs had argued, without elaboration, that the statute lacked a "guarantee of swift final judicial action."

The defect identified by the Supreme Court was cured by the January 1990 amendment eliminating the administrative appeal altogether and permitting direct judicial review of the police chief's decision.

given by the *Garland* Court, if for no other reason than that the provisions evidently would have been enforced to the detriment of the plaintiffs. The district court noted that one plaintiff had been convicted of robbery, and another of a controlled substances act violation, *Dumas*, 648 F. Supp. at 1074 n.35; therefore, under the ordinance prior to the 1986 amendments they would have been ineligible for licenses for the specified time period. Also, two plaintiffs were awaiting trial for obscenity violations and for promotion of prostitution, and would have run afoul of the provision denying licenses to persons under indictment or information. *See id*. at 1075 n.39 (noting a "palpable" threat to those applicants).

The City offers two arguments in support of the view that the plaintiffs cannot recover fees for work resulting in the 1986 changes: (1) that the plaintiffs waived this claim, and (2) that they never had standing to challenge those portions of the ordinance. Both are unavailing. The former argument is based on the City's observation that the plaintiffs' first request for attorneys' fees (or, more precisely, their reminder to the district court that they had yet to apply for the attorneys' fees requested in their complaint) came forty-seven months after the district court's September 1986 judgment. The City argues that the plaintiffs therefore failed to comply with Local Rule 12.2, requiring attorneys' fees requests to be filed within thirty days after judgment. Local Rule 12.2, the City suggests, should be read to refer to the district court's 1986 judgment rather than the final judgment in the litigation, because after the amendment of

the ordinance in October 1986, the specific provisions found defective by the district court in 1986 were no longer at issue in the case. The City asserts that it was unfairly surprised and prejudiced by the plaintiffs' belated request for attorneys' fees, warranting denial of the request under *White v. New Hampshire Department of Employment Security*, 102 S.Ct. 1162 (1982).

In *White*, the Supreme Court did state that it would read section 1988 to allow a district court to deny fees if it felt that such an award would create unfair surprise or prejudice. *Id*. at 1167-68. However, the district court here did *not* deny fees on that ground, and we are not inclined to make such a finding based solely on the City's assertion in its brief to this Court. Also, we are not convinced that under these circumstances Local Rule 12.2 bars the plaintiffs' request insofar as it relates to relief obtained in 1986. Neither side contends that the plaintiffs were "prevailing parties" in September 1986, when the district court's invalidation of the four severable subsections of the ordinance was the only relief they had obtained. Leaving aside the question of whether Local Rule 12.2 may in other situations compel an interim fee request based on a judgment that is being appealed,[10] we do not

[10] The plaintiffs, relying on *Echols v. Parker*, 909 F.2d 795, 801-02 (5th Cir. 1990), argue that Local Rule 12.2 cannot be read to require such interim fee applications because the district court would have no jurisdiction to entertain them after a notice of appeal on the merits was filed. *Echols*, however, held that a defendant's appeal *from an award of attorneys' fees* deprived the district court of jurisdiction to supplement the fee award. Though we are not required here to decide whether *Echols* can be given the broader reading urged by the plaintiffs, we note that the broader reading would conflict with the rule followed by most other circuits. *See, e.g.*, *West v. Keve*, 721 F.2d 91, 95 n.5 (3d Cir. 1983); *Masalosalo by Masalosalo v. Stonewall Insurance Co.*,

think that it can possibly dictate such a request prior to the judgment that creates the plaintiff's substantive entitlement to fees under section 1988. *See White*, 102 S.Ct. at 1166 (the inquiry into entitlement to attorneys' fees "cannot even commence until one party has 'prevailed'"). Moreover, the wording of the rule gives the district judge discretion to consider untimely fee requests, so even if we were inclined to agree with the City's interpretation, it would be inappropriate for us to hold as a matter of law that the local rule bars the plaintiffs' request.

The City's second argumentSQrelying on a lack of standingSQis based on the Supreme Court's holding that the plaintiffs lacked standing to challenge the civil disability provision of the ordinance, section 41A-5(a)(10). *See FW/PBS*, 110 S.Ct. at 607-10.

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718 F.2d 955, 956-57 (9th Cir. 1983); *Rothenberg v. Security Management Co.*, 677 F.2d 64 (11th Cir. 1982); *see also Dallas Gay Alliance v. Dallas County Hospital District*, 719 F.Supp. 1380, 1393 (N.D. Tex. 1989). Also, the Supreme Court has held that as a matter of federal law unresolved attorneys' fees issues do not deprive a decision on the merits of finality because the fees issues are collateral and separate. *Budinich v. Becton Dickinson and Co.*, 108 S.Ct. 1717 (1988).

We also recognize that other courts have construed comparable local rules to require such interim fee requests, *see Watkins v. McMillan*, 779 F.2d 1465 (11th Cir. 1985) (per curiam); *Pitts v. Freeman*, 755 F.2d 897 (11th Cir. 1985) (per curiam); *Jackson v. Beard*, 828 F.2d 1077 (4th Cir. 1987), and that one of our decisions approves of an interpretation of a local rule under which the allotted time for filing a fees application is measured from the date of the favorable judgment rather than the conclusion of the litigation. *See Quarles v. Oxford Municipal Separate School District*, 868 F.2d 750, 758 (5th Cir. 1989). However, the district court is the best judge of its own rules, and we do not have an interpretation of Local Rule 12.2 by the district courts in the Northern District. Moreover, in none of the cited cases did the court confront a situation such as that presented here, in which the plaintiffs' application is based in crucial part on relief obtained on appeal, and therefore their entitlement to fees was not established at the time of the district court judgment.

The City concludes from this holding that the plaintiffs *never* had standing to challenge that provision, so three of the four grounds on which the district court granted relief cannot be counted for purposes of a fee award. The Supreme Court's standing discussion, however, demonstrates that its holding applied only to those parts of the civil disability provision that were then still at issue in the suitsSQnot to those that had already been invalidated and amended or deleted. For instance, the Court observed that the one person alleged to be affected by the provision disqualifying applicants whose spouses had past convictions had not demonstrated standing in part because her husband's conviction was one of those eliminated by the October 1986 amendments. *Id*. at 609. The district court's findings necessarily imply that standing existed as to two of the three portions of the civil disability provision it struck down, *see Dumas*, 648 F.Supp. at 1074 n.35, 1075 n.39, and the Supreme Court's standing analysissQbased on the failure of any plaintiff to affirmatively show that his conviction was recent enough to be disablingSQis patently inapplicable to the third (the provision permitting the police chief to deny a license *despite* the passage of the requisite number of years if the applicant was not "presently fit"). Moreover, the issue of standing as to those provisions is *res judicata*; the plaintiffs received a favorable judgment from the district court as to those provisions, and the City did not appeal.

Therefore, taking the plaintiffs' partial success before the Supreme Court in conjunction with the four minor changes to the ordinance in 1986, we conclude that the plaintiffs are prevailing

parties who achieved more than purely technical or *de minimis* success and are thus entitled to an award of some fees under section 1988(b). We accordingly must reverse the district court's contrary holding and remand for a determination of appropriate fee awards. Several additional arguments raised by the parties before us, however, will have some bearing on this determination, and therefore warrant our attention.

For instance, it does *not* follow from our holding, as the cabaret plaintiffs argue, that they are entitled to fees for *all* work performed in challenging the license provisions. As is evident from the summaries above, the plaintiffs brought numerous and wide-ranging attacks against the licensing scheme, only a few of which were successful. *Hensley v. Eckerhart*, 103 S.Ct. 1933 (1983), directs the following procedure when a plaintiff has achieved only partial success. First, the district court must determine whether the plaintiff has crossed the threshold of "prevailing party" status. Then, after determining a reasonable fee and excluding hours not reasonably expended on the litigation, the district court should decide if the plaintiff has presented "distinctly different claims for relief that are based on different facts and legal theories." *Id*. at 1940. If he has, then the district court should treat the claims on which he prevailed as if they had been brought in a separate lawsuit, and award no fees for services on the unrelated claims. If, on the other hand, the plaintiff's claims for relief "involve a common core of facts or [are] based on related legal theories," the district court must exercise its discretion in arriving at a reasonable fee award in

light of the significance of the relief obtained. *Id*. Our above holding resolves only the first step of this procedure. Whether the district court concludes that under the *Hensley* framework the challenges to the licensing scheme are properly evaluated as separate lawsuits or as one suit involving interrelated claims, the very limited degree of the plaintiffs' success will be distinctly pertinent.[11] We again note that *Farrar* emphasized that "'the degree of success obtained'" is "'the most critical factor' in determining the reasonableness of a fee award." *Id*., 113 S.Ct. at 574 (quoting *Hensley*, 102 S.Ct. at 1941). Here, although we have held that plaintiffs' success is sufficient to entitle them to more than a zero award, we do not thereby imply that the district court, even if it finds all the licensing challenges interrelated, may not reduce the fee award to a level well below what would have properly been made had a substantially greater degree of success been achieved.

Also, we do not agree with the cabaret plaintiffs' contention that the 1990 change to the ordinance removing the disqualification of a license applicant based on his cohabitation with an unsuccessful applicant should be counted as part of the relief obtained for this purpose. Unlike for the 1986 changes, a fee award for this change *is* foreclosed by the Supreme Court's holding

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[11] With regard to costs other than attorneys' fees, however, the plaintiffs are in the same posture as the prevailing party in any other case: under FED. R. CIV. P. 54(d), costs are allowed as of course to the prevailing party unless the court otherwise directs. *See Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 639-40 (6th Cir. 1979), *cert. denied*, 100 S.Ct. 2999 (1980).

that the plaintiffs lacked standing to challenge the provision. The Supreme Court vacated our judgment insofar as it applied to that provision "with directions to dismiss that portion of the action." *FW/PBS*, 110 S.Ct. at 610. The plaintiffs cannot obtain attorneys' fees for a challenge that they never had standing to bring and that the Supreme Court directed should be dismissed. With regard to the other 1990 amendment not compelled by the Supreme Court's opinionsQthe deletion of the provision concerning new license applications after the denial of a license renewalsQthe district court will need to make a finding as to whether or not it can plausibly be characterized as a product of the plaintiffs' suit. It concerns a provision that was not challenged in this Court and that, though raised by the cabaret plaintiffs in their brief to the Supreme Court, was not mentioned by the Supreme Court in its opinion.

II. Damages

The district court also rejected the bookstore plaintiffs' claim for monetary damages under section 1983, concluding that none of them had shown that they sustained any injury as a result of any part of the ordinance held unconstitutional. We agree that there is no evidence in the record supporting an award of monetary damages. In their response to the City's summary judgment motion asking that "Plaintiffs take nothing," the bookstore plaintiffs argued that any damages from the closure of any of their establishments pursuant to the ordinance would be compensable, but they did not specify whether any business had been forced to close, or cite any evidence in the record in support of their alleged

damages. In their May 1, 1991 motion to amend the judgment, they asked for a continuance under FED. R. CIV. P. 56(f) to develop their request for damages, and also argued that evidence already in the record from 1986 indicated that the plaintiffs were damaged because the sworn statements of William Evert, Paul Radnitz, and Charles Carlock indicated that they were forced to complete license applications under the invalid ordinance and to pay licensing fees therefor. None of these statements, however, indicates that the plaintiffs were forced to pay any licensing fee; Radnitz, in fact, expressly stated that no fee is required until the license is granted.

In their brief to this Court, they refer to the same statements and to affidavits of Beverly Van Dusen, John Randall Dumas, and Mike Murphy. The Van Dusen affidavit, however, also contains no allegation that she was forced to pay a fee or was denied a license, and Dumas and Murphy are cabaret plaintiffs whose alleged damages cannot support the bookstore plaintiffs' request. The bookstore plaintiffs also refer in their present brief (as they did in their brief to the Supreme Court) to an affidavit by Dallas police officer Stephen Foster allegedly stating that 2 licenses had been revoked on the basis of obscenity convictions, and that overall 147 out of 165 applications for licenses had been granted (suggesting that 18 license applications had been rejected). This affidavit, which supposedly was part of the City's response to a motion by the plaintiffs to stay the mandate of one of the courts in this litigation, is not part of the record and has not been provided to this Court. Moreover, the bookstore plaintiffs

conspicuously fail to allege that the persons described in this affidavit are even parties to this suit. Finally, although in their brief to this Court the bookstore plaintiffs describe their complaint as one seeking declaratory and injunctive relief, attorneys' fees, and damages, their original complaint contains no request for monetary damages, and we can find no indication in the record that they ever amended their complaint.

Because none of the references in their brief or in their motions below lead to any competent summary judgment evidence of damages, and because they did not request monetary damages until their response to the summary judgment motion in August 1990, we conclude that the bookstore plaintiffs have raised no genuine issue of material fact regarding their entitlement to damages, and that the district court was correct in granting summary judgment on this issue and did not abuse its discretion in refusing a continuance.[12]

Conclusion

Because we conclude that the district court erred in holding that the bookstore and cabaret plaintiffs were not "prevailing parties" achieving more than purely technical or *de minimis* success for purposes of section 1988, we reverse the portion of the summary judgment denying any and all attorneys' fees and remand for a determination of appropriate fee awards. However, we conclude that the district court properly granted summary judgment against the

[12] The bookstore plaintiffs further argue that at the least they were entitled to nominal damages under *Carey v. Piphus*, 98 S.Ct. 1042 (1978). Because we have already held that they are prevailing parties for the purposes of an attorneys' fees award, we see no remaining relevance in this issue.

bookstore plaintiffs on their claim for monetary damages under section 1983, and we affirm that portion of the district court's order.

AFFIRMED in part; REVERSED and REMANDED in part