Kentucky Supreme Court

NO. 2007-SC-000812-D

CAM I, INC., D/B/A PRESTON VIDEO, ET AL. MOVANTS/APPELLANTS

ON APPEAL FROM THE
KENTUCKY COURT OF APPEALS
NO. 2005-CA-000085-MR;
NO. 2005-CA-000090-MR;
NO. 2005-CA-000091-MR;
NO. 2005-CA-000092-MR;
NO. 2005-CA-000100-MR;
NO. 2005-CA-000113-MR;
AND
NO. 2005-CA-000176-MR

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APPEAL FROM JEFFERSON CIRCUIT COURT
CASE NO. 04-CI-01967

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LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT RESPONDENT/APPELLEE

AMICUS CURIAE BRIEF OF RECLAIM OUR CULTURE KENTUCKIANA, INC.

Respectfully submitted,

Griffin Terry Sumner
Christopher S. Burnside
FROST BROWN TODD LLC
400 W. Market St., 32nd Floor
Louisville, Kentucky 40202-3363
(502) 589-5400

Counsel for *Amicus Curiae*

STATEMENT OF POINTS AND AUTHORITIES

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INTRODUCTION

The Court of Appeals' detailed and well-reasoned opinion should be affirmed in all respects. "The city's interest in attempting to preserve or improve the quality of urban life is one which must be accorded high respect." *Hendricks v. Commonwealth*, 865 S.W.2d 332, 338 (Ky. 1993) (citing *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976)). Metro Louisville enacted Ordinance No. 21 ("the Ordinance" or "the challenged Ordinance"), amending Chapter 111 of the Louisville/Jefferson County Metro Government Codes of Ordinances (2004), to protect local citizens from the well-documented harms related to sexually-oriented businesses. *See* § 111.01(C). The Ordinance is a reasonable and narrowly-tailored response to a serious problem, and is constitutionally valid and enforceable. *Amici Curiae* citizens urge this Court to respect the decision of their elected officials to regulate sexually-oriented businesses in Louisville.

ARGUMENT

I. The Court of Appeals correctly recognized the secondary effects of sex businesses on communities and families.

The secondary effects of sex businesses on communities and families cannot seriously be disputed. As documented in the underlying record, these negative secondary effects, include increased crime; prostitution; sexual violence and exploitation of women and children; the use and sale of illegal drugs; and diminished property values.

There are a large number of these "sex businesses" and escort services operating in the local area, with many located in the heart of our communities – near schools, churches and homes. "The growth of pornography in Louisville now ranks with some of the worst areas in the country." Roger Young, former lead obscenity investigator, F.B.I.,

Address before American Mothers Against Pornography (August 27, 2004) [as quoted by WHAS-11 TV].

The secondary effects have been repeatedly recognized by courts across the country, including the courts of this Commonwealth and the United States Supreme Court. See, e.g., *Rest. Ventures v. Lexington-Fayette Urban County Gov't.*, 60 S.W.3d 572, 577-78 (Ky. App. 2001) ("Increase in sex crimes, social disease and general depreciation of the neighborhood, are secondary effects of adult establishments which the courts have recognized as being within the government's power to control. ... "[T]he asserted interests in combating the secondary effects associated with nude dancing are undeniably important."); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 279 (2000) (noting secondary effects of nude dancing, including "crime and other negative secondary effects caused by the presence of adult entertainment establishments"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986)(upholding zoning ordinance as a "valid governmental response" to the "admittedly serious problems" created by adult theaters); *City of Erie*, 529 U.S. at 279 (quoting *City of Renton*, 475 U.S. at 47-48, 50) ("secondary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are 'caused by the presence of even one such' establishment"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (1991) (citing *United States v. Marren*, 890 F.2d 924, 926 (7th Cir. 1989) (noting "nude female dancers who, when not performing on stage, solicited the club's patrons to engage in sexual activities in rooms located above the club")); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410 (6th Cir. 1997) (noting testimony about disease transmission risk resulting from contact between

dancers and patrons during lap dances); *United States v. Doerr*, 886 F.2d 944, 949 (7th Cir. 1989) (noting that nude dancing clubs included prostitution activities on premises).

The documented risks to the health, safety and welfare of local citizens and their families, including prostitution and other illicit sexual behavior, motivated the Louisville Metro Government to act to protect local citizens and their families. Elected representatives, prompted by these negative effects and by the concerns of the citizens and families they represent, enacted legislation aimed at minimizing the impact of these harms through narrowly-tailored zoning and licensing regulations addressing nudity, hours of operation, physical contact between dancers and patrons, sale of alcohol, and ownership disclosure.

II. The Court of Appeals correctly recognized that Metro Louisville has broad authority to craft an ordinance to address the negative secondary effects of sex businesses in our community.

"[T]he legislature's power to pass laws, especially laws in the interest of public safety and welfare, is an essential attribute of government." *Posey v. Commonwealth*, 185 S.W.3d 170, 175 (Ky. 2006). Metro Louisville's representatives set forth, in §111.01, a four page summary of the rationale behind the challenged Ordinance, including a non-exhaustive list of more than twenty-five court opinions and more than fifteen reports and studies recognizing the presence of various secondary effects in and around sexually-oriented businesses. Section 111.01 also explicitly describes the reasoning behind its various regulations and requirements. The sex businesses have raised no credible challenge to the veracity of the secondary effects studies relied upon by Metro Louisville in enacting the Ordinance; *e.g.*, there have been no claims that the sex crimes discussed in the Phoenix report or the unsanitary conditions discussed in the Tucson report did not

exist. Instead, the sex businesses simply disagree with the conclusions to be drawn from the records. Resolving this disagreement on the meaning of data is precisely the function of elected government.

The sex businesses have merely attempted to show, albeit unsuccessfully, that there is currently no localized proof for two of the numerous secondary effects identified by Metro Louisville as bases for enacting the Ordinance. The courts of Kentucky and the United States Supreme Court have never required a local government to produce evidence of *localized* secondary effects in order to enact legislation aimed at preventing such negative effects. *Commonwealth v. Jameson*, 215 S.W.3d 9, 32-35 (Ky. 2006). *Accord City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) ("in terms of demonstrating that such secondary effects pose a threat, the city need not 'conduct new studies or produce evidence independent of that already generated by other cities' . . . so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. at 584 (Souter, J., concurring) ("legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects"); *City of Renton*, 475 U.S. at 51-52 ("[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as [the] evidence . . . is reasonably believed to be relevant to the problem").

Our elected representatives fulfilled their duty to protect public health, safety and welfare, by reviewing the numerous reports that sex businesses have deleterious effects

on the surrounding communities, and determined that the challenged Ordinance was the rational and appropriate remedy for those harms.[1]

"[D]eference to the evidence presented by [a municipality] is the product of a careful balance between competing interests," recognizing that the municipality "is in a better position than the Judiciary to gather and evaluate data on local problems." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002); *accord City of Erie,* 529 U.S. at 297-98 (plurality opinion). "Municipalities will, in general, have greater experience with and understanding of the secondary effects that follow certain protected speech than will the courts." *Alameda Books,* 535 U.S. at 442. A local government's choice of prevention and remedy is also afforded deference, within constitutional boundaries. *Jameson*, 215 S.W.3d at 27. "[M]unicipalities must be given a 'reasonable opportunity to experiment with solutions'" to address the secondary effects. *Alameda Books*, 535 U.S. at 439; *City of Renton*, 475 U.S. at 52. The Ordinance set forth by Metro Louisville is not unlike ordinances that have been widely implemented and upheld across the country. It aims to curtail specific adverse secondary effects, identified in the ordinance, and do so in a rational manner with only incidental effects on the operations of sex businesses. Given the wide latitude granted to local governments to protect public safety, health and welfare, there can be no question that the challenged Ordinance should be upheld.

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[1] For example, the six-foot buffer required by the Ordinance between patrons and semi-nude performers is logically related to the evidence relied upon by our representatives as set forth in § 111.01(C)(2):

> Sexual acts, including masturbation, oral and anal sex, sometimes occur at unregulated adult entertainment businesses, especially those which provide private or semi-private booths, rooms, or cubicles for view[ing] films, videos, or live sexually explicit shows, which acts constitute a public nuisance and pose a risk to public health through the spread of sexually transmitted diseases.

III. No Kentucky Court has ever afforded extra state constitutional protections to public nudity.

No Kentucky court has ever held that the state constitution provides additional protection to public nudity or adult entertainment. To the contrary, Kentucky courts have repeatedly applied an analysis consistent with the standards enunciated by the United States Supreme Court under the federal constitution. *See, e.g., Commonwealth v. Jameson*, 215 S.W.3d 9 (Ky. 2006); *McDonald v. Ethics Comm. of the State Judiciary,* 3 S.W.3d 740, 743 (Ky. 1999); *Flying J Travel Plaza v. Transportation Cabinet, Dep't of Highways* 928 S.W.2d 344 (Ky. 1996); *Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991); *Restaurant Ventures v. Lexington-Fayette Urban County Gov't*, 60 S.W.3d 572 (Ky. App. 2001); *Commonwealth v. Ashcraft*, 691 S.W.2d 229, 230 (Ky. App. 1985); *Summe v. Judicial Retirement & Removal Comm'n*, 947 S.W.2d 42 (Ky. 1997); *Lee v. Commonwealth*, 565 S.W.2d 634, 637 (Ky. App. 1978). Indeed, Kentucky courts, including the Court of Appeals in this case, have suggested that Kentucky might be inclined to grant less protection to certain types of expression. *See, e.g., Ashcraft*, 691 S.W.2d at 230.

Appellants mistakenly rely upon decisions involving privacy rights to argue that Kentucky's constitution affords greater protection to expression than the federal constitution. That argument blatantly ignores the numerous contrary decisions by Kentucky appellate courts. *See, e.g., Jameson*, 215 S.W.3d at 15-28 (tracing development of constitutional jurisprudence through federal decisions).

Appellants' argument that this Court should rely only on Pennsylvania precedents is similarly specious. As the Court of Appeals opinion detailed at length, Kentucky jurisprudence is unusually well-developed in this area. It is the Kentucky precedents –

not those from other jurisdictions – that should continue to guide this Court's interpretation of our state Constitution.

There is no reason – much less authority – to create a new constitutional right to unregulated nude dancing, regardless of the decisions of courts in other states. Federal constitutional analysis is more than sufficient to adequately protect any value in the conduct occurring at these sex businesses.

IV. The Ordinance satisfies all applicable constitutional authority and represents reasoned legislative judgment to address documented negative secondary effects.

Louisville Metro crafted the challenged Ordinance both to respond to the concerns of its citizens, but also to have no more than an incidental impact on the rights of those establishments subject to regulations. While the sex businesses would have this Court believe that it must look to cases from other jurisdictions for its constitutionality analysis, and thereby apply a stricter standard of review, the United States Supreme Court and this Court have already outlined the requirements for a permissible regulation:

> A government regulation is sufficiently justified if [1] it is within the constitutional power of the Government, [2] it furthers an important or substantial governmental interest, [3] the Governmental interest is unrelated to the suppression of free expression, and [4] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Accord Commonwealth v. Jameson, 215 S.W.3d 9 (Ky. 2006). *See also Restaurant Ventures v. Lexington-Fayette Urban County Gov't*, 60 S.W.3d 572, 577 (Ky. App. 2001) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). The challenged Ordinance satisfies each of those requirements.

Local governments are afforded wide latitude in proactively selecting solutions to further the substantial government interest in protecting citizens' health, safety and welfare. The Ordinance at issue here is constitutionally permissible and represents a reasoned legislative decision based on numerous studies and judicial opinions documenting these negative secondary effects.

Moreover, the primary regulations at issue – and those that have drawn the most fire from the sex businesses – have each been repeatedly upheld as constitutional by the U.S. Supreme Court and Kentucky appellate courts. *See Jameson*, 215 S.W.3d at 36 (upholding ordinance banning total nudity, prohibiting touching, and limiting hours of operation). *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (upholding zoning restrictions on sex businesses); *Hendricks v. Commonwealth*, 865 S.W.2d 332, 338 (Ky. 1993) (upholding ban on public nudity as constitutional exercise of police power); *California v. La Rue*, 409 U.S. 109, 118-19 (1972) (upholding ban on selling alcohol at sex businesses); *Restaurant Ventures,* 60 S.W.3d at 580-81 (upholding buffer zone and restrictions on hours of operation and nudity); *City of Littleton v. Z. J. Gifts D-4, LLC*, 541 U.S. 774, 774 (2004) (holding regular court procedures satisfy "prompt judicial decision" requirement for regulating sexually-oriented businesses).

A. Nudity/Clothing Regulations

The nudity restrictions in § 111.35 of the challenged Ordinance are well within constitutional bounds, and indeed are even more narrowly tailored than the ordinance upheld by the Kentucky Supreme Court in *Hendricks v. Commonwealth*, 865 S.W.2d 332, 333 (Ky. 1993) (upholding ordinance which prohibits one from appearing "'in any public place' [while] exposing 'to view any portion of the pubic area, anus, vulva or

genitals including certain portions of the breast unless covered by pasties'"). A similar provision was upheld by this Court in the *Jameson* case. 215 S.W.3d at 35. *See also Restaurant Ventures,* 60 S.W.3d at 576 (upholding an ordinance prohibiting dancers in adult entertainment establishments from "appearing in a manner so as to expose to public view the anus, genitals, pubic region, or areola of the female breast").[2]

Similar regulations regarding nudity have also been upheld by the United States Supreme Court. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 283 (2000) (ordinance prohibiting a person from knowingly or intentionally, in a public place, appearing in a "state of nudity," defined similarly to the same term in the Metro Ordinance). The Court of Appeals applied the same analysis in the *Restaurant Ventures* case, stating that where a regulation is unrelated to suppression of expression the four-part, O'Brien test provides the appropriate standard. *Restaurant Ventures*, 60 S.W.3d at 577. "[T]he view that a ban on public nudity is necessarily related to the suppression of the erotic message of nude dancing . . . is flawed. The State's interest in preventing harmful secondary effects is not related to the suppression of expression." *Id.* (quoting *City of Erie*, 529 U.S. at 281).

Appellants challenge the constitutionality of this provision by again mistakenly relying upon Pennsylvania decisions – ones that expressly reject the federal O'Brien test

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[2] This Court in *Hendricks* reiterated the wide latitude granted to local governments when acting for public health, safety and welfare:

> It is well settled that the state may legitimately exercise police power to advance aesthetic values. [citation omitted]. The concept of public welfare is broad and inclusive. The values it protects are spiritual as well as physical, aesthetic as well as monetary. *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L.Ed. 27 (1954). **The city's interest in attempting to preserve or improve the quality of urban life is one which must be accorded high respect.** *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976).

865 S.W.2d at 338 [emphasis added].

that this Court has deemed applicable. Discussion of *Hendricks*, the controlling precedent, is limited to a footnote. Appellants even go so far as to imply that *Hendricks* is no longer good law because the **Pennsylvania** Supreme Court has subsequently reached a different conclusion. But Kentucky law still recognizes the ability of our elected representatives to act to protect citizens. *See Jameson*, 215 S.W.3d at 29-31; *Hendricks*, 865 S.W. 2d at 338.

B. Alcohol Regulation

Similarly, the United States Supreme Court has repeatedly rejected challenges to alcohol regulations related to sex businesses. *See e.g., Newport v. Iacobucci*, 479 U.S. 92, 95 (1986)[3] (upholding the constitutionality of a city ordinance prohibiting nude or nearly nude dancing in local establishments licensed to sell liquor for consumption on the premises); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 717 (1981) (holding that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises" of adult entertainment facilities); *Kenosha v. Bruno*, 412 U.S. 507, 515 (1973) (noting that regulations prohibiting the sale of liquor by the drink at adult entertainment businesses are "facially constitutional"); *California v. La Rue*, 409 U.S. 109, 118-19 (1972) (regulation prohibiting sexually-oriented performances in businesses licensed to sell alcohol upheld as facially constitutional); *accord Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 722 (7th Cir. 2003) (an ordinance prohibiting "the sale, use, or consumption of alcoholic beverages on the Premises of a Sexually-oriented Business" does not violate the First Amendment).

In *Louisville v. Woods*, 883 S.W.2d 881 (Ky. App. 1993), the court upheld a city ordinance prohibiting nude activities in establishments licensed to serve alcohol because

[3] Contrary to the assertions in Appellants' Brief, this case does not suggest the Ordinance is impermissible.

"[t]he ordinance does not conflict with or usurp the state's 'scheme.'" *Id.* at 884. This Court held such an ordinance is permissible where "it is merely in addition to what the state has attempted to provide as a minimum standard." *Id.* As in *Woods*, the challenged Ordinance here is not in conflict with the state regulations and is merely an additional provision to further the same purpose – to avoid the "explosive combination" of liquor and sex. *See Ben's Bar, Inc.*, 316 F.3d at 707. State regulations prohibit licensed premises from allowing "lewd" entertainment, "including but not limited to public display of . . . simulated sex acts, or fondling or touching of genitalia or of the female breast." 804 KAR 5:060. The challenged Ordinance also serves to prevent *the exact same outcome.*

Appellants argue that some combination of the 21st Amendment and Kentucky's local wet/dry vote requirement precludes Louisville Metro from regulating sex businesses' sale of alcohol. They claim this is a "distinction without a difference." But Kentucky courts have previously recognized just such a difference. *See, e.g. Mr. B's Bar & Lounge, Inc. v. City of Louisville*, 630 S.W.2d 564 (Ky. App. 1981).

It is axiomatic that local governments may properly exercise their authority in other areas which may impact the sale of alcohol. Zoning regulations are a prime example. In *Peter Garrett Gunsmith, Inc. v. City of Dayton*, 98 S.W.3d 517 (Ky. App. 2002), the court held that a state statute prohibiting local regulation of firearm sales did not preclude zoning ordinances enacted under the city's authority to regulate land use. Similarly, here, Metro Government's proper exercise of police powers to protect the citizens is not precluded by a voting requirement for alcohol sales.

C. Hours of Operation

Federal and state courts have also repeatedly upheld reasonable regulation of the operating hours of adult entertainment establishments. The challenged Ordinance permits sex businesses to operate for longer hours than ordinances upheld in other cases by only prohibiting operations between 1:00 AM and 9:00 AM. § 111.18. Indeed, the Ordinance would permit total weekly hours of operation exceeding those used by Appellant PT's as argued in Appellants' Brief.

The *Restaurant Ventures* court upheld a stricter hours provision, prohibiting sex business operations between 1:00 AM and 3:00 PM as a "valid exercise of the government's power to regulate those establishments." 60 S.W.3d at 581. A similar restriction was upheld by this Court in the *Jameson* case. 215 S.W.3d at 36 (1:00 a.m. to 6:00 a.m.). Federal courts have also consistently upheld similar regulations. *See e.g., Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 441 (6th Cir. 1998) (regulations prohibiting sex businesses from opening before 8:00 AM or after midnight Monday through Saturday and at all on Sundays or legal holidays did not violate First Amendment); *Envy, Ltd. v. City of Louisville*, 734 F. Supp. 785, 790 (W.D. Ky. 1990) (ordinance prohibiting adult entertainment establishments from displaying any form of entertainment between midnight and 6:00 AM is "rationally related to the reduction in secondary effects resulting from adult entertainment businesses").

Our elected representatives chose to regulate operating hours of sex businesses to curb negative secondary effects of sex businesses, and did so in a manner that is even narrower than similar regulations previously approved by state and federal courts. "It is the rule that all presumptions and intendments are in favor of the constitutionality of

statutes and, even in cases of reasonable doubt of their constitutionality, they should be upheld and the doubt resolved in favor of the voice of the people as expressed through their legislative department of government." *Walters v. Bindner*, 435 S.W.2d 464, 467 (Ky. 1968).

D. Distance Between Customers and Performers

This Court should also uphold the Ordinance's regulation of the distance between customers and performers, as well as the no touching provision. Identical buffer zone and stage requirements were upheld in *Restaurant Ventures,* 60 S.W.3d at 580 (upholding a six foot buffer zone between performer and patron and minimum stage height of eighteen inches as "substantially related to the ability to control crime and disease"). Similar regulations have been held constitutional by the Sixth Circuit Court of Appeals and the United States District Court for the Western District of Kentucky. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir. 1997) (six foot buffer zone between entertainers and customers, employees, and other entertainers during performances held valid under the First Amendment); *Ky. Res. Concepts, Inc. v. City of Louisville*, 209 F. Supp. 2d 672, 683 (W.D. Ky. 2002) (three foot buffer zone and eighteen inch stage requirement did not violate the First Amendment). This Court upheld a "no touching" provision in the *Jameson* case. 215 S.W.3d at 36.

Appellants again rely upon out-of-state authorities, applying standards different from those previously approved by this Court. But under Kentucky and applicable federal precedents, the Ordinance is valid.

Appellants also make the argument that, because the Ordinance essentially requires pasties and G-strings, that the buffer zone provision is an attempt to regulate

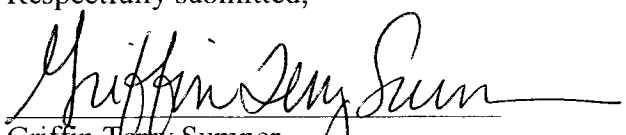
"clothed" dancing. It seems doubtful that anyone could actually describe the activities at sex businesses as "clothed" dancing. Rather, the buffer zone and no-touching provisions are a proper exercise of Metro Louisville's police power to protect citizens from illicit sexual behavior and the spread of disease – concerns that are not ameliorated by the "clothes" that performers may or may not be wearing.

Finally, Appellants argue that there are constitutional implications to the current layout of one sex business. Appellants seem to argue that the current number, size and location of their "stages" preclude imposition of a buffer zone. But there is no constitutional protection for their interior design choices. Appellants have not – because they cannot – suggested that compliance with the Ordinance would be impossible with design modifications. The buffer zone, stage requirements and no touching provisions do not preclude expression in any impermissible way and should be upheld.

CONCLUSION

Amici Curiae citizens strongly urge this Court to respect the constitutionally permissible actions taken by Metro Louisville to protect citizens and their families from the well-documented harms associated with sex businesses. The Court of Appeals' opinion should be affirmed in all respects.

Respectfully submitted,



Griffin Terry Sumner
Christopher S. Burnside
FROST BROWN TODD LLC
400 W. Market St., 32nd Floor
Louisville, KY 40202
(502) 589-5400

Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was served this 14th day of July, 2008, via U.S. Mail, postage pre-paid, on the following named individuals:

Frank Mascagni III
701 West Jefferson Street
Louisville, KY 40202

N. Scott Lilly
William P. O'Brien
Assistant Jefferson County Attorneys
ATTN: Civil Division
521 Court Place, Suite 1001
Louisville, KY 40202

Scott D. Bergthold
8052 Standifer Gap Road, Suite C
Chattanooga, Tennessee 37421

H. Louis Sirkin
Sirkin, Pinales & Schwartz, LLP
920 Fourth and Race Tower
105 West Fourth Street
Cincinnati, OH 45202-2776

Bradley J. Shafer
Shafer & Associates, P.C.
3800 Capital City Boulevard, Suite 2
Lansing, Michigan 48906

Allan S. Rubin
Draper & Rubin
29800 Telegraph Road
Southfield, Michigan 48034

C. Michael Hatzell
Hatzell & Groves
One Riverfront Plaza, Suite 704
Louisville, Kentucky 40202

Jeremy A. Rosenbaum
J. Michael Murray
Berkman, Gordon, Murray & Devan
55 Public Square, Suite 2121
Cleveland, Ohio 44113-1949

Ronald L. Cook
David S. Stevenson
600 West Main Street, Suite 100
Louisville, Kentucky 40202

E. Brian Davis
701 West Jefferson Street
Louisville, Kentucky 40202-2742

Stephen P. Ryan
Retired Judge
Jefferson Circuit Court
Division 5 (formerly 6)
700 West Jefferson Street
Louisville, Kentucky 40202

Jack Conway
Attorney General
700 Capital Avenue
Frankfort, Kentucky 40601

Clerk of the Court
Kentucky Court of Appeals
700 Capital Avenue, Room 209
Capitol Building
Frankfort, Kentucky 40601

Counsel for *Amicus Curiae*