COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2007-SC-000812-D

CAM I, INC., D/B/A PRESTON VIDEO, et al,
MOVANTS-APPELLANTS

ON APPEAL FROM
THE COMMONWEALTH OF 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
DIVISION SIX (6)
NOW KNOWN AS DIVISION FIVE (5)
CASE NO. 04-CI-01967

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LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT,
RESPONDENT-APPELLEE

****

BRIEF OF MOVANTS-APPELLANTS AND APPENDICES A - Q IN SUPPORT THEREOF

Certificate of Service Required by CR 76.12(6):

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by UPS Next Day Air with postage prepaid on June 24, 2008: Honorable N. Scott Lilly, Honorable William P. O'Brien, Honorable Scott D. Bergthold, Honorable H. Louis Sirkin, Honorable Bradley J. Shafer, Honorable Allan S. Rubin, Honorable C. Michael Hatzell, Honorable Jeremy A. Rosenbaum, Honorable J. Michael Murray, Honorable Ronald L. Cook, Honorable David S. Stevenson, Honorable E. Brian Davis, Honorable Paul S. Gold, Honorable Stephen P. Ryan, Honorable Jack Conway, and Clerk, Kentucky Court of Appeals.

Frank Mascagni

Frank Mascagni III

INTRODUCTION

Plaintiffs appeal from the Court of Appeals' decision affirming a circuit court's ruling on a challenge brought under the Kentucky Constitution against a Louisville/Jefferson County Metro Government ordinance that provides for the licensing and regulation of "adult entertainment establishments," where the ruling: 1) vacated a previously entered restraining order; 2) denied Plaintiffs' motion for a temporary injunction; and 3) with two small exceptions, granted the Defendants' motion for summary judgment. Plaintiffs further appeal from the Court of Appeals' decision reversing the circuit court's ruling on the two provisions it found to be unconstitutional.

STATEMENT CONCERNING ORAL ARGUMENT

Due to the importance of the constitutional claims at issue in this case, many of which involve matters of first impression related to the interpretation of provisions of the Kentucky Constitution, Plaintiffs respectfully request that oral arguments be heard. Oral argument is particularly warranted because of the inability of the United States Supreme Court to articulate clear and usable standards for the application of analogous provisions of the Federal Constitution in regard to the matters at issue here. Plaintiffs respectfully request 45 minutes to present their arguments in light of: 1) the number and complexity of the constitutional issues that are raised in this action; and 2) the business diversity of Plaintiffs creating certain conflicts of interest among them in regard to the constitutional issues raised here, which will necessitate more than one attorney arguing the positions of the various Plaintiffs.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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Plaintiff Kentucky Restaurant Concepts, d/b/a *PT's* ("*PT's*"), operates a liquor-licensed establishment in Louisville which presents to the consenting adult public a variety of female exotic performance dance entertainment where entertainers are at times clothed, at times "topless," and at other times fully nude. *PT's* has been open for business since February, 1997, and it is licensed to remain open and serve alcoholic beverages until 4:00 a.m. Complaint, ¶ 10; Circuit Court Record ("R.") Vol. I, pp. 1-44.

Blue Movies, Inc., d/b/a *Love Boutique* ("*Blue Movies*"), operates a retail facility in Louisville that presents, sells, and rents to the consenting adult public a variety of non-obscene but sexually explicit expressive materials. *Blue Movies* has operated since 1982. Complaint, ¶ 11; R. Vol. I., pp. 1-44.

On March 1, 2004, Defendant Louisville/Jefferson County Metropolitan Government ("Metro") enacted Ordinance No. 21, Series 2004, which amended Chapter 111 of the Metro Government Code of Ordinances ("Chapter 111," or simply the "Ordinance"; Apx. D). In general, the Ordinance requires that the "principal owners" or "operators" of defined "adult entertainment establishments" must obtain a license from the Director of Inspection, Permits and Licenses (the "Director") as a condition to operating, and that all employees of such establishments must also obtain a license prior to working in such establishments (§§ 111.36-111.38 and 111.42-111.43); it provides for the denial of license applications and for the suspension and revocation of licenses for numerous reasons (§ 111.43); it requires a $1,000.00 annual licensing fee, presumably for the "principal owners" and "operators," and a $25.00 per year fee for employee licenses (§§ 111.41 and 111.42(B)); it precludes any form of live nude entertainment, or even "topless" dancing, and requires entertainers to wear at all times at least "pasties and g-strings" (§ 111.35(A)); it precludes establishments presenting such clothed dancing from having a liquor license (§ 111.3); it prohibits anyone under the age of eighteen from entering such establishments, even though no true live "adult" entertainment is presented as a result of the nudity prohibitions (§ 111.17); it precludes licensing of individuals convicted

of "specified criminal activities," which include, for example, simple drug possession offenses (§§ 111.02; 111.36(B)(2)(b) and (6); 111.38(A)(4); and 111.42(B)); it prohibits such establishments from operating between 1:00 a.m. and 9:00 a.m. on any day (§ 111.18) (referred to as the "hours of operation" restrictions); it prohibits entertainers while "semi-nude" (*i.e.*, while clothed) from receiving any pay or gratuity directly from a patron (§ 111.35(c)), and requires that such entertainers remain at least six feet away from any patron and perform only on a fixed stage at least eighteen inches above the floor (§ 111.35(B)); and provides for penalties for violating the Ordinance - - in addition to license suspension and/or revocation - - which can include civil fines between $100.00 to $1,000.00, a misdemeanor conviction (punishable by a fine of not less than $250.00 or more than $500.00, or imprisonment not to exceed ninety days, or both), and "remedial civil actions" brought by the licensing authorities (§ 111.99).

Plaintiffs filed suit on March 5, 2004, challenging the Ordinance on numerous state constitutional grounds. At the same time, they filed a Motion for Temporary [sic] Restraining Order/Temporary Injunction. The bases of the constitutional attacks against Chapter 111 are set forth in Plaintiffs' complaint (R. Vol. I, pp. 1-44), and the matters at issue in the various motions which resulted in the dismissal of the lawsuit below are found in the Summary and Outline of Constitutional Challenges to Chapter 111. R. Vol. III, pp. 410-30; Apx. E.[1]

At the commencement of litigation and following oral argument on the date of filing, the circuit court entered a restraining order enjoining Metro from enforcing the Ordinance. R.Vol. I, p. 52; Apx. F. The court later clarified that its ruling was actually in the form of a temporary [sic] restraining order. R. Vol. III, pp.

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[1]These arguments can be discerned in detail from Plaintiffs' Brief in Support of Motion for Temporary Injunction ("Brief"), filed March 5, 2004; Plaintiffs' Response to Motion for Summary Judgment (R. Vol. III, pp. 433-49); and Plaintiffs' Supplemental Brief in Support of Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary [sic] Restraining Order ("Supp. Brief"), filed August 4, 2004.

358-61; Apx. J. Plaintiffs' Motion for Temporary Injunction was left pending.[2]

Metro filed a Motion to Dissolve Temporary [sic] Restraining Order/Temporary Injunction (R. Vol. I, pp. 76-89) while the case was in federal court (after Metro had filed a notice of removal but before the federal district court entered an order of remand), and then later filed a motion for summary judgment. R. Vol. II, pp. 148-241. The motion to dissolve was later "passed to the trial date." (Order, R. Vol. III, pp. 347-50; Apx. I). Pending before the circuit court were therefore: 1) Plaintiffs' Motion for Temporary Injunction; 2) Metro's Motion to Dissolve Temporary [sic] Restraining Order/Temporary Injunction; and 3) Metro's Motion for Summary Judgment.

On December 14, 2004, the circuit court entered a final and appealable judgment dissolving the restraining order; granting Defendant's motion for summary judgment as to all issues except for § 111.36(B)(2)(b) (a requirement of the disclosure of principal owners) and § 111.35(D) (a "no touch" provision); granting Plaintiffs' motion for temporary injunction only with regard to those two sections "until further order of this Court;" and denying the remainder of that motion. R. Vol. VII, pp. 942-62; Apx. C. The circuit court granted virtually complete summary judgment to the Defendant: 1) Without permitting the completion of discovery on matters which the court acknowledged, at least at one point, were relevant to

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[2] In June and July of 2004, the other Appellants/Counter-Appellees were granted permission to intervene as plaintiffs. Those businesses fell into two categories. First were Cam I, Inc., d/b/a *Preston Video*; Blue Sky Video, Inc.; Berry Boulevard Entertainment, Inc., d/b/a *The Adult Toy Store*; Pure Pleasure Mega Center, LLC; American Pride VI, Inc., d/b/a Lion's Den Adult Superstore; Taylor Boulevard Theatre, Inc., d/b/a *Erotic Touch*; and TBC, Inc., d/b/a *Metro Station*, which are all retail facilities that present, sell and rent to the consenting adult public a variety of non-obscene but sexually explicit expressive materials. Second were Danny's Inc., d/b/a *Thorobred II*; Entertainment Enterprises, Inc., d/b/a *The Godfather*; Gold Coast, Inc., d/b/a *Thorobred III*; Hayes Entertainment, Inc., d/b/a *Thorobred IV*; LLL, Inc., d/b/a *Greenlight Lounge*; Phat's Bar & Grill, Inc., d/b/a *Phat's Bar & Grill*; Riverview Entertainment, Inc., d/b/a *Thorobred VI*; South Dixie Entertainment, Inc., d/b/a *Thorobred VII*; Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*; Teddy's Inc., d/b/a *Thorobred V*; Thorobred, Inc., d/b/a *Thorobred Lounge*; Foxy Lady, Inc., d/b/a *Foxy Lady Gentlemen's Club*; Tinsley's Central Bar, Inc., d/b/a *Bear Necessities, Inc.*; and Win Place and Show Bar, Inc., d/b/a *Win, Place & Show Bar*, all of which are liquor-licensed establishments (except for Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*, which does not have a liquor license) that present to the consenting adult public a variety of female exotic performance dance entertainment where entertainers perform at times fully clothed, at times "topless," and at other times fully nude. All of these parties are referred to hereinafter simply as "Plaintiffs."

the issues in the case; 2) without conducting any evidentiary hearing; 3) without permitting oral argument on any of the then-pending motions; and 4) after intentionally, and with the consent of the parties, "sanitizing" certain evidence from the record on critical factual issues which the parties acknowledged were not then pending before the court.

Plaintiffs timely filed Notices of Appeal, and Metro filed a cross-appeal regarding the rulings concerning §§ 111.36(B)(2)(b) and 111.35(D). On October 5, 2007, the Court of Appeals issued a 89 page decision, affirming each and every ruling of the circuit court adverse to the Plaintiffs, and reversing the circuit court on the two cross-appeal issues. Apx. A. The Plaintiffs then filed a motion for discretionary review to this Court, which was granted on April 16, 2008. Apx. B. This appeal follows.

ARGUMENT

I. BECAUSE CHAPTER 111 IS INFIRM UNDER THE KENTUCKY CONSTITUTION, THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S RULING WHICH GRANTED NEARLY THE ENTIRETY OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

A. STANDARD OF REVIEW.

The standard of review regarding a grant of summary judgment is:

> [W]hether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. [ ]Summary judgment is only proper when it would be impossible for the plaintiff to produce any evidence at trial warranting a judgment in his favor. In ruling on a motion for summary judgment, the court is required to construe the record in a light most favorable to the party opposing the motion.

Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d 364, 366 (Ky. 2005) (citations omitted). Moreover, "[t]here is no requirement that the appellate court defer to the trial court since factual findings are not at issue." *Lucchese v. Sparks-Malone, P.L.L.C.*, 44 S.W.3d 816, 817 (Ky. App. 2001). Finally, conclusions of law, which are the rulings at issue here, are subject to "independent *de novo* appellate determination." *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. Ct. App. 2005).

B. THE LICENSING SCHEME OF CHAPTER 111 EFFECTUATES AN IMPERMISSIBLE PRIOR RESTRAINT UPON EXPRESSION.

"A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir. 2000), *overruled on other grounds.*[3] *See also Near v. Minnesota*, 283 U.S. 697, 713 n. 13 (1931). Under federal jurisprudence, "[a]ny system of prior restraints of expression comes to this Court bearing a ***heavy presumption against its constitutional validity***." *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317 (1980) (emphasis added). *Accord James v. Hines*, 63 S.W.3d 602, 606 (Ky. Ct. App. 1998), *appeal dismissed* ("Prior restraint on speech is ***presumptively unconstitutional***") (emphasis added). These limitations upon the prior restraint of speech and expression should be of concern to this Court for the following reasons.

First, this Court has often declared that the State Constitution affords broader protections than the Federal Constitution.[4] This is because:

> Our own constitutional guarantees against the intrusive power of the state do not derive from the Federal Constitution. . . . [W]hile there is, of course, overlap between state and federal constitutional guarantees of individual rights, they are by no means identical. . . . Both the record of the 1890-91 debates and the opinions of Justices of this Court who were the contemporaries of our founding fathers express protection of individual liberties *significantly greater than the selective list of rights addressed by the Federal Bill of Rights.*

Commonwealth v. Wasson, 842 S.W.2d 487, 492, 494 (Ky. 1992) (invalidating the states sodomy law based on privacy grounds) (emphasis added).

Here, Ky. Const. §§ 1, 2, 8 and 26 contain language far broader than the First Amendment. Indeed,

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[3] Although Plaintiffs' claims were predicated solely upon the Kentucky Constitution, they will cite to federal precedent as state rights cannot fall below the minimum guarantees of rights under the United States Constitution. *The Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 417-18 (Ky. 2005).

[4] *See, e.g., Commonwealth v. Brandenburg*, 114 S.W.3d 830, 835 (Ky. 2003) (court has right to "enhance the protections afforded the citizens of this Commonwealth by the Kentucky Constitution"); *Yeoman v. Commonwealth*, 983 S.W.2d 459, 474 (Ky. 1998) ("privacy rights guaranteed by the Kentucky Constitution exceed those granted by the United States Constitution"); *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky. 1989), *overruled on other grounds* (right of confrontation broader); and *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) (finding a fundamental right to public education, even though the U.S. Supreme Court had rejected just such an argument).

the Kentucky Constitution protects the freedom of speech and communication in not one, but two separate provisions. Ky. Const. §§ 1(Fourth) and 8. In addition, there is the broad limitation upon government as set forth in Ky. Const. § 26. This demonstrates that Kentucky has indeed chosen the broadest protections for expression that are possible. Moreover, this Court should not consider the textual difference between the Federal and State Constitutions to be insignificant. Indeed, "each word in the Constitution should be given meaning and effect. . . ." *Hodgkin v. Kentucky Chamber of Commerce*, 246 S.W.2d 1014, 1016 (Ky. Ct. App. 1952). This admonition should be kept in mind when considering the precedent below which discusses the literal differences between the federal and state constitutional provisions at issue.

Second, and more specifically, the ***Pennsylvania*** Constitution has been interpreted to afford extremely broad protections against prior restraints. This is important because a"comparison of the Kentucky Bill of Rights of 1792 and a number of earlier, now defunct constitutions of the leading colonies, ***demonstrates unequivocally that the original Kentucky Bill of Rights was borrowed almost verbatim from the Pennsylvania Constitution of 1790.***" *Wasson*, 842 S.W.2d at 492 (emphasis added).

Accordingly, as succinctly stated by this Court, "Decisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are ***uniquely persuasive*** in interpreting our own." *Id.* at 498 (emphasis added). [5]

At the time of adoption of the Kentucky Constitution, as well as the federal constitution and the constitution of the State of Pennsylvania, there were two philosophical approaches to the freedoms of speech and the press. The more limited was the Blackstone view that freedom of speech meant only freedom from prior restraint. Under Blackstone's view, there could, however, be punishment for the "abuse"

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[5] *See also Yeoman*, 983 S.W.2d at 473 ("decisions of the Supreme Court of Pennsylvania, when interpreting provisions of the Pennsylvania Constitution similar to that of the Kentucky Constitution, are ***very persuasive*** to the Courts of the Commonwealth and should be given as much deference as any non-binding authority receives") (emphasis added); and Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541 (1989)(influence is remarkable).

of that liberty. The other was a natural rights philosophy advanced in the works of John Locke, which taught that freedom of speech was an "inalienable" natural right that was always retained by the individual, limited only by the fundamental rights of others. A detailed discussion of these competing theories is found in the recent decision of the *Oregon Supreme Court in Oregon v. Ciancanelli*, 121 P.3d 613, 620 (Or. 2005).

It is beyond question that Kentucky has chosen the broadest protections possible by blending these two philosophical approaches into the State Constitution. Certainly, Ky. Const. § 1 contains natural rights attributes (its refers to the "***inalienable*** rights" of men to "freely communicate their thoughts and opinions" (emphasis added)). In addition, in also adopting a Blackstonian approach to these liberties, the Framers drafted Ky. Const. § 8 to protect the "free and full" right to speak, write and print "on any subject," while holding individuals "responsible for the abuse of that liberty."[6]

Similarly, it is clear that the framers of the Pennsylvania constitution chose broad protections against prior restraints as well. In *Long v. 130 Market St. Gift & Novelty of Johnstown*, 440 A.2d 517, 525 (Pa. Super. Ct.1982), the Superior Court of Pennsylvania noted that Blackstone's approach had become part of the "bedrock of Pennsylvania's constitutional system," and that under their state constitution, there were two distinct elements to the right of freedom of expression. "The first, ***arguably an absolute right***, guarantees to each citizen the freedom to make public whatever he may choose. *The prohibition against*

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[6] The Court of Appeals below was misguided in its ruling in this case by its vehement dislike for adult establishments, very clearly holding that if it were up to the Court of Appeals, this type of expression would be granted no constitutional protections at all. Apx. A, p. 87 ("Simply because United States Supreme Court case law ***has thrust upon us a mandate that erotic expression deserves at least minimal First Amendment protection***, this does not mean that all activities taking place in such an environment are likewise protected") (emphasis added); and Apx. A, p. 88 ("Without the mandate by federal jurisprudence that we grant such protection, meaning that Kentucky's Constitution can give no lesser protection to this form of alleged expression, it is ***not evident that Kentucky would grant any protection at all to erotic expression if we had the choice***.") (emphasis added). It should be noted that Court of Appeals issued its decision without viewing one item of merchandise or a single performance presented in Plaintiffs' establishments upon which to base its opinion that those forms of expression are not protected.

the prior restraint of publication serves to protect the sanctity of this right."[7] *Id.* (emphasis added).

The Pennsylvania Supreme Court concurs in these comments. In *William Goldman Theatres, Inc. v. Dana*, 173 A.2d 59, 62 (Pa. 1961), the High Court, in addressing the interpretation of the Pennsylvania constitutional right of free expression as a matter of first impression,[8] succinctly held that "it is clear enough that what it was designed to do was to *prohibit the imposition of prior restraints upon the communication of thoughts and opinions*, leaving the utterer liable ***only*** for the abuse of the privilege" *Id.* at 62 (emphasis added). In discussing the renowned Blackstone Commentaries and the prohibition against prior restraints, the Pennsylvania Supreme Court further observed that what Blackstone had recognized as the law of England came to be "an established constitutional right in Pennsylvania as to both speech and press. . . ."

Accordingly, the Pennsylvania courts have acknowledged the "***arguably . . . absolute right***" to be free from prior restraints. This Court should recognize and indeed follow this "uniquely persuasive" precedent from the State of Pennsylvania.[9] *See also Commonwealth v. Campbell*, 117 S.W. 383, 385-86 (Ky. Ct. App. 1909) (the court of appeals following the Blackstone approach in differentiating between

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[7] The second distinct element to the right of freedom of expression under the Pennsylvania and Kentucky constitutions is the responsibility "for the abuse of that liberty." The court in *Long* further noted that "[i]t would seem that the right to ***trial by jury . . . protects the sanctity of this more limited right***." *Long*, 440 A.2d at 525 (emphasis added). However, there is no right to trial by jury with regard to the criminal disability provisions of Chapter 111 further discussed, *infra*, which can effectuate an absolute prior restraint upon expression. Rather, the Director, and not a jury, makes the decision that an individual or business is precluded from engaging in protected expression in the Louisville/Jefferson County area. Because the Ordinance does not require a determination by jury of penalties under Chapter 111 (including license suspension and/or revocation), the Ordinance is constitutionally infirm for this additional reason.

[8] As will be discussed further herein, that provision served as the basis for the rights found in Ky. Const. § 8.

[9] Tennessee, whose constitution was also borrowed "***in virtually identical form***" from the Pennsylvania constitution, has also recognized the broad prohibitions against prior restraints (an "arguably absolute right") by directly and liberally quoting from *Long* in *Tennessee v. Marshall*, 859 S.W.2d 289, 293 (Tenn. 1993). That court further observed, in adopting the Pennsylvania approach, that "[t]here is no indication in the journals chronicling the historical development of the Constitutions of Tennessee, nor in any prior Tennessee Supreme Court cases, that the delegates to Tennessee's Constitutional Convention in 1796 intended, when they adopted, ***verbatim***, the language that was contained in Article 9,§ 7 of the Pennsylvania Constitution of 1790, *that such language have any meaning other than that which had been, and continues to be, attributed to it in the context of the Pennsylvania Constitution of 1790.*" *Id.* at 294 (emphasis added).

absolute and relative rights).

Therefore, because Chapter 111 is clearly a prior restraint (in that no one can engage in the defined conduct within the county without prior governmental approval from the Director), it is invalid in-and-of itself under the plain language of the Kentucky Constitution. The Court of Appeals was in error in rejecting this argument. Apx. A, p. 53. Yet, an additional facet of the Ordinance further makes this point.

In order to obtain an adult entertainment establishment license, each principal owner, officer, director, general partner, and "each other person who will participate directly in decisions relating to management of the business" must be identified in the application and must list thereon all convictions for "specified criminal activities as defined in this Chapter. . . ." § 111.36(B)(2)(b) and (6).

An application for an adult entertainment establishment license is to be denied if the "applicant" has been convicted of a "specified criminal activity. . . ." § 111.38(A)(4).[10] In addition, *each and every person employed at an adult establishment must obtain an employee license prior to working --* ***even janitors***! *See* generally § 111.40(D) and § 111.42(A). An employee license must also be denied if the Director determines that the employee applicant has been convicted of a "specified criminal activity." § 111.42(B). Interestingly, while this restriction parrots the requirement for club licenses, employee applicants are ***not*** – for whatever reason – obligated to disclose any such convictions on their applications. *See, e.g.*, § 111.42(A)(1)-(7).

Any license may be suspended if the licensee "knowingly or recklessly violated or is not in compliance with any section of this chapter. . . ." § 111.43(A). A license may be revoked if the licensee "knowingly or recklessly commits two or more violations specified in this chapter within a 12-month period," § 111.43(B), or for a single instance of certain criminal conduct. § 111.43(C). The fact that a conviction is

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[10] These include the crimes of rape, sexual misconduct, indecent exposure, falsifying business records, prostitution, obscenity, engaging in organized crime, and even offenses relating to controlled substances. § 111.02. Such convictions preclude licensing for two years from the date of a conviction for a misdemeanor offense; five years from the date of a felony conviction; and five years from the date of the last conviction of two or more misdemeanor offenses occurring within any twenty-four month period. § 111.02.

being appealed "shall have no effect on the revocation of the license. . . ." § 111.43(D). A license revocation is effective for ***one year***. § 111.43(E). All of these sections of Chapter 111, in combination, will be referred to hereinafter as the "***criminal disability provisions***" of the Ordinance.

The circuit court upheld these restrictions, R. Vol. VII, pp. 942-62; Apx. C, pp. 6-7, and held that Plaintiffs did not have standing to challenge them.[11] *Id.* at 7. The appellate court affirmed, also finding a lack of standing. Apx. A, pp. 61-62. However, the criminal disability provisions are unquestionably prior restraints upon expression, and accordingly fail to pass muster under the Kentucky Constitution.

First, since prior restraints should not be permitted ***at all*** under the Kentucky Constitution, these provisions are invalid. They disenfranchise certain individuals and businesses from engaging in expression-related activities, and therefore unquestionably effectuate an impermissible prior restraint. Indeed, supreme courts of a number of states have come to the conclusion that these types of criminal disability provisions are constitutionally infirm.[12]

Second, there is also federal precedent that establishes the infirmity of such restrictions. Most telling is the recent Seventh Circuit decision in *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000), where that Circuit succinctly concluded:

"We know of no doctrine that permits the state to deny to a person First Amendment

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[11] Plaintiffs have standing because they're required to pay the application fees used to defray the costs of the criminal background checks which facilitate administration of the criminal disability provisions. *See* Section I(C), *infra*. In addition, all "applicants" must forego their privacy rights and provide certain personal information and submit to background check; again conferring standing to challenge these provisions.

[12] *See, e.g., Perrine v. Municipal Court*, 488 P.2d 648, 652 (Cal. 1971) (ordinance unconstitutional as no showing had been made that persons convicted of specifically articulated sex crimes were "in any way disqualified to participate in the operation of a[n adult] bookstore or likely to abuse the right to do so to promote any criminal propensities that they may still possess") (clarification added); *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272, 288-89 (Colo. 1995); *Seattle v. Bittner*, 505 P.2d 126, 131 (Wash. 1973); and *Alexander v. City of St. Paul*, 227 N.W.2d 370, 373 (Minn. 1975) (holding that the presumptive unconstitutionality of such provisions which effectuated a prior restraint could be overcome only upon a showing that the operation of a business would present a "clear and present danger" of a substantive evil). *See also James*, 63 S.W.3d at 606 ("Prior restraint must be supported by findings that a 'clear and present danger of actual prejudice or an imminent threat' to the defendant is present").

> liberties other than the right to vote solely because that person was once convicted of a crime or other offense.". . . these license ineligibility provisions ***absolutely disentitle classes of speakers from a category of expression***. They produce a complete ban on certain expression for a disqualified group of applicants who, by definition, wish to speak, and such a drastic measure ***cannot be justified here as narrowly tailored to resist noisome secondary effects***."[13]

228 F.3d at 852-53 (emphasis added, citations omitted).

Here, although the preambles to Chapter 111 do not articulate any reason for engrafting the criminal disability provisions on to the Ordinance (a constitutional failing in-and-of-itself), it is clear that the only basis for these prohibitions could be the conclusion that people who were convicted of crimes in the past would be more likely to engage in such conduct in the future. As is aptly demonstrated above, however, Metro should not be permitted to effectuate such impermissible prior restraints.

C. THE LICENSING FEES ARE UNCONSTITUTIONAL.

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[13] Consequently, criminal disability provisions such as are found in Chapter 111 ***cannot*** be justified upon a concern of "adverse secondary effects" as is the stated purpose of this Ordinance. *See* further discussion in Section IV, *infra*. While the United States Supreme Court has never directly ruled on the validity of these types of disability provisions, a number of its decisions, and in particular those dealing with "adult" entertainment, certainly imply that they would be ruled unconstitutional. *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 n.2 (Court held that a nuisance abatement padlocking of an adult bookstore for non-speech related activities (prostitution and lewdness) did not constitute an impermissible prior restraint since respondents were "free to carry on their bookselling business at another location," which would not be the case here where the disabled individuals and businesses are precluded from engaging in protected activities anywhere in the County); *Alexander v. United States*, 509 U.S. 544, 551 (1993) (Court concluded that the forfeiture provisions of the federal RICO statute did not violate the First Amendment as it "impose[d] no legal impediment to--no prior restraint on--petitioner's ability to engage in any expressive activity he chooses" (clarification added) whereas Chapter 111 violates this doctrine by imposing an absolute "legal impediment" to constitutionally protected expressive conduct); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434-42 (2002) (plurality) (Justice Kennedy, in his critical concurring opinion (discussed, *infra*), observed that a municipality may not attempt to address a concern of secondary effects by "suppressing the speech itself." To be constitutional, the law must instead "leave the quantity and accessibility of speech substantially undiminished"). *See also Vance*, 445 U.S. at 317 (Prohibition of the future exhibition of films previously found to be obscene found unconstitutional as the future conduct was protected); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (Previous misconduct or prior illegal activity by anti-abortion protesters could not serve as a basis to deprive them of their right to engage in current and future First Amendment activities); *Simon & Schuster, Inc. v. Crime Victims Bd.*, 502 U.S. 105 (1991) (Individuals convicted of heinous crimes, such as murder, could not be deprived of their First Amendment rights to author, publish, and receive royalties from books describing their criminal activities); and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("[T]he prospect of crime" does not justify laws suppressing protected speech).

The annual fee for an adult entertainment establishment license is $1,000.00. § 111.41. For an employee license, it is $25.00 per year. § 111.42(B). It is clear that the purpose of these fees is, at least in part, to defray the costs of the ***background checks*** necessary to enforce the criminal disability provisions. *See, e.g.*, § 111.42(B) ("Within 20 working days of the application, the Director shall determine whether the applicant has been convicted of a specified criminal activity, as defined in this Chapter"). Given that the criminal disability provisions are infirm for the reasons as set forth above, the license fees are unconstitutional as well.

As a basic premise, a state may not impose a charge upon the exercise of a constitutional right. *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). Nevertheless, under federal analysis, a licensing fee levied upon "adult entertainment establishments" does not excessively burden First Amendment rights "so long as it is imposed as a regulatory measure to ***defray the cost of investigating the license applicant***." *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486, 493 (E.D. Tenn. 1986).[14] The fee should be as minimal as necessary to meet the cost to the city. *Id.* The rationale for this rule is that "the power to impose a license tax on the exercise of . . . [First Amendment] freedoms is indeed as potent as the power of censorship." *Murdock*, 319 U.S. at 113 (clarification added).

The burden of proving that the fees are necessary to cover the reasonable costs of the licensing scheme *lies with the licensing authority. See, e.g., Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F.Supp.2d 672, 691-92 (W.D. Ky. 2002) (in striking down fees, "municipality bears the burden of

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[14] Whether municipalities can impose a particular licensing fee under federal jurisprudence only against "adult" businesses is now open to question. *See Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring in the judgment) ("On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax"). As will be discussed, *infra*, Justice Kennedy's concurring opinion has been determined to be the "holding" of *Alameda Books*. In addition, the protections against prior restraints as embodied in the Kentucky Constitution would also seem to exclude the notion that the engagement in constitutionally protected activities can be made contingent upon the payment of a fee. Accordingly, the fees as set forth in the challenged Ordinance may be unconstitutional in-and-of themselves, irrespective of the other matters discussed in this subsection.

presenting evidence that its fee is necessary to defray the cost of administering the regulatory scheme").

If the criminal disability provisions of the Ordinance are unconstitutional, so clearly then are the application/licensing fees, which are specifically predicated upon administering the criminal disability components of Chapter 111. While the circuit court found that Metro had substantiated the amount of these fees by way of affidavit (Apx. C, p. 6), which was affirmed by the Court of Appeals (Apx. A, p. 55), the lower court decisions were, of course, predicated upon the upholding of the criminal disability provisions. If they are infirm, all of the costs associated with administering those provisions – which are indeed the lion's share of the licensing fees – are similarly unjustified, which negates the permissibility of these fees.

D. THE INFIRMITY OF THE LICENSING SCHEME INVALIDATES THE ORDINANCE IN ITS ENTIRETY.

Although Chapter 111 contains a severability provision (§ 111.98), the invalidity of the licensing scheme renders the ordinance invalid in its entirety. The district court decision in *Kentucky Restaurant Concepts*, is particularly illuminating as it involved the predecessor adult entertainment establishment ordinance. The court there held that:

> "As a practical matter, however, partial operation of Chapter 111 post-severance is untenable. The Ordinance's basic purpose is to regulate sexually oriented businesses. Its primary method for doing so is its licensing and enforcement scheme. Although the Ordinance's substantive provisions are constitutional, they are actually but minor subsets of the broader licensing requirement. . . . If the City may not deny or revoke licenses - - the fundamental regulatory mechanism upon which the Ordinance is structured - - then enforcement of the Ordinance is impossible."

209 F. Supp.2d at 701. *Accord Artistic Entm't, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1204 (11th Cir. 2003). The same circumstances apply here, and the circuit court should therefore have enjoined the enforcement of the entire Ordinance, or the Court of Appeals should have reversed that holding.

In addition, because the licensing fees are unconstitutional, the entire Ordinance must be enjoined. *See, e.g., Ellwest Stereo Theater, Inc. v. Boner*, 718 F.Supp. 1553, 1574-75, and 1581-82 (M.D. Tenn. 1989) (invalidation of numerous provisions of an adult business licensing ordinance – including the fee

provision – rendered it impossible to sever, thereby requiring the entire ordinance to be enjoined); and *City of Chicago Heights v. Public Service Co.*, 97 N.E.2d 807, 811 (Ill. 1951) (invalidation of licensing fees associated with an ordinance regulating the location and construction of poles, wires, and main electrical lines in streets and other public places rendered the entirety of the ordinance unconstitutional, as the impermissible fee provisions were not severable in that the duties imposed upon the municipal agency "must be performed without reimbursement to the City because the license and permit fees provided for are excessive and void"). Here, Metro certainly did not intend the ***County*** to pay for the costs of administering this Ordinance, and since the fee provisions are therefore infirm, so is the entirety of Chapter 111.

E. THE ANTI-NUDITY PROVISION AND THE ARTICULATED BASIS FOR THE ENACTMENT OF THE ORDINANCE VIOLATE THE KENTUCKY CONSTITUTION.

Section 111.35(A) provides that it is a violation of the Chapter "for a patron, employee, or any other person to knowingly or intentionally, in an adult entertainment establishment, appear in a *state of nudity, regardless of whether such public nudity is expressive in nature.*"[15] (Emphasis added). The phrase "state of nudity" is basically defined as a person appearing in clothing of something ***less than*** pasties and a G-string. *See* § 111.02 ("NUDITY OR STATE OF NUDITY"[16]). Accordingly, under the Ordinance, entertainers must wear at least pasties and a G-string at all times. ***Under Chapter 111, then, there is to be no fully nude dancing, or even "topless" entertainment, within the County.***

This restriction, and indeed Chapter 111 in its entirety, was enacted upon a purported concern of the "adverse secondary effects" of adult entertainment establishments. § 111.01. While discussed in greater detail in Section IV, *infra*, this doctrine, and indeed the ability to preclude nude entertainment under

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[15] Plaintiffs do not challenge this provision in regard to non-expressive nudity, but rather merely assert that the ban on "expressive" nudity is unconstitutional. Non-expressive public nudity is already prohibited by law. *See* K.R.S. § 510.150(1)

[16] This is defined as the "showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, or the showing of the female breast with less than a full opaque covering of any part of the nipple and areola."

federal jurisprudence, has been the subject of a rash of highly-fractured plurality opinions from the Supreme Court. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (three Member plurality concluding that an anti-nudity statute could be justified upon the morality of society); *City of Erie v. Pap's, A.M.*, 529 U.S. 277 (2000) ("*Pap's II*") (five Justices, in two opinions, concluding that an ordinance proscribing public nudity could be justified upon the adverse secondary effects of adult entertainment establishments, but with no majority of Justices agreeing upon the evidentiary standards to apply in such circumstances); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (fragmented Court discussing the evidentiary burden upon the government in order to substantiate a regulation enacted upon a purported concern of adverse secondary effects). These cases all concluded, however, that in the particular circumstances presented, the Court would apply an intermediate level of constitutional scrutiny pursuant to a four part test as set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).[17]

In its opinion, the Court of Appeals analyzed the constitutionality of Chapter 111 under the *O'Brien* standards (Apx. A, pp. 29-33), as did the circuit court. R. Vol. VII, pp. 942-62; Apx. C, p. 4. The circuit court found that this test was the appropriate level of review for determining the constitutionality of the Ordinance "given its stated justification to decrease secondary effects," (R. Vol. VII, pp. 942-62; Apx. C, p. 4.), a holding affirmed by the Court of Appeals. Apx. A, pp. 31-32. Plaintiffs contend that secondary effects is not a permissible basis to reduce the level of constitutional scrutiny under the Kentucky Constitution, and that reference to Pennsylvania law is once again necessary in arriving at this conclusion.

In the years following *Barnes*, courts quickly observed irreconcilable nature of the various opinions of the Justices. In applying the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five

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[17] 1) the regulation at issue is within the government's constitutional power; 2) the regulation 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 freedom is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377.

Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds'"), the Sixth Circuit observed that those standards were less helpful in a case where the opinions were so divergent, and the appellate court referred to its job as "reading the tea leaves of Barnes." *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994).

In 1998, the Pennsylvania Supreme Court was squarely faced with the Barnes dilemma in *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998) ("*Pap's I*"). Finding *Barnes* "hopelessly fragmented" (*Pap's I*, 719 A.2d at 277), that court concluded that the anti-nudity ordinance at issue before it was subject to strict constitutional scrutiny and was unconstitutional ***under the First Amendment***. *Id.* at 278-280. The Supreme Court reversed in yet another plurality decision. *Pap's II*, 529 U.S. 277.

The Supreme Court remanded to the Pennsylvania Supreme Court for a determination of the plaintiffs' overbreadth and state constitutional claims. *Pap's II*, 529 U.S. at 286, 302. In its decision, reported as *Pap's A.M. v. City of Erie*, 812 A.2d 591, 613 (Pa. 2002) ("*Pap's III*"), *the Supreme Court of Pennsylvania adjudicated the exact same issue facing this Court with regard to Chapter 111; that being whether an anti-nudity provision which impacts upon expressive entertainment is consistent with the state constitutional right of freedom of speech and expression.* The Pennsylvania Supreme Court, with only a single dissent, concluded that it was not.[18] The decision in *Pap's III* is critical here because, as previously

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[18] *Accord Mendoza v. Licensing Board of Fall River*, 827 N.E.2d 180 (Mass. 2005), where the Massachusetts Supreme Court recently ruled an anti-nudity ordinance unconstitutional, even in the face of the type of secondary effects "evidence" submitted with regard to the enactment of Chapter 111. *Id.* at 189 n. 13. That court observed that the focus on "secondary effects" evidence "seems a strong indicator that the ordinance is directed at the form of nudity common in adult entertainment." *Id.* The court therefore concluded that the ordinance was unconstitutional as a ban on protected expression. *Id.* at 198-99. Equally as important, the High Court of Massachusetts noted that in exercising its independent judgment to "uphold the cherished protections of the Declaration of Rights as a matter of State constitutional law," *id.* at 191, it was following prior decisions of other state supreme courts, including *Pap's III*, *Mickens v. Kodiak*, 640 P.2d 818, 821-23 (Alaska 1982); and *Bellanca v. New York State Liquor Auth.*, 429 N.E.2d 765 (N.Y. 1981). *See also City of Nyssa v. Dufloth*, 121 P.3d 639 (Or. 2005), and *Oregon v. Ciancanelli*, 121 P.3d 613 (Or. 2005), where the Oregon Supreme Court, in applying their state constitutional right of freedom of expression (markedly similar to that at issue here and also similar to the Pennsylvania right – *Ciancanelli*, 121 P.3d at 634-35) declined to analyze various restrictions of exotic performance dance entertainment under any form of intermediate scrutiny by rejecting a secondary effects justification for such provisions. *See Nyssa*, 121 P.3d at 644 (De

stated, ***the Pennsylvania Constitution served as the basis of the Kentucky Constitution.***

Upon remand, the Pennsylvania Supreme Court concluded that the anti-nudity ordinance at issue there – ***predicated upon a supposed concern of "secondary effects"*** (as is Chapter 111) – violated Article 1,§ 7 of their state constitution. The court rejected the intermediate scrutiny standard of *O'Brien*, and held that it must apply strict scrutiny, requiring the city to "establish that the regulation be 'narrowly drawn to accomplish a compelling governmental interest.'" *Pap's III*, 812 A.2d at 612.

The Pennsylvania Supreme Court noted that freedom of expression had a "robust constitutional history" in that state. *Id.* at 603-05. Probably most importantly, it stated that:

> "***As purely textural matter, Article I, § 7 is broader than the First Amendment*** in that it guarantees not only freedom of speech and the press, but specifically affirms the 'invaluable right' to the ***free communication of thoughts and opinions***, and the right of 'every citizen' to 'speak freely' on 'any subject' so long as that liberty is not abused. '***Communication' is obviously broader than 'speech.***'"

Id. at 603 (emphasis added).

Certainly, the same is true here. Ky. Const. § 1 articulates that citizens are imbued with the right of "***freely communicating their thoughts and opinions***," and Ky. Const. § 8 protects the freedom to speak on "any subject." That is not to even mention the broad protections afforded by Ky. Const. § 26. Consequently, the same rights should apply here.[19]

Muniz, J., dissenting)). These are discussed in further detail in Section I(H)(1), *infra*.

[19] Such a conclusion is not foreclosed by the decision in *Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993). There, this Court upheld a municipal anti-nudity ordinance challenged by a nude dance establishment. *Hendricks* is not dispositive of this issue for three cogent reasons. First, it was decided before *Pap's II* and utilized the now-abandoned *Barnes* standard. Second, its makes no adjudication under the State Constitution, and contains no analysis, let alone even argument, of whether the protections under Ky. Const. § 8 are anything different than what are provided by the First Amendment. Third, and most importantly, *Hendricks* pre-dates, almost by a decade, the Pennsylvania Supreme Court decision in *Pap's III*, which has particular persuasive authority as referenced above because of the use of the Pennsylvania Constitution as the basis for the Constitution of the Commonwealth of Kentucky. For basically these same reasons, *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't*, 60 S.W.3d 572 (Ky. Ct. App. 2001), is similarly inapplicable. In addition, the ruling in *Jameson* reserved the state constitutional issue squarely facing this Court in this appeal because Mr. Jameson had not properly preserved that issue for appellate review. *Jameson*, 215 S.W.3d 9, 13, 14 (Ky. 2006).

In addition, in particular regard to the highly fractured plurality opinion in *Alameda Books*, by which any "secondary effects" analysis under the Federal Constitution must be governed, the High Court of Pennsylvania observed: "It is also notable that the five Justices in the U.S. Supreme Court who agreed that the *O'Brien* test applied ***could not agree upon the precise evidentiary showing which would be required to satisfy that test.***"[20] *Pap's III*, 812 A.2d at 609-10 (emphasis added).

Elaborating on this lack of guidance, the Pennsylvania Supreme Court held:

> "Although this Court has often followed the lead of the U.S. Supreme Court in matters of free expression under Article I, §7, doing so here is no easy matter, even if we were obliged or inclined to. The position of the decisive Supreme Court concurrence by Justice Scalia – a position rejected by seven other Justices on the High Court – that this ordinance does not raise a question of protected expression at all finds no support in our jurisprudence. Nor does the concurrence offer any illumination on the proper application of the O'Brien standard, since the concurrence would have sustained the ordinance on grounds that it did not implicate protected expression at all. Meanwhile, the five Justices who agreed that O'Brien should apply ***disagreed upon the application of that intermediate scrutiny test***."

Pap's III, 812 A.2d at 611 (emphasis added). In light of this dilemma, this Court should heed the words of the High Court of Pennsylvania:

> "As a matter of policy, Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while the U.S. Supreme Court struggles to articulate a standard to govern a similar federal question."

Pap's III, 812 A.2d at 611. ***Citizens of Kentucky are entitled to no less.***

This Court should follow this additional "uniquely persuasive authority," and for the same reasons articulated by the Pennsylvania Supreme Court that the ordinance at issue in *Pap's III* failed muster under strict scrutiny (812 A.2d at 612-13), similarly conclude that Chapter 111 is constitutionally infirm pursuant to Ky. Const. §§ 1, 2, 8 and 26, and that the lower courts thus erred.

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[20] The lower courts never confronted this evidentiary dilemma or even the application of Pennsylvania precedent in this regard. Rather, they simply adopted the *O'Brien* standard as justification to uphold the provisions, impliedly concluding that whatever standard applied, it had been met. Apx. A, pp. 30-31.

F. THE HOURS OF OPERATION AND "NO DIRECT PAYMENT" PROVISIONS ARE CONSTITUTIONALLY INVALID.

As amended, § 111.18 now precludes an adult entertainment establishment from remaining open for business "between the hours of 1:00 a.m. and 9:00 a.m. on any day." Accordingly, defined establishments (and, again, even those providing no true "adult" entertainment, such as cabarets where entertainers have to wear at least pasties and G-strings at all times) must remain closed and must refrain from engaging in constitutionally protected expressive activities for ***eight hours of each day***. That is ***one-third of each day; one-third of each week; and one-third of each year***.

PT's is open for business from 11:00 a.m. to 4:00 a.m. Monday through Friday, 4:00 p.m. to 4:00 a.m. on Saturday, and 6:00 p.m. to 2:00 a.m. on Sunday. Affidavit of Brian Franson ("Franson Aff.") ¶ 16; Ex. E to Supp. Brief, Aug. 4, 2004; Apx. K. Mr. Franson, the Area Director of *PT's*, estimates that complying with the hours of operation restrictions as set forth in § 111.18 would result in an approximate reduction of twenty-two percent in the number of customers patronizing *PT's*; a thirty percent reduction in the number of dancers performing at the club; a thirty percent reduction in the number of dances performed; and a thirty-two percent reduction in the revenue generated by the establishment. Id. at ¶ 19.

Blue Movies operates, and has operated in the past, twenty-four hours a day, seven days a week. Affidavit of Robert Hollis, ¶'s 4-6; Ex. F to Supp. Brief, Aug. 4, 2004; Apx. L. For a "24/7" establishment such as *Blue Movies*, the restrictions represent a *33.3% reduction* in the number of hours that it can operate. Per Mr. Hollis complying with the hours of operation provision would result in a 30% reduction in the number of customers; the amount of expressive materials presented; and business revenues. Id. at ¶ 10.

The circuit court upheld the hours of operation provision predicated upon the conclusion in *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003). R. Vol. VII, pp. 942-62, Apx. C, p. 18. The Court of Appeals affirmed. Apx. A, pp. 36-38. These rulings were erroneous.

First, *Center for Fair Public Policy* utilizes (or at least attempts to utilize) the *O'Brien* standard of

intermediate scrutiny which is simply not applicable under the Kentucky Constitution. Indeed, the lower courts never explained why they had failed to undertake any independent analysis under the Constitution of the Commonwealth of Kentucky. Second, in light of the fractured nature of *Barnes*, *Pap's II*, and *Alameda Books*, it is not even clear how those *O'Brien* standards are supposed to be applied. Neither lower court engaged in any discussion of the disputes in federal courts concerning the application of the *O'Brien* elements, and in particular the "narrow tailoring" component thereof.

Because *Alameda Books* is in fact a plurality ruling, the lower federal courts have struggled to utilize the *Marks* standards in order to determine the constitutional "holding" of that decision. Most courts, including the Court of Appeals (Apx. A, p. 26 n.9) have concluded that the holding is represented by the concurring opinion of Justice Kennedy.[21] Reference to his opinion is, therefore, necessary.

Justice Kennedy notes that while regulations may constitutionally be utilized to reduce secondary effects, they cannot have the consequent effect of also reducing either speech or expression related activities, and must "*leave the quantity and accessibility of the speech substantially undiminished.*" *Alameda*, 535 U.S. at 445 (Kennedy, J., concurring) (emphasis added). As he succinctly stated, *"a city may not regulate the secondary effects of speech by suppressing the speech itself."* *Id.* (emphasis added).

Justice Kennedy also observes that a regulation can be consistent with the First Amendment "if it is ***likely*** to cause a ***significant decrease*** in secondary effects and a ***trivial decrease*** in the quantity of speech." *Id.* at 445 (Kennedy, J., concurring) (emphasis added). He summed up his analysis as follows:

> [A] city ***must advance some basis to show*** that its regulation has the ***purpose and effect of suppressing secondary effects***, while leaving the ***quantity*** and ***accessibility***

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[21] *See, e.g., 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 491 (6th Cir. 2008). *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 721-22 (7th Cir. 2003) (regarding ordinance prohibiting the sale, use or consumption of alcohol such as is the case here – *see* Section I(G), *infra*); *SOB, Inc., v. County of Benton*, 317 F.3d 856, 861-62 (8th Cir. 2003) (public indecency ordinance); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1269 (11th Cir. 2003) (zoning and public nudity ordinances); and *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 637-38 (7th Cir. 2003) (alcohol prohibition and to a dancer/patron "buffer zone").

> of ***speech substantially intact***. The ordinance may identify the speech based on content, but only as a short hand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects *by reducing speech in the same proportion.*

Id. at 449–50 (Kennedy, J., concurring) (emphasis added). Equally as important, he further stated that a constitutional analysis directed at these types of regulations ***must*** "address how speech will fare under the city's ordinance." *Id.* at 450.

Irrespective, the one court that seems to marginalize Justice Kennedy's concurring opinion is indeed the Ninth Circuit decision in *Center for Fair Public Policy*, the ruling relied upon by the lower courts. That opinion, however, is a mere two-two-one decision, and even under federal jurisprudence seems to be at odds with the general doctrine of narrow tailoring under intermediate scrutiny.

First, as noted by the dissent in *Center for Fair Public Policy*, if, as all of the other circuits agree, Justice Kennedy's concurring opinion is in fact the holding of *Alameda Books*, an hours of operation provision is the ***quintessential*** violation of those concerns. *See* 336 F.3d at 1172 (Canby, J., dissenting). Second, Justice Kennedy's opinion does no more than operationalize the fourth prong of *O'Brien*, which requires that the "incidental" restriction on First Amendment freedoms be "no greater than is ***essential***" to the furtherance of the governmental interest. 391 U.S. at 377. The word "incidental" is generally defined to have two separate components; the effect must be both "***indirect***," and "***minimal***." If the impact is not "indirect," or, more importantly, if it is not "minimal," the regulation fails muster for not being sufficiently narrowly tailored. This is all that Justice Kennedy advocates. Given the affidavits of Franson and Hollis, as acknowledged in the circuit court's ruling (Apx. C, p. 17), the effect upon expression is neither ***minimal*** nor ***indirect***, and the challenges to these provisions should not have been summarily dismissed.

Third, economic impact is certainly one of the effects that a court must look at when determining the constitutionality of a law that impacts upon First Amendment rights (and, accordingly, state constitutional rights as well). And, for the same reason, the "no payment" provision contained in § 111.35(C) is similarly infirm, and the lower courts were in error in holding otherwise. As the Supreme Court stated in *Buckley*

v. Valeo, 424 U.S. 1, 65 n.76 (1976), "money" is "a necessary and integral part of many, perhaps most, forms of communication." Succinctly put, "it is obvious that the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected materials." *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 827 (4th Cir. 1979).[22]

Just as government may not simply ban expression it dislikes, it cannot use financial disincentives and economic hardship to drive disfavored expression into oblivion.[23]

Fourth, even the plurality opinion authored in *Pap's II* notes that a significant constitutional

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[22] *See also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468-69 (1995) (Court noted that "because compensation provides a significant incentive toward more expression" by artists, "[b]y denying respondents that incentive, the honoraria ban induces them to curtail their expression," and therefore "unquestionably imposes a significant burden on expressive activity"); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 208 (1997) (the Court underwent a detailed economic analysis in determining what the First Amendment benefits and detriments were in regard to the F.C.C. "must carry" provision for cable T.V. broadcasters, and found that -- in invalidating the regulation -- an 11% decline in advertising revenues posed a "***serious risk*** of financial difficulty" and that stations would suffer "financial harm and possible ruin") (emphasis added); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 n.'s 7&8 (1975) (Court invalidated an ordinance that prohibited the showing of films containing nudity at drive-in theaters when the screen was visible from a public street or place, by concluding that the structural requirements necessary to comply with the ordinance would "increase the cost of showing films containing nudity," that in certain circumstances theaters might avoid showing these movies rather than incur the additional costs, that this could result in individuals being unable to see such films, and that the ordinance was therefore unconstitutional in that it was a "restraint on free expression"); and *Simon & Schuster, Inc.*, 502 U.S. at 116 (invalidated a law that took the profits of books by convicted criminals by noting that such a regulation "imposes a financial disincentive," and that this "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

[23] In *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999) the court upheld less restrictive rules because it had "no reason to believe that this is a significant impairment of [the Plaintiffs'] business." This is not the case here. The preambles to the Ordinance, in a conclusory fashion, observe that the hours of operation restrictions will have community benefits "without significantly interfering with the availability of adult entertainment." § 111.02(H). Certainly, this evidence establishes that the preamble is incorrect. And, if the preamble is the constitutional justification for this provision, the fact that it is found to be untruthful establishes the infirmity of this Ordinance section. In any event, there were certainly issues of fact in regard to this issue that should have precluded the entry of summary judgment against the Plaintiffs. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 809 (2000) (struck down law restricting the ability to broadcast at certain hours because there was a "significant restriction of communication, with a corresponding reduction in Playboy's revenues."); and *Playboy Entertainment Group. Inc. v. United States*, 30 F.Supp.2d 702, 711 (D. Del. 1998) (a mere 15% decline in revenues, it further observed that this impact served as a "quantitative measure of the lost First Amendment opportunities suffered by Playboy and its viewers").

infringement would raise the level of scrutiny and shift the presumption to be against constitutional validity. "If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based." 529 U.S. at 294. The intrusions here are not *de minimis*.

Fifth, the fact that the fractured decision in Alameda Books has modified the secondary effects doctrine as first articulated by the Supreme Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is demonstrated no better than by a decision from the very federal district court which is continuing the *Alameda Books* saga following remand from the Supreme Court. In *Alameda Books, Inc. v. City of Los Angeles*, Case No. CV 95 07771 DDP (C.D. Cal., June 10, 2005) (Apx. M), the district court there found that "while the *Renton* standard is still the controlling standard in this case, that standard was ***modified*** by the Supreme Court's holding in *Alameda Books*. Specifically, the court agrees with the plaintiffs that the proportionality requirement [as set forth in Justice Kennedy's concurring opinion] adds a new element to the *Renton* inquiry. . . ." Apx. M, at 19 (emphasis and clarification added).

That inquiry includes an examination of whether the regulating body advances "some basis to show that its regulation has the purpose and effect of suppressing secondary effects, ***while leaving the quantity and accessibility of speech substantially intact***." Apx. M at 21 (emphasis added). *See also* Apx. M at 22-24. The court notes that the government's premise "cannot be merely that cutting adult speech in half would probably reduce secondary effects proportionately."[24] Apx. M at 26. Yet, that is ***exactly*** the purpose and effect of the hours of operation restrictions here. *See also* Apx. M at 30.

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[24] If this Court does, indeed, seek to "borrow" the convoluted federal jurisprudence of intermediate scrutiny related to sexual expression, this Court must also decide, in addition to the narrow tailoring issue, the evidentiary standards that must be applied in order to satisfy the justification for such regulations. In that event, Plaintiffs contend that this Court should adopt the partial concurrence and partial dissent of Justice Souter in *Pap's II* (529 U.S. at 310-17), and his dissent, joined in by Justices Stevens, Ginsburg and Breyer, in *Alameda Books* (535 U.S. at 453-66), for the reasons stated therein. This issue was not, however, resolved by the circuit court. The Court of Appeals did address this issue (Apx. A, pp. 73-78), but Plaintiffs will discuss the erroneous nature of that Court's holding below.

Here, Plaintiffs submitted ***uncontroverted*** evidence that Metro's approach to reducing secondary effects "will do so by substantially diminishing speech." At the very least, there were material issues of fact which precluded the entry of summary judgment on this issue. For these reasons, the decision upholding the hours of operation provision should be reversed.

G. THE PROHIBITION OF THE SALE OF ALCOHOL IS UNCONSTITUTIONAL.

1. METRO LACKS CONSTITUTIONAL AUTHORITY TO UNILATERALLY IMPOSE NEW AND ABSOLUTE PROHIBITIONS ON ALCOHOL WITHOUT VOTER APPROVAL.

Section 111.30 of Metro's Ordinance, entitled "Sale of Alcoholic Beverages Prohibited," imposes a local legislative prohibition on alcohol in adult entertainment facilities. This prohibition is unconstitutional because it was enacted without voter approval, as required under § 61 of the Kentucky Constitution, and the State has not otherwise delegated to Metro any constitutional authority under the Twenty-First Amendment of the United States Constitution to legislatively impose liquor prohibitions.[25]

The Twenty-First Amendment to the United States Constitution is the source for the States' police power over the use and distribution of alcoholic beverages. This Amendment provides in relevant part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Generally, this provision allows each state, as a distinct unit of government, to determine liquor regulations within its jurisdiction. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (providing a history).

This Amendment, however, does not directly grant authority to local governments to regulate or otherwise control intoxicating beverages. Instead, states may choose to delegate all, part, or none of this power to local authorities. In Kentucky, the General Assembly has chosen to delegate a portion of its

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[25] This issue is presented here pursuant to this Court's order granting discretionary review, wherein the Court expressed an interest in reviewing "any Twenty First Amendment issues raised by the prohibition on alcohol." (Apx. B, Order Granting Discretionary Review).

alcohol prohibition authority to local ***voters*** who have the power to prohibit the sale of alcohol within their own territories.[26] *See Early v. Rains*, 28 Ky.L.Rptr. 415, 89 S.W. 289 (1905) (history of § 61). Under this constitutional provision, "[t]he citizens who are legal voters in the territory ***alone*** can take the initiative in [alcohol prohibition] matter[s] . . . [and] it is not permitted to the Legislature to deny a town or city the right to vote on this subject ***as a whole***." *Id.* at 289 (emphasis added).

To effectuate § 61, the General Assembly enacted statutory procedures for conducting local elections regarding the prohibition of alcohol. *See* Ky.Rev.Stat. §§ 242.010- 242.990 (1998 and Supp.2007). Under these provisions, voters within Kentucky territories, rather than local governments or the Commonwealth, determine whether and where alcohol may be sold.

In enacting § 111.30, Metro ignored the constitutional and statutory requirements for alcohol prohibition in Kentucky and usurped the Commonwealth's authority under the Twenty-First Amendment, which has been delegated to local voters. This violates Constitution § 61 and the corresponding voting procedures found in KRS §§ 242.010- 242.990. It also violates KRS § 82.082, which bars Metro from exercising "any power . . . in conflict with a constitutional provision or statute."

The constitutional restriction on local governments enacting liquor prohibitions in Kentucky was recognized in *Iacobucci v. City of Newport, Kentucky*, 785 F.2d 1354 (6th Cir.1986), *rev'd*, 479 U.S. 92 (1986). In that case, the United States Court of Appeals for the Sixth Circuit held that an ordinance enacted by the city council of Newport, Kentucky, which prohibited nude or nearly nude dancing in establishments selling liquor, was an unconstitutional exercise of police powers outside the realm of the Twenty-First Amendment. In rejecting the city ordinance, the court acknowledged that the Commonwealth of Kentucky's

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[26] Section 61 of the Kentucky Constitution provides :The General Assembly shall, by general law, provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken, as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All such elections may be held on a day other than the regular election days.

power to ban the sale of alcoholic beverages entirely under the Twenty-First Amendment "included the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Id.* at 1358 (citations omitted). The court, however, questioned whether the Commonwealth had delegated this power to local legislative authorities:

> Given the express statutory authorization for cities to conduct popular elections on the question of local prohibition, see K.R.S. §§ 242.010-242.990, as required by the Kentucky Constitution, it is very doubtful that a city in Kentucky may by ordinance "ban the sale of alcoholic beverages entirely." . . . A local government cannot exercise in part a power it does not hold in full, and the citizens of Louisville/Jefferson County have not chosen to exercise the power granted to them by K.R.S. §§ 242.010- 242.990 and § 61 of the Kentucky Constitution.

Id. at 1358.

The Supreme Court reversed the Sixth Circuit's decision insofar as the appellate court fail to consider and apply *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981). But the Court "expressed no opinion" on the "state-law question" of whether the Commonwealth had delegated to local legislatures the authority to enact prohibitions on alcohol. *Iacobucci,* 479 U.S. at 96 n.6 (1986).[27]

In an apparent effort to avoid the Twenty-First Amendment delegation-defect identified in *Iacobucci*, Metro has claimed that § 111.30 is not a liquor regulation, but merely a regulation of adult entertainment facilities. Metro Court of Appeals Br., p. 39. With all due respect, this is a distinction without a difference. Regardless of the ***form*** that Metro uses to classify and describe § 111.30, Metro, ***in substance***, has imposed a prohibition on the sale of alcohol without voter approval. And as a result, it has violated the Kentucky Constitution.

Local governments in Kentucky share some concurrent responsibilities with the Commonwealth

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[27] The precedential value of the Supreme Court's approval of the ordinance in *Iacobucci* has been called into question following the Court's subsequent ruling in *44 Liquormart*. *See Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 1002 n.6 (11th Cir. 1998). But regardless of the *44 Liquormart* decision, the Twenty-First Amendment delegation concerns identified by the Supreme Court and the Sixth Circuit in *Iacobucci* still exist.

for the regulation of alcohol.[28] But the fact of the matter is, local governments do not share concurrent power with the ***voters*** to approve local prohibitions on alcohol. Under § 61 of the Constitution, this power has been delegated only to local electorates. Thus, while Metro can ***regulate*** alcohol, in some capacities, concurrently and consistently with state authorities, it may not impose an outright ***prohibition*** on the sale of alcohol without voter approval. This is precisely what Metro has done.

2. EVEN ASSUMING METRO HAS AUTHORITY TO PROHIBIT ALCOHOL WITHOUT VOTER APPROVAL, SECTION 111.30 IS PREEMPTED BY STATE LEGISLATION.

Section 111.30 prohibits those establishments which hold adult entertainment business licenses from also obtaining liquor licenses. This provision of the Ordinance is preempted by state statute. "[T]he power of the state to regulate the alcoholic beverage industry is supreme. Any delegation of that authority, because of the nature of the industry, must be specific and unequivocal, not merely inferential." *Whitehead v. Estate of Bravard*, 719 S.W. 2d 720, 724 (Ky. 1986). Thus, any local regulation of that industry must be specifically authorized by the General Assembly or the Alcoholic Beverage Control Board. *Id.* In *City of Ashland v. Kentucky Alcoholic Beverage Control Bd.*, 982 S.W. 2d 210, 213 (Ky. Ct. App. 1998), the court held that absent express or specific authority to disqualify certain retailers from holding an alcoholic beverage license, such a restriction was invalid, and stated:

> However, there is no express or specific authority to create a scheme that disqualifies certain types of retailers such as grocery stores or gasoline stations from obtaining a package license to sell alcoholic beverages. We agree with the lower court that any conflict between the City's ordinance and a specific statute must be resolved in favor of the statute. *See Commonwealth v. Do, Inc., Ky.*, 674 S.W.2d 519 (1984).

Recently, in *Ky. Licensed Beverage Ass'n v. Louisville - Jefferson County Metro Gov't*, 127 S.W.3d 647 (Ky. 2004), this Court again reaffirmed that where a local ordinance is in conflict with state statues, it

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[28] For example, KRS 241.160 requires cities wherein alcoholic beverages are sold to appoint a local administrator. And under KRS 241.190, the local administrator has the same duties and responsibilities regarding local licenses as the State Board has to state licenses. Moreover, KRS 243.070 gives local authorities the power to impose license fees upon the sale of alcohol.

may not be enforced:

> Accordingly, the Metro Government's ordinance is in conflict with state statutes on the subject and is not authorized pursuant to any home rule statute cited above. Therefore, in absence of a particular grant of authority to regulate non-licensees by the imposition of civil fines in KRS 241 et seq., the Metro Government is without authority to apply the penalties set forth in the Ordinance to non-licensees. See *Boyle v. Campbell, Ky.*, 450 S.W.2d 265, 268 (1970) (invalidating a city ordinance dealing with Sunday Closing laws, and holding that "if the doctrines of 'preemption' and 'conflict' are not dispositive . . . there is a basic concept which invalidates this ordinance. . . . that the City of Bowling Green simply lacks the authority by local law to amend, modify, interpret or construe at [sic] state statute").

Id. at 649 (clarification in original).

There is no state statute that prohibits a business engaged in "adult entertainment" from applying for and receiving a liquor license. As stated, a number of the Plaintiffs possess just such a license. This provision is therefore statutorily preempted in regard to them.

3. SECTION 111.30 IMPOSES AN UNCONSTITUTIONAL CONDITION ON THE ISSUANCE OF A LICENSE.

The government may not condition the issuance of a license upon the agreement of the applicant to give up or waive his or her constitutional rights, as the Sixth Circuit made clear in *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071, 1077 (6th Cir. 1994). The Ordinance flatly contradicts the well-established precedent that a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or entertainment permit, on an agreement to refrain from exercising one's constitutional rights, especially one's right to free expression. *Id.*[29] Nevertheless, § 111.44 requires that

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[29] *See also Perry v. Sinderman*, 408 U.S. 593, 597 (1972) ("For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech"); *Keyshian v. Board of Regents*, 385 U.S. 589, 606 (1967) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege")); and *44 Liquormart*, 517 U.S. at 513(" . . .it does not follow that conferral of [a governmental] benefit may be conditioned on the surrender of a constitutional right") (clarification added).

the liquor-licensed Plaintiffs, as a condition of obtaining their adult business licenses, give up their liquor licenses. Those Plaintiffs have made significant investments in time, money and energy in establishing their businesses, and each of their licenses are valuable. Metro may not condition the maintenance of the Plaintiffs' liquor licenses upon their willingness to give up their right to engage in constitutionally protected expression. As such, the imposition of such a condition as a requirement to obtain or maintain a liquor license is blatantly unconstitutional and is preempted by state law.

H. THE ENTERTAINMENT "BUFFER ZONE" PROVISIONS ARE INFIRM UNDER THE KENTUCKY CONSTITUTION.

Chapter 111 creates an entertainment "buffer zone" by providing that it is a violation for any employee to appear "semi-nude" (*i.e.*, while ***clothed***) unless he or she is located ". . .at least six (6) feet from any patron or customer and on a fixed stage at least eighteen (18) inches from the floor." § 111.35(B). The lower courts erred in upholding the constitutionality of such provisions as they violate the Kentucky Constitution for a variety of reasons.

1. THE BUFFER ZONE DOES NOT PASS MUSTER UNDER THE HEIGHTENED SCRUTINY REQUIRED BY THE KENTUCKY CONSTITUTION.

That the six-foot buffer zone does not pass scrutiny under the Kentucky Constitution is ***directly*** demonstrated by the Oregon Supreme Court's recent consideration of the constitutionality of a similar (but two foot ***smaller***) buffer zone under Art I,§ 8 of the Oregon Constitution[30] in *City of Nyssa v. Dufloth,* 121 P.3d 639 (Or. 2005). There, the ordinance in question required every entertainer to be clothed unless "removed at least four feet from the nearest patron." *Id.* at 640. In its decision, the Oregon Supreme Court relied on its analysis in the related case of *Oregon v. Ciancanelli,* 121 P.3d 639 (Or. 2005) decided the same day. That decision found that a statute prohibiting "live public shows" in which participants engaged

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[30] Article I, § 8 of the Oregon Constitution is similar to the corollary provisions of the Kentucky Constitution, and provides that: "No law shall be passed restraining the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

in "sexual conduct" was aimed directly toward the expressive aspect of the conduct that the law described, and therefore was a regulation restraining free expression. *Id.* at 634.

Applying that construct, the court in *Nyssa* found that a four foot buffer zone was also specifically directed by its terms at restraining free expression since the ordinance applied only to performances in establishments that regularly featured nude entertainment. *Nyssa*, 121 P.3d at 643-35:

> . . . Article I, section 8, precludes the Legislature from using limitations on speech or expression as a substitute for regulating that conduct directly. . . . In the present case, the city constitutionally can regulate such conduct as sexually contact between performers and patrons, and the fact that an individual uses speech or expression in the course of that conduct would not immunize the individual from prosecution. However, that is not what the ordinance at issue here does. The four-foot ordinance does not specifically preclude or even refer to sexual contact between performers and patrons. Rather, as discussed, it simply restrains certain kinds of expression in certain kinds of establishments.

Id. at 643 n.5 (citations omitted). Accordingly, the buffer zone ordinance was found unconstitutional on its face as a restraint upon free expression. *Id.* at 643-644.

The six foot buffer zone here is similarly directed solely at the expressive aspect of live entertainment, and is therefore a direct restraint on expression protected by the Kentucky Constitution. As noted in *Nyssa*, these types of buffer zones are aimed directly at a particular type of expression as they only apply to "one disfavored type of communication (nude performances) in one disfavored type of establishment (one that regularly features that type of entertainment)."[31] *Id.* at 643 (clarifications in original). Chapter 111 also restrains free expression and should therefore have been declared unconstitutional.

2. THE BUFFER ZONE PROVISIONS ARE UNCONSTITUTIONAL AS THEY VIOLATE THE STATE RIGHT OF ASSOCIATION.

Section 1 of the Kentucky Constitution protects the freedom of association. The corollary rights protected under the First Amendment are described in *Roberts v. United States Jaycees*, 468 U.S. 609, 618

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[31] It is important to note that the buffer zone in *Nyssa* applied in regard to ***nude*** entertainers. As stated herein on numerous occasions, neither nude nor even "topless" entertainment is permitted under the provisions of Chapter 111.

(1984), where the Court stated that it "has recognized a ***right to associate*** for the purpose of *engaging in those activities protected by the First Amendment.*" (Emphasis added). Here, of course, Plaintiffs are engaged in "First Amendment" speech-related activities. And, the Sixth Circuit has agreed that exotic dance performers and patrons desiring to view such entertainment are indeed imbued with freedom of association protections under the First Amendment. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson* County, 274 F.3d 377, 396-97 (6th Cir. 2001).

Most importantly, freedom of association rights are not analyzed under an intermediate level of scrutiny. Rather, infringements on such liberties must pass muster under strict scrutiny in order to be upheld. "Infringements on that right may be justified by regulations adopted to serve ***compelling*** state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623 (emphasis added). *Accord Deja Vu of Nashville*, 274 F.3d at 396. Consequently, the freedom of association rights under the Kentucky Constitution must be evaluated pursuant to strict scrutiny as well.

The lower courts improperly rejected Plaintiffs' freedom of association argument in regard to the buffer zone provisions by in fact relying upon *Deja Vu of Nashville.* R. Vol. VII, pp. 942-62; Apx. C, p. 16; Apx. A, pp. 46-47. What those courts failed to recognize was that the Sixth Circuit ***agreed*** that exotic dance entertainers and their patrons (even while nude - - which is certainly not the circumstance here) receive freedom of association rights under the First Amendment, and that a ***three foot*** buffer zone was narrowly tailored because "it went no further than necessary. . . ." *Id.* at 396-97. *See also Kentucky Restaurant Concepts*, 209 F.Supp.2d at 680-82 (a ***three foot*** buffer zone contained in the now-superceded Louisville Code of Ordinances went "no further" than necessary and was therefore sufficiently narrowly tailored).[32]

Consequently, given the fact that Metro has enacted a buffer zone *twice as large* as the Sixth

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[32] In addition, both of these cases were decided before the Supreme Court decision in *Alameda Books*, which significantly undercuts any contention that the government can enact such entertainment buffer zones.

Circuit and the federal district court in Louisville have held necessary to effectuate the purported governmental interests, it goes without saying that such a requirement cannot pass muster under the narrow tailoring component of either *intermediate or strict scrutiny*. The governmental concerns noted by the Sixth Circuit in *Deja Vu of Nashville* are simply irrelevant here, for those entertainers could dance ***fully nude***. Here, Chapter 111 ***specifically precludes*** such dance entertainment.

3. THE BUFFER ZONE FAILS MUSTER EVEN UNDER FREE SPEECH INTERMEDIATE SCRUTINY.

Assuming, *arguendo*, that the constitutionality of the entertainment buffer zone under Ky. Const. § 8 is to be evaluated pursuant to federal intermediate scrutiny (whatever that may be), the first thing for this Court to determine is whether Metro had the power to enact this regulation in the first place. *O'Brien*, 391 U.S. at 377. It did not.

The preambles to Chapter 111 do not articulate a specific reason for adoption of these restrictions. Accordingly, it is somewhat difficult to discern the supposed governmental interest underlying their enactment. It is safe to conclude that the supposed purpose was to reduce the chance of illegal activity occurring between dancers and customers; *i.e.*, some type of illegal or impermissible touching between the two. There is nothing inherently illegal about an entertainer, while wearing pasties and a G-string, from dancing five feet eleven inches away from a customer, or performing on a stage that is only seventeen (as opposed to eighteen) inches "from the floor." § 111.35(B).

Consequently, the ability of Metro to enact this "buffer zone" is governed by the dictates of the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 253 (2002), where the it concluded that the government may not prohibit speech "because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" Metro simply does not then have the authority to preclude a form of close but ***clothed*** dancing not consisting of some form of illegal contact. The remedies available to government are to punish violations of the law; not to abridge the rights of free speech. *Free Speech Coalition*, 535 U.S.

at 245. *See also Commonwealth v. Ashcraft*, 691 S.W.2d 229, 232 (Ky. Ct. App. 1985) (regulation is overbroad when "in an effort to control impermissible conduct, the [ordinance] also prohibits conduct which is constitutionally permissible" (clarification added)). Metro may prohibit impermissible sexual touching, but it may not criminalize ***clothed*** dancing in close proximity to viewers. While the former may be narrowly tailored, the latter is not.

But the foremost reason that this "buffer zone" is not narrowly tailored is because of its impact upon protected expression. In Subsection I(F), Plaintiffs discussed the fact that imposing a significant impact upon expressive activities is a constitutional deprivation. Part of that argument revolves around Justice Kennedy's critical concurrence in *Alameda Books*. There, he provides an example of when his "proportionality" standard has been violated. If a law has a minimal *two percent impact upon speech and expression-related activities,* it will not be found to be constitutionally wanting. 535 U.S. at 451-53. He describes the constitutionally allowable impact as being limited to that which is "trivial." *Id.* at 445.

The law in the Sixth Circuit in regard to this issue pre-*Alameda Books* is found in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 41s3 (6th Cir. 1997), where the appellate court concluded that the effect of a dancer buffer zone must be examined in order to determine whether it "intended to destroy the market for adult cabarets . . . ." The court there noted that the plaintiffs had failed to present any evidence substantiating any harm associated with the buffer zone at issue there. *Id.* In the lower courts here, however, Plaintiffs presented detailed evidence substantiating just such drastic consequences.

The Affidavit of Franson (Ex. E to Supp. Brief, Aug. 4, 2004; Apx. K) attached as Exhibit 2 thereto a diagram of the *PT's* club, and demonstrates the effect that the buffer zone would have on that establishment. The areas in green are where entertainers perform, and the red hatching are all of the areas of the club where -- if entertainers were performing in the green areas -- customers could ***not*** be located pursuant to the requirements of the six foot buffer zone. Id. at ¶'s 7-10.

A simple review by this Court of Ex. 2 to Mr. Franson's affidavit illustrates that the dissemination

of this form of ***clothed*** expression will be ***significantly*** reduced -- if not completely obliterated - - if § 111.35(B) can be enforced. Either, there is little-to-no space left in the club for customers to locate when entertainers are utilizing the stage areas, or if customers are using all of the floor space currently available to them, there is ***no*** space left ***anywhere*** in the club for entertainers to perform. Id. ¶'s 12 and 13.

A federal court has addressed these types of concerns in regard to a ten foot buffer zone in the case of *J.L. Spoons, Inc. v. City of Brunswick*, 49 F.Supp.2d 1032, 1046 (N.D. Ohio 1999), and found this type of evidence sufficient to justify an injunction against such a buffer zone.[33] The same type of evidence certainly precluded the entry of summary judgment against the Plaintiffs on this issue.

I. THE RESTRICTIONS ARE SUBJECT TO STRICT CONSTITUTIONAL SCRUTINY AND DO NOT PASS MUSTER UNDER THAT STANDARD.

For the reasons set forth above, the challenged provisions of Chapter 111 are subject to strict scrutiny. Either, they are subject to that level of review in-and-of-themselves, or because they do not satisfy the *O'Brien* standards, they must be subject to strict constitutional scrutiny. The restrictions as contained in Chapter 111, however, do not pass muster under that heightened standard because they are certainly not the "least restrictive means" available which would be necessary in order to further a compelling governmental interest. Even if "adverse secondary effects" could be used as a basis to justify such regulations, there are certainly a myriad of less restrictive means available which would not so adversely impact upon the engagement of speech and expression-related activities. Zoning laws and prohibitions against sexual conduct and contact are only a few such examples. Because Chapter 111, however, has such a drastic impact upon protected expression, it does not satisfy the requisites of strict scrutiny which

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[33] The district court in *J.L. Spoons* also observed that the two foot stage height requirement rendered the buffer zone duplicative and therefore most likely unconstitutional. *Id.* at 49 F.Supp.2d at 1045-46 (". . . if performers already must remain on a stage that is two feet high, it is especially difficult to see how the ten-foot buffer zone is narrowly tailored to the City's interest in preventing crime and disease"). Given the fact that § 111.36(B) contains a similar (albeit eighteen inch) stage height requirement, the buffer zone fails the narrow tailoring component of *O'Brien* for this additional reason.

the Kentucky Constitution requires.

II. THE LOWER COURTS ERRED IN RULING THAT THE PLAINTIFFS LACKED STANDING TO RAISE A NUMBER OF CONSTITUTIONAL CHALLENGES.

Plaintiffs challenged a number of terms contained in Chapter 111, including the critical definitions therein, as being impermissibly vague. Brief, March 5, 2004; Apx. T, pp. 41-46. Yet, the circuit court concluded that Plaintiffs lacked standing to challenge the definitions under § 111.02 as to what would constitute an "adult entertainment establishment because Plaintiffs ***admittedly*** qualify as such establishments." R. Vol. VII, pp. 942-62; Apx. C, p. 13. The Court of Appeals affirmed for the same reason. Apx. A, pp. 57-58. Respectfully, Plaintiffs never "admitted" any such thing.

In fact, Plaintiffs' complaint asserts only that "*Defendant* contends that Plaintiffs are subject to the regulatory provisions of the Ordinance. . . ." Complaint, ¶ 17; R. Vol. I, pp. 1-44. *See also* Complaint, ¶ 24 (same allegation). Paragraph 21 of the complaint further asserts that two entertainers, despite wearing clothing covering more than required in the Ordinance, received citations for violating Chapter 111 and "are now subject to criminal penalties." The paragraph also states that this action "was taken despite Metro's representations to Division 6 [the circuit court] that the regulatory provisions would ***not*** apply to entertainers dressed in such a fashion." (Emphasis and clarification added). Accordingly, Plaintiffs have not "admitted" that they "qualify" as such establishments, and because the definitions of the Ordinance are so central to the enforceability of its provisions, the appellate court's ruling should not stand until these issues are addressed and resolved.

The circuit court also concluded that Plaintiffs lacked standing to challenge the prohibition of minors as set forth in § 111.17 (Plaintiffs having raised this argument in Apx. U, pp. 18-24), stating that the rights of minors "are not before this Court. . . ." R. Vol. VII, pp. 942-62; Apx. C, p. 9. This conclusion is erroneous for two reasons. First, the prohibition that Plaintiffs challenged, the violation of which is subject to a civil fine, imprisonment, and license suspension and/or revocation (*see, e.g.*, § 111.99 and § 111.43), applies to the

"***operator***," and ***not*** the minor. *See* § 111.17(a) ("an *operator or employee* of an adult entertainment establishment shall not permit a person under eighteen (18) years of age to be employed by or to enter the establishment") (emphasis added). Consequently, Plaintiffs are not asserting the rights of minors; they are asserting *their own rights* to not be subject to prosecution under an ordinance provision that directly applies penalties to ***them.*** Second, Plaintiffs are clearly entitled to assert standing of their patrons. [34]

Because of these erroneous standing rulings, the circuit court never addressed the ***merits*** of these claims and, consequently, its decision should therefore be reversed. The Court of Appeals affirmed (Apx. A, pp. 58-61), and held that Plaintiffs set forth a different argument before the Court of Appeals than the one submitted to the circuit court. Apx. A, p. 59. Respectfully, the difference was because Plaintiffs were not arguing their standing to raise this issue before the circuit court; they were discussing the issue of preclusion of minors from the business. The circuit court raised the standing issue in its decision, and Plaintiffs therefore addressed with the Court of Appeals the minor restrictions in response to that aspect of the circuit court's decision, demonstrating why Plaintiffs had standing. Further, Plaintiffs' argument was misconstrued by the Court of Appeals. Apx. A, pp. 60-61. ***If*** the nudity provisions were found to be constitutional, ***then*** the businesses would cease to be true "adult" establishments. *See* Apx. U, p. 19. Therefore, Plaintiffs' patrons could then include minors. The Court of Appeals holding on this issue should also be reversed.

III. THE CIRCUIT COURT ERRED IN DISMISSING THE ACTION WITHOUT ADJUDICATING NO LESS THAN SIX OF THE PLAINTIFFS' PRELIMINARY INJUNCTION ARGUMENTS, AND THE COURT OF APPEALS ERRED IN AFFIRMING.

Plaintiffs raised the following arguments in their briefings which the circuit court simply failed to address in its ruling; each of which was sufficient to warrant the denial of summary judgment in favor of the

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[34] *See Connection Distributing Co. v. Reno*, 154 F.3d 281, 289 n.6 (6th Cir. 1998) (adult entertainment magazine had standing to assert rights of its advertisers and readers); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1252 (5th Cir. 1995) (adult cabaret has standing to assert the rights of entertainers who perform there); *Craig v. Boren*, 429 U.S. 190, 192-97 (1976) (seller of beer had standing to argue that statute violated customers' equal protection rights); and *Carey v. Population Serv. Int'l*, 431 U.S. 678, 682-84 (1977) (seller of contraceptives had standing to assert customers' substantive due process rights).

Defendant. The Court of Appeals erred in finding that each of these claims were either sufficiently addressed or were without merit. These include:

- The inspection provisions as contained in § 111.39 violated the doctrine of unconstitutional conditions. Plaintiffs raised this issue in their Brief filed March 5, 2004; Apx. T, pp. 48-52.[35] The circuit court failed to rule on this issue, even though it noted in its Dec. 14 Order this argument. R. Vol. VII, pp. 942-62; Apx. C, pp. 7-8. *See also* Apx. A, p. 62.

- The no direct "tipping" provision of § 111.35(C) violated the right of liberty and the right of freedom of speech. Supp. Brief, Aug. 4, 2004; Apx. U, pp. 64-69.[36] While the circuit court concluded that this ordinance provision was not vague (R. Vol. VII, pp. 942-62; Apx. C, pp. 16-17), ***Plaintiffs had made no such vagueness challenge***. *See also* Apx. A, p. 63.

- The entertainment "buffer zone" as set forth in § 111.35(B) violated the right of liberty. Supp. Brief, Aug. 4, 2004; Apx. U, pp. 73-75.[37] *See also* Apx. A, pp. 63-64.

- The licensing scheme is unconstitutional because it does not maintain the status quo pending judicial determination. Brief, March 5, 2004; Apx. T, pp. 32-34.[38] *See also* Apx. A, p. 64.

- The licensing scheme of Chapter 111 does not contain the requisite procedural guarantees

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[35] Because the circuit court never even addressed these various matters, Plaintiffs will not substantively discuss them in detail here, but rather refer this Court to the sections of the various memoranda in the record where they were extensively commented upon for the detailed arguments as to why these provisions are unconstitutional. Nevertheless, Plaintiffs will in footnote form, provide very brief references to the applicable authorities which support the unconstitutionality of these provisions. On this issue, *see, e.g., G&V Lounge*, 23 F.3d at 1077 (government cannot condition the receipt of a benefit, such as a license, upon the agreement to refrain from exercising one's constitutional rights – here the rights under Ky. Const. § 10 against warrantless searches); and *44 Liquor Mart*, 517 U.S. at 513 (1996) (same).

[36] In regard to the violation of the entertainers' liberty interest, the most relevant authorities include *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (court referring to the "broad statements" of the substantive reach of liberty under the Due Process Clause, and that liberty "presumes an autonomy of self that includes freedom of thought, belief, [and] expression. . . "); and *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (liberty includes the right "to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or avocation. . .") (clarifications added).

[37] *See* n. 36, *supra*. In addition, the Court in *Lawrence* noted that "[f]reedom extends beyond spatial bounds." 539 U.S. at 562.

[38] *See Deja Vu of Nashville*, 274 F.3d at 400 ("the status quo must be preserved pending a final judicial determination on the merits"); *T.K.'s Video, Inc. v. Denton County*, 24 F.3d 705, 708 (5th Cir. 1994) (cannot regulate an existing business during the licensing process); and *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965) (for a law which effectuates a prior restraint on expression to pass muster, it must, among other things, provide that any restraint prior to judicial review can be imposed only for a specified brief period of time during which the status quo must be maintained).

because it does not require Metro to initiate judicial review and to carry the burden of proof once in court. Brief, March 5, 2004; Apx. T, pp. 34-38.[39] *See also* Apx. A, pp. 64-65.

- Metro cannot engraft a dancer buffer zone and "no tip" provision, because Chapter 111 already prohibits both full nudity and "topless" entertainment, which has been recognized by the courts as being the "*de minimis*" restriction to satisfy the narrow tailoring component of intermediate scrutiny. Supp. Brief, Aug. 4, 2004; Apx. U, pp. 24-29[40]. *See also* Apx. A, pp. 65-66.

Because the circuit court did not adjudicate any of these critical constitutional issues (despite the Court of Appeals' holding to the contrary), because Plaintiffs' arguments on these matters are well taken, and because each and every one of these claims was sufficient to defeat the entry of summary judgment on behalf of the Defendant, the decision below should be reversed, with instructions for the circuit court to consider and resolve these various claims.

IV. THE CIRCUIT COURT ERRED IN DISMISSING - - AND THE COURT OF APPEALS ERRED IN AFFIRMING - - THE ACTION WITHOUT AFFORDING THE PLAINTIFFS THE OPPORTUNITY TO LITIGATE THEIR "AS APPLIED" CHALLENGE TO THE "SECONDARY EFFECTS" JUSTIFICATION FOR THE ENACTMENT OF THE ORDINANCE.

One of the challenges brought by Plaintiffs was that Chapter 111 was "not enacted upon a proper basis, nor supported by competent and material evidence. . . ." Complaint, Ex. D, ¶ 27(u); R. Vol. I, pp.

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[39] *See Freedman* 380 U.S. at 58-60 (the government must bear the burden of going to court to suppress speech and must bear the burden of proof once in court); and *Cathy's Tap, Inc. v. Village of Mapleton*, 65 F.Supp.2d 874, 889-91 (C.D. Ill. 1999) (licensing scheme of adult businesses must contain the *Freedman* requirement that the government initiate judicial review and bear the burden of proof once in court).

[40] *See G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d. 631, 637-38 (7th Cir. 2003) (ordinances prohibiting nude and "topless" dancing in an establishment licensed to sell alcoholic beverages, prohibiting nude and topless dancers from having any physical contact with any other person during a performance, and imposing a buffer zone, were constitutional because they did not prohibit nude dancing (unlike Chapter 111), and the entertainment was not effected because "if all dancers choose to wear *de minimis* clothing necessary to cover all 'specified anatomical parts' then neither the physical proximity nor alcohol prohibition requirement are implicated"); *Kentucky Restaurant Concepts*, 209 F.Supp.2d at 682 (same); and *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 413-16 (7th Cir. 2004) (regulation of entertainment establishments which provided ***clothed*** entertainment (such as Chapter 111 now does) was unconstitutional because, in utilizing Justice Kennedy's approach in *Alameda Books*, as a "direct restriction on erotic expression speech fares worse under the Ordinance than it did under the laws at issue in similar cases," with the court further noting that the ordinance did not apply to nude dancing or other forms of nude entertainment, and that the "uniqueness of the Ordinance is that it removes nudity from the calculus and seeks to regulate clothed individuals"). Here this Ordinance precludes nude entertainment but still then regulates clothed expression.

1-44. As the Supreme Court noted in *Renton*, the enactment of at least zoning ordinances directed at "adult" businesses could be justified by the "secondary effects" of such establishments (*i.e.*, the causing of neighborhood crime, decreases in property values, and the increasing of urban blight). 475 U.S. at 47. Chapter 111 was certainly enacted upon such purported concerns. *See* Apx. D, § 111.01. Yet, assuming, *arguendo*, that irrespective of the matters discussed in Subsections I(B) and (E) above (that this doctrine cannot be utilized under the Kentucky Constitution to justify the enactment of restrictions like those in Chapter 111), this Court nevertheless decides that "Federal" intermediate scrutiny is the appropriate standard to apply, Plaintiffs certainly have the right to ***challenge*** Metro's assertion that its Ordinance is justified upon a concern of adverse secondary effects. First, the Court observed in *Pap's II*, where it extended – in a plurality fashion – application of the secondary effects doctrine to anti-nudity laws:

> Here, Kandyland [the plaintiff there] has had ample opportunity to contest the council's findings about secondary effects -- before the council itself, throughout the state proceedings, and before this Court. Yet to this day, *Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings.*

Pap's II, 529 U.S. at 298 (emphasis and clarification added).

Second, in *Alameda Books*, the plurality opinion authored by Justice O'Connor noted that in attempting to justify restrictions on expression, a municipality can't "get away with shoddy data or reasoning," and that its "evidence must fairly support the municipality's rationale for its ordinance." 535 U.S. at 438-39. Further, the Court held that:

> If plaintiffs ***fail to cast direct doubt*** on this rationale, *either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings*, the municipality meets the standard set forth in Renton. If plaintiffs ***succeed in casting doubt*** *on a municipality's rationale in either manner*, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39 (clarification and emphasis added).

While Plaintiffs raised such a challenge as to the evidentiary justification for the enactment of Chapter 111 and the amendments thereto in their complaint, this matter was ***not*** at issue in the three

pending motions. Plaintiffs pointed that out to the circuit court. *See* Plaintiffs' Response to Motion for Summary Judgment, R. Vol. III, pp. 433-49, at pp. 1-2. Nevertheless, the court granted complete summary judgment to the Defendant and never permitted Plaintiffs to factually litigate their secondary effects challenge. ***More importantly, the circuit court actually "cleansed" the record in order to insure that this factual issue would not be ripe for consideration in the pending motions.***

When Metro filed its Composite Reply in Support of its Motions for Summary Judgment and to Dissolve, and in Opposition to the Plaintiffs' Motion for Temporary Injunction, it raised specific arguments in regard to its evidentiary "justification" for enacting Chapter 111, and submitted affidavits in support thereof. Because Metro was then raising new arguments for the first time in its reply, Plaintiffs filed a motion to strike the composite reply. R. Vol. VII, pp. 899-910; Apx. N. Pursuant to that motion, the circuit court initially granted the relief requested, which was the ability of Plaintiffs to complete certain depositions,[41] and to then file a sur-reply brief with necessary counter-affidavits. R. Vol. VI, pp. 897-98; Apx. O.

Defendant then filed a motion for clarification. R. Vol. VII, pp. 918-24. The court then entered an Order – ***issued by agreement of the parties*** – stating that the reply was to be stricken, and ordering that Metro was to file a "new Reply ***which eliminates reference to the affidavits filed in the stricken reply***. . . ." R. Vol. VII, pp. 933-34; Apx. P (emphasis added). The court also ordered, again pursuant to the agreement of the parties, that ***Plaintiffs*** would strike "Exhibit C" of their exhibits in support of their Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary [sic] Restraining Order. Id.

"Exhibit C," which was stricken, was the affidavit of Plaintiffs' secondary effects expert, Dr. Daniel

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[41] The various deposition notices and accompanying expert witness interrogatories are found as Apx. R. No discovery was, however, taken before the circuit court entered summary disposition.

Linz, with supporting evidentiary materials.[42] Apx. S. Subsequently, Judge Ryan entered an amended order (R. Vol VII, pp. 937-38; Apx. Q) which clarified what was being stricken, and required Metro to file a "new Reply which ***eliminates reference to the secondary effects affidavits filed in the stricken Reply***. . . ." (New language underlined).

The court insured that the evidentiary challenge to the secondary effects basis would not be at issue in the pending motions, yet it then granted virtually complete summary judgment to the Defendant without ever affording the Plaintiffs the opportunity to litigate that claim. Despite the Court of Appeals' interpretation (Apx. A, pp. 66-72), the fact remains that this issue was removed from full consideration.

The Court of Appeals then spent five pages of its opinion discussing this Court's decision in Jameson[43] (Apx. A, 73-78), and evaluated the few references in the lower court to potential secondary effects evidence, concluding that even though the circuit court denied Plaintiffs the ability to even attempt to cast doubt on Metro's supposed evidence, "there was no error by the trial court." Apx. A, p. 78. The Court of Appeals took it upon itself to evaluate what would ultimately be a ***factual*** dispute and found that "we conclude that the stated reasons articulated by Metro were not pretextual as a prior restraint on free expression, but rather an effort, in accord with the well-established law, to curb the secondary effects associated with adult entertainment establishments." Apx. A, p. 78. Yet, the Court of Appeals undertook

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[42] In addition, during the pendency of these motions, the Court of Appeals issued its decision in *Jameson v. Commonwealth*, 2004 WL 1752597 (Ky. Ct. App. 2004), *rev'd* 215 S.W.3d 9 (Ky. 2006), which dealt with such an evidentiary challenge. This led to Plaintiffs filing a second supplemental brief for the purpose of demonstrating that full summary judgment could not be justified (even if the court disagreed with every contention raised by the Plaintiffs in the pending motions), because Plaintiffs could submit at trial virtually the same type of evidence which the Court of Appeals in *Jameson* found to have rebutted the supposed "secondary effects" basis for enacting the ordinance there. Attached thereto was trial testimony from a federal district court action in Louisville involving some of these same Plaintiffs, and exhibits that were previously entered in that action establishing a lack of connection between a number of the "cabarets" in town and adverse secondary effects. Testimony was also attached which concerned the lack of disease transmission in these type of establishments. R. Vol. IV, pp. 588-98; Apx. V.

[43] It should also be noted that in *Jameson*, this Court did not conduct an analysis under the Kentucky Constitution.

no discussion of how such a secondary effects assertion justified enactment of the particular restrictions contained in Chapter 111, or whether the Ordinance provisions satisfied the "narrowly tailored" prong of *Alameda Books*, or satisfied Justice Kennedy's "how speech would fare" test. As discussed above, Justice Kennedy stressed that a constitutional analysis directed at these types of regulations ***must*** "address how speech will fare under the city's ordinance." *Id.* at 450.

The Plaintiffs should have been afforded the opportunity to actually place all of their secondary effects evidence before the circuit court which - - as evidenced even by the Court of Appeals' recitation of the circuit court record - - it is clear they were denied. The circuit court should have not granted full summary judgment on the case until a later date when all discovery had been taken, evidence from both parties had been submitted, and the issue fully litigated. Indeed, this Court has acknowledged that "evidence of the occurrence, or non-occurrence, of the feared secondary effects will bear on the reasonableness of the legislative belief for the need of such regulation." *Jameson*, 215 S.W.3d at 32. Obviously, this Court believes that a secondary effects challenge can be mounted and that actual evidence is necessary to resolve that challenge. Plaintiffs simply ask that they be afforded the opportunity to fully develop that evidentiary record and have it fully considered by the circuit court.

If Plaintiffs were to have successfully challenged the secondary effects justification for the enactment of Chapter 111 at trial under *Pap's II* and *Alameda Books*, the entire ordinance would be ***invalid***. *See, e.g., Alameda Books*, 535 U.S. at 439. Given the record originally submitted by the Plaintiffs below, and more importantly the lower court's subsequent cleansing thereof, it was improper to dismiss Plaintiffs' entire lawsuit without affording them the opportunity to litigate their claim that Metro did not have a sufficient evidentiary basis to enact Chapter 111. The Court of Appeals was further in error in not reversing this decision and in its analysis of the secondary effects jurisprudence as applied to this case.

V. THE CIRCUIT COURT SHOULD HAVE ENTERED A TEMPORARY INJUNCTION AND SHOULD NOT HAVE LIFTED THE RESTRAINING ORDER.

For the same reasons that a reversal of the partial grant of summary judgment is warranted, the denial of Plaintiffs' motion for temporary injunction also warrants reversal as an injunction was necessary to prevent any further irreparable harm to Plaintiffs' freedom of expression rights. The Court of Appeals erred in not reversing these decisions. Plaintiffs established the elements required for a temporary injunction pursuant to CR 65.04: (1) Plaintiff showed a probability of irreparable injury; (2) the public interest will be harmed, or the injunction will merely be to maintain the status quo; and, (3) a substantial question was presented. *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978).

Plaintiffs clearly showed a probability of irreparable injury as they were being, and would continue to be, deprived of their right to free expression under the Kentucky Constitution if an injunction was not issued. Any infringement of expressive rights, for even minimal periods of time, constitutes irreparable harm under the federal constitution, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and nothing is different under the State Constitution. *James*, 63 S.W.3d at 605 ("Restraining free speech constitutes immediate and irreparable harm, if unauthorized"). The public interest would not have been harmed by an injunction as "it is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc.*, 23 F.3d at 1079. In addition, the injunction would merely have preserved the status quo. Finally, Plaintiffs presented substantial questions on the merits of their challenges, as is demonstrated by the briefing herein.

VI. THE PRINCIPAL OWNER DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL.

The Court of Appeals erred by overturning the ruling of the circuit court that § 111.36(A), which requires a mere 20% shareholder and corporate directors to undergo the entire licensing process contained in Chapter 111 (*See* §§ 111.36, 111.02, and 111.36 (B)(2)(b)),[44] is unconstitutional. Apx. A, pp. 79-84.

Regulations compelling disclosures in order to be able to engage in constitutionally protected

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[44] These persons would therefore be required to disclose their name, mailing address, date of birth, and a copy of a government-issued photo identification card or set of fingerprints, § 111.36(B)(2), and to disclose all convictions for "specified criminal activities as defined in this Chapter . . . ." § 111.36(B)(6).

activities violate the First and Fourteenth Amendments and the rights of privacy related thereto,[45] as well as the corollary, and more expansive, protections contained in the Kentucky Constitution (Ky. Const §§ 1,2,8,14,and 26). The federal precedent on this issue stands for the proposition that persons are entitled to engage in protected conduct, especially that which is controversial, without the public disclosure of their connection to such activities. There is a fundamental right to anonymously associate for the purpose of engaging in First Amendment activities. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357 (1995); and *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 167 (2002) ("The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity"). *See also* cases set forth in n.45, *supra*. Ownership of, and association with, "First Amendment" protected businesses clearly fall within this zone of privacy.

For example, in *Ellwest*, the court dealt with disclosure requirements for partners and shareholders that were similar to the provisions here. The only significant difference is that here, § 111.36(A) calls for information disclosure of any and all owners having a 20% interest, *regardless of their involvement with the operation of the establishment*, while the similar provision in *Ellwest* compelled disclosure of shareholders holding five percent or more of the stock of a corporate applicant. *Ellwest*, 718 F.Supp. at 1564. This distinction is without constitutional significance. The District Court in *Ellwest* observed that:

> Persons who solely have ownership interests in adult-oriented establishments, such as limited partners and shareholders, have no responsibility for the day-to-day operations of the business and, therefore, are not charged with operating such establishments in accordance with the ordinance. . . . Other courts have also consistently struck down disclosure provisions relating to stockholders and persons having only a financial interest in a business on the basis that there is insufficient necessity on the part of the government to justify such intrusion into fundamental First Amendment rights.

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[45] *See, e.g., Buckley*, 424 U.S. at 64; *Talley v. California*, 362 U.S. 60, 64 (1960); *N.A.A.C.P. v. Alabama ex rel Patterson*, 357 U.S. 449, 461-62 (1958); *Genusa v. City of Peoria*, 619 F.2d 1203, 1215-17 & n.33 (7th Cir. 1980); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 226 (6th Cir. 1995); *TK's Video, Inc. v. Denton County, Tx.*, 24 F.3d 705, 709-10 (5th Cir. 1994); *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219, 224-26 (9th Cir. 1989); *T-Marc, Inc. v. Pinellas County, Fla.*, 804 F.Supp. 1500, 1505-06 (M.D. Fla. 1992); and *Ellwest*, 718 F.Supp. at1564-70.

Id. at 1565.[46]

The Court of Appeals ignored these precedents when holding that the trial court erred in finding that the challenged disclosure of 20% owners was not *de minimus*, without considering "the purpose for which the provisions was enacted," and whether "there exists a substantial relation to the stated governmental interest." (Apx. A, p. 80-81, 84).

The Court of Appeals held that the circuit court did not "make a proper evaluation under *O'Brien's* fourth prong: whether the incidental restriction on alleged free speech or expression is no greater than essential to the furtherance of that interest." Apx. A, p. 80. The circuit court made a proper analysis (Apx. C, pp. 10), holding that requiring a 20% shareholder, who would have little or no responsibility for the day to day operation of a business is greater than essential to the furtherance of Metro's interest. Apx. A, p. 80.

Further, the Court of Appeals goes to great lengths to point to cases in which similar disclosure provisions were invalidated, contending that because the various interests those municipalities sought to further differ from some of Metro's interests, Chapter 111's shareholder disclosure provisions are valid. Apx. A, pp. 80-83. Because one of Metro's purported interests sought to be furthered was to monitor the involvement of organized crime in the adult entertainment industry, the Court of Appeals felt that it was permissible to require more than the *de minimus* disclosures. Apx. A, pp. 83-84. However, one of the cited cases in that opinion supports the circuit court's invalidation of this provision: "Shareholders are not ultimately responsible for the day-to-day operation of the business and therefore would have no control over

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[46] *See also Genusa*, 619 F.2d at 1217 (the Seventh Circuit striking down disclosure requirements for individual *officers, directors, and shareholders* as an "unjustified prior restraint and an invasion of privacy"); *Pentco, Inc. v. Moody*, 474 F.Supp. 1001 (S.D. Ohio 1978) (court invalidating similar disclosure provisions for partners and shareholders holding ten percent or more of the stock of a corporate applicant, on the basis that such individuals were not involved in the day-to-day management of the business); *East Brooks Books*, 48 F.3d at 226 (the Sixth Circuit invalidating an ordinance requiring disclosure of all stockholders' names); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366-67 (11th Cir. 1999) (court striking down ***all*** stockholder disclosure requirements); and *Buckley*, 424 U.S. at 64 (Court held that "compelled disclosure, in itself, can seriously infringe on the privacy of association and belief guaranteed by the First Amendment").

the conditions at the adult establishments." Apx. A, p. 82. Further, the Court of Appeals cites to *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), noting that the court there held "that officers and directors, not shareholders, were legally responsible for the management of a corporation's business." Apx. A, p. 82. Regardless of the fact that one of Chapter 111's purported governmental interests is the involvement of "organized crime," the required disclosure of individuals who have no legal responsibility for the management of an adult establishment does not satisfy the fourth prong of *O'Brien*, and the Court of Appeals erred in reversing.

Additionally, the Court of Appeals failed to address the issue that requiring such disclosures ***to the government*** as a condition for engaging in constitutionally protected expression is impermissible. These compelled disclosures further evidence the unconstitutional nature of the criminal disability provisions in that "principal shareholders" can be denied licensing where that individual has absolutely no management, control, or operational oversight of the day-to-day management of the business. This why other courts have invalidated these type of "shareholder" disclosure requirements.

VII. THE "NO-TOUCH" PROVISION OF CHAPTER 111 IS UNCONSTITUTIONAL.

The "no touch" provision in § 111.35(D) is unconstitutional for numerous reasons, as held by the trial court. First, it must be noted that the "no touch" provision ***does not*** apply merely when the entertainer is "semi-nude," as is the case of the buffer zone and the "no payment" provisions. Basically, if a dancer "regularly" (whatever that may mean) appears "semi-nude in an adult entertainment establishment," she cannot "touch a customer or the clothing of a customer" *irrespective of how she is dressed, or whether or not she is even performing.* She cannot, for example, shake the hand of a customer even though she is fully dressed in a nightgown and sitting in a chair. Such purely innocent conduct can result *in fines, double fines, imprisonment and loss of license to engage in future expressive activities.* §§ 111.43 and 111.99.

This provision is constitutionally impermissible and the trial court agreed "with Plaintiffs that the sweep of subsection (D) is overbroad in that its reach prohibits ***otherwise legal*** and expressive touching

such as a handshake between a patron and a dancer who is fully clothed and not performing at the time." R. Vol. VII, p. 959; Apx. C, p. 17 (emphasis added). The Court of Appeals disagreed, finding that "touching between a performer and a customer is not protected expression," and reversed the circuit court on this issue. Apx. A, pp. 86-87. Of course the Court of Appeals cited to not one Kentucky court supporting this holding, and ignores both the freedom of association and liberty rights involved.

A law is overbroad if, in its reach, it prohibits constitutionally protected conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). Here, the statutory provision at issue certainly criminalizes and proscribes innocent conduct that is not otherwise illegal; *i.e.*, non-sexual touching.[47]

Before moving past this point, however, one further comment is in order. Plaintiffs are ***not*** seeking a ruling that would permit any type of illicit touching. Metro can certainly proscribe impermissible sexual touching between individuals in an adult establishment, or elsewhere. That is not, however, the approach which Metro decided to take, and instead enacted a draconian provision which prohibits any innocent physical interaction between certain individuals at any time.

Second, and in this regard, the no touch provision *is not limited to conduct occurring within an "adult entertainment establishment."* As long as an entertainer "regularly" appears semi-nude in an adult entertainment establishment, she cannot ***ever*** "touch a customer or the clothing of a customer," according to the plain terms of the Ordinance.[48] Pursuant to the canons of statutory construction, the textual difference between this provision and the buffer zone and "no payment" sections (*see* n.51, *supra*) must be considered

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[47] The proscriptions as contained in § 111.35(D) should therefore be contrasted with another "no-touch" provision evaluated by a federal district court in *J.L. Spoons, Inc. v. City of Brunswick*, 49 F.Supp.2d 1032, 1046-47 (N.D. Ohio 1999), where that court upheld a no touch provision because it had a "scienter element" that allowed "inadvertent and non-sexual contact," and that permitted contact when a dancer had on more than pasties and a g-string. *Id.* at 1046-1047. None of these limitations apply here, thereby rendering these provisions overbroad and unconstitutional as found by the circuit court.

[48] This, again, should be contrasted with the buffer zone and "no payment" provisions, which facially only apply when an entertainer is semi-nude ***and*** in an adult entertainment establishment. §§ 111.35(B) and (C).

intentional and of interpretational significance, and should not be ignored by the lower courts or this Court.

Certainly, it is clear that any law which precludes persons from shaking hands at any time and in any place is overbroad for the reasons set forth above. Nevertheless, the Court of Appeals contends that the trial court was obliged to interpret § 111.35(D) by applying a narrower construction that would thus uphold the constitutional validity of the Ordinance by causing it to apply only to dancers within an adult entertainment establishment. Apx. A, pp. 85-86. However, there are numerous reasons why such a contention is misplaced. First, such a limiting construction would not save § 111.35(D) from constitutional invalidation. In fact, the circuit court first found this provision infirm because it "prohibits otherwise legal and expressive touching such as a handshake between a patron and a dancer who is fully clothed and not performing at the time." R. Vol. VII, p. 959; Apx. C, p. 17. Consequently, because the Court of Appeals' limiting construction does not address the primary reason why the circuit court found this provision constitutionally infirm, reversal based upon the limiting construction was in error.

Second, as stated above, because this provision is specifically written in a fashion so that it is ***not*** limited to conduct occurring in an adult entertainment establishment - - as acknowledged by the Court of Appeals (Apx. A, p. 85) - - whereas other proscriptions found in the Ordinance contain specific language limiting the reach of those proscriptions to conduct occurring inside such businesses (the buffer zone and "no payment" provisions), this Court cannot ignore this intentional textual difference. To apply the Court of Appeals' limiting construction, this Court would have to directly ignore ***intentional*** textual differences which the Metropolitan council placed into the Ordinance.

Third, the Court of Appeals failed to take into account that although courts are obliged to give "if possible, an interpretation which upholds [a statute's] constitutional validity," *American Trucking Assoc. v. Commonwealth of Kentucky Transportation Cabinet*, 676 S.W.2d 785, 789 (Ky. 1984), "the courts are not at liberty to supply words or insert something or make additions which amount, as sometimes stated, to providing for a *casus omissus,* or cure an omission, however just or desirable it might be to supply an

omitted provision." *Hatchett v. City of Glasgow*, 340 S.W.2d 248, 251 (Ky. Ct. App. 1960) (emphasis in original). In providing a statutory construction, the courts may only "supply clerical or grammatical omissions in obscure phrases or language of a statute in order to give effect to the intention of the Legislature, presumed or ascertainable from the context. . . ." *Id.* The Court of Appeals either overlooked or chose to ignore these restraints upon judicial interpretation, and held that the trial court failed to re-write the Ordinance in order to avoid what the appellate court calls a "hypothetical constitutional clash." Apx. A, p. 86. The trial court, however, acted properly in refusing to act as the legislative branch of Metro Government.

Finally, this provision violates both the Freedom of Association Clause of the Kentucky Constitution, as well as the liberty rights found in the Due Process Clause as discussed in Section III above. The protection of liberty emanates from Ky. Const. §§ 1 and 11. The federal corollary to these provisions is found in the Fourteenth Amendment.[49] *See Lawrence*, 539 U.S. at 565 (Court "confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person").[50] The liberty rights afforded under the Kentucky Constitution are no less. By effectively prohibiting entertainers from even shaking the hand of a patron while fully clothed, Metro has unquestionably deprived entertainers of their right to liberty protected by Ky. Const. §§ 1 and 11, not to mention their right to freely associate.

Suffice it to say that citizens of the Commonwealth of Kentucky have the right to associate for lawful purposes (including a husband being able to simply hold his wife's hand), and the freedom of liberty "presumes an autonomy of self. . . ." *Lawrence*, 539 U.S. at 562. Even the federal Due Process Clause

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[49] *See, e.g., Allgeyer*,165 U.S. at 589 ("'liberty' mentioned in [the Fourteenth A]mendment means, not only the right of the citizen to be free from the mere physical restraint of his person . . . but the term is deemed to embrace the right of the citizen to be free . . . ***to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation***") (emphasis and clarification added).

[50] In addition, what may textually be implied in the Federal Constitution is explicit in the Constitution of the Commonwealth of Kentucky. "All men . . . have certain inalienable rights, among which . . . [is] . . . the right of enjoying and defending their lives and liberties." Ky. Const. § 1.

extends protection of the right to associate with others. *See City of Chicago v. Morales,* 527 U.S. 41, 54 n.19 (1999). Short of conduct arising to a "harmful purpose," the right of persons to touch one-another in a non-unlawful manner cannot be precluded. *Id.* at 62. The Court of Appeals, of course, ignores this aspect of the unconstitutionality of this provision, arguing that the touching at issue here is "not protected expression[51]" therefore disagreeing "with the circuit court that the no-touch provision is overbroad." Apx. A, p. 87. These comments, while wrong in-and-of-themselves, say nothing about the liberty and associational rights at issue here.

CONCLUSION

Plaintiffs respectfully request this Honorable Court to reverse the ruling of the Court of Appeals. In addition, this Court should either hold Chapter 111 to be infirm under the Kentucky Constitution, or remand for full consideration of Plaintiffs' claims.

Respectfully Submitted,

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Hon. C. Michael Hatzell
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Hon. Ronald L. Cook
Hon. E. Brian Davis
Hon. Davis S. Stevenson
Hon. Paul S. Gold
Co-counsel for Cam I, Inc. d/b/a Preston Video, et al.

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[51] Touching can be expressive, particularly here where it may occur in the context of an entertainment performance being undertaken by a particular dancer for a specific patron.

CERTIFICATE OF SERVICE

It is hereby certified that the original and nine (9) copies of this pleading were filed with the Clerk of the Kentucky Supreme Court, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Kentucky 40601 (502-564-5444), by mailing same on this the 24th day of June, 2008, and a true copy thereof was mailed on this the 24th day of June, 2008, to the following counsel of record, Office of the Attorney General, original trial judge, and Court of Appeals:

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