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

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

****

APPEAL FROM JEFFERSON CIRCUIT COURT
DIVISION SIX (6)
NOW KNOWN AS DIVISION FIVE (5)
CASE NO. 04-CI-01967

****

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT,
RESPONDENT-APPELLEE

****

REPLY BRIEF OF MOVANTS-APPELLANTS

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 September 16, 2008:
Honorable N. Scott Lilly, Honorable William P. O'Brien, Honorable Scott D. Bergthold, Honorable H. Louis Sirkin, Honorable Frank Mascagni, III, 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.

Bradley J. Shafer, *Admitted Pro Hac Vice*

STATEMENT OF POINTS AND AUTHORITIES

A. THE LICENSING SCHEME EFFECTUATES AN IMPERMISSIBLE PRIOR RESTRAINT 1

Admiral Theater v. City of Chicago, 832 F.Supp. 1995, 1205 (N.D. Ill. 1993) 2
Commonwealth v. Foley, 798 S.W.2d 947 (Ky. 1990) 2
Commonwealth v. Jameson, 215 S.W.3d 9 (Ky. 2006) 1
Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) 1
FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 2,8
Martin v. Commonwealth, 96 S.W.3d 38 (Ky. 2003) 2
McDonald v. Ethics Committee of the Kentucky Judiciary, 3 S.W.3d 740 (Ky. 1999) 1,2
Millennium Restaurants Group, Inc. v. City of Dallas, 181 F.Supp.2d 659 (N.D. Tex. 2001) 2
Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291 (6th Cir. 2008) 1
Vance v. Universal Amusement Co., 445 U.S. 308 (1980) 2

B. THE LICENSING FEES OF CHAPTER 111 ARE UNCONSTITUTIONAL 3

C. THE ANTI-NUDITY PROVISION VIOLATES THE KENTUCKY CONSTITUTION 3

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 3
City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 3
Hendricks v. Commonwealth, 865 S.W.2d 332 (Ky. 1993) 3,4,6,7

D. THE HOURS OF OPERATION/NO TIPPING PROVISIONS ARE UNCONSTITUTIONAL ... 4

729, Inc. v. Kenton County Fiscal Court, 515 F.3d 485 (6th Cir. 2008) 4
Center for Fair Public Policy v. Maricopa County, 336 F.3d 1153 (9th Cir. 2003) 4
City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002) 4,5
Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't,
60 S.W.3d 572 (Ky. Ct. App. 2001) 4,8,10
Simon & Schuster v. New York State Crime Victims Bd., 502 U.S. 105 (1991) 4

E. THE ALCOHOL PROHIBITION IS UNCONSTITUTIONAL 5

44 Liquormart v. Rhode Island, 517 U.S. 484 (1996) 6
City of Newport v. Iacobucci, 479 U.S. 92 (1986) 5
Elk Horn Coal Corp. v. Cheyenne Resources, Inc., 163 S.W.3d 408 (Ky. 2005) 5
G&V Lounge, Inc. v. Michiagn Liquor Control Comm'n, 23 F.3d 1071 (6th Cir. 1994) 6
Priestley v. Priestley, 949 S.W.2d 594 (Ky. 1997) 5

F. THE BUFFER ZONE IS UNCONSTITUTIONAL 6

Hendricks v. Commonwealth, 865 S.W.2d 332 (Ky. 1993) 3,4,6,7
Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) 6

G. METRO INCORRECTLY ASSERTS THAT THE STANDING ARGUMENT IS UNAVAILING . 7

H. THE TRIAL COURT DID NOT ADJUDICATE ALL OF PLAINTIFFS' CLAIMS 7

Freedman v. Maryland, 380 US 51 (1965) 8
FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 2,8
Lawrence v. Texas, 539 US 558 (2003) 7
Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't,
60 S.W.3d 572 (Ky. Ct. App. 2001) 4,8,10
TK's Video, Inc. v. Denton County, Texas, 24 F.3d 705 (5th Cir. 1994) 8

I. PLAINTIFFS' CHALLENGE TO THE "SECONDARY EFFECTS" JUSTIFICATION FOR THE ENACTMENT OF CHAPTER 111 WAS SIMPLY NOT BEFORE THE TRIAL COURT 9

City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 9
Holmberg v. City of Ramsey, 12 F.3d 140 (8th Cir. 1993), *cert. denied*, 513 U.S. 810 (1994) 9
Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985) 9
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 9
Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622 (1994) 9
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 9

J. THE PRINCIPAL OWNER DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL . 10

Buckley v. Valeo, 424 U.S. 1 (1975) 10
East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (6th Cir. 1995) 10

K. THE NO-TOUCH PROVISION OF CHAPTER 111 IS UNCONSTITUTIONAL 10

Hatchett v. City of Glasgow, 340 S.W.2d 248 (Ky. Ct. App. 1960) 10

A. THE LICENSING SCHEME EFFECTUATES AN IMPERMISSIBLE PRIOR RESTRAINT.

The Metropolitan Government of Louisville/Jefferson County (sometimes "Metro," or the "Defendant") argues that Plaintiffs' reliance upon *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992), is misplaced because it did not involve the "free speech provisions of either the federal or state constitutions," and because its holding is "limited to the context of sexually intimate relationships. . . ." Brief of Respondent-Appellee ("Metro Br."), at 9-10.[1]

Plaintiffs rely upon *Wasson* not for any ruling concerning "sexually intimate relationships," but for the proposition - - not directly responded to by Metro- - that because the Kentucky Bill of Rights was borrowed "almost *verbatim*" from the Pennsylvania Constitution, decisions of the Pennsylvania Supreme Court "interpreting like clauses in the Pennsylvania Constitution are ***uniquely persuasive in interpreting our own***." *Wasson*, 842 S.W.2d at 492, 498. *See* Brief of Movants-Appellants ("App. Br."), at 6-8. Here, there is directly relevant Pennsylvania case law - - again, not directly addressed by Metro - - which is, at the very least, "uniquely persuasive in interpreting" the similar provisions of the Kentucky Constitution. Metro fails to cite a decision which dealt with a circumstance where there was established Pennsylvania precedent related to the state constitutional issue at bar. That, however, is the circumstance ***in this case***, not only with regard to the prior restraint issue discussed here, but also the nudity prohibition discussed more fully below. Respectfully, this Court should not dismiss that precedent out-of-hand.

Similarly unavailing is the Metro's reliance upon *McDonald v. Ethics Committee of the Kentucky Judiciary*, 3 S.W.3d 740 (Ky. 1999). First, the question of whether the State Constitution provided any different protections than the Federal Constitution was not even addressed by this Court in *McDonald*.

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[1]As an initial matter, Metro's repeated reliance on *Commonwealth v. Jameson*, 215 S.W.3d 9 (Ky. 2006), and *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291 (6th Cir. 2008), throughout its brief is inapplicable here as neither case was decided under the Kentucky Constitution which, Plaintiffs assert, provides greater protections than its federal counterpart. Further, Metro's contention that Plaintiffs did not address the Court of Appeals' decision is belied by the simple fact that the entirety of Plaintiffs' previous brief demonstrates that the appellate court utilized incorrect standards and reached erroneous conclusions.

More to the point, there was no contention there that external precedent supported the fact that the State Constitution may well provide broader protections than the First Amendment. Second, and more importantly, the statements of this Court in *McDonald* must be placed in context with the case it relies upon; *Commonwealth v. Foley*, 798 S.W.2d 947 (Ky. 1990).[2]

Next, Metro argues that the challenged ordinance (sometimes "Ch. 111," or the "Ordinance") is not a prior restraint. Metro Br., pp. 17-18. Of course it is. The criminal disability provisions of the Ordinance, which preclude licensing of individuals with certain ***prior*** criminal convictions, prohibits such individuals from engaging in expressive activities ***in advance***. Irrespective of the issue of discretion, prior restraints upon the engagement of speech and expression-related activities should not be permitted under the Kentucky Constitution ***at all***. App. Br., pp. 6-11.

Metro's argument that the criminal disability provisions only apply to suspension and revocation is misleading, since they clearly preclude licensing ***in the first place***. Moreover, the provisions permitting -- and indeed requiring -- the suspension and/or revocation of a license to engage in ***future*** constitutionally protected expressive activities constitute an impermissible prior restraint.[3] The fact that there may be a provisional licensing mechanism during judicial review of a suspension or revocation (*see* argument at Metro Br., pp. 13-14) is of no moment since the restraint nevertheless ultimately occurs.

Metro's standing argument predicated upon the decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), is similarly unavailing. First, the question there dealt with Article III standing under the

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[2] *Foley* does not purport to hold that in all circumstances and involving all constitutional principles, the Constitution of Kentucky affords no broader protections than does the First Amendment; it did not address the question of whether, even in the particular circumstances there, the State Constitution afforded broader protections (particularly when there is Pennsylvania precedent on point); and its holding is limited to a very narrow legal issue which is not relevant here. *See Foley*, 798 S.W.2d. at 952. It should also be noted that *Foley* was overruled on other grounds in *Martin v. Commonwealth*, 96 S.W.3d 38 (Ky. 2003).

[3] *Admiral Theater v. City of Chicago*, 832 F.Supp. 1195, 1205 (N.D. Ill. 1993). *Accord, Vance v. Universal Amusement Co.*, 445 U.S. 308, 311 n.3 (1980); *Millennium Restaurants Group, Inc. v. City of Dallas*, 181 F.Supp.2d 659, 665 (N.D. Tex. 2001).

Federal Constitution, which is simply not applicable here. Second, the Court did not address - - and was not asked to address - - standing in context of the circumstances where an individual had to ***pay*** application fees which are used to defray the costs of administering impermissible criminal background checks and where the "applicants" must forego their privacy rights by providing certain personal information and submitting to a criminal background check pursuant to a constitutionally infirm licensing scheme. Certainly, all of this is required by Ch. 111, and there is clearly standing to challenge these provisions.

B. THE LICENSING FEES OF CHAPTER 111 ARE UNCONSTITUTIONAL.

If the civil disability provisions are constitutional, Plaintiffs concede that their argument involving the licensing fees is not well taken. Nevertheless, assuming the infirmity of the criminal disability provisions, Metro's arguments have no merit. First, as the federal district court in Louisville noted, the burden of establishing the permissibility of such fees is on the ***government***, not upon the Plaintiffs in this action. App. Br., p. 12. Metro has it backwards (Metro Br., pp. 15-16). Second, Metro *concedes* the statements contained in the Affidavit of Schreck, *which Metro submitted in an effort to justify the licensing fees*, which dealt with the costs that would be incurred in processing the license applications; which would be administered pursuant to the infirm disability provisions. Id. If the criminal disability provisions are impermissible, any fees associated with administering them are equally impermissible. Third, Metro's reliance upon the Affidavit of Glidewell is misplaced in that he estimated costs dealing with certain criminal prosecutions. Metro Br., p. 16. Metro has cited no case law supporting the proposition that the costs of enforcing the criminal laws can be shifted to licensing fees upon constitutionally protected activities.

C. THE ANTI-NUDITY PROVISION VIOLATES THE KENTUCKY CONSTITUTION.

Metro's reliance upon *Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993), is unavailing because it adopted the standards as contained in the three Justice plurality in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (which permitted the justification of such regulations upon societal order and morality), which has been wholly abandoned by the Supreme Court in *City of Erie v. Pap's A.M.*, 529 U.S.

277 (2000) ("*Pap's II*"). Moreover, *Hendricks* does not discuss State Constitutional issues.

D. THE HOURS OF OPERATION/NO TIPPING PROVISIONS ARE UNCONSTITUTIONAL.

Metro's authority on this point, *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't*, 60 S.W.3d 572 (Ky. Ct. App. 2001), does not contain any analysis under the State Constitution; does not analyze an hours provision under the strict scrutiny that is required under the State Constitution; does not analyze an hours-of-operation restriction with an ***evidentiary record*** that establishes -- even under federal intermediate scrutiny -- that such restrictions are unconstitutional; and only dealt with the appellate issue of whether the restrictions at issue were preempted (60 S.W.3d at 580-81).[4]

Next, Metro contends that economic impact does not state a First Amendment violation. Metro Br., p. 20-22. First, that is irrelevant to an analysis under the State Constitution, which requires the imposition of strict scrutiny. Second, this simply is not true. *See Simon & Schuster v. New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (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.") *See also* App. Br., pp. 21-22.

Metro then asserts that *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), did not change the law regarding hours of operation and no tipping regulations. Metro Br., pp. 22-24. Plaintiffs have already explained how it has in fact changed this jurisprudence, and why *Center for Fair Public Policy* should not control this issue, contrary to the trial court's holding. App. Br., pp. 19-23. In fact, the Sixth Circuit does not limit Justice Kennedy's proportionality test in the way the Ninth Circuit does. *See, 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d. 485, 491 (6th Cir. 2008) (Justice Kennedy's proportionality

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[4]The federal cases relied upon by Metro in supporting the constitutionality of these provisions are all pre- *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), with the exception of the *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003) and *Sensations*. Metro Br., p. 19-20. Plaintiffs have already set forth how *Alameda Books* changed the federal analysis of such provisions, and distinguished those other cases. *Supra*, and at App. Br., pp. 19-23.

test relevant to comprehensive licensing scheme such as the one at bar).[5]

Finally, Plaintiffs point out that the substantive evidence which they submitted concerning the impact that these provisions would have not only upon the economies of the facilities, but more importantly in the engagement in expression-related activities as well, was all ***unrefuted***. Metro does not attempt to minimize that impact in its briefing, or contend that the evidence was unreliable or insufficient.

E. THE ALCOHOL PROHIBITION IS UNCONSTITUTIONAL.

Metro's claim that this Court is barred from reviewing the constitutional issues created by § 111.30's alcohol prohibition (Metro Br., p. 25) is wrong for several reasons. First, this Court properly identified these issues as viable and worthy subjects for review (Apx. B, Order), which is well within the Court's inherent judicial powers. *See Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408 (Ky., 2005). Second, in addressing these issues, Plaintiffs confined their arguments to the factual record of the lower courts. *See Priestley v. Priestley,* 949 S.W.2d 594, 596 (Ky.1997) ("So long as an appellate court confines itself to the record, no rule of court or constitutional provision prevents it from deciding an issue not presented by the parties") (citations omitted)).

Metro further claims that § 111.30 is not a local prohibition on the sale of alcoholic beverages, but rather, a regulation of adult businesses. (Metro Br., p. 26). Such semantics ignore the plain reality of this case. Plainly, § 111.30 looks and operates as a ban on alcohol.[6] Unlike *City of Newport v. Iacobucci*, 479 U.S. 92, 96 (1986), which banned nude dancing in liquor establishments, § 111.30 bans the sale of liquor in adult establishments. Thus, pursuant to § 61 of the Kentucky Constitution, it must be approved by the

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[5] The "unreported" decision of which Metro speaks, Metro Br., p. 23, is actually the decision on remand from the Supreme Court in **Alameda Books**, and is therefore quite relevant in this analysis. In fact, final judgment has now been entered in favor of the business. Appendix A hereto. Further, the **Fantasyland** case originates from the 9th Circuit, which is the only circuit which restricts Kennedy's holding to zoning matters. See App. Br. p. 20 n. 21.

[6] Metro also misses the point when it asserts that it has adopted a regulation of "adult entertainment establishments, not liquor licenses. . . ." Metro Br., p. 26. The Ordinance provision at issue prohibits the obtaining (or more-to-the-point, renewing) of ***liquor licenses***; not of operating "adult entertainment establishments."

voters in order to be constitutional.

Finally, Metro wrongly suggests that it has a "general police power" to regulate alcohol. (Metro Br., p. 25). This police power belongs to *the Commonwealth*, not local governments. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 515 (1996) ("*the State* has ample power to prohibit the sale of alcoholic beverages in inappropriate locations") (emphasis added). Local authorities have no more power to prohibit alcohol than that specifically granted to them by the Commonwealth which, here, is limited to voter-approved prohibitions. *See* Kentucky Constitution, § 61.

Additionally, overlooked in the entirety of Metro's brief is one salient, but indisputable fact. Ch. 111 already prohibits nudity. It prohibits full nudity, and it even prohibits "topless" dance entertainment. Plaintiffs contended that these provisions were unconstitutional, but the circuit court found otherwise. Accordingly, the arguments of Metro are of no avail.[7]

F. THE BUFFER ZONE IS UNCONSTITUTIONAL.

Again, Metro's main authority on this point, *Restaurant Ventures*, and contains ***no independent analysis*** under the Kentucky Constitution, nor does it contain ***any*** discussion of the freedom of association rights (either federal or state) argued by the Plaintiffs here.[8] For this reason, Metro's dismissal of the discussion of the Oregon cases - - which involve interpretation of constitutional provisions similar to those

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[7] Metro points out the specious nature of its argument when it cites (Metro Br., pp. 43-44) to *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1073, 1079 (6th Cir. 1994), for the proposition that the city "could have adopted an ordinance prohibiting toplessness," and that the city there could have prohibited "'saloonkeepers from placing bare-breasted women dancers on public exhibition' regardless of whether liquor is served." ***But the Metropolitan Government has already done just that!*** Nevertheless, it ***further*** seeks to preclude businesses which present ***clothed*** dancing from having liquor licenses. Metro has cited no cases justifying such a prohibition.

[8] Metro's reliance on *Hendricks* to refute the Supreme Court's holding regarding association rights in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) is disingenuous. Metro. Br., p. 30. This Court's rejection of *Roberts* was solely based in the context of a challenge to a prohibition on nudity in a public place, and the opinion did not even address the state freedom of association. 865 S.W.2d at 334-36.

of Kentucky's - - is misguided.[9]

G. METRO INCORRECTLY ASSERTS THAT THE STANDING ARGUMENT IS UNAVAILING.

Metro claims that Plaintiffs admitted that they were defined "adult entertainment establishments" because some of the words in the complaint connote an "adult" nature of the entertainment provided. Metro Br., pp. 32-33. Yet, how Plaintiffs characterize their businesses is different from whether or not they fall within the ***particular and specific definitions*** contained in the Ordinance that would establish their businesses as being defined "adult entertainment establishments" and therefore subject to the Ordinance. Most importantly, Plaintiffs have described to this Court the specific allegations contained in their complaint, which made absolutely no such admission. App. Br., p. 35.[10]

H. THE TRIAL COURT DID NOT ADJUDICATE ALL OF PLAINTIFFS' CLAIMS.

Metro attempts to argue that if a provision satisfies scrutiny under a specifically enumerated liberty (here, free speech), "it will also satisfy the lower scrutiny of the alternative doctrine(s)," namely the challenges raised under the right to liberty. Metro Br., p. 34-36. But *Lawrence v. Texas*, 539 US 558 (2003) belies any such assertion (invalidating an anti-sodomy statute under the 14th Amendment irrespective of the fact that it could have invalidated the statute – and was asked to – solely on equal protection grounds). If Metro was correct, *Lawrence* would ***have to have been*** decided exclusively under an equal protection argument, since such a claim was clearly available and was indeed the basis upon which Justice O'Connor (in her concurring opinion) would have invalidated the law at issue there.

Metro's only response to Plaintiffs' contention that the trial court did not adjudicate their "unconstitutional conditions" challenge to the inspection provisions is to merely cite from the trial court's

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[9]In fact, *Hendricks* seems to support Plaintiffs' reliance on the Oregon cases, as this Court held that when"there are no reported Kentucky cases on this specific issue, this Court may consider decisions from other states which have reviewed this kind of situation." 865 S.W.2d at 334.

[10] Metro also asserts - - without pointing to any part of the record or appeal brief - - that Plaintiffs "do not dispute" that a "'claim to relief will not rest upon the legal rights of third persons." Metro Br., p. 33. This is demonstrably false, as Plaintiffs specifically discussed their right to assert standing of their patrons. App. Br., p. 36 n. 34.

order regarding Plaintiffs' ***other*** challenges to the inspection provisions. Metro Br., p. 35. This does nothing to refute - - and actually highlights - - the fact that the trial court did not adjudicate this challenge.

Next, Metro argues - - without even contending that the trial court adjudicated this specific issue - - that the status quo is maintained pending judicial determination simply due to the temporary license issued. Metro Br., pp. 36-37. But, the trial court did not even address the issue of the status quo being maintained when discussing the judicial review mechanisms. R. Vol. VII, pp. 942-62; Apx. C, pp. 4-6. Maintaining the status quo goes beyond the issue of temporary licenses, and mandates that a business does not have to comply with any portions of an ordinance until a full license is granted.[11]

Metro also doesn't even attempt to argue that the trial court adjudicated Plaintiffs' claim that the Ordinance does not require Metro to initiate judicial review and to carry the burden of proof once in court. Instead, Metro simply contends that the Supreme Court's decision in *FW/PBS*, eliminated this third prong of the *Freedman v. Maryland*, 380 U.S. 51 (1965) judicial review requirements. Metro Br., p. 37. There, however, a three Justice plurality stated that the third *Freedman* requirement would not apply when the decision maker "does not exercise discretion by passing judgment on the *content* of any protected speech." 493 U.S at 229. However, this is not the case with Ch. 111, which ***does*** require the evaluation of the content of expression. Brief, Apx. T, pp. 35-38. In any event, the opinion of a three Justice plurality is not binding precedent upon the interpretation of state constitutional rights.

Lastly, Metro attempts to argue that since the trial court cited *Restaurant Ventures* in its opinion, that somehow means that the trial court adjudicated Plaintiffs' claim regarding the prohibition of nude and "topless" entertainment being the "*de minimus*" restriction to satisfy the narrow tailoring component of intermediate scrutiny, thereby upholding the buffer zone and no tipping provisions. The only time the court

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[11] *TK's Video, Inc. v. Denton County, Tx.*, 24 F.3d 705, 708 (5th Cir. 1994) ("Maintaining the status quo means in our view that the County cannot regulate an existing business during the licensing process"). *See*, Brief, March 5, 2004; Apx. T, pp. 32-34.

approached addressing this issue was when it upheld the ban on total nudity, R. Vol. VII, pp. 942-62; Apx. C, p. 4, and ***not*** when it discussed the buffer zone and no tip challenges. Id. at pp. 15-17. Plaintiffs discussed this issue in both their initial appeal brief, p.38, and in their prior briefing to the trial court, and will not reiterate those arguments here. Supp. Brief, Aug. 4, 2004; Apx. U, pp. 24-29.

I. PLAINTIFFS' CHALLENGE TO THE "SECONDARY EFFECTS" JUSTIFICATION FOR THE ENACTMENT OF CHAPTER 111 WAS SIMPLY NOT BEFORE THE TRIAL COURT.

Metro's arguments are nothing short of disingenuous. The mere fact that there may have been substantial briefing on the issues actually ***raised*** in the motions (Metro Br., p. 55) says nothing about which issues were ***litigated*** and which were not. Indeed, Plaintiffs pointed out to the circuit court that the secondary effects issue was simply not before it as part of the then-pending motions.[12]

Finally, Metro appears to contend that the mere fact that the record contained its purported legislative record was sufficient to permit the circuit court to grant summary judgment without permitting Plaintiffs to litigate this issue. Metro Br., p. 38. When analyzing whether regulations suppress protected expression, however, courts ***must not accept at face value*** the supposed legislative motivation for enacting such laws. *See Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 645-46 (1994). This means that Metro does not satisfy its ***evidentiary*** burden merely by rattling off in legislative "preambles" a supposedly justifying purpose (*i.e.*, "secondary effects" motivation).[13] This is why, as discussed in the

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[12] "On June 9, 2004, Metro filed a Motion for Summary Judgment. In this Motion, Metro asserts that it is entitled to summary judgment on Plaintiffs' claims. ***It must be pointed out that Metro has only challenged the issues raised in Plaintiffs' Motion for Temporary Injunction***. Metro has not challenged the other basis [sic] for relief set forth in the Plaintiffs' Complaint, [such as a challenge to the underlying basis for enactment of the Ordinance (i.e. secondary effects), or that the Ordinance is not narrowly tailored.] As a result, even if the Court were to grant summary judgment on each and every issue raised by Metro, much of Plaintiffs' case would remain. As a result, Metro's Motion is properly characterized as a Motion for Partial Summary Judgment." Response to Motion for Summary Judgment, R. Vol. III, pp. 433-49, pp. 1-2 (clarifications in original, emphasis added).

[13] *See, e.g., Holmberg v. City of Ramsey*, 12 F.3d 140, 143 (8th Cir. 1993), *cert. denied*, 513 U.S. 810 (1994); *Discotheque v. City Council of Augusta*, 449 S.E.2d 608, 609 (Ga. 1994); and *Krueger v. City of Pensacola*, 759 F.2d 851, 856 (11th Cir. 1985) *See also Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986); and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978).

initial brief, the Plaintiffs are clearly permitted, even under federal precedent, to challenge the purported secondary effects justification for the enactment of Ch. 111. That was not allowed here.

J. THE PRINCIPAL OWNER DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL.

Considering the holdings cited in the initial brief, pp. 43-45, particularly *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 226 (6th Cir. 1995), and *Buckley v. Valeo*, 424 U.S. 1 (1975), Metro's argument that Ch. 111 is constitutional simply because it requires ***less*** information than other regulations is unpersuasive. In fact, here, the principal owners have to submit to fingerprinting and a criminal background check, which is hardly *de minimus*. The enjoined requirements are neither the "least restrictive means" nor "narrowly tailored" as Metro contends. Metro Br., p. 43-44.

Additionally, Metro relies upon *Kentucky Restaurant Concepts*, for the proposition that the personal information protected by the right to privacy is protected from public dissemination. Metro Br., p. 42-43. But Metro misses the point. The cases cited throughout this section which invalidate such disclosures have nothing to do with *public* dissemination. They hold the disclosure *to the government* as a condition for engaging in constitutionally protected expression is impermissible.

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

Metro fails to address the scienter element or freedom of association arguments set forth by Plaintiffs which demonstrate why Ch. 111's provision is unconstitutional. App. Br., pp. 47, n. 47, 50. Nor did Metro address *Hatchett v. City of Glasgow*, 340 S.W.2d 248, 251 (Ky. Ct. App. 1960), in its discussion regarding judicial construction of a statute, also ignoring Plaintiffs' arguments regarding the intentional textual differences between this provision and others in Ch. 111. App. Br., pp. 48-49.

Dated: September 16, 2008

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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 16th day of September, 2008, and a true copy thereof was mailed on this the 16th day of September, 2008, to the following counsel of record, Office of the Attorney General, original trial judge, and Court of Appeals:

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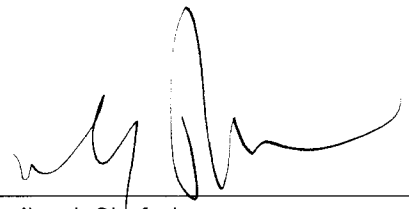

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* On behalf of all Movants-Appellants in all related Appeals; + Admitted *Pro Hac Vice*