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

****

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

****

BRIEF OF RESPONDENT-APPELLEE

Certificate of Service Required by CR 76.12(6)

The undersigned certifies that copies of this brief were served by U.S. Mail, postage prepaid, on August 29, 2008, upon: Clerk, Kentucky Court of Appeals; Hon. Judge Stephen P. Ryan; Hon. Jack Conway; Hon. Frank Mascagni, III; Hon. Paul S. Gold; Hon. Bradley Shafer; Hon. Louis Sirkin; Hon. Allan Rubin; Hon. C. Michael Hatzell; Hon. Ronald L. Cook; Hon. David S. Stephenson; Hon. E. Brian Davis; Hon. J. Michael Murray; Hon. Jeremy A. Rosenbaum; Hon. N. Scott Lilly; Hon. William P. O'Brien; Hon. Winston King; Hon. Griffin Terry Sumner; and Hon. Christopher S. Burnside.

Scott D. Bergthold

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STATEMENT CONCERNING ORAL ARGUMENT

Metro does not request oral argument. As the comprehensive decision of the Court of Appeals demonstrates, the constitutionality of Chapter 111 is clear under the governing authorities. Plaintiffs allege that oral argument—including extra time—is particularly warranted because they have brought their claims under the Kentucky Constitution, because the federal authorities (authorities their brief regularly cites) are deficient, and because of "the number and complexity of the constitutional issues that are raised in this action." Metro disagrees on all counts. This Court has held that the free speech provisions of the Kentucky Constitution are coextensive with the First Amendment to the U.S. Constitution. The federal authorities are not deficient; they simply foreclose Plaintiffs' challenges. Last, the "number and complexity" of the issues on appeal is the result of Plaintiffs' shotgun approach to the litigation, their avoidance of the on-point cases, and their failure to limit the issues raised on appeal. Oral argument is not warranted.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

While the Plaintiffs' statement of the case states the procedural sequence of the case, it ignores important facts and misstates others. Metro thus provides this statement.

When the City of Louisville and Jefferson County merged to form Metro Louisville on January 6, 2003, both the City and the County were involved in extensive litigation challenging their ordinances pertaining to adult entertainment. Appellants' Appendix ("Apx.") A, p. 2. As a result of that litigation, the Metro Council initiated a review of the law governing adult entertainment. Over the next several months, a thorough evaluation of the case law governing regulations designed to prevent secondary effects was completed, § 111.01(C), a wealth of evidence documenting the negative secondary effects of adult businesses was compiled, § 111.01(C)-(J), and, on February 26, 2004, Ordinance No. 21, Series 2004, was adopted. R. Vol. 1, pp.19-44; Apx. D.

The Ordinance, codified as Metro Code Chapter 111, is a comprehensive ordinance for adult businesses similar to those upheld by this Court in *Jameson v. Commonwealth*, 295 S.W.3d 9 (Ky. 2006) and the Court of Appeals in *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572 (Ky. App. 2001). Chapter 111, however, provides additional protections in its licensing process, allowing both preexisting businesses and new applicants to operate *from the date of application until the conclusion of judicial review of any adverse licensing decision.*

Under § 111.38(A), an applicant is given a temporary license while its application is considered. The initial licensing decision must be made within twenty (20) days, and denial can be based on one of only seven objective factors specified in § 111.38(A)(1)-(7) (*e.g.*, the applicant is a minor, has recently been convicted of certain sex or sex-business

related crimes, is located in an illegal location, etc.). Applicants are entitled to an administrative hearing for any adverse decision, § 111.43(F), and a final decision is rendered on a fixed timetable. § 111.43(F). Moreover, if Metro fails to take any required act in the time specified, such failure shall not prevent "the exercise of constitutional rights of an applicant or licensee," and the application is deemed approved. § 111.46.

Finally, even if an applicant is denied a license after a hearing, § 111.43 (G) provides a "provisional license" that allows the applicant to continue operation as a sexually oriented business (or work as a sexually oriented business employee) until entry of a judgment in any court action challenging the adverse licensing decision.

In addition to strengthening the procedural protections of Chapter 111, the Metro Council modified several substantive regulations, including:

1. § 111.18 was changed to *increase* the number of operating hours.

2. § 111.35 was changed to prohibit complete nudity per *Pap's A.M. v. City of Erie*, 529 U.S. 277 (2000) and to clarify rules governing interaction between erotic dancers and patrons.

3. § 111.30, which already prohibited adult businesses from obtaining alcohol licenses, was amended prohibit alcohol consumption on premises, clarify that alcohol sales could continue until current licenses expired, and clarify that adult businesses with liquor licenses must obey the hours regulation (§ 111.18).

4. § 111.45 added a *scienter* requirement, *i.e.*, that a violation must be committed "knowingly or recklessly." Per *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson Co.*, 274 F.3d 377 (6th Cir. 2001), § 111.45 establishes an affirmative defense if the licensee was powerless to prevent the violation.

5. § 111.46 adds that if Metro fails to timely act on an application, it "shall be deemed to have satisfied the condition(s) for which approval was sought."

Plaintiffs filed their complaint (R. Vol. I., pp. 1-44) and a Motion for Temporary Restraining Order (R. Vol. I, pp. 45-52), which was granted. R. Vol. I, p. 52; Apx. F. Metro removed the case based on the federal constitutional arguments underlying

Plaintiffs' claims, but the federal court remanded the action for lack of jurisdiction. R. Vol. I, pp. 76-89. While the case was in federal court, Metro filed a Motion to Dissolve Temporary Restraining Order/Temporary Injunction (R. Vol. I, pp. 76-89), which the trial court later clarified was a temporary restraining order. R. Vol. III, pp. 358-61; Apx. J.

On June 9, 2004, Metro filed a Motion for Summary Judgment on all issues, along with an 80-page Brief in Support of Motion for Summary Judgment and Supplemental Brief in Support of Motion to Dissolve. R. Vol. II, pp. 148-241. The next week, Metro apprised the court of *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004) (R. Vol. II, pp. 242-92), which upheld similar adult business licensing regulations.

On August 4, 2004, Plaintiffs' filed an 84-page Supplemental Brief in Support of Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary Restraining Order, along with affidavits and exhibits regarding secondary effects. R. Other, Entry 6. The same day, Plaintiffs filed a 110-page Response to Motion for Summary Judgment. R. Vol. III, p. 433 – Vol. IV, p. 556.

On August 19, 2004, Plaintiffs'—in violation of CR 76.28, as it then stood, *see* Apx. A, p. 68—filed a Motion for Leave to File Second Supplemental Brief based on the non-final decision in *Jameson v. Commonwealth*, No. 2003-CA-000967-DG (Ky. App. Aug. 6, 2004). R. Vol. V, pp. 605-11. Plaintiffs attached several additional secondary effects exhibits to their motion, which was granted August 24, 2004. R. Vol. V, pp. 611.

On September 10, 2004, Metro filed a 100-page Composite Reply addressing all of the pending motions, along with affidavits and exhibits in support. R. Vol. VI, pp. 882-84; R. Other, Entry 5. Despite having filed exhibits going to the heart of the secondary effects issue in both their supplemental brief and their motion to file a second

supplemental brief, on September 23, 2004, Plaintiffs filed a Motion to Strike Metro Government's Composite Reply on the theory that it raised, for the first time, the substantial government interest issue (secondary effects)—even though the issue occupies four pages of the subject ordinance, *see* § 111.01, had been discussed no less than 27 times in Metro's first summary judgment brief, and was the focus of the last 10 pages of Plaintiffs' Summary Judgment Response. R. Vol. III, p. 433 – Vol. IV, p. 556.

As Plaintiffs *concede*, the parties reached an agreement in open court that certain secondary effects affidavits would be redacted from briefs previously filed by Plaintiffs and Defendant. Plaintiffs agreed to redact the affidavit of Dr. Daniel Linz, filed as Exhibit C in Plaintiffs' Exhibits in Support of Supplemental Brief in Support of Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary Restraining Order. Defendant agreed to redact the affidavits of Dr. Richard McCleary, four citizen "neighbors" of adult businesses, and Ron Carroll, a private investigator, contained in Metro's exhibits to its Composite Reply. October 11, 2004 Hearing Video at 11:39:25-11:39:55. The Court entered an Order noting the agreement and ordering the filing of redacted versions of the briefs by October 18, 2004, noting that "this matter will stand submitted on October 19, 2004." R. Vol. VII, pp. 937-38, Apx. O.

On October 18, 2004, the parties filed their redacted pleadings and exhibits. Thus, the record on Metro's plenary summary judgment motion included, *inter alia*, a certified copy of Ordinance No. 21, Series 2004, including the legislative record supporting same. R. Other, Entry 5. For Plaintiffs, the record included, *inter alia*, affidavits from managers of certain Plaintiffs filed with Plaintiffs' (first) Supplemental

Brief as well as exhibits on the secondary effects issue filed with Plaintiffs' Second Supplemental Brief. R. Vol. IV, pp. 588-98, R. Other, Entry 7; Apx. T, pp. 12-136.

Two months passed with no further argument from either party as to the contents of the record or the scope of Metro's plenary Summary Judgment Motion. On December 14, 2004, the court entered a final and appealable judgment that dissolved the restraining order, granted Metro's summary judgment except as to § 111.36(B)(2)(b) (principal owner disclosure) and § 111.35(D) ("no-touch" rule), and denied Plaintiffs' Motion for Temporary Injunction except as to those two sections. R. Vol. VII, pp. 942-62; Apx. A.

Plaintiffs filed Notices of Appeal, and Metro filed a cross-appeal. On October 5, 2007, the Court of Appeals issued an detailed, 89-page decision affirming the summary judgment while reversing the trial court as to the two cross-appeal issues. Apx. A. Plaintiffs filed a motion for discretionary review, which was granted. Apx. B.

ARGUMENT

I. Chapter 111 is Constitutional in Its Entirety.

In a recent, detailed decision, this Court—following U.S. Supreme Court precedents—held that cities have an "undeniably important" interest in combating the adverse secondary effects of sexually oriented businesses. *Commonwealth v. Jameson*, 215 S.W.3d 9, 30 (Ky. 2006) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000)). Accordingly, regulations designed to serve this content-neutral interest receive only intermediate scrutiny, and are valid if they are narrowly tailored to serve the interest and allow for adequate means of expressing eroticism. *Id.* at 30-33 (applying *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *United States v. O'Brien*, 391 U.S. 367 (1968)). The "least-restrictive" regulation is not required; rather "narrow tailoring is

satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). Finally, an adult business licensing ordinance is valid if it requires a licensing decision in a brief period of time and allows for prompt judicial review of that decision. *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004).

As thoroughly demonstrated by the Court of Appeals, Chapter 111 is constitutional under these on-point authorities and their progeny. Apx. A (following, *inter alia*, *Jameson* and *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't*, 60 S.W.3d 572 (Ky. App. 2001) (upholding ordinance similar to Chapter 111)).

Plaintiffs, however, continue to ignore the on-point cases—including *Jameson*—as well as the relevant tests. To justify this, Plaintiffs claim that the Kentucky Constitution provides more expansive rights than the U.S. Constitution to nude dancing and sexually oriented businesses. In making this argument, Plaintiffs ignore: (a) this Court's explicit holding that the Kentucky Constitution's free speech protection is *not* greater than that of the First Amendment, *see, e.g., McDonald v. Ethics Commission of the State Judiciary*, 3 S.W.3d 740, 743 (Ky. 1999); (b) "Kentucky constitutional text, the Debates of the Constitutional Convention, history, tradition, and relevant precedent," *Commonwealth v. Cooper*, 899 S.W.2d 75, 77-78 (Ky. 1995)—under which the accurate view is that nude dancing is not a constitutional right at all, *Jameson*, 215 S.W.3d at 13 n.9 (noting that persons "familiar with the Debates of the 1890 Kentucky Constitutional Convention could only imagine the humorous confrontation which would have occurred had these rights been asserted at the convention"); and (c) the entirety of the Court of Appeals's detailed analysis and refutation of Plaintiffs' claim. Apx. A, pp. 5-22.

Worse, when Plaintiffs resort to federal authorities (the cases they previously urged the Court to ignore), Plaintiffs do not do justice to them. One of many examples is Plaintiffs' quotation from *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 827 (4th Cir. 1979). Brf. Aplts. at 22. Plaintiffs included the same quotation in their Court of Appeals brief, but the Court of Appeals explained that the "statement has been taken out of context." Apx. A at 56. The Court of Appeals, after quoting the entire passage in context, stated: "Consequently, *Hart* actually holds contrary to Appellants' argument." Apx. A at 57. Nevertheless, Plaintiffs repeat the error in their brief to this Court.

Finally, Metro notes that Plaintiffs circumvent this Court's page limits by using a small font and more than 50 substantive footnotes—some of which are more than 20 lines long, *see* Brf. Aplts. at 11 n.13, and some of which raise new arguments. *See* Brf. Aplts. at 8 n.7 (raising new "trial by jury" argument). To ease the burden of Plaintiffs' approach on the Court, Metro will refute the arguments in the order they are raised.

A. Standard of review.

1. Summary judgment.

The standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Lucchese v. Sparks-Malone, P.L.L.C.*, 44 S.W.3d 816, 817 (Ky. App. 2001). While the record is viewed in the light most favorable to the non-moving party, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring

trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). The constitutionality of legislation is a question of law reviewed by the Court *de novo*. *Board of Educ. v. Jayne*, 812 S.W.2d 129, 132 (Ky. 1991) ("The issue of constitutionality is a legal one, and should only be decided by a Court."). This court may affirm summary judgment for any reason supported by the record. *Harmon v. McMasters*, 57 S.W.3d 850 (Ky. 2001).

2. Principles of constitutional construction.

"It is a well-established principle of constitutional law that a statute carries a presumption of constitutionality." *Am. Trucking Ass'n. v. Commonwealth*, 676 S.W.2d 785, 789 (Ky. 1984). "The one who questions the validity of an act bears the burden to sustain such a contention." *Stephens v. State Farm Mutual Auto Ins. Co.*, 894 S.W.2d 624 (Ky. 1995). Courts are, "when considering the constitutionality of a statute, obligated to give it, if possible, an interpretation which upholds its constitutional validity." *Id.* The constitutional violation "must be clear, complete, and unmistakable in order to find the law unconstitutional." *Posey v. Commonwealth*, 185 S.W.3d 170, 175 (Ky. 2006) (internal citations and quotations omitted). Thus,

> It is the rule that all presumptions and intendments are in favor of the constitutionality of statutes and, even in cases of reasonable doubt of their constitutionality, they should be upheld and the doubt resolved in favor of the voice of the people as expressed through their legislative department of government.

Walters v. Bindner, 435 S.W.2d 464, 467 (Ky. 1968).

3. The Kentucky Constitution does not provide greater protection than the First Amendment for sexually oriented businesses.

The inescapable answer to Plaintiffs' argument for expansive rights under our Constitution is this Court's holding that "the Kentucky Constitution provides protection

no greater than but co-extensive with the First Amendment" of the U.S. Constitution. *McDonald v. Ethics Comm' n of the State Judiciary*, 3 S.W.3d 740, 743 (Ky. 1999).

First, this Court need go no further to decide the issue. As the detailed—and unrefuted—analysis of the Court of Appeals shows, this Court routinely relies on First Amendment cases in applying Article 1, Section 8 of the Kentucky Constitution. Apx. A at 17-22. Because the free speech protections of the state and federal constitutions are coterminous, the Kentucky appellate decisions that Plaintiffs eschew are controlling here. *See, e.g., Commonwealth v. Jameson*, 215 S.W.3d 9 (Ky. 2006) (upholding adult business ordinance with nudity, hours of operation, and no-touch regulations); *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't*, 60 S.W.3d 572 (Ky. App. 2001) (upholding licensing ordinance with similar regulations).

Plaintiffs would have this Court ignore Kentucky's own jurisprudence and wholly follow a Pennsylvania case, *Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002), but here—as in the lower courts—Plaintiffs "have not cited this Court to one case wherein Kentucky's courts have relied on Pennsylvania's courts for the parameters and boundaries of free expression or speech." Apx. A, p. 7. Although the Court of Appeals analyzed Kentucky and Pennsylvania cases and concluded that they reveal "different views regarding free speech and free expression," *id.* at 9, Plaintiffs do not address this analysis which disposes of their claim. Apx. A, pp. 5-22.

Plaintiffs instead return to *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992), which followed a Pennsylvania case but did not involve the free speech texts of either the federal or state constitutions. *Wasson's* holding has been limited to the context of sexually intimate relationships, and has even been rejected as grounds for expanding

general privacy protections under the Kentucky Constitution. *Colbert v. Commonwealth*, 43 S.W.3d 777, 781 (Ky. 2001); *Commonwealth v. Harrelson*, 14 S.W.3d 541, 547 (Ky. 2000). And this Court, over a dissent that relied upon *Wasson*, rejected a freedom of association challenge to the disclosure requirements for lobbyists. *Associated Industries of Kentucky v. Commonwealth*, 912 S.W.2d 947, 953 (Ky. 1995); *cf. Holbrook v. Knopf*, 847 S.W.2d 52, 55 (Ky. 1992) (holding that state constitution may produce different result "only where the dictates of our Kentucky Constitution, tradition, and other relevant precedents call for such action," and that it should not "encourage lawsuits espousing novel theories to revise well-established legal practice and principles").

The application of *Wasson* here is particularly dubious, given that two months after that decision, this Court upheld a nudity ordinance, broader than the one here, as applied to adult businesses. *Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993).

While the language of the Pennsylvania Constitution's free speech clause is similar to that of Kentucky's, equally similar are the free speech clauses of 41 other states. *American Bush v. City of South Salt Lake*, 140 P.3d 1235, 1247 (Utah 2006) ("As of the year 2000, 43 state constitutions contained the 'freedom of speech' tempered by a 'responsibility for abuse' clause."). The vast majority of these state constitutions have been held to provide no greater protection for sexually oriented businesses. *See, e.g., Eastwood Mall v. Slanco*, 626 N.E.2d 59, 61 (Ohio 1994); *Tily B., Inc v. City of Newport Beach*, 69 Cal. App. 4th 1, 22 (Cal. Ct. App. 1998); *Jott, Inc. v. Clinton Charter Twp.*, 569 N.W.2d 841, 846 (Mich. Ct. App. 1997); *City of Bangor v. Diva's, Inc.*, 830 A.2d 898, 902 (Me. 2003); *Tennessee v. Marshall*, 859 S.W.2d 289, 294 (Tenn. 1993).

Moreover, the history of the language in these state constitutional texts does not

support Plaintiffs' claim of protection for nude dancing:

> Even the freedom of speech clause of the Pennsylvania Constitution was no exception to this trend, as the once plenary right of expression became qualified by the Blackstonian addendum requiring responsibility for abuse: "The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Pa. Const. art. IX, § 7 (1790). In view of the liberal and unqualified nature of the 1776 clause, the addition of this Blackstonian limitation is no empty formulation, but represents a shift to a more limited freedom of speech right.

American Bush, 140 P.3d at 1247; *see also id.* at 1248 (noting that the "responsibility for abuse" phrase traces "back to Blackstone's *Commentaries*," which preserve the ability to restrict "'immoral' speech").

This leads to Metro's second, and alternative argument: if the Court were to go further—*i.e.* if it were to invoke the Kentucky constitutional analysis that Plaintiffs invite, but never actually conduct—it would conclude that there is *no* support in "Kentucky constitutional text, the Debates of the Constitutional Convention, history, tradition, and relevant precedent," *Commonwealth v. Cooper*, 899 S.W.2d 75, 77-78 (Ky. 1995), for the notion that nude dancing is protected by the Kentucky Constitution.

Indeed, while it is true that a state law or local ordinance may not be enforced if ruled contrary to the federal constitution, this provides no logical support for the argument that *the Kentucky Constitution must be interpreted to protect nude dancing.* Such an argument reflects not an *independent* state constitutional jurisprudence, but rather the opposite: a *dependent* jurisprudence whereby this Court must hold that the Kentucky Constitution protects whatever the U.S. Supreme Court may say that the First Amendment protects. *Cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding that computer-generated child pornography is protected speech).

As the Court of Appeals stated, "[w]e most certainly doubt that as our forefathers were debating the guiding doctrines of our Commonwealth at its inception and later in refining our Constitution, that they were considering erotic dancing, nude or otherwise, as speech." Apx. A. at 10. This Court expressed a similar sentiment in *Jameson*. *See* 215 S.W.3d at 13 n.9 (noting "the humorous confrontation which would have occurred had these rights been asserted at the [constitutional] convention"). Under the required historical analysis, this Court should conclude that "it is inconceivable that the framers of our constitution or the citizens of this state intended to protect nude dancing under the constitutional right of the freedom of speech." *American Bush*, 140 P.3d at 1254.

Plaintiffs have presented no authority to justify ignoring this court's cases, let alone any history, tradition, or relevant precedent to show that Article I, Section 8 was intended to protect nude dancing as free speech. Instead, Plaintiffs urge the Court to create, *ex nihilo*, expansive rights for sexually oriented businesses that would impair local governments' efforts to prevent secondary effects. This argument should be rejected.

B. Plaintiffs' prior restraint claim is without merit.

Plaintiffs argue that any license requirement which requires "prior approval of public officials" is a prior restraint. Brf. Aplts. at 5. On the contrary, the U.S. Supreme Court explicitly upheld an adult business licensing ordinance like the one at bar in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), which was decided during summary judgment briefing in the trial court. Plaintiffs cite *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir. 2000), but note it as being "overruled on other grounds." In fact, *Nightclubs* was overruled in *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 501 (6th Cir. 2008), precisely because it is contrary to *City of Littleton*.

After beginning with this misleading citation, Plaintiffs circle back to their state constitutional argument which, as detailed above, is untenable.

"The term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4-14 (1984)). Here, of course, no "certain communication" is forbidden; no book, film, or speech is censored. As the Supreme court has held, "the city may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression." *City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750, 760 (1988). Thus, Plaintiffs' argument that any license requirement is a prior restraint is flawed—such requirements only become constitutionally invalid if they contain unbridled discretion to grant or deny a permit, the *sine qua non* of an unconstitutional prior restraint. *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002); *Shuttlesworth v. Birmingham*, 395 U.S. 147, 150 (1969) (noting unbridled discretion "in deciding whether or not to withhold a permit").

As the trial court recognized, unbridled discretion is absent here because "the Ordinance at issue here involves neutral and nondiscretionary criteria for the issuance of a license (see § 111.38(A)(1)-(7))." R. Vol. VII, pp. 942-62; Apx. C at 5; *compare City of Littleton*, 541 U.S. at 783 (listing 8 similar criteria in Littleton ordinance).

Plaintiffs' argument also fails because under Chapter 111, the applicant is *allowed to operate uninterrupted from the day of application to the conclusion of judicial review of any adverse licensing decision. See infra* at 1-2; R. Vol. VII, pp. 942-62; Apx. C at 5.

These extraordinary safeguards eliminate any prior restraint concern. *Ky. Restaurant Concepts, Inc. v. City of Louisville*, 209 F. Supp. 2d 672, 700 (W.D. Ky. 2002).

Plaintiffs' next "prior restraint" challenge centers on what Plaintiffs call the "criminal disability provisions." Brf. Aplts. at 10. Plaintiffs include license suspensions and revocations in this group, but these sanctions—which occur only *after* a business is licensed, and after hearings are given—are subsequent punishments, not *prior restraints*. *Jakes Ltd., Inc. v. City of Coates*, 202 F.3d 884, 890 (8th Cir. 2002). In any event, Metro's provisional license, § 111.43(G), stays these sanctions until after judicial review.

The other part of Plaintiffs' "criminal disability provisions" argument challenges the lower courts' rulings that: (1) Plaintiffs lack standing to challenge the disqualification of individuals convicted of defined "specified criminal activities," and (2) the disqualification provisions are constitutional. R. Vol. VII, pp. 942-62; Apx. A at 61-62.

Plaintiffs give only a passing glance at the standing impediment, claiming in a footnote that they have standing because they have to pay licensing fees, a portion of which go to background checks, and because they "must forego their privacy rights" and submit to a such checks. There is no citation to any authority for Plaintiffs' proposition.

The U.S. Supreme Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-36 (1990), is on point. No record evidence shows that any Plaintiff has been convicted of any of the specified crimes within the relevant period. Thus, Plaintiffs can show no injury by virtue of the disability provision, and lack standing to challenge it. *Id.* at 235; *see also Associated Industries of Kentucky, Inc. v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995) (following federal standing rules); *Winn v. First Bank of Irvington*, 581 S.W.2d 21 (Ky. App. 1978) (plaintiff must have real, direct, and present interest).

Second, even if Plaintiffs had standing, their challenge fails on the merits. Plaintiffs rely on the pre-*Littleton* case *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000), and a footnote of string cites, *none* of which involves adult business licensing.

Simultaneously, Plaintiffs ignore the analysis below which is fatal to their claim:

> Courts have routinely held criminal disability provisions constitutional under the rationale that they further the government's interest in curbing secondary effects of adult entertainment businesses, while only imposing incidental burdens on First Amendment rights. *See Deja Vu of Nashville*, 274 F.3d 377; *Kentucky Restaurant Concepts, Inc. v. City of Louisville, Jefferson County, Kentucky,* 209 F. Supp. 2d 672 (W.D. Ky. 2002).

Apx. A, p. 62.

C. The revenue-neutral licensing fees are less than necessary to defray the costs of administering and enforcing the Ordinance, and are constitutional.

Plaintiffs' argument against the reduced licensing fee of $1,000 (down from $5,000 in the prior City ordinance) is that because the disability provision is infirm, the fee is infirm because a portion of it is spent on background checks to enforce that provision. As explained above, Plaintiffs' premise is unfounded. Moreover, Metro's summary judgment evidence establishes that even absent the costs of background checks, the fee is insufficient to defray the cost of policing the adult businesses. The lower courts properly rejected this challenge. Apx. A, pp. 52-55; R. Vol. VII, pp. 942-62; Apx. C at 6.

In rejecting a challenge to a $2,500 adult business fee, the Eighth Circuit distinguished *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)—upon which Plaintiffs rely—and affirmed summary judgment for the city. *Jakes, Ltd., Inc. v. City of Coates*, 284 F.3d 884, 890-91 (8th Cir. 2002). Similarly, this Court upheld a license fee in the First Amendment context in *Associated Industries of Ky. v. Commonwealth*, 912 S.W.2d 947, 951-52 (Ky. 1995), even though the opinion does not reflect any evidence to support

the fee. *Cf. Mr. B's Bar & Lounge, Inc. v. City of Louisville*, 630 S.W.2d 564, 568 (Ky. App. 1981) (affirming, as a matter of law, that adult entertainment licensing fee was constitutional, over appellants' request to offer evidence against the reasonableness of the fee). In any event, Metro's fee is valid because it is "necessary to achieve an underlying, governmental interest and such fees are used to defray the cost of policing such activity." *Associated Industries*, 912 S.W.2d at 951-52 (citing *Bright Lights, Inc. v. City of Newport*, 830 F. Supp. 378 (E.D. Ky. 1993) (upholding $5,000 adult business fee).

Metro's evidence is unrebutted. R. Vol. VII, p. 947, Apx. A, p. 6; R. Other, Entry 5 (Exhibit E to Composite Reply) (police affidavit documenting costs of approximately $48,215.44). This amount exceeds the projected revenue of $35,000 expected from the adult entertainment establishment license fees ($1,000 x 35 establishments). The license fee is therefore constitutional, independent of costs for background checks, which are substantial. R. Other, Entry 5 (Exhibit D to Composite Reply) (director of inspections affidavit estimating application processing costs at $21,769.78). Finally, just one comprehensive enforcement operation, which resulted in numerous indictments for prostitution offenses, cost more than $70,000. *See* R. Other, Entry 5 (Exhibit G to Composite Reply) (detective affidavit).

In light of this evidence, Metro's fee is plainly constitutional. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson Co.*, 274 F.3d 377, 395-96 (6th Cir. 2001) (upholding fee where enforcement costs exceed fee revenue).

D. Plaintiffs' claim for total invalidation fails because its prior restraint claim fails and because the Ordinance provisions are severable.

Plaintiffs' argument for total invalidation of Chapter 111 is completely without merit. First, the argument is allegedly predicated on alleged defects in the licensing

procedures, but there are no such infirmities. Plaintiffs have basically ignored the procedural safeguards in Chapter 111—which guarantee continuous operation from the day of application to the conclusion of judicial review—and instead rely on a talismanic incantation of "prior restraint" that does not apply here.

In any event, the Ordinance's robust severability clause (§ 111.98) provides, *inter alia*, that "should any license procedure in this ordinance be deemed invalid, the substantive regulations and restrictions contained herein shall not be affected thereby." This clearly states Metro's legislative intent, which is the controlling issue. *Martin v. Commonwealth*, 96 S.W.3d 38, 58 (Ky. 2003). Here, as in *CAM I, Inc. v. Louisville/Jefferson County Metro Gov't*, 460 F.3d 717 (6th Cir. 2006), the Ordinance's substantive regulations can function independently of the licensing provisions and carry criminal penalties independent of licensing sanctions. Thus, Plaintiffs' argument against severability—irrelevant here—is in any event wrong.

E. The nudity prohibition does not violate the Kentucky Constitution.

Plaintiffs' argument that the Ordinance's nudity prohibition, § 111.35(A), violates our Constitution runs headlong into this Court's rulings that: (a) free speech protections under the state and federal constitutions are coterminous, and (b) such nudity regulations are constitutional. *Commonwealth v. Jameson*, 215 S.W.3d 9 (Ky. 2006); *Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993); *see also* Apx. A at 33-34 (noting that regulation serves to prevent sex crimes, social disease, and neighborhood depreciation).

The argument also runs headlong into the most recent federal authority on point. In *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291 (6th Cir. 2008), the Sixth Circuit affirmed a judgment on the pleadings, prior to any discovery, that upheld a

sexually oriented business ordinance that prohibited nudity and imposed regulations like those at bar. In upholding the nudity proscription, the court followed *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1990)—the same cases cited by this Court in *Jameson* and *Hendricks*.

Under the relevant authorities, then, Plaintiffs' challenge is a non-starter because it fails to apply this Court's on-point decisions. Instead, Plaintiffs claim in a footnote that *Hendricks* is irrelevant "for three cogent reasons," adding that *Restaurant Ventures* is "similarly inapplicable," and that *Jameson* does not control. Brf. Aplts. at 17 n.19.

The first and third of the stated reasons for ignoring *Hendricks* and *Restaurant Ventures* turn on the fact that they pre-date the 2002 Pennsylvania Supreme Court *Pap's* decision. In other words, Plaintiffs' arguments turn on Plaintiffs' unavailing theory of state constitutional law, which seeks to "cast aside Kentucky and federal jurisprudence on the issue of nudity in adult entertainment businesses." Apx. A at 33.

And of course, *Jameson* was decided in 2006, undermining any arguments based on when *Hendricks* was decided. This leads us to the second argument against applying *Hendricks* and the only argument made against applying *Jameson*: the cases were decided under the First Amendment, not the Kentucky Constitution. But this argument leads, once again, back to Plaintiffs' state constitutional argument that ignores the coterminous nature of the Kentucky and U.S. free speech provisions. This means that either: (a) *Jameson* and *Hendricks* effectively decided the state constitutional question when they applied the coterminous protection of the First Amendment, or (b) Plaintiffs have wholly failed to meet their burden of proving, under the required historical-contextual analysis, that the framers of our Constitution intended *any* whatsoever for

nude dancing. *Stephens v. State Farm Mutual Auto Ins. Co.*, 894 S.W.2d 624 (Ky. 1995) (holding that challenger bears burden to prove law "clearly offends" Constitution).

Thus, this Court should affirm the unanswered decision of the Court of Appeals, Apx. A at 33-36, which properly rejected Plaintiffs' claim.

F. The hours of operation and "direct-tipping" regulations are valid.

Plaintiffs' argument as to these two provisions is another example where—although Plaintiffs purport to bring this case under Kentucky law—they completely fail to acknowledge the Kentucky authority on point which upheld similar regulations. *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572 (Ky. App. 2001). *Restaurant Ventures* upheld an hours regulation requiring adult businesses to be closed *almost double the amount of hours* as that required under § 111.18. *Compare Restaurant Ventures, supra* at 580-81 (requiring closure for 14 hours each day) to §111.18 (requiring closure for only 8 early morning hours, 1 a.m. to 9 a.m.).

Plaintiffs' instead rely on inapposite federal cases, and again *totally ignore the federal appellate authorities on point, which unanimously uphold hours of operation regulations for sexually oriented businesses. Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986); *Ben Rich Trading, Inc. v. City of Vineland*, 126 F.3d 155 (3rd Cir. 1997); *National Amusements v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *Richland Bookmart v. Nichols*, 278 F.3d 570 (6th Cir. 2002); *Mitchell v. Comm'n on*

Adult Entertainment Establishments, 10 F.3d 123 (3rd Cir. 1993); *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003).

The cases involving "direct-tipping" prohibitions are in accord. *See, e.g., Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1061-62 (9th Cir. 1986) (upholding 10-foot buffer and complete prohibition on direct tipping); *Deja Vu of Nashville, Inc. v. Metropolitan Nashville and Davidson Co.*, 274 F.3d 377, 397 (6th Cir. 2001); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997); *Jakes, Ltd., Inc. v. City of Coates*, 284 F.3d 884 (8th Cir. 2002).

The Sixth Circuit's recent decision in *Sensations, Inc. v. City of Grand Rapids* demonstrates that challenges to such well-established regulations deserve little attention:

> In addition, the Sixth Circuit has upheld every one of the other regulatory provisions contained in the Ordinance: the six-foot distance requirement between performer and audience members and the no-touching rule; the open-booth requirement; and the limitation on hours of operation. . . . *Given the overwhelming weight of precedent against their case*, we asked Plaintiffs-Appellants at oral argument which specific provisions of the Ordinance allegedly violated the First Amendment. Plaintiffs-Appellants could offer no answer except to argue that the sum of the Ordinance's parts placed such a significant burden on speech as to violate the First Amendment, even though each individual provision is constitutional. This argument is unavailing.

Id. at 299 (internal citations omitted, emphasis supplied).

Recognizing that the authorities on point are against them, Plaintiffs string together quotes from inapposite strict scrutiny cases and muster two arguments: (1) economic impact creates a First Amendment harm, and (2) the hours regulation violates Justice Kennedy's concurrence in *Alameda Books*. These arguments are foreclosed.

As to the first argument, the Supreme Court's leading decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), made it clear that "[t]he inquiry for First

Amendment purposes is not concerned with economic impact." *Id.* at 54 (internal citation omitted). The hours and direct-tipping cases follow this rule. *See Mitchell*, 10 F.3d at 132 n.10 (rejecting adult bookstore's First Amendment claim, based upon an alleged loss of a "tremendous amount of business," in challenge to statute imposing 10 p.m. closing time); *Jakes, Ltd.*, 284 F.3d at 891-92 (rejecting economic claim against direct-tipping rule); *DLS, Inc.*, 107 F.3d at 413; *Deja Vu of Nashville*, 274 F.3d at 397.

Plaintiffs cannot simply ignore these on-point authorities by citing inapposite cases for their "economic harm" argument, which is barred as a matter of law.

In any event, Plaintiffs' affidavits are unavailing. For example, the Franson affidavit describes the current location of stages and mini-stages in the establishment—a design that does not guarantee that the largest audience will be able to view the largest number of "performances," but one that is designed to maximize the business's profits from individualized encounters. However, nothing in the affidavit says that PT's could not reconfigure its premises to maintain the basic 6-feet separation between nearly nude employees and patrons. Moreover, even if an individual establishment were so small (which PT's is not) that compliance would be impossible at a specific location, the ordinance would still be constitutional. As the Sixth Circuit has explained:

> The plaintiffs assert that the buffer zone is broader than necessary because it will force them to engage in expensive renovations of the Diamonds and Lace Showbar. They also argue that customers are motivated to reward the dancers with tips when they are in close proximity to the dancers, and that therefore a distance requirement will lead directly to a decrease in revenues for the dancers. However, "the inquiry for First Amendment purposes is not concerned with economic impact. In our view, the First Amendment requires only that [Chattanooga] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city." Renton, 475 U.S. at 54 (internal citation omitted).

DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 413 (6th Cir. 1997); *see also Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663 (9th Cir. 1996) (holding that "[e]ven if the costs of compliance were so great that World Video would be forced out of business, the ordinances do not pose any intrinsic limitation" on speech and therefore "constitute valid manner restrictions."); *id.* at 667 (distinguishing *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) and rejecting "economic impact" argument).

Again, "the relevant inquiry is not whether the Ordinance will cause any economic impact on the sexually oriented businesses." *Deja Vu*, 274 F.3d at 397. Rather, "[t]he point is that any problems dancers may experience with receiving tips or speaking with customers [while complying with no-touch and buffer zone requirements] will be caused not by the Ordinance, *but by the clubs' refusal to alter their standard operating procedures in response to these constitutional regulations*." *Id.* (emphasis supplied).

Plaintiffs next claim that *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), which dealt with a unique zoning regulation not at issue here, somehow overrules the cases upholding hours of operation regulations. This claim is without merit.

The on-point decision is *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003) (upholding 1 a.m. closing time for adult businesses). The decision is particularly relevant here because Metro explicitly relied on *Maricopa County* in adopting the current version of Chapter 111. *See* § 111.02; *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (upholding reliance on prior judicial opinion and evidence detailed therein). In *Maricopa County*, the Ninth Circuit rejected Plaintiffs' argument:

> First and foremost, the argument that Justice Kennedy meant to invalidate an hours of operation restriction of the type at issue here cannot be squared with his insistence that "the central holding of *Renton* remains sound." *Id.* at 448. Limiting the negative externalities associated with

> certain land uses, as a properly crafted secondary effects ordinance is designed to do, is a "prima facie legitimate purpose," and for this reason "such laws do not automatically raise the specter of impermissible content discrimination." *Id.* at 449. Justice Kennedy quite clearly agreed with the plurality that laws "designed to decrease secondary effects . . . should be subject to intermediate rather than strict scrutiny." *Id.* at 449. He wrote separately to guard against "a subtle expansion" of *Renton*, and *not*, as Fair Public Policy would have it, to signal a fundamental shift in the *Renton* framework. Given his emphatic reaffirmance of *Renton*, we are not persuaded that Justice Kennedy meant to precipitate a sea change in this particular corner of First Amendment law. This is especially so given that the circuit courts have thus far been unanimous in upholding similar or even more severe hours of operation restrictions under *Renton*. *See DiMa Corp., 185 F.3d at 829*; *Lady J. Lingerie, Inc., 176 F.3d at 1358*; *Richland Bookmart Inc., 137 F.3d at 435*; *Nat'l Amusements Inc., 43 F.3d at 731*; *Mitchell, 10 F.3d at 123*; *Star Satellite, Inc., 779 F.2d at 1074*. We read nothing in Justice Kennedy's separate opinion signaling disapproval with these results.

336 F.3d at 1162-63.

In light of the Ninth Circuit's position on this issue, Plaintiffs' reliance on an unreported, non-final decision (*see* Apx. M) from a district court *in the Ninth Circuit*—a decision that does not even address hours of operation or direct-tipping regulations—is untenable. Ironically, the most recent case from the Ninth Circuit upholds an adult-business hours regulation against a *state* constitutional law claim. *Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996, 1002 (9th Cir. 2007) ("Thus, the County's hours-of-operation ordinance withstands intermediate scrutiny and Fantasyland's challenge under the California Constitution fails.").

Chapter 111 is content-neutral, and therefore subject to only intermediate scrutiny, because it is "*justified* without reference to the content of the regulated speech," *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986), *i.e.*, based on secondary effects, *id.* at 51-52, and because it does not prohibit any speech based on content. Thus it receives only intermediate scrutiny, *Maricopa County*, 336 F.3d at 1164-65, under which

"the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock against Racism*, 491 U.S. 781, 798-99 (1989) (internal citations omitted). The hours and direct-tipping regulations easily meet this standard and are constitutional. Apx. A at 36-38 (hours), 55-57 (direct tipping). Plaintiffs' claims were therefore properly rejected at summary judgment.

G. Preventing alcohol use in sexually oriented businesses is valid.

1. Plaintiffs' local option argument is waived because it was not raised below and, in any event, is without merit.

As an initial matter, this case presents no Twenty-first Amendment issue; thus, the federal court remanded it to state court for lack of federal jurisdiction. Apx. A at 3.

Moreover, Plaintiffs did not challenge § 111.30 based on either the Twenty-first Amendment or § 61 of the Kentucky Constitution. Plaintiffs raise these arguments for the first time here (Brf. Aplts. at 24-27), so these arguments have plainly been waived. *See, e.g., Catron v. Citizens Union Bank*, 229 S.W.3d 54, 58-59 (Ky. App. 2006).

In addition, Plaintiffs' argument from the Twenty-first Amendment and from § 61 of the Kentucky Constitution is irrelevant because it flows from Plaintiffs' fundamental mischaracterization of Metro's regulation. Section 111.30 is not a local prohibition on the sale of alcoholic beverages throughout Metro's jurisdiction, which would require voter approval under § 61 of the Kentucky Constitution. Instead, § 111.30 regulates the operation of adult entertainment businesses by preventing them from seeking a liquor license and banning the use of alcoholic beverages on their premises. Liquor control authority and local option elections have nothing to do with sexually oriented business regulations, even those relating to alcohol (§ 111.30), in a wet area like Metro Louisville.

Further, Plaintiffs' argument fails even if § 111.30 were properly viewed as an alcoholic beverage regulation. First, Plaintiffs assert that 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." (Br. Aplts at 24.) Plaintiffs are wrong because "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996). Thus, prohibiting alcoholic beverages at adult entertainment businesses pursuant to the general police power is a valid regulation.

Plaintiffs also wrongly suggest that all authority to regulate alcohol in the Commonwealth "has been delegated to local voters." (Br. Aplts at 25.) To the contrary, § 61 and related statutes authorize local option elections so citizens in a particular jurisdiction may indicate whether they are in favor of the sale of alcoholic beverages in their jurisdiction. *See, e.g.* K.R.S. § 242.050. As the U.S. Supreme Court has observed, "while Kentucky provides that the question of local prohibition is to be decided by popular election, . . . there is no statutory provision that gives the voters direct authority, once the sale of alcohol is permitted, to determine the manner of regulation." *City of Newport v. Iacobucci*, 479 U.S. 92, 96 (1986) (reversing Sixth Circuit and rejecting idea that § 61 of Kentucky Constitution would prohibit city ordinance regulating nude dancing in bars). Thus, voter approval of § 111.30 is not required by the Kentucky Constitution.

Plaintiffs' Twenty-first Amendment and § 61 arguments, being new in this Court, are waived and are thus unreviewable. In any event, those arguments are irrelevant to § 111.30. To the extent that Plaintiffs mount a relevant argument, the argument is foreclosed by Metro's police power to prohibit alcohol in sexually oriented businesses to

prevent well-established secondary effects. In the final analysis, Plaintiffs argument collapses into their preemption argument, which fails for the reasons set forth below.

2. Preemption does not apply.

As with other issues on appeal, Plaintiffs fail to refute the Court of Appeals's analysis that rejects their arguments. Apx. At 38-41.

On appeal, Plaintiffs continue to ignore the crux of why Metro's proscription of alcohol in sexually oriented businesses is not preempted—Chapter 111 regulates adult entertainment establishments by virtue of their trade in sexually oriented entertainment, not by virtue of their trade in liquor. R. Vol. VII, pp. 953; Apx. A at 12.

Plaintiffs nevertheless cite inapposite cases dealing with local liquor ordinances, *see City of Ashland v. Kentucky Alcoholic Beverage Control Bd.*, 982 S.W.2d 210 (Ky. App. 1998) and *Kentucky Licensed Beverage Ass'n v. Louisville-Jefferson Metro Gov't*, 127 S.W.3d 647 (Ky. 2004), to the exclusion of appellate cases that directly address local adult business regulations and reject liquor preemption arguments against such local ordinances. *Mr. B's Bar and Lounge, Inc. v. City of Louisville*, 630 S.W.2d 564, 566 (Ky. App. 1981) ("The ordinance seeks to regulate the businesses of the appellants not because they sell alcoholic beverages, but rather because of the sexually-oriented nature of the entertainment provided."); *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't*, 60 S.W.2d 572, 581 (Ky. App. 2001) ("The ordinance regulates the operating hours not because they sell alcoholic beverages, but because of the sexually oriented nature of the entertainment provided."). Here, Metro has adopted an ordinance regulating adult entertainment establishments, not liquor licensees, as a class, and the relevant authorities demonstrate that the Ordinance is not preempted.

Here, there is no express preemption, for which this Court requires "clear and unmistakable language" that "expressly preempt[s] entire fields of local regulation and ordinances." *Lexington Fayette County Food & Beverage Ass'n*, 131 S.W.3d 745, 752 (Ky. 2004). There is no "clear and unmistakable language" in the KRS which demonstrates an intent to expressly preempt the entire field of local adult business regulation; the opposite its true. KRS 67.083(3)(z) (authorizing county "regulation of establishments or commercial enterprises offering adult entertainment and adult entertainment activities"). Nor is there implied preemption, which requires an "implied expression of prohibition which arises to the level of a conflict between the ordinance and state law." 131 S.W.2d at 752. The KRS lack a comprehensive scheme of legislation on the subject of adult entertainment, leaving this to local governments. KRS 67.083(3)(z).

3. Section 111.30 is not an "unconstitutional condition."

Plaintiffs rely for their argument on *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994), but the argument does not survive the analysis of this case below. Apx. A at 38-39.

In *G & V Lounge*, the court noted that the city could have accomplished through legislation what it could not accomplish by a contract directly conditioned on a licensee's abstention from conduct not otherwise prohibited by statute or ordinance. *Id.* at 1073 (noting that the city could have adopted an ordinance prohibiting toplessness); *id.* at 1079 (Nelson, J., concurring) (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and explaining that there is no reason why the city could not, "pursuant to properly drafted laws or ordinances, prohibit saloonkeepers from placing bare-breasted women dancers on public exhibition" regardless of whether liquor is served). Thus, *G & V Lounge* does not

apply to the legislation at issue here. *Barden Detroit Casino L.L.C. v. City of Detroit*, 59 F. Supp. 2d 641, 665 (E.D. Mich. 1999) (noting that *G & V*'s holding applies only when benefit is "directly conditioned" on an agreement or covenant to forego expression); *see also Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003) (upholding prohibition on sale, use, or consumption of alcohol in adult businesses); *Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306 (11th Cir. 2000) (same).

In light of the relevant authorities, summary judgment was proper.

H. Plaintiffs' challenges to the six-foot "buffer zone" fail.

As is the case with hours of operation regulations, *every* federal appellate decision adjudicating stripper-patron buffer zones has upheld them as constitutional. *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291 (6th Cir. 2008) (upholding 6-ft. rule); *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006); *Jakes Ltd., Inc. v. City of Coates*, 284 F.3d 884 (8th Cir. 2002) (same); *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403 (6th Cir. 1997) (same); *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998) (upholding 10-foot buffer zone). The *Restaurant Ventures* decision is in accord:

> The government contends that the no touch requirement, buffer zone, and stage area and height requirements are all substantially related to the ability to control crime and disease. In *DLS, supra,* the court applied the O'Brien analysis and upheld provisions similar to those in the present ordinance. By placing a reasonable distance between the patrons and the performers, there is a decreased opportunity to solicit sex, contract social disease, and renders enforcement of the no touch rule easier. All are legitimate government interests furthered by the ordinance.

60 S.W.3d at 580 (citing *DLS, Inc.*, 107 F.3d at 411-12).

Consistent with their policy of avoiding controlling authorities, Plaintiffs argue that: (1) an Oregon decision compels heightened scrutiny under the Kentucky Constitution and, accordingly, invalidation of the regulation, *but see discussion supra* at

8-12, (2) in a similar vein, the regulation violates the Kentucky Constitution's protection of freedom of association, *but see Associated Industries of Kentucky, Inc. v. Commonwealth*, Ky., 912 S.W.2d 947, 953 (1995) (rejecting expansive right of association under Kentucky Constitution), and (3) the regulation's economic impact causes it to fail intermediate scrutiny, *but see discussion supra* 20-22 (addressing similar challenge to hours of operation and direct-tipping regulations).

The Court of Appeals refuted these arguments with 12 pages of detailed analysis. Apx. A at 41-52. Plaintiffs ignore this analysis, to the demise of their arguments. Because it is unrefuted, Metro will not repeat this analysis in detail, but will summarize why Plaintiffs' novel theories fail.

1. The six-foot buffer does not violate the Kentucky Constitution.

Because our Constitution's free speech provisions are at best coextensive with the First Amendment, Plaintiffs' avoidance of the foregoing authorities fails as a matter of law. Plaintiffs' citation to Oregon jurisprudence also fails because it represents bad public policy that would eviscerate municipal efforts to address secondary effects.

Plaintiffs cite *Oregon v. Ciancanelli*, 121 P.3d 613 (Or. 2005) and *City of Nyssa v. Dufloth*, 121 P.3d 639 (Or. 2205), which reveal Oregon's radical approach that deems all adult business zoning rules invalid, *City of Portland v. Tidyman*, 759 P.2d 242 (Or. 1988), and obscenity constitutionally protected. *State v. Henry*, 732 P.2d 9 (Or. 1987).

In *Ciancanelli*, the Oregon Supreme Court extended its precedents to invalidate a statute prohibiting "live sex shows" and to reverse the convictions of an adult business operator who featured young women who masturbated with dildos and engaged in oral sex before an audience. 121 P.3d at 616; *but see id.* at 637 (De Muniz, J., dissenting)

(observing that "the idea that the Victorian-era drafters and ratifiers of the Oregon Constitution sought to bring public masturbation and sexual intercourse within the purview of constitutional free-speech protection is difficult to comprehend."). The *City of Nyssa* case relied on *Ciancanelli* to strike down a four-foot stripper-patron buffer zone, thus facilitating "live sex shows" now permitted by *Ciancanelli*.

"Appellants cannot cite this Court to one Kentucky case showing even a remotely similar stance on the issue." Apx. At 41. Plaintiffs' position is contrary to the great weight of authority *and* to local governments' interest in controlling secondary effects.

2. The buffer zone does not violate the right of association.

Plaintiffs next argue that the buffer zone violates the Kentucky right of freedom of association, but the claim runs headlong into *Restaurant Ventures*, 60 S.W.3d at 581, and this Court's ruling in *Associated Industries*, 912 S.W.2d at 953, which rejected the idea that Kentucky's freedom of association is greater than its federal counterpart.

The proposition also contravenes *Deja Vu of Nashville, Inc. v. Metropolitan Nashville and Davidson Co.*, 274 F.3d 377 (6th Cir. 1997), which Plaintiffs cite for their freedom of association argument, but then fail to advise the Court of one minor detail—*Deja Vu* explicitly *rejected* the freedom of association argument. *Id.* at 396-97.

Plaintiffs also cite *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), but fail to answer the Court of Appeals's analysis of *Roberts*, Apx. A, pp. 43-47, or the fact that this Court in *Hendricks* cited *Roberts* in *rejecting* a "private club" argument advanced by an adult cabaret. *Hendricks v. Commonwealth*, 865 S.W.2d 332, 335-36 (Ky. 1993).

Similarly unavailing is Plaintiffs' argument that a six-foot rule is unconstitutional because only a three-foot rule was upheld in *Deja Vu of Nashville*. 274 F.3d at 396-97.

Plaintiffs conveniently ignore the fact that *Deja Vu* relied directly on *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410-11 (6th Cir. 1997), upheld a *six*-foot buffer. *Compare Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998) (upholding 10-foot rule).

Finally, the Court need not be detained by Plaintiffs' passing argument that the governmental concerns in prohibiting dancer-patron contact evaporate when total nudity is prohibited. Brf. Aplts. at 36. The laws at issue in *Sensations* and *DLS* also included nudity bans. *Sensations*, 526 F.3d at 299-300 (upholding nudity ban and 6-ft. buffer and rejecting freedom of association claim); *DLS, Inc.*, 107 F.3d at 406 (noting ordinance's ban on "exposure of certain defined parts of the body" and upholding 6-ft. buffer). Moreover, "[t]here is no reason to believe that minimal clothing obviates the need for these measures when the atmosphere is equally charged—money exchanges and touching are no more difficult if the dancer is wearing minimal clothing than if she is partially or fully nude." *Gammoh v. City of La Habra*, 395 F.3d 1114, 1127 (9th Cir. 2004).

3. Plaintiffs' "intermediate scrutiny" argument is foreclosed.

At page 32 of their briefs, Plaintiffs finally appear to applying intermediate scrutiny, but the discussion again quickly reverts to inapposite strict scrutiny case law, *id.* (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)), so-called "heightened proportionality" analysis from *Alameda Books*, *id.* at 33 (rejected in *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003)), and irrelevant economic impact arguments. *Id.* Indeed, the similarity between Plaintiffs' arguments on the six-foot rule and Plaintiffs' combined argument on the hours of operation and "no direct-tipping" rules raises a natural suspicion as to why the arguments are separated by

approximately 10 pages of text. In any event, Metro's analysis from section F, *supra* at 19-24, applies here, as does the reasoning of the Court of Appeals at Apx. A, pp. 47-52.

Here, as in *Restaurant Ventures*, "the buffer zone requires only that patrons sit essentially a body length from the performers. And, the stage height requirement of eighteen inches is not overly burdensome and requires only construction of a simple stage." 60 S.W.3d at 580. Plaintiffs' claim is therefore without merit.

I. Strict scrutiny does not apply.

Plaintiffs' one-paragraph argument on this point is contrary to governing law from the U.S. Supreme Court, *see City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (applying intermediate scrutiny), and this Court. *Jameson*, 215 S.W.3d at 29 (noting that laws aimed at secondary effects are content-neutral and receive intermediate scrutiny). Plaintiffs' pleas for heightened scrutiny and "least restrictive means" analysis under the state constitution have previously been refuted. The analysis need not be repeated here.

II. Plaintiffs' standing arguments are unavailing.

Plaintiffs' three standing arguments fail for the reasons stated by the Court of Appeals at Apx. A, pp. 57-62.

First, Plaintiffs argue that they never admitted to being adult entertainment establishments in their Complaint, and that they therefore escape the rule established in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 58-59 (1976) (holding that plaintiff adult businesses lacked standing to raise vagueness challenges concerning applicability of ordinances where ordinances clearly applied to them).

Plaintiffs' own Complaint characterizes their establishments as adults-only "cabaret-style" nightclubs featuring "semi-nude and nude" dancing or bookstores

presenting "non-obscene but sexually explicit materials." R. Vol. I, pp. 3-4. This kind of characterization is replete in Plaintiffs' pleadings, from their Complaint to their brief on appeal. *See* Brf. Aplts. at 1. Moreover, Plaintiffs are not identified as doing *anything* other than providing adult entertainment; it is beyond cavil that Plaintiffs' are adult entertainment establishments. Plaintiffs cite irrelevant portions of their Complaint, but ignore the portions cited by Metro and the Court of Appeals. This approach fails.

For similar reasons, this Court should affirm the lower court's holding that Plaintiffs' lack standing to challenge the prohibition against minors on the premises. § 111.17. Plaintiffs do not dispute that standing is an indispensable element of its constitutional challenge, *Associated Industries of Kentucky v. Commonwealth*, Ky., 912 S.W.2d 947, 950-51 (1995), nor that "[o]rdinarily, a litigant may only assert his own constitutional rights or immunities . . . and [that] the claim to relief will not rest upon the legal rights of third persons." *Id.* (brackets inserted, internal citations omitted).

Thus, Plaintiffs' argument—that they "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*"—is new on appeal, and therefore is waived. Apx. A at 59-60. In any event, the argument cannot stand. Plaintiffs have evinced no desire or intent to allow minors on the premises of their establishments; on the contrary, Plaintiffs expressly limit access to their establishments to the consenting "adult public." The Ordinance does not impose strict liability, *see* § 111.45, and since Plaintiffs disavow any intent to allow minors on the premises their establishments, they are not at risk of prosecution under § 111.17. In short, they have no "real, direct, present and substantial right" sufficient to challenge the prohibition on allowing minors on the

premises of sexually oriented businesses. *Housing Authority of Louisville v. Service Employees*, 885 S.W.2d 692, 695 (Ky. 1994); *see FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-236 (1990) (plurality opinion) (discussing, at length, adult businesses' lack of standing to challenge certain regulations).

Finally, Plaintiffs' argument that if the nudity provisions are upheld, Plaintiffs' businesses would cease to be "adult" establishments is absurd. There is no support for the notion that adult bookstores or strip clubs are no longer adult entertainment businesses is employees wear pasties and G-strings. As to Plaintiffs' claim that "Plaintiffs' patrons could then include minors," this argument: (a) shows the extreme results that adopting Plaintiffs' views could engender, and (b) does not solve the standing problem in Plaintiffs' complaint, where they (wisely) limit their patronage to adults only.

III. The trial court sufficiently adjudicated all of Plaintiffs' claims.

As the Court of Appeals explained, the trial court's order addressed every challenged provision of Chapter 111 under the relevant authorities from the appellate courts in Kentucky and the federal system. Apx. A at 62-66.

Plaintiffs avoided these authorities in the lower courts, and instead pieced together inapposite legal theories. However, because First Amendment scrutiny is greater than scrutiny under the alternative doctrines, provisions that satisfy the First Amendment also satisfy the alternative doctrine(s). *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 55 n.4 (1986) (noting that plaintiffs "can fare no better" under lower scrutiny of the Equal Protection Clause). Thus, Plaintiffs' contentions fail because: (a) the trial court addressed the issues, Apx. A at 62-66, (2) because summary judgment can be affirmed for any reason supported by the record, *Harmon v. McMasters*, 57 S.W.3d 850 (Ky. 2001), and

(3) because trial court's conclusions that the regulations satisfy free speech scrutiny necessarily dispose of Plaintiffs' claims under the secondary doctrines.

First, Plaintiffs argue that "[t]he inspection provisions as contained in § 111.39 violated the doctrine of unconstitutional conditions." Brf. Aplts. at 37. As noted previously, however, the "unconstitutional conditions" doctrine does not apply to legislative enactments like the constitutional inspection provision at bar.

In rejecting Plaintiffs' challenge to the inspection provision, the trial court noted that § 111.39 applies only to "the public areas of any adult entertainment establishment during business hours" and therefore did not violate a reasonable expectation of privacy, the *sine qua non* of a Fourth Amendment claim. R. Vol. VII, pp. 948-49; Apx. C, pp. 7-8 (following *Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993) and *Maryland v. Macon*, 472 U.S. 463 (1985)); *see also Andy's Restaurant & Lounge, Inc. v. City of Gary*, 466 F.3d 550, 557 (7th Cir. 2006) (upholding virtually identical provision).

The Court went on to hold that, "even assuming a reasonable expectation of privacy," the inspections are valid under the 'closely regulated industry' exception to the warrant requirement" because they are "clearly limited in time, place, and scope. They can only be conducted in public areas, during business hours, and for the purpose of ensuring compliance with the Ordinance." R. Vol. VII, p. 949; Apx. C, p. 8 (following *Kentucky Restaurant Concepts*, 209 F. Supp. 2d at 691). This analysis shows that the regulation is constitutional and that Plaintiffs' "unconstitutional conditions" claim fails.

Second, Plaintiffs argue that "[t]he no direct 'tipping' provision of § 111.35(C) violated the right of liberty and the right of freedom of speech." Brf. Aplts. at 42. The trial court resolved these issues when it held that the no-tipping rule has "been found to

meet the *O'Brien* test when challenged under the First Amendment, despite their adverse economic impact on such businesses as a whole. See *Restaurant Ventures, LLC*, 60 S.W.3d at 580; *Deja Vu of Nashville, Inc.*, 274 F.3d at 396-97." Later, the court explained that the regulation allows a customer "to place a tip in a jar on the edge of the stage, which the semi-nude dancer could then retrieve from the jar" and that this "is a permissible way for the semi-nude dancers to receive compensation" for performances. *See also Nightlife Partners, Ltd. v. City of Beverly Hills*, 304 F. Supp. 2d 1208, 1230-31 (C.D. Cal. 2004) (holding that "plaintiffs' substantive due process claims are encompassed by the First Amendment. The Court has properly analyzed and ruled upon the plaintiffs' claims regarding the six-foot separation requirement and the restricted tipping provisions under the First Amendment," and granting summary judgment).

Third, Plaintiffs claim that the "entertainment 'buffer zone' as set forth in § 111.35(B) violated the right of liberty." Plaintiffs' "right of liberty"—a pseudonym for substantive due process—fails under the trial court's conclusion that the buffer serves to prevent secondary effects. R. Vol. VII, pp. 957-58; Apx. C, pp. 15-16. "This is sufficient to address Appellants' claim of a violation of the right of liberty. Individual rights may be restricted pursuant to police power." Apx. A at 64; *see also Nightlife Partners*, 304 F. Supp. 2d at 1230.

Fourth, Plaintiffs argue that the "licensing scheme of Chapter 111 is unconstitutional because it does not maintain the status quo pending judicial determination." Brf. Aplts. at 37. However, as the trial court correctly noted, Chapter 111 provides a temporary license on the day of application that stays in effect during administrative proceedings and, if any adverse licensing decision is challenged in court,

Chapter 111 provides "a provisional license to continue operating during the appeal process. See § 111.43." Plaintiffs' argument is meritless. *Deja Vu of Cincinnati, L.L.C. v. Union Township*, 411 F.3d 777, 788-89 (6th Cir. 2005) (en banc) (noting that temporary permits are one way of constitutionally maintaining the status quo).

Fifth, Plaintiffs allege an infirmity in that Chapter 111 "does not require Metro to initiate judicial review and to carry the burden of proof once in court." Brf. Aplts. at 37-38. Since neither the First Amendment nor the coextensive provisions of the Kentucky Constitution requires Metro to do these things, Plaintiffs' argument rings hollow. The trial court properly cited to *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), which upheld an adult business licensing ordinance similar to Chapter 111, *i.e.*, that does not require the government to initiate judicial review or carry the burden once in court. *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (abrogating this requirement in adult business licensing context).

Last, Plaintiffs assert that Metro "cannot engraft a dancer buffer zone and 'no tip' provision" because Chapter 111 also prohibits nudity. Brf. Aplts. at 38. The trial court's repeated citation to *Restaurant Ventures*—which upheld a nudity prohibition as well as a "no touch requirement, buffer zone, and stage area and height requirements," 60 S.W.3d at 580—puts this claim to rest. R. Vol. VII, pp. 946, 956-57; Apx. C, pp. 5, 15-16. *See also Sensations*, 526 F.3d at 299 (upholding similar set of comprehensive regulations).

The trial court properly adjudicated Plaintiffs' challenges, found them to be lacking, and entered summary judgment. This Court should affirm.

IV. Plaintiffs had ample opportunities to litigate the secondary effects issue, and the trial court committed no error in granting the plenary summary judgment that Metro sought.

After a thorough review of the record, the Court of Appeals observed:

> From any vantage point, the record bears out that the issue of secondary effects was fully before the circuit court. Moreover, the circuit court went out of its way to give Appellants the opportunity to rebut Metro's claims of secondary effects. Appellants cannot now be heard to complaint because it entered into an agreement with Metro to strike their respective "expert" affidavits on secondary effects from the record.

Apx. A at 72; *id.* at 66-78 (analyzing Plaintiffs' arguments in detail).

Plaintiffs do not identify a single misstatement in the appellate court's analysis. Nor do they dispute that they filed hundreds of pages of argument and exhibits over many months, or that they *willingly* entered into the agreement regarding experts. Nor do they dispute that Metro's legislative record supporting its ordinance is properly in the record. In short, they show no error at all in the circuit court's grant of Metro's plenary motion for summary judgment.

As Metro's Counterstatement of the Case details, *supra* pp. 1-5, and as the Court of Appeals found, "the issue of secondary effects permeates the parties' briefing." Apx. A at 73. This includes Metro's plenary Motion for Summary Judgment and Brief in Support, R. Vol. II, pp. 148-241 (Metro's Motion for Summary Judgment and Brief in Support) (*see e.g.*, Brief at 3 (discussing "detailed legislative findings, and extensive secondary effects evidence," upon which Metro relied); Brief at 4 (noting that "a wealth of evidence was compiled documenting the negative secondary effects of adult businesses"); Brief at 6 ("Metro now seeks summary judgment on the plaintiffs' complaint."); Brief at 48 (noting that "Metro was fully aware of the illicit and unsanitary conduct known to take place in and on the premises of sexually oriented businesses" and that is legislative findings cited *DLS* regarding performances "where a dancer invited customers to spoon-feed themselves whipped cream off her vaginal area," and a peep

show case where a regulation like Metro's was "justified by public health concerns. The ordinance is aimed at eliminating carnal sexual activity in closed peep show booths in adult bookstores"); Brief at 77 (noting that Judge Heyburn in *Kentucky Restaurant Concepts* "concluded that the studies cited in the preamble to the Louisville ordinance—some of the same studies as those cited in § 111.01(C)—were sufficient under *O'Brien* to establish the city's substantial government interest in regulating sexually oriented businesses."); Brief at 70-80 (discussing secondary effects repeatedly)).

Thus, the entire premise of Plaintiffs' argument that the secondary effects issue was not at issue in the three pending motions—*i.e.* that Metro raised it "for the first time in its reply"—is ridiculous. Rather, as the Court of Appeals explained, Appellants "filed exhibits going to the heart of a secondary effects argument in both their supplemental brief and motion to filed second supplemental brief." Apx. A at 70. And whatever Plaintiffs' strategy in entering the agreement may have been—they were enjoying the benefits of a TRO that lasted eight months—there is no contention that it was anything other than voluntary. Nor is there a contention that the deal that the parties willingly entered into was not followed by both sides. Thus, Plaintiffs' attempt to blame the trial court for their failed litigation strategy is disingenuous. In the two months after the case was submitted but before the decision was rendered, Plaintiffs made no effort to set aside the deal they had brokered by moving the trial court for relief from the order that memorialized the agreement of the parties.

"Accordingly," the "parties were afforded an opportunity, and actually did, litigate the issue of secondary effects." For the reasons stated here as well as those detailed in the opinion of the Court of Appeals, Apx. A, 66-73, this Court should affirm

that the trial court did not err in ruling on the matter.

Likewise, this Court should affirm the lower courts' rulings that Chapter 111 is designed to serve a substantial government interest. The Court of Appeals, adhering closely to this Court's decision in *Jameson*, concluded that Metro properly supported the Ordinance's secondary effects rationale. Apx. A at 73-78. Plaintiffs's cannot, and do not, offer any analysis to rebut the lower court's conclusions, but instead revert to blame-shifting for their failed strategy decision in the trial court. This argument is meritless.

Equally unavailing is Plaintiffs' suggestion that whether the Ordinance is constitutional is a factual that must be addressed at trial. On the contrary, [t]he issue of constitutionality is a legal one, and should only be decided by a Court." *Board of Educ. v. Jayne*, 812 S.W.2d 129, 132 (Ky. 1991). Moreover, the constitutional issue of whether an adult business ordinance serves a substantial government interest is routinely resolved on dispositive motions. *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291 (6th Cir. 2008) (affirming judgment on the pleadings); *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville & Davidson County*, 466 F.3d 391 (6th Cir. 2006) (affirming dismissal of secondary effects challenge); *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003) (same). Finally, as previously explained, Justice Kennedy's *Alameda* concurrence did not change the deferential narrow tailoring standard in this context. *See e.g.*, 459 F.3d 546, 561 (5th Cir. 2006) (rejecting this argument and explaining that "[t]he question of narrow tailoring was not before the Court in Alameda Books"). The lower courts correctly concluded that Plaintiffs introduced no evidence that casts direct doubt on the legislative record or rationale for Chapter 111. Summary judgment on this issue was proper.

V. Requiring disclosure of principal owners of sexually oriented businesses is constitutional.

The Court of Appeals correctly concluded that the required disclosure of persons owning at least 20% of a sexually oriented business (a) does not affect *de minimis* owners, and (b) is properly supported by Metro's "legitimate governmental concern under its police power: monetary backing for adult entertainment businesses tied to organized crime. The cases relied upon by the trial court and those cited by Appellants do not include this legitimate government concern." Apx. A at 84.

The Court of Appeals explained that:

> The case of *Envy, Ltd. v. City of Louisville*, 734 F. Supp. 785 (W.D. Ky. 1990), cited by Metro, provides support for this concern. In *Envy, Ltd.*, the City of Louisville found extensive involvement of organized crime in adult entertainment activities, which necessitated the disclosure of the true owners of these establishments to aid in the criminal laws, public and safety regulations. *Id.*, 734 F. Supp. at 790.

Apx. A at 83

Plaintiffs' brief here does nothing to undermine the Court of Appeals's decision.

Indeed, in addition to the reasons cited by the Court of Appeals, *see* Apx. A at 79-84, there are additional reasons to affirm its decision. First, the trial court recognized that "criminal disability provisions similar to those at issue in this case have been upheld as constitutional under the First Amendment. *See Deja Vu of Nashville, Inc.*, 274 F.3d at 391-93; *Kentucky Restaurant Concepts, Inc.*, 209 F. Supp. 2d at 687-90. Plaintiffs' challenge to § 111.43 likewise fails." R. Vol. VII, p. 948; Apx. C, p. 7.

The cited authorities recognized that cities have a substantial interest in preventing persons recently convicted of certain crimes from operating sexually oriented businesses—and that *the disclosure provisions facilitate this interest*. Moreover, the

cited authorities involve more extensive disclosures than those at issue here. *Compare* § 111.36(B) (requiring only name, mailing address, date of birth, photo ID, designated agent, and landowner) *with Deja Vu of Nashville*, 274 F.3d at 393 (requiring "full name, height, weight, hair color, eye color, date of birth, current residential address, and all residential addresses for the prior three years . . . fingerprints and two portrait photographs"), *and Kentucky Restaurant Concepts, Inc.*, 209 F. Supp. 2d at 684 (Heyburn, J.) (requiring similar disclosures plus Social Security Numbers).

Significantly, unlike the cited authorities, Chapter 111 does not require disclosure of a residential address or residential phone number – disclosure of which (to the general public) is the very basis of Plaintiffs' "chilling argument." *See Deja Vu of Nashville*, 274 F.3d at 394 (noting concern over public disclosure of residential addresses).

This was also the crux of the trial court's ruling: "Given the possibility that such disclosure may chill protected expression, the Court finds that . . . requiring the disclosure of principal owners who have only a twenty percent ownership interest in the entity does not survive the *O'Brien* test, as it is impermissibly broad." R. Vol. VII, pp. 951; Apx. C, p. 10.

Irrespective of the threshold of adult business ownership that requires disclosure—which Metro will address shortly—this conclusion cannot stand because: (1) the personal information (residential addresses and phone numbers) that could cause the "possibility" of chilling that the trial court surmised *is not required to be disclosed here*, and (2) even if it were, "K.R.S. § 61.878(1)(a) exempts from disclosure 'public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]'" *Kentucky Restaurant*

Concepts, Inc. v. City of Louisville, 209 F. Supp. 2d 672, 685 (W.D. Ky. 2002).

In *Kentucky Restaurant*, Judge Heyburn—following the Sixth Circuit's decision in *Deja Vu* interpreting an analogous provision of the Tennessee Open Records Act—held that personal information is exempt from disclosure under Kentucky law. *Id.* at 686. The court then stated:

> With these restrictions on public dissemination in place, the Court holds that the Ordinance's disclosure provisions pose only an incidental burden on First Amendment freedoms. The burden is not substantially greater than necessary to further the City's legitimate interests and, therefore, these provisions pass the fourth prong of the O'Brien test.

Id.

Judge Heyburn's analysis applies with even greater force here—Chapter 111 does not require disclosure of personal residences or telephone numbers in the first place, and even if it did, such information would be exempt from public disclosure, making Plaintiffs' "chilling" argument (which is unsubstantiated by any evidence in the record) completely unpersuasive. In this facial challenge to duly adopted legislation—where all reasonable doubt as to constitutionality is resolved in the statute's favor, *Fann v. McGuffey*, 534 S.W.2d 770, 777 (Ky. 1975)—this is a sufficient basis to uphold the regulation.

An additional, and independent, reason to reverse the trial court's decision is its conclusion that a "20% or more" threshold for adult business ownership is too low. First, there was no evidence in the record identifying any owner with exactly 20% ownership that would be affected by this provision. Thus, this is simply another facial challenge that the owner disclosure provision is not narrowly tailored under *O'Brien* analysis. However, the trial court failed to identify the standard for such an argument.

The U.S. Supreme Court has made it clear that under intermediate scrutiny, the government need not employ the "least-restrictive means" of serving its interests, but rather that "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward v. Rock against Racism*, 491 U.S. 781, 798-99 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1986)). Moreover, "*Renton's* constitutional framework grants the city broad discretion to choose the means and scope of its regulation of sexually oriented businesses" and this relaxed narrow tailoring prong "recognizes the judiciary's limited role in reviewing content-neutral limitations on speech." *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 689 (10th Cir. 1998). Specifically, cities must be allowed "reasonable opportunity to experiment with solutions to admittedly serious problems" such as secondary effects. *Id.* (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976)).

There is no doubt that the problems targeted by the regulation here are serious. *Envy, Ltd. v. City of Louisville*, 734 F. Supp. 785, 789-790 (W.D. Ky. 1990) (noting that expert testimony presented to Louisville found "extensive involvement of organized crime in adult entertainment activities" which "necessitates disclosure of true owners of these establishments to aid in enforcement of criminal laws, public and safety regulations and income tax laws"). As the Sixth Circuit has emphasized, the fine-line drawing in such regulatory matters is left with the legislative body. *DLS, Inc. v. City of Chattanooga*, 107 F.3d at 412 ("[W]hile it is probable that each marginal foot of the buffer zone achieves each of these goals somewhat less efficiently, it is not for us to say that a seven-foot zone or a five-foot zone would strike a better balance.").

The trial court sought support in the Sixth Circuit's decision in *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 226 (6th 1995), but that case only emphasizes the vital distinction between requiring disclosure of *de minimis* shareholders—which it invalidated—and disclosure of significant shareholders, which it countenanced. Nothing in *East Brooks Books* even indicates that 20% is *de minimis*.

Such a proposition is suspect. *See Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986) (upholding 20% disclosure rule), *aff'd sub nom, FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988), *vac'd in part on other grounds*, 493 U.S. 215 (1990); *see also Airport Book Store, Inc. v. Jackson*, 248 S.E.2d 623, 625 (Ga. 1978) (upholding "principal shareholder" disclosure). As the federal court in *Tee & Bee, Inc. v. City of W. Allis*, 936 F. Supp. 1479 (E.D. Wis. 1996), emphasized, the "important distinction" is "the setting of a minimum level of interest in the adult-oriented establishment in order to ensure that an individual shareholder is not subjected to regulation when her or she possesses a mere *de minimus* interest. *Id.* at 1489. The court went on to hold that "[t]he City safeguarded against such a result by requiring a license for shareholders holding more than ten percent of the corporation's stock. Therefore, the stockholder and other disclosure and license requirements are constitutional." *Id.*

The trial court's opinion striking the principal owner disclosure requirement on an unsubstantiated "chilling" theory finds no support in the text of Chapter 111, the authorities the trial court cited, or the principles governing judicial review of facial challenges like the one at bar. Thus, the Court of Appeals was correct to reverse on this issue, and its decision should be affirmed.

VI. The prohibition on touching between erotic dancers and patrons is valid.

Again, Plaintiffs fail to address the cogent analysis of the appellate court in reversing the trial court's injunction on the no-touch rule. Apx. A at 84-87.

Section 111.35(D) provides: "It shall be a violation of this chapter for any employee, who regularly appears semi-nude in an adult entertainment establishment, to knowingly or intentionally touch a customer or the clothing of a customer." R. Vol. I, pp. 19-44; Apx. D, p. 14. The trial court broadly construed § 111.35(D)'s "no-touch" rule between adult business dancers and patrons as applying "off premises" such that a dancer could not touch even her husband off premises. R. Vol. VII, p. 959; Apx. C, p. 17. The court then struck the rule under the overbreadth doctrine, which is applied only as a "last resort," *i.e.*, when a law cannot be narrowly construed and the overbreadth is both "real and substantial." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The court erred.

The standards for challenging a law on overbreadth grounds—standards that the trial court never articulated—are stringent. This is because "[f]acial challenges are strong medicine. . . . Because facial challenges push the judiciary towards the edge of its traditional purview and expertise, courts must be vigilant in applying a most exacting analysis to such claims." *Ward v. Utah*, 398 F.3d 1289, 1247 (10th Cir. 2005) (emphasis supplied). Because overbreadth is a departure from the traditional rules of standing, the claimant must demonstrate, from the "text of [the law] and from actual fact," *Virginia v. Hicks*, 539 U.S. 113, 122 (2003), "*a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.*" *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800, 801 (1984) (emphasis supplied).

No such showing was, or could be, made here. First, while the overbreadth

doctrine assumes that *expression* is significantly curtailed, the touching at issue here is not expression. *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995) (rejecting argument that dancer-patron touching in cabarets is speech, and concluding that "[t]he conduct at that point has overwhelmed any expressive strains it may contain. That the physical contact occurs while in the course of protected activity does not bring it within the scope of the First Amendment."). Thus, the very basis for applying the overbreadth doctrine in the first instance is absent, and the Court of Appeals properly reversed the injunction against § 111.35(D).

The trial court's observation that "this subsection is not limited to contact when the employee is performing semi-nude" does not cure the court's error in applying the overbreadth doctrine. R. Vol. VII, p. 959; Apx. C, p. 17. As noted previously, "[t]here is no reason to believe that minimal clothing obviates the need for these measures when the atmosphere is equally charged—money exchanges and touching are no more difficult if the dancer is wearing minimal clothing than if she is partially or fully nude." *Gammoh v. City of La Habra*, 395 F.3d 1114, 1127 (9th Cir. 2004) (upholding buffer applicable to adult cabaret dancers); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986) (same).

The trial court's other observation is equally unpersuasive. The trial court held that § 111.35(D) "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. First, and foremost, the touching involved in a handshake is not "speech" protected by the First Amendment. Indeed, it does not even rise to the level of expression associated with social dancing, which the U.S. Supreme Court has held to involve only a "kernel of expression" not protected by the First

Amendment. *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Thus, again, the overbreadth doctrine is inapposite here and should not have been employed:

> For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, *ibid.*, before applying the "strong medicine" of overbreadth invalidation.

Virginia v. Hicks, 539 U.S. 113, 119 (2003) (emphasis in original).

A key portion of the trial court's ruling validates the "social costs" identified in the Ordinance (secondary effects) and thereby undermines its striking of the "no-touch" provision. The trial court noted that the "six foot buffer zone, the eighteen inch stage requirement, and 'no tipping/no touch' prohibition" are "all aimed at curtailing the secondary effects associated with adult businesses" and have "been found to meet the *O'Brien* test when challenged under the First Amendment . . . . See *Restaurant Ventures, LLC*, 60 S.W.3d at 580; *Deja Vu of Nashville, Inc.*, 274 F.3d at 396-97." R. Vol. VII, p. 957; Apx. C, p. 15. This observation severely undermines the trial court's decision to facially invalidate a regulation that directly prevents secondary effects.

Finally, and perhaps most egregiously, the trial court broadly construed § 111.35(D) in a fashion contrary to the entire context of the Ordinance is which it is located. Chapter 111 is clearly and narrowly tailored to regulate the time, place, and manner of adult entertainment business operations. There is no indication from the legislative history, rationale, or findings of the Ordinance that suggest it should be interpreted to apply anywhere other than on the premises of adult entertainment establishments. Nevertheless, the trial court held that § 111.35(D) "could be read" to

apply elsewhere, which could "lead to the absurd result" of the regulation being applied away from the adult entertainment establishment premises regulated in the Ordinance. R. Vol. VII, p. 959; Apx. C, p. 17. "Consequently," the trial court deemed it overbroad.

The trial court's analysis flies in the face of the rules governing judicial construction of statutes. Courts are, "when considering the constitutionality of a statute, obligated to give it, if possible, an interpretation which upholds its constitutional validity." *American Trucking Assoc. v. Commonwealth, Transp. Cabinet*, 676 S.W.2d 785, 789 (Ky. 1984) (citing *Ratliff v. Fiscal Court of Caldwell County*, 617 S.W.2d 36 (Ky. 1981)). Additionally, "[w]here a statute is reasonably susceptible of two constructions, one of which will uphold the validity thereof, and the other would render it unconstitutional, the court must adopt the construction which sustains the constitutionality of the statute." *Id.* at 789-90. These rules apply with special force here: "As to overbreadth, it has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be readily susceptible to a narrowing construction that would make it constitutional, it will be upheld." *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F. Supp. 2d 672, 683 (W.D. Ky. 2002).

Here, the most common-sense interpretation of § 111.35(D) is that it applies only on the premises of adult entertainment establishments. The section clearly describes a violation "of this chapter," *i.e.*, Chapter 111, which applies exclusively to adult entertainment establishments. Moreover, the rule applies only to employees who regularly appear semi-nude "in an adult entertainment establishment," which is the sole focus of the Ordinance.

In adopting a contrary, and more expansive, interpretation—concerning how the

provision "could be read"—the trial court violated the rule that it was "obligated to give it, if possible, an interpretation which upholds its constitutional validity." *American Trucking Assoc.*, 676 S.W.2d at 789. The narrower construction was the most natural interpretation and the only one consistent with the regulatory context of the Ordinance. Under both principles of statutory construction, the lower court was bound to give the provision this construction and to avoid facial invalidation of the no-touch regulation. The Court of Appeals thus properly reversed that portion of the trial court's injunction.

VI. Conclusion

Chapter 111 is a content-neutral time, place, and manner regulation properly directed at the negative secondary effects of sexually oriented businesses. The Court of Appeals, following the relevant Kentucky and federal authorities, properly upheld the Ordinance as constitutional. Metro respectfully urges this Honorable Court to affirm.

Respectfully submitted,

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