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KENTUCKY SUPREME COURT GRANTED DISCRETIONARY REVIEW:
APRIL 16, 2008
(FILE NO. 2007-SC-0812-D)

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

CAM I, INC. AND OTHER LITIGANTS AS NAMED ON THE NOTICES OF APPEAL — APPELLANTS/ CROSS-APPELLEES

v.

APPEALS AND CROSS-APPEAL
FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 04-CI-001967

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT — APPELLEE/ CROSS-APPELLANT

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HOWARD AND MOORE, JUDGES.

MOORE, JUDGE: This is a consolidated case in which Appellants, entities that are engaged in various adult entertainment or sexually oriented businesses, are challenging an ordinance amending Appellee Louisville/Jefferson County Metro Government's Code of Ordinances. Appellants appeal the Order and Judgment of the Jefferson Circuit Court granting in part summary judgment to Metro and denying in part Appellants' motion for temporary injunction. Metro cross-appeals the portions of the Order and Judgment granting in part Appellants' motion for temporary injunction.

I. PROCEDURAL BACKGROUND

In January of 2003, the City of Louisville and Jefferson County were merged to form Metro Louisville. At that time, both entities were involved in litigation in federal court challenging ordinances contained in Chapter 111 of the Metro Code pertaining to adult entertainment. As a result of that litigation, members of the Metro Council initiated a review of the then current status of the law governing adult entertainment businesses. Thereafter, Chapter 111 was amended by Ordinance No. 21, Series 2004, which is the subject of the matter at hand.

While Ordinance 21 contains many sections, those under attack by Appellants include provisions regarding: (1) a licensing requirement to operate an adult entertainment business; (2) anti-nudity provisions; (3) hours of operation restrictions; (4) “no direct payment” to entertainers restrictions; (5) prohibition of the sale of alcohol; (6) “buffer zone” requirements; and (7) no touch provisions.

Appellants filed suit in Jefferson Circuit Court challenging Chapter 111 on numerous state constitutional grounds and moved the court for a temporary restraining order and a temporary injunction enjoining Metro from enforcing or implementing Chapter 111.[1] On the day the complaint was filed, the circuit court entered an order granting temporary injunctive relief enjoining Metro from enforcing Chapter 111 pending further orders of the court.[2]

Thereafter, Metro removed the case to federal court and Appellants filed a motion to remand. While the matter was pending in federal court, Metro sought to dissolve the Jefferson Circuit Court's Order for Temporary Restraining Order/Temporary Injunction. The federal court granted Appellants' motion, deciding that it lacked jurisdiction under 28 U.S.C. § 1441 because Appellants did not make any claims under the federal Constitution. Instead, Appellants relied only on state constitutional grounds for their complaint.

Both parties filed substantive motions in Jefferson Circuit Court. Among other pleadings, Metro filed a motion for summary judgment and a supplemental brief in support of its motion to dissolve the temporary restraining order. Appellants filed a supplemental brief in support of their motion for temporary injunction. Both parties having fully briefed the issues and the law, the circuit court entered a final and appealable

[1] Appellants properly notified the Attorney General of Kentucky of the action. The Attorney General filed a Notice of Intention Not To Intervene in the matter.

[2] The circuit court later clarified that this was a temporary restraining order.

judgment dissolving the restraining order, granting Metro's summary judgment in part, and denying in part and granting in part Appellants' motion for temporary injunction.

Appellants timely filed a notice of appeal, and Metro filed a cross appeal. A stay pending appeal was granted by this Court.

II. STANDARD OF REVIEW

Both parties agree that the proper standard of review on appeal of a summary judgment is the *de novo* standard. Thus, we review whether the trial court correctly held that there were no genuine issues as to any material fact, and the moving party was entitled to a judgment as a matter of law. *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 366 (Ky. 2005). We conduct *de novo* review of the circuit court's application of the law to the facts. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). In conducting our review, we must consider the record in a light most favorable to the party opposing the motion for summary judgment. *Baker v. Coombs*, 219 S.W.3d 204 (Ky. App. 2007). Summary judgment is proper only when it would be impossible for the party opposing the motion to produce evidence at trial justifying a judgment as a matter of law in his or her favor. *Horne*, 170 S.W.3d at 366.

III. ANALYSIS

A. SECTIONS OF THE KENTUCKY CONSTITUTION UNDER REVIEW

Appellants contend that numerous provisions of Chapter 111 violate several sections of the Kentucky Constitution. The Kentucky Constitutional sections, in relevant part, at issue are:

> Section 1(4). The right of freely communicating . . . thoughts and opinions.
>
> Section 2. Absolute and arbitrary power over the lives, liberty and property of freeman exists nowhere in a republic, not even in the largest majority.
>
> Section 8. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.
>
> Section 14. All courts shall be open and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.
>
> Section 26. To guard against transgression of the high powers which we have delegated, We Declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.

Primarily however, Sections 1(4) and 8 are the main sections upon which Appellants rely.

B. CONSTITUTIONAL CONSTRUCTION PRINCIPLES

When considering the constitutionality of legislation, the Court draws all fair and reasonable inferences in favor of the validity of the legislation. *Posey v. Commonwealth.*, 185 S.W.3d 170, 175 (Ky. 2006) (citing *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 499 (Ky. 1998)). "'[T]he violation of the Constitution must be clear, complete and unmistakable in order to find the law unconstitutional.'" *Id*. (citing *Kentucky Utilities*, 983 S.W.2d at 499); *Walters v. Bindner*, 435 S.W.2d 464, 467 (Ky. 1968) ("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.").

The sections of the Kentucky Constitution under present review are included in Kentucky's Bill of Rights, which is recognized as the supreme law of the Commonwealth.[3] *Id*. at 176 (citing *Gatewood v. Matthews*, 403 S.W.2d 716, 718 (Ky. 1966)). The Supreme Court of Kentucky articulated the standards for deciding state constitutional issues in *Kentucky State Board for Elementary and Secondary Education v. Rudasill*, 589 S.W.2d 877 (Ky. 1979). *See Commonwealth v. Wasson*, 842 S.W.2d 487, 514 (Ky. 1992) (Wintersheimer, J., dissenting). In *Rudasill*, a four-part test was adopted for Kentucky courts reviewing state constitutional issues. Under *Rudasill*, the Court should examine: (1) the text of the Constitution; (2) the intent of the framers; (3) a comparison of the state constitutional provision to the federal counterpart; and (4) how prior judicial opinions interpreted the constitutional provisions in question.

Rather than applying the test in *Rudasill*, Appellants insist that to review the Kentucky Constitution we should turn to other states' constitutional construction. Primarily, Appellants urge the Court to rely heavily on decisions from Pennsylvania for the proper construction of Kentucky's Constitution. It is true that Kentucky's Constitutional Convention relied on language used in Pennsylvania's Constitution when

[3] Sections 1 through 26 of the Kentucky Constitution are collectively known as "Kentucky's Bill of Rights." *Posey*, 185 S.W.3d at 176, n. 5.

drafting Kentucky's Constitution. However, Appellants would have this Court ignore Kentucky's own jurisprudence in deciding this matter and instead, rely wholly on Pennsylvania's courts for interpreting the constitutional sections at hand. While certainly Kentucky's courts have relied on Pennsylvania jurisprudence in some areas, this is not true for all areas of the law. Indeed, Appellants 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 free speech.

To the contrary, a comparison of opinions from courts from the two Commonwealths on similar free speech cases during the same period of time illustrates the inherent flaw in Appellants' reasoning. In 1940, the highest court in Kentucky decided *Reuben H. Donnelley Corp. v. City of Bellevue*, 283 Ky. 152, 140 S.W.2d 1024 (1940) and in 1941, Pennsylvania's Superior Court decided *Commonwealth v. Reid*, 20 A. 2d 841 (Pa. Super. 1941). Both cases dealt with a fee imposed on the distribution of written material, such as books, circulars, pamphlets, cards, hand bills, etc. Before any person or corporation could engage in the distribution of such materials, a license had to be obtained.[4]

[4] The ordinance at issue in the Kentucky case provided in relevant part as follows: "Advertising. For distribution of samples, books, circulars, pamphlets, cards, hand bills, or other device, the sum of twenty-five ($25.00) Dollars per year, or $1.00 per day, and but one person at a time allowed to operate under said license."

The ordinance at issue in the Pennsylvania case provided in relevant part as follows: "Section 1. Be it enacted by the Burgess and Town Council of the Borough of Clearfield in Council regularly assembled, that from and after the passage of this ordinance every person canvassing from house to house, or on the public streets in the Borough of Clearfield, Pennsylvania, for the purpose of selling or soliciting orders for, by samples or otherwise, . . . printing, stationery, books . . . magazines, periodicals . . . shall take out a license from the Burgess, and pay the fees hereinafter required before selling or offering for sale anything as aforesaid within the Borough

In the Kentucky case, the appellant was convicted of violating the ordinance for engaging in the business of distributing circulars at residences advertising the wares of a local druggist. He defended, in part, arguing that the ordinance offended his constitutional right of freedom of speech and press without abridgment. In upholding the ordinance at issue, Kentucky's highest court held as follows:

> It does not undertake either to prohibit or restrict the distribution of literature of any sort. It only imposes a tax upon the privilege of carrying on the business of advertising in a particular manner. Absent from the ordinance is any censorship of substance or form. No power of discrimination as between any person or class of citizens is reserved or exercised. The privilege of distributing advertising matter is available to any one paying the tax. True it is that a license is required. We construe the term, however, not in the sense of being a grant or permission but as descriptive of the tax and the document evidencing its payment. The penalty prescribed is not for distributing advertising matter but for exercising the privilege without paying the tax.
> . . . .
> If the right of the state or a municipal subdivision merely to exact a reasonable license tax for the privilege of carrying on the business of distributing advertising matter, or even of publishing a newspaper, for private profit, be denied as an abridgment of freedom of speech or press, then there is a clash with the fundamental social and political philosophy and constitutional mandate of equality of right and equality of burden. The constitution is not to be construed as destroying itself. Its principles are of equal dignity and none must be so enforced as to nullify or substantially impair the other. The business of advertising possesses no virtue justifying immunity from the ordinary license or other taxes. Freedom of speech or publication does not authorize it.

. . . . The fees . . . vary from $5 to $10 per day, and $100 to $200 per month, where vehicles are used. Where sales are made without vehicles, $2 per day, per applicant."

Reuben H. Donnelley Corp., 140 S.W.2d at 1026 (internal case names and citations omitted).

In the Pennsylvania case, *Reid*, 20 A.2d 841, a husband and wife were arrested and found guilty for selling and offering to sale, periodicals and magazines relating to their religious beliefs as Jehovah's witnesses, without first taking out a license or paying the required fee.[5] Contrary to the decision rendered just a year earlier in Kentucky, Pennsylvania's highest court struck the Pennsylvania ordinance relying on United States Supreme Court precedent. The Court in *Reid* held that the Supreme Court cases "hold, in effect, that ordinances forbidding the distribution or sale on the streets of a municipality of pamphlets, magazines, or periodicals, not in themselves harmful, unless a license permitting it has first been obtained from the proper municipal authority, are void as in conflict with the constitutional provisions against laws abridging the freedom of the press." *Reid*, 20 A.2d at 842.

Interestingly, Kentucky's court reviewed many of the same Supreme Court cases as the *Reid* court and came to a contrary decision on an almost indistinguishable issue. Consequently, it is not legally accurate to assume that because Kentucky borrowed language from Pennsylvania's Constitution that Kentucky is forever married to or agrees with Pennsylvania's interpretation of free speech or free expression. The case analysis just presented illustrates that Kentucky traditionally has different views regarding free speech and free expression than Pennsylvania.

[5] The fact that the Pennsylvania matter involved literature relating to religion was not used as a basis for the court's decision. Moreover, the content of the literature was not analyzed at all by the court.

A survey of Pennsylvania cases involving free expression evinces that Pennsylvania does have a history of granting an expansion of rights beyond those given by the United States Constitution, as illustrated in *Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002), upon which Appellants urge this Court to heavily rely. However, Appellants have not cited this Court to Kentucky case law which justifies an equivalent expansive right to free expression as that given in Pennsylvania. And, upon its own research, this Court has not located any Kentucky case law analogous to those of Pennsylvania on the issue.

Moreover, even a cursory review of the cases primarily relied upon by Appellants illustrates that they do not represent Kentucky's view of free expression. Appellants spend valuable space in their brief citing to Pennsylvania, as well as Oregon cases, wherein the courts give much broader protections to the form of expression that is presently under review. Consistent with correct constitutional construction, Appellants cite to the development of the Kentucky Constitution. But, rather than cite this Court to relevant Kentucky case law or constitutional construction doctrines, they cite to Pennsylvania and Oregon cases.

As earlier noted, Kentucky relied on language used in the Pennsylvania Constitution for the development of its own Constitution. However, the constitutional debates, at least for Kentucky, shed no real light on the subject at hand. We 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. Despite volumes written long after the adoption of our present Constitution on the topic at hand, we are simply left to make an educated guess on the intent of the drafters of our Constitution regarding free expression in the realm of adult entertainment businesses.

We look for cases decided close in time to the present Kentucky Constitution to ascertain the framers' intent in drafting the provisions at issue. Intriguingly, in a case decided within twenty-five years after the adoption of the 1891 Constitution, no protection was given to speech much milder when compared to the "expressive conduct" offered at Appellants' businesses. In *Delk v. Commonwealth*, 166 Ky. 39, 178 S.W. 1129 (1915), the appellant, a minister, used the following language while preaching a sermon in 1914: "Some men will stand around the depot, stores, the post office, and street corners, and watch the women pass, and size them up, the foot, ankle, and form, and they would be willing to give five dollars for the fork." *Id.*

For using these words, the minister was convicted and fined $67.50 for having committed a breach of the peace. The warrant on which he was charged read:

> "The said Delk did, in Pulaski county [sic], Kentucky, on or about the 2d day of November, 1914, unlawfully commit a breach of the peace by using obscene, vulgar, and indecent language in the presence of and to an assembly of people, men, women, and children, which language was obscene, indecent, and offensive, and was calculated to insult the hearers and to provoke an assault, and was in other respects disorderly; the language used and words uttered being unknown to the court, against the peace and dignity of the commonwealth [sic] of Kentucky."

Id., 178 S.W. at 1130.

Delk was charged under common law breach of the peace because the "obscene language used . . . was calculated to insult his hearers and to provoke an assault." *Id.*, 178 S.W. at 1131. In determining what constituted a breach of the peace under common law, the court analyzed prior cases and treatises on the subject, many dating back into the 1800's. The court concluded that "'breach of the peace' is quite broad, and includes, not only all violations of the public peace or order, but acts tending to the disturbance thereof, including acts of public turbulence or indecorum, in violation of the common peace and quiet." *Id.*, 178 S.W. at 1132 (citing *King v. Commonwealth*, 32 Ky. Law. Rep. 79, 105 S.W. 419 (1907)).

The court thereafter held that

> [a]pplying this definition to the nasty and obscene words used by appellant, we are of opinion they come within this definition, and constituted a breach of the peace. There was no possible excuse for the use of such language in the pulpit or elsewhere; and that fact alone is sufficient to incite all right-thinking persons to indignation, if not violence. *People v. Burman*, 154 Mich. 150, 117 N.W. 589, 25 L.R.A. (N.S.) 251; *State v. White*, 18 R. I. 473, 28 Atl. 968. The appellant's excuse that he was merely rebuking the sin of impurity, that he did not intend to disturb or embarrass any one [sic], but made the statement as a warning and rebuke to sin, is wholly without justification. It does not avail appellant for him to say he has a right to propagate his religious views. That right is not denied; but one will not be permitted to commit a breach of the peace, under the guise of preaching the gospel. If one be licensed to use the pulpit for such disgraceful performances as the appellant admits he was guilty of in this case, then women and children are to be insulted with impunity by the use of the most obscene vulgarity in places where they go to worship.
> . . . .

> We are clearly of [the] opinion that the language used by appellant constituted a breach of the peace.

Id.

Historically, it is apparent that Kentucky does not openly embrace forms of expression that some other states do. Although Appellants attempt to persuade the Court that Kentucky, like other states, has a long history of openly embracing any and all expression without restriction, the *Delk* case illustrates that Appellants' theory is not legally sound.

When the *Delk* case is compared to the cases on which Appellants rely, it is readily apparent that Kentucky does not embrace those views of free expression held by those states. Take for example, *Oregon v. Ciancanelli*, 121 P.3d 613 (Or. 2005), which Appellants urge us to use to inform our decision. Certainly, *Ciancanelli* contains a rather comprehensive review of competing constitutional theories, but unlike Kentucky in construing free expression under its Constitution, Oregon places no reliance on federal jurisprudence. Early restrictions on sexually explicit or obscene expressions among adults were not well established at the time of the adoption of Oregon's constitution. *Id.* at 615 (citing *State v. Henry*, 732 P.2d 9 (Or. 1987)). Nonetheless, relying on the framework established in *State v. Robertson*, 649 P.2d 569 (Or. 1982), the *Ciancanelli* court determined that the adult entertainment statute under review was content based and struck it down. The court noted that "lawmakers are precluded from enacting restrictions on speech solely on the theory that the speech is connected with some adverse consequences and that, absent the speech, the consequences are, to some indefinable

degree, less likely." *Ciancanelli*, 121 P. 3d at 635, n. 31 (citing *Robertson*, 649 P.2d 569). The Oregon court struck, as unconstitutional under the Oregon Constitution, a statute which made it a crime to "'direct, manage, finance or present' a 'live public show' in which the participants engage in 'sexual conduct.'" *Id*., 121 P. 3d at 614-15 (citing ORS §167.062).[6]

In addition, Appellants ask us to rely upon *Pap's A.M.*, 812 A.2d 591. Like *Ciancanelli*, the Pennsylvania Supreme Court in *Pap's A.M.* adhered to its state's long history of granting greater protection to erotic expressive conduct. In *Pap's A.M.*, the Pennsylvania Supreme Court held an ordinance prohibiting completely nude dancing to be content-based and a violation of the freedom of expression guaranteed by Article I, Section 7, of Pennsylvania's Constitution.

We strongly disagree with Appellants' reliance on the constitutional

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[6] In the *Ciancanelli* case, the defendant had been charged with violations of ORS Chapter 167 for two counts of promoting a live sex show. *Ciancanelli*, 121 P.3d at 615. Oregon Revised Statute §167.062 provides in part:
"(3) It is unlawful for any person to knowingly direct, manage, finance or present a live public show in which the participants engage in sadomasochistic abuse or sexual conduct.
(4) Violation of subsection (3) of this section is a Class C felony.
(5) As used in . . . this section unless the context requires otherwise:
(a) 'Live public show' means a public show in which human beings, animals, or both appear bodily before spectators or customers.
(b) 'Public show' means any entertainment or exhibition advertised or in some other fashion held out to be accessible to the public or member of a club, whether or not an admission or other charge is levied or collected and whether or not minors are admitted or excluded."

For purposes of the statute, "sexual conduct" is defined as "human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification." ORS §167.060(10). In relying on its interpretation of the Oregon Constitution, the *Ciancanelli* Court held that the statute which criminalizes this conduct, ORS §167.062, was content based and struck it down as unconstitutional.

interpretation given by other states to their respective Constitutions. We believe our Commonwealth's Bill of Rights to be of such importance that Kentucky jurisprudence must be invoked in the interpretation of it. And, unlike Pennsylvania or Oregon, Kentucky, with limited exceptions, has a history of interpreting its Bill of Rights consistently with the federal Constitution. *See Wasson*, 842 S.W.2d at 513 (Wintersheimer, J., dissenting). In his dissent, Justice Wintersheimer pointed out that

> decisions of this Court in the more modern era indicate an unwillingness to engage in random revision of the Kentucky Constitution by judicial fiat. *See Estep v. Commonwealth*, Ky., 663 S.W.2d 213 (1983) in which it is held that Section 10 of the Kentucky Constitution provides no greater protection than does the Federal Fourth Amendment; *Jordan v. Commonwealth*, Ky., 703 S.W.2d 870 (1985) which provides that Section 13 of the Kentucky Constitution affords no greater protection than does the Federal Fifth Amendment; *Commonwealth v. Willis*, Ky., 716 S.W.2d 224 (1986) which indicates that Section 11 of the Kentucky Constitution provides no greater protection than does the Federal Sixth Amendment and *Delta Airlines, Inc. v. Commonwealth, Revenue Cabinet*, Ky., 689 S.W.2d 14 (1985) which holds that the standards for classification under the Kentucky Constitution are the same as those under the Fourteenth Amendment to the Federal Constitution.
>
> *Commonwealth v. Foley*, Ky., 798 S.W.2d 947 (1990) [*overruled on other grounds by Martin v. Commonwealth*, 96 S.W.3d 38, 56 (Ky. 2003)] provides that Section 1(4) of the Kentucky Constitution gives no more protection than does the Federal First Amendment; *Tabler v. Wallace*, Ky., 704 S.W. 2d 179 (1985) notes that Sections 1, 2 and 3 of the Kentucky Constitution suffice to embrace the Equal Protection Clause of the Federal Fourteen Amendment; *Cain v. Commonwealth*, Ky., 556 S.W.2d 902 (1977) announces that the right of counsel guaranteed by Section 11 of the Kentucky Constitution is no greater than the right of counsel in the Federal Sixth Amendment; *Glasson v. Tucker*, 477 S.W.2d

> 168 (1972) holds that Section 1 of the Kentucky Constitution is coterminous with the Federal First Amendment; *Ray v. City of Owensboro*, Ky., 415 S.W.2d 77 (1967) states that Section 1(5) of the Kentucky Constitution is coterminous with the Equal Protection Clause of the Federal Fourteenth Amendment. *Rawlings v. Butler*, Ky., 290 S.W.2d 801 (1956) states that Sections 1 and 5 of the Kentucky Constitution are coterminous with the religious clauses of the Federal First Amendment; *Fischer v. Grieb*, 272 Ky. 166, 113 S.W.2d 1139 (1938) holds that *514 Section 3 of the Kentucky Constitution is interchangeable with the Equal Protection Clause of the Federal Fourteenth Amendment. *Commonwealth v. Ashcraft*, Ky.App., 691 S.W.2d 229 (1985) held that the Federal First Amendment actually provided more free speech rights than does the Kentucky Constitution.

Wasson, 842 S.W.2d at 513- 514 (Wintersheimer, J., dissenting).

Notwithstanding the above,

> [f]rom time to time in recent years [the Kentucky Supreme] Court has interpreted the Constitution of Kentucky in a manner which differs from the interpretation of parallel federal constitutional rights by the Supreme Court of the United States. However, when [the Court has] differed from the Supreme Court, it has been because of Kentucky constitutional text, the Debates of the Constitutional Convention, history, tradition, and relevant precedent. [The Court has] admonished against "novel theories to revise well-established legal practice and principle" and stated the prevailing rule as follows:
>
> > While we have decided several recent cases protecting individual rights on state constitutional law grounds, our stated purpose is to do so only where the dictates of our Kentucky Constitution, tradition, and other relevant precedents call for such action. (Citations omitted).

Commonwealth v. Cooper, 899 S.W.2d 75, 77-78 (Ky. 1995) (quoting *Holbrook v. Knopf*, 847 S.W.2d 52, 55 (Ky. 1992)).

In *Associated Industries of Kentucky v. Commonwealth*, 912 S.W.2d 947, 953 (Ky. 1995), the Court succinctly outlined the relationship between the two Constitutions deciding that:

> [w]e determine that the legislation does not violate the United States Constitution although a theorist may correctly assert that under Kentucky's Constitution the rights of association and petition may not be absolutely synonymous with that of the federal constitution. We are not convinced in this case that freedoms of petition and association under the Kentucky Constitution should be afforded a broader scope or a different analysis than the corresponding rights under the United States Constitution. *Commonwealth v. Foley*, Ky., 798 S.W.2d 947, 953 (1990).

We also find Appellants' argument that the Kentucky Constitution gives greater protection than the United States Constitution unpersuasive in light of overwhelming Kentucky case law wherein issues under Kentucky's free speech clauses were analyzed relying on federal constitutional standards. For example, in *Commonwealth v. Ashcraft*, 691 S.W.2d 229, 230 (Ky. App. 1985), this Court reviewed a case in which the appellee had been charged with violating KRS 161.190, providing that "[n]o person shall upbraid, insult or abuse any teacher of the public schools in the presence of the school or in the presence of a pupil of the school." The appellee had successfully moved to dismiss the complaint against him on the basis that KRS 161.190 was unconstitutionally vague and overbroad in violation of both the United States Constitution and the Kentucky Constitution. Despite the fact that the appellee's challenge

was hinged on Section 1(4) and 8 of Kentucky's Constitution, as well as the federal Constitution, this Court relied on the United States Supreme Court's interpretation of the First Amendment of the federal Constitution to decide the case. In fact, in relying upon federal jurisprudence, this Court held that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Id.* 691 S.W.2d at 232 (citing *Heffron v. Int. Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981)). Relying on federal jurisprudence, in spite of a combined state and federal constitutional challenge, this Court struck down KRS 161.190 as unconstitutional.

Pivotal to illustrate the inherent flaw in Appellants' argument that Kentucky's Constitution provides greater protection to free speech than the federal Constitution, although the Court in *Ashcraft* was reviewing both the State and federal Constitution, it let its dismay be known that it did not want to give as much protection as the federal Constitution but believed it had no other alternative. The court in *Ashcraft* stated

> [f]rom what we have said herein, we do not intend to convey the message that the legal philosophy is ours but rather one foisted upon us by the Supreme Court of the United States. Under the overbreadth doctrine, the First Amendment has been stretched to a point of torture in order to permit such individuals as Paul Cohen (*Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L.Ed. 2d 284 (1971)), David Rosenfeld (*Rosenfeld v. New Jersey*, 408 U.S. 901, 92 S. Ct. 2479, 33 L.Ed. 2d 321 (1972)), and Wilbert Brown (*Brown v. Oklahoma*, 408 U.S. 914, 92 S. Ct. 2507, 33 L.Ed.2d 326 (1972)), to do and say whatever they want in total disregard of where they may be or who may be present . . . .

> There could be little doubt that KRS 161.190 was enacted to protect the authority and dignity of our teachers, and nothing we have said should be construed that this Court subscribes to a contrary view of the position of those professionals. Nevertheless, in *Tinker v. Des Moines Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed. 2d 731 (1969), written in an atmosphere of what its author referred to as ". . . this relatively permissive, often disputatious society," the court commenced the decimation of school authority under First Amendment arguments similar to those made in the case at bar. Even though we have been compelled to reach the result that we did, our views are more closely aligned to those of Justice Black, dissenting in *Tinker*.

Ashcraft, 691 S.W.2d at 233.

Ashcraft evidences that, from any vantage point, this Court views Section 1(4) and Section 8 of Kentucky's Constitution as at most consistent with, rather than more expansive than, the protections provided by the federal Constitution. Furthermore, *Ashcraft* illustrates that but for the inherent legal truth that the federal Constitution provides a floor of constitutional protections, *see Associated Industries of Kentucky*, 912 S.W.2d at 952, this Court may not have granted as much protection under Kentucky's Constitution as the federal Constitution in the *Ashcraft* case.

Other cases also illustrate the point that Kentucky courts have interpreted free speech under the same standards as the federal Constitution. In *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991), the Court reviewed a matter involving disciplinary proceedings brought against a judge who was a candidate for the Kentucky Supreme Court for announcing his views on certain legal issues. The Court reviewed the issue under both the federal Constitution and the Commonwealth's Constitution. On this, the

Court noted that "[t]he United States Constitution guarantees the right of an individual to free speech. Accordingly, Congress can make no law abridging the freedom of speech. First Amendment, U.S. Constitution. Similarly, Section Eight of the Kentucky Constitution provides that '[e]very person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.'" *Id*., 803 S.W.2d at 954.

As with *Ashcraft*, the Court reviewed a free speech issue under both the State and federal Constitution, but yet relied solely on federal jurisprudence under the First Amendment to decide the case. The Court held that the "right of free speech is not absolute, however. States have the authority to regulate this conduct within certain limitations if in the public interest." *Id.* (citing *Valentine v. Chrestensen*, 316 U.S. 52, 62 S. Ct. 920, 86 L. Ed. 1262 (1942), *overruled on other grounds by Bigelow v. Virginia*, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975)).

And, in *Flying J Travel Plaza v. Commonwealth, Transportation Cabinet, Department of Highways*, 928 S.W.2d 344 (Ky. 1996), a challenge was brought against a statute regulating billboards based on Section 1(4) and Section 2 of the Kentucky Constitution. Despite the fact that the case was brought solely on Kentucky constitutional grounds, the Court determined that the review must first focus on the then current state of Kentucky law on the subject, and then consider how it relates to the then existing federal law on the subject. *Id.*, 928 S.W.2d at 346-347. After a survey of Kentucky case law on the issue of the constitutionality of statutes regulating billboards, the Court turned to federal law and the United States Constitution for a determination on the central issue in

the case: "whether the regulation [was] no more broad or no more expansive than is necessary to serve the substantial governmental interest asserted." *Id.*, 928 S.W.2d at 348. Accordingly, the Court, in deciding a matter brought under the Kentucky Constitution, wholly relied on the interpretation of the federal Constitution to articulate the standard applicable to the Kentucky Constitution on free speech concerns.

And, in *McDonald v. Ethics Committee of the Kentucky Judiciary*, 3 S.W.3d 740, 743 (Ky. 1999), the Kentucky Supreme Court again affirmed its determination that the Kentucky Constitution provides protection no greater than, but co-extensive with, the First Amendment to the United States Constitution. (Citing *Foley*, 798 S.W.2d 947). In *McDonald*, the Court, as it has historically done, relied on the First Amendment to the United States Constitution in addressing a free speech issue. It succinctly stated that "[t]he right to free speech is not absolute and states are permitted to regulate it within certain limitations if the regulation is within the public interest." *Id.* (citing *Valentine*, 316 U.S. 52, 62 S. Ct. 920, 86 L. Ed. 2d 1262).

Foley and *McDonald* do not stand alone. Kentucky courts, in other cases, have specifically held that the freedom of speech provisions in the Kentucky Constitution are similar to that of the United States Constitution. *See Summe v. Judicial Retirement and Removal Com'n*, 947 S.W.2d 42 (Ky. 1997); *Lee v. Commonwealth*, 565 S.W.2d 634, 637 (Ky. App. 1978) ("Our State Constitution §1 and §8 secures the right of free speech similar to that protected by the First Amendment to the Constitution of the United States.").

Beyond these cases, the Kentucky Supreme Court has squarely held that the interpretation of the First Amendment of the United States Constitution by the United States Supreme Court reflects a proper interpretation of Section 1(4) of the Kentucky Constitution. *Foley*, 798 S.W.2d at 952.

These cases and others evince that Kentucky has long construed Section 1(4) and Section 8 of the Kentucky Constitution consistently with the United States Constitution, granting no greater protection to free speech and free expression. Thus, to the degree there is confusion on the issue, the Court holds that free speech and free expression protections under the Kentucky Constitution are consistent with those in the United States Constitution. Consequently, all arguments advanced by Appellants relying on a higher level of protection under the Kentucky Constitution beyond that granted by the First Amendment are wholly without merit and will not be further reviewed.[7]

C. APPLICATION OF INTERMEDIATE SCRUTINY

Appellants' challenge to Chapter 111 is based on freedom of expression and speech which Appellants contend are protected by Section 1(4) and Section (8) of the Kentucky Constitution. The United States Constitution is a floor to the level of protection given to individual rights, and whether or not this Court agrees, freedom of expression under the First Amendment includes conduct that contains or communicates an erotic message, *see Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981), including nude and semi-nude dancing, *Barnes v. Glen Theatre, Inc.*,

[7] Because we conclude that freedom of expression and speech under the Kentucky Constitution are on an even par with those under the First Amendment to the United States Constitution, we, at times, cite to case law interpreting and referencing the First Amendment.

501 U.S. 560, 581, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (Souter, J., concurring); *see also California v. LaRue*, 409 U.S. 109, 118, 93 S. Ct. 390, 397, 34 L. Ed. 2d 342 (1972 (Rehnquist, J., majority) ("at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression"), *overruled in part on other grounds by 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (Stevens, J., plurality) ("the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate"); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S. Ct. 1382, 1391, 146 L. Ed. 2D 265 (2000) (O'Connor, J. plurality) ("Being in a 'state of nudity' is not an inherently expressive condition. As [the Court] explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although . . . it falls only within the outer ambit of the First Amendment's protection.") (citations omitted).

It matters not whether this Court may or may not believe that the type of conduct under review is constitutionally protected. Rather, based upon Kentucky's reliance upon the interpretations given to the First Amendment to define the boundaries of conduct protected under Kentucky's Bill of Rights, we are bound by precedent to conclude that this type of expression is afforded some protection under the Kentucky

Constitution, albeit the "outer ambits" of the Constitution. *Hendricks v. Commonwealth*, 865 S.W.2d 332, 336 (Ky. 1993). According to federal law, "[d]ancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, *in the absence of some contrary clue*, is eroticism, carrying an endorsement of erotic experience." *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 409 (6th Cir. 1997) (quoting *Barnes*, 501 U.S. at 581, 111 S. Ct. at 2468, 115 L. Ed. 2d 504 (Souter, J., concurring) (emphasis added in *DLS*)).[8] However, the legal fact that protection is granted to this form of expression should by no means be confused with elevating this type of expression with pure speech or speech for which we would send our sons and daughters off to war. *See Young*, 427 U.S. at 70, 96 S. Ct. at 2451, 49 L. Ed. 2d 310.

We pause to stress that pure speech is given much more protection and is reviewed under a much higher level of scrutiny. When erotic expression presumably seeks to convey a message enhanced by semi-nudity or nudity, its expressive value is given lesser protection than other forms of speech. *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572 (Ky. App. 2001) (citing *Barnes*, 501 U.S. at 566, 111 S. Ct. at 2460, 115 L. Ed. 2d 504 (plurality opinion)). It is

[8] A prior panel of this Court reviewing a similar issue regarding erotic dancing noted its disagreement with a finding that erotic dancing alone conveys a message. *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572, 576 (Ky. App. 2001). It stated that "what idea erotic dancing alone conveys, this court is unable to discern. Mere nude dancing without intent to make a statement, political, social, or otherwise, would seem to be merely for the purpose of sexually arousing the viewer." *Id.* Nevertheless, the Court determined that it was bound by the United States Supreme Court's interpretation of the First Amendment made applicable to the states through the Fourteenth Amendment. *Id.* We wholly agree with the Court's analysis on this in *Restaurant Ventures*.

well settled that this type of expression falls to the outer fringes of protected speech via an expressive message. *Id.* (citing *Barnes*, 501 U.S. at 566, 111 S. Ct. at 2460, 115 L. Ed. 2d 504). Thus, its protection is marginal, at best. *Id.* (citing *Barnes*, 501 U.S. at 566, 111 S. Ct. at 2460, 115 L. Ed. 2d 504).

Of course in considering a regulation impacting free speech, the threshold matter to be determined is the level of scrutiny to be applied by the Court. If the regulation is aimed at the content of the message, generally the highest level of scrutiny, known as strict scrutiny, is applied. Legislation is "content based" if it regulates protected speech based on the message conveyed. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753, 105 L. Ed. 2d 661 (1989). On the other hand, legislation is typically "content neutral" if the regulation is "justified without reference to the content of the regulated speech," thus serving a purpose not related to the content of the expression. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-95, 104 S. Ct. 3065, 3069-70, 82 L. Ed. 2d 221 (1984). Accordingly, government "may regulate speech when necessary to advance legitimate state interests, but the First Amendment prohibits the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others." *Flying J Travel Plaza*, 928 S.W.2d at 349 (citing *City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)).

When the regulation of speech is content-neutral, the government may, within constitutional bounds, regulate even protected expression. Accordingly,

government can use time, place and manner restrictions so long as they do not target the content of the expression itself. *Bright Lights, Inc. v. City of Newport*, 830 F. Supp. 378, 382-83 (E.D. Ky. 1993) (citing *Barnes*, 501 U.S. at 560, 111 S. Ct. at 2460, 115 L. Ed. 2d 504); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002) (plurality opinion). Regulations are content neutral even when they have an incidental impact on protected speech. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986).

Metro government unmistakably sets out in the preamble of the Ordinance that its purpose is to protect its citizenry from secondary effects associated with adult entertainment businesses. Speech, unpopular or not, can and often does have secondary effects. And, without reference to the content of the speech, local governments may constitutionally enact time, place or manner restrictions to help curb these secondary effects, while at the same time allowing avenues for the free exercise of speech or expression. From any vantage point, Chapter 111 has the purpose of regulating activities surrounding adult entertainment businesses not in regard to the message allegedly conveyed therein, but to combat the secondary effects associated with these businesses. Accordingly, we believe these restrictions to be content neutral. Justice Kennedy's concurrence in *Alameda Books*, clearly sets forth that intermediate scrutiny is to be applied in such cases.[9] *Alameda Books*, 535 U.S. at 449, 122 S. Ct. at 1728, 152 L. Ed.

[9] Because Justice Kennedy's concurrence is the narrowest opinion joining in the judgment of the Court, it may be regarded as the controlling opinion. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on

2d 670. (Kennedy, J., concurring) ("The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.").[10]

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the narrowest grounds . . . ." (Citations omitted).

[10] There does appear to be some confusion over whether a government's efforts at eliminating, or at least limiting, the negative secondary effects of adult entertainment businesses to protect the public is content neutral or content based. The majority view is that these types of restrictions are content neutral. *See e.g.*, *Barnes*, 501 U.S. 560, 111 S. Ct. 3456, 115 L. Ed. 2d 504 (Souter, J. concurring); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 131-34 (6th Cir. 1994). On the other hand, in *Alameda Books*, in his concurrence, Justice Kennedy analyzed *City of Renton*, wherein the Court considered whether a zoning ordinance that is a time, place, or manner restriction is content based or content neutral. *Alameda Books*, 535 U.S. at 448, 122 S. Ct. at 1741, 152 L. Ed. 2d 670 (citing *City of Renton*, 475 U.S. at 48, 106 S. Ct. 925, 89 L. Ed. 2d 29). Because the ordinance under review in the *City of Renton* case "[was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life, [and] not to suppress the expression of unpopular views'" the Court had designated the ordinance as content neutral. *Id.* (quoting *City of Renton*, 475 U.S. at 48, 106 S. Ct. 929, 89 L. Ed. 2d) (internal quotation marks omitted in *Alameda Books*). Justice Kennedy, in his concurrence in *Alameda Books*, noted that despite the "content neutral" designation given by the Court in *City of Renton*, the Court had treated theaters that specialized in adult films differently from other kinds of theaters. *Id.* Justice Kennedy reasoned that because the theaters showing adult films were treated differently from other theaters not showing adult films that "[t]hese ordinances are content based, and [the Court] should call them so." *Id.* Nevertheless, Justice Kennedy's statement does not put adult entertainment businesses on par with other content-based restrictions nor did he advocate a change in the level of scrutiny afforded adult entertainment businesses. Significantly, Justice Kennedy went on to state that

> [n]evertheless, . . . the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny. Generally, the government has no power to restrict speech based on content, but there are exceptions to the rule. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 126-27, 112 S. Ct. 501, 116 L.Ed. 2d 476 (1991) (Kennedy, J., concurring in judgment). And zoning regulations do not automatically raise the specter of impermissible

And, recently the Kentucky Supreme Court ruled that intermediate scrutiny applies when the secondary effects of sexually oriented businesses are targeted. *Commonwealth v. Jameson*, 215 S.W.3d 9 (Ky. 2006), *reh'g denied*.

Because the Court decided *supra* that Kentucky offers no greater protection in the realm of free speech and expression than the United States Constitution and because Kentucky has a long and well-established history of relying on federal jurisprudence in this area, it is proper for the Court to follow Justice Souter's concurring opinion in *Barnes*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504, wherein he adopted the four-part test developed in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L. Ed. 2d 672 (1968), to review cases falling under intermediate scrutiny. *Jameson*, 215 S.W.3d 9; *see also Restaurant Ventures*, 60 S.W.3d at 576-77; *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994). The *O'Brien* test requires

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> content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumptions that content-based restrictions are unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.

Id.

It is evident that Justice Kennedy's concurrence has resulted in confusion over whether ordinances aimed at curbing the negative secondary effects of adult entertainment businesses are content based or content neutral. *See e.g., Gammoh v. City of La Habra*, 395 F.3d 1114, 1123 (9th Cir. 2005). Even courts that believe such restrictions to be content based apply intermediate scrutiny if two conditions are met: 1) the ordinance regulates speech that is sexual or pornographic in nature; and 2) the primary motivation behind the regulation is to prevent secondary effects. *Gammoh*, 395 F.3d at 1123-24 (citing *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1164-65 (9th Cir. 2003) (citing *Alameda Books*, 535 U.S. at 434, 122 S. Ct. at 1733-34, 152 L. Ed. 2d 670)).

that to survive intermediate scrutiny an ordinance must: (1) be within the constitutional power of the government; (2) further an important or substantial governmental interest; (3) provide an asserted governmental interest unrelated to the suppression of free expression; and (4) ensure that any incidental restriction on alleged free expression is no greater than essential.

1. Application of the *O'Brien* test

The first *O'Brien* requirement is easily met in this matter. Metro possesses the power to protect its community against negative secondary effects through its police power. It is constitutionally sound that freedoms protected under the Kentucky Constitution may nonetheless be limited by enactments in the interest of the public health or welfare. *Economy Optical Co. v. Kentucky Bd. of Optometric Examiners*, 310 S.W.2d 783 (Ky. 1958). It is a basic tenet of our governmental structure that government, pursuant to its police power, "has wide latitude to adopt ordinances which promote the health, safety, morals or general welfare of the people." *Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745, 749 (Ky. 2004) (citing *U.S. Mining & Exploration Natural Resources Co., Inc. v. City of Beattyville*, 548 S.W.2d 833 (Ky. 1977)). "Among the police powers of government, the authority to promote and safeguard public health is a high priority." *Id.* (citing *Graybeal v. McNevin*, 439 S.W.2d 323 (Ky. 1969)). "Indeed, [a] legislature's power to pass laws, especially laws in the interest of public safety and welfare, is an essential attribute of government." *Posey*, 185 S.W.3d at 175 (citing *Manning v. Sims*, 308 Ky. 587, 213 S.W.

2d 577, 592 (Ky. 1948)) ("when the power of the Legislature to enact a law is called into question, the court should proceed with the greatest possible caution and should never declare an act invalid until after every doubt has been resolved in its favor") (quotation and citation omitted in *Posey*). "The concept of public welfare is broad and inclusive. The values it protects are spiritual as well as physical, aesthetic as well as monetary." *Hendricks*, 865 S.W.2d at 338 (citing *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954)). A governmental entity's attempts "to preserve or improve the quality of urban life is one which must be accorded high respect." *Id*. (citing *Young*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310). For these reasons, the Court "must always accord great deference to the legislature's exercise of these so-called 'police powers,' unless to do so would 'clearly offend[] the limitations and prohibitions of the constitution.'" *Posey*, 185 S.W.3d at 175 (citing *Manning*, 308 Ky. 587, 213 S.W.2d at 592*; Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)) ("'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'") (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985)).

It has long been recognized "[t]hat adult entertainment bars often generate harmful 'secondary effects' on neighborhoods . . . ." *Bright Lights*, 830 F.Supp. at 385-86 (citing *City of Renton*, 475 U.S. at 52, 106 S. Ct. at 931, 89 L. Ed. 2d 29 (upholding strict zoning ordinance aimed at adult theatres, where city had proven such harmful "secondary effects"); *Barnes*, 501 U.S. at 582, 111 S. Ct. at 2469, 115 L. Ed. 2d 504 (Souter, J.,

concurring); *Friedman v. Valentine*, 30 N.Y.S.2d 891, 894 (N.Y. Sup. 1941) ("That an unsupervised cabaret offers a tempting field for abuses and crimes is almost axiomatic."), *aff'd*, 42 N.Y.S. 2d 593 (1943).

Governmental entities are not required "before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities[.]" *City of Renton*, 475 U.S. at 51, 106 S. Ct. at 931, 89 L. Ed. 2d 29; *see also Jameson*, 215 S.W.3d 9. Local governments may rely upon previous findings in judicial opinions about secondary effects resulting from the presence of adult entertainment businesses. *City of Renton*, 475 U.S. at 51, 106 S. Ct. at 931, 89 L. Ed. 2d 29; *Jameson*, 215 S.W.3d 9; *Pap's A.M.*, 529 U.S. at 297, 120 S. Ct. at 1395, 146 L. Ed. 2d 265 (plurality opinion). Furthermore, local governments are permitted to "rely, in part, on 'appeal to common sense,'" in enacting regulations governing adult entertainment businesses. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1186 (10th Cir. 2003) (quoting *Alameda Books*, 535 U.S. at 439, 122 S. Ct. at 1728, 152 L. Ed. 2d 670). Accordingly, we determined that Chapter 111 easily satisfies the first prong of *O'Brien*.

As to the second *O'Brien* prong, the preamble of Chapter 111 sets forth that its aim is targeted at the secondary effects of adult entertainment businesses and curbing the negative secondary effects. These goals have been recognized as important government interests. *DLS*, 107 F.3d at 410 ("courts have repeatedly found the prevention of crime and disease to satisfy this part of the *O'Brien* test") (citing *Barnes*, 501 U.S. at 582, 111 S. Ct. at 2468-69, 115 L. Ed. 2d 504; *City of Renton*, 475 U.S. at 48,

106 S. Ct. at 929, 89 L. Ed. 2d 29; *Triplett Grille*, 40 F.3d at 134). Furthermore, "a city's interest in attempting to preserve the quality of urban life, is one that must be accorded high respect." *City of Renton*, 475 U.S. at 50, 106 S. Ct. at 930, 89 L. Ed. 2d 29.

Rather than second guessing local governments, as a general rule, courts should accept the expressed purpose of local governments. *See Barnes*, 501 U.S. at 582, 111 S. Ct. at 2468, 115 L. Ed. 2d 504. It is permissible for local governments to rely upon studies and experiment with their own regulation of secondary effects inherent with adult entertainment businesses. *See Alameda Books*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670; *Jameson*, 215 S.W.3d 9. Courts are cautioned not to act as "super legislatures" "appr[ising] the wisdom" of the decision making of local governments. *City of Renton*, 475 U.S. at 52, 106 S. Ct. at 931, 89 L. Ed. 2d 29 (quoting *Young*, 427 U.S. at 71, 96 S. Ct. at 2453, 49 L. Ed. 2d 310). Accordingly, the second prong is likewise easily met.

As to the third prong, because the Court has already determined that Chapter 111 is content neutral, this is the same as a determination that the ordinance is unrelated to the suppression of free expression. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S. Ct. 3065, 3071, 82 L. Ed. 2d 221 (1984).

The final prong of *O'Brien* requires us to determine whether the restriction is no greater than essential to further the government interest. However, no greater than essential does not mean least-restrictive means available. *Ward*, 491 U.S. at 798, 109 S.

Ct. at 2757, 105 L. Ed. 2d 661. This standard will be met where "'any incidental impact on the expressive element of nude dancing is *de minimis*.'" *Jo-Bet, Inc. v. City of Southgate*, 415 F. Supp. 2d 725, 731 (E.D. Mich. 2006) (quoting *Pap's A.M.*, 529 U.S. at 301, 120 S. Ct. at 1397, 146 L. Ed. 2d 265). As stated by the majority in *Ward*, 491 U.S. at 799-800, 109 S. Ct. at 2757-2758, 105 L. Ed. 2d 661, "narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," and any resulting burden on speech is not substantially broader than necessary to achieve the governmental goal. *Id*. (Internal quotation marks and citations omitted). In distinguishing narrow tailoring from least-intrusive means, the Supreme Court noted that a "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id*., 491 U.S. at 800, 109 S. Ct. at 2758, 105 L. Ed. 2d 661. Having determined that the first three *O'Brien* factors are met, we will in turn analyze the challenges brought by Appellants against the specific provision of Chapter 111 to determine if they are no greater than essential to further the stated government interest.

a. Nudity

Section 111.35(A) prohibits nudity at adult entertainment businesses, and Appellants claim that therefore this section of Chapter 111 is unconstitutional. Having rejected Appellants' theory that the Court should rely heavily on Pennsylvania case law,

we likewise reject Appellants' request that we cast aside Kentucky and federal jurisprudence on the issue of nudity in adult entertainment businesses.

"Ordinances that ban nude dancing are generally considered to be content neutral. Increase in sex crimes, social disease and general depreciation of the neighborhood, are secondary effects of adult establishments which the courts have recognized as being within the government's power to control." *Restaurant Ventures*, 60 S.W.3d at 577. Quoting *Pap's A. M.*, 529 U.S. at 292, 120 S. Ct. at 1393-94, 146 L. Ed. 2d 265, at length, the Court in *Restaurant Ventures,* 60 S.W.3d at 577-78, stated

> [e]ven if we had not already rejected the view that a ban on public nudity is necessarily related to the suppression of the erotic message of nude dancing, we would do so now because the premise of such a view is flawed. The State's interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood.
> ***
> Similarly, even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is *de minimis*. And as Justice STEVENS eloquently stated for the plurality in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 49 L.Ed. 2d 310 (1976), "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," and "few of us would march our sons or daughters off to war to preserve the citizen's right to see" specified anatomical areas exhibited at

> establishments like Kandyland. If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based.

And, according to the analysis in *Barnes*,

> we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers. Presumably numerous other erotic performances are presented at these establishments and similar clubs without any interference from the State, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.

Barnes, 501 U.S. at 570-571, 111 S. Ct. at 2463, 115 L. Ed. 2d 2456.

And, this Court has stated that

> [t]he amount of clothing required does not interfere with the expression sought to be conveyed by clogging, Appalachian dancing, the two-step, Indian tribal dancing, belly dancing, and striptease and/or the traditional burlesque comedy.

Hendricks, 865 S.W.2d at 336.

Because we have concluded *supra* that the interpretation of the free expression clauses under Kentucky's Constitution are parallel to those under the federal Constitution and, based on the above case law, we hold that any impact that Chapter 111 has on Appellants' right to free expression conducted while in a state of nudity is *de*

minimis and leaves ample capacity for federally protected expressive conduct. *See Jameson*, 215 S.W.3d at 27-28 (citations omitted). Accordingly, we conclude that any incidental restriction on free expression is no greater than essential and meets the fourth *O'Brien* prong.

b. Hours of operation

Section 111.18 of Chapter 111 precludes an adult entertainment business from remaining open for business between the hours of 1:00 a.m. and 9:00 a.m. on any day. Under the prior Ordinance, many of the Appellants' businesses were open longer hours. Appellants set forth a three-prong analysis in support of their argument, much of which surrounds their theory that federal jurisprudence plays no role under freedom of expression within the bounds of the Kentucky Constitution. For reasons as stated *supra*, we reject these arguments.

This Court has previously reviewed this issue analyzing an ordinance that prohibited adult entertainment businesses from operating between the hour of 1:00 a.m. and 3:00 p.m.-- six hours more than the ordinance under present review. *See Restaurant Ventures*, 60 S.W.3d at 580. In *Restaurant Ventures*, we held that "[t]he regulation of operating hours of adult entertainment establishments is a valid exercise of the government's power to regulate those establishments." 60 S.W.3d at 581.

There are sound reasons under local government's police powers for hour restrictions. The Court in *Bright Lights* upheld a restriction that allowed establishments to remain open for only eight and one-half hours. The Court held that "[t]he restriction of

hours serves the legitimate purpose of confining to evening hours the illicit and immoral practices that accompany [adult entertainment businesses] and concentrate around them." *Brights Lights*, 830 F. Supp. at 389.

The Sixth Circuit has also upheld strict hour restrictions. In *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 411 F.3d 777, 789 (6th Cir. 2005), the Court upheld a midnight-close restriction finding that it was a reasonable time, place or manner restriction. The Court concluded that the restriction generally furthered the governmental interest in protecting public health, safety and welfare, and in combating already recognized harmful secondary effects of crime and other public health and safety problems associated with nude dancing and caused by the presence of those establishments specifically. *Id.*, 411 F.3d at 790. Even more importantly, in considering allowing avenues for constitutionally protected speech, the Sixth Circuit in *Deja Vu of Cincinnati* found that because the adult entertainment businesses could be open for twelve hours per day, six days per week, ample channels for expressive communication were available. *Id.*, 411 F.3d at 791.

Beyond courts within the Sixth Circuit, many federal courts have had occasion to consider hour-of-operation restrictions and found them to be constitutional under the "secondary effects" test. *See Center for Fair Public Policy*, 336 F.3d 1153; *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *Nat'l Amusements, Inc. v. Town of*

Dedham, 43 F.3d 731 (1st Cir. 1995); *Mitchell v. Comm'n on Adult Entm't. Est.*, 10 F.3d 123 (3d Cir. 1993); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986).

Chapter 111 allows adult entertainment businesses to be open substantially longer than the hours held to be constitutional in many cases, including *Deja Vu of Cincinnati* and *Bright Lights.* Accordingly, Chapter 111 exceeds the acceptable hours of operation in other cases, leaving ample channels available for expressive conduct in Appellants' business, which is only minimally protected anyway. Thus, this restriction meets the fourth prong under *O'Brien*.

c. Prohibition against alcohol sales

Section 111.30 prohibits establishments which hold adult entertainment business licenses from also obtaining liquor licenses. Appellants contend that this section of the ordinance is preempted by state statute, citing to a series of Kentucky cases analyzing the regulation of alcohol. However, we have previously rejected similar arguments twice. *See Restaurant Ventures*, 60 S.W.3d at 581 ("The ordinance regulates the operating hours not because they sell alcoholic beverages, but because of the sexually oriented nature of the entertainment provided."); *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."). Having previously upheld similar ordinances restricting the sale of liquor at adult entertainment businesses, we are not inclined to overturn those decisions now.

Further, we are not persuaded by the cases cited by Appellants. For example, Appellants cited to *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071 (6th Cir. 1994), wherein the Court struck a *contract* between a business and the City as unenforceable on the basis that the government may not condition the issuance of a license upon the agreement of the applicant to give up or waive his or her constitutional rights.[11] *Id.*, 23 F.3d at 1077. In his concurrence, Judge Nelson explained that in light of *Barnes*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504, there was no reason why the City could not, "pursuant to properly drafted laws or ordinances, prohibit saloonkeepers from placing barebreasted women dancers on public exhibition." *G & V Lounge, Inc.*, 23 F.3d at 1079-80 (Nelson, J., concurring).

And, indeed, many jurisdictions have done just that. The case of *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003) gives an excellent and in-depth analysis of this area of the law. In *Ben's Bar*, the Court reiterated that the ordinance then under review did not impose restrictions on entertainers' ability to convey an erotic message. To the contrary, it only prohibited adult entertainment businesses from serving alcohol to customers while nude or semi-nude dancing is taking place. The Court in *Ben's Bar* concluded that this was not a restriction on expressive conduct; rather, it was a prohibition of the non-expressive conduct of serving and consuming alcohol during the performances of expressive conduct. The First Amendment does not constitutionally

[11] The agreement at issue provided that in exchange for the City's approval of the request for a liquor license, the business would not permit any topless entertainment on its premises. *G & V Lounge, Inc.*, 23 F.3d at 1072.

entitle patrons, or even dancers, to have alcohol available while the performance is taking place. *Id*., 316 F.3d at 726. The Court succinctly stated that

> [t]he regulation has no impact whatsoever on the tavern's ability to offer nude or semi-nude dancing to its patrons; it seeks to regulate alcohol and nude or semi-nude dancing without prohibiting either . . . . [C]itizens . . . may still buy a drink and watch nude or semi-nude dancing. They are not, however, constitutionally entitled to do both at the same time and in the same place. *Gary* [*v. City of Warner Robins*], 311 F.3d [1334] at 1338 [(11th Cir. 2002)] (holding that there is no generalized right to associate with other adults in alcohol-purveying establishments . . .). The deprivation of alcohol does not prevent the observer from witnessing nude or semi-nude dancing, or the dancer from conveying an erotic message. Perhaps a sober patron will find the performance less tantalizing, and the dancer might therefore feel less appreciated (not necessarily from the reduction in ogling and cat calls, but certainly from any decrease in the amount of tips she might otherwise receive). And we do not doubt Ben's Bar's assertion that its profit margin will suffer if it is unable to serve alcohol to its patrons. But the First Amendment rights of each are not offended when the show goes on without liquor.

Ben's Bar, 316 F.3d at 728. We agree with this well-reasoned analysis and find no other reason to decide otherwise.

Metro has added this restriction to curb the secondary effects of adult entertainment businesses, and it is well established. "Liquor and sex are an explosive combination . . . ." *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir. 2001). Erotic performances in establishments serving liquor have "a long history of spawning deleterious effects" which include "prostitution and the criminal abuse and

exploitation of young women." *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 637 (4th Cir. 1999).

In sum, because this Court has previously upheld similar regulations and because we agree that there is no constitutionally guaranteed right to consume or sell alcohol at the same time as an erotic performance is taking place, we find no constitutional infirmity with this section of Chapter 111.

d. Staging requirements

Appellants contend that the staging requirements in Chapter 111 are unconstitutional. Pursuant to Chapter 111.35(B) it is a violation for any employee to appear "semi-nude" unless he or she is located

> [a]t least six (6) feet from any patron or customer and on a fixed stage at least eighteen (18) inches from the floor. The six (6) foot requirement is measured from the edge of the stage where the semi-nude employee is located to the patron seating or standing area, or, if patrons are allowed to sit at the stage, from the edge of the stage to a line or other barrier six feet from the edge beyond which employees are allowed to appear semi-nude.

In support of their argument, Appellants rely on two Oregon cases, *City of Nyssa v. Dufloth*, 121 P.3d 639 (Or. 2005) and *Ciancanelli*, 121 P.3d 613. However, as established *supra*, Oregon applies much broader protection to adult entertainment establishments, even to the point of allowing live sex shows. Appellants cannot cite this Court to one Kentucky case showing even a remotely similar stance on the issue.

On the other hand, numerous courts, including this Court, have routinely upheld buffer zones. *See Restaurant Ventures*, 60 S.W.3d 572; *DLS*, 107 F.3d 403; *Deja*

Vu of Nashville, Inc. v. Metropolitan Government of Nashville & Davidson County, 274 F.3d 377, 396-97 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073, 122 S. Ct. 1952, 152 L. Ed. 2d 855 (2002); *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F. Supp. 2d 672 (W.D. Ky. 2002); *Threesome Entertainment v. Strittmather*, 4 F. Supp.2d 710 (N.D. Ohio 1998); *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998), *cert. denied*, 529 U.S. 1053, 120 S. Ct. 1553 146 L. Ed. 2d 459 (2000) (ten feet); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986). In *Restaurant Ventures*, 60 S.W.3d at 580, this Court reviewed an ordinance that provided, in relevant part that:

> [n]o person in an adult entertainment establishment shall engage in any form of entertainment or dancing except while said person is positioned in or occupying an entertainment area, . . . and while the person so dancing, performing, displaying or exhibiting is positioned not less than six (6) feet from any patron or spectator.

The Court held that the buffer zone allowed a reasonable distance between the patrons and performers. This resulted in a decreased opportunity for sex, contract of social diseases, and rendered easier the enforcement of the "no touch" rule. The Court agreed with the government that the buffer zone was substantially related to the ability to control crime and disease, which are beyond question legitimate governmental interests.

Appellants do not even address *Restaurant Ventures* on this issue in their brief. Rather, they rely on cases from other jurisdictions.[12] While many of the ordinances

[12] Having already determined that free expression and free speech under the Kentucky Constitution is consistent with the First Amendment, we reject Appellants' contention that cases from other jurisdictions better define Kentucky's Constitution than cases from our own Commonwealth.

in the cases cited *supra* have differing buffer zone requirements,[13] the courts are not in the business of micromanaging local governments. "'The judiciary should not second-guess the judgment of local government officials.'" *Jameson*, 215 S.W.3d at 35 (quoting *Alameda Books*, 535 U.S. at 451, 122 S. Ct. at 1743, 152 L. Ed. 2d 670 (Kennedy, J., concurring)).

We agree with the wisdom of the Court in *DFW Vending, Inc. v. Jefferson County*, 991 F. Supp. 578, 594 (E.D. Tex. 1998) that "[s]ix feet is sufficiently close for a person to view and appreciate an artistic dance performance. Indeed, that distance is closer than distances at which artistic dance performances at theaters and concert halls are generally viewed."[14]

Appellants further contend that the buffer zone provisions violate Section 1(6) of the Kentucky Constitution, which guarantees the freedom of association. They also maintain that freedom of association is reviewed under strict scrutiny, relying on *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 104 S. Ct. 3244, 3249, 82 L. Ed. 2d 462 (1984). The crux of this argument is that performers in adult entertainment establishments have a right, under Section 1 of the Kentucky Constitution, to freely associate without governmental interference. Any arguments advanced by Appellants that freedom of association under the Kentucky Constitution is broader than the federal

[13] For example, in *Deja Vu of Nashville*, 274 F.3d 377, a three-foot buffer zone was at issue, while in *Kev*, 793 F.2d 1053, a ten-foot buffer zone was under review.

[14] We do not intend this statement as a litmus test of a six-foot buffer zone for every case dealing with this issue.

Constitution lack all merit. The Supreme Court of Kentucky has previously rejected this argument. *See Associated Industries of Kentucky*, 912 S.W.2d at 953 (citing *Foley*, 798 S.W.2d at 953).

The United States Supreme Court has recognized two types of "freedom of association." *Dallas v. Stanglin*, 490 U.S. 19, 23-24, 109 S. Ct. 1591, 1594, 104 L. Ed. 2d 18 (1989);[15] *see also Gold Diggers, LLC v. Town of Berlin, Connecticut*, 469 F. Supp. 2d 43 (D.Conn. 2007). The first type of freedom of association includes the "'choice[ ] to enter into and maintain certain intimate human relationships.'" *Dallas*, 490 U.S. at 24 (quoting *Roberts*, 468 U.S. at 617-618, 104 S. Ct. at 3249, 82 L. Ed. 2d 462). These types of associations are the sorts of traditional personal bonds that have "'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'" *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 237, 110 S. Ct. 596, 611, 107 L. Ed. 2d 603 (1990), *overruled in part on other grounds by City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004) (quoting

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[15] The United States Supreme Court has held that its

> "decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion."

Stanglin, 490 U.S. at 24, 109 S. Ct. at 1594, 104 L. Ed. 2d 18 (quoting *Roberts*, 468 U.S. at 617-618, 104 S. Ct. at 3249, 82 L. Ed. 2d 462).

Roberts, 468 U.S. at 618-619, 104 S. Ct. at 3249-50, 82 L. Ed. 2d 462). As such, these relationships receive "protection as a fundamental element of personal liberty." *Roberts*, 468 U.S. at 618, 104 S. Ct. at 3249, 82 L. Ed. 2d 462.

The second type of freedom of association is the right to associate for the purpose of engaging in expressive activity as protected by the First Amendment. *Stanglin*, 490 U.S. at 24, 109 S. Ct. at 1595, 82 L. Ed. 2d 462. The *Stanglin* Court stated, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes--for example, walking down the street or meeting one's friends at a shopping mall--but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Stanglin*, 490 U.S. at 25, 109 S. Ct. at 1595, 82 L. Ed. 2d 462.

It is not evident under which class Appellants are proceeding. First, they claim their rights are described in *Roberts*, 468 U.S. at 618, 104 S. Ct. at 3250. But, in the next sentence, they claim that they are "engaged in 'First Amendment' speech-related activities." The class described in *Roberts* includes the types of association that have traditional personal bonds and that have "'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideas and beliefs.'" *FW/PBS*, 493 U.S. at 237, 110 S. Ct. at 611 (quoting *Roberts*, 468 U.S. at 618-19, 104 S. Ct. at 3249-50, 82 L. Ed. 2d 462). Appellants have not asserted that the associations for which they seek protection are traditional and intimate relationships as envisioned under *Roberts*.

The Supreme Court of the United States, nonetheless, has held that the types of "relationships" that might be formed in Appellants' establishments do not fit the first category under *Roberts*. *See FW/PBS*, 493 U.S. at 237, 110 S. Ct. at 611, 107 L. Ed. 2d 603 (holding that "[a]ny 'personal bonds' that are formed from the use of a motel room for fewer than 10 hours are not those that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'") (quoting *Roberts*, 468 U.S. at 618-19, 104 S. Ct. at 3249-3250, 82 L. Ed. 2d 462); *see also Stanglin*, 490 U.S. at 24, 109 S. Ct. at 1595 (dance hall patrons coming together to engage in recreational dancing is not protected by First Amendment).

Rather, the staging restrictions, including the buffer zone and no touch provisions, "implicate[] the right to associate for expressive purposes." *Gold Diggers*, 469 F. Supp. 2d at 65 (citing *Deja Vu of Nashville*, 274 F.3d at 396). "The right to associate for expressive purposes, however, is not absolute. 'Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Deja Vu of Nashville*, 274 F.3d at 396 (quoting *Roberts*, 468 U.S. at 623, 104 S. Ct. at 3252, 82 L. Ed. 2d 462).

The Court in *Deja Vu of Nashville* upheld the staging restrictions of a three-foot buffer zone against a freedom of association attack concluding that these restrictions went no further than necessary to guard against negative secondary effects of adult

entertainment establishments. 274 F.3d at 397 (citing *DLS*, 107 F.3d at 412-13) (upholding a six-foot buffer zone). Consequently, the Court upheld the restrictions.

Appellants attempt to capitalize on the fact that in *Deja Vu of Nashville* the staging requirement was only three feet, intimating that only restrictions of three feet or less will meet constitutional muster. We disagree. *Deja Vu of Nashville* did not create a litmus test of a three-foot buffer zone to survive constitutional attacks. Moreover, it is not the business of the Court to second guess local government on how to govern their communities. The buffer zone requirement at issue is content neutral and furthers Metro's legitimate interests in curbing secondary effects of adult entertainment businesses, including minimizing sexual contact between entertainers and customers, guarding against sexually-transmitted diseases. The dancers and customers can still engage in their "expressive association." Courts have held that

> "[s]eparating dancers from patrons would reduce the opportunity for prostitution and narcotics transactions . . . . Preventing the exchange of money between dancers and patrons would also appear to reduce the likelihood of drug and sex transactions occurring on regulated premises . . . . While the dancer's erotic message may be slightly less effective from [several] feet, the ability to engage in the protected expression is not significantly impaired."

Jakes, Ltd., Inc., v. City of Coates, 284 F.3d 884, 891 (8th Cir. 2002) *cert. denied*, 537 U.S. 948, 123 S. Ct. 413, 154 L. Ed. 2d 292 (2002) (quoting *Kev*, 793 F.2d at 1061) (footnotes omitted in *Jakes, Ltd.*).

Appellants also attack the buffer zone requirement maintaining that they have "evidence substantiating . . . drastic consequences" resulting from the six-foot buffer zone. Appellants included the affidavit of Brian Franson and a diagram of Appellant PT's club thereto in their brief. According to the diagram, there are fourteen areas where dancers perform spaced throughout the building on one floor. Five of these areas are larger stages, with the remaining areas being the tops of bars or smaller tables for more "intimate" performances. Based on Appellants' diagram, using a one-eighth inch scale, four of the larger staging areas are from approximately eight-to-nine feet in diameter, and the largest staging area is over nine-feet wide and at least eight-feet long. One staging area on a bar is nearly sixteen-feet long, and another is nearly six-to-eight-feet long. Appellants contend that under the six-foot buffer zone restriction, there will be "little-to-no" space left for customers while entertainers are performing in Appellant PT's club.

Appellants rely on *J.L. Spoons, Inc. v. City of Brunswick*, 49 F. Supp. 2d 1032 (N.D. Ohio 1999), contending that the type of evidence Appellants present is sufficient to justify striking the buffer-zone requirement. However, *J.L. Spoons* actually supports a contrary conclusion.

The Court in *J.L. Spoons* reasoned that "[p]rohibiting physical contact between semi-nude dancers and patrons is a legitimate way to eradicate the secondary effects of adult-oriented cabarets. Moreover, a buffer zone may be necessary 'to ensure that the ban on contact i[s] enforceable.'" *Id.*, 49 F. Supp. 2d at 1045 (quoting *DLS*, 107 F.3d at 412). The Court in *J.L. Spoons* recognized that six-foot buffer zones have been

upheld. *Id*. (citing *DLS*, 107 F.3d 412-13). However, the reason the buffer zone was struck in *J.L. Spoons* was that it was a ten-foot buffer zone. The Court reasoned that

> [w]hile six feet may reasonably be expected to keep people outside of each other's reach, ten feet goes beyond the length of two arm spans. The City has failed to show how such a long distance requirement furthers the City's interests, and, consequently, the ten-foot buffer zone may not satisfy the second requirement of *O'Brien.* In any event, the ten-foot buffer zone must also be understood in conjunction with the two-foot stage height requirement. Unlike *DLS*, the disputed section in this case requires performers to both remain ten feet from patrons and remain on a stage at least two feet from the floor. Although this Court finds the two-foot stage requirement not to be substantially greater than necessary to achieve the City's goals, this requirement helps render the ten-foot requirement unconstitutional. That is, if performers already must remain on a stage that is two feet high, it is especially difficult to see how the ten-foot buffer zone is narrowly tailored to the City's interest in preventing crime and disease.

Id. at 1045-46.

In the *J.L. Spoons* case, the business produced evidence tending to show that the ten-foot buffer zone would destroy the market for adult cabarets. *Id.* (quoting *DLS,* 107 F.3d at 413) ("if ordinance were intended to destroy the *market* for adult cabarets, it might run afoul of the First Amendment") (emphasis added). The Court determined that it must consider the effect of a ten-foot barrier on the entire market, not just one establishment. *Id*., 49 F. Supp. 2d at 1046. Reasoning that "[i]f a ten-foot buffer would substantially impact the seating at a relatively large establishment like [the business under review], then its impact on smaller adult entertainment businesses would be severe." *Id.*

However, as in the *DLS* case and numerous other cases, a six-foot buffer zone has been upheld. The Court in *J.L. Spoons* recognized that a six-foot buffer zone may reasonably be expected to keep people outside of each other's reach and accordingly, supports the government's interest in eliminating contact between the dancers and customers. On the other hand, according to the Court in *J.L. Spoons*, a ten-foot buffer zone goes beyond the length of two arm spans, and the government could not show such a length furthered its interest in curbing the negative secondary effects that creating a buffer zone enhanced. Consequently, we conclude that *J.L. Spoons* does not support Appellants' arguments.

Appellants also advance an argument that Justice Kennedy's concurrence in *Alameda Books* compels a conclusion that Chapter 111 is constitutionally deficient. They contend that Justice Kennedy's "'proportionality'" standard will be violated "[i]f a law has a minimal ***two percent impact upon speech and expression-related activities***." (Appellants' brief at p. 38, emphasis in original). Nowhere in his concurrence does Justice Kennedy set forth such a standard.[16] To the contrary, in the example

[16] The example given by Justice Kennedy referenced by Appellants is as follows:

"If we assume that the study supports the original ordinance, then most of the necessary analysis follows. We may posit that two adult stores next door to each other attract 100 patrons per day. The two businesses split apart might attract 49 patrons each. (Two patrons, perhaps, will be discouraged by the inconvenience of the separation-a relatively small cost to speech.) On the other hand, the reduction in secondary effects might be dramatic, because secondary effects may require a critical mass. Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all. If so, a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech. Indeed, the very absence of secondary effects might increase the audience for the speech; perhaps for every two people who are discouraged by the inconvenience of two-stop shopping, another two are encouraged by hospitable surroundings. In that case, secondary effects might be eliminated at no cost to speech whatsoever, and both the city and the speaker will have their interests well served." *Alameda Books*, 535 U.S. at 452-53,

referenced by Appellants that Justice Kennedy offers, he posits that the restrictions enacted to curb secondary effects may actually be eliminated with no impact on speech, and both the government and the businesses may have their interests served. *Alameda Books*, 535 U.S. at 453, 122 S. Ct. at 1743, 152 L. Ed. 2d 670.

While the six-foot buffer zone will restrict the viewing areas available at Appellants PT's business as it is presently configured, we are struck by the fact from the diagram that the staging areas are scattered in such a manner that almost any buffer zone requirement would impact the viewing areas. Certainly, adult entertainment businesses could become very creative in structuring their staging areas so that nearly any buffer zone requirement would restrict viewing areas; we are not compelled to condone this.

Moreover, we do not believe the law compels the result Appellants seek. Under the *City of Renton* standard, Metro must only afford PT's and the other Appellants a "'reasonable opportunity to open and operate.'" *Jakes Ltd.*, 284 F.3d at 891 (quoting *City of Renton*, 475 U.S. at 54, 106 S. Ct. at 932, 89 L. Ed. 2d 29). Our inquiry is not concerned with the economic impact of restrictions on a particular business; instead, "'we consider the economic effects of the ordinance in the aggregate, not at the individual level.'" *Id.* (quoting *DLS*, 107 F.3d at 413).

In *DLS*, 107 F.3d at 413, the Court reasoned that it

> consider[s] the economic effects of the ordinance in the aggregate, not at the individual level; if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment, but not if it merely has adverse effects on the individual theater. *See Spokane Arcade, Inc. v.*

122 S. Ct. at 1743, 152 L. Ed. 2d 670.

> *City of Spokane*, 75 F.3d 663, 665-66 (9th Cir. 1996). Although the plaintiffs did not present the district court with evidence regarding the effect of the ordinance on the market for adult cabarets in Chattanooga, the district court did find that DLS could comply with the ordinance by installing brass rails at a cost of about $5,000. We therefore infer that, in the aggregate, the ordinance does not foreclose a "reasonable opportunity" to operate an adult cabaret. Accordingly, we join those courts that have determined that similar buffer-zone requirements are sufficiently narrowly tailored to be valid regulations under the First Amendment. *See BSA, Inc. v. King County*, 804 F.2d 1104, 1111 (9th Cir. 1986) (six feet); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1061 (9th Cir. 1986) (ten feet); *Colacurcio v. Kent*, 944 F. Supp. 1470, 1477 (W.D. Wash. 1996) (ten feet); *Zanganeh v. Hymes*, 844 F. Supp. 1087, 1091 (D. Md.1994) (six feet); *T-Marc, Inc. v. Pinellas County*, 804 F. Supp. 1500, 1506 (M.D. Fla. 1992) (three feet).

Even if Appellant PT or other Appellants will have to do renovations to their establishments to comply with the buffer zone restrictions, this argument has previously been rejected by the courts. *DLS*, 107 F.3d at 413. All that is constitutionally required is that Metro Government refrain from effectively denying Appellants a "'reasonable opportunity to open and operate an adult [business] within the city . . . .'" *Deja Vu of Nashville*, 274 F.3d at 397 (quoting *City of Renton*, 475 U.S. at 54, 106 S. Ct. at 932, 89 L. Ed. 2d 29). Accordingly, while complying with the buffer zone restrictions *may* reduce PT's and the other Appellants' profits, they have not shown that they will not have a reasonable opportunity to operate within the borders of Jefferson County. *See e.g., id.*

Relying on federal jurisprudence, Kentucky cases, and in all respects the purpose for which Chapter 111 was drafted, we conclude that the *O'Brien* test is met against the challenges brought by Appellants.

D. PRIOR RESTRAINT REGARDING LICENSING FEES REQUIREMENTS

Appellants contend that Chapter 111 constitutes a prior restraint because they cannot engage in the defined conduct without prior governmental approval, and consequently this is "invalid in-and-of itself under the plain language of the Kentucky Constitution." At its heart, Appellants' challenge is based on their theory that the licensing scheme of Chapter 111 is a prior restraint on its face. Their attack is based on the premise that because "no one can engage in the defined conduct within the county without prior governmental approval from the Director," it is an unconstitutional prior restraint.

Appellants begin their targeted prior restraint attack on Chapter 111 by initially contending that the Kentucky Constitution offers far greater protection than the United States Constitution. Having determined *supra* that this is an erroneous statement of the law and Appellants' having failed to substantiate this statement with any Kentucky or otherwise binding precedent, we outright reject this portion of Appellants' argument.

Appellants' next attack on Chapter 111 is for the licensing fees charged. Appellants concede that the purpose of these fees is, at least in part, to defray the costs of the background checks necessary to enforce the criminal disability provisions. And, the record supports that these fees are necessary and used to offset costs typically associated

with sexually oriented businesses. Nonetheless, Appellants rely on *Murdock v. Pennsylvania*, 319 U.S. 105, 113, 63 S. Ct. 870, 87 L. Ed. 1292 (1943), for the proposition that a state may not impose a charge upon the exercise of a constitutional right. However, "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest." *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109-10 (6th Cir. 1997). Fees directed at adult entertainment establishments "must be necessary 'to achieve an overriding governmental interest.'" *Bright Lights*, 830 F. Supp. at 385 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 582, 103 S. Ct. 1365, 1370, 75 L. Ed. 2d 295 (1983)). These fees must go toward defraying the costs incurred in policing the activities associated with adult entertainment businesses or their negative secondary effects. *Id.* (citing *Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553, 1574 (M.D. Tenn. 1989)). "That adult entertainment bars often generate harmful 'secondary effects' on neighborhoods has long been recognized." *Id.* (citing *City of Renton*, 475 U.S. at 52, 106 S. Ct. at 931, 89 L. Ed. 2d 29) (upholding strict zoning ordinance aimed at adult theatres, where city had proven such harmful "secondary effects"); *Barnes*, 501 U.S. at 560, 111 S. Ct. at 2456, 89 L. Ed. 2d 29.

In *Bright Lights*, the Court decided that a $5,000 licensing fee on adult entertainment businesses was reasonably related to the cost of administering and

enforcing ordinances covering sexually oriented businesses. 830 F. Supp. at 386. And, in numerous other cases, courts have upheld licensing fees for engaging in protected activities to offset costs associated with regulating the business. *See e.g.*, *Deja Vu of Nashville*, 274 F.3d at 395; *City of Elko v. Abed*, 677 N.W.2d 455 (Minn. Ct. App. 2004); *Steverson v. City of Vicksburg, Miss.*, 900 F. Supp. 1, 16-17 (S.D. Miss. 1994).

Kentucky courts have held in accord. *See Associated Industries of Kentucky*, 912 S.W.2d at 951-52 ("The trial court correctly enunciated that states may not impose a charge upon the exercise of a First Amendment right, but fees may be imposed upon activities protected by the First Amendment if the fees are necessary to achieve an underlying, governmental interest and such fees are used to defray the cost of policing such activity.") (citing *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 515, 582, 103 S. Ct. 1365, 1370, 75 L. Ed. 2d 295 (1983); *Bright Lights*, 830 F. Supp. at 385-86). Finding record evidence that adult entertainment businesses have caused Metro to incur additional costs associated with these businesses and finding support in the case law for the circuit court's decision, we find no error on this issue.

E. ECONOMIC IMPACT CONCERNING DIRECT TIPPING

Appellants take issue with §111.35(C) which provides that

> [i]t shall be a violation of this chapter for any employee, while semi-nude in an adult business, to knowingly or intentionally receive any pay or gratuity directly from any patron or customer or for any patron or customer to knowingly or intentionally pay or give any gratuity directly to

> any employee, while said employee is semi-nude in an adult entertainment establishment.

Appellants bring this attack based on an economic impact theory. We agree with their citation to *Buckley v. Valeo*, 424 U.S. 1, 65, 96 S. Ct. 612, 656, 46 L. Ed. 2d 659, n. 76 (1976), that "money" is "a necessary and integral part of many, perhaps most, forms of communication." However, customers may still give gratuities to performers, but they may not do so directly. The restriction is a limited burden on free speech rights and well within constitutional boundaries.

Appellants next quote *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 827 (4th Cir. 1979), *cert. denied*, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980), stating "it is obvious that the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected materials." However, this statement has been taken out of context. The full quote in *Hart* is that

> [w]hile it is obvious that the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected materials, we simply do not find those exceeded by the relocation burden involved here. Zoning and other regulations for the public welfare frequently are an economic detriment to affected businesses; the fact that these carry materials protected by the First Amendment does not exempt them from the consequences of an otherwise valid regulation. Again we find *Mini-Theatres* dispositive:
>
> > The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that

> sustained zoning against claims of serious economic damage. . . .
>
> The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression. 427 U.S. at 78, 96 S. Ct. at 2456 (Powell, J., concurring).

Hart, 612 F.2d at 827-828.

Consequently, *Hart* actually holds contrary to Appellants' argument. In fact, it recognizes that under the government's police power, businesses may suffer adverse economic impacts for the public welfare. And, in case after case, perhaps more so than in any other area of business, this truth has been upheld in the realm of adult entertainment businesses. *See City of Renton*, 475 U.S. at 54, 106 S. Ct. at 932, 89 L. Ed. 2d 29 ("'[t]he inquiry for First Amendment purposes is not concerned with economic impact.'") (quoting *Young*, 427 U.S. at 78, 96 S. Ct. at 2456, 49 L. Ed. 2d 310 (Powell, J., concurring)); *Deja Vu of Nashville*, 274 F.3d at 397; *DLS*, 107 F.3d at 413; *Jakes, Ltd*., 284 F.3d at 891-92. Accordingly, we find no error.

F. STANDING ISSUES

Appellants contend that the trial court erred on issues of standing in three respects: (1) that Appellants cannot bring a void for vagueness challenge to Chapter 111, (2) that Appellants cannot attack the provisions governing minors, and (3) that Appellants lack standing to challenge the criminal disability section.

1. Vagueness challenge

The circuit court concluded that Appellants lacked standing to challenge the definitions under §111.02 under a vagueness doctrine as to what would constitute an "adult entertainment establishment because [they] admittedly qualify as such establishments." Accordingly, the circuit court found it would be "improper for Plaintiffs to assert the rights of third parties not before the Court." Appellants argue to the contrary: they have not admitted to qualifying as such establishments under §111.02.

Section 111.02 of Chapter 111 includes within its realm of the regulation of adult amusement arcades, adult book stores, adult novelty centers, adult motion picture theaters, adult stage show theaters, adult video cassette rental centers, cabarets, commercial sexual entertainment centers, and self-designated adult entertainment centers. Appellant Kentucky Restaurant Concepts, Inc., d/b/a P.T.'s Showclub, describes itself in the complaint as a "cabaret style nightclub that features live, non-obscene, clothed, nude, [and] semi-nude performance dance entertainment presented to the consenting adult public." Appellant Blue Movies, Inc., d/b/a Love Boutique "presents, sells, and rents to the consenting adult public a variety of non-obscene but sexually explicit expressive materials, such as films, videos, books and magazines." Consequently, Appellants' own description of their respective operations belie their contention that Chapter 111 is vague and does not apply to them. We agree with the circuit court that Appellants have admitted to being adult entertainment establishments and easily fit into the categories delineated in §111.02. Accordingly, we agree with the circuit court that Appellants lack standing to bring a vagueness challenge on this issue.

2. Minors

The second standing issue deals with whether Appellants can bring challenges to the restrictions on minors pursuant to Section 111.17 which provides in relevant part that

> (A) An operator or employee of an adult entertainment establishment shall not permit a person under 18 years of age to be employed by or to enter the establishment.
>
> (B) An adult entertainment establishment shall, at all times, cause the entrance of the establishment to be so attended as to insure compliance with the requirements contained in subsection (A) of this section.

Appellants contend that the circuit court erred in deciding that they lacked standing to challenge Section 111.17, the employee age requirement section of the Ordinance, prohibiting minors from being employed by or entering adult entertainment businesses. Before this Court, Appellants contend that the circuit court erred because 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***." (Appellants' brief at p. 41; emphasis in original). According to their present argument, because the Ordinance prohibits minors from being employed by or entering their businesses, if a minor does so, it is Appellants who are subject to penalties under Sections 111.99 and 111.43; thus, they contend they have standing because they are asserting their own rights, not those of minors.

Their present argument is, however, a horse of a different color as compared to their argument before the circuit court. At the trial court level, the

Appellants did not present this argument; rather, they argued that Section 111.17 impeded the fundamental rights of minors to enter their establishments. Indeed, they dedicated five pages of their trial court brief to the fundamental rights of minors; yet, not one of the plaintiffs is a minor. Appellants abandoned that argument before this Court and presented a wholly new argument: "the prohibition that Plaintiffs challenged, the violation of which is subject to a civil fine, imprisonment, and license suspension and/or revocation (*see e.g.*, §111.17(a) ("an ***operator or employee*** of an adult entertainment establishment shall not permit a person under eighteen (18) years of age to be employed by or to enter the establishment")). Consequently, Plaintiffs are not asserting the rights of minors; they are asserting ***their own rights*** to not be subject to prosecution under an ordinance provision that directly applies penalties to ***them***." (Appellants' brief at p. 41). Because this argument is presented for the first time on appeal, we decline to review it. *See Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980). Moreover, parties cannot present one argument to the trial court and another to the appellate court. *Carrier v. Commonwealth*, 142 S.W.3d 670, 677-78, n. 4 (Ky. 2004).

To the degree that Appellants' one sentence statement in a forty-eight page brief before this Court alleging that they clearly are "entitled to assert standing of their patrons" is meant to relate to minors, none of the cases to which they cite in footnote 31 of their brief so holds. Moreover, nothing Appellants have cited in the record evinces that their patrons are minors or that they intend to solicit minors as patrons. To the contrary, several Appellants have described themselves in their complaint as offering

entertainment "to the consenting adult public" or that "admission is limited only to those members over the age of 21 . . . ." Thus, if the above statement is directed toward asserting claims on behalf of their belief that minors have a fundamental right to be employed by or enter adult entertainment establishments and Appellants are asserting the rights of their minor "patrons," the averments in their complaints belie this argument. Accordingly, because Appellants asserted in their complaint that their patrons are "consenting adults" or that they limit admission to persons over the age of twenty-one, minors are not their patrons and therefore, assuming *arguendo*, that the law would allow Appellants to assert the rights of their patrons, Appellants lack standing to do so for minors.

3. Criminal disability provisions

Appellants contend the circuit court erred in holding they lacked standing to challenge the constitutionality of the criminal disability provisions. They also insist the circuit court erred in upholding the provisions as constitutional, arguing they are a clear prior restraint on constitutionally protected expressive conduct.

As for standing, we agree with the circuit court that Appellants lacked standing to challenge the constitutionality of the provisions. The United States Supreme Court has held that to challenge the constitutionality of criminal disability provisions, an applicant must show in the record he or she was convicted of one of the enumerated crimes set forth in the provisions, and the conviction is the reason for the applicant having been denied a license. *FW/PBS*, 493 U.S. 231, 110 S. Ct. 609, 107 L. Ed. 2d 603,

("[S]tanding … must affirmatively appear in the record." (internal quotations and citations omitted)). A thorough review of the record does not present any evidence to this Court that any of the Appellants were denied a license, or had a previously issued license revoked, because of a conviction for one of the crimes set forth in the criminal disability section of the Ordinance.

Nonetheless, even if Appellants had standing, the circuit court correctly found the provision to be constitutional. 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). Similarly, the criminal disability provisions in this case do not provide Metro officials discretionary authority to prohibit adult entertainment businesses and their employees from obtaining licenses. Rather, the provisions set forth an objective standard for Metro to follow that does not completely prohibit the constitutional right of erotic expression, but only temporarily serves as a method to curb the secondary effects of the adult entertainment industry. Accordingly, we find no error by the circuit court on this issue.

G. COMPLETENESS OF RULING BY THE CIRCUIT COURT

Appellants complain that the circuit court failed to rule on a number of issues in their brief. First, they contend that the circuit court did not address their

doctrine of unconstitutional condition arguments under §111.39. To the contrary, the circuit court did fully address this issue in its opinion. Appellants present no arguments on the merits of this issue. Consequently, because the circuit court did address this issue, this claim is without merit.

Second, Appellants claim that the circuit court did not address their arguments relevant to the no direct tipping provision of §111.35(C) as a violation of the right to liberty and the right to freedom of speech. However, the circuit court did address these arguments and concluded that they "have been found to meet the *O'Brien* test when challenged under the First Amendment." As to Appellants' challenges under the liberty provisions, the circuit court did address this, stating that "[t]he tip jar is a permissible way for the semi-nude dancers to receive compensation for their work because it is not direct (i.e., with nothing intervening; in an uninterrupted course) but is circuitious (i.e., in a roundabout course)."[17] This certainly addresses Appellants' claim in their Supplemental Brief in Support of Motion for Temporary Injunction, wherein they maintain that

> [b]y effectively prohibiting entertainers from receiving remuneration from their customers for the constitutionally protected services which they provide, and by prohibiting patrons from giving dancers any such compensation, Metro has unquestionably deprived "pasties and G-string" entertainers of their right to liberty protected by Ky. Const. §§1 and 11.

[17] Although the circuit court did address this clause for vagueness, which Appellants contend they were not arguing, the import of the decision was that the performers could in fact receive compensation by patrons for their work. This was the crux of Appellants' argument and was addressed by the trial court.

Consequently, Appellants' arguments that the circuit court did not address these issues lack merit.

Third, Appellants contend that the circuit court did not address their arguments that the buffer zone as set forth in §111.35(B) violated the right to liberty. However, the circuit court held that this restriction was "aimed at curtailing the secondary effects associated with adult oriented businesses." This is sufficient to address Appellants' claim of a violation of the right to liberty. Individual rights may be restricted pursuant to police power. *See e.g.*, *Deja Vu of Nashville*, 274 F.3d 377.

Fourth, Appellants contend that the circuit court did not address their claim that the licensing scheme of Chapter 111 is unconstitutional because it does not maintain the status quo pending judicial determination. This argument lacks all merit as the circuit court did address the issue of maintaining the status quo during administrative proceedings and concluded that a temporary license is given to an applicant which stays in effect pending the administrative proceedings and judicial determination. Accordingly, we are satisfied that the circuit court addressed this issue.

Fifth, Appellants claim that the circuit court failed to address their claim that the licensing scheme of Chapter 111 does not contain the requisite procedural guarantees because it does not require Metro to initiate judicial review and to carry the burden of proof in court. Appellants are referencing the third prong of the constitutional test for a licensing scheme to provide adequate and prompt judicial review of any alleged government restraint of expression as set forth in *Freedman v. Maryland*, 380 U.S. 51,

59, 85 S. Ct. 734, 739, 13 L. Ed. 2d 649 (1965). Contrary to Appellants' argument, the circuit court's opinion sufficiently addresses this issue. The circuit court found that the ordinance contained "neutral and nondiscretionary criteria for the issuance of a license." The protection under the third prong in *Freedman* applies only when the prior restraint system requires a public official to pass judgment on the content of the speech. *Deja Vu of Kentucky, Inc. v. Lexington-Fayette Urban County Gov't*, 194 F. Supp.2d 606, 614 (E.D. Ky. 2002) (citing *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 890 (6th Cir. 2000) (citing *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224, *reh'g denied* (6th Cir. 1995), *cert. denied*, 516 U.S. 909, 116 S. Ct. 277, 133 L. Ed. 2d 198 (1995))).

The circuit court concluded that the "licensing scheme in the Ordinance contains the proper judicial review mechanisms and procedural safeguards necessary to satisfy First Amendment requirements." This review included whether, in issuing a license, the licensor was engaged in reviewing the content of the conduct or using objective criteria; i.e., whether the licensing review was based on content-neutral or content-based criteria. Thus, having determined that the Ordinance is content neutral, there was no error by the circuit court in not addressing the third *Freedman* prong.

Appellants contend that the circuit court did not adjudicate whether Metro can implement a buffer zone requirement and "no tip" provision because Chapter 111 already prohibits both full nudity and "topless" entertainment. Appellants assert that these restrictions have been recognized by the court as being the "*de minimis*" restriction to satisfy the narrow tailoring component of intermediate scrutiny. Throughout its

opinion, the circuit court addresses these issues and finds that they meet the *O'Brien* test and constitutional scrutiny. Simply because the circuit court did not put the language exactly as Appellants wanted, this does not mean the circuit court did not address the issue.

Finally, Appellants argue that Metro cannot engraft a dancer buffer zone and "no tip" provision because Chapter 111 also prohibits nudity. Our Court has previously upheld similar restrictions. *See e.g., Restaurant Ventures*, 60 S.W.3d 572. Thus, we find no error.

H. SECONDARY EFFECTS

Appellants claim that the circuit court erred when it failed to allow them to factually litigate their challenges to Metro's claims of harmful secondary effects of sexually oriented businesses. Appellants further contend that the circuit court "***'cleansed' the record in order to insure that this factual issue would not be ripe for consideration in the pending motions.***" (Appellants' brief at p. 45).

Metro wholly disagrees with Appellants' characterization of what actually took place at the circuit court level. A review of the circuit court record clarifies this issue.

The record in the matter is voluminous, with the parties, as well as *amicus curiae*, filing literally hundreds of pages of briefing. In Metro's "Composite Reply in Support of Motion for Summary Judgment and Motion to Dismiss in Opposition to Plaintiff's (sic) Motion for Temporary Injunction" filed on September 10, 2004, which

apparently should have been the last brief filed in the matter prior to disposition of the case before the circuit court, Metro attached voluminous exhibits and affidavits. Appellants moved to strike this brief alleging that Metro was attempting to "sandbag" them by presenting new arguments and evidence in a reply brief. Ironically, however, in Appellants' "Supplemental Brief in Support of Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary Restraining Order" filed on August 4, 2004, *before* Metro's composite reply was filed, Appellants filed exhibits in support of Appellants' Supplemental Brief that went straight to the heart of attacking Metro's secondary effects foundation for Chapter 111. Included in the exhibits submitted by Appellants were:

> (A) Findings of Fact, Conclusions of Law, and Order in Kentucky Restaurant Concepts, Inc. v. Louisville/Jefferson County Metro Government, Case No. 02-CI-06086;
>
> (B) *Pap's A.M. v. City of Erie*, 812 A.2d 592 (Pa. 2002);
>
> (C) Affidavit of Dr. Daniel Linz, whose areas of concentration include the effects of sexually-related expression and secondary effects "studies" and information. Dr. Link was hired by Appellants to review the information relied upon by Metro as the basis for its secondary effects concerns.
>
> (D)(1) Dr. Linz's Curriculum Vitae;
>
> (D)(2) An article, authored in part by Dr. Linz, entitled "Government Regulation of 'Adult' Businesses Through Zoning and Anti-Nudity Ordinance: Debunking the Legal Myth of Negative Secondary Effects."

(E) An article entitled “Using Crime Mapping to Measure the Negative Secondary Effects of Adult Businesses in Fort Wayne, Indiana: A Quasi-Experimental Methodology” The unpublished case of *Lee v. City of Newport*, 947 F.2d 945, 1991 WL 227750 (6th Cir. Nov. 5, 1991).

(F) The affidavit of Brian Franson, the Area Director of Kentucky Restaurant Concepts, Inc.

(G)(1) A diagram of Appellant PT's floor plan.

(G)(2) A diagram of Appellant PT's, illustrating the six-foot distance restriction.

(H) The affidavit of Robert Hollis, manager of Appellant Blue Movies, LLC.

Moreover, in contravention of CR 76.28, as it stood at that time, Appellants filed a Motion for Leave to File Second Supplemental Brief on August 19, 2004, for the purpose of informing the circuit court that on August 6, 2004, this Court issued its decision in *Jameson v. Commonwealth*, (No. 2003-CA-00967-DG) (Ky. App. August 6, 2004). Relying on this Court's opinion in *Jameson*, Appellants argued that it set forth the constitutional standard to employ in determining whether an ordinance which regulates adult entertainment is constitutional, specifically as to the evidentiary basis for a local government to rely upon for secondary effects. Attached to Appellants' supplemental motion were several exhibits “designed to illustrate to [the circuit court] the type of evidence that Plaintiffs will be able to place before the Court at trial to establish that Metro did not have a sufficient “secondary effects” justification for enacting Chapter 111.” These exhibits included:

(A) *Jameson v. Commonwealth*, Slip Opinion No. 2003-CA-000967, which dealt heavily with the evidence necessary to defeat a governmental entity's claim of legislation necessary to defeat secondary effects of adult entertainment businesses;[18]

(B) The transcript of Volume 3 of the preliminary injunction hearing in *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, Case No. 3:01-CV-374-H, which included testimonial evidence and record evidence in that matter regarding whether the alleged secondary effects that Metro sought to curb by enacting were substantiated;

(B)(1) The resume of Michael Ober, an investigator hired by Appellants;

(B)(2) A document entitled "Police Service Calls for Local Bars and Cabarets" for Louisville, Kentucky from January 1998 to the present;

(C) The transcript of Volume 1 of the preliminary injunction hearing in *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, Case No. 3:01-CV-374-H, which included testimonial evidence and record evidence in that matter regarding whether the alleged secondary effects that Metro sought to curb by enacting the amendments to Chapter 111 were substantiated;

(C)(1) The Curriculum Vitae of Rebakah J. Thomas, Ph.D, who was hired by Appellants to testify at the preliminary hearing in *Kentucky Restaurants Concepts*; she had reviewed and reported on the secondary effects involving disease transmission in adult use establishments in the State of Florida;

(C)(2) A report written by Dr. Thomas titled "The Effect of Adult Use Entertainment Activities on Transmission of Disease."

[18] At the time this was filed, CR 76.28 did not allow the citation to non-final opinions.

On August 24, 2004, the circuit court granted Appellants' motion to file the supplemental brief, which included the exhibits regarding secondary effects. Thereafter, Metro filed its Composite Reply on October 10, 2004, going to great lengths to address the issues raised by Appellants' references to our Court's opinion in *Jameson* and to the exhibits submitted by Appellants in both their supplemental brief and second supplemental brief referencing secondary effects.

Despite Appellants' having filed exhibits going to the heart of a secondary effects argument in both their supplemental brief and motion to file second supplemental brief, Appellants filed a motion on September 23, 2004, to strike Metro's composite reply arguing Metro had presented new arguments and affidavits in a reply brief. In the alternative, the Appellants requested that they should be permitted to complete depositions of Metro's affiants and be given additional time to file a sur-reply with any necessary counter-affidavits.

In ruling on Appellants' motion to strike on September 28, 2004, the circuit court held that:

> [h]aving given due consideration to the arguments of the parties and the circumstances of this case, the Court declines to strike Metro Government's composite reply, but it will allow Plaintiffs to file a sur-reply on or before November 5, 2004. At that time, the matter will be taken under submission by the Court, without any further briefs being filed unless leave by Court . . .[19]

[19] For clarification purposes, it appears that the circuit court record contains an error in the chronological filings of Appellants' motion to strike and the circuit court's order ruling on that motion. The order, entered on September 28, 2004, was filed in the record *before* Appellants' motion to strike, which was entered on September 23, 2004.

Because the circuit court's ruling created confusion regarding scheduling dates, both parties filed motions for clarification. Additionally, Metro moved for the circuit court to vacate its order allowing a sur-reply by Appellants. The foundation for this motion was Metro's argument that Appellants' motion to strike was "spurious and belied by the fact the issue [was] discussed or mentioned 27 times in Metro Government's initial summary judgment memorandum."

The circuit court ruled on the parties' motions, entering an order on October 13, 2004, and amending it on October 19, 2004. Contrary to Appellants' characterization that the circuit court "***'cleansed' the record in order to insure that this factual issue would not be ripe for consideration in the pending motions"*** (Appellants' brief at p. 45), in its amended order, the circuit court ruled that

> [t]his matter came before the Court on Plaintiff's Motion to Strike the pleading of Metro Government filed on September 10, 2004, titled Metro's Composite Reply in Support of Motion for Summary Judgment and Motion to Dissolve in Opposition to Plaintiff's (sic) Motion for Temporary Injunction. After discussion, *it was agreed by all parties that this pleading would be stricken from the record along with the Plaintiff's* (sic) *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, filed on August 4, 2004.*
>
> It is further ORDERED by the Court that Metro Government is to file a new Reply which eliminates references to the secondary affidavits filed in the stricken Reply and the Plaintiffs *may file a new Exhibits* (sic) *in Support without the affidavits in Exhibit C of the stricken Report.*

> The Reply and Exhibits are to be filed no later than the close of business on October 18, 2004 (sic) and this matter will stand submitted on October 19, 2004.

(Emphasis added).

Neither party filed any motions to vacate this order. Rather, they both filed their respective briefs in a timely manner. Although Appellants had been given additional time for discovery and were permitted to file additional exhibits supporting their claims, they did not file any additional record evidence referencing secondary effects. Nonetheless, in their "Re-Filed Supplemental Brief in Support of Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary Restraining Order," they referenced the nature of secondary effects numerous times. Significantly, in footnote 9 of their Supplemental Brief, Appellants contend that

> [i]f [the circuit court] is to adopt, however, the secondary effects doctrine as a legitimate basis upon which to justify constitutional legislation in regard to the rights afforded by Ky. Const. §§ 8 and 26, Plaintiffs suggest that the proper application of that doctrine should be that as is set forth in Justice Souter's partial concurrence and partial dissent in **Pap's II** (529 U.S. at 310-317), along with the dissent which he authored) (joined by three other Justices) in **Alameda Books**, ***535 U.S. at 453-466.***

(Appellants' Supplemental Brief filed on October 18, 2004 at p. 18, n. 9) (emphasis in original). And in its redacted composite reply, Metro heavily relied on secondary effects to support the basis for the enactment of Chapter 111. Specifically, it stated that "this record demonstrates that Metro relies upon evidence 'reasonably believed to be relevant' to the problems of secondary effects associated with sexually oriented businesses."

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 complain because it entered into an agreement with Metro to strike their respective "expert" affidavits on secondary effects from the record. Nothing in the circuit court's October 19, 2004 order dictates that the issue of secondary effects would not be reviewed, only that it would honor the parties' agreement that they would remove their respective expert affidavits from the record but would allow additional discovery and evidence on the issue. Contrary to Appellants' present argument, the issue of secondary effects permeates the parties' briefing. Accordingly, the Court concludes that the parties were afforded an opportunity, and actually did, litigate the issue of secondary effects. Therefore, we reject Appellants' argument that the circuit court erred in ruling on this matter.

Furthermore, the case law squarely supports the trial court's assessment that "[c]ombating secondary effects associated with adult-oriented entertainment is an important governmental interest, which is unrelated to the suppression of free expression." Recently, the Kentucky Supreme Court, in a thorough review of case law defining sexually oriented businesses, decided specifically the issue of the evidentiary burden of secondary effects in *Jameson*, 215 S.W.3d 9. In *Jameson*, the Court decided that to shift the burden to the government, a party would have to

> present "actual and convincing evidence" sufficient to cast "direct doubt" on the fiscal court's rationale or findings or that

> the secondary effects generally associated with sexually oriented businesses are merely a pre-textual justification for the suppression of protected expression. Merely presenting evidence showing a lack of some *local* secondary effects is insufficient to override the fiscal court's rationale and findings.

Id. at 34. Furthermore,

> [t]o cast direct doubt, the challenger must present evidence that is *directly contrary* to the municipality's evidence, not simply produce a general study refuting all secondary effects. This is not a new or heightened evidentiary standard as this interpretation is consistent with the holding in *Renton*, which established the proper evidentiary burden on the parties.

Id. at 36 (quoting *City of Elko v. Abed*, 677 N.W.2d 455, 465 (Minn. App. 2004)).

Furthermore, in *Jameson*, the Court noted

> that *Alameda Books* does not require [it] to re-weigh the evidence relied upon by the fiscal court, "nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence 'reasonably believed to be relevant to the problem' addressed."

Id., 215 S.W.3d at 35 (quoting *G.M. Enterprises, Inc. v. Town of St. Joseph, Wisconsin*, 350 F.3d 631, 639-40 (7th Cir. 2003) (citing *Alameda Books*, 535 U.S. at 451, 122 S. Ct. at 1743, 152 L. Ed. 2d 670 (Kennedy, J. concurring))). Accordingly, "substantial deference is afforded local officials in their assessments and inferences of solutions to problems within their city." *Id.* (citing *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1199 (10th Cir. 2003)).

Local governments "may rely upon any evidence 'reasonably believed to be relevant' for demonstrating that completely nude dancing contributes to the deterioration of residential and commercial neighborhoods." *Jameson*, 215 S.W.3d at 30 (quoting *Alameda Books*, 535 U.S. at 438, 122 S. Ct. at 1736, 152 L. Ed. 2d 670; *City of Renton*, 475 U.S. at 51-52, 106 S. Ct. at 931, 89 L. Ed. 2d 29). "This includes, but is not limited to, the experiences of, and studies produced by, other cities, as well as 'detailed findings' in judicial opinions." *Id*. (citing *Pap's A.M.*, 529 U.S. at 297, 120 S. Ct. at 1395, 146 L. Ed. 2d 265; *City of Renton*, 475 U.S. at 50-51, 106 S. Ct. at 930-31, 89 L. Ed. 2d 29). "However, '[t]he municipality's evidence must *fairly* support the municipality's rationale for its ordinance.'" *Id.* (citing *Alameda Books*, 535 U.S. at 438, 122 S. Ct. at 1736, 152 L. Ed. 2d 670) (emphasis added in *Jameson*). "'Even in cases addressing regulations that strike closer to the core of the First Amendment values, [the Court has] accepted a state or local government's *reasonable belief* that the experience of other jurisdictions is relevant to the problem it is addressing.'" *Id.*, 215 S.W.3d at 31 (quoting *Pap's A.M.*, 529 U.S. at 297, 120 S. Ct. at 1395, 146 L. Ed. 2d 265) (emphasis added in *Jameson*).

The burden on Metro is admittedly low. *Id.* "[A local government] could rely on *any* evidence, short of 'shoddy data,' that the [local government] 'reasonably believed to be relevant' for establishing a link between the regulation and a substantial government interest." *Id.* (quoting *Alameda Books*, 535 U.S. at 438, 122 S. Ct. at 1736, 152 L. Ed. 2d 670) (citing *City of Renton*, 475 U.S. at 51-52, 106 S. Ct. 925, 89 L. Ed. 2d

29; *Barnes*, 501 U.S. at 584, 111 S. Ct. at 2469, 115 L. Ed. 2d 504) (emphasis added in *Jameson*).

The Court in *Jameson* also took note that the United States Supreme Court "has explicitly rejected the requirement that a municipality show, by empirical data, that its ordinance will successfully, 'cure' the secondary effects attributed to the establishments at issue in this case." *Id.* The Court reasoned that "'[s]uch a requirement would go too far in undermining our settled position that municipalities must be given a "reasonable opportunity to experiment with solutions" to address the secondary effects of protected speech.'" *Id*., 215 S.W.3d at 31-32 (quoting *Alameda Books*, 525 U.S. at 439, 122 S. Ct. at 1736, 152 L. Ed. 2d 670) (quoting *Young*, 427 U.S. at 71, 96 S. Ct. at 2453, 49 L. Ed. 2d 310); (citing *Pap's A.M.*, 529 U.S. at 300, 120 S. Ct. at 1397, 146 L. Ed. 2d 265 (addressing Justice Souter's dissent, wherein he would require empirical analysis, and recognizing that this idea has been "flatly rejected")); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 394, 120 S. Ct. 897, 908, 145 L. Ed. 2d 886 (2000) (noting that the "invocation of academic studies said to indicate" that certain threatened harms were not real was insufficient to cast doubt on the experience of local government).

> [I]t is irrelevant whether the local government is actually wrong regarding the extent of all the secondary effects that have actually occurred or may occur in the future when considering its decision to regulate the sexually oriented business. Rather the emphasis is on whether the decision to regulate is merely a pre-text to suppress the freedom of expression. And, of course, evidence of the occurrence, or non-occurrence, of the feared secondary effects will bear on

> the reasonableness of the legislative belief for the need of such regulation. But, such evidence must rise to the level of casting "direct doubt" on the county's evidence supporting that reasonable belief, including whether the county's interest is, indeed, substantial.

Id., 215 S.W.3d at 32.

In light of *Jameson*, the law in Kentucky is that local governments are not required to conduct their own studies to justify local ordinances. *Id*., 215 S.W.3d at 33 (citing *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1193 (9th Cir. 2004)). They may rely on studies of other localities, experiences of other governments and even judicial decisions in determining the need for regulating the secondary effects associated with the adult entertainment business.

Nonetheless, even if Appellants had set forth sufficient evidence casting direct doubt as to Metro's rationale for the ordinance, such doubt would have been rebutted by evidence set forth by Metro of actual adverse effects in the Metro area resulting from adult entertainment businesses. Although not required to submit reports evidencing secondary effects in its own locality, Metro included in the record a substantial number of police citations for prostitution, drugs and disorderly conduct issued at seven different adult entertainment businesses in the Metro area. For example, on October 30, 2003, seven prostitution violations alone were issued at Appellant Thoroughbred II's location at 4744 Poplar Level Road. It is this type of behavior that Metro unequivocally stated the Ordinance was enacted to deter.

Metro set out in the preamble of the Ordinance that "it had been the experience of other communities, as well as [Metro]" that adult entertainment facilities adversely affected nearby properties. It relied on judicial opinions, media reports, land use studies, and crime impact reports. It also relied on repeated judicial findings validating municipalities' reasonable reliance on the secondary effects evidence to support time, place and manner regulations of sexually oriented businesses. Metro additionally cited to reports concerning secondary effects in and around numerous cities spanning over twenty years. Metro unequivocally stated that its purpose was to curb secondary effects associated with adult entertainment businesses and provided the evidentiary basis for this need to satisfy the *Jameson* standard. Consequently, we conclude that the stated reasons articulated by Metro were not pretextual as a prior restraint on free expression, but rather an effort, in accord with the well-established law, to curb the secondary effects associated with adult entertainment establishments. Thus, there was no error by the trial court.

I. SEVERABILITY

Relying on their argument that the licensing fees are unconstitutional, Appellants contend the infirmity of the licensing provisions renders the entire Ordinance invalid. "The Supreme Court has held that invalid portions of a statute should be severed unless it is clear that the Legislature would not have enacted those provisions which are constitutional, independent of those provisions which are not." *Plain Dealer Publ'g Co. v. City of Lakewood*, 794 F.2d 1139, 1147 (6th Cir. 1986), *aff'd in part and remanded*,

486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (citing *I.N.S. v. Chadha*, 462 U.S. 919, 931-32, 103 S. Ct. 2764, 2774, 77 L. Ed. 2d 317 (1983)).

However, we need not address the severability issue because our previous determination that the licensing fees are not unconstitutional negates the core of Appellants' argument. Nonetheless, as Metro correctly cites in its brief, Section 111.98, which specifically addresses the issue of severability, also refutes Appellants' argument. It states each section and provision of Chapter 111 is to be independent of all other provisions and sections. Specifically, as to license applications, the section states "should any license procedure in this ordinance be deemed invalid, the substantive regulations and restrictions contained herein shall not be affected thereby." Accordingly, Appellants' severability argument is without merit.

Having reviewed the arguments presented by Appellants on appeal, we find no error. Therefore, we affirm the circuit court's decision on each of the above issues.

IV. QUESTIONS ON CROSS-APPEAL

Metro brings a cross appeal challenging the trial court's invalidation of two provisions: (1) the required disclosure of principal owners of sexually oriented business and (2) the prohibition on physical contact between erotic dancers, while they are not performing, and patrons.

A. DISCLOSURE OF SHAREHOLDERS

Pursuant to §111.36(B)(2)(b), the application for a license requires that

> [i]f the applicant is other than an individual, such as a corporation or partnership, each officer, director, general partner, principal owner and each other person who will participate directly in decisions relating to management of the business shall sign the application for a license as the applicant and comply with the requirements of this section.
>
> Pursuant to §111.02 of the ordinance, a principal owner is
>
> [a]ny person owning, directly or beneficially, twenty percent (20%) of a corporation's equity securities, 20% or more of the membership interests in a limited liability company, or, in the case of any other legal entity, 20% or more of the ownership interests in the entity. Applications for adult entertainment licenses must contain the name, address, date of birth, and a copy of a government-issued photo identification card or a set of fingerprints of all principal owners, if the applicant is one or more individuals.

The trial court recognized that local governments have a legitimate interest in identifying those persons who have direct legal responsibility for the business operations of an adult oriented business. However, it determined that the requirement of the disclosure of a twenty-percent shareholder did not meet the fourth prong of *O'Brien*, reasoning that this disclosure did not comport with local governmental interest in identifying those persons who have a direct legal responsibility for the business operations of an adult oriented establishment. Relying on *East Brooks Books*, 48 F.3d 220, the trial court held that "[a] twenty percent or less shareholder would normally have little, if any, responsibility for the everyday operation of the business, and twenty percent is generally not a controlling or significant share in the business."[20] On this basis, the trial court determined that the disclosure requirement was impermissibly broad.

[20] Any reference to less than twenty percent is an inaccurate statement of the Ordinance. Shareholders with less than twenty percent are not required to be named on the application.

We are troubled by the trial court's analysis of this issue on several grounds. First, under *East Brooks Books*, the shareholder disclosure requirement was that *any* shareholder, regardless of the amount of shares owned, was required to be disclosed.

But, second, and more importantly, we do not believe the trial court made a proper evaluation under *O'Brien's* fourth prong: whether the incidental restriction on alleged free speech or expression is no greater than essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679, 20 L. Ed. 2d 672. Following *O'Brien*, we believe that it is error for any court to simply review the disclosure requirement based only on the percentage of holdings a shareholder may have without also reviewing the purpose for which the provision was enacted.

For example, in *East Brooks Books*, an applicant would not have been issued a permit to operate if he or she "has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers." 48 F.3d at 223 (citing Memphis Ordinance 4013 sec. 20-122(b)(1)). No other provisions of the ordinance are cited in the opinion in reference to applicants. Apparently relying on this provision of the ordinance, the Sixth Circuit concluded that "the City has a legitimate interest in identifying those who are legally accountable for the operation of a sexually oriented business, and perhaps those who have a controlling or significant share in such a business." *Id*., 48 F. 3d at 226. Accordingly, section 20-122(b)(1) of the ordinance, requiring the naming of any shareholder whether they otherwise met the stated purpose for the provision, was not

geared toward furthering the legitimate governmental purposes as stated in section 20-122(b)(1) in the ordinance. Thus, it was impermissibly broad.

Appellants rely heavily on *Ellwest*, 718 F. Supp. 1553. In *Ellwest*, the ordinance under review required disclosure of principal shareholders in the application for a license to operate a sexually oriented business. The prime objective of the ordinance in the *Ellwest* case was "to protect and enhance public health by reducing the spread of sexually-transmitted diseases and other diseases which could thrive and be transmitted in the conditions found to be prevalent in the majority of adult-oriented establishments . . . ." 718 F. Supp. at 1564. The Court determined that the evidence was clear that the ordinance was "implemented to further an important and substantial government interest to protect and enhance public health by reducing the spread of diseases which thrive in the conditions created by the unregulated adult-oriented establishments." *Id*. The Court held that the required disclosure of principal shareholders would not further the stated purpose of the ordinance because shareholders are not ultimately responsible for the day-to-day operation of the business and therefore would have no control over the conditions at the adult establishments. *Id*., 718 F. Supp. at 1565.

Appellants also point to *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989). In that case, like *East Brook Books*, the disclosure requirement was a listing of all shareholders. The ordinance expressly provided that applicants would not be denied a license because of the identity of any of its shareholders. "Rather, '[t]he

information will be used solely to identify and notify control persons of their responsibilities under [the licensing ordinance] and *to hold such persons legally responsible should any provisions of [the ordinance] be violated.*'" *Id*., 887 F.2d at 225 (emphasis added in *Acorn Investments*). Accordingly, the purpose of the disclosure provision was to identify the real persons in control of the corporation or the policy makers. *Id*., 887 F.2d at 225-226. The Court held, however, that officers and directors, not shareholders, were legally responsible for the management of a corporation's business. Consequently, the Court "fail[ed] to see how the City's interest in accountability [was] served by notifying shareholders [of violations of the ordinance]. If [the adult businesses] fail[ed] to comply with the ordinance, the City [was] free to take appropriate enforcement action against the corporation and its officers and directors." *Id*., 887 F.2d at 226. Accordingly, the Court held that "there is no logical connection between the City's legitimate interest in compliance with the . . . ordinance and the rule requiring disclosure of the names of shareholders." *Id*., 887 F.2d at 226.

In *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), the ordinance under review was aimed at scatter zoning. However, requiring owner information would not further this purpose. Therefore, the Court held the requirement invalid.

From the foregoing, it can first easily be discerned that the disclosure requirement cannot be aimed at *de minimis* owners. *See East Brook Books,* 48 F.3d 220. But, second, the required disclosure must further the stated governmental interest, namely that it meet the *O'Brien* test. The stated purpose in the Ordinance presently

under review for the necessity of owners' information concerns issues of "extensive" involvement by "organized crime" in the adult entertainment industry. 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 enforcement of criminal laws, public and safety regulations. *Id.*, 734 F. Supp. at 790.

With these considerations as our background, we cannot say that the disclosure provision is overly broad. Metro has stated a 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. Therefore, disclosure of the principal owners will further Metro's legitimate interest without unduly burdening free expression. While compelled disclosure of owner information may chill expression, as was the trial court's concern, so long as the disclosure furthers a countervailing governmental interest that is substantial, the disclosure requirement may be valid. *See generally Buckley*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659. This requires a "relevant correlation" or "substantial relation" between the information required and the government interest but does not require an exact fit. *Id*. Because Metro has set the floor of disclosure at twenty percent, which is not *de minimis* when combined with Metro's stated governmental interest for the disclosure, we conclude there exists a

substantial relation to the stated governmental interest. Thus, the disclosure requirement is valid, and we reverse the trial court on this issue.

B. PROHIBITION ON TOUCHING BETWEEN DANCERS AND PATRONS

Section 111.35(D) provides that "[i]t 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. The circuit court held this provision was invalid on two grounds: (1) it is overbroad in that its reach prohibits otherwise legal and expressive touching such as a handshake between a patron and a dancer who is fully clothed and not performing at the time; and (2) it is not limited to touching on the premises of an adult entertainment establishment and could be read to prohibit a dancer from touching anyone, off premises, who happens to be a customer. The circuit court concluded that "[c]arrying this to its full extent would lead to the absurd result that a dancer could not touch someone like a husband, boyfriend, or relative if that person is also a customer of the adult entertainment establishment." Based on these reasons, the circuit court found the provision overbroad. Nonetheless, the circuit court upheld, as it should, provisions of Metro's ordinance that buffer zones and no direct tipping prohibitions that are aimed at curtailing the secondary effects associated with adult businesses.

We will first address the second reason for striking the provision. The circuit court is correct that the provision at issue does not specify that it governs entertainers and patrons only while inside an adult entertainment establishment.

According to this reasoning, an entertainer could be subject to penalties and charges if she touches a patron outside of the premises of the adult entertainment business. Thus, the circuit court found the provision to be overbroad.

Regarding the overbreadth doctrine, however, "'[i]t 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*, 209 F. Supp. 2d at 683 (quoting *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397, 108 S. Ct. 636, 645 (1988)) (citations omitted in *Kentucky Restaurant Concepts*). Certainly, the language of Section 111.35(D) *may* broadly be read as applying to contact occurring outside the premises of an adult entertainment establishment. However, to do so requires an interpretation "entirely inconsistent with the obvious purpose of the Ordinance . . . ." *Kentucky Restaurant Concepts*, 209 F. Supp. 2d at 683. "Given both the evident legislative intent and the actual text . . . the [trial court] should not contort the Ordinance 'to conjure up a hypothetical constitutional clash where none actually exists.'" *Id*. (quoting *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1036 (W.D. Ky. 1998)) (citations omitted in *Kentucky Restaurant Concepts*, 209 F. Supp. 2d at 683).

With this in mind, we do not believe that Section 111.35(D) can be read to apply to conduct outside the premises of adult entertainment businesses. A reading of the Ordinance evidences its intent is directed toward sexually oriented businesses, and no

where does it mention conduct or actions taking place outside these businesses' premises. Accordingly, we reject the circuit court's analysis on this issue.

The other question is whether the Ordinance is constitutionally infirm in its prohibition of personal contact between entertainers and patrons at all times while they are inside their places of business. The circuit court correctly cited to the Sixth Circuit interpretation of *Barnes* "not to state that all similar activities are speech as a matter of law, but instead to leave open the possibility that, on a different record, some activities may be considered not to be expressive at all," *DLS*, 107 F.3d at 409, but nonetheless struck the provision.

Numerous courts have held that a no-touch provision is not constitutionally infirm because there is no constitutionally expressive conduct involved. *See e.g., Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253-55 (5th Cir. 1995) (holding "no touch" provision not overbroad and does not burden more protected expression than necessary); *American Show Bar Series, Inc. v. Sullivan County*, 30 S.W.3d 324, 338 (Tenn. Ct. App. 2000); *2300, Inc. v. City of Arlington*, 888 S.W.2d 123, 129 (Tex. Ct. App. 1994) (upholding "no touching" provision). We agree with these courts that touching between a performer and a customer is not protected expression. Simply because United States Supreme Court case law has thrust upon us a mandate that erotic expression deserves at least minimal First Amendment protection, this does not mean that all activities taking place in such an environment are likewise protected. Because (1) performers have no constitutional right to touch patrons, (2) patrons have no constitutional right to touch

performers, and (3) government can pass legislation designed to reduce the negative secondary effects of sexually oriented businesses, we disagree with the circuit court that the no-touch provision is overbroad.

In conclusion, we find no error by the circuit court on the issues on which Appellants appeal; thus, we affirm. As to the cross-appeal brought by Metro, we find both provisions to be constitutionally sound and hereby reverse the circuit court on these issues. As mentioned earlier, we believe we are bound by the interpretation of the federal Constitution, which is the floor for the level of protection given to free expression and free speech, to conclude that the conduct at issue is entitled to some level of protection, but this type of conduct only exists at the outer most boundary of freedom of expression and speech. Without the mandate by federal jurisprudence that we grant such protection, meaning that Kentucky's Constitution can give no lesser protection to this form of alleged expression, it is not evident that Kentucky would grant any protection at all to erotic expression if we had the choice.

We are keenly aware that many have relied on freedom of expression to condone behavior that would not be otherwise constitutionally protected. We find enlightening the language in *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972, 974 (1942) wherein the high Court of Kentucky, in ruling on a freedom of religion issue, quoted *Jones v. City of Opelika*, 316 U.S. 584, 593, 62 S. Ct. 1231, 1237, 86 L. Ed. 1691 (1942) *rev'd on other grounds on reh'g, Jones v. City of Opelika*, 319 U.S. 103, 63 S. Ct. 890, 87 L. Ed. 1290 (1943), as follows:

> They are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument. Conflicts in the exercise of rights arise and the conflicting forces seek adjustments in the courts, as do these parties, claiming on the one side the freedom of religion, speech and the press, guaranteed by the Fourteenth Amendment, and on the other the right to employ the sovereign power explicitly reserved to the State by the Tenth Amendment to insure orderly living without which constitutional guarantees of civil liberties would be a mockery. Courts, no more than Constitutions, can intrude into the consciences of men or compel them to believe contrary to their faith or think contrary to their convictions, but courts are competent to adjudge the acts men do under color of a constitutional right, such as that of freedom of speech or of the press or the free exercise of religion and to determine whether the claimed right is limited by other recognized powers, equally precious to mankind. So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows.

And taking this line of reasoning one step further, we agree with the Court in *Ladd v. Commonwealth*, 313 Ky. 754, 761, 233 S.W.2d 517, 521 (1950), holding that when an individual is engaged in a right protected wherein he seeks to receive a fee or make a monetary profit, it "becomes a matter for proper regulation by the state." For the reasons as analyzed, we conclude the Ordinance at issue to be constitutionally sound.

HOWARD, JUDGE, CONCURS.

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