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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000967-DG

EDWARD GREEN JAMESON — APPELLANT

ON DISCRETIONARY REVIEW
FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE R. JEFFREY HINES, JUDGE
ACTION NOS. 00-M-01796, 00-M-01797 AND 02-XX-00004

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Edward Green Jameson has petitioned for review from an order of the McCracken Circuit Court entered on April 10, 2003, which affirmed an order of the McCracken District Court denying Jameson's motion to declare McCracken County Ordinance No. 2000-4 unconstitutional and to dismiss the criminal complaint against him.[1] Having concluded that recent

[1] After Jameson's motion to declare Ordinance No. 2000-4 unconstitutional was denied by the district court, Jameson entered a conditional plea of guilty to the charges against him, while preserving his right to appeal to the circuit court the determination as to the ordinance's constitutionality. Hence, as

case law from the Supreme Court of the United States requires that this matter be remanded for further fact-finding, but that the McCracken District Court did not otherwise err by denying Jameson's motion, we affirm in part, vacate in part and remand for further proceedings.

McCracken County Ordinance No. 2000-4 became effective on April 26, 2000.[2] The ordinance provided for the "regulation of sexually oriented businesses and their employees." Among other things, the ordinance classified certain establishments as falling within the definition of what was termed an "Adult Cabaret."[3] The ordinance restricted the times during which an

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compared to other cases dealing with the constitutionality of regulations which target sexually-oriented businesses, the case at bar arrives before us in a somewhat unusual manner. Typically, when a First Amendment challenge is made against a regulation which targets sexually-oriented businesses, the aggrieved party will file an original action at the circuit court level seeking injunctive relief to prohibit the enforcement of the regulation at issue. See, e.g., Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government, Ky.App., 60 S.W.3d 572, 575 (2001)(noting that "[s]everal adult entertainment establishments and their employees brought [an action in Fayette Circuit Court] challenging the constitutionality of ordinances enacted by the Lexington-Fayette Urban County Government"); and Schultz v. City of Cumberland, 228 F.3d 831, 839 (7th Cir. 2000)(noting that "plaintiffs sued Cumberland in [federal] district court seeking a permanent injunction against enforcement of the" regulation in question).

[2] Ordinance No. 2000-4 was enacted by the McCracken County Fiscal Court.

[3] Ordinance No. 2000-4(II)(3) provides in full as follows:

> "Adult Cabaret" means a night club, bar, restaurant, or similar commercial establishment which regularly features:
>
> (a) Persons who appear in a state of nudity or semi-nude; or
>
> (b) Live performance[s] which are characterized by the exposure of

adult cabaret could remain open for business,[4] and provided for the regulation of any "live performances" that might take place within the establishment. According to the terms of the ordinance, it was aimed at controlling the alleged negative, secondary effects associated with sexually-oriented businesses, e.g., increased crime rates and decreased property values in and around the areas where such businesses are located.

In August 2000 Jameson was employed as a manager of Regina's II[5] in Paducah, McCracken County, Kentucky. There is no dispute that Regina's II, which featured live exotic dancing, was an "Adult Cabaret" as defined by Ordinance No. 2000-4. On August 19, 2000, Jameson was criminally charged by a member of the McCracken County Sheriff's Department for various violations of Ordinance No. 2000-4. Specifically, Jameson was cited for operating past the 1:00 a.m. mandatory closing time, for permitting the dancers to appear totally nude while performing,

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> "specified anatomical areas" or by "specified sexual activities"; or
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> (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".

[4] Ordinance No. 2000-4 (IV)(e) provided that "[n]o establishment, except for an adult motel, shall remain open at any time between the hours of one o'clock (1:00) a.m. and six o'clock (6:00) a.m."

[5] According to the record, Regina's II was owned by Nightclubs, Inc.

and for allowing physical contact between the dancers and the patrons.

On October 31, 2000, Jameson filed a motion with the McCracken District Court, asking the court to declare Ordinance No. 2000-4 unconstitutional on its face and as applied to him, and to dismiss the criminal complaint against him. Jameson argued that Ordinance No. 2000-4 violated several provisions of the United States Constitution and the Kentucky Constitution. Jameson argued, inter alia, that Ordinance No. 2000-4 as applied to him imposed an impermissible burden on his right to freedom of expression as guaranteed by the First Amendment to the United States Constitution and Section 1 of the Kentucky Constitution.

Approximately one year later, on October 18, 2001, an evidentiary hearing on the matter was held before the district court. During this hearing, Jameson introduced evidence in an attempt to show that the alleged negative, secondary effects associated with sexually-oriented businesses were not present in and around the area of Regina's II. Jameson argued that this evidence supported his claim that Ordinance No. 2000-4 was not enacted to combat these secondary effects, but that it was instead enacted specifically to prohibit nude dancing and related forms of expression.

On May 31, 2002, the district court entered an order denying Jameson's motion to declare Ordinance No. 2000-4

unconstitutional and to dismiss the criminal complaint against him. On July 2, 2002, Jameson entered a conditional plea of guilty to the various charges against him, while preserving his right to appeal the denial of his motion to declare the ordinance unconstitutional. Jameson was sentenced to 90 days in jail, which was probated for a period of two years, and fined $500.00.

Jameson appealed to the McCracken Circuit Court and once again argued that Ordinance No. 2000-4 as applied to him was an unconstitutional restraint on his freedom of expression. On April 10, 2003, the circuit court entered an order affirming the district court's denial of Jameson's motion to declare Ordinance No. 2000-4 unconstitutional. Jameson subsequently filed a motion seeking discretionary review with this Court, which was granted on October 14, 2003.

Jameson raises several arguments on appeal. He first claims that Section VII(b) of the ordinance, which is among those provisions regulating live performances, is "a content-based regulation of speech," and must therefore be subjected to strict judicial scrutiny. Section VII(b) of the ordinance states in full as follows:

> No person shall appear nude or in a state of nudity while engaged in any live

> performance on the premises of any sexually oriented business.[6]

"Nude" or "state of nudity" is further defined in Section II (15) as:

> [T]he showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discern[i]bly turgid state.

Jameson claims that Section VII(b)'s purpose "is specifically and solely to ban nude dancing in sexually oriented businesses; a specific type of speech at a specific type of establishment." Hence, Jameson argues that this provision represents a regulation of the particular message involved and that it must therefore be subjected to strict judicial scrutiny.[7] Thus, Jameson contends that the district court erred by not analyzing Section VII(b) pursuant to a strict scrutiny standard. While we agree that Section VII(b) is a content-based regulation of speech, we do not agree that strict scrutiny is the correct

[6] Section II(20) defines "Sexually Oriented Business" as "an adult amusement arcade, adult book store, adult novelty store, adult video store, adult cabaret, adult motel, adult motion picture theater, adult stage theater, escort agency, or sexual encounter center."

[7] See Texas v. Johnson, 491 U.S. 397, 403, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342 (1989)(stating that if a regulation is related to expression, intermediate scrutiny is not appropriate and a more "demanding" standard is required).

standard to be used to determine the constitutionality of this provision.

As an initial matter, we note that exotic dancing is generally considered to be a form of expression which enjoys at least some protection under the First Amendment. In Barnes v. Glen Theatre, Inc.,[8] Chief Justice Rehnquist in writing for the plurality stated that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." In the case sub judice, the Commonwealth has conceded that, from a factual standpoint, the type of exotic dancing featured at Regina's II fell within this particular realm of protected speech.

Thus, since the First Amendment is in fact implicated, we turn to determining whether strict scrutiny analysis is required. The Supreme Court of the United States has provided lower courts with two somewhat differing, yet overlapping standards by which to determine the constitutionality of regulations specifically targeting sexually-oriented businesses.

[8] 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991)(plurality opinion). See also Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981)(stating that "nude dancing is not without its First Amendment protections from official regulation"); and City of Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265 (2000)(plurality opinion)(stating that "[b]eing 'in a state of nudity' is not an inherently expressive condition. As we explained in Barnes, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection").

Due to the complexity of these standards, a review of the development of the Supreme Court's jurisprudence in this area is in order.

We first turn to the Supreme Court's treatment of zoning ordinances which specifically target sexually-oriented businesses. In Young v. American Mini Theatres, Inc.,[9] the Supreme Court considered a First Amendment challenge to a portion of the City of Detroit's zoning ordinance which required that "adult" theaters "not be located within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area" [footnote omitted].[10] Although a majority of the justices could not agree on a single rationale, a majority of the Court did recognize that even though the adult theaters were singled out under the zoning laws because of the content of the films that were shown in those establishments, the city could constitutionally regulate the businesses in that manner since the purpose was to control the negative, secondary effects associated with such establishments.[11]

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[9] 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

[10] 427 U.S. at 52.

[11] Id. 427 U.S. at 62-63 (holding that "[p]utting to one side for the moment the fact that adult motion picture theaters must satisfy a locational restriction not applicable to other theaters, we are also persuaded that the 1,000-foot restriction does not, in itself, create an impermissible restraint on protected communication. The city's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support that kind of restriction applicable to all theaters within the city limits. In short, apart from the fact that the ordinances treat adult theaters

Approximately ten years later, the Supreme Court upheld a similar zoning ordinance in City of Renton v. Playtime Theatres, Inc.[12] The Court invoked a three-step analysis in upholding the city's zoning ordinance. First, since the ordinance did "not ban adult theaters altogether," but merely regulated where the theaters could be located, "[t]he ordinance [could be] properly analyzed as a form of time, place, and manner regulation."[13] The Court next asked whether the ordinance was content-based or content-neutral. If the Court determined that the ordinance was content-neutral, it would be upheld "so long as [it was] designed to serve a substantial governmental interest and [did] not unreasonably limit alternative avenues of communication."[14]

In determining whether the ordinance was content-based or content-neutral, the Court noted that the ordinance did "not appear to fit neatly into either the 'content-based' or the 'content-neutral' category."[15] However, in keeping with its prior decision in American Mini Theatres, the Court held that

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differently from other theaters and the fact that the classification is predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment").

[12] 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

[13] 475 U.S. at 46.

[14] Id. 475 U.S. at 47.

[15] Id.

even though "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters[,]" the ordinance was nonetheless "completely consistent with our definition of 'content-neutral' speech regulations[.]"[16] Therefore, the Court held that the ordinance, which was aimed at combating the negative, secondary effects associated with sexually-oriented businesses, would be subjected to review under the standards reserved for "content-neutral" time, place and manner regulations.[17] Finally, in the third step of its analysis, the Court held that the ordinance did serve a substantial governmental interest without unreasonably limiting alternative avenues of communication.

Hence, American Mini Theatres and Renton both stand for the proposition that a content-based zoning ordinance targeting sexually-oriented businesses may nevertheless be treated like a content-neutral regulation if the ordinance is aimed at combating the negative, secondary effects associated with such businesses.[18] In other words, since these ordinances

[16] Id. 475 U.S. at 47-48.

[17] Id. 475 U.S. at 49 (stating that "[i]t was with this understanding in mind that, in American Mini Theatres, a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations").

[18] As some lower federal courts have noted, the better reading of Renton is that the Court treated a technically content-based regulation as if it were a content-neutral regulation. See Richland Bookmart, Inc. v. Nichols, 137 F.3d

do not totally prohibit sexually-oriented businesses, but merely restrict the areas in which these businesses may be located, the ordinances are not subjected to strict scrutiny analysis. Rather, since the ordinances are aimed at combating the negative, secondary effects associated with such businesses, they are instead subjected to an intermediate level standard of review.

We next turn to the Supreme Court's consideration of regulations governing nudity. In Barnes, the regulation at issue was an Indiana statute "proscribing public nudity across the board."[19] As applied to establishments featuring exotic dancing, the statute had the effect of requiring the dancers to wear "pasties" and "G-strings." The Court upheld the statute, but found itself fragmented, with no single rationale uniting a

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435, 440 (6th Cir. 1998)(stating that "[o]ver the last decade, some courts reviewing these type of regulations started simply referring to them as content-neutral without explaining, as the Supreme Court carefully did in both American Mini Theatres and City of Renton, that they are in fact content-based but are to be treated like content-neutral regulations for some purposes. Thus, in some cases, a kind of legal fiction has been created that calls regulation of such literature 'content neutral' when what is meant is only that the regulation is constitutionally valid [emphasis original][citations omitted]"); and DiMa Corp. v. Town of Hallie, 185 F.3d 823, 828 (7th Cir. 1999)(discussing Renton and stating that "[t]he Court held that regulation of sexually explicit material would be treated like content-neutral time, place, and manner regulations, not that it was content-neutral [emphases original]"). See also City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448, 122 S.Ct. 1728, 1741, 152 L.Ed.2d 670 (2002)(Kennedy, J., concurring in the judgment)(noting that designating ordinances like those at issue in Renton as being content-neutral "was something of a fiction," but that despite the fact that such ordinances are in reality content-based, "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").

[19] 501 U.S. at 566.

majority of the justices. However, as lower federal courts have noted, Justice Souter's opinion concurring in the judgment was "on the narrowest grounds," and therefore became "binding" on lower courts.[20]

Justice Souter agreed with the plurality that the less stringent test as announced in United States v. O'Brien,[21] should be the standard by which to determine the statute's constitutionality. In O'Brien, the Court announced a four-pronged test for determining the constitutionality of regulations that were aimed at conduct, but which also had the effect of placing incidental limitations on speech:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[22]

With respect to the second prong from O'Brien, Justice Souter cited the Court's previous holding in Renton and stated that "substantial governmental interests" should include goals

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[20] See DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 408-09 (6th Cir. 1997)(citing Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 993-94, 51 L.Ed.2d 260 (1977)(instructing lower courts that where no single opinion unites a majority of the Court, they should follow the opinion concurring in the judgment on the narrowest grounds)).

[21] 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

[22] 391 U.S. at 377.

of "preventing prostitution, sexual assault, and other criminal activity" that is associated with sexually-oriented businesses.[23] Hence, Justice Souter concluded that Indiana's public nudity ban could be constitutionally applied to prohibit totally nude dancing in order to further the state's interest in controlling the negative, secondary effects that sexually-oriented businesses had on the surrounding areas of the community.

Finally, with respect to the fourth prong from O'Brien, Justice Souter stated that it too had been satisfied:

> The fourth O'Brien condition, that the restriction be no greater than essential to further the governmental interest, requires little discussion. Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message.[24]

Subsequently, in Pap's A.M., a four-justice plurality once again applied the O'Brien test in upholding a city ordinance prohibiting persons from appearing in public "in a state of nudity."[25] As in Barnes, exotic dancers were compelled to wear "pasties" and "G-strings" in order to comply with the terms of the ordinance while performing in sexually-oriented

[23] Barnes, 501 U.S. at 583.

[24] Id. 501 U.S. at 587.

[25] Pap's A.M., 529 U.S. at 283.

businesses. In writing for the four-justice plurality, Justice O'Connor stated that applying the ban to prohibit totally nude dancing was justified on grounds that "the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood."[26]

In discussing the fourth prong of the O'Brien test, Justice O'Connor stated:

> The fourth and final O'Brien factor--that the restriction is no greater than is essential to the furtherance of the government interest--is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is de minimis. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.[27]

Thus, as in Barnes, the ordinance in Pap's A.M. withstood a First Amendment challenge.

Therefore, both Barnes and Pap's A.M. stand for the proposition that a content-neutral, general ban on public nudity may be constitutionally applied to prohibit totally nude dancing in order to combat the negative, secondary effects associated with sexually-oriented businesses. Under both of these cases, the Supreme Court applied an intermediate level standard of

[26] Id. 529 U.S. at 293.

[27] Id. 529 U.S. at 301.

review in upholding the regulations at issue. Finally, both Barnes and Pap's A.M. indicate that requiring exotic dancers to wear pasties and G-strings has a de minimis impact on the message being conveyed.

The preceding summary shows that the Supreme Court has developed two somewhat distinguishable, yet overlapping standards to guide lower courts when determining the constitutionality of regulations targeting sexually-oriented businesses. As the Court in Barnes noted, the Renton-type time, place and manner test "has been interpreted to embody much the same standards as those set forth in [O'Brien]."[28] Thus, having established a basic framework, we now apply the aforementioned principles to Section VII(b).

As we mentioned above, Section VII(b) prohibits a person from appearing nude or in a state of nudity "while engaged in any live performance on the premises of any sexually oriented business." Thus, unlike the statute at issue in Barnes, and the ordinance at issue in Pap's A.M., Section VII(b)

[28] See Barnes, 501 U.S. at 566; Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298, 104 S.Ct. 3065, 3071, 82 L.Ed.2d 221 (1984)(noting that there is little, if any, difference between the four-pronged O'Brien test and the standard applied to time, place and manner restrictions); and Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 714 (7th Cir. 2003)(stating that "the analytical frameworks and standards utilized by the Court in evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable"). But see Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida, 337 F.3d 1251, 1265 n.13 (11th Cir. 2003)(analyzing a zoning ordinance governing sexually-oriented business pursuant to the Renton time, place and manner standard, and an ordinance governing public nudity under the O'Brien standard).

is not a content-neutral ban on nudity. Rather, Section VII(b) only prohibits nudity in a sexually-oriented business if an individual is "engaged in any live performance." Apparently, under the terms of this provision, an individual would not be in violation of Section VII(b) if she appeared nude while merely serving drinks to the patrons. Therefore, since Section VII(b)'s ban on nudity is content-based, it does not fit squarely under the Barnes and Pap's A.M. mode of analysis.

Similarly, Section VII(b) is not a zoning-type regulation which merely restricts the availability of exotic dancing to certain locations within the county; it is a complete ban on totally nude live performances on the premises of sexually-oriented businesses. Thus, the Supreme Court's Renton-type analysis would also seem to be inapplicable. Hence, at first blush, it would appear that Section VII(b) should be subjected to a strict scrutiny standard of review. However, taking into account the overlapping nature of the two standards discussed above, we hold that Section VII(b) may be properly analyzed pursuant to an intermediate level standard of review.

In both Justice Souter's concurring opinion in Barnes, and Justice O'Connor's plurality opinion in Pap's A.M., the "secondary effects" rationale from Renton was extended to justify the application of an intermediate level of scrutiny to the Court's consideration of public nudity bans. In both cases,

the application of the general public nudity bans against sexually-oriented businesses was upheld in light of the governments' efforts to control the negative, secondary effects associated with such businesses.

In the case sub judice, Ordinance No. 2000-4 is clearly aimed at controlling those same negative, secondary effects. The McCracken County Fiscal Court made several findings linking the presence of sexually-oriented businesses in an area to decreased property values, increased crime rates, and increased risks of the spread of sexually-transmitted diseases. Accordingly, a logical extension of Renton, Barnes, and Pap's A.M. is that a prohibition on totally nude dancing, although content-based, may nevertheless be subjected to an intermediate level standard of review if the regulation is aimed at controlling the negative, secondary effects associated with sexually-oriented businesses.

While it is true that Section VII(b) effectuates a complete ban on totally nude dancing, whereas the ordinance at issue in Renton did not ban adult theaters altogether, we conclude that the "de minimis" language from Barnes and Pap's A.M. further justifies the application of an intermediate level standard of review. For example, in Pap's A.M., the plurality stated that any "muting" of the erotic message that took place

by prohibiting the "last stitch" from being dropped during an exotic dance was de minimis.[29]

Under Ordinance No. 2000-4, exotic dancers are permitted to perform "semi-nude."[30] Similar to the situations in Barnes and Pap's A.M., this has the effect of requiring female dancers to wear pasties and G-strings. Therefore, in keeping with the decisions in Barnes and Pap's A.M., as between totally nude exotic dancing and exotic dancing that is accompanied by pasties and G-strings, we hold that any muting of the erotic message that occurs by prohibiting the totally nude exotic dancing is de minimis.[31] Accordingly, Section VII(b) may be appropriately analyzed pursuant to an intermediate level standard of review.

We find support for this result in Fly-Fish, Inc. v. City of Cocoa Beach.[32] In Fly-Fish, the United States Court of

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[29] Pap's A.M., 529 U.S. at 294.

[30] Section II(17) defines "semi-nude" as follows:

> "Semi-nude" or in a "semi-nude condition" means the showing of the female breast below a horizontal line across the top of the areolae at its highest point or the showing of the male or female buttocks. This definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, skirt, leotard, bathing suit, or other wearing apparel provided the areolae is not exposed in whole or in part.

[31] This holding is further bolstered by different language from Barnes and Pap's A.M., which indicates that nude dancing is only "marginally" protected by, or within the "outer ambits of" the First Amendment. See Barnes, 501 U.S. at 566; and Pap's A.M., 529 U.S. at 289.

[32] 337 F.3d 1301 (11th Cir. 2003).

Appeals for the Eleventh Circuit considered a constitutional challenge to a city ordinance prohibiting employees of sexually-oriented businesses from appearing totally nude within those establishments. The Eleventh Circuit held that although the ordinance was clearly content-based, inasmuch as it specifically targeted nude dancing,[33] it would nonetheless be subjected to an intermediate level standard of review. The Court stated that since the ordinance merely regulated the manner in which the erotic message was conveyed, i.e., it did not prohibit exotic dancing, but merely required that there be "more clothing on the messenger," and that since any muting of the message caused by a ban on total nudity was de minimis, an intermediate level standard of review was appropriate.[34]

Therefore, Section VII(b) may be appropriately analyzed pursuant to an intermediate level standard of review. Accordingly, the district court did not err by denying Jameson's request to apply a strict scrutiny standard of review.

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[33] Similar to the ordinance in the instant case, the ordinance at issue in Fly-Fish was not a content-neutral ban on public nudity in general, but was instead a ban on nudity within sexually-oriented businesses only. Id. at 1306.

[34] Id. at 1308. See also Schultz, 228 F.3d at 847 (applying intermediate level scrutiny to a content-based ordinance prohibiting employees of sexually-oriented businesses from appearing nude within those establishments and stating that "[i]nsofar as [the ordinance] prohibits full nudity and requires dancers to wear pasties and G-strings while performing, [the ordinance] does not offend the First Amendment").

We next turn to Jameson's claim that if we determine that intermediate scrutiny is the appropriate standard of review, the case must nonetheless be remanded to the district court in light of the Supreme Court's recent decision in Alameda Books.[35] We agree.

In Alameda Books, the Supreme Court's plurality opinion clarified the procedure involved when a party has challenged a regulation targeting the secondary effects associated with sexually-oriented businesses:

> In Renton, we . . . held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in Renton. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its

[35] 535 U.S. at 425. Alameda Books was rendered on May 13, 2002. In the case at bar, the district court's order denying Jameson's motion to declare Ordinance No. 2000-4 unconstitutional was entered on May 31, 2002. Our review of the briefs filed with the district court shows that it was likely not aware of the Alameda Books decision prior to denying Jameson's motion.

ordinance [citations omitted][emphasis added].[36]

The Supreme Court has noted that when enacting ordinances aimed at combating the negative, secondary effects associated with sexually-oriented businesses, cities are entitled to rely on studies from other municipalities and even prior court precedents which tend to establish the link between sexually-oriented businesses and those negative, secondary effects.[37] However, as Alameda Books makes clear, if a party challenging the regulation casts doubt on the city's pre-

[36] 535 U.S. at 438-39.

[37] See Pap's A.M., 529 U.S. at 296-97 stating:

> [I]n terms of demonstrating that such secondary effects pose a threat, the city need not 'conduct new studies or produce evidence independent of that already generated by other cities' to demonstrate the problem of secondary effects, 'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.' Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in Renton, American Mini Theatres, and California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in Renton and American Mini Theatres to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. In fact, Erie expressly relied on Barnes and its discussion of secondary effects, including its reference to Renton and American Mini Theatres. Even in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing" [citations omitted].

enactment rationale, the burden shifts back to the city to proffer supplemental evidence justifying the regulation.

In Peek-A-Boo Lounge, the United States Court of Appeals for the Eleventh Circuit noted that "[t]he significance of Alameda Books is that it clarifies how the court is to interpret the third step of the Renton analysis as well as the second prong of the O'Brien test," i.e., the reviewing court must determine whether the legislative body can proffer supplementary evidence tending to show that the challenged regulation furthers a substantial governmental interest without unreasonably limiting alternative avenues of communication.[38] Accordingly, post-Alameda Books, when a party successfully casts doubt on a government's pre-enactment rationale for regulating sexually-oriented businesses, legislative bodies are required to supplement their evidence before the court to show that the challenged regulation furthers the government's interest in combating the negative, secondary effects associated with sexually-oriented businesses.

In the instant case, our review of the record shows that Jameson presented unrebutted evidence before the district court which tended to cast doubt on the fiscal court's pre-enactment justifications for Section VII(b). For example, Brent Stringer, chief dispatcher for Paducah/McCracken E-911

[38] 337 F.3d at 1264-65.

Communications Services, offered records from his department indicating that the number of times local police officers had been asked to respond to various incidents at Regina's II and The Playhouse, two sexually-oriented businesses, was lower than at two non-sexually-oriented nightclubs in the same area of the city. In addition, Jameson offered the deposition testimony of George Wiley, a realtor, who stated that property values in and around the area where Regina's II was located had actually increased over time. Finally, Jameson presented the testimony of Joann Warner, owner of The Playhouse, and Melissa Meyer, an employee of The Playhouse. Both women testified regarding various rules and regulations that were in place to prevent the spread of sexually-transmitted diseases at that establishment.

Hence, in light of Alameda Books, we conclude that Jameson's unrebutted evidence was sufficient to cast doubt on the fiscal court's pre-enactment rationale for Section VII(b). In the face of such evidence, the burden has shifted back to the fiscal court to proffer supplementary evidence justifying the regulation. However, since Alameda Books had not yet been rendered at the time of the evidentiary hearing conducted on October 18, 2001, the fiscal court must be given an opportunity to respond to Jameson's evidence. Accordingly, a remand of this matter to the district court is necessary to determine whether the fiscal court can proffer supplementary evidence indicating

that Section VII(b)'s ban on totally nude dancing furthers a substantial governmental interest in McCracken County without unreasonably limiting alternative avenues of communication.[39] On remand, the fiscal court's legislative judgment should be upheld as long as the evidence upon which it relies is credible.[40]

We next turn to Jameson's claim that Ordinance No. 2000-4, as a whole, represents an example of "arbitrary legislation," which, according to Jameson, violates Section 2 of the Kentucky Constitution. In support of this argument, Jameson restates his previous assertions that the fiscal court acted improperly by (1) initially enacting Ordinance No. 2000-4 without establishing a specific link between sexually-oriented businesses and negative, secondary effects in McCracken County; and (2) by failing to produce evidence at the October 18, 2001, hearing justifying the enactment of Ordinance No. 2000-4.

To the extent Jameson is asking for the same type of relief he seeks with respect to his federal constitutional

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[39] See id. at 1273 (stating that "in light of our finding that the Adult Lounges have managed to cast direct doubt on the County's rationale for adopting Ordinance 99-18, the District Court must decide by a preponderance of the available evidence (including whatever additional evidence the County places in the record) whether there remains credible evidence upon which the County could reasonably rely in concluding that the ordinance would combat the secondary effects of adult entertainment establishments in Manatee County. The burden lies with the County in this regard" [emphasis added]).

[40] Id. (stating that on remand, "the District Court should be careful not to substitute its own judgment for that of the County. The County's legislative judgment should be upheld provided that the County can show that its judgment is still supported by credible evidence, upon which the County reasonably relies").

arguments, our preceding analysis renders this claim moot, and we need not address this issue any further.[41] To the extent Jameson is requesting additional relief,[42] Jameson has not attacked any specific provision within Ordinance No. 2000-4 as being arbitrary and in violation of Section 2. Accordingly, we decline to discuss the merits of this argument on appeal.

Next, we address Jameson's claim that since the regulations prohibiting nude dancing only apply to "sexually oriented businesses," Ordinance No. 2000-4 is a violation of the Equal Protection Clause of the Kentucky Constitution.[43] Specifically, Jameson argues:

> [A]ny business in McCracken County can have nude entertainment as long as it is not considered part of the regular performances due to the fact that it does not fall within the definition of a sexually oriented business. Such a distinction without any rational relation is discriminatory.

As this Court has previously noted, the negative, secondary effects associated with sexually-oriented businesses are unique to those establishments.[44] Therefore, the fiscal

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[41] See Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 184 (2001)(stating that issues raised on appeal which are rendered moot "require no further discussion").

[42] It is unclear whether Jameson's Section 2 constitutional claim is offered as a request for additional relief, or as an alternative basis for invalidating the ordinance.

[43] See Ky. Const. § 3.

[44] See Restaurant Ventures, 60 S.W.3d at 579 (rejecting a similar Equal Protection Clause argument).

court could have reasonably concluded that an establishment which regularly features adult entertainment would be more likely to attract the negative, secondary effects associated with sexually-oriented businesses than an establishment which only occasionally features adult-type entertainment. Accordingly, we reject Jameson's claim that such a distinction is "without any rational relation," and violative of the Equal Protection Clause of the Kentucky Constitution.

Jameson next claims that Ordinance No. 2000-4 is unconstitutionally overbroad, and that Section VII(d), which prohibits physical contact between customers and dancers, is unconstitutionally vague. We reject both contentions.

With respect to Jameson's overbreadth claim, he appears to argue that since some "mainstream" movies shown in conventional theaters depict sexual activities which would not be permitted at Regina's II, Ordinance No. 2000-4 reaches "a range of protected speech" and is therefore unconstitutionally overbroad. Obviously, this argument overlooks the important difference between the depiction of a certain sexual activity on film and the live performance of that same activity in front of a group of customers at an adult cabaret. Accordingly, Jameson's overbreadth argument is plainly without merit.

With respect to Jameson's vagueness claim, he asserts that Section VII(d), which prohibits physical contact between

patrons and exotic dancers, does "not clearly draw[ ]" the line between prohibited and acceptable conduct. Specifically, he contends that it could be interpreted to prohibit "social niceties, such as a handshake." We disagree.

A law is impermissibly vague if it is worded in such a way that a person of ordinary intelligence cannot reasonably discern what activity is prohibited.[45] Section VII(d) states in full that "[n]o entertainer or employee shall be permitted to have any physical contact with any patron during any performance." Hence, Section VII(d) only prohibits physical contact between patrons and dancers while the dancer is engaged in an exotic performance. Accordingly, since Section VII(d) clearly defines the prohibited activity, it is not void for vagueness.

Finally, Jameson argues that Section VI of the ordinance, which requires a sexually-oriented business to submit to inspection by county officials "at any time it is occupied or open for business" violates the Fourth Amendment to the United States Constitution. We disagree.

Although the Fourth Amendment's warrant requirement applies to administrative searches and extends to protect

[45] Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972)(stating that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined," and that persons of ordinary intelligence must have a reasonable opportunity to know what is prohibited).

commercial businesses,[46] the Supreme Court of the United States recognized an exception for so-called "closely-regulated" industries in New York v. Burger.[47] The Supreme Court stated that a statute or ordinance granting government officials the discretion to inspect such a business without a warrant must, inter alia, be "'carefully limited in time, place, and scope'" [citations omitted].[48]

We first note that the issue of whether sexually-oriented businesses as defined by Ordinance No. 2000-4 fell within the definition of a "closely-regulated" industry was not a contested issue below or on this current appeal.[49] Indeed, in his brief to this Court, Jameson has apparently conceded that

[46] See Donovan v. Dewey, 452 U.S. 594, 598, 101 S.Ct. 2534, 2537-38, 69 L.Ed.2d 262 (1981)(stating that "[o]ur prior cases have established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property").

[47] 482 U.S. 691, 702-03, 107 S.Ct. 2636, 2644, 96 L.Ed.2d 601 (1987).

[48] Id. 482 U.S. at 703.

[49] Our research indicates that this issue is one which is open for debate. See FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1306 (5th Cir. 1988)(vacated in part on other grounds 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990)(upholding portion of a zoning regulation requiring sexually-oriented businesses to submit to inspections whenever the premises were occupied or open for business and stating that the regulation permitted "reasonable" searches of "pervasively regulated business[es]"); and Alexis, Inc. v. Pinellas County, Florida, 194 F.Supp.2d 1336, 1350 n.15 (M.D. Fla. 2002)(referencing a previous order of the Court finding that the sexually-oriented business at issue fell within the definition of a "highly regulated" business as contemplated by Burger). But see J.L. Spoons, Inc. v. City of Brunswick, 49 F.Supp.2d 1032, 1040 (N.D. Ohio 1999)(finding that "because sexually oriented businesses enjoy a degree of First Amendment protection," they "do not qualify as highly regulated industries"); and Pentco, Inc. v. Moody, 474 F.Supp. 1001, 1009 (S.D. Ohio 1978)(determining, prior to Burger, that the regulation of massage parlors was not "'deeply rooted' in government control as the Supreme Court found with respect to firearms in United States v. Biswell, 406 U.S. 311, 315, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972)").

Regina's II fits within the definition of a "closely-regulated" business as defined by Burger. Thus, without deciding whether Jameson's concession is warranted, we proceed with our analysis according to the issue as framed by the parties on appeal.

In Kentucky Restaurant Concepts, Inc. v. City of Louisville, Jefferson County, Kentucky,[50] the United States District Court for the Western District of Kentucky recently invalidated a somewhat similar regulation on grounds that the provision governing administrative inspections had "no [ ] limitation upon the time of the searches." The Court went on to state that adding the phrase "reasonable times" would correct the ordinance's Fourth Amendment defect with respect to the time element.[51] In the instant case, Section VI expressly limits the time for administrative inspections to those occasions when the business is either occupied or open for business. Accordingly, unlike the regulation at issue in Kentucky Restaurant Concepts, since Section VI "carefully limits" the time for conducting administrative inspections, we conclude that Jameson's Fourth Amendment claim is without merit.

Based on the foregoing, the order of the McCracken District Court is affirmed in part, vacated in part, and this

[50] 209 F.Supp.2d 672, 691 (W.D. Ky. 2002).

[51] Id. Similar to the case at bar, whether sexually-oriented businesses fell within the definition of a "closely-regulated" industry as contemplated by Burger does not appear to have been a contested issue in Kentucky Restaurant Concepts.

matter is remanded for further proceedings consistent with this Opinion.

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