UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

84 VIDEO/NEWSSTAND, INC., *et al.*,	)	Case No.: 1:07 CV 3190
	)	
Plaintiffs	)	
	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
	)	
THOMAS SARTINI, *et al.*,	)	
	)	
Defendants	)	ORDER

Plaintiffs 84 Video/Newsstand, Inc., *et al.* ("Plaintiffs") challenge the constitutionality of Ohio Revised Code § 2907.40, which regulates sexually oriented businesses in Ohio. Pending before the court is: (1) Plaintiffs' Preliminary Injunction Motion (ECF No. 3); (2) Motion of Defendant Mahoning County Prosecutor Paul J. Gains to Adopt and Incorporate by Reference the State of Ohio's Memorandum Contra Plaintiffs' Motion for a Preliminary Injunction ("Gains Motion to Incorporate," ECF No. 81); and (3) Motion of Defendant Hamilton County Prosecutor Joseph T. Deters to Adopt and Incorporate by Reference the State of Ohio's Memorandum Contra Plaintiffs' Motion for a Preliminary Injunction ("Deters Motion to Incorporate," ECF No. 83.) For the following reasons, the court denies Plaintiffs' Preliminary Injunction Motion, grants Gains's Motion to Incorporate, and grants Deters's Motion to Incorporate.

I. FACTS

A. The Parties

As stated above, Plaintiffs challenge the constitutionality of R.C. § 2907.40, which regulates sexually oriented businesses in Ohio. Plaintiffs consist of three groups: (1) businesses throughout Ohio that sell adult books, magazines, videos, and DVDs ("bookstore Plaintiffs"); (2) businesses throughout Ohio that present nude or seminude adult performances to patrons ("cabaret Plaintiffs"); and (3) the Buckeye Association of Club Executives ("BACE"), a not-for-profit trade group that promotes and protects the rights of member adult bookstores and cabarets throughout Ohio.

Defendants consist of two groups: (1) law directors for cities and villages throughout Ohio in which Plaintiffs and BACE members are located; and (2) county prosecutors for the counties throughout Ohio in which Plaintiffs and BACE members are located. Defendants have the authority to prosecute violations of § 2907.40. Plaintiffs also served the Ohio Attorney General, pursuant to Federal Rule of Civil Procedure 5.1, because the case involves a question of Ohio constitutional law.

B. Ohio Revised Code § 2907.40

On May 16, 2007, the Ohio General Assembly adopted Substitute Senate Bill 16 ("S.B. 16"), which was scheduled to take effect on September 4, 2007. The effective date of the statute was delayed as the result of a referendum petition seeking to place the law on the November, 2007 statewide ballot. Because the Secretary of State found that the circulators of the referendum failed to gain the required number of signatures, the law went into effect at midnight on October 17, 2007.

R.C. § 2907.40 contains: (1) an hours of operation restriction, set forth in § 2907.40(B); and (2) a no-touch provision, set forth in § 2907.40(C). Sections 2907.40(D) and (E) set forth the punishment for violating the law. Specifically, O.R.C. § 2907.40 provides:

> (B) No sexually oriented business shall be or remain open for business between 12:00 midnight and 6:00 a.m. on any day, except that a sexually oriented business that holds a liquor permit pursuant to Chapter 4303[] of the Revised Code may remain open until the hour specified in that permit if it does not conduct, offer, or

allow sexually oriented entertainment activity in which the performers appear nude.

(C)(1) No patron who is not a member of the employee's immediate family shall knowingly touch any employee while that employee is nude or seminude or touch the clothing of any employee while that employee is nude or seminude.

(2) No employee who regularly appears nude or seminude on the premises of a sexually oriented business, while on the premises of that sexually oriented business and while nude or seminude, shall knowingly touch a patron ... or another employee...or the clothing of a patron ...or allow a patron ... or another employee ... to touch the employee or the clothing of the employee.

(D) Whoever violates division (B) of this section is guilty of illegally operating a sexually oriented business, a misdemeanor of the first degree.

(E) Whoever violates division (C) of this section is guilty of illegal sexually oriented activity in a sexually oriented business. If the offender touches a specified anatomical area of the patron or employee, or the clothing covering a specified anatomical area, a violation of division (C) of this section is a misdemeanor of the first degree. If the offender does not touch a specified anatomical area of the patron or employee, or the clothing covering a specified anatomical area, a violation of division (C) of this section is a misdemeanor of the fourth degree.

C. Jurisdiction

Plaintiffs state that jurisdiction is conferred upon this court by 28 U.S.C. § 1331 because it is a civil action arising under the Constitution and the laws of the United States. (Compl. ¶ 6.) Plaintiffs also contend that jurisdiction exists pursuant to "28 U.S.C. § 1343(a)(3) and (4), 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. §§ 1983 and 1988, this being an action for declaratory judgment and equitable relief authorized by law to redress deprivations under color of law of rights, privileges, and immunities secured by the Constitution of the United States." (*Id.*)

D. Plaintiffs' Motion for a Temporary Restraining Order

Plaintiffs filed a Motion for a Temporary Restraining Order (TRO) on October 17, 2007. (ECF No. 3.) That day, the court held a telephonic conference at which the court heard from counsel for the parties regarding Plaintiff's Motion for a TRO. The court denied Plaintiffs' Motion, stating

in pertinent part that:

> In balancing the four factors required to issue a TRO, the court finds that the Motion (ECF No. 3) should be denied in light of the fact that Plaintiffs have not shown a likelihood of success on the merits. This determination is obviously based on the limited record before the court. The parties shall have an opportunity at the hearing for Plaintiffs' Motion for Preliminary Injunction to develop a more complete record on which the court may revisit the determinations made herein.

(TRO Order, ECF No. 16.)

E. Preliminary Injunction Hearing and Post-Hearing Brief

1. Plaintiffs' Witnesses

Plaintiffs called five witnesses at the preliminary injunction hearing: (1) Dr. Daniel Linz, an expert on secondary effects studies; (2) Dr. Judith Hanna, an expert on exotic dance; (3) Joe Hall, General Manager for Deja Vu Consulting, Inc.; (4) Jennifer Walker, Executive Administrative Assistant to the Chief Operating Officer of General Video of America Transworld News ("GVATWN"), which operates sexually oriented retail businesses in Ohio; and (5) Anthony Jones, the Assistant to the President of LD Management, a company that operates the sexually oriented Lion's Den Superstores.

a. Dr. Daniel Linz

Plaintiffs' expert on the adverse secondary effects of sexually oriented businesses, Dr. Daniel Linz, is a Professor of Communications and a Professor of Law and Society at the University of California, Santa Barbara. Dr. Linz testified that he has examined over one hundred studies regarding the alleged adverse secondary effects, such as crime that result from sexually oriented businesses. Dr. Linz stated that municipalities tend to cite the same set of secondary effects studies to justify the regulation of sexually oriented businesses. However, Dr. Linz opined that the methods used in these studies were seriously or often fatally flawed, and as such, these studies were unable to reliably determine adverse secondary effects. In fact, Dr. Linz stated that, when he analyzed the

studies, he either found no adverse secondary effects from sexually oriented businesses or found effects that were actually smaller around such businesses.

Dr. Linz based his conclusion that the widely-cited secondary effects studies are unreliable on five criteria, which are a set of questions that he acknowledges are scientific only in the sense that they allow researchers to determine what information is reliable and what information is unreliable. The first criteria or question is "compared to what"? For example, Dr. Linz stated that many studies may cite one or two criminal incidents at a certain sexually oriented business as evidence of adverse secondary effects from that business, but these studies fail to acknowledge that there may be far less crime at sexually oriented businesses than other types of businesses in the same neighborhood.

Dr. Linz's second criteria or question is whether the studies examined the alleged secondary effects associated with sexually oriented businesses for a sufficient period of time. Dr. Linz stated that many secondary effects studies only used data for one- or two-year periods, but a minimum of three years is necessary to account for fluctuations in crime that typically occur.

The third criteria or question is whether the studies measured crime, which is an alleged secondary effect of sexually oriented businesses, by some reliable source. Dr. Linz stated that secondary effects studies tend to rely upon Uniform Crime Reports ("UCR"), which are statistics provided by local police departments and used by the FBI and the Justice Department to report on the number of crimes that might be occurring in a particular community. However, Dr. Linz states that he prefers to rely upon Calls For Service, which are statistics of calls placed to police regarding crime incidents.

The fourth question or criteria is whether the police went looking for crimes related to sexually oriented businesses. Dr. Linz stated that communities frequently step-up police enforcement efforts in areas with sexually oriented businesses while secondary effects studies are conducted, and that this increased policing results in a greater likelihood of finding crime.

The fifth or final question or criteria is whether researchers only talk to people from whom they want to hear regarding the adverse secondary effects of adult businesses. Dr. Linz stated that highly biased individuals, such as real estate appraisers or concerned citizens, are over-represented in secondary effects studies, and that researchers are therefore only hearing opinions from a small segment of the overall population.

Moreover, in response to hypotheticals from Plaintiffs' counsel, Dr. Linz opined that most secondary effects studies were conducted in urban areas, and that these studies do not support a finding that the following cause secondary effects: (1) adult videostores; (2) adult businesses located in an isolated area off the highway; (3) establishments that sell a relatively small amount of adult material, such as romance novels, which constitutes a substantial portion of business revenue; or (4) non-adult establishments that infrequently feature entertainment, such as male Chippendale dancers.

Finally, Dr. Linz testified that he has conducted studies regarding alleged adverse secondary effects caused by sexually oriented business in: Fort Wayne, Indiana; Charlotte, North Carolina; San Diego, California; San Diego County, California; New York; Indiana; and Florida, wherein he used the five criteria methodology described above. Additionally, Dr. Linz testified that he was commissioned by BACE to perform a study in four Ohio communities: Toledo, Cleveland, Columbus, and Dayton. Dr. Linz testified that he found no adverse secondary effects resulting from sexually oriented businesses in these studies.

b. Dr. Judith Hanna

Dr. Judith Hanna is an anthropologist who works as a senior researcher at the University of Maryland. Dr. Hanna is also a writer for *Dance Magazine* and other publications. Plaintiffs offered Dr. Hanna as an expert in performance dancing, including erotic dance. Dr. Hanna stated that erotic dance has serious artistic merit. It requires athletic ability, gymnastic skill, and grace, and it communicates "a fantasy of special interest." Dr. Hanna stated that it is very common for nude or

seminude dancers to touch other nude or seminude dancers during an erotic dance performance, and that this touching facilitates the communication of the message of fantasy. Consequently, Dr. Hanna opined that the "no-touch" provision of R.C. § 2907.40(C) would have a negative effect on erotic dance performances because the provision bans artistic choice and expression.

c. Joe Hall

Joe Hall is the General Manager of Deja Vu Consulting, Inc. Mr. Hall provides consulting and management services to approximately forty-five sexually oriented businesses. Approximately twenty of these businesses are juice bars that do not have a liquor license, although patrons can bring their own alcoholic beverages. Mr. Hall primarily testified about the potential deleterious financial effect of R.C. § 2907.40(B) on the juice bar industry. Mr. Hall explained that typical juice bar hours of operation are noon until 4:00 a.m., although some juice bars stay open later where no hours of operation restrictions exist. Mr. Hall stated that the vast majority of the revenue from juice bars is derived from 11:00 p.m. until 4 a.m. As a result of the hours of operation restriction of R.C. § 2907.40(B), which requires juice bars to close at midnight, Mr. Hall estimates that juice bar establishments will lose 60-70% of their current revenue. Additionally, Mr. Hall noted that the no-touch provision of R.C. § 2907.40(C) would likely detrimentally impact juice bar revenue because most juice bars feature nude dancers who frequently touch other nude or seminude dancers on stage.

d. Jennifer Walker

Jennifer Walker is the Chief Executive Assistant to the Chief Operating Officer of GVATWN, a company that operates sexually oriented retail stores in Ohio. Ms. Walker is responsible for organizing and recording the weekly sales from all GVATWN stores. Ms. Walker testified that, prior to the passage of R.C. § 2907.40, some of these stores had been open twenty-four hours per day or from 5:30 a.m. to 2:30 a.m. However, Ms. Walker stated that all of the GVATWN stores now close their doors at midnight, in accordance with R.C. § 2907.40(B). Consequently, Ms.

Walker testified that GVATWN stores have experienced a loss in revenue since R.C. § 2907.40(B) went into effect, and that twenty workers have been laid off as a result.

Additionally, Ms. Walker stated that not all of the GVATWN stores sell exclusively sexually oriented items; for example, one store sold as little as 15% of such items. However, this store was subject to regulation under the R.C. § 2907.40(B) because the majority of its revenues were obtained from the sale of sexually oriented items.

e. Anthony Jones

Anthony Jones is the Assistant to the President of LD Management, a management company that operates the sexually oriented retail Lion's Den Superstores. Mr. Jones stated that the Lion's Den Superstores do not sell any material that is not sexually oriented. Mr. Jones stated that the hours of operation provision of R.C. 2907.40(B) will result in a decrease in Lion's Den revenues.

2. Defendants' Witnesses

Defendants called three witnesses at the preliminary injunction hearing: (1) Julie Taylor Schmatz, a former exotic dancer; (2) Louis Gentile, a private investigator; and (3) Dr. Richard McCleary, Professor of Criminology and Statistics at the University of California at Irvine, who is an expert on secondary effects studies.

a. Julie Taylor Schmatz

Julie Taylor Schmatz testified that she previously worked as an exotic dancer in approximately thirteen sexually oriented businesses over a period of seven years. Mrs. Schmatz stated that many of the exotic dancers with whom she worked were engaged in prostitution, and the majority of the dancers used illegal substances such as marijuana, cocaine, Ecstacy, and heroin. Mrs. Schmatz also asserted that she frequently witnessed explicit sexual contact between dancers or between dancers and patrons. Mrs. Schmatz founded and is now the Executive Director of Beauty from Ashes, a nonprofit organization with a strong religious bent that encourages exotic

dancers to leave the sex industry.

b. Louis Gentile

Louis Gentile has a law enforcement background and is currently the President of Gentile-Meinert & Associates, which employs fifty-five investigators and has experience in conducting undercover investigations of sexually oriented businesses. Defendants hired Mr. Gentile to determine whether criminal activity was taking place in thirteen sexually oriented businesses throughout Ohio, and whether dancers or customers at these businesses were violating the no-touch or hours of operation restriction of R.C. § 2907.40. Mr. Gentile stated that he witnessed sexually explicit contact between dancers and customers at several sexually oriented establishments that he believed constituted violations of R.C. § 2907.40(C). Moreover, Mr. Gentile stated that some of the dancers at the sexually oriented businesses mentioned that they would be performing after midnight. If these statements were true, such actions would constitute a violation of the hours of operation provision of R.C. § 2907.40(B). However, Mr. Gentile left these businesses before midnight and therefore could not confirm the accuracy of the dancers' alleged statements.

c. Dr. Richard McCleary

Defendants' expert on the adverse secondary effects of sexually oriented businesses, Dr. Richard McCleary, is a Professor of Criminology and Statistics at the University of California at Irvine. Dr. McCleary testified that he was familiar with the published and unpublished research on the adverse secondary effects of sexually oriented businesses.

Dr. McCleary testified that he has been involved in measuring crime for many years. Dr. McCleary stated that UCR, NIBRS, or Incident Based Reports ("IBR") are the best statistical measure of crime. NBIRS or UCR data measures crime based on crime incident reports, *i.e.*, where a police officer has investigated a crime and filed a report on the crime, which is then entered into the police department's statistical reporting system. Dr. McCleary employed these methods of

measuring crime when he was the associate director of a UCR agency in New Mexico. Dr. McCleary was also involved in founding UCR agencies in Alaska and Kentucky. Dr. McCleary has consulted for an UCR agency in Arizona and has served on a number of national panels advising the Bureau of Justice Statistics and the FBI on issues related to UCR and NIBRs. Additionally, Dr. McCleary has written a number of peer-reviewed articles using NIBR data.

Based on his professional experience, Dr. McCleary testified that Dr. Linz's preferred methodology of measuring crime, Calls for Service, is a weak measure of determining whether crime is a secondary effect of sexually oriented businesses because Calls for Service only use 911 calls as data. Dr. McCleary stated that most 911 calls have nothing to do with crime, and most criminal incidents are not discovered through 911 calls. Consequently, Dr. McCleary stated that Calls for Service undercount or overcount certain crimes. For example, Calls for Service do not reflect crimes such as DWIs or prostitution.

Dr. McCleary also testified that he disagreed with Dr. Linz's conclusion that at least a three-year period of time was necessary to design a reliable secondary effects study. Dr. McCleary stated that there is a mathematical formula one can use to tell exactly how long a period of time one needs to measure a change in crime with the conventional levels of confidence and statistical power. Consequently, Dr. McCleary testified that the period of time needed to analyze secondary effects varies from study to study. Moreover, Dr. McCleary noted that Dr. Linz himself used less than three years as the measure in his Toledo study. Specifically, Dr. McCleary stated, in the Toledo study, that Dr. Linz compared Calls for Service six months before and six months after the closing of a sexually oriented business.

Finally, Dr. McCleary stated that he and other scholars evaluate the validity of a secondary effects study by applying each of the following four types of validities: (1) internal; (2) external; (3) statistical conclusion; and (4) construct validity. First, Dr. McCleary testified that internal

validity is closely associated with design and therefore refers to the validity of inference. The two major structures of design to rule out threats to internal validity are before/after contrast and control groups. Second, Dr. McCleary stated that external validity is the generalized ability of one's study to produce findings that are consistent or coherent with other studies on the same topic or, alternatively, explain why the conclusions of one's study are different from the conclusions of other studies. Third, Dr. McCleary explained that statistical conclusion validity refers to closely scrutinizing all of the statistical assumptions that are made in calculating a degree of confidence. The significant issues are the false positive rate and the false negative rate. Fourth, Dr. McCleary testified that construct validity is most closely related to measurement and theory. Therefore, one needs to have a well-specified, well-identified theory, and then measure all of the variables with attention to their reliability and potential biases.

Dr. McCleary stated that he does not agree with Dr. Linz's approach using the five criteria stated above. Dr. McCleary noted that Dr. Linz's criteria was widely-used in lawsuits challenging the regulation of sexually oriented businesses. However, Dr. McCleary stated that the five criteria are rarely used outside of lawsuits of this sort and are not widely-cited in academic circles. Dr. McCleary asserted that a secondary effect study may violate one or more of Dr. Linz's criteria, but the findings or the results of the study could still be valid under the four academically accepted validities discussed above.

Dr. McCleary testified that he has performed secondary effects studies in: Los Angeles, California; Sioux City, Iowa; Montrose, Illinois; Centralia, Washington; and Garden Grove, California. In each of these studies, Dr. McCleary found that sexually oriented businesses have adverse secondary effects such as crime and decrease in property values. Dr. McCleary disagreed with Dr. Linz's critique that the methodology employed in secondary effects studies upon which municipalities frequently rely to justify the regulation of sexually oriented businesses are

methodologically flawed, and that the results are therefore invalid. Dr. McCleary addressed Dr. Linz's critique of the methodology employed in each of these studies and explained why Dr. McCleary concluded that Dr. Linz's critique is unwarranted. Dr. McCleary asserted that it is a scientific fact that sexually oriented businesses have crime-related secondary effects and that these businesses pose public safety hazards to their immediate environments.

F. Post-Hearing Briefs and Supplemental Authority

Plaintiffs filed their Post-Hearing Brief on December 28, 2007. (ECF No. 174.) Defendants filed their Post-Hearing Opposition Briefs on January 14, 2008 (ECF Nos. 180, 182), and Plaintiffs filed their Post-Hearing Reply on January 18, 2008 (ECF No. 189.) Additionally, the parties have filed Supplemental Authority in support of their respective positions. (*See* ECF Nos. 197, 198, 199, 217, 220, 225, 227, and 228.)

II. LEGAL STANDARD

A preliminary injunction is an extraordinary remedy which requires the party seeking relief to demonstrate a clear entitlement to the injunction. *Overstreet v. Lexington-Fayett Urban Cty. Gov't,* 305 F.3d 566, 573 (6th Cir. 2002). In deciding whether a party is entitled to a preliminary injunction, the court must consider the following four criteria: (1) whether the movant has demonstrated a substantial likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction will cause substantial harm to others if issued; and (4) whether the public interest is served by issuance of the injunction. *Id.* The Sixth Circuit has recognized that "these factors are not prerequisites, but are factors that are to be balanced against each other." *Id.* (citation omitted).

III LAW AND ANALYSIS

A. Substantial Likelihood of Success on the Merits

1. Constitutionality of R.C. § 2907.40

Plaintiffs contend that the no-touch provision and hours of operation restrictions contained in R.C. § 2907.40 are facially unconstitutional. For the reasons stated below, the court finds that Plaintiffs do not demonstrate a substantial likelihood of success on the merits of this claim.

a. Applicable Level of Scrutiny

The Sixth Circuit in *Sensations, Inc. v. City of Grand Rapids,* 526 F.3d 291, 298 (6th Cir. 2008), recently reiterated that strict scrutiny is not applicable to statutes regulating sexually oriented businesses and that courts should apply the content-neutral *O'Brien* test to such statutes:

> Nude dancing is a form of expressive conduct protected by the First Amendment. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville* (*Deja Vu of Nashville I*), 274 F.3d 377, 391 (6th Cir.), *cert. denied*, 535 U.S. 1073 (2002). Nevertheless, in accordance with Supreme Court precedent, the Sixth Circuit treats laws such as the Ordinance, which regulate adult-entertainment businesses, as if they were content neutral. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 438-39 (6th Cir. 1998). We have applied the test first set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), to regulations on the operation of sexually oriented businesses. *See, e.g., Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.*, 411 F.3d 777, 789-90 (6th Cir. 2005) (*en banc*) (applying the O'Brien test to an hours-of-operation provision); *Deja Vu of Nashville I*, 274 F.3d at 396 (applying the O'Brien test to a regulation requiring a specified buffer zone between the performer and audience); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410 (6th Cir. 1997) (same).

Id. (affirming the district court's denial of the plaintiffs' motion for a preliminary injunction as well as the district court's granting of defendants' motion for judgment on the pleadings for both the city and the citizen groups). This statement is consistent with the Supreme Court's pronouncement in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000), which held that "government restrictions on public nudity . . . should be evaluated under the framework set forth in [*United States v.*] *O'Brien* [391 U.S. 367 (1968),] for content-neutral restrictions on symbolic speech," because the "state's interest in preventing harmful secondary effects is not related to the suppression of expression." Therefore, the court will treat R.C. § 2907.40, which regulates sexually oriented businesses, as content-neutral.

Consequently, like the courts in *Sensations, Deja Vu of Cincinnati, Deja Vu of Nashville I,*

and *DLS,* the court will apply the *O'Brien* test to determine whether the Ohio General Assembly enacted the statute:

> (1) within its constitutional power; (2) to further a substantial governmental interest that is; (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest.

Sensations, 526 F.3d at 298 (citing *Deja Vu of Nashville I,* 274 F.3d at 393).

i. Statute Enacted within Ohio's Constitutional Power

Since Plaintiffs do not dispute that the General Legislature has the power to regulate sexually oriented businesses, the court need not analyze the first prong of the *O'Brien* test.

ii. Statute Furthers a Substantial Governmental Interest

The Supreme Court's holding in *City of Los Angeles v. Alameda Books,* 535 U.S. 425, 434 (2002), contemplates the following three-step burden-shifting process in regard to the second prong of the *O'Brien* test:

> [First, 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 ordinance.

(Citations omitted).

(a) Defendants' Evidence of Secondary Effects

When statutes regulating sexually oriented businesses are the subject of litigation, the judiciary is not a super-legislature whereby judges sit to evaluate the wisdom of a government's discretion. *Renton v. Playtime Theatres, Inc.,* 475 U.S. at 1132. Rather, as the Sixth Circuit

explained in *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 466 F.3d 391, 399 (6th Cir. 2006), courts should treat such regulations deferentially:

> We have followed the Supreme Court in deferring to local governments' conclusions regarding whether and how their ordinances address adverse secondary effects of adult-oriented establishments. It is clear, for instance, that a local government does not need localized proof of adverse secondary effects in order to regulate adult establishments. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 411 (6th Cir. 1997) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582-84 (1991) (Souter, J., concurring in the judgment)). Similarly, all that is needed to justify a regulation is a reasonable belief that it will help ameliorate such secondary effects. *Deja Vu of Cincinnati, L.L.C. v. Union Township Bd. of Trustees*, 411 F.3d 777, 790 (6th Cir. 2005) (en banc) (quoting Richland Bookmart, Inc. v. Nichols, 137 F.3d 435, 440 (6th Cir. 1998)).

(Emphasis added); *Threesome Entertainment v. Strittmather*, 4 F. Supp. 2d 710, 719 (N.D. Ohio 1998) ("A court should not ask whether the legislator subjectively believed or was motivated by other concerns, but rather whether an objective lawmaker could have so concluded, supported by an actual basis for the conclusion. Legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experiences of other cities.") (Citations omitted).

In *Sensations, Inc. v. City of Grand Rapids,* No. 1:06 cv 300, 2006 U.S. Dist. LEXIS 60934, at *12-13 (W.D. Mich. Aug. 28, 2006), the district court found that the defendant city relied upon decisions of the Supreme Court and the Sixth Circuit in enacting its ordinance, which contained a no-touch and an hours-of-operation restriction. *Id.* at *12-13. Therefore, the court denied the plaintiffs' request for a temporary restraining order. *Id.* Similarly, in the instant case, the court finds the Ohio General Assembly relied upon a wealth of information in enacting R.C. § 2907.40, including:

> (1) Power Point presentations by David Miller, Citizens for Community Values, and Scott Berthold, counsel for various defendants in this case, that summarized: (a) anecdotal adverse secondary effects of sexually oriented businesses around Ohio; (b) studies of adverse secondary effects from sexually oriented businesses; and (c) judicial opinions on the adverse secondary effects of sexually-oriented businesses;

(2) Dr. McCleary's critique of Dr. Linz's methodology and conclusions in his report on secondary effects in four Ohio cities;

(3) Reports on the secondary effects sexually oriented businesses from a wide variety of locations, including: Phoenix, AZ; Tuscon, AZ; Garden Grove, CA; Los Angeles, CA; Whittier, CA; Adams County, CO; Indianapolis, IN; Kenton and Campell Counties, KY; Minneapolis, MN; New Hanover County, NC; New York City, NY; Ellicottville, NY; Oklahoma City, OK; Amarillo, TX; Dallas, TX; El Paso, TX; Houston, TX; Seattle, WA; St. Croix County, WI;

(4) Numerous legal opinions, including: *Richland Bookmart, Inc. v. Nichols,* 137 F.3d 435 (6th Cir. 1998) (hours of operation); *Deja Vu of Cincinnati, L.L.C. v. Union Township,* 411 F.3d 777 (6th Cir. 2005) (*en banc*) (hours of operation); *Center for Fair Public Policy v. Maricopa County,* 336 F.3d 1153 (9th Cir. 2003) (hours of operation); *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403 (6th Cir. 1997) (6 foot rule); *Colacurcio v. City of Kent,* 163 F.3d 545 (9th Cir. 1998) (10 foot rule); *Fantasy Ranch, Inc. v. City of Arlington,* 450 F.3d 546 (5th Cir. 2006);

(5) Testimony from proponents of the bill, including: (a) Sheriff Dave Phalen, Fairfield County; (b) Captain Chuck Adams, Troy Police Department; (c) Sheriff Daniel Beck, Allen County; (d) Theresa Fleming, Director, MOMS for Ohio; (e) David Porter, Member, Ohio State Bar Association; (f) Dan Hieronomus, Director, STAR Community Justice Center; (g) Lucille Wells, Director of Governor's Council on People with Disabilities; (h) Glenda Pope, Former Member, Ohio Developmental Disabilities Council; and (i) Jerry Lyon, Vice President of Operations, Citizens for Community Values.

(6) Testimony from opponents of the bill, including: (a) Jeffery Schutt, Director of Operations, Entertainment USA/Christie's Cabarets; (b) Luke Liakos, President of BACE; (c) Angelina Spencer, Executive Director of Association of Club Executives ("ACE National"); (d) Frank Spencer, CEO, Grand American Franchise; (e) Charity Fickisen; (f) Tom Klein, State VP, Ohio Licensed Beverage Association; (f) Jay Nelson, General Manager, Platinum Showgirls; (g) Jim Hannan, Legislative Chairman, Ohio Licensed Beverage Association; (h) Raymond Vasvari, Attorney, Berkman, Gordon, Murray, and DeVan; (i) Joe Hall, Director of Operations, Deja Vu Consulting/BACE; and (j) John Legati, self-employed.

(Affidavit of Katelyn Barlage, Legislative Aide to State Rep. Louis Blessing, Chairman of the House Judiciary Committee ("Barlage Aff."), citing Ex. A, Minutes of the House Judiciary Committee, and Ex. B, a CD ROM containing case and secondary effects studies that were exhibits in David Miller's testimony before the House Judiciary Committee.)

Defendants' proffered evidence shows that the Ohio General Assembly held hearings, asked

questions, and reviewed the secondary effects evidence and studies cited above that courts have repeatedly held to be a sufficient basis for a reasonable belief that regulations such as R.C. § 2907.40 will ameliorate the negative secondary effects of sexually oriented businesses. Accordingly, in light of overwhelming Sixth Circuit precedent, the court finds that Defendants' evidence shows that the Ohio General Assembly had a reasonable belief that the statute would ameliorate the secondary effects of sexually oriented businesses.

(b) Casting Direct Doubt on Defendants' Secondary Effects Evidence and Evidence

The district court in *Sensations*, 2006 U.S. Dist. LEXIS 60934, at *12, citing *Alameda Books,* stated that "to challenge the Ordinance, Plaintiffs must demonstrate that the evidence supporting each of the City's findings of secondary effects is so insubstantial as to fail to support those findings." The *Sensations* plaintiffs offered the affidavit of Dr. Linz, who testified that the studies relied upon by the City of Grand Rapids and the courts in the cases cited in the administrative record are based on faulty methodology. *Id.* at *12-13. The district court concluded that the plaintiffs failed to cast direct doubt on the defendant's proffered secondary effects evidence:

> Plaintiffs at a minimum face a substantial hurdle to prove the insubstantiality of all of the City's secondary effects findings. As Justice Kennedy stated in *Alameda Books*, "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners, [I]f inferences appear reasonable, we should not say there is no basis for [the municipality's] conclusion." *Id.* at 451-52. Defendants conceded at oral argument that the City need only have reasonable supporting evidence, not conclusive evidence, to support its determinations. *See Renton*, 475 U.S. at 51-52; *Alameda Books*, 535 U.S. at 438-39,451. As a result, Plaintiffs' ability to undermine the City's secondary effects findings is, at best, limited.

Id. at *13. Here, Plaintiffs assert that they satisfy their burden of casting direct doubt on Defendants' secondary effects evidence based on Dr. Linz's testimony and the Tenth Circuit's ruling in *Abilene Retail #30, Inc., v. Dickinson County,* 492 F.3d 1164 (10th Cir. 2007). However, Defendants maintain that Plaintiffs' conclusion is incorrect and is based upon: an erroneous interpretation of the state's burden; *Abilene,* an inapposite case; and a disagreement between Dr.

Linz and Dr. McCleary about the proper methodology for studying adverse secondary effects of sexually oriented businesses. The court finds that Defendants' arguments are well-taken.

In attempting to fulfill their burden of casting direct doubt on Defendants' secondary effects evidence, Plaintiffs offer the testimony of Dr. Linz. As he did in *Sensations,* Dr. Linz testified in the instant case, as set forth above in Section I(D)(1)(a), that the secondary effects studies relied upon by every government in enacting regulations similar to R.C. § 2907.40 are fatally flawed because they rely on faulty methodology. Dr. Linz testified that Calls for Service is the best way to gauge adverse secondary effects. Conversely, Defendants' expert, Dr. McCleary, testified that use of UCR and NIBR data is the better way of tracking crime in an area.

Like Dr. Linz, the plaintiffs' expert in *Bottoms Up Enterprises,* No. 07-344, 2007 U.S. Dist. LEXIS 74366, at *43-44 (W.D. Pa. Oct. 4, 2007), argued that his secondary effects data was "empirically more accurate and persuasive" than the studies relied upon by the defendants. However, the *Bottoms Up* court noted that this argument has been rejected by a number of courts. *Id.* For example, the Ninth Circuit in *Gammoh v. City of La Habra,* 395 F.3d 1114, 1126-27 (9th Cir. 2005), held that:

> The Appellants' proffered expert declared that the City's evidence was flawed because "systematically collecting police call-for-service information" and adhering to the Appellants' suggested methodological standards were "the only reliable information" that could have supported the City's concern. This is simply not the law. "So long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses[,]" it is sufficient to support the Ordinance. *Renton*, 475 U.S. at 51-52. While we do not permit legislative bodies to rely on shoddy data, we also will not specify the methodological standards to which their evidence must conform.

See also G.M. Enterprises, Inc. v. Town of St. Joseph's, Wis., 350 F.3d 631, 639 (7th Cir. 2003) (rejecting attempts by plaintiffs to rely on Calls for Service to cast direct doubt on ordinances supported by other studies, anecdotes, and court cases, and noting that "although this evidence shows that the Board might have reached a different and equally reasonable conclusion regarding

the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the Board's legislative process.")

Like the courts in *Bottoms Up* and *G.M Enterprises,* the court in the instant case finds that the fact that Dr. Linz and Dr. McCleary fundamentally disagree about methodological standards does not mean that Plaintiffs have fulfilled their burden of casting direct doubt on Defendants' secondary effects evidence. Indeed, while Dr. Linz's evidence in the instant case shows that the General Assembly may have reached a different conclusion regarding the relationship between secondary effects and sexually oriented businesses, the court finds, as did the *G.M. Enterprises* court, that such evidence "does not vitiate the result reached in the [General Assembly's] legislative process."

Moreover, in contrast to *Alameda Books,* where the municipality relied upon a study that did not directly support the secondary effects upon which the municipality based its ordinance, the General Assembly in the instant case did not attempt to use a study that supported one conclusion to support a second, somewhat related conclusion. Instead, the General Assembly relied upon the prior holdings of the Sixth Circuit and the Supreme Court on the same or similar supporting facts to support identical or similar restrictions previously approved by those courts. Dr. McCleary reiterated in his testimony that the secondary effects rationale has been accepted by the Supreme Court and courts in the Sixth Circuit and throughout the country. In light of this judicial acceptance of the same or similar restrictions, the court does not find that Dr. Linz's testimony, studies, and critique of Dr. McCleary's methodology demonstrate that the evidence supporting the State's findings of secondary effects is so insubstantial as to fail to support those findings. This conclusion is significantly bolstered by the court's own evaluation of the evidence presented at the preliminary injunction hearing.

Additionally, *Abilene* is not dispositive in the instant case. In *Abilene,* 492 F.3d at 1175-76,

the majority held that there was a genuine issue of material fact as to whether the government entity had established a connection between adverse secondary effects and "a single adult bookstore, located on a highway pullout far from any business or residential area within the County, ..." The concurring opinion asserted that Dr. Linz had cast "direct doubt" on whether the county could have believed its own evidence justified the ordinance at issue. *Id.* at 1187 (Ebel, J., concurring). In the instant case, Dr. McCleary's hearing testimony supplied evidence in support of the theory that adverse secondary effects are indeed associated with remote, isolated sexually oriented businesses off an Interstate exit. Specifically, Dr. McCleary testified on direct testimony that, contrary to Dr. Linz's assertions, there have been secondary effects studies of sexually oriented businesses in sparsely populated areas. Moreover, Dr. Linz stated that the work he did in the small village of Montrose, Illinois, located off Interstate 70, showed that an increase in crime occurred after a sexually oriented business opened its doors. Therefore, for the reasons stated above, the court finds that Plaintiffs do not demonstrate a substantial likelihood of success on the merits of their argument that they can cast direct doubt on Defendants' secondary effects evidence.

iii. The State's Interest is Unrelated to the Suppression of Speech

The court finds, in light of a wealth of case law, that Ohio's interest in combating the negative secondary effects of sexually oriented businesses does not constitute a constitutionally impermissible suppression of expression under the First Amendment. *See, e.g., City of Los Angeles v. Alameda Books,* 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (proper rationale for secondary-effects ordinance will leave "quantity of speech .. substantially undiminished" and not be aimed at suppressing speech, with the aim that "total secondary effects will be significantly reduced"); *Barnes v. Glen Theatre,* 501 U.S. 560, 585 (1991) (Souter, J., concurring) ("On its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression"); *Richland Bookmart, Inc. v. Nichols,* 137 F.3d 435, 440 (6th Cir. 1998) (time,

place and manner regulation of adult literature based on its content is constitutionally valid). Accordingly, Plaintiffs do not demonstrate a substantial likelihood of success on the merits regarding the third *O'Brien* prong.

iv. Statute Poses Only an Incidental Burden on First Amendment Freedoms

First, Plaintiffs argue that the hours of operation provision with respect to the adult bookstores and juice bars is unconstitutional under Justice Kenndy's proportionality analysis in his controlling concurring opinion in *Alameda Bookstores,* which stated that a zoning regulation cannot "substantially reduce speech," because R.C. § 2907.40 impermissibly reduces the quantity of speech. Plaintiffs rely on the dissenting opinion in *Center for Fair Policy v. Maricopa County,* 336 F.3d 1153 (9th Cir. 2003), which maintained that the hours of operation provision violated Justice Kennedy's proportionality analysis in *Alameda Books* because the quantity and availability of adult speech was diminished in an effort to alleviate adverse secondary effects related to that speech. Plaintiffs contend that a recent Sixth Circuit case, *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 491 (6th Cir. 2008), provides additional authority for this position. Conversely, counsel for some of the Defendants other than the State of Ohio argue that Justice Kennedy's proportionality analysis was not meant to invalidate all hours of operation restrictions, and in fact is properly applied only in the zoning context. The State of Ohio asserts that the majority opinion in *Maricopa* correctly read Justice Kennedy's controlling concurrence in *Alameda Bookstores* to permit it to hold that an hours of operation regulation was consistent with Justice Kennedy's proportionality analysis. For the following reasons, the court finds that the State of Ohio's argument is well-taken.

The Sixth Circuit in *729, Inc.,* affirmed the district court's granting of summary judgment to the defendants, finding that a regulation requiring an entertainer at a sexually oriented business to stay at least five feet away from areas being occupied by customers for at least one hour after the entertainer performs semi-nude on stage, was constitutional under Justice Kennedy's controlling

opinion in *Alameda Books.* The *729, Inc.* court recognized that "[a]lthough the *Alameda Books* plurality did not discuss the ... [proportionality analysis], Justice Kennedy expressly said that consideration of this issue was required for his concurrence in the judgment. Justice Kennedy's opinion binds us on this point." *Id.* at 491. The *729, Inc.* court then found that the one-hour restriction at issue, which this court construes as a no-touch regulation, complied with Justice Kennedy proportionality requirement because it left the quantity and accessibility of protected speech substantially intact.

729, Inc., did not involve or address in any way an hours of operation regulation and is therefore inapplicable to the instant case. Moreover, like the majority opinion in *Maricopa,* the court finds that Justice Kennedy's proportionality analysis, which the *Alameda Books* plurality considered "unobjectionable," and "simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban" does not necessitate that this court find that the hours of operation in the instant case is unconstitutional. In fact, the court finds that the hours operation restriction in the instant case does not run afoul of Justice Kennedy's proportionality analysis because patrons have access to sexually oriented businesses for sixteen hours per day, and protected speech is therefore not "substantially reduced." The court's finding is buttressed by the Sixth Circuit's recent opinion in *Sensations,* 526 F.3d at 291, which was issued more than three months after *729, Inc.* In *Sensations,* the Sixth Circuit noted that "it has upheld every one of the regulatory provisions contained in the Grand Rapids ordinance at issue," including the no-touch and hours of operation restrictions. *Id.* at 299 (citing *Deja Vu of Cincinnati,* 411 F.3d at 789-91) (upholding an hours of operation limitation on adult businesses); *Deja Vu of Nashville I,* 274 F.3d at 396 (upholding a three-foot buffer/no touching regulation); *Richland Bookmart,* 137 F.3d at 440-41 (upholding limitations on the hours and days that an adult-entertainment business could operate); *DLS, Inc.,* 107 F.3d at 408-13 (upholding a six-foot

buffer/no-touching regulation); *Bamon Corp. v. City of Dayton,* 923 F.2d 470, 474 (6th Cir. 1991). Therefore, the *Sensations* court concluded that the plaintiffs' argument that the ordinance placed a significant burden on speech was unavailing in light of the overwhelming case precedent cited above, some of which was decided post-*Alameda Books*. Similarly, in light of *Sensations* and the extensive Sixth Circuit precedent upholding similar no-touch and hours of operation provisions, the court finds that Plaintiffs in the instant case have not shown a substantial likelihood of success on the merits of their argument that R.C. § 2907.40 impermissibly restricts speech.

Plaintiffs also argue that R.C. § 2907.40 is unconstitutional because there is no reasonable explanation for the General Assembly's decision to allow adult cabarets with liquor licenses to stay open until the times set out in their liquor license and present semi-nude entertainment, while juice bars must close at midnight. Plaintiffs' attempt to distinguish *Deja Vu, Inc. v. Union Township,* 411 F.3d 777 (6th Cir. 2004), which rejected a similar claim, to support their argument is unavailing. In *Union Township*, the Sixth Circuit stated that if there were no plausible reason for the township's distinction between the two classes of cabarets, "the inference could be drawn that Union Township was acting with some invidious motive in passing the resolution." *Id.* at 790. However, the Sixth Circuit upheld the statute, concluding that:

> [U]nion Township can point to at least two plausible justifications for the different closing times. The first is that Union Township wanted to institute a midnight closing time for all adult cabarets, but was prevented from doing so by conflicting state liquor laws. Second, in enacting the resolution, Union Township relied upon research suggesting that the patrons of alcohol-free adult cabarets are often more unruly because these cabarets are frequently patronized later in the evening by customers who have become intoxicated at other establishments. Although Union Township could have elected to permit all adult cabarets to close at 2:30 a.m., thereby accommodating state liquor laws and eliminating the disparate treatment concerns, the First Amendment does not require Union Township to make this choice.

Id. at 790-91 (citations omitted) (emphasis added).

Here, the evidence before the court shows that the General Assembly can and did rely on

the same research relied upon by Union Township, which suggested that the patrons of alcohol-free adult cabarets are often more unruly, to justify the disparate treatment between the juice bars and adult cabarets with liquor licenses. The *Union Township* decision was among the materials submitted to the General Assembly as it considered Sub. S.B. 16, and it was featured in the Power Point presentations of Mr. Bergthold and Mr. Miller before the General Assembly. (*See* Barlage Affidavit.) The Supreme Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000), stated that a government "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 [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses."

Finally, Plaintiffs rely on *Joelner v. City of Washington Park,* 508 F.3d 427 (7th Cir. 2007), to argue that the underinclusiveness of the hours of operation provision renders it unconstitutional as to both adult cabarets and bookstores. Specifically, Plaintiffs argue that R.C. § 2907.40(B) is underinclusive because the regulation allows alcohol-serving cabarets to remain open to present entertainment longer than establishments that do not serve alcohol. Additionally, Plaintiffs also argue that R.C. § 2907.40(B) is underinclusive because the regulation allegedly restricts the sale of expressive materials at adult bookstores but does not impose the same restrictions upon adult arcades.

The court finds that *Joelner,* which applied strict scrutiny to strike down a local law that banned new businesses from selling alcohol but did not apply the law to existing businesses, is inapposite to the instant case. Furthermore, the court finds that Plaintiffs' underinclusiveness argument is not well-taken in light of the Sixth Circuit's ruling in *Richland Bookmart Inc. v. Nichols*, 278 F.3d 570, 577 (6th Cir. 2002). In *Richland Bookmart,* the plaintiffs argued that an hours of operation ordinance that regulated adult bookstores but not adult cabarets was

underinclusive and therefore unconstitutional. *Id.* at 577. The *Richland Bookmart* court first noted that, with respect to the ordinance, "an inference of content-based discrimination is inconsistent with the uncontroverted fact that the expressive content of live cabarets is virtually identical to that of adult bookstores." *Id.* The *Richland Bookmart* then stated that:

> [T]he virtually identical expressive content as between live adult cabarets and adult bookstores, belies the notion that the Tennessee legislature made an impermissible distinction on the basis of content or that the operating-hours exemption of the live cabarets was invidious. This court has determined that "[a] state legislature may implement its program of reform by gradually adopting regulations that only partially ameliorate a perceived evil." *In re Grand Jury Proceedings*, 810 F.2d 580, 588 (6th Cir. 1987). ...
>
> Although the Act did not go as far as it might due to its exemption of live cabarets from the operating-hour restrictions placed on the regulated businesses, this does not make the Act unconstitutional. *See Roschen v. Ward*, 279 U.S. 337, 339, 73 L. Ed. 722, 49 S. Ct. 336 (1929) ("A statute is not invalid under the Constitution because it might have gone farther than it did."). Moreover, the legislature may select one phase of one field and apply a remedy there, neglecting the others. *See Young v. American Mini Theatres*, Inc., 427 U.S. 50, 71, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976) (holding that Detroit "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems" in regulating adult movie theaters, book stores, and similar establishments).

Here, the court also finds that the virtually identical expressive content featured at juice bars and alcohol-serving establishments and adult bookstores and adult arcades belies the notion that the Ohio legislature made an impermissible distinction on the basis of content, or that the operating hours exemption was invidious. Just as in *Richland Bookmart,* the fact that the Ohio Legislature did not go as far as it might have with respect to regulating alcohol-serving establishments and adult arcades does not make R.C. § 2907.40(B) unconstitutional. Accordingly, for the reasons stated above, the court finds that Plaintiffs fail to show that they have a substantial likelihood of success on the merits of the fourth *O'Brien* prong.

2. Overbreadth

The Sixth Circuit has recognized that the purpose of the overbreadth doctrine is "to prevent

the chilling of protected expression." *Staley v. Jones,* 239 F.3d 769, 779 (6th Cir. 2001). The overbreadth of a statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973). In *Sensations,* 526 F.3d at 300, the Sixth Circuit quoted *Broadrick* to reiterate that, "the overbreadth doctrine is ... 'manifestly, strong medicine' and 'should be employed only as a last resort.'"

In the instant case, Plaintiffs argue that R.C. § 2907.40 is unconstitutionally overbroad with respect to: (1) the definition of an "adult bookstore"; (2) the definition of an "adult cabaret"; and (3) the definition of the "no touch" provision. For the reasons stated below, the court finds that Plaintiffs have not demonstrated a strong likelihood of success on the merits with respect to their overbreadth claims.

a. "Adult Bookstore"

Plaintiffs contend that the following definition of an "adult bookstore"contained in R.C. § 2907.40(A)(1) is unconstitutionally overbroad:

> [A] commercial establishment that has as a significant or substantial portion of its stock in trade or inventory in, derives a significant or substantial portion of its revenues from, devotes a significant or substantial portion of its interior business or advertising to, or maintains a substantial section of its sales or display space for the sale or rental, for any form of consideration, of books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, slides, or other visual representations, that are characterized by their emphasis upon the exhibition or description of specified sexual activities or specified anatomical areas.

(Emphasis added). Plaintiffs argue that R.C. § 2907.40(A)(1) is "broadly drawn to bring a wide variety of commercial establishments within its scope, not just a narrowly drawn category of adult-oriented businesses." (Pls.' Post-Hearing Br. at 4.) Plaintiffs maintain that various commercial establishments such as airport bookstores and grocery stores are plainly susceptible to regulation under R.C. § 2907.40(A)(1) as a result of their sale of mainstream publications such as: romance novels; novels such as James Joyce's *Ulysses* and Bret Easton Ellis's *American Psycho*; poetry by

Sappho; non-fiction works such as the Kinsey Report; reproductions of nudes by artists such as Renoir; and CDs of R-rated television shows such as "Sex and the City" and "The Sopranos." (*Id.* at 5-6.)

The court finds that Plaintiffs' argument is unavailing because R.C. § 2907.40(A)(1) regulates printed materials and visual representations that are "characterized by their emphasis upon the exhibition or description of specified sexual activities or specified anatomical areas." (Emphasis added). R.C. § 2907.40(A) defines "characterized by" as "describing the essential nature or quality of an item." In determining whether a similar statute that regulated materials "characterized by" the depiction of nudity or sexual activity was overbroad, the Seventh Circuit in *Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 996 (7th Cir. 2000), concluded that:

> "Characterized" means "to be a distinguishing characteristic of," and "characteristic" means "belonging to . . . essential nature of." Webster's Third New Int'l Dictionary 376 (1986) (emphases added). The Ordinance's plain language limits its application to Media of which nudity or sexual activities form the essential component. Thus, protected speech remains outside the scope of the definition, and we reject plaintiffs' facial overbreadth challenge.

(Emphasis added). Similarly, the court in the instant case does not find that nudity or sexual activities form the essential component of protected speech such as the examples of mainstream printed materials and visual representations suggested by Plaintiff, and these materials are therefore not susceptible to regulation by R.C. § 2907.40.

Additionally, Plaintiffs' reliance on *Executive Arts Studio,* 391 F.3d 783, 796-97 (6th Cir. 2003), to advance their argument that even those commercial establishments selling a small amount of adult fare can be susceptible to regulation under R.C. § 2907.40(A)(1) is unavailing. In *Executive Arts Studio,* the Sixth Circuit held that a city statute that regulated establishments, such as Borders or Walden's, that carried "a section or segment" of adult reading material was not narrowly tailored because it encompassed a wide variety of mainstream establishments, and the city failed to produce

evidence of secondary effects from these mainstream establishments. *Id.* at 686-87 (emphasis added).

However, *Executive Arts* is readily distinguishable from the instant case. Unlike the broad reach of the regulation in *Executive Arts,* the definition of "adult bookstore" in the instant case does not include stores with "a segment or section," no matter how small, devoted to selling adult materials. Rather, R.C. § 2907.40 only encompasses those bookstores with a "substantial portion" of their business devoted to selling adult materials. A number of courts have held that regulations containing "substantial or significant" language are not overbroad. *See, e.g., Pleasureland Museum, Inc.,* 288 F.3d at 997 n.4 (rejecting the plaintiff's claim that the statute which used "significant or substantial" language was overbroad); *Z.J. Gifts D-4 L.L.C.,* 311 F.3d at 1230 (*rev'd on other grounds*, 541 U.S. 774) (holding that the "significant or substantial" language sufficiently narrowed the statute to avoid constitutional problems); *Gold Diggers,* 469 F. Supp. 2d at 60 (same). Accordingly, the court finds that Plaintiffs do not demonstrate a substantial likelihood of success on the merits of this overbreadth claim because the definition of "adult bookstore" sufficiently identifies that the scope of its coverage is applicable only to sexually oriented businesses and not mainstream commercial establishments.

b. "Adult Cabaret"

Plaintiffs contend that the following definition of an "adult cabaret" contained in R.C. § 2907.40(A)(2) is unconstitutionally overbroad:

> [A] nightclub, bar, juice bar, restaurant, bottle club, or other similar commercial establishment, regardless of whether alcoholic beverages are served, that regularly features individuals who appear in a state of nudity or seminudity.

(Pls.' Mot. for Prelim. Inj. at 9-10.) However, Defendants point out that, since the preliminary injunction hearing, Substitute Senate Bill 183 ("S.B. 183") amended R.C. § 2907.40(A)(2). (Defs.' Notice of Amendment to Statute at 1, ECF No. 225.) S.B. 183 became law in mid-June and becomes

effective on September 11, 2008. (*Id.*) In pertinent part, S.B. 183 amended R.C. § 2907.40(A)(2) to read as follows: "'Adult cabaret' has the same meaning as in section 2907.39 of the Revised Code." Section 2907.39(b)(3) provides:

> "Adult cabaret" means a nightclub, bar, juice bar, restaurant, bottle club, or similar commercial establishment, whether or not alcoholic beverages are served, that regularly features any of the following:
>
> (a) Persons who appear in a state of nudity or seminudity;
>
> (b) Live performances that are characterized by the exposure of specified anatomical areas or specified sexual activities;
>
> (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions that are distinguished or characterized by their emphasis upon the exhibition or description of specified sexual activities or specified anatomical areas.

(Emphasis added). "'The term "regularly" is defined in R.C. § 2907.40(A)(10) as "repeatedly or consistently." A person is "nude" if he shows the genitals/pubic area, anus, or the female nipple. R.C. § 2907.40(A)(10). A person is "seminude" if he or she is wearing "not more than" that necessary to cover the foregoing body parts, plus any supporting straps. R.C. § 2907.40(A)(11).

Plaintiffs state that the special, statutory definition of "regularly" includes seminude performances once a week or once every two weeks, that the definition of adult cabarets are not limited to bars and includes restaurants, comedy clubs, and dinner theaters, and that the state failed to show that such establishments cause adverse secondary effects. However, well-established case authority construes the word "regularly" to avoid such unconstitutional overbreadth. In *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000), the regulation at issue defined an adult cabaret as one that "regularly featured" nudity or seminudity. The regulation at issue in *Schultz*, like the unamended statute in the instant case, "contain[ed] no explicit exception for expression that contain[ed] nudity or sexual depiction but also possesses serious artistic, social or political value." *Id.* at 849-850. However, the *Schultz* court concluded that although the definition of "regularly features" could lend itself to an expansive interpretation, the statute's potentially broad reach could be remedied by using a limiting construction of "regularly features" to mean "always features" for

the purpose of "giving special prominence at uniform, orderly intervals as a matter of normal course." *Id.* A number of courts have followed the *Schulz* approach and construed statutes that use "regularly features" in their definition of "adult cabarets" as not unconstitutionally overbroad. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 259-260 (1990) ("regularly" was construed "in the present context to mean a continuous presentation of the sexual material as one of the very objectives of the commercial enterprise").

Significantly, the court finds that the amendment, which now narrows the definition of an adult cabaret to regulate only live performances, movies, and photographic images that are characterized by exposure of specified anatomical areas or specified sexual activities, strengthens Defendants' argument that the statute is not overly broad. As discussed above in the context of adult bookstores, the term "characterized by" limits the statute's application to performances or media of which nudity or sexual activities form the essential component. Therefore, the court in the instant case does not find that nudity or sexual activities form the essential component of mainstream speech, such as Plaintiffs' example of comedy clubs or dinner theaters, and these performances are therefore not susceptible to regulation by R.C. § 2907.40.

Moreover, *Schultz* is distinguishable from the Sixth Circuit's holdings in *Odle v. Decatur County,* 421 F.3d 386, and *Triplett Grille v. City of Akron,* 40 F.3d 129 (6th Cir. 1994), where the Sixth Circuit found that the statutes regulating public nudity were unconstitutionally overbroad because they effectively encompassed all public places and contained no limiting provisions narrowing the construction of the laws. Therefore, this court finds that *Triplett* and *Odle* are distinguishable from R.C. § 2907.40, which seeks to regulate only sexually oriented businesses and is readily susceptible to a narrowing construction.

Accordingly, in light of the wealth of case authority finding that "regularly" is not overly broad because it is conducive to the limiting construction that was applied in *Schultz* and S.B. 183,

which narrows the statute's scope, the court finds that Plaintiffs do not establish a substantial likelihood of success on the merits regarding this overbreadth claim.

c. "No-touch" provision

Plaintiffs contend that the following definition of an "adult cabaret" contained in R.C. § 2907.40(C)(2) is unconstitutionally overbroad:

> No employee who regularly appears nude or seminude on the premises of a sexually oriented business, while on the premises of that sexually oriented business and while nude or seminude, shall knowingly touch a patron ... or another employee...or the clothing of a patron ...or allow a patron ... or another employee ... to touch the employee or the clothing of the employee.

Plaintiffs argue that the no-touch provision is unconstitutionally overbroad for two reasons: (1) the no-touch provision interferes with the erotic message conveyed by the nude or seminude employee's dancing; and (2) the specific inclusion of a ban on even non-sexual employee-employee touching "depletes a performer's arsenal of tools" in an unconstitutional way.

The Sixth Circuit has consistently held that no-touch provisions for adult cabarets are constitutional. *See, e.g.*, *Sensations,* 526 F.3d at 299 (upholding the statute's no-touch provision and stating that it has upheld every other no-touch provision that was the subject of litigation before the circuit's district courts); *DLS*, 107 F.3d at 403 (upholding an ordinance requiring eighteen-inch-high stage and 6-foot buffer zone between performers and others, including other dancers); *Déjà Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville*, 274 F.3d 377 (6th Cir. 2001) (upholding a ban on touching between dancers and patrons, three-foot buffer); *Entertainment Productions, Inc. v. Shelby County,* 545 F. Supp. 2d 734 (W.D. Tenn. 2008) (denying plaintiffs' request for a temporary restraining order and holding that plaintiffs cannot establish that the no-touch provision banning contact between dancers is likely to succeed on the merits); *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F. Supp. 2d 672 (W.D. Ky. 2002) (upholding an ordinance banning touching

between a performer and everyone else, and requiring a three-foot buffer zone during performances, as well as confining performances to an eighteen-inch-high stage).

Significantly, the court in *Entertainment Productions,* 545 F. Supp. 2d at 745, rejected the plaintiffs' argument that contact between dancers is part of the erotic message conveyed by the nude or seminude dancer, finding that "there is nothing in constitutional jurisprudence to suggest that patrons are entitled, under the First Amendment, to the maximum erotic experience possible." Additionally, the *Kentucky Restaurants Concepts* court, 209 F. Supp. 2d at 681, rejected the plaintiffs' argument that the three-foot buffer provision between dancer and patron interferes with the erotic message conveyed by the nude or seminude employee's dancing.

Moreover, the plaintiffs in *Cam I, Inc. v. Louisville/Jefferson County Metro Gov't*, No. 2005-CA-85-MR, 2007 Ky. App. LEXIS 370 (Ky. App. Ct. Oct. 5, 2007), like the Plaintiffs in the instant case, argued that the no-touch provision was constitutionally overbroad because it banned such non-sexual conduct as a handshake. The following no-touch prohibition in *Cam I* is almost identical to the no-touch provision in the instant case: "It shall be a violation of this chapter for any employee, who regularly appears semi-nude in an adult entertainment establishment, to knowingly or intentionally touch a customer or the clothing of a customer." *Id.* at *125. The *Cam I* court rejected the plaintiffs' overbreadth argument, finding that, in light of cases like *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253-55 (5th Cir. 1995); *American Show Bar Series, Inc.*, 30 S.W.3d at 338; and *2300, Inc. v. City of Arlington*, 888 S.W.2d 123, 129 (Tex. Ct. App. 1994), "touching between a performer and a customer is not protected expression." *Id.* at 128. The court finds that the *Cam I* court's reasoning is persuasive. Moreover, Plaintiffs' examples of employee-employee touching, *e.g.,* one dancer turning the stage over to the next dancer with a handshake, a hug, or a hand up onto the stage, are not part of an erotic dance performance, but take place between dances. Thus, the no-touch provision does not interfere with the erotic message conveyed by the employee's

dancing or deplete a performer's arsenal of tools in an unconstitutional way, unlike the sections of the ordinance in *Schultz*, 228 F.3d at 847, that restricted the particular movements and gestures of the erotic dancer. *Schulz* is therefore distinguishable from the instant case with respect to the no-touch provision.

Accordingly, the court finds that, in light of Sixth Circuit case law, Plaintiffs fail to demonstrate a substantial likelihood of success on the merits regarding their argument that R.C. § 2907.40 is impermissibly overbroad as to the provisions regulating dancer-dancer touching and dancer-patron touching.

3. Vagueness

In their Post-Hearing Brief, Plaintiffs do not renew their challenges to R.C. § 2907.40's definitions of "adult bookstore" and "adult cabaret" as unconstitutionally vague and apparently rely on the arguments set forth in its Motion for Temporary Restraining Order/Preliminary Injunction. For the reasons that follow, the court finds Plaintiffs' arguments unconvincing that the "significant or substantial portion" and "regularly" language contained in the statute is unconstitutionally vague.

The Sixth Circuit set forth the legal standard for vagueness in *Deja Vu of Cincinnati, L.L.C. v. Union Township,* 411 F.3d 777, 798 (6th Cir. 2005):

> An enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972) (holding that Rockford's antinoise ordinance was not unconstitutionally vague). Vague laws are problematic because they (1) "may trap the innocent by not providing fair warning," (2) fail to "provide explicit standards for those who apply them," and (3) threaten to inhibit the exercise of [First Amendment] freedoms." *Id.* at 108-09 (quotation marks and footnote omitted). A law must therefore "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108.

The *Union Township* court, citing *Grayned,* emphasized that "the Supreme Court has explained that, 'condemned to the use of words, we can never expect mathematical certainty from our language.'" *Id.*

In *Richland Bookmart,* 137 F.3d at 441, the court rejected the adult bookstore plaintiffs' vagueness challenge, holding that:

> [T]he plaintiff's establishment here clearly falls within the purview of the statute. In *American Mini Theatres*, the Court found that it was unnecessary to consider vagueness when an otherwise valid ordinance indisputably applies to the plaintiff -- when there is no vagueness as to him. 427 U.S. at 58-59. *See also City of Renton*, 475 U.S. at 55 n.4. Plaintiff is clearly an "adult-oriented establishment" as defined in the act. Any element of vagueness in the act does not affect this plaintiff.

In the instant case, it is undisputed that Plaintiffs here are "sexually oriented businesses" as defined in R.C. § 2907.40. Therefore, pursuant to *Richland Bookmart,* any element of vagueness in the statute does not affect Plaintiffs, and the court need not consider Plaintiffs' vagueness challenge.

However, numerous courts have found that the "significant and substantial language" is not unconstitutionally vague. *See, e.g., Z.J. Gifts D-4, L.L.C.,* 411 F.3d at 1230 (analyzing "significant or substantial" language and collecting cases where state courts applied a narrowing construction to develop a percentage that will act as a guide to what constitutes "significant or substantial"). Similarly, courts have also held that the "regularly" language is also not unconstitutionally vague. *See, e.g., Gold Diggers,* 469 F. Supp. 2d at 60 ("the term 'regularly features' also withstands plaintiffs' vagueness challenge."). Finally, the court finds that the statute's definition of "regularly," unlike the statute at issue in *Threesome Entertainment,* 4 F. Supp. 2d at 710, contains *scienter* language which "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Vill. of Hoffman Estates v. Flipside,* 455 U.S. 589, 499 (1982); *United States v. Caseer,* 399 F.3d 828, 839 (6th Cir. 2005). Accordingly, the court finds that Plaintiffs do not show that they have a substantial likelihood of success on the merits with respect to their vagueness claim.

B. Irreparable Harm and Balancing the Interests of the Parties

Plaintiffs argue that the denial of a constitutional right, if such a denial is established,

constitutes irreparable harm. While the court does not dispute this assertion, the court finds, for the reasons stated above, that Plaintiffs have not demonstrated that their First Amendment rights have been denied. Although the hours of operation restriction requires sexually oriented businesses to close from midnight until 6 a.m., the businesses may still operate for the remaining eighteen hours a day. Therefore, R.C. § 2907.40 is merely a reasonable regulation on the time, place, and manner in which Plaintiffs may exercise their First Amendment rights. Moreover, the only injury Plaintiffs identify as a result of R.C.§ 2907.40 is a loss of revenue. However, "the inquiry for First Amendment purposes is not concerned with economic impact." *Renton,* 475 U.S. at 54 (citation omitted).

Therefore, in balancing the competing interests of the parties and considering that Plaintiffs have not demonstrated a substantial likelihood of success on the merits that R.C. § 2907.40 deprives Plaintiffs of their First Amendment rights, the court finds that Plaintiffs fail to demonstrate irreparable harm. Additionally, when comparing the competing harms to the parties, the court finds that the scales tip in favor of Defendants. Defendants argue that they will suffer irreparable harm from the issuance of a preliminary injunction because an injunction barring enforcement of R.C. § 2907.40 during the parties' ongoing litigation would allow secondary effects to go unabated and Ohio's substantial interest in preventing these effects to go unfulfilled. Accordingly, the court finds that this prong weighs in favor of Defendants.

C. Public Policy Interests

The court finds that the evidence provided by Defendants demonstrates that the Ohio General Assembly, after extensive hearings and consideration of Plaintiffs' arguments, enacted R.C. § 2907.40 to minimize the adverse effects of sexually oriented businesses in Ohio and benefit its citizens. Accordingly, the court finds that this factor weighs in favor of Defendants.

IV. CONCLUSION

For the reasons stated above, the court denies Plaintiffs' Motion for Preliminary Injunction (ECF No. 3), grants Gains's Motion to Incorporate (ECF No. 81), and grants Deters's Motion to Incorporate (ECF No 83.) The court will hold a telephonic status conference with the parties on August 21, 2008, at 4:00 p.m.

IT IS SO ORDERED.

/s/*SOLOMON OLIVER, JR.*
UNITED STATES DISTRICT JUDGE

August 8, 2008