IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE LEGEND NIGHT CLUB	*	
Plaintiff	*	
vs.	*	**CIVIL ACTION NO. MJG-05-2138** (Consolidated with MJG-05-2686)
PRINCE GEORGE'S COUNTY BOARD OF LICENSE COMMISSIONERS, et al.	*	
Defendants	*	

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MEMORANDUM OF DECISION

The Court has conducted a bench trial in the instant case. The Court has heard the evidence, reviewed the exhibits, considered the materials submitted by the parties, and had the benefit of the arguments of counsel. The Court now issues this Memorandum of Decision as its findings of fact and conclusions of law in compliance with Rule 52(a) of the Federal Rules of Civil Procedure. The Court finds the facts stated herein based upon its evaluation of the evidence, including the credibility of witnesses, and the inferences that the Court has found it reasonable to draw from the evidence.

I. BACKGROUND

Plaintiffs in these consolidated cases, The Legend Night Club ("The Legend") and International Nite Life Enterprises,

Inc. ("The Classics") operate establishments in Prince George's County, Maryland ("P.G. County") that sell alcoholic beverages and present "adult entertainment" (including exotic dancing). Plaintiffs seek to have the Court declare unconstitutional statutory provisions that would, if enforced, require revocation of their liquor licenses if they provide such "adult entertainment." Md. Ann. Code Art. 2B, § 10-405(c),(d)(2005)("the Legislation").

As discussed herein, Plaintiffs contend that the Legislation:

1. **Is unconstitutionally overbroad because it would restrict performances of serious literary or artistic value, and**

2. **Violates the Equal Protection Clause of the Fourteenth Amendment.**

Plaintiffs seek a permanent injunction prohibiting enforcement of the Legislation and their litigation costs.

II. DISCUSSION

A. Overbreadth

The Legislation provides that an establishment's liquor license shall be revoked if any of specified prohibited activities occur on the licensed premises. These prohibitions

include attire and conduct restrictions,[1] as well as entertainment restrictions.[2]

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[1] With respect to attire and conduct, a person may not:

(1) Be employed or used in the sale or service of alcoholic beverages in or upon the licensed premises while the person is unclothed or in attire, costume or clothing so as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals;

(2) Be employed or act as a hostess or act in a similar-type capacity to mingle with the patrons while the hostess or person acting in a similar-type capacity is unclothed or in attire, costume or clothing as described in paragraph (1) of this subsection;

(3) Encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person; or

(4) Permit any employee or person to wear or use any device or covering exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion of it.

Md. Code, Art. 2B § 10-405(c).

[2] With respect to entertainment provided, a person may not:

(1) Permit any person to perform acts of or acts which simulate:

(i) The act of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(ii) The touching, caressing or fondling of the breast, buttocks, anus or genitals; or

(iii) The display of the pubic hair, anus, vulva or genitals;

(2) Permit any entertainer whose breasts or buttocks are exposed (subject to the restrictions of paragraph (1) of this subsection) to perform closer than six feet from the nearest patron; or

(3) Permit any person to use artificial devices or inanimate objects to depict, perform or simulate any activity prohibited by paragraph (1) of this subsection.

Md. Code, Art. 2B § 10-405(d).

1. Standing

The threshold inquiry is whether Plaintiffs have standing to complain about restrictions that would unconstitutionally affect performances other than those the Plaintiffs themselves seek to present. As expressed by Judge Kelley in Norfolk 302, LLC v. Vassar:

> **[b]efore the Court can weigh the merits of Plaintiffs' constitutional challenges, it must determine whether they have standing to maintain an action that complains of restrictions on matters of serious literary or artistic value . . . . Plaintiffs' establishments are more likely to sponsor jello shooter contests [in the instant case, dancers squirming on patron's laps] than present an erotic version of Shakespeare or The Canterbury Tales.**
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> **Normally, 'a litigant only has standing to vindicate his own constitutional rights.' Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 796, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). However, this general principle does not apply in cases where a plaintiff challenges the constitutionality of a statute on the basis of overbreadth or vagueness. See id. at 798, 104 S.Ct. 2118 (excepting plaintiff bringing overbreadth claim from traditional standing requirements); Gooding v. Wilson, 405 U.S. 518, 521, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972) (same for vagueness claim).**
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> **This exception to ordinary standing rules derives not from any special quality of the plaintiff, but rather, from the**

> **nature of a facial attack. In this type of action, 'a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in questions.' City of Chi. v. Morales, 527 U.S. 41, 56, 119 S.Ct.1849, 144 L.Ed.2d 67 (1999).**

524 F. Supp. 2d 728, 734-35 (E.D. Va. 2007). See also Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 512 (4th Cir. 2002) ("Carandola I").

Therefore, in the instant case, "the overbreadth doctrine allows [Plaintiffs] to assert the First Amendment rights of those who do wish to "present or act" in a ballet or other theatrical production, even if [Plaintiffs do] not." Carandola I, 303 F.3d at 512.

To prevail on their challenge, Plaintiffs must demonstrate that the Legislation's overbreadth is "not only . . . real, but substantial as well, judged in relation to the [Legislation's] plainly legitimate sweep," and also that no "limiting construction" or "partial invalidation" could "remove the seeming threat or deterrence to constitutionally protected expression." Broadrick v. Oklahoma, 413 U.S. 601, 613, 615 (1973).

2. Level of Scrutiny

As stated in Carandola I:

> **The level of First Amendment scrutiny a court applies to determine the 'plainly legitimate sweep' of a regulation depends on the purpose for which the regulation was adopted. If the regulation was adopted to burden disfavored viewpoints or modes of expression, a court applies strict scrutiny. If, by contrast, the regulation was adopted for a purpose unrelated to the suppression of expression – e.g., to regulate conduct, or the time, place, and manner in which expression may take place – a court must apply a less demanding intermediate scrutiny.**

303 F.3d at 512-13 (citations omitted).

Inasmuch as the evidence, legislative history, and context are essentially equivalent to what existed in Carandola I, the Court will follow the Fourth Circuit's view that "precedent requires us to evaluate the challenged restrictions as content-neutral provisions aimed at secondary effects." Id. at 514. Accordingly, the Court will subject the Legislation to intermediate scrutiny.

3. Intermediate Scrutiny

"To pass [the intermediate scrutiny] test a law must be narrowly tailored to serve substantial government interests." Am. Life League Inc. v. Reno, 47 F.3d 647, 648-49 (4th Cir. 1995).

There can be a substantial governmental interest in regulating harmful secondary effects of expressive conduct. However, Defendants have not produced evidence of harmful secondary effects in Prince George's County, Maryland. The absence of such evidence would not pose Constitutional problems if the Legislation were sufficiently narrowly tailored. For example, if it applied only to establishments that present such "adult entertainment" as Plaintiffs provide. Carandola I at 516. But,

> **[t]he restrictions challenged here, however, sweep far beyond bars and nude dancing establishments. They reach a great deal of expression 'in the heartland of [the First Amendment's] protection.' . . . [T]he plain language of the restrictions prohibits on licensed premises any entertainment that 'simulate[s]' sexual behavior, even if performers are fully clothed or covered, and even if the conduct is integral to the production-for example, a political satire, a Shakespeare play depicting young love, or a drama depicting the horrors of rape. The Commission has further conceded that the restrictions have the same prohibitory effect on much non-erotic dance –such as a ballet in which one dancer touches another's buttock during a lift – and all nudity or simulated nudity, however brief, in productions with clear artistic merit – such as the Pulitzer Prize winning play, Wit. Furthermore, evidence before the district court indicated that the restrictions also apply to much other mainstream entertainment, including popular and award-winning musicals such as Cabaret, Chicago,**

> Contact, and The Full Monty and most kinds of jazz and flamenco dance.[3]

303 F.3d at 516 (Footnote in original).

In Carandola I, the Fourth Circuit, affirming a grant of preliminary injunction, held that the district court did not abuse its discretion in holding that the Plaintiff would likely prevail on its overbreadth challenge. In response to this decision, the North Carolina legislature amended the statute to add a "carve-out" provision[4] stating that:

> [t]his section does not apply to persons operating theaters, concert halls, art centers, museums, or similar establishments that are primarily devoted to the arts or theatrical performances, when the performances that are presented are expressing matters of serious literary, artistic, scientific or political value.

N.C. Gen. Stat. § 18B-1005.1(c)(2005).

The amended statute was tested in Giovani Carandola, Ltd. v. Fox, 470 F.3d 1074, 1082 (4th Cir. 2006)("Carandola II") and

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[3] As further evidence of the poor fit between the [Legislations'] objective and the undiscriminating terms of its restrictions, we note that the restrictions would also punish the owners of [Fed Ex Stadium] for allowing [Redskin] players or coaches to give a congratulatory pat on the bottom during a game. While this conduct may not be protected by the First Amendment, and so we do not count it as an impermissible application, it does illustrate the extraordinary breadth of the restrictions at issue here.

[4] As well as a preamble supporting the proposition that the legislation was enacted "to address the harmful secondary effects of [the subject] entertainment."

held to have had its overbreadth cured by the "carve out."

Following Carandola II, in Norfolk 302, the court held that a Virginia statute substantially similar to the Legislation was unconstitutionally overbroad and granted a preliminary injunction against enforcement. The district court noted that "a carve-out (as in Carandola II) would most likely remedy the overbreadth." Norfolk 302, 524 F. Supp. 2d at 739. The Virginia legislature responded to the decision in Norfolk 302 by enacting a "carve out" provision.[5]

The Legislation at issue is constitutionally overbroad as were the enactments at issue in Carandola I and Norfolk 302. A "carve-out" similar to those enacted in North Carolina [responding to Carandola I] and in Virginia [responding to

[5] The Virginia "carve-out," enacted in 2008, provided that the subject restrictions:

> (i) shall not apply to persons operating theaters, concert halls, art centers, museums, or similar establishments that are devoted primarily to the arts or theatrical performances, when the performances that are presented are expressing matters of serious literary, artistic, scientific, or political value.

Va. Code Ann. § 4.1-226.

Norfolk 302] would likely provide a cure. But, to date, there has been none pertinent to Prince George's County.[6]

The defense asks the Court to apply a limiting construction to the Legislation so as to narrow its overbreadth. The Court does not find the Legislation "readily susceptible" to such a construction. Moreover, it is not for this Court to rewrite the Legislation by making choices – best left to the legislature - as to what should be, and what should not be, exempted from the subject restrictions. If the defense wants to fix the Legislation, it can ask the legislature to enact a curative carve-out as was done in North Carolina and Virginia.

The defense also suggests that the Court can ignore the facial overbreadth of the statute because "no venue exists in [Prince George's County], other than adult entertainment establishments, to which [the Legislation] can conceivably apply." Def.'s Pretrial Mem. at 15. However, the Legislation would prohibit any existing, or new, liquor licensee from starting to present serious artistic performers that would violate the restrictions.

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[6] **The Legislation provides an exemption in Washington County, for the Washington County Playhouse and a[ny] theater holding a Class B beer, wine and liquor on-sale license. Md. Ann. Code, Art. 2B § 10-405(i).**

The Legislation has the chilling effect on speech that warrants permitting a litigant to "challenge a statute on its face because it []threatens others not before the court - those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987)(quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985)).

Finally, the Court does not find, at least on the present record, adequate assurances – if it were possible to cure the overbreadth by such assurances – that the enforcement of the Legislation would be sufficiently narrowly tailored.

Accordingly, the Court holds that the Legislation is unconstitutional due to substantial overbreadth.

B. Equal Protection

The Legislation, enacted as to Prince Georges County effective October 1, 2005, has a rather curious exemption for:

> **a current alcoholic beverage license holder that currently conducts an activity that is made unlawful by this Act only if the license holder:**

> (a) received approval from the [Liquor Control] Board to conduct the activity on or before August 15, 1981; and
>
> (b) has owned the licensed premises continuously since September 1, 1981.

2005 Md. Laws 262 § 2.

One might wonder why the legislature would choose to exempt from the Legislation any establishment that had received approval to conduct "adult entertainment" more than exactly 24 years, 1 month and 16 days prior to the effective date of the Legislation.

While the defense seeks to have the Court ignore the matter, it seems pertinent that former Senator Thomas Broadwater's Ebony Club received approval to conduct the "adult entertainment" at issue on August 14, 1981. Moreover, the defense has presented no evidence and, indeed, not even a hypothetical reason (other than the obvious one) for the selection of August 15, 1981 as the exemption cutoff date.

The Court finds Plaintiffs to have established beyond any reasonable doubt, that the Legislation's "grandfather clause" was deliberately crafted to favor the potentially connected former Senator. The Legislation was drafted expressly to exempt Senator Broadwater's establishment and happened to exempt one

other establishment, the Hanger Club, that had been in operation since 1974.

Under the Fourteenth Amendment, "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Where an Equal Protection challenge is brought against a statute that does not draw a distinction based on a suspect class, the statute is presumed constitutional, so long as the challenged classification rationally relates to a legitimate state interest. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). "[I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." Id. at 297.

As the Supreme Court noted in Dukes, states have broad discretion in the regulation of their local economies. Id. A court will overturn the classification if the treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the governmental actions were irrational. Kirsch v. Prince George's County, 331 Md. 89, 96-97 (1993) (quoting Murphy v. Edmonds, 325 Md. 342, 355-57 (1992)).

In Dukes, the City of New Orleans sought to enhance the special character of the Vieux Carre (French Quarter) by

permitting two pushcart vendors,[7] who had continually operated in the French Quarter for twenty years, to maintain their current operations. The Dukes grandfather clause represented a rational compromise between the deleterious effects of "street peddlers and hawkers" on the city's tourism industry and the preservation of the "appearance and custom valued by the Quarter's residents and attractive to tourists." Dukes, 427 U.S. at 304.

In sharp contrast, there is no community benefit that results from allowing two "adult entertainment" facilities to remain open while closing the Plaintiffs' and others' competing operations. Indeed, if the purported legislative purpose were genuine, there would have been no reason whatsoever for allowing any establishment to present the "adult entertainment" at issue.

In Dukes, the Supreme Court deferred to the legislature, observing that, "[l]egislatures may implement their program step by step, in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." Id. at 303 (internal citations omitted). Here, in contrast, there is no

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[7] The two vendors both of whom operated in the area for 20 years had become part of the distinctive character and charm that distinguishes the Vieux Carre. Dukes, 427 U.S. at 305.

appropriate deference to the legislature inasmuch as there is nothing that credibly supports the proposition that the Legislation was partial amelioration of an evil. Rather, the Legislation was limited in application solely to favor one former Senator's business.

In Dukes, the Supreme Court recognized that the legislature might properly protect the reliance interests of the favored push cart operators. However, in Dukes, the "grandfathered" operator had been operating twenty years, while their next oldest competitor had only operated for eight years. Id. at 305. In the instant case, there can hardly be a rational reason – other than the obvious intentional discriminatory one – to draw the bright line precisely at August 14, 1981, so as to exempt Senator Broadwater's enterprise (24 years, 1 month and 16 days of reliance) but not, for example, Plaintiff Legend's establishment (approval October 6, 1982) for its 23 years[8] of reliance.

The Court holds that the grandfather clause in the Legislation is obviously unrelated to any legitimate community interest and was enacted solely to favor a politically connected business establishment. It may be true that, by happenstance or

[8] **To be exact, four days short of 23 years.**

a drafting error, Senator Broadwater's establishment may not be held entitled to the exemption if the County would decide to take such a position. However, even if the intended beneficiary does not get the exemption, the provision would give a monopoly position to the Hanger Club without there being any community benefit from such a bonanza.

Finally, the defense contends that the Court can, and should, sever the grandfather clause so as cure the Equal Protection defect. This Court should not, even if it had the power to do so, redraft the Legislation so as to impose the pertinent restrictions upon the Hanger Club, an establishment not subjected to those restrictions by the legislature. If the defense wants to fix the Equal Protection problem, it can ask the legislature to cure the Legislation by, for example, eliminating the grandfather clause.

In sum, the Court holds that even if the Legislation were not unconstitutionally substantially overbroad, it would be unconstitutional by virtue of the denial of Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment.

III. CONCLUSION

For the foregoing reasons, the Court decides that:

1. **In regard to Prince Georges County, Maryland, the Legislation at issue, Md. Ann. Code Art. 2B, § 10-405(c),(d)(2005) is substantially overbroad in violation of the First Amendment.**

2. **In regard to Prince Georges County, Maryland, the Legislation at issue, Md. Ann. Code Art. 2B, § 10-405(c),(d)(2005) violates the Fourteenth Amendment's Equal Protection Clause by virtue of 2005 Md. Laws 262, § 2.**

3. **The Court shall issue a permanent injunction against enforcement, in Prince Georges County, Maryland, of the Legislation at issue, Md. Ann. Code Art. 2B, § 10-405(c),(d)(2005).**

4. **Plaintiffs may file a motion seeking an award of their costs, including reasonable attorneys' fees, by April 29, 2009.**

SO DECIDED, on Thursday, April 1, 2009.

/s/
Marvin J. Garbis
United States District Judge