

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
May 5, 2005 Session

**SILVER VIDEO USA, INC., ET AL. v. PAUL G. SUMMERS, ET AL.**

**Appeal from the Circuit Court for Davidson County  
No. 03C-3488 Walter C. Kurtz, Judge**

**No. M2004-00794-COA-R3-CV -Filed November 1, 2006**

Plaintiffs challenge the trial court's determination that the Tennessee Adult Oriented Establishment Act is constitutional under Article 1, Section 19 of the Tennessee Constitution. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR. JJ., joined.

John E. Herbison, Nashville, Tennessee, for the appellants Silver Video USA, Inc., et al.

Steven A. Hart, special counsel for the appellees, Paul G. Summers, Attorney General and Reporter, et al.

**OPINION**

**I. FACTS**

In 1995 the General Assembly passed Tennessee's Adult Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401 *et seq.* ("Act"), that limits the hours and days during which adult establishments can be open and requires elimination of closed viewing booths at such establishments. The plaintiffs, Silver Video USA, Inc., ("Silver Video") and Jenna's Adult Toy Box, Inc. ("Jenna's Toy Box"), with their respective majority shareholders, Frank Cross and Scotty Cross, filed suit for injunctive relief and a declaratory judgment asking that the Act be held unconstitutional under the Tennessee Constitution. The suit named as defendants the Tennessee Attorney General, the District Attorney General for the Twentieth Judicial District, and the Metropolitan Government of Nashville and Davidson County Police Chief. After

considering cross motions for summary judgment, the trial court upheld the validity of the Act. Plaintiffs appealed.<sup>1</sup>

Silver Video and Jenna's Toy Box challenge only the restriction in the Act regarding hours and days of operation. It is agreed that neither establishment operates or desires to operate viewing booths on-site as prohibited by the Act. With regard to hours and days of operation, the Act provides that an "adult-oriented establishment" can only do business between 8:00 a.m. and midnight on Monday through Saturday and may not be open at all on Sundays or legal holidays. Tenn. Code Ann. § 7-51-1402(a).<sup>2</sup> The Act defines "adult-oriented establishment" as a business that offers "as its principal or predominant stock or trade" sexually-oriented material, devices, or paraphernalia. Tenn. Code Ann. § 7-51-1401(4).<sup>3</sup> The Act then predictably defines "sexually-

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<sup>1</sup> At oral argument, this court was apprised by counsel that the constitutionality of the Act was a primary issue in a case which the Tennessee Supreme Court had decided to accept. Consequently, it appeared likely to be addressed by the Tennessee Supreme Court in *Clinton Books, Inc. and Fantasy Warehouse, Inc. v. City of Memphis*, \_\_\_ S.W.3d \_\_\_, 2006 WL 1072052 (Tenn. 2006). This Court held this matter in abeyance pending the Tennessee Supreme Court's consideration of *Clinton Books*. The Supreme Court, however, issued its opinion on April 25, 2006, deciding the matter on grounds unrelated to its constitutionality.

<sup>2</sup> The text of Tenn. Code Ann. § 7-51-1402 provides as follows:

(a) No adult-oriented establishment shall open to do business before eight o'clock a.m. (8:00 a.m.), Monday through Saturday; and no such establishment shall remain open after twelve o'clock (12:00) midnight, Monday through Saturday. No adult-oriented establishment shall be open for business on any Sunday or a legal holiday as designated in § 15-1-101.

(b) A local ordinance, resolution or private act may establish opening hours for adult-oriented establishments that are later than eight o'clock a.m. (8:00 a.m.) and closing hours that are earlier than twelve o'clock (12:00) midnight, but in no event may such ordinances, resolutions or private acts extend the opening hours to earlier than eight o'clock a.m. (8:00 a.m.) or the closing hours to later than twelve o'clock (12:00) midnight.

<sup>3</sup> The complete definition of "adult-oriented establishment" found in Tenn. Code Ann. § 7-51-140(4) is as follows:

"Adult-oriented establishment" means any commercial establishment, business or service, or portion thereof, that offers, as its principal or predominant stock or trade, sexually-oriented material, devices, or paraphernalia or specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live and that restricts or purports to restrict admission to adults or to any class of adults. "Adult-oriented establishment" includes, but is not limited to:

(A) "Adult book stores" means any corporation, partnership or business of any kind that has as its principal or predominant stock or trade, books, magazines or other periodicals and that offers, sells, provides or rents for a fee:

(i) Is available for viewing by patrons on the premises by means of the operation of movie machines or slide projectors; or

(ii) Has a substantial portion of its contents devoted to the pictorial depiction of sadism, masochism or bestiality; or

(iii) Has as its principal theme the depiction of sexual activity by, or lascivious exhibition of, the uncovered genitals, pubic region or buttocks of children who are or appear to be under eighteen (18) years of age;

oriented material” as written matter or film that depicts particular types of sexual activity.<sup>4</sup> Violation of the Act as a first offense is a Class B Misdemeanor and a Class A misdemeanor thereafter. Tenn. Code Ann. § 7-51-1404.<sup>5</sup> The Act exempts live adult stage entertainment from its hours of operation restrictions. Tenn Code Ann. § 7-51-1405.

The material facts of this controversy are not in dispute and have been agreed upon by the parties. Silver Video and Jenna’s Toy Box acknowledge that they offer for sale and rent “sexually-oriented material” as defined by the Act together with sexual devices and paraphernalia.<sup>6</sup> Silver Video and Jenna’s Toy Box agreed that “all or substantially all” of their adult videos, DVDs and magazines meet the Act’s definition of “sexually-oriented material.” Both businesses agree that the sexually-oriented material is “prominently” displayed at their stores. While Silver Video also sells jewelry and tobacco, historically income from Silver Video was “primarily from adult-oriented material.” While Jenna’s Toy Box also sells tobacco, which was added to comply with Metropolitan zoning codes, the “bulk of income” from Jenna’s Toy Box is from XXX-rated movies. Jenna’s Toy Box offers 3000 “mainstream regular movies” for rent, yet these are priced high so as to avoid restocking and are placed in the rear of the store so one would first pass the 6,500 XXX-rated videos and 12,000 “adult” VHS and DVDs in order to locate the “mainstream regular movies.” Silver Video offers for sale only 110 regular movies. Ninety-five (95%) percent of Silver Video’s DVD and DHS stock is XX or XXX-rated materials. When Jenna’s Toy Box opened in January of 2004, it was located between two other adult establishments to take advantage of the customer traffic generated by these two businesses. Silver Video added adult toys and lotions to attract late night customers, including people leaving bars and strip clubs “after getting sexually aroused.” Both establishments are restricted to adult members of the public.

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(B) “Adult motion picture theaters” means an enclosed building used for presenting film presentations that are distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities for observation by patrons therein; and

(C) “Adult shows” or “adult peep shows” means all adult shows, exhibitions, performances or presentations that contain acts or depictions of specified sexual activities.

4 The complete definition of “sexually-oriented material” found in the Act is as follows:

“Sexually-oriented material” means any book, article, magazine, publication or written matter of any kind, drawing, etching, painting, photograph, motion picture film or sound recording that depicts sexual activity, actual or simulated, involving human beings or human beings and animals, that exhibits uncovered human genitals or pubic region in a lewd or lascivious manner, or that exhibits human male genitals in a discernibly turgid state, even if completely covered;

Tenn. Code Ann. § 7-51-1401(9).

5 The Act provides in Tenn. Code Ann. § 7-51-1404 as follows:

A first offense for a violation of this part is a Class B misdemeanor, punishable only by a fine of five hundred dollars (\$500); and a second or subsequent such offense is a Class A misdemeanor.

6 The parties stipulate that these “adult toys” are not constitutionally protected speech.

After passage of the Act, law enforcement officials in Metropolitan Nashville and Davidson County declined to enforce the Act. During this period, the constitutionality of the Act under the United States Constitution was being litigated by other parties in federal court. (See *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998) (“Richland I”) and *Richland Bookmart, Inc., v. Nichols*, 278 F.3d 570 (6th Cir. 2002) (“*Richland II*”, *cert. den.* 537 U.S. 823, 123 S.Ct. 109 (2002)). After the Sixth Circuit Court of Appeals upheld the constitutionality of the Act in *Richland Bookmart, Inc. I & II*, and *certiorari* to the United States Supreme Court was denied, in July of 2003 Metro officials notified Silver Video and Jenna’s Toy Box by letter that enforcement of the Act would become effective August of 2003. Since receiving notice of enforcement, neither establishment has been cited for failure to comply with the Act. The Metro Police Department has issued citations to others for violation of the Act after the August 2003 enforcement notice. Before receiving the August letter regarding enforcement of the Act, Silver Video was open past midnight, Sundays and legal holidays. Jenna’s Toy Box opened after the August 2003 notice letter, but its owner testified that it would be open after midnight and on Sundays and legal holidays but for the Act.

Since the Act was found constitutional under the United States Constitution in *Richland Bookmart I and II*, plaintiffs brought this suit to challenge the Act under the Tennessee Constitution. Specifically, Silver Video and Jenna’s Toy Box alleged that the Act, both facially and as applied to them, violates the free expression guarantee of Article I, Section 19, the equal protection and due process guarantees of Article I, Section 8, and various other provisions of the Tennessee Constitution relative to the fundamental right of privacy.

The trial court upheld the constitutionality of the Act upon cross motions for summary judgment. As a preliminary matter, the trial court found that there is “no doubt” that Silver Video and Jenna’s Toy Box have as their principal or predominant business the sale of sexually-oriented material thus bringing them within the purview of the Act. While the trial court acknowledged that the protections of the Tennessee Constitution may be more expansive than the United States Constitution, the trial court adopted the rationale of the Sixth Circuit interpreting the rights of free speech, equal protection, and due process in the United States Constitution in *Richland Bookmart I and II* as being consistent with those rights protected by the Tennessee Constitution. With regard to plaintiff’s allegations about a right of privacy arising from the Tennessee Constitution, the trial court found that “curtailing the hours of operation of adult entertainment establishments” does not implicate any privacy issues. Finally, the trial court found scienter was an element of an offense under the Act pursuant to Tenn. Code Ann. § 39-11-102(b) and § 39-11-301(c).

Plaintiffs appeal, claiming the Act is constitutionally flawed because it is an impermissible content-based restriction on free speech and because the Act does not require scienter as an element of an offense. First, plaintiffs argue that the Act is a content-based restriction on the right of free speech under Article I, Section 19 of the Tennessee Constitution which does not meet the applicable strict scrutiny criteria and is thus unconstitutional. Alternatively, plaintiffs argue that the Act is nevertheless unconstitutional because it is overbroad and vague. Second, plaintiffs argue that scienter is a constitutionally required element of any violation of the Act and the Act is constitutionally flawed because it fails to include

scienter as an element of the offense. According to plaintiffs, the scienter provisions of Tenn. Code Ann. § 39-11-102(b) and § 39-11-301(c) may not be applied to the Act.

## II. CONTENT-BASED RESTRICTION ON FREE SPEECH

### A. Positions of Parties

Plaintiffs' principal contention on appeal is that the Act is a content-based restriction on expression that violates the plain language of Article I, Section 19 of the Tennessee Constitution guaranteeing that "every citizen may freely speak, write and print on **any** subject" (emphasis added).

Plaintiffs' argument follows a fairly logical sequence. The "sexually-oriented material" *i.e.*, the magazines, videos and books sold by plaintiffs is not a recognized exception to the protection of Article I, Section 19 and is therefore material protected by Article I, Section 19. According to plaintiffs, since the Act regulates only material pertaining to sex, then it is a content-based restriction on free expression which must be analyzed under the exacting strict scrutiny standard and is presumptively a violation of Article I, Section 19.

The defendant government officials, on the other hand, argue that under the "secondary effects doctrine," the Act is not to be treated as a content-based restriction on free speech, but instead should be treated as a reasonable time, place and manner restriction on speech, requiring application of the less stringent, intermediate scrutiny. Under the "secondary effects doctrine," federal courts have held that if a content-based zoning restriction is aimed at the "secondary effects" of the material and not at the content itself, then for purposes of First Amendment analysis the restrictions will be deemed content neutral and the more relaxed intermediate scrutiny shall be applicable. The Sixth Circuit in *Richland Bookmart I* applied the secondary effects doctrine to the Act finding that since the Act was aimed at the secondary effects of these types of establishments on neighborhoods and not at the content itself, then the Act is constitutional under the First Amendment to the United States Constitution.<sup>7</sup>

According to plaintiffs, the secondary effects doctrine holds no sway in this analysis. Plaintiffs argue that the federal court's rationale in upholding the Act in *Richland Bookmart I & II* should not be applicable because the protections afforded by the Tennessee Constitution are different from those afforded by the United States Constitution. Since the language guaranteeing free expression under Article 1, Section 19 of the Tennessee Constitution is substantially stronger than the correlating guarantee of free speech under the First Amendment to the United States Constitution, plaintiffs argue that we are precluded from adopting the "secondary effects doctrine" when construing the Tennessee Constitution even though federal courts have adopted it in interpreting the First Amendment to the United States Constitution.

Whether or not the Act survives a challenge under Article 1, Section 19 turns in large part on whether the Act is to be analyzed under strict or intermediate scrutiny. The government does not even attempt to argue that the Act would pass strict scrutiny analysis.

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<sup>7</sup> In *Richland Bookmart II*, the Sixth Circuit also sustained the Act against challenge under the federal equal protection clause. 278 F.3d at 577-78.

## **B. Legislative History Of The Act**

The Preamble to the Act sets out extensively the perceived ills that the Act is intended to address. Support for the government's position that the Act is aimed at the consequences of adult-oriented establishment on neighborhoods and health can be found in the Preamble to the Act and materials submitted by the government officials in support of their motion for summary judgment.

The Preamble to the Act provides in its entirety:

WHEREAS, Many adult-oriented establishments exist where enclosed booths, stalls or cubicles and entertainment are provided to persons for a fee for the purpose of viewing adult entertainment; and

WHEREAS, Studies performed in a substantial number of communities around the country indicate that such closed booths, stalls or cubicles have been used by patrons, clients or customers of such adult-oriented establishments for the purpose of engaging anonymously in sexual acts which cause blood, semen, urine or excrement to be deposited on the floors and/or walls of such enclosures; and

WHEREAS, These studies also found that closed booth activities are likely to foster a pattern of conduct inimical to the public health; that enclosed booths encourage illegal and unsanitary sexual activity; and per se present a health risk; and

WHEREAS, The health risks include the possible unchecked spread of the AIDS virus, hepatitis-B virus and other sexually transmitted diseases because tracking of potentially infected parties is not possible given the anonymity of the sexual encounter; and

WHEREAS, Adult-oriented establishments, also known as sexually-oriented businesses require special supervision from public safety and health agencies in order to protect and preserve the health, safety and welfare of the patrons of such businesses, as well as citizens of the state and of the city and county in which they are located; and

WHEREAS, Extensive reviews have been conducted of land use studies concerning the secondary effects of adult-oriented establishments and sexually-oriented businesses in other cities, including, but not limited to, Garden Grove, California (1991); Phoenix, Arizona (1986); Minneapolis, Minnesota (1980); Houston, Texas (1983); Indianapolis, Indiana (1984); Amarillo, Texas (1977); City of Los Angeles, California (1977); Cleveland, Ohio (1977); Austin, Texas (1986); Seattle, Washington (1989); Oklahoma City (1986); Beaumont, Texas (1982); and Whittier, California (1978); and considered the experience of citizens and public officials in this state; and WHEREAS, From review of other cities'

studies and evidence from this state, there is convincing documented evidence that adult-oriented establishments, because of their very nature, have a deleterious effect on existing businesses around them, the surrounding residential areas, and the public at large, causing, among other adverse secondary effects, increased crime, downgrading of property values and spread of sexually transmitted and communicable diseases; and WHEREAS, It is recognized that adult-oriented establishments, due to their nature, have serious objectionable operational characteristics, including location, hours of operation and physical layout of the establishment, thereby contributing to crime, disease, lower property values, urban blight and downgrading of the quality of life; and WHEREAS, It is recognized that adult-oriented establishments are frequently used for unlawful and/or dangerous sexual activities, including prostitution, indecent exposure and public or indiscriminate masturbation and sexual conduct; and WHEREAS, Increased crime and unhealthful conduct tend to accompany, concentrate around and be aggravated by adult-oriented establishments, including, but not limited to, prostitution, pandering, unprotected or indiscriminate sexual conduct and masturbation, distribution of obscene materials and child pornography, possession and sale of controlled substances, violent crimes against persons, property crimes and exposing minors to harmful materials; and WHEREAS, Concern over sexually transmitted diseases, including AIDS, is a legitimate health concern of the state which demands reasonable regulations of adult-oriented establishments in order to protect the health and well-being of the citizens; and WHEREAS, The experience of other states and cities demonstrate that reasonable restrictions on closing hours, as contained in this act, are beneficial and necessary as a means of reducing and curtailing deleterious secondary effects of adult-oriented establishments, including crime, noise, traffic congestion, police response time and efforts, parking problems, sexual disease, sexual activity and discarded pornographic material on neighboring properties and whereas, the Supreme Court in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50-52 (1986), held that states and cities may rely on the experiences of other communities to prevent or reduce the attendant harmful secondary effects of adult-oriented establishments and sexually-oriented businesses, rather than await the impact of such effects, and whereas, several courts have upheld similar restrictions on hours of operations of such establishments and businesses, including: *Mitchell v. Commission on Adult Entertainment*, 802 F. Supp. 1112 (D. Del.1992), affirmed at 10 F.3d 123 (3rd Cir.1993); *Ellwest Stores v. Boner*, 718 F. Supp. 1553, 1577 (M.D. Tenn.1989) (law is difficult to enforce and police in middle of night); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir.1986); *Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486, 491 (E.D. Tenn.1986) (law furthers legitimate law enforcement purpose), and that, therefore, such restrictions are lawful and proper to adopt in this state; and WHEREAS, Several courts have upheld restrictions on the configuration and viewability of the peep show motion picture viewing booths in adult-oriented establishments and sexually-oriented businesses as a means of controlling and preventing the spread of sexual and communicable diseases, public and unhealthy sexual activities, and unlawful sexual conduct in such booths, including: *Libra Books, Inc. v. City of Milwaukee*, 818 F. Supp. 263 (E.D.

Wisc.1993); *City News & Novelty v. City of Waukesha*, 487 N.W.2d 316 (Wisc. App.1993); *Bamon Corp. v. City of Dayton*, 923 F.2d 470 (6th Cir.1991); *Movie & Video World v. Board of County Commissioners*, 723 F. Supp. 695 S.D. Fla.1989); *Ellwest Stereo Theatre, Inc. v. Boner*, 718 F. Supp. 1553 (M.D. Tenn.1989) (Nashville open booth law upheld to prevent prostitution, sexual conduct, diseases); *Berg v. Health and Hospital Corp. of Marion County*, 856 F.2d 797 (7th Cir.1988); *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir.1988); *Postscript Enterprises v. City of Bridgeton*, 699 F. Supp. 1939 (E.D. Mo.1988); *Suburban Video, Inc. v. City of Delafield*, 694 F.Supp. 585 (E.D. Wisc.1988); *Doe v. City of Minneapolis*, 693 F.Supp. 774 (D. Minn.1988); *Wall distributors, Inc. v. City of Newport News*, 782 F.2d 1165 (4th Cir.1986); *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486, 492 (E.D. Tenn. S.D. 1986) (Chattanooga open booth law upheld); *Moody v. Board of County Commissioners*, 697 P.2d 1310 (Kan.1986); *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243 (9th Cir.1982); *EWAP, Inc. v. City of Los Angeles*, 158 Cal.Rptr. 579 (Cal. App.1979), and that, therefore, such restrictions are lawful and proper to adopt in this state; now, therefore,

The defendants introduced considerable evidence made available to the legislature that support the legislature's conclusions as found in the Act's Preamble. Numerous studies on the secondary effects of adult establishments from other jurisdictions were presented to the legislature during its consideration of the Act. The legislature heard from several competent witnesses including police officers and public health officials about the presence of criminal activity and health risks posed by adult-oriented establishments.

A considerable amount of the evidence dealt with the harmful health effects of on-site viewing of sexual material, which is not particularly relevant to the issues in the case before us. The evidence presented, however, also concerned studies in other cities about the effect of adult establishments on the community. Land use studies found that crime increased, residential and commercial property values decreased, and neighbors surveyed noted deteriorating conditions with the opening of adult businesses. Some studies showed that people avoided commercial establishments located near adult establishments.

This material is relevant to our inquiry for two distinct reasons. First, it is offered by the government to show that the Act is not aimed at the content of the material but, rather, is intended to address the secondary or deleterious effects of adult-oriented establishments. Second, since the government's interest is relevant under both strict and intermediate scrutiny, it is offered as evidence to substantiate the government's interest to reduce and curtail "crime, noise, traffic congestion, . . . sexual activity and discarded pornographic material on neighboring properties." (Preamble to Act).

### **C. Secondary Effects Doctrine and Richland Bookmart I and II**

Plaintiffs are correct that absent application of the secondary effects doctrine, the Act would be subject to strict scrutiny. The Tennessee Supreme Court has recognized that "all basic rights of free speech are subject to reasonable regulation." *State v. Smoky Mtn. Secrets, Inc.*, 937 S.W.2d 905, 910 (Tenn. 1996) (quoting *H & L Messengers Inc. v. City of Brentwood*, 577

S.W.2d 444, 451 (Tenn. 1979)). While discussing a challenge to legislation governing charitable solicitations under the federal and state constitutions, the Tennessee Supreme Court found that restrictions on speech based on its content must “withstand ‘exacting First Amendment scrutiny.’”<sup>8</sup> *Smoky Mtn. Secrets*, 937 S.W.2d at 910 (quoting *Riley v. National Fed’n of the Blind*, 487 U.S. 781, 789 108 S.Ct. 2667, 2673 (1988)). To determine if a regulation is reasonable, there must be a “balancing of the freedom of expression against recognized competing rights.” *Smokey Mtn. Secrets*, 937 S.W.2d at 911 (quoting *State v. Marshall*, 859 S.W.2d 289, 305 (Tenn. 1993)) (*Reid C.J.*, concurring and dissenting). When applying strict scrutiny, the applicable standard to analyze challenges under Article I, Section 19 of the Tennessee Constitution, although cast in terms of the First Amendment is:

Regulations which restrain speech on the basis of its content presumptively violate the First Amendment. Such a regulation may be upheld only if the State can prove that “the burden placed on free speech rights is justified by a compelling state interest. The least intrusive means must be utilized by the State to achieve its goals and the means chosen must bear a substantial relation to the interest being served by the statute in question.”

*Smokey Mtn. Secrets*, 937 S.W.2d at 911 (quoting *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 903 (Tenn. 1987)) *app. dismissed*, 485 U.S. 930, 108 S.Ct. 1102 (1988); *see Doe v. Doe*, 127 S.W.3d 728, 732 (Tenn. 2004).

The effect of the secondary effects doctrine on First Amendment analysis was discussed at length by the United States Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1985). The city of Renton, Washington, enacted a zoning ordinance that prohibited adult theatres within 1000 feet of dwellings, churches, parks or schools, and the ordinance was challenged as violating the First Amendment. 475 U.S. at 43, 106 S.Ct. of 926. The district court upheld the ordinance and the Ninth Circuit reversed. *Id.*

The Supreme Court in *Renton* noted that laws enacted to restrict speech based on its content are presumptively unconstitutional and are subject to strict scrutiny. 475 U.S. at 47, 106 S.Ct. at 928. On the other hand, if the restriction is a content neutral time, place or manner restriction it is acceptable if it is “designed to serve a substantial government interest and [does] not unreasonably limit alternative avenues of communication.” *Id.* (citations omitted). The Court noted, however, that the *Renton* zoning ordinance did not “fit neatly” into either category. 475 U.S. at 47, 106 S.Ct. at 929. Clearly, the ordinance treated adult theaters differently, yet the stated purpose of the ordinance was not directed at content but at the effects on neighborhoods. *Id.*

In short, the *Renton* ordinance is completely consistent with our definition of “content-neutral” speech regulations as those that “are *justified* without reference to the content of the regulated speech.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817,

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<sup>8</sup> Many of the Tennessee decisions discussed in this opinion were entertaining challenges simultaneously under the First Amendment and Article 1, Section 19. For that reason, many of the quotes and verbiage refer to the First Amendment but were equally applicable under Article 1, Section 19.

1830, 48 L.Ed.2d 346 (1976) (emphasis added); *Community for Creative Non-Violence*, *supra*, 468 U.S., at 293, 104 S.Ct., at 3069; *International Society for Krishna Consciousness*, *supra*, 452 U.S., at 648, 101 S.Ct., at 2564. The ordinance does not contravene the fundamental principle that underlies our concern about “content-based” speech regulations: that “government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.” *Mosley*, *supra*, 408 U.S., at 95-96, 92 S.Ct., at 2289-2290.

It was with this understanding in mind that, in *American Mini Theatres*, a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to “content-neutral” time, place, and manner regulations. Justice STEVENS, writing for the plurality, concluded that the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters “without violating the government’s paramount obligation of neutrality in its regulation of protected communication,” 427 U.S., at 70, 96 S.Ct., at 2452, noting that “[i]t is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of ‘offensive’ speech,” *id.* at 71, n. 34, 96 S.Ct. at 2453, n. 34.

*Renton*, 475 U.S. at 48-49, 106 S.Ct. at 929-30 (emphasis original).

The Sixth Circuit Court of Appeals in *Richland Bookmart I* found that the Act being challenged in this appeal was not an unconstitutional restriction on free speech under the First Amendment. Like Silver Video and Jenna’s Toy Box, the plaintiffs in *Richland Bookmart I* sold sexually-explicit books, magazines, and videos. 137 F.3d 435, 437. The issue in *Richland Bookmart I* was whether the Act violated the First Amendment. *Id.* Writing for the panel, Judge Merritt discussed at length the law governing the constitutionality of zoning restrictions on adult establishments.

As a preliminary matter, the court in *Richland Bookmart I* found that Supreme Court precedent recognized that sexually explicit speech is in a rather unique First Amendment category.

This case arises from the tension between two competing interests: free speech protection of erotic literature and giving communities the power to preserve the “quality of life” of their neighborhoods and prevent or clean up “skid-rows.” The tension arises because the First Amendment offers some protection for “soft porn,” *i.e.*, sexually-explicit, non-obscene material-although “society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate. . . .” *Young v. American a Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976). The Supreme Court most recently restated this view that “porn-type” speech is generally afforded less-than-full First Amendment protection in *Barnes v. Glen*

*Theatre, Inc.* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing).

*Richland Bookmart I*, 137 F.3d at 438.

The court in *Richland Bookmart I* found that the Act is clearly not content neutral, *i.e.* it applies solely to sexual materials. *Id.* at 439. Because it involves sexual literature, however, law developed under the First Amendment provides protection of a lesser magnitude. *Id.* (quoting *Young v. American Mini Theatres*, 427 U.S. at 70, 96 S.Ct. at 2452). Under the “secondary effects” analysis of *Renton*, the court in *Richland Bookmart I* found that when zoning laws seek to lessen the damaging effects of establishments selling sexual literature, then the laws will be “deemed” content neutral for purposes of constitutional analysis. *Id.* at 440. Therefore, according to the court in *Richland Bookmart I*,

Under present First Amendment principles governing regulation of sex literature, the real question is one of reasonableness. The appropriate inquiry is whether the [Act] is designed to serve a substantial government interest and allows for alternative avenues of communication. Does the law in question unduly restrict “sexually explicit” or “hard-core” erotic expression?

Reducing crime, open sex and solicitation of sex and preserving the aesthetic and commercial character of the neighborhoods surrounding adult establishments is a “substantial government interest.” The Tennessee legislature reasonably relied on the experiences of other jurisdictions in restricting the hours of operation. It is not unreasonable to believe that such regulation of hours of shops selling sex literature would tend to deter prostitution in the neighborhood at night or the creation of drug “corners” on the surrounding streets. By deterring such behavior, the neighborhood may be able to ward off high vacancy rates, deteriorating store fronts, a blighted appearance and the lowering of the property values of homes and shopping areas. Such regulation may prevent the bombed-out, boarded-up look of areas invaded by such establishments. At least that is the theory, and it is not unreasonable for legislators to believe it based on evidence from other places.

*Id.* at 440-41.

The Sixth Circuit’s decision in *Richland Bookmart I* finding the Act constitutional under the First Amendment does not, however, eliminate the plaintiffs’ argument that the Act is unconstitutional under the Tennessee Constitution.

### **III. ANALYSIS OF THE ACT UNDER ARTICLE 1, SECTION 19 OF THE TENNESSEE CONSTITUTION**

Having reviewed federal authorities on the secondary effects doctrine, we now turn our attention to plaintiffs’ challenge under the Tennessee Constitution. While the crux of the issue may be the appropriate level of scrutiny, in order to address the constitutionality of the Act under

Article 1, Section 19, we must analyze the matter in stages. The first question is whether Article 1 Section 19 protects the “sexually-oriented material” sold by plaintiffs. If so, then we must address whether plaintiffs’ establishments meet the definition of “adult oriented establishment” under the Act. If the material sold by plaintiff is protected by Article 1, Section 19 and is included in the Act, then the next question is whether strict or intermediate scrutiny is to be brought to bear on the Act. The determinative question deciding the appropriate level of scrutiny is whether Tennessee will recognize the secondary effects doctrine under State constitutional analysis. Once that issue is decided, our final task is then to apply the constitutionally required scrutiny to determine whether the Act is constitutional under Article 1, Section 19.

It is agreed by the parties the “sexually-oriented material” sold by plaintiffs is not obscene and has no other characteristics that create an exclusion from the protection of Article 1, Section 19.<sup>9</sup> Therefore, the magazines, books and videos sold by plaintiffs are entitled to protection under the Tennessee Constitution’s guarantee of free expression.

Plaintiffs argue that failure of the Act to provide a standard to decide whether sexually-oriented materials, devices, or paraphernalia constitute the “principal or predominant stock or trade” of a business renders the definition of “adult-oriented establishment” under the Act unconstitutionally vague.<sup>10</sup>

We find, however, that the Act does clearly provide a standard. In order to be an adult oriented business subject to the Act, the stock (*i.e.* inventory) or trade (*i.e.* business, as in sales)<sup>11</sup> must be principally or predominantly from sexually-oriented materials. This is not a difficult, complex, or convoluted determination to make. Defendants argue that one cannot discern from the definition whether the determination is made based on sales, stock, profit or space in the store allocated to the materials. We disagree.

We agree with the trial court that it is abundantly clear from the record that Silver Video and Jenna’s Toy Box are adult-oriented establishments. Each sells almost exclusively sexually-oriented material.<sup>12</sup> The vast majority of the stock and sales are of sexually-oriented material. Likewise, the vast majority of profits of each establishment derive from the sale of sexually-oriented material.

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<sup>9</sup> Our Tennessee Supreme Court has found that the Tennessee Constitution affords no protection to obscenity. *Davis-Kidd Booksellers, Inc. v. Leach*, 866 S.W.2d 520, 524 (Tenn. 1993); *State v. Marshall*, 859 S.W.2d 289, 294 (Tenn. 1993).

<sup>10</sup> Tenn. Code Ann. § 7-51-140(4).

<sup>11</sup> According to THE AMERICAN HERITAGE DESK DICTIONARY, “stock” is defined to mean “the total merchandise kept on hand by a commercial establishment” and “trade” is defined to mean “the business of buying and selling goods.”

<sup>12</sup> We note the definition of “adult-oriented establishment” in Tenn. Code Ann. § 7-51-140(4) applies to a “portion” of a business that offers as its “principal or predominant stock” sexually-oriented material. It is difficult to determine how a court can decide what is the principal or predominant stock in a portion of a business. Since as a practical matter, there is no question that sexually-oriented material is the principal or predominant business for Jenna’s Toy Box and Silver Video and since plaintiffs have not raised this issue, we are not presented with the question of whether the inclusion of “portion” is constitutionally suspect.

As to the vagueness argument, due process under Article 1, Section 8 of the Tennessee Constitution requires that laws provide people of ordinary intelligence notice of what is prohibited so they may act accordingly. *Id.* at 655.

A statute is unconstitutionally vague, therefore, if it does not serve sufficient notice of what is prohibited, forcing “men of common intelligence [to] necessarily guess at its meaning.

...

Vague laws implicating the First Amendment to the United States Constitution and Article I, section 19 of the Tennessee Constitution are subject to a more stringent standard than laws in other contexts because of the danger of chilling protected speech. *Davis-Kidd*, 866 S.W.2d at 531. “Where a statute’s literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.” *Smith*, 415 U.S. at 573, 94 S.Ct. 1242

*Knoxville v. Entertainment Resources, LLC*, 166 S.W.3d 650, 656 (Tenn. 2005) *cert. den.* \_\_\_ U.S. \_\_\_, 126 S.Ct. 798 (2005). In *Entertainment Resources*, the Tennessee Supreme Court discussed whether the term “substantial or significant portion of its stock or trade” is unconstitutionally vague when used in an ordinance regulating the location of adult bookstores. The issue in that case, however, was the lack of definition or meaning of “substantial or significant” *Id.* at 657-58. While “substantial or significant” is difficult to quantify, “principal or predominant” can be determined in a particular fact situation by straightforward analysis.<sup>13</sup>

It is our conclusion that the term “principal or predominant stock or trade” is sufficiently defined so that a reasonable person would understand it. The Sixth Circuit reached a similar

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<sup>13</sup> As this court found in *Sherwood v. Microsoft Corporation*, No. M2000-01850-COA-R9-CV, 2003 WL 21780975, at \* 18-19, (Tenn. Ct. App., July 31, 2003) *perm. app. denied* (Aug. 2, 2004),

Courts are not unfamiliar with legal standards requiring them to determine predominance. *See e.g., Trau-Med of Am., Inc.*, 71 S.W.3d at 702 n. 5 (holding that to sustain an action for intentional inference with business relationships, improper motive must be shown by plaintiff demonstrating that the defendant’s predominant purpose was to injure the plaintiff); *City of Chattanooga v. Davis*, 54 S.W.3d 248, 270 n. 22 (Tenn. 2001) (requiring a determination of whether the predominant “remedial” purpose of a monetary sanction is ensuring deterrence against wrongdoing); *Williams v. Estate of Williams*, 865 S.W.2d 3, 5 (Tenn. 1993) (holding that the expressed predominant purpose of a testator prevails, and subsidiary clauses must be construed so as to bring them into subordination to the predominant purpose); *Hudson v. Town and Country True Value Hardware, Inc.*, 666 S.W.2d 51 (Tenn. 1984) (adopting and applying the test for the application of the Uniform Commercial Code as depending on whether the predominant assets to be transferred are goods or services).

“Predominant” is a relative term; whether something is predominant can only be determined in relation to other things; it is greater or superior in influence compared to other factors. *Dillard v. City of Greensboro*, 946 F.Supp. 946, 955-56 (M. D. Ala. 1996); *Matthews v. Bliss*, 39 Mass. 48, 53 (1839).

conclusion in *Richland Bookmart I* under the United States Constitution and rejected the contention that the Act is unconstitutionally vague or overbroad. *Richland Bookmart I*, 137 F.3d at 441. In *Richland Bookmart I*, plaintiff appears to have alleged that “adult oriented establishment” is unconstitutionally vague in that it is not defined. The court found that “principal or predominant” are “understandable common terms” and that “most buyers, sellers and judges know what such materials are.” *Id.* at 441.

#### **IV. WHETHER ARTICLE 1, SECTION 19 REQUIRES STRICT OR INTERMEDIATE SCRUTINY OF THE ACT.**

Plaintiffs are correct that the Tennessee Constitution requires strict scrutiny where protected speech is regulated due to its content. The defendants do not even attempt to argue that the Act would pass strict scrutiny analysis. The question presented to us, however, is whether under Article 1, Section 19 of the Tennessee Constitution the Act should be treated as content neutral based on the secondary effects doctrine of *Renton*.

##### **A. Tennessee Decisions On Secondary Effects Doctrine**

It does not appear that the Tennessee Supreme Court has ruled on whether the secondary effects doctrine in *Renton* as discussed in *Richland Bookmart I* is applicable to analysis of the Tennessee Constitution’s protection of free speech. The Court has, however, discussed the doctrine in the context of a challenge to a statute under the Tennessee and United States Constitutions.

In *Freeman v. Burson*, 802 S.W.2d 210 (Tenn. 1990), *rev’d* 504 U.S. 191, 112 S.Ct. 1846 (1992), the Tennessee Supreme Court reviewed a statute limiting political activities within 100 feet of a polling place. *Id.* at 211. The statute was challenged as being unconstitutional under the First Amendment to the United States Constitution and Article I, Section 19 of the Tennessee Constitution. *Id.* The Court ultimately found that since the statute was not content neutral, *i.e.*, it was aimed at political speech, then it must pass the compelling interest, strict scrutiny test. *Id.* at 212. The Court then found the statute restricting political activity around polling places unconstitutional since it did not meet the strict scrutiny test. *Id.* at 214-15. The United States Supreme Court reversed the Tennessee Supreme Court, finding that although strict scrutiny was applicable, the statute in question “is the rare case in which we have held that a law survives strict scrutiny.” *Freeman v. Burson*, 504 U.S. 191, 211, 112 S.Ct. 1846, 1857 (1992).

For our current purposes, the brief discussion of *Renton* by the Tennessee Supreme Court in *Freeman* is relevant but not determinative. In *Freeman*, the State argued that since the statute was not aimed at speech but was aimed at the “secondary effects” of political activity at the polling place then, applying *Renton*, the statute should be deemed content neutral. 802 S.W.2d at 212. The Tennessee Supreme Court did not decline to apply the secondary effects doctrine of *Renton* to the challenge under the State Constitution. Instead, the Court declined to apply *Renton* because it found that the secondary effects doctrine of *Renton* does not apply to political speech. *Id.* at 212-13. In other words, the court did not dismiss the applicability of the secondary effects doctrine to the Tennessee Constitution; rather, it chose to decline to apply the doctrine when political speech is at issue. The significance of this omission is uncertain, however, since the

Court was not clear whether this ruling pertained only to the United States Constitution or included the Tennessee Constitution as well.

While the Tennessee Supreme Court has not ruled on the applicability of the secondary effects doctrine to Tennessee Constitutional analysis, two Court of Appeals decisions have adopted the doctrine. First, in *American Show Bar Series, Inc. v. Sullivan County*, 30 S.W.3d 324 (Tenn.Ct.App.2000), the court found that the secondary effects doctrine of *Renton* applied to analysis of the Adult-Oriented Establishment Registration Act of 1998 adopted by Sullivan County by ordinance. *Id.* at 333-334. The ordinance required, among other things, registration, work permits and a minimum distance between the audience and the entertainers. *Id.* at 331. The ordinance also prohibited alcohol, touching the entertainers, and exposing certain parts of the body. *Id.* Two clubs challenged the ordinance under the provisions guaranteeing free expression under the federal and state constitutions. *Id.* at 333.

The court in *American Showbar* first found that the nude dancing addressed by the ordinance “enjoys only minimal protection by the First Amendment.” *Id.*

As a threshold matter, we must determine if the Act is a “content-neutral” time, place, and manner regulation or if it is a “content-based” restriction. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47, 106 S.Ct. 925, 928, 89 L.Ed.2d (1986). If the Act is targeted specifically at the content of the erotic message conveyed by such entertainment, then the Act is presumptively invalid and will be subject to strict scrutiny. *See id.* On the other hand, if the ordinance is “justified without reference to the content of the regulated speech,” or the ordinance serves a purpose that is unrelated to the content of expressive conduct, the ordinance may be considered content-neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). Thus, if the Act is targeted at combating the negative secondary effects of the protected expression, then the Act may be upheld as a reasonable time, place, and manner restriction. *See City of Renton*, 475 U.S. at 49, 106 S.Ct. at 929-30.

*Id.* at 333-34. The Court found the evidence supported the conclusion that the ordinance was aimed at the secondary effects. *Id.* at 334-35. Consequently, the intermediate level of scrutiny was applicable. *Id.* at 335-36.

More recently, this issue was presented again in *City of Cleveland v. Wade*, No. E2004-02633-COA-R3-CV, 2006 WL 468731 (Tenn.Ct.App. Feb. 28, 2006) *perm. app. denied* ( Aug. 21, 2006). The owner of Babylon Adult Bookstore alleged that a Cleveland zoning ordinance prohibiting “sex outlets” within 750 feet of a residential district was an unconstitutional content-based restriction under both the First Amendment and Article 1, Section 19. *Id.*, at \*1-2. The court in *Wade* posed the question identically to the above quoted language from *American Showbar*. *Id.*, at \*4. In other words, as in *American Showbar*, the court took for granted that the secondary effects doctrine applied to analysis under both constitutions. The court in *Wade* then decided the zoning ordinance was directed at the secondary effects associated with adult

businesses, applied intermediate scrutiny, and found the ordinance to be a reasonable time, place, and manner restriction. *Id.*, at \*5-6.

While both *American Showbar* and *Wade* applied the secondary effects doctrine to interpretation of Article 1, Section 19, it is not clear that its applicability to the Tennessee Constitution was an issue raised by the parties.

## **B. Protected Status Of Sexually-oriented Material**

Turning to plaintiffs' argument herein, it is clear that Article 1, Section 19 "provides protection of free speech rights at least as broad as the First Amendment." *Doe v. Doe*, 127 S.W.3d 728, 732 (Tenn. 2004). It is plaintiffs' position that in this context, the Tennessee Constitution's protection of sexual literature is broader than that of the United States Constitution. Since Article 1, Section 19 is broader than the First Amendment, *i.e.*, protects speech on "any subject," then plaintiffs maintain that *Renton* and the secondary effects doctrine have no applicability.<sup>14</sup> According to plaintiffs, once speech is deemed protected, then the "any subject" language of Article I, Section 19 requires strict scrutiny.

Plaintiffs argue that we should not adopt the secondary effects doctrine developed in *Renton* as discussed in *Richland Bookmart I* because the underlying premise of *Richland Bookmart I* is flawed. Unlike the United States Constitution, they argue that under Article 1, Section 19 of the Tennessee Constitution there is no "sliding scale" of protection for sexual literature *i.e.*, it is not subject to "lesser protection."

We do not agree that all legislation that may impact speech is subject to a strict scrutiny analysis under the Tennessee Constitution. The Tennessee Supreme Court has found that some speech is not protected at all, *i.e.* obscenity. *Marshall*, 859 S.W.2d at 294. In addition to finding that some speech is not protected at all, the Tennessee Supreme Court has found that some types of *protected* speech require greater protection while others are accorded less protection under the Tennessee Constitution. It is clear both from the Constitution itself and decisions interpreting it that political speech is afforded particular protection. In the *Freeman* decision, the Tennessee Supreme Court refused to apply *Renton* to political speech because it "is the most highly protected form of speech." *Freeman*, 802 S.W.2d at 212. When one examines Article 1, Section 19 in context, it is obvious that, while certainly not limited to political speech, the provision's breadth is aimed at political speech:

That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the rights thereof. The free communication of thoughts

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<sup>14</sup> The Tennessee Supreme Court has recognized that the protection of Article 1, Section 19, depending on the context, may be stronger than the First Amendment. *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978). *Press Inc.* dealt with political speech (newspaper articles about public officials' conduct) which our Court has deemed "the most highly protected form of speech." *Freeman v. Burson*, 802 S.W.2d at 212. The Court has, however, subsequently stated that the "difference in protection afforded, to the extent it may exist" is not material under specific fact circumstances. *Ferguson v. Union City Daily Messenger, Inc.*, 845 S.W.2d 162, 165 (Tenn. 1992) *cert den.* 508 U.S. 961, 113 S.Ct. 2931 (1993) (regarding the interplay of defamation and constitutional guarantees of free speech).

and opinions, is one of the invaluable rights of man, and every citizen may speak, write, and print on any subject, being responsible for the abuse of that liberty.

In *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn.1978), the Tennessee Supreme Court discussed our State Constitution in the context of a controversy involving a newspaper's accounts of the activities of a social worker and whether the social worker was a public figure for libel purposes.

To the extent of this controversy, [newspaper coverage of public official] this [Art. 1, Sec. 19] is a substantially stronger provision than that contained in the First Amendment to the United States Constitution ("Congress shall make no law . . . abridging the freedom . . . of the press") in that it is clear and certain, leaving nothing to conjecture and requiring no interpretation, construction or clarification.

This mandate of Tennessee's Constitution requires that any infringement upon the "free communication of thoughts" and any stumbling block to the complete freedom of the press "to examine (and publish) the proceedings . . . of any branch or officer of the government" is regarded as constitutionally suspect, and at the very threshold there is a presumption against the validity of any such impediment.

*Id.* at 442.

At the other end of the spectrum, the Tennessee Supreme Court has found commercial speech is afforded "a qualified protection under both the federal and state constitutions." *Douglas v. State*, 921 S.W.2d 180, 183 - 84 (Tenn. 1996). In *PP&C, Inc. v. Metropolitan Beer Permit Board*, 833 S.W.2d 90, 93 (Tenn. Ct. App. 1992), this court found "[t]hat the reality is, however, that nude dancing or nudity in general is minimally protected under the First Amendment."<sup>15</sup>

It is clear that under Article 1, Section 19 there are levels of protected speech. The question then becomes whether sexually explicit literature is to be accorded the same level of protection as political speech in the context of zoning restrictions.

We believe that explicit sexual materials are not to be accorded the full measure of protection due political speech under the Tennessee Constitution.<sup>16</sup> The Tennessee Supreme Court has recognized that the applicable scrutiny is, in effect, a "balancing of the freedom of expression against recognized competing rights." *Smoky Mtn Secrets*, 937 S.W.2d at 911 (quoting *State v. Marshall*, 859 S.W.2d 289, 305 (Tenn. 1993) (Reid, C.J. concurring and dissenting.)) We agree with the Sixth Circuit's reasoning in *Richland Bookmart I* that once it is determined that the speech at issue does not trigger the strictest scrutiny, then courts must try to balance two legitimate competing interests: "free speech protection of erotic literature and giving communities the power to preserve the 'quality of life' of their neighbor hoods and prevent or clean up 'skid rows'." 137 F.3d at 438. We believe that where a zoning law is aimed not at the

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<sup>15</sup> Although cast in terms of the First Amendment, the challenge was likewise under Article 1, Section 19 of the Tennessee State Constitution. *PP&C*, 833 S.W.2d at 92.

<sup>16</sup> Plaintiffs try to argue that sexually explicit literature is political in nature. The material at issue may have some remote political ramifications, but that does not transform it into political speech.

content of erotic expression but its damaging effects on the community, then under Article 1, Section 19 it is to be deemed a time, place, and manner restriction requiring intermediate scrutiny.

While plaintiffs warn that recognizing varying levels of protection for speech in the Tennessee Constitution is a slippery slope, our holding is limited to the Act being challenged herein. We simply hold that because the business at issue sells erotic literature does not insulate that business entirely from zoning restrictions intended to ameliorate damaging effects on the community. Our decision is narrow and applies only to zoning restrictions aimed at the secondary effects of businesses selling predominantly sexually explicit material. Furthermore, any such zoning restrictions that touch upon speech must meet a vigorous intermediate scrutiny analysis.

### **C. Application Of Intermediate Scrutiny.**

Both parties appear to agree that *if* intermediate scrutiny is applicable, the Act must meet the intermediate scrutiny analysis discussed in *United State v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968) which governs when the conduct at issue includes “speech” and “nonspeech” elements. Under this test, an enactment is constitutional if:

- 1) it is within the constitutional power of the government;
- 2) it furthers an important or substantial government interest;
- 3) the governmental interest is unrelated to the suppression of free speech; and
- 4) the incidental restriction on free speech is no greater than necessary to further that interest, i.e., the regulation of speech is narrowly tailored and is not overly broad.

*O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679.

As to the first element, it is not disputed that governments are authorized to enact land use regulations. Furthermore, the Tennessee Supreme Court has recognized that all rights of free speech are subject to “reasonable regulation.” *Smokey Mountain Secrets*, 937 S.W.2d at 911 (quoting *H&L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 451 (Tenn. 1979)). Therefore, the Act is clearly within the power of the General Assembly.

The Act furthers the requisite governmental interest that is unrelated to speech satisfying the second and third prong of the *O'Brien* test. The governmental objectives of the Act as stated in the Preamble are as follows:

WHEREAS, The experience of other states and cities demonstrate that reasonable restrictions on closing hours, as contained in this act, are beneficial and necessary as a means of reducing and curtailing deleterious secondary effects of adult-oriented establishments, including crime, noise, traffic congestion, police response time and efforts, parking problems, sexual disease, sexual activity and discarded pornographic material on neighboring properties and whereas, the Supreme Court in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50-52

(1986), held that states and cities may rely on the experiences of other communities to prevent or reduce the attendant harmful secondary effects of adult-oriented establishments and sexually-oriented businesses, rather than await the impact of such effects, and whereas, several courts have upheld similar restrictions on hours of operations of such establishments and businesses, including: *Mitchell v. Commission on Adult Entertainment*, 802 F. Supp. 1112 (D. Del.1992), affirmed at 10 F.3d 123 (3rd Cir.1993); *Ellwest Stores v. Boner*, 718 F. Supp. 1553, 1577 (M.D. Tenn.1989) (law is difficult to enforce and police in middle of night); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir.1986); *Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486, 491 (E.D. Tenn.1986) (law furthers legitimate law enforcement purpose), and that, therefore, such restrictions are lawful and proper to adopt in this state; and

As the United States Supreme Court found in *Young* and *Renton*, attempting to preserve the quality of urban life is a governmental interest that “must be accorded the highest respect” and is a “vital governmental interest.” *Renton*, 475 U.S. at 50, 106 S.Ct. at 930 (quoting *Young*, 427 U.S. at 71, 96 S.Ct. at 2453). It is clear from the Preamble and reasonable to believe that the Act’s restrictions on hours of operation for adult-oriented establishments serve that interest. Furthermore, there are many avenues available to disseminate this material and even these establishments are open other hours during the day and night. This material may also be purchased after the operating hours of adult-oriented establishments at stores that do not offer predominately “sexually-oriented material.” During the course of the secondary effects analysis discussion, we have explained that we find the zoning restriction was not enacted to suppress speech.

Plaintiffs vigorously deny that the restrictions of the Act meet the final factor of the *O’Brien* test, *i.e.*, that its restrictions are no greater than necessary to further the government’s interest to prevent the damaging secondary effects of these establishments. As discussed by the United States Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99, 109 S.Ct. 2746, 2757-58 (1989).

[the regulation at issue] need not be the least restrictive or least intrusive means of [achieving the government interest.] Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government’s legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. So long as the means chosen are not substantially broader than necessary to achieve the government’s interest, however, the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less speech-restrictive alternative. The validity of [the regulation] does not turn on a judge’s agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.

(citations and internal quotations omitted).

Plaintiffs argue that the Act is overbroad in several respects. The Act includes plaintiffs' stores that sell material for off-site viewing with stores that display the sexually-oriented material on premises in booths or stalls. The plaintiffs agree that businesses that allow on-premise viewing warrant government regulation, but argue that including their businesses is excessively broad coverage. According to plaintiffs, the ills discussed in the Preamble primarily concern health and public safety problems associated with viewing booths. Plaintiffs claim that defendants have failed to show that hours of operation restrictions combat secondary effects. Furthermore, plaintiffs argue that the Act's definitions are so broad that it includes businesses that do not produce the damaging secondary effects.

We do not believe the Act is "substantially broader" than necessary to achieve its goals. It is clear that the legislature, based on the studies submitted to it, could reasonably conclude that neighborhoods suffer from these establishments. Restricting hours of operation is not unduly burdensome. The plaintiffs herein and businesses like them may operate until midnight most days. Prohibiting post-midnight and Sunday operation is a reasonable effort to reduce the undesirable effects that accompany such establishments.

## V. SCIENTER

Plaintiffs first argue that since the Act has no scienter requirement it is unconstitutional as a deprivation of due process, citing *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215 (1959).<sup>17</sup> A thorough examination of *Smith* reveals, however, that the rationale for that decision is not applicable in this case. In *Smith*, the City of Los Angeles enacted an ordinance that made it unlawful for any bookseller to offer for sale an obscene book. *Id.* at 149. The ordinance had no requirement that a person have “scienter-knowledge” of the contents of the obscene book thereby imposing “strict” criminal liability. *Id.* In other words, a bookseller whose inventory was otherwise composed of non-sexual material but unwittingly had a single obscene book was subject to criminal penalty.

The Court in *Smith* acknowledged that legislative bodies were at liberty to create criminal offenses without a scienter requirement, *i.e.*, strict liability offenses. *Id.* at 150. In *Smith*, however, the Court was concerned when the elimination of the scienter requirement leads to a “substantial restriction on the freedom of speech and of the press.” *Id.* at 150. The state may not restrict dissemination of books that are not obscene. *Id.* at 152. The Court found that eliminating the scienter requirement in the criminal statute prohibiting the sale of an obscene book would have that effect, because booksellers would tend to restrict the books they sell to those that have been inspected. Consequently, the government will have imposed a restriction upon non-obscene speech. *Id.* at 153. The Court in *Smith* then reasoned that the bookseller’s burden would become the public’s burden because “by restricting [the bookseller] the public’s access to reading matter would be restricted.” *Id.* at 153.

The plaintiffs cite two Tennessee Supreme Court decisions where scienter was found to be a constitutionally required element of a criminal offense. In each of these cases, however, like *Smith* the issue dealt with criminal possession of obscene material, and the “scienter” at issue related to knowledge that the material was obscene.

In *Taylor v. State*, 529 S.W.2d 692 (Tenn. 1975), the Tennessee Supreme Court upheld the statute at issue because it contained “scienter in the only sense in which it is demanded by the First Amendment.” *Id.* at 695. In *Taylor*, the Court favorably cited *Mishkin v. New York*, 383 U.S. 502, 86 S.Ct. 958 (1966), as follows:

The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity.

*Taylor*, 529 S.W.2d at 695 (quoting *Mishkin*, 383 U.S. at 511, 86 S.Ct. at 965).

Likewise, in *Ellenburg v. State*, 384 S.W.2d 29 (Tenn. 1964), the Tennessee Supreme Court, relying on *Smith*, required that scienter be an element of an offense regarding sale of obscene material. *Id.* at 155-56. This is true because dispensing with the scienter requirement

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<sup>17</sup> Before we discuss whether the scienter elements found in Tenn. Code Ann. § 39-11-102(b) and § 39-11-301(c) may be incorporated into the Act, we must first decide whether scienter is a constitutionally required element of an offense under the Act.

places a severe limitation on the public's access to constitutionally protected material. *Id.* (quoting *Smith*).

The current statute does not place a burden on the plaintiffs or a limitation on the public's access like those discussed in *Smith*, *Taylor* and *Ellenburg*. First, the Act does not prohibit or impose criminal penalties for the sale of particular types of material. Second, it merely limits the hours of operation of the businesses. The Act applies only if the business is predominately or primarily sexually-oriented materials. No burden is placed on plaintiffs by the Act to censor the materials sold in order to avoid criminal penalty as described in *Smith*. As observed by the Sixth Circuit in *Richland Bookmart I*, "Access to adult establishments is not unduly restricted by the legislation." 137 F.3d at 441. In other words, the lack of a scienter requirement does not require censorship by the plaintiffs that then affects the public's access.<sup>18</sup> For this reason we do not find scienter to be a constitutionally required element of an offense under the Act.<sup>19</sup>

The judgment of the trial court is affirmed. Costs are taxed to the appellants, Silver Video USA, Inc., et al. for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE

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<sup>18</sup> Plaintiffs do not specify exactly what type of scienter or element of knowledge they believe is constitutionally required. Presumably, plaintiffs would argue that plaintiffs' knowledge that their principal or predominant stock or trade is adult-oriented material is constitutionally mandated. Unlike *Smith* and its progeny, the absence of this requirement does not restrict the material plaintiffs may sell since it places no burden on plaintiffs to restrict their sales to items that have been inspected. The Act is triggered not by a potential lone obscene book but by the plaintiff's principal or predominant stock or trade. Further, application of the statute simply limits hours of operation (8:00 a.m. to midnight) for those who choose to operate a business predominated by adult-oriented material.

<sup>19</sup> Since scienter is not constitutionally required, we need not discuss whether Tenn. Code Ann. § 39-11-102(b) or § 39-11-301(c) provide the scienter requirement.