IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

NORFOLK 302, LLC	)	
t/a HAVE A NICE DAY CAFÉ, et. al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil No.: 2:07-cv-00203**
	)	
ESTHER H. VASSAR, et. al.	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF AMICI CURIAE
IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Amici Curiae, the Thomas Jefferson Center for the Protection of Free Expression and the American Civil Liberties Union of Virginia, Inc., respectfully urge the Court to grant the plaintiffs' motion for a preliminary injunction for the following reasons:

I. THE CHALLENGED STATUTES ARE OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT.

The importance of this case extends beyond its facts; it involves more than the health and safety concerns behind regulating who can serve alcohol and where. Rather, this matter involves a fundamental issue of constitutional law: the precision required of state governmental authorities in drafting rules and laws that affect First Amendment rights. As such, this case has importance for all the citizens of Virginia, regardless of the businesses they solicit or whether they drink alcohol or not.

The Constitution protects not just political and ideological speech, but also "live entertainment," including "nude dancing" and other performances involving nudity or other sexual elements. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66 (1981) (citations

omitted); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). "In evaluating the free speech rights of adults, we have made it perfectly clear that sexual expression which is indecent but not obscene is protected by the First Amendment." *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

The overbreadth doctrine is an important and unique tool in the protection of First Amendment freedoms. The central purpose behind the doctrine is to ensure that, even if a regulation might be capable of a constitutional application to a person who is before the court, the regulation does not impair the speech rights of others unjustly included in its sweep.

> A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. When the statutes also have an overbroad sweep... the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. For '(t)he threat of sanctions may deter... almost as potently as the actual application of sanctions.'

Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120-21 (1965) (internal citations omitted). Thus, when a legislative or administrative body takes action that regulates expression, it should do so carefully and precisely.

While some regulatory interests are sufficiently compelling to warrant limited restrictions on the freedom of expression, it is the responsibility of the legislative body to ensure that these regulations do not inhibit constitutionally protected speech. In circumstances where the target of a regulation is conduct, not speech, "the overbreadth... must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep" in order for it to be struck down on a facial challenge. *Broadrick v.*

Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908, 2918 (1973). Yet, even in such cases, the legislative body has the responsibility to ensure the regulation does not have an overly burdensome chilling effect on the exercise of First Amendment rights. As the Fourth Circuit made abundantly clear in *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002) ("*Carandola I*"), when a legislative body fails to draft a statute such that it will not harm the legitimate First Amendment interests retained by others, it is the responsibility of the courts to strike it down.

In *Carandola I*, the Fourth Circuit heard a challenge to a North Carolina statute that prohibited, among other things, "lewd and obscene entertainment" in establishments licensed to sell alcoholic beverages. The court found the statute to be overbroad because, by its terms, it could be applied to performances of legitimate theatrical works in museums, theaters, and halls. The Fourth Circuit later upheld a revised version of the statute in *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074 (4th Cir. 2002) ("*Carandola II*") because of the addition of a provision precluding its application to performances in "theaters, concerts halls, art centers, museums, or similar establishments…." The core issue now before this court is whether the Virginia statutes and rules in this case have more in common with those at issue in *Carandola I* or those in *Carandola II*. Amici contend that the Virginia restrictions are constitutionally flawed for the same reasons as were those in *Carandola I*.

Virginia's Administrative Code states that "any real or simulated act of sexual intercourse…by any person, *whether an entertainer or not,*" constitutes lewd and disorderly conduct. Unlike the revised statute upheld in *Carandola II*, the Virginia restrictions have no word or phrase that admits of a saving construction. Critically acclaimed plays that simulate sexual activity such as *Equus* and *Hair* could be barred in Virginia theatres licensed to serve

alcohol. Thus, the Virginia restrictions have the same overbroad constraint on artistic expression as did the statute in *Carandola I,* they unconstitutionally sweep beyond bars and nude dancing facilities to include theaters, concert halls, and museums.

Indeed, the ABC Board concedes that the Virginia restrictions "could be read to encompass mainstream venues and entertainment" (Defendants' Memorandum, p. 2) yet nonetheless request that this court "defer ruling on the plaintiffs' Motion pending adoption of [a] proposed new preamble and regulation." Such a request should be denied because it fails to recognize the U.S. Supreme Court's determination that the "loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

II. THE CHALLENGED REGULATIONS ARE UNCONSTITUIONALLY VAGUE

This case also raises issues relating to how carefully legislative bodies must define the laws they make, and how such definitions can affect a robust exercise of First Amendment freedoms. Much like overbroad laws, regulations that are excessively vague may inhibit the full exercise of rights of speech and expression guaranteed by the First Amendment. When a regulation "is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits," then it unconstitutionally violates due process. *Giaccio v. State of Pa.*, 382 U.S. 399, 402-3, 86 S.Ct. 518, 520-521 (1966). Such regulations are likely to have a chilling effect on the free exchange of ideas, and to impair freedoms constitutionally protected under the First Amendment. Laws are also held to violate due process when "the legislature fails to provide... minimal guidelines" such that "a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to

pursue their personal predilections." *Koleander v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983) (internal citation and quotations omitted).

A statute will be found to be impermissibly vague if it either (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or (2) authorizes or even encourages arbitrary and discriminatory enforcement. Essential to the inquiry of vagueness is whether the provisions in question provide fair notice to the targeted audience of a statute.

In *Carandola II,* the Fourth Circuit dismissed the plaintiff's claim that the term "simulate" was vague in the North Carolina restrictions at issue in the case. The court found that "simulate" was sufficiently precise to notify persons of ordinary intelligence of the conduct sought to be prohibited in the statute at issue and, because of its precise meaning, there would be little possibility of arbitrary and discriminatory enforcement.

Comparable clarity is lacking in the Virginia restrictions. As discussed in Section I, VA Code § 4.1-225 allows the Board to suspend or revoke the license of licensees who allow "noisy" "lewd" or "disorderly conduct" on their premises or those who provide a meeting place or rendezvous for "persons of ill repute." First, neither the Code of Virginia nor the Virginia Administrative Code attempt to explain the meaning or scope or "noisy" for the purposes of VA Code §4.1-225. Contrary to the assertion of Defendants, the mere fact the word "noise" is found in a standard dictionary does not change the inherently subjective nature of the term. Thus, the potential for arbitrary and discriminatory enforcement is substantial.

Another unconstitutionally vague phrase in the Virginia restrictions is "lewd or disorderly." Ironically, in attempting to provide greater precision to this provision, the

Virginia Administrative Code makes its meaning less clear. Pursuant to Va. Code §4.1-225(h), the Virginia ABC Board may suspend the license of a licensee "who has allowed noisy, lewd or disorderly conduct" on his premises. The Virginia Administrative Code attempts to offer some guidance as to what constitutes "lewd or disorderly conduct" by offering specific examples, but explicitly states that "lewd and disorderly conduct" is not limited to those examples. 3VAC5-50-140. Under the statutory terms, therefore, the Virginia ABC Board has unbridled discretion in classifying conduct that is "lewd and disorderly."

Finally, the phrase "persons of ill repute" in section 4.1-225(h) is far from precise as the Virginia legislature fails to provide a definition for the phrase and because this phrase itself is largely subjective.

CONCLUSION

The Virginia restrictions at issue both overbroad riddled with vague phrases and terms; therefore Plaintiffs' Motion for a Preliminary Injunction should be granted.

Respectfully submitted,

THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC.

By: /s/ Rebecca K. Glenberg
Rebecca K. Glenberg (VSB #44099)
Attorney for Amici Curiae
American Civil Liberties Union of Virginia Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, Virginia 23219

(804) 644-8080
fax: (804) 649-2733
rglenberg@acluva.org

J. Joshua Wheeler
Attorney for Amici Curiae
The Thomas Jefferson Center for
the Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
(434) 295-4784
(434) 296-3621 (facsimile)
jjw@tjcenter.org

Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded by the Court's electronic filing procedures on this 8th day of June, 2007 to:

Robert F. McDonnell
William C. Mims
Maureen Riley Matsen
Catherine Crooks Hill
Mike F. Melis (VSB No. 43021)
Office of the Attorney General
900 East Main Street
Richmond, VA 23219

Kevin E. Martingayle, Esq.
Stallings & Bischoff, P.C.
2101 Parks Avenue, Suite 801
Post Office Box 1687
Virginia Beach, VA 23451

James Neal Insley, Esq.
Neal Insley, P.L.C.
800 Seahawk Circle, Suite 111
Virginia Beach, VA 23452

/s/ Rebecca K. Glenberg