

SC91563

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IN THE SUPREME COURT OF MISSOURI

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MICHAEL OCELLO, et al,

Appellants,

v.

CHRIS KOSTER, in his official capacity  
as the Attorney General  
for the State of Missouri,

Respondent.

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Appeal from the 19<sup>TH</sup> Circuit Court of Cole County, Missouri,  
The Honorable Jon E. Beetem, Circuit Judge.

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RESPONDENT'S BRIEF

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## JURISDICTIONAL STATEMENT

This case involves a challenge to House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bills 586 & 617 (“SB 586”) of 2010, enacted as §§ 573.525-573.537, RSMo<sup>1</sup> (“Statute”). The statutory provisions concern the operations of sexually oriented businesses.

Appellants challenge the Missouri General Assembly’s process in passing the bill, claiming that the process violated § 23.140, RSMo, and Article III, § 35 of the Missouri Constitution because the Committee on Legislative Research failed to hold a hearing on the fiscal note as requested by a legislator. Appellants also challenge the statutory provisions concerning sexually oriented businesses, claiming violations of the First and Fourteenth Amendments of the U.S. Constitution, and Article I, § 8 of the Missouri Constitution.

This Court has jurisdiction pursuant to Article V, § 3 of the Missouri Constitution as it involves the constitutional validity of a Missouri statute.

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<sup>1</sup> All statutory references are to RSMo Supp. 2010 unless noted otherwise.

## PRELIMINARY STATEMENT

Appellants challenge the process by which the Statute, as a whole, was adopted. But their challenge to the substance of the Statute is necessarily limited to the six provisions that affect them. *See* § 573.531, subsections 3, 4, 5, 6, 8, and 9 (containing, respectively, a prohibition on *total* nudity (which allows women to strip all the way down to pasties and a G-string), a required 6-ft. buffer between patrons and semi-nude (*e.g.*, pasties and G-string) employees, no-touch, open-booth, and hours of operation rules, and an alcohol proscription).

Appellants did not plead facts to show that subsections 1, 2, and 10 of § 573.531 affect any Appellant. Thus, Appellants lack standing to challenge those subsections. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-36 (1990) (finding that sexually oriented businesses lacked standing to challenge certain provisions of ordinance because no plaintiff alleged facts to show injury from those provisions).

Specifically, § 573.531.1 requires new sexually oriented businesses to locate at least 1,000 feet from certain land uses, but Appellants are existing businesses explicitly allowed to continue at their current locations. Similarly, no Appellant has standing to challenge § 573.531.2 because none has alleged that he has recently been convicted of a specified criminal act (*e.g.*, rape or prostitution) that would temporarily bar him from operating a sexually

oriented business. Finally, no Appellant has alleged a desire to admit minors in violation of § 573.531.10.

Respondent raised the standing defect below (LF 119); Appellants conceded the issue by not responding to it. (LF 1906) (noting this fact).

## STATEMENT OF FACTS

### Procedural Posture Below

When Respondent answered the Appellants' petition, he attached six composite exhibits consisting of various documents from committees of the General Assembly pertaining to the consideration and adoption of the Statute. (LF 100-101, Answer, ¶¶ 127-132). These documents are contained in the two-volume Supplemental Legal File ("SLF") for this appeal. (*See* Apls.' Brf. at 4, n.1 (noting legislative record was appended to Answer and that those documents comprise the SLF, including documents contained on CDs at SLF 47, 248)).

Because the petition raised only legal issues, Respondent moved for judgment on the pleadings on Count I (the fiscal note) and Count II (First Amendment), relying on the text of the Statute and the legislative record documents, which were attached to the Petition and the Answer, respectively. Because these documents were attached to and part of the pleadings for all purposes, Mo. R. Civ. P. 55.12, the legislative record documents set forth in the SLF were properly before the Circuit Court.

In response, Appellants moved for summary judgment on Count I and for summary judgment on Count II (but only on grounds that the Statute imposes content-based restrictions). (LF 222-223). Appellants filed affidavits labeled A through X in support of the summary judgment motion. (LF 352-

353 (Table); 354-540 (Affidavits)). Despite the fact that Respondent filed a motion for judgment on the pleadings (not summary judgment), Appellants also submitted affidavits in opposition to Respondent's motion. (LF 541-543 (Table); 544-1712 (Affidavits)).

### **Decision Below**

After a hearing on Count I, the Circuit Court granted judgment on the pleadings for Respondent and denied Appellants' motion for summary judgment as to the fiscal note issue. (LF 1800). The court later held that the State was entitled to judgment on the pleadings as to the other constitutional issues. (LF 1964).

In support of its motion for judgment on the pleadings the State pointed to the extensive evidence that was considered by the legislature before approving SB 586.

### **The Extensive Secondary Effects Evidence Considered by the General Assembly from Both Sides of the Debate.**

On several occasions in recent years, the Missouri General Assembly has heard from constituents regarding adverse secondary effects of sexually oriented businesses in their communities. In the last five years, several bills have been introduced to address these secondary effects. (*See* SLF 42, Answer, Exh. 2, ¶ 2).

In 2010, SB 586 was introduced, and the General Assembly held extensive hearings on the bill. On January 19, 2010, the Senate Judiciary and Civil and Criminal Jurisprudence Committee heard from numerous witnesses—*both for and against the bill*. The Committee received a CD containing voluminous information documenting the adverse secondary effects of adult businesses in Missouri and around the country. (SLF 42-51, Answer, Exh. 2, ¶¶ 3-6, Exhs. 2A (Minutes) and 2B (CD & Index)).

Similarly, the House Small Business Committee held a hearing on April 7, 2010, taking extensive proponent and opponent testimony and receiving a CD with the same extensive secondary effects evidence. (SLF 53-252, Answer, Exh. 3, ¶¶ 3-7; Exhs. 3A (Minutes, committee documents, witness forms and written submissions; *see* SLF 55-247) and 3B (CD & Index; *see* SLF 248-252)). At this hearing, the Committee heard from Daniel G. Linz, Ph.D—the Appellants’ expert witness in this case—and received written testimony from him. (SLF 65, 126-129; Answer, Exh. 3A at 11/193, 72-75/193). A packet of additional information on the adverse secondary effects of adult businesses was provided to the House Small Business Committee on April 8. (SLF 254-294, Answer, Exh. 4, ¶¶ 2-4; Exh. 4A, Letter from State Representative Ed Emery, April 8, 2010, with attachments).

On April 28, Representative Emery distributed a similar packet on secondary effects, along with an annotated version of the bill, to the entire

House membership. (SLF 254, 295-322, Answer, Exh. 4, ¶ 5; Exh. 4B, Letter from Representative Ed Emery, April 28, 2010, with attachments).

### **Review of Types of Evidence Approved by Appellate Courts.**

Through the legislative proceedings, the General Assembly learned about, and relied upon, all of the types of evidence that appellate courts have found relevant to legislative determinations regarding secondary effects:

(1) judicial decisions, (2) land use studies, (3) crime and health impact reports, (4) anecdotal evidence, and (5) expert witness testimony.

### **Judicial Decisions Were Reviewed by the General Assembly.**

First, the annotated copy of the bill provided to the House clearly indicated that *each* of the conduct regulations at issue in this case (*i.e.*, the total nudity prohibition, the 6-ft. dancer-patron buffer, the no-touch, open-booth, and hours of operation rules, and the alcohol proscription) have been previously upheld on appeal as constitutional regulations for preventing negative secondary effects: (SLF 320-321, Answer, Exh. 4B at 26-27) (citing *all* of the following cases: *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991) (Souter, J., concurring in judgment) (upholding nudity prohibition based on state's interest in preventing prostitution, sexual assaults, and other criminal activity); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 301 (2000) (same); *Jake's, Ltd., Inc. v. City of Coates*, 284 F.3d 884, 891-92 (8th Cir. 2002) (upholding, *inter alia*, 6-ft. rule); *Sensations, Inc. v. City of Grand*

*Rapids*, 526 F.3d 291, 299 (6th Cir. 2008) (upholding nudity prohibition and 6-ft., no-touch, open-booth, and hours regulations); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995) (upholding no-touch rule); *Scope Pictures, of Missouri, Inc. v. City of Kansas City*, 140 F.3d 1201, 1204 (8th Cir. 1998) (upholding open-booth requirement); *Doe v. City of Minneapolis*, 898 F.2d 612, 619-20 (8th Cir. 1990) (upholding open-booth rule and stating that “sexual encounters occur in bookstore booths. . . . The health risk results from the booth being closed, not from the material viewed.”); *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440-41 (6th Cir. 1998) (upholding hours of operation regulations to prevent secondary effects during overnight hours); *Schultz v. City of Cumberland*, 228 F.3d 831, 846 (7th Cir. 2000) (upholding hour regulation as “legislative research indicated that the hours-of-operation constraint enabled local law enforcement to concentrate its limited resources for those business hours”); *Andy’s Restaurant & Lounge, Inc. v. City of Gary*, 466 F.3d 550, 555-56 (7th Cir. 2006) (upholding hours and open-booth rules); *Flanigan’s Enterprises, Inc. v. Fulton County*, 596 F.3d 1265 (11th Cir. 2010) (upholding ban on alcohol to prevent, *inter alia*, masturbation for hire and other sex crimes at adult businesses); *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512, 532 (6th Cir. 2009) (upholding reliance on “judicial decisions finding sufficient evidence to support the connection between adverse effects and adult entertainment when combined

with alcohol consumption”); *BZAPS, Inc. v. City of Mankato*, 268 F.3d 608 (8th Cir. 2001) (same)).

The legislature also heard in detail about the “business models” of sexually oriented businesses, which depend in significant part on providing conduct *unprotected* by constitutional guarantees—such as “private, customized dances” (Aplts.’ Brf. 18), *i.e.* lap dances and table dances, and private “viewing booths.” (Aplts.’ Brf. 19) “Lap dancing consists of physical contact between the genital areas of a scantily clad female dancer and fully clothed male customers. In essence, the term is a euphemism for simulated coitus in which the female dancer gyrates her genital area on the male customer’s genital area.” *Colonial First Properties, LLC v. Henrico Co.*, 236 F. Supp. 2d 588, 589 n.1 (E.D. Va. 2002); *see also Dodger’s Bar and Grill v. Johnson County Bd. of Comm’rs*, 815 F. Supp. 399, 400 (D. Kan. 1993) (noting that “typically the dancer straddles the patron’s legs or sits on his lap” and permits “table or lap dance customers to fondle their buttocks and touch and kiss their breasts”). Similarly, it is “clearly establish[ed] that booths in adult bookstores are used for fellatio and anal intercourse, both deemed high risk sexual activity by the ordinance. Officer Severson testified to seeing hundreds of instances of sodomy, indecent exposure, and prostitution in the booths of adult bookstores over the past six years.” *Doe v. City of Minneapolis*, 898 F.2d at 618.

In addition, full copies of relevant secondary effects decisions were presented to the General Assembly. Among these cases are *Barnes v. Glen Theatre* and *City of Erie v. Pap's A.M.*, in which the U.S. Supreme Court pointed to judicial decisions as adequate sources of secondary effects evidence to justify regulations on sexually oriented businesses. (SLF 47, Answer, Exh. 2B, CD, “USSC-Barnes\_v\_Glen\_Theatre.pdf” and “USSC-Erie\_v\_Paps.pdf”). Justice Souter’s controlling concurrence in *Barnes* states that judicial decisions linking prostitution with nude dancing establishments confirmed the conclusion that live nude dancing “is likely to produce the same pernicious secondary effects as the adult films. . . at issue in *Renton*.” *Barnes*, 501 U.S. at 584 (Souter, J. concurring). Likewise, the plurality in *City of Erie* stated that the government “could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood.” *City of Erie*, 529 U.S. at 297.

In light of that precedent, the General Assembly relied on secondary effects findings described in various judicial decisions. One such case describes health risks associated with proximity and physical contact between dancers and patrons:

An officer of the Chattanooga Health Department testified that such contact poses a risk of the transmission of disease. Furthermore, particular dances described in the record—such as one instance in which a dancer invited customers to spoon-feed themselves whipped cream off of her breasts, buttocks, and vaginal area—pose a particularly acute risk of the transmission of disease.

(SLF 48, Answer, Exh. 2B, CD, “DLSInc\_v\_City\_of\_Chattanooga.PDF” at 8/13; *see also DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410 (6th Cir. 1997)).

Another decision in the legislative record notes “carnal sexual activity in closed peep show booths in adult bookstores which, the city commission found, contributes to the epidemic spread of sexually transmitted diseases, including AIDS.” (SLF 47, Answer, Exh. 2B, CD, “Bamon\_Corp\_v\_City\_of\_Dayton.PDF” at 3/5; *see Bamon Corp. v. City of Dayton*, 923 F.2d 470, 473 (6th Cir. 1991)).

Also provided was the decision upholding Tennessee’s statewide hours of operation law:

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.

(SLF 47, Answer, Exh. 2B, CD, “Richland\_BookmartInc\_v\_Nichols.PDF” at 6/8; *see also Richland Bookmart*, 137 F.3d at 440-41)).

In terms of judicial decisions, legislators also heard in detail about (and received a copy of) U.S. District Court Chief Judge Gaitan’s decision granting Jackson County’s motion for judgment on the pleadings and upholding the county’s comprehensive sexually oriented business ordinance—which, in addition to the regulations at bar, contains extensive licensing requirements. (SLF 161-177, Answer, Exh. 3A, paper attachments at 107-123/193 (*Enlightened Reading, Inc. v. Jackson Co.*, No. 08-0209-CV-W-FJG, 2009 WL 792492 (W.D. Mo. Mar. 24, 2009)). That decision details just some of the evidence of secondary effects flowing from “retail-only” adult bookstores, including prostitution, sexual solicitation, drug transactions, public lewdness,

and harassment of citizens near retail-only adult bookstores in Spokane, Washington and rural Illinois. (SLF 167-168, Answer, Exh. 3A at 113-114/193) (citing *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1190 n.6 (9th Cir. 2004) and *People ex rel. Deters v. Effingham Retail #27, Inc.*, Case No. 04-CH-26 (Ill. Fourth Judicial Circuit, Effingham County, July 13, 2005).

**Land Use Studies Were Presented to the General Assembly.**

Second, the General Assembly received land use studies prepared for a range of governmental entities that reflect numerous problems with adult businesses.

One study, “An Analysis of the Effects of SOBs on the Surrounding Neighborhoods in Dallas, Texas” indicates the following:

The second major influence is the hours of operation and the type of people which [sexually oriented businesses] attract. This appears to lead to . . . loitering by unsavory people, including prostitutes, and parking problems . . . . Additionally there is frequently parking lot noise and disturbances which often turn violent.

(SLF 47, Answer, Exh. 2B, CD, “TX Dallas.pdf” at 4/30).

A study for Phoenix, Arizona indicates that adult businesses are associated with significant sex-related crimes and tend to decrease the desirability and livability of the surrounding neighborhood. (SLF 47, Answer, Exh. 2B, CD, “AZ Phoenix.pdf” at 3/14; *id.* at 10-11/14 (stating that average sex crime rate in adult business areas was 606% higher than the rate in control areas and that most indecent exposure crimes were committed at adult business addresses)).

Real estate appraisers surveyed for a study for Indianapolis, Indiana “overwhelmingly (80%) felt that an adult bookstore” would have a “negative impact on residential property values of premises within one block of the site.” (SLF 47, Answer, Exh. 2B, CD, “IN Indianapolis 2.pdf” at 42/85).

**Crime and Health Impact Reports Were Presented  
to the General Assembly.**

Third, crime and health impact reports provided to the General Assembly also demonstrate negative secondary effects.

A study of crime in Garden Grove, California found that adult businesses tend to be “hot spots” for criminal activity and constitute serious, significant public safety hazards. (SLF 47, Answer Exh. 2B, CD, “CA Garden Grove.pdf” at 30-32/96).

The Houston, Texas Police Department’s Vice Division reported prostitution, public lewdness, narcotics, and indecent exposure offenses at

area topless clubs. (SLF 47, Answer, Exh. 2B, CD, “TX Houston 1997.pdf” at 7/30). That report also noted that “[a]uto thefts are also on the rise in topless bar vicinities. This is due largely to the fact that a thief knows that he has about an hour and a half to steal the car before the owner comes back.” (*Id.*) Patrons of modeling studios and sexual encounter adult businesses, often merely fronts for prostitution, have been victims of credit card fraud, and when a customer complains, “he is threatened with the disclosure of the type of enterprise that he was in.” (*Id.*) And Houston vice officers have observed that “[adult] bookstores are nothing more than just blatant open sexual contact between people with complete anonymity.” (*Id.* at 8/30).

Similarly, in Tucson, Arizona, police investigations demonstrated that at several adult businesses, “customers were allowed inside the booths with the dancer and were encouraged to undress and masturbate. For a little more money, the dancers would help the customer masturbate.” (SLF 47, Answer, Exh. 2B, CD, “AZ Tucson.pdf” at 1-2/6) (discussing prostitution on the premises, as well as “glory holes” in the walls of adjoining booths “to facilitate sexual acts with the occupant of the neighboring booth”). The Tucson police study also documented unsanitary and unhealthy conditions in adult businesses. “Between April and August of 1987, investigators collected 26 random samples at eight separate adult entertainment bookstores and

establishments. Of these 26 samples the TPD [Tucson Police Dept.] Crime Lab reported that 21 (81%) tested positive for semen.” (*Id.* at 2/6).

**Anecdotal Evidence of Secondary Effects Was Presented  
to the General Assembly.**

Fourth, anecdotal evidence of secondary effects at adult businesses—including crime and illicit sexual behavior—presented to the General Assembly confirms the need to abate negative secondary effects inside adult businesses.

The General Assembly heard that in 2008 a man was convicted for subjecting his 14-year old step daughter to numerous sexual encounters with men in the “orgy room” of a Jackson County, Missouri adult business. (SLF 114, Answer, Exh. 3A, paper attachments at 60/193). Former strip bar dancers described drug use and drug transactions in adult businesses, illicit sexual touching between patrons and dancers during lap dances, male patrons ejaculating as a result, and solicitation and prostitution arranged or occurring in adult cabarets. (SLF 258, Answer, Exh. 4A, paper attachments at 3/39, “Dawnissa Lawrence Testimony”; SLF 47, Answer, Exh. 2B, CD, “Former Stripper Testimony.pdf”; “Strip club testimony and study.pdf”). The legislative record contains evidence of illicit sexual activity and unsanitary conditions in Missouri adult arcades, as provided to the Jefferson County Commission in 2002. (SLF 276-294, Answer, Exh. 4A, paper

attachments at 21-39/39). After discussing health inspections at local adult businesses with private video booths, an official with the Jefferson County Health Department stated: “All the video viewing areas were contaminated with what appeared to be semen and body fluids. This is in all the video shops, in every one of them. There wasn’t one of them that didn’t have that.” (*Id.* at 282:12-16, Exh. 4A at 27/39). A supervisor for STD and HIV prevention with the Missouri Department of Health and Senior Services stated: “I have in this area counseled a number of individuals who are HIV positive. They do acknowledge that they travel to the adult industry throughout the region in order to acquire sex partners.” (*Id.* at 283:9-12, 292:13-19, Exh. 4A at 28, 37/39). The HIV prevention supervisor was asked to confirm whether “individuals who are HIV positive . . . have advised you during counseling sessions that they frequent sexually oriented businesses like we have described today, particularly those with video viewing booths, in Jefferson County, and participate in anonymous sex acts with individual that they meet there?” The supervisor replied, “That is correct.” (*Id.* at 293:17-294:3, Exh. 4A at 38-39/39).

The General Assembly concluded that it does not take an academic study or rigorous, comparative analysis between adult and non-adult businesses to establish that the foregoing constitute secondary effects that the General Assembly has a substantial interest in preventing. In its

findings, the General Assembly recognized those secondary effects and explicitly rejected Dr. Linz's underlying assumption that secondary effects must be compared before they can be abated. (*Compare* LF 49, § 573.525.2(3) *with* SLF 128, Answer, Exh. 3A, paper attachments at 74/193).

**Expert Testimony from Opponents and Proponents Was  
Presented to the General Assembly.**

Fifth, although the General Assembly recognized that scientific studies are not necessary to demonstrate secondary effects warranting regulation, the General Assembly did receive expert witness testimony on the topic of secondary effects. Richard McCleary, Ph.D., a professor at the University of California, Irvine with expertise in criminology and statistics, authored a report concerning secondary effects in Greensboro, North Carolina and found that crime ranged from 120% to 720% higher for adult businesses than for bars and taverns. (SLF 47, Answer, Exh. 2B, CD, "McCleary Critique of Linz Report.pdf" at 49/58). Dr. McCleary's report analyzed and critiqued the research and conclusions presented by Dr. Daniel Linz, explaining how Dr. Linz's methodology underestimated the substantively large secondary effects in Greensboro. (*Id.* at 4/58). Despite design flaws in Dr. Linz's study, the Greensboro research shows statistically significant higher rates of crimes against persons and property for adult businesses. (*Id.* at 5/58).

It is significant to note again, however, that the General Assembly also received extensive testimony and numerous written submissions from several Appellants and their representatives. The Missouri Association of Club Executives provided a list of talking points emphasizing that sexually oriented businesses provide jobs and tax revenue, that some Missouri communities have local adult business ordinances, and that adopting the Statute could lead to a court challenge for the State and economic stress for regulated businesses. (SLF 122, Answer, Exh. 3A, paper attachments at 68/193). An adult store owner from Columbia stated that crime was worse near city hall than around her business and that her business was much like other small businesses. (SLF 124-125, Answer, Exh. 3A, paper attachments at 70-71/193). A lobbyist and former adult club owner and erotic dancer testified that her involvement with sexually oriented businesses was positive for her, derided the proposed six-foot dancer-patron buffer rule, and suggested that other issues were more deserving of legislative attention. (SLF 130-132, Answer, Exh. 3A, paper attachments at 76-78/193). Affidavits from the sheriff of Cooper County and from business operators near adult businesses Passions Video and Passions Too asserted that the stores have no relation to drugs, prostitution, complaints, or excessive calls for police service, and are good neighbors that cause no problems or harm to property values. (SLF 147-158, Answer, Exh. 3A, paper attachments at 93-104/194).

On April 7, 2010, Appellant’s expert witness Dr. Linz—a communications professor—testified against SB 586 before the House Small Business Committee. (SLF 65, 123-124, Answer, Exh. 3A, paper attachments at 11, 69-70/193). Dr. Linz offered his opinion that sexually oriented businesses do not have negative secondary effects such as increased crime, that there is no reliable evidence anywhere to justify the regulations in the Statute, and that his approach to analyzing secondary effects undermines all regulatory efforts. (SLF 123, 126-129, Answer, Exh. 3A, paper attachments at 69, 72-75/193). Dr. Linz presented his view that secondary effects evidence, including empirical studies, that have been credited in judicial decisions as supporting sexually oriented business regulations are nonetheless insufficient to support such regulations. (*Id.* at 69/193). Dr. Linz also cited *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009), one of the few adult business cases that has not rejected Dr. Linz’s views regarding secondary effects evidence.

Directly refuting Dr. Linz’s testimony was an expert report from Dr. Richard McCleary. (SLF 180-247 (Vol. II), Answer, Exh. 3A, paper attachments at 126-193/193). Dr. McCleary’s report—prepared for Jackson County, Missouri and submitted in the *Enlightened Reading* case—explains why criminological theory predicts, and empirical studies demonstrate, that sexually oriented businesses pose large, significant ambient crime risks.

Moreover, the study documents crime-related secondary effects from all subclasses of sexually oriented businesses, including “retail-only” adult bookstores and sexually oriented businesses located in rural settings. (SLF 213-220, Answer, Exh. 3A, paper attachments at 159-166/193) (documenting crime and related secondary effects from “retail-only” or “off-site” adult bookstores, including a rural *Lion’s Den* adult bookstore in Illinois); *see also* (SLF 167, Answer, Exh. 3A, paper attachments at 113/193) (portion of *Enlightened Reading* decision citing the trial court’s permanent injunction in that Illinois case as well as *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d at 1190 n.6 (citing secondary effects from retail-only adult bookstores, including “various criminal acts in and around World Wide’s stores, including prostitution, drug transactions, public lewdness, harassment of citizens by World Wide’s clientele[.]”).

Dr. McCleary’s report also addresses the secondary effects studies sponsored by the adult business industry and frequently performed by Dr. Linz. Dr. McCleary explains the methodological flaws that render those studies inconclusive on the secondary effects question. One such flaw stems from using police calls-for-service (CFS), which are only weakly correlated to actual crime and seriously undercount the vice crimes targeted by secondary effects legislation. (SLF 221-227, Answer, Exh. 3A, paper attachment at 167-173/193.) Another flaw is the adult business industry’s assumption that

comparisons between adult and non-adult businesses are required to establish any secondary effects. Moreover, the General Assembly was informed that federal appellate courts have repeatedly rejected Dr. Linz’s conclusions and underlying assumptions as insufficient to preclude judgment as a matter of law in favor of regulations similar to those contained in the Statute. (SLF 274-275, Answer, Exh. 4A, paper attachments at 19-20/39) (citing 14 appellate decisions).

**The General Assembly’s Statement of Purpose  
and Legislative Findings.**

After receiving this extensive body of secondary effects evidence, and hearing from witnesses both for and against the Statute, the General Assembly expressed its purpose for the Statute and made a number of findings.

The Statute specifies that the purpose is “to regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of this state, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the state.” § 573.525.1. The General Assembly expressly disavowed any intent to restrict the content of sexually oriented materials, to deny adults access to such materials, or to condone or legitimize any distribution of obscene material. *Id.*

The General Assembly then made findings based on the secondary effects evidence in the legislative record. On the topic of secondary effects, the legislature found that:

(1) Sexually oriented businesses, as a category of commercial enterprises, are associated with a wide variety of adverse secondary effects, including but not limited to personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation;

§ 573.525.2(1). Next, the General Assembly found that sexually oriented businesses should be separated from sensitive land uses and from one another to prevent concentrations of sexually oriented businesses and to minimize their impact on surrounding properties. *Id.* § 573.525.2(2).

Finally, the General Assembly clearly articulated its regulatory rationale:

(3) Each of the foregoing negative secondary effects constitutes a harm which the state has a

substantial interest in preventing or abating, or both. Such substantial government interest in preventing secondary effects, which is the state's rationale for sections 573.525 to 573.537, exists independent of any comparative analysis between sexually oriented and nonsexually oriented businesses. Additionally, the state's interest in regulating sexually oriented businesses extends to preventing future secondary effects of current or future sexually oriented businesses that may locate in the state.

*Id.* at 573.525.2(3).

After explaining that the Statute is not aimed at the content of any speech, but at adult businesses' adverse secondary effects, the General Assembly adopted regulations that do not prohibit any speech, but rather regulate the time, place, and manner of sexually oriented business operations to prevent those secondary effects.

On April 15, 2010, Appellant Curt Dougherty, then state representative, authored a letter challenging the bill's current fiscal note and requesting that the General Assembly's Joint Committee on Legislative Research conduct a hearing on the fiscal note. (LF 565 and 575). No such hearing was held by the Committee. (LF 565 and 1657-8).

The lack of a fiscal note hearing was raised by a legislator during the May 6, 2010, House debate on the bill, but the chair overruled that Point of Order. (House Journal (“HJ”), p. 1349) (SLF 343, Ex. 6).

## STANDARD OF REVIEW

“Constitutional challenges to a statute are reviewed de novo. A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision. The person challenging the statute’s validity bears the burden of proving the act clearly and undoubtedly violates the constitution.” *In re Brasch*, 332 S.W.3d 115, 119 (Mo. banc 2011), *reh’g denied* (Mar. 29, 2011). Courts “resolve all doubt in favor of the act’s validity,” and in so doing should “make every reasonable intendment to sustain the constitutionality of the statute.” *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984) (rejecting hotel’s constitutional challenges and affirming judgment on the pleadings).

“The question presented by a motion for judgment on the pleadings is whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.” *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272, 274 (Mo. App. W.D. 2010). “The well-pleaded facts of the non-moving party’s pleading are treated as admitted for purposes of the motion.” *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599 (Mo. banc 2007). The Court does *not*, “however, blindly accept the legal conclusions drawn by the pleader from the facts.” *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). “Conclusory allegations of fact and legal conclusions are not considered in determining whether a petition states a claim upon which relief

can be granted.” *Willamette Indus., Inc. v. Clean Water Comm’n*, 34 S.W.3d 197, 200 (Mo. App. W.D. 2000).

## ARGUMENT

### I. Appellants' fiscal note challenge cannot succeed on the merits.

Appellants challenge the passage of the bill by the Missouri General Assembly, claiming that the failure to hold a hearing on the bill's fiscal note violates the Missouri Constitution. But the Missouri Constitution does not require that a bill have a fiscal note, let alone require that the Committee on Legislative Research hold a hearing before passage by the General Assembly.

As this Court has often noted, it is presumed that bills are constitutional, and that procedural objections to legislation, even constitutional ones, are not favored:

[L]aws enacted by the legislature and approved by the governor have a strong presumption of constitutionality.... [T]he use of procedural limitations to attack the constitutionality of statutes is not favored.... [T]his Court 'interprets procedural limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act clearly and undoubtedly violates the constitutional limitation' ... [and] the burden of proof rests on the statute's challenger.

*Trout v. State*, 231 S.W.3d 140, 143 (Mo. banc 2007) (quoting *Jackson County Sports Complex Authority v. State*, 226 S.W.3d 156, 160 (Mo. banc 2007) (citations omitted)); see also *Strup v. Dir. of Revenue*, 311 S.W.3d 793, 796 (Mo. banc 2010). Appellants have not overcome that presumption of constitutionality.

**A. There is no constitutional violation.**

Appellants base their constitutional arguments on Article III, § 35 of the Missouri Constitution, which provides:

There shall be a permanent joint committee on legislative research, selected by and from the members of each house as provided by law. The general assembly, by a majority vote of the elected members, may discharge any or all of the members of the committee at any time and select their successors. The committee may employ a staff as provided by law. The committee shall meet when necessary to perform the duties, advisory to the general assembly, assigned to it by law. The members of the committee shall receive no compensation in addition to their salary as members of the general assembly, but may receive their

necessary expenses while attending the meetings of  
the committee.

Appellants claim that this language requires a hearing on a bill's fiscal note.

Except for the creation of the committee, Article III, § 35 *imposes no duties* beyond advice to the general assembly as requested by the general assembly. More specifically the constitution does not require a fiscal note for any bill pending before the General Assembly and obviously does not require a hearing on a fiscal note. As such, a fiscal note is not a constitutional requirement for a bill to be introduced, debated, passed, and signed into law.

The requirement for a fiscal note is purely a creature of statute, § 23.140, which also provides for a hearing on a bill's fiscal note upon request. But § 23.140 is, at best, a procedural directive, and not a prerequisite, or certainly not a constitutional prerequisite, for the passage or validity of a bill. As such, any failure by the Joint Committee to hold a hearing regarding a fiscal note cannot defeat the strong presumption in favor of constitutionality of a legislative enactment, passed by the General Assembly and signed by the Governor.

Unlike the federal constitution which grants powers to the legislature, the Missouri Constitution is “only a limitation; and therefore, except for the limitations imposed thereby, the power of the State Legislature is unlimited and practically absolute.” *Franklin County ex rel. Parks v. Franklin County*

*Comm'n.*, 269 S.W.3d 26, 31 (Mo. banc 2008). This Court has also noted that the Joint Committee on Legislative Research “only has the power granted it by the constitutional provision that creates it.” *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, 395 (Mo. banc 1996). Its powers may not be expanded by the general assembly.

The Joint Committee’s only constitutional role is to carry out actions “advisory to the general assembly.” As the *Thompson* Court stated: “‘[A]dvisory to the general assembly’ means that the Committee’s duties must relate to giving advice to the general assembly and do not extend beyond that.” *Thompson*, 932 S.W.2d at 395 (footnote cite omitted). Thus, not even the legislature can add duties to the Committee that are more than just advisory. A footnote in *Thompson* noted the meaning of “advisory:”

“Advisory means having or exercising power to advise.” Webster’s Third New International Dictionary 32, 1976. To “advise” is “to give advice to.” Advice is a “recommendation regarding a decision or course of conduct.”

*Id.*

Similarly, the Committee cannot be assigned duties or be given power beyond that provided in the Constitution. Appellants’ interpretation of § 23.140.3 would grant the Joint Committee more power than the

Constitution permits: the ability to prevent a bill's passage, pending a hearing. But the Joint Committee does not possess a bill, nor does it have the power to impede a bill from being reported to the floor, debated and ultimately passed.

Appellants' interpretation of the Constitution would permit any single legislator to block adoption of a bill by simply requesting a hearing on the fiscal note, as no debate, amendment, or passage of a bill could be done until the hearing was held. No such prohibition is found in the Missouri Constitution, nor is it the intent of the Constitution.<sup>2</sup> Any attempt to make the Joint Committee's sanction and approval necessary for the enactment of a valid law would, in fact, itself violate the Constitution.

Simply put, the Joint Committee does not possess the power that Appellants desire. The Joint Committee's role is advisory, and no more. Any deficiency in the performance of the Joint Committee's duties does not result in a constitutional defect in a bill.

**B. The statutory challenge does not invalidate the bill.**

As noted above, the requirement of a fiscal note for a bill is created by statute. The Joint Committee's Oversight Division prepares fiscal notes on

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<sup>2</sup> Nor is there any such power granted by the statutes governing the Joint Committee.

pending legislation, except for appropriation bills. Section 23.140.3, permits a legislator to request a hearing on a fiscal note:

3. The fiscal note for a bill shall accompany the bill throughout its course of passage. . . Appeals to revise, change or to substitute a fiscal note shall be made in writing by a member of the general assembly to the chairman of the legislative research committee and a hearing before the committee or subcommittee shall be granted as soon as possible. Any member of the general assembly, upon presentation of new or additional material, may, within three legislative days after the hearing on the request to revise, change or substitute a fiscal note, request one rehearing before the full committee to further consider the requested change. The subcommittee, if satisfied that new or additional material has been presented, may recommend such rehearing to the full committee, and the rehearing shall be held as soon as possible thereafter.

For SB 586, a request was made on April 15, 2010 to the Joint Committee for a hearing under § 23.140 regarding the fiscal note. It is undisputed that no hearing on that request was held.

Appellants assert that the lack of a Joint Committee hearing pursuant to statute violates the requirement of Article III, § 35 that “[t]he committee shall meet when necessary to perform the duties, advisory to the general assembly, assigned to it by law.” But that constitutional provision does not specify that a hearing be held under these circumstances. As such, any failure to hold a hearing may violate the statute, but not the Constitution.

“The legislature is presumed to know the state of the law when it enacts a statute. Further, the legislature is presumed to intend what the statute says, and we give effect to the words based on their plain and ordinary meaning.” *State v. Prince*, 311 S.W.3d 327, 334-35 (Mo. App. W.D. 2010) (citations omitted). Here, by statutorily assigning any fiscal note challenge under § 23.140 to the Joint Committee, the General Assembly was presumably aware that the Joint Committee itself had no power to halt a bill’s progress, nor does the statute (or the Constitution) restrict the General Assembly’s rights of regulation of debate, amendment, or passage of any piece of legislation. Consequently, it is presumed that the General Assembly intended that the Joint Committee’s action, or inaction, would not impair or certainly prevent the progress of legislation through the General Assembly.

Appellants argue that passage of a law that does not follow the proper legislative procedures is unconstitutional, citing the decision in *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994). But there, the law violated the Article III, § 23 requirement that a bill contain “one subject which will be clearly expressed in its title.” *Id* at 101. Unlike the situation in *Hammerschmidt*, herein the procedural violation was of a statutory requirement, not a constitutional provision.

Moreover, the Missouri Supreme Court has previously held that a violation of even constitutional procedural requirement does not automatically invalidate a law. In examining the specific requirement of Article III, § 30 that the presiding officer of each chamber sign a bill, the Court held that the requirement is merely directory, that the House Speaker’s failure to do so was only a procedural defect, and that it was cured by the approval of voters on the referendum issue it contained. *Brown v. Morris*, 290 S.W.2d 160, 168 (Mo. banc 1956), fn. 2.

Even if the lack of a fiscal note hearing was a procedural flaw, like the situation in *Brown*, it is merely directory, and does not automatically invalidate the law. Any such defect was cured by the issuance of a subsequent fiscal note for a later version of the bill, the passage of the bill by both chambers of the General Assembly, and by the signing of the bill by the Speaker and the President Pro Tem without an objection by any member.

Section 23.140 does not purport to restrict the General Assembly's constitutional authority to enact legislation in the absence of a hearing. Nor could it do so, as that would be an act by one General Assembly to bind a subsequent one, which is not permitted. *Independence-Nat. Educ. Ass'n v. Independence School Dist.*, 223 S.W.3d 131, 147-48 (Mo. banc 2007) (citations omitted; Price, J. dissenting in part). But even if § 23.140.3 was intended to restrict the actions of subsequent legislatures (and there is no reason to suspect that it was), it cannot be applied to do so. As the statute does not limit the ability of any General Assembly to enact legislation, its provisions can be only directory in nature.

Neither Article III, § 35, nor § 23.140 set forth any type of penalty or consequence if the Joint Committee fails to hold a meeting. Appellants claim that the constitution and statute both require that a hearing “shall” be held. But the lack of a penalty makes the language directory under Missouri law, not mandatory. “Whether the statutory word “shall” is mandatory or directory is a function of context...Where the legislature fails to include a sanction for failure to do that which “shall” be done, courts have said that “shall” is directory, not mandatory. . . . Moreover, courts have concluded that statutes directing the performance of an act by a public official within a specified time are directory, not mandatory.” *Farmers & Merchants Bank*

*and Trust Co. v. Dir. of Revenue*, 896 S.W.2d 30, 32-33 (Mo. banc 1995)

(citations omitted).

Here, § 23.140.3 states that a hearing is to be “as soon as possible.” Notably, the statute does not require that a hearing occur before additional debate is undertaken, or even passage of the bill. As such, the statute is directory, not mandatory. There is no specific power given to the Joint Committee even after such a hearing. Presumably it may modify the fiscal note or ignore any objection. It is ultimately up to the General Assembly to determine the consequences of an allegedly inadequate fiscal note. There are good reasons why the Joint Committee has very limited powers when an objection is made to a fiscal note. The Joint Committee often has limited information available in preparing a fiscal note. It sends requests for estimates of fiscal impact to various local and state agencies. But no agency is required to respond and many do not. The Joint Committee has no power to force a response.

The lack of a fiscal note hearing by the Joint Committee was actually raised by a legislator during the May 6, 2010 House debate on the bill. The Chair overruled that Point of Order. (HJ 1349) (Ex. 6). Further, the Missouri Constitution provides that if “any member shall object in writing to the signing of a bill, the objection shall be noted in the journal and annexed to the bill to be considered by the governor in connection therewith.” Article

III, § 30. No such objections were made by any member. (SJ 1975) (Ex. 5); (HJ 1945) (Ex. 6).

The statute does not prohibit the passage of a bill if a hearing is not held. Nor does the statute prohibit the General Assembly from debating, amending, and enacting legislation unless a hearing is held. Any statutory defect in the operations of the Joint Committee does not invalidate a bill passed by both houses of the General Assembly and enacted into law. The statute does not abrogate the General Assembly's plenary power to enact legislation.

## II. Intermediate, not Strict, Scrutiny Applies to the Statute, and Appellants' Argument Is Contrary to Governing Law.

It is settled law that governments have an “undeniably important” interest in combating the adverse secondary effects of sexually oriented businesses. *City of Erie v. Pap's A.M.*, 529 U.S. at 296. Courts use one of two interchangeable tests to evaluate sexually oriented business regulations.

Under the four-part test set forth for regulations of expressive conduct in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), a law is constitutional if: (1) it is within the government's authority, (2) it serves a substantial government interest, (3) that interest is unrelated to suppressing the content of speech, and (4) the regulation is narrowly tailored to serve the interest. *Farkas v. Miller*, 151 F.3d 900, 902 (8th Cir. 1998) (applying *O'Brien* in rejecting challenge to Iowa's nudity ban).

Under the corollary test for time, place, and manner regulations applied in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), a court proceeds in three steps. First, the court determines whether the law is an invalid total ban on speech or merely a time, place, and manner regulation. Second, if the latter, the court decides whether the time, place, and manner regulation is *justified* by content-based interests such as disagreement with the message (warranting strict scrutiny) or content-neutral interests like preventing secondary effects (warranting only

intermediate scrutiny). Third, if intermediate scrutiny applies, the court decides whether the law is designed to serve a substantial government interest and allows for reasonable alternatives for communicating the message. *Id.* at 46-48.

The four-part *O'Brien* test “in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.” *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (internal citation omitted); *see also DLS, Inc. v. City of Chattanooga*, 107 F.3d at 410-13 & n.6 (upholding comprehensive sexually oriented business ordinance and noting that the *O'Brien* and *Renton* tests are “materially identical”).

The Supreme Court has made it clear that under either form of intermediate scrutiny, the “least-restrictive” regulations are not required; rather “narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” *Ward*, 491 U.S. at 798-99; *see also Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216, 1221 (8th Cir. 1997).

In this case, it is beyond cavil that the Statute does not ban sexually oriented businesses, but instead regulates them for the express purpose of preventing their negative secondary effects. § 573.525 (setting forth the General Assembly’s secondary-effects purpose). Nor is there any question that the legislature’s interest in preventing secondary effects is content-

neutral, *i.e.*, “‘is not at all inherently related to expression.’” *City of Erie*, 529 U.S. at 585 (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 585 (1991) (Souter, J., concurring in judgment)).

Nevertheless, Appellants—*ignoring almost every on-point appellate decision in the 25 years since Renton was decided*—urge the Court to apply strict scrutiny.

Appellants make two arguments for strict scrutiny, but neither has merit.

- A. The text of the Statute clearly establishes that the regulations merit only intermediate scrutiny because they are directed at the content-neutral interest in preventing negative secondary effects.**

Appellants first claim that the General Assembly’s legislative findings show that the “predominant purpose” of the Statute is a desire to suppress the content of sexually graphic speech. Aplt.’ Brf. at 54. But this argument is meritless, as nothing in the statute controls the content of any speech—there is no regulation whatsoever of any book or video. Nothing in the statute censors any pornography or controls what sex scenes businesses may disseminate or individuals may view.

The overwhelming weight of authority, beginning with *Renton*, establishes that sexually oriented business regulations aimed at secondary

effects receive intermediate, not strict, scrutiny. *See, e.g., Renton*, 475 U.S. at 48 (holding that adult business zoning 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”) (internal citation and quotation marks omitted); *Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 863 (8<sup>th</sup> Cir. 1994) (upholding ordinance targeting secondary effects, stating that “[t]he fact that the ordinance covers only a particular category of businesses – those that are sexually oriented – does not make it content based.”). Moreover, Appellants’ argument that the law’s predominant purpose is to control content runs headlong into the General Assembly’s expressly-stated purpose:

The General Assembly declared its purpose in enacting the regulations:

It is the purpose of sections 573.525 to 573.537 to regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of this state, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the state. The provisions of sections 573.525 to 573.537 have neither the purpose nor effect of imposing a limitation or restriction on the content or

reasonable access to any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of sections 573.525 to 573.537 to restrict or deny access by adults to sexually oriented materials protected by the first amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of sections 573.525 to 573.537 to condone or legitimize the distribution of obscene material.

§ 573.525.1.

Nevertheless, Appellants contend that the General Assembly admitted that the Statute is content-based when it identified the negative secondary effects of sexually oriented businesses (personal and property crimes, prostitution, potential spread of disease, lewdness, illicit drug use and drug trafficking, negative impacts on surrounding properties, *etc.*) and then stated that the General Assembly's interest in controlling these secondary effects "exists independent of any comparative analysis between sexually oriented and nonsexually oriented businesses." § 573.525.2(3).

Appellants call the General Assembly's finding a "remarkable" statement that constitutes an "admission" of an "unconstitutional animus

toward sexually oriented expression based on its content.” Aplt’s. Brf. at 55.  
It is nothing of the sort.

As an initial matter, Appellants’ argument attempts to conflate one prong of intermediate scrutiny (the content-neutrality inquiry, which goes to the statute’s purpose), with a separate prong (the substantial government interest inquiry, which goes to a legislative body’s support for its secondary-effects rationale). The U.S. Supreme Court has specifically rejected such an approach. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 441 (2002) (plurality) (rejecting dissent’s suggestion to “merge these two inquiries or move the evidentiary analysis into the inquiry on content neutrality”); *see also ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1416 (8th Cir. 1994) (“That argument impermissibly confuses distinct aspects of the *City of Renton* test. Content neutrality focuses on the City’s purposes in enacting the ordinance.”).

The General Assembly’s finding does not show that the Statute regulates content, but instead the finding preempts, and directly refutes, a *non sequitur* that plaintiffs advance under the substantial government interest analysis in every case. Appellants, usually through a witness like Dr. Linz, argue that unless the government can prove that secondary effects from adult businesses are *greater* than secondary effects from non-adult businesses, the government lacks any interest in preventing those secondary

effects associated with the adult businesses. But it does not follow that if a strip bar has 100 reported crimes in a year and a regular bar has 110 reported crimes in that same year, then there is no government interest in regulating to prevent the 100 crimes at the strip bar. Thus, the General Assembly found that it has a substantial government interest in regulating sexually oriented businesses to prevent the secondary effects at those businesses, regardless of whether other businesses—many of which are governed under other statutes or regulations—also produce secondary effects. § 573.525.2(3).

In *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, No. 8:05-CV-1707, 2009 WL 4349319, \*6 (M.D. Fla. Nov. 25, 2009), *aff'd* 630 F.3d 1346 (11th Cir. 2011), the federal court addressed a legislative finding identical to § 573.525.2(3), applied intermediate scrutiny, and held that:

Evidence that other businesses also experience secondary effects does little to cast doubt on the secondary effects associated with sexually oriented businesses. Nor does it render regulation of Plaintiffs' businesses arbitrary, discriminatory, or unreasonable. The [government] may regulate secondary effects in sexually oriented businesses,

including Plaintiffs’, notwithstanding the existence of secondary effects in other types of businesses.

*Accord Schultz v. City of Cumberland*, 26 F. Supp. 2d 1128, 1143 (W.D. Wis. 1998) (“Contrary to plaintiffs’ assertion, these findings [of crime at the sexually oriented business] need not be measured against the law enforcement problems associated with non-sexually oriented businesses in Cumberland. Nothing in *Renton* or any of the three opinions written by the *Barnes* majority would require defendant to engage in this type of rigorous, comparative analysis.”), *aff’d in part, rev’d in part on other grounds*, 228 F.3d 831 (7th Cir. 2000); *Flanigan’s Enterprises, Inc. v. Fulton County*, 596 F.3d 1265, 1281 (11th Cir. 2010) (“Even if we were to accept that crime is greater in and around the non-adult establishments—and the record is hotly disputed on this point—a municipality would still be empowered to act in order to check a class of crime it found to be particularly troublesome.”); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126 (9th Cir. 2005) (rejecting Dr. Linz’s claim that his methodological approach requiring comparative analysis is “‘the only reliable information’ that could have supported” the city’s interest in controlling secondary effects at strip clubs because “[t]hat is simply not the law”).

The General Assembly’s substantial interest in regulating secondary effects is addressed in detail in the next section of this brief, where it properly belongs.

Suffice it to say that no authority supports applying strict scrutiny to the Statute, and nothing in the legislative findings constitutes an “admission” of “animus” toward sexually oriented “expression based on its content.” Here, (a) nothing in the Statute regulates the content of any book, film, or video, (b) the General Assembly rejects any intent to “deny access by adults to sexually oriented materials protected by the first amendment,” § 573.525.1, and (c) the Statute explicitly targets secondary effects (with regulations previously upheld for addressing those effects), demonstrating that the regulations are “justified without reference to the content of the regulated speech.” *Renton*, 475 U.S. at 41.

**B. Appellants’ argument for strict scrutiny based on the comments of one legislator fails under governing law.**

Appellants’ second argument for strict scrutiny urges the Court to ignore the General Assembly’s express purpose for the Statute, and instead look to the comments of one legislator. This argument is a non-starter, having been rejected by *O’Brien*, *Renton*, and a wealth of cases following those Supreme Court decisions. As the Eighth Circuit explained:

Courts, however, normally do not look behind the legislative findings and policy statements to attempt to discern the hidden (as distinguished from the stated) purpose of the legislation. In *Renton*, the court of appeals had held that if “a motivating factor” in enacting the ordinance was to restrict the theater owner’s exercise of First Amendment rights, although its stated purpose was to deal with the secondary effects, the ordinance would be invalid. 475 U.S. at 47. The Supreme Court rejected this “view of the law,” quoting the following statement from *United States v. O’Brien*, 391 U.S. 367, 383-4, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968):

It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.

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What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are

sufficiently high for us to eschew guesswork.

475 U.S. at 47-48.

*Ambassador Books*, 20 F.3d at 863; *see also id.* at 859 (refusing to apply strict scrutiny, even where city attorney instructed his subordinates to “[p]lease get together and draft a legal opinion on this – I want to shut these places down!”); *accord City of Erie*, 529 U.S. at 292 (rejecting argument that legislators’ comments justified application of strict scrutiny); *Zibtluda, LLC v. Gwinnett County*, 411 F.3d 1278, 1286 (11th Cir. 2005) (noting that the *Renton* court, in determining that secondary effects constituted the city’s predominate concern, “looked no further than the ordinance itself, which recited as its purpose the protection and preservation of the quality of life in the city”); *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1194 (10th Cir. 2003) (upholding sexually oriented business ordinance and stating that, “[b]y limiting its nudity ban to sexually oriented businesses - a classification that itself is ‘content-neutral’ within the meaning of this Court’s cases,” the city avoided overbreadth problems found in laws not so limited).

Thus, under *O’Brien* and *Renton* and their progeny, even if the one legislator, Senator Matt Bartle, referred to Appellants’ businesses as “smut shops,” that fact would not make the Statute (which, again, does not control the content of speech) content-based or subject to strict scrutiny.

Moreover, it is plain that Senator Bartle, who distributed extensive secondary effects data to the General Assembly (SLF 42-43, 47-51, Answer, Exh. 2, ¶¶ 3-6, Exh. 2B (CD & Index)), evinced a clear purpose to prevent the negative secondary effects of sexually oriented businesses. In the Weekly Column that Appellants quote, Senator Bartle stated that “[t]he negative effects of these businesses cannot be denied,” specifically, that sexually oriented businesses “hurt local property values, as well as our image as a vacation destination for families (particularly troublesome when tourism is such a huge industry for Missouri). Additionally, smut shops often create an environment for serious crime to occur, such as prostitution and sexual exploitation.” Sen. Matt Bartle, Dist. 8, Weekly Column, 5/3/10, <http://www.senate.mo.gov/multimedia/Bartle/WeeklyColumn/2010/AdultBusinesses050310.htm>, last accessed August 20, 2010. This is completely consistent with a secondary-effects purpose. *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 877-78 (11th Cir. 2007) (nudity and alcohol prohibitions upheld based on, in part, negative impacts on family tourism).

In the face of overwhelming authority supporting the application of only intermediate scrutiny, Appellants resort to the one post-*Renton* appellate case that applied strict scrutiny to a sexually oriented business ordinance—a case that Appellants expressly declined to rely on at the TRO

hearing. That case, *Joelner v. Village of Washington Park*, 508 F.3d 427, 430-432 (7th Cir. 2007), is plainly inapposite.

*Joelner* involved a unique situation in which “the Village derives almost 100% of its income from the adult entertainment industry, a situation that the tiny Village has admitted it is doing little to remedy. *See* John McCormick, Cash-strapped Town Relies on Strip Clubs to Pay Bills, Chi. Trib., Apr. 29, 2003, at A1.” 508 F.3d at 429. Essentially, the village adopted a prohibition on alcohol in strip clubs that applied *only* to new strip clubs (*e.g.*, *Joelner*’s), not to any of the preexisting eight (8) strip clubs in the tiny village. The court thus concluded that the regulation was not designed to prevent secondary effects, but instead to protect the entrenched strip clubs (patrons of the politicians) from competition. *Id.* at 433.

*Joelner* has no application here, where the Statute applies to all sexually oriented businesses in Missouri. *Imaginary Images, Inc. v. Evans*, 593 F. Supp. 2d 848, 858 (E.D. Va. 2008) (distinguishing *Joelner* because “[t]he current case presents a different situation; mixed beverage licenses are prohibited at all adult entertainment nightclubs and the regulatory provisions were designed entirely with regard to the nature of negative effects of such clubs, not competition”), *aff’d* 612 F.3d 736 (4th Cir. 2010).

Appellants’ quest for strict scrutiny is: unsupported by the Statute’s text, contrary to the Statute’s extensive legislative record, and contravened

by governing law. The trial court therefore correctly granted judgment on the pleadings.

### III. The Overwhelming Weight of Authority Demonstrates that the Statute Satisfies Intermediate Scrutiny as a Matter of Law.

The most revealing characteristic of Appellants’ brief—a characteristic that it shares with the two outlier cases on which it relies—is that the brief *never states the deferential, governing legal standard for laws targeting secondary effects.*

Under intermediate scrutiny as applied by *O’Brien*, *Renton*, and both the plurality and the concurrence in *Alameda Books*, the standard is clear: a legislative body may rely on “*any* evidence that is ‘reasonably believed to be relevant’” to its interest in preventing negative secondary effects. *Alameda Books*, 535 U.S. at 438 (plurality opinion) (emphasis supplied) (quoting *Renton*, 475 U.S. at 51-52); *id.* at 451 (Kennedy, J., concurring) (quoting *Renton*, 475 U.S. at 51-52).

*That* is the legal standard to be applied to the legislative record (containing evidence from both sides) that is contained within the pleadings that are before the Court in this appeal. *See* LF 100-101 (incorporating legislative record into Answer); Mo. R. Civ. P. 55.12; *Hendricks v. Curators of University of Missouri*, 308 S.W.3d 740, 747-48 (Mo. App. W.D. 2010).

Whether a law satisfies the “any evidence reasonably believed to be relevant” standard is a question that is answered by legal authority, *i.e.*, by the judicial decisions determining the broad contours of that standard. Thus,

the Supreme Court cases applying the “reasonably believed to be relevant” standard—that is, identifying the types of *legislative* evidence that satisfy the standard—are determinative here. These cases hold that reliance on judicial decisions setting forth the legislature’s secondary effects interest is sufficient. *See, e.g., Renton*, 475 U.S. at 51-52 (upholding adult zoning ordinance based on city’s reliance on judicial decision detailing secondary effects); *Erie*, 529 U.S. at 297 (“*Erie* could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood.”).

*That* is why Appellants never once acknowledge the “any evidence reasonably believed to be relevant” standard in their brief, and why Appellants simply ignore the overwhelming appellate authority (including extensive post-*Alameda Books* authority) that has consistently applied this deferential standard to uphold, as a matter of law, the precise regulations contained in the Statute.

Instead, Appellants spend the bulk of their brief arguing that: (A) they are entitled to a trial evaluating the wisdom of the General Assembly’s policy judgment because Appellants alleged the legal conclusion that the legislative record (which included their own submissions to the General Assembly) was

“shoddy,” and (B) they submitted “substantial evidence” which avers the non-existence of secondary effects, requiring a voiding of the Statute.

These claims fail because: (A) Appellants cannot avoid judgment as a matter of law by simply labeling as “shoddy” the precise kinds of evidence that *Renton* and its progeny hold that governments may reasonably rely upon, and (B) Appellants’ affidavits are not before the Court and, in any event, they impose too high of a standard and fail to cast “direct doubt” on the legislative rationale and record.

Before detailing the fatal flaws in Appellants’ arguments, Respondent will first explain the U.S. Supreme Court cases establishing the broad contours of the “any evidence reasonably believed to be relevant” standard.

The cornerstone of the law of adult business regulation is *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In that case, the city originally adopted an adult theater zoning ordinance without any legislative predicate. After *Renton* was sued, it amended the ordinance to add a statement of reasons for its adoption, including a statement that it had intended to rely on a prior state supreme court decision upholding Seattle’s adult business ordinance. *Renton* did not rely on any extrinsic evidence of secondary effects. *Id.* at 60-61 & n.5 (Brennan, J., dissenting). The Supreme Court nevertheless upheld the ordinance, stating:

We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the “detailed findings” summarized in the Washington Supreme Court’s *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

*Id.* at 51-52 (upholding reliance on *Northend Cinema* notwithstanding dissent’s complaint, *id.* at 61 n.5, that *Northend Cinema* “does not explain the evidence it purports to summarize”).

Thus, the seminal U.S. Supreme Court case on adult business regulation treats reliance, in litigation, on a previous judicial opinion as sufficient legislative “evidence” to support a different governmental body’s adult business regulations. Indeed, the Court held that Renton’s reliance on Seattle’s experience was reasonable even though Seattle is 20 times Renton’s size and even though Seattle “chose a different method [concentration] of adult theater zoning than that chosen by Renton [dispersal].” *Id.* at 52.

*Renton* also directly rejected the claim that an alleged decrease in “speech” due to the economic impacts of an adult business regulation can establish a First Amendment violation. There, the adult theater owners argued that Renton’s law left “no ‘commercially viable’ adult theater sites” available to them. *Id.* at 53. The Court of Appeals accepted their argument and concluded that the law “‘would result in a substantial restriction’ on speech.” *Id.* at 54 (internal citation omitted).

Even though the zoning restriction affected whether the adult theaters could operate in the city, the Supreme Court reversed and held, as a matter of law, that “**The inquiry for First Amendment purposes is not concerned with economic impact.**” *Id.* (emphasis added) (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring)).

Five years later, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Supreme Court examined a statewide nudity regulation challenged by a strip club under the First Amendment. Although the statute was from Indiana, which keeps no legislative record, the Supreme Court upheld the regulation as constitutional on secondary effects grounds. The controlling opinion specifically cited prior U.S. Supreme Court decisions—as well as lower court decisions handed down after the legislation was adopted—as policy evidence sufficient to support the regulation:

The type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton*, *American Mini Theatres*, and *LaRue*. It therefore is no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying “specified anatomical areas” at issue in *Renton*. Other reported cases from the Circuit in which this litigation arose confirm the conclusion. See, e. g., *United States v. Marren*, 890 F.2d 924, 926 (CA7 1989) (prostitution associated with nude dancing establishment); *United States v. Doerr*, 886 F.2d 944, 949 (CA7 1989) (same).

*Id.* at 584 (Souter, J., concurring in judgment); *id.* at 584-85 (“Given our recognition that ‘society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate,’ *American Mini Theatres*, *supra*, at 70, I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case.”).

Ten years thereafter, the Supreme Court addressed a similar nudity regulation in *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000). Again, the

government relied *only* on their own legislative findings citing prior judicial decisions upholding similar regulations. Notwithstanding the lack of *any* extrinsic secondary effects evidence in the form of studies, reports, or crime data, the Supreme Court held that the city's reliance on prior judicial decisions was sufficient:

Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 51-52 (indicating that reliance on a judicial opinion that describes the evidentiary basis is sufficient). In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres*. Even in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is

addressing. See *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 145 L. Ed. 2d 886, 120 S. Ct. 897 (2000) (slip op., at 13, n. 6).

*Id.* at 297.

It is interesting that the case striking “closer to the core of First Amendment values” that the Supreme Court mentions here involved the Missouri campaign finance law upheld by the Court that same term. In *Shrink Missouri Government PAC*, the Court stated that “this case does not present a close call” concerning whether the government met its burden to justify its campaign finance regulations. 528 U.S. at 393. Missouri’s evidence in that case consisted mainly of *newspaper articles* which conveyed the perception that large campaign contributions could buy votes. *Id.* at 393-94. Thus, the *City of Erie* Court had no difficulty in crediting the government’s reliance on prior judicial findings, which are more reliable than newspaper articles, to support a regulation designed to prevent the secondary effects of sexually oriented businesses.

Equally relevant here is the fact that *City of Erie* went on to state that, independent of the government’s reliance on *Renton* and *Barnes*, the legislative body made findings which justified the regulation. “In any event, Erie also relied on its own findings concerning secondary effects,” which the Court treated—again, even in the absence of extrinsic evidence—as

“particularized, expert judgments about the resulting harmful secondary effects.” 529 U.S. at 297-98.

Finally, the *City of Erie* court returned to *Nixon v. Shrink Missouri Government PAC* in rejecting the dissent’s reliance on a study by Dr. Daniel Linz, *Appellants’ expert in this case*. The Court refused to require “an empirical analysis” to justify regulations targeting secondary effects. 529 U.S. at 300. The Court explained that in *Nixon*, it had “flatly rejected that idea. 528 U.S. at 393 (slip op., at 14-15) (noting that the ‘invocation of academic studies said to indicate’ that the threatened harms are not real is insufficient to cast doubt on the experience of the local government).” 529 U.S. at 300.

The foregoing discussion demonstrates that in *Renton*, *Barnes*, and *Erie*, the Supreme Court upheld regulations targeting secondary effects based on the government’s reliance, either before or during litigation, on prior judicial decisions detailing secondary effects and upholding similar regulations. The Court treated those decisions as evidence “reasonably believed to be relevant” to preventing secondary effects. Two years after *Erie*, the Supreme Court reaffirmed that deferential standard.

In *City of Los Angeles v. Alameda Books*, the Court dealt with a single study used to defend a unique break-up regulation—a regulation that prohibited an adult arcade use and an adult bookstore use from remaining

under the same roof. 535 U.S. 425 (2002). In that case, the study looked only at concentrations of separate adult businesses in a given neighborhood; the government *admitted* that the study did not address any secondary effects from a single adult business, whether a single adult use or a “combination” of adult uses. *Id.* at 437-39.

Unsurprisingly, the case focused on the study and, because the city admitted that the study did not address harms from individual structures containing adult use(s), the case turned on whether the city could rely on an *inference* drawn from the study. Reversing the lower courts and reiterating the deferential *Renton* standard, the Court held that the government could rely upon a reasonable inference drawn from the study. It was in this context of relying on an inference—not evidence directly relevant to the targeted harm—that the plurality introduced a burden-shifting procedure to test whether the low *Renton* standard has been met:

In *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on **any evidence that is “reasonably believed to be relevant”** for demonstrating a connection between speech and a substantial, independent government interest. 475

U.S. at 51-52; *see also, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991) (SOUTER, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects). This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets **the standard set forth in *Renton***. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. *See,*

*e.g.*, *Erie v. Pap's A.M.*, 529 U.S. 277, 298, 146 L. Ed.

2d 265, 120 S. Ct. 1382 (2000) (plurality opinion).

*Id.* at 438-39 (emphasis added).

The bold language above makes it clear that the beginning and end of *Alameda Books* is the “standard set forth in *Renton*,” *i.e.*, that governments may rely on “any evidence reasonably believed to be relevant,” including prior judicial decisions affirming the secondary effects basis for regulation. More specifically, when the *Alameda Books* plurality reiterated the *Renton* standard, it cited pages 51-52 of the *Renton* decision and page 584 of the *Barnes* decision—the precise pages of those decisions that credit the government’s reliance on prior judicial decisions as evidence supporting the legislative judgment regarding secondary effects.

Indeed, the *Alameda Books* plurality described Justice Souter’s *Barnes* opinion—the one evaluating a nudity regulation supported by absolutely *no* legislative record—as “permitting municipality to use **evidence** that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects.” *Id.* at 438 (emphasis added). In other words, *Alameda Books*’ references to *evidence* in *Renton* and *Barnes* were references to only judicial decisions on which the City of Renton and the State of Indiana relied.

This evidence, cited with approval in *Alameda Books*, cannot be the “shoddy data or reasoning” referenced in the following sentence that introduces the plurality’s burden-shifting procedure—a procedure for testing inferences based on evidence related only indirectly to the proposition at hand (*e.g.*, inferences based on the Los Angeles study, which did not study the effects of multiuse adult establishments or any standalone adult establishment). The explicit purpose of this procedure is only to ensure that the government “meets the standard set forth in *Renton*,” which, as discussed above, may plainly be met by reliance on prior judicial decisions affirming the secondary effects basis for the regulations. The rest of the plurality opinion takes pains to explain that satisfying *Renton* does not require “empirical data,” *id.* at 439, *and* that its procedure for testing inferences drawn from indirectly relevant information does not “raise the evidentiary bar,” *id.* at 441, above *Renton*’s low “any evidence reasonably believed to be relevant [including prior judicial opinions]” standard.

Thus, although the *Alameda Books* plurality focused on a slightly inapposite study and the inferences drawn therefrom, it reaffirmed *Renton*’s holding, repeated in *Barnes* and *Erie*, that a government can rely on prior judicial decisions to support the constitutionality of its similar regulations.

Justice Kennedy’s concurrence in *Alameda Books* in no way undermines this proposition, but explicitly agrees with the plurality’s

evidentiary standard. The concurrence addressed two issues: (1) “what proposition does a city need to advance in order to sustain a secondary effects ordinance?” and (2) “how much evidence is required to support the proposition?” 535 U.S. at 449 (Kennedy, J., concurring). In agreeing with the plurality’s answer to the second question, *i.e.*, that the low *Renton* standard applies, Justice Kennedy cited those portions of *Renton* and the *Erie* plurality decision (which he joined) that specifically permitted reliance on prior judicial decisions as evidence sufficient to support regulations aimed at preventing secondary effects. *Id.* at 451.

With regard to the first issue, Justice Kennedy opined that a municipality’s rationale need only advance “some basis” to show that its ordinance “may reduce the costs of secondary effects,” 535 U.S. at 450; however, the rationale of possible secondary effects reduction cannot be *premised* upon the forced closure (there, through the city’s zoning ordinance) of adult businesses. *Id.* at 451 (noting that Los Angeles’s unique zoning break-up policy could require one of the two adult “uses” presently under the same roof to move or to close down, and stating: “The city’s *premise* cannot be the latter.”) (emphasis added).

Thus, the discussion by Justice Kennedy of seeking a reduction in secondary effects while leaving the quantity and accessibility of actual speech substantially intact, does not concern a new evidentiary standard or

heightened narrow tailoring analysis, but rather “the necessary rationale for applying intermediate scrutiny” instead of strict scrutiny, namely, “the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech.” *Id.* at 450.

Indeed, the vast majority of federal appellate cases decided in the wake *Alameda Books* certainly did not view Justice Kennedy’s opinion as changing the standard for sexually oriented business regulations. *See SOB, Inc. v. County of Benton*, 317 F.3d 856, 863-64 (8th Cir. 2003) (reviewing the “substantially intact” language and holding there is “nothing to suggest that [Justice Kennedy] has retreated from his votes in *Barnes* and *Pap’s*. . . . [T]he Court’s holding in *Pap’s* is still controlling regarding the deference to be afforded local governments that decide to ban live nude dancing.”); *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1163 (9th Cir. 2003) (emphasizing *Alameda Books*’ zoning context and holding that Justice Kennedy’s “proportionality” language means only that a “city’s rationale cannot be that when it requires businesses to disperse (or concentrate), it will force the closure of a number of those businesses, thereby reducing the quantity of protected speech”); *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004) (“All five Justices in the *Alameda Books* majority affirmed *Renton*’s core principle that local governments are

not required to conduct their own studies in order to justify an ordinance designed to combat the secondary effects of adult businesses.”).

Therefore, under *Renton* and *Alameda Books*, the legislative body can rely on “any evidence reasonably believed to be relevant” to support the proposition that its regulations “may reduce the costs of secondary effects.” *Alameda Books*, 535 U.S. at 438 (plurality opinion); *id.* at 450-51 (Kennedy, J., concurring) (observing that “very little” evidence is necessary).

Significantly, the First Amendment does not require a showing that a law regulates all sources of secondary effects, concentrates on the biggest sources of secondary effects, regulates secondary effects in the most effective or efficient manner, or even that sexually oriented businesses have more secondary effects than non-sexually oriented businesses (*i.e.*, regular bars).

And as discussed in Section II. A. above, nothing in *Alameda Books* requires rigorous, comparative analysis between adult and non-adult businesses.

*Flanigan’s Enterprises, Inc. v. Fulton County*, 596 F.3d 1265, 1278-79 (11th Cir. 2010).

The government is not required to prove secondary effects to a scientific certainty; rather, the government’s evidence need only “fairly support the [government]’s rationale for its ordinance.” *Alameda Books*, 535 U.S. at 438 (plurality opinion); *id.* at 439 (rejecting “empirical data” requirement); *id.* at 451 (Kennedy, J., concurring) (citing *City of Renton* and *City of Erie*); *accord*

*City of Erie*, 529 U.S. at 300 (plurality opinion joined by Justice Kennedy) (noting that the Court has “flatly rejected” the notion that empirical analysis trumps legislative judgments). Indeed, Justice Kennedy emphasized that “courts should not be in the business of second-guessing fact-bound empirical assessments” of the legislative body—which is entitled to rely upon its knowledge—“and if its inferences appear reasonable, we should not say there is no basis for its conclusion.” *Id.* at 451-52 (Kennedy, J., concurring); see also *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 880 (11th Cir. 2007) (rejecting the argument that *Alameda Books* “raises the evidentiary bar or requires a city to justify its ordinances with empirical evidence or scientific studies” and observing that “Justice Kennedy’s *Alameda Books* concurrence, which all parties agree states the holding of that case . . . emphasized that the evidentiary standard announced in *Renton* remained sound . . .”). Finally, legislatures may rely on common sense in making policy judgments. *Alameda Books*, 535 U.S. at 439.

**A. Appellants’ well-pleaded allegations fail as a matter of law because they assume an incorrect legal standard for evaluating First Amendment challenges to secondary-effects regulations.**

“A trial court properly grants a motion for judgment on the pleadings if, from the face of the pleadings, the moving party is entitled to a judgment as a matter of law.” *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 134 (Mo. banc. 2000). While the non-moving party’s “well-pleaded facts” are deemed admitted, the court does not “blindly accept the legal conclusions drawn by the pleader from the facts.” *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). “Conclusory allegations of fact and legal conclusions are not considered in determining whether a petition states a claim upon which relief can be granted.” *Williamette Indus., Inc. v. Clean Water Comm’n*, 34 S.W.3d 197, 200 (Mo. App. W.D. 2000). Under Mo. R. Civ. P. 55.12, “[a]n exhibit to a pleading is a part thereof for all purposes.”

Accordingly, the legislative record challenged in the Verified Amended Petition (*see* SLF 177 ¶¶ 110, 119(g), 116(h)), and attached to the Answer, was properly considered in the grant of judgment on the pleadings below. (LF 100-101, Answer, ¶¶ 128-133; SLF 42-322, Exhs. 2, 3, and 4, and attachments) (including CD with dozens of land use studies, crime impact reports, judicial decisions, testimony from former dancers, and expert

reports); *Hendricks v. Curators of University of Missouri*, 308 S.W.3d 740 (Mo. App. W.D. 2010); *cf. Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909 (8th Cir. 2002).

Judgment on the pleadings is appropriate for two reasons.

First, independent of the voluminous reports and studies considered by the General Assembly, a litany of on-point authorities establish that the challenged regulations serve the substantial government interest in preventing secondary effects. Indeed, many of these decisions apply *Alameda Books* in upholding, as a matter of law, measures containing *all* of the challenged regulations in the Statute. *See, e.g., Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 630 F.3d 1346, 1349-50 (11th Cir. 2011), *cert. denied*, No. 10-1300, 2011 WL 1578816, --- S. Ct. --- (U.S. June 6, 2011); *Enlightened Reading, Inc. v. Jackson County*, No. 08-0209-CV-W-FJG, 2009 WL 792492 (W.D. Mo. Mar. 24, 2009); *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512 (6th Cir. 2009); *Entertainment Productions, Inc. v. Shelby County*, 588 F.3d 372 (6th Cir. 2009); *Plaza Group Properties, LLC v. Spencer County Plan Comm'n*, 877 N.E.2d 877 (Ind. Ct. App. 2007); *LM Entertainment, Inc. v. City of Mt. Sterling*, No. 2008-CA-000469-MR, 2009 WL 1974549 (Ky. App. 2009); *5634 East Hillsborough Ave., Inc. v. Hillsborough County*, 294 Fed. Appx. 435 (11th Cir. 2008); *High Five Investments, Inc. v. Floyd County*, 239 F.R.D. 663, Case No. 4:06-cv-00190

(N.D. Ga. 2007); *Little Mack Entertainment II, Inc. v. Township of Marengo*, 625 F. Supp. 2d 570 (W.D. Mich. 2008).

The U.S. Supreme Court has repeatedly held that the prohibition on total nudity serves the government’s “undeniably important” interest in preventing secondary effects at sexually oriented businesses. *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1990). The Eighth Circuit is in accord. *SOB, Inc. v. County of Benton*, 317 F.3d 856, 864 (8th Cir. 2003); *Farkas v. Miller*, 151 F.3d 900, 904-05 (8th Cir. 1998). The Eighth Circuit has also rejected challenges to a six-foot buffer separating patrons and erotic dancers, finding that “[s]eparating dancers from patrons would reduce the opportunity for prostitution and narcotics transactions. ... Preventing the exchange of money between dancers and patrons would also appear to reduce the likelihood of drug and sex transactions occurring on regulated premises.” *Jake’s, Ltd. v. City of Coates*, 284 F.3d 884, 891 (8th Cir. 2002); *accord Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995) (holding that no-touch rule serves the “interest in preventing prostitution, drug dealing, and assault”).

Open-booth regulations for adult arcades have likewise been repeatedly upheld by the Eighth Circuit as a means of preventing anonymous high risk sex and unsanitary conditions in the booths. *Doe v. City of Minneapolis*, 898 F.2d 612, 619-20 (8th Cir. 1990) (“[S]exual encounters occur in bookstore

booths. . . . The health risk results from the booth being closed, not from the material viewed”); accord *Scope Pictures, Inc. v. City of Kansas City*, 140 F.3d 1201, 1204 (8th Cir. 1998).

Prohibitions on the combustible combination of alcohol and adult entertainment have been approved for decades, both before and since *Alameda Books*. See *California v. LaRue*, 409 U.S. 109, 114-116, 118-119 (1972); *BZAPS, Inc v. City of Mankato*, 268 F.3d 603, 607-08 (8th Cir. 2001); *Flanigan’s Enterprises, Inc. v. Fulton County*, 596 F.3d 1265 (11th Cir. 2010) (citing detail secondary effects evidence and upholding prohibition on alcohol in adult establishments); *Ben’s Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 727 (7th Cir. 2003) (same).

Finally, seven different federal appellate courts have upheld regulations requiring adult businesses to close during the overnight hours, when darkness makes law enforcement more difficult and dangerous. *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1159, 1162-63 (9th Cir. 2003) (applying *Alameda Books* in upholding more restrictive statewide hours of operation statute and noting that six other federal appellate courts had upheld similar adult business hours regulations); *Deja Vu of Cincinnati, L.L.C. v. Union Township*, 411 F.3d 777 (6th Cir. 2005) (*en banc*) (upholding resolution allowing adult businesses to operate for 84 hours each week, as opposed to at least 126 hours each week under the Statute); *Andy’s*

*Restaurant & Lounge, Inc. v. City of Gary*, 466 F.3d 550 (7th Cir. 2006)

(upholding sexually oriented business ordinance requiring closure at 11 p.m.).

This extensive, on-point authority demonstrates that each of the challenged regulations is a reasonable, constitutionally sound approach to addressing identified secondary effects. The circuit court’s judgment on the pleadings that the Statute is constitutional is thus appropriate.

Judgment on the pleadings is appropriate for the second reason that the General Assembly’s voluminous secondary effects record and specific legislative findings, *see* § 573.525.1, §§ 573.525.2(1), (2), and (3), far exceed the deferential “any evidence reasonably believed to be relevant” standard.

The legislative record, which is addressed in some detail in the Statement of Facts, need not be repeated here. It is sufficient to note that it plainly documents numerous secondary effects, including filthy conditions and illicit sexual behavior in adult bookstore booths, noise and crime problems associated with late-night adult business operations, the combustible combination of alcohol and adult live sexual entertainment, and prostitution and drugs in strip clubs. These events and conditions have been observed in places from Jefferson County, Missouri to Dallas, Texas to Tucson, Arizona. They are documented in published judicial decisions, certified transcripts of testimony, affidavits, land use studies, and expert reports.

Notwithstanding the General Assembly’s thorough consideration of policy evidence—from both sides of the debate—and the overwhelming, on-point authority upholding identical regulations based, Appellants claim that the legal question of the Statute’s constitutionality cannot be resolved on the pleadings.

Appellants do not allege *any* facts directly challenging the veracity of facts reported to the legislature. They do not, for example, allege inaccuracies or errors in the testimony of the HIV prevention supervisor for the Missouri Department of Health and Senior Services, which discusses high-risk sexual behaviors in peep show booths in Jefferson County. Nor do they allege that the Statute’s open-booth rule will not serve General Assembly’s “undeniably important” interest in preventing such behavior.

Similarly, Appellants do not allege any facts that would establish the unreasonableness of the General Assembly’s reliance on the straightforward propositions in the secondary effects cases. For example, Appellants do not claim that “[s]eparating dancers from patrons would” *not* “reduce the opportunity for prostitution and narcotics transactions” in sexually oriented businesses. *Jake’s, Ltd. v. City of Coates*, 284 F.3d 884, 891 (8th Cir. 2002).

Instead, Appellants allege that “the General Assembly failed to reasonably rely upon constitutionally adequate predicate evidence” in adopting the Statute. (LF 177, Verified Am. Pet. ¶ 110).

But this allegation is the classic legal conclusion masquerading as an allegation of fact, because it begs the legal question of what is “constitutionally adequate predicate evidence.” As explained above, the answer to that question is “*any evidence reasonably believed to be relevant*” to the secondary effects that the Statute targets, and the broad contours of that deferential standard are established in the governing authorities. As a matter of law, the General Assembly met that standard.

In Appellants’ view, however, there is no “law” upon which governments may rely to guide their conduct in regulating sexually oriented businesses. Although the Supreme Court has held that a State is *not* “required affirmatively to undertake to litigate this [secondary effects] issue repeatedly in every case,” *Barnes*, 501 U.S. at 584-85 (Souter, J., concurring), Appellants seek a rule requiring just that. Under such a rule, no number of prior judicial decisions upholding the same regulations would be sufficient to establish their constitutionality as a matter of law.

Nor does *Alameda Books* compel such a rule. The Court explicitly *refused* to “raise the evidentiary bar” above the *Renton* standard, 535 U.S. at 441, either by requiring “evidence that rules out” alternative theories of secondary effects, *id.* at 437, or “empirical data” to support the legislative judgment. *Id.* at 439. The Court expressly reaffirmed *Renton* and the

deferential nature of its “any evidence reasonably believed to be relevant” standard.

And while *Alameda Books* involved a challenge to a unique regulation based on an inference drawn from somewhat inapposite policy evidence, *Alameda Books* did *not* suggest that all regulations—including ones based on directly relevant evidence—can be successfully challenged. Nothing in *Alameda Books* suggests, for example, that a plaintiff can successfully challenge the government’s straightforward rationale that a six-foot buffer between patrons and dancers will serve the government’s interest in preventing illicit sexual behavior in sexually oriented businesses (while allowing the erotic dancing to continue).

This is the reason why Appellants prefer not to challenge the Statute on a regulation-by-regulation basis.<sup>3</sup> There are too many cases upholding its

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<sup>3</sup> In the trial court, Appellants’ petition challenged individual regulations in the Statute on narrow tailoring grounds, and Respondent refuted these challenges in detail. (*See* LF 109, 1915-1916 (referring to TRO briefing and Appellants’ abandonment of narrow tailoring arguments.)) On appeal, Appellants have not made arguments against distinct aspects of the Statute, and should not be allowed to sandbag Respondent by raising any such challenges in their reply brief.

conduct regulations (*e.g.*, 6-ft. buffer, no-touch, hours, open booths, alcohol prohibition) based on illicit behavior in sexually oriented businesses and the logical conclusion that the regulations serve to prevent such behavior without prohibiting speech. Instead, Appellants remain general, challenging the secondary effects basis of the Statute as a whole while ignoring *the many cases that uphold the specific regulations therein*.

Those cases, the secondary effects findings contained in them, and the General Assembly's thorough legislative record demonstrate that the Circuit Court properly granted judgment on the pleadings at the Statute's constitutionality:

Here, in contrast to *Alameda Books*, the City did not attempt to use a study that supported one conclusion to support a second, somewhat related conclusion. Instead, the City relied upon the prior holdings of the Sixth Circuit and the Supreme Court on identical supporting facts to support identical restrictions previously approved by those courts. **To permit Plaintiffs to challenge those findings and apply the burden-shifting analysis of *Alameda Books* to the instant case would directly undermine both the right of municipalities to rely upon the studies and**

decisions from other jurisdictions and the  
fundamental rule of *stare decisis*.

*Sensations, Inc. v. City of Grand Rapids*, Nos. 1:06-CV-300, 4:06-CV-60, 2006 WL 5779504, \*7 (W.D. Mich. 2006) (granting judgment on the pleadings upholding ordinance containing regulations like those at bar), *aff'd* 526 F.3d 291 (6th Cir. 2008) (ruling that case was properly resolved on the pleadings); *see also Enlightened Reading, Inc. v. Jackson County, Mo.*, No. 08-0209-CV-W-FJG, 2009 WL 792492 (W.D. Mo. Mar. 24, 2009) (granting judgment on the pleadings in challenge to law containing the regulations in the Statute); *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984) (rejecting hotel's constitutional challenges and affirming judgment on the pleadings).

**B. Appellants do not cast “direct doubt” on whether the General Assembly relied on “any evidence reasonably believed to be relevant” to the secondary effects targeted by the Statute’s regulations.**

**1. Appellants have the burden of casting direct doubt on *all* of the State’s evidence of adverse secondary effects.**

Under the *Renton–Alameda Books* standard, the party challenging sexually oriented business regulations bears the burden of disproving *each*

secondary effect interest that a regulation may serve. *Alameda*, 535 U.S. at 435-36 (holding that secondary effects evidence concerning crime is sufficient, regardless of inconclusive evidence regarding property values); *see also SOB, Inc. v. County of Benton*, 317 F.3d 856, 864 (8th Cir. 2003) (noting that while zoning regulations generally target crime and property value effects, nude dancing regulations are more likely to prevent public indecency, drug transactions, and prostitution).

Because governments can meet the *Renton* standard by relying on “some evidence” of adverse secondary effects, *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1196 n.11 (9th Cir. 2004), opponents must “cast direct doubt on all of the evidence that the [government] reasonably relied on when enacting the challenged [regulations].” *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 884 (11th Cir. 2007).

Moreover, a government need not disprove a challenger’s theories of secondary effects, *Alameda*, 535 U.S. at 437, but rather the challenger must address the government’s rationale for its regulations. *Id.* at 438. Casting “any doubt” on the government’s regulatory rationale is insufficient; a plaintiff must present “actual and convincing evidence,” *id.* at 439, that is “directly contrary to the municipality’s evidence, not simply produce a

general study refuting all secondary effects.” *City of Elko v. Abed*, 677 N.W.2d 455, 465 (Minn. Ct. App. 2004) (citing *Alameda*, 535 U.S. at 439).

Appellants endeavor to undermine Respondent’s secondary effects rationale for the Statute, but they fall short of the threshold prescribed in *Alameda Books*. “If plaintiffs fail to cast *direct* doubt on this rationale, . . . the municipality meets the standard set forth in *Renton*.” *Alameda*, 535 U.S. at 438-39 (emphasis added). In theory, there are ways that Appellants may cast direct doubt on Respondent’s secondary effects rationale: “demonstrat[e] that the [government]’s evidence does not support its rationale or [furnish] evidence that disputes the [government]’s factual findings.” *Id.*

**2. Appellants do not challenge large portions of the State’s evidence of adverse secondary effects.**

The Appellants’ effort to cast direct doubt stumbles in the starting block. Appellants fail to challenge critical components of the rationale and legislative record evidence for the Statute. For example, the General Assembly’s reliance on secondary effects discussed in judicial decisions is uncontested. *Accord Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 630 F.3d 1346, 1357, 1359 (11th Cir. 2011) (noting neither adult businesses nor their experts “has directly addressed the twenty-five judicial opinions relied upon by the County”) (“But the suggestion that the County may not reasonably rely on judicial opinions as evidence has been squarely

rejected by this Court in *Peek-a-Boo I*, where we held that ‘any evidence ... including a municipality’s own findings, evidence gathered by other localities, *or* evidence described in a judicial opinion—may form an adequate predicate to the adoption of a secondary effects ordinance.’ 337 F.3d at 1268 (emphasis added).”).

Likewise, Appellants offer nothing to dispute the testimony concerning anonymous sexual activity and related health risks that occur in closed viewing booths at sexually oriented businesses in Jefferson County, Missouri and elsewhere. (*See* SLF 276-294, Answer, Exh. 4A at 21-39/39). Testimony from a former stripper that lap dances commonly involve stimulation of a customer’s genitals sufficient to cause ejaculation also stands uncontradicted. (*See* SLF 258, Answer, Exh. 4A at 3/39). Because Appellants ignore significant portions of the legislative record, it follows that Appellants fail to cast direct doubt on the General Assembly’s conclusion that regulations in the Statute will serve to reduce and prevent the secondary effects described in these sources.

Using a shotgun approach supported by mere cross-reference to Appellants’ suggestions in the Circuit Court (which refer to yet another document, *see* Aplt.’ Brf. at 79-83), Appellants assert that the General

Assembly's secondary effects evidence fails to satisfy Dr. Linz's standards<sup>4</sup> for evidence to justify regulating sexually oriented businesses. As an initial matter, courts have repeatedly rejected Dr. Linz's methodological requirements for judging secondary effects evidence. *Doctor John's, Inc. v. Wahlen*, 542 F.3d 787, 792 (10th Cir. 2008) (noting rejection of same by Supreme Court in *City of Erie*, 529 U.S. at 300); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 640 (7th Cir. 2003). Furthermore, Dr. Linz's superficial criticisms cannot diminish the substantial evidence of secondary effects set forth in these studies and reports.

Studies in the legislative record show that neighborhoods suffer in the vicinity of sexually oriented businesses. The 1979 Phoenix study documented that sex crimes occurred six times as frequently in areas with adult businesses as compared with control areas, and most of those crimes occurred at the adult business address. (SLF 47, Answer, Exh. 2B, CD, "AZ

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<sup>4</sup> See LF 756, Linz Aff. at 4, ¶ 7 ("[W]e develop[ed] a list of criteria that we believed are critical in order for evidence of adverse secondary effects to be reasonably relied upon or objectively sound.") (citing to attached article, see LF 876, contending that factors from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) should govern acceptability of legislative evidence concerning secondary effects).

Phoenix.pdf” at 10-11/14). *Cf. Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1245 (9th Cir. 1982) (upholding Phoenix open-booth rule) (“The parties further stipulated that in the two years preceding this lawsuit, [t]here were 783 sex-related arrests in the eleven business establishments located in the City of Phoenix which have video viewing devices such as Plaintiff’s displaying ‘adult’ films.”).

According to the U.S. Supreme Court, the 1977 Los Angeles study reveals that “from 1965 to 1975, certain crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments in the city, than in the city of Los Angeles as a whole. For example, robberies increased 3 times faster and prostitution 15 times faster in Hollywood than citywide.” *Alameda Books*, 535 U.S. at 435; *see also* (SLF 47, Answer, Exh. 2B, CD, “CA Los Angeles.pdf” at 9, 73/106).

Numerous studies demonstrate the need to regulate conduct on adult business premises. The 1997 Dallas study, approved by the Fifth Circuit in *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002), describes unruly behavior “both inside and outside of the [sexually oriented] clubs” and “numerous situations” where “prostitution was occurring.” (SLF 47, Answer, Exh. 2B, CD, “TX Dallas.pdf” at 11/30). The 1986 Austin study likewise documented “illegal sexual activity and unsanitary conditions” at adult businesses. (SLF 47, Answer, Exh. 2B, CD,

“TX Austin.pdf” at 5/38). The 1997 Houston study, approved by the Fifth Circuit in *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 191-192 (5th Cir. 2003) to support zoning and conduct regulations, reported “blatant open sexual contact between people with complete anonymity” in adult bookstores and prostitution, public lewdness, narcotics, and indecent exposure crimes in adult cabarets. (SLF 47, Answer, Exh. 2B, CD, “TX Houston 1997.pdf” at 6-8/30). The 1991 Tucson study documented sex acts between dancers for pay, masturbation by patrons, dancers masturbating patrons, prostitution, bodily fluids in adult entertainment spaces, etc. (SLF 47, Answer, Exh. 2B, CD, “AZ Tucson.pdf” at 2-4/6). The 1977 Whittier study reported that investigations and evidence “documented that all of the nude model studios and three of the massage parlors were actively involved in prostitution.” (SLF 47, Answer, Exh. 2B, CD, “CA Whittier.pdf” at 6/22).

Dr. Linz’s tepid criticisms of material by Dr. McCleary, including the report to the Jackson County Legislature and critiques of Dr. Linz’s work, are likewise without merit. Dr. McCleary’s report is no mere summary of municipal studies; rather, it comprehensively discusses criminological theory and original research showing the crime-related secondary effects of sexually oriented businesses. (SLF Vol. II, 180-247). The Jackson County report discusses relevant theory in the context of adult businesses (SLF 183-195), and then it explains the empirical evidence demonstrating negative

secondary effects contained in older and recent research by various authors, including Dr. Linz and Dr. McCleary. (SLF 196-232). Dr. McCleary’s material undoubtedly satisfies the “reasonably believed to be relevant” standard set forth in *Renton* and *Alameda Books*.

**3. Appellants attempted use of affidavits completely fails to cast direct doubt on any, let alone all, of the States secondary effects evidence.**

Much of Appellants’ purported challenge to the State’s secondary effects evidence rests on a group of affidavits attached to their dispositive motion briefs. (*Compare* Aplt’s. Brf. at 67-83 *with* LF 352-1712). However, many of these affidavits—primarily from managers and neighbors of adult businesses—were not part of the pleadings and were not considered by the Circuit Court when it granted Respondent’s motion for judgment on the pleadings. Mo. R. Civ. P. 55.12 (exhibits to pleadings, not motions, are part of pleadings). Nevertheless, even if the affidavits had been considered below, the affidavits would still fall far short of casting doubt on the secondary effects rationale articulated by the General Assemble.

“While the [government] may rely on evidence from other locations and anecdotal evidence, Plaintiffs’ burden is heavier and cannot be met with unsound inference or similarly anecdotal information.” *Richland Bookmart*, 555 F.3d at 527. In this case, the General Assembly relied on a wide range of

judicial decisions, land use studies, crime impact reports, expert witness testimony, and anecdotal evidence to conclude that: “Sexually oriented businesses, as a category of commercial enterprises, are associated with a wide variety of adverse secondary effects, including but not limited to personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation.” (§ 573.525.2(1)). Appellants’ affidavits are wholly insufficient to cast direct doubt on these findings for several reasons.

First, affidavits that speak to an alleged absence of secondary effects at particular times and places do not contradict the General Assembly’s evidence and findings that, as a category, sexually oriented businesses are associated with a wide variety of negative secondary effects. For example, Appellants rely heavily upon an affidavit from Victor Zinn, a former special agent with the Division of Alcohol & Tobacco Control as well as former Kansas City vice and narcotics investigator. Appellants quote Mr. Zinn’s statement that his “investigations have *failed to reveal* drug activities, prostitution activities, or other similar conduct in adult oriented businesses.” (LF 742, Zinn Aff. ¶7 (emphasis added.)) The affidavit provides no foundational details, however, about his personal investigations—details such as how many businesses he investigated, which businesses he investigated,

how often he investigated, and the extent of the investigation. As a further illustration of the type of problems saturating Appellants' affidavits, Mr. Zinn's affidavit is void of evidence that Mr. Zinn went undercover into VIP rooms or peep show booths—the most common locales for prostitution in adult businesses. Even if he had, Mr. Zinn's failure to witness drug or prostitution activities during his particular visit(s) to an adult business would still be completely consistent with the idea that such activities were occurring at other adult businesses or even at the same adult business(es) at different times.

For that matter, the fact that drug use and prostitution was not “revealed” to Mr. Zinn when he entered an adult business is completely consistent with such activities occurring in the business's VIP room or a peep show booth away from Mr. Zinn's gaze. Even more importantly, Mr. Zinn's lack of observation in no way contradicts the wealth of evidence considered by General Assembly linking drug trafficking, prostitution, and other illicit conduct to sexually oriented businesses. For example, nothing in Mr. Zinn's affidavit refutes a Jefferson County Health Department official's observation when he inspected some adult businesses: “All the video viewing areas were contaminated with what appeared to be semen and body fluids. This is in all the video shops, in every one of them. There wasn't one of them that didn't have that.” (*Id.* at 282:12-16, Exh. 4A at 27/39). Simply stated, the absence

of particular conduct at a particular moment and place does not refute evidence of the same conduct at other moments or other places.

Mr. Zinn's affidavit also attempts to go well beyond his personal observation, leaving his affidavit rife with raw speculation, inadmissible hearsay, and opinions without foundation. For example, Appellant's quote Mr. Zinn's "*belief* that the presence of adult entertainment . . . has demonstrated no negative impact on the operation of the business, on the surrounding areas, or neighboring businesses." Yet, his support for this speculative proposition rests simply on his description of the relocation of one such business and his unsubstantiated *belief* that former "opponents" of the relocating business would now say that the anticipated crime, prostitution, drug use and economic drag did not actually occur. Such a statement, of course, is void of foundation and is paradigmatic inadmissible hearsay and speculation. Indeed, hearsay, speculation and lack of foundation permeate Mr. Zinn's affidavit.

After Mr. Zinn, Appellants rely most heavily on the affidavit of Steven Allen, another former special agent for the Division of Alcohol & Tobacco Control. His affidavit is very similar to that of Mr. Zinn's—even tracking some of the same phraseology—but even more lacking in foundation. Whereas Mr. Zinn's affidavit suggested that he had personally entered an adult business on one or more occasions, Mr. Allen's affidavit speaks of how

“investigators monitor businesses,” “agents from this Division conducted investigations,” and “Agents have made arrests.” (LF 545, Zinn Aff. ¶¶5, 6, 7). Mr. Allen did not testify that he personally participated in the monitoring or investigation of any adult businesses. Neither did Mr. Allen present any other foundation sufficient to support any of the opinions he expressed in the affidavit. And of course, as with Mr. Zinn, even if Mr. Allen’s affidavit could be considered evidence of no prostitution or drug use occurring at a particular time and location, such would not refute the General Assembly’s voluminous evidence of such activities occurring at other places and times.

Appellants do not rely as extensively on other affidavits, but nevertheless quote from 13 others. Without exception, *every single affidavit* suffers from one or more of the same deficiencies apparent in the affidavits of Mr. Zinn and Mr. Allen.

Five of the affidavits are from neighbors of a “Passions” adult business. Each contains a statement to the effect that the neighbor has not seen prostitution or drug use at the particular Passions store in question. (LF 740, Younger Aff. ¶4; LF 727, Umfleet Aff. ¶4; LF 559, Cottle Aff.4; LF 585, Hamilton Aff. ¶3; LF 598, Mullins Aff. ¶4). A sixth affidavit—from a county commissioner—also defends Passions, stating “I am unaware of any problems involving Passions Video.” (LF 550, Brickner Aff. ¶4). Importantly, however, none of the affiants profess to ever darkening the door of Passions or

otherwise having any personal knowledge of what happens inside the store. Likewise, none even hint of having information that would refute the proposition—overwhelming supported in the evidence before the General Assembly—that prostitution and drug trafficking are serious problems at adult businesses even if it were to be assumed for the sake of argument that such may not occur at Passions.

Two additional affidavits are also from a county commissioner and from a neighbor of an adult business. They, too, speak in general terms of how the affiant is not aware of crime emanating from a particular adult business. (LF 590, Hornbostel Aff. ¶4; LF 548, Brenner Aff. ¶4). Again, however, the affiants do not profess to have seen what occurs inside those particular businesses or what occurs at other adult businesses. Neither do they purport to have personal knowledge refuting the General Assembly’s evidence of drugs and prostitution at adult businesses.

Finally, the five remaining affidavits cited by Appellants come from four adult business managers and an adult business landlord. The affidavit from the Shady Lady’s manager is cited only for the proposition that the Shady Lady has made charitable donations—hardly a contradiction of the General Assembly’s evidence that drug, prostitution and other problems exist at adult businesses. (LF 723, Spinello Aff. ¶ 4; Appellant’s Brief at 75). The affidavit from Olde Un Theater’s general manager is similar and is cited by

Appellants for the proposition that this particular adult business “takes pains to have good relations with its neighbors,” including “mowing their lawns.” (LF 716, Simpson Aff. ¶ 5).

Likewise, the affidavit from Bazooka Show Girls’ managing officer, Richard Snow, is meaningless. Appellants only cite the affidavit as proof that this business’s rezoning application was approved by the electorate. (Appellant’s Brief at 74). They cite Venus Adult Mega Store manager Mitchell Harrington’s affidavit for the proposition that this particular store has a well-lit parking lot and security cameras which discourage nighttime break-ins. (Appellant’s Brief at 75). Appellants also rely on an affidavit from that store’s landlord which praises the store for paying rent and then goes on to speculate, without foundation, that the store causes no problems for the police or city agencies.

Again, none of these affidavits are properly before this Court, but even if the affidavits were to be considered, they neither separately nor collectively cast any direct doubt on the General Assembly’s secondary effects rationale. They do not contradict legislative record evidence demonstrating adverse secondary effects at adult businesses, and any argument for their supposed pertinence rests on a flawed legal standard. As long as the government relies on some evidence “reasonably believed to be relevant” to the problem it

addresses, the government is not required to produce anything more.

*Renton*, 475 U.S. at 50-52.

4. **Outlier cases contravene the central principles of *Renton-Alameda Books*, do not help Appellants cast direct doubt, and do not preclude judgment as a matter of law.**

Because the overwhelming weight of authority is in Respondent’s favor, Appellants resort to anomalies in the case law, including a pair of opinions that were authored by the same judge. In *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009), the court made one general citation to *Renton*, but never articulated its “any evidence reasonably believed to be relevant” standard. Instead, the court announced a new standard, requiring the city to adduce empirical evidence proving the actual efficacy of its sexually oriented business regulations in reducing secondary effects. *Id.* at 462 (holding that under intermediate scrutiny, “the City needs evidence that the restrictions actually have public benefits great enough to justify any curtailment of speech”); *id.* at 464.

This new standard was specifically rejected in *Alameda Books*: “In effect, JUSTICE SOUTER asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. . . . Such a requirement would go too far in

undermining our settled position that municipalities must be given a ‘reasonable opportunity to experiment with solutions’ to address the secondary effects of protected speech.” 535 U.S. at 439.

Indeed, the new *Annex Books* standard contradicts the Seventh Circuit’s own post-*Alameda Books* precedent. *Ben’s Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 721 (7th Cir. 2003) (“Justice Kennedy’s position is not that a municipality must prove the efficacy of its rationale for reducing secondary effects prior to implementation, as Justice Souter and the other dissenters would require, *see generally Alameda Books*, 122 S. Ct. at 1744-51; but that a municipality’s rationale must be premised on the theory that it ‘may reduce the costs of secondary effects without substantially reducing speech.’ *Id.* at 1742 (emphasis added).”).

Additionally, the new *Annex Books* test conflicts with *Renton*, as it requires not just any evidence “reasonably believed to relevant” to the secondary effects of sexually oriented businesses, but legislative evidence specific to sub-categories of adult businesses and to the type of regulation adopted. *Annex Books*, 581 F.3d at 462-63, 464. In a subsequent per curiam opinion, *Annex Books* has deviated further from *Alameda* by rejecting a published, empirical secondary effects study because it failed to rule out competing explanations for a change in crime rates. *Compare Annex Books, Inc. v. City of Indianapolis*, 624 F.3d 368, 369-70 (7th Cir. 2010), *with*

*Alameda*, 535 U.S. at 437 (plurality) (stating government “does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own”).

Not surprisingly, this new “heightened specificity” requirement *also* contradicts prior Seventh Circuit post-*Alameda Books* precedent. *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir. 2003) (“The plurality [in *Alameda Books*] did not require that a regulating body rely on research that targeted the exact activity it wished to regulate, so long as the research it relied upon reasonably linked the regulated activity to adverse secondary effects.”).

In sum, *Annex Books* cites *Alameda Books* to make new law that contravenes the clear language of both *Alameda Books* and prior Seventh Circuit decisions interpreting *Alameda Books*. The Seventh Circuit compounded the error by applying the new *Annex Books* standard a week later in *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556, 560 (7th Cir. 2009)—another case that never mentions the ubiquitous “reasonably believed to be relevant” standard. Additionally, *New Albany DVD*’s analysis is suspect because the opinion relies on cases invalidating, under strict scrutiny, content-based regulations designed to protect readers from the primary effects of speech. Those cases demonstrate no infirmity in a statute targeting secondary effects.

In a similar vein, Appellants cite *Abilene Retail #30, Inc. v. Board of Commissioners of Dickinson County*, 492 F.3d 1164 (10th Cir. 2007). But in that case, the Tenth Circuit ruled that exclusively urban studies did not justify the regulation of the sole sexually oriented business in the government’s jurisdiction, which was “located on a highway pullout far from any business or residential area within the County.” 492 F.3d at 1175. Appellants’ truncated quotation from that case obscures the fact that the panel majority required the county to analogize the studies to its local, rural situation. The Statute here, of course, applies statewide, including in many urban areas.

Moreover, the Tenth Circuit’s holding in *Abilene Retail* is wrong as a matter of law because it is contrary to *Renton*. In *Renton*, the Ninth Circuit had invalidated the Renton ordinance on the ground that Renton failed to show that its legislative evidence—from Seattle, a city twenty times Renton’s size—was relevant “to the particular problems or needs of Renton.” *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 537 (9th Cir. 1984). The U.S. Supreme Court reversed, rejecting the more “rigid burden of proof” imposed by the Ninth Circuit and holding that a local government is not required to “produce evidence independent of that already generated” by others, as long as the government relies on some evidence “reasonably believed to be relevant” to the problem it addresses. *Id.* at 51-52.

Yet the court in *Abilene Retail* invalidated the same conclusion that the U.S. Supreme Court had upheld in *Renton*: that it is reasonable to believe that the same negative secondary effects that attend sexually oriented businesses in one geographic area will likewise attend sexually oriented businesses in another, even dissimilar, geographic area. Like other courts, this Court should decline to follow in that error. *Plaza Group Properties, LLC v. Spencer County Plan Comm’n*, 877 N.E.2d 877, 892 (Ind. Ct. App. 2007) (upholding regulation of rural adult business and concluding that “[w]hile Plaza urges us to follow the *Abilene Retail* court’s rationale, as the *R.V.S.* court cautioned, we should not be in the business of second-guessing the empirical assessment of municipalities enacting sexually oriented business ordinances”); *LLEH, Inc. v. Wichita County*, 289 F.3d 358, 366 (5th Cir. 2002) (holding that under *United States v. Albertini*, 472 U.S. 675, 688-89 (1985), regulations on “the time, place and manner of expression must be evaluated in terms of their general effect,” and holding that trial court erred in relying on plaintiff’s rural surrounding to invalidate an adult business ordinance).

In any event, *Abilene Retail* is inapposite just based on the facts. The General Assembly considered a wide variety of secondary effects evidence, including expert evidence specific to rural communities. (SLF 213-220, Answer, Exh. 3A at 159-166/193) (documenting crime and related secondary

effects from “retail-only” or “off-site” adult bookstores, including a retail-only Lion’s Den adult bookstore in rural Illinois); (*see also* SLF 167, Answer, Exh. 3A at 113/193) (citing portion of *Enlightened Reading* decision citing *People ex rel. Deters v. Effingham Retail #27, Inc. d/b/a Lion’s Den*, Case No. 04-CH-26, Modified Perm. Inj. Order (Ill. 4th Judicial Cir., Effingham County, July 13, 2005) (secondary effects, including sexual solicitation, at rural adult store)). These anomalous decisions should be rejected.

**5. Dr. Linz’s studies do not cast direct doubt on the State’s secondary effects evidence.**

Appellants also seek to cast direct doubt, in their own way, on Respondent’s evidence by arguing that Dr. Linz’s testimony, rejected by the U.S. Supreme as well as the Missouri General Assembly, should be accepted as the standard for judging secondary effects regulations.<sup>5</sup> As a matter of

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<sup>5</sup> Like the other affidavits, Dr. Linz’s affidavit and expert report is not before the Court for the reasons previously discussed. *Cf. Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 297 (6th Cir. 2008) (affirming judgment on the pleadings in favor of a municipality where trial court considered the legislative record that was part of the pleadings but did not consider affidavits of Dr. Linz and others that went beyond the legislative record). However, Dr. Linz did present evidence to the General Assembly.

law, however, Dr. Linz's testimony does not cast direct doubt on the General Assembly's secondary effects rationale.

By requiring a rigorous, comparative analysis before recognizing any sort of secondary effects, Dr. Linz seeks to impose a scientific evidentiary standard that is much more demanding than the deferential "reasonably believed to be relevant" standard that the Supreme Court has established for secondary effects legislation. Indeed, Dr. Linz has admitted that comparative analysis between adult and non-adult businesses is the *sine qua non* in *his definition* of "secondary effects." (SLF 128, Answer, Exh. 3A at 74/193) (claiming that his "studies demonstrate that crime around adult businesses is *no greater than* crime around non-adult businesses) (emphasis added); *but see Flanigan's Enters., Inc. v. Fulton County*, 596 F.3d 1265, 1281 (11th Cir. 2010) ("Even if we were to accept that crime is greater in and around the non-adult establishments-and the record is hotly disputed on this point-a municipality would still be empowered to act in order to check a class of crime it found to be particularly troublesome."). *See* discussion at II. A. above.

But Dr. Linz's (and the Appellants') definition of secondary effects relies on a *non sequitur*: it simply does not follow that if a non-adult business has more crime or other problems than an adult business, there is no justification for regulations designed to prevent the harms of the adult

business. For example, prostitution in adult cabarets is a secondary effect regardless of any comparison between adult cabarets and non-adult businesses, and the Statute's six-foot rule certainly "may reduce the costs" of such secondary effects:

Appellants also offer their own compilation of data suggesting that police service calls are placed less often from their establishments than from certain other Louisville-area establishments which do not feature adult entertainment. Even if true, this does not disprove that the enactment of buffer zone regulations may reduce criminal activity and further an important governmental interest.

*Kentucky Rest. Concepts, Inc. v. City of Louisville*, 209 F. Supp. 2d 672, 680 (W.D. Ky. 2002).

The approach advocated by Dr. Linz and Appellants does not account for the fact that numerous adult business cases have concluded that the studies they criticize satisfy *Renton*, and those cases have upheld the challenged regulations as constitutional. *See, e.g., Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512, 525 (6th Cir. 2009) (crediting reliance upon: 1984 Indianapolis, Indiana study; 1986 Oklahoma City, Oklahoma study); *H&A Land Corp. v. City of Kennedale*, 480 F.3d 336, 339-40 (5th Cir. 2007)

(same); *BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 606 (8th Cir. 2001) (crediting reliance upon Indianapolis, Indiana study); *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 n.1 (10th Cir. 1998) (crediting reliance upon: Whittier, California study; Austin, Texas study; Indianapolis, Indiana study; Garden Grove, California study; Minneapolis, Minnesota report; Oklahoma City, Oklahoma study ; Amarillo, Texas study).

In short, Dr. Linz’s comparison-based approach to secondary effects—which underlies all of his studies and opinions—is not essential to the secondary effects debate. *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007) (reversing district court judgment that relied on Dr. Linz’s comparative analysis). *See also Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F. Supp. 2d 672, 680 (W.D. Ky. 2002) (rejecting Dr. Linz’s “compilation of data” and comparative-analysis standard).

Moreover, the General Assembly explicitly stated this fact when specifying its regulatory rationale. § 573.525.2(3) (stating that the “interest in preventing secondary effects . . . exists independent of any comparative analysis” between adult and non-adult businesses).

Thus, while Appellants attempt to paint this case as inherently involving a factual issue ripe for expert testimony, it is not. Rather, the central issue is whose regulatory rationale concerning secondary effects—the General Assembly’s or the Appellants’—controls in this case. Under the

Supreme Court's decisions, the *government's* rationale controls. The challenger must cast "direct doubt" by "clear and convincing evidence" on *that* rationale. *Alameda Books*, 535 U.S. at 437-39; *Daytona Grand*, 490 F.3d at 882 ("Our review is designed to determine whether *the City's* rationale was a reasonable one, and even if Lollipop's demonstrates that another conclusion was also reasonable, we cannot simply substitute our own judgment for the City's.") (emphasis in original).

Dr. Linz's approach also inherently fails because of his persistent reliance on police calls for service data. For example, some of the studies attached to Dr. Linz's report are Dr. Linz's own studies. Appellants' brief mentions two in particular, a San Diego study and an Indianapolis study. Consistent with Dr. Linz's standard approach, both studies are based on police "calls for service" data, "which, in lay terms, is essentially 911 emergency call data." *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860, 882 (11th Cir. 2007). "Relying on such data to study crime rates is problematic, however, because many crimes do not result in calls to 911, and, therefore, do not have corresponding records in the City's CAD data." *Id.* "This is especially true for crimes, such as lewdness and prostitution," that are often targeted by adult business regulations and were in fact targeted by the Missouri statute now before this Court. *See also Flanigan's Enters. Inc. of Georgia v. Fulton County*, 596 F.3d 1265, 1281 n. 9

(11th Cir. 2010) (noting “the unreliability of police call data as an accurate measure of crime rates” and that victims and witnesses of crimes at adult establishments are often embarrassed to report the crime); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 630 F.3d 1346 (11th 2011) (similar); *Jameson v. Commonwealth*, 215 S.W.3d 9, 12 (Ky. 2006) (“It does seem unlikely that one participating in illicit sexual behavior at such a business would call 911 and complain about it.”).

Significantly, courts have repeatedly upheld adult business regulations as a matter of law—in the face of Dr. Linz’s opposing viewpoint. *See, e.g., Heideman v. South Salt Lake City*, 165 F. App’x 627, 631-32 (10th Cir. 2006) (rejecting expert witness [Dr. Linz’s] attack on legislative evidence); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126-27 (9th Cir. 2005) (rejecting expert’s [Dr. Linz’s] critique of legislative evidence, as “simply not the law”); *G.M. Enters., Inc. v. Town of St. Joseph*, 350 F.3d 631, 639-40 (7th Cir. 2003) (holding Dr. Linz’s challenge “is not sufficient to vitiate the result reached in the Board’s legislative process”); *City of Elko v. Abed*, 677 N.W.2d 455, 464-65 (Minn. Ct. App. 2004) (holding article co-authored by Dr. Linz did not cast “direct doubt” on city’s secondary effects rationale); *Charter Township of Van Buren v. Garter Belt, Inc.*, 258 Mich. App. 594, 621-22 (Mich. Ct. App. 2003) (rejecting Dr. Linz affidavit as insufficient to require trial). *See also City of*

*Erie v. Pap's A.M.*, 529 U.S. 277, 300 (2000) (rejecting Dr. Linz's allegedly "scientifically sound" study as insufficient).

In a rare case where the trial court denied judgment as a matter of law on the secondary effects issue and read *Alameda Books* to require a trial to evaluate a city's evidence and rationale, that court was reversed overwhelmingly on appeal. *See Daytona Grand*, 490 F.3d at 869, 873-86. Persuaded by Dr. Linz and "scientific" studies that the city's evidence was "shoddy," the trial court held that plaintiffs cast direct doubt on the city's rationale for its adult business ordinances. *Id.* at 880; *see also id.* at 883 n.33. On appeal, the Eleventh Circuit reversed, explaining that even if plaintiffs demonstrate that a contrary secondary effects conclusion is reasonable, courts cannot substitute their own judgment if the *government's* rationale is reasonable. *Id.* at 882; *see also G.M. Enters., Inc. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir. 2003) (the possibility of reaching "a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses . . . is not sufficient to vitiate the result reached in the [State's] legislative process."); *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546, 561 (5th Cir. 2006); *Alameda Books*, 535 U.S. at 437 (government "does not bear the burden of providing evidence that rules out every theory . . . that is inconsistent with its own").

Appellants' ultimate goal is to have the Court submit the General Assembly's legislative judgment to a factfinder (either the trial court or a jury) "to appraise the wisdom of" the Statute by "second-guessing" the General Assembly's policy determination. This quest is contrary to governing law and subject to judgment on the pleadings. *Renton*, 475 U.S. at 53 (holding that it is not the court's role to "appraise the wisdom" of the city's legislative determination concerning how to control secondary effects); *Alameda Books*, 535 U.S. at 451 (Kennedy, J.) (courts should not be "in the business of second-guessing" such determinations).

As the Seventh Circuit explained in *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 639-40 (7th Cir. 2003):

*Alameda Books* does not require a court to re-weigh the evidence considered by a legislative body, nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence "reasonably believed to be relevant to the problem" addressed.

In *G.M. Enterprises*, the plaintiff submitted Dr. Linz's article supposedly "debunking" the idea of secondary effects. 350 F.3d at 635-36.

This is the same article that Dr. Linz submitted with his affidavit below; indeed, it forms the basis of his affidavit. (LF 755). This is also the same paper / article *rejected* by the Supreme Court in *City of Erie. Doctor John's, Inc. v. Wahlen*, 542 F.3d 787, 792 (10th Cir. 2008). It maintains that “[t]he basic requirements for the acceptance of scientific evidence, such as secondary effects studies, were prescribed by the Supreme Court in the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*” (LF 872).

The Seventh Circuit in *G.M. Enterprises*, 350 F.3d at 640, rejected Plaintiffs’ reliance on Dr. Linz to preclude judgment as a matter of law:

Plaintiff argues that its complaint must survive summary judgment because the evidence relied upon by the Board does not meet the standards of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). Under the plaintiff’s view, the Town cannot demonstrate a reasonable belief in a causal relationship between the activity regulated and secondary effects, as required by *Alameda Books* and *Renton*, unless the studies it relied upon are of sufficient methodological rigor to be admissible under *Daubert*. This argument is completely unfounded.

The *G.M. Enterprises* decision went on to state that “[a] requirement of *Daubert* quality evidence would impose an unreasonable burden on the legislative process, and further would be logical only if *Alameda Books* required a regulating body to prove that its regulation would—undeniably—reduce adverse secondary effects. *Alameda Books* clearly did not impose such a requirement.” *Id.*

Appellants’ attack on the General Assembly’s legislative rationale assumes an incorrect legal standard. The Circuit Court refused to follow this standard and properly granted Respondent’s motion for judgment on the pleadings.

#### **IV. Lost Revenues Do Not Establish a First Amendment Violation.**

Appellants invoke Justice Kennedy’s concurrence in *Alameda Books* in an effort to invalidate the Statute by claiming that sexually oriented businesses have lost patrons, employees, and revenue since its regulations took effect. Relying on affidavits (outside the pleadings), Appellants contend that individual and aggregate responses to the Statute show that the effect of the regulations is a reduction in business that violates Justice Kennedy’s “proportionality requirement.”

Appellants fail to recognize that Justice Kennedy’s concern with the anticipated effect of proposed regulations relates only to evaluating the government’s *rationale* for the regulations and what level of scrutiny to

apply. Justice Kennedy’s concurrence does not overrule *Renton*’s holding that “[t]he inquiry for First Amendment purposes is not concerned with economic impact.” 475 U.S. at 54; *see also Ben’s Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 727 & n.32 (7th Cir. 2003) (rejecting challenge to adult business alcohol ban supported by testimony that “Ben’s Bar cannot operate at a profit without the revenue from the sale of alcoholic beverages, and the business such sales bring in.”).

As an initial matter, Justice Kennedy’s proportionality discussion focused on the rationale for a dispersal zoning requirement that forced sexually oriented businesses to either close or relocate. *Alameda Books*, 535 U.S. at 450-51 (Kennedy, J., concurring) (“One business will either move elsewhere or close. The city’s premise cannot be the latter.”). Because the Statute does not affect Appellants’ business locations or require them to close, proportionality analysis does not apply in this case. *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546, 562 (5th Cir. 2006) (holding that Justice Kennedy’s concurrence did not change *Renton*, questioning even whether the “proportionality” language, “which was formulated for zoning cases, would apply here, in a symbolic-speech case,” and affirming summary judgment upholding a 6-ft. buffer); *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1163 (9th Cir. 2003) (upholding statewide adult business hours of operation law, explaining that Justice Kennedy’s

proportionality language was directed to “a classic erogenous zoning ordinance” and means only that regulatory rationale cannot rely on *closure* of adult businesses to achieve secondary effect reduction).

To the extent that Justice Kennedy’s concurrence—which specifically mentioned the zoning context 22 times—applies here, the Statute plainly satisfies the required regulatory rationale. The General Assembly’s rationale is not that the Statute will *cause* the permanent closure or business failure of adult businesses and *thereby* decrease secondary effects. On the contrary, the Statute allows erotic dancing to continue and sexually explicit films to be shown without any intrinsic limitations on the speech itself; the only restrictions are court-tested regulations governing the time, place, and manner of ongoing sexually oriented business operations in order to prevent negative secondary effects.

Justice Kennedy’s concurrence does not stand for the proposition that Appellants now advance, namely, that decreased revenue renders content-neutral regulations unconstitutional. Again, nothing in Justice Kennedy’s concurrence overrules *Renton’s* straightforward holding that “[t]he inquiry for First Amendment purposes is not concerned with economic impact.” 475 U.S. at 54. *See also Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 78 (Powell, J., concurring) (holding that the First Amendment inquiry “looks only to the effect of [a regulation] upon freedom of expression,” not upon

profitability); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377, 397 (6th Cir. 2001) (“The point is that any problems dancers may experience with receiving tips or speaking with customers will be caused not by the Ordinance, but by the clubs’ refusal to alter their standard operating procedures in response to these constitutional regulations.”); *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663, 667 (9th Cir. 1996) (“The ordinances promulgated by the city in this case do not deny World Video the opportunity to operate its establishments, but merely (or rather, allegedly) increase the costs of its doing so. Even if the costs of compliance were so great that World Video would be forced out of business, the ordinances *do not pose any intrinsic limitation on the operation of the arcades*, but merely increase World Video’s vulnerability to such market forces as the increased costs of labor and the decreased or stagnant demand for pornography. Accordingly, we hold that the ordinances constitute valid manner restrictions.”).

The Ninth Circuit’s analysis in *Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996 (9th Cir. 2007) is directly on point. There, the appellate court affirmed summary judgment in favor of hours-of-operation and open-booth regulations for sexually oriented businesses. Appellants argued, *inter alia*, that the open-booth regulation was unconstitutional under

*Alameda Books*, presenting an affidavit showing “that peep show patronage generally declines by 60% after removal of the doors.” *Id.* at 1004.

The Ninth Circuit held that “such decline in business” is “not determinative” because it presents no intrinsic limitation on the speech: “Furthermore, the ordinance does not restrict protected speech occurring in the booths. The ordinance does not in any way limit the content of the videos, the number of booths available for viewing the videos, or the availability of the videos. The videos are as available as ever.” *Id.*

Addressing the plaintiffs’ argument that Justice Kennedy’s concurrence rendered the open-booth requirement unconstitutional, the Ninth Circuit reaffirmed that “Justice Kennedy’s concurrence did nothing ‘to precipitate a sea change in this particular corner of First Amendment law.’” *Id.* at 1005 (quoting *Center for Fair Public Policy*, 336 F.3d at 1162). Moreover, the proportionality language therein is limited to classic adult business zoning contexts and cannot be read to apply to hours of operation or open-booth regulations. *Id.* (noting that applying a literal proportionality requirement to hours of operation laws would invalidate *all* such laws, *i.e.*, all *time* regulations—an absurd result under myriad time, place, and manner authorities).

The *Fantasyland Video* court then explained:

We now hold that Justice Kennedy's concurrence is also inapplicable to an open-booth requirement.

Under the County's rationale, the patron watching a private peep show often seeks to masturbate, solicit sexual acts, or engage in sexual acts while in the booth. Any regulation that deters these activities will necessarily make the forum for the speech less attractive, but only because the speech and sexual acts originate with the same person and occur at the same time. The overall quantity of the protected expression must be reduced, but only because the patron is chilled from also contemporaneously engaging in the unprotected behavior. Justice Kennedy's proportionality language was not designed for situations where the protected speech and the unprotected conduct merge in the same forum.

*Id.*

The application of these principles to the case at bar is plain. The General Assembly's rationale for the open booth regulation in the Statute is the same as San Diego County's rationale. The General Assembly had before it evidence that illicit sexual behavior occurs in closed peep show booths.

(*See, e.g.*, SLF 279-282, Answer, Exh. 4A at 24-27/39 (Transcript of Jefferson County, MO Commission Hearing)). This involves conduct that can spread HIV. (SLF 293-294, Exh. 4A at 38-39/39). Taking the doors off the booths may decrease the desirability of the venue for would-be patrons—and thereby substantially reduce the profitability of the venue—but this neutral secondary-effects regulation is constitutional. Indeed, *every* appellate decision addressing the open-booth requirement, both before and after *Alameda Books*, has held the requirement constitutional.

As discussed in Section III above, a litany of cases apply similar analysis in upholding all of the regulations at issue here, including the nude conduct prohibition, hours regulation, 6-ft. and no-touch rules, and alcohol prohibition.

Thus, being unable to obtain the bump-and-grind experience of a lap dance at an adult cabaret may significantly decrease the profitability of adult cabarets, but only because “protected speech and the unprotected conduct merge in the same forum,” *Fantasyland Video*, 505 F.3d at 1005, and the protected speech (erotic dancing) may not be as attractive to the patron if it is unaccompanied by the unprotected conduct (physical stimulation). *Fantasy Ranch*, 459 F.3d at 557 (upholding ordinance with 6-ft. and no-touch rules as reasonable measures “to eradicate certain negative secondary effects that flow from this particular form of symbolic speech, particularly the physical

contact between dancer and patron that we have already held to be unprotected by the First Amendment, and the crimes which that touching encourages and facilitates”); *see also id.* (quoting Justice Kennedy’s *Alameda Books* concurrence, 535 U.S. at 449, and holding that “the ordinance attempts to control secondary effects while leaving the ‘quantity and accessibility of speech substantially intact’”).

Similarly, the alcohol prohibition presents no intrinsic limitation on speech whatsoever. To be sure, patrons may desire to consume alcohol while they watch erotic dancing (and receive physical stimulation from lap dances), but a regulation designed to prevent the lowered inhibition, impaired judgment, and antisocial behavior associated with alcohol consumption does not intrinsically limit speech.

In *Ben’s Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003), the Seventh Circuit evaluated the argument that Appellants present by affidavits here: that to avoid the alcohol prohibition applicable to sexually oriented businesses (here, adult cabarets), those establishments must become bikini bars, and that the dancers’ donning of the additional covering impairs speech. The “central fallacy” in this argument is that the alcohol prohibition “restricts the sale and consumption of alcoholic beverages in establishments that serve as venues for adult entertainment, not the attire of nude dancers.

In the absence of alcohol, Ben's Bar's dancers are free to express themselves all the way down to their pasties and G-strings." *Id.* at 708.

The same is true here. It is beyond cavil that inebriation engenders secondary effects, and that the General Assembly has a substantial government interest in preventing those secondary effects. *Id.* at 727 (holding that, "as a practical matter, a complete ban of alcohol on the premises of adult entertainment establishments is the only way the Village can advance" the "Village's substantial interest in combating the secondary effects resulting from the combination of nude and semi-nude dancing and alcohol consumption"). *California v. LaRue*, 409 U.S. 109, 111 (1972) (documenting secondary effects in adult entertainment bars); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 717-18 (1981) ("Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior."); *Flanigan's Enterprises, Inc. v. Fulton County*, 596 F.3d 1265 (11th Cir. 2010) (upholding prohibition on alcohol in adult entertainment establishments based on documented secondary effects).

Despite this longstanding (as well as recent) authority, Appellants argue that Justice Kennedy's *Alameda Books* concurrence renders the regulations unconstitutional because adult cabarets have lost income, and that the lost income is a proxy for lost speech, *i.e.*, it represents "a reduction in the quantity and availability of adult expression in Missouri." (Aplts.' Brf.

at 94-95). But as the Seventh Circuit held in *Ben's Bar*—and as numerous other courts have held—the alcohol regulation “does not impose any restrictions whatsoever on a dancer’s ability to convey an erotic message.” 316 F.3d at 726 (citing cases). Rather, it is a regulation of unprotected “conduct (i.e., serving and consuming alcohol) during the presentation of expressive conduct.” *Id.* Thus, the Statute regulates the alcohol consumption that gives rise to secondary effects without prohibiting the expressive conduct of erotic dancing, which is the only First Amendment activity at issue.

Similar to the affidavits submitted (outside the pleadings) in this case, the affidavit submitted by the adult cabaret owner in *Ben's Bar* averred that the cabaret “*cannot operate at a profit without the revenue from the sale of alcoholic beverages, and the business such sales bring in.*” *Id.* at 727 n.2 (emphasis added by Seventh Circuit opinion). The Seventh Circuit, however, held that a reasonable opportunity to present protected speech “does not include a concern for economic considerations.” *Id.* at 727 (citing *Renton*, 475 U.S. at 54).

Thus, Appellants’ arguments based on decreased revenues fail as a matter of law.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the judgment below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) in that it contains 25,351 words exclusive of the cover, this Certificate of Compliance and of Service and the signature block, as determined by the Word Count feature of the software in which it was prepared, WordPerfect 2007;

2. The disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free, and;

3. Two true and accurate copies of the foregoing Respondent's Brief were served today, via First Class United States Mail, sufficient postage prepaid, upon the counsel for the Appellant, at the addresses listed below, this 28<sup>th</sup> day of July, 2011.

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