SC 87154

IN THE SUPREME COURT OF MISSOURI

MISSOURI ASSOCIATION OF CLUB EXECUTIVES, INC., et al.

Respondents

v.

STATE OF MISSOURI

Appellant.

BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

Except as supplemented below, Respondents concur in Appellant's statement concerning the legislative history of House Bill 972 ("HB 972").[1] Respondents would also add the following statement relating to the First Amendment issues before the Court.

Respondents consist of a variety of persons (individuals and entities) who are involved in the adult entertainment business in Missouri. (Legal File ("L.F.") at 153-156) The Missouri Association of Club Executives, Inc. ("Club Executives") is a not-for-profit association which represents the interests of its members who are engaged in the business of operating adult entertainment establishments in Missouri. (L.F. 153-54) Among the members of Club Executives are adult entertainment businesses which employ persons who are over the age of eighteen but less than twenty-one. (L.F. 156) Those members also have patrons or customers who are within this age range. (L.F. 156) Scope Pictures of Missouri, Inc., d/b/a Bazookas, is an adult entertainment establishment located in Kansas City which offers nude and semi-nude dancing for its patrons. (L.F. 154) Passions Video, Inc. is a retail store selling a variety of depictional adult entertainment products in print and video media. (L.F. 154) Its products also include non-depictional items, including lingerie and items commonly

[1] For purposes of continuity and ease of understanding, it is necessary to recite the history behind the legislative enactment of HB 972 in some length.

referred to as sexual aids or sex toys. (L.F. 154) The remaining Respondents are (i) three individuals who are over the age of eighteen but under the age of twenty-one who perform nude or semi-nude dancing at Bazookas for their livelihood; (ii) an individual over the age of eighteen but under the age of twenty-one who is employed as a sales clerk for Passion Videos, Inc.; and (iii) a person over the age of eighteen but under the age of twenty-one who patronizes adult entertainment establishments in Missouri. (L.F. 154-56)

The nude and semi-nude dancing performed or offered by Respondents and members of Club Executives is non-obscene, non-pornographic. (L.F. 162) Similarly, the material offered for sale at Passions Video, Inc. and by members of Club Executives is non-obscene, non-pornographic material. (L.F. 162) By stipulation for purposes of this litigation, the State also agrees that this material is protected material by the First Amendment to the United States Constitution and Article I, Section 8 of the Missouri Constitution. (L.F. 162) With respect to the operation of the adult entertainment establishments which are parties to this litigation, there is no empirical evidence that they have an impact on the safety and welfare of persons in Missouri. (L.F. 163) Similarly, the adult entertainment establishments named in this litigation and members of Club Executives do not negatively impact Missouri through their operations in that: they do not allow minors on their premises or sell to minors (L.F. 163); they prohibit prostitution, criminal activity and juvenile delinquency on their property (L.F. 163); they do not conduct their businesses in such a manner to create or produce these conditions

(L.F. 163); they are properly zoned for adult entertainment businesses and properly licensed to conduct those businesses (L.F. 163); they do not conduct their businesses in such a manner as to cause a deterioration in property values or lethargy in neighborhood improvement efforts (L.F. 163); they do conduct their businesses in such a manner to maintain the physical condition of their property (L.F. 163); and they are otherwise actively involved in their communities, not only in the payment of state and local taxes, but also in their voluntary participation in civic and charitable activities within their communities. (L.F. 164)

With respect to the information on purported "secondary effects" of adult entertainment establishments noted by the State in its brief, Brief of Appellant at 10, it can only be said that the studies were distributed to members of the Legislature with respect to consideration of Senate Bill 32 (not HB 972), but there is no evidence that any member of the Legislature reviewed or considered this information in voting on HB 972. (L.F. 164) The parties also specifically stipulated that the information that was distributed (and made an exhibit to the Stipulation), was not offered for the purpose of proving the existence of "secondary effects," did not prove the existence of "secondary effects," and that a proper foundation had not been laid for the admission of the substance of that material. (L.F. 164-64)

Legislative history of HB 972. As originally introduced, House Bill 972 was titled, in pertinent part, "An Act to repeal sections 577.001, 577.023, RSMo, and section 302.309 . . . , and to enact in lieu thereof four new sections related to

intoxication-related traffic offenses, with penalty provisions." (L.F. 30). As originally introduced, House Bill 972 sought to amend Section 302.309, RSMo., relating to the suspension or revocation of drivers licenses for intoxication-related driving, with the amendment to this section relating to the subsection on eligibility for a limited driving privilege. (L.F. 30-41). Section 302.309, as it existed before the introduction of HB 972 contained no provisions of a criminal nature nor did it impose any criminal penalties. (L.F. 37). The provisions of House Bill 972 as originally introduced and as it affected Section 302.309, did not add any provisions of a criminal nature nor did it impose any criminal penalties. (L.F. 30-41). The remainder of House Bill 972 added a new section, 565.022, which established the crime of aggravated vehicular manslaughter, and amended Sections 577.001 and 577.023 to add definitions to these sections on intoxication-related criminal offenses. (L.F. 30-41).

House Bill 972 was referred to the House Special Committee on General Laws on April 7, 2005, and a hearing held by the committee on April 14, 2005. (L.F. 157-158). The committee reported out House Committee Substitute for House Bill 972. *Id*. The House Committee Substitute was titled, "An Act To repeal sections 577.001 and 577.023, RSMo, and to enact in lieu thereof three new sections related to intoxication-related traffic offenses, with penalty provisions." (L.F. 42). The House Committee Substitute was essentially identical to the original bill except that it omitted the repeal of Section 302.309 and the enactment of that same numbered section with changes. (*Compare* L.F. 30-41 *with* 42-46).

The House Committee Substitute was referred to the House Rules Committee which reported it "do pass" on April 19, 2005. (L.F. 158). The House Committee Substitute was then taken up and perfected by the House of Representatives without any changes on April 28, 2005. *Id.* The perfected bill was referred to the House Fiscal Review Committee, which reported it "do pass" on May 3, 2005, and was ultimately passed by the full House on May 3, 2005. *Id.* The perfected version of the House Committee Substitute was identical in title and substance to the version reported out of the House Special Committee on General Laws. (L.F. 42-46 and 47-51).

The House Committee Substitute was first read in the Senate on May 5, 2005, second read on May 10, 2005, and then referred to committee. (L.F. 158). The bill was reported out of committee also on May 10, 2005, with a recommendation of do pass. *Id.* At that time, three days before the end of session, the bill was still titled "An Act To repeal sections 577.001 and 577.023, RSMo, and to enact in lieu thereof three new sections related to intoxication-related traffic offenses, with penalty provisions,"and still was limited to changes to the intoxication-related traffic offenses specified by it. (L.F. 47-51).

House Bill 972 was then amended for the second time on May 10, 2005, three days before the end of the legislative session, by a Senate Committee Substitute for House Committee Substitute for House Bill 972 (Senate Committee Substitute). (L.F. 159). The Senate Committee Substitute was titled "An Act To repeals [sic] sections 311.310, 565.024, 568.050, and 577.023, RSMo, and to enact

in lieu thereof four new sections related to alcohol related offenses, with penalty provisions." (L.F. 52-58). The changes sought to be made by this version of House Bill 972 included: (1) an amendment to Section 311.310, relating to the sale of alcohol to persons under the age of twenty-one by liquor licensees, to prohibit any person from knowingly or recklessly allowing a person under the age of twenty-one to drink or possess intoxicating liquor on their premises or to fail to stop such under-aged person from drinking or possessing intoxicating liquor on the premises; (2) an amendment to Section 565.024, relating to the offense of involuntary manslaughter in the first degree to add the provisions of what had been the crime of aggravated vehicular manslaughter in the earlier versions of House Bill 972, with slight modifications; (3) an amendment to Section 568.050, relating to the crime of endangering the life of a child in the second degree by adding a provision making it a violation of the statute to commit certain intoxication-related driving offenses with a child under the age of seventeen in the vehicle; and (4) an amendment to Section 577.023 that was the same as the amendments contained in the earlier versions of House Bill 972, with slight modifications. (L.F. 52-58). The slight modifications to the amendment to Section 577.023 incorporated the modification to Section 577.001 that had originally been set out in the originally introduced version of House Bill 972. *Compare* L.F. 56 ("state, county, or municipal court" substituted for term "court") *with* L.F. 38 (term "court" to mean circuit, associate or municipal court, including traffic court).

On May 11, 2005, the Senate Committee Substitute was brought up for debate on the floor of the Senate. (L.F. 159). Senator Nodler introduced a Senate Substitute ("Nodler Senate Substitute"). *Id.* The Nodler Senate Substitute did not substantively change the title or contents of the Senate Committee Substitute. *Id.* The Nodler Senate Substitute was placed on the informal calendar two days before the close of the legislative session. *Id.* (The close of the legislative session was May 13, 2005. *Id.*)

On the next to the last day of the session, the Nodler Senate Substitute was brought to the floor and then withdrawn by Senator Nodler with Senate Substitute No. 2 offered in its stead. (L.F. 59). Senate Substitute No. 2 was titled, "An Act To repeal sections 311.310, 565.024, 566.083, 568.050, 577.001, and 577.023, RSMo, and to enact in lieu thereof thirteen new sections relating to crime, with penalty provisions and an emergency clause for a certain section." (L.F. 66). With this amendment introduced on the next to the last day of the session, House Bill 972 was amended to add provisions related to the adult entertainment industry through the inclusion of new Sections 67.2540, 67.2546 and 67.2552. (L.F. 66-69). The other provisions included in the bill as then amended were: (1) an amendment to Section 311.310 similar (but not identical) to the amendment to this section proposed in the Senate Committee Substitute; (2) new provisions related to the supervision of prior sex offenders to be contained in new statutory sections 217.735 and 559.106; (3) an amendment to Section 564.024 that was similar to the amendment to that section in the Senate Committee Substitute; (4) an amendment

to Section 566.083, relating to the crime of sexual misconduct involving a child; (5) an amendment to Section 568.050 which was identical to the amendment to that same section contained in the Senate Committee Substitute; (6) a new provision establishing the crime of tampering with electronic monitoring equipment; (7) a new provision establishing the crime of violating a condition of lifetime supervision; (8) an amendment to the definition of "court" in Section 577.001, which is the same as the amendment to that section found in House Bill 972 as originally introduced but subsequently removed in later amendments; and (9) the amendment to Section 577.023 that had been included in all prior versions of House Bill 972. (L.F. 66-77).

During discussion of Senate Substitute No. 2 on the Senate floor, Senator Graham raised a point of order that Senate Substitute No. 2 was out of order as it went beyond the scope of the original bill. (L.F. 60). The point of order was referred to the President Pro Tem of the Senate who ruled it not well-taken. (*Id.*) The Senate passed Senate Substitute No. 2 on May 12, 2005, the next to last day of the session, and sent it back to the House. (L.F. 65). This expanded version of the bill was truly agreed to and finally passed on the session's final day, May 13, 2005. (L.F. 160).

ARGUMENT

I.

(Responds to Appellant's Point I)

Article III, Section 21 of the Missouri Constitution provides, in pertinent part, "No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose." MO. CONST. Art. III, §21. This Court summarized this constitutional provision as follows:

> [T]he constitutional limitations [of Article I, Sections 21 and 23] function in the legislative process to facilitate orderly procedure, avoid surprise, and prevent "logrolling,"in which several matters that would not individually constitute a majority vote are rounded up into a single bill to ensure passage. Sections 21 and 23 also serve to keep individual members of the legislature and the public fairly apprised of the subject matter of pending laws and to insulate the governor from "take-it-or-leave-it" choices when contemplating the use of the veto power.

Stroh Brewery Co. v. State, 954 S.W.2d 323, 325-26 (Mo. banc 1997). The original purpose of the bill is measured at the time of the bill's introduction. *Id.* at 326.

> At this time, a bill's sponsor is faced with a double-edged strategic choice. A title that is broadly worded as to purpose will accommodate many amendments that may garner sufficient support

> for the bill's passage. Alternatively, a title that is more limited as to purpose may protect the bill from undesired amendments, but may lessen the ability of the bill to garner sufficient support for passage.

Id. Compliance with the requirement is mandatory without consideration of any factor beyond whether the legislature has faithfully followed the mandate of the Constitution. *Id.*

Original purpose refers to the general purpose of the bill and not to the mere details by which that purpose is to be carried out in the bill. *McEuen v. Missouri State Board of Education*, 120 S.W.2d 207, 210 (Mo. banc 2003); *Missouri State Medical Association v. Missouri Department of Health*, 39 S.W.3d 837, 840 (Mo. banc 2001). The provision prohibits the introduction of matters during the legislative process that are not germane to the legislation's initial object, i.e., its original subject. *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 327 (Mo. banc 2000). "'Germane' is defined as: 'in close relationship, appropriate, relative, pertinent. Relevant to or closely allied.'" *Id.*

The long and laborious history of House Bill 972 ("HB 972") "clearly and undoubtedly" demonstrates that HB 972 underwent a dramatic, drastic metamorphosis in its journey through the legislative process, none more dramatic or drastic than in the waning hours of the session when it became a magnet for other provisions that were not germane to its original purpose of dealing with intoxication-related traffic offenses. As an initial matter, it should be remembered that compliance with Article III, Section 21, is determined by reference to the

original purpose of the bill at the time it was introduced. *Stroh Brewery Co.*, 954 S.W.2d at 26 (Mo. banc 1997). While the title of the bill as introduced is not dispositive and the title can be changed as the bill makes its way through the legislative process, the title of the bill as introduced defines the original purpose.

The State places extensive reliance on *Stroh Brewery Company*. However, *Stroh Brewery Company* has no application to the current matter, as shown by the facts of that case. The initial title of the bill at is issue in *Stroh Brewery Company* stated it was an act to amend chapter 311 and included a provision related to "the auction of vintage wine." *Id.* at 324. After amendment, the title was changed to "relating to intoxicating beverages" and additional provisions on intoxicating liquors added. *Id.* at 325. Since the General Assembly continued to deal with intoxicating liquors within chapter 311 in the bill as amended, it was only logical the bill would be held valid under a change of purpose challenge. As the Court noted:

> By including the words, 'an act to amend Chapter 311, RSMo,' without any further language of specific limitation, such as 'for the sole purpose,' S.B. 933 gave fair notice to all concerned that the amendment of Missouri's liquor control law, Chapter 311, was the purpose of S.B. 933.

Id. at 326. Based upon this notice that the liquor control law was being amended and that all provisions contained in the bill as finally passed were in Chapter 311, this Court upheld the validity of Senate Bill 933.

The fundamental distinction between *Stroh Brewery Company* and the instant case is that the purpose in *Stroh Brewery Company* encompassed the entire range of subjects covered by Chapter 311. In contrast, the title and purpose of HB 972 as introduced contained no such far-ranging language. The title stated: "An Act to repeal sections 577.001, 577.023, RSMo, and section 302.309 . . . , and to enact in lieu thereof four new sections related to intoxication-related traffic offenses, with penalty provisions."[2] The contents of the bill, particularly as evidenced by the actual changes being implemented to existing statutes, exhibited a limited general purpose, i.e., issues related to driving while intoxicated. Specifically, the original bill was not concerned with the definition of criminal activity or the setting of criminal penalties. The first eight of the twelve pages of the bill relate to the administrative/civil procedures for suspension or revocation of driver's licenses and the ability to obtain hardship driving privileges following a suspension or revocation. (L.F. 30-41). Clearly, the original general purpose of the bill was limited in scope to a concern with the problem of driving while intoxicated and not some broader, even amorphous concept, of crime.

When the Court declared a bill invalid in *Allied Mutual Ins. Co. v. Bell*, 353 Mo. 891, 896, 185 S.W.2d 4, 6 (Mo. 1945), under Article III, Section 21, it looked

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[2] At no time was Chapter 67 ever referenced in any of the multiple amendments to HB 972 until the very last one, unlike the reference to Chapter 311 in the original bill in *Stroh Brewery Company*.

to the effect of the original bill in determining its general purpose. In terms of HB 972, its original purpose is readily discernible through its selective combination of particular provisions, some relating to procedures for suspending or revoking a drivers license for driving while intoxicated and provisions in the criminal code related to drinking and driving. These provisions are linked only by their relationship to driving while intoxicated and not to any broader purpose to define criminal behavior. In other words, the tie that binds the multiple provisions of HB 972 as originally introduced is driving while intoxicated, not a common purpose to define criminal behavior and its punishments in a very general sense. *Contrast Lincoln Credit Co. v. Peach*, 636 S.W.2d 31 (Mo. banc 1982)(disparate sections under original bill concerning lawful interest rates, causes of action for excessively extracted interest, negotiability of notes, availability of usury as a defense, all evidenced a common bond of credit transactions).

The State also relies on *C.C. Dillon Company v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000) to support its argument that the original purpose of House Bill 972 was not changed. However, this Court's decision in *C.C. Dillon* belies that argument. In *C.C. Dillon* the title of the bill was "relating to transportation." *Id.* at 326. In reviewing the connection between billboard regulation and transportation, the Court determined that there was a long-standing history of congressional action dealing with federal highway aid and billboards. *Id.* at 327-328. Moreover, this Court found that since the public policy had delegated regulation of billboards to the Missouri Department of Highway and

Transportation and to the Highway and Transportation Commission, billboards clearly fell within the ambit of "transportation." *Id.* The inclusion of billboards in a transportation bill did not change the original purpose of the bill.

Accordingly, the *C.C. Dillon* case does not support Respondents' position. In the current case, the regulation of adult entertainment business cannot be normally viewed as being under the ambit of intoxication related driving offenses as was the original purpose of House Bill 972. Moreover, there is no history to demonstrate or show that adult entertainment businesses would rationally or normally be related to alcohol related traffic offenses. The Legislature does not appear to have made any attempt to link the regulation of adult entertainment businesses with alcohol related traffic offenses, as the final title to HB 972 did not retain any reference to alcohol related traffic offenses as found in the multiple versions of the bill preceding the final amendment.

The State's reference to *Missouri State Medical Association v. Missouri Department of Health*, 39 S.W.3d 837 (Mo. banc 2001), also offers no sustenance to its argument. In *Missouri State Medical Association*, this Court looked at the original purpose of House Bill 191 and determined that the original purpose was to "mandate health services for serious illnesses, including cancer." *Id.* at 840. The Court determined that, by mandating patients undergoing surgery for breast implants be informed of the health risks associated with those implants, the Legislature remained true to the original purpose of the legislation. *Id.* In making that determination, the Court noted the "content of [the introduced bill] remained

substantially intact throughout the legislative process as germane amendments were added." *Id.*

That is not the situation here as evidenced by the legislative history of HB 972 discussed above. In the current matter, there is no natural connection between the regulation of adult entertainment businesses and alcohol related traffic offenses or any other type of alcohol related driving program.

This case represents the classic logrolling situation – the days of the legislative session were winding down, Senate Bill 32 ("SB 32") was not advancing in the House, and was stuck in the House Rules Committee where it had been referred on May 9, 2005.[3] The only way to move SB 32 or some parts of it forward was to logroll it into another piece of legislation which, because of its other contents, was sure to gain approval in both houses as the session wound down. HB 972 became the magnet for the provisions of SB 32 not moving forward in the House Rules Committee even though SB 32 had no relation whatsoever to driving while intoxicated. What could be more surprising than having a bill which is stuck in committee in one house in the waning days of the session being tacked onto a totally unrelated bill in the other house on the next to last day of the session ? This is the very definition of the logrolling practice which

[3]SB 32 was titled "relating to sexually oriented businesses." (L.F. 78) It contained a number of provisions which were logrolled into HB 972.

Article III, Section 21 was intended to prevent – a bill going nowhere being rounded up and added to another one assured of passage.

The essential factor in deciding whether HB 972 violates Article III, Section 21 is whether the adult entertainment provisions (or the other provisions) added to HB 972 after its initial introduction are germane to the original general purpose of the bill. No one can seriously contend that the provisions on adult entertainment found in Senate Substitute No. 2 satisfy any of the terms in the above definition of germane when compared to the original general purpose of HB 972 to deal with matters of driving while intoxicated.

The trial court's decision invalidating House Bill 972, and Sections 67.2540, 67.2546 and 67.2552, was correct and should be affirmed by this Court.

II.

(**Responds to Appellant's Point II)**

Article III, Section 23 of the Missouri Constitution provides, "No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subject and accounts for which moneys are appropriated." HB 972 involved neither an appropriation nor a matter enacted pursuant to Article III, Section 37. It is subject to the general proviso that "No bill shall contain more than one subject which shall be clearly expressed in its title[.]"

As noted in the discussion of Article III, Section 21, Article III, Section 23 exists to serve the following purpose:

> [T]he constitutional limitations [of Article I, Sections 21 and 23] function in the legislative process to facilitate orderly procedure, avoid surprise, and prevent "logrolling,"in which several matters that would not individually constitute a majority vote are rounded up into a single bill to ensure passage. Sections 21 and 23 also serve to keep individual members of the legislature and the public fairly apprised of the subject matter of pending laws and to insulate the governor from "take-it-or-leave-it" choices when contemplating the use of the veto power.

Stroh Brewery Co. v. State, 954 S.W.2d 323, 325-26 (Mo. banc 1997).

The starting point for clear title analysis under Article III, Section 23 is the title of the bill as finally enacted. The final version of HB 972 as finally enacted is "An Act To repeal sections 311.310, 565.024, 566.083, 568.050, 577.001, and 577.023, RSMo, and to enact in lieu thereof thirteen new sections relating to crime, with penalty provisions and an emergency clause for a certain section." (L.F. 66).

The "clear title" requirement of Article III, Section 23, can be violated in one of two ways: "that it is so restrictive and underinclusive that some of the provisions of the bill fall outside its scope," or it "may be unclear because the subject it expresses is so broad and amorphous in scope that it fails to give notice of its content, which 'effectively renders the single subject requirement meaningless or obscures the actual subject of the legislation.'" *Home Builders Association v. State*, 75 S.W.3d 267, 270 (Mo. banc 2002).[4] In *Home Builders*, the Missouri Supreme Court struck down a bill for a clear title violation because the title "relating to property ownership" was too broad and amorphous. *Id.* at 270-71. The bill violated the clear title requirement because the title was so broad that it could describe in a very general sense most, if not all, the legislation being passed and was susceptible to creative arguments that could connect all the parts of the

[4] The former being called "under-inclusive" and the latter being called "overbroad." *Id.*

bill to the title in some way, regardless of how disparate the parts might be. *Id.* at 270-71, 272.

In *St. Louis Health Care Network v. State*, 968 S.W.2d 145, 147 (Mo. banc 1998), the Court struck down a bill for a clear title violation because its title, "relating to certain incorporated and non-incorporated entities" was too broad and amorphous. The clear title requirement, the Court noted, prohibited titles that were so general as to tend to obscure the contents of the bill or so broad as to render the single subject requirement meaningless. *Id.* In essence, the term "incorporated and non-incorporated entities" was reduced to any entity and "therefore, could refer to anything; it is difficult to imagine a broader phrase that could be employed in the title of legislation." *Id.* Attempts by the State to limit the broad language of the title to the term "entity" as defined in the Missouri Nonprofit Corporation Act or according to the sections repealed by the bill were unavailing as they were, in themselves, too broad and amorphous, encompassing as they did such a wide range of entities. *Id.* at 148-49.

The title being challenged in *Carmack v. Director, Missouri Department of Agriculture*, 945 S.W.2d 956 (Mo. banc 1997), also was overbroad as pointed out in *Home Builders*. 75 S.W.3d at 270-71. The title under consideration there was "relating to economic development." The State defined the term "economic development" broadly to mean "any activity that 'promotes and protects an important sector of the Missouri economy.'" *Carmack*, 945 S.W.2d at 960. As the court concluded, "[u]nder the state's proposed definition, economic development

includes any activity that indirectly promotes or protects portions of the Missouri economy, nearly every activity the state takes falls within the meaning of economic development." *Id.* This title was amorphous and so broad as to render its subject uncertain and to require the court to look beyond the title to other sources to determine if the single subject requirement of Article III, Section 23, had been violated. *Id.* at 960-61.

The title to HB 972 suffers from the same deficiencies found to exist in the *Home Builders, St. Louis Health Care* and *Carmack* cases.[5] The title of HB 972 is simply "relating to crime." The term "crime" is defined as:

> 1. An act committed or omitted in violation of a law forbidding or commanding it, and for which punishment is imposed upon conviction. 2. Unlawful activity in general. 3. Any serious wrongdoing or offense. 4. An unjust or senseless act or condition.

The American Heritage Dictionary of the English Language (New College Edition 1976) at 312. *See, e.g., Home Builders*, 75 S.W.3d at 271, and *St. Louis Health Care Network*, 968 S.W.2d at 147 regarding the consideration of the dictionary

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[5] Appellant ignores all three of these cases in its Brief and only uses a few broad statements to support its second point. *Home Builders, St. Louis Health Care* and *Carmack* are the pre-eminent clear title cases of this Court and are controlling.

definition of the term or terms used in the title of the bill in resolving clear title challenges.

No matter which of these definitions is used, they all are so amorphous and broad as to render the subject of HB 972 uncertain. As with the use of the term "property ownership" in *Home Builders*, "incorporated and non-incorporated entities" in *St. Louis Health Care Network*, and "economic development" in *Carmack*, the term "crime" is so broad that almost any piece of legislation passed by the General Assembly could be argued to have some direct or indirect connection with such a subject. There is no limit to the subject matter which could be log-rolled into such a piece of legislation or an argument that the subject matter addressed might somehow effect the incidence of crime in the community.

The trial court correctly divined that the title "relating to crime" was so broad as to give no notice of what its contents might include and that such a broad, amorphous term could only serve as a vehicle for the log-rolling evils proscribed by Article III, Section 21 of the Missouri Constitution. The Judgment should be affirmed.

III.

(Responds to Appellant's Point III)

HB 972 also violates the single subject requirement of Article III, Section 23, of the Missouri Constitution. As set out in *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994):

> [T]he words "one subject" must be broadly read, but not so broadly that the phrase becomes meaningless. To that end, this Court's test for determining whether a bill violates the single subject requirement of article III, section 23, has remained virtually the same since 1869. So long as "the matter is germane, connected and congruous," the law does not violate the single subject rule. From these consistent precedents we conclude that a "subject" within the meaning of article III, section 23, includes all matters that fall within or are reasonably relate to the general core purpose of the legislation.

(citations omitted) When an amorphous title is too broad to inform the public of its contents, the Court must look beyond the title to determine the core substance of the bill for purposes of determining whether it involves multiple subjects or a single subject. *Carmack*, 945 S.W.2d at 959. *See, also, Hammerschmidt*, 877 S.W.2d at 102, n..3. There are two sources the Court can look to in determining the subject of the bill. "First, the constitution itself is organized around subjects to which we can refer in determining the meaning of the single subject requirement.

Second, the Court may examine the contents of the bill originally filed to determine its subject." *Carmack*, 945 S.W.2d at 960 (emphasis added).

The Missouri Constitution does not include a section entitled "crime." MO. CONST. Arts. I - XIII. It is, therefore, necessary to look to the original purpose of the bill. As noted in the discussion of the original purpose challenge (see Point I, *supra*), the original bill was titled "relating to intoxication-related driving offenses." It contained an amendment to the existing statute on the revocation or suspension of driving licenses, added definitions on intoxication-related driving offenses to two other statutes and established the crime of aggravated vehicular manslaughter as it pertained to driving while intoxicated. As enacted, HB 972 repealed, amended or enacted provisions that fell within nine different chapters of the Revised Missouri Statutes:

- Chapter 67 - Political Subdivisions, Miscellaneous Powers
- Chapter 217 - Department of Corrections
- Chapter 311 - Liquor Control Law
- Chapter 559 - Probation
- Chapter 565 - Offenses Against the Person
- Chapter 566 - Sexual Offenses
- Chapter 568 - Offenses Against the Family
- Chapter 575 - Offenses Against the Administration of Justice
- Chapter 577 – Public Safety Offenses

(L.F. 66-77). The provisions of HB 972 encompassed provisions relating to the regulation of adult entertainment establishments, supervision of prior sex offenders, intoxication-related driving offenses, provision of alcohol to minors, the offenses of sexual misconduct involving a child and endangering the welfare of a child, and offenses of tampering with electronic monitoring equipment or violating a condition of lifetime supervision. (L.F. 66-77).

As to HB 972's original purpose, it is impossible to discern how the regulation of the adult entertainment industry might relate to or have a natural connection with intoxication-related driving offenses. *See, e.g., SSM Cardinal Glennon Children's Hospital v. State*, 68 S.W.3d 412, 417 (Mo. banc 2002)(test for single subject challenge is whether the individual provisions of the bill fairly relate to the subject of the bill, have a natural connection with the subject, or are a means to accomplish the law's purpose). There simply is no connection between adult entertainment establishments, whether they are establishments offering live entertainment or are retail outlets selling sexually-oriented material, and driving while intoxicated. *Hammerschmidt, Carmack* and *SSM Cardinal Glennon* all support the invalidation of HB 972 for its violation of the single subject requirement.

The State summarily concludes that "the bill [in this case] is in no significant respects different from the bills upheld, as against multiple subject challenges, in the *Missouri State Medical Association, Stroh Brewery, Westin, Fust* and *C.C. Dillon* cases," Brief of Appellant at 32, with no further discussion of

those cases or elucidation of their controlling aspect. The essence of its argument appears to be that since some cases have upheld legislation as against a multiple subject challenge this Court should blindly uphold HB 972, as well.

When the actual substance of the State's cases are reviewed, and not just the results, it becomes clear the cases do not support the State's position. In *Missouri State Medical Association*, the bill survived the multiple subject challenge because the different matters addressed - health insurance, medical records and mandated health information - were "(at least) incidents or means to health services." 39 S.W.3d at 841. The State makes no argument here, nor could it, that the disparate subjects covered by HB 972 are incidents or means to accomplish the purposes of "crime." *Stroh Brewery Company* is similarly unavailing to the State. In direct contrast to HB 972, which involves multiple chapters of the Revised Statutes, the bill in *Stroh Brewery Company* was upheld because the bill's title was "relating to intoxicating beverages" and all provisions of the bill either repealed or enacted new statutory sections within Chapter 311 of the Revised Statutes relating to liquor control. *Westin Crown Plaza Hotel* involved only one subject because the title was "relating to certain fees related to the division of health" and all the substantive changes to existing statutes entailed only changes to the fee structures in those statutes. *Westin Crown Plaza Hotel v. May*, 664 S.W.2d 2, 6 (Mo. banc 1984). In *Fust*, while the bill contained provisions pertaining to liability insurance, pre-judgment interest, trial procedures involving the award of punitive damages and the creation of the tort victims'

compensation fund, the title of the bill was "assuring just compensation for certain person's damages." There was no single subject violation in *Fust* because all the provisions directly promoted compensation for certain tort victims. *Fust v. Attorney General*, 947 S.W.2d 424, 428 (Mo. Banc 1997). Finally, in *C.C. Dillon Co.*, there was no violation of the single subject limitation because the title of the bill was "relating to transportation" and the regulation of billboards (the challenged provisions) had a well-recognized and long-standing historic and regulatory connection to highway transportation. 12 S.W.3d at 329. The constant in all these cases was a distinct unity between the parts that looked to the achievement of a singular, readily discernible purpose. No such unifying connection exists here.

The decision in this case would be the same even if the issue was viewed solely from the words contained in the title of HB 972 as enacted, i.e., "relating to crime." As *Hammerschmidt* made clear, one must look to the *raison d'etre* of the individual parts to see how they fit in with the whole and its core purpose. 877 S.W.2d at 103. In *Hammerschmidt*, the bill was titled "relating to elections," while the provisions being challenged related to the creation of a new form of county charter government. *Id.* The county charter government provisions did include sections which required approval of the proposition through an election. *Id.* This provision for election, however, was not sufficient to save the bill from the single subject challenge. *Id.* The reason for being of the challenged provisions is what was dispositive and "[t]he election provisions contained in the amendment

served no purpose beyond furthering the adoption of this new form of government." *Id.*

The *raison d'etre* for the provisions regulating the adult entertainment industry in HB 972 was just that – to impose regulations on the lawful activities of adult entertainment establishments by saying who could work in those establishments, who could be patrons of those establishments, what kind of live adult entertainment they could offer, what kind of sexually-oriented material they could offer for sale, and how these establishments were to be physically configured. That the regulation of adult entertainment establishments is the *raison d'etre* of the amendment to HB 972, and not "crime," is shown by the legislature's decision to place the provisions relating to adult entertainment establishments in Chapter 67 (the Miscellaneous Local Government chapter) and not in the chapters of the state's criminal code. As in *Hammerschmidt*, the inclusion of the incidental penalty provisions in the sections dealing with the regulation of adult entertainment establishments do not save HB 972 from a single subject challenge.

This Court's most recent pronouncement on the multiple subject clause likewise supports the trial court's judgment. *See Rizzo v. State of Missouri*, Slip op., Case No. SC87550 (April 25, 2006). In *Rizzo*, the Court struck a provision which barred persons convicted of a federal felony or misdemeanor from qualifying as a candidate for office because the provision was joined in a bill titled "relating to political subdivisions." *Id.* The provision in question, the Court noted, did not fairly relate to political subdivisions because it had application to

candidates for statewide offices in addition to candidates for office with political subdivisions. *Id.* In reaching this result, the Court looked to the *raison d'etre* of the section being challenged as outside the subject matter of the bill and determined that its purpose was to create a restriction on persons running for public office. *Id.* The Court concluded, "While the provision may incidentally relate to political subdivisions, its scope is far more expansive." *Id.* The same problem of overbreadth exists here, particularly as it relates to the provisions establishing a system of regulation for adult entertainment establishments. The *raison d'etre* for the provisions Respondents challenge here is to regulate adult entertainment establishments, not to define criminal behavior. To paraphrase this Court's language in *Rizzo*, while the provisions may incidentally relate to "crime" by providing for penalties for violations of some of the conduct regulated, the scope of the provisions is far more expansive.

The legislature chose to ignore the prohibitions set out in Article III, Section 21, relating to the orderly procedure it is to follow in enacting legislation. The trial court correctly held the legislature to the standards imposed on it by the people in their Constitution. This Court should affirm the trial court's decision invalidating Sections 67.2540, 67.2546 and 67.2552 and severing them from House Bill 972.

IV.

(Responds to Appellant's Point IV)

The State argues under its fourth point that the age restrictions in HB 972 violate neither the Free Speech nor Equal Protection clauses of the United States or Missouri Constitutions because the limitations are a "content neutral regulation aimed at ameliorating the adverse secondary effects of" adult entertainment businesses. Brief of Appellant at 33. However, as the circumstances of this case show, and as the trial court correctly determined (L.F. 285), whatever interest the State might have in alleviating the purported secondary effects of adult entertainment businesses, there is no connection between the age limitations imposed under HB 972 and the secondary effects it was purportedly designed to address.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech," U.S. CONST. Amend. I, while its counterpart in the Missouri Constitution provides, "That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject[.]" Mo. CONST. Art. I, Sec. 8. The Equal Protection clauses of those same two documents also provide that the State will not deny anyone the equal protection of the laws. U.S. CONST. Amend. XIV; Mo. CONST. Art. I, Sec. 2. HB 972 impacted the rights of expression and equal protection of the parties bringing this action in a number of

respects, including imposing a ban on persons under the age of twenty-one from adult entertainment establishments. It was this age ban which the trial court found violative of the Free Speech and Equal Protection clauses and which is the subject of this appeal.[6]

A.

As an initial matter, there is no dispute that the nude and semi-nude dancing performed by Alyea, Williams and Goff is non-obscene. (L.F. 162) Nor is there any dispute that this dancing is expressive: all three perform their nude dancing as a form of expression, believing that their performances are a form of art and a form of entertainment; that the performances allow them to express themselves; that those performances lead to their own self-improvement; and that the performances are also a beneficial social activity creating enjoyment for those persons watching the performances. (L.F. 100-101, 141, 142-44, 148, 150-51) Similarly, there is no dispute that the adult-oriented material sold at Passions Video, Inc. and similar adult-oriented retail establishments is non-obscene and non-pornogragraphic material. (L.F. 162) With respect to this material, the State

[6]There were a number of free speech and equal protection challenges to HB 972 made by the Respondents. Based on his determination that the age restrictions were invalid and that these restrictions were not severable from the other constitutional challenges, the trial court determined it unnecessary to address the remaining constitutional challenges.

concedes for purposes of this litigation that this material is protected by the Free Speech clauses of the U.S. and Missouri Constitutions. (L.F. 162)

The United States Supreme Court has also recognized that the Free Speech clause protects this activity when exercised by or involving persons eighteen years of age or older. As it said in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S.Ct. 464, 469 (1994), "non-obscene sexually explicit materials involving persons over the age of seventeen are protected by the First Amendment." Further, the Court has held that the First Amendment assures the right of adults eighteen and older to determine for themselves what constitutionally protected, sexually explicit materials they may read or see. *Ginsburg v. New York*, 390 U.S. 629, 636-37, 88 S.Ct. 1274, 1278-79 (1968). The protection afforded sexually explicit materials involving persons aged eighteen and over applies whether they are customers, performers or serving in any other capacity relative to this material. *See, e.g., Alexander v. United States*, 509 U.S. 544, 549-50, 113 S.Ct. 2766, 2771 (1993); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836-37 (1989); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 224, 110 S.Ct. 596, 604 (1990); *Smith v. California*, 361 U.S. 147, 152, 80 S.Ct. 215, 218 (1959); *X-Citement Video, Inc.*, 513 U.S. at 72, 115 S.Ct. at 469. Finally, it is also well-established that erotic dancing of the type performed by the individual entertainers who are parties to this action is expressive conduct enjoying constitutional protection. *See, e.g., Schultz v. City of Cumberland*, 228 F.3d 831, 839 (7th Cir. 2000). As was said in *Kraimer v. City of Schofield*, 342 F. Supp.2d 807, 814

(W.D. Wis. 2004), "For constitutional purposes, the term 'speech' encompasses much but not all nonverbal communication and expressive conduct. For example, it does not extend to public nudity in and of itself, but it does apply to non-obscene nude dancing, which is considered expressive conduct that conveys an erotic message." *See, also, Red Eyed Jack, Inc. v. City of Daytona Beach*, 322 F. Supp.2d 1361, 1366 (M.D. Fla. 2004). In short, persons who are eighteen or older may express themselves through the form of erotic dance; persons who are eighteen or older may choose whether to be patrons of adult entertainment establishments to observe erotic dance and/or to purchase adult-oriented material; and businesses and their employees who are not entertainers but who are eighteen or older may engage in the dissemination of such constitutionally protected material.

It is the existence of protected speech which distinguishes this case from the cases which the State cites to the Court. The State would have the Court believe that the age limitations set by HB 972 are no different from what occurs when the State sets a minimum age for drinking. What sets the age limits of HB 972 apart from the cases cited by the State is the express recognition that the conduct involved here is protected speech and the further express recognition that it is protected speech for those who are eighteen years of age or older.

B.

The limits to which the State can regulate this expressive conduct and material depends in the first instance on whether its regulation is to be

characterized as a restraint on speech because of its content or whether it is a content-neutral time, place and manner restraint. *Schultz*, 228 F.3d at 840-41. "Content-based regulations 'by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed.'" *Id.* at 840. The essence of content-based regulation is that certain viewpoints or subject matter are singled out for differential treatment. *Id.* Content-neutral time, place and manner restraints "do not refer to expressive content and do not single out a particular viewpoint or category of speech for different treatment." *Id.* This type of regulation is designed to address a significant governmental interest that is unrelated directly to content. *Id.* at 840-41. These types of restrictions "control the surrounding circumstances of speech without obstructing discussions of particular viewpoint or subject matter." *Id.* at 841. The characterization of speech as content-based or content-neutral is important because the former is reviewed under a strict scrutiny standard, *Id.* at 840, while the latter is reviewed under an intermediate scrutiny test. *Id.* at 841-42.

For this appeal, what is at issue is whether the State can bar expressive dancing by persons between the ages of eighteen and twenty-one; whether it can bar other persons between these ages from enjoying gainful employment at adult entertainment establishments; and whether it can bar persons between the ages of eighteen and twenty-one from patronizing these establishments and partaking of the constitutionally-protected speech offered there. Regardless of the spin The State wants to put on this part of the challenged legislation, its effect is singular: it

deprives persons between the ages of eighteen and twenty-one from engaging in or enjoying expressive material. Importantly for free speech analysis, it does so based solely on the content of the expression in which these persons seek to engage or enjoy. The restrictions distinguish between favored and disfavored speech for persons between the age of eighteen and twenty-one due to the content of the speech being exercised – adult-oriented speech (and only adult-oriented speech) is disfavored and, therefore, prohibited. As such, the age restrictions enacted in HB 972 are content-based and require a strict scrutiny analysis. *Id*. at 840. In reviewing an age restriction identical to the one here, the Georgia Supreme Court agreed that the age restrictions were content-based: "It is clear that OCGA §16-12-103(b)(2) regulates speech in that it denies the speaker an unlimited audience and it denies those between the ages of 18 and 21 the right to determine whether they will view the expressive activity taking place within Café Erotica." *State v. Café Erotica*, 500 S.E.2d 574, 576 (Ga. 1998).[7]

[7]In the only other case dealing with the same eighteen to twenty-one age restriction at issue here, the court determined it did not need to determine whether the age restrictions were content-based or content neutral since the restrictions failed to pass even the intermediate level of scrutiny applied to content neutral restrictions on speech. *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1283 (10th Cir. 2002). Respondents were able to find only one case which upheld an age restriction, although the issue there was one of overbreadth, the discussion

The State seeks to have the age restrictions of HB 972 treated as content neutral on the basis of its assertion that the provision addresses the secondary effects of adult entertainment establishments. Merely repeating the mantra of "secondary effects" does not save the subject restrictions from being classified for what they truly are – content-based restrictions. There must be substance to the claim of "secondary effects" as it pertains to the provision under consideration. *See, e.g., Schultz*, 228 F.3d at 842 (restrictions on sexually explicit movements in nude dancing is content-based restriction because the ban is referenced with respect to certain expressive content, notwithstanding city's assertion it was addressing secondary effects of nude dancing). As stated in *Centerfolds, Inc. v. Town of Berlin*, 352 F.Supp.2d 183, 193 (D. Conn. 2004), "the government cannot hide behind a secondary-effects rationale, which does not by itself 'bestow upon the government free license to suppress specific content of a specific message. . . . Otherwise, a regulation that had been formatted to prohibit a singled-out message would draw intermediate time, place and manner analysis based on a pretextual secondary effects rational (sic)." (Citation omitted)

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summary and it was questionable whether the age restriction was actually being challenged. Most importantly, however, the minimum age for participating in expressive conduct being reviewed in that case was eighteen years of age. *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 414 (6th Cir. 1997).

The fallacy of the State's "secondary effects" reliance is seen in a consideration of both the stated purpose behind the enactment of HB 972 and the argument in its brief. The purpose behind the bill was stated to be "to mitigate the adverse secondary effects of sexually oriented businesses, to limit harm to minors, and to reduce prostitution, crime, juvenile delinquency, deterioration in property values and lethargy in neighborhood improvement efforts." HB 972, §67.2552.5. The purported secondary effects identified by the State in its brief also point to conditions purportedly related to the operation of adult entertainment establishments – deterioration of property values, higher incidence of certain crimes, negative influences on those attending nearby churches or schools, and potential unsanitary or unhealthy conditions that might arise from the existence of closed viewing booths. Brief of Appellant at 33-35. None of these proffered justifications for enacting HB 972 address or purport to stand as the reason for the age restrictions at issue here. As the trial court correctly determined, and as has been established by the United States Supreme Court, persons between the ages of eighteen and twenty-one are not minors, nor do any concerns with juvenile delinquency apply to them. The remaining justifications relate to physical conditions purportedly associated with adult entertainment establishments. The subject age limitations, in contrast, address solely who may be on such premises in one status or another. That restriction has nothing to do with physical conditions and does not come within the "secondary effects" justification put forth in HB 972 or the State's brief.

What was said in *Schultz* with respect to singling out erotic dance moves for prohibition is equally applicable to the age restrictions here. The restrictions apply to certain persons characterized by their presentation or receipt of adult-oriented speech, i.e., the permissible limits of what persons between the age of eighteen and twenty-one may do and not do is determined by the content of the speech in which they wish to engage. As a result, the limits sought to be imposed are content-based. *Schultz*, 228 F.3d at 843.

C.

Regardless of whether the restrictions at issue here are considered content-based or content neutral, the restrictions fail to satisfy either the strict scrutiny or intermediate scrutiny test. *See, e.g., State v. Café Erotica*, 500 S.E.2d 574 (Ga. 1998)(age limits invalid under strict scrutiny test); *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272 (10th Cir. 2002)(age limits invalid under intermediate scrutiny test). The State fails to address its regulation from a strict scrutiny standard. It proceeds from the premise that the age restrictions are content neutral and, therefore, subject to the intermediate scrutiny test. Brief of Appellant at 33-40. They make no effort to address the strict scrutiny standard, notwithstanding that the trial court based its decision in part on *Café Erotica*, a strict scrutiny case. A content-based regulation of speech is presumptively invalid. *Doctor John's, Inc. v. City of Sioux City*, 305 F. Supp.2d 1022, 1037 (N.D. Iowa 2004). In analyzing a content-based regulation under strict scrutiny analysis, the provision will only be upheld if it is necessary to serve a compelling state interest and it is narrowly

tailored to achieve that end. *Schultz*, 228 F.3d at 848; *Café Erotica*, 500 S.E.2d at 576; *Doctor John's, Inc.*, 305 F. Supp. at 1037. The burden of establishing these two conditions is on the State, not the party challenging the restrictions on speech. *Café Erotica*, 500 S.E.2d at 576.

In its argument both at the trial court and here, the State only offers "secondary effects" as its justification for its age limitations but makes no attempt to establish (much less argue) how barring eighteen to twenty-one year olds from engaging in these types of protected speech activities furthers its attempt to address its "secondary effects" or how its regulation is narrowly tailored to achieve its stated end. In the absence of any such showing, the age restriction in HB 972 fails to pass constitutional muster under the strict scrutiny test. *Schultz*, 228 F.3d at 848; *Café Erotica*, 500 S.E.2d at 576. Further, as shown below in the discussion of intermediate scrutiny, there is no connection between restricting adults between the ages of eighteen and twenty-one from engaging in expressive conduct and the purported secondary effects from adult entertainment establishments that the State has identified. Absent such a connection, these restrictions fail to satisfy the strict scrutiny test. *Centerfolds, Inc.*, 352 F.Supp.2d at 193-94.

The age restrictions likewise fail to satisfy the intermediate scrutiny test. It should be noted that the State argues that the age limit restrictions should be

judged from what is known as the *Renton* standard[8], rather than the *O'Brien* standard.[9] However, it is the *O'Brien* standard which applies to the age restrictions under consideration here. *See, e.g., Essence, Inc.*, 285 F.3d at 1283 (four factor *O'Brien* standard applied in review of age restriction imposed on adult entertainment establishments). The *Renton* standard is applied in the context of zoning limitations on adult entertainment establishments,[10] while the *O'Brien* standard applies to other contexts where expression is affected. *See, e.g., Peek-A-Boo Lounge of Bradenton v. Manatee County*, 337 F.3d 1251, 1264 (11th Cir. 2003); *Daytona Grand, Inc. v. City of Daytona Beach*, 410 F. Supp.2d 1173, 1177 (M.D. Fla. 2006); *Giovani Carandola, Ltd. v. Fox*, 396 F. Supp.2d 630, 636-37 (M.D. N.C. 2005); *Diva's Inc. v. City of Bangor*, 21 F. Supp.2d 60, 65 (D. Maine 1998).

The *O'Brien* test requires consideration of four factors:

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[8]*City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986).

[9]*United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968), made applicable in the context of adult entertainment establishments by *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567, 111 S.Ct. 2454, 2456 (1991)(plurality opinion).

[10]Although the *Renton* standard is now applied in a somewhat modified form after *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728 (2002).

> First, this court must assess whether [the government] possesses the constitutional power to enact the ordinance. Second, the regulation must further an important or substantial government interest. Third, the government interest must be unrelated to the suppression of free expression. Fourth, the restriction must be no greater than is essential to the furtherance of the governmental interest. It is the burden of [the government] to prove satisfaction of each of these elements.

Essence, Inc., 285 F.3d at 1283-84 (citations omitted). *See, also*, *Peek-A-Boo Lounge*, 337 F.3d at 1264. In application, the *O'Brien* test and the *Renton* test "are to a certain extent, virtually indistinguishable," particularly as to whether the regulation at issue furthers an important or substantial governmental interest. *Peek-A-Boo Lounge*, 337 F.3d at 1264-65. To satisfy this nexus standard, the government must show that the evidence it relied upon in adopting its measures was reasonably believed to be relevant to the problem that it sought to address. *Id.* at 1269. Its evidence need not consist of local studies conducted by it and it may rely on evidence already generated by other governments; however, it still must show that the pre-enactment evidence it relied on fairly supports the rationale for enacting the regulation. *Id.* at 1268. In addition, the government's evidence cannot rely on shoddy data or reasoning. *Id.* at 1269. Procedurally, this is not the end of the analysis. The party challenging the restrictions is also given the opportunity to challenge the government's rationale by casting direct doubt on it, either by showing that the government's evidence does not support its rationale or

by furnishing evidence disputing the government's factual findings. *Id.* At this point, the burden shifts back to the government to produce additional evidence to support the rationale for enacting the regulations. *Id.*

The State has failed to meet its burden of establishing compliance with the *O'Brien* test. It is not enough that the State regurgitate its "secondary effects" explanation. As the Eleventh Circuit pointed out in striking a similar age restriction, "The *O'Brien* test is not satisfied, however, merely by the existence of a substantial government interest in regulating secondary effects. The [government] must also prove that its chosen weapons against those secondary effects will further its mission." *Essence, Inc.*, 285 F.3d at 1287.

Essence, Inc., which invalidated a twenty-one year old age restriction no different from the one here, clearly delineates the problem with what the State is attempting to with H.B. 972. As the court noted there, the issue was not whether a ban on nude dancing might further the city's interest in minimizing secondary effects. This was because the regulations imposed a more limited ban on those under twenty-one years of age. Trumpeting the secondary effects that might arise from nude dancing was not sufficient: "Federal Heights must establish that banning persons under twenty-one while maintaining nude dancing [for persons twenty-one or older] would combat the secondary effects associated with nude dancing," *Id.* at 1288, and "Federal Heights bears the burden at trial of proving that the age restrictions furthers its interest in preventing the secondary effects of nude dancing even though nude dancing may still occur." *Id.* at 1289. It was not

enough that Federal Heights' generalized intent in enacting its comprehensive ordinance was to combat secondary effects associated with adult entertainment establishments or that its officials could opine in a conclusory fashion that the age restriction furthered the city's interest in combating secondary effects. *Id.* There had to be some factual basis in the record which established a nexus between the regulation being imposed and the secondary effects sought to be addressed. *Id.* While a strict scrutiny case, *Café Erotica* focused in on this same point – the government could not simply rely on its stated purpose of eliminating the exhibition of harmful material to minors when it sought to regulate the access of persons between the ages of eighteen and twenty-one to such material. 500 S.E.2d at 576-77. It had to articulate and substantiate with facts the connection between the age restriction it sought to impose and the governmental interest it sought to further. *Id.*

This nexus or connection requirement is a stalwart of the Free Speech jurisprudence reviewing regulation of the adult entertainment industry. In terms of the *O'Brien* factors, courts have consistently found that the government's failure to establish a nexus between the regulation imposed and the secondary effects it sought to address rendered their legislation unconstitutional because it did not satisfy either the second or fourth prong of the *O'Brien* test. *R.V.S., L.L.C. v. City of Rockford,* 361 F.3d 402, 411-12 (7th Cir. 2004)(ban on erotic dance moves unconstitutional)(second *O'Brien* factor); *Daytona Grand, Inc. v. City of Daytona Beach*, 410 F. Supp.2d 1173, 1188(M.D. Fla. 2006)(minimum clothing

requirements beyond G-strings and pasties and locational requirements unconstitutional)(second *O'Brien* factor); *White River Amusement Pub, Inc. v. Town of Hartford*, 412 F.Supp.2d 416, (D. Ver. 2005)(minimum clothing requirements beyond G-strings and pasties unconstitutional)(second *O'Brien* factor); *Diva's, Inc. v. City of Bangor*, 21 F. Supp.2d 60, 65 (D. Maine 1998)(ordinance ban on issuance of license to owner of nude dancing establishment who also owned escort service unconstitutional)(second *O'Brien* factor); *Giovani Carandola, Ltd.*, 396 F. Supp.2d at 654 (ban on erotic dance moves unconstitutional)(fourth *O'Brien* factor); *Centerfolds, Inc.*, 352 F. Supp.2d at 194 (ban on erotic dance moves unconstitutional)(fourth *O'Brien* factor); *MDK, Inc. v. Village of Grafton*, 345 F. Supp.2d 952, 958-59 (E.D. Wis. 2004)(minimum clothing requirements beyond G-strings and pasties unconstitutional)(*Renton* narrowly tailored requirement; equivalent to fourth *O'Brien* factor). The shortcomings of the State's argument and its legislation is best realized when viewed in the language of these cases when explaining the nexus requirement: "The government interest of regulating secondary effects may only be upheld as substantial if a connection can be made between the secondary effects and the regulated speech," *R.V.S., L.L.C.*, 361 F.3d at 408; "In order to meet the narrow tailoring requirement, some evidence must be presented that is *specific* to the activity or business being regulated," *Giovani Carandola, Ltd.*, 396 F. Supp.2d at 654 (emphasis in original); "What the cases do make plain, however, is that application of an intermediate scrutiny test to government's asserted rationale for

regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue," *White River Amusement Pub, Inc.*, 412 F.Supp.2d at 425; "*O'Brien's* requirement that a content-neutral nudity ordinance further a substantial government interest has long depended on the degree to which the ordinance is supported by evidence of a causal link between erotic expression and adverse 'secondary effects,'" and "[G]one are the days when a municipality may enact an ordinance ostensibly regulating secondary effects on the basis of evidence consisting of little more than the self-serving assertions of municipality officials," *Daytona Grand, Inc.*, 410 F. Supp.2d at 1178 & 1188, respectively. The nexus requirement was best explained in *Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D. N.Y. 1997):

> [T]he constitutional limitation is the requirement that the incremental restriction on expression must result in an incremental *furthering* of the purported governmental interest. To wit, each additional piece of clothing required must result in a further reduction in pernicious side effects. Without demanding this connection at each step, each additional layer of restriction can be legally added simply on the basis that the previous restriction was valid, until the entire activity is banned: i.e., nude dancing is banned so long as the dancers wear pasties and G-strings; then t-shirts; then long pants and a sweater.

Id. at 997 (emphasis in original).

Under the plethora of cases cited above, the State has failed to meet even its initial burden of pointing to some evidence in the record which connects the age limitations H.B. 972 imposes with the secondary effects it has identified. Further, it has also failed to come forward with additional evidence to counter that of the Respondents showing that there are no secondary effects arising from adult entertainment establishments. In the two opportunities the State has been afforded to point out an evidentiary nexus – at the trial court and in its opening brief with this Court – it has failed to show any valid connection between the age limit and its identified secondary effects. Instead, it has chosen to engage in the creeping infringement warned about in *Nakatomi Investments*, not caring to establish any nexus between the age limitations it imposes and secondary effects but satisfying itself to heap additional layers of restriction on the expression of speech on the basis that it can argue a nexus between some other restrictions on adult entertainment establishments (although not necessarily even any restriction found in HB 972) and the secondary effects that piece of legislation identifies. As in *Essence, Inc.* and *Café Erotica*, the eighteen to twenty-one year old age limitations contained in H.B. 972 are invalid under the Free Speech clauses of the United States and Missouri Constitutions.

D.

The trial court also correctly determined that the age limitations of H.B. 972 violated the Equal Protection clauses of the United States and Missouri Constitutions. In reviewing the validity of legislation under the Equal Protection

clause, this Court first determines whether the legislation impacts a suspect classification or affects a fundamental right. *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004). If a suspect class is involved or a fundamental right is affected, the statutory classification is viewed under the strict scrutiny test; otherwise rational basis applies. *Id.* For purposes of Equal Protection analysis, a fundamental right includes the right to free speech of the First Amendment to the United States Constitution. *Id.* Thus, if legislation affects free speech, strict scrutiny must be applied.

The State seeks to avoid strict scrutiny of this action by attempting to characterize the case simply as an age discrimination case, allowing a rational basis scrutiny of the statute. Brief of Appellants at 36. It then seeks protection behind its secondary effects argument. *Id.* at 37. Without citation to any authority, the State simply concludes, "[L]aws whose predominant purpose is the amelioration of adverse secondary effects also enjoy a deferential standard of Equal Protection review." *Id.* Significantly, however, the State concludes that the age restriction is, in fact, "content-based." *Id.*

One of the bright lines for applying a heightened standard under the Equal Protection clause is whether the regulation distinguishes between classes of persons based on the exercise of their right of free speech. *United C.O.D.*, 150 S.W.3d at 113. A restriction is based on the exercise of the right of free speech when it discriminates between speakers based on the ideas they express or the subject matter or content of the expression involved, i.e., the permissibility of

engaging in the expressive activity is "dependent solely on the basis of the message being conveyed." *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2291 (1980). *See, also, Jaffe v. Alexis*, 659 F.2d 1018, 1021 (9th Cir. 1981).

Contrary to the State's assertion, it is evident on its face that the age limitations contained in H.B. 972 discriminate between those in the 18-20 age group and those in the over 21 age group solely in terms of the subject matter of the speech involved. It is the content of the speech which determines a person's ability to engage in particular expressive conduct, to receive and view particular constitutionally-protected materials and to disseminate such materials. No clearer speech-based discrimination could be found.

The State argues that a rational basis test should apply based on *Renton*, citing to the Court's discussion of the free speech issues and to a footnote in the opinion. With respect to the former, the State does not explain how this First Amendment principle has application in the context of equal protection, particularly as it relates to determining which level of scrutiny will apply. Neither does the footnote's simple statement, quoted in full here, support the State's argument: "As should be apparent from our preceding discussion, respondents can fare no better under the Equal Protection Clause than the under the First Amendment itself. See *Young v. American Mini-Theatres, Inc.*, 427 U.S., at 63-73, 96 S.Ct., at 2448-2454." *Renton*, 475 U.S. at 55 n. 4; 106 S.Ct. at 932 n. 4.

The problem with the State's argument is two-fold. First, reliance on the footnote from *Renton* does not tell the entire story. *American Mini-Theatres* (an

Equal Protection case), the cited authority on which the *Renton* opinion relied in the above-quoted statement, contains a very important caveat relevant to the instant case: "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 71 n.35, 96 S.Ct. 2440, 2453 n.35 (1976). Here, the age restrictions imposed by H.B. 972 do suppress and/or do greatly restrict access to lawful speech by those between the ages of 18 and 21. *See, e.g., United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S.Ct. 464, 469 (1994), *Ginsburg v. New York*, 390 U.S. 629, 636-37, 88 S.Ct. 1274, 1278-79 (1968), with respect to the rights of persons over the age of 18 to engage in activities related to adult-oriented speech.

Second, *Renton* was a pure zoning case and was concerned with where expressive conduct could occur within the limits of the city. The State's argument places a heavy reliance on *Renton's* "content-neutral" characterization of these zoning restrictions but such a characterization no longer seems to be supported by a majority of the Court after *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728 (2002). As *Peek-A-Boo Lounge v. Manatee Florida*, 337 F.3d 1251, 1263 (11th Cir. 2003), points out in its detailed analysis of the free speech, adult entertainment jurisprudence, the view of five Justices of the Court is that regulations of the adult entertainment industry, including zoning regulations,

are content-based and should be treated as such in constitutional analysis.[11] In short, the restrictions here are content-based and are directed at the exercise of speech activities.

Even without this change in view by a majority of the United States Supreme Court, however, the restriction here is qualitatively different from the zoning restrictions in *Renton*. The age restrictions here are directed solely at the specific exercise of speech activities by individuals – persons of majority age between 18 and 21 years of age. Clearly, this is a restriction based on the exercise of speech. Equally as clear, under Equal Protection analysis, the State's argument that the rational basis test should be applied is without merit. *See, also, Carroll v. City of Detroit*, 410 F. Supp. 615, 623 (E.D. Mich.)(if restriction is analyzed under intermediate scrutiny for purposes of First Amendment Free Speech clause, equal protection claims involving the same restriction is also subject to intermediate review).

Under a strict scrutiny analysis, the restrictions must be finely tailored to serve a substantial state interest, with the justifications for the distinctions carefully scrutinized. *Jaffe v. Alexis*, 659 F.2d 1018, 1021 (9th Cir. 1981). Under strict scrutiny, the burden is on the State to justify its discriminatory treatment.

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[11]The five disagree, however, on whether, under First Amendment principles, these content-based restrictions should be accorded strict scrutiny or intermediate scrutiny. *Id.*

Carey v. Brown, 447 U.S. 455, 461, 100 S.Ct. 2286, 2291 (1980). As the discussion of the Free Speech issues above showed, the State has failed to show any nexus whatsoever between the age restrictions in H.B. 972 and the secondary effects it touts as the state interest involved. Not only has it failed to meet its burden to show that the age restrictions advance its stated interest, it has likewise failed to show how those restrictions are finely tailored to serve that purpose. In either respect, the restrictions violate Equal Protection. *Jaffe v. Alexis*, 659 F.2d 1018 (9th Cir. 1981).

Under intermediate scrutiny, Equal Protection analysis requires that the government's classification must serve an important governmental objective and be substantially related to the achievement of that objective. *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 457 (1976). *Craig v. Boren* is particularly enlightening on the application of the intermediate scrutiny test to the age limitations contained in H.B. 972,[12] especially as it is compared to the substance of the State's argument. The State argues, "If 18 year olds are allowed to work at

[12]*Craig v. Boren*, interestingly enough, was a case cited by the State in support of its position and for the proposition that questions about whether to raise or lower the age of majority relative to the drinking age was primarily an issue of state law. Brief of Appellant at 36. Applying intermediate scrutiny to the provision at issue, the Court struck down Oklahoma's exercise of this primary issue of state law under the Equal Protection clause. 429 U.S. at 204, 97 S. Ct. at 460.

and patronize SOBs, it is more likely that individuals under the age of 18 will make their way into SOBs," Brief of Appellant at 39; "The Missouri legislature has made the decision that raising the age of customers and employees who may enter or work at SOBs from 18 to 21 will combat the adverse secondary effects associated with SOBs, including reducing crime and prostitution," Brief of Appellant at 40; and that the State is allowed to address the problems created by one particular kind of adult business without regulating all adult businesses. Brief of Appellant at 37.

As *Craig v. Boren* emphasized, for purposes of intermediate scrutiny, it is not enough to attempt to justify state action with generalized statements about intent and potential connections between the classification and that intent. The basis for the classification, as well as the stated interest, must comport with fact. 429 U.S. at 199, 97 S.Ct. at 458. In *Craig v. Boren*, the Court determined that the state's attempt to set an age limitation violated the Equal Protection clause because only 2% of all males in the age group were involved in the conduct sought to be addressed by the classification. 429 U.S. at 202, 97 S.Ct. at 459. As the Court concluded, such a disparity could hardly form the basis for employment of the particular classifying device. *Id.* Here, the State cannot point to any correlation between the two classes it has established. The State's contrived theory that individuals under the age of 18 will make their way into adult entertainment establishments simply because 18 year olds are allowed to work in or patronize those establishments is simply that – contrived. The State points to no evidence

that establishes such a correlation between the two and its minimal threshold rational basis argument would indicate that if any correlation did in fact exist, it would not even rise to the statistical correlation found wanting in *Craig v. Boren*. Similarly, the State has no evidence that there is any correlation between persons in the 18-20 age group and the purported secondary effects of crime and prostitution, much less that there is a correlation of constitutional significance.

Nor is the State's third justification availing. The State is regulating the rights of particular individuals to engage in protected speech activities. In effect, the State is arguing that it is permissible to regulate in this fashion so long as it does it one discrete group at a time. *Craig v. Boren* answered this argument, as well: "Thus, if statistics were to govern the permissibility of state alcohol regulation without regard to the Equal Protection Clause as a limiting principle, it might follow that States could freely favor Jews and Italian Catholics at the expense of all other Americans, since available studies regularly demonstrate that the former two groups exhibit the lowest rates of problem drinking. Similarly, if a State were allowed simply to depend upon demographic characteristics of adolescents in identifying problem drinkers, statistics might support the conclusion that only black teenagers should be permitted to drink, followed by Asian-Americans and Spanish-Americans." 429 U.S. at 208 n. 22, 97 S.Ct. at 463 n. 463. Having simply started with the class of persons in the age group of 18 to 21, if the State's position is adopted it would then have carte blanche to chip away at the rights of others outside that age group because some legislator perceives that

some correlation might exist between a particular class of persons, e.g., white males or persons within a defined range of income, and the secondary effects of crime and prostitution asserted to be associated with adult entertainment establishments. Again, as *Craig v. Boren* would hold, a mere statistical relationship will not justify state-imposed discriminatory classification. There must be a real interest that comports with fact and a real relationship that does so, as well.

Further, in *Carroll v. City of Detroit*, 410 F. Supp.2d 615 (E.D. 2006), the court was likewise concerned with both a free speech and Equal Protection challenge to a ban on ticket scalping in a city ordinance. The ordinance allowed the sale of tickets by individuals outside of some venues within the city but not others. The provision failed an Equal Protection intermediate scrutiny test because the city neither advanced nor showed a "substantial governmental interest or rational basis for distinguishing between ticket sellers at different venues." *Id.* at 623-24. In support of its ordinance, the city relied on statements that the purpose was self-evident, to include concerns with what would be secondary effects from such activity – regulation of street traffic, congestion and security, and language from other court cases that scalping activity was perceived to be an annoyance and, in some cases, dangerous. *Id.* at 622. Here, the State has relied on similarly generalized statements without coming forward with concrete proof. Here, the State has similarly failed to advance a substantial governmental interest or basis for distinguishing between those in the 18 to 20 age group and those 21 or over in

terms of their exercise of protected speech. The result should be no different. Indeed, as the *Carroll* case's reference to "rational basis" in its discussion of the Equal Protection issue would indicate, the age limitation provision in H.B. 972 cannot even survive an Equal Protection challenge applying a rational basis test.

Finally, the speciousness inherent in the State's argument is evidenced by the State's criminal pornography statutes. For purposes of pornography and related offenses, the term "minor" is defined as a person under the age of eighteen, § 573.010(7), RSMo., and child pornography as material or performance involving a person under the age of eighteen. § 573.010(7), RSMo. Consistent with the provisions of chapter 573, the State has said that it is permissible for persons over the age of eighteen to participate in the production and/or performance of material depicting nudity, sexual conduct, sexual contact and sexual performance. §§ 573.010 – 573.065, RSMo. It has said that it is permissible to distribute that material to consenting adults. §§ 573.040 – 573.065, RSMo. The irony of the State's position is that its criminal statutes recognize the right of a person between the ages of eighteen and twenty-one to participate in the production of sexually-explicit material and the right of a person between the ages of eighteen and twenty-one to give away that same material to consenting adults. These statutes also recognize that there are no pernicious side effects when persons within this age group engage in this conduct. The State has failed to explain, and cannot explain, any basis for such a distinction that would survive Equal Protection analysis under any level of scrutiny.

The trial court correctly determined that the age limitations violated the Equal Protection clauses of both the United States and Missouri Constitutions. This is so regardless of which level of scrutiny is applied.

V.

(Responds to Appellant's Point V)

Inherent in the case as presented to the trial court were two distinct issues of severability, one related to the severability of the provisions on regulation of adult entertainment from the non-adult entertainment provisions of H.B. 972 under the Article III challenges and the other related to the severability of the different provisions of the regulation on adult entertainment from one another under the Free Speech and Equal Protection challenges. The State's final argument under Point V concerns only the latter issue of severability and the trial court's determination that the provisions within this unified system of regulation are not severable one from another. Thus, as a practical matter, if the Court should determine that the enactment of H.B. 972 violated Article III, Sections 21 and 23 of the Missouri Constitution (Points I - III), it is unnecessary to address the separate severability issue raised under Point V of the State's brief.

Initially, it should be noted that in declaring Sections 67.2540, 67.2546, and 67.2552 invalid, the trial court found it necessary only to address the constitutionality of the age limitations. (L.F. 281) It determined that it was unnecessary to address the other Free Speech and Equal Protection challenges because of its determination that H.B. 972 was invalid in light of the Article III challenges and its further determination that the age limitations of H.B. 972 were unconstitutional. (L.F. 281) In other words, even if it were determined that the age limitations provisions were severable from the other adult entertainment

provisions in H.B. 972, it does not follow that those other provisions are constitutional or valid. Indeed, as shown in the argument under Point IV, there is substantial authority that, at the least, the minimum clothing requirements and limitations on erotic dancing contained in H.B. 972 also run afoul of Free Speech protections. *Daytona Grand, Inc. v. City of Daytona Beach*, 410 F. Supp.2d 1173, 1188(M.D. Fla. 2006)(minimum clothing requirements); *White River Amusement Pub, Inc. v. Town of Hartford*, 412 F.Supp.2d 416, (D. Ver. 2005)(minimum clothing requirements); *MDK, Inc. v. Village of Grafton*, 345 F. Supp.2d 952, 958-59 (E.D. Wis. 2004)(minimum clothing requirements); *Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D. N.Y. 1997)(minimum clothing requirements); *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 411-12 (7th Cir. 2004)(erotic dance moves); *Schultz v. City of Cumberland*, 228 F.3d 831, 839 (7th Cir. 2000)(erotic dance moves); *Giovani Carandola, Ltd.*, 396 F. Supp.2d at 654 (erotic dance moves); *Centerfolds, Inc.*, 352 F. Supp.2d at 194 (erotic dance moves). Further, in light of Respondents' evidence casting doubt on the State's secondary effects rationale, the validity of any remaining regulation of adult entertainment in H.B. 972 is seriously questioned by the failure of the State to come forward with additional evidence to support that rationale. *See, e.g., Peek-a-Boo Lounge*, 337 F.3d at 1269.

In its argument, the State places substantial reliance on *Akin v. Director of Revenue*, 934 S.W.2d 295, 300 (Mo. banc 1996), and the statement in that case that one method to discern legislative intent on severability is that the Legislature

divided the bill into discrete subsections. The problem with the State's argument is that it fails to recognize the distinction between a challenge to the validity of a bill based on the process under which it was enacted and a challenge to the validity of a bill based on its substance. *Akin* involved a challenge to the process under which the bill was enacted and, in that regard, is more akin to the Article III challenges to H.B. 972 which the trial court upheld. While organizing a bill into distinct subdivisions may give clues to legislative intent when a procedural deficiency is determined to exist, the same cannot be said with respect to enacting provisions within a section of a bill by reference to sections within the statutory code. *Akin* has no application to the issue presented by the State under Point V of its brief.

In determining the issue of severability in the context in which it is presented here, it is said that the fact that what remains after a part is declared invalid "'may be complete in itself, is not alone sufficient to sustain it.'" *State ex rel. McKittrick v. Cameron*, 117 S.W.2d 1078, 1082 (Mo. banc 1938). *See, also, State ex rel. Bunker Resource Recycling and Reclamation, Inc. v. Mehan*, 782 S.W.2d 381, 389 (Mo. banc 1990). The factors to consider in judging severability are whether "the provision is essential to the efficacy of the amendment, whether it is a provision with which the amendment would be incomplete and unworkable, and whether the provision is one without which the bill may not have been adopted." *SSM Cardinal Glennon Children's Hospital v. State*, 68 S.W.3d 412, 417 (Mo. banc 2002). As with all legislation, the ultimate test is legislative intent

– is the law which remains after the invalid part is removed one which the Legislature would have enacted had it known that the challenged portions were invalid. *Pettit v. Field*, 341 S.W.2d 106, 110 (Mo. 1960)(portion of statute invalid under Equal Protection). A further caveat is that what remains must also be susceptible of constitutional enforcement. *Id.*

The age limitation of H.B. 972 which the trial court struck down is found not only in the prohibition against person under the age of twenty-one being on the premises of an adult entertainment establishment, *see* § 67.2552.4, RSMo., but it is also a key element to the definition of employee. § 67.2540(2), RSMo.. Significantly, three of the four prohibitions found under § 67.2552 are directed specifically at conduct of employees or persons under twenty-one. § 67.2552.2-.4. In addition to these express provisions, the Act's nuisance provision similarly relies substantially on what can and cannot be done by these employees who are defined with reference to their age – an adult entertainment establishment can be declared a nuisance if it allows "specified sexual activities on its premises." § 67.2546.2, RSMo. The definition of "specified sexual activities" is directed at the activities that would be engaged in by employees, more specifically, erotic dancing by them. § 67.2540(10). The age limitation of H.B. 972 permeates the entire comprehensive system for regulation of adult entertainment businesses contained in H.B. 972. In light of this, the trial court made the correct determination on the issue of severability. The age limitation provision is so much

a part of the Legislature's comprehensive scheme of regulation that sections 67.2540, 67.2546, and 67.2552 are not severable from each other.

There is other evidence of the Legislature's intent on the severability issue that becomes evident from a comparison of HB 972 with SB 32. It should be recalled that Sections 67.2540, 67.2546 and 67.2552 were based on the provisions of SB 32. (L.F. 78-82). Importantly, SB 32 contained a clause specifically providing for severability (L.F. 82); however, in enacting HB 972, the legislature specifically omitted that clause. Clearly, its intent was to make the provisions that were ultimately adopted in HB 972 non-severable from each other.

Finally, as noted above, the question of severability is also to be determined by whether the residue of the enactment can be constitutionally enforced. What remains of the regulation of adult entertainment continues to violate constitutional strictures whether in the individual parts or as a whole relating to the failure of the State to come forward with additional evidence to support its secondary effects rationale.

CONCLUSION

The trial court correctly determined the multiple constitutional deficiencies of both the process by which HB 972 was enacted and the substance of its regulation of adult entertainment in Missouri and accordingly declared the relevant provisions invalid. This Court should affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Respondents' Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 15,510 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____

CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondents' Brief and a copy in electronic format on a 3 ½" disk were sent U.S. Mail, postage prepaid, to the following parties of record on this ____ day of April, 2006:

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