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No. SC101423

In the Supreme Court of Missouri

MISSOURI ASSOCIATION OF SCHOOL LIBRARIANS, ET AL.,

Respondents,

v.

MELESA JOHNSON, ET AL.,

Appellants.

Appeal from the Circuit Court of Jackson County
The Honorable J. Dale Youngs, No. 2316-CV05732

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This appeal challenges the Circuit Court of Jackson County's grant of summary judgment in favor of Plaintiff-Respondents Missouri Library Association ("MLA") and Missouri Association of State Librarians ("MASL"), permanently enjoining and declaring unconstitutional § 573.550, RSMo, as overbroad under article I, § 8 of the Missouri Constitution and unconstitutionally vague under article I, §§ 8 and 10 of the Missouri Constitution. Because this case involves "the validity . . . of a statute," it falls within the exclusive appellate jurisdiction of this Court pursuant to article V, § 3 of the Missouri Constitution.

Throughout pleadings and briefing below, Plaintiff-Respondents asserted that § 573.550 "directly violate[d] the constitution" via a facial challenge. *Goodman v. Saline Cnty. Comm'n*, 699 S.W.3d 437, 440 (Mo. banc 2024) (quoting *McNeal v. McNeal-Sydnor*, 472 S.W.3d 194, 195 (Mo. banc 2015)). In opposition, the State, as Defendant-Intervenors, and now Appellants, argued that § 573.550 did not violate the Missouri Constitution. The claim was duly presented to and ruled on by the Circuit Court. The Circuit Court granted Respondents' motion for summary judgment, denied the State's cross-motion for summary judgment, and rendered a final judgment as to the statute's constitutionality under article I, §§ 8, 10. Here, the constitutional challenge to § 573.550 is "real and substantial" and a matter of "first impression with this Court." *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 52 (Mo. banc 1999). Therefore, this Court properly exercises appellate jurisdiction over this appeal.

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INTRODUCTION AND SUMMARY OF ARGUMENT

When Missouri parents send their children to school, they have a legitimate expectation that school officials will deliver age-appropriate instruction. And they legitimately expect that school officials have a "duty to supervise the students under their custody and control." *Davis v. Lutheran S. High Sch. Ass'n of St. Louis*, 200 S.W.3d 163, 166 (Mo. App. E.D. 2006). It is Missouri's constitutional prerogative to help fulfill those legitimate expectations. *See State ex rel. Ranney v. Sch. Dist. of City of Cape Girardeau*, 141 S.W. 640, 642 (Mo. 1911) (holding that the State has the power to "make such rules as shall be needful for the orderly conduct of the schools, and to guard the moral and physical health of the pupils").

Therefore, it is hardly controversial that school officials should not disseminate non-educational, prurient obscenity to students. Schools and libraries already constitutionally filter out "harmful pornography" on computer systems. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 200, 203–04 (2003) (plurality). Section 573.550 operates in a similar vein, prohibiting school officials' dissemination, but not students' consumption, of prurient and obscene visual materials while incorporating rigorous safeguards for materials of actual pedagogical value. Section 573.550's narrow category of regulated sexually explicit imagery—depictions of "human masturbation, deviate sexual intercourse," "sexual intercourse, direct physical stimulation of genitals, sadomasochistic abuse, or emphasizing the depiction of postpubertal human genitals"—only bars materials that do not advance academic objectives and are not age-appropriate for minors.

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Respondents cavil with these regulatory justifications. They seek to invalidate a duly enacted state statute on the belief that § 573.550 "forces Plaintiffs and their members to make an intolerable choice between self-censorship of their own expressive activity and violations of their students' rights on the one hand, or risking their own criminal prosecution on the other." D1648 at p. 63. Minimizing the responsibility of Missouri educators and the State to shield students from non-academic obscenity, Respondents complain, for example, that § 573.550 intrudes on "librarians' rights to disseminate ideas and information." D1648 at p. 63. They package these grievances into a two-pronged constitutional objection—claiming that § 573.550 is overbroad (Count II) under article I, § 8 of the Missouri Constitution and void for vagueness under article I, § 10 (Count I). D1553 at pp. 15–18.[1]

Both these theories of unconstitutionality fail. Below, the Circuit Court erroneously accepted Respondents' assertions that a state law barring school officials from disseminating specific sexually explicit materials to students necessitates facial invalidation. Repeatedly, Respondents have characterized § 573.550 as a free-ranging restriction of student and private speech. Presumably, the Circuit Court, which offered no reasoning for its judgment, adopted this characterization. However, § 573.550's plain text makes clear it imposes only a *narrow* limit on the ability of school employees—i.e., they cannot distribute obscene materials to students. Substantial precedent makes clear that the General Assembly can do this. *See, e.g.*, *Free Speech Coal. v. Paxton*, 606 U.S. 461, 474

[1] Respondents also seek a declaratory judgment. *See* D1553 at pp. 18–19.

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(2025) (upholding that States "may enact laws to prevent minors from accessing" "sexually explicit content"); *accord Kan. City Premier Apartments, Inc. v. Mo. Real Estate Comm'n*, 344 S.W.3d 160, 169 n.4 (Mo. banc 2011) (stating that in the constitutional speech context, "[t]his Court has traditionally given due deference to United States Supreme Court precedents when our state constitutional provisions are the same as the United States constitutional provisions").[2]

First, § 573.550 is not overbroad. It is constitutionally calibrated to achieve the State's educational regulatory objective of excluding prurient, obscene, and non-academic imagery from Missouri schools. In fact, Respondents' facial overbreadth claim fails from the beginning because § 573.550 *does not regulate constitutionally protected speech*. It regulates materials obscene for minors, which fall "outside the scope" of First Amendment and article I, § 8 protections. *State v. Simmer*, 772 S.W.2d 372, 373 (Mo. banc 1989). And it is Respondents' burden to show that the law "reaches a substantial amount of constitutionally protected conduct." *Bennett v. St. Louis Cnty.*, 542 S.W.3d 392, 398 (Mo. App. E.D. 2017) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). They cannot bear this burden. Instead, they attempt to artificially hamstring the State's legislative prerogative, attempting to apply strict scrutiny where

[2] Respondents contend that "Missouri courts have wielded the overbreadth doctrine even more widely than the United States Supreme Court, including to invalidate state statutes that do not implicate any rights of free expression." D1648 at p. 28 n.11. However, this Court has "rejected the argument that *[State v.] Beine* extended the overbreadth doctrine outside of the First Amendment arena." *State v. Jeffrey*, 400 S.W.3d 303, 309 (Mo. banc 2013). Furthermore, since Respondents' other objections to § 573.550 are predicated on free speech arguments, the relevance of this contention about non-free speech circumstances is unclear.

rational basis review actually prevails. *See* D1648 at p. 46 (stating that § 573.550 does not "survive strict scrutiny").

As independent grounds, Respondents' facial overbreadth gambit fails because in public schools (the only schools where Respondents allege to be affected by § 573.550),[3] § 573.550 regulates only government speech. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 728 (2024); *Little v. Llano Cnty.*, 138 F.4th 834, 852–53 (5th Cir. 2025) (en banc). When government schools curate school library collections, the *government* is effectively speaking—and the First Amendment is not impugned. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

Alternatively, Respondents' facial overbreadth claim fails because § 573.550 regulates school-sponsored speech "reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). As recent case law—decided after the judgment below—indicates, "a school library bears the imprimatur of the school and is properly characterized as part of the school's curriculum." *Penguin Random House, LLC v. Robbins*, 172 F.4th 581, 587 (8th Cir. 2026) (citing *Hazelwood*, 484 U.S. at 271). Respondents provide no grounds to show that § 573.550's exclusion of non-educational prurient imagery from school environments fails the *Hazelwood* inquiry.

Second, § 573.550 is not void for vagueness. At the threshold, Respondents' vagueness claim fails because their argument rests solely on hypothetical foundations.

[3] Respondents do not assert that any non-public school is affected by this law. State SUMF ¶ 56 ("All of the materials identified by Plaintiffs as being removed because of § 573.550 were removed from public school districts.").

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Instead of pointing to actual enforcement, they only conjure a series of "what if" objections in their pleadings. This is insufficient to facially invalidate a statute for vagueness in Missouri. *See State v. Pribble*, 285 S.W.3d 310, 315 (Mo. banc 2009) (noting that whether a statute "conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct" may only be measured by actually looking at the particular "proscribed conduct" subject to penalties under the statute). Even reaching the void for vagueness inquiry, Respondents' assertions fall flat. To start, § 573.550 gives "fair and adequate notice of proscribed conduct." *Feldhaus v. State*, 311 S.W.3d 802, 806 (Mo. banc 2010) (quoting *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77, 81 (Mo. banc 2008)). Its terms are clearly defined, relying on internal definitions or drawing from other Missouri law sources. It includes an exhaustive list of covered materials. Nor does § 573.550 invite "arbitrary and discriminatory enforcement." *Id.* (quoting *Nixon*, 253 S.W.3d at 81). It provides more than "minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). These include objective criteria, evinced by the statute's clear categories of covered persons and covered conduct, as well as its *mens rea* requirement.

Finally, the Circuit Court erred by permanently enjoining and declaring unconstitutional § 573.550 without seeking a narrowing construction or attempting to sever the statute. As part and parcel of the doctrine to find "harmony" between legislation and the Constitution, *United States v. Hansen*, 599 U.S. 762, 781 (2023), courts must try to narrow or sever overbroad statutes when they identical constitutional issues, *see Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732, 741 (Mo. banc 2007). Contrary to this

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longstanding approach, the terse Circuit Court judgment indicates no attempt to save § 573.550. Even overlooking the myriad errors in Respondents' legal theories, the proper recourse is narrowly drawn injunctive relief, not facial invalidation of the statute.

This Court should reverse the Circuit Court's judgment and remand for further proceedings.

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STATEMENT OF FACTS

I. Background on § 573.550.

1. During the 2022 legislative session, the Missouri General Assembly passed and the Governor signed Senate Bill 775. D1553 at p. 3 (Pet. ¶¶ 11–12).

2. Senate Bill 775 enacted a new statute, § 573.550, which became effective on August 28, 2022. D1553 at p. 3 (Pet. ¶ 13).

3. Section 573.550 states:

> 1. A person commits the offense of providing explicit sexual material to a student if such person is affiliated with a public or private elementary or secondary school in an official capacity and, knowing of its content and character, such person provides, assigns, supplies, distributes, loans, or coerces acceptance of or the approval of the providing of explicit sexual material to a student or possesses with the purpose of providing, assigning, supplying, distributing, loaning, or coercing acceptance of or the approval of the providing of explicit sexual material to a student.
>
> 2. The offense of providing explicit sexual material to a student is a class A misdemeanor.
>
> 3. As used in this section, the following terms shall mean:
>
> (1) "Explicit sexual material", any pictorial, three-dimensional, or visual depiction, including any photography, film, video, picture, or computer-generated image, showing human masturbation, deviate sexual intercourse as defined in section 566.010, sexual intercourse, direct physical stimulation of genitals, sadomasochistic abuse, or emphasizing the depiction of postpubertal human genitals; provided, however, that works of art, when taken as a whole, that have serious artistic significance, or works of anthropological significance, or materials used in science courses, including but not limited to materials used in biology, anatomy, physiology, and sexual education classes shall not be deemed to be within the foregoing definition;
>
> (2) "Person affiliated with a public or private elementary or secondary school in an official capacity", an administrator, teacher, librarian, media center personnel, substitute teacher, teacher's assistant, student teacher, law enforcement officer, school board member, school bus driver, guidance counselor, coach, guest lecturer,

guest speaker, or other nonschool employee who is invited to present information to students by a teacher, administrator, or other school employee. Such term shall not include a student enrolled in the elementary or secondary school.

4. Students in Missouri's elementary schools include children in kindergarten who are as young as five years old. D1553 at p. 8 (Pet. ¶ 41); D1732 at p. 89 (MLA Dep. 316:12–14).

5. When § 573.550 became law in August of 2022, it was already an offense in Missouri to furnish obscene and pornographic material to minors. § 573.040, RSMo; D1553 at p. 5 (Pet. ¶ 20).

6. Section 573.550 only applies to pictorial, three-dimensional, or visual depictions of explicit sexual material. It does not apply to the words or text in books or other library materials. D1733 at pp. 10–16 (MASL Dep. 18:15–19:12; 20:17–24:4); D1732 at pp. 14–15, 64–65, 85 (MLA Dep. 40:5–15; 46:8–18; 213:22–214:2; 301:13–18); D1734, D1735, D1736 (MASL Dep. Exs. 5, 7, 8); D1737, D1738 (MLA Dep. Exs. 12, 13).

7. Section 573.550 includes exceptions for works of art, when taken as a whole, that have serious artistic significance, or works of anthropological significance, or materials used in science courses, including but not limited to materials used in biology, anatomy, physiology, and sexual education classes. D1553 at p. 5 (Pet. ¶ 18).

8. Plaintiff-Respondents have previously stated that they believe that § 573.550 clearly defines what is considered explicit sexual material. D1732 at pp. 29, 33 (MLA Dep. 91:1–3; 94:2–12); D1737, D1738 (MLA Dep. Exs. 12, 13); D1735 (MASL Dep. Ex. 7).

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9. Plaintiff-Respondents Missouri Association of School Librarians (MASL), for example, advised one of its members that children's books like "No David," "A Light in the Attic," "Where the Sidewalk Ends," and "Hippocrene Children's Illustrated Dictionaries" that include pictures of "naked bottoms" do not need to be removed from school libraries because of § 573.550. D1733 at pp. 26–28 (MASL Dep. 60:13–62:23). D1739 (MASL Dep. Ex. 9).

10. And Plaintiff Missouri Library Association (MLA) agrees with a statement put out by the ACLU that § 573.550 defines explicit sexual material narrowly and includes broad exceptions that require materials to be considered as a whole. D1732 at pp.39–42 (MLA Dep. 108:24–111:6); D1740 (MLA Dep Ex. 14).

11. When § 573.550 was first enacted, MASL released a statement to its members explaining that § 573.550 applied "in school settings," which MASL understands to mean "materials that would be provided or introduced to students or within or connected to schools." D1736 at p.1 (MASL Dep. Ex. 7); D1733 at pp. 19–20 (MASL Dep. 35:1–36:5).

12. MLA released a statement stating that it "strongly agree[d]" with the points made in MASL's statement referenced in Paragraph 11 of the State's Statement of Undisputed Material Facts. D1737, D1738 (MLA Dep. Exs. 12, 13).

Plaintiff-Respondents MASL and MLA

13. Plaintiff-Respondent MASL is a voluntary membership association for library media specialists in Missouri schools. D1733 at p. 6 (MASL Dep. 13:19–21); D1553 at p. 2 (Pet. ¶ 4).

14. MASL has around 900 members. D1733 at p. 6 (MASL Dep. 13:17–18).

15. Some of MASL's members are employed by public school districts or public schools in Missouri. D1741 at p. 3 (MASL 3rd Sup. Rog. 2, 13).

16. Not all school librarians in Missouri are MASL members. D1733 at p. 6 (MASL Dep. 13:22–25).

17. Not all of MASL's members are school librarians, and MASL estimates that around 100 of MASL's members do not work in school libraries. D1733 at p. 7 (MASL Dep. 15:11–13).

18. Plaintiff MLA is a voluntary membership organization that promotes library services and the profession of librarianship. D1732 at p. 7 (MLA Dep. 22:23–25); D1553 at p. 3 (Pet. ¶ 7).

19. MLA has around 500 members. D1732 at p. 7 (MLA Dep. 22:9–19).

20. Some of MLA's members are employed by public school districts, public school, or public library systems in Missouri. D1742 at p. 3 (MASL 2nd Sup. Rog. 2, 13).

21. MLA members do not need to be affiliated with a library to join MLA. D1732 at pp. at 8–9 (MLA Dep. 23:16–248:8).

22. Not all Missouri librarians are members of MLA. D1732 at p. 9 (MLA Dep. 24:9–12).

23. Only between ten and twenty percent of librarians in Missouri are members of MLA. D1732 at p. 10 (MLA Dep. 25:2–9).

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24. Plaintiff-Respondents MASL and MLA are not challenging any statutes that prohibit the provision of obscene material to minors other than § 573.550. D1733 at p. 9 (MASL Dep. 17:2–7); D1732 at pp.11–12 (MLA Dep. 28:20–29:13).

Selection of School Library Materials

25. In Missouri, school districts and schools boards set standards that include selection criteria for appropriate library and curricular material. D1553 at p. 6 (Pet. ¶ 22); D1741 (MASL 3rd Sup. Rog. 15); D1742 (MASL 2nd Sup. Rog. 15); D1733 at pp. 43–45 (MASL Dep. 115:4–13; 117:18–20; 118:9–15); D1735, D1736 (MASL Dep. Exs. 7, 8); D1732 at pp. 17–18, 46–47, 71, 87–88 (MLA Dep. 54:19–55:9; 122:21–123:5; 265:15–22; 307:6–308:12); D1737, D1738 (MLA Dep. Exs. 12, 13).

26. Plaintiff-Respondents' members select books for school libraries as part of their job duties. D1553 at p. 6 (Pet. ¶ 22); D1741 (MASL 3rd Sup. Rog. 15); D1742 (MASL 2nd Sup. Rog. 15); D1733 at pp. 43–45, 47 (MASL Dep. 115:4–13; 117:18–20; 118:9–15; 131:8–12); D1732 at pp. 87–88 (MLA Dep. 307:6–308:12).

27. Plaintiff-Respondents' members that work in schools follow school district policy when they select and remove books from school library collections. D1553 at p. 6 (Pet. ¶ 22); D1741 (MASL 3rd Sup. Rog. 15); D1742 (MASL 2nd Sup. Rog. 15); D1733 at pp. 21–22, 44–45, 53–55, 61, 65 (MASL Dep. 44:8–45:8; 117:18–20; 118:9–15; 145:14–18; 146:19–23; 147:14–19; 157:5–11; 175:16–20); D1732 at pp. 87–88 (MLA Dep. 307:6–308:12).

28. School districts ultimately control school libraries and what materials are removed from schools. D1553 at p. 6 (Pet. ¶ 23); D1741 (MASL 3rd Sup. Rog. 15); D1742

(MASL 2nd Sup. Rog. 15); D1733 at pp. 52, 55, 60–61, 65 (MASL Dep. 144:13–22; 147:14–19; 156:22–157:1; 175:16–20); D1732 at pp. 56–57, 72, 86–88 (MLA Dep. 179:20–180:2; 267:9–18; 302:12–18; 307:6–308:12).

29. Any materials removed from a school or school library are in the possession, custody, or control of the school or school district. D1568 ¶¶ 1–2 (MASL RFP 2); D1569 ¶¶ 2–3 (MLA RFP 2).

30. School libraries remove books for multiple reasons, including that the book is in poor condition, outdated, or unpopular. D1732 at pp. 54–55 (MLA Dep. 159:16–160:4); D1741 (MASL 3rd Sup. Rog. 15) (citing Missouri School Board Association Regulation IIAC-R1: Instructional Media Centers/School Libraries - Selection and Reconsideration of Materials).

31. Both MASL and MLA agree that elementary and secondary school employees and volunteers, including teachers, librarians, coaches, and guest speakers, should not provide minors with material that is obscene to minors. D1733 at p. 9 (MASL Dep. 17:8–12); D1732 at pp. 22–24, 26 (MLA Dep. 66:7–14; 69:7–70:14; 74:1–18).

32. Both MASL and MLA agree that material obscene for minors should not be allowed in school libraries and should not be part of a curated library collection in a school library. D1733 at p. 46 (MASL Dep. 119:6–18); D1732 at pp. 13, 16, 19 (MLA Dep. 30:3–9; 49:6–20. 56:17–24); D1570 (MLA Dep. Ex. 6).

Enforcement of § 573.550

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33. Neither MASL nor MLA have ever had a member prosecuted for a violation of § 573.550. D1733 at p. 79 (MASL Dep. 198:10–15); D1732 at pp. 73–74 (MLA Dep. 270:25–271:4).

34. Plaintiff-Respondents are not aware of any person—member or otherwise—who has been prosecuted for a violation of § 573.550. D1733 at p. 79 (MASL Dep. 198:16–20); D1732 at p. 74 (MLA Dep. 271:5–8).

35. None of Plaintiff-Respondents' members have been charged with a violation of § 573.550. D1733 at pp. 79–80 (MASL Dep. 198:21–199:1); D1732 at p. 74 (MLA Dep. 271:11–25).

36. Plaintiff-Respondents are not aware of any person—member or otherwise—being charged with a violation of § 573.550. D1733 at p. 80 (MASL Dep. 199:2–11); D1732 at p. 75 (MLA Dep. 272:1–4).

37. None of Plaintiff-Respondents' members have been investigated for a violation of § 573.550. D1733 at p. 80 (MASL Dep. 199:12–24); D1732 at p. 75 (MLA Dep. 272:5–20).

38. Plaintiff-Respondents are aware that law enforcement officers visited and spoke with librarians in the Wentzville School District, but do not know about the specific bases for the visits. D1741 (MASL 3rd Sup. Rog. 14); D1742 (MASL 2nd Sup. Rog. 14).

39. MASL member Mernie Maestas works in the Wentzville school district. She stated that she was aware of a Wentzville librarian being visited by law enforcement prior to § 573.550 was in effect. She was not aware of any Wentzville librarian being

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investigated for a violation of § 573.550. D1571 at pp. 5–6, 8–9 (Maestas Dep. 20:11–21:3; 81:13–82:3).

40. A librarian from the Scenic River Regional Library was visited by a sheriff. D1572 (MLA Dep. Ex. 17).

41. Scenic River Regional Library is not an elementary or secondary school library. D1572 (MLA Dep. Ex. 17).

42. The librarian from Scenic River Regional Library informed MLA's past president, Otter Bowman, that the sheriff was not investigating a violation of § 573.550, but was aware of "other laws involving public libraries the Assembly" and wanted to give the librarian a "friendly 'heads up.'" D1572 (MLA Dep. Ex. 17); D1732 (MLA Dep. 277:14–279:5).

43. Plaintiff-Respondents are not aware of any member who has suffered an adverse employment action because of § 573.550. D1733 at pp. 80–81 (MASL Dep. 199:25–200:24); D1732 at pp. 77–84 (MLA Dep. 288:24–295:10).

44. MASL is not aware of any member of MASL who is violating § 573.550. D1733 at p. 82 (MASL Dep. 201:7–10).

45. MASL is not aware of any instances of discriminatory enforcement of § 573.550. D1733 at p. 83 (MASL Dep. 202:4–20).

School Districts' Applications of § 573.550

46. Plaintiff-Respondents did not track or keep record of any books removed as a result of § 573.550. D1741 (MASL 3rd Sup. Rog. 4); D1742 (MASL 2nd Sup. Rog. 4); D1733 at pp. 35–36 (MASL Dep. 104:23–105:11); D1732 at p. 45 (MLA Dep. 120:6–17).

47. School districts in Missouri removed some materials from school library collections after § 573.550 went into effect. D1741 (MASL 3rd Sup. Rog. 4); D1742 (MASL 2nd Sup. Rog. 4).

48. MASL is not aware of any books that were removed from classroom collections. D1733 at p. 106 (MASL Dep. 257:11–22).

49. Plaintiff-Respondents relied on reporting from the organization PEN America to determine which books were removed from school libraries in Missouri, but Plaintiff-Respondents did not verify the accuracy of the list of books identified by PEN America. D1733 at pp. 23–24 (MASL Dep. 57:22–58:19); D1732 at pp. 49–50 (MLA Dep. 133:22–134:13).

50. MLA does not know how PEN America got the information for its list of books that were removed as a result of § 573.550. D1732 at p. 61 (MLA Dep. 193:4–7).

51. Some of the materials that were initially removed by school districts were later returned to use by the school district. D1741 (MASL 3rd Sup. Rog. 7); D1742 (MASL 2nd Sup. Rog. 7); D1733 at pp. 38–39 (MASL Dep. 108:18–23; 109:5–24); D1732 at p. 51 (MLA Dep. 137:6–8).

52. Wentzville School District returned around 200 books that had been temporarily removed. D1741 (MASL 3rd Sup. Rog. 7); D1742 (MASL 2nd Sup. Rog. 7).

53. Plaintiff-Respondents' counsel created a list of books that school districts reportedly removed using information collected through open-record or "Sunshine" requests. D1741 (MASL 3rd Sup. Rog. 4); D1742 (MASL 2nd Sup. Rog. 4).

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54. Plaintiff-Respondents did not verify the information collected in the Sunshine requests. D1733 at pp. 24–25, 32 (MASL Dep. 58:20–59:15; 92:21–22); D1732 at pp. 52–53, 66 (MLA Dep. 148:20–149:13; 227:14–22).

55. The information collected through the Sunshine requests is current only as of the date the responsive information was produced by the responding school district. D1733 at p. 29 (MASL Dep. 69:7–16); D1732 at pp. 66–67 (MLA Dep. 227:23–228:3).

56. All of the materials identified by Plaintiff-Respondents as being removed because of § 573.550 were removed from public school districts. D1741 (MASL 3rd Sup. Rog. 4); D1742 (MASL 2nd Sup. Rog. 4); D1733 at pp.36–37 (MASL Dep. 105:23–106:7).

57. Plaintiff-Respondents cannot identify any specific schools from which materials were removed because of § 573.550. D1741 (MASL 3rd Sup. Rog. 5); D1742 (MASL 2nd Sup. Rog. 5); D1733 at pp. 33–34, 42, 94–95 (MASL Dep. 94:17–95:1; 112:5–10; 226:20–227:16); D1732 at p. 60 (MLA Dep. 187:15-21).

58. MASL cannot identify any members—or the schools they work at—that were asked to look through their school library's collection and were ordered to remove titles because of § 573.550 without the school district providing guidance about whether it applies to the removed titled. D1733 at pp. 103–04 (MASL Dep. 237:2–238:11).

59. MASL cannot identify any members that have spent significant amounts of time examining their school library's collection to comply with § 573.550 because of their fear of prosecution for violating § 573.550. D1733 (MASL Dep. 238:12-21).

60. MASL assumes that when a book is added to a library collection, it was added in accordance with the library's collection policies. D1733 at p. 65 (MASL Dep. 175:5–10).

61. Each Plaintiff asserts that, if materials in a school library are selected in accordance with school-district-collection policies, they qualify for an exception contained in § 573.550 for works of art, when taken as a whole, that have serious artistic significance, or works of anthropological significance, or materials used in science courses, including but not limited to materials used in biology, anatomy, physiology, and sexual education classes. D1741 (MASL 3rd Sup. Rog. 11, 15); D1742 (MASL 2nd Sup. Rog. 11, 15); D1733 at pp. 63–64 (MASL Dep. 172:12–14; 173:6–20); D1732 at pp. 27–28, 42–43, 58–59, 63 (MLA Dep. 88:5–21; 89:2–5; 111:8–20; 112:6–16; 184:15–185:1; 203:14–20).

62. Plaintiff-Respondents are unaware of what procedures school districts followed to comply with § 573.550. D1733 at p. 105 (MASL Dep. 241:12–14); D1732 at p. 62 (MLA Dep. 199:17–23).

63. Plaintiff-Respondents believe that all of the materials which Plaintiff-Respondents assert were removed by a school district in response to § 573.550 do not violate § 573.550. D1741 (MASL 3rd Sup. Rog. 11, 15); D1742 (MASL 2nd Sup. Rog. 11, 15); D1732 at p.20 (MLA Dep. 59:9–10); D1733 at pp. 17–18 (MASL Dep. 28:19–29:19).

64. MLA believes that § 573.550 covers the same scope as federal and state laws that already exist. D1732 at p. 44 (MLA Dep. 116:16–19).

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65. MASL's executive council members did not share or exchange any information about any specific books that were removed from MASL members' libraries in response to § 573.550. D1733 at p. 107 (MASL Dep. 259:13–19).

66. MASL does not evaluate, and is in fact incapable of evaluating, images with regard to what is appropriate or not appropriate for inclusion in an elementary or secondary school library. MASL only refers to school districts' policies to determine what images are appropriate or inappropriate for a school library. D1733 at pp. 58–60 (MASL Dep. 156:1–10; 152:24–153:4).

67. MASL cannot state, and is incapable of stating, whether it is ever appropriate to include a copy of a *Hustler* pornographic magazine in an elementary or secondary school library. D1733 at pp. 52–54, 60 (MASL Dep. 144:23–146:7; 156:1–10).

68. MASL cannot state, and is incapable of stating, whether it is ever appropriate for an elementary school library to include books with images depicting fully naked adults. D1733 at pp. 73, 60 (MASL Dep. 184:5–25; 156:1–10).

69. MASL did not review any books to determine whether the images contained in the book violate § 573.550. D1733 at p. 60 (MASL Dep. 156:1–10); D1741 (MASL 3rd Sup. Rog. 5).

70. MASL cannot state, and is incapable of stating, whether or not any of the books that it claims were removed because of § 573.550 contained material obscene to children. D1733 at pp. 48–49, 60, 62 (MASL Dep. 140:12–14; 141:8–11; 156:1–10; 158:8–19).

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71. MASL cannot state, and is incapable of stating, whether any of the materials removed from school libraries contain images depicting human masturbation. D1733 at pp. 30, 60 (MASL Dep. 86:13–18; 156:1–10).

72. MASL cannot state, and is incapable of stating, whether it is appropriate to include materials with images depicting human masturbation in an elementary or secondary school library. D1733 at pp. 51, 60 (MASL Dep. 143:2–7; 156:1–10).

73. MASL cannot state, and is incapable of stating, whether any image depicts human masturbation. D1733 at p. 70 (MASL Dep. 181:3–23).

74. MASL is not aware of any school library in Missouri that currently contains materials containing images of human masturbation. D1733 at pp. 84–85 (MASL Dep. 205:19–206:3).

75. MASL cannot state, and is incapable of stating, whether any of the materials removed from school libraries contain images depicting deviate sexual intercourse. D1733 at pp. 30, 60 (MASL Dep. 86:19–22; 156:1–10).

76. MASL cannot state, and is incapable of stating, whether it is appropriate to include materials with images depicting deviate sexual intercourse in an elementary or secondary school library. D1733 at pp. 52, 60 (MASL Dep. 144:9–19; 156:1–10).

77. MASL cannot state, and is incapable of stating, whether any image depicts deviate sexual intercourse. D1733 at pp. 70–71 (MASL Dep. 181:24–182:3).

78. MASL is not aware of any school library in Missouri that currently contains materials containing images of "deviate sexual intercourse." D1733 at p. 85 (MASL Dep. 206:7–12).

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79. MASL cannot state, and is incapable of stating, whether any of the materials removed from school libraries contain images depicting sexual intercourse. D1733 at pp. 30, 60 (MASL Dep. 86:23–25; 156:1–10).

80. MASL cannot state, and is incapable of stating, whether it is appropriate to include materials with images depicting sexual intercourse in an elementary or secondary school library. D1733 at pp. 52, 60 (MASL Dep. 144:9–19; 156:1–10).

81. MASL cannot state, and is incapable of stating, whether any image depicts sexual intercourse. D1733 at pp. 68–71 (MASL Dep. 178:12–18; 180:22–181:2; 182:4–10).

82. MASL is not aware of any school library in Missouri that currently contains materials containing images of sexual intercourse. D1733 at p. 85 (MASL Dep. 206:13–18).

83. MASL cannot state, and is incapable of stating, whether any of the materials removed from school libraries contain images depicting direct physical stimulation of genitals. D1733 at pp. 31, 60 (MASL Dep. 87:1–4; 156:1–10).

84. MASL cannot state, and is incapable of stating, whether it is appropriate to include materials with images depicting direct physical stimulation of genitals in an elementary or secondary school library. D1733 at pp. 52, 60 (MASL Dep. 144:2–8; 156:1–10).

85. MASL cannot state, and is incapable of stating, whether any image depicts direct physical stimulation of genitals. D1733 at p. 71 (MASL Dep. 182:11–15).

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86. MASL is not aware of any school library in Missouri that currently contains materials containing images of direct physical stimulation of genitals. D1733 at p. 85 (MASL Dep. 206:19–24).

87. MASL cannot state, and is incapable of stating, whether any of the materials removed from school libraries contain images depicting sadomasochistic abuse. D1733 at pp. 31, 60 (MASL Dep. 87:5–8; 156:1–10).

88. MASL cannot state, and is incapable of stating, whether it is appropriate to include materials with images depicting sadomasochistic abuse in an elementary or secondary school library. D1733 at pp. 52, 60 (MASL Dep. 144:9–19; 156:1–10).

89. MASL cannot state, and is incapable of stating, whether any image depicts sadomasochistic abuse. D1733 at p. 71 (MASL Dep. 182:16–20).

90. MASL is not aware of any school library in Missouri that currently contains materials containing images of sadomasochistic abuse. D1733 at pp. 85–86 (MASL Dep. 206:25–207:6).

91. MASL cannot state, and is incapable of stating, whether any of the materials removed from school libraries contain images depicting post pubertal human genitals. D1733 pp. 31, 60 (MASL Dep. 87:9–12; 156:1–10).

92. MASL cannot state, and is incapable of stating, whether it is appropriate to include materials with images depicting post pubertal human genitals in an elementary or secondary school library. D1733 at pp. 52, 60 (MASL Dep. 144:9–19; 156:1–10).

93. MASL cannot state, and is incapable of stating, whether any image depicts postpubertal human genitals. D1733 at pp. 71–72 (MASL Dep. 182:21–183:1).

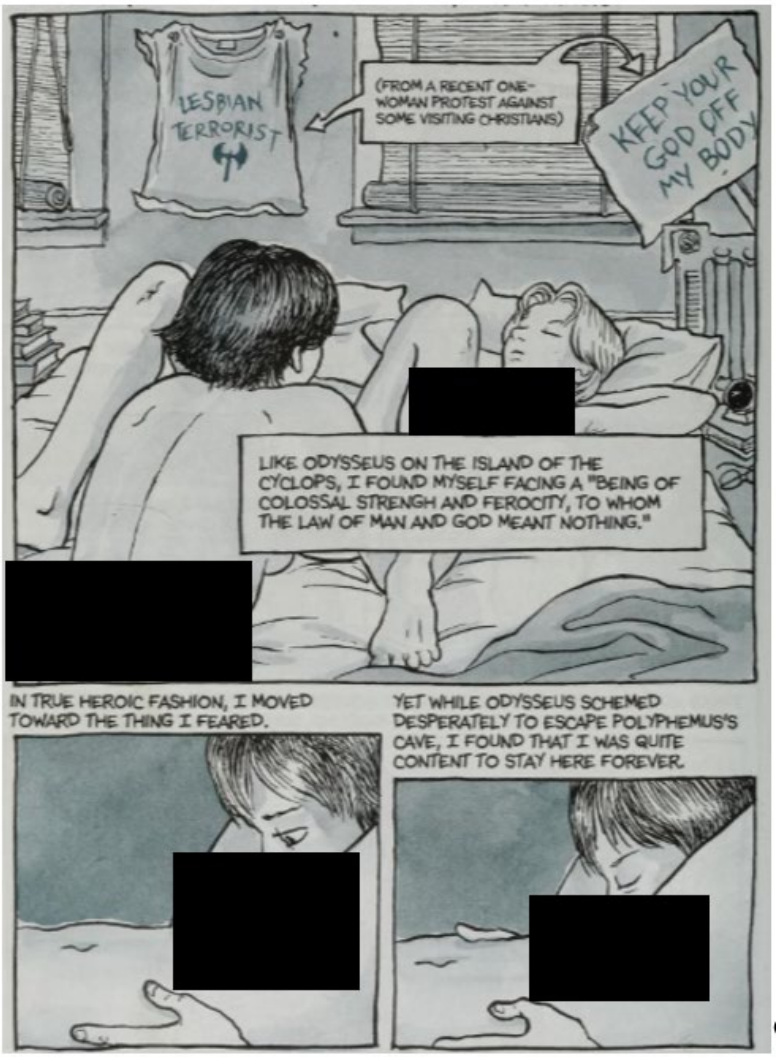
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94. MASL is not aware of any school library in Missouri that currently contains materials containing images of post pubertal human genitals. D1733 at p. 86 (MASL Dep. 207:7–12).

95. MLA is not aware of the specific pictorial, three-dimensional, or visual depictions of explicit sexual material in the library materials that school districts removed because it did not track that information and asserts that such information is not within its possession or control. D1742 (MASL 2nd Sup. Rog. 5).

96. The following image is a redacted copy of an image found in the book *Fun Home* by Alison Bechdel (with the unredacted image filed under seal with the Court):

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D1573 (MLA Dep. Ex. 19).

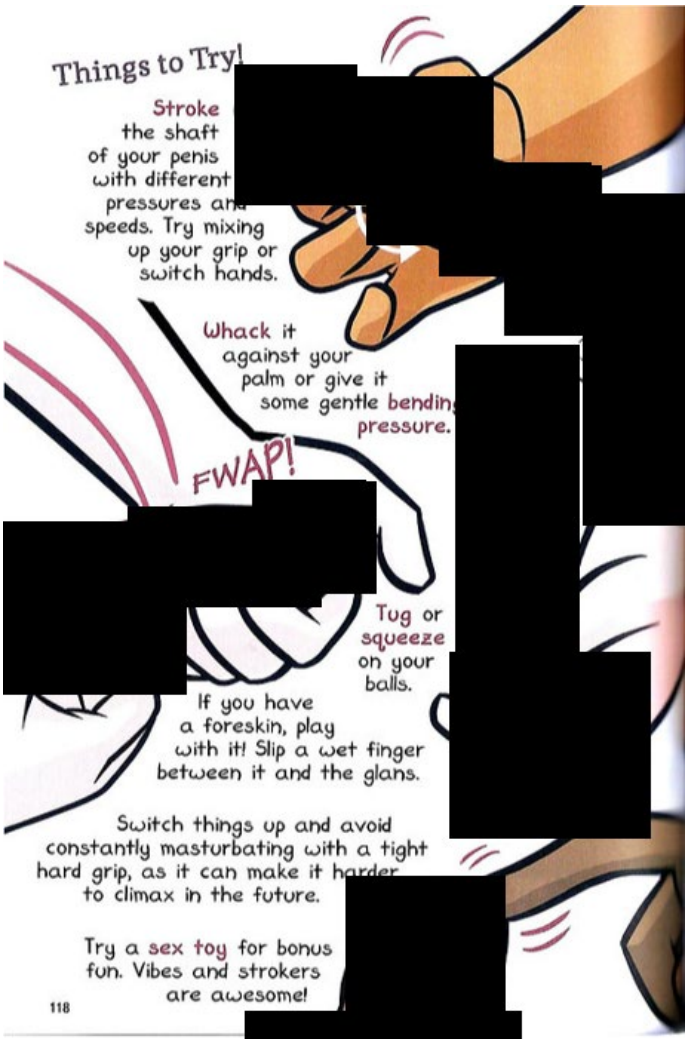
97. MLA acknowledges that this image fits the description of deviate sexual intercourse in § 573.550. D1732 at pp. 91–92 (MLA Dep. 325:20–326:3).

98. MLA believes that a school library that included *Fun Home* would not be in violation of § 573.550, because MLA believes the book *Fun Home* fits within one of § 573.550's exceptions. D1732 at pp. 63, 92–93 (MLA Dep. 203:14–20; 326:17–327:4).

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99. The following image is a redacted copy of an image included in the book *Let's Talk About It* by Erika Moen and Matthew Nolan (with the unredacted image filed under seal with the Court):



D1733 at pp. 56–59 (MASL Dep. 150:1–153:9); D1574 (MASL Dep. Ex. 11).

100. MASL cannot say and is incapable of saying whether the picture above depicts human masturbation. D1733 at pp. 56–57 (MASL Dep. 150:24–151:21).

101. The following image is a redacted copy of an image included in the book *Game of Thrones, The Graphic Novel* (with an unredacted image filed under seal with the Court):



D1733 at pp. 66–67 (MASL Dep. 176:21–177:18); D1575 (MASL Dep. Ex. 13).

102. MASL cannot say and is incapable of saying whether the picture above depicts sexual intercourse or deviate sexual intercourse. D1733 at pp. 67–68 (MASL Dep. 177:7–178:18).

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103. *Fun Home*, *Let's Talk About It,* and *Game of Thrones the Graphic Novel* were all present in elementary or secondary school libraries in Missouri prior to the effective date of § 573.550. D1741 (MASL 3rd Sup. Rog. 4); D1742 (MASL 2nd Sup. Rog. 4).

104. *Fun Home* was in two school districts. D1741 (MASL 3rd Sup. Rog. 4); D1742 (MASL 2nd Sup. Rog. 4); D1576, D1577 (MASL Dep. Ex. 10); D1571 (MLA Dep. Ex. 16).

105. *Let's Talk About It* was in two school districts. D1741 (MASL 3rd Sup. Rog. 4); D1742 (MASL 2nd Sup. Rog. 4); D1576 at p. 8, D1577 at p. 5, D1576, D1577 (MASL Dep. Ex. 10); D1580 (MLA Dep. Ex. 16).

106. The Park Hill School District removed multiple copies of a children's picture book with multiple illustrated pictures of nude women depicting bare breasts and genitalia with pubic hair from elementary school libraries in the Park Hill School District. D1581 at pp. 7–9 (Coke Dep. 42:14-43:19; 64:16–25).

Plaintiff-Respondents' Members Response to § 573.550

107. The only members of either Plaintiff-Respondents who MASL and MLA assert self-censored in response to § 573.550 are members who work in public school libraries or public school districts. D1732 at p. 68 (MLA Dep. 236:22–25); D1741 (MASL 3rd Sup. Rog. 13); D1742 (MASL 2nd Sup. Rog. 13).

108. MASL is aware of thirty-one members that reported self-censoring because of § 573.550. D1741 (MASL 3rd Sup. Rog. 13); D1733 at pp. 77–78 (MASL Dep. 190:13–191:13).

109. MLA is aware of seven members that reported self-censoring because of § 573.550. D1742 (MASL 2nd Sup. Rog. 13).

110. MASL is not aware of any specific books that its members have self-censored as a result of § 573.550. D1733 at pp. 101–02 (MASL Dep. 235:18–236:9).

111. Plaintiff-Respondents cannot identify how, or what way, any member of either of their organizations self-censored as a result of § 573.550. D1733 at pp. 74–78 (MASL Dep. 187:14–191:13); D1732 at 69–70 (MLA Dep. 237:10–238:7).

112. MASL never contacted a school district to inform the school district administrators that the school district was removing any school library materials in response to § 573.550 without following the school district's regular policies and procedures challenges to school library materials. D1741 (MASL 3rd Sup. Rog. 10).

113. MASL does not have any specific information about why its members, including any of the members it listed in response to Interrogatory 19, believe that they risk being prosecuted outside of their official context, including at home with their own children who are students. D1733 at pp. 87–93, 96–101 (MASL Dep. 217:10–223:13; 230:6–235:17).

114. Plaintiff-Respondents have spoken out publicly against § 573.550. D1582 (MLA Dep. Ex. 25); D1732 at p. 94 (MLA Dep. 347:11–18).

115. MLA's intellectual freedom committee released a statement about one month after § 573.550 went into effect stating that some members of the Missouri Legislature were "engaging in cynical acts of cowardice" by enacting § 573.550, that the governor was "complicit," and that § 573.550 was part of a "political strategy" designed to "encourage

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the most negative elements of public sentiment toward ignorance and bigotry." D1582 (MLA Dep. Ex. 25).

II. Procedural History.

Plaintiff-Respondents Missouri Association of School Librarians and Missouri Library Association initially filed this action for injunctive and declaratory relief on February 16, 2023. D1553. On May 3, 2023, Defendant Jean Peters Baker filed her answer. D1554. On November 1, 2023, the State of Missouri and Attorney General Andrew Bailey filed their motion to intervene as defendants along with suggestions in support thereof. D1555. The Circuit Court granted intervention on March 25, 2024. *Order Granting Intervention, Mo. Ass'n of Sch. Librarians v. Baker*, No. 2316-CV05732 (Mo. Cir. Ct. Jackson Cnty. Mar. 25, 2024).

Defendant-Intervenors (hereafter "the State") filed their answer to Plaintiff-Respondents' petition on April 8, 2024. D1557.

On July 30, 2025, Plaintiff-Respondents filed their motion for summary judgment, D1647, along with suggestions in support thereof, D1648, and their statement of uncontroverted material facts (hereafter "Respondents' SUMF"), D1649. That same day, the State filed its motion for summary judgment, D1727, along with suggestions in support thereof, D1728, and its statement of uncontroverted material facts (hereafter "State's SUMF"), D1729. The Circuit Court heard argument on the cross-summary judgment motions on October 8, 2025.

On November 17, 2025, the Circuit Court granted Plaintiff-Respondents' motion for summary judgment on Counts I, II, and III. D1842. The Circuit Court declared

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§ 573.550 facially unconstitutional for violation of Article I, §§ 8 and 10 of the Missouri Constitution. *Id.* at pp. 4–5. The Circuit Court permanently enjoined all defendants from enforcing § 573.550's provisions. Correspondingly, the Circuit Court denied the State's motion for summary judgment.

This appeal follows.

POINTS RELIED ON

I. The Circuit Court erred in concluding that § 573.550 was unconstitutionally overbroad, because it misapplied the law, in that the overbreadth doctrine does not apply to the regulated exclusion of constitutionally unprotected speech under Article I, § 8 of the Missouri Constitution.

- *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).
- *Free Speech Coalition, Inc. v. Paxton*, 606 U.S. 461 (2025).
- *Penguin Random House, LLC v. Robbins*, 172 F.4th 581 (8th Cir. 2026).
- *State v. Simmer*, 772 S.W.2d 372 (Mo. banc 1989).

II. The Circuit Court erred in concluding that § 573.550 was unconstitutionally void for vagueness, because it misapplied the law, in that § 573.550 is not unconstitutionally vague.

- *City of Maryland Heights v. State*, 638 S.W.3d 895 (Mo. banc 2022).
- *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955 (Mo. banc 1999).
- *Free Speech Coalition, Inc. v. Paxton*, 606 U.S. 461 (2025).
- *Kinder v. Missouri Department of Corrections*, 43 S.W.3d 369 (Mo. App. W.D. 2001).

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III. The Circuit Court erred in permanently enjoining and declaring § 573.550 unconstitutional, because it misapplied the law, in that § 573.550 is subject to Missouri's severability doctrine and the Circuit Court must make every effort to construe a challenged statute as compliant with the Missouri Constitution.

- *Akin v. Director of Revenue*, 934 S.W.2d 295 (Mo. banc 1996).
- *Gurley v. Missouri Board of Private Investigator Examiners*, 361 S.W.3d 406 (Mo. banc 2012).
- *Planned Parenthood of Kansas. v. Nixon*, 220 S.W.3d 732 (Mo. banc 2007).
- Section 1.140, RSMo.

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STANDARD OF REVIEW

"Appellate review of the grant of summary judgment is *de novo*." *Kinnaman-Carson v. Westport Ins. Corp.*, 283 S.W.3d 761, 764 (Mo. banc 2009) (citing *Southers v. City of Farmington*, 263 S.W.3d 603, 608 (Mo. banc 2008)). "In reviewing the decision to grant summary judgment, this Court applies the same criteria as the trial court in determining whether summary judgment was proper." *Wilkinson v. Farmers Holding Cos.*, 732 S.W.3d 93, 96 (Mo. banc 2026) (quoting *Green v. Fotoohighiam*, 606 S.W.3d 113, 115 (Mo. banc 2020)). "Summary judgment is proper if the moving party establishes there is no genuine issue as to the material facts and the movant is entitled to judgment as a matter of law." *Id.* "The record below is reviewed in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record." *Id.* (quoting *Green*, 606 S.W.3d at 116).

Respondents asked the Circuit Court to facially enjoin and declare a lawfully passed state statute unconstitutional. "A statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009) (quoting *Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 368–69 (Mo. banc 2001)). "As such, the burden of proof rests with the challenging party to prove that a statute 'clearly and undoubtedly violates the constitution.'" *State v. Blankenship*, 415 S.W.3d 116, 120 (Mo. banc 2013) (quoting *State v. Young*, 362 S.W.3d 386, 390 (Mo. banc 2012)). This Court must "resolve all doubt in favor of [the challenged statute's] validity and may make every reasonable intendment to

sustain the constitutionality of the statute." *State v. Faruqi*, 344 S.W.3d 193, 199 (Mo. banc 2011) (internal citations and quotation marks omitted).

Respondents have characterized their challenge as "pre-enforcement" and "facial" in nature. D1829 at p. 20. "When bringing a facial challenge, 'the challenger must establish that *no set of circumstances exists* under which the [statute] would be valid.'" *E.N. v. Kehoe*, 726 S.W.3d 679, 686 (Mo. banc 2026) (emphasis added) (quoting *Donaldson v. Mo. State Bd. of Registration for the Healing Arts*, 615 S.W.3d 57, 66 (Mo. banc 2020)). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *Id.* (quoting *State v. Perry*, 275 S.W.3d 237, 243 (Mo. banc 2009)). "The result of a successful facial challenge would invalidate [the] law in its entirety." *Id.* (citing *State v. Collins*, 648 S.W.3d 711, 715 (Mo. banc 2022)).

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ARGUMENT

I. The Circuit Court erred in concluding that § 573.550 was unconstitutionally overbroad, because it misapplied the law, in that the overbreadth doctrine does not apply to the regulated exclusion of constitutionally unprotected speech under Article I, § 8 of the Missouri Constitution.

Section 573.550 is not overbroad. It is Respondents' burden to show otherwise. They must prove that § 573.550 "reaches a substantial amount of *constitutionally protected* conduct" when the law is balanced against its constitutional scope. *Bennett*, 542 S.W.3d at 398 (emphasis added) (quoting *Hoffman Estates*, 455 U.S. at 494). Since § 573.550 regulates only constitutionally *unprotected* obscenity for minors, *see Paxton*, 606 U.S. at 474 (restrictions of materials obscene for minors "trigger no heightened First Amendment scrutiny"), Respondents face an insurmountable hill to facially enjoin and invalidate a duly enacted Missouri statute. Therefore, because § 573.550 does not "make unlawful a substantial amount of constitutionally protected conduct," *Collins*, 648 S.W.3d at 715 (quoting *Pribble*, 285 S.W.3d at 316), its tailored proscription of "explicit sexual material," § 573.550, RSMo, falls outside the parameters of the constitutional overbreadth inquiry.

Unlike the Circuit Court, this Court should hesitate to deal out dramatic invalidations of state law on such shaky grounds. After all, "[i]nvalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'" *United States v. Williams*, 553 U.S. 285, 293 (2008) (quoting *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999)) (quotations omitted). Even entertaining that § 573.550 may regulate *some* protected speech (it does not), the statute still passes constitutional muster. The Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be

substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* at 292. "It is well recognized that courts will not invalidate a[] [statute] on its face 'merely because it is possible to conceive of a single impermissible application.'" *Bennett*, 542 S.W.3d at 398 (Mo. App. E.D. 2017) (quoting *City of Houston v. Hill*, 482 U.S. 451, 458 (1987)). Rather, "[a] law may be invalidated as overbroad" only "if a *substantial number of its application*s are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Gurley v. Mo. Bd. of Private Investigator Examiners*, 361 S.W.3d 406, 412 (Mo. banc 2012) (emphasis added) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)); *see also Diggs v. City of St. Louis*, 613 S.W.3d 858, 866 (Mo. App. E.D. 2020) ("A facial challenge to a statute will be successful only where the overbreadth is 'substantial.'").

As additional grounds, and independently, § 573.550 is not overbroad as to public schools because it purely regulates unprotected speech: government speech or, in the alternative, school-sponsored speech. Since § 573.550 regulates government speech—the exclusion of non-academically-relevant sexually explicit imagery from curricula, libraries, and other school environments—its prohibitions lay outside the scope of the overbreadth doctrine. *See PETA, Inc. v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005) ("With respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude."); *Little*, 138 F.4th at 852 ("[T]he Supreme Court has held that the speaker is the one who selects, compiles, and presents.").

In the alternative, recent legal authorities indicate that, if not government speech, § 573.550 regulates school-sponsored speech, requiring Respondents to show that the

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statute's regulatory ambit is not "reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *see also Penguin Random House*, 172 F.4th at 587. "'Expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school' constitute school-sponsored speech, over which a school can exercise editorial control, 'so long as [its] actions are reasonably related to legitimate pedagogical concerns.'" *Penguin Random House*, 172 F.4th at 587 (quoting *Hazelwood*, 484 U.S. at 271, 273). Since school libraries constitute part of the "school's curriculum," § 573.550 permissibly regulates this curriculum to ensure "age-appropriate materials" which advance "legitimate pedagogical concerns." *Id.* Section 573.550's narrowly drawn application to school officials, careful definition of covered materials, and broad savings clause reflect this objective. Such curricular regulation is not overbroad.

A. Section 573.550's restrictions do not reach a "substantial amount" of constitutionally protected conduct.

Section 573.550 is not overbroad because its restrictions do not reach a "substantial amount" of constitutionally protected conduct. *State v. Moore*, 90 S.W.3d 64, 66 (Mo. banc 2002) (quoting *Hill*, 482 U.S. at 459). Rather, § 573.550 is an entirely constitutional restriction on the provision of sexually explicit images to minors in a school setting. Its constitutionality rests on two grounds. First, § 573.550 regulates speech that is obscene *to minors*. Prior Missouri legislation and the concentration of minors in Missouri schools further substantiate that § 573.550 "may fairly be construed in a manner which limits its

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application to a 'core' of unprotected expression." *State v. Vaughn*, 366 S.W.3d 513, 518 (Mo. banc 2012) (quoting *Moore*, 90 S.W.3d at 67).

Second, the State may constitutionally prohibit the dissemination of sexually explicit material—material without any curricular or academic value—by school officials to students. All such content may be permissibly regulated as material obscene for children, or as Respondents themselves admit, is either subject to § 573.550's statutory exemptions or subject to already existing penal statutes. Contrary to Respondents' averments, there is no avalanche of banned books which exist outside these categories.

1. Section 573.550 prohibits only materials that are obscene for minors and therefore may constitutionally be regulated in elementary and secondary school environments.

"[O]bscenity is not within the area of constitutionally protected speech or press." *Simmer*, 772 S.W.2d at 373 (Mo. banc 1989) (citing *Miller v. California*, 413 U.S. 15, 23 (1973); *Roth v. United States*, 354 U.S. 476, 485 (1957)). "[A]s early as 1896," this Court held that "obscene publications are outside the scope of constitutionally protected speech." *Id.* (citing *State v. Van Wye*, 37 S.W. 938, 939 (1896)). To that end, this Court has repeatedly endorsed "[t]he constitutionality of statutes prohibiting the sale or dissemination of obscene materials." *Id.* In particular, the bar for obscenity and the concomitant bar for constitutionality for obscenity-regulating statutes are lower when minors may be readily exposed to sexually explicit content. *See Paxton*, 606 U.S. at 473 ("[O]ur precedents recognize that States can impose greater limits on children's access to sexually explicit speech than they can on adults' access."). As the U.S. Supreme Court has explained, "First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest

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of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986). Therefore, the same sexually explicit materials, even if "not obscene for adults," may, by virtue of their sexual nature, be deemed obscene to minors "on the basis of [their prurient] appeal to minors." *Ginsberg v. New York*, 390 U.S. 629, 634, 637–39, 643 (1968).

Under *Ginsberg*, since "obscenity is not protected expression," a state statute prohibiting minors from purchasing material obscene to those minors "requires only that [the Court] be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." 390 U.S. at 641; *see also State v. Harrison*, 996 S.W.2d 704, 708 (Mo. App. W.D. 1999) (Missouri applies "adult community standards with respect to what is suitable for minors"). Thus, Respondents' task is to prove that "the challenged law is [*not*] rationally related to some legitimate end." *Mo. Nat'l Educ. Ass'n v. Mo. Dep't of Lab. & Indus. Rels.*, 623 S.W.3d 585, 592 (Mo. banc 2021) (quoting *Amick v. Dir. of Revenue*, 428 S.W.3d 638, 640 (Mo. banc 2014)).

Specifically, Missouri "may prevent minors from accessing works that (a) taken as a whole, and under contemporary community standards, appeal to the prurient interest of *minors*; (b) depict or describe specifically defined sexual conduct in a way that is patently offensive *for minors*; and (c) taken as a whole, lack serious literary, artistic, political, or scientific value *for minors*." *Paxton*, 606 U.S. at 474 (emphasis in original) (citing *Miller*, 413 U.S. at 24; *Ginsberg*, 390 U.S. at 635, 638). "Restrictions of this kind trigger no heightened First Amendment scrutiny and are subject only to rational-basis review, even

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though they encompass speech that is "not obscene for adults." *Id.* (quoting *Ginsberg*, 390 U.S. at 634, 639).

Since the "First Amendment permits States to prohibit minors from accessing speech that is obscene to them, it likewise permits States to employ the ordinary and appropriate means of enforcing such a prohibition." *Id.* at 479. The State's police power to regulate schools is one such "ordinary and appropriate means." *Id.* In fact, § 573.550 does not even regulate students nor prohibit their consumption of such obscene materials but rather prevents teachers and school officials from disseminating obscene materials to students. It is narrowly drawn and targeted at already-regulated parties acting in their official capacity—not private citizens. Moreover, § 573.550 regulates works which classically appeal to the "prurient interest[s] *of minors*," *Paxton*, 606 U.S. at 474, images of human masturbation, sexual intercourse and deviate sexual intercourse, direct physical stimulation of genitals, sadomasochistic abuse, and depictions of postpubertal human genitals, § 573.550.3(1), RSMo.

And § 573.550 specifically defines such regulated sexually explicit materials. Each of its defined, discrete categories fall under the statutory prohibitions of plainly obscene to minors when applying "adult community standards with respect to what is suitable for minors." *Harrison*, 996 S.W.2d at 708. Missouri courts have already characterized exactly these categories as constituting "unadulterated and unmitigated smut" that is obscene for children. *State v. Cooley*, 766 S.W.2d 133, 135 (Mo. App. S.D. 1989); *see also State ex rel. Martin v. XLNT Corp.*, 525 S.W.2d 616, 619 (Mo. App. K.C. 1975) (calling "patently offensive" depictions of "ultimate sexual acts, normal or perverted, actual or simulated"

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and "of masturbation, excretory functions, and lewd exhibition of the genitals"). Because § 573.550's narrow band of prohibited conduct—or at least "a substantial amount" of the conduct—is not "constitutionally protected conduct," § 573.550 is not overbroad.

Section 573.550 only regulates materials which "as a whole, lack serious literary, artistic, political, or scientific value for minors." *Paxton*, 606 U.S. at 474. It excludes "works of art, when taken as a whole, that have serious artistic significance, or works of anthropological significance, or materials used in science courses, including but not limited to materials used in biology, anatomy, physiology, and sexual education classes" from its coverage. § 573.550.3(1), RSMo. Contrary to Respondents' protestations, this savings clause's wide exclusion directly mirrors the *Miller*/*Ginsberg* exclusion.

Respondents claim that "Section 573.550's saving clause is much narrower," D1648 at pp. 21–22, trying to artificially compress the exclusion to escape the *Miller*/*Ginsberg* framework. Specifically, they complain that "§ 573.550's definition of 'explicit sexual material' is broader than § 573.040's definition of obscene to minors." D1648 at p.21. Respondents' characterization is flawed for two reasons.

First, Missouri has flexibility to craft more stringent restrictions on "sexually explicit speech" than *Miller* exposits because "States have a specific interest in protecting children from sexually explicit speech." *Paxton*, 606 U.S. at 473. Contrary to Respondents' belief, the U.S. Supreme Court has held that Missouri's police power to protect children is not limited to the precise facts discussed in *Miller*. *See id.*

Second, and in any case, § 573.550's saving clause is almost semantically identical to the *Miller* language, despite Respondents' gambit to find nonexistent daylight in

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between. A quick comparison between § 573.010(14)(c), defining "[p]ornographic for minors," which Respondents concede is constitutionally compliant, *see* D1648 at pp. 21–22, and § 573.550's savings clause illustrates this. Section 573.010(14) features the following savings clause: "The material or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." § 573.010(14)(c), RSMo. Meanwhile, § 573.550's savings clause reads: "that works of art, when taken as a whole, that have serious artistic significance, or works of anthropological significance, or materials used in science courses, including but not limited to materials used in biology, anatomy, physiology, and sexual education classes . . . ." Breaking down § 573.010(14)(c) into constituent parts, it excludes from statutory prohibition four categories: (1) materials or performances of serious literary value for minors; (2) materials or performances of serious artistic value for minors; (3) materials or performances of serious political value for minors; and (4) materials or performances of serious scientific value for minors.

Section 573.550 has three wide exception categories: (1) "works . . . , when taken as a whole, that have serious artistic significance"; (2) "works of anthropological significance"; and (3) "materials used in science courses." § 573.550.3(1), RSMo. The first category matches the first two *Miller/Ginsberg* categories. No ordinary person would contest that "literary value" can be subsumed within "artistic value." The *arts* is a catchall category. And this Court will "construe any doubts regarding a statute in favor of its constitutionality." *McEuen ex rel. McEuen v. Mo. State Bd. of Educ.*, 120 S.W.3d 207, 209 (Mo. banc 2003) (citing *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984)).

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Second, "works of anthropological significance" is indeed a broader category than its corollaries under the *Miller*/*Ginsberg* inquiry. *Compare* § 573.550, RSMo, *with* D1648 at pp. 37–39. Anthropology is defined as the science of human beings, "the study of human beings and their ancestors through time and space and in relation to physical character, environmental and social relations, and culture."[4] This is a *very* broad category that would sweep in "political" and many "scientific works." Furthermore, § 573.550 does not include the *Miller*/*Ginsberg* narrowing caveats that such works be taken "as a whole" nor that they be of value for minors. This creates a more capacious exclusion to § 573.550's prohibitory coverage. Finally, "materials used in science courses" not only captures "materials . . . of serious scientific value for minors" but sweeps even more broadly. Not only may this include materials that may be of scientific value for *adults*, but such materials merely have to be relevant to curricula, rather than be of "serious scientific value." Taken together, a plain reading of § 573.550 against *Miller*/*Ginsberg* shows semantic equivalence, even though the General Assembly was not required to include such a broad savings clause.

Missouri's preexisting statutes also reinforce § 573.550's constitutionality. Contrary to Respondents' assertions, *see* Tr. 143:14–144:7, § 573.550's overlap with preexisting, constitutional statutes protecting minors from sexually explicit materials bolsters, rather than undermines, its constitutionality. Just because Missouri legislated protections before does not divest the General Assembly from legislating further protections. Moreover, that reality proves that adopting Respondents' theory would

[4] "Anthropology," *Merriam-Webster.com Dictionary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/anthropology (last accessed May 18, 2026).

jeopardize a host of other statutes. Their failure to address such implications reveals that they have not grappled with "the blast radius of their legal theory." *Moore v. United States*, 602 U.S. 572, 592 (2024).

First, Missouri's penal laws—such as §§ 573.020 (prohibiting *inter alia* "possess[ing] with the purpose to wholesale promote any obscene material"), 573.030 (prohibiting *inter alia* "possess[ing] with the purpose to promote . . . any performance that is pornographic for minors via computer. . . ."), and 573.040 (creating the "offense of furnishing pornographic material to minors"), all reinforce the State's legislative prerogative in this area. To the extent such dissemination occurs in government-controlled schools, the State wields enhanced regulatory authority. *See State ex. inf. Eagleton ex rel. Reorganized Sch. Dist. R-1 of Miller Cnty. v. Van Landuyt*, 359 S.W.2d 773, 777–78 (Mo. banc 1962) ("The establishment and maintenance of a public school system is primarily a function of the state to be exercised by the legislature, whose powers are not to be fettered if exercised within the limits of the Constitution."); *State ex rel. St. Louis Union Trust Co. v. Ferriss*, 304 S.W.2d 896, 902 (Mo. banc 1957) (averring that the General Assembly has "full power in relation to the 'maintenance, support or administration'" of Missouri's "system of free public education" (citations omitted)).

Second, Missouri permits a belts-and-suspenders approach to legislation. *See State v. Bouse*, 150 S.W.3d 326, 335 (Mo. App. W.D. 2004) ("The state may proceed under any applicable criminal statute when there is more than one that prohibits the defendant's conduct."). It is fully within the powers of the Missouri General Assembly to enact

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different statutory regimes to protect children and students. Just because it has legislated in this domain before, does not render subsequent overlapping legislation overbroad.

Nor does this Court's analysis change because some seniors in Missouri high schools may be eighteen years old. Section 573.550 still does not reach a "substantial amount" of protected speech. *First*, since § 573.550 applies to Missouri elementary and middle schools, the law plainly encompasses a swath of conduct involving *only* minors. *Second*, even when applied to conduct in high schools, § 573.550 is still not overbroad. High school libraries are regularly open to children as young as thirteen (and sometimes younger). Indeed, most students in Missouri high schools are minors ranging in age from thirteen to seventeen years old. As such, inclusion of materials obscene for minors in school libraries or other areas of high schools would readily expose these minors to sexually explicit content obscene for minors. In fact, minors would be the significant majority of students exposed to the explicit content.

Moreover, § 573.550's restrictions simply recognize that a school setting demands a high concentration of children that cannot reasonably be separated between those eighteen years old and those thirteen through seventeen years old. Indeed, the language's scope tracks other Missouri statutes protecting children from obscene material by not only prohibiting *providing* such material to minors, but also by acting in "reckless disregard of the *likelihood*" that a person is a minor. § 573.040.1, RSMo. The Supreme Court has, likewise, recognized that states may permissibly regulate or "prohibit[] dissemination or exhibition of obscene material when the mode of dissemination carries with it *a significant*

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danger of . . . exposure to juveniles." *New York v. Ferber*, 458 U.S. 747, 754–55 (1982) (emphasis added).

Section 573.550 takes a parallel approach, restricting the provision of certain sexually explicit images only to students in the setting of elementary and secondary schools—settings where there is certainly at least a "significant" danger that minors would be exposed to any materials. Finally, it cannot be said that a restriction on providing sexually explicit images obscene to children to elementary or secondary school students in a school setting contains a "substantial number" of impermissible applications "judged in relation to the statute's plainly legitimate sweep." *Gurley*, 361 S.W.3d at 412.[5] Any one of these reasons forecloses Respondents' overbreadth claim.

2. The Missouri Constitution's free speech guarantee does not prohibit the State from regulating sexually explicit material in the school setting.

Section 573.550 does not prohibit speech that is already *not* obscene for minors. Alone, this defeats Respondents' overbreadth argument. In fact, the bar here is even lower. Claims of constitutionally protected speech "must be 'applied in light of the special characteristics of the school environment.'" *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*

[5] This is especially the case given that Respondents have each professed an absolute inability to identify *which individual elementary, middle, or high schools* any particular books were removed from in a school district. Rather, Respondents have represented that they are *only* able to identify particular school districts each book was pulled from, with no further detail. State SUMF ¶ 57. As with any constitutional challenge, "the burden of proof rests with [Respondents]" to prove that § 573.550 "clearly and undoubtedly violates the constitution." *Blankenship*, 415 S.W.3d at 120 (internal quotation marks omitted). Respondents' inability to establish which elementary, middle, or high schools actually even removed books is further fatal to their overbreadth claims.

v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)). Because of "society's transcendent interest in protecting the welfare of children," *Ginsberg*, 390 U.S. at 640, the State may constitutionally exclude "sexually explicit, indecent, or lewd speech" in school settings, even if it does not reach the level of obscenity, *Fraser*, 478 U.S. at 684.

First Amendment "jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience *may* include children." *Fraser*, 478 U.S. at 684 (emphasis added). Students in Missouri's schools—the relevant "audience" under § 573.550—will consist almost entirely of children. The State may "determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech." *Id*. at 683.

Moreover, school library curation advances legitimate state goals. *See Fraser*, 478 U.S. at 684 ("[A]ll Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar."); *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 114 F.4th 660, 670 (8th Cir. 2024) ("[T]he purpose of public school libraries is to advance the school curriculum—that is, to facilitate the pedagogical mission of the school, which may involve some limitation of expression.").

Consequently, Missouri may constitutionally prohibit certain sexually explicit images in schools in response to "the obvious concern" of the State "to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Fraser*, 478 U.S. at 684. Section 573.550 does just that. Even if § 573.550's restrictions were not already otherwise permissible as a constitutional restriction on

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material obscene for minors (and they are), the unique nature of the school setting and the State's interest in the school setting independently render the statute constitutional.

While Respondents must show that "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," *Gurley*, 361 S.W.3d at 412, § 573.550's language, narrowly drawn to cover the most graphic sexual images, is a permissible restriction on the provision to minors of material that is obscene for minors, *Ginsberg*, 390 U.S. at 641; *Fraser*, 478 U.S. at 684; *Harrison*, 996 S.W.2d at 708. Additionally, to the extent this Court concludes that there are any unconstitutional applications at all (there are not), § 573.550's permissible applications easily outweigh any impermissible applications for the purpose of an overbreadth analysis. *Gurley*, 361 S.W.3d at 412*; see also Ferber*, 458 U.S. at 773 (finding a statute is not overbroad under the First Amendment where the statute's "legitimate reach dwarfs its arguably impermissible applications."); *Diggs*, 613 S.W.3d at 866. Respondents cannot show that § 573.550 is facially overbroad.

B. Section 573.550 regulates government speech not covered by Article I, § 8 of the Missouri Constitution.

The government speech doctrine recognizes that the First Amendment's Free Speech Clause "restricts government regulation of private speech" but "does not regulate government speech." *Summum*, 555 U.S. at 467. "When the government wishes to state an opinion, to speak for the community, to formulate policies"—such as education—"or to implement programs, it naturally chooses what to say and what not to say." *Shurtleff v. City of Boston*, 596 U.S. 243, 251 (2022). Courts will not force the government to subsidize

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messages the government disagrees with. Rather, "when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015). That includes when public schools prevent officials from disseminating obscene, prurient materials from school environments that would undermine the State's educational policy objectives.

1. Curation of books for a public school library is government speech.

"Like a private person, a government may express itself by crafting and presenting a collection of third-party speech." *Little*, 138 F.4th at 852–53. Hence, other courts have recognized that when the government regulates the curation of public libraries, *government* speech is at issue. *See Walls v. Sanders*, 144 F.4th 995, 1002 (8th Cir. 2025) ("Though a listener's right to receive information means the government cannot stop a willing private speaker from disseminating his message, that right cannot be used to require the government to provide a message it no longer is willing to say." (citing *Little*, 138 F.4th at 842–47)).

Section 573.550 regulates the conduct of school officials acting in their "official capacity." § 573.550, RSMo. Therefore, in public school, it regulates government officials acting—or speaking—in their "official capacity." Such government speech falls outside the bounds of the overbreadth doctrine. "The Free Speech Clause restricts government regulation of private speech; *it does not regulate government speech*." *Summum*, 555 U.S. at 467 (2009) (emphasis added); *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment) ("It is the very business of

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government to favor and disfavor points of view."). Thus, at least so far as § 573.550 applies to *public* school libraries, it regulates government speech and is thus constitutional. *See, e.g.*, *Summum*, 555 U.S. at 469.

Throughout their arguments below, Respondents imported the private speech doctrine when the government speech doctrine actually applied. Indeed, it is the government property itself—library books— and the curation thereof which is the sole type of material Respondents identify as subject to § 573.550 for the purpose of this lawsuit. *See* State SUMF ¶ 107 ("The only members of either Plaintiffs who MASL and MLA assert self-censored in response to § 573.550 are members who work in public school libraries or public school districts."). Respondents' assertions that the law is reviewed under the *private* speech doctrine are mistaken. *See* D1648 at p. 60*, e.g., Gittens*, 414 F.3d at 28 ("[T]he government speaks through its selection of which books to put on the shelves and which books to exclude.").

That error includes their mistaken emphasis on the overbreadth doctrine. "[T]he First Amendment overbreadth doctrine . . . permits those against whom a statute may constitutionally be applied to challenge its unconstitutional effect on protected speech by others." *State v. Helgoth*, 691 S.W.2d 281, 284 (Mo. banc 1985). Here, overbreadth is inapposite because government speech is not "protected expression" under the First Amendment. *Bennett*, 542 S.W.3d at 397–98. Precedent shows that overbreadth concerns concern threatened government chilling of *private* speech. In fact, the Supreme Court has restricted the applicability of the overbreadth doctrine in numerous contexts. *See e.g.*, *Hoffman Estates*, 455 U.S. at 497 (holding that "the overbreadth doctrine does not apply to

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commercial speech"); *Jeffrey*, 400 S.W.3d at 310–11 ("The Supreme Court has recognized that the overbreadth doctrine generally is not applicable when a statute regulates only conduct. . . ." (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973))).

Similarly, § 573.550 is outside the scope of the overbreadth doctrine. "Under the modern government-speech doctrine, government speech (or the government's decision not to speak) does not implicate the Free Speech Clause." *Walls v. Sanders*, 760 F. Supp. 3d 766, 779 (E.D. Ark. 2024).

2. The government speech doctrine permits § 573.550 to exclude lawfully obscene materials from public school libraries.

Governments—which include public school districts—exercise "broad discretion" over what curated materials are available in school libraries. *Am. Library Ass'n*, 539 U.S. at 204 (plurality); *see Summum*, 555 U.S. at 470–73. For example, the Fifth Circuit resolved an analogous constitutional challenge to a government library anti-obscenity directive in Texas, upholding such curatorial regulation. *Little*, 138 F.4th 834. Refining and distilling the holdings of *Moody* and *Summum*, the Fifth Circuit held that the Government's speech does not "lay in the words of the books themselves"; rather a school library oversees a "curated compilation." *Little*, 138 F.4th at 857. "It is one thing to tell the *government* it cannot stop *you* from receiving a book. The First Amendment protects your right to do that." *Id.* at 845. "It is another thing for *you* to tell the *government* which books it must keep in the library. The First Amendment does not give you the right to demand that." *Id.* As the Fifth Circuit aptly stated, "the library speaks by selecting some books over others and presenting that collection to the public—just as a museum does when

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it curates a collection of various schools of art. No one thinks the museum is contradicting itself by featuring both Rembrandt and Andy Warhol." *Id.* at 837–38. Missouri schools—like the Llano County library—may remove books, a "decision [that] is not subject to challenge under the [Federal] Free Speech Clause." *Id.* at 865. The origin of one curatorial directive from the State does not alter that fact.

C. Section 573.550 regulates school-sponsored speech where exclusion of sexually explicit materials is "reasonably related to legitimate pedagogical concerns."

Even if this Court holds that § 573.550 does not regulate quintessentially government speech (it does) in public schools, recent federal decisions indicate that § 573.550—at most—regulates school-sponsored speech. *See Penguin Random House, LLC v. Robbins*, 172 F.4th 581 (8th Cir. 2026). The applicability of overbreadth is far narrower here: "Only when a decision to censor a school-sponsored 'vehicle of student expression has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention.'" *Penguin Random House*, 172 F.4th at 588 (quoting *Hazelwood*, 484 U.S. at 273). *Penguin Random House* strongly favors reversing the Circuit Court's erroneous overbreadth holding. Under the Supreme Court's holding in *Hazelwood*, the *Penguin Random House* court, considering an analogous restriction of "visual depictions of a sex act" from Iowa libraries, rejected challengers' First Amendment claim. *Id.* at 585. The court held that "[e]ven under a standard less strict than government speech, the selection of books in a school library implicates school-sponsored speech, and the Iowa legislature's action relating to the curation of school libraries is reasonably related to legitimate pedagogical concerns." *Id.* at 588.

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The facts of *Penguin Random House* also track closely to § 573.550. The *Penguin Random House* court considered Iowa legislation—Senate File 496—which requires the removal of books containing "'descriptions or visual depictions of a sex act' from Iowa public school libraries and impose penalties" on noncompliant individuals. *Id.* at 585–86. Senate File 496 sweeps more broadly than § 573.550; the latter only prohibits imagery and visual representations and contains carefully drawn exceptions for academically relevant materials. Furthermore, § 573.550 does not regulate the speech of students themselves. In fact, it explicitly *excludes* "student[s] enrolled in the elementary or secondary school." § 573.550.3(2), RSMo.

"Activities that may be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, are those that 'are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.'" *Penguin Random House*, 172 F.4th at 587 (quoting *Hazelwood*, 484 U.S. at 271). "[T]he purposes of a school library are to enhance education, supplement classroom learning, and facilitate the development of students' knowledge and skills. . . . Given these aspects, under *Hazelwood*, a school library bears the imprimatur of the school and is properly characterized as part of the school's curriculum." *Id.*

The *Penguin Random House* court made this clear. There, Iowa "[l]ibrarians and educators do not have to import their view or understanding of sex act, as this term is expressly defined under Iowa law." *Id.* at 587–88. The same is true in Missouri. Section 573.550 and other Missouri laws clearly establish the meaning of "explicit sexual material." *See* § 573.550(3)(1); § 566.200(14) (defining "sexual conduct"); § 573.110.1(8)

(defining "sexual act"); § 589.404(10) (defining "sexual contact"); § 573.110.1(5) (defining "intimate parts"); § 573.010(10) (defining "nudity" and "state of nudity"); § 566.093 (establishing the offense of sexual misconduct in the first degree), RSMo.

Similarly, "[t]he library restrictions are neither amorphous nor unreasonable." *Penguin Random House*, 172 F.4th at 588. Schools have a "legitimate pedagogical interest in prohibiting speech involving sexual content." *Penguin Random House*, 172 F.4th at 588; *see also Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.) ("[A] school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern."). That includes blocking prurient materials on school computers, and it includes the sweep of Iowa's Senate File 496 and Missouri's § 573.550. "[A]ctions 'reasonably related to legitimate pedagogical concerns' do not run afoul of the First Amendment." *Penguin Random House*, 172 F.4th at 588 (quoting *Hazelwood*, 484 U.S. at 273).

* * *

For all these reasons, this Court should reverse the Circuit Court's judgment as to overbreadth and remand for further proceedings.

II. The Circuit Court erred in concluding that § 573.550 was unconstitutionally void for vagueness, because it misapplied the law, in that § 573.550 is not unconstitutionally vague.

Respondents' void-for-vagueness challenge easily fails.

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First and foremost, Respondents' vagueness claims are entirely hypothetical—a fact that dooms their facial challenge. "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *City of Maryland Heights v. State*, 638 S.W.3d 895, 899–900 (Mo. banc 2022) (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)). After all, the General Assembly need not write statutes with such precision as to anticipate *any* possible hypothetical "situation." "[N]either absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague." *Id.* at 899 (Mo. banc 2022) (alteration in original) (quoting *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999)). Here, Respondents provided *zero* evidence that § 573.550 has ever been enforced, which makes facial invalidation all but impossible. *See* State SUMF ¶¶ 33–45.

Second, and in any case, § 573.550 is written in clear terms which "ordinary people can understand what conduct is prohibited." *State v. Schroeder*, 330 S.W.3d 468, 475 (Mo. banc 2011). It defines terms or uses terms which have definition in existing Missouri law, providing "a sufficiently definite warning as to the proscribed conduct." *Pribble*, 285 S.W.3d at 315; *Faruqi*, 344 S.W.3d at 200.

Overall, this Court will not aim to inject vagueness into statutory language where none exists. It is not the General Assembly's task to play defense whenever it enacts a statute, but rather Respondents' burden to annul Missouri legislation. To that end, this Court's analysis is holistic, looking at the statute "in its entirety" rather than consider only individual words. *Pribble*, 285 S.W.3d at 315. After all, "[i]t is well established that 'if

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the law is susceptible of any reasonable and practical construction which will support it, it will be held valid, and . . . the courts must endeavor, by every rule of construction, to give it effect.'" *Harjoe v. Herz Fin.*, 108 S.W.3d 653, 655 (Mo. banc 2003) (omission in original) (quoting *State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc 1991)); *see also Pribble*, 285 S.W.3d at 315 (courts must "give the law effect if it is amenable to a reasonable and practical construction").

A. Respondents' vagueness claims rest entirely on inapposite hypothetical grounds.

As a threshold impediment to Respondents' vagueness claim, Missouri's vagueness doctrine does not sanction "the hypothetical approach . . . for reviewing whether a regulation is void for vagueness." *Cocktail Fortune*, 994 S.W.2d at 958; *see also State v. Mahan*, 971 S.W.2d 307, 312 (Mo. banc 1998) (though "[i]t may be possible to hypothesize conduct that would not clearly fall either in or out of the statutory prohibition . . . on a challenge that a statute is unconstitutionally vague . . . the language is to be evaluated by applying it to the facts at hand"). Bereft of any actual enforcement evidence, *see* State SUMF ¶¶ 33–37 (Respondents cannot identify any individuals actually prosecuted under § 573.550), Respondents resort to exactly this type of impermissible hypothetical approach, D1553 ¶ 37 (alleging that members and others "may be subject to the law's penalties"); ¶ 40 (alleging that language in § 573.550 "could subject" certain members to criminal prosecution); ¶ 104 (alleging that certain members may "face the risk" of prosecution). "Could" and "may" are telling clues that Respondents rely entirely on

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"hypothetical applications or situations not at issue." *State v. Conner*, 583 S.W.3d 102, 113–14 (Mo. App. E.D. 2019).

This Court has abjured such hypothetical approach in similar cases. In *Cocktail Fortune*, this Court observed that "[a]lthough it may be possible to hypothesize conduct where it is unclear that the conduct falls under the regulatory prohibition against 'simulated oral copulation,' the hypothetical approach is not the appropriate standard for reviewing whether a regulation is void for vagueness." 994 S.W.2d at 958. Rather, this Court looked solely to the regulation's enforcement in the present, based on acts which this Court concluded "leave no doubt that Cocktail's dancers performed simulated acts of 'oral copulation.'" *Id.* at 959; *see also Brooks v. State*, 128 S.W.3d 844, 851 (Mo. banc 2004) (noting that Plaintiffs' vagueness challenge "merit[s] little attention" because the plaintiffs' "sole support for their argument . . . consists of nothing more than a series of far-fetched hypotheticals").

B. Section 573.550 gives "fair and reasonable" notice.

Section 573.550 gives "fair and reasonable" notice to citizens, and, in particular, the covered class of school officials. First, § 573.550 restricts its coverage to actions taken in an "official capacity." Second, § 573.550 provides a detailed list of types of covered materials so that "ordinary people can understand what conduct is prohibited." *Schroeder*, 330 S.W.3d at 475. Third, § 573.550 features a scienter requirement, a "*mens rea* requirement" which "further blunts any notice concern." *Skilling v. United States*, 561 U.S. 358, 412 (2010).

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1. Section 573.550's limitation to actions taken in an "official capacity" is not unconstitutionally vague.

Despite Respondents' efforts to inject ambiguity, § 573.550's limitation in coverage to activities done in an "official capacity," § 573.550.1, is pellucid and easily understood. "Official capacity" is not some neologism, but a commonly used phrase across Missouri and U.S. law. Where the terms of a statute "have a settled common-law meaning and are words of general and common usage about which there is no great dispute as to meaning," use of the terms is not void for vagueness. *State v. Brown*, 660 S.W.2d 694, 698 (Mo. banc 1983). Such is the case for the language of § 573.550.

The plain and ordinary meaning of "official capacity," and the limitation on the scope of activities the use of the term imposes, has long been evident from its consistent definition in Missouri judicial opinions. *See Kinder v. Mo. Dep't of Corrections*, 43 S.W.3d 369, 373 (Mo. App. W.D. 2001) (defining "official capacity" as a term limiting the frame of reference to only when an individual "is acting within the scope of what he or she is employed to do rather than being engaged in a personal frolic").

This Court has repeatedly used the phrase "official capacity" in the same manner as the Western District in *Kinder*—without any vagueness worries. *See, e.g.*, *Allsberry v. Flynn*, 628 S.W.3d 392, 396 (Mo. banc 2021) (discussing "people who . . . act in an official capacity for the court"); *Smith v. State*, 152 S.W.3d 275, 277 (Mo. banc 2005) (affirming a declaratory action related to parties "named as defendants in lawsuits arising out of actions taken in their official capacity."); *State ex rel. Raack v. Kohn*, 720 S.W.2d 941, 944 (Mo. banc 1986) (finding "no precedent for the assessment of attorney's fees and costs

against a judge acting in his official capacity."). In 2025, this Court assessed whether sovereign immunity applied to claims against public officials "in their official capacities," without needing to provide a more specific definition. *Ramirez v. Mo. Prosecuting Att'ys*, 694 S.W.3d 432, 435–36 (Mo. banc 2024).

The use of "official capacity" in the school context is also common. *See, e.g.*, *McCutchen v. Windsor*, 55 Mo. 149, 151 (Mo. 1874) (discussing school official defendants "acting in an official capacity"); *In re Thomas*, 926 S.W.2d 163, 165 (Mo. App. E.D. 1996) (discussing immoral conduct and a teacher "acting in her official capacity"); *Franklin v. Harris*, 762 S.W.2d 847, 849 (Mo. App. W.D. 1989) (discussing school district officials "acting in their official capacity"). Bizarrely, Respondents read "official capacity" to "regulate the conduct of 'person[s] affiliated with a public or private elementary or secondary school in an official capacity' even when the prohibited conduct of those persons is private and off school grounds." D1648 at pp. 20–21, 60–61. They argue that the phrase is limitless and "modifies the *class of persons* to whom the statute applies; it does not modify the circumstances under which the *prohibited act* . . . must occur." *Id.* at p. 60 (emphasis original).

Beyond this Court's command to read any perceived statutory ambiguity in harmony with the Constitution, statutory interpretation tools also bolster § 573.550's clarity—and the dearth of vagueness in "official capacity." As a matter of presumption, "the legislature 1) is aware of existing law when passing a statute, 2) intend[s] all words used to have meaning, and 3) does not include unnecessary or superfluous language." *State ex rel. Swoboda v. Mo. Comm'n on Human Rts.*, 651 S.W.3d 800, 806 (Mo. banc 2022)

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(citations omitted). In using the term "official capacity," the legislature is presumed to be aware of how the term has been regularly defined and applied by Missouri courts for the several decades prior, as addressed *supra*. The General Assembly is also presumed to have intended that its use of the term "official capacity" in § 573.550 holds specific use and effect (rather than using the term as superfluous language). Here, that intent is clearly to act as a limiting modifier to the term "person affiliated with a public or private elementary or secondary school."

Respondents' strained, alternative reading makes little sense. Under Respondents' view, a "guest speaker," for example, joins a permanent class—as would a "law enforcement officer" temporarily seconded as a school resources officer. Consequently, any connection to a school whatsoever would permanently attach private individuals to the threat of criminal liability for private actions for the rest of time. Additionally, their reading would render the enumeration of the specific individuals under § 573.550 (*e.g.*, student teacher, coach, school district official), superfluous because any "affiliated" person in "an official capacity" would already include these individuals. Instead, reading "official capacity" to delineate *conduct* avoids surplusage, and avoids a statutory construction "that [is] unreasonable or would lead to absurd results." *State ex rel. Dep't of Health and Senior Servs. v. Slusher*, 638 S.W.3d 496, 500 (Mo. banc 2022). Here, "official capacity" must be presumed to do work and its work undercuts Respondents' argument. "There is no reason to strain the limits of common parlance or legal jargon" when interpreting § 573.550. *State v. Foster*, 838 S.W.2d 60, 64 (Mo. App. E.D. 1992).

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2. Section 573.550's category of covered materials is not unconstitutionally vague.

Section 573.550 plainly enumerates the categories of covered materials which are barred from dissemination by school officials to students. Despite this, Respondents believe that § 573.550 "fails to provide ordinary people, including [Respondents], with fair notice" of "what materials . . . are covered by § 573.550." D1553 ¶¶ 105, 108. Their belief is misplaced.

Section 573.550 clearly enumerates the types of sexually explicit materials it covers:

> A person commits the offense of providing explicit sexual material to a student if such person is affiliated with a public or private elementary or secondary school in an official capacity and, knowing of its content and character, such person provides, assigns, supplies, distributes, loans, or coerces acceptance of or the approval of the providing of explicit sexual material to a student or possesses with the purpose of providing, assigning, supplying, distributing, loaning, or coercing acceptance of or the approval of the providing of explicit sexual material to a student.

§ 573.550.1, RSMo. The term "explicit sexual material," in turn, is defined in the statute:

> [A]ny pictorial, three-dimensional, or visual depiction, including any photography, film, video, picture, or computer-generated image, showing human masturbation, deviate sexual intercourse as defined in section 566.010, sexual intercourse, direct physical stimulation of genitals, sadomasochistic abuse, or emphasizing the depiction of postpubertal human genitals; provided, however, that works of art, when taken as a whole, that have serious artistic significance, or works of anthropological significance, or materials used in science courses, including but not limited to materials used in biology, anatomy, physiology, and sexual education classes shall not be deemed to be within the foregoing definition.

§ 573.550.3(1), RSMo. The Eighth Circuit has upheld exactly this type of definition as shielded from First Amendment challenge. *See Penguin Random House*, 172 F.4th at 587–88.

Section 573.550 prohibits, with certain enumerated exceptions, providing images depicting any of six categories of sexually explicit material to students while in a school setting. These categories cover images showing: (1) "human masturbation"; (2) "deviate sexual intercourse as defined in section 566.010"; (3) "sexual intercourse"; (4) "direct physical stimulation of genitals"; (5) "sadomasochistic abuse"; or (6) images depicting "postpubertal human genitals."

Each of these terms has a clear and ordinary meaning commonly understood by a reasonable person. Three of these terms have been expressly defined by the legislature as they are used in the statute, either directly defined in § 573.550 or provided in the definitions section of Chapter 573. *See* § 573.550.3(1), RSMo (defining "deviate sexual intercourse" in the same manner "as defined in section 566.010"); § 566.010(3), RSMo (defining "deviate sexual intercourse" as "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the penis, female genitalia, or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim"); § 573.010(18), RSMo (defining "sadomasochistic abuse," for the purpose of Chapter 573, as "flagellation or torture by or upon a person as an act of sexual stimulation or gratification"); § 573.010(21)(a), RSMo (defining "sexual intercourse" as "including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex"). As such, none of these terms can be said to be unconstitutionally vague.

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Other terms used in § 573.550, including "masturbation" and references to the stimulation or depiction of human genitals, have plain and ordinary meanings and are consistently referenced in Missouri statutes in a manner commonly understood by reasonable people without the need for further definition. *See, e.g.*, § 566.200(14) (defining "sexual conduct" as including "sexual intercourse," "deviate sexual intercourse," and "actual or simulated acts of human masturbation"); § 573.110(8) (defining "sexual act" as "sexual penetration, masturbation, or sexual activity"); § 589.404(10) (defining "sexual contact" as including "any touching of another person with the genitals or any touching of the genitals or anus of another person . . . for the purpose of terrorizing the victim"); § 573.110(5) (defining "intimate parts" as including, among other things, "the fully unclothed, partially unclothed, or transparently clothed genitals, pubic area, or anus"); § 573.010(10) (defining "nudity" and "state of nudity" as including "the showing of the human genitals"); § 566.093, RSMo (establishing the offense of sexual misconduct in the first degree if a person, among other things, "[e]xposes his or her genitals under circumstances in which he or she knows that his or her conduct is likely to cause affront or alarm"). As this Court has observed, statutory definitions and uses of like terms found in other chapters, "even though not strictly applicable to [Chapter 573], nevertheless comports with the common understanding of the phrase[s] and refutes that it cannot be understood by a reasonable person." *City of Maryland Heights*, 638 S.W.3d at 899. Each of the prohibited actions can be commonly understood by a reasonable person.

Indeed, Missouri courts have upheld statutory prohibitions regulating explicit conduct using *broader terms* than those used in § 573.550. *See Helgoth*, 691 S.W.2d at

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283 (holding that statutory language prohibiting acts involving minors engaged in "'sexual stimulation or gratification,' while somewhat refined in its usage, is not a formula which is apt to be lost on adults possessed of common sensibilities"). And this Court has upheld statutes and regulations prohibiting sexually explicit activities using nearly identical language to § 573.550. *See Cocktail Fortune*, 994 S.W.2d at 958 (a regulation is not unconstitutionally vague where it prohibits acts, or simulated acts, of "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation . . . [t]he displaying of any portion of the areola of the female breast . . . [or] [t]he actual or simulated displaying of the pubic hair, anus, vulva or genitals"). As courts have long recognized, each of these terms, every one of which "deals with sexually related conduct," has a plain and ordinary meaning obvious to a reasonable person. *Cocktail Fortune*, 994 S.W.2d at 958.

With statutes dealing with sexually explicit content, Missouri courts have acknowledged that "[i]t has been recognized that . . . some vagueness is inevitable." *State v. Duncan*, 495 S.W.2d 460, 461 (Mo. App. St. Louis 1973). After all, "impossible standards of specificity are [not] required in determining whether terms are impermissibly vague." *City of Maryland Heights*, 638 S.W.3d at 899 (quoting *Cocktail Fortune*, 994 S.W.2d at 957). As such, this Court has repeatedly "considered and rejected the argument that obscenity statutes are impermissibly overbroad, ambiguous or vague." *Simmer*, 772 S.W.2d at 374. A statute is not void for vagueness simply because "[i]t is necessary that a person subject to the rule be able to make some judgment whether" the action in question "is prohibited." *Medvik v. Ollendorf*, 772 S.W.2d 696, 701 (Mo. App. E.D. 1989) (holding that a prohibited against "an unwanted or imprudent statement . . . to a co-worker of a

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sexual, racial, ethnic or religious nature" is not unduly vague). It is enough that a reasonable person would have fair notice before the specific enforcement action occurred. The language of § 573.550 provides this fair and reasonable notice.

Section 573.550 also includes clear exceptions to its definition of explicit sexual material. Specifically, the statute provides that the term "explicit sexual material," the material covered under the statute, does not include any "works of art [that], when taken as a whole, . . . have serious artistic significance, or works of anthropological significance, or materials used in science courses, including but not limited to materials used in biology, anatomy, physiology, and sexual education classes." *Id.* This exception in § 573.550's language, further limiting the scope of material covered under the law, is not unconstitutionally vague. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010) (noting that definitions can "increase[] the clarity of the statute's terms").

Indeed, this exception language is familiar under both Missouri and federal law because it tracks language upheld as permissibly defining certain types of speech that may be restricted under the First Amendment. In *Miller*, the Supreme Court laid out its test for when "works which depict or describe sexual conduct" may be restricted or prohibited as obscene material. 413 U.S. at 24. The "basic guidelines for the trier of fact" to determine whether the work is obscene include, among other things, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* This Court has, likewise, "adopted the guidelines established in *Miller* to enable Missouri to regulate the dissemination of obscene material if these guidelines are met." *State v. Cox*, 619 S.W.2d 794, 795 (Mo. App. E.D. 1981) (citing *McNary v. Carlton*, 527 S.W.2d 343, 347–48 (Mo.

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banc 1975)). In adopting the *Miller* standard, this Court recognized "that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material.'" *Id.* (quoting *Miller*, 413 U.S. at 18).

Section 573.550's exceptions are not rendered vague by closely following the standard laid out in *Miller* and embraced by this Court. Just as *Miller* held that an obscenity test must consider whether a work "lacks serious literary, artistic, political, or scientific value," 413 U.S. at 24, § 573.550 makes clear that the prohibition does not cover any works "that have serious artistic significance, or works of anthropological significance, or materials used in science courses." The exceptions contained in § 573.550, in other words, closely mirror language that has long been used and applied by this Court and the U.S. Supreme Court. *See, e.g.*, *State v. Triplett*, 722 S.W.2d 633, 638 (Mo. App. S.D. 1986) (rejecting the argument section 573.010 is unconstitutionally vague because the challenged statute "follow[s] the approved pattern set out in *Miller*"); *Cox*, 619 S.W.2d at 795 (noting that "a majority of the Missouri Supreme Court adopted the guidelines established in *Miller*"); *Kansas City v. O'Connor*, 510 S.W.2d 689, 696 (Mo. banc 1974) (finding that an obscenity ordinance was not unconstitutionally vague where the ordinance's standard for prohibited material parallels the Supreme Court's obscenity test); *Ferber*, 458 U.S. at 756 (subsequent Supreme Court decisions "have adhered to the guidelines expressed in *Miller*, which subsequently has been followed in the regulatory schemes of most States").

Nor does the fact that § 573.550's exceptions require the application of statutory text to different factual situations render the statute unconstitutionally vague. On the contrary, Missouri courts have long upheld as sufficiently definite statutory terms or

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prohibitions which require some application or determination by the person reading the statute of how statutory categorization applies to the facts at hand. *See, e.g.*, *Harris v. Hunt*, 122 S.W.3d 683, 689 (Mo. App. E.D. 2003) (holding that a statute requiring applicants be of "good moral character" and have a "good reputation for honesty, integrity, and fair dealing" is not vague); *Schroeder*, 330 S.W.3d at 475 ("[O]rdinary persons understand what is meant by the terms 'intoxicated condition' and 'under the influence.'"); *State v. Bratina*, 73 S.W.3d 625, 628 (Mo. banc 2002) ("'Proper notice' and 'proper law enforcement officials' are terms that have plain and ordinary meanings and are quite understandable by a person of ordinary intelligence."); *Mahan*, 971 S.W.2d at 312 (rejecting the argument "that the phrase 'grave and unjustifiable risk' does not give fair notice of prohibited conduct" in a void for vagueness challenge); *State v. Dale*, 775 S.W.2d 126, 130 (Mo. banc 1989) (collecting cases stating that criminal statutes prohibiting conduct using the terms "'cruel and inhuman punishment,'" "'rude,' 'angry,' and 'threatening,'" and "'the detestable and abominable crime against nature'" are "not unconstitutionally vague"); *Simmer*, 772 S.W.2d at 374 ("Missouri Courts have . . . considered and rejected the argument that obscenity statutes are impermissibly overbroad, ambiguous or vague."). Likewise, here, § 573.550's exception to the definition of "explicit sexual material" for any works of serious artistic significance, anthropological significance, or materials used in science courses is not unconstitutionally vague. *See, e.g.*, *Miller*, 413 U.S. at 24; *Simmer*, 772 S.W.2d at 374 (considering whether the pornographic magazines "Poppin Mamas" and "Beavers" "lack serious literary, artistic, political or scientific value."); *Triplett*, 722 S.W.2d at 638 (considering whether the pornographic

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magazine "Hustler," which depicted "photographs of homosexual and heterosexual intercourse . . . gang rapes, fellation, cunnilingus, [and] ejaculation" lack "serious literary, artistic, political or scientific value."); *Cooley*, 766 S.W.2d at 135 (reviewing "[t]he contents of [the magazines] "'Eat Me' and 'Hot Flesh'" and concluding that the "pictures of nude or partially nude men and women engaging in various actual or simulated acts of vaginal intercourse, cunnilingus and fellatio . . . constitute unadulterated and unmitigated smut").

Indeed, applying the facts of a particular image to statutory language is necessary in the face of the sheer impossibility of listing out every possible image that may or may not fall into a "serious artistic significance" (or other) exception. *See, e.g.*, *Miller*, 413 U.S. at 27 n.10 ("Many decisions have recognized that these terms of obscenity statutes are not precise . . . This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process." (quoting *Roth*, 354 U.S. at 491)); *Duncan*, 495 S.W.2d at 461 (in drafting statutes involving pornographic or sexually explicit material, "some vagueness is inevitable").

Missouri courts have consistently held that statutes regulating sexually explicit or obscene materials are *not* unconstitutionally vague for requiring application of facts to statutory language similar to, or patterned after, the U.S. Supreme Court's *Miller* language. *Triplett*, 722 S.W.2d at 638; *Cox*, 619 S.W.2d at 795; *O'Connor*, 510 S.W.2d at 696. This Court should apply those precedents and reject Respondents' vagueness challenge.

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3. Section 573.550's scienter requirement reinforces its clarity and helps provide fair notice.

Section 573.550's inclusion of a scienter requirement further bolsters its constitutional clarity. *See Skilling*, 561 U.S. at 412 (noting that "the statute's *mens rea* requirement further blunts any notice concern"). Specifically, § 573.550 provides that "[a] person commits the offense of providing explicit sexual material to a student" only if the person, among other things, provides certain materials to a student while "*knowing* of its content and character." § 573.550.1 (emphasis added). Statutory phrases such as "knowledge of the content and character" means that any prosecution must prove, beyond a reasonable doubt, that any defendant "knew of the content and character of the materials he possessed." *State v. Liker*, 537 S.W.3d 405, 409 (Mo. App. S.D. 2018). Such a requirement is often referred to as a mental "scienter" requirement. And courts, again and again, hold that clear scienter requirements are likely to convey statutory meaning to people of "ordinary intelligence." *See Hill*, 530 U.S. at 732–33 ("The statute only applies to a person who 'knowingly' approaches within eight feet of another, without that person's consent, for the purpose of engaging in oral protest, education, or counseling. The likelihood that anyone would not understand any of those common words seems quite remote.").

This Court has held that, even if the language of a law was otherwise vague, a "scienter requirement" can "mitigate a law's vagueness especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Dale*, 775 S.W.2d at 131 (quoting *Hoffman Estates*, 455 U.S. at 499). The inclusion of a requisite mental

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state transforms a constitutional vagueness challenge into a "vastly different" analysis than it would otherwise without the scienter requirement. *State v. Koetting*, 616 S.W.2d 822, 824 (Mo. banc 1981). This is because the addition of the mental state means that "the criminality of the conduct is measured in the statute not by the unpredictable effect upon third persons, *but by the mental state of the actor*." *Id.* (emphasis added). Therefore, "[t]he requirement of knowledge is the saving grace" where a criminal statute's text may be otherwise vague. *Dale*, 775 S.W.2d at 131.

Were there any doubt that § 573.550 provides clear and direct notice of the scope of activities and materials covered under the statute, § 573.550's knowledge of both the "content and character" of the material in question avoids vagueness. *Simmer*, 772 S.W.2d at 375. In other words, the language of § 573.550 both "require[s] some element of scienter and the depicted sexual conduct proscribed was suitably limited and described." *See Foster*, 838 S.W.2d at 66. As such, the statute "pass[es] constitutional muster." *Id.*

* * *

Each of § 573.550's terms used to detail the scope of the law or the types of prohibited activities—"official capacity," the various types of images falling under the definition of "explicit sexual material," and the exception for artistic, anthropological, or scientific works—are clearly defined and have plain and ordinary meanings evident to a reasonable person. And the General Assembly gave additional protection by including a knowledge scienter requirement—confirming § 573.550's constitutionality. This Court should reverse the Circuit Court's erroneous holding.

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III. The Circuit Court erred in permanently enjoining and declaring § 573.550 unconstitutional, because it misapplied the law, in that § 573.550 is subject to Missouri's severability doctrine and the Circuit Court must make every effort to construe a challenged statute as compliant with the Missouri Constitution.

The Circuit Court erred when it facially invalidated § 573.550 on overbreadth and void for vagueness grounds. In particular, the Circuit Court was required—at a minimum—to adopt a "narrowing construction" before voiding the entire statute. *See Gurley*, 361 S.W.3d at 413 ("In determining claims of overbreadth," courts "are obliged to give [the statute] a construction which will render it valid, if possible.").

The Circuit Court also failed to attempt to sever the law, or even, apparently, to consider it. Under Missouri law, duly enacted statutes are presumed to be severable. Per § 1.140, RSMo:

> The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Id. "Every statute" includes § 573.550. This is consistent with this Court's directive that "a statute is construed so as to be in harmony with the constitution and upheld." *Collins*, 648 S.W.3d at 716 (quoting *Planned Parenthood of Kan.*, 220 S.W.3d at 741). Therefore, the Circuit Court erred by facially invalidating § 573.550 writ-large without seeking a saving construction as Missouri law requires.

To the extent that this Court accepts government and/or school-sponsored speech grounds as proper justifications for rejecting Respondents' overbreadth claims but does not

accept these claims as saving the statute's restrictions vis-à-vis "private schools," the proper course is to sever the "or private" phrase from the statutory text. This would leave the statutory text operative, "permit[ting] one offending provision of a law to be stricken and the remainder to survive." *Akin v. Dir. of Revenue*, 934 S.W.2d 295, 300 (Mo. banc 1996). Here, the Court can be assured "beyond a reasonable doubt that the legislature would have passed the bill without the additional provisions and that the provisions in question are not essential to the efficacy of the bill," *City of De Soto v. Parson*, 625 S.W.3d 412, 418 (Mo. banc 2012) (quotation omitted), because by simply narrowing the scope of the law to public schools, the law's efficacy to regulate these schools is in no way impeded. Here, severance is appropriate because the "valid provisions of the statute" are *not* so "essentially and inseparably connected with, and so dependent on, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one." *Legends Bank v. State*, 361 S.W.3d 383, 387 (Mo. banc 2012) (citing *Mo. Ass'n of Club Executives v. State*, 208 S.W.3d 885, 889 (Mo. banc 2006))

CONCLUSION

This Court should reverse the Circuit Court's judgment and remand to the Circuit Court for further proceedings.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 19,576 words, excluding tables, the cover, the signature, and certificates; complies with Missouri Supreme Court Rule 84.06(b); includes the information required by Rule 55.03; and includes information on how the brief was served on the opposing party.

/s/ Louis J. Capozzi, III

CERTIFICATE OF SERVICE

I hereby certify that, on June 1, 2026, a true and correct copy of the above was filed with the Court's electronic filing system to be served by electronic methods on counsel for all parties entered in the case.

/s/ Louis J. Capozzi, III

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