

Summary of SC91563, *Michael Ocello, et al. v. Chris Koster, In His Official Capacity as Missouri Attorney General*

Appeal from the Cole County circuit court, Judge Jon E. Beetem
Argued and submitted Sept. 7, 2011; opinion issued Nov. 15, 2011

Attorneys: The Missouri residents and adult entertainment businesses were represented by J. Michael Murray and Raymond V. Vasvari Jr. of Berkman, Gordon, Murray & DeVan in Cleveland, (216) 781-5243; James B. Deutsch, Mark H. Ellinger and Thomas W. Rynard of Blitz, Bardgett & Deutsch LC in Jefferson City, (573) 634-2500; Richard T. Bryant, a solo practitioner in Kansas City, (816) 221-9000; and H. Louis Sirkin and Jennifer Kinsley of Sirkin Kinsley in Cincinnati, (513) 721-4876. The state was represented by General Counsel Ronald Holliger, Mark E. Long and Emily Dodge of the attorney general's office in Jefferson City, (573) 751-3321; and Scott D. Bergthold, a solo practitioner in Chattanooga, Tenn., (423) 899-3025.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Certain Missouri residents and adult entertainment businesses (collectively, “the businesses”) appeal the trial court’s grant of judgment on the pleadings in their action alleging sections 573.525 to 573.540, RSMo, (the “act”) violate the First Amendment by placing unreasonable restrictions on sexually oriented businesses operating in Missouri. The trial court found that the legislature reasonably relied on evidence establishing a connection between the restrictions contained in the act and the suppression of negative secondary effects associated with sexually oriented businesses. In addition, the trial court found that the legislature’s failure to hold a hearing concerning the accuracy of the act’s fiscal note did not violate article III, section 35 of the Missouri Constitution, and did not invalidate the act. In a decision written by Judge Laura Denvir Stith and joined by all participating judges, the Supreme Court of Missouri affirms the trial court’s judgment and finds that the act is valid under the First Amendment of the United States Constitution as well as article III, section 35 of the Missouri Constitution. Judge William W. Francis Jr., a judge of the Missouri Court of Appeals, Southern District, sat in this case by special designation to fill a then-vacancy on the Court.

Facts: In 2010, the Missouri legislature passed the act, which restricted the operation of sexually oriented businesses by, among other things: (1) banning nude dancing in public; (2) requiring that semi-nude dancers not touch or come within six feet of customers; (3) prohibiting alcohol in sexually oriented businesses; (4) requiring sexually oriented businesses to close between midnight and 6 a.m.; and (5) requiring viewing booths in sexually oriented businesses to be visible from a central operating station. Prior to passing the act, the legislature reviewed a plethora of evidence regarding the connection between sexually oriented businesses and a variety of negative secondary effects, including increased crime, decreased property values, and sanitary and health problems. This evidence, submitted by both supporters and opponents of the act, included studies, expert testimony, judicial opinions, and anecdotal evidence from government officials and people involved in the sexually oriented entertainment industry. Based on this evidence, the legislature concluded that the act would reduce the negative secondary effects

associated with sexually oriented businesses. The businesses challenged the validity of the act in a lawsuit, claiming that the act violated the First Amendment of the United States Constitution as well as article III, section 35 of the Missouri Constitution. The trial court rejected both arguments. The businesses appeal.

AFFIRMED.

Court en banc holds: (1) The trial court properly found that the act did not violate article III, section 35 of the Missouri Constitution. That section merely requires that a joint committee on legislative research be formed, that it meet, and that it perform an advisory role to the legislature. It does not require that the committee prepare a fiscal note or hold a hearing as to the accuracy of that note, nor does it purport to void a piece of legislation if the committee fails to carry out its duties properly before the legislature enacts legislation. As a result, if the failure to follow section 23.140 – which requires that the committee prepare a fiscal note regarding legislation – could void the act, the Missouri Constitution, in effect, would have been amended by a statute. This is not permissible. Furthermore, section 23.140 is merely directory and does not impose a mandatory duty on the legislature to follow its provisions. Therefore, the legislature’s failure to comply with section 23.140 did not invalidate the act.

(2) The trial court correctly found that the act does not violate the First Amendment. Under *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), a law restricting sexually oriented speech is valid under the First Amendment if it is: (a) aimed at the negative secondary effects associated with such speech and not the speech itself; (b) a time, place, and manner restriction and not a total ban on speech; and (c) designed to serve a substantial government interest and leaves open alternative avenues of communication. Here, the record demonstrates that the act complies with all three of these requirements.

(a) The act’s preamble expressly states that its purpose is to reduce the detrimental secondary effects associated with sexually oriented businesses, not to suppress sexually oriented speech itself. Furthermore, all the restrictions except for the nudity ban on their face are time, place and manner restrictions. Although the nudity ban completely prohibits nude dancing in the businesses, the United States Supreme Court has ruled that nudity bans place a minimal burden on speech and should be treated the same as time, place and manner restrictions. Therefore, the act is valid under the first two prongs of *Alameda Books*.

(b) The case at hand hinged on the third prong: whether the government could show that the act is designed to serve the substantial government interest in reducing negative secondary effects associated with sexually oriented businesses. Under this standard, the government has the initial burden of showing that the legislature relied on evidence reasonably believed to be relevant to establishing a connection between the act and the reduction of negative secondary effects associated with sexually-oriented businesses. This burden is not heavy. The government may rely on anecdotal evidence and need not conduct scientific studies establishing a conclusive connection between sexually oriented businesses and negative secondary effects. If the government meets its initial burden, the

burden shifts to the challenger to cast direct doubt on the government's evidence. If the challenger fails to cast direct doubt, the challenge to the act will fail.

Here, the voluminous evidentiary record on which the legislature relied to establish a connection between sexually oriented businesses and negative secondary effects – consisting of judicial opinions, studies, crime and health reports, expert testimony and anecdotal evidence – was more than sufficient to meet the government's initial burden. The businesses sought to cast direct doubt on this evidence by introducing expert testimony and studies showing that the methodologies used to create many of the studies relied upon by the government were not scientifically sound. The businesses also presented anecdotal evidence claiming that sexually oriented businesses do not cause negative secondary effects. The evidence presented by the businesses was not sufficient to cast direct doubt on the government's evidence. The evidence did not address the health and sanitary problems associated with sexually oriented businesses, which the act was designed to reduce. Furthermore, the criticisms of the government's studies merely showed they were not controlled scientific studies, but they need not be. The government needs to show only that its evidence reasonably is related to showing a connection between sexually oriented speech and negative secondary effects. Because the businesses failed to cast direct doubt on the government's evidence, the third prong of *Alameda Books* was satisfied.

(3) To the extent the businesses claim that the act led to reduced revenue at sexually oriented businesses, forcing many to close, this does not make the act unconstitutional. The constitution protects speech, not economic viability of adult businesses. Here, the act imposes reasonable restrictions designed to avoid negative secondary effects of adult businesses and does not improperly limit expression in violation of the First Amendment. Accordingly, any collateral effect that these reasonable restrictions may have on reducing profits is not a result of an unconstitutional restriction of speech but rather of the fact that it was not speech that drew these patrons to the businesses in the first instance. The act is not unconstitutional simply because it may make some sexually oriented businesses economically less viable.