Docket No. SC 91563

IN THE SUPREME COURT OF MISSOURI

MICHAEL OCELLO, et al.,

Appellants,

– vs –

CHRIS KOSTER, IN HIS OFFICIAL CAPACITY
AS MISSOURI ATTORNEY GENERAL,

Respondent.

On Appeal from the 19th Circuit Court
Cole County, Missouri

MERIT BRIEF OF THE APPELLANTS

J. Michael Murray (Ohio 0019626)
Raymond V. Vasvari, Jr. (Ohio 0055538)
BERKMAN, GORDON, MURRAY & DEVAN
55 Public Square Suite 2200
Cleveland, Ohio 44113-1949
Telephone: 216-781-5245
Telecopier: 216-781-8207

Richard T. Bryant (Mo. 27075)
1102 Grand Avenue Suite 804
Kansas City, Missouri 64106
Telephone: 816-221-9000
Facsimile: 816-221-9019

BLITZ, BARDGETT & DEUTSCH, L.C
James B. Deutsch (Mo. 27093)
Marc H. Ellinger (Mo. 40828)
Thomas W. Rynard (Mo. 34562)
308 East High Street, Suite 301
Jefferson City, MO 65101
Telephone No.: (573) 634-2500
Facsimile No.: (573) 634-3358

Counsel for the Appellants

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– JURISDICTIONAL STATEMENT –

This case is one involving facial and as applied challenges to the validity of sweeping statutory restrictions on the presentation of constitutionally protected adult-oriented expression in the nature of erotic dance performances and the sales of erotic books, magazines, videos and other media, enacted and codified in H.C.S. S.S. S.C.S. S.B.s 586 & 617 ("the Act"). Those challenges were asserted in two Counts.

Count I alleged that the Act was adopted without a proper hearing, in the General Assembly, on the legislative fiscal note associated with it, in violation of R.S.Mo. § 23.140, and in consequent violation of Article III, § 35 of the Missouri Constitution.

Count II alleged that the Act restrains constitutionally protected expression in both a content-based manner, or alternatively in a content-neutral manner that cannot be justified given the evidentiary record presented to the General Assembly, or that considered in the Circuit Court, all in violation of Amendments I and XIV to the United States Constitution, and Article I, §8 of the Missouri Constitution.

This case accordingly involves the validity of a Missouri statute, and exclusive jurisdiction rests in this Court pursuant to Article V, §3 of the Missouri Constitution.

– STATEMENT OF FACTS –

On May 13, 2010, the Missouri General Assembly passed SB 586 & 671, which was signed into law by the Governor, and which took effect on August 28, 2010. The Act imposes a welter of restrictions upon the operation of businesses that offer constitutionally protected erotic expression in Missouri, the details of which are discussed below.

The Appellants – who were Plaintiffs below – are the Missouri Association of Club Executives, a trade association representing adult businesses throughout the state, as well as taxpayers, the owners of adult cabarets and bookstores, entertainers who perform in those cabarets, and a former member of the Missouri House of Representatives. Together, they contest the adoption of the Act on two bases.

First, they contend that the Act was adopted in violation of R.S.Mo. § 23.140, which requires the Joint Committee on Legislative Research, upon the written request of a member of the General Assembly, to promptly hold a hearing to determine the fiscal impact upon state and local governments and upon small businesses a proposed bill will have. Despite such a request having been made in this case, no such hearing was ever held. This failure, Appellants claimed, contravened not only the statute, but Article III, § 35 of the Missouri Constitution, which expressly requires that Committee to meet when necessary to discharge the duties imposed on it by law.

In Count II of their Amended Verified Petition, Appellants contend that the Act violates their First and Fourteenth Amendment rights (and by extension, their rights under Article I, § 8 of the Missouri Constitution) in three distinct ways:

(a) by imposing a content-based set of restrictions on adult expression that cannot survive strict scrutiny, or alternatively:

(b) by adopting an ostensibly content-neutral set of restrictions on adult expression that cannot be justified by the secondary effects record considered by the General Assembly, nor reconciled with substantial evidence which tends to affirmatively disprove the existence of such adverse secondary effects, both generally, and here in Missouri, and;

(c) by substantially reducing the quantity and availability of adult expression in Missouri, a circumstance which in itself will suffice to invalidate a law ostensibly adopted to combat the adverse secondary effects of adult expression.

– PROCEDURAL POSTURE BELOW–

The manner in which the claims outlined above were decided by the Circuit Court bears directly upon the standard of review in this Court, and explains the context in which the abundance of evidentiary material collected in the Legal File should be viewed.

Appellants filed their Verified Petition, together with a Motion for a Temporary Restraining Order, on August 10, 2010, before the Act was set to take effect. Their request for temporary injunctive relief was denied on August 27, 2010. LF 1-3 (Docket Sheet).

On September 17, 2010, Respondent filed a Motion for Judgment on the Pleadings, defending the adoption of the contested statutes against both the state constitutional and statutory and the federal constitutional challenge, as a matter of law. LF 104-07.

In support of that motion, the Respondent submitted materials which together consisted of the legislative record considered by the General Assembly in passing the Act.[1]

On October 12, 2010, Appellants filed an Amended Verified Petition. LF 145-82. On October 14, 2010, Appellants filed a Motion for Partial Summary Judgment, seeking judgment in their favor on the state law claims asserted in Count I, as well as one of the First Amendment claims asserted in Count II, to wit, the allegation that the Act is a content-based restriction on protected expression that cannot survive strict scrutiny.[2]

Appellants filed a single set of Suggestions supporting their Motion for Summary Judgment and opposing the Motion for Judgment on the Pleadings filed by Respondent.[3]

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[1]Those materials had been appended to the Answer, and were included by Respondent with his Motion for Judgment on the Pleadings on the theory that, under Mo. S. Ct. R. 55.12, exhibits appended to a pleading are a part thereof for all purposes. See LF 134 (Suggestions in Support of Motion for Judgment on the Pleadings (hereinafter "Respondent's Suggestions), at 27). The materials, which were verified by the affidavits of three legislative aides, comprise the entirety of the two volume Supplemental Legal File submitted by the Respondent. SLF 1-370. Not paginated, but included in that material, are the secondary effects studies and certain written legislative testimony presented in CD ROM format (SLF 47, 248) indexed in the Supplemental Legal File (SLF 48-51, 249-252).

[2]LF 222-24 (Summary Judgment Motion of the Plaintiffs). Appellants also filed supporting Statement of Uncontroverted Facts, LF 225-49, and extensive briefing.

[3]LF 251-350 (hereinafter "Appellants' Suggestions").

Together with their Suggestions, Appellants submitted a substantial set of affidavits, which included the testimony of adult business owners, adult entertainers, law enforcement officers, local government officials, members of the General Assembly, and an extensive body of expert testimony, buttressed with secondary effects studies of their own.[4]

In addition to seeking summary judgment in their own favor with respect to the claims described above, Appellants argued that genuine issues of material fact precluded judgment in favor of the Respondent on the question of whether the Act was in fact justified as a content-neutral restriction on adult expression designed to ameliorate the adverse secondary effects of that expression.[5]

– DECISIONS BELOW –

On November 15, 2010, Senior Judge Kinder of the Circuit Court held a hearing on the cross-motions of the parties with respect to the state law claims asserted in Count I.

On November 23, 2010 the Circuit Court entered its findings of fact, conclusions of law and judgment granting the Respondent's Motion for Judgment on the Pleadings as to Count I of the Amended Verified Petition and denying the Summary Judgment Motion of the Appellants with respect to the same.[6]

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[4]The evidentiary submission of the Appellants ran to well over one thousand pages of affidavits, articles, studies and supporting documentation. LF 541-1712.

[5]LF 304-48 (Appellants' Suggestions, at 44-88).

[6] LF 1794-1801 (Findings of Fact, Conclusions of Law & Judgment.

At this stage, all of the First Amendment claims raised in Count II of the Complaint remained to be decided.

On January 27, 2011, Judge Beetem of the Circuit Count granted judgment on the pleadings to the Respondents on all the outstanding claims, and denied the remaining part of the summary judgment motion filed by the Appellants as moot. The Circuit Court provided no analysis or basis for its decision.[7]

A Notice of Appeal with Jurisdictional Statement and Supporting Suggestions was filed in this Court on February 18, 2011. LF 1966-87.

– THE PROHIBITIONS OF THE ACT –

The Act regulates the operation of adult businesses across the state, including adult cabarets and adult bookstores.[8] It reaches dozens of cabarets in which nude, or even semi nude dancing is presented, the latter being defined to include any performance in which the lower portion of the female breast, or the male or female buttocks is displayed.[9]

The statutory provisions at issue dramatically altered the landscape upon which the Appellants do business, and have seriously undermined long-established businesses.

The contested legislation mandates that every adult establishment in Missouri, as that term is defined in the Act, close its doors between midnight and 6:00 a.m.[10]

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[7]LF 1964-65 (Judgment, at 1-2).

[8]R.S. Mo. § 573.528 (2), (15).

[9]R.S. Mo. § 573.528 (12).

[10]R.S. Mo. § 573.531.8.

The Act prohibits the sale, consumption, use or service of alcoholic beverages in any adult establishment in the state.[11]

Under the Act, no person may knowingly and intentionally appear in a state of nudity in a sexually oriented business.[12]

While semi-nudity, as broadly defined by the Act, is permitted in sexually oriented businesses, it is tightly constrained under penalty of law.

Entertainers who appear semi-nude – which includes a bared female nipple, the bared lower portion of the female breast, and even a less-than-completely covered buttocks – must remain on a stage at least eighteen inches high, and at least six feet from patrons. None may appear in a room smaller than six hundred square feet.[13]

Noone who appears semi-nude in a sexually oriented business may touch a patron or the patron's clothing, on the premises of a sexually oriented business.[14]

Sexually oriented businesses are now required to conform to a variety of physical specifications. Adult cabarets must provide stages that comply with Section 573.531(4), described above. Sexually oriented businesses which display motion pictures in private viewing booths are subject to extensive physical requirements regarding the size and construction of the booths, and their visibility from a centrally located operator's station.[15]

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[11]R.S.Mo. § 573.531.9.

[12]R.S.Mo. § 573.531.3.

[13]R.S.Mo. § 573.531.4.

[14]R.S.Mo. § 573.531.5.

[15]R.S.Mo. § 573.531.6.

Establishments which provide such fare, but were not physically constructed in the manner which the law now provides, were required to retrofit their premises within one hundred eighty days of the August 28, 2010 effective date of the Act.[16]

Under R.S. Mo. § 573.537.1, violation of any provision of Sections 573.525 to 573.537 is a misdemeanor, punishable by a $500.00 fine and ninety days in jail. Offenses that persist over time are treated as new offenses for each day the violation occurs.

Establishments which exist in violation of one or more of the provisions adopted by the Act are deemed to be civil nuisances, subject to actions for abatement brought by the state. In addition, the state is empowered under the Act to pursue whatever other civil remedies it may have against violators of the Act in any court of competent jurisdiction.[17]

– THE ADOPTION OF THE ACT WITHOUT A FISCAL NOTE HEARING–

Article III, § 35 of the Missouri Constitution provides:

> § 35. Committee on legislative research
>
> There shall be a permanent joint committee on legislative research, selected by and from the members of each house as provided by law. The general assembly, by a majority vote of the elected members, may discharge any or all of the members of the committee at any time and select their successors. The committee may employ a staff as provided by law. ***The***

[16]R.S.Mo. § 573.531.7.

[17]R.S.Mo. § 573.537.

> ***committee shall meet when necessary to perform the duties, advisory to the general assembly, assigned to it by law.*** The members of the committee shall receive no compensation in addition to their salary as members of the general assembly, but may receive their necessary expenses while attending the meetings of the committee.[18]

R. S. Mo. § 23.140 assigns as a duty to the Joint Committee on Legislative Research the preparation of fiscal notes for each piece of proposed legislation–save for appropriation bills. That statute reads in relevant part:

> 1. Legislation, with the exception of appropriation bills, introduced into either house of the general assembly ***shall, before being acted upon***, be submitted to the oversight division of the committee on legislative research for the preparation of a fiscal note. The staff of the oversight division ***shall prepare a fiscal note***, examining the items contained in subsection 2 and such additional items as may be provided either by joint rule of the house and senate or by resolution adopted by the committee or the oversight subcommittee.
>
> 2. The fiscal note shall state:
>
> (1) The cost of the proposed legislation to the state for the next two fiscal years;

[18]MO. CONST. ART III, § 35 (emphasis added).

* * *

(2) Whether or not the proposed program or agency will have significant direct fiscal impact upon any political subdivision of the state;

* * *

(4) Whether or not the proposed legislation will have an economic impact on small businesses . . . .

* * *

(6) The fiscal note for a bill shall accompany the bill throughout its course of passage . . . . Once a fiscal note has been signed and approved by the director of the oversight division, the note shall not be changed or revised without prior approval of the chairman of the legislative research committee, except to reflect changes made in the bill it accompanies, or to correct patent typographical, clerical or drafting errors that do not involve changes of substance, nor shall substitution be made therefor. Appeals to revise, change or to substitute a fiscal note shall be made in writing by a member of the general assembly to the chairman of the legislative research committee and ***a hearing before the committee***

or subcommittee shall be granted as soon as possible....[19]

Here, the fiscal note to S.B. 586 & 617 estimated a fiscal impact of under $100,000.00 on local government revenues, and no net impact on the state treasury if the subject bill was passed. LF 65-66. A few revisions were made to the fiscal note in the weeks that followed, but its ultimate conclusion that the bill would have zero impact on the State's General Revenue Fund or other State Funds and only minimal impact on local government funds remained the same. LF 159-60, 198-203, 204-11, 212-19, 1720. The fiscal note also reported that small businesses that were sexually oriented in nature could experience an unspecified fiscal impact. LF 215.

Plaintiff Curt Dougherty, a member of the House of Representatives, representing District 53, received and reviewed the fiscal note prepared by the Committee on Legislative Research on SB 586 & 617 and concluded that it was inaccurate and incomplete. LF 563-65 (Dougherty Aff. ¶¶ 3-4).

Specifically, he found that the note did not account for the effect of the proposed legislation in terms of lost revenues from sales and employment taxes, that would presumably decrease since the legislation required all adult entertainment establishments to close at midnight; it did not account for the effect on revenues from liquor licenses, nor did it address the added costs for enforcement of its provisions, to name just a few of its deficiencies. LF 564-65 (Dougherty Aff. ¶ 4).

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[19]R.S.MO. § 23.140 (emphasis added).

Representative Dougherty therefore concluded that the fiscal note did not adequately report the fiscal impact on state and local revenues, nor on small businesses. LF 564-65 (Id.).

With these concerns in mind, on April 15, 2010, Appellant Dougherty hand delivered a written challenge to the fiscal note to the Honorable Brian Pratt, Vice Chair of the Joint Committee on Legislative Research, on the basis that it was not accurate, and requested a hearing pursuant to R.S.Mo. § 23.140.[20]

Dougherty directed his secretary to hand-deliver his written challenge and request for hearing to the Honorable Tom Dempsey, Chair of the Joint Committee on Legislative Research on that same date. LF 565 (Aff. ¶ 5) and 576 (Dougherty Aff. Ex. C).

Representative Dougherty confirmed by phone call to both Representative Pratt and Senator Dempsey the following business day, April 19, 2010, that they had each received his written challenge to the fiscal note and request for hearing on the note as provided by statute. LF 565 (Aff. ¶ 5).

Mickey Wilson, the Director of the Oversight Division of the Committee (a staff member), contacted Dougherty shortly after he submitted his appeal and request for hearing on the fiscal note. He inquired about Dougherty's concerns and whether an amendment could be made by agreement without the necessity of a hearing. Dougherty explained that he thought given the effect on the generation of sales taxes and employment taxes as well as fees in connection with liquor licensing, that the fiscal impact was in the vicinity of $1,000,000.00. Mr. Wilson told Dougherty that he could not amend the fiscal note to that

[20]LF 565 (Dougherty Aff. ¶ 5) and 575 (Dougherty Aff. Ex. B).

extent and that it was best to resolve the issue by convening a hearing. LF 565-66 (Dougherty Aff. ¶¶ 7).

No hearing was ever held on the fiscal note for SB 586 & 617, even though Representative Dougherty repeatedly inquired of Mr. Wilson about it. LF 566 (Dougherty Aff. ¶ 8); LF 1657-58 (Affidavit of the Hon. Bryan Pratt at ¶11).

Petitioner Dougherty believes that had the fiscal impact of the legislation been fully and accurately reflected, a number of the members of the General Assembly would have voted against the bill and that it would have been defeated. LF 566 (Dougherty Aff. ¶ 10).

– THE REAL FISCAL IMPACT OF THE ACT –

Plaintiff Michael Ocello, who is, among other things, a member of Missouri's Small Business Regulatory Fairness Board and President of a publicly traded company that operates a national chain of upscale adult cabarets, described the precise threat to Missouri's tax revenues and economy posed by the law:

> [SB 586 & 617] imposes substantial burdens on and impairments to the business model under which viable adult businesses operate. These restrictions, therefore, pose serious consequences for these businesses in terms of the revenues they generate. And as with any business, the constriction of their revenues has consequences beyond the singular business directly laboring under the regulations. Tax revenues generated by these businesses paid to state and local government are reduced, jobs

> are wiped out, and vendors and other suppliers who depend on these businesses as customers are likewise adversely affected.[21]

Ann Michael, Executive Director of the Missouri Association of Club Executives, compiled data of state sales and employment taxes paid from twenty-five of its member businesses – a figure which did not encompass the entire membership – for 2008 and 2009.

Over the course of two years, those twenty-five clubs alone paid roughly $352,000.00 in state withholding tax and roughly $1,649,800.00 in sales tax, for a total tax contribution of $2,001,800.00.[22]

In addition, one county – Johnson County – has an adult cabaret tax based on a cabaret's gross revenues; it has collected nearly $500,000.00 in tax revenues since its cabaret tax ordinance's enactment. Reduction in the revenues of the adult cabaret located in Johnson County will directly result in the reduction of tax revenues to the county, a fact attested to in the record by county officials and others.[23] These numbers, of course, tell only part of the story. The Act has already worked a second, and substantial disruption on local economies, by leading to layoffs, job losses and closed businesses.

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[21]LF 600 (Affidavit of Michael Ocello at ¶¶ 2-3).

[22]LF 745-46 (Michael Affidavit, at ¶¶ 4, 7-8)

[23]Affidavit of Johnson County Auditor Kay Reynolds, with attached cabaret tax records at LF 624 (Affidavit) and LF 625-704 (records); Affidavit of Bill Brenner, Presiding Commissioner of Johnson County, at LF 548; Affidavit of Paul Silvio, LF 712 (at ¶ 3).

The twenty-five clubs that provided information to Ann Michael, the Executive Director of Missouri Club Executives, reported employing between 500 and 600 people. [24]

They include college students, like Anthony Jones, who worked nights to fund his education and support his family while attending classes during the day.[25]

James Bryant, a student in his senior year at the University of Missouri, majoring in psychology, worked at an adult bookstore.[26]

Bryant paid for his education through a combination of grants and loans, in addition to money he earned to put himself through school. The Venus Adult Mega Store, which accommodated his class schedule and allowed Bryant to work nights , allowed him to earn money without interfering with his classes.[27] When the store was forced to close during the late night hours, Bryant was laid off. He was unable to find a new job, and was forced to take an additional student loan.[28]

Anneliece Smith was a student at the University of Kansas who was one year away from achieving her degree with a major in French. Like James Bryant, she funded her education through her work at an adult entertainment establishment. She has left Missouri

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[24]LF 745 (Affidavit of Ann Michael, at ¶6).

[25]LF 592-93 (Affidavit of Anthony Jones, at ¶4).

[26]LF 552 (Affidavit of James Bryant at ¶ 2).

[27]LF 552 (Bryant Aff., at ¶ 3).

[28]LF 552 (Bryant Aff., ¶¶ 6-7).

and now works at an adult cabaret in Kansas, so she can earn a sufficient income.[29]

These human stories have multiplied across the state, as the Act has undermined long established businesses, closing some and severely damaging others.

Adult entertainment was and is popular in Missouri, in urban and rural areas alike. Cabarets and adult bookstores offered constitutionally protected expression that was enjoyed by thousands of people. The Act is changing that dramatically.

Prior to the passage of SB 586 & 617, the Shady Lady in Kansas City averaged between 100 and 200 customers per night–many of them well-known musicians and sports figures as well as Kansas City residents.[30] Bazooka's in Kansas City hosted 850 to 1,000 customers per week.[31] Baccalá, an adult cabaret in Kansas City, averaged 1,000 patrons per month.[32] In Columbia, Rumors Cabaret averaged 100-125 customers per night on the weekends and 20-30 customers per night during the week.[33] Blondie's in St. Joseph averaged $5,000.00 of revenues per week.[34]

Cabarets in less urban areas were also popular entertainment spots. Club Illusions in Nixa averaged between 150 and 200 guests per night on weekend nights and between 100

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[29]LF 748-49 (Affidavit of Anneliece Smith, at ¶¶ 2,4 and 5).

[30]LF 723 (Affidavit of Joseph Spinello, at ¶3).

[31]LF 19-20 (Affidavit of Richard T. Snow, at ¶6).

[32]LF 733 (Affidavit of Steve Wille, at ¶3).

[33]LF 556 (Affidavit of Robert Call, at ¶3).

[34]LF 581 (Affidavit of George Gray, at ¶3).

and 150 guests during the week. In Kaiser, Missouri, Night Moves II averaged between 70 to 125 guests per night.[35]

Fantasy Ranch in Centerview averaged between 30 and 40 customers per night during the week and roughly 100 patrons per night on the weekends.[36] Emerald Gentlemen's Club, located outside St. Joseph in Andrew County, averaged between 100 and 150 customers each night on the weekend and between 25 and 50 patrons each night during the week.[37] The entertainment offered was diverse. Many were upscale Las Vegas-style gentlemen's clubs that prided themselves on being first-class venues that were well-appointed and well-maintained.[38] They were part of their community's vibrant nightlife.[39] They had lounges and concessions stands with television where patrons could gather and chat.[40]

Their owners invested substantial capital in the businesses including money for remodeling and maintaining them. It took $2,000,000.00 to gut and remodel the building in which Bazooka's is located.[41]

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[35]LF 736-37 (Affidavit of Craig Winchell at ¶¶4, 9).

[36]LF 712 (Silvio Aff., at ¶2).

[37]LF 582 (Gray Aff., at ¶10).

[38]LF 706, 736 (Affidavit of John Ribaste, at ¶3; Winchell Aff., at ¶3).

[39]LF 723 (Spinnllo Aff., at ¶3).

[40]LF 716 (Affidavit of Richard Simpson, at ¶3).

[41]LF 719 (Snow Aff., at ¶ 4)

The Show, a cabaret in Kansas City, was purchased with a loan of $680,000.00.[42]

Robert Call purchased Stephanie's, an adult cabaret in Columbia, for $500,000.00 and invested additional money in remodeling the structure and building its business.[43]

The Vegas Adult Mega Store in Columbia invests substantial sums in maintaining its premises.[44] Some were converted from other uses, or rehabilitated old buildings into new, and spacious entertainment venues.[45]

The various adult businesses affected by the contested legislation depended on certain businesses models which the restrictions and prohibitions adopted in that legislation have rendered all but impossible to continue.

The viability of adult cabarets that presented nude dancing depended on: (1) the ability to present nude dance presentations; (2) the ability to attract talented dancers to perform them; (3) the ability to provide late night entertainment in the hours after midnight as part of their area's nightlife; and (4) the ability to provide patrons with private, customized dances.[46]

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[42]LF 709-10 (Affidavit of John Serendich, at ¶ 7).

[43]LF 555 (Affidavit of Robert Call, at ¶2).

[44]LF 587 (Harrington Aff., at ¶4)

[45]LF 716 (Simpson Aff., at ¶4).

[46]See LF 555 (Call Aff., at ¶4); LF 712-13 (Silvio Aff., at ¶4); LF 737 Winchell Aff., at ¶5) ; LF 720 (Snow AFF., at ¶7); LF 729-30 (Affidavit of Jerry Westlund, at ¶6); LF 582 (Gray Aff., at ¶11).

The viability of adult cabarets that were licensed to serve alcohol and presented semi-nude dancing were based on a business model that relied on: (1) the ability to serve alcoholic beverages; (2) the ability to remain open during the late night hours after midnight; (3) the ability to present live dance performances by women in classic exotic dance costume; and (4) the ability to provide private dances for their customers.[47]

As for adult bookstores and arcades, the ability to be open during the late night hours was very important to their success. Roughly half the business at Pop Roxx, an adult retail store with viewing booths on the premises in Poplar Bluff, occurred after midnight.[48] Late night patronage at the Lion's Den stores and at Bazooka's was also substantial.[49]

As previously noted, the contested legislation imposes restrictions and prohibitions which cut to the core of these business models. It prohibits nude dancing altogether. It requires all adult businesses to close at midnight. It prohibits them from serving alcohol. It prohibits private dance performances for customers.

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[47]See LF 723-24 (Spinello Aff., at ¶6); LF 730 (Westlund Aff., at ¶7, 8); LF 706 (Ribaste Aff., at ¶4); LF 733 (Wille Aff., at ¶4); LF 581 (Gray Aff., at ¶4).

[48]LF 729 (Westlund Aff., at ¶3).

[49]See LF 592 (Jones Aff., at ¶3)(Since October 2007, some $582,655.00 of merchandise, including $325,247.00 of expressive materials, was sold between midnight and 6:00 a.m. at Lions Den) ; LF 720 (retail portion of Bazooka's formerly open until 3:00 a.m.).

The law also requires adult bookstores to re-configure their premises and to station an employee at a designated spot during all hours of operation. In sum, it imposes substantial burdens and impairments to the sustainability of these businesses.[50]

On August 28, 2010, the contested legislation took effect. Its suffocation of expression was quick and dramatic.

Cabarets that had offered nude dancing determined that the only way they could continue to remain viable was to cease presenting adult entertainment so that they could remain open after midnight and could present popular private dances.[51] Those that served alcohol and presented semi-nude dancing made the same determination.[52] The clubs, therefore, required their dancers to don full bikinis.

Two things occurred as a consequence: (1) the clubs experienced a mass exodus of dancers who went looking for work in other states without such restrictions on their expression, and (2) their customers stopped coming in. As Robert Call, the owner of Rumors Cabaret in Columbia, Missouri explained:

> At midnight on August 28, 2010, our dancers donned bikinis.
>
> Half of our customers left.

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[50] LF 600-01 (Ocello Aff., at ¶ 3).

[51] LF 556 (Call Aff., at 6); LF 737 (Winchell Aff., at ¶7); LF 713 (Silvio Aff., at ¶6); LF 583 (Gray Aff., at ¶13).

[52] LF 707 (Ribaste Aff., at ¶7); LF 723-34 (Spinello at Aff., at ¶6); LF 734 (Wille Aff., at ¶7); LF 731 (Westlund Aff., at ¶11); LF 581 (Gray Aff., at ¶6).

> We immediately experienced an exodus of dancers: 10 of Rumors' 12 dancers left. The dancers were unwilling to present entertainment under the restrictions of the new law. We were unable to operate with only two dancers, so we closed Rumors for three days, and re-opened as a bikini bar with six dancers. On Tuesday and Wednesday this past week, we had a total of four customers each night.[53]

Craig Winchell, the owner of Club Illusions and Night Moves I and II, testified to a similar experience:

> When I was forced by the law to implement this change [of requiring dancers to wear bikinis] to our business model, three-fourths of our dancers left. The dancers were unwilling to present entertainment under the restrictions of the new law. With a dwindling number of dancers who were now required to wear bikinis, we went from entertaining 150 customers per night to 8 or less. One customer told us that he could see more at the mall in town than he could see at our club. On Club Illusions' last day, it had one customer in a nine-hour period. So after 15 years of providing dance performances, Club Illusions closed.

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[53]LF 556 (Call Aff., at ¶¶ 6-7). When he submitted his affidavit in September 2010, Call feared for the survival of his businesses. LF 557 (Call Aff., at ¶ 9).

It could not operate as an ongoing business under the new law.

> Night Moves II experienced the same fate. Night Moves II presented nude dance performances from 5:30 p.m. until 3:00 a.m. in Kaiser, Missouri. We had more than 20 entertainers who performed for between 70 to 125 patrons per night. When the new law was enacted preventing us from presenting nude dancing and we attempted to survive by presenting dance performances by dancers in bikinis, the entire staff of dancers left. I had not one dancer left to perform, so as I did with Club Illusions, I shut down the business.[54]

These experiences were repeated in club after club – both in those that had presented nude dancing and in those that had presented semi-nude dancing – throughout the State.

The Shady Lady in Kansas City had a repertory of 55 dancers; when the summary judgment briefs were filed, it had only 18. While the Shady Lady used to average 100 to 200 customers per night, after the restrictions at bar took effect, it averaged about 30 per night. During lunch, it used to serve 30 to 50 guests. Afterward, it served six to eight.[55]

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[54]LF 737-38 (Winchell Aff., at ¶¶8-9). As a result of these losses, Winchell shut down all three businesses, in the process laying off his employees and severing ties with the vendors supplying his clubs. LF 738 (Winchell Aff., at ¶ 11).

[55]LF 724-25 (Spinello Aff., at ¶¶ 9-10).

The Show in Kansas City had 30 to 35 dancers and generated revenues of between $40,000.00 and $50,000.00 per month. When word of the law's passage reached its dancers, many of them left. When the law took effect at the end of August, The Show lost all of its dancers, and the club was shut down.[56]

After the law took effect, Fantasy Ranch's business was cut in half or worse; on a Sunday during the beginning weeks of September, it had a total of two customers.[57]

Pure's business has been cut in half and its staff of dancers has been cut by sixty percent.[58] Baccalá, which used to average 1,000 customers per month, is now lucky to average 100 customers per week.[59]

Bazooka's admissions are down by forty percent and it now has only half the dancers it had before the law took effect.[60]

Business at both The Pony in Springfield and The Pony in Poplar Bluff has dropped by forty percent as well.[61]

Emerald Gentlemen's Club, which had been open until 3:00 a.m. until the law took effect and did about seventy percent of its business after 1:30 a.m. when area bars closed,

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[56]LF 710 (Serendich Aff., ¶¶ 5-6).

[57]LF 713 (Silvio Aff., at ¶ 6).

[58]LF 707 (Ribaste Aff, at ¶8).

[59]LF 734 (Wille Aff., at ¶8).

[60]LF 721 (Snow Aff., at ¶10).

[61]LF 731 (Westlund Aff., at ¶11).

went from a staff of twenty dancers to a staff of three dancers; its audience on the weekends has dropped from between 100 and 150 per night to about 30 per night, and from between 25 and 50 customers per night during the week, to two or three.[62]

As noted above, like other cabarets that served alcohol and presented semi-nude dancing, Blondie's, a cabaret in St. Joseph's, began presenting dances by performers wearing bikinis after the new restrictions took effect.

Nevertheless, several St. Joseph police officers entered the premises, observed the dance performances, told Blondie's management that presentation of dances in bikinis violated the new law, and threatened to revoke the business's liquor license. In response to that threat, Blondie's ceased presenting dances by female performers. [63]

Blondie's did, however, continue with plans to present a previously scheduled Chippendale-style show with male dancers for an audience of 136 women. When during the dance performance, one of the dancers, all of whom were wearing bathing trunks, exposed his buttocks, the local authorities cited Blondie's for a violation of the new law and shut it down at 10:30 p.m. During one recent Friday night in the aftermath of these events, Blondie's total revenue was $34.00.[64]

Rebecca Eli explained the effect of the laws restrictions on dancers:

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[62]LF 581-82 (Gray Aff., ¶¶ 6, 10).

[63]LF582 (Gray Aff, at ¶ 7).

[64]LF582 (Gray Aff, at ¶¶ 8-9).

> The new law placing restrictions on my performances has inhibited my expression and has substantially reduced my income. Before the law went into effect, I was earning approximately $750.00 to $1,500.00 per week at Bazooka's. Since the law went into effect, I have been earning approximately $150.00 to $275.00 per week. Bazooka's has had a huge drop-off in customers because we no longer can present nude dancing and therefore, my earnings have been substantially reduced.
>
> I have had to travel to venues in Chicago, Kansas and North Dakota, that are not subject to such restrictions, to find places to perform my nude dances so I can earn additional income to pay my bills. Since August 28, 2010, I have made five out-of-state trips, lasting four-days at a time–having to incur rental costs for a car and hotel expenses. My family, including my husband, all lives in Missouri, which removes the option of moving out of state for me.[65]

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[65]LF 578-79 (Affidavit of Rebecca Eli, at ¶¶4-6). Other dancers gave similar testimony. See also: LF 595 -96 (Affidavit of Sally Lane, at ¶¶4-5); LF 751-52 (Affidavit of Cindy Doe, at ¶¶5,6).

Bookstores, theaters and arcades have also experienced the constriction of expression that they disseminate.[66]

The law's interior configuration and hiring requirements for such stores, which took effect on February 24, 2011, compounded its effects still further. Mitchell Harrington, manager of Venus Adult Mega Store, explained:

> The way our premises are configured make it impossible to comply with the configuration requirements of Missouri's new adult establishment law. The only way that we could conform our arcade and theater area would be to knock down the wall that separates the retail business and the theaters, but the wall that would have to be knocked down is a load-bearing and fire wall. Therefore, we will be forced to shut down our theaters and arcade because we cannot meet the law's requirements. Between August 28, 2009 and August 28, 2010, we generated more than $130,000.00 in ticket sales from our adult theaters and more than $62,000.00 in revenues from those viewing films in our arcade. The new law will, therefore, prevent us from presenting a substantial amount of constitutionally protected expression.

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[66]See LF 592 (Jones Aff., at ¶3); LF 721 (Snow Aff., at ¶11); LF 588 (Harrington Aff., at ¶6).

> Shutting down our theaters and the arcade coupled with the reduction in sales of adult expression make it doubtful that Venus will be able to remain open. We have laid off two full-time employees and two part-time employees because of the law's effect on our business.[67]

Similarly, the Olde Un Theater, a Columbia institution operating for nearly forty years has been curtailed in its presentation of expression–losing $9,000.00 in revenues from late night theater admissions and sales in the five weeks after the law took effect. Another business contemplates having to spend roughly $20,000.00 to re-configure its premises–in which it has already made a substantial investment–to bring it into compliance with the law.[68]

– THE SECONDARY EFFECTS EVIDENCE IN MISSOURI –

The ostensible purpose of the Act was to ameliorate the adverse secondary effects said to attend the operation of adult cabarets and bookstores in Missouri.

The nature and quality of the secondary effects evidence contained in both the legislative record, and in the Circuit Court record below, is of pivotal importance to the question of whether the Act can survive First Amendment review at intermediate scrutiny.

For that reason, our discussion of the secondary effects evidence adduced both for and against the Act will be presented with the arguments on that issue.

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[67]LF 587-88 (Harrington Aff., at ¶¶5-7). See also, LF 721 (Snow Aff., at ¶11) (testifying about uncertainty about ability to comply with new configuration requirements).

[68]LF 716-17 (Simpson Aff., at ¶¶ 6-7).

Here, however, it bears emphasis that the evidence relied upon by the General Assembly in passing the Act was starkly at odds with the dozens of affidavits Appellants submitted from citizens, business owners with establishments near adult cabarets and bookstores, community leaders, public officials and law enforcement officers.[69]

[69]See generally, LF 269-75, 335-39 (Appellants' Suggestions, at 9-15, 75-79, summarizing affidavits discussed in detail later, in Point Relied on 3-B, of this Brief).

– POINT RELIED ON I –

THE CIRCUIT COURT ERRED IN HOLDING THAT SB 586 & 617 WAS VALIDLY ADOPTED, BECAUSE THE ACT WAS ADOPTED WITHOUT A FISCAL NOTE HEARING, AFTER A MEMBER OF THE HOUSE OF REPRESENTATIVES MADE A WRITTEN REQUEST THAT THE JOINT COMMITTEE ON LEGISLATIVE RESEARCH CONDUCT A HEARING ON ITS FISCAL NOTE, IN THAT R.S. MO. § 23.140 REQUIRES THAT THE COMMITTEE HOLD SUCH A HEARING, AS SOON AS POSSIBLE AFTER SUCH A WRITTEN REQUEST IS MADE, AND IN THAT MO. CONST. ART III, § 35 EXPRESSLY REQUIRES THE COMMITTEE TO MEET TO DISCHARGE THE DUTIES ASSIGNED TO IT BY LAW.

Bauer v. Transitional School District, 111 S.W. 3d 405, 408 (Mo. banc 2003).

Hammerschmidt v. Boone County, 877 S.W.2d 98, 102 (Mo. banc 1994);

State v. Teer, 275 S.W.3d 258 (Mo. banc 2009)

Thompson v. Committee on Legislative Research, 932 S.W.2d 392 (Mo. banc 1996).

MO. CONST. ART. III § 35

R.S.MO. § 23.140

– POINT RELIED ON II –

THE CIRCUIT COURT ERRED IN GRANTING JUDGMENT ON THE PLEADINGS FOR THE RESPONDENT, AND IN DENYING SUMMARY JUDGMENT TO THE APPELLANTS ON THAT PORTION OF COUNT II OF THE AMENDED VERIFIED COMPLAINT WHICH CONTESTED THE ACT AS A CONTENT-BASED RESTRICTION ON CONSTITUTIONALLY PROTECTED EXPRESSION, BECAUSE THE ACT WAS ADOPTED TO RESTRICT ADULT EXPRESSION REGARDLESS OF THE PRESENCE OR ABSENCE OF ADVERSE SECONDARY EFFECTS, IN THAT IT RECITES AS MUCH IN ITS PREAMBLE, AND BECAUSE THE ACT IS ON THAT BASIS UNCONSTITUTIONAL, IN THAT IT IS NEITHER NECESSARY TO SERVE A COMPELLING GOVERNMENTAL INTEREST, NOT THE LEAST RESTRICTIVE MEANS OF DOING SO.

City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002)

Joelner v. Village of Washington Park, 508 F.3d 427 (7th Cir. 2007).

United States v. Playboy Entertainment Group, 529 U.S. 803 (2002)

U.S. CONST. AMEND. I

R.S. Mo. 573.525.2 (3)

– POINT RELIED ON III –

THE CIRCUIT COURT ERRED IN ENTERING JUDGMENT ON THE PLEADINGS IN FAVOR OF THE RESPONDENT WITH RESPECT TO COUNT II OF THE AMENDED VERIFIED PETITION, BECAUSE THE QUESTION OF WHETHER THE ACT CAN SURVIVE INTERMEDIATE SCRUTINY UNDER THE FIRST AMENDMENT COULD NOT BE DECIDED IN FAVOR OF THE RESPONDENT, AS A MATTER OF LAW, ON THE PLEADINGS, IN THAT: (A) THE WELL-PLEADED ALLEGATIONS OF THE AMENDED VERIFIED PETITION, WHEN TAKEN AS TRUE, PLAINLY STATE A CLAIM UNDER THE FIRST AMENDMENT: (B) SUBSTANTIAL EVIDENCE PRODUCED IN SUPPORT OF APPELLANTS' SUMMARY JUDGMENT MOTION AND IN OPPOSITION TO RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS, ESTABLISHED THAT THE SECONDARY EFFECTS RECORD UPON WHICH THE ACT WAS ADOPTED, AND BY WHICH IT WAS JUSTIFIED, WAS DEMONSTRABLY SHODDY, AND; (C) SUBSTANTIAL EVIDENCE PRODUCED IN SUPPORT OF APPELLANTS' SUMMARY JUDGMENT MOTION AND IN OPPOSITION TO RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS, AFFIRMATIVELY DISPROVED THE SECONDARY EFFECTS RATIONALE ADVANCED IN SUPPORT OF THE ACT IN MISSOURI.

Abilene Retail # 30 v. Board of Commissioners of

Dickinson County, Kansas, 492 F.3d 1164 (10th Cir. 2007)

Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460 (7th Cir. 2009)

Annex Books v. City of Indianapolis, 624 F.3d 368 (7th Cir. 2010)

City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002)

U.S. CONST. AMEND. I

– POINT RELIED ON IV –

THE CIRCUIT COURT ERRED IN ENTERING JUDGMENT ON THE PLEADINGS IN FAVOR OF THE RESPONDENT WITH RESPECT TO COUNT II OF THE AMENDED VERIFIED PETITION, BECAUSE THE QUESTION OF WHETHER THE ACT CAN SURVIVE INTERMEDIATE SCRUTINY UNDER THE FIRST AMENDMENT COULD NOT BE DECIDED IN FAVOR OF THE RESPONDENT, AS A MATTER OF LAW, ON THE PLEADINGS, IN THAT, RESTRICTIONS ON ADULT EXPRESSION MUST SUBSTANTIALLY REDUCE ADVERSE SECONDARY EFFECTS WITHOUT MATERIALLY DIMINISHING THE QUANTITY AND AVAILABILITY OF ADULT SPEECH IN THE SUBJECT JURISDICTION, AND IN THAT THE ACT HAS ALREADY HAD, AND WILL CONTINUE TO HAVE, A DEVASTATING IMPACT ON ADULT BUSINESSES IN MISSOURI, SOMETHING THAT WAS BOTH ALLEGED IN THE AMENDED VERIFIED COMPLAINT AND DEMONSTRATED IN THE EVIDENCE SUBMITTED TO THE CIRCUIT COURT.

City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002)

Annex Books v. City of Indianapolis, , 581 F.3d 460 (7th Cir. 2009)

U.S. CONST. AMEND. I

– ARGUMENT –

– STANDARD OF REVIEW –

There were two Counts in the Amended Verified Complaint.

Respondent sought, and was granted, judgment on the pleadings as to both the state constitutional and statutory claims asserted in Count I, and as to the state and federal constitutional claims asserted in Count II.[70]

Appellants sought, and were denied, summary judgment as to the claims asserted in Count I, and that portion of Count II which alleged that the legislation contested in this case was a content-based restriction on protected expression that was subject to, but could not survive, strict scrutiny as a matter of First Amendment law, or under Article I, § 8 of the Missouri Constitution.[71]

The Circuit Court also rejected Appellants' opposition to Respondent's Motion for Judgment on the Pleadings both as to Count I, and that portion of Count II which alleged that the Act could not survive as a content-based restriction on protected expression subject to strict scrutiny.[72]

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[70]LF 104-06 (Respondent's Motion for Judgment on the Pleadings, at 1-3); LF 1800 (Judgment of November 23, 2010); LF 1964 (Judgment of January 17, 2011).

[71]LF 222-24 (Appellants' Motion for Summary Judgment, at 1-3); LF 1800 (Judgment of November 23, 2010); LF 1964 (Judgment of January 17, 2011).

[72]*Id.*

This Court reviews an order granting judgment on the pleadings to see if the allegations set forth in the pleadings are sufficient as a matter of law.[73] "The party moving for judgment on the pleadings admits, for purposes of the motion, the truth of all well pleaded facts in the opposing party's pleadings." [74]

Judgment on the pleadings is only appropriate when, with every such allegation taken as true, the non-moving party is found to have no claim to relief, as a matter of law.[75]

The denial of a summary judgment motion may be reviewed on appeal when the legal issues central to the disposition of the motion below were "inextricably bound up with" the legal issues central to an order granting judgment to the adverse party.[76] Because the basis for granting judgment on the pleadings, and denying partial summary judgment as to Count I and the portion of Count II described above were essentially the same, the denial of the summary judgment motion is properly before this Court on appeal.

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[73]*State ex rel. Nixon v. American Tobacco Co., Inc*., 34 S.W.3d 122, 134 (Mo. banc 2000).

[74]*Id*. (quoting *Barker v. Danner*, 903 S.W.2d 950, 957 (Mo. App. 1995)(in turn quoting *Angelo v. City of Hazelwood*, 810 S.W.2d 706, 707 (Mo.App. 1991))).

[75]*Id.*, (quoting *Madison Block Pharmacy, Inc. v. U. S. Fidelity and Guaranty Co.*, 620 S.W.2d 343, 344 (Mo. banc 1981).

[76]*Nodaway Valley Bank v. E.L. Crawford Const., Inc.*, 126 S.W.3d 820, 824 (Mo.App. W.D. 2004)(denial of summary judgment may be reviewed on appeal when tied up with the same issues that supported granting summary judgment to adverse party).

To demonstrate that summary judgment should have been granted in their favor, the Appellants must show that there was no genuine issue as to any material fact as to which they would have born the burden of proof at trial.[77] Such review is de novo.[78]

Should the Court determine that the Circuit Court erred in dismissing that portion of Count II which alleged the Act cannot survive its encounter with the First Amendment and Article I, § 8 of the Missouri Constitution under intermediate scrutiny, this Case should be remanded for a trial on the question of whether the Act is justified by the need to address, and is narrowly tailored to address the adverse secondary effects of adult expression which may or may not actually exist in Missouri, and whether the Act does so to a material degree without impermissibly reducing the quantity and availability of adult expression in this state.

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[77]*Id*., at 824 (citing *ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp*., 854 S.W.2d 371, 387-88 (Mo. banc. 2003).

[78]*ITT Commercial Finance*, 854 S.W.2d at 387-88.

– POINT RELIED ON I –

THE CIRCUIT COURT ERRED IN HOLDING THAT SB 586 & 617 WAS VALIDLY ADOPTED, BECAUSE THE ACT WAS ADOPTED WITHOUT A FISCAL NOTE HEARING, AFTER A MEMBER OF THE HOUSE OF REPRESENTATIVES MADE A WRITTEN REQUEST THAT THE JOINT COMMITTEE ON LEGISLATIVE RESEARCH CONDUCT A HEARING ON ITS FISCAL NOTE, IN THAT R.S. MO. § 23.140 REQUIRES THAT THE COMMITTEE HOLD SUCH A HEARING, AS SOON AS POSSIBLE AFTER SUCH A WRITTEN REQUEST IS MADE, AND IN THAT MO. CONST. ART III, § 35 EXPRESSLY REQUIRES THE COMMITTEE TO MEET TO DISCHARGE THE DUTIES ASSIGNED TO IT BY LAW.

The Circuit Court held that SB 586 & 617 was not invalid for having been passed by the General Assembly without a hearing as to its fiscal note by the Joint Committee on Legislative Research ("the Committee"), notwithstanding the fact that Petitioner Dougherty formally requested that such a hearing be held.[79]

Its essential reasoning may be briefly summarized: the Missouri Constitution does not require that a bill have a fiscal note in order to be passed (LF 1796); a fiscal note and a hearing is required only by statute, namely R.S. Mo. § 23.140 (LF 1797); the failure to hold such a hearing is thus, at worst, a statutory failure (LF 1797); such a failing does not invalidate a law because the statute in question is directory, and not mandatory (LF 1798-99).

[79] LF 1800 (Judgment of November 23, 2010, at 7).

In short, the Circuit Court simply, and erroneously, gave the General Assembly a pass, permitting it to disregard both a constitutional imperative and its statute of its own creation without consequence. In doing so, it erred as a matter of law.

Article III, § 35 of the Missouri Constitution provides, in pertinent part:

> The committee **shall meet when necessary to perform the duties, advisory to the general assembly, assigned to it by law**.[80]

The Joint Committee on Legislative Research is the **only** legislative committee established by the Missouri Constitution. Its authority is derived from the Constitution and is not subject to alteration in derogation of the constitutional provision which created it.[81]

For that reason, this Court, in *Thompson*, invalidated a provision that would have required the Committee to prepare fiscal notes in connection with legislation proposed not by the General Assembly itself, but through popular initiatives. It did so after explaining that the Committee, as a creature of the Constitution, had duties rooted in the Constitution:

> The Committee serves the legislature, but it is a creation of the constitution. The Committee's authority is not co-extensive with that of the legislature; it has only the power granted it by the constitutional provision that creates it. The relevant inquiry here, therefore, is not about the power of the general assembly.

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[80]MO. CONST. ART III, § 35 (West 2011)(emphasis added).

[81]*Thompson v. Committee on Legislative Research*, 932 S.W.2d 392 (Mo. Banc 1996).

> Instead, the proper focus is on the authority of the Committee.
>
> * * *
>
> The general assembly has no power — plenary or otherwise — to adopt a statute that increases the duties of the Committee beyond those **expressly authorized** by article III, section 35. To hold otherwise would permit the legislature to amend the constitution with a statute.[82]

If the General Assembly cannot increase the duties of the Committee beyond what the Constitution authorizes, it certainly cannot diminish them by fiat.

The central duty of the Committee is to act in a capacity that is advisory to the General Assembly. And it is clear that the duties imposed upon the Committee by law – by the General Assembly itself, and pursuant to R.S.Mo. 23.140 – are expressly authorized by Article III, Section 35. The statute simply delineates the sort of advisory responsibilities which the Constitution compels the Committee to discharge. It reads in relevant part:

> 1. Legislation, with the exception of appropriation bills, introduced into either house of the general assembly **shall, before being acted upon**, be submitted to the oversight division of the committee on legislative research for the preparation of a fiscal note. The staff of the oversight division **shall prepare a fiscal note**,

[82] *Id*, at 394-95 (emphasis added).

examining the items contained in subsection 2 and such additional items as may be provided either by joint rule of the house and senate or by resolution adopted by the committee or the oversight subcommittee.

2. The fiscal note shall state:

(1) The cost of the proposed legislation to the state for the next two fiscal years;

* * *

(4) Whether or not the proposed program or agency will have significant direct fiscal impact upon any political subdivision of the state;

* * *

(6) Whether or not the proposed legislation will have an economic impact on small business.

* * *

3. The fiscal note for a bill shall accompany the bill throughout its course of passage . . . . Once a fiscal note has been signed and approved by the director of the oversight division, the note shall not be changed or revised without prior approval of the chairman of the legislative research committee, except to reflect changes

> made in the bill it accompanies, or to correct patent typographical, clerical or drafting errors that do not involve changes of substance, nor shall substitution be made therefor. Appeals to revise, change or to substitute a fiscal note shall be made in writing by a member of the general assembly to the chairman of the legislative research committee and **a hearing before the committee or subcommittee shall be granted as soon as possible** . . . .[83]

Plainly, the requirements of Section 23.140.3 are among "the duties, advisory to the general assembly, assigned to it by law."

As to those duties, Article III, Section 35 is unambiguous: the Committee "shall meet" when necessary in order to perform them.

In short, the requirement – set forth in R.S. Mo. § 23.140.3 – that a hearing be held on the written appeal of a member of the General Assembly triggers the constitutional provision of Art. III, § 35 mandating that "[t]he committee shall meet when necessary to perform the duties, advisory to the general assembly, assigned to it by law."

The committee is thus **constitutionally** required to meet and hold a hearing on a legislator's appeal on a fiscal note, a duty assigned to the committee by law.

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[83]R.S. MO. § 23.140 (West 2011)(emphases added).

The Circuit Court found, as a matter of undisputed fact, that Appellant Dougherty – then a member of the General Assembly – did request a hearing on the fiscal note, and that no such hearing was ever held.[84]

The decision to grant the Respondent judgment on the pleadings must rise or fall, then, with the justification for that failure which the Circuit Court deemed acceptable.

While internal rules or resolutions regulating the internal affairs of the Assembly may not have "the force and effect of law,"[85] the legislature is bound to comply with the mandates of the Missouri Constitution and with legislation duly passed and approved by the governor.[86]

"Generally the word 'shall' connotes a mandatory duty."[87]

Thus the "plain language" of both Section 23.140 and Article III, Section 35 support the construction of those passages as imposing a mandatory duty to grant a hearing on a

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[84]LF 1795 (Judgment of November 23, 2010, at 2).

[85]*State ex rel. Royal Insurance v. Director of the Missouri Department of Insurance*, 894 S.W. 2d 159, 162 (Mo. banc 1995).

[86]*See e.g., Weinstock v. Holden*, 995 S.W.2d 411, 416-17 (Mo. banc 1999); *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994); *Bergman v. Mills*, 988 S.W.2d 84, 89 (Mo.App. W.D. 1999) (legislature limited its own ability to act by statutory enactment and could not thereafter act in contravention of statute).

[87]*Bauer v. Transitional School District*, 111 S.W. 3d 405, 408 (Mo. banc 2003).

fiscal note when such a hearing is requested by a member of the General Assembly.

The Circuit Court characterized the requirement that the Committee hold the requested hearing as directory, and not mandatory, upon the strength of *Farmers & Merchants Bank and Trust Co. v. Director of Revenue*, 896 S.W.2d 30, 32 (Mo. banc 1995), which it cited for the proposition that statutes which impose duties without a penalty provision enunciating the consequences of noncompliance, are merely directory in nature.[88]

This analysis is flawed in two ways.

First, no single factor can excuse a given use of the term "shall" as directory. Rather, what matters is assessing the word in its overall statutory (or constitutional) context.[89]

Indeed, this Court has expressly rejected the notion that any one factor can render the use of the word shall directory on its face, and in doing so, rejected precisely the sort of single-factor reliance on *Farmers & Merchants Bank* that the Circuit Court embraced below.

In *Teer*, for example, this Court held the language of R.S. Mo. §558.021.2 (which requires the state to plead and prove prior offender status before a case is submitted to a jury) used the word "shall" in a mandatory, and not directory fashion.

> The word "shall" generally prescribes a mandatory duty. *Bauer*

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[88]LF 1799 (Judgment of November 23, 2010, at 6).

[89]*Farmers & Merchants Bank and Trust*, 896 S.W.2d at 32 ("Whether the statutory word "shall" is mandatory or directory is a function of context"); *Accord*: *State v. Teer*, 275 S.W.3d 258 (Mo. banc. 2009)("determining if the word 'shall' is mandatory or directory requires courts to review the context of the statute and to ascertain legislative intent.").

> *v. Transitional School District of City of St. Louis,* 111 S.W.3d 405, 408 (Mo. banc 2003). There are cases that have qualified the interpretation of the word "shall" by holding that "where a statute or rule does not state what results will follow in the event of a failure to comply with its terms, the rule or statute is directory and not mandatory." *Id*.; *Cline v. Carthage Crushed Limestone Co.*, 504 S.W.2d 118 (Mo.1974). Although section 558.021.2 does not state that a particular result will follow if the statute is violated, the "presence or absence of a penalty provision is 'but one method' for determining whether a statute is directory or mandatory." *Id*., quoting *Southwestern Bell Tel. Co. v. Mahn*, 766 S.W.2d 443, 446 (Mo. banc 1989). As with all matters of statutory interpretation, determining if the word "shall" is mandatory or directory requires courts to review the context of the statute and to ascertain legislative intent.[90]

The same reasoning applies here: it is in the broader context of both Article III, Section 35 and Section 23.140.3, and the purposes those provisions are intended to serve, that the mandatory character of "shall" becomes apparent.

In determining Article III, Section 23 of the Missouri Constitution imposed a mandatory duty on – as opposed to simple direction to – the General Assembly in connection

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[90]*State v. Teer*, 275 S.W.3d at 262 (quotations and citations preserved above).

with the bills it drafted, this Court in *Hammerschmidt* examined the policies advanced by the requirement, at issue in that case, that bills contain no more than one subject. The provision, like the provisions at issue here, did not specify a penalty for its violation.

In concluding that Section 23 is mandatory, this Court focused on the manner in which the single subject rule advanced important public interests, including "facilitat[ing] orderly legislative procedure.[91]

The Court found that the single subject rule was important in preserving the integrity of the legislative process by preventing logrolling – the practice of combining unrelated amendments to command a majority vote – in "defeat[ing] surprise in the legislative process," assuring that the people are fairly apprised about the subject of the legislation "in order that they have [an] opportunity of being heard thereon," and preventing the governor from being placed in a "take-it-or leave-it choice" in exercising his veto.[92]

For these reasons, the Court determined that the constitutional provision requiring legislation to embrace only a single subject was mandatory.[93]

The legislative policies and interests advanced by R.S. Mo. 23.140 are also compelling and like the provision at issue in *Hammerschmidt*, involve an integral issue in the

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[91]*Hammerschmidt,* 877 S.W.2d at 101.

[92]*Id.* at 101-02.

[93]*Id.* at 102. *See also, Carmack v. Director, Missouri Department of Agriculture*, 945 S.W.2d 956, 959 (Mo. banc 1997).

legislative process: the economic impact of a bill on state and local government treasuries and on the state's small businesses; its provisions are likewise mandatory.

The information that a fiscal note provides is critical in allowing members of the General Assembly to evaluate whether a bill's passage will impose serious and devastating economic consequences for state and local government and the state's small business community. As the Court of Appeals has recognized – in the context of a similar duty imposed on administrative agencies under R.S.Mo. § 536.200 et seq. – the "object of the fiscal note requirement is assurance that state agencies and, in turn, the legislature and the public are aware of the economic costs as well as the benefit" of a proposed regulation.[94]

In this context, the hearing required by Section 23.140 at the request of a member of the General Assembly allows the constitutionally created Joint Committee on Legislative Research and concomitantly, the legislative body, to discover the truth regarding the fiscal impact of proposed legislation to avoid unintended and crippling economic consequences.

This brings us back to the importance of the hearing requested by then-Representative Dougherty in this case.

On its face, the fiscal note appeared incomplete and inaccurate, something which compelled Representative Dougherty to invoke the only lawful corrective measure available

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[94]*Missouri Hospital Association v. Air Conservation Com'n*,874 S.W.2d 380, 391 (Mo.App. W.D. 1994)(*quoting* Alfred S. Neely & Daniel W. Shinn, *Missouri Practice: Administrative Practice and Procedure* §6.51 (1986))

to a member who doubts the accuracy or completeness of a legislative fiscal note: he invoked his right to request a hearing on the fiscal note in the Committee.

> When I read the fiscal note, I was troubled. The note did not account for the effect of the proposed legislation in terms of lost revenues from sales and employment taxes, which would presumably decrease since the legislation required all adult entertainment establishments to close at midnight; it did not account for the effect on revenues from liquor licenses, nor did it address the added costs for enforcement of its provisions–to name just a few items. I concluded that the fiscal note did not adequately report the fiscal impact on the state and local revenues, nor on small businesses. Given the particular economic challenges that we had been facing and will continue to face, I felt it was important that the General Assembly have a full and accurate assessment of SB 586 & 617's fiscal impact to inform our vote.[95]

All this underscores the need to grant a hearing on the fiscal note "as soon as possible" when a member of the General Assembly questions its accuracy and requests a hearing, to allow the presentation of information that corrects an inaccurate or incomplete fiscal note before it is submitted to the General Assembly for a vote. To serve such a purpose, the

[95]LF 564-65 (Dougherty Aff., at ¶¶ 3-4).

requirement to hold such a hearing is – and must be – mandatory, and not directory.

Apart from erroneously concluding that the requirement of R.S. Mo. § 23.140 to hold a fiscal note hearing as soon as possible, when requested by a member, is directory, the Circuit Court (LF 1798) suggested that enforcement of this requirement would represent an improper attempt by one legislature (the General Assembly which enacted Section 23.140) to bind a subsequent legislature (the General Assembly which passed SB 586 & 617), a conclusion based entirely on the partial dissent of Judge Price in *Independence-National Educ. Ass'n v. Independence School Dist.*, 223 S.W.3d 131, 147-48 (Mo. banc 2007)(Price, J., dissenting in part).[96]

In *Independence-National*, this Court, overruling its own prior decision, determined that public employees had the right to bargain collectively.

Judge Price, in dissent, expressed concern about the ability of a school board to bind a subsequent school board to a collective bargaining agreement with its employees–referring to the doctrine establishing that one legislature cannot bind another legislature by its enactments. Apart from the notably different context of *Independence-National*, the doctrine Judge Price referenced does not excuse the General Assembly from complying with the mandates imposed on it by current legislation; it simply provides that a subsequent General

[96]Of course, that argument does nothing to spare the Act from invalidity because it was enacted in violation of Article III, Section 35, which independently mandates that the Committee meet to fulfill a duty imposed on it by law.

Assembly always has the power to repeal legislation passed by its predecessor.[97]

But the power to **repeal** prior legislation does not imply the power to simply **ignore** it:

> [T]he scope of the legislature's methods of acting are not as comprehensive as the scope of its objects. Consequently, the General Assembly has "all the powers and privileges which are necessary to enable it to exercise in all respects, in a free, intelligent, and impartial manner, its appropriate functions, except so far as it may be restrained by the express provisions of the Constitution, or by some express law made unto itself, regulating and limiting the same."[98]

In short, the General Assembly is bound by its own past enactments – including by

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[97]Indeed, the power of one General Assembly to repeal the work of it predecessor is precisely the manner through which the inability of the former to bind the latter is given force, something recognized by this Court in *State v. Hamey*, 67 S.W. 620, 624 (1902), one of the cases upon which Judge Price relied for that proposition in his dissent.

[98]*Bergman v. Mills*, 988 S.W.2d 84, 89 (Mo.App. W.D. 1999)(quoting *Bohrer v. Toberman*, 360 Mo. 244, 227 S.W.2d 719, 723 (1950)(in turn quoting Luther Stearns Cushing, Lex Parliamentaria Americana: Elements of the Law and Practice of Legislative Assemblies in the United States of America 221 (1874) (emphasis added))).

R.S. § Mo. 23.140 – unless and until it repeals them, no less than it is bound by the Missouri Constitution, including Article III, Section 35.

Both those provisions required the Committee to meet upon the written request of Petitioner Dougherty. The Committee did not meet, instead enacting SB 586 & 617 upon a deeply flawed fiscal note and in contravention of law. The Act is accordingly invalid.

– POINT RELIED ON II –

THE CIRCUIT COURT ERRED IN GRANTING JUDGMENT ON THE PLEADINGS FOR THE RESPONDENT, AND IN DENYING SUMMARY JUDGMENT TO THE APPELLANTS ON THAT PORTION OF COUNT II OF THE AMENDED VERIFIED COMPLAINT WHICH CONTESTED THE ACT AS A CONTENT-BASED RESTRICTION ON CONSTITUTIONALLY PROTECTED EXPRESSION, BECAUSE THE ACT WAS ADOPTED TO RESTRICT ADULT EXPRESSION REGARDLESS OF THE PRESENCE OR ABSENCE OF ADVERSE SECONDARY EFFECTS, IN THAT IT RECITES AS MUCH IN ITS PREAMBLE, AND BECAUSE THE ACT IS ON THAT BASIS UNCONSTITUTIONAL, IN THAT IT IS NEITHER NECESSARY TO SERVE A COMPELLING GOVERNMENTAL INTEREST, NOT THE LEAST RESTRICTIVE MEANS OF DOING SO.

The Circuit Court – in what was essentially a single-page entry without elaboration – sustained the contested legislation against all the First Amendment challenges presented in Count II of the Amended Verified Complaint.[99] The court gave no indication as to the standard of constitutional review applied in reaching its decision.

Appellants argued, inter alia, that the Act was content based, and was thus properly subject to strict scrutiny, which it could not survive.[100]

The Circuit Court erred, as a matter of law, in failing to invalidate the Act on that

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[99]LF 1964 (Judgment of January 27, 2011 at 1).

[100]LF 298-304 (Appellants' Suggestions, at 38-44).

basis, both by granting judgment on the pleadings against all of Count II, and by denying that portion of the summary judgment motion below in which the Appellants argued for strict scrutiny.

The Act unquestionably identifies the expression to which it applies – erotic dance performances and sexually candid literature – by the content of that expression.[101]

Ordinarily, laws which are triggered by the content of the expression they address are subject to strict scrutiny: to pass First Amendment muster, they must be necessary to achieve a compelling governmental interest, and must employ the least restrictive means of achieving that end.[102]

A different line of authority has emerged, however, to govern laws which identify the expression they regulate by reference to its content, but purport to impose restrictions on that speech not in an effort to suppress the content itself, but rather for purposes unrelated to the content, such as the adverse secondary effects said to attend the speech. Such laws are subject to intermediate, rather than strict, scrutiny on the theory that they are content-neutral and their effect on expression is merely incidental.[103]

Laws which regulate the location and operation of adult businesses may fall within

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[101]R.S. Mo. §§ 573.528 (1)(defining "adult bookstore) and 573.528(2)(defining "adult cabaret").

[102]*United States v. Playboy Entertainment Group*, 529 U.S. 803, 811 (2002).

[103]*See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986).

this category of content-neutral regulations, provided that their predominant concern is not the regulation of the expression itself, but rather the suppression of the adverse secondary effects said to attend such businesses.[104] In other words, these laws are subject to intermediate scrutiny, so long as the amelioration of adverse secondary effects is, in fact, their "predominate" purpose.[105]

For that reason, the first duty of a court facing a constitutional challenge to an adult use regulation is to ascertain what level of constitutional scrutiny to apply. This "requires courts to verify that the 'predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech].'"[106]

The Act at issue here contains a formal preamble, which duly recites that its purpose is to "regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of this state, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the state."[107]

The General Assembly also listed the negative secondary effects allegedly caused by adult uses, which the Act was ostensibly adopted to ameliorate:

> Sexually oriented businesses, as a category of commercial

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[104]*City of Los Angeles v. Alameda Books*, 535 U.S. 425, 434 (2002)(plurality)(citing *Renton*, 475 U.S. at 47-49).

[105]*Id.* at 48.

[106]*Alameda Books*, 535 U.S. at 440(plurality)(quoting *Renton*, 475 U.S. at 75).

[107] R.S. Mo. 573.525.1.

> enterprises, are associated with a wide variety of adverse secondary effects, including but not limited to personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation . . . . [108]

As we explain later in this brief, this litany of anticipated evils is little more than a complete fiction, based on decades-old surveys and other shoddy evidence that has been repeatedly invoked to justify adult use regulations.

What is most telling, for First Amendment purposes, is the admission of purpose that the General Assembly included after this parade of (imagined) horrors. It observed:

> Each of the foregoing negative secondary effects constitutes a harm which the state has a substantial interest in preventing or abating, or both. Such substantial government interest in preventing secondary effects, which is the state's rationale for sections 573.525 to 573.537, **exists independent of any comparative analysis between sexually oriented and nonsexually oriented businesses**.

R.S. Mo. 573.525.2(3)(emphasis added).

This is a remarkable statement, and is nothing less than an admission by the legislature

[108]R.S. MO. 573.525.2 (1).

of an unconstitutional animus toward sexually oriented expression based on its content.

The General Assembly admitted in this statement that it cares not whether the secondary effects of adult businesses are identical to or even less than the secondary effects of businesses offering expression with no sexual or erotic content.

Even if – the legislature declares in the passage quoted above – business offering the preferred non-sexually-explicit expression cause secondary effects identical to or greater than adult businesses that offer sexually oriented expression, it is only those sexually-oriented businesses that will be regulated and burdened.

No explanation for such a legislative statement is plausible other than an hostility to the content of sexually-oriented speech. This legislative statement demonstrates that the provisions adopted by the Act are, and were intended to be, content-based restrictions on constitutionally protected expression.

That conclusion is only reinforced by the remarks of the principal legislative proponent of the Act, Senator Matt Bartle, whose career-long crusade against what he has characterized as the moral evil of sexually candid expression is a matter of public record. Of his efforts to pass the legislation at issue, he told the *Saint Louis Post-Dispatch*:

> I've been at this for 12 years now . . . [a]nd I've grown really frustrated with an overwhelming Republican Legislature that tells people we support family values and that we're social conservatives. And we can't get a regulation of the porn industry

through the Legislature.[109]

While couched in the obligatory language of secondary effects, the antipathy to sexually mature content at the heart of the contested legislation all but drips from the May 3, 2010 Weekly Column posted by Senator Bartle on his official Senate website.

Characterizing adult bookstores along Interstate 70 as "dollar driven smut shops" whose "shocking proliferation" needed to be stopped, Senator Bartle voiced his commitment to stopping them in an openly paternalistic way.

> As this is my final legislative session, I've made it one of my top priorities to work on a bill that will clean up our state's image and make Missouri an even more family friendly destination.[110]

These comments, taken together with the express decision of the General Assembly to restrict adult businesses – whether-or-not they cause adverse secondary effects of a sort or to a degree greater than any other business in the state – point to the inescapable conclusion that the Act was adopted for the purpose of suppressing the content of the expression offered by the Plaintiffs.

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[109]LF 302 (Appellants' Suggestion, at 42)(quoting: Tony Messenger, Matt Bartle still waiting for Legislature to Act, Saint Louis Post-Dispatch, May 12, 2010, available online at www.stltoday.com/news/local/govt-and-politics, last visited July 15, 2010).

[110]Memorandum (LF 302) quoting State Senator Matt Bartle in his online District 8, Weekly Column, published May 3, 2010, available online at www.senate.mo.gov/multimedia/Bartle/weeklycolumn, last visited July 15, 2010.

What is more, the rote recitation of a content-neutral purpose, and the citation to secondary effects cases, will not save legislation which displays an evident animus toward adult expression from strict scrutiny. In one comparatively recent case, for example, the Seventh Circuit looked past the preamble of a municipal adult use regulation ordinance, which duly recited that it had been adopted to combat adverse secondary effects, to consider its actual effect on local businesses, ultimately finding it motivated by an impermissible motive – in that case, political patronage – and thus subject to strict scrutiny.[111]

Content based restrictions on protected expression are presumptively invalid, and the Government bears the burden of justifying their enactment under strict scrutiny.[112]

A law subject to strict scrutiny can only be sustained if it both furthers a compelling governmental interest and employs the least restrictive means of doing so.[113] This is true notwithstanding the fact that he law in question regulates sexually candid expression.[114]

In this case, noone could seriously contend that the Act satisfies strict scrutiny. To

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[111]*Joelner v. Village of Washington Park*, 508 F.3d 427, 430-32 (7th Cir. 2007).

[112]*Playboy Entertainment Group,* 529 U.S. at 817-18 (quoting: *Greater New Orleans Broadcasting Assn., Inc. v. United States,* 527 U.S. 173 (1999); *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997); *Edenfield v. Fane,* 507 U.S. 761 (1993).

[113]*Playboy Entertainment Group*, 529 U.S. at 813 (citing *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989)).

[114]*Playboy Entertainment Group*, 529 U.S. at 813

overcome the presumption against the constitutional validity of the Act, the state would have to demonstrate that it is necessary to achieve a compelling governmental interest, and it does so in the least restrictive manner. Clearly that burden cannot be met.

Noone could seriously contend, for example, that the Act addresses alleged secondary effects in the manner least restrictive of protected expression, when those effects, such as drug crime, theft, prostitution, improper sexual conduct and the like, are already proscribed by criminal laws.

Because the burden of justifying the restrictions of the Act remains with the Respondent regardless of the procedural posture on which the strict scrutiny challenge was decided, and because the Respondent manifestly failed to carry that burden below, this Court should reverse the decision of the Circuit Court granting judgment on the pleadings to the Respondent on the portion of Count II here at issue, and enter summary judgment for the Appellants, invalidating the Act as a content-based restriction on protected expression.

– POINT RELIED ON III –

THE CIRCUIT COURT ERRED IN ENTERING JUDGMENT ON THE PLEADINGS IN FAVOR OF THE RESPONDENT WITH RESPECT TO COUNT II OF THE AMENDED VERIFIED PETITION, BECAUSE THE QUESTION OF WHETHER THE ACT CAN SURVIVE INTERMEDIATE SCRUTINY UNDER THE FIRST AMENDMENT COULD NOT BE DECIDED IN FAVOR OF THE RESPONDENT, AS A MATTER OF LAW, ON THE PLEADINGS, IN THAT: (A) THE WELL-PLEADED ALLEGATIONS OF THE AMENDED VERIFIED PETITION, WHEN TAKEN AS TRUE, PLAINLY STATE A CLAIM UNDER THE FIRST AMENDMENT: (B) SUBSTANTIAL EVIDENCE PRODUCED IN SUPPORT OF APPELLANTS' SUMMARY JUDGMENT MOTION AND IN OPPOSITION TO RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS, ESTABLISHED THAT THE SECONDARY EFFECTS RECORD UPON WHICH THE ACT WAS ADOPTED, AND BY WHICH IT WAS JUSTIFIED, WAS DEMONSTRABLY SHODDY, AND; (C) SUBSTANTIAL EVIDENCE PRODUCED IN SUPPORT OF APPELLANTS' SUMMARY JUDGMENT MOTION AND IN OPPOSITION TO RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS, AFFIRMATIVELY DISPROVED THE SECONDARY EFFECTS RATIONALE ADVANCED IN SUPPORT OF THE ACT IN MISSOURI.

In the Circuit Court, Appellants argued that, even if the Act was not properly subject to strict scrutiny, it none-the-less failed constitutional muster, because it could not survive intermediate scrutiny in any event.

Laws which restrict adult expression in an attempt to ameliorate the adverse secondary effects allegedly associated with that expression are subject to intermediate scrutiny.

In *Renton*, the Supreme Court held that such laws are not valid unless they advance an important governmental purpose (suppressing adverse secondary effects), are narrowly tailored to that task, do not burden substantially more speech than necessary, and leave open adequate alternative channels of communication.[115]

In *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), the Court considered the validity of a Los Angeles ordinance which prohibited two adult establishments from operating in the same structure.

The district court had granted summary judgment to the plaintiffs, finding that the restriction was content based, and concluding that the legislative record relied upon by the city had failed to justify, at strict scrutiny, the separation requirement imposed by its ordinance.[116] The Ninth Circuit affirmed, holding that even if the restriction were regarded as content-neutral, it could not survive intermediate scrutiny because there was insufficient evidence to establish that it was designed to serve the purpose for which it was enacted.[117]

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[115]*Renton*, 475 U.S. at 47-49.

[116]*Alameda Books*, 535 U.S. at 431-32 (plurality)(citation to the district court omitted).

[117]*Id.*, 535 U.S. at 433 (plurality)(citation to the Ninth Circuit omitted).

The Supreme Court reversed and remanded the case, instructing the district court to establish a factual record upon which the adequacy of the legislative rationale for the contested ordinance could be tested.[118] In doing so, the Court formulated a mechanism by which the adequacy of the legislative rationale for an adult use ordinance could be tested.

The initial burden falls to the government, which must come forward with some evidence to demonstrate that its restrictions on adult expression are premised upon the need to ameliorate the adverse secondary effects of the speech regulated.[119]

The initial burden is not a heavy one, but it does represent a threshold which every adult use regulation must cross if it is to survive intermediate scrutiny.[120]

Crossing that threshold is not the end of the inquiry, of course, but only the beginning. Once the government has put forth some evidence to demonstrate the existence of its secondary effects rationale, it falls to the challenger to contest the reasonableness of the state having relied upon that evidence. The challenger may do so in either or both of two ways.

> This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. f plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or

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[118]*Id.*, at 443.

[119]*Alameda Books*, 535 U.S. at 438 (plurality).

[120]*Id.*

> by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. [121]

Thus, the government does not prevail, as a matter of law, simply because it **has** a legislative rationale, supported by some evidence in the legislative record. Only if the "plaintiffs fail to cast direct doubt on this rationale" in one of the two ways just described, does "the municipality meet[] the standard set forth in *Renton*." *Id*., at 439.

In seeking judgment on the pleadings, the Respondent claimed to have won the war, despite well-pleaded allegations, and voluminous evidence advanced to support those allegations – before the first battle was joined.

Alameda Books does not permit such a result, because it allows plaintiffs, as a matter of First Amendment law, to contest the reasonableness of the legislative predicate in both of the ways described above. As demonstrated below, the Appellants met that challenge in both of the ways vouchsafed to them under *Alameda Books*.

– A –

It is axiomatic that judgment on the pleadings tests the legal sufficiency of the allegations set forth in the Petition.

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[121] *Alameda Books*, 535 U.S. at 438-39 (plurality).

> "The party moving for judgment on the pleadings admits, for purposes of the motion, the truth of all well pleaded facts in the opposing party's pleadings." "The position of a party moving for judgment on the pleadings is similar to that of a movant on a motion to dismiss; i.e., assuming the facts pleaded by the opposite party to be true, these facts are, nevertheless, insufficient as a matter of law."A trial court properly grants a motion for judgment on the pleadings if, from the face of the pleadings, the moving party is entitled to a judgment as a matter of law.[122]

This Court on appeal from a "grant of [a] motion for judgment on the pleadings . . ." review[s] the allegations of Appellants' petition to determine "whether the facts pleaded therein are insufficient as a matter of law." *American Tobacco Co.*, 34 S.W.3d at 134.

Here, the Circuit Court – without the benefit of analysis – granted judgment on the pleadings to the Respondents as to the entirety of Count II of the Amended Verified Petition, including the claims contesting the Act on intermediate scrutiny.

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[122]*State ex rel Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 134 (Mo. banc. 2000)(quoting, seriatim, *Barker v. Danner*, 903 S.W.2d 950, 957 (Mo.App.1995)(in turn quoting *Angelo v. City of Hazelwood*, 810 S.W.2d 706, 707 (Mo.App.1991) and *Madison Block Pharmacy v. U.S. Fidelity*, 620 S.W.2d 343, 345 (Mo. banc 1981)(in turn quoting *Cantor v. Union Mutual Life Insurance Company*, 547 S.W.2d 220, 224 (Mo.App.1977)).

But the well-plead allegations of the Amended Verified Petition were simply not amenable to dismissal as a matter of law. Consider the allegations that form the basis for the intermediate scrutiny claims set forth in Count II.

Having stated in detail the necessary context and background, Appellants alleged that adult entertainment establishments do not produce adverse secondary effects of the sort claimed by the Act, that the General Assembly failed to reasonably rely upon a sound legislative record in concluding otherwise, and that, in fact, by operating as responsible, well managed and well-patronized businesses in their communities, the Appellants help to preserve property values and deter crime.[123]

In short, the Appellants pleaded that the secondary effects justification offered in support of the Act was insufficient to meet even the initial burden of the state under *Alameda Books*, in that it was unsupported by sufficient evidence in the legislative record.

In addition, Appellants pleaded that, even if the Respondent had met that burden, the evidence advanced in support of the Act was countered both by (a) evidence demonstrating the absence of adverse secondary effects in Missouri, and (b) evidence which showed the legislative record was comprised of nothing more than shoddy evidence in any event.

In short, the allegations of the Amended Verified Petition, taken as true, would undermine the secondary effects justification offered on behalf of the Act both at the initial stage of the *Alameda Books* burden shifting process, and in both of the two ways vouchsafed to the Appellants at the second stage as well.

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[123]LF 177-78 (Amended Verified Complaint, at Pages 33-34).

In seeking judgment on the Pleadings, the Respondent argued that each of the restrictions imposed by the Act has been upheld by some court in some case, and that the Act could accordingly be sustained – and the challenge to it dismissed – as a matter of law.[124]

He also argued that the "voluminous legislative record" relied upon by the General Assembly could, as a matter of law, be deemed sufficient to have met the evidentiary burden imposed on the government under *Alameda Books*.[125]

But neither of these arguments can be squared with the plain mandate of the *Alameda Books* plurality, which unquestionably established a burden-shifting mechanism that requires courts to weigh the restrictions imposed by a given law against the justifications offered in support on a case by case basis.

In short, pleading that the General Assembly could point to a certain set of cases, or a given set of secondary effects studies, could do nothing more – as a matter of law – than establish that the government has met its initial burden under the three-step *Alameda Books* burden shifting process, and Appellants contend the evidence did not do even that much.

But the Respondent **could not** establish, at the pleadings stage, that he is entitled to judgment as a matter of law under *Alameda Books*, because the burden shifting mechanism established in that case plainly vouchsafes to the Appellants a right to demonstrate, through the introduction of evidence, that the legislative predicate for adopting the Act was flawed,

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[124]LF 130-34 (Respondent's Suggestions, at 23-27).

[125]LF 134-36 ((Respondent's Suggestions, at 27-29).

and gives them that right **as a matter of First Amendment law**.[126]

Taken as true, the allegations in the Amended Verified Petition met the requirements of the second part of the three part *Alameda Books* process: they undermined the secondary effects rationale advanced in support of the Act.

And those allegations were backed up with evidentiary proof.

Appellants adduced a wealth of evidence both to demonstrate (1) that the legislative record was based on generally shoddy evidence and (2) that the evidence in Missouri overwhelmingly disproved the secondary effects rationale of the Respondent. We turn to that evidence next, and begin with the local evidence in Missouri.

– B –

Far from being sources of crime, blight and adverse secondary effects on their neighborhoods, the testimony of law enforcement officers, elected officials, neighboring business and organizations, establish that adult entertainment businesses in Missouri have operated as well-run businesses should, maintaining their properties, discouraging criminal activity on or near their premises, and respecting their civic role in their neighborhoods.

In support of the Motion for Summary Judgment and in opposition to Respondent's Motion for Judgment on the Pleadings, Appellants submitted hundreds of pages of evidence, including dozens of affidavits, from those with first-hand knowledge of adult businesses across the state.[127]

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[126]*Alameda Books,* 535 U.S. at 439 (plurality).

[127]LF 269-76, 335-39 (Petioners' Suggestions, 9-16, 75-79)(summarizing testimony).

From every vantage point in community after community one message came forth: adult businesses in Missouri are good, responsible neighbors.

Victor Zinn, a Deputy Sheriff with the Jackson County Sheriff's Department, was formerly a Special Agent for the State Division of Alcohol & Tobacco Control. His jurisdiction at times, extended to more than 46 counties. He was also formerly an investigator in the Vice and Narcotics Unit of the Kansas City Missouri Police Department.

He testified, by way of affidavit, that adult entertainment businesses do not cause crime or other problems as Defendant alleges.[128] Deputy Zinn's responsibilities placed him in a particularly good position to assess and evaluate adult entertainment businesses in terms of illegal activity. His employment with the State Division of Alcohol & Tobacco Control and Kansas City's Vice Unit included policing all manner of adult entertainment businesses to insure compliance with the laws governing businesses licensed to serve alcohol and to investigate violations of the drug laws, laws prohibiting prostitution and lewdness, and other criminal offenses.[129] He testified under oath as follows.

Some affidavits were submitted twice, both in opposition to the motion for judgment on the pleadings filed by the Respondent, and separately in support of the summary judgment motion of the Appellants. Compare LF 351-540 (Affidavits in Support) with LF 541-1712 (Affidavits in Opposition). Not all these affidavits, obviously, dealt with the absence of adverse secondary effects.

[128]LF 742 (Affidavit of Victor Zinn, ¶¶ 1-5).

[129]LF 742 (Zinn Aff. ¶¶ 2-6).

Agents and police officers including me have made arrests in non-adult businesses for individuals being on the premises under the legal age or for engaging in disruptive conduct or for other serious violations. It is my experience that there are no similar findings in businesses where there are adult business activities. My investigations have failed to reveal drug activities, prostitution activities, or other similar conduct in adult oriented businesses and as a general rule there is no trash or debris in the area of these businesses, nor persons loitering in the area or engaging in other criminal activity regulated by statute.

It is my experience that the businesses that offered adult entertainment are generally regulated through management and security personnel.

The Division of Alcohol & Tobacco Control and the Kansas City, Missouri Police Department have officers who have made arrests and taken enforcement action against non-adult businesses for receiving stolen liquor, serving underage minors alcohol, drug activities, prostitution activities and other lewd conduct.

It is my belief that the presence of adult entertainment at a business licensed to serve alcohol has demonstrated no negative impact on the operation of the business, on the surrounding areas, or neighboring businesses. In fact, when Bazooka's, an adult entertainment facility in Kansas City, Missouri was relocated to the downtown core following a redevelopment project and vote of the general population authorizing the move, there were opponents who argued that the presence of the business would increase crime, lead to prostitution and drug activities, discourage economic growth, and create problems for the surrounding neighbors. In fact, those opponents would now say that none of these things occurred, and it is my observation that crime in the general area actually decreased and there were no drug or prostitution ever associated with this business or any of the other businesses offering adult entertainment in the Kansas City area.

While the police department and the Division of Alcohol & Tobacco Control regularly receive complaints regarding businesses which are not adult oriented, they do not receive valid or substantiated complaints relating to lewd activities or

criminal activities for adult oriented businesses.[130]

Zinn's observations and experiences are shared by Steven Allen, another member of the law enforcement community, who was similarly involved with policing violations of Missouri's liquor laws.

Allen worked for the Missouri State Division of Alcohol & Tobacco as a special agent investigating adult entertainment establishments for twenty years.[131]

Like Zinn, Allen stated, under oath, that "over the last 15 or more years" there were "few if any" violations for underage drinking, disruptive conduct or lewdness violations "in businesses where there are adult activities."[132] Allen continued.

> During investigations we found no drug activities, prostitution activities, or other similar conduct in adult oriented businesses and as a general rule there is no trash or debris in the areas of these businesses, nor persons loitering in the area or engaging in illegal activity. Furthermore, there were substantially fewer violations of statutes or regulations dealing with violent or drug related activities around the area where adult businesses were found, as opposed to other businesses which were non-adult in nature. To my knowledge, no prostitution activities or drug

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[130]LF 742-43 (Zinn Aff. ¶¶ 7-11).

[131]LF 545 (Affidavit of Steve Allen, ¶¶ 2-6).

[132]LF at 545 (Allen Aff. ¶7).

> activities were ever found to exist in Kansas City adult businesses where conduct was regulated by city ordinances.[133]

Like Victor Zinn, Allen concluded, that adult entertainment "has demonstrated no negative impact on the operation of the business, on the surrounding areas, or neighboring businesses."[134]

The testimony of Zinn and Allen that businesses offering adult entertainment do not cause adverse secondary effects is likewise confirmed by the Presiding Commissioners of Johnson and Cooper Counties.

Bill Brenner, the Presiding Commissioner of Johnson County, testified that the Fantasy Ranch, an adult cabaret in Johnson County, "is a well-run business that has been conscientious in maintaining security and working closely and cooperatively with [Johnson County's] sheriff's office." He confirmed that the Fantasy Ranch has not been a source of criminal activity, has not caused property values to diminish, and is an asset to Johnson County.[135] Brenner stated under oath that the Fantasy Ranch is a "valuable source of revenue for Johnson County."[136]

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[133]LF at 545 (Allen Aff. ¶7).

[134]LF 546 (Allen Aff. ¶ 10).

[135]LF 548 (Affidavit of Bill Brenner at ¶¶ 4, 6).

[136]LF 548 (Brenner Aff., at ¶ 5). See also, Supra, Note 23 and accompanying text (Johnson County has received $492,062.30 in revenues from the Fantasy Ranch in satisfaction of a county cabaret tax).

Brenner's counterpart in Cooper County, Eddie Brickner, testifies that he is aware of no problem with Petitioner Passions Video, an adult establishment that sells adult expression and presents such expression on its premises, nor has the Commission received any complaints about crime at Passions Video.[137]

In the experience of many neighbors, adult businesses in Missouri are **not** the cause of adverse secondary effects, but good neighbors and members of the community.

The former and current business owners surrounding Passions, an adult video store in Columbia, Missouri, not only attested to the fact that Passions was not responsible for criminal activity, litter or blight in their neighborhood, but, in fact, has cleaned up the property it occupies and has made the area more desirable, by ridding the area of bothersome and disruptive vagrants.

Betty Jo Hamilton owns the Tiger Bar, across the street from Passions. She characterized the bookstore a quiet and well-kept, and has seen no problems with drugs or prostitution near the store. On the contrary, she noted that after the store opened in its present location, a neighborhood problem with vagrants has got better.[138] She also notes that the store's customers cause her no problems and are better behaved that persons at other retail venues.[139]

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[137]LF 550 (Affidavit of Eddie Brickner, at ¶¶ 4-5).

[138]LF 585 (Hamilton Aff., at ¶¶ 2-3).

[139]LF 585 (Id., at ¶¶ 3-5).

Patty Umfleet owns a barber shop across the street from Passions in Columbia. She also credits Passions with helping to solve a problem of vagrants who lingered in the neighborhood and drink. She too has seen no increase in crime since Passions moved in.[140]

Brice Cottle, who owns Automotive Specialists in Columbia, was located next door to Passions before it moved in July 2010. He too characterized the store as a good corporate neighbor that cause no increase in crime nearby. He also testified that the store did not cause litter or blight, nor cause his own property values to decrease.

He noted that he preferred being located to Passions over the current occupant of its former space. [141]

Petitioner Passions Too, in Saline County, drew similar support from its neighbor, who called it a well-run business that did not cause crime or other problems in the area.[142]

Jim Mullin, who has owned one of the businesses located next to Passions Video near Booneville since 2001, stated that the Act has made the neighborhood less safe by requiring Passions Video, which was previously open 24-hours, to close at midnight, since its presence, lighting, and commercial activity formerly discouraged nighttime criminal activity.[143]

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[140]LF 727 (Affidavit of Patty Umfleet, at ¶¶ 2-4).

[141]LF 559 (Affidavit of Brice Cottle, ¶¶ 2-5).

[142]LF 740 (Affidavit of Dale Younger).

[143]LF 598 (Affidavit of Jim Mullins, at ¶5).

Joel Hornbostel, the publisher of Pitch, a newspaper in Kansas City with some 258,000 readers has, since 2000, had offices in the same block as Bazooka's, an adult cabaret, that until the Act took effect, presented nude dancing.

He testified that the cabaret has been an asset to the area, and that he has witnessed neither criminal activity nor the other negative effects supposedly caused by Bazooka's, including any decrease his property value.[144]

In fact, the people of Kansas City voted by a wide margin in favor of re-zoning to allow Bazooka's to re-locate and to continue to operate in the city, a rather resounding rebuttal by the populace to claim, by the Respondent, that adult entertainment establishments are viewed as undesirable businesses associated with negative secondary effects.[145]

James Dodson, the landlord of Venus Adult Mega Store in Columbia, Missouri, stated under oath, that the store is and always has been an excellent tenant, that pays its rent in advance, causes no problems with the police or other city agencies, and has done an excellent job of maintaining and improving the property – going so far as to black top the parking lot on its own accord.[146] Crime is simply not a problem at Venus Adult Mega Store, and Dodson believes his properties have increased in value because of the way that the store has conducted and maintained its business.[147]

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[144]LF 590 (Affidavit of Joel Hornbostel, at ¶¶ 2-4).

[145]LF 719 (Affidavit of Richard T. Snow, managing officer of Bazooka's, at ¶¶ 2-3).

[146]LF 561 (Affidavit of James Dodson, at ¶ 4).

[147]LF 561 (Dodson Aff., at ¶¶ 4-5).

The fact that the store was open 24-hours and had a well-lit parking lot that was monitored by security cameras had the effect of discouraging nighttime break-ins the area.[148]

The Shady Lady in Kansas City provides food and donations to neighborhood charities and organizations.[149] The Olde Un Theater, a quiet well-run adult business that has been operating in Columbia, Missouri since 1971, takes pains to have good relations with its neighbors, mowing their lawns, picking up trash and keeping an eye on their properties like any good neighbor would do.[150]

All this sworn testimony, based on first hand knowledge of the Appellants and their businesses, refute the adverse secondary effects rationale asserted in support of the Act in the second of the two ways described by the *Alameda Books* plurality: by refuting the secondary effects premise with direct and contrary evidence proving that it is not true.

As if this was not enough to cast doubt upn the secondary effects rationale of the Respondent, there is another body of evidence – which was also presented to the Circuit Court – and which directly undermines the secondary effects rationale behind the Act as well.

That evidence consists of a series of peer reviewed, academically rigorous studies which demonstrate that, in case-after-case, the theory that adverse secondary effects attend adult businesses just does not hold up to careful scrutiny.

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[148]LF 587 (Affidavit of Mitchell Harrington at ¶4).

[149]LF 723 (Affidavit of Joe Spinello, at ¶4).

[150]LF 716 (Affidavit of Richard Simpson, at ¶¶ 2, 5).

Daniel Linz, Ph.D., is Professor in the Departments of Law and Society, and Communications at the University of California, Santa Barbara. Dr. Linz, who holds a Ph.D. in psychology from the University of Wisconsin, has extensively researched and published regarding the question of how sexually oriented businesses affect the communities in which they are located.

Dr. Linz submitted an exhaustive affidavit and expert report – itself supported by numerous studies and exhibits – on behalf of the Appellants below.[151]

His affidavit described and attached studies which tend to disprove the supposed link between adult uses and adverse secondary effects, each of which undermines one of the fundamental premises upon which the contested county ordinance is based, namely, that such a correlation exists.[152] A study of peep-show style adult establishments in San Diego, for example, by Dr. Linz and Bryant Paul, of Indiana University, examined criminal activity around adult arcades in the overnight hours.

The peer reviewed study, which was published in the Journal of Sex Research, showed no increase in crime in the areas surrounding those establishments.[153]

An empirical study of crime in various neighborhoods in Indianapolis by Drs. Linz and Paul, which concluded that adult businesses were not associated with increased crime.[154]

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[151]LF 321-34 (Appellants' Suggestions, 61-74); LF 754-1655 (Linz Report and Affidavits and Supporting Exhibits).

[152]LF 785-802, 860-1638 (Linz Aff., Section III-V, ¶¶ 1-60, and Aff. Exs. 2 to 10).

[153]LF 786-87, 900-911 (Linz Aff., Section IV, ¶4-7 and Ex. 3).

[154]LF 787-88, 913-39 (Linz Aff., Section IV, ¶¶ 8-12 and Ex. 4).

Significantly, the Seventh Circuit would later rely in part upon precisely this study to call into question the legislative rationale upon which Indianapolis had relied in passing its own adult use ordinance.[155] Additional work conducted by Dr. Linz in Indianapolis established that closing adult businesses overnight actually caused an increase in crime nearby.[156]

A study of the relationship between crime and adult businesses in four Ohio cities, that was later published in a peer reviewed journal, established that there is no demonstrable correlation between alcohol service in adult cabarets and crime, and in some instances found that adult establishments were negatively correlated with certain crimes.[157]

Studies conducted in Fort Wayne, Indiana and Charlotte, North Carolina both concluded that the presence of an adult business in a given neighborhood does not lead to an increase in criminal activity within that neighborhood.[158] Studies in the town of Davie, Florida, and in Seattle support the same conclusion. So did studies of crimes statistics in the neighborhood of adult businesses in Rancho Cordova, California and Charlotte, North Carolina.[159]

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[155]*Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 465 (7th Cir. 2009).

[156]LF 788-92, 956-59 (Linz Aff., Section V, ¶¶ 1-17 and Ex.6).

[157]LF 793-94, 1085-1117 (Linz Aff., Section V, ¶¶ 25-27 and Ex. 9).

[158]LF 795-96, 1140, 1141-70 (Linz Aff., Section V, ¶¶ 32-35 and Ex. 11 and 12).

[159]LF 796-98, 1209-30, 1232-1305, 1307-53, 1355-1404 (Linz Aff., Section V, ¶¶ 37-45 and Ex. 13 to 16).

A study, published in a peer reviewed journal, found no relationship between adult businesses and the presence of crime in their neighborhoods in San Antonio.[160]

A published study by authors at the University of North Carolina examines county property tax records and found that the presence of adult businesses could not be said to cause lower property values nearby, in Charlotte.[161]

In sum, a substantial body of published, peer-reviewed and rigorous data, as well as other data calls into question the central premise of the legislative rationale at issue in this case: that there is a real link between adult businesses and adverse secondary effects.[162]

– C –

It is little wonder that the first-hand knowledge of Missourians contradicts the dire secondary effects predictions of the studies submitted to the General Assembly which, while voluminous, are dated, conclusory, based upon threadbare evidence and in some cases actually tend to disprove the secondary effects rationale for which theyare invoked.

In a word, the studies are shoddy, and demonstrating that they are so is the first of the two methods in which the *Alameda Books* plurality allows a plaintiff to rebut the legislative rationale for restrictions on adult expression such as those now sub judice.[163]

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[160]LF 801-02, 1406-47 (Linz Aff., Section V, ¶ 57 and Ex. 17).

[161]LF 802, 1449-78 (Linz Aff., Section V, ¶ 58-59 and Ex. 18).

[162]LF 802 (Linz Aff., Section V, ¶ 60).

[163]*Alameda Books*, 535 U.S. at 438-39 (plurality).

As a part of his research, Dr. Linz, together with other scholars, has systematically studied over 120 of the secondary effects reports commonly referenced by municipalities in support of the proposition that adult businesses are responsible for increases in crime, decreases in property value, the spread of urban blight and other deleterious effects.

His research includes a review each of the studies upon which Missouri has purported to rely in adopting the Act.[164]

Dr. Linz has focused his research on examining whether the studies in question present credible, reliable conclusions, or are so flawed as to be untrustworthy. His analysis has focused on a number of potential flaws, each of which is addressed at considerable length in the Suggestions filed by the Appellants below, and each of which is summarized herein with references to that analysis.[165]

In general, he has concluded that the secondary effects studies relied upon in support of restrictions on adult uses are not typically reliable.

Many studies, for example, fail to meaningfully compare the crime said to occur near a sexually oriented business to anything else. Crime, of course, occurs everywhere. The question of whether a sexually oriented businesses is associated with criminal activity can only be meaningfully addressed by comparing areas with adult businesses to areas without.

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[164]LF 754-55, 758 (Linz Aff., at Section II, ¶¶ 1 to 4, and 13, 14).

[165]LF 755 (Linz Aff., at Section II, ¶ 3); LF 323-28 (Petitioner's Suggestions, 63-68).

For that comparison to be useful, it is important to compare areas that are as similar as possible, so that other factors, such as unemployment, lower property values, and socioeconomic factors do not skew the results.

Many of the studies relied upon by the General Assembly make no such effort.[166] These flaws, which we characterized below as errors in "data collection," appear in numerous studies in the legislative record, and the flaws are discussed in our suggestions below.[167]

Still other studies relied upon flawed, unreliable or inherently worthless information, like public opinion polls, to "prove" that sexually oriented businesses are associated with increased crime or lower property values.[168]

Another common flaw is that the frequently cited studies are often based on insufficient data, by failing to collect data over a sufficiently-long time period to ensure that the results obtained are truly representative of crime or property values in the neighborhood.[169]

Some of the studies failed to account for the fact that the increase in crime which they

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[166]LF 756-57 (Linz Aff., Section II, ¶¶ 7 to 9).

[167]LF 325 (Appellants' Suggestions, at 65 and Note 32). The paragraphs of the Linz affidavit cited therein provide a detailed critique of each study cited in this regard.

[168]LF 325 (Appellants' Suggestions at 65, and Note 33). Again, the paragraphs of the Linz affidavit cited therein provide a detailed critique of each study so flawed.

[169]LF 325 (Appellants' Suggestions, at 65 and Note 32). See also the corresponding portions of the Linz Affidavit identified therein.

reported could well have been attributable to more aggressive policing directed at the areas in which the supposed "increase" was "documented."[170]

Perhaps the most damaging fact of all for the legislative rationale behind the Act is that in several of the studies cited, the authors themselves cautioned that they had not found, or could not reliably claim to have found, a connection between sexually oriented businesses and the sorts of adverse secondary effects commonly attributed to those businesses.[171]

Some of the studies at issue contain express disclaimers, in which their authors repudiate or undermine the claim that adult uses cause adverse secondary effects, or have been criticized in the field by acknowledged experts, as unreliable and no longer vital.[172]

Other studies have blithely gone on to quote those studies as supporting the existence

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[170]LF 325 (Appellants' Suggestions, at 65 and Note 35). See also the corresponding paragpraghs of the Linz Affidavit.

[171]LF 326 (Appellants' Suggestions, at 65 and Note 35). See the paragraphs of the Linz affidavit cited therein, which establish that studies in Phoenix, Indianapolis, Minneapolis, St. Paul and Los Angeles contained such language.

[172]LF 326 (Appellants' Suggestions, at 66 and Note 36). The cited portions of the Linz affidavit establish that such disclaimers may be found in studies, relied upon by the General Assembly in this case, conducted in Disclaimers Phoenix, Los Angeles, Whittier, California, St. Paul and New York City.

of a correlation between adult businesses and adverse secondary effects, notwithstanding the fact that the authors of the cited studies expressly found no such relationship.[173]

Some of the studies, as Dr. Linz notes, were not empirical studies at all: that is to say, they did not collect or analyze new data, or reach original conclusions, but simply parroted the results of earlier studies as the basis for their own conclusions, adding nothing new to the literature.[174]

One study did not even purport to address the question of adult businesses as sexually oriented businesses at all.[175]

In sum, the secondary effects studies present to the General Assembly, while numerous, were shoddy, consisting of a motley collection of dated, threadbare and conclusory documents.

The Respondent has put into evidence several summaries of secondary effects studies, overviews and synopses which were presented to the General Assembly in committee.[176]

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[173]LF 326-27 (Petitions' Suggestions, at 66-67 and Note 37).

[174]LF 327 (Petitions' Suggestions, at 67 and Note 38). As the cited portions of the Linz affidavit make clear, this is true of a substantial fraction of the studies upon which the General Assembly purports to have relied in adopting the Act.

[175]LF 327 (Petitions' Suggestions, at 67 and Note 39).

[176]See, e.g., SLF 42-3, and Attached Disc (Exhibit 2 to Respondent's Suggestions, Scott Aff., ¶ 5, at Ex. 31) (Summary of Key Reports Concerning the Negative Secondary Effects of Sexually Oriented Businesses); Ex. 32 (Summary by Peter Hecht, Ph.D. to the

Those summaries simply recited – with a favorable gloss – secondary effects studies already presented to the General Assembly in their entirety, and are not original works in any sense.[177] As such, they add nothing to the shoddy studies which they purport to summarize.

This is also true of the lengthy report offered by Richard McCleary to Jackson County in support of its own adult use ordinance, the excerpt from the work by McCleary and Meeker submitted as an exhibit, and the critique of Dr. Linz offered by Dr. McCleary.[178]

As noted by Dr. Linz, the Jackson County material consisted in substantial part of studies that have already been discussed here and shown to be flawed.

An extensive commentary on and criticism of the Jackson County report was included in the Affidavit of Dr. Linz. [179] So was a rebuttal outlining flaws in the McCleary critique.[180]

The Seventh Circuit reversed an order sustaining a set of adult use restrictions on

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American Center for Law and Justice); SLF 254, 299-313 (Exhibit 4 to the Memorandum of the Defendant, Head Aff., ¶ 5, at Ex. 4b, at 5-19 (same)).

[177]LF 788-89 (Linz Aff., Section V, ¶¶ 1 and 2).

[178]See SLF 53-54, 117, 180-247 (Exhibit 3 to the Memorandum of the Defendant, Percival Aff., Ex. 3A at Page 63 (McCleary & Meeker), Pages 126-93 (Jackson County) and Second Disc (McCleary Critique).

[179]LF 330 (Petitioner's Suggestions, at 70 and Note 50); LF 810-823 (Linz Aff., Section IX, ¶¶ 1-57).

[180]LF 330 (Petitioner's Suggestions, at 70 and Note 50); LF 802-03 (Linz Aff., Section VI, ¶ 1-4).

summary judgment on a similar record in *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009). There, the city justified its regulations as necessary to reduce crime near adult bookstores, invoking, inter alia, its own study.[181]

The plaintiffs produced a critique of the studies relied upon by the city, in addition to their own study of crime in Indianapolis, which tended to disprove that the contested law had succeeded in reducing secondary effects at all. The city responded by attacking the author of the study, Dr. Linz, but the Seventh Circuit found that his critique cast direct doubt on the legislative rational for the ordinance, precluding summary judgment for the city.[182]

In the same case – on appeal from the district court's grant of a preliminary injunction against the enforcement of the ordinance after remand – the Seventh Circuit analyzed the work of Dr. McCleary, the expert relied upon by the Respondent below, and found his analysis to be wanting.

> After the remand, plaintiffs asked the district court to enter a preliminary injunction. A hearing was held, at which Indianapolis offered a single piece of evidence: Richard McCleary & Alan C. Weinstein, Do "Off-Site" Adult Businesses Have Secondary Effects? Legal Doctrine, Social Theory, and Empirical Evidence, 31 L. & Policy 217 (2009). The authors concluded that dispersing adult stores that sell for

[181] *Annex Books*, 581 F.3d at 462-63.

[182] *Id.*, at 464-65.

> off-site reading or viewing reduced crime in Sioux City, Iowa. Indianapolis contended that this article supports its ordinance too. The district judge was skeptical, and entitled to be so, for three reasons.[183]

The per curium opinion summarized those flaws as follows:

> The single article that Indianapolis offered suffers some of the shortcomings of the evidence we evaluated last year: it concerns a dispersal ordinance rather than an hours-of-operation limit, and the authors did not attempt to control for other potential causes of change in the number of arrests near adult establishments.[184]

In this light, the entry of judgment on the pleadings for the Respondent – in a case that in many ways involved a battle of experts between Drs. McCleary and Linz – was especially flawed. The sort of evidentiary battle that emerged was singularly unsuited for a resolution, favoring the state, other than after a full exposition, at trial, by the trier of fact.

The Seventh Circuit reached a similar conclusion in *New Albany DVD, L.L.C. v. City of New Albany, Indiana*, 581 F.3d 556 (7th Cir. 2009), holding that the Plaintiffs in that case had managed to cast doubt upon the existence of crime near adult bookstores in a way that demonstrated that the evidence relied upon by the city in adopting its adult use restrictions

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[183] *Annex Books v. City of Indianapolis*, 624 F.3d 368, 369 (7th Cir. 2010)(per curium).

[184] *Id.*, at 370.

did not "reasonably support" the restrictions imposed.[185]

For that reason, the Court of Appeals remanded the case for an evidentiary hearing, in which any additional secondary effects evidence the city could adduce could be tested by the trier of fact.[186]

In the same light, the Tenth Circuit decision in *Abilene Retail # 30 v. Board of Commissioners of Dickinson County, Kansas*, 492 F.3d 1164 (10th Cir. 2007), *reh'g and reh'g en banc denied*, 508 F.3d 958 (10th Cir. 2007), *and cert denied*, 552 U.S. 1296 (2008) is especially instructive here, because it involved an attempt to sustain an adult use ordinance, on summary judgment, despite a thorough challenge to, and critique of the reasonableness of the legislative rationale upon which it was adopted.[187]

There, the county obtained summary judgment, after arguing that the secondary effects studies and cases contained in the legislative record were proof of their adverse secondary effects rationale, and that evidence the challenger had presented in opposition was insufficient, as a matter of law, to undermine the legislative record, and create a question of material fact for trial.[188]

The Panel majority found that these materials could not be deemed to have complied

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[185]*New Albany DVD*, 581 F.3d at 560.

[186]*Id.*

[187]*Abilene Retail*, 492 F.3d at 1186-87.

[188]*Id.*, at 1174.

with the requirements of *Renton*, as explicated in *Alameda Books*, as a matter of law.[189]

> In this case, we are not satisfied that the evidence relied upon by the Board is sufficient to permit summary judgment at the first step of *Alameda Books*.
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> * * *
>
> Had the *Alameda Books* plurality and Justice Kennedy held that any municipality may reasonably rely on the existing body of prepackaged secondary effects studies to justify a zoning ordinance regulating local sexually oriented businesses, we would affirm the district court on this point. They did not, but instead reaffirmed municipalities' need to make a showing that the evidence on which they relied is germane to their local experience. We are therefore constrained to hold that a genuine dispute of material fact exists as to whether the evidence cited by the Board provides a sufficient connection between the continued operation of Dickinson County sexually oriented businesses and the negative secondary effects targeted by the Second Ordinance.[190]

In a concurring opinion, which the panel majority joined as an alternative basis for its

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[189]*Id.*, at 1177.

[190]*Id.*, at 1177.

own holding, Judge Ebel reasoned that the challengers in *Abilene Retail* had succeeded in casting doubt upon the legislative rationale offered by the government, and had done so, in part, through a critique of the legislative record offered by Profession Linz, who produced a very similar critique of the very similar record in this case.[191]

The decision of the Tenth Circuit in *Abilene Retail*, which overturned a decision granting summary judgment, applies with even greater force here, where the Circuit Court of Cole County granted judgment on the pleadings.

In sum, the Circuit Court erred to the extent that it departed from the plain mandate of *Alameda Books*, which allows the Appellants to show the General Assembly relied upon shoddy secondary effects evidence, and to present evidence of their own undermining the secondary effects rationale of the state. The Appellants did both here. For that reason, it was improper to grant judgment against them on the pleadings.

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[191] *Abilene Retail*, 492 F.3d at 1185-86 (Ebel, J., concurring).

– POINT RELIED ON IV –

THE CIRCUIT COURT ERRED IN ENTERING JUDGMENT ON THE PLEADINGS IN FAVOR OF THE RESPONDENT WITH RESPECT TO COUNT II OF THE AMENDED VERIFIED PETITION, BECAUSE THE QUESTION OF WHETHER THE ACT CAN SURVIVE INTERMEDIATE SCRUTINY UNDER THE FIRST AMENDMENT COULD NOT BE DECIDED IN FAVOR OF THE RESPONDENT, AS A MATTER OF LAW, ON THE PLEADINGS, IN THAT, RESTRICTIONS ON ADULT EXPRESSION MUST SUBSTANTIALLY REDUCE ADVERSE SECONDARY EFFECTS WITHOUT MATERIALLY DIMINISHING THE QUALITY AND AVAILABILITY OF ADULT SPEECH IN THE SUBJECT JURISDICTION, AND IN THAT THE ACT HAS ALREADY HAD, AND WILL CONTINUE TO HAVE, A DEVASTATING IMPACT ON ADULT BUSINESSES IN MISSOURI, SOMETHING THAT WAS BOTH ALLEGED IN THE AMENDED VERIFIED COMPLAINT AND DEMONSTRATED IN THE EVIDENCE SUBMITTED TO THE CIRCUIT COURT.

Until now, we have focused on the requirements imposed on laws regulating adult expression under the plurality opinion in *Alameda Books*, requirements the contested legislation fails. But there is another part to *Alameda Books*, the concurrence of Justice Kennedy, which makes clear that is, in order to articulate and prove a constitutionally valid secondary effects premise – a regulation cannot reduce adverse secondary effects through simple, artless, and impermissible expedient of reducing the available quantity of speech

itself.[192]

The critical question, for Justice Kennedy, is "how speech will fare" under the regulation in question. *Alameda Books*, 535 U.S. at 450 (Kennedy, J., concurring in the judgment). In this case, the answer is "not very well, at all."

The question of how speech will fare under the Act necessarily precedes questions regarding the legislative record supporting such a restriction, its perceived efficacy, or the related, but conceptually distinct question of whether it leaves adequate alternative avenues for speech:

> The narrow question presented in this case is whether the ordinance at issue is invalid "because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from

[192]No single opinion in *Alameda Books* commanded the support of five justices. At least five federal circuits have recognized that the concurrence of Justice Kennedy is the narrowest opinion joining the judgment of the Court, and therefore constitutes the holding of that case under the rule articulated in *Marks v. United States*, 430 U.S. 188 (1977). *See: World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1193 (9th Cir. 2004); *Joelner*, 378 F.3d 613, 624 (7th Cir. 2004) ; *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 173-74 (5th Cir. 2003); *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1310 (11th Cir.2003); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 862 (8th Cir. 2003).

> other jurisdictions." This question is actually two questions. First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition? The plurality skips to the second question and gives the correct answer; but in my view more attention must be given to the first.
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> * * *
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> At the outset, we must identify the claim a city must make in order to justify a content-based zoning ordinance. As discussed above, a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact.[193]

The first question goes to both theory and effect. It is neither permissible for the state to undertake to reduce secondary effects by adopting regulations that will close the purveyors of such expression, nor to adopt an ordinance which in fact leads to that result:

> The plurality's analysis does not address how speech will fare under the city's ordinance. As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary

[193] *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring in the judgement).

> effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects.
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> * * *
>
> It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech.[194]

Using the Los Angeles ordinance forbidding the location of two or more adult businesses under one roof as an example, Justice Kennedy explained precisely how a city may **not** go about reducing secondary effects:

> The analysis requires a few more steps. If two adult businesses are under the same roof, an ordinance requiring them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional reduction does not suffice. Content-based taxes could achieve that, yet these are impermissible.

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[194] *Id.*, at 450.

> The premise, therefore, must be that businesses – even those that have always been under one roof – will for the most part disperse rather than shut down.
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> * * *
>
> The claim, therefore, must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. This must be the rationale of a dispersal statute.[195]

This analysis – which has come to be called the proportionality requirement – has been recognized as an essential part of the holding in *Alameda Books*.[196]

Here, evidence already in the record demonstrates that the contested legislation does not have "the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact."[197]

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[195]*Id.* at 450-451 (citation to the opinion of Souter, J., dissenting, omitted).

[196]*Annex Books*, 581 F.3d at 485. *Accord: 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 491 (6th Cir. 2008)(holding that the proportionality requirement was a necessary component to secure the vote of Justice Kennedy and thus a part of the holding in *Alameda Books*).

[197]*Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring in the judgement).

Rather, it demonstrates that the contested statutes has stifled adult expression across Missouri, and will continue to do so.

The damage already underway at adult cabarets and bookstores across the state has been considerable. And the inevitability of that damage was spelled out in the Amended Verified Petition in prescient detail, as the Appellants predicted that the changes wrought by the Act would significant undermine their business model and drive away patrons.

Appellants predicted a substantial reduction in revenues which would ultimately result in businesses closing, with the inevitable result that the both the quantity and availability of adult expression in Missouri would be dramatically reduced.[198]

Taken as true, and with every inference construed in favor of the Appellants, these allegations more than suffice to establish that the Act would decimate the quantity and availability of adult expression in Missouri in several ways..

And, as the record evidence submitted to the Circuit Court proves only too well, the prognostications of the Amended Verified Petition have since come to pass.[199]

As previously detailed earlier in this brief, adult cabarets and bookstores have been decimated by the Act, losing substantial numbers of customers, scaling back their entertainment offerings and their hours of operation, and in many case simply going out of business after years in operation.[200]

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[198]LF 170-72

[199]*See supra*, this Brief, at Pages 14-28.

[200]*Id.*

All these stories, and the figures involving lost business and lost sales directly reflect a reduction in the quantity and availability of adult expression in Missouri. By any measure, the contested statutes fail the proportionality requirement.

– CONCLUSION –

For the foregoing reasons, the Circuit Court erred in granting judgment on the pleadings to the Respondent, and in denying summary judgment to the Appellants on Count I of their Complaint, and that portion of Count II which alleged that the Act should be subject to, and invalidated under, strict scrutiny.

This Court should accordingly **REVERSE** the judgment of the Circuit Court of Cole County granting judgement on the pleadings to the Respondent and **ENTER SUMMARY JUDGMENT** in favor of the Appellants on on Count I of their Complaint, and that portion of Count II which alleged that the Act should be subject to, and invalidated under, strict scrutiny**.** Should the Court not enter summary judgment for the Appellants as stated above, it should none-the-less **REVERSE** the judgment of the Circuit Court of Cole County granting judgement on the pleadings to the Respondent, and **REMAND** this case for trial.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By:_____

James B. Deutsch, #27093
Marc H. Ellinger, #40828
Thomas W. Rynard, #34562
308 East High Street, Suite 301
Jefferson City, MO 65101
Telephone: 573/634-2500
Facsimile: 573/634-3358

Richard T. Bryant, #27075
1102 Grand Avenue, Suite 804
Kansas City, MO 64106
Telephone: 816/221-9000
Facsimile: 816/221-9010

By: _____
J. Michael Murray (Ohio 0019626)
(admitted *pro hac vice*)
Raymond V. Vasvari, Jr. (Ohio 0055538)
(admitted *pro hac vice*)
Berkman, Gordon, Murray & DeVan
55 Public Square Suite 2200
Cleveland, Ohio 44113-1949
Telephone: 216/781-5245
Facsimile: 216/781-8207

Counsel for Appellants

– CERTIFICATE OF COMPLIANCE AND OF SERVICE –

I hereby certify that:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) in that it contains 21,716 words exclusive of the cover, this Certificate of Compliance and of Service and the signature block, as determined by the Word Count feature of the software in which it was prepared, WordPerfect X5;

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

3. Two true and accurate copies of the foregoing Appendix to the Merit Brief of the Appellants were served today, Via First Class United States Mail, sufficient postage prepaid, upon the counsel for the Respondent, at the addresses listed below, this 26th Day of May 2011.

Ronald Holliger, Esq.
General Counsel
Office of Missouri Attorney
General Chris Koster
P.O. Box 899
Jefferson City, Missouri 65012

Scott D. Bergthold, Esq.
Special Assist Attorney General
7446 Shallowford Road
Suite 202
Chattanooga, Tennessee 37421

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By: _____

James B. Deutsch, #27093
Marc H. Ellinger, #40828
Thomas W. Rynard, #34562
308 East High Street, Suite 301
Jefferson City, MO 65101
Telephone: 573/634-2500
Facsimile: 573/634-3358

Richard T. Bryant, #27075
1102 Grand Avenue, Suite 804
Kansas City, MO 64106
Telephone: 816/221-9000
Facsimile: 816/221-9010

J. Michael Murray (Ohio 0019626)
(admitted *pro hac vice*)
Raymond V. Vasvari, Jr. (Ohio 0055538)
(admitted *pro hac vice*)
Berkman, Gordon, Murray & DeVan
55 Public Square Suite 2200
Cleveland, Ohio 44113-1949
Telephone: 216/781-5245
Facsimile: 216/781-8207

Counsel for Appellants