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

REPLY BRIEF OF THE APPELLANTS

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CONSTITUTIONAL PROVISION

STATUTES, RULES AND REGULATIONS

MISCELLANEOUS

– ARGUMENT –

I. The General Assembly Violated the Constitutional Mandate of Article III, Section 35, and the Statutory Mandate of R.S. Mo. § 23.140, When It Enacted the Contested Legislation Without Holding the Fiscal Note Hearing Required By Law and Requested By Representative Dougherty.

(Replies to Point I of Respondent's Response)

It is uncontroverted that in April 2010, Representative Curt Dougherty requested that the Joint Committee on Legislative Research convene to consider the fiscal note appended to SB 586 & 617; that he made that request pursuant to R.S.Mo. § 23.140; that he did so based on his belief that the fiscal note woefully understated the economic effect of the proposed legislation; that no such hearing was ever held, and; that SB 586 & 617 was enacted by the General Assembly notwithstanding the failure to hold such a hearing.[1]

Respondent contends that the failure of the committee to meet prior to the passage of the contested legislation does not violate the Missouri Constitution, and that the violation of R.S.Mo. § 23.140 is an insufficient basis upon which to invalidate the contested legislation.[2]

Neither contention can be squared with the express requirements of Article III, Section

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[1]LF 563-65, 575 (Dougherty Aff. ¶¶ 3-5 and Exhibit B); LF 1975 (Findings of Fact, Conclusions of Law & Judgment, November 23, 2010, at Findings 6 & 7).

[2]Response Brief, at 40-43 (no constitutional violation), 44-49 (statutory violation does not invalidate legislation).

35 and R.S.Mo. 23.140, which combine to make the requested hearing mandatory.

– A –

The State insists that Article III, Section 35 "does not require a fiscal note for any bill pending before the General Assembly and obviously does not require a hearing on a fiscal note." (Response, at 41). That argument, however, ignores the effect of the sentence in Article III, Section 35 upon which we rely:

> The committee **shall meet** when necessary to perform the duties, advisory to the general assembly, assigned to it by law.[3]

The fact that the quoted sentence does not itself refer specifically to the joint committee meeting to hold a fiscal note hearing upon the request of a member, but rather requires it to meet when necessary to perform the duties assigned to it by law, does not lead to the conclusion that the duty to hold a fiscal note hearing upon the request of a legislator is not imposed by the constitution.

If a mandatory duty to hold a fiscal hearing upon the request is "assigned" to the committee "by law" as is the case here, it necessarily follows that the constitutional provision requires the committee to meet in order to carry out that duty.

Thus, it is simply wrong to say that the failure to hold the fiscal hearing does not rise to the level of a constitutional violation.

Indeed, to accept the state's argument is to read an entire sentence out of the state

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

constitution. In fact, it would read out of Article III, Section 35 the only sentence that describes what the committee created by that provision is charged with doing.

Such an elision would contravene the most basic principles of statutory and constitutional construction: that words mean something, and that their plain meaning is to be given effect by the Courts.

> Though applied more broadly because of the permanent nature of constitutional provisions, rules of statutory construction apply to interpretation of the constitution. ***Every word in a constitutional provision is assumed to have effect and meaning; their use is not meaningless surplusage***.[4]

R.S.Mo. § 23.140 is unquestionably a law, which directly assigns to the committee an unambiguous duty to meet to consider a fiscal note upon the request of a legislator.

> 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**.[5]

Nor can there be any question but that considering, revising, changing and substituting

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[4]*Thompson v. Committee on Legislative Research*, 932 S.W.3d 392, 395 n.4 (Mo. Banc. 1996)(citing *Buechner v. Bond*, 650 S.W.2d 611, 612-13 (Mo. banc 1983))(emphasis added).

[5]R.S.MO. § 23.140(3)(emphasis added).

a fiscal note are paradigmatic examples of duties which are "advisory to the general assembly," something which is evident from the requirements of Section 23.140, which not only specifies the detailed analysis and content a fiscal note must contain, but requires that the note, once prepared, must attend a pending piece of legislation as it makes its way through the General Assembly.[6]

The obvious purpose of these requirements – the only plausible purpose – is to ensure that the General Assembly makes fiscally informed choices when considering legislation.

The fiscal note, then, is nothing if not advice, and the review, modification or substitution of the fiscal note is inherently an act advisory to the general assembly.

The content mandated by R.S.Mo. § 23.140(2) is intended to ensure that the legislature makes well informed economic decisions.

The need for such insight is especially salient in this economy, where jobs are scarce, state and local treasuries are depleted and small businesses are struggling to succeed.

The importance of reasonably accurate information about the economic impact of a given bill cannot, in this light, be overestimated.

The fiscal note process is not some legislative detail – an "i" to be dotted or a "t" to

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[6]R.S.MO. § 23.140(2) (detailed requirements for the contents of a fiscal note, including the estimated economic impact of state and local government revenues, and on small businesses during a two year prospective period, and; (3)(requiring the fiscal note to accompany a given bill throughout the legislative process).

be crossed on the way to passing a bill. Rather, it is designed to provide the legislature with critical information that informs the decision of whether or not to enact a given piece of legislation.

This case provides a perfect example of why the fiscal note process is important, and why circumventing that process undermines the very purpose of Article III, Section 35. As demonstrated at length in our opening brief, the fiscal note which attended SB 586 & 617 woefully underestimated its impact on state and local revenues, and on small businesses. The hearing requested by Representative Dougherty would have revealed those miscalculations.

Respondent (Response, at 41) observes that the Missouri constitution does not require that a fiscal note be prepared for every bill considered by the general assembly. But this observation is of no moment. Article III, Section 35 creates the joint committee, and imposes upon it a single duty: **to meet** to perform such other duties as are assigned to it by law.

While the fiscal note itself may be a creature of statute, the committee is a creature of the constitution, *Thompson*, 932 S.W.3d at 394-95, and its duty to meet proceeds directly from the constitution.

That is the constitutional duty that was disregarded in this case, and with precisely the results one would expect: the general assembly adopted a bill blind to its sweeping and deleterious negative effect on revenues and small businesses.

Oddly, in the portion of his brief devoted to dismissing that omission as merely a

statutory violation, the Respondent proceeds to argue that legislation can survive even violations of the constitution, an argument he advances on the strength of *Brown v. Morris*, 290 S.W.2d 160 (Mo. banc 1956).

But *Brown,* which was decided on facts and principles very different from those at play here, offers no support for the contested legislation.

In *Brown*, the general assembly authorized the submission to the electorate of a referendum proposing a new cigarette tax. *Brown*, 290 S.W.2d at 160.

The House passed the underlying bill, but the Speaker refused to sign it as enrolled when it returned from the Senate, as it had not been read in the House on three successive days. He instead affixed his signature to a separate document noting his position. *Id*.

The secretary of state submitted the tax referendum to the electorate, which adopted it in the next general election. A cigarette vendor contested the tax as unconstitutional, claiming that the failure of the Speaker to sign the bill authorizing the referendum violated Article III, Section 30 of the Missouri Constitution. *Brown*, 290 S.W.2d at 953-54.

The question presented in *Brown* was whether the procedural defect which ostensibly violated Article III, Section 30 nullified the action of the House in light of the subsequently adopted provisions of Article III, Section 31, which did not require the signature of the Speaker in order for a bill to be deemed finally passed. *Brown*, 290 S.W.2d at 166-67.

This Court held it did not, and found Article III, Section 30 directory precisely

because Article III, Section 31 provided a complete and alternative mechanism by which a law could be enacted without the Speaker's attestation. *Brown*, 290 S.W.2d at 167.

Article III, Section 35 cannot be so easily dismissed. Its use of the word "shall" is plainly mandatory, and it provides the joint committee no option but to meet when the law requires it to meet. In this regard, *Brown* is entirely distinguishable.

– B –

Respondent (Response at 45-49) concedes that the failure to hold the fiscal note hearing in this case violated R.S.Mo. § 23.140. He argues, however, that a statutory violation by the general assembly is not sufficient to invalidate a law.[7]

He offers absolutely no authority for the remarkable proposition that the general assembly is not bound by the very laws it creates, including laws which create specific requirements regarding the conduct and duties of its own committees. All his arguments can be reduced to the claim that the use of the word "shall" in Section 23.140.3 is directory, and not mandatory.

But, while the nature of the power vested in the general assembly may be generally

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[7]The Respondent also suggests (Response, at 46) that because several fiscal notes were issued as SB 586 & 617 wended its way through the general assembly, any defect caused by the failure of the joint committee to meet was somehow cured. This is unavailing, because the latter fiscal notes were all but substantively identical to the earlier one which prompted the request for a hearing at issue in this case. Compare the fiscal notes reproduced in the record at LF 56-62, 63-68, 69-76 and 77-84.

regarded as plenary, it is none-the-less subject to limitations imposed by statute:

> The Missouri constitution, unlike the federal constitution, does not grant legislative power to the General Assembly, but rather is a limitation thereon. Thus, except for restrictions imposed by the Missouri constitution ***and statutes enacted by the General Assembly***, the power of the state legislature is unlimited and practically absolute.[8]

We submit that this violation of R.S.Mo. § 23.140 alone, apart from the constitutional mandate of Article III, Section 35, is sufficient to invalidate the legislation challenged here. Respondent argues, however, that notwithstanding this – and notwithstanding the fact that the use of the word "shall" is generally presumed to be mandatory, *State ex rel. Royal Insurance v. Director of the Missouri Department of Insurance*, 894 S.W. 2d 159, 162 (Mo. banc 1995) – that Section 23.140 is merely directory in its requirement to hold a fiscal note hearing.

Respondent also contends (Response at 48) that the directory nature of Section 23.140 can be inferred from its requirement that the joint committee hold a requested hearing "as soon as possible," without specifying a deadline, even leaving open the possibility that the hearing could be held after the bill is already passed.

But that position simply cannot be reconciled with the language of R.S.Mo. § 23.140.1

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[8]*Bergman v. Mills*, 988 S.W.2d 84, 89 (Mo.App. W.D.,1999)(citing *Americans United v. Rogers*, 538 S.W.2d 711, 716 (Mo. banc 1976)).

itself, which requires the fiscal note "shall, before being acted upon, be submitted to the committee on legislative research for the preparation of a fiscal note."

To treat Section 23.140 as directory would be to ignore the precise, specific and comprehensive nature of the fiscal note scheme created by 23.140 in its various subparts.

II. The Circuit Court Erred in Denying Summary Judgment to The Appellants on their Claim that SB 586 & 617 Was a Content-Based Restriction on Constitutionally Protected Expression Which is Subject To, and Fails, Strict Scrutiny.

(Replies to Point II of Respondent's Response)

Respondent contends that the pre-ambulatory language codified at R.S.Mo. § 573.525.2(3), which speaks directly to the legislative purpose in adopting the contested legislation, does nothing to subject the restrictions sub judice to strict scrutiny as content-based. The reasons he offers are unpersuasive, especially in light of the language itself, which plainly evinces an intention to treat erotic expression differently from similarly situated non-erotic speech.

> 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**.[9]

Here, it bears emphasis that the quoted language appears in the statement of legislative purpose enacted as part of SB 586 & 617.

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[9]R.S.Mo. § 573.525.2(3)(emphasis added).

The application of intermediate scrutiny to adult use regulations is only appropriate when "the 'predominate concerns' motivating the ordinance were with the secondary effects of adult [speech], and not with the content of adult [speech].'" [10]

Intermediate scrutiny, then, is reserved for restrictions on expression which are "justified without reference to the content of the regulated speech."[11] Reading Section 573.525.2(3) demonstrates that SB 586 & 617 does not fit that bill.

The general assembly enacted a series of restrictions on adult speech. In one breath, it claimed to be doing so to ameliorate the adverse secondary effects alleged to be associated with that expression. But, in the next breath, the general assembly betrayed its concern with the content of the expression by stating that even if businesses offering books, magazines, videos and live entertainment with a non-erotic theme produced the same, or even greater secondary effects, SB 586 & 617 would only regulate businesses offering adult content.

Under Missouri law, a nightclub that presents comedy acts, and a nightclub that presents adult dancers are treated differently, notwithstanding the fact that they might cause precisely the same sorts of adverse secondary effects.

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[10] *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 440-41 (2002)(plurality) (quoting *City of Renton v. Playtime Theatres*, 475 U.S. 45, 47-54 (1986)(bracketed substitutions by the *Alameda Books* Court)).

[11] *Id.*, at 48 (citations omitted).

A bookstore that sells newspapers and sporting magazines is unregulated. A similar bookstore, with an adult inventory, that draws precisely the same number of customers, and results in the same levels of crime, noise and litter, is burdened.

In short, whether the dissemination of speech is regulated is defined by the content of the speech, and the general assembly has admitted to treating these businesses differently even if they produce the same secondary effects, based upon differences in the content of the expression which they offer. "This is the essence of content-based regulation." *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 811 (2000).

Respondent contends (Response, at 51) that the contested regulations merit intermediate scrutiny because they merely restrict, but do not ban, adult expression. This is unavailing.

> It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.

Playboy Entertainment Group, 529 U.S. at 812.

The language of Section 573.525.2(3) points up the underinclusiveness of the legislation sub judice, and that in itself underscores the degree to which it is content-based.

The Supreme Court recently decided *Brown v. Entertainment Merchant's Association*, 131 S.Ct. 2729, 79 U.S.L.W. 4658 (June 27, 2011), a First Amendment challenge to a California statute which imposed restrictions upon the dissemination of violent video-games to minors. The statute applied only to depictions of violence in video games: depictions of violence in cartoons, comic-books, photographs and other media which might be disseminated to children were not affected. *Brown*, 131 S.Ct. at 2740.

The Court treated the disparate treatment of different media not only as meriting the application of strict scrutiny, but as sufficient in-and-of-itself to doom the act to constitutional invalidity. Justice Scalia outlined the First Amendment dangers, and significance, of underinclusive laws.

> Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. **Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint**.
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> * * *

> Here, California has singled out the purveyors of video games for disfavored treatment – at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.[12]

Missouri has done no less. It has declined to regulate book and video stores and nightclubs which disseminate the favored, non-erotic expression even if they cause the identical harm claimed to justify the regulation of the adult bookstores and nightclubs offering the disfavored, erotic expression. The challenged legislation should be subject to strict scrutiny, which it cannot survive

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[12]*Entertainment Merchants Assn*., 131 S.Ct. at 2740 (emphasis added)(citing *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989)).

III. The Circuit Court Erred in Granting Judgment on the Pleadings to The Respondent Against Our Claim that SB 586 & 617 Fails Intermediate Scrutiny, A Claim The Resolution of Which Cannot Be Made On The Pleadings and Without A Full Exposition of the Evidence Adduced By the Parties.

(Replies to Point III of Respondent's Response)

- A -

Our Amended Petition specifically alleged that adult establishments do not produce adverse secondary effects of the sort that would support the contested legislation, do not diminish property values or contribute to urban blight, and actually improve the property values of and safety in their respective neighborhoods.[13] We further alleged that the enforcement of the contested legislation would impermissibly reduce the quantity and availability of adult expression in Missouri.[14]

The Respondent filed an Answer to which he attached, as an exhibit, the whole of the legislative record relied upon by the general assembly.[15]

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[13]Amended Verified Petition, at ¶¶ 110-14, LF 177-78.

[14]Amended Verified Petition, at ¶ 117, LF 178.

[15]Answer, LF 1715-1732; Exhibits to Original Answer, SLF 2-370.

Having filed a cache of evidence with his Answer, the Respondent moved for judgment on the pleadings, claiming that we should be given no opportunity to contest the evidence he had entered into the record.[16]

But such a result cannot be reconciled with the standard for granting judgment on the pleadings, under which

> "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." [17]

Assuming the allegations of the Amended Verified Petition to be true foreclosed judgment on the pleadings for the state in the most direct possible way.

Moreover, Respondent's claim that the secondary effects jurisprudence of the United States Supreme Court cuts off our right to challenge the record they have put forth both in the general assembly and in the Circuit Court is just plain wrong.

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[16]Suggestions Pro Motion for Judgment on the Pleadings , at 27-28, LF 134-35.

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

The standards and methods by which a court must judge the legislative record upon which a particular set of adult use regulations is based was set forth with clarity in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002).

Those standards, however, did not come into being overnight. The secondary effects jurisprudence of the United States Supreme Court has steadily evolved since *Renton*, and with it has evolved a mechanism by which to assess the adequacy of the evidence advanced in support of a law allegedly justified by reference to the adverse secondary effect said to be associated with adult expression.

That framework began with *Renton*, in which the Court considered the contention that a municipality was required to conduct its own secondary effects studies before regulating adult establishments, and could not found its secondary effects analysis upon the experience of other cities, as expressed in studies and, in that case, judicial opinions. Importantly, the challenger in that case did not contest the findings of the studies cited by the City of Renton. Rather, the argument was that Renton had to do its own study. *Renton*, 475 U.S. at 50-51.

The Court held that *Renton* could rely on the experience of other cities, including that expressed in judicial opinions, with a caveat: the city could rely on such evidence "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52.

It is **not** true that Renton was vindicated in enacting its ordinance simply because it had averred to the experience of Seattle. That alone would not have been enough.

Rather, it was necessary to demonstrate that its reliance was reasonable. Because Renton met that test **too** its adult use ordinance was sustained.

The next important case in the evolution of the secondary effects doctrine was *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), a case upon which the Respondent relies heavily. Actually, however, *City of Erie* is important because it presaged the pivotal secondary effects decision in *Alameda Books*. In *City of Erie*, the operator of an adult cabaret contested a municipal ban on public nudity, which operate to prohibit expressive nude dancing within his establishment. The issue was whether, as applied to nude dancing, the prohibition could be justified based upon the adverse secondary effects attributed to such entertainment. *City of Erie*, 529 U.S. at 293.

Justice O'Connor, writing for the, plurality held that it was reasonable for the city to have relied, in addition to its own experience, upon cases including *Barnes*.[18]

Justice O'Connor hardly did so in a vacuum. Significantly, the plaintiff in that case did nothing to contest or otherwise undermine the legislative record relied upon by the city, a fact the Court noted in detail.

Here, Kandyland has had ample opportunity to contest the

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[18]Respondent (Response, at 68-69) also relies on *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) for the proposition that reliance on judicial opinions alone can justify a secondary effects rationale. His argument is essentially the same as that which he advances on the strength of *City of Erie*, to which we next reply.

> council's findings about secondary effects – before the council itself, throughout the state proceedings, and before this Court. **Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings.** Instead, it has simply asserted that the council's evidentiary proof was lacking. **In the absence of any reason to doubt it**, the city's expert judgment should be credited.

City of Erie, 529 U.S. at 298 (emphases added).

The passage quoted above, without more, belies Respondent's claim that including judicial decisions in the legislative record of an adult use statute conclusively establishes that the legislature reasonably relied upon the evidence offered in support of that statute.

Erie, Pennsylvania expressly relied on judicial opinions, including *Barnes*, in support of its ban on public nudity. *City of Erie,* 529 U.S. at 297 (plurality).

But was that reliance conclusive proof that the ban was reasonably adopted?

Not at all. If it had been, the plurality would not have noted the failure of the plaintiff Kandyland to contest the legislative record, or to cast doubt upon the legislative findings of the city council. If the Respondent is right, those tasks would have been futile.

Justice O'Connor's focus on the absence of a challenge to the legislative record in *City of Erie* is echoed in her plurality opinion in *Alameda Books*, written two years later.

Both the burden shifting mechanism of the plurality opinion, *Alameda Books*, 535

U.S. at 438-39 (plurality) and its specific provisions allowing a plaintiff to contest a legislative rationale either by (a) undermining the evidence relied upon by the state, or (b) refuting that evidence with contrary evidence of its own, speak to the sort of challenge that was altogether absent in *City of Erie*.

The case is nothing less than explicit as to the right of a plaintiff to present, and the duty of a government to defend against, such an evidentiary challenge. Applying to a Los Angeles adult use ordinance the same standard that governs the statute at issue here, Justice O'Connor wrote:

> This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipalitys rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. [19]

[19] *Alameda Books*, 535 U.S. at 438-39 (citing *Renton*, and citing as exemplary *City of Erie*, 529 U.S. at 298 (plurality)).

While our Amended Petition more than plead facts sufficient to survive judgment on the pleadings, our summary judgment motion and brief opposing judgment on the pleadings marshaled voluminous evidence demonstrating the merits of our challenge to the contested legislation.

As extensively summarized in our Opening Brief, it casts doubt on the legislative rationale of the general assembly both by adducing affirmative evidence tending to undermine the connections between adult establishments and adverse secondary effects (Brief, at 65-74), and by calling into question the validity of the government's own evidence (Brief, at 74-84).

On the ninety-second page of his Response, the Respondent quietly admits what he cannot credibly deny: that this is the mechanism by which *Alameda Books* allows us to mount an evidentiary challenge to the legislative record behind SB 586 & 617:

> In theory, there are ways that Appellants may cast direct doubt on Respondent's secondary effects rational: "demonstrate[e] that the [government]'s evidence does not support its rationale or [furnish] evidence that disputes the [government]'s factual findings."[20]

The Respondent proceeds to engage – albeit in the alternative – in the very sort of

[20]Response, at 92 (quoting *Alameda Books*, 535 U.S. at 438-39 (plurality)(elliptical substitutions by the Respondent).

analysis and argument that should occur at the trial of this case, or perhaps on a motion for summary judgment, but **not** on a motion for judgment on the pleadings.

This is not to concede that the Respondent's criticism of our evidence has merit. That said, he asserts our evidence fails to cast direct doubt upon the government's secondary effects rationale (Response, at 90-94), offers a familiar, discredited critique of our expert, Dr. Daniel Linz (Response, at 94, 95-96, 109-18), and claims (Response, at 97-104) that our affidavits cannot disprove the existence of adverse secondary effects everywhere in Missouri.

In addition to his critique of the studies employed by the General Assembly, Dr. Linz attached to his affidavit hundreds of pages of peer-reviewed, academic studies tending to undermine the secondary effects premise upon which the contested legislation was adopted.[21]

This affirmative evidence was bolstered by the numerous affidavits submitted, from business owners, public officials, law enforcement officers and members of the public, all of which demonstrated that adult businesses in Missouri not only do not produce adverse secondary effects, but actually have a positive impact upon the economic well being, and in many cases the safety, of the neighborhoods in which they are located.[22]

All this was more than sufficient to meet the burden imposed under the second phase

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[21]See Opening Brief, at 75-77 nn. 152-62, the accompanying text, and the extensive portions of the Legal File to which reference is made therein.

[22]See Opening Brief, at 64-74 nn. 128-51, the accompanying text, and the affidavits in the Legal File to which reference is made therein.

of the *Alameda Books* analysis, and merits a full consideration of our evidence.

Faced with this reality, the Respondent attacks both the credibility of Dr. Linz, and the reliability of our affidavits; both are arguments that go entirely to the weight, but not the sufficiency of our critique, and are thus ill-suited to judgment on the pleadings.

It is remarkable that the Respondent contends (Response, at 93-94) that the work of Dr. Linz has been rejected as a matter of law by the Seventh Circuit in *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir. 2003), when the Seventh Circuit itself has put that shibboleth to rest. Crediting the work of Dr. Linz as having cast doubt upon the legislative rationale for an Indianapolis adult use scheme, Chief Judge Easterbrook rejected the characterization of Dr. Linz which the Respondent (Response, at 94) puts before the Court. *Annex Books, Inc. v. City of Indianapolis, Ind.*, 581 F.3d 460, 465 (7th Cir. 2009).[23]

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[23]The notion that the Supreme Court has banished Dr. Linz and his analysis to some First Amendment dustbin is a canard frequently peddled by the Special Attorney General. Justice Souter, concurring in *City of Erie*, pointed favorably to a study which Dr. Linz had submitted in that case in support of a brief filed by amicus curia. *City of Erie*, 529 U.S. at 315 and Note 3 (Souter, J., concurring in part and dissenting in part).

Writing for the plurality, Justice O'Connor "rejected the idea" that "we should ignore [a local government's own] actual experience and require an empirical analysis"simply because such an analysis was possible. *Id*. at 302 (plurality). But the unwillingness of the Court to accept a study – submitted for the first time in an amicus brief filed in the Supreme Court – over the first hand experience of legislators already in the record, hardly amounts to

The claim that our affidavits cannot completely disprove the existence of adverse secondary effects in Missouri (Response, at 97-103) simply ignores the orderly progression of evidence mandated by *Alameda Books* in applying intermediate scrutiny.

The state had advanced its legislative record in support of the contested statute. As a matter of law, we have the right at this stage of the case to cast doubt upon the legislative rationale in either or both of the ways specified in *Alameda Books*, 535 U.S. at 438-39. If we succeed in casting direct doubt, the burden then shifts to the state to justify its regulations through the submission of additional evidence. But our burden at this stage is not to conclusively disprove anything: it is to cast direct doubt upon the legislative rationale, something we have more than succeeded in doing.

The Respondent denigrates as "outliers" a number of recent federal appellate decisions which have scrupulously held the government to its burden under *Alameda Books*. His critiques of those cases are unavailing.

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 particularly instructive here, because it involved an attempt to sustain an adult use ordinance, as a matter of law, despite a thoughtful challenge to the reasonableness of the legislative rationale upon which it was adopted. *Id*., at 1186-87.

There, as here, the legislative record contained numerous secondary effects studies

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an outright rejection of Dr. Linz or his analysis.

from jurisdictions around the country. *Id*., at 1187 (Ebel, J., concurring).

There, as here, the plaintiff contested both the shoddiness of that legislative record, and the reasonableness of the government having relied upon it.

It did both by introducing an expert critique in which Professor Daniel Linz exposed the flaws in the secondary effects studies cited, and by introducing evidence which demonstrated that the secondary effects feared by the county did not exist near the adult bookstore operated by the plaintiff. *Id*., at 1186-87 (Ebel, J., concurring).

The government sought summary judgment, arguing that the secondary effects studies and cases contained in the legislative record were sufficient proof of their adverse secondary effects rationale, and that no questions of material fact existed for trial. *Id*., at 1174.

The Panel majority found that these materials could not be deemed to have complied with the requirements of *Renton*, as explicated in *Alameda Books*, as a matter of law. *Id*. at 1177. The Respondent paints *Abilene Retail* as a case which turned on the distinction between urban studies and rural legislators. The Court should not be distracted by the particulars and miss the big picture in the process. What prevented essentially the same body of cases and studies now *sub judice* from carrying the day on summary judgment had less to do with geography than it did with the defendants in that case taking the same one-size-fits-all approach as the Respondent did below, claiming that the courts are not in a position to sit in judgment over the content of the legislative record, or the degree to which that record supports the restrictions that were adopted in its name. *Abilene Retail*, 492 F.3d at 1177.

If it was inappropriate to grant summary judgment without allowing the evidence of

the parties to be weighed at trial in *Abilene Retail*, it was a fortiorari improper to grant judgment to the state on the pleadings in this case.

The Respondent also endeavored to distinguish several recent opinions by the Seventh Circuit as "outliers." These cases hardly merit that sobriquet,

What the Seventh Circuit did in *Annex Books v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009) hewed scrupulously to the requirements of *Alameda Books*, which may cause some discomfiture to the Respondent.

Rather than accept, at face value, the claim that the studies upon which Indianapolis relied in regulating supported the regulations adopted upon their strength, the Court actually looked at the studies cited by the city, looked at the regulations it adopted, and found an unjustifiable disconnect between the two.

Respondent (Response, at 105-06) accuses the Seventh Circuit of establishing a new test, in which a local jurisdiction is required to link its regulations with "heightened specificity" to the adverse secondary effects it ostensibly seeks to regulate. And yet the burden of demonstrating that there is a connection between the evidence relied upon and the restrictions enacted in this context rests squarely with the state:

> *Alameda Books* establishes that much. Four Justices would have ruled for the plaintiff [bookstore], without need for a trial, even though the empirical support for the Los Angeles ordinance was materially stronger than the data that Indianapolis proffers.

* * *

> The other five Justices concluded that a hearing was necessary to determine whether the evidence that Los Angeles offered was strong enough. *None* of the Justices thought that summary judgment could be granted in the municipality's favor when the strength of, and appropriate inferences from, the studies were contested.

Annex Books, 581 F.3d at 464 (citing *Alameda Books*, 535 U.S. at 443-44, 453-66)(emphasis original). It is difficult in this light to see *Annex Books* as a departure from *Alameda Books*.[24]

The decisions in *New Albany DVD, L.L.C. v. City of New Albany*, 581 F.3d 556 (7th Cir. 2010), *cert denied*, 130 S.Ct. 3410 (June 14, 2010) is no less orthodox.

In that case, the city limited the location of adult bookstores with respect to certain sensitive uses, upon a legislative record that contained no proof that the crime said to justify the separation, and alleged that it also had an interest in reducing pornographic litter, which it supported by reference to *World Wide Video of Washington, Inc. v. Spokane*, 368 F.3d 1186, 1197 (9th Cir.2004). The Seventh Circuit found this scant proof to be insufficient to meet the burden imposed under *Alameda Books*. *New Albany DVD*, 581 F.3d at 561.

The court held that New Albany might be able to revive its rationales on remand, but

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[24]On appeal after remand, the Seventh Circuit last year sustained the trial court's grant of a preliminary injunction against the same ordinance, based upon the evidentiary critique of its secondary effects rationale presented by the plaintiffs. *Annex Books, Inc. v. City of Indianapolis*, 624 F.3d 368 (7th Cir. 2010).

that doing so would require the introduction of evidence germane to the problems it faced. *Id*.

The Respondent does not like these cases, and it is easy to see why. Rather than rubber-stamp the conclusions of the legislature, which were grounded upon the same shopworn set of generic studies, both the Seventh and the Tenth Circuit required the government to toe the line drawn by *Renton*, and demonstrate that it had **reasonably relied** on the evidence contained in its record.

They did so, of course, because *Alameda Books* afforded the plaintiffs in those cases the opportunity to demonstrate that the evidence in the record was shoddy, and that it was not otherwise reasonable to rely upon it.

To hold that the General Assembly reasonably enacted the contested statute based on the record before it, as a matter of law, without affording the Petitioners the opportunity to contest that reliance in the ways vouchsafed to them by the *Alameda Books* plurality, would be to ignore the plain mandate of the Supreme Court, and to "abdicate [this Court's duty to exercise] 'independent judgment' entirely" *Abilene Retail*, 492 F.3d at 1175.

– B –

(Replies to Point IV of Respondent's Response)

In our Opening Brief (at 88-94), we argued that the Proportionality Requirement imposed on adult use regulations by Justice Kennedy's concurrence in *Alameda Books* cannot be satisfied by a set of laws which have decimated adult entertainment in Missouri.

At the outset, it bears emphasis that the proportionality requirement, like the rest of

Justice Kennedy's concurrence, constitutes the holding in *Alameda Books*.[25]

Both the Sixth and Seventh Circuits have expressly recognized that adult use regulations must satisfy the proportionality requirement in order to survive intermediate scrutiny. *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 507 (6th Cir. 2008); *Annex Books*, 581 F.3d at 465.

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). It is neither permissible for a city to undertake to reduce secondary effects by adopting regulations that will substantially reduce the availability of such expression, nor to adopt an ordinance which in fact leads to that result:

> As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead

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[25]No single opinion in *Alameda Books* commanded the support of five justices. Numerous circuits have recognized that, under the rule articulated in *Marks v. United States*, 430 U.S. 188 (1977), Justice Kennedy's concurrence in *Alameda Books* is the narrowest opinion joining the judgment of the Court, and therefore constitutes the holding of that case. *See: World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1193 (9th Cir. 2004)(collecting cases).

to fewer secondary effects.

* * *

> 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.[26]

Our summary judgment evidence demonstrates that the restrictions imposed by the contested legislation cannot survive the these requirements. The testimony of small businesses owners associated with both adult bookstores and adult cabarets shows that those businesses have already suffered a vast diminution in the quantity of speech which they disseminate as a result of SB 586 & 617.

Respondent argues that the proportionality requirement only requires that the state not have, as its legislative premise, an intent to suppress secondary effects through a reduction in speech (Response, at 119-20), and; that a loss in revenues by adult businesses is not a constitutionally cognizable harm (Response, at 120-24). Neither argument is persuasive.

The claim that the proportionality requirement demands only that the general assembly legislate with a pure heart simply cannot be reconciled with Justice Kennedy's own summation of his analysis: in order to be valid, a law aimed at reducing secondary effects must have both "the ***purpose and effect*** of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring in the judgment)(emphases added).

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[26] *Id*. at 450.

Nor will it do to dismiss the proof of the devastating effect the contested legislation has had on adult expression in Missouri as simply the "loss of revenue." Every adult cabaret closed, every bookstore shuttered, every publication unsold and every dance not performed is, in the last analysis, a diminution in the quantity and accessibility of speech. The lost revenues and decimated businesses to which our Opening Brief refers are symptoms of those constitutional harms, not the harms themselves.

– CONCLUSION –

The Circuit Court erred as a matter of state and federal law. This Court should enter the relief prayed for in our Opening Brief (at 96).

Respectfully submitted,

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– 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 7,667 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 Reply 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 12th day of August, 2011.

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