



Law Office of Scott D. Bergthold, P.L.L.C.

Scott D. Bergthold
sbergthold@sdblawnfirm.com

Bryan A. Dykes
bdykes@sdblawnfirm.com

TO: Local Government Committee
Missouri House of Representatives

FROM: Scott D. Bergthold, Esquire
Law Office of Scott D. Bergthold, PLLC

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RE: Substitute HB 2026 – Response to Industry Arguments & Anticipated Arguments

During last Wednesday's hearing on HB 2026, a representative of several sexually oriented businesses in Missouri (Ms. Michael) made several misstatements concerning the bill that warrant a response. It is also anticipated that during today's hearing, further attacks will be made on the bill and on the statements I made concerning the constitutionality of HB 2026. This memo is designed to address the misstatements made last Wednesday, to further demonstrate the constitutionality of substitute House Bill 2026, and to make myself available at any time to answer questions concerning the bill via email or telephone (my cell phone is 423-802-9459).

Responses to Challenges to HB 2026

1. Hours of operation. I explained that every federal appellate court to consider hours of operation regulations for sexually oriented businesses has upheld them as constitutional. Ms. Michael stated that the cases upholding, and striking, hours of operation regulations are "about equal." This is not true, and Ms. Michael failed to cite a single case that, after all appeals had concluded, invalidated a similar hours of operation regulation for sexually oriented businesses. While there could be a trial court case, or a state court case somewhere, that invalidated an hours regulation, the federal appellate case law upholding them is uniform and overwhelming. *See, e.g., Andy's Restaurant & Lounge v. City of Gary*, 466 F.3d 550 (7th Cir. 2006); *Ctr. for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003) (upholding AZ law); *Richland Bookmart v. Nichols*, 137 F.3d 435 (6th Cir. 1998) (upholding TN law); *Mitchell v. Comm'n on Adult Entertainment Establishments*, 10 F.3d 123 (3d Cir. 1993) (upholding Delaware's law).

The case law is similarly uniform in upholding stripper-patron buffers (*i.e.*, 6-ft. rule), no-touch rules, and open-booth regulations. *See, e.g., Jake's Ltd., Inc. v. City of Coates*, 284 F.3d 884 (8th Cir. 2002) (upholding 6-ft. rule); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) (same); *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998) (upholding 10-ft. rule); *Hang-On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995) (concluding that touching is not constitutionally protected "expression" and upholding no-touch rule); *Scope Pictures, Inc. v. City*

of *Kansas City*, 140 F.3d 1201 (8th Cir. 1998) (upholding open-booth regulation); *Andy's Restaurant & Lounge, Inc. v. City of Gary*, 466 F.3d 550 (7th Cir. 2006) (same).

2. Need for statewide regulation. Ms. Michael listed several municipalities that have local regulations of sexually oriented businesses. What she did not acknowledge, however, is that many states also regulate sexually oriented businesses at the statewide level. Indeed, just yesterday, the Attorney General of Texas appeared before the Texas legislature and asked for a number of additional statewide regulations to be implemented for sexually oriented businesses.

Moreover, the *critical* distinction between statewide regulations and local regulation is that, in addition to the high cost of defending lawsuits, local governments are at risk of significant liability for plaintiffs' attorneys' fees and damages if they lose in court. Because of sovereign immunity, this risk *does not apply* to the State of Missouri. Thus, for many smaller communities—like tiny Bates City, Missouri, which is currently facing the expense of a federal lawsuit—statewide regulations would be a tremendous help.

3. Dr. Daniel Linz and the secondary effects data. Ms. Michael touted Dr. Daniel Linz (a communications professor who has admitted, in deposition, to having no background in criminology) as a leading “criminologist” who has “debunked” all the secondary effects studies as flawed. As an initial matter, court after court has made it clear that you don't need a “study” to show that keeping strip clubs away from homes is a good idea, that requiring “open” peep show booths serves the government's interest in preventing illicit sex acts, or that putting erotic dancers in a main room on a stage 6 feet from patrons reduces the opportunity for prostitution.

More important, Dr. Linz and his industry-funded “counter-studies” have repeatedly been rejected by the courts. The Eighth Circuit refused to enjoin regulations on the basis of work by Dr. Linz, Bryant Paul (his graduate asst.), and Brad Shafer (a strip club lawyer). *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003). The Seventh Circuit called Dr. Linz's theory for challenging adult business regulations “completely unfounded.” *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 639-40 (7th Cir. 2003). The Ninth Circuit reviewed the standard he applies to the studies and stated: “This is simply not the law.” *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2004). In a single case, an appellate court held that because there were competing experts on the issue of secondary effects (of which Dr. Linz was one), a trial was required. *Abilene Retail #30, Inc. v. Dickinson County*, 492 F.3d 1167 (10th Cir. 2007). Nevertheless, where Dr. Linz has testified at trial, his testimony has been rejected by the appellate court as flawed. *Daytona Grand, Inc v. City of Daytona Beach*, 490 F.3d 860, 883 n.33 (11th Cir. 2007) (“We also note that at least three other circuits have rejected, for similar reasons, attempts by plaintiffs to use studies based on CAD [calls for police service] data to cast direct doubt on an ordinance Interestingly, Daniel Linz, one of the experts hired by Lollipop's, also co-authored the studies found to be insufficient in two of these cases.”).

Conclusion

The secondary effects information that has previously been provided to you is more than sufficient to support the bill and its common-sense regulations. I anticipate that the well-heeled industry will flood the hearing with attacks, both substantive and *ad hominem*. I remain available (423-802-9459) to answer any questions you may have. Thank you for your service.