Missouri Law Review

Volume 72
Issue 2 *Spring 2007*

Article 8

Spring 2007

Advertising Regulations on Sexually Oriented Business: How Far Is Too Far

Jennifer Stonecipher

Advertising Regulations on Sexually Oriented Businesses: How Far is Too Far?

Passions Video, Inc. v. Nixon[1]

I. INTRODUCTION

In recent decades, various courts have held that the First Amendment extends to commercial speech.[2] Although the level of protection afforded to commercial speech differs from that given to non-commercial speech, these courts have held that the First Amendment protects commercial speech that is neither misleading nor concerns illegal activities.[3] Under such a framework, in order to regulate commercial speech, the government must demonstrate that the regulation directly advances a substantial interest and is no more restrictive than necessary to serve that interest.

In *Passions Video, Inc. v. Nixon*, a group of business owners challenged a Missouri statute that restricted the location of advertisements by sexually-oriented businesses and adult cabarets. The Eighth Circuit held that the restriction unconstitutionally abridged commercial speech. This Note argues that the court correctly found that the regulations were not narrowly tailored to serve the asserted government interest, and that the court took an important step in recognizing the importance of the free flow of information in a democracy and free-market economy.

II. FACTS & HOLDING

In *Passions Video*, an adult cabaret and two sexually-oriented businesses challenged the constitutionality of a Missouri statute that restricted their ability to advertise.[4] Missouri Revised Statute section 226.531 prohibited billboards and exterior advertising signs for adult cabarets and sexually-oriented businesses from being located within one mile of a state highway.[5] The statute provided an exception for businesses that were located within one mile of a state highway, allowing these businesses to display two exterior signs.[6] For

1. 458 F.3d 837 (8th Cir. 2006).
2. Ann K. Wooster, Annotation, *Protection of Commercial Speech under First Amendment – Supreme Court Cases*, 164 A.L.R. Fed. 1 (2000).
3. *Passions Video, Inc.*, 458 F.3d at 837.
4. *Id.* at 839.
5. MO. REV. STAT. § 226.531.2 (Supp. 2004).
6. *Id.*

businesses that fell within the exception, the statute restricted the signs' size and contents.[7]

Under the Missouri statute, Passions Video was classified as a "sexually-oriented business,"[8] and Gala Entertainment was classified as an "adult cabaret."[9] In August 2004, Passions Video and Gala Entertainment jointly sued the State of Missouri in the United States District Court for the Western District of Missouri, challenging the constitutionality of the Missouri statute.[10] Arguing that section 226.531 was a content-based speech regulation that should have been subject to strict scrutiny, Passions Video requested preliminary and permanent injunctions to enjoin the enforcement of the statute, a declaration that the statute was unconstitutional, and fees and costs.[11]

After the district court denied Passions Video's motion for a temporary restraining order and a preliminary injunction, Passions Video and the State cross-moved for summary judgment.[12] The district court granted the State's motion and determined that the Missouri statute regulated commercial speech and should be subject to Supreme Court's test as set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[13] Ultimately, under this test, the court found that the statute did not unconstitutionally restrict speech.[14]

Passions Video also argued that the statute violated its equal protection rights because the statute distinguished owners of adult cabarets and sexually-oriented business.[15] The district court rejected this argument, noting that "legislation is presumed to be valid and will be sustained if the classification

---

7. *Id.* The statute regulated the display signs to

> one identification sign and one sign solely giving notice that the premises are off limits to minors. The identification sign shall be no more than forty square feet in size and shall include no more than the following information: name, street address, telephone number, and operating hours of the business.

Id.

8. MO. REV. STAT. § 226.531.1(3) (Supp. 2004). The statute defines a "sexually oriented business" as "any business which offers its patrons goods of which a substantial portion are sexually oriented materials. Any business where more than ten percent of display space shall be presumed to be a sexually oriented business." *Id.*

9. Passions Video, Inc. v. Nixon, 458 F.3d 837, 839 (8th Cir. 2006). The statute defines an "adult cabaret" as "a nightclub, bar, restaurant, or similar establishment in which persons appear in a state of nudity . . . or seminudity, in the performance of their duties." MO. REV. STAT. § 226.531.1(1).

10. *Passions Video, Inc.*, 458 F.3d at 839. Gala Entertainment closed subsequent to the commencement of the suit. In addressing the Passions Video suit, the Court included reference to the Gala Entertainment suit. *Id.* at 840 n.1.

11. *Id.* at 839.

12. *Id.*

13. *Id.* at 842.

14. Passions Video, Inc. v. Nixon, 375 F. Supp. 2d 866, 873 (W.D. Mo. 2005).

15. *Id.*

drawn by the statute is rationally related to a legitimate state interest."[16] The court held that, because the statute was designed to reduce the negative secondary effects of sexually-oriented businesses, it did not violate the equal protection clause.[17]

Steele Retail 37, LLC ("Steele Retail"), the second party in this consolidated appeal, operates a gas station and convenience store.[18] Although most of its income was derived from gas and traditional convenience store items, the Missouri statute classified it as a sexually-oriented business because it devoted more than ten percent of its interior space to sexually-oriented materials.[19] On August 10, 2005, Steele Retail filed suit in the United States District Court for the Western District of Missouri, seeking a declaration that the statute was unconstitutional and seeking preliminary and permanent injunctions enjoining its enforcement.[20] Steele Retail argued that the statute was overly broad because it was not limited to the regulation of sexually-oriented materials.[21] Steele Retail claimed that, because of the Missouri statute, it was unable to display a sign that read "LION'S DEN SUPERSTORE FOOD FUEL ADULT EXIT NOW."[22]

The district court denied Steele Retail's motion for preliminary and permanent injunctions.[23] In doing so, the district court relied on the same reasoning that it had advanced in granting summary judgment against Passions Video and interpreted section 226.531 as restricting only the advertisement of sexually-oriented materials, not as restricting all advertisements by sexually-oriented businesses.[24]

Appeals for Steele Retail and Passions Video were consolidated into the present action.[25] On appeal, the Eighth Circuit reversed,[26] holding that the Missouri statute's regulations on commercial speech were not narrowly tailored and thus, restricted more speech than was necessary to achieve the state's substantial interest.[27]

---

16. *Id.*
17. *Id.*
18. Passions Video, Inc. v. Nixon, 458 F.3d 837, 840 (8th Cir. 2006).
19. *Id.*
20. *Id.*
21. Steele Retail 37, LLC v. Nixon, No. 05-4254-CV-W-GAF, 2005 WL 2788819, at *2 (W.D. Mo. Oct. 26, 2005).
22. *Id.*
23. *Passions Video, Inc.*, 458 F.3d at 840.
24. *Id.*
25. *Id.*
26. *Id.* at 839.
27. *Id.* at 843-44.

III. LEGAL BACKGROUND

This section will analyze the relevant language of section 226.531, including the legislature's specified goals for the statute. Next, the section will address the evolution of the constitutional protection of commercial speech, and finally, the section will explain the Supreme Court's *Central Hudson* test for commercial speech.

A. Missouri Revised Statute Section 226.531

On April 17, 2004, Governor Bob Holden signed section 226.531 into law.[28] The statute prohibited adult cabarets and sexually-oriented businesses from displaying any billboard or exterior advertising sign within one mile of any state highway, unless the business was located within one mile of a state highway.[29] Businesses located within one mile of a state highway were limited to displaying two exterior signs: one sign, a maximum of forty square feet in size, containing only identification information, and another sign giving notice that the premises are off limits to minors.[30] Violations were punishable as a Class C misdemeanor,[31] with each week of violation constituting a new offense.[32] According to the legislature, the statute was designed to "mitigate the adverse secondary effects of sexually oriented businesses, to improve traffic safety, to limit harm to minors, and to reduce prostitution, crime juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts."[33]

---

28. Mo. Senate Bill History, S.B. 870, 2004 Reg. Sess.

29. MO. REV. STAT. § 226.531.2 (Supp. 2004).

30. *Id.* Information on the identification sign is limited to "name, street address, telephone number, and operating hours of the business." *Id.*

31. A person convicted of a Class C misdemeanor may be punished by up to 15 days in county jail or a fine of up to $300. MO. REV. STAT. §§ 558.011.1(7), 560.016.1(3) (2000).

32. MO. REV. STAT. § 226.531.4 (Supp. 2004).

33. *Id.* § 226.531.5. Other jurisdictions, including New Jersey and Minnesota, have recognized a substantial governmental interest in reducing the secondary effects of sexually-oriented businesses. *See, e.g.*, Hamilton Amusement Cent. v. Verniero, 716 A.2d 1137 (N.J. 1998) (recognizing that secondary effects of sexually oriented businesses include promotion of juvenile delinquency, increase in crime, deterioration of neighborhoods and lower property values.); Excalibur Group, Inc. v. City of Minneapolis, 116 F.3d 1216, 1221 (8th Cir. 1997) ("[A]s a matter of settled law, regulations aimed at minimizing the secondary effects of sexually oriented businesses serve a significant and substantial governmental interest."). The district court noted that State Senator Matt Bartle relied upon the experiences of these jurisdictions in "drafting, proposing, and passing Senate Bill 870." Passions Video, Inc. v. Nixon, 375 F. Supp. 2d 866, 871 (W.D. Mo. 2005).

B. Constitutional Protection of Commercial Speech

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[34] In defining the parameters of the First Amendment, the Supreme Court has distinguished between commercial speech and other types of speech, noting that "our decisions have recognized 'the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'"[35]

As defined in *Central Hudson*, "commercial speech" is a form of "expression related solely to the economic interests of the speaker and its audience."[36] Commercial speech is afforded less protection under the First Amendment than other types of "constitutionally guaranteed expression."[37] This distinction is based on the inherent nature of commercial speech, which serves an "informational function" in advertising.[38] Accordingly, the government may regulate commercial speech to protect against deceptive and misleading advertisements.[39] The government may also restrict commercial speech that relates to an unlawful activity.[40]

Constitutional protection of commercial speech has undergone several changes in recent decades. Until 1976, commercial speech was treated as an exception to First Amendment protection.[41] As such, the courts afforded no First Amendment protection to commercial speech.[42]

In *Valentine v. Chrestensen*, the Supreme Court upheld a New York statute that prohibited the distribution of advertising materials in public places.[43] The Supreme Court held that, while the Constitution prohibits a state from excessively restricting speech in a public place, "the Constitution

34. U.S. CONST. amend. I. The First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980). "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

35. *Cent. Hudson*, 447 U.S. at 562.

36. *Id.* at 561.

37. *Id.* at 563.

38. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

39. Friedman v. Rogers, 440 U.S. 1, 15 (1979).

40. Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973).

41. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 758 (1976).

42. 316 U.S. 52, 54 (1942).

43. *Id.* at 55.

imposes no such restraint on government as respects purely commercial advertising."[44]

In 1975, the Court began to chip away at the commercial speech exception in *Bigelow v. Virginia*.[45] At issue in *Bigelow* was a Virginia statute that prohibited the circulation or sale of publications which encouraged or promoted the procurement of abortions.[46] In holding that the statute unconstitutionally infringed on protected speech, the Court noted that its holding in *Valentine* was limited and that "the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed."[47] However, while it extended First Amendment protection to these advertisements, the Court declined to clarify the "precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."[48]

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court struck down a statute that prohibited pharmacists from advertising prescription drug prices.[49] While recognizing that the First Amendment protection of commercial speech is not absolute, the Court held that such speech should be protected against unwarranted regulation.[50] The Court rejected the idea of a commercial speech exception to the First Amendment.[51] However, the Court clarified that some forms of "commercial speech regulation are surely permissible."[52] According to the Court, examples of permissible regulations include content-neutral time, place, and manner restrictions, regulations on untruthful speech, and regulations on speech relating to illegal activities.[53]

In reaching its decision, the court discussed the importance of advertising in a free enterprise economy, noting that:

---

44. *Id.* at 54. The Supreme Court also indicated that purely commercial speech was outside of First Amendment protection in its decision in *Breard v. City of Alexandria, LA.*, 341 U.S. 622, 645 (1951). In that case, the Supreme Court upheld the conviction of a door-to-door salesman who violated a city ordinance prohibiting uninvited solicitation upon private residences. *Id.* at 624, 645. The Court rejected the argument that the ordinance violated the First Amendment, relying on the commercial nature of the transaction. *Id.* at 642.

45. 421 U.S. 809 (1975).

46. *Id.*

47. *Id.* at 819. The Court noted that *Valentine* did not completely remove commercial speech from First Amendment protection. *Id.* at 820.

48. *Id.* at 825.

49. 425 U.S. at 748 (1976).

50. *Id.* at 770.

51. *Id.*

52. *Id.*

53. *Id.* at 771-72.

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[54]

In addition to recognizing the importance of commercial speech in a free market economy, the Supreme Court has also recognized commercial speech as essential to a democratic society. The Supreme Court noted, "The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society."[55] According to the Court, "These basic First Amendment principles clearly apply to commercial speech."[56]

In determining the degree to which these First Amendment principles apply to commercial speech, courts apply an intermediate level of scrutiny.[57] In order for a regulation to survive intermediate scrutiny, the government must demonstrate a *substantial* interest in support of the regulation.[58] If the commercial speech is not misleading and is not relating to an unlawful activity, the government's ability to regulate the speech is limited by the following test, as set forth in *Central Hudson*.

C. The Central Hudson *Test*

Central Hudson arose in the late 1970s, when the New York Public Service Commission (the "Commission") banned promotional advertisements by electric utility companies.[59] The Commission had divided advertising into two types: promotional advertising, intended to increase the demand for utility services, and informational, all other advertising, not intended to increase the demand.[60] Three years after its imposition, the Commission decided to

---

54. *Id.* at 765.

55. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512 (1996).

56. *Id.* at 512.

57. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995).

58. *Id.* at 624. Intermediate scrutiny in commercial speech regulations does not permit the court "to supplant the precise interests put forward by the State with other suppositions." Edenfield v. Fane, 507 U.S. 761, 768 (1993).

59. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 558 (1980).

60. *Id.* at 559. The advertisement ban was based on the Commission's concern over a possible fuel shortage during the winter of 1973-1974. *Id.*

extend the ban in an effort to promote energy conservation.[61] The Commission based its decision on their determination that promotional advertising was "contrary to the national policy of conserving energy."[62]

Central Hudson challenged the Commission's ban as an unconstitutional restriction of commercial speech.[63] Ultimately, the Supreme Court agreed with Central Hudson and invalidated the Commission's ban.[64] In evaluating the constitutionality of commercial speech regulations under the First Amendment, the Court established a four-part test: (1) whether the speech concerns a lawful activity and is not misleading, (2) whether the regulation of speech is based on a substantial governmental interest, (3) whether the regulation directly advances the stated governmental interests, and (4) whether the speech regulation restricts more speech than is necessary to serve the governmental interests.[65]

The Court found that, while the Commission's regulation met the first three requirements, the regulation was more restrictive than necessary to achieve the state's interest.[66] The Court reasoned that the ban on promotional advertising did not take into consideration whether the advertisements would actually affect overall energy consumption.[67] According to the Court, "the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use."[68] Therefore, because the regulation restricted more speech than was necessary, the Court held that the regulation violated the First and Fourteenth Amendments.[69]

IV. INSTANT DECISION

In *Passions Video, Inc. v. Nixon*, the Eighth Circuit considered whether Missouri Revised Statute section 226.531 violated the First Amendment by unconstitutionally restricting commercial speech. As commercial speech, the statute was subject to intermediate scrutiny under *Central Hudson*.[70]

---

61. *Id.*

62. *Id.*

63. *Id.* at 560.

64. *Id.* at 570.

65. *Id.* at 566. The test announced in *Central Hudson* has become the standard for determining the constitutionality of commercial speech regulations. 16A AM. JUR. 2D *Constitutional Law* § 483.

66. *Cent. Hudson*, 477 U.S. at 571-72.

67. *Id.* at 570.

68. *Id.*

69. *Id.*

70. Passions Video, Inc. v. Nixon, 458 F.3d 837, 841-42 (8th Cir. 2006). Appellants argued that the Court should apply strict scrutiny in reviewing the constitutionality of the statute, however the Court noted that since the statute did not survive the

In reviewing the district court's grant of summary judgment, the Eighth Circuit applied *de novo* review.[71] Before beginning its analysis, the court declared that the district court's interpretation of section 226.531 contradicted "the plain language of the statute as well as the state's own interpretation."[72] The court found that the statute did not mention the contents of off-premises advertising signs and would prohibit them, without consideration of its contents.[73]

In beginning its analysis of the *Central Hudson* factors, the court quickly determined that the speech in question did not contain misleading statements or statements which concerned illegal activity.[74] Then, in analyzing section 226.531 under the second *Central Hudson* factor, the Eighth Circuit stated that the government had shown a substantial asserted interest in regulating sexually-oriented businesses.[75] The court noted that it had previously recognized the validity of the State's interests in reducing the secondary effects of sexually-oriented businesses.[76]

The third *Central Hudson* factor requires that the regulation must "directly advance the state's asserted interest."[77] The court noted that there was evidence that the regulation would advance the State's interest in reducing the secondary effects of sexually-oriented businesses.[78] However, according to the court, this would most likely be accomplished by limiting the businesses' ability to advertise, thereby reducing profits and forcing some businesses to close.[79] Ultimately, the court declined to elaborate further on the third *Central Hudson* factor, because the regulation failed to meet the fourth factor.[80]

In analyzing the fourth and final *Central Hudson* factor, the court looked to whether the regulation was narrowly tailored so as not to restrict any more speech than was necessary to achieve the substantial state interest of reducing

---

less rigorous, intermediate scrutiny, there was no need to consider the application of strict scrutiny analysis. *Id.* at 842 n.5.

71. *Id.* at 840.

72. *Id.* at 841.

73. *Id.*

74. *Id.* at 842.

75. *Id.*

76. *Id. See* Excalibur Group v. City of Minneapolis, 116 F.3d 1216, 1221 (8th Cir. 1997) (recognizing that "regulations aimed at minimized the secondary effects of sexually oriented businesses serve a significant and substantial governmental interest").

77. *Passions Video, Inc.*, 458 F.3d at 842. To meet this step of analysis, "the regulation must advance the stated governmental interest 'directly and materially.'" *Id.* (quoting Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999)).

78. *Id.*

79. *Id.*

80. *Id.* at 842-43.

the secondary effects of sexually-oriented businesses.[81] The Supreme Court has recognized that this factor does not require the least restrictive means of achieving the government's interest, but only a "reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends.'"[82] The Eighth Circuit highlighted this Supreme Court precedent and noted that the statute must be "'reasonable' and 'narrowly tailored to achieve the desired objective.'"[83] In the end, the court held that the statute was not narrowly tailored in its restrictions and would stifle unnecessary amounts of commercial speech.[84] Further, the court held that "[t]he prohibition is directed at speech beyond that which would lead to the stated secondary effects, and is not narrowly tailored to achieve Missouri's stated goal."[85]

The court also applied its analysis to the provision restricting the advertisements of businesses located within one mile of a state highway. According to the provision, affected businesses would be limited to posting the name, address, telephone number, operating hours, and language giving notice that the premises are off limits to minors.[86] The court held that this type of regulation on advertisement would restrict more speech than necessary to serve the purposes of the statute.[87] According to the court, this type of language would prevent affected businesses from displaying the price of gasoline or advertisements for soft drinks.[88]

Because the Missouri statute failed the fourth *Central Hudson* factor, the court held that the regulation was an unconstitutional restriction on commercial speech.[89] Accordingly, the court reversed the district court's grant of summary judgment and its denial of appellants' motions for injunctive relief.[90] Ultimately, the case was remanded to the district court for further proceedings.[91]

V. COMMENT

In *Passions Video, Inc. v. Nixon*, the Eighth Circuit invalidated a Missouri statute that regulated advertisements by sexually-oriented businesses as an unconstitutional restriction on commercial speech. In so holding, the court

81. *Id.*

82. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001) (quoting Fla. Bar v. Went for It, Inc., 515 U.S. 618, 632 (1995)).

83. *Passions Video, Inc.*, 458 F.3d at 843 (quoting *Lorillard Tobacco Co.*, 533 U.S. at 556).

84. *Id.*

85. *Id.*

86. MO. REV. STAT. § 226.531.2 (Supp. 2004).

87. *Passions Video, Inc.*, 458 F.3d at 843.

88. *Id.* at 844.

89. *Id.*

90. *Id.*

91. *Id.*

recognized the importance of protecting commercial speech, even for publicly disfavored industries. The court properly concluded that the Missouri statute was not narrowly tailored under the *Central Hudson* test for four main reasons. First, the statute was not specific in the type of speech that would be subject to regulation. Second, the statute defined "sexually oriented businesses" broadly and regulated more businesses than would be necessary to achieve the state's substantial interests. Third, the geographical restrictions placed on affected businesses were overly broad, in that they effectively eliminated all "meaningful" advertisements by sexually-oriented businesses. Finally, the court's decision underscores the importance and the interconnectedness of free speech and a free market economy.

Since the 1970s, it has been recognized that, although not absolute, the First Amendment also applies to commercial speech,[92] and the Eighth Circuit's decision was important in clarifying how far the protection extends in the face of substantial governmental interests. In finding that the Missouri statute was not narrowly tailored to the government interest advanced by the state, as required by *Central Hudson*, the Eighth Circuit made an important distinction for determining what can be considered an unconstitutional restriction on commercial speech. This decision is important for legislatures to consider as they craft regulations pertaining to advertisements.

One of the main problems with the Missouri statute was that it did not specify the type of speech that it would restrict. This ambiguity caused the statute to be over-inclusive in the type of speech that was subject to restriction.[93] The statute's drafters could have specified the type of speech that was prohibited. Instead, the statute was drafted so that it prevented all speech in the form of billboards and exterior signs by adult cabarets and sexually-oriented businesses, just by virtue of the message's author. In application, the statute became overly broad and restrictive because it was not explicit in the types of messages that were to be restricted.

---

92. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 758 (1976).

93. The district court attempted to reconcile this inherent flaw in the statute in its interpretation of the type of speech subject to regulation. In the district court, the plaintiffs argued that the statute prohibited all types of speech, including political speech. Passions Video, Inc. v. Nixon, 375 F. Supp. 2d 866, 870, n.1 (W.D. Mo. 2005). The district court reasoned that the statute did not restrict political speech by adult cabarets and sexually-oriented businesses, "as long as there is not a commercial component to that speech." *Id.* However, the language of the statute did not support such a conclusion. The statute provided no exceptions for political speech devoid of a commercial component. Instead, it specified that, "No billboard or other exterior advertising sign . . . shall be located within one mile of any state highway . . . ." MO. REV. STAT. § 226.531.2 (Supp. 2004). The Eighth Circuit recognized this error in interpretation when it noted, "The regulation makes no reference to the content of the off-premises advertising signs." Passions Video, Inc. v. Nixon, 458 F.3d 837, 841 (8th Cir. 2006).

A regulation on *all* billboards and exterior advertising signs by sexually-oriented businesses and adult cabarets is an overly broad restriction on commercial speech. The statute at issue in *Passions Video*, though, went beyond regulating only commercial speech – it also restricted any expressive or political speech by sexually-oriented businesses. Restricting billboards and signs that contain purely political messages, such as messages to encourage voters to support a particular candidate or issue, is an unconstitutional restriction on speech.[94] The state could hardly argue that restricting political messages by adult cabarets and sexually-oriented businesses was necessary to reduce the secondary effects of sexually-oriented businesses.

In addition to restricting political speech, the statute would also prevent businesses from advertising other, non-sexually-oriented materials. Businesses such as Steele Retail, which sold gas and traditional convenience store items, but were classified as a "sexually oriented business" under the statute,[95] would be prevented from displaying signs that indicate the price of gas or advertising for traditional convenience store items. The statute did not differentiate between advertisements for adult and non-adult oriented products. The wide variety of advertisements and speech that were covered under this statute shows that the statute was not narrowly tailored to achieve the interests of the state.

Another problem that plagued section 226.531 was in the scope of businesses that was to be affected by the regulation. The definition of "sexually oriented business" could have been drawn more narrowly, while still achieving the state's asserted interests. For example, a New Jersey statute regulating advertisement by sexually-oriented businesses classified a business as such if the sale, rental, or display of sexually-oriented materials constitute "one of its *principal* business purposes."[96]

By setting the standard at only ten percent of a business's display space, the imposition of the Missouri statute created the risk of having more businesses included in the regulation than would be necessary to achieve the state's interests. This risk materialized in the case of *Steele Retail*. In its appellate brief, Steele Retail described itself as a "combination gas sta-

94. City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994) (finding unconstitutional a city ordinance which banned residential signs, in part, because it "totally foreclosed that medium to political, religious, or personal messages").

95. MO. REV. STAT. § 226.531.1(3) (Supp. 2004).

96. N.J. REV. STAT. § 2C:34-6a(1) (2005) (emphasis added). New Jersey's asserted interests in reducing the secondary effects of sexually-oriented businesses were nearly identical to those asserted by the Missouri statute. Passions Video, Inc. v. Nixon, 375 F. Supp. 2d 866, 871 (W.D. Mo. 2005); Hamilton Amusement Cent. v. Verniero, 716 A.2d 1137, 1144 (N.J. 1998) (recognizing that secondary effects of sexually oriented businesses include promotion of juvenile delinquency, increase in crime, deterioration of neighborhoods, and lower property values).

tion/convenience store."[97] However, because more than ten percent of its display space was devoted to sexually-oriented materials, it was considered a sexually-oriented business and prohibited from advertising on billboards or exterior signs.[98]

The broad definition of what constituted a "sexually-oriented business" compounded the problem of the overly inclusive regulations on advertisements in the statute. Businesses that devoted up to ninety percent of their display space to non-sexually oriented materials would be effectively prohibited from advertising. This restriction was not narrowly tailored, because prohibitions on general – not sexually-oriented – advertisements by gas stations and convenience stores do little, if anything, to reduce the secondary effects of sexually-oriented businesses. The definition of "sexually-oriented business" was too broad and would limit more speech than would be necessary to achieve the state's asserted goals. Broad inclusion of businesses under the statute contributed to the overbreadth of the statute, therefore necessitating the Court's finding of an unconstitutional restriction on commercial speech.

Another reason why the Eighth Circuit was correct in concluding that the Missouri statute was not narrowly tailored involved the geographical restrictions that were included in the statute, which were far more extensive than necessary. The statute restricted sexually-oriented businesses from advertising within one mile of a state highway.[99] Restricting sexually-oriented businesses from maintaining any billboard or exterior advertising sign within one mile of a state highway would severely limit the ability of sexually-oriented businesses to advertise. The State of Missouri maintains over 32,000 miles of state highways.[100] Because the statute leaves very few locations for a sexually-oriented business to advertise, the restriction was overly broad.

Furthermore, there is no apparent justification for basing the restrictions around state highways. Preventing sexually-oriented businesses from advertising within one mile of a state highway prevents those businesses from conducting any sort of meaningful advertisement. Consequently, the businesses will lose profits and, likely be forced out of business. The Supreme Court has recognized that "retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about [those] products."[101]

---

97. Summary of the Case and Request for Oral Argument at 1, Steele Retail 37 v. Nixon, No. 05-4053 (8th Cir. Jan. 2006).

98. *Id.*

99. MO. REV. STAT. § 226.531.2 (Supp. 2004).

100. MISSOURI DEPARTMENT OF TRANSPORTATION, REPORT TO THE JOINT COMMITTEE ON TRANSPORTATION OVERSIGHT 4 (2005), http://www.modot.gov/newsandinfo/reports/2005AccountabilityReport/documents/2_Accountability_Report_Executive_Summary-2005_1.pdf.

101. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001). *See also* Reno v. ACLU, 521 U.S. 844, 875 (1997).

Overly restrictive advertising regulations undermine the retailer's interests and the consumer's corresponding interest.

The court addressed this issue in its analysis of the third *Central Hudson* factor.[102] According to the court, limiting the presence of sexually-oriented businesses by forcing such businesses to close would reduce the secondary effects of such businesses.[103] But, the court was quick to point out that such a justification for a restriction on advertisement would fail intermediate scrutiny, because the regulation would not be narrowly tailored and would restrict more speech than is necessary. The Eighth Circuit cited a Georgia Supreme Court case, which held that the "absolute proscription against any form of off-site advertising impedes the free flow of information and far exceeds the State's legitimate interest, is an unconstitutional infringement on free speech."[104]

This distinction underscores the fourth and final reason why the Eighth Circuit was correct in holding section 226.531 unconstitutional, and that reason involves the protection of a free market economy. The government may not ban advertisement by a business in order to limit its customers and force the business to close.[105] The Eighth Circuit properly recognized that such a restriction would not be narrowly tailored.[106] As the court in *Virginia State Board of Pharmacy* recognized, the First Amendment is vital in ensuring the free flow of information that is necessary in a free enterprise economy.[107] If the government were allowed to completely prohibit advertisements by a particular business or industry, the government would have control over which businesses would remain profitable. Under this framework, the government would also have the ability to dictate which businesses should ultimately close down. In a free market economy, this power is and should be left to the consumers. While the government has a legitimate interest in regulating certain aspects of commercial activity, that interest does not extend so far as to dictate which industries will and will not be profitable. The provision preventing sexually-oriented businesses from advertising within one mile of a state highway shows that the statute was not drawn to be narrowly tailored to achieve its stated goals. Instead of targeting the restrictions to areas near churches or schools, the legislature chose a wide and arbitrary geographical restriction. The apparent purpose was to prevent such businesses from any meaningful advertisement, and that type of restriction is overly broad. There were less restrictive measures that the state could have taken in lieu of the one-mile restriction. Instead, the statute was much more inclusive

102. Passions Video, Inc. v. Nixon, 458 F.3d 837, 842 (8th Cir. 2006).

103. *Id.*

104. State v. Café Erotica, Inc., 507 S.E.2d 732, 735 (Ga. 1998).

105. *Passions Video, Inc.*, 458 F.3d at 842.

106. *Id.*

107. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

than necessary to achieve the state's goals, and, for that reason, the court was correct in concluding that the statute failed the fourth factor of the *Central Hudson* test.

As is often the case, the Eighth Circuit was faced with a choice between competing values. The court had to balance the state's interests in protecting minors, reducing crime, and protecting property values with the fundamental goals of the First Amendment, including ensuring the free flow of information to support a free market economy and democratic society.[108] While the First Amendment is not absolute, we should never sacrifice more freedom of expression than is necessary to strike a balance between competing values. In holding that the Missouri statute was an overly restrictive ban on speech, the Eighth Circuit recognized that the Missouri statute upset the essential balance between the government's substantial interests and the principles of the First Amendment.

VI. CONCLUSION

The First Amendment protection of the freedom of speech is essential to our democracy and free market. While commercial speech is not afforded the same level of protection as other types of protected speech, the Constitution prevents the state from imposing overly broad and unjustified restrictions on commercial speech. As enunciated in *Central Hudson*, these protections ensure that commercial speech will not be unnecessarily restricted. In *Passions Video*, the Eighth Circuit followed *Central Hudson*'s mandate, striking down Missouri's statute that unconstitutionally restricted advertisement by sexually-oriented businesses. This decision reiterated the necessity for restrictions on commercial speech to be drawn narrowly, as to not restrict more speech than is necessary to achieve the state's asserted interests. In doing so, the Eighth Circuit correctly held that the Missouri statute was an unconstitutionally broad restriction of protected commercial speech.

JENNIFER STONECIPHER

108. *Id.* at 765; 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512 (1996).