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Zoning Adult Businesses After Los Angeles v. Alameda Books

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ZONING ADULT BUSINESSES AFTER *LOS ANGELES v. ALAMEDA BOOKS*

I. INTRODUCTION

As observed by the United States Supreme Court, the French author Voltaire eloquently illuminated the right of free speech provided to citizens of this country in one powerful statement, "I disapprove of what you say, but I will defend to the death your right to say it."[1] The ideal embodied by this sentiment is challenged aggressively in situations where a community has a significant interest in regulating unpopular speech.[2] One example of such a situation is *City of Los Angeles v. Alameda Books, Inc.*,[3] which was recently presented to the United States Supreme Court. In this case, the Court was asked to rule on the constitutionality of a city zoning ordinance regulating the location of adult entertainment businesses. While the decision only received plurality support, the holding in *Alameda* is sound. The plurality and concurring opinions, as will be shown, provide the appropriate rationale for determining whether a zoning ordinance is designed to serve a substantial government interest and is deemed to be constitutional.

It is questionable whether some types of establishments, especially those that are adult-oriented, enjoy the First Amendment's full protection.[4] Allegedly, a lesser extent of protection applies when city governments, acting within their zoning powers, inhibit the prosperity of these businesses by limiting their choice of location,[5] hours,[6] and modes of operation.[7] City

1. Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 (1976) (plurality opinion) (quoting S. TALLENTRYE, THE FRIENDS OF VOLTAIRE 199 (1907)).

2. Z.J. Gifts D-2 L.L.C. v. City of Aurora, 136 F.3d 683, 686 (10th Cir. 1998). The *Z.J. Gifts* court recognized that "governmental limitations which limit expressive interests strike '[a]t the heart of the First Amendment.'" *Id.* (quoting Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 641 (1994)). Dealing specifically with adult entertainment, Supreme Court Justice Stevens commented that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *Young*, 427 U.S. at 70.

3. 535 U.S. 425 (2002).

4. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991). Nude dancing can consist of "expressive conduct within the outer perimeters of the First Amendment, though [the Court] view[s] it as only marginally so." *Barnes*, 501 U.S. at 566.

5. *See generally Young*, 427 U.S. at 52; City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

governments are fully entitled to restrict the free use of land if the regulation is justified by "some aspect of the police power, asserted for the public welfare."[8] The rationale behind this proposition seems to be that "[t]he operation of an establishment like [an adult book store] may have a place in our society but like the proverbial pig, it can be regulated out of the parlor and off the lawn."[9] Thus, in order to preserve the First Amendment protections of these adult establishments, it is important to maintain a balance between a city's zoning power and a specific business' right of free speech.[10]

While regulations that limit speech based on its content "presumptively violate the First Amendment,"[11] cities are not held to such a strict standard when they justify the regulation of adult establishments, not by the content of speech, but by the secondary effects the businesses generate. As evidenced by numerous studies,[12] the damage produced by these establishments is measurable,[13] and the "law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech."[14] Thus, when a city takes action and imposes a zoning regulation, one pivotal question is whether the ordinance is designed to serve the government's asserted interest in combating negative secondary effects.[15] When considering the evidence on this issue, certain standards must be employed to determine whether the regulation passes constitutional muster. First established by the Supreme Court in 1986,[16] those standards were recently reviewed in *Alameda.* This article will introduce *Alameda* in Section II and will outline the relevant history that brought it before the United States Supreme Court in Section III. Section IV will discuss and dissect the Supreme

6. *See generally* Mitchell v. Comm'n on Adult Entertainment Establishments of Delaware, 10 F.3d 123 (3d Cir. 1993).

7. *See generally* Colacurcio v. City of Kent, 163 F.3d 545 (9th Cir. 1998).

8. *Young*, 427 U.S. at 74 (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926)).

9. *Mitchell*, 10 F.3d at 137.

10. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440 (2002).

11. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986).

12. ERIC DAMIAN KELLY & CONNIE COOPER, "EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT REGULATING SEX BUSINESSES. . ." 57-65 (2000). A 1998 study from Denver, Colo. concluded that adult shops lowered property values, generated crime, and decreased the quality of life. *Id.* at 57. A 1986 Fort Worth, Tex. study found the adult businesses contributed "to neighborhood decline by increasing vice-related activities, such as prostitution, obscenity, violations, and public lewdness." *Id.* at 58. A study performed in St. Paul, Minn. in 1978 found that the "the presence of adult entertainment establishments correlate[d] statistically with poor neighborhood condition." *Id.* at 62. A 1990 Tucson, Ariz. study exemplified the unsanitary conditions of some adult businesses—findings that may prove useful as support for regulations. *Id.* at 63.

13. *Alameda*, 535 U.S. at 444 (Kennedy, J., concurring).

14. *Id.*

15. *Renton*, 475 U.S. at 50.

16. *See id.*

Court opinions rendered in that case and will evaluate subsequent lower court decisions. Based on prior precedent as well as the responses from lower courts, it is apparent the plurality opinion, as well as Justice Kennedy's concurring opinion, resolved the evidentiary issue correctly.

II. CITY OF LOS ANGELES V. ALAMEDA BOOKS, INC.

Even though a balance has been reached, the boundary preventing the government from encroaching upon a business' right of free speech is not clearly defined. This ambiguity is exemplified in *Alameda*. In 1977, the city of Los Angeles conducted a comprehensive study to assess how concentrations of adult businesses impacted their surrounding areas.[17] The study "found a positive correlation between concentrations of adult businesses and increases in prostitution, robberies, assaults, and thefts."[18] It also noted "there was 'some basis to conclude' that property values in the study areas increased to a lesser degree than in the control areas."[19]

Responding to this study in 1978, the city enacted Los Angeles Municipal Code § 12.70(C) which attempted to regulate the location of adult entertainment establishments.[20] After the enactment of the ordinance however, it became evident that multiple adult enterprises were congregating in a single building.[21] To prevent this effect, in 1983, the city amended section 12.70(C) to prohibit "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof."[22] Further, the definition of "adult entertainment business" was altered to include and distinguish between adult arcades, bookstores, cabarets, motels, theaters, massage parlors, and places for sexual encounter.[23] According to the ordinance, each specified enterprise would "constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment."[24] In addition, each would

17. Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719, 720 (9th Cir. 2000).

18. *Alameda*, 222 F.3d at 720.

19. *Id.* at n.1. With respect to property values however, the study concluded "the concentration of adult businesses was not the primary cause" of lesser appreciation of value. *Id.*

20. *Id*. This ordinance prohibited "the establishment, substantial enlargement, or transfer of ownership or control of an adult business establishment within 1,000 feet of another such business or within 500 feet of any religious institution, school, or public park." *Id.* (citing L.A.M.C. § 12.70(C) (1977). The constitutionality of this first regulation has not been challenged, and the Court assumed it was valid. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 452 (2002) (Kennedy, J., concurring).

21. *Alameda*, 535 U.S. at 431.

22. *Id.* (quoting L.A.M.C. § 12.70 (1983)).

23. *Id.* (citing L.A.M.C. § 12.70(B)(17)).

24. *Id.* (quoting L.A.M.C. § 12.70(B)(17)).

be held individually accountable for obeying the locational restrictions outlined therein.[25]

Both Alameda Books, Inc. ("Alameda") and Highland Books, Inc. ("Highland") operated "retail sales and rental operations in the same commercial space in which [their] video booths [were] located"[26] and were concededly violating section 12.70(C) of the amended city code.[27] Alameda and Highland joined together, suing "for declaratory and injunctive relief to prevent enforcement of the ordinance," which allegedly violated their First Amendment rights.[28]

The district court for the Central District of California granted Alameda's and Highland's motion for summary judgment and "issued a permanent injunction enjoining the enforcement of the ordinance against [them]."[29] The Court of Appeals for the Ninth Circuit affirmed because it determined that the "city failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments [was] 'designed to serve' the city's substantial interest in reducing crime."[30] The Ninth Circuit held that because the city did not satisfy the test used to judge the validity of an adult entertainment regulation justified by secondary effects,[31] the ordinance was accordingly invalid.[32] The United States Supreme Court granted certiorari[33] "to clarify the standard for determining whether an ordinance serves a substantial government interest," and ultimately reversed the Ninth Circuit's decision.[34]

III. PRECEDENT NECESSITATING SUPREME COURT REVIEW

To understand the underlying problem presented in *Alameda*, whether a zoning ordinance is designed to serve a substantial government interest, it is essential to review prior decisions that both give rise to the inquiry as well as call for its resolution. Of particular importance are the United States Supreme Court cases that codified the standards for review when dealing with an adult

25. *See id.*

26. *Alameda*, 535 U.S. at 432.

27. *Id.*

28. *Id*.

29. *Id*. at 433.

30. *Id*. "The Court of Appeals found that the 1977 study did not reasonably support the inference that a concentration of adult operations within a single adult establishment produced greater levels of criminal activity because the study focused on the effect that a concentration of establishments—not a concentration of operations within a single establishment—had on crime rates." *Alameda*, 535 U.S. at 436.

31. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

32. *Alameda*, 535 U.S. at 433.

33. 532 U.S. 902 (2001).

34. *Alameda*, 535 U.S. at 433.

entertainment establishment's challenge to its city's zoning ordinance. These cases are discussed in Section A. Additionally, the differing interpretations of such standards among the circuit courts, analyzed in Section B, illuminate relevant considerations that necessitated Supreme Court guidance. Finally, Section C explores the history of *Alameda*.

A. Supreme Court Foundation

As recognized by one commentator, what is now known as the "secondary effects" doctrine originated as a footnote[35] in *Young v. American Mini Theatres, Inc*.[36] The ordinance at issue in that case prohibited adult motion picture theaters and book stores from being located within 1,000 feet of any two other such establishments or within 500 feet of a residential area.[37] Those supporting the ordinance emphasized that a concentration of such businesses tended to "attract an undesirable quantity and quality of transients, adversely affect[ed] property values, cause[d] an increase in crime, especially prostitution, and encourage[d] residents and businesses to move elsewhere."[38] Two adult motion picture operators that were located in violation of the ordinance brought suit.

Alleging the ordinance would prohibit some theaters from exhibiting films protected by the First Amendment, the motion picture operators argued that the ordinance was unconstitutional.[39] A majority of the Court found the 1,000-foot restriction imposed on the adult motion picture theaters did not "create an impermissible restraint on protected communication" even though the theaters were required to "satisfy a locational restriction not applicable to other theaters."[40] It then held that apart from the dissimilar treatment of certain theaters, as well as "the fact that the classification [was] predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited [did] not offend the First Amendment."[41] The Court further stressed, "[r]easonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, [were] permitted by the First Amendment."[42] Disappointingly though, although the Court reached a conclusion, it divided over the appropriate rationale.

35. David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55, 61 (1997).

36. 427 U.S. 50 (1976).

37. *Id.* at 52. Adopted in 1972, this ordinance was, among others, an amendment to Detroit's "Anti-Skid Row Ordinance" that had been initiated ten years earlier. *Id.* at 54.

38. *Id.* at 55.

39. *Id.*

40. *Young*, 427 U.S. at 62.

41. *Id.* at 63.

42. *Id.* at 63 n.18.

The plurality opinion authored by Justice Stevens focused on "the need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator."[43] That said, Justice Stevens was quick to point out that "a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication."[44] The remaining question therefore, was whether the line could be "justified by the city's interest in preserving the character of its neighborhoods,"[45] an interest that "must be accorded high respect."[46] Turning to the facts, Justice Stevens found that through police department memoranda and findings made by the city's common council,[47] the city had shown that the increase in criminal activity and area deterioration was caused by concentrations of adult movie theaters and not by those showing other types of films.[48] Thus, it was evident that it was the "secondary effect which the zoning ordinances attempt[ed] to avoid, not the dissemination of 'offensive' speech."[49] Falling under such a classification, Justice Stevens concluded the zoning ordinance was constitutional.[50]

Building on the principles established in *Young*, the Court in *City of Renton v. Playtime Theatres, Inc.*,[51] went a step further to develop a constitutional test of validity. In that case, the Mayor of Renton advised the city council to enact zoning legislation to deal with adult entertainment establishments.[52] As a result, the Planning and Development Committee "held public hearings, reviewed the experiences of . . . other cities, and received a report from the City Attorney's Office advising as to developments in other

43. *Id.* at 67.

44. *Id.* at 70. The "regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same." *Young*, 427 U.S. at 70.

45. *Id.* at 71.

46. *Id.* "Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.*

47. *Id.* at 55 n.8. "[T]he Detroit Common Council made a finding that some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas." *Young*, 427 U.S. at 54.

48. *Id.* at 71 n.34.

49. *Id.*

50. *Id.* at 72-73. "Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, [Justice Stevens concluded] that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures." *Id.* at 72.

51. 475 U.S. 41 (1986).

52. *Renton*, 475 U.S. at 44.

cities."[53] Acting on the Committee's recommendation, the City Council enacted an ordinance prohibiting any adult motion picture theater "from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school."[54] The owner of two theaters located in violation of the ordinance challenged its constitutionality.[55]

In *Renton*, the Court outlined a three-prong test which must be satisfied in order for a zoning ordinance of this sort to be considered constitutionally valid. Finding authority from Justice Stevens in *Young*, the Court stated the first step was to determine whether the ordinance could be analyzed as a "time, place, and manner regulation."[56] The ordinances in *Young* and *Renton* were similar and could both be so characterized because they restricted the possible locations within which adult businesses could operate instead of prohibiting them completely.[57]

Following close behind was the second query: whether the ordinance was content-based or content-neutral.[58] This determination was significant because each classification applied a different standard to establish constitutionality. For example, "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment."[59] Alternatively, content-neutral regulations are "acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."[60] In *Renton*, the Court deferred to the lower court's finding that the City Council's "predominate concerns" were with the secondary effects of theaters housing such adult films.[61] It

53. *Id*. While discussions were taking place, the City Council imposed a moratorium on the licensing of sexually explicit businesses, explaining that such businesses would severely impact neighboring communities. *Id.*

54. *Id.*

55. *Id.* at 45.

56. *Renton*, 475 U.S. at 46.

57. *Id.*

58. *See id.* at 46-47.

59. *Id.* When a regulation "focuses *only* on the content of the speech and the direct impact that speech has on its listeners," the regulation is labeled content based. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811-812 (2000) (quoting Boos v. Barry, 485 U.S. 312, 321 (1988) (emphasis in original)). Analyzing the regulation under strict scrutiny, "it must be narrowly tailored to promote a compelling Government interest." *Playboy Entm't Group, Inc.*, 529 U.S. at 813. Thus, if there is a "less restrictive alternative [that] would serve the Government's purpose, the legislature must use that alternative." *Id.* "To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit." *Id.*

60. *Renton*, 475 U.S. at 47.

61. *Id*. In finding the *Renton* ordinance to be content-neutral, the Court stressed that instead of being designed to "suppress the expression of unpopular views," the ordinance was designed to combat negative secondary effects associated with adult establishments. *Id.* at 48. "If [the city]

concluded, "zoning ordinances designed to combat the undesirable secondary effects of [adult entertainment] businesses [were] to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations."[62]

After an ordinance is deemed to be content-neutral, the Court must still consider *Renton's* third step: whether the ordinance "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication."[63] In determining whether an ordinance is designed to serve a substantial interest, courts must keep in mind that the

> First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.[64]

The *Renton* Court also recognized it must show deference to the city's choices for combating negative externalities, stating it was not the Court's "function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas."[65] Thus, because the secondary effects associated with concentrations of adult businesses are "admittedly [a] serious problem," the "city must be allowed a reasonable opportunity to experiment with solutions."[66]

Even when the regulations are connected to a substantial government interest, the final task is to determine whether the ordinance leaves open alternative avenues of communication for the adult entertainment business.[67] Identifying alternative avenues, the Court in *Renton* stressed that there was no First Amendment violation when adult businesses were placed on an equal footing with other prospective purchasers or lessees of real estate.[68] The Court expressly stated, "the First Amendment requires only that [the city] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city."[69]

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had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." Young v. American Mini Theatres, Inc., 427 U.S. 50, 82 n.4 (1976) (Powell, J., concurring).

62. *Renton*, 475 U.S. at 49.

63. *Id.* at 50.

64. *Id*. at 51-52.

65. *Id.* at 52 (quoting *Young*, 427 U.S. at 71 (plurality opinion)) (alteration in original).

66. *Id*. (quoting *Young*, 427 U.S. at 71 (plurality opinion)).

67. *Renton*, 475 U.S. at 50.

68. *Id.* at 54. The Court was quick to note that it had "never suggested that the First Amendment [compelled] the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, [would] be able to obtain sites at bargain prices." *Id.*

69. *Id.*

Turning to the facts before it, the *Renton* Court concluded that the city had validly responded to the "admittedly serious problems" associated with adult businesses and had not used "the power to zone as a pretext for suppressing expression."[70] The zoning ordinance was therefore constitutional.[71] Although its ultimate decision was important, it was the three-part test set out in *Renton* that cemented the guidelines for lower courts to follow.

Five years after *Renton* was decided, the Supreme Court issued a plurality decision upholding a zoning ordinance that regulated nude dancing in *Barnes v. Glen Theatre, Inc.*[72] Of significance to this discussion is Justice Souter's concurring opinion, in which he commented on the applicability of the *Renton* test.[73] Justice Souter noted that in *Renton*, the city "was not compelled to justify its restrictions by studies specifically relating to the problems that would be caused by adult theaters in that city."[74] As a result, a city could rely on the experiences of other cities demonstrating a correlation between secondary effects and one adult theater.[75] Justice Souter then found similarities between the regulated activities in *Barnes* with those in *Renton* and commented that it was "no leap to say that live nude dancing . . . [was] likely to produce the same pernicious secondary effects as [] adult films. . . ."[76] Therefore, in light of *Renton*,[77] the State "could reasonably conclude that forbidding nude entertainment" furthered its interests in preventing prostitution, sexual assault, and associated crimes.[78]

Shortly before *Alameda* reached the Supreme Court, another nude dancing case, *City of Erie v. Pap's A.M.*,[79] helped shed light on *Renton's* standards.

70. *Id.* (quoting *Young*, 427 U.S. at 84 (Powell J., concurring)).

71. *Renton*, 475 U.S. at 54-55. The city had preserved the quality of life in its communities while "satisfying the dictates of the First Amendment." *Id.*

72. 501 U.S. 560 (1991) (plurality opinion) (applying the slightly different intermediate scrutiny test from United States v. O'Brien, 391 U.S. 367 (1968)). The *O'Brien* test includes four factors: 1) "whether the government regulation is within the constitutional power of the government to enact;" 2) "whether the regulation furthers an important or substantial government interest;" 3) "that the government interest is unrelated to the suppression of free expression;" and 4) "that the restriction is no greater than is essential to the furtherance of the government interest." City of Erie v. Pap's A.M., 529 U.S. 277, 296, 301 (2000) (plurality opinion).

73. The second prong of the *O'Brien* test asks "whether the regulation furthers an important or substantial governmental interest," which is sufficiently similar to *Renton's* prong requiring that the ordinance be designed to serve a substantial government interest. *See Barnes*, 501 U.S. at 583 (Souter, J., concurring).

74. *Id.* at 583-84.

75. *Id.* at 584.

76. *Id.*

77. *Id. Renton* recognized that "legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of [secondary] effects." *Barnes*, 501 U.S. at 584.

78. *Id.* A state is not required to "affirmatively [] undertake to litigate this issue repeatedly in every case." *Id.* at 584-85 (Souter, J., concurring).

79. 529 U.S. 277 (2000).

Unfortunately however, the decision only received plurality support. Deciding whether the challenged regulation furthered a substantial government interest,[80] Justice O'Connor noted that with regulations that "strike [close] to the core of First Amendment values," a "local government's reasonable belief that the experience of other jurisdictions [was] relevant to the problem it [was] addressing" was sufficient.[81] The record revealed however, that the city of Erie did more than simply rely on the findings of other cities; it also relied on its own to justify its regulation.[82] The record also demonstrated the adult business "had ample opportunity to contest the council's findings about secondary effects," but it never challenged those findings or cast any specific doubt on their validity.[83] Consequently, the plurality concluded that "[i]n the absence of any reason to doubt it, the city's expert judgment should be credited."[84]

B. Conflicting Interpretations by the Circuit Courts

The test outlined in *Renton* appeared to be straightforward in judging whether a city intruded upon an adult business' First Amendment rights. But when applied in different scenarios, the standard grew susceptible to conflicting interpretations and, as one commentator pointed out, has been inconsistently employed.[85] One prevalent dispute among the circuits concerned the third part of *Renton's* test: the extent of evidence considered sufficient to justify reliance by a city and support a reasonable belief that the ordinance targeted secondary effects. The viewpoints held by the circuits on this issue tended to be similar, with one exception. The Ninth Circuit, which decided *Alameda*, proved to be the divergent Circuit. As will be shown, given the state of disagreement between the circuits, it was critical for the Supreme Court to resolve this issue in a concrete fashion.

The challenged bill in *Mitchell v. Commission on Adult Entertainment Establishments of Delaware*,[86] a Third Circuit case, limited the hours during

80. As did the Court in *Barnes*, the Court in *Pap's A.M.* used the *O'Brien* test. *See Pap's A.M.*, 529 U.S. at 296-301.

81. *Id.* at 297.

82. *Id.* In fact, Erie's City Council found on various occasions spanning over one hundred years that "certain lewd, immoral activities carried on in public places for profit . . . promote violence, public intoxication, prostitution and other serious criminal activity." *Id.*

83. *Id.* at 298. The only complaint raised was a simple assertion that evidentiary proof was lacking. *Pap's A.M.*, 529 U.S. at 298.

84. *Id.* at 297.

85. David Wolfson, *Case Note: City of Los Angeles v. Alameda Books, Inc.*, 4 J.L. & FAM. STUD. 191, 197 (2002).

86. 10 F.3d 123 (3d Cir. 1993).

which adult entertainment businesses could operate.[87] The bill was challenged by respondents alleging that, before enactment, there was insufficient evidence of the secondary effects of adult businesses to support the regulation.[88] The court in *Mitchell* cited *Renton* to support its position that the omission of such evidence was not determinative on the regulation's invalidity. It noted, "a city or state may rely heavily on the experience of, and studies produced by, other cities and states, as well as on court opinions from other jurisdictions."[89] The *Mitchell* court stressed however, that the city must *rely* on such evidence to justify the regulations. [90] Taking into account the findings from other cities as well as the support garnered before passage of the bill, it concluded the city had a substantial government interest in regulating the hours of adult businesses.[91]

The court in *Mitchell* then recognized that even after determining the existence of a substantial government interest, it still had to address whether the regulation was narrowly tailored to serve that interest.[92] Interpreting *Renton*, the court stated this requirement left "a legislative body free to classify and draw lines, provided it [did] not wholly or practically prevent access to the expressive material whose sale and distribution the ordinance or statute incidentally regulate[d]."[93] Under such a perspective, instead of proving a particular adult business must be restricted to prevent undesirable secondary effects, the city needed only to "show that adult entertainment establishments *as a class* cause the unwanted secondary effects the statute regulates."[94] Under such a definition, the restrictions in this case met the standards of *Renton*.

87. *Mitchell*, 10 F.3d at 127. The establishment offered adult film and "video presentations for viewing from within completely enclosed booths. It also provided enclosed booths for viewing live entertainment." *Id.* at 127-28.

88. *Id.* at 133. There was no sworn testimony supporting its amendments, no public hearings had been conducted, nor had the city conducted an official study to determine whether the operating hours of an establishment affected the welfare of surrounding neighborhoods. *Id.* This is not to say the bill was passed for no reason. "As pre-enactment evidence, the Senate had before it a synopsis of the [b]ill and a statement by its chief sponsor." *Id.* at 134. The district court deemed this to be sufficient support to satisfy the test outlined in *Renton*. *Mitchell*, 10 F.3d at 134.

89. *Id.* at 133.

90. *Id.* (emphasis in original).

91. *Id.* at 137.

92. *Id.* "Whether the asserted government interest is proper and adequately supported is usually analyzed in terms of whether the enactment is narrowly tailored to achieve this interest[.]" *Mitchell*, 10 F.3d at 133.

93. *Id.* at 138. The *Mitchell* court understood *Renton* to mean that a state legislature did "not need to survey every adult book store in the state to determine the effect the statute or regulation [would] have on each." *Id.*

94. *Id.* (emphasis added).

According to the Eighth Circuit in *ILQ Investments, Inc. v. City of Rochester*,[95] it was obvious that regulations that are "reasonably designed to curb unwanted secondary effects of sexually oriented businesses serve a substantial governmental interest."[96] In this case, when enacting its regulation restricting the location of adult businesses, the city relied upon studies conducted by other cities.[97] The *ILQ* court recognized that this practice was clearly allowed by *Renton*.[98] But, respondents argued that the city should be "constitutionally required to disregard these studies" because they "did not specifically address businesses similar to [those owned by ILQ] . . . adult bookstores 'that offer both sexually explicit and non-sexually explicit material and allow only off-premises consumption of those materials.'"[99] The *ILQ* court responded that such a view was "simply not the law."[100] It reiterated that a "city may rely upon studies or evidence generated by other cities 'so long as [that] evidence [was] reasonably believed to be relevant to the problem that the city addresse[d].'"[101] Thus, the court in *ILQ* did not require the city to prove that specific adult establishments would likely have the exact same adverse effects on their surroundings as did the adult businesses studied in other cities.[102]

The challenged ordinance before the Tenth Circuit in *Z.J. Gifts D-2, L.L.C. v. City of Aurora*,[103] was very similar to the locational zoning regulation at issue in *ILQ*.[104] The adult establishment challenging the ordinance did not provide any on-site adult entertainment such as nude dancing or peep shows, but instead only sold and rented material to customers for off-premises viewing.[105] The court in *Z.J. Gifts* overcame a quick obstacle after stating this ordinance could be analyzed under either the *Renton* or *O'Brien* standards,[106] because there was little difference between them.[107]

95. 25 F.3d 1413 (8th Cir. 1994).

96. *ILQ Inv., Inc.*, 25 F.3d at 1416.

97. *Id.* at 1416-1417.

98. *Id.* at 1416.

99. *Id.* at 1417-1418. The studies focused on the secondary effects of adult businesses generally. *Id.*

100. *ILQ Inv., Inc.*, 25 F.3d at 1418.

101. *Id.* at 1416 (first alteration in original) (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986)).

102. *Id.* at 1418.

103. 136 F.3d 683 (10th Cir. 1998).

104. Specifically, the *Z.J. Gifts'* ordinance "required sexually oriented businesses to locate in industrially-zoned areas, and prohibited them from locating within 1500 feet of churches, schools, residential districts or dwellings, public parks, and other sexually oriented businesses." *Z.J. Gifts*, 136 F.3d at 685.

105. *Id.* at 685.

106. *See id.* at 688.

107. *Id.* at 688.

Turning to the facts, the *Z.J. Gifts* court noted that the city had enacted its ordinance after deliberating, holding public hearings, and reviewing "a thorough legislative record."[108] The adult business argued that this evidence failed to demonstrate "that the recited harms [were] real, not merely conjectural . . ."[109] The court disagreed and stressed a city "need not wait for sexually oriented businesses to locate within its boundaries, depress property values, increase crime, and spread sexually transmitted diseases before it regulates those businesses. . . . In other words, the city may control a perceived risk through regulation."[110] The court emphasized that "*Renton's* constitutional framework [granted] the city broad discretion to choose the means and scope of its regulation of sexually oriented businesses."[111]

The Ninth Circuit had an opportunity to apply the *Renton* test to a zoning ordinance challenge in *Tollis, Inc. v. San Bernardino County*.[112] The ordinance in that case prohibited location of adult-oriented businesses "within 1000 feet of any residential land use; place of worship; funeral home; school, park or playground; or 'any other recreational facility or other area where large numbers of minors regularly travel or congregate.'"[113] Although it did not find fault with the county's "substantial interest in preventing the deleterious secondary effects often associated with adult theaters,"[114] for the ordinance to be valid, the court required a "logical relationship between the evil feared and the method selected to combat it."[115] This meant that, in enacting certain restrictions against adult businesses, the city had to show that "it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects."[116] According to the *Tollis* court, the county failed to present evidence that "a single showing of an adult movie would have any harmful secondary effects on the community."[117] Therefore, the court concluded that the ordinance failed to satisfy the third prong of *Renton's* test,[118] and the injunction against enforcing the ordinance was proper.[119]

108. *Id.* at 685.

109. *Z.J. Gifts*, 136 F.3d at 688 (quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 664 (1994)).

110. *Id*.

111. *Id.* at 689.

112. 827 F.2d 1329, 1332 (9th Cir. 1987).

113. *Tollis*, 827 F.2d at 1331.

114. *Id*. at 1332.

115. *Id.* at 1332-33.

116. *Id.* at 1333.

117. *Id.*

118. *Tollis*, 827 F.2d at 1332.

119. *Id.* at 1333.

Another Ninth Circuit case, *Colacurcio v. City of Kent*,[120] was decided along the same lines as *Tollis*. After examining issues related to adult entertainment, the city's planning department published a study concerning the effects of adult entertainment on surrounding communities.[121] Soon afterward, the city enacted an ordinance prohibiting, among other things, performers in adult establishments from dancing within ten feet of patrons.[122]

The respondent contended there were less burdensome alternatives than the ten-foot requirement, so the ordinance was not narrowly tailored to serve the city's interests.[123] The court disagreed and specified that the alleged alternatives, a one-foot distance requirement and a "no-touch" rule, were not reasonable "as they would not serve the city's purposes of controlling drug transactions and prostitution."[124] The *Colacurcio* court held that the adult business "failed to present evidence showing that a ten-foot rule burden[ed] substantially more expression than necessary to achieve its purpose."[125] Accordingly, the ordinance was considered to be narrowly tailored to achieve the city's objective in combating secondary effects.[126]

C. Alameda *Before the Ninth Circuit*

The Ninth Circuit, in *Alameda Books, Inc. v. City of Los Angeles*,[127] zeroed in on the discreet issue of whether a regulation is "designed to serve" a government's substantial interest in reducing crime, which it defined to be *Colacurcio's* second step.[128] The court first decided that the evidence Los Angeles had relied upon to justify its amendments was insufficient to show that the regulation was designed to serve the city's interest in reducing the

120. 163 F.3d 545 (9th Cir. 1998).

121. *Colacurcio*, 163 F.3d at 548. The study also included a "discussion of various regulatory alternatives." *Id.*

122. *Id.* at 549. After reviewing the city's own study as well as affidavits and statements from police officers and vice detectives, the court found the ordinance was content neutral and proceeded to the narrow tailoring requirement. *Id.* at 553.

123. *Id.* This case was decided using the *O'Brien* standards. *Id.* at 551.

124. *Colacurcio*, 163 F.3d at 554. The proposed alternatives would "fail to provide sufficient line-of-vision for law enforcement personnel" and would still allow "verbal communication between dancers and patrons, thereby failing to curtail propositions for drugs or sex." *Id.*

125. *Id.* at 554.

126. *Id.*

127. 222 F.3d 719 (9th Cir. 2000).

128. *Id.* at 723-24. The test outlined in *Colacurcio* allowed a city to "impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions [were]: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) [left] open ample alternative channels for communication of the information." *Colacurcio*, 163 F.3d at 551 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). The Ninth Circuit did specify that there was "no substantive difference" between the standard tests in *Tollis* and *Colacurcio*. *Alameda*, 222 F.3d at 722-23.

secondary effects generated by adult businesses.[129] The study did not "analyze an individual bookstore/arcade combination as a concentration of adult businesses[,]" and therefore "did not identify any harmful secondary effects resulting from [such establishments] as individual business units."[130] Thus, it was "unreasonable for the [c]ity to infer that absent its regulations, a bookstore/arcade combination would have harmful secondary effects."[131] The Ninth Circuit also noted that although a city may rely on foreign studies, it was still obligated to demonstrate that its own study is reasonably believed to be relevant to the addressed problem.[132]

These circuit court cases exhibit the subtle problem encountered when interpreting the test outlined in *Renton*. The Ninth Circuit seemed clearly at odds with the other circuits in imposing a higher burden on the government to prove a connection between its regulation of adult establishments and its substantial interest in combating secondary effects. Given this disagreement, it was important for the Supreme Court to rule on the issue and define the appropriate evidentiary burden. Thus by taking *Alameda*, the United States Supreme Court agreed to analyze the disagreement and "clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton*."[133]

IV. SUPREME COURT'S FRACTURED RESPONSE TO THE CIRCUIT COURT CONFUSION

Following *Renton*, courts used its three-part test as a safeguard to ensure that government zoning ordinances regulating adult businesses did not infringe on the First Amendment rights of those businesses. As shown through the circuit court opinions, however, there were conflicting interpretations of *Renton's* standards. The Supreme Court responded in an attempt to dispel the confusion, but did so in a fractured decision. Section A discusses the opinions given in *Alameda*, penned by Justice O'Connor, Justice Kennedy, and Justice Souter, respectively. Section B analyzes these opinions and determines that the most fitting rationale would be a combination of the opinions written by Justice O'Connor and Justice Kennedy. Section C looks at lower court decisions rendered after *Alameda* to discover how the circuit courts are responding to the Supreme Court decision.

129. *Id.* at 724.
130. *Id.*
131. *Id.* at 725.
132. *Id.* at 726.
133. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 433 (2002).

A. Discussion of Zoning Ordinance Rationales

1. Justice O'Connor's Plurality Opinion Deferred to the City's Justification.

The plurality opinion in *Alameda* was written by Justice O'Connor and joined by Chief Justice Rehnquist, Justice Thomas, and Justice Scalia.[134] Recognizing the consequences a clear decision in this case would impose, Justice O'Connor began by noting the Court must carefully balance competing interests.[135] It must "exercise independent judgment when First Amendment rights are implicated," but also acknowledge that a particular city "is in a better position than the Judiciary to gather and evaluate data on local problems."[136]

Applying the *Renton* standard in *Alameda*, Justice O'Connor established the point at which evidence supporting a zoning ordinance must be introduced in order to satisfy *Renton's* third prong.[137] "[T]he inquiry into whether [the ordinance was] 'designed to serve a substantial government interest and [did] not unreasonably limit alternative avenues of communication'" began with verification that the 'predominate concerns' behind the ordinance were the secondary effects of speech.[138] The analysis continued with the plurality asking "whether the municipality [could] demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance."[139] For the plurality in *Alameda*, evidence would only be required to satisfy the latter inquiry.[140] The extent of evidence sufficient to establish a correlation was the next question to resolve.

To demonstrate a connection between speech and a government interest, Justice O'Connor followed *Renton* and asserted that the city may rely on any evidence that is "reasonably believed to be relevant" to show a correlation.[141]

134. Although he thought the plurality correctly applied *Renton's* test in the *Alameda* case, Justice Scalia also wrote separately. Drawing on his earlier opinions in *Pap's A.M.* and FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990), Justice Scalia reasserted his view that the "secondary effects" rationale in the regulation of pornographic speech was completely unnecessary. *Id.* at 443 (Scalia, J., concurring) (citing Erie v. Pap's A.M., 529 U.S. 277, 310 (2000) (Scalia, J., concurring in judgment); *FW/PBS*, 493 U.S. at 256-61 (Scalia, J., concurring in part and dissenting in part)). He held strongly to the notion that the "Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex." *Alameda*, 535 at 443-44 (Scalia, J., concurring).

135. *Id.* at 440.

136. *Id.* (quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 666, 665-66 (1978)).

137. *Id*. at 440.

138. *Id*. at 440-41 (citations omitted).

139. Alameda, 535 U.S. at 441.

140. *Id.*

141. *Id.* at 438 (citing City of Renton v. Playtime Theatres, Inc. 475 U.S. 41, 51-52 (1986)). In *Renton*, the Court held that a city, in enacting an adult business zoning ordinance, was allowed

She was also quick to point out that this did not mean that "a municipality [could] get away with shoddy data or reasoning," but only that the evidence must "fairly support the municipality's rationale for its ordinance."[142] Justice O'Connor then proposed a useful balancing test:

> If plaintiffs fail to cast direct doubt on [the secondary effects] 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.[143]

Looking to the facts of the case, Justice O'Connor identified the central piece of evidence at issue in *Alameda* as the city's 1977 study, which included a report on city crime patterns provided by the Los Angeles Police Department.[144] The Court of Appeals had faulted the 1977 study for focusing on "the effect that a concentration of establishments—not a concentration of operations within a single establishment—had on crime rates."[145] The *Alameda* plurality responded that the Ninth Circuit "misunderstood the implications of the 1977 study."[146] Justice O'Connor found that it was both consistent with the 1977 study and reasonable for Los Angeles "to suppose that a concentration of adult establishments [was] correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity."[147] The plurality in *Alameda* then concluded that it was "rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, [would] reduce crime rates."[148]

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to rely on experiences of other cities as well as findings of other courts. *Renton*, 475 U.S. at 51. As long as the evidence relied upon is "reasonably believed to be relevant to the problem that the city addresses," the method chosen by the city to further its interests would receive deference. *Id.* at 51-52. "The city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 52 (citing *Young*, 427 U.S. at 71 (plurality opinion)).

142. *Alameda*, 535 U.S. at 438.

143. *Id*. at 438-39 (citations omitted).

144. *Id.* at 435.

145. *Id.* at 436. "The Court of Appeals pointed out that the study treated combination adult bookstore/arcades as single establishments and did not study the effect of any separate-standing adult bookstore or arcade." *Id.*

146. *Alameda*, 535 U.S. at 436.

147. *Id.* The underlying assumption is that multiple adult businesses in one establishment draws the same traffic as multiple establishments in close proximity to each other. Therefore, it is very similar to mini-malls and department stores which attract crowds of consumers. *Id.*

148. *Alameda*, 535 U.S. at 439.

Addressing the type of evidence necessary for Los Angeles to show that its ordinance successfully decreased secondary effects, Justice O'Connor specified that empirical evidence was not required.[149] The Court had "never required that municipalities make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary."[150] This was especially true in this case where neither establishment "provide[d] any reason to question the city's theory."[151]

> While the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own.[152]

Imposing an empirical evidence requirement "would go too far in undermining [the] settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech."[153] Thus, for Justice O'Connor, instead of requiring empirical evidence to prove a correlation between the regulated speech and secondary effects, only a reasonable belief of such a connection was necessary.[154] The *Alameda* plurality concluded that the 1977 study conducted by Los Angeles was sufficient to support a reasonable belief by the city that the regulation would further its interest in combating negative secondary effects, and accordingly, it met *Renton's* third prong.

2. Justice Kennedy's Concurrence Considered the Effect on Speech.

Justice Kennedy's agreement with the plurality that Los Angeles could reasonably rely on its 1977 study to justify regulation of the adult establishments in question secured a majority decision in this case. His

149. *See id.*

150. *Id.*

151. *Id.* at 437. "In particular, they do not offer a competing theory, let alone data, that explains why the elevated crime rates in neighborhoods with a concentration of adult establishments can be attributed entirely to the presence of permanent walls between, and separate entrances to, each individual adult operation." *Id.*

152. *Alameda*, 535 U.S. at 437.

153. *Id.* at 439 (quoting Renton v. Playtime Theatres, Inc. 475 U.S. 41, 52 (1986)).

154. *Id.* at 430, 442. Justice O'Connor gave an example of a city considering an innovative solution, such as the Los Angeles ordinance in this case, which regulated multiple-use adult establishments. *Id.* at 430-40. The city might "not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." *Id.* Allegedly, there were no adult video arcades that operated independently of adult bookstores. *Alameda*, 535 U.S. at 440. Thus, there would be no treatment group with which to compare a control group of adult establishments. *Id.* If the ordinance would be struck down accordingly for lack of such an empirical comparison, the city would be without the "means to address the secondary effects with which it is concerned." *Id.* at 440.

separate opinion, however, provided a rationale divergent from that of Justice O'Connor. For Justice Kennedy, the question presented in this case was "whether the ordinance at issue [was] invalid 'because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions.'"[155] He answered this question by splitting it into two separate inquiries: what proposition must be advanced to sustain a secondary-effects ordinance and what is the extent of evidence required to support the proposition?[156]

In the answer to the first of his two questions, Justice Kennedy began by showing respect to city governments that know that "high concentrations of adult businesses can damage the value and the integrity of a neighborhood. The damage is measurable; it is all too real."[157] Accordingly, the "law [did] not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech."[158] With these ideas in mind, Justice Kennedy asserted that the "rationale of the ordinance must be that it will suppress secondary effects—and not by suppressing speech."[159] Therefore, the premise behind the ordinance must be that the ordinance "will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced."[160]

The remaining question for Justice Kennedy was whether there was sufficient evidence in this case to support such a rationale. Because the Los Angeles City Council knew the streets of Los Angeles better than the Court, the City Council was "entitled to rely on that knowledge; and if its inferences appear[ed] reasonable, [the Court] should not say there [was] no basis for its conclusion."[161] Justice Kennedy noted that after finding "a correlation between the concentration of adult establishments and crime" as a result of its own study, the city of Los Angeles "sought to disperse these businesses."[162] The Court would be allowed to posit that a "dispersal ordinance would cause a

155. *Id.* at 449 (Kennedy, J., concurring) (quoting Pet. for Cert. i).

156. *Id.* (Kennedy, J., concurring).

157. *Alameda*, 535 U.S. at 444 (Kennedy, J., concurring).

158. *Id.*

159. *Id.* at 449-50 (Kennedy, J., concurring). "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." *Id.* at 450.

160. *Id.* at 451 (Kennedy, J., concurring). "If two adult businesses are under the same roof, an ordinance requiring them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter." *Alameda*, 535 U.S. at 450-51.

161. *Id.* at 451-52 (Kennedy, J., concurring).

162. *Id.* at 452 (Kennedy, J., concurring). "Two or more adult businesses in close proximity seem[ed] to attract a critical mass of unsavory characters and the crime rate may increase as a result." *Id.*

great reduction in secondary effects at very small cost to speech."[163] As a result, the remaining step to justify the ordinance was to permit the city to "infer—from its study and from its own experience—that two adult businesses under the same roof [were] no better than two next door."[164] Thus, Justice Kennedy agreed with the plurality in concluding that the Los Angeles regulation was reasonably likely to reduce negative secondary effects associated with adult establishments.[165]

3. Justice Souter's Dissent Argued that the Evidence was Insufficient.

Justice Souter, along with Justice Stevens, Justice Ginsburg, and Justice Breyer, concluded that Los Angeles had failed to demonstrate a sufficient connection between its amended zoning ordinance and its interest in crime control.[166]

Justice Souter focused on the empirical nature of the evidence necessary to support a secondary effects zoning ordinance.[167] He began by attacking the city's 1977 study itself, stating it was unsuccessful in confirming an "association between higher crime rates and any isolated adult establishments."[168] According to Justice Souter, the city reviewed its study and simply assumed "a bookstore selling videos and providing viewing booths produce[d] secondary effects of crime, and more crime than would result from having a single store without booths in one part of town and a video arcade in another."[169] This assumption was faulty because the city offered no evidence to support "even the simple proposition that an otherwise lawfully located adult bookstore combined with video booths [would] produce any criminal

163. *Id.* (Kennedy, J., concurring). "We may posit that two adult stores next door to each other attract 100 patrons per day. The two businesses split apart might attract 49 patrons each. (Two patrons, perhaps, will be discouraged by the inconvenience of the separation—a relatively small cost to speech.)" *Alameda*, 535 U.S. at 452. Justice Kennedy continued, stating that "[d]epending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all." *Id.* If this was the case, "a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech." *Id.*

164. *Id.* at 453 (Kennedy, J., concurring). "The city could reach the reasonable conclusion that knocking down the wall between two adult businesses does not ameliorate any undesirable secondary effects of their proximity to one another." *Id.*

165. *Alameda*, 535 U.S. at 453 (Kennedy, J., concurring).

166. *Id.* at 465 (Souter, J., dissenting).

167. *Id.* at 458 (Souter, J., dissenting). "In examining claims that there are causal relationships between adult businesses and an increase in secondary effects . . . , and between zoning and the mitigation of the effects, stress needs to be placed on the empirical character of the demonstration available." *Id.* "The weaker the demonstration of facts distinct from disapproval of the 'adult' viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation." *Id.*

168. *Alameda*, 535 U.S. (Souter J., dissenting).

169. *Id.* at 462 (Souter, J., dissenting).

effects."[170] Furthermore, the only evidence produced by the city was the study, which could not support the proposition because it drew "no general conclusion that individual stores spread apart from other adult establishments . . . [were] associated with any degree of criminal activity above the general norm."[171] Based on the study, the proper conclusion for Justice Souter was that splitting up the freestanding adult stores would "have no consequence for secondary effects whatever."[172]

Justice Souter bolstered his position by refuting the applicability of the studies used in *Renton* and *Young*. He pointed to a 'key distinction' between the Los Angeles breakup requirement and the zoning ordinances at issue in the prior cases. This difference was that "the zoning approved in those two cases had no effect on the way the owners of the stores carried on their adult businesses beyond controlling location."[173] Los Angeles, on the other hand, "no longer accept[ed] businesses as their owners choose to conduct them within their own four walls, but [barred] a video arcade in a bookstore, a combination shown by the record to be commercially natural, if not universal."[174] Thus, Justice Souter concluded the ordinance lacked "any demonstrable connection to the interest in crime control" and imposed a heavier burden than that condoned by the Court in either *Renton* or *Young*.[175]

B. Analysis

1. Summary Judgment Requires Inferences Drawn in the City's Favor

The distinct aspects of *Alameda*, particularly its disposition as a summary judgment motion, solidify its holding. When considering a motion for summary judgment, the Court must determine whether the record, viewed in the light most favorable to the non-moving party, shows any genuine issue of material fact.[176] Both the plurality and Justice Kennedy appropriately concluded that because this case was only at the summary judgment stage, Los

170. *Id.* at 462 (Souter, J., dissenting).

171. *Id.* at 462 (Souter, J., dissenting). The city has not "called the Court's attention to any other empirical study, or even anecdotal police evidence, that supports the city's assumption." *Id.* (Souter, J., dissenting). The subsequent inference therefore, must be that "if the Los Angeles study sheds any light whatever on the city's position, it is the light of skepticism, for [the Court] may fairly suspect that the study said nothing about the secondary effects of freestanding stores because no effects were observed." *Alameda*, 535 U.S. at 462 (Souter, J., dissenting).

172. *Id.* at 462 (Souter, J., dissenting).

173. *Id.* at 465 (Souter, J., dissenting). Furthermore, "no heavier burden than the location limit was approved by this Court." *Id.*

174. *Id.* (Souter, J., dissenting).

175. *Alameda*, 535 U.S. at 465 (Souter, J., dissenting).

176. FED. R. CIV. P. 56(c). *See also*, Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986).

Angeles' zoning regulation on adult businesses should not be struck down.[177] Justice Souter, for the dissent, nonetheless disagreed, stating that Los Angeles had failed to meet its evidentiary burden.[178] The reasoning behind these conclusions will be discussed infra.

2. Deference to the City Makes the Presumption of Pretext Inappropriate.

Substantial deference should be paid to the city of Los Angeles not only because it opposed the summary judgment motion brought by the adult businesses, but also because it was attempting to remedy a serious situation on its city streets.[179] As noted in *Young* and adopted by the Court in *Renton*, a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect."[180] Both the plurality of *Alameda* and Justice Kennedy agreed that a city "is in a better position than the Judiciary to gather and evaluate data on local problems."[181] Los Angeles conducted its own study in 1977 to assess how adult establishments impacted their surrounding neighborhoods and found a correlation between concentrations of adult businesses and an increase in crime.[182] Relying on this study, Los Angeles amended its zoning ordinance to prevent the congregation of adult businesses in a single building.[183] This amendment to its zoning ordinance was a clear attempt by the city to preserve the quality of Los Angeles neighborhoods. Under *Renton*, the city's choice should be respected.[184]

While deferring to a particular city's judgment on resolving local problems, the plurality also noted that when First Amendment rights are at

177. Justice O'Connor, for the plurality, concluded that "the city, at this stage of the litigation, ha[d] complied with the evidentiary requirement in *Renton*." *Alameda*, 535 U.S. at 439. In Justice Kennedy's view, Los Angeles should be allowed to impose regulations on adult businesses under its zoning authority, at least to the extent that it not be foreclosed by summary judgment. *Id.* at 444 (Kennedy, J., concurring).

178. *Id.* at 466 n. 9 (Souter, J., dissenting). "The plurality seems to ask us to shut our eyes to the city's failings by emphasizing that this case is merely at the stage of summary judgment, but ignores the fact that at this summary judgment stage the city has made it plain that it relies on no evidence beyond the 1977 study, which provides no support for the city's action." *Id.*

179. Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976) (plurality opinion).

180. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) (quoting *Young*, 427 U.S. at 71).

181. *Alameda*, 535 U.S. at 440 (plurality opinion). Justice Kennedy expressly stated that the "Los Angeles City Council [knew] the streets of Los Angeles better than [the Court did.]" *Id.* at 451-52 (Kennedy, J., concurring). Further, when the inferences drawn by the city appear to be reasonable, the Court should not say the conclusion is baseless. *Id.* at 452.

182. Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719, 720 (9th Cir. 2000).

183. *Alameda*, 535 U.S. at 431.

184. *Id.* at 451 (Kennedy, J., concurring).

issue, it must still exercise independent judgment.[185] The failure to follow through on this second step and "address how speech will fare under the city's ordinance" was, in Justice Kennedy's opinion, the plurality's downfall.[186] Turning to zoning ordinances in general, Justice Kennedy asserted that they "have a prima facie legitimate purpose: to limit the negative externalities of land use."[187]

The dissent in *Alameda* was primarily worried about the use of secondary effects as a pretext for suppressing speech through zoning ordinances.[188] As Justice Kennedy eloquently put it however, "the ordinance may be a covert attack on speech, but [the Court] should not presume it to be so." Justice Kennedy's position is supported by *Young* and *Renton.*

In *Young,* the plurality concluded that the zoning ordinance restricting the location of adult movie theaters in an attempt to prevent negative secondary effects was constitutional.[189] The plurality expressly noted that what ultimately was at stake was "nothing more than a limitation on the place where adult films may be exhibited."[190] Justice Powell, who concurred in *Young*, continued along the same line, stating that if the city "had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location."[191] Thus, the plurality and concurring opinions in *Young,* agreed that the zoning ordinance, which restricted available locations for adult businesses to operate, should not be presumed to have illicit motives.

The Court in *Renton* also addressed the issue of pretext and specifically stated, "it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[192] The Court's finding that the city's predominate intent in

185. *Id.* at 440. Thus, the "deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests." *Id.*

186. *Id.* at 450 (Kennedy, J., concurring). While "the material inside adult bookstores and movie theaters is speech, the consequent sordidness outside is not. The challenge is to correct the latter while leaving the former, as far as possible, untouched." *Alameda*, 535 U.S. at 445 (Kennedy, J., concurring).

187. *Id*. at 449 (Kennedy, J., concurring).

188. *Id*. at 458 (Souter, J., dissenting). "The weaker the demonstration of facts distinct from disapproval of the 'adult' viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation." *Id.*

189. Young v. American Mini Theatres, Inc., 427 U.S. 50, 72-73 (1976).

190. *Young*, 427 U.S. at 72-73. The plurality went on to comment that the "situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 73 n.35.

191. *Id.* at 82 n.4 (Powell, J., concurring).

192. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)). "The decisions of this [C]ourt from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power

regulating adult businesses was to control secondary effects was "more than adequate to establish that the city's pursuit of its zoning interests here [were] unrelated to the suppression of free expression."[193] Therefore, even if the legislature had a hidden agenda, *Renton* showed that the Court would not automatically strike down the statute on such a basis.

Coupling this idea of lack of pretext with that of deference to the municipalities leads to the conclusion that Justice Kennedy was correct in stating the secondary effects rationale of a city's zoning ordinance should not be presumed to be an attempt to suppress speech. The plurality in *Young* and the Court in *Renton* were both faced with locational zoning ordinances intended to alleviate the negative secondary effects associated with adult businesses in their respective cities. Both gave substantial deference to the cities and did not give credit to the argument that the secondary effects rationale was simply a pretext for suppression of speech. Because the ordinance in *Alameda* was closely related to the time, place, manner restrictions at issue in *Young* and *Renton*, it was not, as believed to be by the dissent, an attempt to suppress free speech or regulate how adult establishment owners should run their businesses.

3. The Evidentiary Burden to be Overcome by the City is Slight.

When a city asserts a secondary effects rationale for its zoning ordinance, the Court should give deference to the city's justification. But according to Justice Kennedy, it should also assess the extent of intrusion the zoning regulation would have on the adult entertainment business.[194] Justice Kennedy's argument gains support from one commentator who asserted, "where the limitations on speech under [zoning] regulations are considered merely incidental to the necessary regulation of the target conduct, they pass constitutional muster."[195] Similarly, the Court in *United States v. O'Brien* noted that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment

on the assumption that a wrongful purpose or motive has caused the power to be exerted." *O'Brien*, 391 U.S. at 383 (quoting McCray v. United States, 195 U.S. 27, 56 (1904)). The Court further noted that inquiring into the purposes or motives behind the enactment of certain statutes was a "hazardous matter." *Id.* "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for [the Court] to eschew guesswork." *Id.*

193. *Renton*, 475 U.S. at 48.

194. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 450 (2002) (Kennedy, J., concurring).

195. Jerrold J. Kippen, *Sexually Explicit Speech*, 28 HASTINGS CONST. L.Q. 799, 800 (2001).

freedoms."[196] The appropriate time to address the limitations upon speech caused by a zoning ordinance, as determined under the plurality's balancing test, is after the adult business succeeds in casting doubt on the validity of the city's justification. The validity of this test is the next issue to resolve.

The so-called balancing test used by the *Alameda* plurality, to determine whether there was sufficient evidence to show a zoning regulation was designed to serve a significant government interest, was hinted at in *Pap's A.M.*[197] The plurality there first noted that the city council members were the ones likely to have had firsthand knowledge "of what took place at and around nude dancing establishments in Erie, and [could] make particularized, expert judgments about the resulting harmful secondary effects."[198] It then continued by stating that the establishment "had ample opportunity to contest the council's findings about secondary effects," but had "never challenged that city council's findings or cast any specific doubt on the validity of those findings."[199] The plurality of *Pap's A.M.* then concluded that in "the absence of any reason to doubt it, the city's expert judgment should be credited."[200]

Guided by the plurality in *Pap's A.M.*, *Alameda's* plurality was right to conclude that Los Angeles' zoning ordinance was sufficiently justified by secondary effects. The primary downfall for the adult businesses in *Alameda* was their lack of proof, which called the secondary effects rationale into question.[201] Although they had the opportunity to show that the rationale was faulty, they did not cast any doubt on the city's findings but simply complained

196. *O'Brien*, 391 U.S. at 376. Furthermore, the Court will not "foreclose consideration of First Amendment claims in those rare instances when an 'incidental' restriction upon expression . . . has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate." *Id.* at 388-89 (Harlan, J., concurring).

197. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 298 (2000) (plurality opinion).

198. *Id.* at 297-98. Following up on this principle, the Court has, on another occasion, noted that prior case law did not "require that empirical data come to [the Court] accompanied by a surfeit of background information." Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995). To the contrary, litigants have been permitted "to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether." *Id.* at 628 (citing *Renton*, 475 U.S. at 50-51; *Barnes*, 501 U.S. at 584 (Souter, J., concurring in judgment)). Litigants were also allowed to justify regulations by "simple common sense" in some circumstances. *Id.* (citing Burson v. Freeman, 504 U.S. 191, 211 (1992)). Even when applying the higher standard of strict scrutiny, the litigant was allowed "to justify restriction based solely on history, consensus, and 'simple common sense.'" *Id.*

199. *Pap's A.M.*, 529 U.S. at 298.

200. *Id*. After all, the ordinance was content neutral, and the "government should have sufficient leeway to justify such a law based on secondary effects." *Id.*

201. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 439 (2002) (plurality opinion). The plurality concluded the city had complied with its evidentiary requirements, and the adult businesses merely supported their summary judgment motion with complaints the city's study failed to prove the secondary effects justification was correct. *Alameda*, 535 U.S. at 439.

the study was deficient. In effect, the adult businesses asked the city to produce additional evidence while they failed to reciprocate by providing any reason to question the rationale. As aptly displayed in *Pap's A.M.*, because there was no reason to doubt the city's justification for its ordinance, Los Angeles' choice to regulate adult businesses should be respected.

4. Cities Need Not Conduct Business Specific Studies.

The dissent in *Alameda* stressed that the city's study, which allegedly supported the city's zoning ordinance, did not in fact, provide such support.[202] The city's primary error was that it failed to show a connection between isolated adult establishments and the negative secondary effects they allegedly produced.[203] The plurality in *Alameda* responded to the dissent's contention, stating that Justice Souter "ask[ed] the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime."[204] The plurality in *Pap's A.M.* did not require such a substantial showing.

In *Pap's A.M.*, the city relied on a study that dealt with different subject matter than did the ordinance before it.[205] The plurality in *Pap's A.M.* noted that nude dancing was "of the same character as the adult entertainment at issue in *Renton* [and] *Young*."[206] Thus, "it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects."[207] Similarly, the study in *Alameda* found a correlation between concentrations of adult establishments and secondary effects, although it did not specifically study isolated establishments. It is logical that if the city of Erie was allowed to "reasonably rely on the evidentiary foundation set forth in *Renton* and

202. *Id.* at 462 (Souter, J., dissenting). "If the Los Angeles study sheds any light whatever on the city's position, it is the light of skepticism, for [the Court] may fairly suspect that the study said nothing about the secondary effects of freestanding stores because no effects were observed." *Id.*

203. *Id.* (Souter, J., dissenting). "The Los Angeles study treats such combined stores as one and draws no general conclusion that individual stores spread apart from other adult establishments are associated with any degree of criminal activity above the general norm." *Id.* at 462 (citations omitted).

204. *Id.* at 439.

205. In *Pap's A.M.*, the city enacted an ordinance banning public nudity. *Pap's A.M.*, 529 U.S. at 283. Consequently, nude dancers were required to wear, "at a minimum, pasties and a 'G-string.'" *Id.* at 284. Support for its ordinance was found in the decisions of *Renton* and *Young*, which dealt with zoning regulations of adult motion picture theaters. *See id.* at 296-97.

206. *Id.* at 296-97.

207. *Id.* at 297. The plurality concluded that Erie could "reasonably rely on the evidentiary foundation set forth in *Renton* and [*Young*] to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood." *Pap's A.M.*, 529 U.S. at 297.

[*Young*,]"[208] Los Angeles may reasonably rely on its own 1977 study. Justice Kennedy was therefore correct in stating the city may "infer—from its study and from its own experience—that two adult businesses under the same roof are no better than two next door."[209] This inference is sufficient to show the city's zoning ordinance was designed to serve the city's interest in avoiding the secondary effects associated with adult businesses.

As shown, it is apparent that the plurality and concurring opinions in *Alameda* are sound. The city of Los Angeles produced enough evidence at this stage in the litigation to meet the requirements outlined in *Renton.* The plurality and Justice Kennedy rightly paid substantial deference to the city's findings in its 1977 study of adult businesses and secondary effects. Because the adult business did not produce evidence challenging the city's rationale, the city was not required to present more evidence than its study. Finally, its study alone was sufficient to support a reasonable belief that the city's zoning ordinance was designed to serve its interest in combating negative secondary effects.

C. Lower Court Interpretations of Alameda

In order to assess the impact of *Alameda,* subsequent cases prove to be the most insightful. A major obstacle for *Alameda* was that it only achieved plurality status. One court aptly commented that the plurality status of a decision may prove to be a disadvantage.[210] Specifically, it mentioned that "*Alameda Books* is difficult to apply, because no single opinion garnered the votes of a majority of Justices."[211] This consideration is significant when attempting to understand the lower court decisions issued after *Alameda* and also provides a rationale for their apparent lack of uniformity.

1. The Fifth Circuit Reveals Discrepancies.

Some circuit courts, including the Fifth, have used the plurality opinion in *Alameda* as the appropriate authority. For example, the respondents in *Baby*

208. *Id.*

209. *Alameda,* 535 U.S. at 453 (Kennedy, J., concurring). "The city could reach the reasonable conclusion that knocking down the wall between two adult businesses does not ameliorate any undesirable secondary effects of their proximity to one another." *Id.*

210. Encore Videos, Inc. v. City of San Antonio, 310 F.3d 812, 818 (5th Cir. 2002). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 819 (quoting Marks v. United States, 430 U.S. 188, 193 (1977) (quotations omitted)). Once an area of agreement has been discovered "between 'at least five justices,' that conclusion is valid as law even if some of the Justices endorsing the proposition in question were in dissent." *Id.* (quoting Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1333 n.10 (5th Cir. 1993)).

211. *Id.* at 818.

Dolls Topless Saloons, Inc. v. City of Dallas[212] argued the zoning ordinance at issue was not designed to serve the government's interest in controlling secondary effects.[213] Evidence relied upon by the city in enacting its ordinance included studies, public hearings, comment-taking, and town hall meetings regarding the negative secondary effects produced by sexually-oriented businesses.[214] Respondents specifically claimed that the evidence produced did not indicate that the "requirement that all dancers wear bikini tops instead of pasties [would] reduce deleterious secondary effects."[215] The court in *Baby Dolls* responded that a city was not required to demonstrate with empirical data that its ordinance would successfully lower crime, at least "not without actual and convincing evidence from plaintiffs to the contrary."[216]

The Fifth Circuit decided "it was reasonable for the [c]ity to conclude that establishments featuring performers in attire more revealing than bikini tops pose the same types of problems associated with other [sexual oriented businesses.]"[217] This decision by the Fifth Circuit was correctly decided along the same lines as was *Alameda.* Because it was reasonable for the city of Erie in *Pap's A.M.* to infer nude dancing would produce the same negative effects as adult theaters, it was reasonable for the Fifth Circuit to conclude that businesses allowing their performers to wear less clothing than bikini tops would as well. Therefore, as in *Alameda,* the court in *Baby Dolls* rightly concluded that the zoning ordinance that regulated adult businesses was designed to serve a substantial government interest.[218]

Shortly after the decision in *Baby Dolls* was issued, the Fifth Circuit decided *Encore Videos, Inc. v. City of San Antonio.*[219] The ordinance at issue in *Encore* forbade "sexually oriented businesses from locating within 1000 feet of residential areas."[220] As in *Renton,* the city in *Encore* relied on studies produced by other cities that focused on secondary effects of adult businesses in general.[221] Unlike *Renton* however, the Fifth Circuit required the city to

212. 295 F.3d 471 (5th Cir. 2002).

213. *Baby Dolls*, 295 F.3d at 481. Respondents maintained "that the evidence the City relied upon [was] irrelevant to the *Ordinance*." *Id.* The ordinance imposed a locational restriction on sexually—oriented businesses. *Id.* at 474. To avoid being classified as a sexually—oriented business, dancers at the adult establishments were effectively required to wear no less than bikini tops. *See id.* at 476.

214. *Id.* at 480.

215. *Baby Dolls*, 295 F.3d at 481.

216. *Id.*

217. *Id.* at 482.

218. *See id.* at 482.

219. 310 F.3d 812 (5th Cir. 2002).

220. *Encore*, 310 F.3d at 814. Encore Videos, a business that provided only sales for off-premises viewing, brought suit.

221. *Id.* at 821.

produce more evidence than the studies, and its failure to do so prompted the court to strike down the zoning ordinance.[222]

The court in *Encore* emphasized an apparent agreement between Justice Kennedy's concurring opinion in *Alameda* and the dissenting opinion written by Justice Souter.[223] "Justice Kennedy and the dissenters therefore agree that the city at least must provide evidence that the burden on speech imposed by an ordinance is 'no greater than necessary to further [the city's] interest' in combating secondary effects."[224] The *Encore* court then stated that for this city to meet its burden under *Alameda*, it "must provide at least some evidence of secondary effects specific to adult businesses that sell books or videos solely for off-site entertainment."[225]

In defining the evidentiary burden held by the city, the *Encore* court overlooked the holdings of both *Baby Dolls* and *Alameda.* The Court in *Alameda* held that the city of Los Angeles could reasonably rely on its study to support its zoning ordinance, at least at summary judgment stage.[226] Contrary to this position, which specified no additional support was required, the *Encore* court declared that the city's evidence was insufficient to link secondary effects to specific adult businesses and further proof was required.[227] As shown in the above analysis, this requirement is clearly excessive, especially because the court in *Encore* was also decided on a summary judgment motion. Similarly, the conclusion in *Encore* directly conflicted with the prior Fifth Circuit decision in *Baby Dolls.* Thus, in light of *Alameda* and *Baby Dolls,* the *Encore* court reached the wrong decision and should have allowed the city to reasonably infer from its studies that businesses exclusively selling videos for off-premise viewing would produce the same secondary effects as other adult businesses.

2. The Sixth Circuit Grants Deference to a City's Judgment.

The District Court in *Executive Arts Studio, Inc. v. City of Grand Rapids*[228] dealt with a challenge to a city zoning ordinance similar to that in *Young*, where an adult business could not be located within 500 feet of a residential

222. *Id.* at 822-23.

223. *Id.* at 819. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 819 (quoting Marks v. United States, 430 U.S. 188, 193 (1977) (quotations omitted)).

224. *Encore*, 310 F.3d at 819 (quoting City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 464 n.8 (2002) (Souter, J., dissenting)).

225. *Id.* at 822.

226. *Alameda*, 535 U.S. at 444 (Kennedy, J., concurring).

227. *Encore*, 310 F.3d at 822.

228. 227 F. Supp. 2d 731 (W.D. Mich. 2002).

district or within 1000 feet of another adult business.[229] Respondents argued that there was no showing that the city relied upon "anything more than speculation and unsupported conclusions" to justify its ordinance.[230] Looking to the *Alameda* plurality opinion, the *Executive Arts* court noted that a city had "broad latitude in adopting solutions to secondary effects."[231] But, it also specified that the city must provide evidence showing a connection between adult businesses and secondary effects.[232]

Looking to the record, the court in *Executive Arts* found the city had conducted meetings that discussed concerns about the "deleterious effects caused by adult-oriented businesses" as well as various methods to alleviate such concerns.[233] It looked to the express purpose behind the ordinance[234] and also noted it was "almost identical" to the ordinance in *Young*.[235] Relying on the plurality in *Alameda,* the court in *Executive Arts* stated a city may rely on evidence it reasonably believed relevant to show a connection between secondary effects and adult businesses.[236] It then appropriately concluded that the city adequately demonstrated such a connection and could prevail on this issue at the summary judgment stage.[237]

3. The Seventh Circuit Emphasizes Effects on Speech Must be Assessed.

While conflict between the plurality and concurring opinions in *Alameda* produced disputes over which rationale should be utilized, the Judicial Council of the Seventh Circuit resolved the discrepancy solely in favor of Justice Kennedy's concurrence. In *Ben's Bar, Inc. v. Village of Somerset*,[238] the Judicial Council noted the differences between the plurality and concurring opinions in *Alameda* were quite subtle.[239] Moreover, because "Justice

229. *Executive Arts*, 227 F. Supp. 2d at 734.

230. *Id.* at 743. "In particular, [the adult business] argue[d] that the City ha[d] failed to show that the ordinance [was] based upon any evidence showing that there [was] a link between adult bookstores and adverse secondary effects." *Id.*

231. *Id.* at 742.

232. *Id.* at 742 (requiring the city to show a connection is not a demanding standard, however).

233. *Executive Arts*, 227 F. Supp. 2d at 743.

234. The purpose of this ordinance was "to address secondary effects caused by concentrations of specific businesses, particularly those engaged in the sale or display of sexually-explicit material." *Id.* at 744.

235. *Id.*

236. *Id.* at 742.

237. *Id.* at 744.

238. 316 F.3d 702 (7th Cir. 2003).

239. *Ben's Bar*, 316 F.3d at 721. "[W]hile Justice Kennedy believed that the plurality did not adequately address" the effect the city's regulation would have on speech, "he agreed with the plurality's overall conclusion that a municipality's initial burden of demonstrating a substantial government interest in regulating the adverse secondary effects associated with adult entertainment [was] slight." *Id.* at 721-22.

Kennedy's concurrence [was] the narrowest opinion joining the judgment of the Court in *Alameda*," it should be considered the "controlling opinion."[240]

The ordinance at issue in *Ben's Bar* prohibited the sale and consumption of alcohol on the premises of adult businesses.[241] The Village Board, in enacting the ordinance, used judicial decisions, multiple studies from other cities, and reports to "support its conclusion that adult entertainment produce[d] adverse secondary effects."[242] Respondents in *Ben's Bar* argued the city must conduct its own studies "to determine whether adverse secondary effects result when liquor is served on the premises of adult entertainment establishments."[243] Citing Justice Kennedy's opinion in *Alameda*, the Judicial Council quickly disposed of the claim, stating the respondent's view had "been expressly (and repeatedly) rejected by the Supreme Court."[244]

The respondents in *Ben's Bar* next contended that the city's reports were faulty because they failed to relate specifically to the "effects of serving alcohol in establishments offering nude and semi-nude dancing."[245] Relying on the plurality opinion in *Alameda*, the Judicial Council for the Seventh Circuit found "it was entirely reasonable for the Village to conclude that barroom nude dancing was likely to produce adverse secondary effects at the local level, even in the absence of specific studies on the matter."[246] Based on the preceding analysis of *Alameda*, it is apparent the Judicial Council correctly resolved *Ben's Bar* in holding the evidentiary record, without more, fairly supported the city's secondary effects rationale.[247]

4. The Eighth Circuit Proves the City's Rationale is Sufficient.

As in *Alameda*, the issue before the Eighth Circuit in *SOB, Inc. v. County of Benton* was whether there was "sufficient evidence of adverse secondary

240. *Id.* at 722.

241. *Id.* at 723.

242. *Id.* at 725.

243. *Ben's Bar*, 316 F.3d at 725.

244. *Id*. To support this proposition, the *Ben's Bar* court relies on the language from *Renton* that "the First Amendment does not require a city, before enacting an ordinance to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." *Id.* (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 451-52 (2002) (Kennedy, J., concurring); Barnes v. Glen Theatre Inc., 501 U.S. 560, 584 (1991) (Souter, J., concurring)).

245. *Id*.

246. *Id.* at 726. The Judicial Council further stressed that "the Supreme Court has gone so far as to assert that '[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior.'" *Ben's Bar*, 316 F.3d at 726 (quoting New York State Liquor Authority v. Bellanca, 452 U.S. 714, 718 (1981)).

247. *Id.*

effects to justify" the enactment of the county's nude dancing regulation.[248] An adult business, featuring nude dancing, challenged the county's ordinance, which effectively compelled the business' dancers to wear pasties and G-strings when performing.[249] Before the ordinance was passed, the county gathered studies from other cities addressing the secondary effects associated with adult businesses and held a public hearing in which citizens showed their support for the ordinance.[250] The adult business argued the evidence was insufficient to show the ordinance furthered the county's interest in combating secondary effects because of contrary evidence that had been produced.[251]

Although the *SOB* court relied on *Alameda*, the ordinance before it was a ban on nude dancing, and as such, the evidence required to support it was different than that necessary for the zoning regulation at issue in *Alameda*.[252] Notwithstanding this difference, the *SOB* court garnered support from Justice Kennedy's concurring opinion in *Alameda* to conclude "a ban on live nude dancing impose[d] a *de minimis* restriction on expressive conduct, while otherwise 'leaving the quantity and accessibility of speech substantially intact.'"[253] Granting deference to the county's studies,[254] the *SOB* court concluded that because the adult business "failed to cast sufficient doubt on the County's rationale for the Ordinance, the ban on live nude dancing [was] constitutional."[255]

If *SOB* had dealt with a zoning ordinance, the Eighth Circuit might not have reached the same result. Given its reliance on both the plurality and

248. 317 F.3d 856, 862 (8th Cir. 2003).

249. *SOB, Inc.*, 317 F.3d at 859.

250. *Id.* at 862-63.

251. *Id.* at 863. The evidence showed that the adult business "had neither caused higher crime rates nor depressed the value of nearby properties in the time [it] had been operating." *Id.* Additionally, the adult business "submitted an article criticizing the methodologies of the secondary effects studies relied upon by other municipalities." *Id.* (citing Bryant Paul, et al., *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Dubunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL. 355 (2001)).

252. *Id.* at 863. The adult business brought forth evidence that "addressed only two adverse secondary effects, property values and crime in the vicinity of an adult entertainment establishment." *SOB, Inc.*, 317 F.3d at 863. Although these effects may be especially relevant to zoning regulations, a "ban on live nude dancing may address other adverse secondary effects, such as the likelihood that an [establishment's] dancers and customers . . . will foster illegal activity such as drug use, prostitution, tax evasion, and fraud." *Id.*

253. *Id.* at 863 (quoting City of Los Angeles v. Alameda Books, Inc. 535 U.S. 425, 449 (2002) (Kennedy, J., concurring)).

254. *Id.* at 863-64. In reaching this conclusion, the court in *SOB* heavily relied on the plurality opinion from *Pap's A.M.*, which stated the city was not required to produce independent evidence as long as it reasonably believed it to be relevant. *Id.* at 863 (citing City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000)). The *SOB* court also looked to both *Alameda's* plurality opinion and concurrence to support its deferential outcome. *SOB, Inc.*, 317 F.3d at 863-64.

255. *Id.* at 864.

concurring opinions in *Alameda*[256] and the presence of conflicting evidence relevant to the rationale behind a zoning ordinance,[257] the county most likely would have had to produce additional evidence.[258] As shown in the *Alameda* analysis however, because there was no conflicting evidence with respect to the rationale of the county's nude dancing ban, the Eighth Circuit correctly decided that the county's findings addressing secondary effects was sufficient.

5. The Ninth Circuit Reaffirms the Reasonable Reliance Test.

In the Ninth Circuit case, *Deja Vu-Everett-Federal Way, Inc. v. City of Federal Way*,[259] the city amended its zoning ordinance that regulated adult businesses.[260] The respondent argued that the city "had not shown that the then-existing zoning regulations had proven ineffective at curbing secondary effects of adult uses,"[261] and "should be required to conduct its own study to show why the existing regulations need[ed] to be modified."[262] Responding to this argument, the *Deja Vu* court looked to *Alameda*.[263] The Ninth Circuit quickly disposed of the respondent's claim after finding that the "regulations were based on the studies, experiences, and police records of many cities."[264] Therefore, the evidence relied upon by the city was reasonably relevant to the problem the city addressed[265] and satisfied the standards outlined by *Alameda's* plurality.[266]

256. *See id.* at 863-64.

257. The evidence produced by the adult business "addressed only two adverse secondary effects, property values and crime in the vicinity of an adult entertainment establishment. These are issues particularly relevant to zoning." *Id.* at 863.

258. "If plaintiffs succeed in casting doubt on a municipality's rationale" by "furnishing evidence that disputes the municipality's factual findings," the municipality would be left with the additional burden of "supplement[ing] the record with evidence renewing support for a theory that justifies its ordinance." *Alameda*, 535 U.S. at 439 (plurality opinion).

259. 46 Fed.Appx. 409 (9th Cir. 2002).

260. *Deja Vu*, 46 Fed.Appx. at 410. In effect, the zoning ordinance would require the adult business to "shut down, change, or move its operation." *Id.*

261. *Id*.

262. *Id*.

263. *Id.* at 410-11. "The City of Los Angeles was allowed to modify existing regulations by relying on the same study on which the city relied when enacting the original regulations." *Deja Vu*, 46 Fed.Appx. at 410-11.

264. *Id.* at 411.

265. *Id.*

266. "A municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002) (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986)). It was reasonable for the city of Federal Way to rely on studies produced by other cities because *Renton* held a city was not required to conduct its own studies or produce independent evidence. *Renton*, 475 U.S. at 51.

The respondent in *Deja Vu* further argued that the city failed to pass the test Justice Kennedy developed in his *Alameda* concurrence. Under this alleged test, the city must advance "some basis to show that its regulation ha[d] the purpose of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact."[267] The *Deja Vu* court also quickly rejected this argument by stating the city had "satisfied Justice Kennedy's 'test,' as well as that of the plurality opinion of Justice O'Connor."[268]

Although the Ninth Circuit seemed to endorse two different evidentiary standards for zoning ordinances, its reasoning is sound. The evidence presented in this case was composed of studies, experiences, and police reports while the evidence offered in *Alameda* was the city's own study. The holding in *Alameda* was achieved with the help of Justice Kennedy, who concluded it was reasonable for the city of Los Angeles to rely on its study to show a connection between adult businesses and secondary effects.[269] Accordingly, it was appropriate for the Ninth Circuit in *Deja Vu* to conclude the city could reasonably rely on the evidence it already produced and was not required to produce additional evidence.

V. CONCLUSIONS

As shown, courts must balance competing interests when asked to rule on the validity of a city's zoning ordinance regulating adult entertainment businesses. The circuit court opinions before *Alameda*, although relying on Supreme Court precedent, displayed confusion about the evidentiary requirement that must be satisfied for a city to prove that its ordinance was designed to serve a substantial government interest. Both the plurality opinion in *Alameda* and that of Justice Kennedy provided appropriate instruction for the lower courts to follow when presented with similar regulations. Consequently, the decisions issued after *Alameda* reveal a general acceptance of both rationales. Therefore, a combination of rationales taken from both the plurality and concurring opinions, which provide standards for judging whether a city's zoning ordinance was designed to serve its interests, should be followed.

MINDI M. JELSEMA[*]

267. *Deja Vu*, 46 Fed.Appx. at 411.

268. *Id.*

269. *Alameda*, 535 U.S. at 453 (Kennedy, J., concurring).

[*] J.D. candidate 2004. I want to express my thanks to my parents and David Johnson for their continued love and support.