541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84, 72 USLW 4451, 04 Cal. Daily Op. Serv. 4843, 2004 Daily Journal D.A.R. 6662, 19 Fla. L. Weekly Fed. S 350
(Cite as: 541 U.S. 774, 124 S.Ct. 2219)

Briefs and Other Related Documents

Supreme Court of the United States
CITY OF LITTLETON, COLORADO, Petitioner,
v.
Z.J. GIFTS D-4, L.L.C., a Limited Liability Company, dba Christal's.
No. 02-1609.

Argued March 24, 2004.
Decided June 7, 2004.

Background: Owner of store that sold adult books brought § 1983 action challenging city's adult business licensing ordinance as unconstitutional, and seeking declaratory and injunctive relief, attorney fees and damages. The United States District Court for the District of Colorado, Edward W. Nottingham, J., entered summary judgment in favor of city, and owner appealed. The Tenth Circuit Court of Appeals, Lucero, Circuit Judge, 311 F.3d 1220, affirmed in part and reversed in part. Certiorari was granted.

Holdings: The Supreme Court, Justice Breyer, held that:
(1) for an "adult business" licensing scheme to satisfy First Amendment requirements, it is not enough that licensing scheme provides only assurance of speedy access to courts for review of adverse licensing decisions, without also providing assurance of speedy court decision; but
(2) where city's "adult business" licensing scheme simply conditioned operation of adult business on compliance with neutral and nondiscretionary criteria and did not seek to censor content, language in ordinance providing for judicial review of adverse licensing decisions in accordance with state's ordinary review procedures was sufficient to satisfy First Amendment requirements.
Reversed.

Justice Stevens concurred in part and concurred in judgment and filed opinion.

Justice Souter concurred in part and concurred in judgment and filed opinion, in which Justice Kennedy joined.

Justice Scalia concurred in judgment and filed opinion.

West Headnotes

[1] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
For an "adult business" licensing scheme to satisfy First Amendment requirements, it is not enough that licensing scheme provides only assurance of speedy access to courts for review of adverse licensing decisions, without also providing assurance of speedy court decision; delay in issuing judicial decision, no less than delay in obtaining access to court, can prevent license for First Amendment-protected business from being issued within requisite reasonable period of time. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases

[2] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
Where city's "adult business" licensing scheme simply conditioned operation of adult business on compliance with neutral and nondiscretionary criteria and did not seek to censor content, language in ordinance providing for judicial review of adverse licensing decisions in accordance with state's ordinary review procedures was sufficient to satisfy First Amendment requirements, as long as courts remained sensitive to need to prevent First Amendment harms and administered those review procedures accordingly; whether courts have done so is matter normally fit for case-by-case determination rather than facial challenge. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
Where regulation simply conditions operation of adult business on compliance with neutral and nondiscretionary criteria and does not seek to censor

content, adult business is not entitled under First Amendment to unusually speedy judicial decision, of the *Freedman* type, on adverse licensing decision. U.S.C.A. Const.Amend. 1.

****2220 *774** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Under petitioner city's "adult business license" ordinance, the city's decision to deny a license may be appealed to the state district court pursuant to Colorado Rules of Civil Procedure. Respondent Z.J. Gifts D-4, L.L.C. (hereinafter ZJ), opened an adult bookstore in a place not zoned for adult businesses. Instead of applying for a license, ZJ filed suit attacking the ordinance as facially unconstitutional. The Federal District Court rejected ZJ's claims, but the Tenth Circuit held, as relevant here, that state law does not assure the constitutionally required "prompt final judicial *decision*."

Held: The ordinance meets the First Amendment's requirement that such a licensing scheme assure prompt judicial review of an administrative decision denying a license. Pp. 2222-2226.

(a) The Court rejects the city's claim that its licensing scheme need only provide prompt access to judicial review, but not a "prompt judicial determination," of an applicant's legal claim. The city concedes that *Freedman v. Maryland*, 380 U.S. 51, 59, 85 S.Ct. 734, 13 L.Ed.2d 649, in listing constitutionally necessary "safeguards" applicable to a motion picture censorship statute, spoke of the need to assure a "prompt final judicial decision," but adds that Justice O'CONNOR's controlling plurality opinion in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603, which addressed an adult business licensing scheme, did not use the word "decision," instead speaking only of the "*possibility of prompt judicial review*," *id.*, at 228, 110 S.Ct. 596 (emphasis added). Justice O'CONNOR's *FW/PBS* opinion, however, points out that *Freedman's* "judicial review" safeguard is meant to prevent "undue delay," 493 U.S., at 228, 110 S.Ct. 596, which includes *judicial*, as well as *administrative*, delay. A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being "issued within a reasonable period of time." *Ibid.* Nothing in the opinion suggests the contrary. Pp. 2222-2224.

(b) However, the Court accepts the city's claim that Colorado law satisfies any "prompt judicial determination" requirement, agreeing that the Court should modify *FW/PBS*, withdrawing its implication that *Freedman's* special judicial review rules--*e.g.*, strict time limits--apply in this case. Colorado's ordinary "judicial review" rules suffice to assure ***775** a prompt judicial *decision*, as long as the courts remain sensitive to the need to prevent First Amendment harms and administer ****2221** those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge. Four considerations support this conclusion. First, ordinary court procedural rules and practices give reviewing courts judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, courts may arrange their schedules to "accelerate" proceedings, and higher courts may grant expedited review. Second, there is no reason to doubt state judges' willingness to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. And federal remedies would provide an additional safety valve in the event of any such problem. Third, the typical First Amendment harm at issue here differs from that at issue in *Freedman*, diminishing the need in the typical case for procedural rules imposing special decisionmaking time limits. Unlike in *Freedman*, this ordinance does not seek to *censor* material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display. These criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally any specific item of adult material in the community. And the criteria's simple objective nature means that in the ordinary case, judicial review, too, should prove simple, hence expeditious. Finally, nothing in *FW/PBS* or *Freedman* requires a city or State to place judicial review safe-

guards all in the city ordinance that sets forth a licensing scheme. Pp. 2224-2226.

311 F.3d 1220, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, THOMAS, and GINSBURG, JJ., joined, in which STEVENS, J., joined as to Parts I and II-B, and in which SOUTER and KENNEDY, JJ., joined except as to Part II-B. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, post, p. 2226. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, in which KENNEDY, J., joined, post, p. 2227. SCALIA, J., filed an opinion concurring in the judgment, post, p. 2228.

J. Andrew Nathan, Denver, CO, for petitioner.

Douglas R. Cole, for Ohio, et al., as amici curiae, by special leave of the Court, supporting the petitioner.

Michael W. Gross, Denver, CO, for respondent.

J. Andrew Nathan, Counsel of Record, Heidi J. Hugdahl, Nathan, Bremer, Dumm & Myers P.C., Denver, CO, Larry W. Berkowitz, City Attorney, Brad D. Bailey, Assistant City Attorney, Littleton, CO, Scott D. Bergthold, Law Office of Scott D. Bergthold, P.L.L.C., Chattanooga, TN, for petitioner.

Arthur M. Schwartz, Counsel of Record, Michael W. Gross, Cindy D. Schwartz, Schwartz & Goldberg, P.C., Denver, Colorado, for Respondent.

Justice BREYER delivered the opinion of the Court.

776** In this case we examine a city's "adult business" licensing ordinance to determine whether it meets the First Amendment's requirement that such a licensing scheme assure prompt judicial review of an administrative decision denying a license. See ****2222FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); cf. *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). We conclude that the ordinance before us, considered on its face, is consistent with the First Amendment's demands.

I

Littleton, Colorado, has enacted an "adult business" ordinance that requires an "adult bookstore, adult novelty store ***777** or adult video store" to have an "adult business license." Littleton City Code §§ 3-14-2, 3-14-4 (2003), App. to Brief for Petitioner 13a-20a, 23a. The ordinance defines "adult business"; it requires an applicant to provide certain basic information about the business; it insists upon compliance with local "adult business" (and other) zoning rules; it lists eight specific circumstances the presence of which requires the city to deny a license; and it sets forth time limits (typically amounting to about 40 days) within which city officials must reach a final licensing decision. §§ 3-14-2, 3-14-3, 3-14-5, 3-14-7, 3-14-8, *id.*, at 13a-30a. The ordinance adds that the final decision may be "appealed to the [state] district court pursuant to Colorado rules of civil procedure 106(a)(4)." § 3-14-8(B)(3), *id.*, at 30a.

In 1999, the respondent, a company called Z.J. Gifts D-4, L.L.C. (hereinafter ZJ), opened a store that sells "adult books" in a place not zoned for adult businesses. Compare Tr. of Oral Arg. 13 (store "within 500 feet of a church and day care center") with § 3-14-3(B), App. to Brief for Petitioner 21a (forbidding adult businesses at such locations). Instead of applying for an adult business license, ZJ brought this lawsuit attacking Littleton's ordinance as unconstitutional on its face. The Federal District Court rejected ZJ's claims; but on appeal the Court of Appeals for the Tenth Circuit accepted two of them, 311 F.3d 1220, 1224 (2002). The court held that Colorado law "does not assure that [the city's] license decisions will be given expedited [judicial] review"; hence it does not assure the "prompt final judicial *decision*" that the Constitution demands. *Id.*, at 1238. It also held unconstitutional another ordinance provision (not now before us) on the ground that it threatened lengthy administrative delay--a problem that the city believes it has cured by amending the ordinance. Compare *id.*, at 1233-1234, with § 3-14-7, App. to Brief for Petitioner 27a-28a, and Brief for Petitioner 3. Throughout these proceedings, ZJ's store has continued to operate.

***778** The city has asked this Court to review the Tenth Circuit's " judicial review" determination, and

we granted certiorari in light of lower court uncertainty on this issue. Compare, *e.g.*, 311 F.3d, at 1238 (First Amendment requires prompt judicial *determination* of license denial); *Nightclubs, Inc. v. Paducah*, 202 F.3d 884, 892-893 (C.A.6 2000) (same); *Baby Tam & Co. v. Las Vegas*, 154 F.3d 1097, 1101-1102 (C.A.9 1998) (same); *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 998- 1001 (C.A.4 1995) (en banc) (same), with *Boss Capital, Inc. v. Casselberry*, 187 F.3d 1251, 1256-1257 (C.A.11 1999) (Constitution requires only prompt *access* to courts); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (C.A.5 1994) (same); see also *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325-326, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) (noting a Circuit split); *City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 281, 121 S.Ct. 743, 148 L.Ed.2d 757 (2001) (same).

II

The city of Littleton's claims rest essentially upon two arguments. First, this Court, in applying the First Amendment's ****2223** procedural requirements to an "adult business" licensing scheme in *FW/PBS*, found that the First Amendment required such a scheme to provide an applicant with "*prompt access*" to judicial review of an administrative denial of the license, but that the First Amendment did not require assurance of a "prompt judicial *determination*" of the applicant's legal claim. Second, in any event, Colorado law satisfies any "prompt judicial determination" requirement. We reject the first argument, but we accept the second.

A

The city's claim that its licensing scheme need not provide a "prompt judicial determination" of an applicant's legal claim rests upon its reading of two of this Court's cases, *Freedman* and *FW/PBS*. In *Freedman*, the Court considered the First Amendment's application to a "motion picture ***779** censorship statute"--a statute that required an " 'owner or lessee' " of a film, prior to exhibiting a film, to submit the film to the Maryland State Board of Censors and obtain its approval. 380 U.S., at 52, and n. 1, 85 S.Ct. 734 (quoting Maryland statute). It said, "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.*, at 58, 85 S.Ct. 734. The Court added that those safeguards must include (1) strict time limits leading to a speedy administrative decision and minimizing any "prior restraint"-type effects, (2) burden of proof rules favoring speech, and (3) (using language relevant here) a "procedure" that will "*assure a prompt final judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.*, at 58-59, 85 S.Ct. 734 (emphasis added).

In *FW/PBS*, the Court considered the First Amendment's application to a city ordinance that "regulates sexually oriented businesses through a scheme incorporating zoning, licensing, and inspections." 493 U.S., at 220-221, 110 S.Ct. 596. A Court majority held that the ordinance violated the First Amendment because it did not impose strict administrative time limits of the kind described in *Freedman*. In doing so, three Members of the Court wrote that "the full procedural protections set forth in *Freedman* are not required," but that nonetheless such a licensing scheme must comply with *Freedman's* "core policy"--including (1) strict administrative time limits and (2) (using language somewhat different from *Freedman's*) "*the possibility of prompt judicial review in the event that the license is erroneously denied.*" 493 U.S., at 228, 110 S.Ct. 596 (opinion of O'CONNOR, J.) (emphasis added). Three other Members of the Court wrote that all *Freedman's* safeguards should apply, including *Freedman's* requirement that "a prompt judicial determination must be available." 493 U.S., at 239, 110 S.Ct. 596 (Brennan, J., concurring in judgment). Three Members of the Court wrote in dissent that *Freedman's* requirements ***780** did not apply at all. See 493 U.S., at 244-245, 110 S.Ct. 596 (White, J., joined by REHNQUIST, C. J.,, concurring in part and dissenting in part); *id.*, at 250, 110 S.Ct. 596 (SCALIA, J., concurring in part and dissenting in part).

The city points to the differing linguistic descriptions of the "judicial review" requirement set forth in these opinions. It concedes that *Freedman*, in listing constitutionally necessary "safeguards," spoke of the need to assure a "prompt final judicial decision." 380 U.S.,

at 59, 85 S.Ct. 734. But it adds that Justice O'CONNOR's controlling plurality opinion in *FW/PBS* did not use the word "decision," instead speaking only of the "*possibility of prompt judicial* ***2224** *review*." 493 U.S., at 228, 110 S.Ct. 596 (emphasis added); see also *id.*, at 229, 110 S.Ct. 596 ("an avenue for prompt judicial review"); *id.*, at 230, 110 S.Ct. 596 ("availability of prompt judicial review"). This difference in language between *Freedman* and *FW/PBS*, says the city, makes a major difference: The First Amendment, as applied to an "adult business" licensing scheme, demands only an assurance of speedy access to the courts, not an assurance of a speedy court decision.

[1] In our view, however, the city's argument makes too much of too little. While Justice O'CONNOR's *FW/PBS* plurality opinion makes clear that only *Freedman's* "core" requirements apply in the context of "adult business" licensing schemes, it does not purport radically to alter the nature of those "core" requirements. To the contrary, the opinion, immediately prior to its reference to the "judicial review" safeguard, says:

> "The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two *[Freedman]* safeguards are essential ... ." 493 U.S., at 228, 110 S.Ct. 596.

***781** These words, pointing out that *Freedman's* "judicial review" safeguard is meant to prevent "undue delay," 493 U.S., at 228, 110 S.Ct. 596, include *judicial*, as well as *administrative*, delay. A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being "issued within a reasonable period of time." *Ibid.* Nothing in the opinion suggests the contrary. Thus we read that opinion's reference to "prompt judicial review," together with the similar reference in Justice Brennan's separate opinion (joined by two other Justices), see *id.*, at 239, 110 S.Ct. 596, as encompassing a prompt judicial decision. And we reject the city's arguments to the contrary.

B

[2] We find the second argument more convincing. In effect that argument concedes the constitutional importance of assuring a "prompt" judicial decision. It concedes as well that the Court, illustrating what it meant by "prompt" in *Freedman*, there set forth a "model" that involved a "hearing one day after joinder of issue" and a "decision within two days after termination of the hearing." 380 U.S., at 60, 85 S.Ct. 734. But the city says that here the First Amendment nonetheless does not require it to impose 2- or 3-day time limits; the First Amendment does not require special "adult business" judicial review rules; and the First Amendment does not insist that Littleton write detailed judicial review rules into the ordinance itself. In sum, Colorado's ordinary "judicial review" rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming.

Littleton, in effect, argues that we should modify *FW/PBS*, withdrawing its implication that *Freedman's* special judicial review rules apply in this case. And we accept that argument. In our view, Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer ***782** those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge. We reach this conclusion for several reasons.

First, ordinary court procedural rules and practices, in Colorado as elsewhere, ****2225** provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, where necessary, courts may arrange their schedules to "accelerate" proceedings. Colo. Rule Civ. Proc. 106(a)(4)(VIII) (2003). And higher courts may quickly review adverse lower court decisions. See, *e.g.*, *Goebel v. Colorado Dept. of Institutions*, 764 P.2d 785, 792 (Colo.1988) (en banc) (granting "expedited review").

Second, we have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. We presume that courts are aware of the constitutional need to avoid "undue delay result[ing] in the unconstitutional suppression of protec-

ted speech." *FW/PBS, supra*, at 228, 110 S.Ct. 596; see also, *e.g.*, *Schlesinger v. Councilman*, 420 U.S. 738, 756, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975). There is no evidence before us of any special Colorado court-related problem in this respect. And were there some such problems, federal remedies would provide an additional safety valve. See Rev. Stat. § 1979, 42 U.S.C. § 1983.

Third, the typical First Amendment harm at issue here differs from that at issue in *Freedman*, diminishing the need in the typical case for special procedural rules imposing special 2- or 3-day decisionmaking time limits. *Freedman* considered a Maryland statute that created a Board of Censors, which had to decide whether a film was " 'pornographic,' " tended to " 'debase or corrupt morals,' " and lacked " 'whatever other merits.' " 380 U.S., at 52-53, n. 2, 85 S.Ct. 734 (quoting Maryland statute). If so, it denied the permit and the film could not be shown. Thus, in *Freedman*, the Court considered a scheme with rather subjective standards and where a denial likely meant complete censorship.

***783** In contrast, the ordinance at issue here does not seek to *censor* material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display. The ordinance says that an adult business license "*shall*" be denied if the applicant (1) is underage; (2) provides false information; (3) has within the prior year had an adult business license revoked or suspended; (4) has operated an adult business determined to be a state law "public nuisance" within the prior year; (5) (if a corporation) is not authorized to do business in the State; (6) has not timely paid taxes, fees, fines, or penalties; (7) has not obtained a sales tax license (for which zoning compliance is required, see Tr. of Oral Arg. 16-17); or (8) has been convicted of certain crimes within the prior five years. § 3- 14-8(A), App. to Brief for Petitioner 28a-29a (emphasis added).

These objective criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally the presence of any specific item of adult material in the Littleton community. Some license applicants will satisfy the criteria even if others do not; hence the community will likely contain outlets that sell protected adult material. A supplier of that material should be able to find outlets; a potential buyer should be able to find a seller. Nor should zoning requirements suppress that material, for a constitutional zoning system seeks to determine *where*, not *whether*, protected adult material can be sold. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The upshot is that Littleton's "adult business" licensing scheme does "not present the grave 'dangers ****2226** of a censorship system.' " *FW/PBS*, 493 U.S., at 228, 110 S.Ct. 596 (opinion of O'CONNOR, J.) (quoting *Freedman, supra*, at 58, 85 S.Ct. 734). And the simple objective nature of the licensing criteria means that in the ordinary case, judicial review, too, should prove simple, hence expeditious. Where that is not so--where, for example, censorship of material, as well as delay ***784** in opening an additional outlet, is improperly threatened--the courts are able to act to prevent that harm.

Fourth, nothing in *FW/PBS* or in *Freedman* requires a city or a State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme. *Freedman* itself said: "How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." 380 U.S., at 60, 85 S.Ct. 734. This statement is not surprising given the fact that many cities and towns lack the state-law legal authority to impose deadlines on state courts.

[3] These four sets of considerations, taken together, indicate that Colorado's ordinary rules of judicial review are adequate--at least for purposes of this facial challenge to the ordinance. Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria, cf. *post*, at 2226- 2227 (STEVENS, J., concurring in part and concurring in judgment), and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type. Colorado's rules provide for a flexible system of review in which judges can reach a decision promptly in the ordinary case, while using their judicial power to prevent significant harm to First Amendment interests where cir-

cumstances require. Of course, those denied licenses in the future remain free to raise special problems of undue delay in individual cases as the ordinance is applied.

For these reasons, the judgment of the Tenth Circuit is

Reversed.

Justice STEVENS, concurring in part and concurring in the judgment.

There is an important difference between an ordinance conditioning the operation of a business on compliance with certain neutral criteria, on the one hand, and an ordinance ***785** conditioning the exhibition of a motion picture on the consent of a censor. The former is an aspect of the routine operation of a municipal government. The latter is a species of content-based prior restraint. Cf. *Graff v. Chicago*, 9 F.3d 1309, 1330-1333 (C.A.7 1993) (Flaum, J., concurring).

The First Amendment is, of course, implicated whenever a city requires a bookstore, a newsstand, a theater, or an adult business to obtain a license before it can begin to operate. For that reason, as Justice O'CONNOR explained in her plurality opinion in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 226, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), a licensing scheme for businesses that engage in First Amendment activity must be accompanied by adequate procedural safeguards to avert "the possibility that constitutionally protected speech will be suppressed." But Justice O'CONNOR's opinion also recognized that the full complement of safeguards that are necessary in cases that "present the grave 'dangers of a censorship system' " are "not required" in the ordinary adult-business licensing scheme. *Id.*, at 228, 110 S.Ct. 596 (quoting *Freedman v. Maryland*, 380 U.S. 51, 58, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)). In both contexts, "undue delay results in the unconstitutional suppression ****2227** of protected speech," 493 U.S., at 228, 110 S.Ct. 596, and *FW/PBS* therefore requires both that the licensing decision be made promptly and that there be "the possibility of prompt judicial review in the event that the license is erroneously denied." *Ibid.*

But application of neutral licensing criteria is a "ministerial action" that regulates speech, rather than an exercise of discretionary judgment that prohibits speech. *Id.*, at 229, 110 S.Ct. 596. The decision to deny a license for failure to comply with these neutral criteria is therefore not subject to the presumption of invalidity that attaches to the "direct censorship of particular expressive material." *Ibid.* Justice O'CONNOR's opinion accordingly declined to require that the licensor, like the censor, either bear the burden of going to court to effect the denial of a license or otherwise assume responsibility for ensuring ***786** a prompt judicial determination of the validity of its decision. *Ibid.*

The Court today reinterprets *FW/PBS*'s references to "the possibility of prompt judicial review" as the equivalent of *Freedman*'s "prompt judicial decision" requirement. *Ante*, at 2222-2224. I fear that this misinterpretation of *FW/PBS* may invite other, more serious misinterpretations with respect to the content of that requirement. As the Court applies it in this case, assurance of a "prompt judicial decision" means little more than assurance of the *possibility* of a prompt decision--the same possibility of promptness that is available whenever a person files suit subject to "ordinary court procedural rules and practices." *Ante*, at 2224. That possibility will generally be sufficient to guard against the risk of undue delay in obtaining a remedy for the erroneous application of neutral licensing criteria. But the mere possibility of promptness is emphatically insufficient to guard against the dangers of unjustified suppression of speech presented by a censorship system of the type at issue in *Freedman*, and is certainly not what *Freedman* meant by "prompt judicial decision."

Justice O'CONNOR's opinion in *FW/PBS* recognized that differences between ordinary licensing schemes and censorship systems warrant imposition of different procedural protections, including different requirements with respect to which party must assume the burden of taking the case to court, as well as the risk of judicial delay. I would adhere to the views there expressed, and thus do not join Part II-A of the Court's opinion. I do, however, join the Court's judgment and Parts I and II-B of its opinion.

Justice SOUTER, with whom Justice KENNEDY joins, concurring in part and concurring in the judgment.

I join the Court's opinion, except for Part II-B. I agree that this scheme is unlike full-blown censorship, *ante*, at 2224-2226, so that the ordinance does not need a strict timetable of ***787** the kind required by *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), to survive a facial challenge. I write separately to emphasize that the state procedures that make a prompt judicial determination possible need to align with a state judicial practice that provides a prompt disposition in the state courts. The emphasis matters, because although Littleton's ordinance is not as suspect as censorship, neither is it as innocuous as common zoning. It is a licensing scheme triggered by the content of expressive materials to be sold. See *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (KENNEDY, J., concurring in judgment) ("These ordinances are content based, and we should call them so"); *id.*, at 455-457, 122 S.Ct. 1728 (SOUTER, J., dissenting). Because the sellers may be unpopular with local authorities, ****2228** there is a risk of delay in the licensing and review process. If there is evidence of foot-dragging, immediate judicial intervention will be required, and judicial oversight or review at any stage of the proceedings must be expeditious.

Justice SCALIA, concurring in the judgment.

Were the respondent engaged in activity protected by the First Amendment, I would agree with the Court's disposition of the question presented by the facts of this case (though not with all of the Court's reasoning). Such activity, when subjected to a general permit requirement unrelated to censorship of content, has no special claim to priority in the judicial process. The notion that media corporations have constitutional entitlement to accelerated judicial review of the denial of zoning variances is absurd.

I do not believe, however, that Z.J. Gifts is engaged in activity protected by the First Amendment. I adhere to the view I expressed in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 250, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (opinion concurring in part and dissenting in part): the pandering of sex is not protected by the First Amendment. "The Constitution does not require a State or municipality to permit a business that intentionally specializes in, ***788** and holds itself forth to the public as specializing in, performance or portrayal of sex acts, sexual organs in a state of arousal, or live human nudity." *Id.*, at 258, 110 S.Ct. 596. This represents the Nation's long understanding of the First Amendment, recognized and adopted by this Court's opinion in *Ginzburg v. United States*, 383 U.S. 463, 470-471, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966). Littleton's ordinance targets sex-pandering businesses, see Littleton City Code § 3-14-2 (2003); to the extent it could apply to constitutionally protected expression its excess is not so great as to render it substantially overbroad and thus subject to facial invalidation, see *FW/PBS*, 493 U.S., at 261-262, 110 S.Ct. 596. Since the city of Littleton "could constitutionally have proscribed the commercial activities that it chose instead to license, I do not think the details of its licensing scheme had to comply with First Amendment standards." *Id.*, at 253, 110 S.Ct. 596.

541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84, 72 USLW 4451, 04 Cal. Daily Op. Serv. 4843, 2004 Daily Journal D.A.R. 6662, 19 Fla. L. Weekly Fed. S 350

Briefs and Other Related Documents (Back to top)

• 2004 WL 736431, 72 USLW 3631 (Oral Argument) Oral Argument (Mar. 24, 2004)

• 2004 WL 419436 (Appellate Brief) Reply Brief of Petitioner (Mar. 01, 2004)

• 2004 WL 188113 (Appellate Brief) Respondent's Brief on the Merits (Jan. 26, 2004)

• 2004 WL 199239 (Appellate Brief) Brief of Amicus Curiae First Amendment Lawyers Association in Support of Respondent (Jan. 26, 2004)

• 2004 WL 177024 (Appellate Brief) Brief of American Booksellers Foundation for Free Expression, Association of American Publishers Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation, International Periodical Distributors Association,

Publishers Marketing Association, and Video Software Dealers Association as Amici Curiae in Support of Respondent (Jan. 23, 2004)

• 2003 WL 22988869 (Appellate Brief) Brief of the National League of Cities, International Municipal Lawyers Association, International City/County Management Association, National Conference of State Legislatures, National Association of Counties, and U.S. Conference of Mayors, Joined by the American Planning Association, as Amici Curiae Supporting Petitioner (Dec. 12, 2003)

• 2003 WL 22988870 (Appellate Brief) Brief of Petitioner (Dec. 12, 2003)

• 2003 WL 22988871 (Appellate Brief) Brief of Ohio and 14 Other States as Amici Curiae Supporting Petitioner (Dec. 12, 2003)

• 2003 WL 22988872 (Appellate Brief) Brief of Community Defense Counsel as Amicus Curiae in Support of Petitioner (Dec. 12, 2003)

• 02-1609 (Docket) (May. 06, 2003)

END OF DOCUMENT

Briefs and Other Related Documents

Supreme Court of the United States
CITY OF LOS ANGELES, Petitioner,
v.
ALAMEDA BOOKS, INC., et al.
No. 00-799.

Argued Dec. 4, 2001.
Decided May 13, 2002.

Adult businesses brought § 1983 action, challenging city ordinance prohibiting operation of multiple adult businesses in single building. The United States District Court for the Central District of California, Dean D. Pregerson, J., granted summary judgment for businesses. City appealed. The Ninth Circuit Court of Appeals, Michael Daly Hawkins, Circuit Judge, 222 F.3d 719, affirmed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that city could reasonably rely on police department study correlating crime patterns with concentrations of adult businesses when opposing businesses' First Amendment challenge.

Reversed and remanded.

Justice Scalia concurred and filed opinion.

Justice Kennedy concurred in judgment and filed opinion.

Justice Souter filed dissenting opinion, in which Justices Stevens and Ginsburg joined and Justice Breyer joined in part.

West Headnotes

[1] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Reducing crime is a substantial government interest, for purpose of justifying time, place and manner regulation of speech. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[2] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
City could reasonably rely on police department study correlating crime patterns with concentrations of adult businesses when opposing First Amendment challenge to ordinance barring more than one adult entertainment business in same building, even though study had focused on single-use establishments; study fairly supported city's rationale for ordinance. (Per Justice O'Connor, with the Chief Justice and two Justices concurring and one Justice concurring in judgment). U.S.C.A. Const.Amend. 1.

****1728 *425** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Based on its 1977 study concluding that concentrations of adult entertainment establishments are associated with higher crime rates in surrounding communities, petitioner city enacted an ordinance prohibiting such enterprises within 1,000 feet of each other or within 500 feet of a religious institution, school, or public park. Los Angeles Municipal Code § 12.70(C) (1978). Because the ordinance's method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure, the ****1729** city later amended the ordinance to prohibit "more than one adult entertainment business in the same building." § 12.70(C) (1983). Respondents, two adult establishments that openly operate combined bookstores/video arcades in violation of § 12.70(C), as amended, sued under 42 U.S.C. § 1983 for declaratory and injunctive relief, alleging that the ordinance, on its face, violates the First Amendment. Finding that the ordinance was not a content-neutral regulation of speech, the District Court reasoned that neither the 1977 study nor a report cited in *Hart Book Stores v. Edmisten*, a Fourth Circuit case upholding a similar statute, supported a reasonable belief that multiple-use adult establish-

ments produce the secondary effects the city asserted as content-neutral justifications for its prohibition. Subjecting § 12.70(C) to strict scrutiny, the court granted respondents summary judgment because it felt the city had not offered evidence demonstrating that its prohibition was necessary to serve a compelling government interest. The Ninth Circuit affirmed on the different ground that, even if the ordinance were content neutral, 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 its substantial interest in reducing crime. The court therefore held the ordinance invalid under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29.

Held: The judgment is reversed, and the case is remanded.

222 F.3d 719, reversed and remanded.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS, concluded that Los Angeles may reasonably rely ***426** on its 1977 study to demonstrate that its present ban on multiple-use adult establishments serves its interest in reducing crime. Pp. 1733-1738.

(a) The 1977 study's central component is a Los Angeles Police Department report indicating that, from 1965 to 1975, crime rates for, *e.g.*, robbery and prostitution grew much faster in Hollywood, which had the city's largest concentration of adult establishments, than in the city as a whole. The city may reasonably rely on the police department's conclusions regarding crime patterns to overcome summary judgment. In finding to the contrary on the ground that the 1977 study focused on the effect on crime rates of a concentration of establishments--not a concentration of operations within a single establishment--the Ninth Circuit misunderstood the study's implications. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, such areas are also areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the 1977 study's findings, and thus reasonable, for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates. Neither the Ninth Circuit nor respondents nor the dissent provides any reason to question the city's theory. If this Court were to accept their view, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest. *Renton* specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. The Court there held that 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. 475 U.S., at 51-52, 106 S.Ct. 925. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support its rationale for its ordinance. If plaintiffs ****1730** fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the *Renton* standard. 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. See, *e.g.*, *Erie v. Pap's A.M.*, 529 U.S. 277, 298, 120 S.Ct. 1382, 146 L.Ed.2d 265. This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study fails to prove that the city's justification for its ordinance is necessarily ***427** correct. Therefore, it must be concluded that the city, at this stage of the litigation, has complied with *Renton's* evidentiary requirement. Pp. 1733-1738.

(b) The Court need not resolve the parties' dispute over whether the city can rely on evidence from *Hart Book Stores* to overcome summary judgment, nor respondents' alternative argument that the ordinance is not a time, place, and manner regulation, but is effectively a ban on adult video arcades that must be subjected to strict scrutiny. P. 1738.

Justice KENNEDY concluded that this Court's precedents may allow Los Angeles to impose its regulation in the exercise of the zoning authority, and that the city is not, at least, to be foreclosed by summary judgment. Pp. 1739-1744.

(a) Under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, if a city can decrease the crime and blight associated with adult businesses by exercising its zoning power, and at the same time leave the quantity and accessibility of speech substantially undiminished, there is no First Amendment objection, even if the measure identifies the problem outside the establishments by reference to the speech inside--that is, even if the measure is content based. On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. For example, it may not impose a content-based fee or tax, see *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209, even if the government purports to justify the fee by reference to secondary effects, see *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-135, 112 S.Ct. 2395, 120 L.Ed.2d 101. That the ordinance at issue is more a typical land-use restriction than a law suppressing speech is suggested by the fact that it is not limited to expressive activities, but extends, *e.g.*, to massage parlors, which the city has found to cause the same undesirable secondary effects; also, it is just one part of an elaborate web of land-use regulations intended to promote the social value of the land as a whole without suppressing some activities or favoring others. Thus, the ordinance is not so suspect that it must be subjected to the strict scrutiny that content-based laws demand in other instances. Rather, it calls for intermediate scrutiny, as *Renton* held. Pp. 1739-1741.

(b) *Renton's* description of an ordinance similar to Los Angeles' as "content neutral," 475 U.S., at 48, 106 S.Ct. 925, was something of a fiction. These ordinances are content based, and should be so described. Nevertheless, *Renton's* central holding is sound. P. 1741.

(c) The necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like the one at issue may reduce the costs of secondary effects without substantially reducing speech. If two adult businesses are under the same roof, an ordinance requiring ***428** 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. The premise must be that businesses--even those that have always been under one roof--will for the most part disperse rather than shut down, that the quantity of speech will be substantially ****1731** undiminished, and that total secondary effects will be significantly reduced. As to whether there is sufficient evidence to support this proposition, the Court has consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. See, *e.g.*, *Renton*, *supra*, at 51-52, 106 S.Ct. 925. Here, the proposition to be shown is supported by common experience and a study showing a correlation between the concentration of adult establishments and crime. Assuming that the study supports the city's original dispersal ordinance, most of the necessary analysis follows. To justify the ordinance at issue, 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, and that knocking down the wall between the two would not ameliorate any undesirable secondary effects of their proximity to one another. If the city's first ordinance was justified, therefore, then the second is too. Pp. 1741-1743.

(d) Because these considerations seem well enough established in common experience and the Court's case law, the ordinance survives summary judgment. Pp. 1743-1744.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C.J., and SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 1738. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 1739. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, and in which BREYER, J., joined as to Part II, *post*, p. 1744.

Michael L. Klekner, Los Angeles, CA, for petitioner.

John H. Weston, Los Angeles, CA, for respondents.

***429** Justice O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join.

Los Angeles Municipal Code § 12.70(C) (1983), as amended, prohibits "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." Respondents, two adult establishments that each operated an adult bookstore and an adult video arcade in the same building, filed a suit under Rev. Stat. § 1979, 42 U.S.C. § 1983 (1994 ed., Supp. V), alleging that § 12.70(C) violates the First Amendment and seeking declaratory and injunctive relief. The District Court granted summary judgment to respondents, finding that the city of Los Angeles' prohibition was a content-based regulation of speech that failed strict scrutiny. The Court of Appeals for the Ninth Circuit affirmed, but on different grounds. It held that, even if § 12.70(C) were a content-neutral regulation, the city failed to demonstrate that the ***430** prohibition was designed to serve a substantial government interest. Specifically, the Court of Appeals found that the city failed to present evidence upon which it could reasonably rely to demonstrate a link between multiple-use adult establishments and negative secondary effects. Therefore, the Court of Appeals held the Los Angeles prohibition on such establishments invalid under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and its precedents interpreting that case. 222 F.3d 719, 723-728 (2000). We reverse and remand. The city of Los Angeles may reasonably rely on a study it conducted some years before enacting the present version of § 12.70(C) to demonstrate that its ban on multiple-use adult establishments serves its interest in reducing crime.

****1732** I

In 1977, the city of Los Angeles conducted a comprehensive study of adult establishments and concluded that concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities. See App. 35-162 (Los Angeles Dept. of City Planning, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles (City Plan Case No. 26475, City Council File No. 74-4521-S.3, June 1977)). Accordingly, the city enacted an ordinance prohibiting the establishment, substantial enlargement, or transfer of ownership of an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters within 1,000 feet of another such enterprise or within 500 feet of any religious institution, school, or public park. See Los Angeles Municipal Code § 12.70(C) (1978).

There is evidence that the intent of the city council when enacting this prohibition was not only to disperse distinct adult establishments housed in separate buildings, but also to disperse distinct adult businesses operated under common ownership and housed in a single structure. See App. 29 ***431** (Los Angeles Dept. of City Planning, Amendment--Proposed Ordinance to Prohibit the Establishment of More than One Adult Entertainment Business at a Single Location (City Plan Case No. 26475, City Council File No. 82-0155, Jan. 13, 1983)). The ordinance the city enacted, however, directed that "[t]he distance between any two adult entertainment businesses shall be measured in a straight line ... from the closest exterior structural wall of each business." Los Angeles Municipal Code § 12.70(D) (1978). Subsequent to enactment, the city realized that this method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure.

Concerned that allowing an adult-oriented department store to replace a strip of adult establishments could defeat the goal of the original ordinance, the city council amended § 12.70(C) by adding a prohibition on "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." Los Angeles Municipal Code § 12.70(C) (1983). The amended ordinance defines an "Adult Entertainment Business" as an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters, and notes that each of these enterprises "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." § 12.70(B)(17). The ordinance uses the term "business" to refer to

certain types of goods or services sold in adult establishments, rather than the establishment itself. Relevant for purposes of this case are also the ordinance's definitions of adult bookstores and arcades. An "Adult Bookstore" is an operation that "has as a substantial portion of its stock-in-trade and offers for sale" printed matter and videocassettes that emphasize the depiction of specified sexual activities. § 12.70(B)(2)(a). An adult arcade is an operation where, "for any form of consideration," five or fewer patrons together may view films or videocassettes ***432** that emphasize the depiction of specified sexual activities. § 12.70(B)(1).

Respondents, Alameda Books, Inc., and Highland Books, Inc., are two adult establishments operating in Los Angeles. Neither is located within 1,000 feet of another adult establishment or 500 feet of any religious institution, public park, or school. Each establishment occupies less than 3,000 square feet. Both respondents rent and sell sexually oriented products, including videocassettes. Additionally, both provide booths where patrons can view videocassettes for a fee. Although respondents are located in different buildings, each operates its retail sales and rental operations in the same commercial space in which its video booths are located. There are no ****1733** physical distinctions between the different operations within each establishment and each establishment has only one entrance. 222 F.3d, at 721. Respondents concede they are openly operating in violation of § 12.70(C) of the city's code, as amended. Brief for Respondents 7; Brief for Petitioner 9.

After a city building inspector found in 1995 that Alameda Books, Inc., was operating both as an adult bookstore and an adult arcade in violation of the city's adult zoning regulations, respondents joined as plaintiffs and sued under 42 U.S.C. § 1983 for declaratory and injunctive relief to prevent enforcement of the ordinance. 222 F.3d, at 721. At issue in this case is count I of the complaint, which alleges a facial violation of the First Amendment. Both the city and respondents filed cross-motions for summary judgment.

The District Court for the Central District of California initially denied both motions on the First Amendment issues in count I, concluding that there was "a genuine issue of fact whether the operation of a combination video rental and video viewing business leads to the harmful secondary effects associated with a concentration of separate businesses in a single urban area." App. 255. After respondents filed a motion for reconsideration, however, the District ***433** Court found that Los Angeles' prohibition on multiple-use adult establishments was not a content-neutral regulation of speech. App. to Pet. for Cert. 51. It reasoned that neither the city's 1977 study nor a report cited in *Hart Book Stores v. Edmisten*, 612 F.2d 821 (C.A.4 1979) (upholding a North Carolina statute that also banned multiple-use adult establishments), supported a reasonable belief that multiple-use adult establishments produced the secondary effects the city asserted as content-neutral justifications for its prohibition. App. to Pet. for Cert. 34-47. Therefore, the District Court proceeded to subject the Los Angeles ordinance to strict scrutiny. Because it felt that the city did not offer evidence to demonstrate that its prohibition is necessary to serve a compelling government interest, the District Court granted summary judgment for respondents and issued a permanent injunction enjoining the enforcement of the ordinance against respondents. *Id.*, at 51.

The Court of Appeals for the Ninth Circuit affirmed, although on different grounds. The Court of Appeals determined that it did not have to reach the District Court's decision that the Los Angeles ordinance was content based because, even if the ordinance were content neutral, the city failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments is "designed to serve" the city's substantial interest in reducing crime. The challenged ordinance was therefore invalid under *Renton*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29. 222 F.3d, at 723-724. We granted certiorari, 532 U.S. 902, 121 S.Ct. 1223, 149 L.Ed.2d 134 (2001), to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton, supra.*

II

In *Renton v. Playtime Theatres, Inc., supra*, this Court considered the validity of a municipal ordinance that prohibited any adult movie theater from

locating within 1,000 feet of any residential zone, family dwelling, church, park, ***434** or school. Our analysis of the ordinance proceeded in three steps. First, we found that the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations. The ordinance was properly analyzed, therefore, as a time, place, and manner regulation. *Id.*, at 46, 106 S.Ct. 925. We next considered whether the ordinance was content neutral or content based. If the regulation were content based, it would be considered presumptively invalid and subject to strict scrutiny. *Simon & Schuster, Inc. v. Members of N.Y. State* ****1734** *Crime Victims Bd.*, 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230-231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). We held, however, that the Renton ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely, at crime rates, property values, and the quality of the city's neighborhoods. Therefore, the ordinance was deemed content neutral. *Renton, supra*, at 47-49, 106 S.Ct. 925. Finally, given this finding, we stated that the ordinance would be upheld so long as the city of Renton showed that its ordinance was designed to serve a substantial government interest and that reasonable alternative avenues of communication remained available. 475 U.S., at 50, 106 S.Ct. 925. We concluded that Renton had met this burden, and we upheld its ordinance. *Id.*, at 51-54, 106 S.Ct. 925.

The Court of Appeals applied the same analysis to evaluate the Los Angeles ordinance challenged in this case. First, the Court of Appeals found that the Los Angeles ordinance was not a complete ban on adult entertainment establishments, but rather a sort of adult zoning regulation, which *Renton* considered a time, place, and manner regulation. 222 F.3d, at 723. The Court of Appeals turned to the second step of the *Renton* analysis, but did not draw any conclusions about whether the Los Angeles ordinance was content based. It explained that, even if the Los Angeles ordinance were content neutral, the city had failed to demonstrate, ***435** as required by the third step of the *Renton* analysis, that its prohibition on multiple-use adult establishments was designed to serve its substantial interest in reducing crime. The Court of Appeals noted that the primary evidence relied upon by Los Angeles to demonstrate a link between combination adult businesses and harmful secondary effects was the 1977 study conducted by the city's planning department. The Court of Appeals found, however, that the city could not rely on that study because it did not " 'suppor[t] a reasonable belief that [the] combination [of] businesses ... produced harmful secondary effects of the type asserted.' " 222 F.3d, at 724. For similar reasons, the Court of Appeals also rejected the city's attempt to rely on a report on health conditions inside adult video arcades described in *Hart Book Stores, supra*, a case that upheld a North Carolina statute similar to the Los Angeles ordinance challenged in this case.

The central component of the 1977 study is a report on city crime patterns provided by the Los Angeles Police Department. That report indicated that, during the period from 1965 to 1975, certain crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments in the city, than in the city of Los Angeles as a whole. For example, robberies increased 3 times faster and prostitution 15 times faster in Hollywood than citywide. App. 124-125.

[1] The 1977 study also contains reports conducted directly by the staff of the Los Angeles Planning Department that examine the relationship between adult establishments and property values. These staff reports, however, are inconclusive. Not surprisingly, the parties focus their dispute before this Court on the report by the Los Angeles Police Department. Because we find that reducing crime is a substantial government interest and that the police department report's conclusions regarding crime patterns may reasonably be relied upon to overcome summary judgment against ***436** the city, we also focus on the portion of the 1977 study drawn from the police department report.

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 ****1735** effect that a concentration of establishments--not a concentration of operations within a single establishment--had on crime rates. 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. 222 F.3d, at 724.

[2] The Court of Appeals misunderstood the implications of the 1977 study. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, areas with high concentrations of adult establishments are also areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the findings of the 1977 study, and thus reasonable, for Los Angeles to suppose that a concentration of adult establishments is 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. The assumption behind this theory is that having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity, much as minimalls and department stores similarly attract the crowds of consumers. Brief for Petitioner 28. Under this view, it is 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, will reduce crime rates.

***437** Neither the Court of Appeals, nor respondents, nor the dissent provides any reason to question the city's theory. 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. 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.

The error that the Court of Appeals made is that it required the city to prove that its theory about a concentration of adult operations attracting crowds of customers, much like a minimall or department store does, is a necessary consequence of the 1977 study. For example, the Court of Appeals refused to allow the city to draw the inference that "the expansion of an adult bookstore to include an adult arcade would increase" business activity and "produce the harmful secondary effects identified in the Study." 222 F.3d, at 726. It reasoned that such an inference would justify limits on the inventory of an adult bookstore, not a ban on the combination of an adult bookstore and an adult arcade. The Court of Appeals simply replaced the city's theory--that having many different operations in close proximity attracts crowds--with its own--that the size of an operation attracts crowds. If the Court of Appeals' theory is correct, then inventory limits make more sense. If the city's theory is correct, then a prohibition on the combination of businesses makes more sense. Both theories are consistent with the data in the 1977 study. The Court of Appeals' analysis, however, implicitly requires the city to prove that its theory is the only one that can plausibly explain the data ***438** because only in this manner can the city refute the Court of Appeals' logic.

Respondents make the same logical error as the Court of Appeals when they suggest that the city's prohibition on multiuse establishments will raise crime rates in certain neighborhoods because it will ****1736** force certain adult businesses to relocate to areas without any other adult businesses. Respondents' claim assumes that the 1977 study proves that all adult businesses, whether or not they are located near other adult businesses, generate crime. This is a plausible reading of the results from the 1977 study, but respondents do not demonstrate that it is a compelled reading. Nor do they provide evidence that refutes the city's interpretation of the study, under which the city's prohibition should on balance reduce crime. If this Court were nevertheless to accept respondents' speculation, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government in-

terest, but also does not provide support for any other approach to serve that interest.

In *Renton,* we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that 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. 475 U.S., at 51- 52, 106 S.Ct. 925; see also, *e.g., Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (SOUTER, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects). This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's ***439** 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. See, *e.g., Erie v. Pap's A.M.,* 529 U.S. 277, 298, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study fails to prove that the city's justification for its ordinance is necessarily correct. Therefore, we conclude that the city, at this stage of the litigation, has complied with the evidentiary requirement in *Renton.*

Justice SOUTER faults the city for relying on the 1977 study not because the study fails to support the city's theory that adult department stores, like adult minimalls, attract customers and thus crime, but because the city does not demonstrate that freestanding single-use adult establishments reduce crime. See *post,* at 1747-1749 (dissenting opinion). In effect, Justice SOUTER asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary. See, *e.g., Barnes, supra,* at 583-584, 111 S.Ct. 2456 (SOUTER, J., concurring in judgment). Such a requirement would go too far in undermining our settled position that municipalities must be given a " 'reasonable opportunity to experiment with solutions' " to address the secondary effects of protected speech. *Renton, supra,* at 52, 106 S.Ct. 925 (quoting *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion)). A municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because ***440** the solution would, by definition, not have been implemented previously. The city's ordinance banning multiple-****1737** use adult establishments is such a solution. Respondents contend that there are no adult video arcades in Los Angeles County that operate independently of adult bookstores. See Brief for Respondents 41. But without such arcades, the city does not have a treatment group to compare with the control group of multiple-use adult establishments, and without such a comparison Justice SOUTER would strike down the city's ordinance. This leaves the city with no means to address the secondary effects with which it is concerned.

Our deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests. On the one hand, we have an "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 666, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (plurality opinion); see also *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843-844, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). On the other hand, we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems. See *Turner, supra,* at 665-666, 114 S.Ct. 2445; *Erie, supra,* at 297-298, 120 S.Ct. 1382 (plurality opinion). We are also guided by the fact that *Renton* requires that mu-

nicipal ordinances receive only intermediate scrutiny if they are content neutral. 475 U.S., at 48-50, 106 S.Ct. 925. There is less reason to be concerned that municipalities will use these ordinances to discriminate against unpopular speech. See *Erie, supra*, at 298-299, 120 S.Ct. 1382.

Justice SOUTER would have us rethink this balance, and indeed the entire *Renton* framework. In *Renton*, the Court distinguished the inquiry into whether a municipal ordinance is content neutral from the inquiry into whether it is "designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." 475 U.S., at 47- 54, 106 S.Ct. 925. The former requires courts to verify that the "predominate concerns" motivating the ***441** ordinance "were with the secondary effects of adult [speech], and not with the content of adult [speech]." *Id.*, at 47, 106 S.Ct. 925 (emphasis deleted) The latter inquiry goes one step further and asks whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. Only at this stage did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects. *Id.*, at 50-52, 106 S.Ct. 925. Justice SOUTER would either merge these two inquiries or move the evidentiary analysis into the inquiry on content neutrality, and raise the evidentiary bar that a municipality must pass. His logic is that verifying that the ordinance actually reduces the secondary effects asserted would ensure that zoning regulations are not merely content-based regulations in disguise. See *post*, at 1746.

We think this proposal unwise. First, none of the parties request the Court to depart from the *Renton* framework. Nor is the proposal fairly encompassed in the question presented, which focuses on the sorts of evidence upon which the city may rely to demonstrate that its ordinance is designed to serve a substantial governmental interest. Pet. for Cert. i. Second, there is no evidence suggesting that courts have difficulty determining whether municipal ordinances are motivated primarily by the content of adult speech or by its secondary effects without looking to evidence connecting such speech to the asserted secondary effects. In this case, the Court of Appeals has not yet had an opportunity to address the issue, having assumed for the sake of argument that the city's ordinance is content neutral. 222 F.3d, at 723. It would be inappropriate for this Court to reach the question of content neutrality before permitting the lower court to pass upon it. Finally, Justice SOUTER does ****1738** not clarify the sort of evidence upon which municipalities may rely to meet the evidentiary burden he would require. It is easy to say that courts must demand evidence ***442** when "common experience" or "common assumptions" are incorrect, see *post*, at 1747, but it is difficult for courts to know ahead of time whether that condition is met. Municipalities will, in general, have greater experience with and understanding of the secondary effects that follow certain protected speech than will the courts. See *Erie*, 529 U.S., at 297-298, 120 S.Ct. 1382 (plurality opinion). For this reason our cases require only that municipalities rely upon evidence that is " 'reasonably believed to be relevant' " to the secondary effects that they seek to address. *Id.*, at 296.

III

The city of Los Angeles argues that its prohibition on multiuse establishments draws further support from a study of the poor health conditions in adult video arcades described in *Hart Book Stores*, a case that upheld a North Carolina ordinance similar to that challenged here. See 612 F.2d, at 828-829, n. 9. Respondents argue that the city cannot rely on evidence from *Hart Book Stores* because the city cannot prove it examined that evidence before it enacted the current version of § 12.70(C). Brief for Respondents 21. Respondents note, moreover, that unsanitary conditions in adult video arcades would persist regardless of whether arcades were operated in the same buildings as, say, adult bookstores. *Ibid.*

We do not, however, need to resolve the parties' dispute over evidence cited in *Hart Book Stores*. Unlike the city of Renton, the city of Los Angeles conducted its own study of adult businesses. We have concluded that the Los Angeles study provides evidence to support the city's theory that a concentration of adult operations in one locale attracts crime, and can be reasonably relied upon to demonstrate that Los Angeles Municipal Code § 12.70(C) (1983) is designed to promote the city's interest in reducing crime. There-

fore, the city need not present foreign studies to overcome the summary judgment against it.

***443** Before concluding, it should be noted that respondents argue, as an alternative basis to sustain the Court of Appeals' judgment, that the Los Angeles ordinance is not a typical zoning regulation. Rather, respondents explain, the prohibition on multiuse adult establishments is effectively a ban on adult video arcades because no such business exists independently of an adult bookstore. Brief for Respondents 12-13. Respondents request that the Court hold that the Los Angeles ordinance is not a time, place, and manner regulation, and that the Court subject the ordinance to strict scrutiny. This also appears to be the theme of Justice KENNEDY's concurrence. He contends that "[a] city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Post*, at 1742 (opinion concurring in judgment). We consider that unobjectionable proposition as simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban. The Court of Appeals held, however, that the city's prohibition on the combination of adult bookstores and arcades is not a ban and respondents did not petition for review of that determination.

Accordingly, we reverse the Court of Appeals' judgment granting summary judgment to respondents and remand the case for further proceedings.

It is so ordered.

Justice SCALIA, concurring.

I join the plurality opinion because I think it represents a correct application of our jurisprudence concerning regulation of the "secondary effects" of pornographic speech. As I have said elsewhere, however, in a case such as this our First Amendment ****1739** traditions make "secondary effects" analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering ***444** sex. See, *e.g.*, *Erie v. Pap's A.M.*, 529 U.S. 277, 310, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (SCALIA, J., concurring in judgment); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 256-261, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (SCALIA, J., concurring in part and dissenting in part).

Justice KENNEDY, concurring in the judgment.

Speech can produce tangible consequences. It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech. Speech can also cause secondary effects, however, unrelated to the impact of the speech on its audience. A newspaper factory may cause pollution, and a billboard may obstruct a view. These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.

Municipal governments 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. 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. A city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion).

The question in this case is whether Los Angeles can seek to reduce these tangible, adverse consequences by separating adult speech businesses from one another--even two businesses that have always been under the same roof. In my view our precedents may allow the city to impose its regulation in the exercise of the zoning authority. The city is not, at least, to be foreclosed by summary judgment, so I concur in the judgment.

This separate statement seems to me necessary, however, for two reasons. First, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), described a similar ordinance as "content neutral," and I agree with the dissent that the designation ***445** is imprecise. Second, in my view, the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur.

I

In *Renton*, the Court determined that 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. If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection. This is so even if the measure identifies the problem outside by reference to the speech inside--that is, even if the measure is in that sense content based.

On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax. See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) ("[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press"). This is true even if the government purports to justify the fee by reference to secondary effects. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-135, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible ****1740** strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.

A zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech. It is well documented that multiple adult businesses in close proximity may change the character of a neighborhood ***446** for the worse. Those same businesses spread across the city may not have the same deleterious effects. At least in theory, a dispersal ordinance causes these businesses to separate rather than to close, so negative externalities are diminished but speech is not.

The calculus is a familiar one to city planners, for many enterprises other than adult businesses also cause undesirable externalities. Factories, for example, may cause pollution, so a city may seek to reduce the cost of that externality by restricting factories to areas far from residential neighborhoods. With careful urban planning a city in this way may reduce the costs of pollution for communities, while at the same time allowing the productive work of the factories to continue. The challenge is to protect the activity inside while controlling side effects outside.

Such an ordinance might, like a speech restriction, be "content based." It might, for example, single out slaughterhouses for specific zoning treatment, restricting them to a particularly remote part of town. Without knowing more, however, one would hardly presume that because the ordinance is specific to that business, the city seeks to discriminate against it or help a favored group. One would presume, rather, that the ordinance targets not the business but its particular noxious side effects. But cf. *Slaughter-House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1872). The business might well be the city's most valued enterprise; nevertheless, because of the pollution it causes, it may warrant special zoning treatment. This sort of singling out is not impermissible content discrimination; it is sensible urban planning. Cf. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303 (1926) ("A nuisance may be merely a right thing in the wrong place,-- like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

***447** True, the First Amendment protects speech and not slaughterhouses. But in both contexts, the inference of impermissible discrimination is not strong. An equally strong inference is that the ordinance is targeted not at the activity, but at its side effects. If a zoning ordinance is directed to the secondary effects of adult speech, the ordinance does not necessarily constitute impermissible content discrimination. A zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it.

The ordinance at issue in this case is not limited to expressive activities. It also extends, for example, to massage parlors, which the city has found to cause

similar secondary effects. See Los Angeles Municipal Code §§ 12.70(B)(8) (1978), 12.70(B)(17) (1983), 12.70(C) (1986), as amended. This ordinance, moreover, is just one part of an elaborate web of land-use regulations in Los Angeles, all of which are intended to promote the social value of the land as a whole without suppressing some activities or favoring others. See § 12.02 ("The purpose of this article is to consolidate and coordinate all existing zoning regulations and provisions into one comprehensive zoning plan ... in order to encourage the most appropriate use of land ... and to promote the health, safety, and the general welfare ..."). All this further suggests that the ordinance is more in the nature of a typical land-use restriction and less in the nature of a law suppressing speech.

****1741** For these reasons, the ordinance is not so suspect that we must employ the usual rigorous analysis that content-based laws demand in other instances. The ordinance may be a covert attack on speech, but we should not presume it to be so. In the language of our First Amendment doctrine it calls for intermediate and not strict scrutiny, as we held in *Renton.*

***448** II

In *Renton,* the Court began by noting that a zoning ordinance is a time, place, or manner restriction. The Court then proceeded to consider the question whether the ordinance was "content based." The ordinance "by its terms [was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views." 475 U.S., at 48, 106 S.Ct. 925 (internal quotation marks omitted). On this premise, the Court designated the restriction "content neutral." *Ibid.*

The Court appeared to recognize, however, that the designation was something of a fiction, which, perhaps, is why it kept the phrase in quotes. After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based. And the ordinance in *Renton* "treat[ed] theaters that specialize in adult films differently from other kinds of theaters." *Id.*, at 47, 106 S.Ct. 925. The fiction that this sort of ordinance is content neutral--or "content neutral"--is perhaps more confusing than helpful, as Justice SOUTER demonstrates, see *post*, at 1745 (dissenting opinion). It is also not a fiction that has commanded our consistent adherence. See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322, and n. 2, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) (suggesting that a licensing scheme targeting only those businesses purveying sexually explicit speech is not content neutral). These ordinances are content based, and we should call them so.

Nevertheless, for the reasons discussed above, the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny. Generally, the government has no power to restrict speech based on content, but there are exceptions to the rule. See ***449***Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 126-127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring in judgment). And zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.

III

The narrow question presented in this case is whether the ordinance at issue is invalid "because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions." Pet. for Cert. i. This question is actually two questions. First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition? The plurality skips to the second question and gives the correct answer; but in

my view more attention must be given to the first.

****1742** At the outset, we must identify the claim a city must make in order to justify a content-based zoning ordinance. As discussed above, a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with Justice SOUTER. See *post,* at 1746. The rationale of ***450** the ordinance must be that it will suppress secondary effects--and not by suppressing speech.

The plurality's statement of the proposition to be supported is somewhat different. It suggests that Los Angeles could reason as follows: (1) "a concentration of operations in one locale draws ... a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity"; (2) "having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity"; (3) "reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates." *Ante,* at 1735.

These propositions all seem reasonable, and the inferences required to get from one to the next are sensible. Nevertheless, this syllogism fails to capture an important part of the inquiry. The plurality's analysis does not address how speech will fare under the city's ordinance. As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects. This reasoning would as easily justify a content-based tax: Increased prices will reduce demand, and fewer customers will mean fewer secondary effects. But a content-based tax may not be justified in this manner. See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). 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.

The analysis requires a few more steps. If two adult businesses are under the same roof, an ordinance requiring them ***451** to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional reduction does not suffice. Content-based taxes could achieve that, yet these are impermissible.

The premise, therefore, must be that businesses--even those that have always been under one roof--will for the most part disperse rather than shut down. True, this premise has its own conundrum. As Justice SOUTER writes, "[t]he city ... claims no interest in the proliferation of adult establishments." *Post,* at 1748. The claim, therefore, must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. This must be the rationale of a dispersal statute.

Only after identifying the proposition to be proved can we ask the second part of the question presented: is there sufficient evidence to support the proposition? As to this, we have consistently held that a city must have latitude to experiment, at ****1743** least at the outset, and that very little evidence is required. See, *e.g.*, *Renton*, 475 U.S., at 51-52, 106 S.Ct. 925 ("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"); *Young*, 427 U.S., at 71, 96 S.Ct. 2440 ("[T]he city must be allowed a reasonable opportunity to experi-

ment with solutions to admittedly serious problems"); *Erie v. Pap's A.M.*, 529 U.S. 277, 300-301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. See *Renton, supra*, at 51-52, 106 S.Ct. 925. The Los Angeles City Council ***452** knows the streets of Los Angeles better than we do. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665- 666, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); *Erie, supra*, at 297-298, 120 S.Ct. 1382 (plurality opinion). It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion.

In this case the proposition to be shown is supported by a single study and common experience. The city's study shows a correlation between the concentration of adult establishments and crime. Two or more adult businesses in close proximity seem to attract a critical mass of unsavory characters, and the crime rate may increase as a result. The city, therefore, sought to disperse these businesses. Los Angeles Municipal Code § 12.70(C) (1983), as amended. This original ordinance is not challenged here, and we may assume that it is constitutional.

If we assume that the study supports the original ordinance, then most of the necessary analysis follows. 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.) On the other hand, the reduction in secondary effects might be dramatic, because secondary effects may require a critical mass. Depending 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. If so, a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech. Indeed, the very absence of secondary effects might increase the audience for the speech; perhaps for every two people who are discouraged by the inconvenience of two-stop shopping, another two are encouraged by hospitable surroundings. In that case, secondary effects might be eliminated at no cost to ***453** speech whatsoever, and both the city and the speaker will have their interests well served.

Only one small step remains to justify the ordinance at issue in this case. The city may next infer--from its study and from its own experience-- that two adult businesses under the same roof are no better than two next door. 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. If the city's first ordinance was justified, therefore, then the second is too. Dispersing two adult businesses under one roof is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little.

IV

These propositions are well established in common experience and in zoning policies that we have already examined, and for these reasons this ordinance is not invalid on its face. If these assumptions ****1744** can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny. The ordinance does, however, survive the summary judgment motion that the Court of Appeals ordered granted in this case.

Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, and with whom Justice BREYER joins as to Part II, dissenting.

In 1977, the city of Los Angeles studied sections of the city with high and low concentrations of adult business establishments catering to the market for the erotic. The city found no certain correlation between the location of those establishments and depressed property values, but it did find some correlation between areas of higher concentrations of such business and higher crime rates. On that basis, Los Angeles followed the examples of other cities in adopting a zoning ordinance requiring dispersion of adult ***454** establishments. I assume that the ordinance was constitutional when adopted, see, *e.g.*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and assume for purposes of this case that the original ordinance remains valid today. [FN1]

FN1. Although *amicus* First Amendment Lawyers Association argues that recent studies refute the findings of adult business correlations with secondary effects sufficient to justify such an ordinance, Brief for First Amendment Lawyers Association as *Amicus Curiae* 21-23, the issue is one I do not reach.

The city subsequently amended its ordinance to forbid clusters of such businesses at one address, as in a mall. The city has, in turn, taken a third step to apply this amendment to prohibit even a single proprietor from doing business in a traditional way that combines an adult bookstore, selling books, magazines, and videos, with an adult arcade, consisting of open viewing booths, where potential purchasers of videos can view them for a fee.

From a policy of dispersing adult establishments, the city has thus moved to a policy of dividing them in two. The justification claimed for this application of the new policy remains, however, the 1977 survey, as supplemented by the authority of one decided case on regulating adult arcades in another State. The case authority is not on point, see *infra*, at 1748, n. 4, and the 1977 survey provides no support for the breakup policy. Its evidentiary insufficiency bears emphasis and is the principal reason that I respectfully dissent from the Court's judgment today.

I

This ordinance stands or falls on the results of what our cases speak of as intermediate scrutiny, generally contrasted with the demanding standard applied under the First Amendment to a content-based regulation of expression. The variants of middle-tier tests cover a grab bag of restrictive statutes, with a corresponding variety of justifications. ***455** While spoken of as content neutral, these regulations are not uniformly distinct from the content-based regulations calling for scrutiny that is strict, and zoning of businesses based on their sales of expressive adult material receives mid-level scrutiny, even though it raises a risk of content-based restriction. It is worth being clear, then, on how close to a content basis adult business zoning can get, and why the application of a middle-tier standard to zoning regulation of adult bookstores calls for particular care.

Because content-based regulation applies to expression by very reason of what is said, it carries a high risk that expressive limits are imposed for the sake of suppressing a message that is disagreeable to listeners or readers, or the government. See *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 536, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) ("[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure ****1745** that communication has not been prohibited merely because public officials disapprove the speaker's views" (internal quotation marks omitted)). A restriction based on content survives only on a showing of necessity to serve a legitimate and compelling governmental interest, combined with least restrictive narrow tailoring to serve it, see *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); since merely protecting listeners from offense at the message is not a legitimate interest of the government, see *Cohen v. California*, 403 U.S. 15, 24-25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), strict scrutiny leaves few survivors.

The comparatively softer intermediate scrutiny is reserved for regulations justified by something other than content of the message, such as a straightforward restriction going only to the time, place, or manner of speech or other expression. It is easy to see why review of such a regulation may be relatively relaxed. No one has to disagree with any message to find something wrong with a loudspeaker at three in the morning, see ***456***Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949); the sentiment may not provoke, but being blasted out of a sound sleep does. In such a case, we ask simply whether the regulation is "narrowly tailored to serve a significant governmental interest, and ... leave[s] open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). A middle-tier standard is also applied to limits on expression through action that is otherwise subject to regulation for nonexpressive purposes, the best known example being the prohibition on destroying draft cards as an act of protest, *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct.

1673, 20 L.Ed.2d 672 (1968); here a regulation passes muster "if it furthers an important or substantial governmental interest ... unrelated to the suppression of free expression" by a restriction "no greater than is essential to the furtherance of that interest," *id.*, at 377, 88 S.Ct. 1673. As mentioned already, yet another middle-tier variety is zoning restriction as a means of responding to the "secondary effects" of adult businesses, principally crime and declining property values in the neighborhood. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). [FN2]

> FN2. Limiting such effects qualifies as a substantial governmental interest, and an ordinance has been said to survive if it is shown to serve such ends without unreasonably limiting alternatives. *Renton*, 475 U.S., at 50, 106 S.Ct. 925. Because *Renton* called its secondary-effects ordinance a mere time, place, or manner restriction and thereby glossed over the role of content in secondary-effects zoning, see *infra*, at 1745, I believe the soft focus of its statement of the middle-tier test should be rejected in favor of the *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), formulation quoted above. *O'Brien* is a closer relative of secondary-effects zoning than mere time, place, or manner regulations, as the Court has implicitly recognized. *Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion).

Although this type of land-use restriction has even been called a variety of time, place, or manner regulation, *id.*, at 46, 106 S.Ct. 925, equating a secondary-effects zoning regulation with a mere regulation of time, place, or manner jumps over an important difference between them. A restriction on loudspeakers has no obvious relationship to the substance of ***457** what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does. And while it may be true that an adult business is burdened only because of its secondary effects, it is clearly burdened only if its expressive products have adult content. Thus, the Court has recognized that this kind of regulation, though called content neutral, occupies a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said. *Id.*, at 47, 106 S.Ct. 925.

****1746** It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it content correlated, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses. The risk lies in the fact that when a law applies selectively only to speech of particular content, the more precisely the content is identified, the greater is the opportunity for government censorship. Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove.

This risk of viewpoint discrimination is subject to a relatively simple safeguard, however. If combating secondary effects of property devaluation and crime is truly the reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one area), without suppressing the expressive activity itself. This capacity of zoning regulation to address the practical problems without eliminating the speech is, after all, the only possible excuse for speaking of secondary-effects zoning as akin to time, place, or manner regulations.

***458** In examining claims that there are causal relationships between adult businesses and an increase in secondary effects (distinct from disagreement), and between zoning and the mitigation of the effects, stress needs to be placed on the empirical character of the demonstration available. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 510, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("[J]udgments ... defying objective evaluation ... must be carefully scrutinized to determine if they are only a public rationalization of an

impermissible purpose"); *Young*, 427 U.S., at 84, 96 S.Ct. 2440 (Powell, J., concurring) ("[C]ourts must be alert ... to the possibility of using the power to zone as a pretext for suppressing expression"). 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. [FN3]

> FN3. Regulation of commercial speech, which is like secondary-effects zoning in being subject to an intermediate level of First Amendment scrutiny, see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 569, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), provides an instructive parallel in the cases enforcing an evidentiary requirement to ensure that an asserted rationale does not cloak an illegitimate governmental motive. See, *e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995); *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). The government's "burden is not satisfied by mere speculation or conjecture," but only by "demonstrat[ing] that the harms [the government] recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*, at 770-771, 113 S.Ct. 1792. For unless this "critical" requirement is met, *Rubin*, *supra*, at 487, 115 S.Ct. 1585, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression," *Edenfield*, *supra*, at 771, 113 S.Ct. 1792.

Equal stress should be placed on the point that requiring empirical justification of claims about property value or crime is not demanding anything Herculean. Increased crime, like prostitution and muggings, and declining property values in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of market ***459** value, all of which are within a municipality's capacity or available from the distilled experiences of comparable communities. See, *e.g.*, *****1747***Renton, *supra*, at 51, 106 S.Ct. 925; *Young*, *supra*, at 55, 96 S.Ct. 2440.

And precisely because this sort of evidence is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction. It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it. We have appealed to common sense in analogous cases, even if we have disagreed about how far it took us. See *Erie v. Pap's A.M.*, 529 U.S. 277, 300-301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion); *id.*, at 313, and n. 2, 120 S.Ct. 1382 (SOUTER, J., concurring in part and dissenting in part). But we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics and municipal property valuations, lest we find out when the evidence is gathered that the assumptions are highly debatable. The record in this very case makes the point. It has become a commonplace, based on our own cases, that concentrating adult establishments drives down the value of neighboring property used for other purposes. See *Renton*, 475 U.S., at 51, 106 S.Ct. 925; *Young*, *supra*, at 55, 96 S.Ct. 2440. In fact, however, the city found that general assumption unjustified by its 1977 study. App. 39, 45.

The lesson is that the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government's failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration. See, *e.g.*, *Schad v. Mount Ephraim*, 452 U.S. 61, 72-74, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). In this case, however, the government has not shown that bookstores containing viewing booths, isolated from other adult establishments, increase ***460** crime or produce other negative secondary effects in surrounding neighborhoods, and we are thus left without substantial justification for viewing the city's First Amendment restriction as content correlated but not

simply content based. By the same token, the city has failed to show any causal relationship between the breakup policy and elimination or regulation of secondary effects.

II

Our cases on the subject have referred to studies, undertaken with varying degrees of formality, showing the geographical correlations between the presence or concentration of adult business establishments and enhanced crime rates or depressed property values. See, *e.g.*, *Renton, supra*, at 50-51, 106 S.Ct. 925; *Young*, 427 U.S., at 55, 96 S.Ct. 2440. Although we have held that intermediate scrutiny of secondary-effects legislation does not demand a fresh evidentiary study of its factual basis if the published results of investigations elsewhere are "reasonably" thought to be applicable in a different municipal setting, *Renton, supra*, at 51-52, 106 S.Ct. 925, the city here took responsibility to make its own enquiry, App. 35-162. As already mentioned, the study was inconclusive as to any correlation between adult business and lower property values, *id.*, at 45, 106 S.Ct. 925, and it reported no association between higher crime rates and any isolated adult establishments. But it did find a geographical correlation of higher concentrations of adult establishments with higher crime rates, *id.*, at 43, 106 S.Ct. 925, and with this study in hand, Los Angeles enacted its 1978 ordinance requiring dispersion of adult stores and theaters. This original position of the ordinance is not challenged today, and I will assume its justification on the theory accepted in *Young*, that eliminating concentrations of adult establishments will spread out the documented secondary effects and render them more manageable that way.

****1748** The application of the 1983 amendment now before us is, however, a different matter. My concern is not with the ***461** assumption behind the amendment itself, that a conglomeration of adult businesses under one roof, as in a minimall or adult department store, will produce undesirable secondary effects comparable to what a cluster of separate adult establishments brings about, *ante*, at 1735. That may or may not be so. The assumption that is clearly unsupported, however, goes to the city's supposed interest in applying the amendment to the book and video stores in question, and in applying it to break them up. The city, of course, claims no interest in the proliferation of adult establishments, the ostensible consequence of splitting the sales and viewing activities so as to produce two stores where once there was one. Nor does the city assert any interest in limiting the sale of adult expressive material as such, or reducing the number of adult video booths in the city, for that would be clear content-based regulation, and the city was careful in its 1977 report to disclaim any such intent. App. 54. [FN4]

FN4. Finally, the city does not assert an interest in curbing any secondary effects within the combined bookstore-arcades. In *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (1979), the Fourth Circuit upheld a similar ban in North Carolina, relying in part on a county health department report on the results of an inspection of several of the combined adult bookstore-video arcades in Wake County, North Carolina. *Id.*, at 828-829, n. 9. The inspection revealed unsanitary conditions and evidence of salacious activities taking place within the video cubicles. *Ibid.* The city introduces this case to defend its breakup policy although it is not clear from the opinion how separating these video arcades from the adult bookstores would deter the activities that took place within them. In any event, while *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), allowed a city to rely on the experiences and studies of other cities, it did not dispense with the requirement that "whatever evidence the city relies upon [be] reasonably believed to be relevant to the problem that the city addresses," *id.*, at 51-52, 106 S.Ct. 925, and the evidence relied upon by the Fourth Circuit is certainly not necessarily relevant to the Los Angeles ordinance. Since November 1977, five years before the enactment of the ordinance at issue, Los Angeles has regulated adult video booths, prohibiting doors, setting minimum levels of lighting, and requiring that their interiors be fully visible from the entrance to the premises. Los

Angeles Municipal Code §§ 103.101(i), (j). Thus, it seems less likely that the unsanitary conditions identified in *Hart Book Stores* would exist in video arcades in Los Angeles, and the city has suggested no evidence that they do. For that reason, *Hart Book Stores* gives no indication of a substantial governmental interest that the ban on multiuse adult establishments would further.

***462** Rather, the city apparently assumes that a bookstore selling videos and providing viewing booths produces 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. [FN5] But the city neither says this in so many words nor proffers any evidence to support even the simple proposition that an otherwise lawfully located adult bookstore combined with video booths will produce any criminal effects. The Los Angeles study treats such combined stores as one, see *id.*, at 81-82, 96 S.Ct. 2440, and draws no general conclusion that individual stores spread apart from other adult establishments (as under the basic Los Angeles ordinance) are associated with any degree of criminal activity above the general norm; nor has the city called the Court's attention to any other empirical study, or even anecdotal police evidence, that supports the city's assumption. In fact, if the Los Angeles study sheds any light whatever on the city's position, it is the light of skepticism, for we may fairly suspect that the study said nothing about the secondary effects of ****1749** freestanding stores because no effects were observed. The reasonable supposition, then, is that splitting some of them up will have no consequence for secondary effects whatever. [FN6]

FN5. The plurality indulges the city's assumption but goes no further to justify it than stating what is obvious from what the city's study says about concentrations of adult establishments (but not isolated ones): the presence of several adult businesses in one neighborhood draws "a greater concentration of adult consumers to the neighborhood, [which] either attracts or generates criminal activity." *Ante*, at 1735.

FN6. In *Renton*, the Court approved a zoning ordinance "aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood." 475 U.S., at 50, 106 S.Ct. 925. The city, however, does not appeal to that decision to show that combined bookstore-arcades isolated from other adult establishments, like the theaters in *Renton*, give rise to negative secondary effects, perhaps recognizing that such a finding would only call into doubt the sensibility of the city's decision to proliferate such businesses. See *ante*, at 1736. Although the question may be open whether a city can rely on the experiences of other cities when they contradict its own studies, that question is not implicated here, as Los Angeles relies exclusively on its own study, which is tellingly silent on the question whether isolated adult establishments have any bearing on criminal activity.

***463** The inescapable point is that the city does not even claim that the 1977 study provides any support for its assumption. We have previously accepted studies, like the city's own study here, as showing a causal connection between concentrations of adult business and identified secondary effects. [FN7] Since that is an acceptable basis for requiring adult businesses to disperse when they are housed in separate premises, there is certainly a relevant argument to be made that restricting their concentration at one spacious address should have some effect on sales and traffic, and effects in the neighborhood. But even if that argument may justify a ban on adult "minimalls," *ante*, at 1735, it provides no support for what the city proposes to do here. The bookstores involved here are not concentrations of traditionally separate adult businesses that have been studied and shown to have an association with secondary effects, and they exemplify no new form of concentration like a mall under one roof. They are combinations of selling and viewing activities that have commonly been combined, and the plurality itself recognizes, *ante*, at 1736, that no study conducted by the city has reported that this type of traditional business, any more than any other adult business, has a correlation with

secondary effects ***464** in the absence of concentration with other adult establishments in the neighborhood. And even if splitting viewing booths from the bookstores that continue to sell videos were to turn some customers away (or send them in search of video arcades in other neighborhoods), it is nothing but speculation to think that marginally lower traffic to one store would have any measurable effect on the neighborhood, let alone an effect on associated crime that has never been shown to exist in the first place. [FN8]

FN7. As already noted, n. 1, *supra*, *amicus* First Amendment Lawyers Association argues that more recent studies show no such thing, but this case involves no such challenge to the previously accepted causal connection.

FN8. Justice KENNEDY would indulge the city in this speculation, so long as it could show that the ordinance will "leav[e] the quantity and accessibility of speech substantially intact." *Ante*, at 1742 (opinion concurring in judgment). But the suggestion that the speculated consequences may justify content-correlated regulation if speech is only slightly burdened turns intermediate scrutiny on its head. Although the goal of intermediate scrutiny is to filter out laws that unduly burden speech, this is achieved by examining the asserted governmental interest, not the burden on speech, which must simply be no greater than necessary to further that interest. *Erie*, 529 U.S., at 301, 120 S.Ct. 1382; see also n. 2, *supra*. Nor has Justice KENNEDY even shown that this ordinance leaves speech "substantially intact." He posits an example in which two adult stores draw 100 customers, and each business operating separately draws 49. *Ante*, at 1743. It does not follow, however, that a combined bookstore-arcade that draws 100 customers, when split, will yield a bookstore and arcade that together draw nearly that many customers. Given the now double outlays required to operate the businesses at different locations, see *infra*, at 1751, the far more likely outcome is that the stand-alone video store will go out of business. (Of course, the bookstore owner could, consistently with the ordinance, continue to operate video booths at no charge, but if this were always commercially feasible then the city would face the separate problem that under no theory could a rule simply requiring that video booths be operated for free be said to reduce secondary effects.)

****1750** Nor is the plurality's position bolstered, as it seems to think, *ante*, at 1736, by relying on the statement in *Renton* that courts should allow cities a " 'reasonable opportunity to experiment with solutions to admittedly serious problems,' " 475 U.S., at 52, 106 S.Ct. 925. The plurality overlooks a key distinction between the zoning regulations at issue in *Renton* and ***465** *Young* (and in Los Angeles as of 1978), and this new Los Angeles breakup requirement. In those two cases, the municipalities' substantial interest for purposes of intermediate scrutiny was an interest in choosing between two strategies to deal with crime or property value, each strategy tied to the businesses' location, which had been shown to have a causal connection with the secondary effects: the municipality could either concentrate businesses for a concentrated regulatory strategy, or disperse them in order to spread out its regulatory efforts. The limitations on location required no further support than the factual basis tying location to secondary effects; 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, and no heavier burden than the location limit was approved by this Court.

The Los Angeles ordinance, however, does impose a heavier burden, and one lacking any demonstrable connection to the interest in crime control. The city no longer accepts businesses as their owners choose to conduct them within their own four walls, but bars a video arcade in a bookstore, a combination shown by the record to be commercially natural, if not universal. App. 47-51, 229-230, 242. Whereas *Young* and *Renton* gave cities the choice between two strategies when each was causally related to the city's interest, the plurality today gives Los Angeles a right

to "experiment" with a First Amendment restriction in response to a problem of increased crime that the city has never even shown to be associated with combined bookstore-arcades standing alone. But the government's freedom of experimentation cannot displace its burden under the intermediate scrutiny standard to show that the restriction on speech is no greater than essential to realizing an important objective, in this case policing crime. Since we cannot make even a best guess that the city's breakup policy will have any effect on crime ***466** or law enforcement, we are a very far cry from any assurance against covert content-based regulation. [FN9]

> FN9. The plurality's assumption that the city's "motive" in applying secondary-effects zoning can be entirely compartmentalized from the proffer of evidence required to justify the zoning scheme, *ante*, at 1737, is indulgent to an unrealistic degree, as the record in this case shows. When the original dispersion ordinance was enacted in 1978, the city's study showing a correlation between concentrations of adult business and higher crime rates showed that the dispersal of adult businesses was causally related to the city's law enforcement interest, and that in turn was a fair indication that the city's concern was with the secondary effect of higher crime rates. When, however, the city takes the further step of breaking up businesses with no showing that a traditionally combined business has any association with a higher crime rate that could be affected by the breakup, there is no indication that the breakup policy addresses a secondary effect, but there is reason to doubt that secondary effects are the city's concern. 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, *ante*, at 1736, 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.

And concern with content-based regulation targeting a viewpoint is right to the point here, as witness a fact that involves no guesswork. If we take the city's breakup policy at its face, enforcing it will mean that in every case two establishments will operate instead of the traditional one. Since the city presumably does not wish ****1751** merely to multiply adult establishments, it makes sense to ask what offsetting gain the city may obtain from its new breakup policy. The answer may lie in the fact that two establishments in place of one will entail two business overheads in place of one: two monthly rents, two electricity bills, two payrolls. Every month business will be more expensive than it used to be, perhaps even twice as much. That sounds like a good strategy for driving out expressive adult businesses. It sounds, in other words, like a policy of content-based regulation.

I respectfully dissent.

535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670, 70 USLW 4369, 30 Media L. Rep. 1769, 02 Cal. Daily Op. Serv. 4067, 2002 Daily Journal D.A.R. 5167, 15 Fla. L. Weekly Fed. S 267

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- 2001 WL 1104728 (Appellate Brief) PETITIONER'S REPLY BRIEF (Sep. 18, 2001)
- 2001 WL 1575796 (Appellate Brief) RESPONDENTS' BRIEF ON THE MERITS (Aug. 17, 2001)
- 2001 WL 950922 (Appellate Brief) BRIEF AMICUS CURIAE OF THE DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENTS (Aug. 17, 2001)
- 2001 WL 950921 (Appellate Brief) BRIEF AND APPENDIX OF THE FIRST AMENDMENT LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE (Aug. 16, 2001)
- 2001 WL 965537 (Appellate Brief) BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, FEMINISTS FOR FREE EXPRESSION, FREEDOM TO READ FOUNDA-

TION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, PUBLISHERS MARKETING ASSOCIATION, and VIDEO SOFTWARE DEALERS ASSOCIATION AS AM ICI CURIAE IN SUPPORT OF RESPONDENTS (Aug. 15, 2001)

• 2001 WL 521453 (Appellate Brief) BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNM ENTS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONER (May. 15, 2001)

• 2001 WL 540507 (Appellate Brief) BRIEF OF OHIO AND 24 STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER (May. 15, 2001)

• 2001 WL 515060 (Appellate Brief) BRIEF OF AMICI CURIAE AMERICAN PLANNING ASSOCIATION AND COMMUNITY DEFENSE COUNSEL IN SUPPORT OF THE CITY OF LOS ANGELES (May. 14, 2001)

• 2001 WL 535665 (Appellate Brief) BRIEF FOR THE PETITIONER (May. 14, 2001)

• 2001 WL 515065 (Appellate Brief) BRIEF AMICUS CURIAE OF MORALITY IN MEDIA, INC. IN SUPPORT OF PETITIONER (May. 11, 2001)

• 2001 WL 34091983 (Appellate Petition, Motion and Filing) Brief of Capitol Resource Institute & Campaign for California Families as Amici Curiae in Support of Petitioner (May. 02, 2001)Original Image of this Document (PDF)

• 2001 WL 476080 (Appellate Brief) BRIEF OF CAPITOL RESOURCE INSTITUTE & CAMPAIGN FOR CALIFORNIA FAMILIES AS AMICI CURIAE IN SUPPORT OF PETITIONER (May. 02, 2001)

• 2001 WL 34091925 (Appellate Petition, Motion and Filing) Reply to Brief in Opposition (Jan. 17, 2001)Original Image of this Document (PDF)

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• 00-799 (Docket) (Nov. 17, 2000)

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529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265, 68 USLW 4239, 28 Media L. Rep. 1545, 00 Cal. Daily Op. Serv. 2443, 2000 Daily Journal D.A.R. 3255, 2000 CJ C.A.R. 1618, 13 Fla. L. Weekly Fed. S 203
(Cite as: 529 U.S. 277, 120 S.Ct. 1382)

Briefs and Other Related Documents

Supreme Court of the United States
CITY OF ERIE, et al., Petitioners,
v.
PAP'S A.M. tdba "Kandyland".
No. 98-1161.

Argued Nov. 10, 1999.
Decided March 29, 2000.

Operator of establishment featuring nude erotic dancing brought action challenging constitutionality of city's public indecency ordinance proscribing nudity in public places. The Court of Common Pleas, Erie County, Civil Division, No. 1994-60059, Shad Connelly, A.J., declared ordinance unconstitutional. On appeal, the Pennsylvania Commonwealth Court, 674 A.2d 338, Nos. 445 and 446 C.D. 1995, reversed. Operator appealed. The Pennsylvania Supreme Court, Nos. 016 and 017 W.D. Appeal Docket 1997, reversed. Certiorari was granted, and operator moved to dismiss case as moot. The Supreme Court, Justice O'Connor, held that: (1) case was not rendered moot by closing of the establishment; (2) ordinance was content-neutral regulation; and (3) ordinance satisfied *O'Brien* standard for restrictions on symbolic speech.

Reversed and remanded.

Justice Scalia concurred in judgment and filed opinion in which Justice Thomas joined.

Justice Souter concurred in part and dissented in part and filed opinion.

Justice Stevens dissented and filed opinion in which Justice Ginsburg joined.

West Headnotes

[1] Federal Courts 12.1
170Bk12.1 Most Cited Cases
Case is moot when issues presented are no longer "live" or parties lack legally cognizable interest in outcome.

[2] Constitutional Law 46(1)
92k46(1) Most Cited Cases
Suit by operator of establishment featuring nude erotic dancing, challenging constitutionality of city's public indecency ordinance proscribing nudity in public places was not rendered moot by closing of the establishment, since operator was still incorporated, and could have decided to again operate nude dancing establishment in city; "advanced age" of owner did not make it "absolutely clear" that life of quiet retirement was his only reasonable expectation, and city had ongoing injury because it was barred from enforcing ordinance.

[3] Constitutional Law 90.4(2)
92k90.4(2) Most Cited Cases

[3] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Being "in a state of nudity" is not inherently expressive condition, but erotic nude dancing is "expressive conduct," within outer ambit of First Amendment's protection. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 90.1(1)
92k90.1(1) Most Cited Cases
If governmental purpose in regulating expression is unrelated to suppression of expression, then regulation need only satisfy "less stringent" *O'Brien* standard for evaluating restrictions on symbolic speech, but if government interest is related to content of expression, regulation must be justified under more demanding standard. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment). U.S.C.A. Const.Amend. 1

[5] Constitutional Law 90.4(2)
92k90.4(2) Most Cited Cases
Government restrictions on public nudity should be evaluated under framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in

judgment). U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 90.4(2)
92k90.4(2) Most Cited Cases

[6] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Ordinance banning all public nudity, regardless of whether that nudity was accompanied by expressive activity, was content-neutral regulation and thus subject to "less stringent" *O'Brien* standard for evaluating restrictions on symbolic speech; ordinance was aimed at combating crime and other secondary effects caused by presence of adult entertainment establishments. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 70.3(2)
92k70.3(2) Most Cited Cases
Supreme Court will not strike down otherwise constitutional statute on basis of alleged illicit motive. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment).

[8] Constitutional Law 90.1(1)
92k90.1(1) Most Cited Cases
Under *O'Brien* standard for evaluating restrictions on symbolic speech, court inquires whether government regulation is within constitutional power of government to enact, whether regulation furthers important or substantial government interest, whether government interest is unrelated to suppression of free expression, and whether restriction is no greater than is essential to furtherance of the government interest. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 90.4(2)
92k90.4(2) Most Cited Cases

[9] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[9] Municipal Corporations 595
268k595 Most Cited Cases

[9] Obscenity 2.5
281k2.5 Most Cited Cases

[9] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
Ordinance proscribing nudity in public places satisfied *O'Brien* standard for restrictions on symbolic speech; city's efforts to protect public health and safety were clearly within its police powers, ordinance furthered city's interest in combating harmful secondary effects associated with nude dancing, government's interest was unrelated to suppression of free expression, and incidental impact on expressive element of nude dancing was de minimis. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
In demonstrating that secondary effects pose threat that justify regulation of nude dancing, city need not conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence city relies upon is reasonably believed to be relevant to problem that city addresses. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[11] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
Because nude dancing at establishment was of same character as adult entertainment at issue in prior Supreme Court opinions, it was reasonable for city to conclude that such nude dancing was likely to produce same secondary effects, and, to justify ordinance regulating nude dancing, city could reasonably rely on evidentiary foundation set forth in Supreme Court opinions to effect that secondary effects were caused by presence of even one adult entertainment establishment in given neighborhood; city was not required to develop specific evidentiary record supporting ordinance. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two

Justices concurring in judgment).

[12] Administrative Law and Procedure 459
15Ak459 Most Cited Cases
As long as party has opportunity to respond, administrative agency may take official notice of "legislative facts" within its special knowledge, and is not confined to evidence in record in reaching its expert judgment. (Per Justice O'Connor with two Justices and the Chief Justice concurring, and two Justices concurring in judgment).

****1384** *Syllabus [FN*]*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Erie, Pennsylvania, enacted an ordinance making it a summary offense to knowingly or intentionally appear in public in a "state of nudity." Respondent Pap's A.M. (hereinafter Pap's), a Pennsylvania corporation, operated "Kandyland," an Erie establishment featuring totally nude erotic dancing by women. To comply with the ordinance, these dancers had to wear, at a minimum, "pasties" and a "G-string." Pap's filed suit against Erie and city officials, seeking declaratory relief and a permanent injunction against the ordinance's enforcement. The Court of Common Pleas struck down the ordinance as unconstitutional, but the Commonwealth Court reversed. The Pennsylvania Supreme Court in turn reversed, finding that the ordinance's public nudity sections violated Pap's right to freedom of expression as protected by the First and Fourteenth Amendments. The Pennsylvania court held that nude dancing is expressive conduct entitled to some quantum of protection under the First Amendment, a view that the court noted was endorsed by eight Members of this Court in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504. The Pennsylvania court explained that, although one stated purpose of the ordinance was to combat negative secondary effects, there was also an unmentioned purpose to "impact negatively on the erotic message of the dance." Accordingly, the Pennsylvania court concluded that the ordinance was related to the suppression of expression. Because the ordinance was not content neutral, it was subject to strict scrutiny. The court held that the ordinance failed the narrow tailoring requirement of strict scrutiny. After this Court granted certiorari, Pap's filed a motion to dismiss the case as moot, noting that Kandyland no longer operated as a nude dancing club, and that Pap's did not operate such a club at any other location. This Court denied the motion.

Held: The judgment is reversed, and the case is remanded.

553 Pa. 348, 719 A.2d 273, reversed and remanded.

Justice O'CONNOR delivered the opinion of the Court with respect to Parts I and II, concluding that the case is not moot. A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642. Simply closing Kandyland is not sufficient to moot the case because Pap's is still incorporated under Pennsylvania ***278** law, and could again decide to operate a nude dancing establishment in Erie. Moreover, Pap's failed, despite its obligation to the Court, to mention the potential mootness issue in its brief in opposition, which was filed after Kandyland was closed and the property sold. See *Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240, 105 S.Ct. 685, 83 L.Ed.2d 618. In any event, this is not a run of the mill voluntary cessation case. Here it is the plaintiff who, having prevailed below, seeks to have the case declared moot. And it is the defendant city that seeks to invoke the federal judicial power to obtain this Court's review of the decision. Cf. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-618, 109 S.Ct. 2037, 104 L.Ed.2d 696. The city has an ongoing injury because it is barred from enforcing the ordinance's public nudity provisions. If the ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot. See *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13, 113 S.Ct. 447, 121 L.Ed.2d 313. And Pap's still has a concrete stake in the case's outcome because, to the extent it has an interest in resuming operations, it ****1385** has an interest in pre-

serving the judgment below. This Court's interest in preventing litigants from attempting to manipulate its jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness. See, *e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303. Pp. 1390-1391.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER, concluded in Parts III and IV that:

1. Government restrictions on public nudity such as Erie's ordinance should be evaluated under the framework set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, for content-neutral restrictions on symbolic speech. Although being "in a state of nudity" is not an inherently expressive condition, nude dancing of the type at issue here is expressive conduct that falls within the outer ambit of the First Amendment's protection. See, *e.g.*, *Barnes, supra*, at 565-566, 111 S.Ct. 2456 (plurality opinion). What level of scrutiny applies is determined by whether the ordinance is related to the suppression of expression. *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 403, 109 S.Ct. 2533, 105 L.Ed.2d 342. If the governmental purpose in enacting the ordinance is unrelated to such suppression, the ordinance need only satisfy the "less stringent," intermediate *O'Brien* standard. *E.g.*, *Johnson, supra*, at 403, 109 S.Ct. 2533. If the governmental interest is related to the expression's content, however, the ordinance falls outside *O'Brien* and must be justified under the more demanding, strict scrutiny standard. *Johnson, supra*, at 403, 109 S.Ct. 2533. An almost identical public nudity ban was held not to violate the First Amendment in *Barnes*, although no five Members of the Court agreed on a single rationale for that conclusion. The ordinance here, like the statute in *Barnes*, is on its face a general prohibition on public nudity. By its terms, it regulates conduct alone. It does not target ***279** nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. Although Pap's contends that the ordinance is related to the suppression of expression because its preamble suggests that its actual purpose is to prohibit erotic dancing of the type performed at Kandyland, that is not how the Pennsylvania Supreme Court interpreted that language. Rather, the Pennsylvania Supreme Court construed the preamble to mean that one purpose of the ordinance was to combat negative secondary effects. That is, the ordinance is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland, and not at suppressing the erotic message conveyed by this type of nude dancing. See 391 U.S., at 382, 88 S.Ct. 1673; see also *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333. The Pennsylvania Supreme Court's ultimate conclusion that the ordinance was nevertheless content based relied on Justice White's position in dissent in *Barnes* that a ban of this type *necessarily* has the purpose of suppressing the erotic message of the dance. That view was rejected by a majority of the Court in *Barnes*, and is here rejected again. Pap's argument that the ordinance is "aimed" at suppressing expression through a ban on nude dancing is really an argument that Erie also had an illicit motive in enacting the ordinance. However, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive. *O'Brien, supra*, at 382-383, 88 S.Ct. 1673. Even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is therefore *de minimis*. If States are to be able to regulate secondary effects, then such *de minimis* intrusions on ****1386** expression cannot be sufficient to render the ordinance content based. See, *e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299, 104 S.Ct. 3065, 82 L.Ed.2d 221. Thus, Erie's ordinance is valid if it satisfies the *O'Brien* test. Pp. 1391-1395.

2. Erie's ordinance satisfies *O'Brien's* four-factor test. First, the ordinance is within Erie's constitutional power to enact because the city's efforts to protect public health and safety are clearly within its police powers. Second, the ordinance furthers the important government interests of regulating conduct through a public nudity ban and of combating the

harmful secondary effects associated with nude dancing. In terms of demonstrating that such secondary effects pose a threat, the city need not conduct new studies or produce evidence independent of that already generated by other cities, so long as the evidence relied on is reasonably believed to be relevant to the problem addressed. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S.Ct. 925, 89 L.Ed.2d 29. Erie could reasonably ***280** rely on the evidentiary foundation set forth in *Renton* and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton, supra*, at 51-52, 106 S.Ct. 925. In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres.* The evidentiary standard described in *Renton* controls here, and Erie meets that standard. In any event, the ordinance's preamble also relies on the city council's express findings that "certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare ...." The council members, familiar with commercial downtown Erie, are the individuals who would likely have had first-hand knowledge of what took place at, and around, nude dancing establishments there, and can make particularized, expert judgments about the resulting harmful secondary effects. Cf., *e.g.*, *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697. The fact that this sort of leeway is appropriate in this case, which involves a content-neutral restriction that regulates conduct, says nothing whatsoever about its appropriateness in a case involving actual regulation of First Amendment expression. Also, although requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, *O'Brien* requires only that the regulation further the interest in combating such effects. The ordinance also satisfies *O'Brien's* third factor, that the government interest is unrelated to the suppression of free expression, as discussed *supra.* The fourth *O'Brien* factor--that the restriction is no greater than is essential to the furtherance of the government interest--is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.* The pasties and G-string requirement is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message. See, *e.g.*, *Barnes*, 501 U.S., at 572, 111 S.Ct. 2456. Pp. 1395-1398.

Justice SCALIA, joined by Justice THOMAS, agreed that the Pennsylvania Supreme Court's decision must be reversed, but disagreed with the mode of analysis that should be applied. Erie self-consciously modeled its ordinance on the public nudity statute upheld in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504, calculating (one would have supposed reasonably) that the Pennsylvania courts would consider themselves bound by this Court's judgment on a question of federal constitutional law. That statute was constitutional not because it survived some lower level of First Amendment scrutiny, but because, as a ****1387** general law regulating conduct and not specifically directed at expression, it was not subject to First Amendment scrutiny at all. *Id.*, at 572, 111 S.Ct. 2456 (SCALIA, J., concurring in ***281** judgment). Erie's ordinance, too, by its terms prohibits not merely nude dancing, but the act-- irrespective of whether it is engaged in for expressive purposes--of going nude in public. The facts that the preamble explains the ordinance's purpose, in part, as limiting a recent increase in nude live entertainment, that city councilmembers in supporting the ordinance commented to that effect, and that the ordinance includes in the definition of nudity the exposure of devices simulating that condition, neither make the law any less general in its reach nor demonstrate that what the municipal authorities *really* find objectionable is expression rather than public nakedness. That the city made no effort to enforce the ordinance against a production of Equus involving nudity that was being staged in Erie at the time the ordinance became effective does not render the ordinance discriminatory on its face. The assertion of the city's counsel in the trial court that the ordinance would not cover theatrical productions to the extent their expressive activity rose to a higher level of protected expression simply meant that the ordinance would not be en-

forceable against such productions if the Constitution forbade it. That limitation does not cause the ordinance to be not generally applicable, in the relevant sense of being *targeted* against expressive conduct. Moreover, even if it could be concluded that Erie specifically singled out the activity of nude dancing, the ordinance still would not violate the First Amendment unless it could be proved (as on this record it could not) that it was the communicative character of nude dancing that prompted the ban. See *id.*, at 577, 111 S.Ct. 2456. There is no need to identify "secondary effects" associated with nude dancing that Erie could properly seek to eliminate. The traditional power of government to foster good morals, and the acceptability of the traditional judgment that nude public dancing *itself* is immoral, have not been repealed by the First Amendment. Pp. 1400-1402.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which REHNQUIST, C.J., and KENNEDY, SOUTER, and BREYER, JJ., joined, and an opinion with respect to Parts III and IV, in which REHNQUIST, C.J., and KENNEDY and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 1398. SOUTER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 1402. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 1406.

Gregory A. Karle, Erie, PA, for petitioners.

***282** John H. Weston, Los Angeles, CA, for respondent.

Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Parts III and IV, in which THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER join.

The city of Erie, Pennsylvania, enacted an ordinance banning public nudity. Respondent Pap's A.M. (hereinafter ***283** Pap's), which operated a nude dancing establishment in Erie, challenged the constitutionality of the ordinance and sought a permanent injunction against its enforcement. The Pennsylvania Supreme Court, although noting that this Court in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), had upheld an Indiana ordinance that was "strikingly ****1388** similar" to Erie's, found that the public nudity sections of the ordinance violated respondent's right to freedom of expression under the United States Constitution. 553 Pa. 348, 356, 719 A.2d 273, 277 (1998). This case raises the question whether the Pennsylvania Supreme Court properly evaluated the ordinance's constitutionality under the First Amendment. We hold that Erie's ordinance is a content-neutral regulation that satisfies the four-part test of *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Accordingly, we reverse the decision of the Pennsylvania Supreme Court and remand for the consideration of any remaining issues.

I

On September 28, 1994, the city council for the city of Erie, Pennsylvania, enacted Ordinance 75-1994, a public indecency ordinance that makes it a summary offense to knowingly or intentionally appear in public in a "state of nudity." [FN*] ***284** Respondent Pap's, a Pennsylvania corporation, operated an establishment in Erie known as "Kandyland" that featured totally nude erotic dancing performed by women. To comply with the ordinance, these dancers must wear, at a minimum, "pasties" and a "G-string." On October 14, 1994, two days after the ordinance went into effect, Pap's filed a complaint against the city of Erie, the mayor of the city, and members of the city council, seeking declaratory relief and a permanent injunction against the enforcement of the ordinance.

FN* Ordinance 75-1994, codified as Article 711 of the Codified Ordinances of the city of Erie, provides in relevant part:
"1. A person who knowingly or intentionally, in a public place:
"a. engages in sexual intercourse
"b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code
"c. appears in a state of nudity, or
"d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.

> "2. "Nudity" means the showing of the human male or female genital *[sic]*, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.
> "3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.
> "4. The prohibition set forth in subsection 1(c) shall not apply to:
> "a. Any child under ten (10) years of age; or
> "b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age."

The Court of Common Pleas of Erie County granted the permanent injunction and struck down the ordinance as unconstitutional. Civ. No. 60059-1994 (Jan. 18, 1995), Pet. for Cert. 40a. On cross appeals, the Commonwealth Court reversed the trial court's order. 674 A.2d 338 (1996).

The Pennsylvania Supreme Court granted review and reversed, concluding that the public nudity provisions of the ordinance violated respondent's rights to freedom of expression as protected by the First and Fourteenth Amendments. 553 Pa. 348, 719 A.2d 273 (1998). The Pennsylvania court first inquired whether nude dancing constitutes expressive conduct that is within the protection of the First Amendment. The court noted that the act of being nude, in and of ***285** itself, is not entitled to First Amendment protection because it conveys no message. *Id.*, at 354, 719 A.2d, at 276. Nude dancing, however, is expressive conduct that is entitled to some quantum of protection under the ****1389** First Amendment, a view that the Pennsylvania Supreme Court noted was endorsed by eight Members of this Court in *Barnes*. 553 Pa., at 354, 719 A.2d, at 276.

The Pennsylvania court next inquired whether the government interest in enacting the ordinance was content neutral, explaining that regulations that are unrelated to the suppression of expression are not subject to strict scrutiny but to the less stringent standard of *United States v. O'Brien*, *supra*, at 377, 88 S.Ct. 1673. To answer the question whether the ordinance is content based, the court turned to our decision in *Barnes*. 553 Pa., at 355-356, 719 A.2d, at 277. Although the Pennsylvania court noted that the Indiana statute at issue in *Barnes* "is strikingly similar to the Ordinance we are examining," it concluded that "[u]nfortunately for our purposes, the *Barnes* Court splintered and produced four separate, non-harmonious opinions." 553 Pa., at 356, 719 A.2d, at 277. After canvassing these separate opinions, the Pennsylvania court concluded that, although it is permissible to find precedential effect in a fragmented decision, to do so a majority of the Court must have been in agreement on the concept that is deemed to be the holding. See *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). The Pennsylvania court noted that "aside from the agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." 553 Pa., at 358, 719 A.2d, at 278. Accordingly, the court concluded that "no clear precedent arises out of *Barnes* on the issue of whether the [Erie] ordinance ... passes muster under the First Amendment." *Ibid.*

Having determined that there was no United States Supreme Court precedent on point, the Pennsylvania court ***286** conducted an independent examination of the ordinance to ascertain whether it was related to the suppression of expression. The court concluded that although one of the purposes of the ordinance was to combat negative secondary effects, "[i]nextricably bound up with this stated purpose is

an unmentioned purpose ... to impact negatively on the erotic message of the dance." *Id.*, at 359, 719 A.2d, at 279. As such, the court determined the ordinance was content based and subject to strict scrutiny. The ordinance failed the narrow tailoring requirement of strict scrutiny because the court found that imposing criminal and civil sanctions on those who commit sex crimes would be a far narrower means of combating secondary effects than the requirement that dancers wear pasties and G-strings. *Id.*, at 361-362, 719 A.2d, at 280.

Concluding that the ordinance unconstitutionally burdened respondent's expressive conduct, the Pennsylvania court then determined that, under Pennsylvania law, the public nudity provisions of the ordinance could be severed rather than striking the ordinance in its entirety. Accordingly, the court severed §§ 1(c) and 2 from the ordinance and reversed the order of the Commonwealth Court. *Id.*, at 363-364, 719 A.2d, at 281. Because the court determined that the public nudity provisions of the ordinance violated Pap's right to freedom of expression under the United States Constitution, it did not address the constitutionality of the ordinance under the Pennsylvania Constitution or the claim that the ordinance is unconstitutionally overbroad. *Ibid.*

In a separate concurrence, two justices of the Pennsylvania court noted that, because this Court upheld a virtually identical statute in *Barnes*, the ordinance should have been upheld under the United States Constitution. 553 Pa., at 364, 719 A.2d, at 281. They reached the same result as the majority, however, because they would have held that the public nudity sections of the ordinance violate the Pennsylvania Constitution. *Id.*, at 370, 719 A.2d, at 284.

***287** The city of Erie petitioned for a writ of certiorari, which we granted. ****1390**526 U.S. 1111, 119 S.Ct. 1753, 143 L.Ed.2d 786 (1999). Shortly thereafter, Pap's filed a motion to dismiss the case as moot, noting that Kandyland was no longer operating as a nude dancing club, and Pap's was not operating a nude dancing club at any other location. Respondent's Motion to Dismiss as Moot 1. We denied the motion. 527 U.S. 1034, 119 S.Ct. 2391, 144 L.Ed.2d 792 (1999).

II

[1] As a preliminary matter, we must address the justiciability question. " '[A] case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). The underlying concern is that, when the challenged conduct ceases such that " 'there is no reasonable expectation that the wrong will be repeated,' " *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953), then it becomes impossible for the court to grant " 'any effectual relief whatever' to [the] prevailing party," *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895)). In that case, any opinion as to the legality of the challenged action would be advisory.

[2] Here, Pap's submitted an affidavit stating that it had "ceased to operate a nude dancing establishment in Erie." Status Report Re Potential Issue of Mootness 1 (Sept. 8, 1999). Pap's asserts that the case is therefore moot because "[t]he outcome of this case will have no effect upon Respondent." Respondent's Motion to Dismiss as Moot 1. Simply closing Kandyland is not sufficient to render this case moot, however. Pap's is still incorporated under Pennsylvania law, and it could again decide to operate a nude dancing establishment in Erie. See Petitioner's Brief in Opposition to Motion to Dismiss 3. Justice SCALIA differs with our assessment as to the likelihood that Pap's may resume its nude dancing ***288** operation. Several Members of this Court can attest, however, that the "advanced age" of Pap's owner (72) does not make it "absolutely clear" that a life of quiet retirement is his only reasonable expectation. Cf. *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Moreover, our appraisal of Pap's affidavit is influenced by Pap's failure, despite its obligation to the Court, to mention a word about the potential mootness issue in its brief in

opposition to the petition for writ of certiorari, which was filed in April 1999, even though, as Justice SCALIA points out, Kandyland was closed and that property sold in 1998. See *Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240, 105 S.Ct. 685, 83 L.Ed.2d 618 (1985) *(per curiam).* Pap's only raised the issue after this Court granted certiorari.

In any event, this is not a run of the mill voluntary cessation case. Here it is the plaintiff who, having prevailed below, now seeks to have the case declared moot. And it is the city of Erie that seeks to invoke the federal judicial power to obtain this Court's review of the Pennsylvania Supreme Court decision. Cf. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-618, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). The city has an ongoing injury because it is barred from enforcing the public nudity provisions of its ordinance. If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot. See *Church of Scientology of Cal. v. United States*, *supra*, at 13, 113 S.Ct. 447. And Pap's still has a concrete stake in the outcome of this case because, to the extent Pap's has an interest in resuming operations, it has an interest in preserving the judgment of the Pennsylvania Supreme Court. Our interest in preventing litigants from attempting ****1391** to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here. See *United States v. W.T. Grant Co.*, *supra*, at 632, 73 S.Ct. 894; cf. ***289***Arizonans for Official English v. Arizona*, 520 U.S. 43, 74, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). Although the issue is close, we conclude that the case is not moot, and we turn to the merits.

III

[3] Being "in a state of nudity" is not an inherently expressive condition. As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection. See *Barnes v. Glen Theatre, Inc.*, 501 U.S., at 565-566, 111 S.Ct. 2456 (plurality opinion); *Schad v. Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981).

[4] To determine what level of scrutiny applies to the ordinance at issue here, we must decide "whether the State's regulation is related to the suppression of expression." *Texas v. Johnson*, 491 U.S. 397, 403, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); see also *United States v. O'Brien*, 391 U.S., at 377, 88 S.Ct. 1673. If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the "less stringent" standard from *O'Brien* for evaluating restrictions on symbolic speech. *Texas v. Johnson*, *supra*, at 403, 109 S.Ct. 2533; *United States v. O'Brien*, *supra*, at 377, 88 S.Ct. 1673. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard. *Texas v. Johnson*, *supra*, at 403, 109 S.Ct. 2533.

[5] In *Barnes*, we analyzed an almost identical statute, holding that Indiana's public nudity ban did not violate the First Amendment, although no five Members of the Court agreed on a single rationale for that conclusion. We now clarify that government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech.

The city of Erie argues that the ordinance is a content-neutral restriction that is reviewable under *O'Brien* because the ordinance bans conduct, not speech; specifically, public ***290** nudity. Respondent counters that the ordinance targets nude dancing and, as such, is aimed specifically at suppressing expression, making the ordinance a content-based restriction that must be subjected to strict scrutiny.

[6] The ordinance here, like the statute in *Barnes*, is on its face a general prohibition on public nudity. 553 Pa., at 354, 719 A.2d, at 277. By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. And like the statute in *Barnes*, the Erie ordinance replaces and updates provisions of an "Indecency and Immorality" ordinance that has been on the books since 1866, predating the prevalence of nude dancing establish-

ments such as Kandyland. Pet. for Cert. 7a; see *Barnes v. Glen Theatre, Inc., supra*, at 568, 111 S.Ct. 2456.

Respondent and Justice STEVENS contend nonetheless that the ordinance is related to the suppression of expression because language in the ordinance's preamble suggests that its actual purpose is to prohibit erotic dancing of the type performed at Kandyland. *Post*, at 1406 (dissenting opinion). That is not how the Pennsylvania Supreme Court interpreted that language, however. In the preamble to the ordinance, the city council stated that it was adopting the regulation

> " 'for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely ****1392** impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.' " 553 Pa., at 359, 719 A.2d, at 279.

The Pennsylvania Supreme Court construed this language to mean that one purpose of the ordinance was "to combat negative secondary effects." *Ibid.*

***291** As Justice SOUTER noted in *Barnes*, "on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression." 501 U.S., at 585, 111 S.Ct. 2456 (opinion concurring in judgment). In that sense, this case is similar to *O'Brien*. O'Brien burned his draft registration card as a public statement of his antiwar views, and he was convicted under a statute making it a crime to knowingly mutilate or destroy such a card. This Court rejected his claim that the statute violated his First Amendment rights, reasoning that the law punished him for the "noncommunicative impact of his conduct, and for nothing else." 391 U.S., at 382, 88 S.Ct. 1673. In other words, the Government regulation prohibiting the destruction of draft cards was aimed at maintaining the integrity of the Selective Service System and not at suppressing the message of draft resistance that O'Brien sought to convey by burning his draft card. So too here, the ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing. Put another way, the ordinance does not attempt to regulate the primary effects of the expression, *i.e.*, the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are "caused by the presence of even one such" establishment. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); see also *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988).

Although the Pennsylvania Supreme Court acknowledged that one goal of the ordinance was to combat the negative secondary effects associated with nude dancing establishments, the court concluded that the ordinance was nevertheless content based, relying on Justice White's position in dissent in *Barnes* for the proposition that a ban of this type *necessarily* has the purpose of suppressing the erotic message ***292** of the dance. Because the Pennsylvania court agreed with Justice White's approach, it concluded that the ordinance must have another, "unmentioned" purpose related to the suppression of expression. 553 Pa., at 359, 719 A.2d, at 279. That is, the Pennsylvania court adopted the dissent's view in *Barnes* that " '[s]ince the State permits the dancers to perform if they wear pasties and G--strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition.' " 553 Pa., at 359, 719 A.2d, at 279 (quoting *Barnes, supra*, at 592, 111 S.Ct. 2456 (White, J., dissenting)). A majority of the Court rejected that view in *Barnes*, and we do so again here.

[7] Respondent's argument that the ordinance is "aimed" at suppressing expression through a ban on nude dancing--an argument that respondent supports by pointing to statements by the city attorney that the public nudity ban was not intended to apply to "legitimate" theater productions--is really an argument that the city council also had an illicit motive in enacting the ordinance. As we have said before, however, this Court will not strike down an otherwise constitu-

tional statute on the basis of an alleged illicit motive. *O'Brien, supra*, at 382-383, 88 S.Ct. 1673; ****1393** *Renton v. Playtime Theatres, Inc., supra*, at 47-48, 106 S.Ct. 925 (that the "predominate" purpose of the statute was to control secondary effects was "more than adequate to establish" that the city's interest was unrelated to the suppression of expression). In light of the Pennsylvania court's determination that one purpose of the ordinance is to combat harmful secondary effects, the ban on public nudity here is no different from the ban on burning draft registration cards in *O'Brien*, where the Government sought to prevent the means of the expression and not the expression of antiwar sentiment itself.

Justice STEVENS argues that the ordinance enacts a complete ban on expression. We respectfully disagree with that characterization. The public nudity ban certainly has ***293** the effect of limiting one particular means of expressing the kind of erotic message being disseminated at Kandyland. But simply to define what is being banned as the "message" is to assume the conclusion. We did not analyze the regulation in *O'Brien* as having enacted a total ban on expression. Instead, the Court recognized that the regulation against destroying one's draft card was justified by the Government's interest in preventing the harmful "secondary effects" of that conduct (disruption to the Selective Service System), even though that regulation may have some incidental effect on the expressive element of the conduct. Because this justification was unrelated to the suppression of O'Brien's antiwar message, the regulation was content neutral. Although there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message, that is not the case here.

Even if we had not already rejected the view that a ban on public nudity is necessarily related to the suppression of the erotic message of nude dancing, we would do so now because the premise of such a view is flawed. The State's interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood. See *Renton, supra*, at 50-51, 106 S.Ct. 925. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), we held that a National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in Washington, D.C., in connection with a demonstration intended to call attention to the plight of the homeless. Assuming, *arguendo*, that sleeping can be expressive conduct, the Court concluded that the Government interest in conserving park property was unrelated to the demonstrators' message about homelessness. *Id.*, at 299, 104 S.Ct. 3065. ***294** So, while the demonstrators were allowed to erect "symbolic tent cities," they were not allowed to sleep overnight in those tents. Even though the regulation may have directly limited the expressive element involved in actually sleeping in the park, the regulation was nonetheless content neutral.

Similarly, even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is *de minimis*. And as Justice STEVENS eloquently stated for the plurality in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the ****1394** interest in untrammeled political debate," and "few of us would march our sons and daughters off to war to preserve the citizen's right to see" specified anatomical areas exhibited at establishments like Kandyland.
If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based. See *Clark v. Community for Creative Non--Violence, supra*, at 299, 104 S.Ct. 3065; *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (even if

regulation has an incidental effect on some speakers or messages but not others, the regulation is content neutral if it can be justified without reference to the content of the expression).

This case is, in fact, similar to *O'Brien, Community for Creative Non-- Violence,* and *Ward.* The justification for the government regulation in each case prevents harmful "secondary" effects that are unrelated to the suppression of expression. See, *e.g.*, *Ward v. Rock Against Racism, supra,* at 791-792, 109 S.Ct. 2746 (noting that "[t]he principal justification for the ***295** sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the [adjacent] Sheep Meadow and its more sedate activities," and citing *Renton* for the proposition that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others"). While the doctrinal theories behind "incidental burdens" and "secondary effects" are, of course, not identical, there is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity--nude erotic dancing--is particularly problematic because it produces harmful secondary effects.

Justice STEVENS claims that today we "[f]or the first time" extend *Renton's* secondary effects doctrine to justify restrictions other than the location of a commercial enterprise. *Post,* at 1406 (dissenting opinion). Our reliance on *Renton* to justify other restrictions is not new, however. In *Ward,* the Court relied on *Renton* to evaluate restrictions on sound amplification at an outdoor bandshell, rejecting the dissent's contention that *Renton* was inapplicable. See *Ward v. Rock Against Racism, supra,* at 804, n. 1, 109 S.Ct. 2746 (Marshall, J., dissenting) ("Today, for the first time, a majority of the Court applies *Renton* analysis to a category of speech far afield from that decision's original limited focus"). Moreover, Erie's ordinance does not effect a "total ban" on protected expression. *Post,* at 1407.

In *Renton,* the regulation explicitly treated "adult" movie theaters differently from other theaters, and defined "adult" theaters solely by reference to the content of their movies. 475 U.S., at 44, 106 S.Ct. 925. We nonetheless treated the zoning regulation as content neutral because the ordinance was aimed at the secondary effects of adult theaters, a justification unrelated to the content of the adult movies themselves. ***296***Id.,* at 48, 106 S.Ct. 925. Here, Erie's ordinance is on its face a content-neutral restriction on conduct. Even if the city thought that nude dancing at clubs like Kandyland constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing.

We conclude that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishments like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing. The ordinance prohibiting public nudity is therefore valid ****1395** if it satisfies the four-factor test from *O'Brien* for evaluating restrictions on symbolic speech.

IV

[8][9][10][11] Applying that standard here, we conclude that Erie's ordinance is justified under *O'Brien.* The first factor of the *O'Brien* test is whether the government regulation is within the constitutional power of the government to enact. Here, Erie's efforts to protect public health and safety are clearly within the city's police powers. The second factor is whether the regulation furthers an important or substantial government interest. The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important. And in terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities" to demonstrate the problem of secondary effects, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton v. Playtime Theatres, Inc., supra,*

at 51-52, 106 S.Ct. 925. Because the nude dancing at Kandyland is of the same character as the adult entertainment ***297** at issue in *Renton, Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton v. Playtime Theatres, Inc., supra*, at 51-52, 106 S.Ct. 925 (indicating that reliance on a judicial opinion that describes the evidentiary basis is sufficient). In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres.* Even in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing. See *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393, n. 6, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) Regardless of whether Justice SOUTER now wishes to disavow his opinion in *Barnes* on this point, see *post*, at 1406 (opinion concurring in part and dissenting in part), the evidentiary standard described in *Renton* controls here, and Erie meets that standard.

[12] In any event, Erie also relied on its own findings. The preamble to the ordinance states that "the Council of the City of Erie *has, at various times over more than a century, expressed its findings* that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity." Pet. for Cert. 6a (emphasis added). The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments ***298** in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects. Analogizing to the administrative agency context, it is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such "legislative facts" within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978); ****1396***Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945); 2 K. Davis & R. Pierce, Administrative Law Treatise § 10.6 (3d ed.1994). Here, Kandyland has had ample opportunity to contest the council's findings about secondary effects--before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited. And the study relied on by *amicus curiae* does not cast any legitimate doubt on the Erie city council's judgment about Erie. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16-23.

Finally, it is worth repeating that Erie's ordinance is on its face a content-neutral restriction that regulates conduct, not First Amendment expression. And the government should have sufficient leeway to justify such a law based on secondary effects. On this point, *O'Brien* is especially instructive. The Court there did not require evidence that the integrity of the Selective Service System would be jeopardized by the knowing destruction or mutilation of draft cards. It simply reviewed the Government's various administrative interests in issuing the cards, and then concluded that "Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people ***299** who knowingly and willfully destroy or mutilate them." 391 U.S., at 378-380, 88 S.Ct. 1673. There was no study documenting instances of draft card mutilation or the actual effect of such mutilation on the Government's asserted efficiency interests. But the Court permitted Congress

to take official notice, as it were, that draft card destruction would jeopardize the system. The fact that this sort of leeway is appropriate in a case involving conduct says nothing whatsoever about its appropriateness in a case involving actual regulation of First Amendment expression. As we have said, so long as the regulation is unrelated to the suppression of expression, "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S., at 406, 109 S.Ct. 2533. See, *e.g.*, *United States v. O'Brien*, *supra*, at 377, 88 S.Ct. 1673; *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) (finding sufficient the Government's assertion that those who had previously been barred from entering the military installation pose a threat to the security of that installation); *Clark v. Community for Creative Non-Violence*, 468 U.S., at 299, 104 S.Ct. 3065 (finding sufficient the Government's assertion that camping overnight in the park poses a threat to park property).

Justice SOUTER, however, would require Erie to develop a specific evidentiary record supporting its ordinance. *Post*, at 1405-1406 (opinion concurring in part and dissenting in part). Justice SOUTER agrees that Erie's interest in combating the negative secondary effects associated with nude dancing establishments is a legitimate government interest unrelated to the suppression of expression, and he agrees that the ordinance should therefore be evaluated under *O'Brien*. *O'Brien*, of course, required no evidentiary showing at all that the threatened harm was real. But that case is different, Justice SOUTER contends, because in *O'Brien* "there could be no doubt" that a regulation prohibiting the destruction of draft cards would alleviate the harmful secondary effects ***300** flowing from the destruction of those cards. *Post*, at 1402-1403, n. 1.

But whether the harm is evident to our "intuition," *ibid.*, is not the proper inquiry. If it were, we would simply say there is no doubt that a regulation prohibiting public nudity would alleviate the harmful secondary effects associated with nude dancing. In any event, Justice SOUTER conflates ****1397** two distinct concepts under *O'Brien:* whether there is a substantial government interest and whether the regulation furthers that interest. As to the government interest, *i.e.*, whether the threatened harm is real, the city council relied on this Court's opinions detailing the harmful secondary effects caused by establishments like Kandyland, as well as on its own experiences in Erie. Justice SOUTER attempts to denigrate the city council's conclusion that the threatened harm was real, arguing that we cannot accept Erie's findings because the subject of nude dancing is "fraught with some emotionalism," *post*, at 1404. Yet surely the subject of drafting our citizens into the military is "fraught" with more emotionalism than the subject of regulating nude dancing. *Ibid.* Justice SOUTER next hypothesizes that the reason we cannot accept Erie's conclusion is that, since the question whether these secondary effects occur is "amenable to empirical treatment," we should ignore Erie's actual experience and instead require such an empirical analysis. *Post*, at 1404, n. 3 (referring to a "scientifically sound" study offered by an *amicus curiae* to show that nude dancing establishments do not cause secondary effects). In *Nixon*, however, we flatly rejected that idea. 528 U.S., at 394, 120 S.Ct. 897 (noting that the "invocation of academic studies said to indicate" that the threatened harms are not real is insufficient to cast doubt on the experience of the local government).

As to the second point--whether the regulation furthers the government interest--it is evident that, since crime and other public health and safety problems are caused by the presence of nude dancing establishments like Kandyland, a ***301** ban on such nude dancing would further Erie's interest in preventing such secondary effects. To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects. Even though the dissent questions the wisdom of Erie's chosen remedy, *post*, at 1409 (opinion of STEVENS, J.), the " 'city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems,' " *Renton v. Playtime Theatres, Inc.*, 475 U.S., at 52, 106 S.Ct. 925 (quoting *American Mini Theatres*, 427 U.S., at 71, 96 S.Ct. 2440 (plurality opinion)). It also may be true that a pasties and G-string requirement would

not be as effective as, for example, a requirement that the dancers be fully clothed, but the city must balance its efforts to address the problem with the requirement that the restriction be no greater than necessary to further the city's interest.

The ordinance also satisfies *O'Brien's* third factor, that the government interest is unrelated to the suppression of free expression, as discussed *supra*, at 1390-1395. The fourth and final *O'Brien* factor--that the restriction is no greater than is essential to the furtherance of the government interest--is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message. See *Barnes v. Glen Theatre, Inc.*, 501 U.S., at 572, 111 S.Ct. 2456 (plurality opinion of REHNQUIST, C. J., joined by O'CONNOR and KENNEDY, JJ.); *id.*, at 587, 111 S.Ct. 2456 (SOUTER, J., concurring in judgment). Justice SOUTER points out that zoning is an alternative means of addressing this problem. It is far from clear, however, that zoning imposes less of a burden on expression than the minimal requirement implemented here. In any event, since this is a content-neutral restriction, least restrictive ***302** means analysis is not required. See *Ward*, 491 U.S., at 798-799, n. 6, 109 S.Ct. 2746.

****1398** We hold, therefore, that Erie's ordinance is a content-neutral regulation that is valid under *O'Brien*. Accordingly, the judgment of the Pennsylvania Supreme Court is reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, concurring in the judgment.

I

In my view, the case before us here is moot. The Court concludes that it is not because respondent could resume its nude dancing operations in the future, and because petitioners have suffered an ongoing, redressable harm consisting of the state court's invalidation of their public nudity ordinance.

As to the first point: Petitioners do not dispute that Kandyland no longer exists; the building in which it was located has been sold to a real estate developer, and the premises are currently being used as a comedy club. We have a sworn affidavit from respondent's sole shareholder, Nick Panos, to the effect that Pap's "operates no active business," and is "a 'shell' corporation." More to the point, Panos swears that neither Pap's nor Panos "employ[s] any individuals involved in the nude dancing business," "maintain[s] any contacts in the adult entertainment business," "has any current interest in any establishment providing nude dancing," or "has any intention to own or operate a nude dancing establishment in the future." [FN1] App. to Reply to Brief in Opposition to Motion to Dismiss 7-8.

> FN1. Curiously, the Court makes no mention of Panos' averment of no intention to operate a nude dancing establishment in the future, but discusses the issue as though the only factor suggesting mootness is the closing of Kandyland. *Ante*, at 1390. I see no basis for ignoring this averment. The only fact mentioned by the Court to justify regarding it as perjurious is that respondent failed to raise mootness in its brief in opposition to the petition for certiorari. That may be good basis for censure, but it is scant basis for suspicion of perjury--particularly since respondent, far from seeking to "insulate a favorable decision from review," *ante*, at 1391, asks us in light of the mootness to vacate the judgment below. Reply to Brief in Opposition to Motion to Dismiss 5.

***303** Petitioners do not contest these representations, but offer in response only that Pap's *could* very easily get back into the nude dancing business. The Court adopts petitioners' line, concluding that because respondent is still incorporated in Pennsylvania, it "could again decide to operate a nude dancing establishment in Erie." *Ante*, at 1390. That plainly does not suffice under our cases. The test for mootness we have applied in voluntary-termination cases is not

whether the action originally giving rise to the controversy could not *conceivably* reoccur, but whether it is "absolutely clear that the ... behavior could not *reasonably be expected to recur*." *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968) (emphasis added). Here I think that test is met. According to Panos' uncontested sworn affidavit, Pap's ceased doing business at Kandyland, and the premises were sold to an independent developer, in 1998--the year before the petition for certiorari in this case was filed. It strains credulity to suppose that the 72-year-old Mr. Panos shut down his going business *after* securing his victory in the Pennsylvania Supreme Court, and before the city's petition for certiorari was even filed, in order to increase his chances of preserving his judgment in the statistically unlikely event that a (not yet filed) petition might be granted. Given the timing of these events, given the fact that respondent has no existing interest in nude dancing (or in any other business), given Panos' sworn representation that he does not intend to invest--****1399** through Pap's or otherwise--in any nude dancing business, and given Panos' advanced ***304** age, [FN2] it seems to me that there is "no reasonable *expectation*," even if there remains a theoretical possibility, that Pap's will resume nude dancing operations in the future. [FN3]

FN2. The Court asserts that "[s]everal Members of this Court can attest ... that the 'advanced age' " of 72 "does not make it 'absolutely clear' that a life of quiet retirement is [one's] only reasonable expectation." *Ante*, at 1390. That is *tres gallant*, but it misses the point. Now as heretofore, Justices in their seventies continue to do their work competently--indeed, perhaps better than their youthful colleagues because of the wisdom that age imparts. But to respond to my point, what the Court requires is citation of an instance in which a Member of this Court (or of any other court, for that matter) resigned at the age of 72 to begin a new career--or more remarkable still (for this is what the Court suspects the young Mr. Panos is up to) resigned at the age of 72 to go judge on a different court, of no greater stature, and located in Erie, Pennsylvania, rather than Palm Springs. I base my assessment of reasonable expectations not upon Mr. Panos' age alone, but upon that combined with his sale of the business and his assertion, under oath, that he does not intend to enter another.

FN3. It is significant that none of the assertions of Panos' affidavit is contested. Those pertaining to the sale of Kandyland and the current noninvolvement of Pap's in any other nude dancing establishment would seem readily verifiable by petitioners. The statements regarding Pap's and Panos' intentions for the future are by their nature not verifiable, and it would be reasonable not to credit them if *either* petitioners asserted some reason to believe they were not true *or* they were not rendered highly plausible by Panos' age and his past actions. Neither condition exists here.

The situation here is indistinguishable from that which obtained in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997), where the plaintiff-respondent, a state employee who had sued to enjoin enforcement of an amendment to the Arizona Constitution making English that State's official language, had resigned her public-sector employment. We held the case moot and, since the mootness was attributable to the " 'unilateral action of the party who prevailed in the lower court,' " we followed our usual practice of vacating the favorable judgment respondent had obtained in the ***305** Court of Appeals. *Id.*, at 72, 117 S.Ct. 1055 (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994)).

The rub here is that this case comes to us on writ of certiorari to a state court, so that our lack of jurisdiction over the case also entails, according to our recent jurisprudence, a lack of jurisdiction to direct a vacatur. See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 621, n. 1, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). The consequences of that limitation on our power are

in this case significant: A dismissal for mootness caused by respondent's unilateral action would leave petitioners subject to an ongoing legal disability, and a large one at that. Because the Pennsylvania Supreme Court severed the public nudity provision from the ordinance, thus rendering it inoperative, the city would be prevented from enforcing its public nudity prohibition not only against respondent, should it decide to resume operations in the future, and not only against other nude dancing establishments, but against anyone who appears nude in public, regardless of the "expressiveness" of his conduct or his purpose in engaging in it.

That is an unfortunate consequence (which could be avoided, of course, if the Pennsylvania Supreme Court chose to vacate its judgments in cases that become moot during appeal). But it is not a consequence that authorizes us to entertain a suit the Constitution places beyond our power. And leaving in effect erroneous state determinations regarding the Federal Constitution is, after all, not unusual. It would have occurred here, even without the intervening mootness, if we had denied certiorari. And until the 1914 revision of the Judicial Code, it occurred *whenever* a state court erroneously sustained a federal constitutional challenge, since we did not even have *statutory* jurisdiction to entertain ****1400** an appeal. Compare Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85-87, with Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. In any event, the short of the matter is that we have no power to suspend the fundamental precepts that federal courts "are limited by the case-or-controversy requirement ***306** of Art. III to adjudication of actual disputes between adverse parties," *Richardson v. Ramirez*, 418 U.S. 24, 36, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), and that this limitation applies "at all stages of review," *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459, n. 10, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974)) (internal quotation marks omitted).

Which brings me to the Court's second reason for holding that this case is still alive: The Court concludes that because petitioners have an "ongoing injury" caused by the state court's invalidation of its duly enacted public nudity provision, our ability to hear the case and reverse the judgment below is itself "sufficient to prevent the case from being moot." *Ante*, at 1390. Although the Court does not cite any authority for the proposition that the burden of an adverse decision below suffices to keep a case alive, it is evidently relying upon our decision in *ASARCO*, which held that Article III's standing requirements were satisfied on writ of certiorari to a state court even though there would have been no Article III standing for the action producing the state judgment on which certiorari was sought. We assumed jurisdiction in the case because we concluded that the party seeking to invoke the federal judicial power had standing to challenge the adverse judgment entered against them by the state court. Because that judgment, if left undisturbed, would "caus[e] direct, specific, and concrete injury to the parties who petition for our review," *ASARCO*, 490 U.S., at 623-624, 109 S.Ct. 2037, and because a decision by this Court to reverse the State Supreme Court would clearly redress that injury, we concluded that the original plaintiffs' lack of standing was not fatal to our jurisdiction, *id.*, at 624, 109 S.Ct. 2037.

I dissented on this point in *ASARCO*, see *id.*, at 634, 109 S.Ct. 2037 (REHNQUIST, C. J., concurring in part and dissenting in part, joined by SCALIA, J.), and remain of the view that it was incorrectly decided. But *ASARCO* at least did not purport to hold that the constitutional standing requirements of injury, causation, and redressability may be satisfied *solely* by ***307** reference to the lower court's adverse judgment. It was careful to note--however illogical that might have been, see *id.*, at 635, 109 S.Ct. 2037--that the parties "remain[ed] adverse," and that jurisdiction was proper only so long as the "requisites of a case or controversy are also met," *id.*, at 619, 624, 109 S.Ct. 2037. Today the Court would appear to drop even this fig leaf. [FN4] In concluding that the injury to *Erie* is "sufficient" to keep this case alive, the Court performs the neat trick of identifying a "case or controversy" that has only one interested party.

> FN4. I say "appear" because although the Court states categorically that "the availability of ... relief [from the judgment below] is sufficient to prevent the case from being

> moot," it follows this statement, in the next sentence, with the assertion that Pap's, the state-court plaintiff, retains a "concrete stake in the outcome of this case." *Ante*, at 1390. Of course, if the latter were true a classic case or controversy existed, and resort to the exotic theory of "standing by virtue of adverse judgment below" was entirely unnecessary.

II

For the reasons set forth above, I would dismiss this case for want of jurisdiction. Because the Court resolves the threshold mootness question differently and proceeds to address the merits, I will do so briefly as well. I agree that the decision of the Pennsylvania Supreme Court must be reversed, but disagree with the mode of analysis the Court has applied.

The city of Erie self-consciously modeled its ordinance on the public nudity ****1401** statute we upheld against constitutional challenge in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), calculating (one would have supposed reasonably) that the courts of Pennsylvania would consider themselves bound by our judgment on a question of federal constitutional law. In *Barnes*, I voted to uphold the challenged Indiana statute "not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not ***308** subject to First Amendment scrutiny at all." *Id.*, at 572, 111 S.Ct. 2456 (opinion concurring in judgment). Erie's ordinance, too, by its terms prohibits not merely nude dancing, but the act--irrespective of whether it is engaged in for expressive purposes--of going nude in public. The facts that a preamble to the ordinance explains that its purpose, in part, is to "limi[t] a recent increase in nude live entertainment," App. to Pet. for Cert. 42a, that city councilmembers in supporting the ordinance commented to that effect, see *post*, at 1412-1413, and n. 16 (STEVENS, J., dissenting), and that the ordinance includes in the definition of nudity the exposure of devices simulating that condition, see *post*, at 1413, neither make the law any less general in its reach nor demonstrate that what the municipal authorities *really* find objectionable is expression rather than public nakedness. As far as appears (and as seems overwhelmingly likely), the preamble, the councilmembers' comments, and the chosen definition of the prohibited conduct simply reflect the fact that Erie had recently been having a public nudity problem not with streakers, sunbathers or hot dog vendors, see *Barnes, supra*, at 574, 111 S.Ct. 2456 (SCALIA, J., concurring in judgment), but with lap dancers.

There is no basis for the contention that the ordinance does not apply to nudity in theatrical productions such as Equus or Hair. Its text contains no such limitation. It was stipulated in the trial court that no effort was made to enforce the ordinance against a production of Equus involving nudity that was being staged in Erie at the time the ordinance became effective. App. 84. Notwithstanding Justice STEVENS' assertion to the contrary, however, see *post*, at 1411-1412, neither in the stipulation, nor elsewhere in the record, does it appear that the city was aware of the nudity--and before this Court counsel for the city attributed nonenforcement not to a general exception for theatrical productions, but to the fact that no one had complained. Tr. of Oral Arg. 16. One instance of nonenforcement--against a play already in production that prosecutorial discretion might reasonably have ***309** "grandfathered"--does not render this ordinance discriminatory on its face. To be sure, in the trial court counsel for the city said that "[t]o the extent that the expressive activity that is contained in [such] productions rises to a higher level of protected expression, they would not be [covered]," App. 53-- but he rested this assertion upon the provision in the preamble that expressed respect for "fundamental Constitutional guarantees of free speech and free expression," and the provision of Paragraph 6 of the ordinance that provided for severability of unconstitutional provisions, *id.*, at 53-54. [FN5] What he was saying there (in order to fend off the overbreadth challenge of respondent, who was in no doubt that the ordinance *did* cover theatrical productions, see *id.*, at 55) was essentially what he said at oral argument before this Court: that the ordinance would not be enforceable against theatrical productions if the Constitution forbade it. ****1402** Tr. of Oral Arg. 13. Surely that

limitation does not cause the ordinance to be not generally applicable, in the relevant sense of being *targeted* against expressive conduct. [FN6]

> FN5. This followup explanation rendered what Justice STEVENS calls counsel's "categorical" assertion that such productions would be exempt, see *post*, at 1411, n. 12, notably *un* categorical. Rather than accept counsel's explanation--in the trial court and here--that is compatible with the text of the ordinance, Justice STEVENS rushes to assign the ordinance a meaning that its words cannot bear, on the basis of counsel's initial footfault. That is not what constitutional adjudication ought to be.
>
> FN6. To correct Justice STEVENS' characterization of my present point: I do not argue that Erie "carved out an exception" for Equus and Hair. *Post*, at 1412, n. 14. Rather, it is my contention that the city attorney assured the trial court that the ordinance was susceptible of an interpretation that would carve out such exceptions to the extent the Constitution required them. Contrary to Justice STEVENS' view, *ibid.*, I do not believe that a law directed against all public nudity ceases to be a "general law" (rather than one directed at expression) if it makes exceptions for nudity protected by decisions of this Court. To put it another way, I do not think a law contains the vice of being directed against expression if it bans all public nudity, except that public nudity which the Supreme Court has held cannot be banned because of its expressive content.

***310** Moreover, even were I to conclude that the city of Erie had specifically singled out the activity of nude dancing, I still would not find that this regulation violated the First Amendment unless I could be persuaded (as on this record I cannot) that it was the communicative character of nude dancing that prompted the ban. When conduct other than speech itself is regulated, it is my view that the First Amendment is violated only "[w]here the government prohibits conduct precisely because of its communicative attributes." *Barnes*, 501 U.S., at 577, 111 S.Ct. 2456 (emphasis deleted). Here, even if one hypothesizes that the city's object was to suppress only nude dancing, that would not establish an intent to suppress what (if anything) nude dancing communicates. I do not feel the need, as the Court does, to identify some "secondary effects" associated with nude dancing that the city could properly seek to eliminate. (I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease.) The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.

Justice SOUTER, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion and agree with the analytical approach that the plurality employs in deciding this case. Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression under *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and the city's regulation is thus properly considered under the *O'Brien* standards. I do not believe, however, that the current record allows us to say that the city has made a sufficient ***311** evidentiary showing to sustain its regulation, and I would therefore vacate the decision of the Pennsylvania Supreme Court and remand the case for further proceedings.

I

In several recent cases, we have confronted the need for factual justifications to satisfy intermediate scrutiny under the First Amendment. See, *e.g.*, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) *(Turner II)*; *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114

S.Ct. 2445, 129 L.Ed.2d 497 (1994) (*Turner I*). Those cases do not identify with any specificity a particular quantum of evidence, nor do I seek to do so in this brief concurrence. [FN1] What the ****1403** cases do make plain, however, is that application of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue.

> FN1. As explained below, *infra*, at 1405, the issue of evidentiary justification was never joined, and with a multiplicity of factors affecting the analysis, a general formulation of the quantum required under *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), will at best be difficult. A lesser showing may suffice when the means-end fit is evident to the untutored intuition. As we said in *Nixon*, "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." 528 U.S., at 391, 120 S.Ct. 897. (In *O'Brien*, for example, the secondary effects that the Government identified flowed from the destruction of draft cards, and there could be no doubt that a regulation prohibiting that destruction would alleviate the concomitant harm.) The nature of the legislating institution might also affect the calculus. We do not require Congress to create a record in the manner of an administrative agency, see *Turner II*, 520 U.S. 180, 213, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997), and we accord its findings greater respect than those of agencies. See *id.*, at 195, 117 S.Ct. 1174. We might likewise defer less to a city council than we would to Congress. The need for evidence may be especially acute when a regulation is content based on its face and is analyzed as content neutral only because of the secondary effects doctrine. And it may be greater when the regulation takes the form of a ban, rather than a time, place, or manner restriction.

***312** In *Turner I*, for example, we stated that

> "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (C.A.D.C.1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*, at 664, 114 S.Ct. 2445 (plurality opinion).

The plurality concluded there, of course, that the record, though swollen by three years of hearings on the Cable Television Consumer Protection and Competition Act of 1992, was insufficient to permit the necessary determinations and remanded for a more thorough factual development. When the case came back to us, in *Turner II*, a majority of the Court reiterated those requirements, characterizing the enquiry into the acceptability of the Government's regulations as one that turned on whether they "were designed to address a real harm, and whether those provisions will alleviate it in a material way." 520 U.S., at 195, 117 S.Ct. 1174. Most recently, in *Nixon*, we repeated that "[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden," 528 U.S., at 392, 120 S.Ct. 897, and we examined the "evidence introduced into the record by petitioners or cited by the lower courts in this action ...," *ibid.*

The focus on evidence appearing in the record is consistent with the approach earlier applied in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). In *Young*, Detroit adopted a zoning ordinance requiring dispersal of adult theaters through the city and prohibiting them within 500 feet of a residential area. Urban planners and real estate experts attested to the harms created by clusters of such theaters, see 427 U.S., at 55, 96 S.Ct. 2440, and we found that "[t]he record ***313** discloses a factual basis" supporting the efficacy of Detroit's chosen remedy, *id.*, at 71, 96 S.Ct. 2440. In *Renton*, the city similarly enacted a zoning ordinance requiring specified distances between adult theaters and residential zones, churches, parks, or schools. See 475 U.S., at

44, 106 S.Ct. 925. The city "held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities." *Ibid.* We found that Renton's failure to conduct its own studies before enacting the ordinance was not fatal; "[t]he First Amendment does not require a city ****1404** ... 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." *Id.*, at 51-52, 106 S.Ct. 925.

The upshot of these cases is that intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed. [FN2] See, *e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770-773, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (striking down regulation of commercial speech for failure to show direct and material efficacy). That evidentiary basis may be borrowed from the records made by other governments if the experience elsewhere is germane to the measure under consideration and actually relied upon. I will assume, further, that the reliance may be shown by legislative invocation of a judicial opinion that accepted an evidentiary foundation as sufficient ***314** for a similar regulation. What is clear is that the evidence of reliance must be a matter of demonstrated fact, not speculative supposition.

> FN2. The plurality excuses Erie from this requirement with the simple observation that "it is evident" that the regulation will have the required efficacy. *Ante*, at 1397. The *ipse dixit* is unconvincing. While I do agree that evidentiary demands need not ignore an obvious fit between means and ends, see n. 1, *supra*, it is not obvious that this is such a case. It is not apparent to me as a matter of common sense that establishments featuring dancers with pasties and G-strings will differ markedly in their effects on neighborhoods from those whose dancers are nude. If the plurality does find it apparent, we may have to agree to disagree.

By these standards, the record before us today is deficient in its failure to reveal any evidence on which Erie may have relied, either for the seriousness of the threatened harm or for the efficacy of its chosen remedy. The plurality does the best it can with the materials to hand, see *ante*, at 1395-1396, but the pickings are slim. The plurality quotes the ordinance's preamble asserting that over the course of more than a century the city council had expressed "findings" of detrimental secondary effects flowing from lewd and immoral profitmaking activity in public places. But however accurate the recital may be and however honestly the councilors may have held those conclusions to be true over the years, the recitation does not get beyond conclusions on a subject usually fraught with some emotionalism. The plurality recognizes this, of course, but seeks to ratchet up the value of mere conclusions by analogizing them to the legislative facts within an administrative agency's special knowledge, on which action is adequately premised in the absence of evidentiary challenge. *Ante*, at 1395-1396. The analogy is not obvious; agencies are part of the executive branch and we defer to them in part to allow them the freedom necessary to reconcile competing policies. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). That aside, it is one thing to accord administrative leeway as to predictive judgments in applying " 'elusive concepts' " to circumstances where the record is inconclusive and "evidence ... is difficult to compile," *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 796-797, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978), and quite another to dispense with evidence of current fact as a predicate for banning a subcategory of expression. [FN3] As ***315** to current fact, the city council's closest ****1405** approach to an evidentiary record on secondary effects and their causes was the statement of one councilor, during the debate over the ordinance, who spoke of increases in sex crimes in a way that might be construed as a reference to secondary effects. See App. 44. But that reference came at the end of a litany of concerns ("free condoms in schools, drive-by shootings, abortions, suicide machines," and declining stu-

dent achievement test scores) that do not seem to be secondary effects of nude dancing. *Ibid.* Nor does the invocation of *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), in one paragraph of the preamble to Erie's ordinance suffice. App. to Pet. for Cert. 42a. The plurality opinion in *Barnes* made no mention of evidentiary showings at all, and though my separate opinion did make a pass at the issue, I did not demand reliance on germane evidentiary demonstrations, whether specific to the statute in question or developed elsewhere. To invoke *Barnes*, therefore, does not indicate that the issue of evidence has been addressed.

> FN3. The proposition that the presence of nude dancing establishments increases the incidence of prostitution and violence is amenable to empirical treatment, and the city councilors who enacted Erie's ordinance are in a position to look to the facts of their own community's experience as well as to experiences elsewhere. Their failure to do so is made all the clearer by one of the *amicus* briefs, largely devoted to the argument that scientifically sound studies show no such correlation. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16-23; *id.*, at App. 1-29.

There is one point, however, on which an evidentiary record is not quite so hard to find, but it hurts, not helps, the city. The final *O'Brien* requirement is that the incidental speech restriction be shown to be no greater than essential to achieve the government's legitimate purpose. 391 U.S., at 377, 88 S.Ct. 1673. To deal with this issue, we have to ask what basis there is to think that the city would be unsuccessful in countering any secondary effects by the significantly lesser restriction of zoning to control the location of nude dancing, thus allowing for efficient law enforcement, restricting effects on property values, and limiting exposure of the public. ***316** The record shows that for 23 years there has been a zoning ordinance on the books to regulate the location of establishments like Kandyland, but the city has not enforced it. One councilor remarked that "I think there's one of the problems. The ordinances are on the books and not enforced. Now this takes place. You really didn't need any other ordinances." App. 43. Another commented, "I felt very, very strongly, and I feel just as strongly right now, that this is a zoning matter." *Id.*, at 45. Even on the plurality's view of the evidentiary burden, this hurdle to the application of *O'Brien* requires an evidentiary response.

The record suggests that Erie simply did not try to create a record of the sort we have held necessary in other cases, and the suggestion is confirmed by the course of this litigation. The evidentiary question was never decided (or, apparently, argued) below, nor was the issue fairly joined before this Court. While respondent did claim that the evidence before the city council was insufficient to support the ordinance, see Brief for Respondent 44-49, Erie's reply urged us not to consider the question, apparently assuming that *Barnes* authorized us to disregard it. See Reply Brief for Petitioners 6- 8. The question has not been addressed, and in that respect this case has come unmoored from the general standards of our First Amendment jurisprudence. [FN4]

> FN4. By contrast, federal courts in other cases have frequently demanded evidentiary showings. See, *e.g.*, *Phillips v. Keyport*, 107 F.3d 164, 175 (C.A.3 1997) (en banc); *J & B Entertainment, Inc. v. Jackson*, 152 F.3d 362, 370-371 (C.A.5 1998).

Careful readers, and not just those on the Erie City Council, will of course realize that my partial dissent rests on a demand for an evidentiary basis that I failed to make when I concurred in *Barnes, supra.* I should have demanded the evidence then, too, and my mistake calls to mind Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, " 'Ignorance, sir, ignorance.' " *McGrath v. Kristensen*, 340 U.S. 162, 178, 71 S.Ct. 224, 95 L.Ed. 173 (1950) (concurring ***317** opinion). [FN5] I may not be less ignorant of nude dancing than I was nine years ago, but after many subsequent occasions to think further about the needs of the ****1406** First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted. I hope it is enlightenment on my part, and acceptable even if a little late. See *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595,

600, 69 S.Ct. 290, 93 L.Ed. 259 (1949) *(per curiam)* (Frankfurter, J., dissenting).

FN5. See Boswell, Life of Samuel Johnson, in 44 Great Books of the Western World 82 (R. Hutchins & M. Adler eds. 1952).

II

The record before us now does not permit the conclusion that Erie's ordinance is reasonably designed to mitigate real harms. This does not mean that the required showing cannot be made, only that, on this record, Erie has not made it. I would remand to give it the opportunity to do so. [FN6] Accordingly, although I join with the plurality in adopting the *O'Brien* test, I respectfully dissent from the Court's disposition of the case.

FN6. This suggestion does not, of course, bar the Pennsylvania Supreme Court from choosing simpler routes to disposition of the case if they exist. Respondent mounted a federal overbreadth challenge to the ordinance; it also asserted a violation of the Pennsylvania Constitution. Either one of these arguments, if successful, would obviate the need for the factual development that is a prerequisite to *O'Brien* analysis.

Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

Far more important than the question whether nude dancing is entitled to the protection of the First Amendment are the dramatic changes in legal doctrine that the Court endorses today. Until now, the "secondary effects" of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify ***318** the total suppression of protected speech. Indeed, the plurality opinion concludes that admittedly trivial advancements of a State's interests may provide the basis for censorship. The Court's commendable attempt to replace the fractured decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), with a single coherent rationale is strikingly unsuccessful; it is supported neither by precedent nor by persuasive reasoning.

I

As the preamble to Ordinance No. 75-1994 candidly acknowledges, the council of the city of Erie enacted the restriction at issue "for the purpose of limiting a recent increase in nude live entertainment within the City." *Ante*, at 1391 (internal quotation marks omitted). Prior to the enactment of the ordinance, the dancers at Kandyland performed in the nude. As the Court recognizes, after its enactment they can perform precisely the same dances if they wear "pasties and G-strings." *Ante*, at 1393; see also *ante*, at 1404, n. 2 (SOUTER, J., concurring in part and dissenting in part). In both instances, the erotic messages conveyed by the dancers to a willing audience are a form of expression protected by the First Amendment. *Ante*, at 1391. [FN1] Despite the similarity between the messages conveyed by the two forms of dance, they are not identical.

FN1. Respondent does not contend that there is a constitutional right to engage in conduct such as lap dancing. The message of eroticism conveyed by the nudity aspect of the dance is quite different from the issue of the proximity between dancer and audience. Respondent's contention is not that Erie has focused on lap dancers, see *ante*, at 1401 (SCALIA, J., concurring in judgment), but that it has focused on the message conveyed by nude dancing.

If we accept Chief Judge Posner's evaluation of this art form, see *Miller v. South Bend*, 904 F.2d 1081, 1089-1104 (C.A.7 1990) (en banc), the difference between the two messages is significant. The plurality assumes, however, that the difference in the content of the message resulting from ***319** the mandated costume change is "*de minimis.*" *Ante*, at 1393. Although I suspect that the patrons of Kandyland are more likely to share Chief Judge Posner's view than the plurality's, for present purposes I shall accept the assumption that the difference in the message is small. The crucial point to remember, however, is ****1407** that whether one views the difference as large or small, nude dancing still receives First Amendment protection, even if that protection lies

only in the "outer ambit" of that Amendment. *Ante*, at 1391. Erie's ordinance, therefore, burdens a message protected by the First Amendment. If one assumes that the same erotic message is conveyed by nude dancers as by those wearing miniscule costumes, one means of expressing that message is banned; [FN2] if one assumes that the messages are different, one of those messages is banned. In either event, the ordinance is a total ban.

> FN2. Although nude dancing might be described as one protected "means" of conveying an erotic message, it does not follow that a protected message has not been totally banned simply because there are other, similar ways to convey erotic messages. See *ante*, at 1393. A State's prohibition of a particular book, for example, does not fail to be a total ban simply because other books conveying a similar message are available.

The plurality relies on the so-called "secondary effects" test to defend the ordinance. *Ante*, at 1391-1395. The present use of that rationale, however, finds no support whatsoever in our precedents. Never before have we approved the use of that doctrine to justify a total ban on protected First Amendment expression. On the contrary, we have been quite clear that the doctrine would not support that end.

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), we upheld a Detroit zoning ordinance that placed special restrictions on the location of motion picture theaters that exhibited "adult" movies. The "secondary effects" of the adult theaters on the neighborhoods where they were located--lower property values and increases in crime (especially prostitution) to name a few--justified the burden imposed ***320** by the ordinance. *Id.*, at 54, 71, and n. 34, 96 S.Ct. 2440 (plurality opinion). Essential to our holding, however, was the fact that the ordinance was "nothing more than a limitation on the place where adult films may be exhibited" and did not limit the size of the market in such speech. *Id.*, at 71, 96 S.Ct. 2440; see also *id.*, at 61, 63, n. 18, 70, 71, n. 35, 96 S.Ct. 2440. As Justice Powell emphasized in his concurrence:

> "At most the impact of the ordinance on [the First Amendment] interests is incidental and minimal. Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them. The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message to reach an audience." *Id.*, at 78-79, 96 S.Ct. 2440.

See also *id.*, at 81, n. 4, 96 S.Ct. 2440 ("[A] zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression").

In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), we upheld a similar ordinance, again finding that the "secondary effects of such theaters on the surrounding community" justified a restrictive zoning law. *Id.*, at 47, 106 S.Ct. 925 (emphasis deleted). We noted, however, that "[t]he Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether," but merely "circumscribe[s] their choice as to location." *Id.*, at 46, 48, 106 S.Ct. 925; see also *id.*, at 54, 106 S.Ct. 925 ("In our view, the First Amendment requires ... that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city ..."). Indeed, in both *Renton* and *American Mini Theatres*, the zoning ordinances were analyzed as mere "time, ***321** place, and manner" regulations. [FN3] See ****1408***Renton*, 475 U.S., at 46, 106 S.Ct. 925; *American Mini Theatres*, 427 U.S., at 63, and n. 18, 96 S.Ct. 2440; *id.*, at 82, n. 6, 96 S.Ct. 2440. Because time, place, and manner regulations must "leave open ample alternative channels for communication of the information," *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), a total ban would necessarily fail that test. [FN4]

> FN3. The plurality contends, *ante*, at 1394, that *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), shows that we have used the second-

ary effects rationale to justify more burdensome restrictions than those approved in *Renton* and *American Mini Theatres.* That argument is unpersuasive for two reasons.
First, as in the two cases just mentioned, the regulation in *Ward* was as a time, place, and manner restriction. See 491 U.S., at 791, 109 S.Ct. 2746; *id.*, at 804, 109 S.Ct. 2746 (Marshall, J., dissenting). Second, as discussed below, *Ward* is not a secondary effects case. See *infra*, at 1410-1411.

FN4. We also held in *Renton* that in enacting its adult theater zoning ordinance, the city of Renton was permitted to rely on a detailed study conducted by the city of Seattle that examined the relationship between zoning controls and the secondary effects of adult theaters. (It was permitted to rely as well on "the 'detailed findings' summarized" in an opinion of the Washington Supreme Court to the same effect.) 475 U.S., at 51-52, 106 S.Ct. 925. Renton, having identified the same problem in its own city as that experienced in Seattle, quite logically drew on Seattle's experience and adopted a similar solution. But if Erie is relying on the Seattle study as well (as the plurality suggests, *ante*, at 1395), its use of that study is most peculiar. After identifying a problem in its own city similar to that in Seattle, Erie has implemented a solution (pasties and G-strings) bearing no relationship to the efficacious remedy identified by the Seattle study (dispersal through zoning).
But the city of Erie, of course, has not in fact pointed to any study by anyone suggesting that the adverse secondary effects of commercial enterprises featuring erotic dancing depends in the slightest on the precise costume worn by the performers--it merely assumes it to be so. See *infra*, at 1409-1410.
If the city is permitted simply to assume that a slight addition to the dancers' costumes will sufficiently decrease secondary effects, then presumably the city can require more and more clothing as long as any danger of adverse effects remains.

And we so held in *Schad v. Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). There, we addressed a zoning ordinance that did not merely require the dispersal of adult theaters, but prohibited ***322** them altogether. In striking down that law, we focused precisely on that distinction, holding that the secondary effects analysis endorsed in the past did not apply to an ordinance that totally banned nude dancing: "The restriction [in *Young v. American Mini Theatres*] did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them. The Court did not imply that a municipality could ban all adult theaters--much less all live entertainment or all nude dancing--from its commercial districts citywide." *Id.*, at 71, 96 S.Ct. 2440 (plurality opinion); see also *id.*, at 76, 96 S.Ct. 2440; *id.*, at 77, 96 S.Ct. 2440 (Blackmun, J., concurring) (joining plurality); *id.*, at 79, 96 S.Ct. 2440 (Powell, J., concurring) (same).

The reason we have limited our secondary effects cases to zoning and declined to extend their reasoning to total bans is clear and straightforward: A dispersal that simply limits the places where speech may occur is a minimal imposition, whereas a total ban is the most exacting of restrictions. The State's interest in fighting presumed secondary effects is sufficiently strong to justify the former, but far too weak to support the latter, more severe burden. [FN5] Yet it is perfectly clear that in the present case--to use Justice Powell's metaphor in *American Mini Theatres*--the city of Erie has totally silenced a message the dancers at Kandyland want to convey. The fact that this censorship may have a laudable ulterior purpose cannot mean that censorship is not censorship. ****1409** For these reasons, the Court's holding rejects the explicit reasoning in *American Mini Theatres* and *Renton* and the express holding in *Schad.*

FN5. As the plurality recognizes by quoting my opinion in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), see *ante*, at 1393-1394, "the First Amendment will not tolerate the total suppression of erotic materials that have some artistic value," though it

will permit zoning regulations.

The Court's use of the secondary effects rationale to permit a total ban has grave implications for basic free speech principles. Ordinarily, laws regulating the primary effects of speech, *i.e.*, the intended persuasive effects caused by the ***323** speech, are presumptively invalid. Under today's opinion, a State may totally ban speech based on its secondary effects--which are defined as those effects that "happen to be associated" with speech, *Boos v. Barry*, 485 U.S. 312, 320-321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988); see *ante*, at 1392--yet the regulation is not presumptively invalid. Because the category of effects that "happen to be associated" with speech includes the narrower subset of effects caused by speech, today's holding has the effect of swallowing whole a most fundamental principle of First Amendment jurisprudence.

II

The plurality's mishandling of our secondary effects cases is not limited to its approval of a total ban. It compounds that error by dramatically reducing the degree to which the State's interest must be furthered by the restriction imposed on speech, and by ignoring the critical difference between secondary effects caused by speech and the incidental effects on speech that may be caused by a regulation of conduct.

In what can most delicately be characterized as an enormous understatement, the plurality concedes that "requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects." *Ante*, at 1397. To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible. It would be more accurate to acknowledge, as Justice SCALIA does, that there is no reason to believe that such a requirement "will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease." *Ante*, at 1402 (opinion concurring in judgment); see also *ante*, at 1404, n. 2 (SOUTER, J., concurring in part and dissenting in part). Nevertheless, the plurality concludes that the "less stringent" test announced in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), "requires only that the regulation further the interest in ***324** combating such effects," *ante*, at 1397; see also *ante*, at 1391. It is one thing to say, however, that *O'Brien* is more lenient than the "more demanding standard" we have imposed in cases such as *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). See *ante*, at 1391. It is quite another to say that the test can be satisfied by nothing more than the mere possibility of *de minimis* effects on the neighborhood.

The plurality is also mistaken in equating our secondary effects cases with the "incidental burdens" doctrine applied in cases such as *O'Brien;* and it aggravates the error by invoking the latter line of cases to support its assertion that Erie's ordinance is unrelated to speech. The incidental burdens doctrine applies when " 'speech' and 'nonspeech' elements are combined in the same course of conduct," and the government's interest in regulating the latter justifies incidental burdens on the former. *O'Brien*, 391 U.S., at 376, 88 S.Ct. 1673. Secondary effects, on the other hand, are indirect consequences of protected speech and may justify regulation of the places where that speech may occur. See *American Mini Theatres*, 427 U.S., at 71, n. 34, 96 S.Ct. 2440 ("[A] concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime"). [FN6] When a State enacts ****1410** a regulation, it might focus on the secondary effects of speech as its aim, or it might concentrate on nonspeech related concerns, having no thoughts at all with respect to how its regulation will affect speech--and only later, when the regulation is found to burden speech, justify the imposition as an unintended incidental consequence. [FN7] But those interests are not the ***325** same, and the plurality cannot ignore their differences and insist that both aims are equally unrelated to speech simply because Erie might have "recogniz[ed]" that it could possibly have had either aim in mind. See *ante*, at 1394. [FN8] One can think of an apple and an orange at the same time; that does not turn them into the same fruit.

FN6. A secondary effect on the neighborhood that "happen[s] to be associated with" a form of speech is, of course, critically different from "the direct impact of speech on its audience." *Boos v. Berry*, 485 U.S. 312,

320-321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). The primary effect of speech is the persuasive effect of the message itself.

FN7. In fact, the very notion of focusing in on incidental burdens at the time of enactment appears to be a contradiction in terms. And if it were not the case that there is a difference between laws aimed at secondary effects and general bans incidentally burdening speech, then one wonders why Justices SCALIA and SOUTER adopted such strikingly different approaches in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991).

FN8. I frankly do not understand the plurality's declaration that a State's interest in the secondary effects of speech that "are associated" with the speech are not "related" to the speech. *Ante,* at 1393. See, *e.g.,* Webster's Third New International Dictionary 132 (1966) (defining "associate" as "closely related"). Sometimes, though, the plurality says that the secondary effects are "caused" by the speech, rather than merely "associated with" the speech. See, *e.g., ante,* at 1392, 1393, 1395, 1396-1397. If that is the definition of secondary effects the plurality adopts, then it is even more obvious that an interest in secondary effects is related to the speech at issue. See *Barnes,* 501 U.S., at 585-586, 111 S.Ct. 2456 (SOUTER, J., concurring in judgment) (secondary effects are not related to speech because their connection to speech is only one of correlation, not causation).

Of course, the line between governmental interests aimed at conduct and unrelated to speech, on the one hand, and interests arising out of the effects of the speech, on the other, may be somewhat imprecise in some cases. In this case, however, we need not wrestle with any such difficulty because Erie has expressly justified its ordinance with reference to secondary effects. Indeed, if Erie's concern with the effects of the message were unrelated to the message itself, it is strange that the only means used to combat those effects is the suppression of the message. [FN9] For these reasons, the plurality's argument that "this case is similar to *O'Brien,*" *ante,* at 1392; see also *ante,* at 1394, is quite wrong, as are its ***326** citations to *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), and *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), *ante,* at 1393-1394, neither of which involved secondary effects. The plurality cannot have its cake and eat it too--either Erie's ordinance was not aimed at speech and the plurality may attempt to justify the regulation under the incidental burdens test, or Erie has aimed its law at the secondary effects of speech, and the plurality can try to justify the law under that doctrine. But it cannot conflate the two with the expectation that Erie's interests aimed at secondary effects will be rendered unrelated to speech by virtue of this doctrinal polyglot.

FN9. As Justice Powell said in his concurrence in *Young v. American Mini Theatres,* 427 U.S., at 82, n. 4, 96 S.Ct. 2440: "[H]ad [Detroit] 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." Quite plainly, Erie's total ban evinces its concern with the message being regulated.

Correct analysis of the issue in this case should begin with the proposition that nude dancing is a species of expressive conduct that is protected by the First Amendment. As Chief Judge Posner has observed, nude dancing fits well within a broad, cultural tradition recognized as expressive ****1411** in nature and entitled to First Amendment protection. See 904 F.2d, at 1089-1104; see also Note, 97 Colum. L.Rev. 1844 (1997). The nudity of the dancer is both a component of the protected expression and the specific target of the ordinance. It is pure sophistry to reason from the premise that the regulation of the nudity component of nude dancing is unrelated to the message conveyed by nude dancers. Indeed, both the text of the ordinance and the reasoning in the plurality's opinion make it pellucidly clear that the city of Erie has prohibited nude dancing *"precisely because*

of its communicative attributes." Barnes, 501 U.S., at 577, 111 S.Ct. 2456 (SCALIA, J., concurring in judgment) (emphasis in original); see *id.*, at 596, 111 S.Ct. 2456 (White, J., dissenting).

III

The censorial purpose of Erie's ordinance precludes reliance on the judgment in *Barnes* as sufficient support for the Court's holding today. Several differences between the Erie ordinance and the statute at issue in *Barnes* belie the plurality's assertion that the two laws are "almost identical." ***327** *Ante,* at 1391. To begin with, the preamble to Erie's ordinance candidly articulates its agenda, declaring:

> "Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana, which was approved by the U.S. Supreme Court in *Barnes v. Glen Theatre Inc.*, ... *for the purpose of limiting a recent increase in nude live entertainment within the City.*" App. to Pet. for Cert. 42a (emphasis added); see also *ante,* at 1391-1392. [FN10]

> FN10. The preamble also states: "[T]he Council of the City of Erie has [found] ... that certain lewd, immoral activities carried on in public places for profit ... lead to the debasement of both women and men ... ." App. to Pet. for Cert. 41a.

As its preamble forthrightly admits, the ordinance's "purpose" is to "limi[t]" a protected form of speech; its invocation of *Barnes* cannot obliterate that professed aim. [FN11]

> FN11. Relying on five words quoted from the Supreme Court of Pennsylvania, the plurality suggests that I have misinterpreted that court's reading of the preamble. *Ante,* at 1392. What follows, however, is a more complete statement of what that court said on this point:
>
> "We acknowledge that one of the purposes of the Ordinance is to combat negative secondary effects. That, however, is not its only goal. Inextricably bound up with this stated purpose is an unmentioned purpose that directly impacts on the freedom of expression: that purpose is to impact negatively on the erotic message of the dance.... We believe ... that the stated purpose for promulgating the Ordinance is inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing." 553 Pa. 348, 359, 719 A.2d 273, 279 (1998).

Erie's ordinance differs from the statute in *Barnes* in another respect. In *Barnes,* the Court expressly observed that the Indiana statute had not been given a limiting construction by the Indiana Supreme Court. As presented to this Court, there was nothing about the law itself that would confine its application to nude dancing in adult entertainment establishments. See 501 U.S., at 564, n. 1, 111 S.Ct. 2456 (discussing Indiana Supreme Court's lack of a limiting construction); see also *id.*, at 585, n. 2, 111 S.Ct. 2456 (SOUTER, J., concurring in judgment). ***328** Erie's ordinance, however, comes to us in a much different posture. In an earlier proceeding in this case, the Court of Common Pleas asked Erie's counsel "what effect would this ordinance have on theater ... productions such as Equus, Hair, O[h!] Calcutta [!]? Under your ordinance would these things be prevented ... ?" Counsel responded: "No, they wouldn't, Your Honor." App. 53. [FN12] Indeed, as *stipulated* in ****1412** the record, the city permitted a production of Equus to proceed without prosecution, even after the ordinance was in effect, and despite its awareness of the nudity involved in the production. *Id.,* at 84. [FN13] Even if, in light of its broad applicability, the statute in *Barnes* was not aimed at a particular form of speech, Erie's ordinance is quite different. As presented to us, the ordinance is deliberately targeted at Kandyland's type of nude dancing (to the exclusion of plays like Equus), in terms of both its applicable scope and the city's enforcement. [FN14]

> FN12. In my view, Erie's categorical response forecloses Justice SCALIA's assertion that the city's position on Equus and Hair was limited to "[o]ne instance," where "the city was [not] aware of the nudity," and "no one had complained." *Ante,* at 1401 (opinion concurring in judgment). Nor could it be contended that selective applic-

ability by stipulated enforcement should be treated differently from selective applicability by statutory text. See *Barnes*, 501 U.S., at 574, 111 S.Ct. 2456 (SCALIA, J., concurring in judgment) (selective enforcement may affect a law's generality). Were it otherwise, constitutional prohibitions could be circumvented with impunity.

FN13. The stipulation read: "The play, 'Equus' featured frontal nudity and was performed for several weeks in October/ November 1994 at the Roadhouse Theater in downtown Erie with no efforts to enforce the nudity prohibition which became effective during the run of the play."

FN14. Justice SCALIA argues that Erie might have carved out an exception for Equus and Hair because it guessed that this Court would consider them protected forms of expression, see *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 550, 557-558, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (holding that Hair, including the "group nudity and simulated sex" involved in the production, is protected speech); in his view, that makes the distinction unobjectionable and renders the ordinance no less of a general law. *Ante*, at 1401-1402 (opinion concurring in judgment). This argument appears to contradict his earlier definition of a general law: "A law is 'general' ... if it regulates conduct without regard to whether that conduct is expressive." *Barnes v. Glen Theatre, Inc.*, 501 U.S., at 576, n. 3, 111 S.Ct. 2456 (opinion concurring in judgment). If the ordinance regulates conduct (public nudity), it does not do so without regard to whether the nudity is expressive if it exempts the public nudity in Hair *precisely* "because of its expressive content." *Ante*, at 1402, n. 6 (opinion concurring in judgment).
Moreover, if Erie exempts Hair because it wants to avoid a conflict with the First Amendment (rather than simply to exempt instances of nudity it finds inoffensive), that rationale still does not explain why Hair is exempted but Kandyland is not, since *Barnes* held that both are constitutionally protected. Justice SCALIA also states that even if the ordinance singled out nude dancing, he would not strike down the law unless the dancing was singled out because of its message. *Ante*, at 1402. He opines that here, the basis for singling out Kandyland is morality. *Ibid.* But since the "morality" of the public nudity in Hair is left untouched by the ordinance, while the "immorality" of the public nudity in Kandyland is singled out, the distinction cannot be that "nude public dancing *itself* is immoral." *Ibid.* (emphasis in original). Rather, the only arguable difference between the two is that one's message is more immoral than the other's.

***329** This narrow aim is confirmed by the expressed views of the Erie City Councilmembers who voted for the ordinance. The four city councilmembers who approved the measure (of the six total councilmembers) each stated his or her view that the ordinance was aimed specifically at nude adult entertainment, and not at more mainstream forms of entertainment that include total nudity, nor even at nudity in general. One lawmaker observed: "We're not talking about nudity. We're not talking about the theater or art .... We're talking about what is indecent and immoral .... We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." App. 39. Though not quite as succinct, the other councilmembers expressed similar convictions.
For example, one member illustrated his understanding of the aim of the law by contrasting it with his recollection about high school students swimming in the nude in the school's pool. The ordinance was not intended to cover those incidents of nudity: "But what I'm getting at is [the swimming] wasn't indecent, it wasn't an immoral thing, and ***330** yet there was nudity." *Id.*, at 42. The same lawmaker then disfavorably compared the nude swimming incident to the activities that occur in "some of these clubs" that exist in Erie--clubs that would be covered ****1413** by the law. *Ibid. [FN15]* Though such comments could be consistent with an interest in a general prohibition of nudity, the complete absence of commentary on

that broader interest, and the councilmembers' exclusive focus on adult entertainment, is evidence of the ordinance's aim. In my view, we need not strain to find consistency with more general purposes when the most natural reading of the record reflects a near obsessive preoccupation with a single target of the law. [FN16]

FN15. Other members said their focus was on "bottle clubs," and the like, App. 43, and attempted to downplay the effect of the ordinance by acknowledging that "the girls can wear thongs or a G-string and little pasties that are smaller than a diamond." *Ibid.* Echoing that focus, another member stated that "[t]here still will be adult entertainment in this town, only it will be in a little different form." *Id.,* at 47.

FN16. The plurality dismisses this evidence, declaring that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Ante,* at 1392 (citing *United States v. O'Brien*, 391 U.S. 367, 382-383, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). First, it is worth pointing out that this doctrinaire formulation of *O'Brien's* cautionary statement is overbroad. See generally L. Tribe, American Constitutional Law § 12-5, pp. 819-820 (2d ed.1988). Moreover, *O'Brien* itself said only that we would not strike down a law "on the *assumption* that a wrongful purpose or motive has caused the power to be exerted," 391 U.S., at 383, 88 S.Ct. 1673 (emphasis added; internal quotation marks omitted), and that statement was due to our recognition that it is a "hazardous matter" to determine the actual intent of a body as large as Congress "on the basis of what fewer than a handful of Congressmen said about [a law]," *id.*, at 384, 88 S.Ct. 1673. Yet neither consideration is present here. We need not base our inquiry on an "assumption," nor must we infer the collective intent of a large body based on the statements of a few, for we have in the record the actual statements of all the city councilmembers who voted in favor of the ordinance.

The text of Erie's ordinance is also significantly different from the law upheld in *Barnes.* In *Barnes,* the statute defined "nudity" as "the showing of the human male or female ***331** genitals" (and certain other regions of the body) "with less than a fully opaque covering." 501 U.S., at 569, n. 2, 111 S.Ct. 2456. The Erie ordinance duplicates that definition in all material respects, but adds the following to its definition of "[n]udity":

" '[T]he exposure of any device, costume, or covering *which gives the appearance of or simulates* the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, *which device simulates and gives the realistic appearance* of nipples and/or areola.' " *Ante,* at 1388, n. * (emphasis added).

Can it be doubted that this out-of-the-ordinary definition of "nudity" is aimed directly at the dancers in establishments such as Kandyland? Who else is likely to don such garments? [FN17] We should not stretch to embrace fanciful explanations when the most natural reading of the ordinance unmistakably identifies its intended target.

FN17. Is it seriously contended (as would be necessary to sustain the ordinance as a general prohibition) that, when crafting this bizarre definition of "nudity," Erie's concern was with the use of simulated nipple covers on "nude beaches and [by otherwise] unclothed purveyors of hot dogs and machine tools"? *Barnes*, 501 U.S., at 574, 111 S.Ct. 2456 (SCALIA, J., concurring in judgment); see also *ante,* at 1401 (SCALIA, J., concurring in judgment). It is true that one might *conceivably* imagine that is Erie's aim. But it is far more likely that this novel definition was written with the Kandyland dancers and the like in mind, since they are the only ones covered by the law (recall that plays like Equus are exempted from coverage) who are likely to utilize such unconventional clothing.

It is clear beyond a shadow of a doubt that the Erie ordinance was a response to a more specific concern than nudity in general, namely, nude dancing of the sort found in Kandyland. [FN18] Given that the ****1414** Court has not even tried to defend ***332** the ordinance's total ban on the ground that its censorship of protected speech might be justified by an overriding state interest, it should conclude that the ordinance is patently invalid. For these reasons, as well as the reasons set forth in Justice White's dissent in *Barnes,* I respectfully dissent.

FN18. The plurality states that Erie's ordinance merely "replaces and updates provisions of an 'Indecency and Immorality' ordinance" from the mid-19th century, just as the statute in *Barnes* did. *Ante,* at 1391. First of all, it is not clear that this is correct. The record does indicate that Erie's Ordinance No. 75-1994 updates an older ordinance of similar import. Unfortunately, that old regulation is not in the record. Consequently, whether the new ordinance merely "replaces" the old one is a matter of debate.
From statements of one councilmember, it can reasonably be inferred that the old ordinance was merely a residential zoning restriction, not a total ban. See App. 43. If that is so, it leads to the further question why Erie felt it necessary to shift to a total ban in 1994.
But even if the plurality's factual contention is correct, it does not undermine the points I have made in the text. In *Barnes,* the point of noting the ancient pedigree of the Indiana statute was to demonstrate that its passage antedated the appearance of adult entertainment venues, and therefore could not have been motivated by the presence of those establishments. The inference supposedly rebutted in *Barnes* stemmed from the *timing* of the enactment. Here, however, the inferences I draw depend on the text of the ordinance, its preamble, its scope and enforcement, and the comments of the councilmembers. These do not depend on the timing of the ordinance's enactment.

529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265, 68 USLW 4239, 28 Media L. Rep. 1545, 00 Cal. Daily Op. Serv. 2443, 2000 Daily Journal D.A.R. 3255, 2000 CJ C.A.R. 1618, 13 Fla. L. Weekly Fed. S 203

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- 1999 WL 996952 (Appellate Brief) REPLY BRIEF FOR PETITIONERS (Nov. 01, 1999)
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- 1999 WL 787884 (Appellate Brief) BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF PENNSYLVANIA AS AMICI CURIAE SUPPORTING RESPONDENT (Sep. 30, 1999)
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• 1999 WL 459580 (Appellate Brief) MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER CITY OF ERIE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER CITY OF ERIE OF THE ERIE COUNTY CITIZENS COALITION AGAINST VIOLENT PORNOGRAPHY (Jul. 01, 1999)

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• 1999 WL 33639532 (Appellate Petition, Motion and Filing) Amici Curiae Brief of the Thomas Jefferson Center for Protection of Free Expression, Alley Theatre, Association of Performing Arts Presenters, Kathleen Chalfant, Dance/USA, Tony Kushner, the Lookingglass Theatre Co., Terrence McNally, Oregon Shakespe are Company, Yvonne Rainer, Rachel Rosenthal, Theater Artaud, Theatre Communications Group, and the Walker Art Center In Support of Respondent (1999)

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Briefs and Other Related Documents

Supreme Court of the United States
CITY OF RENTON, et al., Appellants
v.
PLAYTIME THEATRES, INC., et al.
No. 84-1360.

Argued Nov. 12, 1985.
Decided Feb. 25, 1986.
Rehearing Denied April 21, 1986.
See 475 U.S. 1132, 106 S.Ct. 1663.

Suit was brought challenging the constitutionality of a zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school. The United States District Court for the Western District of Washington ruled in favor of the city. The Court of Appeals for the Ninth Circuit, 748 F.2d 527, reversed and remanded for reconsideration, and the city appealed. The Supreme Court, Justice Rehnquist, held that the ordinance was a valid governmental response to the serious problems created by adult theaters and satisfied the dictates of the First Amendment.

Reversed.

Justice Blackmun concurred in the result.

Justice Brennan filed a dissenting opinion in which Justice Marshall joined.

West Headnotes

[1] Constitutional Law 90.4(4)
92k90.4(4) Most Cited Cases
City ordinance that prohibited adult motion picture theaters from locating from within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school was properly analyzed as a form of time, place and manner regulation of speech. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90.4(4)
92k90.4(4) Most Cited Cases
A zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school was a valid governmental response to the serious problems created by adult theaters and satisfied the dictates of the First Amendment. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 90.4(4)
92k90.4(4) Most Cited Cases
(Formerly 92k90.1(4))
The First Amendment does not require a city, before enacting an adult theater zoning ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever the evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. U.S.C.A. Const.Amend. 1.

[4] Zoning and Planning 76
414k76 Most Cited Cases
Cities may regulate adult theaters by dispersing them or by effectively concentrating them.

***41** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondents purchased two theaters in Renton, Washington, with the intention of exhibiting adult films and, at about the same time, filed suit in Federal District Court, seeking injunctive relief and a declaratory judgment that the First and Fourteenth Amendments were violated by a city ordinance that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The District Court ultimately entered summary judgment in the city's favor, holding that the ordinance did not violate the First Amendment. The Court of Appeals reversed, holding that the ordinance constituted a substantial restriction on First Amendment interests, and remanded the case for reconsideration as to

whether the city had substantial governmental interests to support the ordinance.

Held: The ordinance is a valid governmental response to the serious problems created by adult theaters and satisfies the dictates of the First Amendment. Cf. ***925** *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310. Pp. 928-933.

(a) Since the ordinance does not ban adult theaters altogether, it is properly analyzed as a form of time, place, and manner regulation. "Content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. Pp. 928-929.

(b) The District Court found that the Renton City Council's "predominate" concerns were with the secondary effects of adult theaters on the surrounding community, not with the content of adult films themselves. This finding is more than adequate to establish that the city's pursuit of its zoning interests was unrelated to the suppression of free expression, and thus the ordinance is a "content-neutral" speech regulation. Pp. 928-930.

(c) The Renton ordinance is designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication. A city's interest in attempting to preserve the quality of urban life, as here, must be accorded high respect. Although the ordinance was enacted without the benefit of studies specifically relating to ***42** Renton's particular problems, Renton was entitled to rely on the experiences of, and studies produced by, the nearby city of Seattle and other cities. Nor was there any constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, or by effectively concentrating them, as in Renton. Moreover, the ordinance is not "underinclusive" for failing to regulate other kinds of adult businesses, since there was no evidence that, at the time the ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. Pp. 930-932.

(d) As required by the First Amendment, the ordinance allows for reasonable alternative avenues of communication. Although respondents argue that in general there are no "commercially viable" adult theater sites within the limited area of land left open for such theaters by the ordinance, the fact that respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a violation of the First Amendment, which does not compel the Government to ensure that adult theaters, or any other kinds of speech-related businesses, will be able to obtain sites at bargain prices. P. 932.

748 F.2d 527 (CA9 1984), reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., concurred in the result. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. ---.

**926 *E. Barrett Prettyman, Jr.*, arguedthe cause for appellants. With him on the briefs were *David W. Burgett, Lawrence J. Warren, Daniel Kellogg, Mark E. Barber,* and *Zanetta L. Fontes.*

Jack R. Burns argued the cause for appellees. With him on the briefs was *Robert E. Smith.**

* Briefs of *amici curiae* urging reversal were filed for Jackson County, Missouri, by *Russell D. Jacobson;* for the Freedom Council Foundation by *Wendell R. Bird* and *Robert K. Skolrood;* for the National Institute of Municipal Law Officers by *George Agnost, Roy D. Bates, Benjamin L. Brown, J. Lamar Shelley, John W. Witt, Roger F. Cutler, Robert J. Alfton, James K. Baker, Barbara Mather, James D. Montgomery, Clifford D. Pierce, Jr., William H. Taube, William I. Thornton, Jr.,* and *Charles S. Rhyne;* and for the National League of Cities et al. by *Benna Ruth Solomon, Joyce Holmes Benjamin, Beate Bloch,* and *Lawrence R. Velvel.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *David Utevsky, Jack D. Novik,* and *Burt Neuborne;* and for the American Booksellers Association, Inc., et al.

by *Michael A. Bamberger*.

Eric M. Rubin and *Walter E. Diercks* filed a brief for the Outdoor Advertising Association of America, Inc., et al. as *amici curiae*.

***43** Justice REHNQUIST delivered the opinion of the Court.

This case involves a constitutional challenge to a zoning ordinance, enacted by appellant city of Renton, Washington, that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Appellees, Playtime Theatres, Inc., and Sea-First Properties, Inc., filed an action in the United States District Court for the Western District of Washington seeking a declaratory judgment that the Renton ordinance violated the First and Fourteenth Amendments and a permanent injunction against its enforcement. The District Court ruled in favor of Renton and denied the permanent injunction, but the Court of Appeals for the Ninth Circuit reversed and remanded for reconsideration. 748 F.2d 527 (1984). We noted probable jurisdiction, ****927**471 U.S. 1013, 105 S.Ct. 2015, 85 L.Ed.2d 297 (1985), and now reverse the judgment of the Ninth Circuit. [FN1]

FN1. This appeal was taken under 28 U.S.C. § 1254(2), which provides this Court with appellate jurisdiction at the behest of a party relying on a state statute or local ordinance held unconstitutional by a court of appeals. As we have previously noted, there is some question whether jurisdiction under § 1254(2) is available to review a nonfinal judgment. See *South Carolina Electric & Gas Co. v. Flemming*, 351 U.S. 901, 76 S.Ct. 692, 100 L.Ed. 1439 (1956); *Slaker v. O'Connor*, 278 U.S. 188, 49 S.Ct. 158, 73 L.Ed. 258 (1929). But see *Chicago v. Atchison, T. & S.F. R. Co.*, 357 U.S. 77, 82-83, 78 S.Ct. 1063, 1066-1067, 2 L.Ed.2d 1174 (1958).
The present appeal seeks review of a judgment remanding the case to the District Court. We need not resolve whether this appeal is proper under § 1254(2), however, because in any event we have certiorari jurisdiction under 28 U.S.C. § 2103. As we have previously done in equivalent situations, see *El Paso v. Simmons*, 379 U.S. 497, 502-503, 85 S.Ct. 577, 580-581, 13 L.Ed.2d 446 (1965); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927, 95 S.Ct. 2561, 2565, 45 L.Ed.2d 648 (1975), we dismiss the appeal and, treating the papers as a petition for certiorari, grant the writ of certiorari. Henceforth, we shall refer to the parties as "petitioners" and "respondents."

***44** In May 1980, the Mayor of Renton, a city of approximately 32,000 people located just south of Seattle, suggested to the Renton City Council that it consider the advisability of enacting zoning legislation dealing with adult entertainment uses. No such uses existed in the city at that time. Upon the Mayor's suggestion, the City Council referred the matter to the city's Planning and Development Committee. The Committee held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities. The City Council, meanwhile, adopted Resolution No. 2368, which imposed a moratorium on the licensing of "any business ... which ... has as its primary purpose the selling, renting or showing of sexually explicit materials." App. 43. The resolution contained a clause explaining that such businesses "would have a severe impact upon surrounding businesses and residences." *Id.*, at 42.

In April 1981, acting on the basis of the Planning and Development Committee's recommendation, the City Council enacted Ordinance No. 3526. The ordinance prohibited 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. App. to Juris. Statement 79a. The term "adult motion picture theater" was defined as "[a]n enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to 'specified sexu-

al activities' or 'specified anatomical areas' ... for observation by patrons therein." *Id.*, at 78a.

***45** In early 1982, respondents acquired two existing theaters in downtown Renton, with the intention of using them to exhibit feature-length adult films. The theaters were located within the area proscribed by Ordinance No. 3526. At about the same time, respondents filed the previously mentioned lawsuit challenging the ordinance on First and Fourteenth Amendment grounds, and seeking declaratory and injunctive relief. While the federal action was pending, the City Council amended the ordinance in several respects, adding a statement of reasons for its enactment and reducing the minimum distance from any school to 1,000 feet.

In November 1982, the Federal Magistrate to whom respondents' action had been referred recommended the entry of a preliminary injunction against enforcement of the Renton ordinance and the denial of Renton's motions to dismiss and for summary judgment. The District Court adopted the Magistrate's recommendations and entered the preliminary injunction, and respondents began showing adult films at their two theaters in Renton. Shortly thereafter, the parties agreed to submit the case for a final decision on whether a permanent****928** injunction should issue on the basis of the record as already developed.

The District Court then vacated the preliminary injunction, denied respondents' requested permanent injunction, and entered summary judgment in favor of Renton. The court found that the Renton ordinance did not substantially restrict First Amendment interests, that Renton was not required to show specific adverse impact on Renton from the operation of adult theaters but could rely on the experiences of other cities, that the purposes of the ordinance were unrelated to the suppression of speech, and that the restrictions on speech imposed by the ordinance were no greater than necessary to further the governmental interests involved. Relying on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), the court held that the Renton ordinance did not violate the First Amendment.

***46** The Court of Appeals for the Ninth Circuit reversed. The Court of Appeals first concluded, contrary to the finding of the District Court, that the Renton ordinance constituted a substantial restriction on First Amendment interests. Then, using the standards set forth in *United States v. O'Brien, supra*, the Court of Appeals held that Renton had improperly relied on the experiences of other cities in lieu of evidence about the effects of adult theaters on Renton, that Renton had thus failed to establish adequately the existence of a substantial governmental interest in support of its ordinance, and that in any event Renton's asserted interests had not been shown to be unrelated to the suppression of expression. The Court of Appeals remanded the case to the District Court for reconsideration of Renton's asserted interests.

In our view, the resolution of this case is largely dictated by our decision in *Young v. American Mini Theatres, Inc., supra.* There, although five Members of the Court did not agree on a single rationale for the decision, we held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments. *Id.*, 427 U.S., at 72-73, 96 S.Ct., at 2453 (plurality opinion of STEVENS, J., joined by BURGER, C.J., and WHITE and REHNQUIST, JJ.); *id.*, at 84, 96 S.Ct., at 2459 (POWELL, J., concurring). The Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation. *Id.*, at 63, and n. 18, 96 S.Ct., at 2448 and n. 18; *id.*, at 78-79, 96 S.Ct., at 2456 (POWELL, J., concurring).

[1] Describing the ordinance as a time, place, and manner regulation is, of course, only the first step in our inquiry. This Court has long held that regulations enacted for the ***47** purpose of restraining speech on the basis of its content presumptively violate the First Amendment. See *Carey v. Brown*, 447 U.S. 455, 462-463, and n. 7, 100 S.Ct. 2286, 2291,

and n. 7, 65 L.Ed.2d 263 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 98- 99, 92 S.Ct. 2286, 2289, 2291-2292, 33 L.Ed.2d 212 (1972). On the other hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807, 104 S.Ct. 2118, 2130, 80 L.Ed.2d 772 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648, 101 S.Ct. 2559, 2563-2564, 69 L.Ed.2d 298 (1981).

****929** At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council's "*predominate* concerns" were with the secondary effects of adult theaters, and not with the content of adult films themselves. App. to Juris. Statement 31a (emphasis added). But the Court of Appeals, relying on its decision in *Tovar v. Billmeyer*, 721 F.2d 1260, 1266 (CA9 1983), held that this was not enough to sustain the ordinance. According to the Court of Appeals, if "*a motivating factor* " in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision. 748 F.2d, at 537 (emphasis in original). This view of the law was rejected in *United States v. O'Brien*, 391 U.S., at 382- 386, 88 S.Ct., at 1681-1684, the very case that the Court of Appeals said it was applying:

> ***48** "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....
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> * * *
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> "... 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 us to eschew guesswork." *Id.*, at 383-384, 88 S.Ct., at 1683.

The District Court's finding as to "predominate" intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. See App. to Juris. Statement 90a. As Justice POWELL observed in *American Mini Theatres*, "[i]f [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." 427 U.S., at 82, n. 4, 96 S.Ct., at 2458, n. 4.

In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976) (emphasis added); *Community for Creative Non-Violence, supra*, 468 U.S., at 293, 104 S.Ct., at 3069; *International Society for Krishna Consciousness, supra*, 452 U.S., at 648, 101 S.Ct., at 2564. The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express ***49** less favored or more controversial views." *Mosley, supra*, 408 U.S., at 95-96, 92 S.Ct., at 2289-2290.

It was with this understanding in mind that, in *American Mini Theatres*, a majority of this Court decided

that, at least with respect to businesses that purvey sexually explicit materials, [FN2] zoning ordinances designed****930** to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to "content-neutral" time, place, and manner regulations. Justice STEVENS, writing for the plurality, concluded that the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters "without violating the government's paramount obligation of neutrality in its regulation of protected communication," 427 U.S., at 70, 96 S.Ct., at 2452, noting that "[i]t is th [e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech," *id.*, at 71, n. 34, 96 S.Ct., at 2453, n. 34. Justice POWELL, in concurrence, elaborated:

> FN2. See *American Mini Theatres*, 427 U.S., at 70, 96 S.Ct., at 2452 (plurality opinion) ("[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate ...").

> "[The] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings.... Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. ***50** See, *e.g.*, *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 509-511 [89 S.Ct. 733, 737-739, 21 L.Ed.2d 731] (1969); *Procunier v. Martinez*, 416 U.S. 396, 413-414 [94 S.Ct. 1800, 1811, 40 L.Ed.2d 224] (1974); *Greer v. Spock*, 424 U.S. 828, 842-844 [96 S.Ct. 1211, 1219-1220, 47 L.Ed.2d 505] (1976) (POWELL, J., concurring); cf. *CSC v. Letter Carriers*, 413 U.S. 548 [93 S.Ct. 2880, 37 L.Ed.2d 796] (1973)." *Id.*, at 82, n. 6, 96 S.Ct., at 2458, n. 6.

[2] The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. See *Community for Creative Non-Violence*, 468 U.S., at 293, 104 S.Ct., at 3069; *International Society for Krishna Consciousness*, 452 U.S., at 649, 654, 101 S.Ct., at 2564, 2567. It is clear that the ordinance meets such a standard. As a majority of this Court recognized in *American Mini Theatres*, a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." 427 U.S., at 71, 96 S.Ct., at 2453 (plurality opinion); see *id.*, at 80, 96 S.Ct., at 2457 (POWELL, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial"). Exactly the same vital governmental interests are at stake here.

The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." 748 F.2d, at 537. We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof. The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood. See *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978). The opinion of the Supreme Court of Washington in *Northend Cinema*, which ***51** was before the Renton City Council when it enacted the ordinance in question here, described Seattle's experience as follows:

> "The amendments to the City's zoning code which are at issue here are the ****931** culmination of a long period of study and discussion of the problems of adult movie theaters in residential areas of the City.... [T]he City's Department of Community Development made a study of the need for zoning controls of adult theaters.... The study analyzed the City's zoning scheme, comprehensive plan, and

> land uses around existing adult motion picture theaters...." *Id.*, at 711, 585 P.2d, at 1155.
>
> "[T]he [trial] court heard extensive testimony regarding the history and purpose of these ordinances. It heard expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts. The court's detailed findings, which include a finding that the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight, are supported by substantial evidence in the record." *Id.*, at 713, 585 P.2d, at 1156.
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> "The record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." *Id.*, at 719, 585 P.2d, at 1159.

[3] We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. 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 ***52** problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

[4] We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas.... [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *American Mini Theatres*, 427 U.S., at 71, 96 S.Ct., at 2453 (plurality opinion). Moreover, the Renton ordinance is "narrowly tailored" to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

Respondents contend that the Renton ordinance is "under-inclusive," in that it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters. On this record the contention must fail. There is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. In fact, Resolution No. 2368, enacted in October 1980, states that "the City of Renton does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials." App. 42. That Renton chose first to address the potential problems created ***53** by one particular kind of adult business in no way suggests that the city has "singled out" adult theaters for discriminatory treatment. We simply have no basis on ****932** this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955).

Finally, turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of "[a]mple, accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads." App. to Juris. Statement 28a.

Respondents argue, however, that some of the land in question is already occupied by existing businesses,

that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the Renton ordinance. Brief for Appellees 34-37. The Court of Appeals accepted these arguments, [FN3] concluded that ***54** the 520 acres was not truly "available" land, and therefore held that the Renton ordinance "would result in a substantial restriction" on speech. 748 F.2d, at 534.

> FN3. The Court of Appeals' rejection of the District Court's findings on this issue may have stemmed in part from the belief, expressed elsewhere in the Court of Appeals' opinion, that, under *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), appellate courts have a duty to review *de novo* all mixed findings of law and fact relevant to the application of First Amendment principles. See 748 F.2d 527, 535 (1984). We need not review the correctness of the Court of Appeals' interpretation of *Bose Corp.*, since we determine that, under any standard of review, the District Court's findings should not have been disturbed.

We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," *American Mini Theatres*, 427 U.S., at 71, n. 35, 96 S.Ct., at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See *id.*, at 78, 96 S.Ct., at 2456 (POWELL, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact"). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

In sum, we find that the Renton ordinance represents a valid governmental response to the "admittedly serious problems" created by adult theaters. See *id.*, at 71, 96 S.Ct., at 2453 (plurality opinion). Renton has not used "the power to zone as a pretext for suppressing expression," *id.*, at 84, 96 S.Ct., at 2459 (POWELL, J., concurring), but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning. Here, as in *American Mini Theatres*, the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the ***55 **933** First Amendment. [FN4] The judgment of the Court of Appeals is therefore

> FN4. Respondents argue, as an "alternative basis" for affirming the decision of the Court of Appeals, that the Renton ordinance violates their rights under the Equal Protection Clause of the Fourteenth Amendment. As should be apparent from our preceding discussion, respondents can fare no better under the Equal Protection Clause than under the First Amendment itself. See *Young v. American Mini Theatres, Inc.*, 427 U.S., at 63-73, 96 S.Ct., at 2448-2454.
>
> Respondents also argue that the Renton ordinance is unconstitutionally vague. More particularly, respondents challenge the ordinance's application to buildings "used" for presenting sexually explicit films, where the term "used" describes "a continuing course of conduct of exhibiting [sexually explicit films] in a manner which appeals to a prurient interest." App. to Juris. Statement 96a. We reject respondents' "vagueness" argument for the same reasons that led us to reject a similar challenge in *American Mini Theatres, supra.* There, the Detroit ordinance applied to theaters "used to present material distinguished or characterized by an emphasis on [sexually explicit matter]." *Id.*,

at 53, 96 S.Ct., at 2444. We held that "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents." *Id.*, at 58-59, 96 S.Ct., at 2446. We also held that the Detroit ordinance created no "significant deterrent effect" that might justify invocation of the First Amendment "overbreadth" doctrine. *Id.*, at 59- 61, 96 S.Ct., at 2446-2448.

Reversed.

Justice BLACKMUN concurs in the result.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there. The constitutionality of the ordinance is therefore not correctly analyzed under standards applied to content-neutral time, place, and manner restrictions. But even assuming that the ordinance may fairly be characterized as content neutral, it is plainly unconstitutional under the standards established by the decisions of this Court. Although the Court's analysis is limited to ***56** cases involving "businesses that purvey sexually explicit materials," *ante*, at 929, and n. 2, and thus does not affect our holdings in cases involving state regulation of other kinds of speech, I dissent.

I

"[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980). The Court asserts that the ordinance is "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community," *ante*, at 929 (emphasis in original), and thus is simply a time, place, and manner regulation. [FN1] This analysis is misguided.

FN1. The Court apparently finds comfort in the fact that the ordinance does not "deny use to those wishing to express less favored or more controversial views." *Ante*, at 929. However, content-based discrimination is not rendered "any less odious" because it distinguishes "among entire classes of ideas, rather than among points of view within a particular class." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 316, 94 S.Ct. 2714, 2724, 41 L.Ed.2d 770 (1974) (BRENNAN, J., dissenting); see also *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 537, 100 S.Ct. 2326, 2333, 65 L.Ed.2d 319 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic"). Moreover, the Court's conclusion that the restrictions imposed here were viewpoint neutral is patently flawed. "As a practical matter, the speech suppressed by restrictions such as those involved [here] will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores. Such restrictions, in other words, have a potent viewpoint-differential impact.... To treat such restrictions as viewpoint-neutral seems simply to ignore reality." Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U.Chi.L.Rev. 81, 111-112 (1978).

The fact that adult movie theaters may cause harmful "secondary" land-use effects may arguably give Renton a compelling ****934** reason to regulate such establishments; it does not mean, however, that such regulations are content neutral. ***57** Because the ordinance imposes special restrictions on certain kinds of speech on the basis of *content*, I cannot simply accept, as the Court does, Renton's claim that the ordinance was not designed to suppress the content of adult movies. "[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' " *Consolidated Edis-*

on Co., supra, at 536, 100 S.Ct., at 2332 (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282, 71 S.Ct. 325, 333, 95 L.Ed. 267 (1951) (Frankfurter, J., concurring in result)). "[B]efore deferring to [Renton's] judgment, [we] must be convinced that the city is seriously and comprehensively addressing" secondary-land use effects associated with adult movie theaters. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 531, 101 S.Ct. 2882, 2904, 69 L.Ed.2d 800 (1981) (BRENNAN, J., concurring in judgment). In this case, both the language of the ordinance and its dubious legislative history belie the Court's conclusion that "the city's pursuit of its zoning interests here was unrelated to the suppression of free expression." *Ante*, at 929.

A

The ordinance discriminates on its face against certain forms of speech based on content. Movie theaters specializing in "adult motion pictures" may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Other motion picture theaters, and other forms of "adult entertainment," such as bars, massage parlors, and adult bookstores, are not subject to the same restrictions. This selective treatment strongly suggests that Renton was interested not in controlling the "secondary effects" associated with adult businesses, but in discriminating against adult theaters based on the content of the films they exhibit. The Court ignores this discriminatory treatment, declaring that Renton is free "to address the potential problems created by one particular kind of adult business," *ante*, at 931, and to amend the ordinance in the ***58** future to include other adult enterprises. *Ante*, at 932 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955)). [FN2] However, because of the First Amendment interests at stake here, this one-step-at-a-time analysis is wholly inappropriate.

> FN2. The Court also explains that "[t]here is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton." *Ante*, at 931. However, at the time the ordinance was enacted, there was no evidence that any *adult movie theaters* were located in, or considering moving to, Renton. Thus, there was no legitimate reason for the city to treat adult movie theaters differently from other adult businesses.

> "This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See *e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95 [92 S.Ct., at 2290]." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215, 95 S.Ct. 2268, 2275, 45 L.Ed.2d 125 (1975).

In this case, the city has not justified treating adult movie theaters differently from other adult entertainment businesses. The ordinance's underinclusiveness is cogent evidence that it was aimed at the *content* of the films shown in adult movie theaters.

****935** B

Shortly *after* this lawsuit commenced, the Renton City Council amended the ordinance, adding a provision explaining that its intention in adopting the ordinance had been "to promote the City of Renton's great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land ***59** use planning." App. to Juris. Statement 81a. The amended ordinance also lists certain conclusory "findings" concerning adult entertainment land uses that the Council purportedly relied upon in adopting the ordinance. *Id.*, at 81a-86 a. The city points to these provisions as evidence that the ordinance was designed to control the secondary effects associated with adult movie theaters, rather than to suppress the content of the films they exhibit. However, the "legislative history" of the ordinance strongly suggests otherwise.

Prior to the amendment, there was no indication that the ordinance was designed to address any "secondary effects" a single adult theater might create. In addition to the suspiciously coincidental timing of the amendment, many of the City Council's "findings" do not relate to legitimate land-use concerns. As the Court of Appeals observed, "[b]oth the magistrate and the district court recognized that many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter." 748 F.2d 527, 537 (CA9 1984). [FN3] That some residents may be offended by the *content* of the films shown at adult movie theaters cannot form the basis for state regulation of speech. See *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).

FN3. For example, "finding" number 2 states that
"[l]ocation of adult entertainment land uses on the main commercial thoroughfares of the City gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for marital relationship and for the sanctity of marriage relations of others, and the concept of non-aggressive, consensual sexual relations." App. to Juris. Statement 86a.
"Finding" number 6 states that
"[l]ocation of adult land uses in close proximity to residential uses, churches, parks, and other public facilities, and schools, will cause a degradation of the community standard of morality. Pornographic material has a degrading effect upon the relationship between spouses." *Ibid.*

Some of the "findings" added by the City Council do relate to supposed "secondary effects" associated with adult movie ***60** theaters. [FN4] However, the Court cannot, as it does, merely accept these *post hoc* statements at face value. "[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Schad v. Mount Ephraim*, 452 U.S. 61, 77, 101 S.Ct. 2176, 2187, 68 L.Ed.2d 671 (1981) (BLACKMUN, J., concurring). As the Court of Appeals concluded, "[t]he record presented by Renton to support its asserted interest in enacting the zoning ordinance is very thin." 748 F.2d, at 536.

FN4. For example, "finding" number 12 states that "[l]ocation of adult entertainment land uses in proximity to residential uses, churches, parks and other public facilities, and schools, may lead to increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses." *Id.*, at 83a.

The amended ordinance states that its "findings" summarize testimony received by the City Council at certain public hearings. While none of this testimony was ever recorded or preserved, a city official reported that residents had objected to having adult movie theaters located in their community. However, the official was unable to recount any testimony as to how adult movie theaters would specifically affect the schools, churches, parks, or residences "protected" by the ordinance. See App. 190-192. The City Council conducted no studies, and heard no expert testimony, on how the protected uses would be affected by the presence of an adult movie theater, and never considered whether residents' concerns could be met by "restrictions ****936** that are less intrusive on protected forms of expression." *Schad, supra*, 452 U.S., at 74, 101 S.Ct., at 2186. As a result, any "findings" regarding "secondary effects" caused by adult movie theaters, or the need to adopt specific locational requirements to combat such effects, were not "findings" at all, but purely speculative conclusions. Such "findings" were not such as are required to justify the burdens ***61** the ordinance imposed upon constitutionally protected expression.

The Court holds that Renton was entitled to rely on the experiences of cities like Detroit and Seattle, which had enacted special zoning regulations for adult entertainment businesses after studying the adverse effects caused by such establishments. However, even assuming that Renton was concerned with the same problems as Seattle and Detroit, it nev-

er actually reviewed any of the studies conducted by those cities. Renton had no basis for determining if any of the "findings" made by these cities were relevant to *Renton*'s problems or needs. [FN5] Moreover, since Renton ultimately adopted zoning regulations different from either Detroit or Seattle, these "studies" provide no basis for assessing the effectiveness of the particular restrictions adopted under the ordinance. [FN6] Renton cannot merely rely on the general experiencesof ***62** Seattle or Detroit, for it must "justify its ordinance in the context of *Renton's* problems--not Seattle's or Detroit's problems." 748 F.2d, at 536 (emphasis in original).

FN5. As part of the amendment passed after this lawsuit commenced, the City Council added a statement that it had intended to rely on the Washington Supreme Court's opinion in *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978), cert. denied *sub nom. Apple Theatre, Inc. v. Seattle*, 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979), which upheld Seattle's zoning regulations against constitutional attack. Again, despite the suspicious coincidental timing of the amendment, the Court holds that "Renton was entitled to rely ... on the 'detailed findings' summarized in the ... *Northend Cinema* opinion." *Ante*, at 931. In *Northend Cinema*, the court noted that "[t]he record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." 90 Wash.2d, at 719, 585 P.2d, at 1159. The opinion however, does not explain the evidence it purports to summarize, and provides no basis for determining whether Seattle's experience is relevant to Renton's.

FN6. As the Court of Appeals observed:
"Although the Renton ordinance *purports* to copy Detroit's and Seattle's, it does not solve the same problem in the same manner. The Detroit ordinance was intended to disperse adult theaters throughout the city so that no one district would deteriorate due to a concentration of such theaters. The Seattle ordinance, by contrast, was intended to *concentrate* the theaters in one place so that the whole city would not bear the effects of them. The Renton Ordinance is allegedly aimed at protecting certain uses--schools, parks, churches and residential areas--from the perceived unfavorable effects of an adult theater." 748 F.2d, at 536 (emphasis in original).

In sum, the circumstances here strongly suggest that the ordinance was designed to suppress expression, even that constitutionally protected, and thus was not to be analyzed as a content-neutral time, place, and manner restriction. The Court allows Renton to conceal its illicit motives, however, by reliance on the fact that other communities adopted similar restrictions. The Court's approach largely immunizes such measures from judicial scrutiny, since a municipality can readily find other municipal ordinances to rely upon, thus always retrospectively justifying special zoning regulations for adult theaters. [FN7] Rather than speculate about Renton's motives for adopting such measures, our cases require the conclusion that the ordinance, like any other content-based restriction on speech, is constitutional "only if the [city] can show ****937** that [it] is a precisely drawn means of serving a compelling [governmental] interest." *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S., at 540, 100 S.Ct., at 2334; see also *Carey v. Brown*, 447 U.S. 455, 461-462, 100 S.Ct. 2286, 2290-2291, 65 L.Ed.2d 263 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 99, 92 S.Ct. 2286, 2292, 33 L.Ed.2d 212 (1972). Only this strict approach can insure that cities will not use their zoning powers as a pretext for suppressing constitutionally protected expression.

FN7. As one commentator has noted:
"[A]nyone with any knowledge of human nature should naturally assume that the decision to adopt almost any content-based restriction might have been affected by an antipathy on the part of at least some legislators to the ideas or information being suppressed. The logical assumption, in other words, is not that there is not improper motivation but, rather, because legislators are only human, that there is a substantial risk

that an impermissible consideration has in fact colored the deliberative process." Stone, *supra* n. 1, at 106.

***63** Applying this standard to the facts of this case, the ordinance is patently unconstitutional. Renton has not shown that locating adult movie theaters in proximity to its churches, schools, parks, and residences will necessarily result in undesirable "secondary effects," or that these problems could not be effectively addressed by less intrusive restrictions.

II

Even assuming that the ordinance should be treated like a content-neutral time, place, and manner restriction, I would still find it unconstitutional. "[R]estrictions of this kind are valid provided ... that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981). In applying this standard, the Court "fails to subject the alleged interests of the [city] to the degree of scrutiny required to ensure that expressive activity protected by the First Amendment remains free of unnecessary limitations." *Community for Creative Non-Violence*, 468 U.S., at 301, 104 S.Ct., at 3073 (MARSHALL, J., dissenting). The Court "evidently [and wrongly] assumes that the balance struck by [Renton] officials is deserving of deference so long as it does not appear to be tainted by content discrimination." *Id.*, at 315, 104 S.Ct., at 3080. Under a *proper* application of the relevant standards, the ordinance is clearly unconstitutional.

A

The Court finds that the ordinance was designed to further Renton's substantial interest in "preserv[ing] the quality of urban life." *Ante*, at 930. As explained above, the record here is simply insufficient to support this assertion. The city made no showing as to how uses "protected" by the ordinance would be affected by the presence of an adult movie theater. Thus, the Renton ordinance is clearly distinguishable from ***64** the Detroit zoning ordinance upheld in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). The Detroit ordinance, which was designed to disperse adult theaters throughout the city, was supported by the testimony of urban planners and real estate experts regarding the adverse effects of locating several such businesses in the same neighborhood. *Id.*, at 55, 96 S.Ct., at 2445; see also *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 711, 585 P.2d 1153, 1154-1155 (1978), cert. denied *sub nom. Apple Theatre, Inc. v. Seattle*, 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979) (Seattle zoning ordinance was the "culmination of a long period of study and discussion"). Here, the Renton Council was aware only that some residents had complained about adult movie theaters, and that other localities had adopted special zoning restrictions for such establishments. These are not "facts" sufficient to justify the burdens the ordinance imposed upon constitutionally protected expression.

B

Finally, the ordinance is invalid because it does not provide for reasonable alternative avenues of communication. The District Court found that the ordinance left 520 acres in Renton available for adult theater sites, an area comprising about five ****938** percent of the city. However, the Court of Appeals found that because much of this land was already occupied, "[l]imiting adult theater uses to these areas is a substantial restriction on speech." 748 F.2d, at 534. Many "available" sites are also largely unsuited for use by movie theaters. See App. 231, 241. Again, these facts serve to distinguish this case from *American Mini Theaters*, where there was no indication that the Detroit zoning ordinance seriously limited the locations available for adult businesses. See *American Mini Theaters, supra*, 427 U.S., at 71, n. 35, 96 S.Ct., at 2453 n. 35 (plurality opinion) ("The situation would be quite different if the ordinance had the effect of ... greatly restricting access to ... lawful speech"); see also *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (CA5 1982) (ordinance effectively banned adult theaters ***65** by restricting them to " 'the most unattractive, inaccessible, and inconvenient areas of a city' "); *Purple Onion, Inc. v. Jackson*,

511 F.Supp. 1207, 1217 (ND Ga.1981) (proposed sites for adult entertainment uses were either "unavailable, unusable, or so inaccessible to the public that ... they amount to no locations").

Despite the evidence in the record, the Court reasons that the fact "[t]hat respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Ante*, at 932. However, respondents are not on equal footing with other prospective purchasers and lessees, but must conduct business under severe restrictions not imposed upon other establishments. The Court also argues that the First Amendment does not compel "the government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." *Ibid.* However, respondents do not ask Renton to guarantee low-price sites for their businesses, but seek only a reasonable opportunity to operate adult theaters in the city. By denying them this opportunity, Renton can effectively ban a form of protected speech from its borders. The ordinance "greatly restrict[s] access to ... lawful speech," *American Mini Theatres, supra*, 427 U.S., at 71, n. 35, 96 S.Ct., at 2453, n. 35 (plurality opinion), and is plainly unconstitutional.

475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, 54 USLW 4160, 12 Media L. Rep. 1721

Briefs and Other Related Documents (Back to top)

• 1985 WL 669603 (Appellate Brief) Second Supplemental Brief of Appellees (Nov. 06, 1985)

• 1985 WL 669601 (Appellate Brief) Supplemental Brief of Appellees (Oct. 30, 1985)

• 1985 WL 669599 (Appellate Brief) Reply Brief of Appellants (Oct. 25, 1985)

• 1985 WL 669613 (Appellate Brief) Brief of American Booksellers Association, Inc., Association of American Publishers, Inc., Council for Periodical Distributors Associations, International Periodical Distributors Association, Inc., National Association of College Stores, Inc., and th e Freedom to Read Foundation, as Amici Curiae, in Support of Appellees (Aug. 15, 1985)

• 1985 WL 669614 (Appellate Brief) Brief of the American Civil Liberties Union and the American Civil Liberties Union of Washington as Amici Curiae in Support of Appellees (Aug. 15, 1985)

• 1985 WL 669597 (Appellate Brief) Brief of Appellees (Aug. 14, 1985)

• 1985 WL 669612 (Appellate Brief) Brief of the Outdoor Advertising Association of America, Inc. and the American Advertising Federation as Amici Curiae in Support of Appellees (Jul. 15, 1985)

• 1985 WL 669611 (Appellate Brief) Brief of the Freedom Council Foundation Amicus Curiae, in Support of Appellants (Jul. 03, 1985)

• 1985 WL 669595 (Appellate Brief) Brief for Appellants (Jun. 28, 1985)

• 1985 WL 669608 (Appellate Brief) Motion to File Brief Amicus Curiae and Brief Amicus Curiae of the National League of Cities, the National Association of Counties, the International City Management Association, the United States Conference of Mayors, the Council of State Governments , and the American Planning Association in Support of Appellants (Jun. 28, 1985)

• 1985 WL 669609 (Appellate Brief) Brief Amicus Curiae of Jackson County, Missouri, in Support of the Petitioners (Jun. 28, 1985)

• 1985 WL 669610 (Appellate Brief) Motion for Leave to File, and Brief Amicus Curiae of the National Institute of Municipal Law Officers (Jun. 28, 1985)

• 1985 WL 669605 (Appellate Brief) Brief of Amici Curiae City of Whittier, California and Other Joining California Cities in Support of Appellants' Jurisdictional Statement (Mar. 29, 1985)

• 1985 WL 669607 (Appellate Brief) Motion to File Brief Amicus Curiae and Brief Amicus Curiae of the National League of Cities, the National Association of Counties, the International City Management As-

sociation, the United States Conference of Mayors, the Council of State Governments , and the American Planning Association in Support of a Plenary Hearing and Reversal of the Decision Below (Mar. 29, 1985)

• 1985 WL 669592 (Appellate Brief) Reply Brief (Mar. 28, 1985)

• 1985 WL 669604 (Appellate Brief) Brief of Amici Curiae Washington and Utah Attorneys General in Support of Appellants (Mar. 28, 1985)

END OF DOCUMENT

Briefs and Other Related Documents

Supreme Court of the United States
Coleman A. YOUNG, Mayor the City of Detroit, et al., Petitioners,
v.
AMERICAN MINI THEATRES, INC., et al.
No. 75-312.

Argued March 24, 1976.
Decided June 24, 1976.
Rehearing Denied Oct. 4, 1976.

See 429 U.S. 873, 97 S.Ct. 191.

The operator of an "adult" movie theater appealed from a ruling of the United States District Court for the Eastern District of Michigan, Southern Division, 373 F.Supp. 363, upholding the validity of Detroit ordinances prohibiting operation of any "adult" movie theater, bookstore and similar establishments within 1000 feet of any other such establishment, or within 500 feet of a residential area. The Court of Appeals, Sixth Circuit, reversed, 518 F.2d 1014. Following grant of certiorari, the Supreme Court, Mr. Justice Stevens, held that where theaters proposed to offer adult fare on regular basis and alleged that they admitted only adult patrons, and neither indicated any plan to exhibit pictures even arguably outside coverage of the ordinances, so that theaters were not affected by alleged vagueness, their challenge to ordinances on ground of alleged vagueness resulting in inadequate notice of what was prohibited would not be considered though ordinances affected communication protected by First Amendment. The ordinances were not violative of First Amendment rights or of the equal protection clause of the Fourteenth Amendment.

Judgment of Court of Appeals reversed.

Mr. Justice Powell filed an opinion concurring in part.

Mr. Justice Stewart dissented and filed opinion in which Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Blackmun joined.

Mr. Justice Blackmun dissented and filed opinion in which Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Marshall joined.

West Headnotes

[1] Municipal Corporations 121
268k121 Most Cited Cases
Where theaters proposed to offer adult fare on regular basis and alleged that they admitted only adult patrons, and neither indicated any plan to exhibit pictures even arguably outside coverage of municipal ordinances, so that theaters were not affected by alleged vagueness, their challenge to ordinances on ground of alleged vagueness resulting in inadequate notice of what was prohibited would not be considered though ordinances affected communication protected by First Amendment. U.S.C.A.Const. Amends. 1, 14.

[2] Constitutional Law 42(1)
92k42(1) Most Cited Cases
Where very existence of statute may cause persons not before court to refrain from engaging in constitutionally protected speech or expression, exception, in allowing litigant to assert rights of third parties, is justified by overriding importance of maintaining free and open market for interchange of ideas, but if deterrent effect of statute on legitimate expression is not both real and substantial and if statute is readily subject to narrowing construction by state courts, litigant is not permitted to assert rights of third parties. U.S.C.A.Const. Amends. 1, 14.

[3] Constitutional Law 46(1)
92k46(1) Most Cited Cases
There being less vital interest in uninhibited exhibition of material on borderline between pornography and artistic expression than in free dissemination of ideas of social and political significance, and where limited amount of uncertainty in ordinances was easily susceptible of narrowing construction, case was inappropriate one in which to adjudicate hypothetical claims of persons not before the court. U.S.C.A.Const. Amends. 1, 14.

[4] Zoning and Planning 76
414k76 Most Cited Cases
Municipality may control location of theaters as well as location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. U.S.C.A.Const. Amend. 1.

[5] Constitutional Law 90.1(4)
92k90.1(4) Most Cited Cases
Mere fact that commercial exploitation of material protected by First Amendment was subjected to zoning and other licensing requirements was not sufficient reason for invalidating city ordinances as prior restraints on free speech. U.S.C.A.Const. Amend. 1.

[6] Constitutional Law 90(3)
92k90(3) Most Cited Cases
(Formerly 92k90.1(1))
Reasonable regulations of time, place and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by First Amendment. U.S.C.A.Const. Amend. 1.

[7] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Question whether speech is, or is not, protected by First Amendment often depends on content of speech. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amend. 1.

[8] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Even within area of protected speech, difference in content may require a different governmental response. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amends. 1, 14.

[9] Constitutional Law 90(3)
92k90(3) Most Cited Cases
General rule prohibits regulation based on content of protected communication, and essence of rule is need for absolute neutrality by government; its regulation of communication may not be affected by sympathy or hostility for point of view being expressed by communicator. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amends. 1, 14.

[10] Constitutional Law 90.2
92k90.2 Most Cited Cases
(Formerly 92k90.1(1))
Measure of constitutional protection to be afforded commercial speech will surely be governed largely by content of communication; difference between commercial price and product advertising and ideological communication permits regulation of former that First Amendment would not tolerate with respect to latter. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amends. 1, 14.

[11] Constitutional Law 90.4(4)
92k90.4(4) Most Cited Cases
(Formerly 92k90.1(6))
First Amendment protects communication, in area of motion picture films of sexual activities, from total suppression, but state may legitimately use contents of these materials as basis for placing them in different classification from other motion pictures. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amends. 1, 14.

[12] Municipal Corporations 589
268k589 Most Cited Cases
City must be allowed reasonable opportunity to experiment with solutions to admittedly serious problems. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amends. 1, 14.

[13] Constitutional Law 228.2
92k228.2 Most Cited Cases
In view of serious problems to which city's ordinances were addressed, in view of district court's finding that burden on First Amendment rights from enforcement of ordinances would be slight, and in view of factual basis, disclosed by record, for common council's conclusion that restriction imposed would have desired effect, city's interest in present and future character of its neighborhoods supported its classification of motion pictures, and, accordingly, zoning ordinances providing that adult motion picture theaters not be located within 1000 feet of two other regulated uses or within 500 feet of a residential area did not violate equal protection clause of Fourteenth Amendment. (Per Mr. Justice Stevens with three Justices concurring.) U.S.C.A.Const. Amends. 1, 14.

****2442** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***50** Respondent operators of two adult motion picture theaters brought this action against petitioner city officials for injunctive relief and a declaratory judgment of unconstitutionality regarding two 1972 Detroit zoning ordinances that amended an "Anti-Skid Row Ordinance" adopted 10 years earlier. The 1972 ordinances provide that an adult theater may not (apart from a special waiver) be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. The term "regulated uses" applies to 10 different kinds of establishments in addition to adult theaters, including adult book stores, cabarets, bars, taxi dance halls, and hotels. If the theater is used to present "material distinguished or characterized by an emphasis on matter depicting . . . 'Specified Sexual Activities' or 'Specified Anatomical Areas' " it is an "adult" establishment. The District Court upheld the ordinances, and granted petitioners' motion for summary judgment. The Court of Appeals ****2443** reversed, holding that the ordinances constituted a prior restraint on constitutionally protected communication and violated equal protection. Respondents, in addition to asserting the correctness of that court's ruling with respect to those constitutional issues, contend that the ordinances are void for vagueness. While not attacking the specificity of the definitions of sexual activities or anatomical areas, respondents maintain (1) that they cannot determine how much of the described activity may be permissible before an exhibition is "characterized by an emphasis" on such matter, and (2) that the ordinances do not specify adequate procedures or standards for obtaining a waiver of the 1,000-foot restriction. Held:

1. The ordinances as applied to these respondents do not violate the Due Process Clause of the Fourteenth Amendment on the ground of vagueness. Pp. 2446-2448.

(a) Neither of the asserted elements of vagueness has affected these respondents, both of which propose to offer adult fare on a regular basis and allege no ground for claiming or anticipating any waiver of the 1,000-foot restriction. P. 2446.

***51** (b) T ordinances will have no demonstrably significant effect on the exhibition of films protected by the First Amendment. To the extent that any area of doubt exists as to the amount of sexually explicit activity that may be portrayed before material can be said to be "characterized by an emphasis" on such matter, there is no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." This would therefore be an inappropriate case to apply the principle urged by respondents that they be permitted to challenge the ordinances, not because their own rights of free expression are violated, but because of the assumption that the ordinances' very existence may cause others not before the court to refrain from constitutionally protected speech or expression. Pp. 2446-2448.

2. The ordinances are not invalid under the First Amendment as prior restraints on protected communication because of the licensing or zoning requirements. Though adult films may be exhibited commercially only in licensed theaters, that is also true of all films. That the place where films may be exhibited is regulated does not violate free expression, the city's interest in planning and regulating the use of property for commercial purposes being clearly adequate to support the locational restriction. P. 2448.

518 F.2d 1014, reversed.

Maureen P. Reilly, Detroit, Mich., for petitioners.

Stephen M. Taylor, Detroit, Mich., and John H. Weston for respondents.

***52** Mr. Justice STEVENS delivered the opinion of the Court. [FN**]

FN** Part III of this opinion is joined by only THE CHIEF JUSTICE, Mr. Justice WHITE, and Mr. Justice REHNQUIST.

Zoning ordinances adopted by the city of Detroit differentiate between motion picture theaters which exhibit sexually explicit "adult" movies and those which do not. The principal question presented by

this case is whether that statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment. [FN1]

FN1. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." This Amendment is made applicable to the States by the Due Process Clause of the Fourteenth Amendment. Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697.

Effective November 2, 1972, Detroit adopted the ordinances challenged in this litigation. Instead of concentrating "adult" theaters in limited zones, these ordinances require that such theaters be dispersed. Specifically, an adult theater may not be located within 1,000 feet of any two other ****2444** "regulated uses" or within 500 feet of a residential area. [FN2] The term "regulated uses" includes 10 different kinds of establishments in addition to adult theaters. [FN3]

FN2. The District Court held that the original form of the 500-foot restriction was invalid because it was measured from "any building containing a residential, dwelling or rooming unit." The city did not appeal from that ruling, but adopted an amendment prohibiting the operation of an adult theater within 500 feet of any area zoned for residential use. The amended restriction is not directly challenged in this litigation.

FN3. In addition to adult motion picture theaters and "mini" theaters, which contain less than 50 seats, the regulated uses include adult bookstores; cabarets (group "D"); establishments for the sale of beer or intoxicating liquor for consumption on the premises; hotels or motels; pawnshops; pool or billiard halls; public lodging houses; secondhand stores; shoeshine parlors; and taxi dance halls.

***53** The classification of a theater as "adult" is expressly predicated on the character of the motion pictures which it exhibits. If the theater is used to present "material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' " [FN4] it is an adult establishment. [FN5]

FN4. These terms are defined as follows:
"For the purpose of this Section, 'Specified Sexual Activities' is defined as:
"1. Human Genitals in a state of sexual stimulation or arousal;
"2. Acts of human masturbation, sexual intercourse or sodomy;
"3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.
"And 'Specified Anatomical Areas' is defined as: "1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
"2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

FN5. There are three types of adult establishments bookstores, motion picture theaters, and mini motion picture theaters defined respectively as follows:
"Adult Book Store
"An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.
"Adult Motion Picture Theater
"An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below)

for observation by patrons therein.
"Adult Mini Motion Picture Theater
"An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below), for observation by patrons therein."

***54** The 1972 ordinances were amendments to an "Anti-Skid Row Ordinance" which had been adopted 10 years earlier. At that time the Detroit Common Council made a finding that some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas. [FN6] The decision to add adult motion picture theaters and adult book stores to the list of businesses which, apart from a special waiver, [FN7] ****2445** could not be located within 1,000 feet of two other "regulated uses," was, in part, a response to the significant growth in the number ***55** of such establishments. [FN8] In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.

FN6. Section 66.000 of the Official Zoning Ordinance (1972) recited:
"In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i. e. not more than two such uses within one thousand feet of each other which would create such adverse effects)."

FN7. The ordinance authorizes the Zoning Commission to waive the 1,000-foot restriction if it finds:
"a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.
"b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.
"c) That the establishment of an additional regulated use in the area will not be contrary to any program of neigh(bor)hood conservation nor will it interfere with any program of urban renewal.
"d) That all applicable regulations of this Ordinance will be observed."

FN8. A police department memorandum addressed to the assistant corporation counsel stated that since 1967 there had been an increase in the number of adult theaters in Detroit from 2 to 25, and a comparable increase in the number of adult book stores and other "adult-type businesses."

Respondents are the operators of two adult motion picture theaters. One, the Nortown, was an established theater which began to exhibit adult films in March 1973. The other, the Pussy Cat, was a corner gas station which was converted into a "mini theater," but denied a certificate of occupancy because of its plan to exhibit adult films. Both theaters were located within 1,000 feet of two other regulated uses and the Pussy Cat was less than 500 feet from a residential area. The respondents brought two separate actions against appropriate city officials, seeking a declaratory judgment that the ordinances were unconstitutional and an injunction against their enforcement. Federal jurisdiction was properly invoked [FN9] and the two cases were consolidated for decision. [FN10]

FN9. Respondents alleged a claim for relief under 42 U.S.C. s 1983, invoking the juris-

diction of the federal court under 28 U.S.C. s 1343(3).

FN10. Both cases were decided in a single opinion filed jointly by Judge Kennedy and Judge Gubow. Nortown Theatre v. Gribbs, 373 F.Supp. 363 (ED Mich.1974).

The District Court granted defendants' motion for summary judgment. 373 F.Supp. 363. On the basis of the reasons stated ***56** by the city for adopting the ordinances, the court concluded that they represented a rational attempt to preserve the city's neighborhoods. [FN11] The court analyzed and rejected respondents' argument that the definition and waiver provisions in the ordinances were impermissibly vague; it held that the disparate treatment of adult theaters and other theaters was justified by a compelling state interest and therefore did not violate the Equal Protection Clause; [FN12] and finally it concluded that the ****2446** regulation of the places where adult films could be shown did not violate the First Amendment. [FN13]

FN11. "When, as here, the City has stated a reason for adopting an ordinance which is a subject of legitimate concern, that statement of purpose is not subject to attack.
"Nor may the Court substitute its judgment for that of the Common Council of the City of Detroit as to the methods adopted to deal with the City's legitimate concern to preserve neighborhoods, so long as there is some rational relationship between the objective of the Ordinance and the methods adopted." Id., at 367.

FN12. "Because the Ordinances distinguish adult theatres and bookstores from ordinary theatres and bookstores on the basis of the content of their respective wares, the classification is one which restrains conduct protected by the First Amendment. See Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968). The appropriate standard for reviewing the classification, therefore, is a test of close scrutiny. Harper v. Virginia Board of Elections, 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Under this test, the validity of the classification depends on whether it is necessary to further a compelling State interest. "The compelling State interest which the Defendants point to as justifying the restrictions on locations of adult theatres and bookstores is the preservation of neighborhoods, upon which adult establishments have been found to have a destructive impact. The affidavit of Dr. Mel Ravitz clearly establishes that the prohibition of more than one regulated use within 1000 feet is necessary to promote that interest. This provision therefore does not offend the equal protection clause." Id, at 369.

FN13. "Applying those standards to the instant case, the power to license and zone businesses and prohibit their location in certain areas is clearly within the constitutional power of the City. The government interest, i. e. the preservation and stabilization of neighborhoods in the City of Detroit, is unrelated to the suppression of free expression. First Amendment rights are indirectly related, but only in the sense that they cannot be freely exercised in specific locations. Plaintiffs would not contend that they are entitled to operate a theatre or bookstore, which are commercial businesses, in a residentially zoned area; nor could they claim the right to put on a performance for profit in a public street. Admittedly the regulation here is more restrictive, but it is of the same character." Id., at 371.

***57** The Court of Appeals reversed. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (CA6 1975). The majority opinion concluded that the ordinances imposed a prior restraint on constitutionally protected communication and therefore "merely establishing that they were designed to serve a compelling public interest" provided an insufficient justification for a classification of motion picture theaters on the basis of the content of the materials they purvey to the pub-

lic. [FN14] Relying primarily on Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212, the court held the ordinance invalid under the Equal Protection Clause. Judge Celebrezze, in dissent, expressed ***58** the opinion that the ordinance was a valid " 'time, place and manner' regulation," rather than a regulation of speech on the basis of its content. [FN15]

> FN14. "The City did not discharge its heavy burden of justifying the prior restraint which these ordinances undoubtedly impose by merely establishing that they were designed to serve a compelling public interest. Since fundamental rights are involved, the City had the further burden of showing that the method which it chose to deal with the problem at hand was necessary and that its effect on protected rights was only incidental. The City could legally regulate movie theatres and bookstores under its police powers by providing that such establishments be operated only in particular areas. . . . However, this ordinance selects for special treatment particular business enterprises which fall within the general business classifications permissible under zoning laws and classifies them as regulated uses solely by reference to the content of the constitutionally protected materials which they purvey to the public." 518 F.2d, at 1019- 1020.
>
> FN15. He stated in part:
> "I do not view the 1000-foot provision as a regulation of speech on the basis of its content. Rather, it is a regulation of the right to locate a business based on the side-effects of its location. The interest in preserving neighborhoods is not a subterfuge for censorship." Id., at 1023.

Because of the importance of the decision, we granted certiorari, 423 U.S. 911, 96 S.Ct. 214, 46 L.Ed.2d 139.

As they did in the District Court, respondents contend (1) that the ordinances are so vague that they violate the Due Process Clause of the Fourteenth Amendment; (2) that they are invalid under the First Amendment as prior restraints on protected communication; and (3) that the classification of theaters on the basis of the content of their exhibitions violates the Equal Protection Clause of the Fourteenth Amendment. We consider their arguments in that order.

I

There are two parts to respondents' claim that the ordinances are too vague. They do not attack the specificity of the definition of "Specified Sexual Activities" or "Specified Anatomical Areas." They argue, however, that they cannot determine how much of the described activity may be permissible before the exhibition is "characterized by an emphasis" on such matter. In addition, they argue that the ordinances are vague because they do not specify adequate procedures or standards for obtaining a waiver of the 1,000-foot restriction.

[1] We find it unnecessary to consider the validity of either of these arguments in the abstract. For even if there may be some uncertainty about the effect of the ***59** ordinances on other litigants, they are unquestionably applicable to these respondents. The record indicates that both theaters ****2447** propose to offer adult fare on a regular basis. [FN16] Neither respondent has alleged any basis for claiming or anticipating any waiver of the restriction as applied to its theater. It is clear, therefore, that any element of vagueness in these ordinances has not affected these respondents. To the extent that their challenge is predicated on inadequate notice resulting in a denial of procedural due process under the Fourteenth Amendment, it must be rejected. Cf. Parker v. Levy, 417 U.S. 733, 754-757, 94 S.Ct. 2547, 2560-2562, 41 L.Ed.2d 439.

> FN16. Both complaints allege that only adults are admitted to these theaters. Nortown expressly alleges that it "desires to continue exhibiting adult-type motion picture films at said theater." Neither respondent has indicated any plan to exhibit pictures even arguably outside the coverage of the ordinances.

[2] Because the ordinances affect communication protected by the First Amendment, respondents argue

that they may raise the vagueness issue even though there is no uncertainty about the impact of the ordinances on their own rights. On several occasions we have determined that a defendant whose own speech was unprotected had standing to challenge the constitutionality of a statute which purported to prohibit protected speech, or even speech arguably protected. [FN17] This exception ***60** from traditional rules of standing to raise constitutional issues has reflected the Court's judgment that the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression. See Broadrick v. Oklahoma, 413 U.S. 601, 611-614, 93 S.Ct. 2908, 2915-2917, 37 L.Ed.2d 830. The exception is justified by the overriding importance of maintaining a free and open market for the interchange of ideas. Nevertheless, if the statute's deterrent effect on legitimate expression is not "both real and substantial," and if the statute is "readily subject to a narrowing construction by the state courts," see Erznoznik v. City of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125, the litigant is not permitted to assert the rights of third parties.

> FN17. "Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words.' Gooding v. Wilson, 405 U.S. 518, 520, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972). See Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. See Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); Shelton v. Tucker (364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)). Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct, see Grayned v. City of Rockford, supra, 408 U.S., at 114-121, 92 S.Ct., at 2302-2306; Cameron v. Johnson, 390 U.S., at 617-619, 88 S.Ct., at 1338, 1339; Zwickler v. Koota, 389 U.S. 241, 249-250, 88 S.Ct. 391, 396-397, 19 L.Ed.2d 444 (1967); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights. See Shuttlesworth v. Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); Cox v. Louisiana, 379 U.S. 536, 553-558, 85 S.Ct. 453, 463-466, 13 L.Ed.2d 471 (1965); Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938)." Broadrick v. Oklahoma, 413 U.S. 601, 612-613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830.

[3] We are not persuaded that the Detroit zoning ordinances will have a significant deterrent effect on the exhibition of films protected by the First Amendment. ***61** As already noted, the only vagueness in the ****2448** ordinances relates to the amount of sexually explicit activity that may be portrayed before the material can be said to "characterized by an emphasis" on such matter. For most films the question will be readily answerable; to the extent that an area of

doubt exists, we see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

The only area of protected communication that may be deterred by these ordinances comprises films containing material falling within the specific definitions of "Specified Sexual Activities" or "Specified Anatomical Areas." The fact that the First Amendment protects some, though not necessarily all, of that material from total suppression does not warrant the further conclusion that an exhibitor's doubts as to whether a borderline film may be shown in his theater, as well as in theaters licensed for adult presentations, involves the kind of threat to the free market in ideas and expression that justifies the exceptional approach to constitutional adjudication recognized in cases like Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22.

The application of the ordinances to respondents is plain; even if there is some area of uncertainty about their application in other situations, we agree with the District Court that respondents' due process argument must be rejected.

***62** II

Petitioners acknowledge that the ordinances prohibit theaters which are not licensed as "adult motion picture theaters" from exhibiting films which are protected by the First Amendment. Respondents argue that the ordinances are therefore invalid as prior restraints on free speech.

The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained.

[4][5] It is true, however, that adult films may only be exhibited commercially in licensed theaters. But that is also true of all motion pictures. The city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances.

[6] Putting to one side for the moment the fact that adult motion picture theaters must satisfy a locational restriction not applicable to other theaters, we are also persuaded that the 1,000-foot restriction does not, in itself, create an impermissible restraint on protected communication. The city's interest in planning and regulating the use of property for commercial purposes ***63** is clearly adequate to support that kind of restriction applicable to all theaters within the city limits. In short, apart from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited does not ****2449** offend the First Amendment. [FN18] We turn, therefore, to the question whether the classification is consistent with the Equal Protection Clause.

> FN18. Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment. See, E. g., Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (limitation on use of sound trucks); Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (ban on demonstrations in or near a courthouse with

the intent to obstruct justice); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of the school session).

III

A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate, he said: "I disapprove of what you say, but I will defend to the death your right to say it." [FN19] The essence of that comment has been repeated time after time in our decisions invalidating attempts by the government to impose selective controls upon the dissemination of ideas.

FN19. S. Tallentrye, The Friends of Voltaire 199 (1907).

Thus, the use of streets and parks for the free expression of views on national affairs may not be conditioned upon the sovereign's agreement with what a speaker may intend to say. [FN20] Nor may speech be curtailed because it ***64** invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger. [FN21] The sovereign's agreement or disagreement with the content of what a speaker has to say may not affect the regulation of the time, place, or manner of presenting the speech.

FN20. See Hague v. CIO, 307 U.S. 496, 516, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (opinion of Roberts, J.).

FN21. Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131.

If picketing in the vicinity of a school is to be allowed to express the point of view of labor, that means of expression in that place must be allowed for other points of view as well. As we said in Mosley :

"The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Cohen v. California, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 269-270, 84 S.Ct. 710, 720-721, 11 L.Ed.2d 686 (1964), and cases cited; NAACP v. Button, 371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963); Wood v. Georgia, 370 U.S. 375, 388-389, 82 S.Ct. 1364, 1371-1372, 8 L.Ed.2d 569 (1962); Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949); De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278 (1937). To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content ***65** would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan, supra*, 376 U.S., at 270, 84 S.Ct., at 721.

****2450** "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." 408 U.S., at 95-96, 92 S.Ct., at 2290.

(Footnote omitted.)

This statement, and others to the same effect, read literally and without regard for the facts of the case in which it was made, would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication. But we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached. [FN22] When we review this Court's actual adjudications in the First Amendment area, we find this to have been the case ***66** with the stated principle that there may be no restriction whatever on expressive activity because of its content.

FN22. See E. g., Kastigar v. United States, 406 U.S. 441, 454-455, 92 S.Ct. 1653, 1661-1662, 32 L.Ed.2d 212; United Gas Imp. Co. v. Continental Oil Co., 381 U.S. 392, 404, 85 S.Ct. 1517, 1524, 14 L.Ed.2d 466.

[7] The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say. [FN23] Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected "fighting comment." [FN24] And in time of war "the publication of the sailing dates of transports or the number and location of troops" may unquestionably be restrained, see Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357, although publication of news stories with a different content would be protected.

FN23. See Bond v. Floyd, 385 U.S. 116, 133-134, 87 S.Ct. 339, 348, 17 L.Ed.2d 235; Harisiades v. Shaughnessy, 342 U.S. 580, 592, 72 S.Ct. 512, 520, 96 L.Ed. 586; Musser v. Utah, 333 U.S. 95, 99-101, 68 S.Ct. 397, 398-399, 92 L.Ed. 562.

FN24. In Chaplinsky v. New Hampshire, 315 U.S. 568, 574, 62 S.Ct. 766, 770, 86 L.Ed. 1031, we held that a statute punishing the use of "damned racketeer(s)" and "damned Fascist(s)" did not unduly impair liberty of expression.

[8] Even within the area of protected speech, a difference in content may require a different governmental response. In New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, we recognized that the First Amendment places limitations on the States' power to enforce their libel laws. We held that a public official may not recover damages from a critic of his official conduct without proof of "malice" as specially defined in that opinion. [FN25] Implicit in the opinion is the assumption that if the content of the newspaper article had been different that is, if its subject matter had not been a public official a lesser standard of proof would have been adequate.

FN25. "Actual malice" is shown by proof that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S., at 280, 84 S.Ct., at 726.

[9] ***67** In a series of later cases, in which separate individual views were frequently stated, the Court addressed the broad problem of when the New York Times standard ****2451** of malice was required by the First Amendment. Despite a diversity of opinion on whether it was required only in cases involving public figures, or also in cases involving public issues, and on whether the character of the damages claim mattered, a common thread which ran through all the opinions was the assumption that the rule to be applied depended on the content of the communication. [FN26] But that assumption did not contradict the underlying reason for the rule which is generally described as a prohibition of regulation based on the content of protected communication. The essence of that rule is 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. [FN27] Thus, although ***68** the content of story must

be examined to decide whether it involves a public figure or a public issue, the Court's application of the relevant rule may not depend on its favorable or unfavorable appraisal of that figure or that issue.

FN26. See, for example, the discussion of the " 'public or general interest' test" for determining the applicability of the New York Times standard in Gertz v. Robert Welch, Inc., 418 U.S. 323, 346, 94 S.Ct. 2997, 3010, 41 L.Ed.2d 789, and the reference, Id., at 348, 94 S.Ct., at 3011, to a factual misstatement "whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." The mere fact that an alleged defamatory statement is false does not, of course, place it completely beyond the protection of the First Amendment. "The First Amendment requires that we protect some falsehood in order to protect speech that matters." Id., at 341, 94 S.Ct. at 3007.

FN27. Thus, Professor Kalven wrote in The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup.Ct.Rev. 1, 29:
"(The Equal Protection Clause) is likely to provide a second line of defense for vigorous users of the public forum. If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached. The objection can then no longer be keyed to interferences with other uses of the public places, but would appear to implicate the kind of message that the groups were transmitting. The regulation would thus slip from the neutrality of time, place, and circumstance into a concern about content. The result is that equal-protection analysis in the area of speech issues would merge with considerations of censorship. And this is precisely what Mr. Justice Black argued in Cox :
" 'But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It is thus trying to prescribe by law what matters of public interest people it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form . . . ' (379 U.S., at 581, 85 S.Ct., at 453)."

[10] We have recently held that the First Amendment affords some protection to commercial speech. [FN28] We have also made it clear, however, that the content of a particular advertisement may determine the extent of its protection. A public rapid transit system may accept some advertisements and reject others. [FN29] A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere, [FN30] and regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive. [FN31] The measure of ****2452** constitutional protection ***69** to be afforded commercial speech will surely be governed largely by the content of the communication. [FN32]

FN28. Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346.

FN29. Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (product advertising accepted, while political cards rejected).

FN30. Markham Advertising Co. v. State, 73 Wash.2d 405, 439 P.2d 248 (1968), appeal dismissed for want of a substantial federal question, 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512.

FN31. In NLRB v. Gissel Packing Co., 395 U.S. 575, 617, 89 S.Ct. 1918, 1941, 23 L.Ed.2d 547, the Court upheld a federal statute which balanced an employer's free speech right to communicate with his employees against the employees' rights to associate freely by providing that the expression of " 'any views, argument, or opinion' " should not be " 'evidence of an unfair labor practice,' " So long as such expression contains " 'no threat of reprisal or force or prom-

ise of benefit' " which would involve interference, restraint, or coercion of employees in the exercise of their right to self-organization.

The power of the Federal Trade Commission to restrain misleading, as well as false, statements in labels and advertisements has long been recognized. See, E. g., Jacob Siegel Co. v. FTC, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888; FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485 (CA7 1975); E. F. Drew & Co. v. FTC, 235 F.2d 735, 740 (CA2 1956).

FN32. As Mr. Justice Stewart pointed out in Virginia Pharmacy Board v. Virginia Consumer Council, supra, 425 U.S., at 779, 96 S.Ct., at 1834 (concurring opinion), the "differences between commercial price and product advertising . . . and ideological communication" permits regulation of the former that the First Amendment would not tolerate with respect to the latter.

More directly in point are opinions dealing with the question whether the First Amendment prohibits the State and Federal Governments from wholly suppressing sexually oriented materials on the basis of their "obscene character." In Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, the Court upheld a conviction for selling to a minor magazines which were concededly not "obscene" if shown to adults. Indeed, the Members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution or exhibition of such materials to juveniles and unconsenting adults. [FN33] Surely the First Amendment does ***70** not foreclose such a prohibition;yet it is equally clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area.

FN33. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 93 S.Ct. 2628, 2665, 37 L.Ed.2d 446, Mr. Justice Brennan, in a dissent joined by Mr. Justice Stewart and Mr. Justice Marshall, explained his approach to the difficult problem of obscenity under the First Amendment:

"I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material." Id., at 113, 93 S.Ct., at 2662.

Such 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. For 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.

[11] Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But 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. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis ***71** for placing them in a different classification from other motion pictures.

[12][13] The remaining question is whether the line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods. On this question we agree with the views expressed by District Judges Kennedy and Gubow. The record disclosed a factual basis for the Common Council's conclusion that this kind of restriction will have the ****2453** desired effect. [FN34] It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

FN34. The Common Council's determination was that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech. In contrast, in Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125, the justifications offered by the city rested primarily on the city's interest in protecting its citizens from exposure to unwanted, "offensive" speech. The only secondary effect relied on to support that ordinance was the impact on traffic an effect which might be caused by a distracting open-air movie even if it did not exhibit nudity.

Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, [FN35] even though the determination of whether a ***72** particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures. We hold that the zoning ordinances requiring that adult ***73** motion picture theaters not be located within 1,000 feet of two other regulated uses does not violate the Equal Protection Clause of the Fourteenth Amendment.

FN35. The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that "(t)he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight." 373 F.Supp., at 370.
It should also be noted that the definitions of "Specified Sexual Activities" and "Specified Anatomical Areas" in the zoning ordinances, which require an emphasis on such matter and primarily concern conduct, are much more limited than the terms of the public nuisance ordinance involved in Erznoznik, supra, which broadly prohibited scenes which could not be deemed inappropriate even for juveniles.
"The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing Any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. See Ginsberg v. New York, supra. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S., at 213-214, 95 S.Ct., at 2274.
Moreover, unlike the ordinances in this case,

> the Erznoznik ordinance singled out movies "containing even the most fleeting and innocent glimpses of nudity . . . ." Id., at 214, 95 S.Ct., at 2275.
>
> The Court's opinion in Erznoznik presaged our holding today by noting that the presumption of statutory validity "has less force when a classification turns on the subject matter of expression." Id., at 215, 95 S.Ct., at 2275. Respondents' position is that the presumption has no force, or more precisely, that any classification based on subject matter is absolutely prohibited.

The judgment of the Court of Appeals is

Reversed.

Mr. Justice POWELL, concurring in the judgment and portions of the opinion.

Although I agree with much of what is said in the Court's opinion, and concur in Parts I and II, my approach to the resolution of this case is sufficiently different to prompt me to write separately. [FN1] I view the ****2454** case as presenting an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent.

> FN1. I do not think we need reach, nor am I inclined to agree with, the holding in Part III (and supporting discussion) that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression. I do not consider the conclusions in Part I of the opinion to depend on distinctions between protected speech.

I

One-half century ago this Court broadly sustained the power of local municipalities to utilize the then relatively novel concept of land-use regulation in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens. Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). The Court there noted the very practical consideration underlying the necessity for such power: "(W)ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." Id., at 386-387, 47 S.Ct., at 118. The Court also ***74** laid out the general boundaries within which the zoning power may operate: Restrictions upon the free use of private land must find their justifications in "some aspect of the police power, asserted for the public welfare"; the legitimacy of any particular restriction must be judged with reference to all of the surrounding circumstances and conditions; and the legislative judgment is to control in cases in which the validity of a particular zoning regulation is "fairly debatable." Id., at 387, 388, 47 S.Ct., at 118.

In the intervening years zoning has become an accepted necessity in our increasingly urbanized society, and the types of zoning restrictions have taken on forms far more complex and innovative than the ordinance involved in Euclid. In Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), we considered an unusual regulation enacted by a small Long Island community in an apparent effort to avoid some of the unpleasantness of urban living. It restricted land use within the village to single-family dwellings and defined "family" in such a way that no more than two unrelated persons could inhabit the same house. We upheld this ordinance, noting that desires to avoid congestion and noise from both people and vehicles were "legitimate guidelines in a land-use project addressed to family needs" and that it was quite within the village's power to "make the area a sanctuary for people." Id., at 9, 94 S.Ct., at 1541.

II

Against this background of precedent, it is clear beyond question that the Detroit Common Council had broad regulatory power to deal with the problem that prompted enactment of the Anti-Skid Row Ordinance. As the Court notes, Ante, at 2444, and n. 6, the Council was motivated by its perception that the "regulated uses," when concentrated, worked a "deleterious effect upon the ***75** adjacent areas" and could "contribute to the blighting or downgrading of the surrounding neighborhood." The purpose of prevent-

ing the deteriorationf commercial neighborhoods was certainly within the concept of the public welfare that defines the limits of the police power. See Berman v. Parker, 348 U.S. 26, 32-33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). Respondents apparently concede the legitimacy of the ordinance as passed in 1962, but challenge the amendments 10 years later that brought within its provisions adult theaters as well as adult bookstores and "topless" cabarets. Those amendments resulted directly from the Common Council's determination that the recent proliferation of these establishments and their tendency to cluster in certain parts of the city would have the adverse effect upon the surrounding areas that the ordinance was aimed at preventing.

Respondents' attack on the amended ordinance, insofar as it affects them, can be stated simply. Contending that it is the "character of the right, not of the limitation," which governs the standard of judicial review, see Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 322, 89 L.Ed. 430 (1945), and that zoning regulations therefore have no talismanic immunity from constitutional ****2455** challenge, cf. New York Times Co. v. Sullivan, 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964), they argue that the 1972 amendments abridge First Amendment rights by restricting the places at which an adult theater may locate on the basis of nothing more substantial than unproved fears and apprehensions about the effects of such a business upon the surrounding area. Cf., E. g., Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). And, even if Detroit's interest in preventing the deterioration of business areas is sufficient to justify the impact upon freedom of expression, the ordinance is nevertheless invalid because it impermissibly ***76** discriminates between types of theaters solely on the basis of their content. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

I reject respondents' argument for the following reasons.

III

This is the first case in this Court in which the interests in free expression protected by the First and Fourteenth Amendments have been implicated by a municipality's commercial zoning ordinances. Respondents would have us mechanically apply the doctrines developed in other contexts. But this situation is not analogous to cases involving expression in public forums or to those involving individual expression or, indeed, to any other prior case. The unique situation presented by this ordinance calls, as cases in this area so often do, for a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression.

Because a substantial burden rests upon the State when it would limit in any way First Amendment rights, it is necessary to identify with specificity the nature of the infringement in each case. The primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message. Vital to this concern is the corollary that there be full opportunity for everyone to receive the message. See, E. g., Whitney v. California, 274 U.S. 357, 377, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring); Cohen v. California, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971); Procunier v. Martinez, 416 U.S. 396, 408-409, 94 S.Ct. 1800, 1808-1809, 40 L.Ed.2d 224 (1974); Kleindienst v. Mandel, 408 U.S. 753, 762-765, 92 S.Ct. 2576, 2581-2582, 33 L.Ed.2d 683 (1972); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 763-765, 96 S.Ct. 1817, 1826-1827, 48 L.Ed.2d 346 (1976). Motion pictures, the medium of expression involved here, are fully within the protection of the First ***77** Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501- 503, 72 S.Ct. 777, 96 L.Ed. 1098 (1952). In the quarter century since *Burstyn* motion pictures and an analous medium, printed books, have been before this Court on many occasions, and the person asserting a First Amendment claim often has been a theater owner or a bookseller. Our cases reveal, however, that the central concern of the First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or a book might convey. Mr. Justice Douglas stated the core idea succinctly: "In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor." Superior Films v.

Department of Education, 346 U.S. 587, 589, 74 S.Ct. 286, 287, 98 L.Ed. 329 (1954) (concurring opinion). In many instances, for example with respect to certain criminal statutes or censorship or licensing schemes, it is only the theater owner or the bookseller who can protect this interest. But the central First Amendment concern remains the need to maintain free access of the public to the expression. See, E. g., Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957); Smith v. California, 361 U.S. 147, 150, 153-154, 80 S.Ct. 215, 218-219, 4 L.Ed.2d 205 (1959); ****2456**Interstate Circuit v. Dallas, 390 U.S. 676, 683-684, 88 S.Ct. 1298, 1302-1303, 20 L.Ed.2d 225 (1968); compare Marcus v. Search Warrant, 367 U.S. 717, 736, 81 S.Ct. 1708, 1718, 6 L.Ed.2d 1127 (1961), and A Quantity of Books v. Kansas, 378 U.S. 205, 213, 84 S.Ct. 1723, 1727, 12 L.Ed.2d 809 (1964), with Heller v. New York, 413 U.S. 483, 491-492, 93 S.Ct. 2789, 2794, 37 L.Ed.2d 745 (1973); and cf. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70-71, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963).

In this case, there is no indication that the application of the Anti-Skid Row Ordinance to adult theaters has the effect of suppressing production of or, to any significant degree, restricting access to adult movies. The Nortown concededly will not be able to exhibit adult movies at its present location, and the ordinance limits the potential ***78** location of the proposed Pussy Cat. The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cas are legion that sustained zoning against claims of serious economic damage. See, E. g., Zahn v. Board of Public Works, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074 (1927).

The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them? On the record in this case, these inquiries must be answered in the negative. At most the impact of the ordinance on these interests is incidental and minimal. [FN2] Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them. The ordinance is addressed only to the places at which this type of ***79** expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message reach an audience. On the basis of the District Court's finding, Ante, at 2453, n. 35, it appears that if a sufficient market exists to support them the number of adult movie theaters in Detroit will remain approximately the same, free to purvey the same message. To be sure some prospective patrons may be inconvenienced by this dispersal. [FN3] But other patrons, depending upon where they live or work, may find it more convenient to view an adult movie when adult theaters are not concentrated in a particular section of the city.

FN2. The communication involved here is not a kind in which the content or effectiveness of the message depends in some measure upon where or how it is conveyed. Cf. Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); Police Dept. of Chicago v. Mosley, supra, 408 U.S. 92, 93, 92 S.Ct. 2286, 2288, 33 L.Ed.2d 212 (1972). There is no suggestion that the Nortown is, or that the Pussy Cat would be, anything more than a commercial purveyor. They do not profess to convey their own personal messages through the movies they show, so that the only communication involved is that contained in the movies themselves. Cf. United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968); Spence v. Washington, 418 U.S. 405, 409-411, 94 S.Ct. 2727, 2729-2730, 41 L.Ed.2d 842 (1974).

FN3. The burden, it should be noted, is no

different from that imposed by more common ordinances that restrict to commercial zones of a city movie theaters generally as well as other types of businesses presenting similar traffic, parking, safety, or noise problems. After a half century of sustaining traditional zoning of this kind, there is no reason to believe this Court would invalidate such an ordinance as violative of the First Amendment. The only difference between such an ordinance and the Detroit ordinance lies in the reasons for regulating the location of adult theaters. The special public interest that supports this ordinance is certainly as substantial as the interests that support the normal area zoning to which all movie theaters, like other commercial establishments, long have been subject.

****2457** In these circumstances, it is appropriate to analyze the permissibility of Detroit's action under the four-part test of United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). Under that test, a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free ***80** expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Ibid.* The factual distinctions between a prosecution for destruction of a Selective Service registration certificate, as in *O'Brien*, and this case are substantial, but the essential weighing and balancing of competing interestare the same. Cf. Procunier v. Martinez, 416 U.S., at 409-412, 94 S.Ct., at 1809-1810.

There is, as noted earlier, no question that the ordinance was within the power of the Detroit Common Council to enact. See Berman v. Parker, 348 U.S., at 32, 75 S.Ct., at 102. Nor is there doubt that the interests furthered by this ordinance are both important and substantial. Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values. While I agree with respondents that no aspect of the police power enjoys immunity from searching constitutional scrutiny, it also is undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." Village of Belle Terre v. Boraas, 416 U.S., at 13, 94 S.Ct., at 1543 (Marshall, J., dissenting).

The third and fourth tests of O'Brien also are met on this record. It is clear both from the chronology and from the facts that Detroit has not embarked on an effort to suppress free expression. The ordinance was already in existence, and its purposes clearly set out, for a full decade before adult establishments were brought under it. When this occurred, it is clear indeed it is not seriously challenged that the governmental interest prompting the inclusion in the ordinance of adult establishments was wholly unrelated to any suppression of ***81** free expression. [FN4] Nor is there reason to question****2458** that the degree of incidental encroachment upon such expression was the minimum necessary to further the purpose ***82** of the ordinance. The evidence presented to the Common Council indicated that the urban deterioration was threatened, not by the concentration of *all* movie theaters with other "regulated uses," but only by a concentration of those that elected to specialize in adult movies. [FN5] The case would present a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas. [FN6]

FN4. Respondents attack the nature of the evidence upon which the Common Council acted in bringing adult entertainment establishments under the ordinance, and which petitioners submitted to the District Court in support of it. That evidence consisted of reports and affidavits from sociologists and urban planning experts, as well as some laymen, on the cycle of decay that had been started in areas of other cities, and that could be expected in Detroit, from the influx and concentration of such establishments. Re-

spondents insist that a major part of that cycle is a kind of "self-fulfilling prophecy" in which a business establishment neighboring on several of the "regulated uses" perceives that the area is going downhill economically, and moves out, with the result that a less desirable establishment takes its place thus fulfilling the prophecy made by the more reputable business. As noted earlier, Supra, at 2454, respondents have tried to analogize these types of fears to the apprehension found insufficient in previous cases to justify stifling free expression. But cases like Cox and Terminiello, upon which respondents rely, involved individuals desiring to express Their own messages rather than commercial exhibitors of films or vendors of books. When an individual or a group of individuals is silenced, the message itself is silenced and free speech is stifled. In the context of movies and books, the more apt analogy to Cox or Terminiello would be the censorship cases, in which a State or a municipality attempted to suppress copies of particular works, or the licensing cases in which that danger was presented. But a zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression. Moreover, the Common Council did not inversely zone adult theaters in an effort to protect citizens against the Content of adult movies. If that had been its purpose, or the effect of the amendment to the ordinance, the case might be analogous to those cited by Mr. Justice STEWART's dissent, Post, at 2459. Moreover, an intent or purpose to restrict the communication itself because of its nature would make the O'Brien test inapplicable. See O'Brien, 391 U.S., at 382, 88 S.Ct., at 1681; Spence v. Washington, 418 U.S., at 414 n. 8, 94 S.Ct., at 2732; cf. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). But the Common Council simply acted to protect the economic integrity of large areas of its city against the effects of a predictable interaction between a concentration of certain businesses and the responses of people in the area. If it 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.

FN5. Respondents have argued that the Common Council should have restricted adult theaters' hours of operation or their exterior advertising instead of refusing to allow their clustering with other "regulated uses." Most of the ill effects, however, appear to result from the clustering itself rather than the operational characteristics of individual theaters. Moreover, the ordinance permits an exception to its 1,000-foot restriction in appropriate cases. See Ante, at 2444 n. 7.

FN6. In my view Mr. Justice STEWART's dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings. See n. 3, Supra. Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. See, E. g., Tinker v. Des Moines School Dist., 393 U.S. 503, 509-511, 89 S.Ct. 733, 737-739, 21 L.Ed.2d 731 (1969); Procunier v. Martinez, 416 U.S. 396, 413-414, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974); Greer v. Spock, 424 U.S. 828, 842-844, 96 S.Ct. 1211, 1219-1220, 47 L.Ed.2d 505 (1976) (Powell, J., concurring); cf. CSC v. Letter Carriers,

413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). It is not analogous to Police Dept. of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), in which no governmental interest justified a distinction between the types of messages permitted in the public forum there involved.

***83** IV

The dissenting opinions perceive support for their position in Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). I believe this perception is a clouded one. The Jacksonville and Detroit ordinances are quite dissimilar, and our analysis of the infirmities of the former is inapplicable to the latter. In Erznoznik, an ordinance purporting to prevent a nuisance, not a comprehensive zoning ordinance, prohibited the showing of films containing nudity by drive-in theaters when the screens were visible from a public street or place. The governmental interests advanced as justifying the ordinance were three: (i) to protect citizens from unwilling exposure to possibly offensive material; (ii) to protect children from such materials; and (iii) to prevent the slowing of passing traffic and the likelihood of resulting accidents. We found the Jacksonville ordinance on its face either overbroad or underinclusive with respect to each of these asserted purposes. As to the first purpose, the ordinance was overbroad because it proscribed the showing of any nudity, however innocent or educational. Moreover, potential viewers who deemed particular nudity to be offensive were not captives; they had only to look elsewhere. Id., at 210-212, 95 S.Ct., at 2273-2274; see Cohen v. California, 403 U.S., at 21, 91 S.Ct., at 1786. As to minors the Jacksonville ordinance was overbroad because it "might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach." 422 U.S., at 213, 95 S.Ct., at 2275. Finally, the ****2459** ordinance was not rationally tailored to support its asserted purpose as a traffic regulation. By proscribing "even the most fleeting and innocent glimpses of nudity," it was strikingly underinclusive omitting "a wide variety ***84** of other scenes in the customary screen diet . . . (that) would be (no) less distracting to the passing motorist." *Id.*, at 214-215, 95 S.Ct., at 2275.

In sum, the ordinance in Erznoznik was a misconceived attempt directly to regulate content of expression. The Detroit zoning ordinance, in contrast, affects expression only incidentally and in furtherance of governmental interests wholly unrelated to the regulation of expression. At least as applied to respondents, it does not offend the First Amendment. Although courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression, it is clear that this is not such a case.

Mr. Justice STEWART, with whom Mr. Justice BRENNAN, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN join, dissenting.

The Court today holds that the First and Fourteenth Amendments do not prevent the city of Detroit from using a system of prior restraints and criminal sanctions to enforce content-based restrictions on the geographic location of motion picture theaters that exhibit nonobscene but sexually oriented films. I dissent from this drastic departure from established principles of First Amendment law.

This case does not involve a simple zoning ordinance, [FN1] or a content-neutral time, place, and manner restriction, [FN2]***85** or a regulation of obscene expression or other speech that is entitled to less than the full protection of the First Amendment. [FN3] The kind of expression at issue here is no doubt objectionable to some, but that fact does not diminish its protected status any more than did the particular content of the "offensive" expression in Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (display of nudity on a drive-in movie screen); Lewis v. City of New Orleans, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (utterance of vulgar epithet); Hess v. Indiana, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (utterance of vulgar remark); Papish v. University of Missouri Curators, 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (indecent remarks in campus newspaper); Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (wearing of clothing inscribed with a vulgar remark); Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (utterance of racial slurs); or

Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (alluring portrayal of adultery as proper behavior).

FN1. Contrast Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797, which upheld a zoning ordinance that restricted no substantive right guaranteed by the Constitution.

FN2. Here, as in Police Dept. of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212, and Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125, the State seeks to impose a selective restraint on speech with a particular content. It is not all movie theaters which must comply with Ordinances No. 742-G and No. 743-G, but only those "used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' . . . ." The ordinances thus " 'sli(p) from the neutrality of time, place, and circumstance into a concern about content.' This is never permitted." Police Dept. of Chicago v. Mosley, supra, 408 U.S., at 99, 92 S.Ct., at 2292 (citation omitted). See, E. g., Hudgens v. NLRB, 424 U.S. 507, 520, 96 S.Ct. 1029, 1037, 47 L.Ed.2d 196; Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222.

FN3. The regulatory scheme contains no provision for a judicial determination of obscenity. As the Court of Appeals correctly held, the material displayed must therefore, be presumed to be fully protected by the First Amendment. 518 F.2d 1014, 1019.

What this case does involve is the constitutional permissibility of selective interference with protected speech whose content is thought to produce distasteful effects. It is ****2460** elementary that a prime function of the First Amendment is to guard against just such interference. [FN4] By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment ***86** law, which require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience. [FN5] In place of these principles the Court invokes a concept wholly alien to the First Amendment. Since "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," Ante, at 2452, the Court implies that these films are not entitled to the full protection of the Constitution. This stands "Voltaire's immortal comment," Ibid., on its head. For if the guarantees of the First Amendment were reserved for expression that more than a "few of us" would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty. [FN6]

FN4. See, E. g., Terminiello v. Chicago, 337 U.S. 1, 4-5, 69 S.Ct. 894, 895-896, 93 L.Ed. 1131.

FN5. See, E. g., Hudgens v. NLRB, supra; Erznoznik v. City of Jacksonville, supra; Police Dept. of Chicago v. Mosley, supra. This case does not involve state regulation narrowly aimed at preventing objectionable communication from being thrust upon an unwilling audience. See Erznoznik v. City of Jacksonville, supra, 422 U.S., at 209, 95 S.Ct., at 2272. Contrast Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770; Rowan v. Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736. Nor is the Detroit ordinance narrowly aimed at protecting children from exposure to sexually oriented displays that would not be judged obscene by adult standards. Contrast Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195.

FN6. See, E. g., Terminiello v. Chicago, supra, 337 U.S., at 4-5, 69 S.Ct., at 895-896. The Court stresses that Detroit's content-based regulatory system does not preclude

> altogether the display of sexually oriented films. But, as the Court noted in a similar context in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448, this is constitutionally irrelevant, for " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " Id., at 556, 95 S.Ct., at 1245, quoting Schneider v. State, 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155. See also Interstate Circuit v. Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584.

***87** The fact that the "offensive" speech here may not address "important" topics "ideas of social and political significance," in the Court's terminology, Ante, at 2447 does not mean that it is less worthy of constitutional protection. "Wholly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons." Winters v. New York, 333 U.S. 507, 528, 68 S.Ct. 665, 676, 92 L.Ed. 840 (Frankfurter, J., dissenting); accord, Cohen v. California, supra, 403 U.S., at 25, 91 S.Ct., at 1788. Moreover, in the absence of a judicial determination of obscenity, it is by no means clear that the speech is not "important" even on the Court's terms. "(S)ex and obscenity are not synonymous. . . . The portrayal of sex, E. g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." Roth v. United States, 354 U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 (footnotes omitted). See also Kingsley Pictures Corp. v. Regents, supra, 360 U.S., at 688-689, 79 S.Ct., at 1365.

I can only interpret today's decision as an aberration. The Court is undoubtedly sympathetic, as am I, to the well-intentioned efforts of Detroit to "clean up" its streets and prevent the proliferation of "skid rows." But it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height.

****2461** Heretofore, the Court has not shied from its responsibility to protect "offensive" speech from governmental interference. Just last Term in Erznoznik v. City of Jacksonville, supra, the Court held that a city could not, consistently with the First and Fourteenth Amendments, make it a public nuisance for a drive-in movie theater to show films containing nudity if the screen were visible ***88** from a public street or place. The factual parallels between that case and this one are striking. There, as here, the ordinance did not forbid altogether the "distasteful" expression but merely required alteration in the physical setting of the forum. There, as here, the city's principal asserted interest was in minimizing the "undesirable" effects of speech having a particular content. And, most significantly, the particular content of the restricted speech at issue in Erznoznik precisely parallels the content restriction embodied in s 1 of Detroit's definition of "Specified Anatomical Areas." Compare Jacksonville Municipal Code s 330.313 with Detroit Ordinance No. 742-G, s 32.0007. In short, Erznoznik is almost on "all fours" with this case.

The Court must never forget that the consequences of rigorously enforcing the guarantees of the First Amendment are frequently unpleasant. Much speech that seems to be of little or no value will enter the market place of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom.

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN, Mr. Justice STEWART, and Mr. Justice MARSHALL join, dissenting.

I join Mr. Justice STEWART's dissent, and write separately to identify an independent ground on which, for me, the challenged ordinance is unconstitutional. That ground is vagueness.

I

We should put ourselves for a moment in the shoes of the motion picture exhibitor. Let us suppose that, having previously offered only a more innocuous

fare, he ***89** decides to vary it by exhibiting on certain days films from a series which occasionally deals explicitly with sex. The exhibitor must determine whether this places h theater into the "adult" class prescribed by the challenged ordinance. If the theater is within that class, it must be licensed, and it may be entirely prohibited, depending on its location.

"Adult" status Vel non depends on whether the theater is "used for presenting" films that are "distinguished or characterized by an emphasis on" certain specified activities, including sexual intercourse, or specified anatomical areas. [FN1] It will be simple enough, as the operator screens films, to tell when one of these areas or activities is being depicted, but if the depiction represents only a part of the films' subject matter, I am at a loss to know how he will tell whether they are "distinguished or characterized by an emphasis" on those areas and activities. The ordinance gives him no guidance. Neither does it instruct him on how to tell whether, assuming the films in question are thus "distinguished or characterized," his theater is being "used for presenting" such films. That phrase could mean Ever used, Often used, or Predominantly used, to name a few possibilities.

> FN1. See Ante, 2443-2445, and nn. 3-7. I reproduce, or cite specifically to, only those sections of the challenged ordinance that are not set out in the Court's opinion.

Let us assume the exhibitor concludes that the film series will render his showhouse an "adult" theater. He still must determine whether the operation of the theater is prohibited by virtue of there being two other "regulated uses" within 1,000 feet. His task of determining whether his own theater is "adult" is suddenly multiplied by however many neighbors he may have that arguably are within that same class. He must, in other ***90** words, know and ****2462** evaluate not only his own films, but those of any competitor within 1,000 feet. And neighboring theaters are not his only worry, since the list of regulated uses also includes "adult" bookstores, "Group 'D' Cabaret(s)," sellers of alcoholic beverages for consumption on the premises, hotels, motels, pawnshops, pool halls, public lodging houses, "secondhand stores," shoeshine parlors, and "taxi dance halls." The exhitor must master all these definitions. Some he will find very clear, of course; others less so. A neighboring bookstore is "adult," for example, if a "substantial or significant portion of its stock in trade" is "distinguished or characterized" in the same way as the films shown in an "adult" theater.

The exhibitor's compounded task of applying the statutory definitions to himself and his neighbors, furthermore, is an ongoing one. At any moment he could become a violator of the ordinance because some neighbor has slipped into a "regulated use" classification. He must know, for example, if the adjacent hotel has opened a bar or shoeshine "parlor" on the premises, though he may still be uncertain whether the hotel as a whole constitutes more than one "regulated use." He must also know the moment when the stock in trade of neighboring bookstores and theaters comes to be of such a character, and predominance, as to render them "adult." Lest he let down his guard, he should remember that if he miscalculates on any of these issues, he may pay a fine or go to jail. [FN2]

> FN2. Official Zoning Ordinance of Detroit s 69.000.

It would not be surprising if, under the circumstances, the exhibitor chose to forgo showing the film series altogether. Such deterrence of protected First Amendment activity in the "gray area" of a statute's possible ***91** coverage is, of course, one of the vices of vagueness. A second is the tendency of vague statutory standards to grant excessive and effectively unreviewable discretion to the officials who enforce those standards. That vice is also present here. It is present because the vague standards already described are left to the interpretation and application of law enforcement authorities. [FN3] It is introduced even more dangerously by the indefinite standards under which city officials are empowered to grant or deny licenses for "adult" theaters, and also waivers of the 1,000-foot rule. [FN4]

> FN3. A special opportunity for arbitrary or discriminatory application of the ordinance is apparently supplied by the operation of the 1,000-foot rule. Presumably, only one of three "regulated uses" within a 1,000-foot

area must be eliminated in order for the remaining two to become legal. For all that appears from the ordinance, the choice of which use to eliminate is left entirely to the enforcement authorities.

FN4. These two features of the ordinance constitute prior restraints and are challengeable on that ground alone. Cf. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). Since, for me, the most glaring defect in the operation of these restraints is the vagueness of the standards governing their applications, however, only the vagueness point is pursued here.

All "adult" theaters must be licensed, and licenses are dispensed by the mayor. The ordinance does not specify the criteria for licensing, except in one respect. The mayor is empowered to refuse an "adult" theater license, or revoke it at any time,

"upon proof submitted to him of the violation . . . , within the preceding two years, of any criminal statute . . . or (zoning) ordinance . . . which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." Code of Detroit s 5-2-3.

***92** If the operation of an "adult" theater would violate the 1,000-foot rule, the exhibitor must obtain the approval not only of the mayor but of the City Planning Commission, which is empowered to waive the rule. It may grant a waiver if it finds that the operation of an "adult" theater, in addition to satisfying several more definite criteria, "will not be contrary to the public interest or injurious to nearby properties," or violative of "the spirit and intent" of the ordinance.

****2463** II

Just the other day, in Hynes v. Mayor of Oradell, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976), we reaffirmed the principle that in the First Amendment area " 'government may regulate . . . only with narrow specificity,' " NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), avoiding the use of language that is so vague that "men of common intelligence must necessarily guess at its meaning." Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). In Hynes we invalidated for its vagueness an ordinance that required "Civic Groups and Organizations," and also anyone seeking to "call from house to house . . . for a recognized charitable . . . or . . . political campaign or cause," to register with the local police "for identification only." We found it intolerably unclear what "Groups and Organizations" were encompassed, what was meant by a "cause," and what was required by way of "identification." I fail to see how a statutory prohibition as difficult to understand and apply as the 1,000-foot rule for "adult" theaters can survive if the ordinance in Hynes could not.

The vagueness in the licensing and waiver standards of this ordinance is more pernicious still. The mayor's power to deny a license because of "flagrant disregard" for the "safety or welfare" of others is apparently exercisable only over those who have committed some ***93** infraction within the previous two years, [FN5] but I do not see why even those persons should be subject to standardless licensing discretion of precisely the kind that this Court so many times has condemned. See *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22.Ed.2d 162 (1969); Staub v. City of Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951); Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948); Schneider v. State, 308 U.S. 147, 163-164, 60 S.Ct. 146, 151- 152, 84 L.Ed. 155 (1939); Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939); Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). For the exhibitor who must obtain a waiver of the 1,000-foot rule, the City Planning Commission likewise functions effectively as a censor, constrained only by its perception of the "public interest" and the "spirit and intent" of the ordinance. This Court repeatedly has invalidated such vague standards for prior approval of film exhibitions. See Interstate Circuit v. Dallas, 390 U.S. 676, 683, 88 S.Ct. 1298, 1302, 20 L.Ed.2d 225 (1968), and cases cited. [FN6] Indeed, a standard much like the waiver standard***94** in this case was the

one found wanting in Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002, 96 L.Ed. 1359 (1952) (censor could ban films "of such character as to be prejudicial to the best interests of the people of said City").

FN5. The ordinance empowers the mayor to act "upon proof submitted to him of (a) violation." It is possible that he may entertain evidence not only of convictions but also of violations themselves, even though these have not been otherwise adjudicated. Whether legal infractions must be otherwise adjudicated or not, the mayor clearly retains the power to revoke a license for "flagrant disregard," should infractions occur at any time after the license's issuance.

FN6. Interstate Circuit disposes of any argument that excessively vague standards may be permitted here because the film exhibitions are not banned entirely, but merely prohibited in a particular place. The ordinance invalidated in Interstate Circuit required exhibitors to submit films for official determination whether persons under 16 should be excluded from the film exhibitions. It thus threatened the exhibitor with a loss of only part of his audience. The effect of the present ordinance is more severe, since if the exhibitor has only one theater, he is completely foreclosed. See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S., at 556 n. 8, 95 S.Ct., at 1245.

It is true that the mayor and the Planning Commission review the applications of theaters, rather than individual films. It might also be argued that at least if they adhere to the "spirit and intent" of the ordinance, their principal concern will be ****2464** with the blighting of the cityscape, rather than that of the minds of their constituents. But neither of these aspects of the case alters its basic and dispositive facts: persons seeking to exhibit "adult," but protected, films must secure, in many cases, the prior approval of the mayor and City Planning Commission; they inevitably will make their decisions by reference to the content of the proposed exhibitions; they are not constrained in doing so by "narrowly drawn, reasonable and definite standards." Niemotko v. Maryland, 340 U.S., at 271, 71 S.Ct., at 327. This may be a permissible way to control pawnshops, pool halls, and the other "regulated uses" for which the ordinance was originally designed. It is not an acceptable way, in the light of the First Amendment's presence, to decide who will be permitted to exhibit what films in what places.

III

The Court today does not really question these settled principles, or raise any doubt that if they were applied in this case, the challenged ordinance would not survive. The Court reasons, instead, that these principles need not be applied in this case because the plaintiffs themselves are clearly within the ordinance's proscriptions, and thus not affected by its vagueness. Our usual practice, as the Court notes, is to entertain facial challenges based on vagueness and overbreadth by anyone subject to a statute's proscription. The reasons given for departing ***95** from this practice are (1) that the ordinance will have no "significant deterrent effect on the exhibition of films protected by the First Amendment"; (2) that the ordinance is easily susceptible of "a narrowing construction"; and (3) that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." *Ante*, at 2447.

As to the first reason, I disagree on the facts, as is clear from the initial section of this opinion. [FN7] As to the second, no easy "narrowing construction" is proposed, and I doubt that one exists, particularly since (due to the operation of the 1,000-foot rule) not only the "used for presenting" and "characterized by an emphasis" language relating to "adult" theaters, and the "flagrant disregard" and "public interest" language of the licensing and waiver provisions, but also the definitions of Other regulated uses must all be reduced to specificity. See also Hynes v. Mayor of Oradell, 425 U.S., at 622, 96 S.Ct., at 1761. ("we are without power to remedy the (vagueness) defects by giving the ordinance constitutionally precise content").

FN7. In Erznoznik v. City of Jacksonville,

> 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), the case on which the Court relies for the proposition that only statutes having a "significant deterrent effect" may be facially challenged, such an effect in fact was found to exist. The ordinance there at issue prohibited drive-in theaters from exhibiting films in which nude parts of the human body would be "visible from any public street or public place." We perceived a "real and substantial" deterrent effect in the "unwelcome choice" to which the ordinance put exhibitors: "either (to) restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." Id., at 217, 95 S.Ct., at 2277. In the present case the second horn of the dilemma is even sharper: the construction (or acquisition) of an entirely new theater.

***96** As the third reason, that "adult" material is simply entitled to less protection, it certainly explains the lapse in applying settled vagueness principles, as indeed it explains this whole case. In joining Mr. Justice STEWART I have joined his forthright rejection of the notion that First Amendment protection is diminished for "erotic materials" that only a "few of us" see the need to protect.

We should not be swayed in this case by the characterization of the challenged ordinance as merely a "zoning" regulation, or by the "adult" nature of the affected material. By whatever name, this ordinance prohibits the showing of certain films in certain places, imposing criminal sanctions ****2465** for violation of the ban. And however distasteful we may suspect the films to be, we cannot approve their suppression without any judicial finding that they are obscene under this Court's carefully delineated and considered standards.

427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, 1 Media L. Rep. 1151

Briefs and Other Related Documents (Back to top)

• 1976 WL 181747 (Appellate Brief) Motion of the American Civil Liberties Union and the American Civil Liberties Union of Michigan for Leave to File a Brief Amici Curiae, and Brief Amici Curiae (Jan. 06, 1976)

• 1976 WL 194126 (Appellate Brief) Motion of the American Civil Liberties Union and the American Civil Liberties Union of Michigan for Leave to File a Brief Amici Curiae, and Brief Amici Curiae (Jan. 06, 1976)

• 1976 WL 181748 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae and Brief of Motion Picture Association of America, Inc. as Amicus Curiae (Jan. 05, 1976)

• 1976 WL 194125 (Appellate Brief) Brief of Respondents American Mini Theatres, Inc. and Pussy Cat Theatres of Michigan, Inc. (Jan. 02, 1976)

• 1975 WL 173868 (Appellate Brief) Brief for Respondent Nortown Theatre, Inc (Dec. 31, 1975)

• 1975 WL 173867 (Appellate Brief) Brief of Petitioners (Dec. 03, 1975)

• 1975 WL 173866 (Appellate Brief) Supplemental Brief and Reply Brief of Petitioners (Oct. 07, 1975)

• 1975 WL 173869 (Appellate Brief) Brief of Respondents American Mini Theatres, Inc. and Pussy Cat Theatres of Michigan, Inc (Oct. Term 1975)

END OF DOCUMENT

Briefs and Other Related Documents

Supreme Court of the United States
Michael BARNES, Prosecuting Attorney of St. Joseph County, Indiana, et al.
v.
GLEN THEATRE, INC., et al.
No. 90-26.

Argued Jan. 8, 1991.
Decided June 21, 1991.

Establishments wishing to provide totally nude dancing as entertainment and individual dancers employed at establishments brought suit to enjoin enforcement of Indiana public indecency statute which required dancers to wear pasties and a G-string, asserting that statute violated the First Amendment. The United States District Court for the Northern District of Indiana, 726 F.Supp. 728, permanently enjoined enforcement. The Court of Appeals for the Seventh Circuit, 802 F.2d 287, reversed and remanded. On remand, the District Court, 695 F.Supp. 414, found that nude dancing in question was not protected by the First Amendment. On appeal, the Court of Appeals, 887 F.2d 826, reversed and remanded. Opinion was vacated and rehearing en banc granted. The Court of Appeals, 904 F.2d 1081, reversed. After granting certiorari, the Supreme Court, Chief Justice Rehnquist, held that enforcement of public indecency statute to require that dancers at adult entertainment establishments wear pasties and a G-string did not violate the First Amendment.

Reversed.

Justices Scalia and Souter filed opinions concurring in the judgment.

Justice White filed dissenting opinion, in which Justices Marshall, Blackmun, and Stevens joined.

West Headnotes

[1] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[1] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases
Totally nude dancing as sought to be performed in lounge presenting "go-go dancing," and in adult "bookstore," was expressive conduct within the outer perimeters of the First Amendment, although only marginally so. (Per Chief Justice Rehnquist, with two Justices concurring, and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Government regulation of expressive conduct is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to furtherance of that interest. (Per Chief Justice Rehnquist, with two Justices concurring, and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[3] Obscenity 2.5
281k2.5 Most Cited Cases
Enforcement of Indiana's public indecency law to require nude dancers in adult entertainment establishments to wear pasties and any G-string did not violate the First Amendment's guarantee of freedom of expression; statute was clearly within state's constitutional power, it furthered substantial governmental interest in protecting societal order and morality, governmental interest was unrelated to suppression of free expression, and incidental restriction on First Amendment freedom was no greater than was essential to furtherance of the governmental interest. (Per Chief Justice Rehnquist, with two Justices concurring, and two Justices concurring in the judgment.) West's A.I.C. 35- 45-4-1; U.S.C.A. Const.Amend. 1.

****2457 *560** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondents, two Indiana establishments wishing to provide totally nude dancing as entertainment and individual dancers employed at those establishments, brought suit in the District Court to enjoin enforcement of the state public indecency law--which requires respondent dancers to wear pasties and G-strings--asserting that the law's prohibition against total nudity in public places violates the First Amendment. The court held that the nude dancing involved here was not expressive conduct. The Court of Appeals reversed, ruling that nonobscene nude dancing performed for entertainment is protected expression, and that the statute was an improper infringement of that activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers.

Held: The judgment is reversed.

904 F.2d 1081 (CA9 1990), reversed.

The Chief Justice, joined by Justice O'CONNOR and Justice KENNEDY, concluded that the enforcement of Indiana's public indecency law to prevent totally nude dancing does not violate the First Amendment's guarantee of freedom of expression. Pp. 2460-2463.

(a) Nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, although only marginally so. See, *e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648. P. 2460.

(b) Applying the four-part test of *United States v. O'Brien*, 391 U.S. 367, 376-377, 88 S.Ct. 1673, 1678-1679, 20 L.Ed.2d 672--which rejected the contention that symbolic speech is entitled to full First Amendment protection--the statute is justified despite its incidental limitations on some expressive activity. The law is clearly within the State's constitutional power. And it furthers a substantial governmental interest in protecting societal order and morality. Public indecency statutes reflect moral disapproval of people appearing in the nude among strangers in public places, and this particular law follows a line of state laws, dating back to 1831, banning public nudity. The States' traditional police power is defined as the authority to provide for the public health, safety, and morals, and such a basis for legislation ***561** has been upheld. See, *e.g.*, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446. This governmental interest is unrelated to the suppression of free expression, since public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity. The law does not proscribe nudity in these establishments because the dancers are conveying an erotic message. To the contrary, an erotic performance may be presented without ****2458** any state interference, so long as the performers wear a scant amount of clothing. Finally, the incidental restriction on First Amendment freedom is no greater than is essential to the furtherance of the governmental interest. Since the statutory prohibition is not a means to some greater end, but an end itself, it is without cavil that the statute is narrowly tailored. Pp. 2460-2463.

Justice SCALIA concluded that the statute--as a general law regulating conduct and not specifically directed at expression, either in practice or on its face--is not subject to normal First Amendment scrutiny and should be upheld on the ground that moral opposition to nudity supplies a rational basis for its prohibition. Cf. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876. There is no intermediate level of scrutiny requiring that an incidental restriction on expression, such as that involved here, be justified by an important or substantial governmental interest. Pp. 2463-2467.

Justice SOUTER, agreeing that the nude dancing at issue here is subject to a degree of First Amendment protection, and that the test of *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, is the appropriate analysis to determine the actual protection required, concluded that the State's interest in preventing the secondary effects of adult entertainment establishments--prostitution, sexual assaults, and other

criminal activity--is sufficient under *O'Brien* to justify the law's enforcement against nude dancing. The prevention of such effects clearly falls within the State's constitutional power. In addition, the asserted interest is plainly substantial, and the State could have concluded that it is furthered by a prohibition on nude dancing, even without localized proof of the harmful effects. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, 51, 106 S.Ct. 925, 930, 930, 89 L.Ed.2d 29. Moreover, the interest is unrelated to the suppression of free expression, since the pernicious effects are merely associated with nude dancing establishments and are not the result of the expression inherent in nude dancing. *Id.*, at 48, 106 S.Ct., at 929. Finally, the restriction is no greater than is essential to further the governmental interest, since pasties and a G-string moderate expression to a minor degree when measured against the dancer's remaining capacity and opportunity to express an erotic message. Pp. 2468-2471.

***562** REHNQUIST, C.J., announced the judgment of the Court and delivered an opinion, in which O'CONNOR and KENNEDY, JJ., joined. SCALIA, J., *post*, p. 2463, and SOUTER, J., *post*, p. 2468, filed opinions concurring in the judgment. WHITE, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 2471.

Wayne E. Uhl, Deputy Attorney General of Indiana, argued the cause for petitioners. With him on the briefs was *Linley E. Pearson*, Attorney General.

Bruce J. Ennis, Jr., argued the cause for respondents. *Lee J. Klein* and *Bradley J. Shafer* filed a brief for respondents Glen Theatre, Inc., et al. *Patrick Louis Baude* and *Charles A. Asher* filed a brief for respondents Darlene Miller et al.*

*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Robert K. Corbin*, Attorney General of Arizona, and *Steven J. Twist*, Chief Assistant Attorney General, *Clarine Nardi Riddle*, Attorney General of Connecticut, and *John J. Kelly*, Chief State's Attorney, *William L. Webster*, Attorney General of Missouri, *Lacy H. Thornburg*, Attorney General of North Carolina, and *Rosalie Simmonds Ballentine*, Acting Attorney General of the Virgin Islands; for the American Family Association, Inc., et al. by *Alan E. Sears*, *James Mueller*, and *Peggy M. Coleman;* and for the National Governors' Association et al. by *Benna Ruth Solomon* and *Peter Buscemi*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Spencer Neth*, *Thomas D. Buckley, Jr.*, *Steven R. Shapiro*, and *John A. Powell;* for the Georgia on Premise & Lounge Association, Inc., by *James A. Walrath;* for People for the American Way et al. by *Timothy B. Dyk*, *Robert H. Klonoff*, *Patricia A. Dunn*, *Elliot M. Mincberg*, *Stephen F. Rohde*, and *Mary D. Dorman*.

James J. Clancy filed a brief *pro se* as *amicus curiae.*

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondents are two establishments in South Bend, Indiana, that wish to provide totally nude dancing as entertainment, and individual dancers who are employed at these ***563** establishments. They claim that the First Amendment's guarantee of freedom of expression prevents the State of Indiana from enforcing its public indecency law to prevent this form of dancing. We reject their claim.

The facts appear from the pleadings and findings of the District Court and are uncontested here. The Kitty Kat Lounge, Inc. (Kitty Kat), is located in the city of South Bend. It sells alcoholic beverages and presents "go-go dancing." Its proprietor desires to present "totally nude dancing," but an applicable Indiana statute regulating public nudity requires that the dancers wear "pasties" ****2459** and "G-strings" when they dance. The dancers are not paid an hourly wage, but work on commission. They receive a 100 percent commission on the first $60 in drink sales during their performances. Darlene Miller, one of the respondents in the action, had worked at the Kitty Kat for about two years at the time this action was brought. Miller wishes to dance nude because she believes she would make more money doing so.

Respondent Glen Theatre, Inc., is an Indiana corporation with a place of business in South Bend. Its

primary business is supplying so-called adult entertainment through written and printed materials, movie showings, and live entertainment at an enclosed "bookstore." The live entertainment at the "bookstore" consists of nude and seminude performances and showings of the female body through glass panels. Customers sit in a booth and insert coins into a timing mechanism that permits them to observe the live nude and seminude dancers for a period of time. One of Glen Theatre's dancers, Gayle Ann Marie Sutro, has danced, modeled, and acted professionally for more than 15 years, and in addition to her performances at the Glen Theatre, can be seen in a pornographic movie at a nearby theater. App. to Pet. for Cert. 131-133.

Respondents sued in the United States District Court for the Northern District of Indiana to enjoin the enforcement of the Indiana public indecency statute, ***564**Ind.Code § 35-45-4-1 (1988), asserting that its prohibition against complete nudity in public places violated the First Amendment. The District Court originally granted respondents' prayer for an injunction, finding that the statute was facially overbroad. The Court of Appeals for the Seventh Circuit reversed, deciding that previous litigation with respect to the statute in the Supreme Court of Indiana and this Court precluded the possibility of such a challenge, [FN1] and remanded to the District Court in order for the plaintiffs to pursue their claim that the statute violated the First Amendment as applied to their dancing. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287, 288-290 (1986). On remand, the District Court concluded that ***565** "the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States," and rendered judgment in favor of the defendants. *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F.Supp. 414, 419 (1988). The case was again appealed to the Seventh Circuit, and a panel of that court reversed the District Court, holding that the nude dancing involved here was expressive conduct protected by the First Amendment. ****2460** *Miller v. Civil City of South Bend*, 887 F.2d 826 (1989). The Court of Appeals then heard the case en banc, and the court rendered a series of comprehensive and thoughtful opinions. The majority concluded that nonobscene nude dancing performed for entertainment is expression protected by the First Amendment, and that the public indecency statute was an improper infringement of that expressive activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (1990). We granted certiorari, 498 U.S. 807, 111 S.Ct. 38, 112 L.Ed.2d 15 (1990), and now hold that the Indiana statutory requirement that the dancers in the establishments involved in this case must wear pasties and G-strings does not violate the First Amendment.

FN1. The Indiana Supreme Court appeared to give the public indecency statute a limiting construction to save it from a facial overbreadth attack:
"There is no right to appear nude in public. Rather, it *may* be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *State v. Baysinger*, 272 Ind. 236, 247, 397 N.E.2d 580, 587 (1979) (emphasis added), appeals dism'd *sub nom. Clark v. Indiana*, 446 U.S. 931, 100 S.Ct. 2146, 64 L.Ed.2d 783, and *Dove v. Indiana*, 449 U.S. 806, 101 S.Ct. 52, 66 L.Ed.2d 10 (1980). Five years after *Baysinger*, however, the Indiana Supreme Court reversed a decision of the Indiana Court of Appeals holding that the statute did "not apply to activity such as the theatrical appearances involved herein, which may not be prohibited absent a finding of obscenity," in a case involving a partially nude dance in the "Miss Erotica of Fort Wayne" contest. *Erhardt v. State*, 468 N.E.2d 224 (Ind.1984). The Indiana Supreme Court did not discuss the constitutional issues beyond a cursory comment that the statute had been upheld against constitutional attack in *Baysinger*, and Erhardt's conduct fell within the statutory prohibition. Justice Hunter dissented, arguing that "a public indecency statute which prohibits nudity in any public place is unconstitutionally overbroad. My reasons for so concluding have

already been articulated in *State v. Baysinger*, (1979) 272 Ind. 236, 397 N.E.2d 580 (Hunter and DeBruler, JJ., dissenting)." 468 N.E.2d at 225-226. Justice DeBruler expressed similar views in his dissent in *Erhardt. Id.*, at 226. Therefore, the Indiana Supreme Court did not affirmatively limit the reach of the statute in *Baysinger*, but merely said that to the extent the First Amendment would require it, the statute might be unconstitutional as applied to some activities.

[1] Several of our cases contain language suggesting that nude dancing of the kind involved here is expressive conduct protected by the First Amendment. In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975), we said: "[A]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." In *Schad v. Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981), we said that "[f]urthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation" (citations omitted). These statements support the conclusion of the Court of Appeals ***566** that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so. This, of course, does not end our inquiry. We must determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity.

Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board. The Supreme Court of Indiana has construed the Indiana statute to preclude nudity in what are essentially places of public accommodation such as the Glen Theatre and the Kitty Kat Lounge. In such places, respondents point out, minors are excluded and there are no nonconsenting viewers. Respondents contend that while the State may license establishments such as the ones involved here, and limit the geographical area in which they do business, it may not in any way limit the performance of the dances within them without violating the First Amendment. The petitioners contend, on the other hand, that Indiana's restriction on nude dancing is a valid "time, place, or manner" restriction under cases such as *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

The "time, place, or manner" test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a "public forum," *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989), although we have on at least one occasion applied it to conduct occurring on private property. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). In *Clark* we observed that this test has been interpreted to embody much the same standards as those set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and we turn, therefore, to the rule enunciated in *O'Brien.*

[2] O'Brien burned his draft card on the steps of the South Boston Courthouse in the presence of a sizable crowd, and ***567** was convicted ****2461** of violating a statute that prohibited the knowing destruction or mutilation of such a card. He claimed that his conviction was contrary to the First Amendment because his act was "symbolic speech"-- expressive conduct. The Court rejected his contention that symbolic speech is entitled to full First Amendment protection, saying:

"[E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held 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 Amend-

> ment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 376-377, 88 S.Ct., at 1678-1679 (footnotes omitted).

[3] Applying the four-part *O'Brien* test enunciated above, we find that Indiana's public indecency statute is justified despite its incidental limitations on some expressive activity. The public indecency statute is clearly within the constitutional power of the State and furthers substantial governmental interests. It is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted ***568** this statute, for Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose. Nonetheless, the statute's purpose of protecting societal order and morality is clear from its text and history. Public indecency statutes of this sort are of ancient origin and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common law, and this Court recognized the common-law roots of the offense of "gross and open indecency" in *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948). Public nudity was considered an act *malum in se*. *Le Roy v. Sidley*, 1 Sid. 168, 82 Eng.Rep. 1036 (K.B.1664). Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places.

This public indecency statute follows a long line of earlier Indiana statutes banning all public nudity. The history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition. At least as early as 1831, Indiana had a statute punishing "open and notorious lewdness, or ... any grossly scandalous and public indecency." Rev.Laws of Ind., ch. 26, § 60 (1831); Ind.Rev.Stat., ch. 53, § 81 (1834). A gap during which no statute was in effect was filled by the Indiana Supreme Court in *Ardery v. State*, 56 Ind. 328 (1877), which held that the court could sustain a conviction for exhibition of "privates" in the presence of others. The court traced the offense to the Bible story of Adam and Eve. *Id.*, at 329-330. In 1881, a statute was enacted that would remain essentially unchanged for nearly a century:

> "Whoever, being over fourteen years of age, makes an indecent exposure of his person in a public place, or in any place where there are other persons to be offended or annoyed thereby, ... is guilty of ****2462** public indecency...." 1881 Ind.Acts, ch. 37, § 90.

***569** The language quoted above remained unchanged until it was simultaneously repealed and replaced with the present statute in 1976. 1976 Ind.Acts, Pub.L. 148, Art. 45, ch. 4, § 1. [FN2]

> FN2. Indiana Code § 35-45-4-1 (1988) provides:
> "Public indecency; indecent exposure "Sec. 1. (a) A person who knowingly or intentionally, in a public place:
> "(1) engages in sexual intercourse;
> "(2) engages in deviate sexual conduct;
> "(3) appears in a state of nudity; or
> "(4) fondles the genitals of himself or another person;
> commits public indecency, a Class A misdemeanor.
> "(b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state."

This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and

morals, and we have upheld such a basis for legislation. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446 (1973), we said:

> "In deciding *Roth* [*v. United States*, 354 U.S. 476 [77 S.Ct. 1304, 1 L.Ed.2d 1498] (1957)], this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' [*Id.*], at 485 [77 S.Ct., at 1309]." (Emphasis omitted.)

And in *Bowers v. Hardwick*, 478 U.S. 186, 196, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986), we said:

> "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."

Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.

***570** This interest is unrelated to the suppression of free expression. Some may view restricting nudity on moral grounds as necessarily related to expression. We disagree. It can be argued, of course, that almost limitless types of conduct--including appearing in the nude in public--are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct" in *O'Brien*, saying:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S., at 376, 88 S.Ct., at 1678.

And in *Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989), we further observed:

> "It is possible to find some kernel of expression in almost every activity a person undertakes--for example, walking down the street or meeting one's friends at a shopping mall--but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons coming together to engage in recreational dancing-- is not protected by the First Amendment." *Id.*, at 25, 109 S.Ct., at 1595.

Respondents contend that even though prohibiting nudity in public generally may not be related to suppressing expression, prohibiting the performance of nude dancing is related to expression because the State seeks to prevent its erotic message. Therefore, they reason that the application of the Indiana statute to the nude dancing in this case violates the First Amendment, because it fails the third part of the *O'Brien* test, viz: ****2463** the governmental interest must be unrelated to the suppression of free expression.

But we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers. ***571** Presumably numerous other erotic performances are presented at these establishments and similar clubs without any interference from the State, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.

This conclusion is buttressed by a reference to the facts of *O'Brien.* An Act of Congress provided that anyone who knowingly destroyed a Selective Service registration certificate committed an offense. O'Brien burned his certificate on the steps of the South Boston Courthouse to influence others to adopt his antiwar beliefs. This Court upheld his conviction, reasoning that the continued availability of issued certificates served a legitimate and substantial purpose in the administration of the Selective Service System. O'Brien's deliberate destruction of his certificate frustrated this purpose and "[f]or this noncommunicative impact of his conduct, and for nothing

else, he was convicted." 391 U.S., at 382, 88 S.Ct., at 1682. It was assumed that O'Brien's act in burning the certificate had a communicative element in it sufficient to bring into play the First Amendment, *id.*, at 376, 88 S.Ct., at 1682, but it was for the noncommunicative element that he was prosecuted. So here with the Indiana statute; while the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.

The fourth part of the *O'Brien* test requires that the incidental restriction on First Amendment freedom be no greater than is essential to the furtherance of the governmental interest. As indicated in the discussion above, the ***572** governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose.

The judgment of the Court of Appeals accordingly is

Reversed.

Justice SCALIA, concurring in the judgment.

I agree that the judgment of the Court of Appeals must be reversed. In my view, however, the challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.

I

Indiana's public indecency statute provides:

> "(a) A person who knowingly or intentionally, in a public place:
> "(1) engages in sexual intercourse;
> "(2) engages in deviate sexual conduct;
> "(3) appears in a state of nudity; or
> "(4) fondles the genitals of himself or another person;
> commits public indecency, a Class A misdemeanor.
> ****2464** "(b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state." Ind.Code § 35-45-4-1 (1988).

On its face, this law is not directed at expression in particular. As Judge Easterbrook put it in his dissent below: "Indiana ***573** does not regulate dancing. It regulates public nudity.... Almost the entire domain of Indiana's statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech." *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1120 (CA7 1990). The intent to convey a "message of eroticism" (or any other message) is not a necessary element of the statutory offense of public indecency; nor does one commit that statutory offense by conveying the most explicit "message of eroticism," so long as he does not commit any of the four specified acts in the process. [FN1]

> FN1. Respondents assert that the statute cannot be characterized as a general regulation of conduct, unrelated to suppression of expression, because one defense put forward in oral argument below by the attorney general referred to the "message of eroticism" conveyed by respondents. But that argument seemed to go to whether the statute could constitutionally be applied to the present performances, rather than to what was the purpose of the legislation. Moreover, the State's argument below was in the alternative: (1) that the statute does not implicate the First Amendment because it is a neutral rule not directed at expression, and (2) that the statute in any event survives First Amendment scrutiny because of the State's interest in suppressing nude barroom dancing. The second argument can be claimed to contradict the first (though I think it does not); but it certainly does not waive or abandon it. In any case, the clear purpose shown by both the text and historical use of

> the statute cannot be refuted by a litigating statement in a single case.

Indiana's statute is in the line of a long tradition of laws against public nudity, which have never been thought to run afoul of traditional understanding of "the freedom of speech." Public indecency--including public nudity--has long been an offense at common law. See 50 Am.Jur.2d, Lewdness, Indecency, and Obscenity 449, 472-474 (1970); Annot., Criminal offense predicated on indecent exposure, 93 A.L.R. 996, 997-998 (1934); *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948). Indiana's first public nudity statute, Rev. Laws of Ind., ch. 26, § 60 (1831), predated by many years the appearance of nude barroom dancing. It was general in scope, directed at all public nudity, and not just at public nude expression; and all succeeding statutes, down to ***574** the present one, have been the same. Were it the case that Indiana *in practice* targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools, see *Miller*, 904 F.2d, at 1120, 1121, it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct. Respondents have adduced no evidence of that. Indiana officials have brought many public indecency prosecutions for activities having no communicative element. See *Bond v. State*, 515 N.E.2d 856, 857 (Ind.1987); *In re Levinson*, 444 N.E.2d 1175, 1176 (Ind.1983); *Preston v. State*, 259 Ind. 353, 354-355, 287 N.E.2d 347, 348 (1972); *Thomas v. State*, 238 Ind. 658, 659-660, 154 N.E.2d 503, 504- 505 (1958); *Blanton v. State*, 533 N.E.2d 190, 191 (Ind.App.1989); *Sweeney v. State*, 486 N.E.2d 651, 652 (Ind.App.1985); *Thompson v. State*, 482 N.E.2d 1372, 1373-1374 (Ind.App.1985); *Adims v. State*, 461 N.E.2d 740, 741-742 (Ind.App.1984); *State v. Elliott*, 435 N.E.2d 302, 304 (Ind.App.1982); *Lasko v. State*, 409 N.E.2d 1124, 1126 (Ind.App.1980). [FN2]

> FN2. Respondents also contend that the statute, as interpreted, is not content neutral in the expressive conduct to which it applies, since it allegedly does not apply to nudity in theatrical productions. See *State v. Baysinger*, 272 Ind. 236, 247, 397 N.E.2d 580, 587 (1979). I am not sure that theater versus nontheater represents a distinction based on content rather than format, but assuming that it does, the argument nonetheless fails for the reason the plurality describes, *ante*, at 2459, n. 1.

****2465** The dissent confidently asserts, *post*, at 2473, that the purpose of restricting nudity in public places in general is to protect nonconsenting parties from offense; and argues that since only consenting, admission-paying patrons see respondents dance, that purpose cannot apply and the only remaining purpose must relate to the communicative elements of the performance. Perhaps the dissenters believe that "offense to others" *ought* to be the only reason for restricting nudity in public places generally, but there is no ***575** basis for thinking that our society has ever shared that Thoreauvian "you - may - do - what - you - like - so - long - as - it - does - not - injure - someone -else" beau ideal--much less for thinking that it was written into the Constitution. The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, *"contra bonos mores," i.e.*, immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality." See *Bowers v. Hardwick*, 478 U.S. 186, 196, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986) (upholding prohibition of private homosexual sodomy enacted solely on "the presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable"). See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68, n. 15, 93

S.Ct. 2628, 2641, n. 15, 37 L.Ed.2d 446 (1973); *Dronenburg v. Zech*, 239 U.S.App.D.C. 229, 238, and n. 6, 741 F.2d 1388, 1397, and n. 6 (1984) (opinion of Bork, J.). The purpose of the Indiana statute, as both its text and the manner of its enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified. Since that is so, the dissent has no basis for positing that, where only thoroughly edified adults are present, the purpose must be repression of communication. [FN3]

> FN3. The dissent, *post*, at 2472-2473, 2475-2476, also misunderstands what is meant by the term "general law." I do not mean that the law restricts the targeted conduct in all places at all times. A law is "general" for the present purposes if it regulates conduct without regard to whether that conduct is expressive. Concededly, Indiana bans nudity in public places, but not within the privacy of the home. (That is not surprising, since the common-law offense, and the traditional moral prohibition, runs against *public* nudity, not against all nudity. *E.g.*, 50 Am.Jur.2d, Lewdness, Indecency, and Obscenity, § 17, pp. 472-474 (1970).) But that confirms, rather than refutes, the general nature of the law: One may not go nude in public, whether or not one intends thereby to convey a message, and similarly one *may* go nude in private, again whether or not that nudity is expressive.

***576** II

Since the Indiana regulation is a general law not specifically targeted at expressive conduct, its application to such conduct does not in my view implicate the First Amendment.

The First Amendment explicitly protects "the freedom of speech [and] of the press"--oral and written speech--not "expressive conduct." When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication (for instance, to reduce noise, see *Saia v. New York*, 334 U.S. 558, 561, 68 S.Ct. 1148, 1150, 92 L.Ed. 1574 (1948), to regulate election campaigns, see *Buckley v. Valeo*, 424 U.S. 1, 16, 96 S.Ct. 612, 633, 46 L.Ed.2d 659 (1976), or to prevent littering, see *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163, 60 S.Ct. 146, 84 L.Ed. 155 (1939)), we insist that ****2466** it meet the high, First-Amendment standard of justification. But virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose--if only expressive of the fact that the actor disagrees with the prohibition. See, *e.g.*, *Florida Free Beaches, Inc. v. Miami*, 734 F.2d 608, 609 (CA11 1984) (nude sunbathers challenging public indecency law claimed their "message" was that nudity is not indecent). It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even--as some of our cases have suggested, see, *e.g.*, *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968)--that it be justified by an "important or substantial" ***577** government interest. Nor do our holdings require such justification: We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest.

This is not to say that the First Amendment affords no protection to expressive conduct. Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional. See, *e.g.*, *United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990) (burning flag); *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (same); *Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (defacing flag); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (wearing black arm bands); *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (participating in silent sit-in); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) (flying a red flag). [FN4] In each of the foregoing cases, we explicitly found that suppressing

communication was the object of the regulation of conduct. Where that has not been the case, however--where suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons--we have allowed the regulation to stand. *O'Brien, supra*, 391 U.S., at 377, 88 S.Ct., at 1679 (law banning destruction of draft card upheld in application against card burning to protest ***578** war); *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990) (Sherman Act upheld in application against restraint of trade to protest low pay); cf. *United States v. Albertini*, 472 U.S. 675, 687-688, 105 S.Ct. 2897, 2905-2906, 86 L.Ed.2d 536 (1985) (rule barring respondent from military base upheld in application against entrance on base to protest war); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (rule barring sleeping in parks upheld in application against persons engaging in such conduct to dramatize plight of homeless). As we clearly expressed the point in *Johnson:*

> FN4. It is easy to conclude that conduct has been forbidden because of its communicative attributes when the conduct in question is what the Court has called "inherently expressive," and what I would prefer to call "conventionally expressive"--such as flying a red flag. I mean by that phrase (as I assume the Court means by "inherently expressive") conduct that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else. I am not sure whether dancing fits that description, see *Dallas v. Stanglin*, 490 U.S. 19, 24, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989) (social dance group "do[es] not involve the sort of expressive association that the First Amendment has been held to protect"). But even if it does, this law is directed against nudity, not dancing. Nudity is *not* normally engaged in for the purpose of communicating an idea or an emotion.

"The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements. What might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for ****2467** singling out that conduct for proscription." 491 U.S., at 406, 109 S.Ct., at 2540-2541 (internal quotation marks and citations omitted; emphasis in original).

All our holdings (though admittedly not some of our discussion) support the conclusion that "the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription." *Community for Creative Non-Violence v. Watt*, 227 U.S.App.D.C. 19, 55-56, 703 F.2d 586, 622-623 (1983) (en banc) (Scalia, J., dissenting), (footnote omitted; emphasis omitted), rev'd sub nom. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). Such a regime ensures that the government does not act to suppress communication, without requiring that all conduct-restricting regulation ***579** which means in effect all regulation) survive an enhanced level of scrutiny.

We have explicitly adopted such a regime in another First Amendment context: that of free exercise. In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), we held that general laws not specifically targeted at religious practices did not require heightened First Amendment scrutiny even though they diminished some people's ability to practice their religion. "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' " *Id.*, at 885 [110 S.Ct., at 1603], quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 451, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988); see also *Minersville School*

District v. Gobitis, 310 U.S. 586, 594-595, 60 S.Ct. 1010, 1012-1013, 84 L.Ed. 1375 (1940) (Frankfurter, J.) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs"). There is even greater reason to apply this approach to the regulation of expressive conduct. Relatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost anyone can violate almost any law as a means of expression. In the one case, as in the other, if the law is not directed against the protected value (religion or expression) the law must be obeyed.

III

While I do not think the plurality's conclusions differ greatly from my own, I cannot entirely endorse its reasoning. The plurality purports to apply to this general law, insofar as it regulates this allegedly expressive conduct, an intermediate level of First Amendment scrutiny: The government interest in the regulation must be " 'important or substantial,' " *ante*, at 2461, quoting *O'Brien*, *supra*, 391 U.S., at 377, 88 S.Ct., at 1679. As I have indicated, ***580** I do not believe such a heightened standard exists. I think we should avoid wherever possible, moreover, a method of analysis that requires judicial assessment of the "importance" of government interests--and especially of government interests in various aspects of morality.

Neither of the cases that the plurality cites to support the "importance" of the State's interest here, see *ante*, at 2462, is in point. *Paris Adult Theatre I v. Slaton*, 413 U.S., at 61, 93 S.Ct., at 2637 and *Bowers v. Hardwick*, 478 U.S., at 196, 106 S.Ct., at 2846, did uphold laws prohibiting private conduct based on concerns of decency and morality; but neither opinion held that those concerns were particularly "important" or "substantial," or amounted to anything more than a *rational basis* for regulation. *Slaton* involved an exhibition which, since it was obscene ****2468** and at least to some extent public, was unprotected by the First Amendment, see *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); the State's prohibition could therefore be invalidated only if it had no rational basis. We found that the State's "right ... to maintain a decent society" provided a "legitimate" basis for regulation--even as to obscene material viewed by consenting adults. 413 U.S., at 59-60, 93 S.Ct., at 2636-2637. In *Bowers*, we held that since homosexual behavior is not a fundamental right, a Georgia law prohibiting private homosexual intercourse needed only a rational basis in order to comply with the Due Process Clause. Moral opposition to homosexuality, we said, provided that rational basis. 478 U.S., at 196, 106 S.Ct., at 2846. I would uphold the Indiana statute on precisely the same ground: Moral opposition to nudity supplies a rational basis for its prohibition, and since the First Amendment has no application to this case no more than that is needed.

* * *

Indiana may constitutionally enforce its prohibition of public nudity even against those who choose to use public nudity as a means of communication. The State is regulating conduct, not expression, and those who choose to employ conduct ***581** as a means of expression must make sure that the conduct they select is not generally forbidden. For these reasons, I agree that the judgment should be reversed.

Justice SOUTER, concurring in the judgment.

Not all dancing is entitled to First Amendment protection as expressive activity. This Court has previously categorized ballroom dancing as beyond the Amendment's protection, *Dallas v. Stanglin*, 490 U.S. 19, 24-25, 109 S.Ct. 1591, 1594-1595, 104 L.Ed.2d 18 (1989), and dancing as aerobic exercise would likewise be outside the First Amendment's concern. But dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience. Such is the expressive content of the dances described in the record.

Although such performance dancing is inherently expressive, nudity *per se* is not. It is a condition, not an activity, and the voluntary assumption of that condition, without more, apparently expresses nothing

beyond the view that the condition is somehow appropriate to the circumstances. But every voluntary act implies some such idea, and the implication is thus so common and minimal that calling all voluntary activity expressive would reduce the concept of expression to the point of the meaningless. A search for some expression beyond the minimal in the choice to go nude will often yield nothing: a person may choose nudity, for example, for maximum sunbathing. But when nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a striptease, are integrated into the dance and its expressive function. Thus I agree with the plurality and the dissent that an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection.

***582** I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), for judging the limits of appropriate state action burdening expressive acts as distinct from pure speech or representation. I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult ****2469** entertainment establishments of the sort typified by respondents' establishments.

It is, of course, true that this justification has not been articulated by Indiana's Legislature or by its courts. As the plurality observes, "Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose," *ante*, at 2461. While it is certainly sound in such circumstances to infer general purposes "of protecting societal order and morality ... from [the statute's] text and history," *ibid.*, I think that we need not so limit ourselves in identifying the justification for the legislation at issue here, and may legitimately consider petitioners' assertion that the statute is applied to nude dancing because such dancing "encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity." Brief for Petitioners 37.

This asserted justification for the statute may not be ignored merely because it is unclear to what extent this purpose motivated the Indiana Legislature in enacting the statute. Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. Cf. ***583***McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 1961). At least as to the regulation of expressive conduct, [FN1] "[w]e decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *O'Brien*, *supra*, 391 U.S., at 384, 88 S.Ct., at 1683. In my view, the interest asserted by petitioners in preventing prostitution, sexual assault, and other criminal activity, although presumably not a justification for all applications of the statute, is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment at issue here.

> FN1. Cf., *e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (striking down state statute on Establishment Clause grounds due to impermissible legislative intent).

At the outset, it is clear that the prevention of such evils falls within the constitutional power of the State, which satisfies the first *O'Brien* criterion. See 391 U.S., at 377, 88 S.Ct., at 1679. The second *O'Brien* prong asks whether the regulation "furthers an important or substantial governmental interest." *Ibid.* The asserted state interest is plainly a substantial one; the only question is whether prohibiting nude dancing of the sort at issue here "furthers" that interest. I believe that our cases have addressed this question sufficiently to establish that it does.

In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), we upheld a city's zoning ordinance designed to prevent the occur-

rence of harmful secondary effects, including the crime associated with adult entertainment, by protecting approximately 95% of the city's area from the placement of motion picture theaters emphasizing " 'matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" ... for observation by patrons therein.' " *Id.*, at 44, 106 S.Ct., at 927. Of particular importance to the present enquiry, we held that the city of Renton was not compelled to justify its restrictions by studies specifically relating to the problems ***584** that would be caused by adult theaters in that city. Rather, "Renton was entitled to rely on the experiences of Seattle and other cities," *id.*, at 51, 106 S.Ct., at 931, which demonstrated the harmful secondary effects correlated with the presence "of even one [adult] theater in a given neighborhood." *Id.*, at 50, 106 S.Ct., at 930; cf. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, n. 34, 96 S.Ct. 2440, 2453, n. 34, 49 L.Ed.2d 310 (1976) (legislative finding that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime"); *California v. LaRue*, 409 U.S. 109, 111, 93 S.Ct. 390, 393, 34 L.Ed.2d 342 (1972) ****2470** (administrative findings of criminal activity associated with adult entertainment).

The type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton*, *American Mini Theatres*, and *LaRue*. It therefore is no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying "specified anatomical areas" at issue in *Renton*. Other reported cases from the Circuit in which this litigation arose confirm the conclusion. See, *e.g.*, *United States v. Marren*, 890 F.2d 924, 926 (CA7 1989) (prostitution associated with nude dancing establishment); *United States v. Doerr*, 886 F.2d 944, 949 (CA7 1989) (same). In light of *Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's "bookstore" furthers its interest in preventing prostitution, sexual assault, and associated crimes. Given our recognition that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," *American Mini Theatres, supra*, 427 U.S., at 70, 96 S.Ct., at 2452, I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every ***585** case. The statute as applied to nudity of the sort at issue here therefore satisfies the second prong of *O'Brien*. [FN2]

> FN2. Because there is no overbreadth challenge before us, we are not called upon to decide whether the application of the statute would be valid in other contexts. It is enough, then, to say that the secondary effects rationale on which I rely here would be open to question if the State were to seek to enforce the statute by barring expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of *Renton*-type adult entertainment was correlated with such secondary effects.

The third *O'Brien* condition is that the governmental interest be "unrelated to the suppression of free expression," 391 U.S., at 377, 88 S.Ct., at 1679, and, on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression. The dissent contends, however, that Indiana seeks to regulate nude dancing as its means of combating such secondary effects "because ... creating or emphasizing [the] thoughts and ideas [expressed by nude dancing] in the minds of the spectators may lead to increased prostitution," *post*, at 2474, and that regulation of expressive conduct because of the fear that the expression will prove persuasive is inherently related to the suppression of free expression. *Ibid.*

The major premise of the dissent's reasoning may be correct, but its minor premise describing the causal theory of Indiana's regulatory justification is not. To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation ***586** actually are. It is possible, for example, that the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities, or from the simple viewing of nude bodies regardless of whether those bodies are engaged in expression or not. In neither case would the chain of causation run through the persuasive effect of the expressive component of nude dancing.

****2471** Because the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, rather than from a relationship between the other evils and the expressive component of the dancing, the interest is unrelated to the suppression of free expression. *Renton* is again persuasive in support of this conclusion. In *Renton*, we held that an ordinance that regulated adult theaters because the presence of such theaters was correlated with secondary effects that the local government had an interest in regulating was content neutral (a determination similar to the "unrelated to the suppression of free expression" determination here, see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, and n. 8, 104 S.Ct. 3065, 3071, and n. 8, 82 L.Ed.2d 221 (1984)) because it was "*justified* without reference to the content of the regulated speech." 475 U.S., at 48, 106 S.Ct., at 929 (emphasis in original). We reached this conclusion without need to decide whether the cause of the correlation might have been the persuasive effect of the adult films that were being regulated. Similarly here, the "secondary effects" justification means that enforcement of the Indiana statute against nude dancing is "justified without reference to the content of the regulated [expression]," *ibid.* (emphasis omitted), which is sufficient, at least in the context of sexually explicit expression, [FN3] to satisfy the third prong of the *O'Brien* test.

> FN3. I reach this conclusion again mindful, as was the Court in *Renton*, that the protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression. See *Renton, supra*, at 49, and n. 2, 106 S.Ct., at 929, and n. 2, citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976).

***587** The fourth *O'Brien* condition, that the restriction be no greater than essential to further the governmental interest, requires little discussion. Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message. Nor, so far as we are told, is the dancer or her employer limited by anything short of obscenity laws from expressing an erotic message by articulate speech or representational means; a pornographic movie featuring one of respondents, for example, was playing nearby without any interference from the authorities at the time these cases arose.

Accordingly, I find *O'Brien* satisfied and concur in the judgment.

Justice WHITE, with whom Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, dissenting.

The first question presented to us in this case is whether nonobscene nude dancing performed as entertainment is expressive conduct protected by the First Amendment. The Court of Appeals held that it is, observing that our prior decisions permit no other conclusion. Not surprisingly, then, the plurality now concedes that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment...." *Ante*, at 2460. This is no more than recognizing, as the Seventh Circuit observed, that dancing is an ancient art form and "inherently embodies the expression and

communication of ideas and emotions." *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1087 (1990) (en banc). [FN1]

> FN1. Justice SCALIA suggests that performance dancing is not inherently expressive activity, see *ante*, at 2466, n. 4, but the Court of Appeals has the better view: "Dance has been defined as 'the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself.' 16 The New Encyclopedia Britannica 935 (1989). Inherently, it is the communication of emotion or ideas. At the root of all '[t]he varied manifestations of dancing ... lies the common impulse to resort to movement to externalise states which we cannot externalise by rational means. This is basic dance.' Martin, J. *Introduction to the Dance* (1939). Aristotle recognized in *Poetics* that the purpose of dance is 'to represent men's character as well as what they do and suffer.' The raw communicative power of dance was noted by the French poet Stéphane Mallarmé who declared that the dancer 'writing with her body ... *suggests* things which the written work could *express* only in several paragraphs of dialogue or descriptive prose.' " 904 F.2d, at 1085-1086. Justice SCALIA cites *Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989), but that decision dealt with social dancing, not performance dancing; and the submission in that case, which we rejected, was not that social dancing was an expressive activity but that plaintiff's *associational* rights were violated by restricting admission to dance halls on the basis of age. The Justice also asserts that even if dancing is inherently expressive, nudity is not. The statement may be true, but it tells us nothing about dancing in the nude.

****2472 *588** Having arrived at the conclusion that nude dancing performed as entertainment enjoys First Amendment protection, the plurality states that it must "determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity." *Ante*, at 2460. For guidance, the plurality turns to *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), which held that expressive conduct could be narrowly regulated or forbidden in pursuit of an important or substantial governmental interest that is unrelated to the content of the expression. The plurality finds that the Indiana statute satisfies the *O'Brien* test in all respects.

The plurality acknowledges that it is impossible to discern the exact state interests which the Indiana Legislature had in mind when it enacted the Indiana statute, but the plurality nonetheless concludes that it is clear from the statute's text and history that the law's purpose is to protect "societal order and morality." *Ante*, at 2461. The plurality goes on to ***589** conclude that Indiana's statute "was enacted as *a general prohibition*," *ante*, at 2461 (emphasis added), on people appearing in the nude among strangers in public places. The plurality then points to cases in which we upheld legislation based on the State's police power, and ultimately concludes that the Indiana statute "furthers a substantial government interest in protecting order and morality." *Ante*, at 2462. The Court also holds that the basis for banning nude dancing is unrelated to free expression and that it is narrowly drawn to serve the State's interest.

The plurality's analysis is erroneous in several respects. Both the plurality and Justice SCALIA in his opinion concurring in the judgment overlook a fundamental and critical aspect of our cases upholding the States' exercise of their police powers. None of the cases they rely upon, including *O'Brien* and *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), involved anything less than truly *general* proscriptions on individual conduct. In *O'Brien*, for example, individuals were prohibited from destroying their draft cards at any time and in any place, even in completely private places such as the home. Likewise, in *Bowers*, the State prohibited sodomy, regardless of where the conduct might occur, including the home as was true in that case. The same is true of cases like *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872,

110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which, though not applicable here because it did not involve any claim that the peyote users were engaged in expressive activity, recognized that the State's interest in preventing the use of illegal drugs extends even into the home. By contrast, in this case Indiana does not suggest that its statute applies to, or could be applied to, nudity wherever it occurs, including the home. We do not understand the plurality or Justice SCALIA to be suggesting that Indiana could constitutionally enact such an intrusive prohibition, nor do we think such a suggestion would be tenable in light of our decision in *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), in which we held that States could not punish the ***590** mere possession of obscenity in the privacy of one's own home.

****2473** We are told by the attorney general of Indiana that, in *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), the Indiana Supreme Court held that the statute at issue here cannot and does not prohibit nudity as a part of some larger form of expression meriting protection when the communication of ideas is involved. Brief for Petitioners 25, 30-31; Reply Brief for Petitioners 9-11. Petitioners also state that the evils sought to be avoided by applying the statute in this case would not obtain in the case of theatrical productions, such as "Salome" or "Hair." *Id.*, at 11-12. Neither is there any evidence that the State has attempted to apply the statute to nudity in performances such as plays, ballets, or operas. "No arrests have ever been made for nudity as part of a play or ballet." App. 19 (affidavit of Sgt. Timothy Corbett).

Thus, the Indiana statute is not a *general* prohibition of the type we have upheld in prior cases. As a result, the plurality and Justice SCALIA's simple references to the State's general interest in promoting societal order and morality are not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity. Instead, in applying the *O'Brien* test, we are obligated to carefully examine the reasons the State has chosen to regulate this expressive conduct in a less than general statute. In other words, when the State enacts a law which draws a line between expressive conduct which is regulated and nonexpressive conduct of the same type which is not regulated, *O'Brien* places the burden on the State to justify the distinctions it has made. Closer inquiry as to the purpose of the statute is surely appropriate.

Legislators do not just randomly select certain conduct for proscription; they have reasons for doing so and those reasons illuminate the purpose of the law that is passed. Indeed, a law may have multiple purposes. The purpose of ***591** forbidding people to appear nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates. This is why *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), is of no help to the State: "In *Clark* ... the damage to the parks was the same whether the sleepers were camping out for fun, were in fact homeless, or wished by sleeping in the park to make a symbolic statement on behalf of the homeless." 904 F.2d, at 1103 (Posner, J., concurring). That cannot be said in this case: The perceived damage to the public interest caused by appearing nude on the streets or in the parks, as I have said, is not what the State seeks to avoid in preventing nude dancing in theaters and taverns. There the perceived harm is the communicative aspect of the erotic dance. As the State now tells us, and as Justice SOUTER agrees, the State's goal in applying what it describes as its "content neutral" statute to the nude dancing in this case is "deterrence of prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure." Reply Brief for Petitioners 11. The attainment of these goals, however, depends on preventing an expressive activity.

The plurality nevertheless holds that the third requirement of the *O'Brien* test, that the governmental interest be unrelated to the suppression of free expression, is satisfied because in applying the statute to nude dancing, the State is not "proscribing nudity be-

cause of the erotic message conveyed by the dancers." *Ante*, at 2463. The plurality suggests that this is so because the State does not ban dancing that sends an erotic message; it is only nude erotic dancing that is forbidden. The perceived evil is not erotic dancing but public ***592** nudity, which may be prohibited despite any incidental impact on ****2474** expressive activity. This analysis is transparently erroneous.

In arriving at its conclusion, the plurality concedes that nude dancing conveys an erotic message and concedes that the message would be muted if the dancers wore pasties and G-strings. Indeed, the emotional or erotic impact of the dance is intensified by the nudity of the performers. As Judge Posner argued in his thoughtful concurring opinion in the Court of Appeals, the nudity of the dancer is an integral part of the emotions and thoughts that a nude dancing performance evokes. 904 F.2d at 1090-1098. The sight of a fully clothed, or even a partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental "conduct." We have previously pointed out that " '[n]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Schad v. Mt. Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981).

This being the case, it cannot be that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication. The nudity element of nude dancing performances cannot ***593** be neatly pigeonholed as mere "conduct" independent of any expressive component of the dance. [FN2]

> FN2. Justice SOUTER agrees with the plurality that the third requirement of the *O'Brien* test is satisfied, but only because he is not certain that there is a causal connection between the message conveyed by nude dancing and the evils which the State is seeking to prevent. See *ante*, at 2470. Justice SOUTER's analysis is at least as flawed as that of the plurality. If Justice SOUTER is correct that there is no causal connection between the message conveyed by the nude dancing at issue here and the negative secondary effects that the State desires to regulate, the State does not have even a rational basis for its absolute prohibition on nude dancing that is admittedly expressive. Furthermore, if the real problem is the "concentration of crowds of men predisposed" to the designated evils, *ante*, at 2470, then the First Amendment requires that the State address that problem in a fashion that does not include banning an entire category of expressive activity. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

That fact dictates the level of First Amendment protection to be accorded the performances at issue here. In *Texas v. Johnson*, 491 U.S. 397, 411-412, 109 S.Ct. 2533, 2543-2544, 105 L.Ed.2d 342 (1989), the Court observed: "Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct.... We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.' *Boos v. Barry*, 485 U.S. [312], 321 [108 S.Ct. 1157, 1164, 99 L.Ed.2d 333] [(1988)]." Content based restrictions "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989). Nothing could be clearer from our cases.

That the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine. The Court's assessment of the artistic merits of nude dancing performances ****2475** should not be the determining factor in deciding this case. In the words of Justice Harlan: "[I]t is largely because governmental officials cannot make principled decisions ***594** in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971). "[W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who ... wants some 'entertainment' with his beer or shot of rye." *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21, n. 3 (CA2 1974), aff'd in part *sub nom.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

The plurality and Justice SOUTER do not go beyond saying that the state interests asserted here are important and substantial. But even if there were compelling interests, the Indiana statute is not narrowly drawn. If the State is genuinely concerned with prostitution and associated evils, as Justice SOUTER seems to think, or the type of conduct that was occurring in *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), it can adopt restrictions that do not interfere with the expressiveness of nonobscene nude dancing performances. For instance, the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators, that nude entertainment be limited to certain hours, or even that establishments providing such entertainment be dispersed throughout the city. Cf. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Likewise, the State clearly has the authority to criminalize prostitution and obscene behavior. Banning an entire category of expressive activity, however, generally does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny. See *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 2503, 101 L.Ed.2d 420 (1988). Furthermore, if nude dancing in barrooms, as compared with other establishments, is the most worrisome problem, the State could invoke its Twenty-first Amendment powers and impose appropriate regulation. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (*per curiam*); *California v. LaRue, supra.*

***595** As I see it, our cases require us to affirm absent a compelling state interest supporting the statute. Neither the plurality nor the State suggest that the statute could withstand scrutiny under that standard.

Justice SCALIA's views are similar to those of the plurality and suffer from the same defects. The Justice asserts that a general law barring specified conduct does not implicate the First Amendment unless the purpose of the law is to suppress the expressive quality of the forbidden conduct, and that, absent such purpose, First Amendment protections are not triggered simply because the incidental effect of the law is to proscribe conduct that is unquestionably expressive. Cf. *Community for Creative Non-Violence v. Watt*, 227 U.S.App.D.C. 19, 703 F.2d 586, 622-623 (1983) (Scalia, J., dissenting). The application of the Justice's proposition to this case is simple to state: The statute at issue is a general law banning nude appearances in public places, including barrooms and theaters. There is no showing that the purpose of this general law was to regulate expressive conduct; hence, the First Amendment is irrelevant and nude dancing in theaters and barrooms may be forbidden, irrespective of the expressiveness of the dancing.

As I have pointed out, however, the premise for the Justice's position--that the statute is a *general* law of the type our cases contemplate-- is nonexistent in this case. Reference to Justice SCALIA's own hypothetical makes this clear. We agree with Justice SCALIA that the Indiana statute would not permit 60,000 consenting Hoosiers to expose themselves to each other in the Hoosier Dome. No one can doubt, however, that those same 60,000 Hoosiers would be perfectly ****2476** free to drive to their respective homes all across Indiana and, once there, to parade around, cavort, and revel in the nude for hours in

front of relatives and friends. It is difficult to see why the State's interest in morality is any less in that situation, especially if, as Justice SCALIA seems to suggest, nudity is inherently evil, but clearly the statute does ***596** not reach such activity. As we pointed out earlier, the State's failure to enact a truly general proscription requires closer scrutiny of the reasons for the distinctions the State has drawn. See *supra*, at 2473.

As explained previously, the purpose of applying the law to the nude dancing performances in respondents' establishments is to prevent their customers from being exposed to the distinctive communicative aspects of nude dancing. That being the case, Justice SCALIA's observation is fully applicable here: "Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional." *Ante*, at 2466.

The *O'Brien* decision does not help Justice SCALIA. Indeed, his position, like the plurality's, would eviscerate the *O'Brien* test. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), is likewise not on point. The Indiana law, as applied to nude dancing, targets the expressive activity itself; in Indiana nudity in a dancing performance is a crime because of the message such dancing communicates. In *Smith*, the use of drugs was not criminal because the use was part of or occurred within the course of an otherwise protected religious ceremony, but because a general law made it so and was supported by the same interests in the religious context as in others.

Accordingly, I would affirm the judgment of the Court of Appeals, and dissent from this Court's judgment.

501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504, 59 USLW 4745

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• 1991 WL 521274 (Appellate Brief) REPLY BRIEF FOR PETITIONERS (Jan. 03, 1991)

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• 1990 WL 10012837 (Appellate Brief) Brief of Respondents Darlene Miller and Jr's Kitty Kat Lounge, Inc. (Dec. 17, 1990)

• 1990 WL 10012839 (Appellate Brief) Brief of People for the American Way, the Coalition for Freedom of Expression, and the National Campaign for Freedom of Expression as Amici Curiae in Support of the Respondents (Dec. 17, 1990)

• 1990 WL 505543 (Appellate Brief) BRIEF OF RESPONDENTS DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC. (Dec. 17, 1990)

• 1990 WL 10012829 (Appellate Brief) Brief of the Georgia on Premise & Lounge Association, Inc. as Amicus Curiae in Support of Respondents (Dec. 14, 1990)

• 1990 WL 10012835 (Appellate Brief) Motions (2) and Amicus Curiae Brief of James J. Clancy, Attorney at Law, in Support of Neither Petitioners nor Respondents (Dec. 14, 1990)

• 1990 WL 10012826 (Appellate Brief) Brief for Petitioners (Nov. 15, 1990)

• 1990 WL 10012828 (Appellate Brief) Brief of the States of Arizona, Connecticut, Missouri, North Carolina, and the Virgin Islands in Support of Petitioners, Amici Curiae (Nov. 15, 1990)

• 1990 WL 10022349 (Appellate Brief) Brief of the National Governors' Association, National Association of Counties, United States Conference of Mayors, International City Management Association, and National League of Cities as Amici Curiae in Support of Petitioners (Nov. 15, 1990)

• 1990 WL 505542 (Appellate Brief) BRIEF FOR PETITIONERS (Nov. 15, 1990)

• 1990 WL 10012822 (Appellate Brief) Brief of

American Family Association, Inc., National Family Legal Foundation, Inc., Children's Legal Foundation, Inc., Elena Bowman, Lou Ann Hill, Sally Beard, and Brenda Gill. Amici Curiae, in Support of Petitioners (Oct. Term 1990)

• 1990 WL 10012832 (Appellate Brief) Brief Amicus Curiae of the American Civil Liberties Union, Indiana Civil Liberties Union, ACLU of Ohio, and Volunteer Lawyers for the Arts, in Support of Respondents (Oct. Term 1990)

• 1990 WL 10012842 (Appellate Brief) Brief for Respondents Glen Theatre, Inc., Gayle Ann Marie Sutro, and Carla Johnson (Oct. Term 1990)

• 1990 WL 10012845 (Appellate Brief) Reply Brief for Petitioners (Oct. Term 1990)

• 1990 WL 10012820 (Appellate Brief) Supplemental Brief on Behalf of Respondents Glen Theatre, Inc., Gayle Ann Marie Sutro and Carla Johnson (Aug. 27, 1990)

• 1990 WL 10022916 (Appellate Petition, Motion and Filing) Supplemental Brief on Behalf of Respondents Glen Theatre, Inc., Gayle Ann Marie Sutro and Carla Johnson (Aug. 27, 1990)Original Image of this Document with Appendix (PDF)

• 1990 WL 10012818 (Appellate Brief) Brief of the States of Arizona, Connecticut, Missouri, North Carolina, and Pennsylvania as Amici Curiae in Support of the Petition for Writ of Certiorari (Aug. 01, 1990)

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• 1990 WL 10012817 (Appellate Brief) Brief Amicus Curiae of American Family Association, Inc. in Support of Petitioners (1990)

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Supreme Court of the United States
CALIFORNIA et al., Appellants,
v.
Robert LaRUE et al.
No. 71--36.

Argued Oct. 10, 1972.
Decided Dec. 5, 1972.
Rehearing Denied Feb. 20, 1973.

See 410 U.S. 948, 93 S.Ct. 1351.

Actions were brought by various holders of California liquor licenses and dancers at licensed premises challenging constitutionality of state-wide rules adopted by Department of Alcoholic not of censoring dramatic performances sexual live entertainment and films and bars and other establishments licensed to dispense liquor by the drink. The United States District Court for the Central District of California, sitting as three-judge court, held certain of the regulations invalid, 326 F.Supp. 348, and the state appealed. The Supreme Court, Mr. Justice Rehnquist, held that in context, not of censoring dramtic performances in theater, but of licensing bars and nightclubs to sell liquor by the drink, California Department of Alcoholic Beverage Control had broad latitude under Twenty-first Amendment to control the manner and circumstances under which liquor might be dispensed, and conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor unreasonable.

Reversed.

Mr. Justice Stewart concurred and filed opinion.

Mr. Justice Douglas dissented and filed opinion.

Mr. Justice Brennan dissented and filed opinion.

Mr. Justice Marshall dissented and filed opinion.

West Headnotes

[1] Civil Rights 1047
78k1047 Most Cited Cases
(Formerly 78k121, 78k13.1)
Claim that regulations of California Department of Alcoholic Beverage Control that regulate type of entertainment that might be presented in bars and nightclubs that it licensed exceed the constitutional authority of the Department as matter of state law was not cognizable in action under Civil Rights Act challenging the constitutionality of the regulations. West's Ann.Cal.Const. art. 20, § 22; 42 U.S.C.A. § 1983; U.S.C.A.Const. Amends. 1, 14.

[2] Courts 23
106k23 Most Cited Cases

[2] Federal Courts 31
170Bk31 Most Cited Cases
Parties may not confer jurisdiction either upon the Supreme Court of the United States or a United States District Court by stipulation. U.S.C.A.Const. art. 3, § 2, cl. 1; 28 U.S.C.A. § 2201.

[3] Federal Courts 30
170Bk30 Most Cited Cases
(Formerly 106k280(5))
Request of licensees and of the California Department of Alcoholic Beverage Control that United States District Court adjudicate merits of constitutional claim concerning Department regulations governing entertainment in bars and nightclubs did not foreclose inquiry by Supreme Court into existence of "actual controversy." 28 U.S.C.A. § 2201; U.S.C.A.Const. art. 3, § 1 et seq.; art. 3, § 2, cl. 1; Amend. 1.

[4] Intoxicating Liquors 6
223k6 Most Cited Cases
While the states, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment confers something more than the normal state authority over public health, welfare, and morals. U.S.C.A.Const. Amend. 21.

[5] Administrative Law and Procedure 381
15Ak381 Most Cited Cases
In legislative rule making, administrative agency may reason from the particular to the general.

[6] Intoxicating Liquors 7
223k7 Most Cited Cases
Wide latitude as to the choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the state's power under the Twenty-first Amendment to regulate intoxicating liquors. U.S.C.A.Const. Amend. 21.

[7] Intoxicating Liquors 15
223k15 Most Cited Cases
Choice by California Department of Alcoholic Beverage Control of prohibition of nude dancing and certain other sexual activity within licensed premises instead of solution that would have required Department's own personnel to judge individual instances of inebriation was not an unreasonable one. West's Ann.Cal.Const. art. 20, § 22; U.S.C.A.Const. Amends. 1, 14, 21.

[8] Intoxicating Liquors 15
223k15 Most Cited Cases
In context, not of censoring dramatic performances in theater, but of licensing bars and nightclubs to sell liquor by the drink, California Department of Alcoholic Beverage Control had broad latitude under Twenty-first Amendment to control the manner and circumstances under which liquor might be dispensed, and conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor unreasonable. West's Ann.Cal.Const. art. 20, § 22; U.S.C.A.const. Amends. 1, 14, 21.

[9] Intoxicating Liquors 112.1(2)
223k112.1(2) Most Cited Cases
(Formerly 223k112.2, 223k129)
Although California Department of Alcoholic Beverage Control regulations prohibiting explicitly sexual live entertainment and films in bars and other licensed establishments on their face would proscribe some forms of visual presentation that would not be found obscene under United States Supreme Court guidelines, the state regulatory authority was not limited to either dealing with the problem it confronted within the limits of decisions as to obscenity or in accordance with decisional limits prescribed for dealing with some forms of communicative conduct. U.S.C.A.Const. Amends. 1, 14, 21.

[10] Constitutional Law 90(3)
92k90(3) Most Cited Cases
As mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, scope of permissible state regulations significantly increases. U.S.C.A.Const. Amends. 1, 14.

[11] Constitutional Law 90(3)
92k90(3) Most Cited Cases
State may sometimes proscribe expression which is directed to the accomplishment of an end that the state has declared to be illegal when such expression consists, in part, of "conduct" or "action." U.S.C.A.Const.
Amends. 1, 14.

[12] Constitutional Law 90.1(4)
92k90.1(4) Most Cited Cases
States may validly limit the manner in which the First Amendment freedoms are exercised by forbidding sound trucks in residential neighborhoods and may enforce nondiscriminatory requirement that those who would parade on the public thoroughfare first obtain permit. U.S.C.A.Const. Amends. 1, 14.

[13] Intoxicating Liquors 15
223k15 Most Cited Cases
There is presumption in favor of validity of state regulation in the area of licensing of the sale of alcoholic beverages by the drink. U.S.C.A.Const. Amends. 1, 14, 21.
****392 *109** Syllabus [FN*]

> FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Following hearings, the California Department of Al-

coholic Beverage Control issued regulations prohibiting explicitly sexual live entertainment and films in bars and other establishments licensed to dispense liquor by the drink. A three-judge District Court held the regulations invalid under the First and Fourteenth Amendments, concluding that under standards laid down by this Court some of the prescribed entertainment could not be classified as obscene or lacking a communicative element. Held: In the context, not of censoring dramatic performances in a theater, but of licensing bars and nightclubs to sell liquor by the drink, the States have broad latitude under the Twenty-first Amendment to control the manner and circumstances under which liquor may be dispensed, and here the conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor was the prophylactic solution unreasonable. Pp. 394--397.

326 F.Supp. 348, reversed.

****393** L. Stephen Porter, San Francisco, Cal., for appellants.

Harrison W. Hertzberg, Los Angeles, Cal., and Kenneth Philip Scholtz, Gardena, Cal., for appellees.

***110** Mr. Justice REHNQUIST delivered the opinion of the Court.

[1] Appellant Kirby is the director of the Department of Alcoholic Beverage Control, an administrative agency vested by the California Constitution with primary authority for the licensing of the sale of alcoholic beverages in that State, and with the authority to suspend or revoke any such license if it determines that its continuation would be contrary to public welfare or morals. Art. XX, s 22, California Constitution. Appellees include holders of various liquor licenses issued by appellant, and dancers at premises operated by such licensees. In 1970 the Department promulgated rules regulating the type of entertainment that might be presented in bars and nightclubs that it licensed. Appellees then brought this action in the United States District Court for the Central District of California under the provisions of 28 U.S.C. ss 1331, 1343, 2201, 2202, and 42 U.S.C. s 1983. A three-judge court was convened in accordance with 28 U.S.C. ss 2281 and 2284, and the majority of that court held that substantial portions of the regulations conflicted with the First and Fourteenth Amendments to the United States Constitution. [FN1]

> FN1. Appellees in their brief here suggest that the regulations may exceed the authority conferred upon the Department as a matter of state law. As the District Court recognized, however, such a claim is not cognizable in the suit brought by these appellees under 42 U.S.C. s 1983.

Concerned with the progression in a few years' time from 'topless' dancers to 'bottomless' dancers and other forms of 'live entertainment' in bars and nightclubs that it licensed, the Department heard a number of witnesses on the subject at public hearings held prior to the promulgation of the rules. The majority opinion ***111** of the District Court described the testimony in these words:

> 'Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers. . . .' 326 F.Supp. 348, 352.

References to the transcript of the hearings submitted by the Department to the District Court indicated that in licensed establishments where 'topless' and 'bottomless' dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.

Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place

on or immediately adjacent to such premises.

At the conclusion of the evidence, the Department promulgated the regulations here challenged, imposing standards as to the type of entertainment that could be presented in bars and nightclubs that it licensed. Those portions of the regulations found to be unconstitutional by the majority of the District Court prohibited the following kinds of conduct on licensed premises:

(a) The performance of acts, or simulated acts, of 'sexual intercourse, ****394** masturbation, sodomy, ***112** bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law';

(b) The actual or simulated 'touching, caressing or fondling on the breast, buttocks, anus or genitals';

(c) The actual or simulated 'displaying of the public hair, anus, vulva or genitals';

(d) The permitting by a licensee of 'any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus'; and, by a companion section,

(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above. Rules 143.3 and 143.4. [FN2]

> FN2. In addition to the regulations held unconstitutional by the court below appellees originally challenged Rule 143.2 prohibiting topless waitresses, Rule 143.3(2) requiring certain entertainers to perform on a stage at a distance away from customers, and Rule 143.5 prohibiting any entertainment that violated local ordinances. At oral argument in that court they withdrew their objections to these rules, conceding 'that topless waitresses are not within the protection of the First Amendment; that local ordinances must be independently challenged depending upon their content; and that the requirement that certain entertainers must dance on a stage is not invalid.' 326 F.Supp. 348, 350--351.

[2][3] Shortly before the effective date of the Department's regulations appellees unsuccessfully sought discretionary review of them in both the State Court of Appeal and the Supreme Court of California. The Department then joined with appellees in requesting the three-judge District Court to decide the merits of appellees' claims that the regulations were invalid under the Federal Constitution. [FN3]

> FN3. Mr. Justice DOUGLAS in his dissenting opinion suggests that the District Court should have declined to adjudicate the merits of appellees' contention until the appellants had given the 'generalized provisions of the rules . . . particularized meaning.' Since parties may not confer jurisdiction either upon this Court or the District Court by stipulation, the request of both parties in this case that the court below adjudicate the merits of the constitutional claim does not foreclose our inquiry into the existence of an 'actual controversy' within the meaning of 28 U.S.C. s 2201 and Art. III, s 2, cl. 1, of the Constitution.
>
> By pretrial stipulation, the appellees admitted they offered performances and depictions on their licensed premises that were proscribed by the challenged rules. Appellants stipulated they would take disciplinary action against the licenses of licensees violating such rules. In similar circumstances, this Court held that where a state commission had 'plainly indicated' an intent to enforce an act that would affect the rights of the United States, there was a 'present and concrete' controversy within the meaning of 28 U.S.C. s 2201 and of Art. III. Public Utilities Comm'n of California v. United States, 355 U.S. 534, 539, 78 S.Ct. 446, 450, 2 L.Ed.2d 470 (1958). The District Court therefore had jurisdiction of this action.
>
> Whether this Court should develop a nonjurisdictional limitation on actions for declaratory judgments to invalidate statutes on their face is an issue not properly before us. Cf. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 56 S.Ct. 466, 480, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Certainly a number of our cases have permitted attacks on First Amendment grounds

similar to those advanced by the appellees, see, e.g., Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964), and we are not inclined to reconsider the procedural holdings of those cases in the absence of a request by a party to do so.

113** The District Court majority upheld the appellees' claim that the regulations in question unconstitutionally abridged the freedom of expression guaranteed to them by the First and Fourteenth Amendments to the United States Constitution. It reasoned that the state regulations had to be justified either as a prohibition of obscenity in accordance with the Roth line of decisions in this Court (*395**Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), or else as a regulation of 'conduct' having a communicative element in it under the standards ***114** laid down by this Court in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Concluding that the regulations would bar some entertainment that could not be called obscene under the Roth line of cases, and that the governmental interest being furthered by the regulations did not meet the tests laid down in O'Brien, the court enjoined the enforcement of the regulations. 326 F.Supp. 348. We noted probable jurisdiction. 404 U.S. 999, 92 S.Ct. 559, 30 L.Ed.2d 551.

The state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink. In Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 41, 86 S.Ct. 1254, 1259, 16 L.Ed.2d 336 (1966), this Court said:

> 'Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[4] While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. In Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330, 84 S.Ct. 1293, 1297, 12 L.Ed.2d 350 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' Still ***115** earlier, the Court stated in State Board v. Young's Market Co., 299 U.S. 59, 64, 57 S.Ct. 77, 79, 81 L.Ed. 38 (1936):

> 'A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth.'

These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations. In Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), the fundamental notice and hearing requirement of the Due Process Clause of the Fourteenth Amendment was held applicable to Wisconsin's statute providing for the public posting of names of persons who had engaged in excessive drinking. But the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment:

> 'Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.' Hostetter v. Idlewild Bon Voyage Liquor Corp., supra, at 332, 84 S.Ct., at 1298.

[5] A common element in the regulations struck down by the District Court appears to be the Department's conclusion that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place in bars and cocktail lounges for which

it has licensing responsibility. Based on the evidence from the hearings that it cited to the District Court, and mindful of the principle that in legislative rule-making the agency may reason from the particular to the general, Assigned Car Cases, 274 U.S. 564, 583, 47 S.Ct. 727, 733--734, 71 L.Ed. 1204 (1927), we do ***116** not think it can be said ****396** that the Department's conclusion in this respect was an irrational one.

[6][7][8] Appellees insist that the same results could have been accomplished by requiring that patrons already well on the way to intoxication be excluded from the licensed premises. But wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment. Joseph E. Seagram & Sons v. Hostetter, supra, 384 U.S. at 48, 86 S.Ct. at 1262. Nothing in the record before us or in common experience compels the conclusion that either self-discipline on the part of the customer or self-regulation on the part of the bartender could have been relied upon by the Department to secure compliance with such an alternative plan of regulation. The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one under the holdings of our prior cases. Williamson v. Lee Optical Co., 348 U.S. 483, 487--488, 75 S.Ct. 461, 464--465, 99 L.Ed. 563 (1955).

[9] We do not disagree with the District Court's determination that these regulations on their face would proscribe some forms of visual presentation that would not be found obscene under Roth and subsequent decisions of this Court. See, e.g., Sunshine Book Co. v. Summerfield, 355 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352 (1958), rev'g per curiam, 101 U.S.App.D.C. 358, 249 F.2d 114 (1957). But we do not believe that the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in O'Brien, supra.

Our prior cases have held that both motion pictures and theatrical productions are within the protection of ***117** the First and Fourteenth Amendments. In Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), it was held that motion pictures are 'included within the free speech and free press guaranty of the First and Fourteenth Amendments,' though not 'necessarily subject to the precise rules governing any other particular method of expression.' Id., at 502--503, 72 S.Ct., at 781. In Schacht v. United States, 398 U.S. 58, 63, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970), the Court said with respect to theatrical productions:

> 'An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance.'

[10][11][12] But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action,' Hughes v. Superior Court, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949). [FN4] In O'Brien, supra, the Court suggested that the extent to which 'conduct' was protected ****397** by the First Amendment depended on the presence of a 'communicative element,' and stated:

> FN4. Similarly, States may validly limit the manner in which the First Amendment freedoms are exercised, by forbidding sound trucks in residential neighborhoods, Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949), and may enforce a nondiscriminatory requirement that those who would parade on a public thoroughfare first obtain a permit. Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). Other state limitations on the 'time, manner and place' of the exercise of First Amendment rights have been sustained. See,

e.g., Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968), and Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

'We cannot accept the view that an apparently ***118** limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express in idea.' 391 U.S., at 376, 88 S.Ct., at 1678.

The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

Viewed in this light, we conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

[13] The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first ***119** Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution. [FN5]

FN5. Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 52, 86 S.Ct. 1254, 1264, 16 L.Ed.2d 336 (1966), is equally in point here: 'Although it is possible that specific future applications of (the statute) may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that so considered, the legislation is constitutionally valid.'

The contrary holding of the District Court is therefore reversed.

Reversed.

Mr. Justice STEWART, concurring.

A State has broad power under the Twenty-first Amendment to specify the times, places, and circumstances where liquor may be dispensed within its borders. Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336; Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330, 84 S.Ct. 1293, 1297, 12 L.Ed.2d 350; Dept. of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 344, 346, 84 S.Ct. 1247, 1249, 1250, 12 L.Ed.2d 362; California v. Washington, 358 U.S. 64, 79 S.Ct. 116, 3 L.Ed.2d 106; Ziffrin, Inc. v. Reeves, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128; Mahoney v. Joseph Triner, Corp., 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424; State Board of Equalization v. Young's Market Co., 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38. I should suppose, therefore, that nobody would question the power of California to prevent the sale of liquor by the drink in places where food is not served, or where dancing is permitted, or where gasoline is sold. But here California has provided that liquor by the drink shall not be sold in places where certain grossly sexual exhibitions are performed; and that action by the State, say the appellees, violates ****398** the First and Fourteenth Amendments. I cannot agree.

Every State is prohibited by these same Amendments

from invading the freedom of the press and from impinging ***120** upon the free exercise of religion. But does this mean that a State cannot provide that liquor shall not be sold in bookstores, or within 200 feet of a church? I think not. For the State would not thereby be interfering with the First Amendment activities of the church or the First Amendment business of the bookstore. It would simply be controlling the distribution of liquor, as it has every right to do under the Twenty-first Amendment. On the same premise, I cannot see how the liquor regulations now before us can be held, on their face, to violate the First and Fourteenth Amendments. [FN*]

> FN* This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution. See Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515; Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329--334, 84 S.Ct. 1293, 1296--1299, 12 L.Ed.2d 350; Dept. of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362.

It is upon this constitutional understanding that I join the opinion and judgment of the Court.

Mr. Justice DOUGLAS, dissenting.

This is an action for a declaratory judgment, challenging Rules and Regulations of the Department of Alcoholic Beverage Control of California. It is a challenge of the constitutionality of the rules on their face; no application of the rules has in fact been made to appellees by the institution of either civil or criminal proceedings. While the case meets the requirements of 'case or controversy' within the meaning of Art. III of the Constitution and therefore complies with Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, the case does not mark the precise impact of these rules against licensees who sell alcoholic beverages in California. The opinion ***121** of the Court can, therefore, only deal with the rules in the abstract.

The line which the Court draws between 'expression' and 'conduct' is generally accurate; and it also accurately describes in general the reach of the police power of a State when 'expression' and 'conduct' are closely brigaded. But we still do not know how broadly or how narrowly these rules will be applied.

It is conceivable that a licensee might produce in a garden served by him a play--shakespearean perhaps or one in a more modern setting--in which, for example, 'fondling' in the sense of the rules appears. I cannot imagine that any such performance could constitutionally be punished or restrained, even though the police power of a State is now buttressed by the Twenty-first Amendment. [FN1] For, as stated by the Court, that Amendment did not supersede all other constitutional provisions 'in the area of liquor regulations.' Certainly a play which passes muster under the First Amendment is not made illegal because it is performed in a beer garden.

> FN1. Section 2 of the Twenty-first Amendment reads as follows:
> 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.'

Chief Justice Hughes stated the controlling principle in Electric Bond & Share Co. v. SEC, 303 U.S. 419, 443, 58 S.Ct. 678, 687, 82 L.Ed. 936:

> 'Defendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts. . . . By the cross-bill, defendants seek a judgment that each ****399** and every provision of the act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the ***122** purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation. . . .'

The same thought was expressed by Chief Justice Stone in Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 470--471, 65 S.Ct. 1384, 1393-- 1394, 89 L.Ed. 1725. Some provisions of an Alabama law regulating labor relations were challenged as too vague and uncertain to meet constitutional requirements. The Chief Justice noted that state courts often construe state statutes so that in their application they are not open to constitutional objections. Id., at 471, 65 S.Ct., at 1394. He said that for us to decide the constitutional question 'by anticipating such an authoritative construction' would be either 'to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow.' [FN2] Ibid. He added:

> FN2. Even in cases on direct appeal from state court, when the decision below leaves unresolved questions of state law or procedure which bear on federal constitutional questions, we dismiss the appeal. Rescue Army v. Municipal Court, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666.

> 'In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes.' Ibid.

Those precedents suggest to me that it would have been more provident for the District Court to have declined ***123** to give a federal constitutional ruling, until and unless the generalized provisions of the rules were given particularized meaning.

Mr. Justice BRENNAN, dissenting.

I dissent. The California regulation at issue here clearly applies to some speech protected by the First Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, and also, no doubt, to some speech and conduct which are unprotected under our prior decisions. See Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The State points out, however, that the regulation does not prohibit speech directly, but speaks only to the conditions under which a license to sell liquor by the drink can be granted and retained. But, as Mr. Justice MARSHALL carefully demonstrates in Part II of his dissenting opinion, by requiring the owner of a nightclub to forgo the exercise of certain rights guaranteed by the First Amendment, the State has imposed an unconstitutional condition on the grant of a license. See Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). Nothing in the language or history of the Twenty-first Amendment authorizes the States to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression. For that reason, I would affirm the judgment of the District Court.

****400** Mr. Justice MARSHALL, dissenting.

In my opinion, the District Court's judgment should be affirmed. The record in this case is not a pretty one, and it is possible that the State could constitutionally punish some of the activities described therein ***124** under a narrowly drawn scheme. But appellees challenge these regulations [FN1] on their face, rather than as applied to a specific course of conduct. [FN2] Cf. ***125**Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). When so viewed, I think it clear that the regulations are overbroad and therefore unconstitutional. See, e.g., Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965). [FN3] Although the State's broad power to regulate the distribution of liquor ****401** and to enforce health and safety regulations is not to be doubted, that power may not be exercised in a manner that broadly stifles First Amendment freedoms. Cf. Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960). Rather,

as this Court has made clear, '(p)recision of regulation ***126** must be the touchstone' when First Amendment rights are implicated. NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963). Because I am convinced that these regulations lack the precision which our prior cases require, I must respectfully dissent.

FN1. Rule 143.3(1) provides in relevant part:
'No licensee shall permit any person to perform acts of or acts which simulate: '(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
'(b) The touching, caressing or fondling on the breasts, buttocks, anus or genitals.
'(c) The displaying of the pubic hair, anus, vulva or genitals.'
Rule 143.4 prohibits: 'The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:
'(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
'(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.
'(3) Scenes wherein a person displays the vulva or the anus or the genitals.
'(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

FN2. This is not an appropriate case for application of the abstention doctrine. Since these regulations are challenged on their face for overbreadth, no purpose would be served by awaiting a state court construction of them unless the principles announced in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), govern. See Zwickler v. Koota, 389 U.S. 241, 248--250, 88 S.Ct. 391, 395--396, 19 L.Ed.2d 444 (1967). Thus far, however, we have limited the applicability of Younger to cases where the plaintiff has an adequate remedy in a pending criminal prosecution. See Younger v. Harris, supra, 401 U.S. at 43--44, 91 S.Ct. at 750. Cf. Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943). But cf. Berryhill v. Gibson, 331 F.Supp. 122, 124 (MD Ala.1971), probable jurisdiction noted, 408 U.S. 920, 92 S.Ct. 2487, 33 L.Ed.2d 331 (1972). The California licensing provisions are, of course, civil in nature. Cf. Hearn v. Short, 327 F.Supp. 33 (SD Tex.1971). Moreover, the Younger doctrine has been held to 'have little force in the absence of a pending state proceeding.' Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509, 92 S.Ct. 1749, 1757, 32 L.Ed.2d 257 (1972) (emphasis added). There are at present no proceedings of any kind pending against these appellees. Finally, since the Younger doctrine rests heavily on federal deference to state administration of its own statutes, see Younger v. Harris, supra, 401 U.S. at 44--45, 91 S.Ct. at 750--751, it is waivable by the State. Cf. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329, 84 S.Ct. 1293, 1296, 12 L.Ed.2d 350 (1964). Appellants have nowhere mentioned the Younger doctrine in their brief before this Court, and when the case was brought to the attention of the attorney for the appellants during oral argument, he expressly eschewed reliance on it. In the court below, appellants specifically asked for a federal decision on the validity of California's regulations and stated that they did not think the court should abstain. See 326 F.Supp. 348, 351 (CD Cal.1971).

FN3. I am startled by the majority's suggestion that the regulations are constitutional on their face even though 'specific future applications of (the statute) may engender concrete problems of constitutional dimension.' (Quoting with approval Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 52, 86 S.Ct. 1254, 1265, 16 L.Ed.2d 336 (1966). Ante, at 397 n. 5.) Ever since Thornhill v.

> Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), it has been thought that statutes which trench upon First Amendment rights are facially void even if the conduct of the party challenging them could be prohibited under a more narrowly drawn scheme. See, e.g., Baggett v. Bullitt, 377 U.S. 360, 366, 84 S.Ct. 1316, 1319, 12 L.Ed.2d 377 (1964); Coates v. City of Cincinnati, 402 U.S. 611, 616, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214 (1971); NAACP v. Button, 371 U.S. 415, 432--433, 83 S.Ct. 328, 337--338, 9 L.Ed.2d 405 (1963).
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> Nor is it relevant that the State here 'sought to prevent (bacchanalian revelries)' rather than performances by 'scantily clad ballet troupe(s).' Whatever the State 'sought' to do, the fact is that these regulations cover both these activities. And it should be clear that a praiseworthy legislative motive can no more rehabilitate an unconstitutional statute than an illicit motive can invalidate a proper statute.

I

It should be clear at the outset that California's regulatory scheme does not conform to the standards which we have previously enunciated for the control of obscenity. [FN4] Before this Court's decision in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), some American courts followed the rule of Regina v. Hicklin, L.R. 3 Q.B. 360 (1868), to the effect that the obscenity vel non of a piece of work could be judged by examining isolated aspects of it. See, e.g., United States v. Kennerley, 209 F. 119 (1913); Commonwealth v. Buckley, 200 Mass. 346, 86 N.E. 910 (1909). But in Roth we held that '(t)he Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press.' 354 U.S., at 489, 77 S.Ct., at 1311. Instead, we held that the material must ***127** be 'taken as a whole,' Ibid., and, when so viewed, must appeal to a prurient interest in sex, patently offend community standards relating to the depiction of sexual matters, and be utterly without redeeming social value. [FN5] See ****402** Memoirs v. Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (1966).

> FN4. Indeed, there are some indications in the legislative history that California adopted these regulations for the specific purpose of evading those standards. Thus, Captain Robert Devin of the Los Angeles Police Department testified that the Department favored adoption of the new regulations for the following reason: 'While statutory law has been available to us to regulate what was formerly considered as antisocial behavior, the federal and state judicial system has, through a series of similar decisions, effectively emasculated law enforcement in its effort to contain and to control the growth of pornography and of obscenity and of behavior that is associated with this kind of performance.' See also testimony of Roy E. June, City Attorney of the City of Costa Mesa; testimony of Richard C. Hirsch, Office of Los Angeles County District Attorney. App. 117.

> FN5. I do not mean to suggest that this test need be rigidly applied in all situations. Different standards may be applicable when children are involved, see Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968); when a consenting adult possesses putatively obscene material in his own home, see Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); or when the material by the nature of its presentation cannot be viewed as a whole, see Rabe v. Washington, 405 U.S. 313, 317 n. 2, 92 S.Ct. 993, 995, 31 L.Ed.2d 258 (1972) (Burger, C.J., concurring). Similarly, I do not mean to foreclose the possibility that even the Roth-Memoirs test will ultimately be found insufficient to protect First Amendment interests when consenting adults view putatively obscene material in private. Cf. Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967). But cf. United States v. Reidel,

> 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971). But I do think that, at very least, Roth-Memoirs sets an absolute limit on the kinds of speech that can be altogether read out of the First Amendment for purposes of consenting adults.

Obviously, the California rules do not conform to these standards. They do not require the material to be judged as a whole and do not speak to the necessity of proving prurient interest, offensiveness to community standards, or lack of redeeming social value. Instead of the contextual test approved in Roth and Memoirs these regulations create a system of per se rules to be applied regardless of context: Certain acts simply may not be depicted and certain parts of the body may under no circumstances be revealed. The regulations thus treat on the same level a serious movie such as 'Ulysses' and a crudely made 'stag film.' They ban not only obviously pornographic photographs, but also great sculpture from antiquity. [FN6]

> FN6. Cf. Fuller, Changing Society Puts Taste to the Test, The National Observer, June 10, 1972, p. 24: 'Context is the essence of esthetic judgment . . .. There is a world of difference between Playboy and less pretentious girly magazines on the one hand, and on the other, The Nude, a picture selection from the whole history of art, by that fine teacher and interpreter of civilization, Kenneth Clark. People may be just as naked in one or the other, the bodies inherently just as beautiful, but the context of the former is vulgar, of the latter, esthetic. 'The same words, the same actions, that are cheap and tawdry in one book or play may contribute to the sublimity, comic universality or tragic power of others. For a viable theory of taste, context is all.'

***128** Roth held 15 years ago that the suppression of serious communication was too high a price to pay in order to vindicate the State's interest in controlling obscenity, and I see no reason to modify that judgment today. Indeed, even the appellants do not seriously contend that these regulations can be justified under the Roth-Memoirs test. Instead, appellants argue that California's regulations do not concern the control of pornography at all. These rules, they argue, deal with conduct rather than with speech and as such are not subject to the strict limitations of the First Amendment.

To support this proposition, appellants rely primarily on United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), which upheld the constitutionality of legislation punishing the destruction or mutilation of Selective Service certificates. O'Brien rejected the notion that 'an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,' and held that Government regulation of speech-related conduct is permissible 'if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' Id., at 376--377, 88 S.Ct., at 1678--1679.

***129** While I do not quarrel with these principles as stated in the abstract, their application in this case stretches them beyond the breaking point. [FN7] In O'Brien, the Court began its discussion by noting that the statute in question 'plainly does not abridge free speech on its face.' Indeed, even O'Brien himself conceded that facially the statute dealt 'with conduct having no connection with speech.' [FN8] Id., at 375, 88 S.Ct., at 1678. ****403** Here, the situation is quite different. A long line of our cases makes clear that motion pictures, unlike draftcard burning, are a form of expression entitled to prima facie First Amendment protection. 'It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.' Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501, 72 S.Ct.

777, 780, 96 L.Ed. 1098 (1952) (footnote omitted). See also Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968); ***130**Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); Pinkus v. Pitchess, 429 F.2d 416 (CA9 1970), aff'd by equally divided court sub nom. California v. Pinkus, 400 U.S. 922, 91 S.Ct. 185, 27 L.Ed.2d 183 (1970). Similarly, live performances and dance have, in recent years, been afforded broad prima facie First Amendment protection. See, e.g., Schacht v. United States, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); P.B.I.C., Inc. v. Byrne, 313 F.Supp. 757 (Mass.1970), vacated to consider mootness, 401 U.S. 987, 91 S.Ct. 1222, 28 L.Ed.2d 526 (1971); In re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535 (1968), cert. denied sub nom. California v. Giannini, 395 U.S. 910, 89 S.Ct. 1743, 23 L.Ed.2d 223 (1969).

> FN7. Moreover, even if the O'Brien test were here applicable, it is far from clear that it has been satisfied. For example, most of the evils that the State alleges are caused by appellees' performances are already punishable under California law. See n. 11, infra. Since the less drastic alternative of criminal prosecution is available to punish these violations, it is hard to see how 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential' to further the State's interest.
>
> FN8. The Court pointed out that the statute 'does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views . . . A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.' 391 U.S., at 375, 88 S.Ct., at 1678.

If, as these many cases hold, movies, plays, and the dance enjoy constitutional protection, it follows, ineluctably I think, that their component parts are protected as well. It is senseless to say that a play is 'speech' within the meaning of the First Amendment, but that the individual gestures of the actors are 'conduct' which the State may prohibit. The State may no more allow movies while punishing the 'acts' of which they are composed than it may allow newspapers while punishing the 'conduct' of setting type.

Of course, I do not mean to suggest that anything which, occurs upon a stage is automatically immune from state regulation. No one seriously contends, for example, that an actual murder may be legally committed so long as it is called for in the script, or that an actor may inject real heroin into his veins while evading the drug laws that apply to everyone else. But once it is recognized that movies and plays enjoy prima facie First Amendment protection, the standard for reviewing state regulation of their component parts shifts dramatically. For while '(m)ere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, (they are) insufficient to justify such as diminishes the exercise of rights so vital' as freedom ***131** of speech. Schneider v. State, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939). Rather, in order to restrict speech, the State must show that the speech is 'used in such circumstances and (is) of such a nature as to create a clear and present danger that (it) will bring about the substantive evils that (the State) has a right to prevent.' Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470 (1919). Cf. Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). [FN9]

> FN9. Of course, the State need not meet the clear and present danger test if the material in question is obscene. See Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). But, as argued above, the difficulty with California's rules is that they do not conform to the Roth test and therefore regulate material that is not obscene. See supra, at 401--402.

When the California regulations are measured against this stringent standard, ****404** they prove woefully inadequate. Appellants defend the rules as necessary to

prevent sex crimes, drug abuse, prostitution, and a wide variety of other evils. These are precisely the same interests that have been asserted time and again before this Court as justification for laws banning frank discussion of sex and that we have consistently rejected. In fact, the empirical link between sex-related entertainment and the criminal activity popularly associated with it has never been proved and, indeed, has now been largely discredited. See, e.g., Report of the Commission on Obscenity and Pornography 27 (1970); Cairns, Paul, & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn.L.Rev. 1009 (1962). Yet even if one were to concede that such a link existed, it would hardly justify a broadscale attack on First Amendment freedoms. The only way to stop murders and drugs abuse is to punish them directly. But the State's interest in controlling material ***132** dealing with sex is secondary in nature. [FN10] It can control rape and prostitution by punishing those acts, rather than by punishing the speech that is one step removed from the feared harm. [FN11] Moreover, because First Amendment rights are at stake, the State must adopt this 'less restrictive alternative' unless it can make a compelling demonstration that the protected activity and criminal conduct are so closely linked that only through regulation of one can the other be stopped. Cf. United States v. Robel, 389 U.S. 258, 268, 88 S.Ct. 419, 426, 19 L.Ed.2d 508 (1967). As we said in Stanley v. Georgia, 394 U.S. 557, 566--567 89 S.Ct. 1243, 1249, 22 L.Ed.2d 542 (1969), 'if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '(a)mong free men, the deterrents ordinarily to be applied to prevent ***133** crime are education and punishment for violations of the law . . ..' Whitney v. California, 274 U.S. 357, 378, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). . . . Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.' [FN12]

FN10. This case might be different if the State asserted a primary interest in stopping the very acts performed by these dancers and actors. However, I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults. Cf. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Moreover, it is unnecessary to reach that question in this case since the State's regulations are plainly not designed to stop the acts themselves, most of which are in fact legal when done in private. Rather, the State punishes the acts only when done in public as part of a dramatic presentation. Cf. United States v. O'Brien, supra, 391 U.S. at 375, 88 S.Ct. at 1678. It must be, therefore, that the asserted state interest stems from the effect of the acts on the audience rather than from a desire to stop the acts themselves. It should also be emphasized that this case does not present problems of an unwilling audience or of an audience composed of minors.

FN11. Indeed, California already has statutes controlling virtually all of the misconduct said to flow from appellees' activities. See Calif.Penal Code s 647(b) (Supp.1972) (prostitution); Calif.Penal Code ss 261, 263 (1970) (rape); Calif.Bus. & Prof.Code s 25657 (Supp.1972) ('B-Girl' activity); Calif.Health & Safety Code ss 11500, 11501, 11721, 11910, 11912 (1964 and Supp.1972) (sale and use of narcotics).

FN12. Of course, it is true that Stanley does not govern this case, since Stanley dealt only with the private possession of obscene materials in one's own home. But in another sense, this case is stronger than Stanley. In Stanley, we held that the State's interest in the prevention of sex crimes did not justify laws restricting possession of certain materials, even though they were conceded to be obscene. It follows a fortiori that this interest is insufficient when the materials are not obscene and, indeed, are constitutionally pro-

tected.

****405** II

It should thus be evident that, under the standards previously developed by this Court, the California regulations are overbroad: They would seem to suppress not only obscenity outside the scope of the First Amendment, but also speech that is clearly protected. But California contends that these regulations do not involve suppression at all. The State claims that its rules are not regulations of obscenity, but are rather merely regulations of the sale and consumption of liquor. Appellants point out that California does not punish establishments which provide the proscribed entertainment, but only requires that they not serve alcoholic beverages on their premises. Appellants vigorously argue that such regulation falls within the State's general police power as augmented, when alcoholic beverages are involved, by the Twenty-first Amendment. [FN13]

FN13. The Twenty-first Amendment, in addition to repealing the Eighteenth Amendment, provides: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.'

***134** I must confess that I find this argument difficult to grasp. To some extent, it seems premised on the notion that the Twenty-first Amendment authorizes the States to regulate liquor in a fashion which would otherwise be constitutionally impermissible. But the Amendment by its terms speaks only to state control of the importation of alcohol, and its legislative history makes clear that it was intended only to permit 'dry' States to control the flow of liquor across their boundaries despite potential Commerce Clause objections. [FN14] See generally Joseph E. Seagram & Sons Inc. v. Hostetter, 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964). There is not a word in that history which indicates that Congress meant to tamper in any way with First Amendment rights. I submit that the framers of the Amendment would be astonished to ***135** discover that they had inadvertently enacted a pro tanto repealer of the rest of the Constitution. Only last Term, we held that the State's conceded power to license the distribution of intoxicating beverages did not justify use of that power in a manner that conflicted with the Equal Protection Clause. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178--179, 92 S.Ct. 1965, 1974--1975, 32 L.Ed.2d 627 (1972). Cf. ****406**Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Hornsby v. Allen, 326 F.2d 605 (CA5 1964). I am at a loss to understand why the Twenty-first Amendment should be thought to override the First Amendment but not the Fourteenth.

FN14. The text of the Amendment is based on the Webb-Kenyon Act, 37 Stat. 699, which antedated prohibition. The Act was entitled 'An Act Divesting intoxicating liquors of their interstate character in certain cases,' and was designed to allow 'dry' States to regulate the flow of alcohol across their borders. See, e.g., McCormick & Co. v. Brown, 286 U.S. 131, 140--141, 52 S.Ct. 522, 526, 76 L.Ed. 1017 (1932); Clark Distilling Co. v. Western Maryland R. Co., 242 U.S. 311, 324, 37 S.Ct. 180, 184, 61 L.Ed. 326 (1917). The Twenty-first Amendment was intended to embed this principle permanently into the Constitution. As explained by its sponsor on the Senate floor 'to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.
'(T)he pending proposal will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity--namely, intoxicating liquor.' 76 Cong.Rec. 4141 (remarks of Sen. Blaine).

To be sure, state regulation of liquor is important, and it is deeply embedded in our history. See, e.g., Colonnade Catering Corp. v. United States, 397 U.S. 72,

77, 90 S.Ct. 774, 777, 25 L.Ed.2d 60 (1970). But First Amendment values are important as well. Indeed in the past they have been thought so important as to provide an independent restraint on every power of Government. 'Freedom of press, freedom of speech, freedom of religion are in a preferred position.' Murdock v. Pennsylvania, 319 U.S. 105, 115, 63 S.Ct. 870, 876, 87 L.Ed. 1292 (1943). Thus, when the Government attempted to justify a limitation on freedom of association by reference to the war power, we categorically rejected the attempt. '(The) concept of 'national defense" we held, 'cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed, be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties--the freedom of association--which ***136** makes the defense of the Nation worthwhile.' United States v. Robel, 389 U.S., at 264, 88 S.Ct., at 423--424. Cf. New York Times Co. v. United States, 403 U.S. 713, 716--717, 91 S.Ct. 2140, 2142--2143, 29 L.Ed.2d 822 (1971) (Black, J., concurring); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231, 235, 78 L.Ed. 413 (1934). If the First Amendment limits the means by which our Government can ensure its very survival, then surely it must limit the State's power to control the sale of alcoholic beverages as well.

Of course, this analysis is relevant only to the extent that California has in fact encroached upon First Amendment rights. Appellants argue that no such encroachment has occurred, since appellees are free to continue providing any entertainment they choose without fear of criminal penalty. Appellants suggest that this case is somehow different because all that is at stake is the 'privilege' of serving liquor by the drink.

It should be clear, however, that the absence of criminal sanctions is insufficient to immunize state regulation from constitutional attack. On the contrary, 'this is only the beginning, not the end, of our inquiry.' Sherbert v. Verner, 374 U.S. 398, 403--404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963). For '(i)t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.' Id., at 404, 84 S.Ct., at 1794. As we pointed out only last Term, '(f)or at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even thought the government may deny him the benefit for any number or reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected ***137** speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.' Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972).

Thus, unconstitutional conditions on welfare benefits, [FN15] unemployment compensation, [FN16] ****407** tax exemptions, [FN17] public employment, [FN18] bar admissions, [FN19] and mailing privileges [FN20] have all been invalidated by this Court. In none of these cases were criminal penalties involved. In all of them, citizens were left free to exercise their constitutional rights so long as they were willing to give up a 'gratuity' that the State had no obligation to provide. Yet in all of them, we found that the discriminatory provision of a privilege placed too great a burden on constitutional freedoms. I therefore have some difficulty in understanding why California nightclub proprietors should be singled out and informed that they alone must sacrifice their constitutional rights before gaining the 'privilege' to serve liquor.

FN15. See Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). But cf. Wyman v. James, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971).

FN16. See Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

FN17. See Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

FN18. See, e.g., Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

FN19. See, e.g., Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); Konigsberg v. State Bar, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). But cf. Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971); Konigsberg v. State Bar, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961).

FN20. See, e.g., Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971); Hannegan v. Esquire Inc., 327 U.S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586 (1946).

Of course, it is true that the State may in proper circumstances enact a broad regulatory scheme that incidentally restricts First Amendment rights. For example, if California prohibited the sale of alcohol altogether, I do not mean to suggest that the proprietors ***138** of theaters and bookstores would be constitutionally entitled to a special dispensation. But in that event, the classification would not be speech related and, hence, could not be rationally perceived as penalizing speech. Classifications that discriminate against the exercise of constitutional rights per se stand on an altogether different footing. They must be supported by a 'compelling' governmental purpose and must be carefully examined to insure that the purpose is unrelated to mere hostility to the right being asserted. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969).

Moreover, not only is this classification speech related; it also discriminates between otherwise indistinguishable parties on the basis of the content of their speech. Thus, California nightclub owners may present live shows and movies dealing with a wide variety of topics while maintaining their licenses. But if they choose to deal with sex, they are treated quite differently. Classifications based on the content of speech have long been disfavored and must be viewed with the gravest suspicion. See, e.g., Cox v. Louisiana, 379 U.S. 536, 556--558, 85 S.Ct. 453, 465--466, 13 L.Ed.2d 471 (1965). Whether this test is thought to derive from equal protection analysis, see Police Department of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267, 280 (1951), or directly from the substantive constitutional provision involved, see Cox v. Louisiana, supra; Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), the result is the same: any law that has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them . . . (is) patently unconstitutional.' United States v. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968).

As argued above, the constitutionally permissible purposes asserted to justify ****408** these regulations are too remote to satisfy the Government's burden, when First Amendment rights are at stake. See supra, at 403--405. ***139** It may be that the Government has an interest in suppressing lewd or 'indecent' speech even when it occurs in private among consenting adults. Cf. United States v. Thirty-seven Photographs, 402 U.S. 363, 376, 91 S.Ct. 1400, 1408, 28 L.Ed.2d 822 (1971). But cf. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). That interest, however, must be balanced against the overriding interest of our citizens in freedom of thought and expression. Our prior decisions on obscenity set such a balance and hold that the Government may suppress expression treating with sex only if it meets the three-pronged Roth-Memoirs test. We have said that '(t)he door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important in-

terests.' Roth v. United States, 354 U.S., at 488, 77 S.Ct., at 1311. Because I can see no reason why we should depart from that standard in this case, I must respectfully dissent.

409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342

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Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.
Bill Badi GAMMOH, dba Taboo Theater aka Pelican Theater; Leslie West; Armine Michelle Bedrosian; Christine Johanna Fener; Charbonesse Garrett; Heather Eloise Elam; Stacy Joy Andre; Meghann Lara Ann Onselen, Plaintiffs-Appellants,
v.
CITY OF LA HABRA, Defendant-Appellee.
No. 04-56072.

Argued and Submitted Nov. 1, 2004.
Filed Jan. 26, 2005.

Background: Owner of adult entertainment club and dancer-employees brought action challenging constitutionality of city ordinance that required adult cabaret dancers to remain two feet away from patrons during performances. The United States District Court for the Central District of California, Gary L. Taylor, J., dismissed certain claims, and granted summary judgment in favor of city on others. Plaintiffs appealed.

Holdings: The Court of Appeals, Tallman, Circuit Judge, held that:
(1) ordinance was not void for vagueness;
(2) ordinance was not overbroad;
(3) plaintiffs failed to demonstrate that ordinance violated Takings Clause;
(4) ordinance was not complete ban on protected expression;
(5) ordinance regulated expression that was sexual or pornographic in nature, as would support application of the intermediate scrutiny standard, for purpose of First Amendment challenge;
(6) secondary effects of adult cabarets were city's primary concern in enacting ordinance, as would support application of the intermediate scrutiny standard;
(7) ordinance was narrowly tailored to serve substantial government interest of preventing secondary effects of adult businesses; and
(8) ordinance did not violate First Amendment guarantee of freedom of expression.
Affirmed.

West Headnotes

[1] Federal Courts 776
170Bk776 Most Cited Cases
Court of Appeals reviews the district court's ruling on the constitutionality of a city ordinance de novo.

[2] Criminal Law 13.1(1)
110k13.1(1) Most Cited Cases
To survive a vagueness challenge, a regulation must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

[3] Constitutional Law 82(4)
92k82(4) Most Cited Cases

[3] Municipal Corporations 594(2)
268k594(2) Most Cited Cases
A greater degree of specificity and clarity is required in the language of a municipal ordinance when First Amendment rights are at stake than would otherwise be required to survive a vagueness challenge. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[4] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, and defining "adult cabaret dancer" as a dancer performing at an adult cabaret, who was sexually-oriented dancer, exotic dancer, stripper, or similar dancer, who focused the performance on or emphasized the dancer's breasts, genitals, or buttocks, on a regular and substantial basis, was not void for vagueness; al-

though some terms were subjective, the definition used a combination of terms, which provided sufficient clarity, to give dancers notice as to who qualified as an "adult cabaret dancer," for purpose of determining application of the two-foot rule.

[5] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[5] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, and defining "adult cabaret dancer" as a dancer performing at an adult cabaret, who was sexually-oriented dancer, exotic dancer, stripper, or similar dancer, who focused the performance on or emphasized the dancer's breasts, genitals, or buttocks, on a regular and substantial basis, was not overbroad; performances occurring outside of an adult cabaret or that did not have a sexual emphasis were unaffected by ordinance, and there was no realistic danger that ordinance would significantly compromise rights protected under the First Amendment. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 82(4)
92k82(4) Most Cited Cases
The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.

[7] Eminent Domain 81.1
148k81.1 Most Cited Cases
In order to state a claim under the Takings Clause, a plaintiff must first demonstrate that he possesses a property interest that is constitutionally protected. U.S.C.A. Const.Amend. 5.

[8] Eminent Domain 81.1
148k81.1 Most Cited Cases
Owner of adult entertainment club and club dancers failed to demonstrate that city ordinance requiring adult cabaret dancers to remain two feet away from patrons during performances violated the Takings Clause, absent identification of a property interest with which the ordinance interfered. U.S.C.A. Const.Amend. 5.

[9] Federal Courts 776
170Bk776 Most Cited Cases

[9] Federal Courts 802
170Bk802 Most Cited Cases
Court of Appeals reviews the district court's decision to grant summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[10] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[10] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, was not a complete ban on protected expression, for purpose of determining if ordinance violated First Amendment's guarantees of freedom of speech and expression; ordinance required that dancers project their erotic message from a slight distance, but did not ban erotic dancing altogether. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Content-based regulations are normally subject to strict scrutiny, for purpose of determining if regulations violate the First Amendment's guarantee of freedom of expression. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
Content-based regulations may be analyzed under intermediate scrutiny, rather than strict scrutiny, for purpose of determining violation of the First Amendment's guarantee of freedom of expression, if two conditions are met: (1) the ordinance regulates speech that is sexual or pornographic in nature, and (2) the primary motivation behind the regulation is to prevent secondary effects. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, and defining "adult cabaret dancer" as a dancer performing at an adult cabaret, who was sexually-oriented dancer, exotic dancer, stripper, or similar dancer, who focused the performance on or emphasized the dancer's breasts, genitals, or buttocks, on a regular and substantial basis, regulated expression that was sexual or pornographic in nature, as would support application of the intermediate scrutiny standard, rather than the strict scrutiny standard, for purpose of First Amendment challenge to ordinance; although dancers wore minimal clothing when performing for individual patrons off stage, dancers performed nude on stage, and the focus of the performance was sexual. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
Court of Appeals generally accepts that the purpose of a regulation on adult businesses is to combat secondary effects, as would warrant application of intermediate scrutiny standard for purpose of First Amendment challenge, if the enactment can be justified without reference to speech. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
To determine the purpose of a municipal ordinance regulating adult businesses, in order to decide whether to apply strict scrutiny or intermediate scrutiny, the Court of Appeals looks to objective indicators of intent.

[16] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases
Secondary effects of adult businesses were city's primary concern in enacting ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, as would support application of the intermediate scrutiny standard, rather than the strict scrutiny standard, for purpose of First Amendment challenge to ordinance; ordinance stated that it was necessary for protection of the welfare of the public, as result of potential negative secondary effects, including crime, protection of retail trade, and maintenance of property values, and the two-foot rule was logically linked to preventing such secondary effects. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 90(3)
92k90(3) Most Cited Cases
A statute will survive intermediate scrutiny, in a First Amendment challenge, if it: (1) is designed to serve a substantial government interest, (2) is narrowly tailored to serve that interest, and (3) leaves open alternative avenues of communication. U.S.C.A. Const.Amend. 1.

[18] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[18] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
City demonstrated connection between its ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, and the secondary effects that the ordinance was intended to address, including crime, protection of retail trade, maintenance of property values, demonstrating that ordinance was designed to serve substantial government interest, for purpose of intermediate scrutiny analysis of First Amendment challenge; city was presented with 17 studies on secondary effects of adult businesses, declarations from vice officers, interviews with nude dancers, and a presentation on the harmful effects of pornography, and there was no requirement that city rely only on evidence targeting the exact problem of
exotic dancing. U.S.C.A. Const.Amend. 1.

[19] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
So long as whatever evidence the city relies upon to demonstrate that an ordinance regulating adult businesses serves substantial government interests is reasonably believed to be relevant to the problem that the city addresses, it is sufficient to support the ordinance, for purpose of First Amendment challenge under intermediate scrutiny standard. U.S.C.A. Const.Amend. 1.

[20] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[20] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, was narrowly tailored to serve substantial government interest of preventing secondary effects of adult businesses, including crime, protection of retail trade, maintenance of property values, for purpose of intermediate scrutiny analysis of First Amendment challenge; ordinance would prevent exchange of money or drugs and touching of patrons. U.S.C.A. Const.Amend. 1.

[21] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[21] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, left open alternative avenues of expression, for purpose of determining if ordinance violated First Amendment's guarantees of freedom of speech and expression, under intermediate scrutiny standard; dancers could still convey their erotic message from a slight distance. U.S.C.A. Const.Amend. 1.

[22] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[22] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
City ordinance, requiring adult cabaret dancers to remain two feet away from patrons during performances, did not violate First Amendment guarantee of freedom of expression; ordinance was thoroughly researched and narrowly-tailored to address substantial government interest of preventing secondary
effects of adult businesses, such as crime, and ordinance left alternative channels of communication open by allowing dancers to perform at slight distance. U.S.C.A. Const.Amend. 1.

***1118** Scott W. Wellman and Stuart Miller, Wellman & Warren, Laguna Hills, CA, for the plaintiffs-appellants.

Deborah J. Fox and Dawn A. McIntosh, Fox & Sohagi, Los Angeles, CA, for the defendant-appellee.

Scott D. Bergthold, Chattanooga, TN, for Amicus Curiae League of California Cities.

Appeal from the United States District Court for the Central District of California; Gary L. Taylor, District Judge, Presiding. D.C. No. CV-03- 00911-GLT.

Before: TASHIMA, FISHER, and TALLMAN, Circuit Judges.

TALLMAN, Circuit Judge.

This case involves constitutional challenges to a city ordinance requiring "adult cabaret dancers" to remain two feet away from patrons during performances. The district court rejected these challenges by dismissing some of the Appellants' claims on the pleadings and granting summary judgment as to other claims. We denied emergency motions for a stay of enforcement of the Ordinance pending appeal and now affirm.

I

The City of La Habra's (City's) Municipal Ordinance 1626 ("Ordinance") regulates adult businesses. The first section of the Ordinance contains extensive findings that adult businesses generate crime, economic harm, and the spread of sexually transmitted diseases. These findings are based on studies and police declarations from other jurisdictions, federal and state judicial opinions, and public health data from surrounding southern California counties. Ordinance, § 1. Other sections of the Ordinance contain regulations purporting to address the secondary effects described in the first section, including a prohibition of physical contact between patrons and performers (the "no-touch rule") and a requirement that adult cabaret dancers perform at least two feet away from their patrons (the "two-foot rule"). Ordinance, §§ 4, 7. The Appellants are Bill Badi Gammoh, the owner of an adult establishment in the City, several dancers at Gammoh's club, and a dancer who has been offered

employment at Gammoh's club but has not yet accepted it. Gammoh's establishment, which does not serve alcoholic beverages, features entertainment by dancers who perform nude on stage and then dress in minimal clothing before offering one-on-one offstage dances. [FN1] The Appellants do not challenge the provisions of the Ordinance governing on-stage dancing and other aspects of the ***1119** operation of an adult cabaret; they challenge only the two-foot rule.

> FN1. Early in this litigation before the district court the Appellants used the term "lap dance" to refer to these performances. They later distanced themselves from this term, preferring "clothed proximate dancing" instead. We reference these individual, close-up performances using the term "offstage dancing" because the City regulates nude on-stage performances separately from partially-clothed offstage performances and it is the latter set of regulations that are challenged here.

Three weeks after the City Council passed the Ordinance, the Appellants filed their constitutional challenge in the Superior Court of California for Orange County. The case was subsequently removed to the United States District Court for the Central District of California. The Appellants were unsuccessful before the district court. In addition to other rulings that the Appellants do not challenge on appeal, the district court dismissed the Appellants' overbreadth argument and part of their vagueness challenge with prejudice, and entered summary judgment in favor of the City on their regulatory takings claim, a First Amendment challenge, and the remaining vagueness argument. The Appellants pursue their vagueness, overbreadth, takings, and free speech and expression claims on appeal.

II

[1] The Ordinance's two-foot rule applies exclusively to "adult cabaret dancers." The Ordinance defines an "adult cabaret dancer" as:

> any person who is an employee or independent contractor of an "adult cabaret" or "adult business" and who, with or without any compensation or other form of consideration, performs as a sexually-oriented dancer, exotic dancer, stripper, go-go dancer or similar dancer whose performance on a regular and substantial basis focuses on or emphasizes the adult cabaret dancer's breasts, genitals, and or buttocks, but does not involve exposure of "specified anatomical areas" or depicting or engaging in "specified sexual activities." Adult cabaret dancer does not include a patron.

Ordinance, § 4. The district court rejected the Appellants' assertion that this definition is vague and overbroad because it contains subjective terms. We review the district court's ruling *de novo*. *See* *United States v. Rodriguez*, 360 F.3d 949, 953 (9th Cir.2004); *United States v. Linick*, 195 F.3d 538, 541 (9th Cir.1999).

A

[2][3] To survive a vagueness challenge, a regulation must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *see also* *United States v. Adams*, 343 F.3d 1024, 1035 (9th Cir.2003), *cert. denied*, --- U.S. ----, 124 S.Ct. 2871, 159 L.Ed.2d 779 (2004). A greater degree of specificity and clarity is required when First Amendment rights are at stake. *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1057 (9th Cir.1986).

The Appellants argue that the subjective language used to define an "adult cabaret dancer" makes the definition, and thus the Ordinance, unconstitutionally vague. *Cf.* *City of Chicago v. Morales*, 527 U.S. 41, 56- 64, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (holding a provision criminalizing loitering, which is defined as "to remain in any one place with no apparent purpose," void for vagueness because the provision was "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene"); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 554- 55 (9th Cir.2004) (holding a statute requiring physicians to treat patients "with consideration, respect, and full recognition of the patient's dignity and individuality" void for vagueness because it "subjected physicians to sanctions based not on their own objective behavior, but on the sub-

jective viewpoint of others") (internal quotation and citation omitted); *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1095 (9th Cir.1999), *aff'd sub nom.* ***1120***Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (holding a provision that criminalized sexually explicit images that "appear[ ] to be a minor" or "convey the impression" that a minor is depicted unconstitutionally vague because it was unclear "whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution").

Several of the terms within the Ordinance's definition of "adult cabaret dancer"--"sexually oriented dancer," "exotic dancer," "similar dancer," "regular basis," and "focuses on or emphasizes"--are unarguably subjective. However, two main factors distinguish the Ordinance from cases such as *Morales*, *Tucson Woman's Clinic*, and *Free Speech Coalition*, where the regulations were held to be too subjective to give notice to ordinary people or guidance to law enforcement: 1) the subjective terms in the Ordinance are used in combination with other terms, and 2) the subjective terms do not define prohibited conduct.

[4] This circuit has previously recognized that otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity. *See* *Kev*, 793 F.2d at 1057 (holding that an ordinance prohibiting dancers from "caressing" and "fondling" patrons was not vague "in the context of the other definitions provided in the ordinance" at issue). In this case, the district court recognized that the two-foot rule applies only to "adult cabaret dancers" who meet the following five qualifications: 1) the individual must perform at an "adult cabaret"; [FN2] 2) the performer must perform as a sexually-oriented dancer, exotic dancer, stripper, or similar dancer; 3) the performance must focus on or emphasize the performer's breasts, genitals, and/or buttocks; 4) the performance must have this focus or emphasis on a regular basis; and 5) the performance must have this focus or emphasis on a substantial basis. Thus, an "adult cabaret dancer" is defined by a combination of features, not by any one subjective term. The combined terms outline the performer, the place of the performance, and the type of performance. Each of the five limitations provides context in which the other limitations may be clearly understood. The definition as a whole gives notice to performers and ample guidance to law enforcement officers as to who is and who is not an "adult cabaret dancer."

> FN2. The City of La Habra Code defines "adult cabaret" as:
> a nightclub, bar or other establishment (whether or not serving alcoholic beverages) which features live performances by topless and/or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainers, and where such performances are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas."
> City of La Habra Code § 18.60.010.

Furthermore, although the definition of an "adult cabaret dancer" contains subjective terms, the prohibited conduct is defined objectively. It is not illegal to be an adult cabaret dancer; only to be an adult cabaret dancer performing within two feet of a patron. This distinction introduces additional objectivity into the Ordinance because the act that is prohibited--being within two feet of a patron--is certainly not vague. [FN3]

> FN3. The appellant dancers argue that they will not relinquish their proximity to patrons, and thus need to know how not to be "adult cabaret dancers." In other words, they assert that they need to know how to continue their sexually expressive performances within two feet of their patrons. This, however, is exactly what the Ordinance prohibits. The fact that the regulation will necessarily alter the dancers' conduct does not make it vague.

***1121** Vagueness doctrine cannot be understood in a manner that prohibits governments from addressing problems that are difficult to define in objective terms. *See* *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("we

can never expect mathematical certainty from our language"). In this case, a combination of subjective and objective terms is used to give a clear picture of an "adult cabaret dancer" and the conduct prohibited of such a dancer is defined objectively. Thus, the definition of "adult cabaret dancer" is sufficiently clear to give notice to performers and guidance to law enforcement. *See* *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir.2001) ("perfect clarity is not required even when a law regulates protected speech").

B

[5] The Appellants claim that the definition of "adult cabaret dancer" is overbroad because it could apply to mainstream or avant-garde performances as well as adult entertainment. The Supreme Court and this circuit have emphasized that "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1198 (9th Cir.2004) (quoting *Osborne v. Ohio*, 495 U.S. 103, 112, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (internal quotations omitted)). In this case, potentially overbroad applications of the Ordinance are minimal because performances occurring outside of an adult cabaret are unaffected by the Ordinance, and those occurring in an adult cabaret and containing the sexual emphasis that defines an "adult cabaret dancer" are within the Ordinance's legitimate sweep.

The Appellants were unable to cite any example of a performance that would fall within the Ordinance to which application of the Ordinance's restrictions would be overbroad. The examples proffered--including a duet, a tango, and an Elvis impersonator--are unpersuasive. A *pas de deux*, a ballroom dance, and an impersonation of the King each escape the two-foot limitation unless performed in an establishment which features live performances by "topless and/or bottomless dancers, go-go dancers, exotic dancers, strippers or similar entertainers" characterized by an emphasis on " 'specified sexual activities' or 'specified anatomical areas.' " *See supra* note 2 (quoting City of La Habra Code § 18.60.010(C)). However, if they occur within an adult cabaret and the performer meets all five prongs of the definition of "adult cabaret dancer," these performances fall within the statute's legitimate sweep.

Regardless of whether the dance is a tango or more typical adult entertainment, requiring a two-foot separation between dance partners in this highly-charged sexual atmosphere may reasonably advance the City's legitimate goal of reducing secondary effects of adult entertainment. The two-foot rule may, for example, provide a line of sight for enforcement of the "no touch" rule and prevent exchanges of money and drugs. When performed in an adult cabaret, these performances, even if done in an Elvis costume, are thus within the statute's legitimate reach.

[6] Even if the Appellants were able to identify performances that fulfill all aspects of an "adult cabaret dancer" but are not tied to the secondary effects the statute is designed to address, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." ***1122***Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Although we recognize that "the First Amendment needs breathing space," *World Wide Video*, 368 F.3d at 1198, in this situation there is no "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Taxpayers for Vincent*, 466 U.S. at 801, 104 S.Ct. 2118. If an overbroad application of the Ordinance exists, it is insubstantial when "judged in relation to the statute's plainly legitimate sweep." *See* *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

III

The district court dismissed the Appellants' regulatory takings claim on summary judgment. We review this decision *de novo*. *Cal. First Amend. Coalition v. Calderon*, 150 F.3d 976, 980 (9th Cir.1998). We "must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the sub-

stantive law." *Id.*

[7][8] The takings clause of the Fifth Amendment protects *private property* from being taken for public use without just compensation. U.S. CONST. amend. V (emphasis added). "In order to state a claim under the Takings Clause, a plaintiff must first demonstrate that he possesses a 'property interest' that is constitutionally protected." *Schneider v. Cal. Dep't Corr.*, 151 F.3d 1194, 1198 (9th Cir.1998) (internal citation omitted). The Appellants have not here pointed to a "property interest" interfered with by the City of La Habra's regulation of the dancers' conduct. [FN4] The district court thus properly dismissed the Appellants' takings claim.

> FN4. Certainly Mr. Gammoh and the dancers may suffer economic losses if patrons are unwilling to pay for dances that must be at least two feet away from customers. Their claim of right to this stream of income was essentially the basis of the vested rights argument that the Appellants made before the district court. The district court rejected this argument on summary judgment, and Appellants did not appeal that ruling.

IV

[9] The Appellants argue that the Ordinance violates the First Amendment's guarantees of freedom of speech and expression. The district court evaluated the Ordinance under intermediate scrutiny and determined that the Appellants' First Amendment rights had not been violated. We review the district court's decision to grant summary judgment *de novo*, viewing the evidence in the light most favorable to the Appellants and looking for genuine issues of material fact. *See* *Calderon*, 150 F.3d at 980.

A

[10] First, we must determine whether the Ordinance is a complete ban on protected expression. *See* *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1164 (9th Cir.2003) (plurality opinion) (citing *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). We conclude that it is not.

The two-foot rule merely requires that dancers give their performances from a slight distance; it does not prohibit them from giving their performances altogether. The rule limits the dancers' freedom to convey their erotic message but does not prohibit them from performing erotic one-on-one-dances for patrons. *See* ***1123***Renton*, 475 U.S. at 46, 106 S.Ct. 925. Because the dancers' performances may continue, albeit from a slight distance, this case stands in sharp contrast to our recent decision in *Dream Palace v. County of Maricopa*, where we applied strict scrutiny to an ordinance regulating adult businesses because even the county conceded that the ordinance was a complete ban on nude and semi-nude dancing. 384 F.3d 990, 1018 (9th Cir.2004). Here, the Ordinance prescribes where offstage dancing can occur (at least two feet away from patrons) but it does not ban any form of dance.

The Appellants argue that close propinquity to patrons is a key element of the dancers' expressive activity, and that the Ordinance is therefore a complete ban on a form of expression: "proximate dancing." This argument has been made and rejected in this circuit. *See* *Colacurcio v. City of Kent*, 163 F.3d 545, 549, 555 (9th Cir.1998) (rejecting the argument that because "table dancing" is a unique form of dancing requiring proximity, a ten-foot separation requirement is a complete ban on this form of expression). It is true that if the dancers' expressive activity is considered "erotic dance within two feet of patrons" and not merely "erotic dance," this activity is completely banned. However, virtually no ordinance would survive this analysis: the "expression" at issue could always be defined to include the contested restriction. *See* *id.* at 556 (rejecting the idea that the applicable "forum" for a table dance is the area within ten feet of the performer). Protected expression is not so narrowly defined. *See* *Dream Palace*, 384 F.3d at 1019-20 (recognizing that the regulations in *Renton* and its progeny did not "proscribe absolutely certain types of adult entertainment" and instead enacted regulations that "avoid[ed] a total ban on protected expression").

"While the dancer's erotic message may be slightly

less effective from [two] feet, the ability to engage in the protected expression is not significantly impaired." *Kev*, 793 F.2d at 1061. We hold that the Ordinance is not a complete ban on a protected form of expression.

B

Next, we must determine what level of scrutiny properly applies. *See Ctr. for Fair Pub. Policy*, 336 F.3d at 1164. Traditionally, the Court has utilized a distinction between content-based and content-neutral regulations to determine the appropriate level of scrutiny. *See e.g.*, *Renton*, 475 U.S. at 46-47, 106 S.Ct. 925. Time, place, and manner restrictions on adult businesses were considered content-neutral. *Id.* at 48, 106 S.Ct. 925.

[11] Recently, however, the Supreme Court has recognized that virtually all regulation of adult businesses is content-based. *See Alameda Books*, 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring); *see also Ctr. for Fair Pub. Policy*, 336 F.3d at 1161 (recognizing Justice Kennedy's opinion in *Alameda Books* as controlling because it is the narrowest opinion joining the plurality's judgment). Content-based regulations are normally subject to strict scrutiny. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (describing the "necessary to serve a compelling state interest" strict scrutiny test).

[12] However, designating regulation of adult establishments as content-based does not end the inquiry as to the appropriate standard of review. Content-based regulations may be analyzed under intermediate scrutiny if two conditions are met: 1) the ordinance regulates speech that is sexual or pornographic in nature; and 2) the primary motivation behind the regulation is to prevent secondary effects. *Ctr. for Fair Pub. Policy*, 336 F.3d at 1164- 65 ***1124** (citing *Alameda Books*, 535 U.S. at 434, 448, 122 S.Ct. 1728).

1

[13] The Appellants differ from plaintiffs in previous cases regarding the regulation of adult businesses in that they wear minimal clothing for their offstage performances (although they perform nude on stage). The Appellants argue that the dancers' expressive activity is not sexual or pornographic because the dancers are "fully clothed." However, the appellant dancers testified that their outfits for offstage dancing include bikinis and g-strings, sometimes paired with a sheer skirt or top; at the very least, these accouterments stretch the term "fully-clothed." The dancers do cover their breasts and genitalia, but their argument that this removes their performances from the sphere of "sexual speech" ignores the context in which their offstage performances occur--in an adult cabaret, minutes after the dancers have performed nude on stage. *See Kev*, 793 F.2d at 1061 n. 12 (noting that "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved") (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 650-51, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)).

There is certainly a point along the continuum where suggestive speech no longer falls within the "sexual or pornographic" exception to the requirement of strict scrutiny. We are mindful that this case pushes us closer to that point than those cases where performers are nude or topless. "Sexual speech" has never been explicitly defined, but the appellant dancers' performances, which "focus[ ] on or emphasize[ ] ... breasts, genitals, and or buttocks," occur in adult establishments, are conducted by dancers who also perform nude, and involve minimal clothing, are certainly within the limits of "sexual speech." We therefore review the Ordinance as a regulation of "sexual or pornographic speech" and proceed to consider whether reducing the secondary effects of adult establishments is the Ordinance's primary purpose.

2

[14] We generally accept that a regulation's purpose is to combat secondary effects if the enactment can be justified without reference to speech. *See Colacurcio*, 163 F.3d at 551-52 (citing *Kev*, 793 F.2d at 1058-59). We have recognized that "so long as the regulation is designed to combat the secondary effects of [adult] establishments on the surrounding

community, namely[ ] crime rates, property values, and the quality of the city's neighborhoods ... then it is subject to intermediate scrutiny." *Ctr. for Fair Pub. Policy*, 336 F.3d at 1164-65 (internal citation and quotation omitted); *see also* *Colacurcio*, 163 F.3d at 551 (9th Cir.1998) (noting that an ordinance is subject to intermediate scrutiny if its "predominant purpose" is combating secondary effects). For plaintiffs, this is "a difficult standard to overcome." *Colacurcio*, 163 F.3d at 552.

[15][16] To determine the purpose of the Ordinance, we look to "objective indicators of intent." *Id.* at 552; *see also* *Ctr. for Fair Pub. Policy*, 336 F.3d at 1165. In this case we have the materials that the City Council considered in determining whether to enact the Ordinance and the Ordinance itself. These indicators demonstrate that secondary effects were the City Council's concern.

The record indicates that the City Council was presented with several volumes of materials prior to enacting the Ordinance. These included studies of secondary effects, declarations from police officers, reports on sexually transmitted diseases, and ***1125** various other evidence. In a report to the City Council, the City Attorney recommended action to address the secondary effects reported in these resources: "[i]n reviewing the City's existing regulations and in light of the extensive existing case law and supporting studies, we conclude that this Ordinance is necessary to reduce and/or preclude these secondary effects." Our review of the materials that the City Council considered indicates that concern about secondary effects, as opposed to the content of the dancers' expression, motivated the challenged Ordinance.

The Ordinance itself also demonstrates that the City Council's purpose was to combat secondary effects. The Ordinance states that it is:

> necessary for the protection of the welfare of the people, as a result of the potential negative secondary effects of adult businesses, including crime, the protection of the city's retail trade, the prevention of blight in neighborhoods and the maintenance of property values, protecting and preserving the quality of the city's neighborhoods and the city's commercial districts, the protection of the city's quality of life, the increased threat of the spread of sexually transmitted diseases, and the protection of the peace, welfare and privacy of persons who patronize adult businesses.

Ordinance, § 1(A). This statement of purpose is supported by regulatory provisions that are logically linked to the secondary effects, such as solicitation of prostitution and drug transactions, that the City identified: the Ordinance forbids contact between patrons and performers and, to make this rule enforceable, requires a two-foot separation between patrons and performers. Both the two-foot rule and the no-touching rule are reasonably linked to the secondary effects that the City identifies as its purpose in enacting the Ordinance.

We are not persuaded by the Appellants' argument that a speech-reducing motive is demonstrated by the fact that proximity between patrons and dancers is allowed when the dancers are not performing. The City may reasonably have decided that such regulations were impractical or unnecessary. The Appellants presented no evidence to support their speculation that the City chose only to regulate dancers when they are performing because it wished to regulate the performances' expressive content.

We are also unpersuaded by the Appellants' argument that a speech-reducing motive is demonstrated by a City employee's testimony that he overheard someone in staff meetings say that they wanted to drive appellant Gammoh out of business. The Appellants presented no evidence that the person who made these comments was on the City Council or affected the Council's decision to pass the Ordinance. Nothing connects this testimony to the process by which the Ordinance was passed. The testimony therefore does not create a genuine issue of material fact as to whether the City's stated goal of preventing secondary effects of adult businesses was its true purpose in enacting the Ordinance.

The Appellants have not raised a genuine issue as to the City's motivation in enacting the Ordinance. As Justice Kennedy wrote in *Alameda Books*, "[t]he ordinance may be a covert attack on speech, but we should not presume it to be so." 535 U.S. at 447, 122 S.Ct. 1728. The objective indicators of the City's in-

tent demonstrate a desire to combat secondary effects, and the Appellants have adduced no evidence that draws this motivation into question. The Ordinance must therefore be evaluated using intermediate scrutiny.

C

[17] A statute will survive intermediate scrutiny if it: 1) is designed to serve a ***1126** substantial government interest; 2) is narrowly tailored to serve that interest; and 3) leaves open alternative avenues of communication. *Ctr. for Fair Pub. Policy*, 336 F.3d at 1166; *see also Renton*, 475 U.S. at 50, 106 S.Ct. 925.

1

Reducing the negative secondary effects of adult businesses is a substantial governmental interest. *See Ctr. for Fair Pub. Policy*, 336 F.3d at 1166 ("It is beyond peradventure at this point in the development of the doctrine that a state's interest in curbing the secondary effects associated with adult entertainment establishments is substantial."). The Appellants concede that preventing secondary effects is a substantial government interest, but argue that the City's evidence of secondary effects is flawed and inapplicable. We disagree.

[18] The pre-enactment record in this case is substantial. *Cf. id.* at 1167-68 (describing the record as "a slim one" and "hardly overwhelming" but concluding that the studies and public hearings relied on by the legislature were sufficient to demonstrate a connection between the regulated activity and secondary effects). The City Council was presented with, *inter alia*, seventeen studies on secondary effects of adult businesses, a summary of some of these studies, the 1986 Attorney General's Report on Pornography, declarations from investigating vice officers, an interview with nude dancers, a presentation on the harmful effects of pornography in nearby Los Angeles, numerous reports on AIDS and other sexually transmitted diseases, and thirty-nine judicial decisions in the area of regulation of adult businesses. These studies and reports meet the City's burden to produce evidence demonstrating a connection between its regulations and the secondary effects that the Ordinance is intended to address. *See Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728; *Ctr. for Fair Pub. Policy*, 336 F.3d at 1166.

Because the City has met this burden, "[i]f plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*." *Alameda Books*, 535 U.S. at 438-39, 122 S.Ct. 1728, *cited in Ctr. for Fair Pub. Policy*, 336 F.3d at 1160. The Appellants attempt to cast doubt by arguing that the studies on which the City relies are flawed and irrelevant.

[19] The Appellants' proffered expert declared that the City's evidence was flawed because "systematically collecting police call-for-service information" and adhering to the Appellants' suggested methodological standards were "the only reliable information" that could have supported the City's concern. This is simply not the law. "[S]o long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses [,]" it is sufficient to support the Ordinance. *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925. [FN5] While we do not ***1127** permit legislative bodies to rely on shoddy data, we also will not specify the methodological standards to which their evidence must conform. *See id.* at 51, 106 S.Ct. 925; *see also Alameda Books*, 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring) ("As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners."). The Appellants have failed to create a genuine issue of material fact as to the reliability of the collection of evidence upon which the City relied.

> FN5. The Seventh Circuit has succinctly explained why clear proof of secondary effects is not required:
> A requirement of *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)]--quality evidence would impose an unreasonable burden on the legislative process, and further would be logical only if *Alameda Books* required a regulating body to prove that its regulation would--undeniably--reduce adverse secondary ef-

> fects. *Alameda Books* clearly did not impose such a requirement.
> *G.M. Enters., Inc. v. Town of St. Joseph, Wis.*, 350 F.3d 631, 640 (7th Cir.2003).

The Appellants also argue that even if the City's evidence is reliable, it is irrelevant because it does not measure the secondary effects of *clothed* performances. No precedent requires the City to obtain research targeting the exact activity that it wishes to regulate: the City is only required to rely on evidence "reasonably believed to be relevant" to the problem being addressed. *Alameda Books*, 535 U.S. at 438, 122 S.Ct. 1728. The studies upon which the City relied evaluate the secondary effects of a variety of adult businesses--a category encompassing any business that would be affected by the Ordinance--and are therefore unquestionably relevant.

The presence or absence of minimal clothing is not relevant to whether separation requirements fulfill the stated purpose of the Ordinance. This circuit recognizes that municipalities may reasonably find that separation requirements serve the interest of reducing the secondary effects of adult establishments. "Buffers" between patrons and performers prevent the exchange of money for prostitution or drug transactions and allow enforcement of "no touching" provisions, which would otherwise be virtually unenforceable. *See Colacurcio*, 163 F.3d at 554. There is no reason to believe that minimal clothing obviates the need for these measures when the atmosphere is equally charged--money exchanges and touching are no more difficult if the dancer is wearing minimal clothing than if she is partially or fully nude. [FN6]

> FN6. The City Council was presented with a report documenting an interview with former adult dancers from another jurisdiction in which the dancers indicated that solicitations for sexual favors occurred "whether the club is nude or not" and that drugs were frequently passed during tipping.

The Appellants have not presented evidence sufficient to create a genuine issue of material fact as to whether the two-foot rule is designed to serve a substantial governmental interest in preventing the secondary effects of adult establishments. The Ordinance therefore survives the first prong of the *Renton* test.

2

[20] Our next consideration is whether the City's two-foot rule is narrowly tailored to address the problem of secondary effects from adult entertainment. *See Ctr. for Fair Pub. Policy*, 336 F.3d at 1166. The Ordinance's two-foot separation requirement is more narrow than other separation requirements that the Ninth Circuit has upheld. *See Colacurcio*, 163 F.3d at 553-54 (upholding a ten-foot separation requirement); *BSA, Inc. v. King County*, 804 F.2d 1104, 1110-11 (9th Cir.1986) (upholding a six-foot separation requirement); *Kev*, 793 F.2d at 1061-62 (upholding a ten-foot separation requirement). These earlier cases involved nude or topless dancing, and therefore differ from the case before us. Nonetheless, they guide us in now holding that in the context of a club that features on-stage nude dancing and offstage minimally clothed dancing, the City's two-foot separation requirement is narrowly tailored to prevent the exchange of money ***1128** or drugs and to allow enforcement of the "no touching" provisions.

3

[21] Finally, we consider whether the Ordinance leaves open alternative avenues of communication. *See Ctr. for Fair Pub. Policy*, 336 F.3d at 1166. This inquiry is analogous to that in Section IV(A), *supra*, which concluded that the Ordinance is not a complete ban on protected expression. The challenged Ordinance leaves dancers free to convey their erotic message as long as they are two feet away from patrons. Although the message may be slightly impaired from this distance, it cannot be said that a dancer's performance "no longer conveys eroticism" from two feet away. *Dream Palace*, 384 F.3d at 1021 (internal citation and quotation omitted). Because the dancer's erotic message may still be communicated from a slight distance, the Ordinance survives this final prong of the *Renton* analysis.

[22] As detailed above, the Ordinance's two-foot rule is narrowly tailored to address the City's concerns about the secondary effects of adult establishments and leaves alternate channels of communication open

by allowing dancers to perform at a two-foot distance. The Ordinance survives intermediate scrutiny.

V

The Ordinance was thoroughly researched and narrowly tailored to combat the negative side-effects of adult businesses that the City's research identified. Regulating adult businesses will always place the City's concerns in tension with First Amendment protections. In this case, however, the City of La Habra designed an Ordinance that falls within what has previously been accepted as constitutional in this circuit, despite the minimal amount of clothing that the appellant dancers wear when performing. The Ordinance is not vague or overbroad, and the Appellants have raised no genuine issue of material fact regarding their takings or First Amendment claims. The judgment of the district court is therefore **AFFIRMED.**

395 F.3d 1114, 05 Cal. Daily Op. Serv. 718, 2005 Daily Journal D.A.R. 999

Briefs and Other Related Documents **(Back to top)**

• 2004 WL 2606568 (Appellate Brief) Appellant's Reply Brief (Sep. 22, 2004)Original Image of this Document (PDF)

• 2004 WL 2203048 (Appellate Brief) Appellants' Brief (Aug. 09, 2004)Original Image of this Document (PDF)

• 04-56072 (Docket) (Jun. 21, 2004)

• (Appellate Brief) Brief of Amicus Curiae Legaue of California Cities, in Support of Appellee City of La Habra, Urging Affirmance (2004)Original Image of this Document (PDF)

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Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.
DREAM PALACE, an Arizona limited liability company, dba Liberty Entertainment
Group, LLC; Edmund Archuleta, Jr.; William Alkire; April Cope; Henry
Jenkins; Eugene Williams; Cari Elmore; Jennifer McGrath; Susan Roberts;
Rachel Russo; Haley Wheeler; Corina Reville; Jill Amante, Plaintiffs-
Appellants,
v.
COUNTY OF MARICOPA, a political subdivision of the State of Arizona, Defendant-
Appellee.
No. 00-16531.

Argued Feb. 11, 2003.
Submitted and Filed Sept. 27, 2004.

Background: Adult nude dancing establishment and certain of its managers and employees brought action challenging constitutionality of county's adult entertainment ordinance. The United States District Court for the District of Arizona, Stephen M. McNamee, Chief Judge, entered judgment in favor of county, and plaintiffs appealed.

Holdings: The Court of Appeals, O'Scannlain, Circuit Judge, held that:
(1) ordinance's licensing requirement satisfied First Amendment requirements for prior restraints on speech;
(2) ordinance's requirement that managers and dancers exhaust their administrative remedies prior to seeking judicial review of denial of work permit was not a prior restraint on free speech;
(3) chilling effect on protected expression created by ordinance required injunction prohibiting county from disclosing personal information about adult entertainers under state public records law;
(4) ordinance's hours of operations restrictions served substantial government interest in curbing secondary effects associated with adult entertainment establishments;
(5) ordinance's requirement that managers of adult entertainment establishments obtain work permits was a reasonable time, place, and manner restriction on free speech; and
(6) ordinance, by effectively banning nude and seminude dancing through its prohibition on "simulated sex acts" during the course of a performance, violated First Amendment free speech protections.
Affirmed in part, reversed in part, and remanded.

Canby, Circuit Judge, filed concurring opinion.

West Headnotes

[1] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Alleged prior restraints on free speech will be upheld only if they provide for a prompt decision during which the status quo is maintained, and there is the opportunity for a prompt judicial decision. U.S.C.A. Const.Amend. 1.

[2] Federal Civil Procedure 103.2
170Ak103.2 Most Cited Cases
The "doctrine of standing" addresses the question whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.

[3] Federal Civil Procedure 103.2
170Ak103.2 Most Cited Cases
[3] Federal Civil Procedure 103.3
170Ak103.3 Most Cited Cases
At an irreducible minimum, Article III of the United States Constitution requires a litigant invoking the authority of a federal court to demonstrate: (1) that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, (2) that the injury fairly can be traced to the challenged action, and (3) that the injury is likely to be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 1 et seq.

[4] Constitutional Law 42.2(1)

92k42.2(1) Most Cited Cases
Under the overbreadth doctrine, a plaintiff may challenge government action by showing that it may inhibit the First Amendment rights of parties not before the court. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 42.2(1)
92k42.2(1) Most Cited Cases
The overbreadth doctrine functions as an exception to the general prohibition on a litigant's raising another person's legal rights, and is based on the idea that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 42.2(1)
92k42.2(1) Most Cited Cases
The overbreadth doctrine does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 42.2(1)
92k42.2(1) Most Cited Cases
Previously existing adult nude dancing establishment had standing to appeal district court's decision that county adult entertainment ordinance's licensing requirements was unconstitutionally overbroad as applied to new businesses; ordinance applied to both preexisting businesses and new businesses, and plaintiff's refusal to apply for the necessary permit placed it in danger of being prosecuted for noncompliance. U.S.C.A. Const. Art. 3, § 1 et seq.; U.S.C.A. Const.Amend. 1.

[8] Federal Civil Procedure 103.2
170Ak103.2 Most Cited Cases

[8] Federal Courts 12.1
170Bk12.1 Most Cited Cases
The issues of mootness and standing are closely related, though circumstances that would not support standing as an initial matter may nevertheless be sufficient to defeat a mootness challenge on appeal.

[9] Federal Courts 12.1
170Bk12.1 Most Cited Cases
The question of mootness focuses upon whether courts can still grant relief between the parties.

[10] Federal Courts 723.1
170Bk723.1 Most Cited Cases
If an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal is moot and must be dismissed; however, while a court may not be able to return the parties to the status quo ante, an appeal is not moot if the court can fashion some form of meaningful relief.

[11] Federal Courts 724
170Bk724 Most Cited Cases
Previously existing adult nude dancing establishment's overbreadth challenge to adult entertainment ordinance's licensing requirements was not rendered moot on appeal after district court ruled that the ordinance was unconstitutional as applied to preexisting businesses, where county was in the process of amending those provisions so that the challenged restrictions would apply to pre-existing businesses. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 90(3)
92k90(3) Most Cited Cases
A prior restraint on free speech exists when the enjoyment of protected expression is contingent upon the approval of government officials. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[13] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
County adult entertainment ordinance requiring all businesses which come within its purview to apply for and to obtain a license before engaging in business was a prior restraint on free speech. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Prior restraints on free speech are not unconstitutional per se. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[15] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
County adult entertainment ordinance's licensing requirement was not an unconstitutional prior restraint on free speech because it placed the burden of proof in the administrative appeals process on the license applicant. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
First Amendment requires that an adult business subject to a licensing scheme not only have prompt access to the courts in the event the license is denied, but also receive a prompt decision from the courts on the legitimacy of such a denial. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[17] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
County adult entertainment ordinance's licensing requirement, read in context of Arizona law, provided for a sufficiently prompt judicial determination of the legitimacy of a license denial to satisfy First Amendment requirements for prior restraints on speech; Arizona courts had procedural tools available if it was necessary to expedite the review of a license denial, and licensing decision under ordinance depended on a set of reasonably objective factors. U.S.C.A. Const.Amend. 1.

[18] Constitutional Law 90(3)
92k90(3) Most Cited Cases
When the First Amendment requires certain safeguards before a system of prior restraint may be enforced, a local government cannot evade that requirement by pointing to its lack of legal authority to ensure such safeguards exist; nevertheless, nothing prevents a county from relying on state law procedures to ensure that First Amendment interests are adequately protected. U.S.C.A. Const.Amend. 1.

[19] Federal Courts 614
170Bk614 Most Cited Cases
Adult nude dancing establishment's arguments, raised for first time on appeal, that county adult entertainment ordinance did not provide constitutionally sufficient judicial review, fell within exception to rule precluding review of issues raised for first time on appeal; arguments were based entirely in law and did not rely on the factual record, and county had full opportunity to brief its response to the new arguments.

[20] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[20] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
Licensing provision of county adult entertainment ordinance provided for constitutionally sufficient judicial review to satisfy First Amendment requirements for prior restraints on speech, even if "special action" review by Arizona courts provided for in ordinance referred to a proceeding in which Arizona courts had discretion to deny jurisdiction; ordinance also authorized appeal from a denial of license by any "other available procedure," which would include suit for injunctive or declaratory relief. U.S.C.A. Const.Amend. 1; A.R.S. § 12-1832.

[21] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[21] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
County adult entertainment ordinance did not violate First Amendment requirements for prior restraints on speech by placing the burden of proof on managers and dancers in administrative proceedings challenging denial of work permit required by the ordinance; county did not exercise discretion by passing judgment on the content of any protected speech, and permit applicants had incentive to vigorously pursue an administrative remedy in event of an adverse decision on an application. U.S.C.A. Const.Amend. 1.

[22] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[22] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
County adult entertainment ordinance's requirement that managers and dancers exhaust their administrative remedies prior to seeking judicial review of denial of work permit required by the ordinance was not a prior restraint on free speech; ordinance guaranteed a "specified and reasonable time" within which an administrative decision was required, and permitted applicants to continue to work pending the outcome of administrative and judicial review. U.S.C.A. Const.Amend. 1.

[23] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[23] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
Provision of county adult entertainment ordinance placing the burden of seeking judicial review on managers and dancers denied work permit required under ordinance was not an unconstitutional prior restraint on free speech. U.S.C.A. Const.Amend. 1.

[24] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[24] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
Provision of county adult entertainment ordinance requiring disclosure of information regarding names, addresses, and telephone numbers in manager and employee work permit applications did not violate First Amendment free speech protections. U.S.C.A. Const.Amend. 1.

[25] Injunction 14
212k14 Most Cited Cases

[25] Injunction 16
212k16 Most Cited Cases
The requirements for the issuance of a permanent injunction are (1) the
likelihood of substantial and immediate irreparable injury; and (2) the inadequacy of remedies at law.

[26] Federal Courts 814.1
170Bk814.1 Most Cited Cases
The district court's refusal to grant a permanent injunction is reviewed for an abuse of discretion.

[27] Civil Rights 1456
78k1456 Most Cited Cases
Chilling effect on protected expression created by work permit provision of county adult entertainment ordinance, making confidentiality of personal information about adult entertainers in work permit applications subject to requirements of state public records law, required injunction prohibiting county from disclosing such information under the public records law; state law made such information presumptively available to anyone, thus inhibiting the ability or the inclination to engage in protected expression. U.S.C.A. Const.Amend. 1; A.R.S. § 39-121.

[28] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
The First Amendment does not permit county to put employees of adult entertainment establishments to the choice of either applying for a permit to engage in protected expression in circumstances where they expose themselves to unwelcome harassment from aggressive suitors and overzealous opponents of such activity, or of choosing not to engage in such activity out of concern for their personal safety. U.S.C.A. Const.Amend. 1.

[29] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Hours of operation restrictions in county adult entertainment ordinance, prohibiting provision of adult services during nighttime hours, were designed to combat secondary effects of adult entertainment establishments on surrounding community, subjecting ordinance to intermediate scrutiny under First Amendment free speech analysis; ordinance's statement of purpose stated that harmful secondary effects such as prostitution, drug abuse, and health risks,

were more pronounced when conducted continuously or during late night hours, and county board heard extensive pre-enactment evidence regarding secondary effects. U.S.C.A. Const.Amend. 1.

[30] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[30] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
Evidence established that hours of operations restrictions in county's adult entertainment ordinance were designed to serve a substantial government interest in curbing the secondary effects associated with adult entertainment establishments, as required by First Amendment free speech protections; county board considered comprehensive summaries detailing secondary effect findings from other jurisdictions, and ordinance permitted adult businesses to operate approximately 5,980 hour per year. U.S.C.A. Const.Amend. 1.

[31] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[31] Public Amusement and Entertainment 35(1)
315Tk35(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
County had a substantial interest in curbing the secondary effects associated with adult entertainment establishments, in determining whether ordinance governing such businesses violated First Amendment free speech protections. U.S.C.A. Const.Amend. 1.

[32] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[32] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
Hours of operations restrictions in county's adult entertainment ordinance did not unreasonably limit alternative avenues of communication, as required by First Amendment free speech protections; ordinance permitted adult businesses to operate approximately 5,980 hour per year. U.S.C.A. Const.Amend. 1.

[33] Constitutional Law 46(1)
92k46(1) Most Cited Cases
First Amendment free speech challenge to county adult entertainment ordinance's requirement that managers of adult entertainment establishments wear identification cards during work hours was moot, where public disclosure of personal information about such managers had been ordered enjoined. U.S.C.A. Const.Amend. 1.

[34] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[34] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
County adult entertainment ordinance's requirement that managers of adult entertainment establishments obtain work permits was a reasonable time, place, and manner restriction on free speech; legislative record indicated that adult businesses were associated with a variety of secondary effects, such as the presence of organized crime and money laundering, which directly involved employees in management positions, and permit process could combat such effects by screening out potential managers with a criminal history. U.S.C.A. Const.Amend. 1.

[35] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[35] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
County adult entertainment ordinance, by effectively banning nude and semi-nude dancing through its prohibition on "simulated sex acts" during the course of a performance, exceeded scope of county's police powers to restrict constitutionally protected expression; ordinance was not limited to establishments holding a liquor license and restricted the particular movements and gestures a dancer could make during the course of a performance. U.S.C.A. Const.Amend. 1.

[36] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[36] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
County adult entertainment ordinance, by effectively banning nude and semi-nude dancing through its prohibition on "simulated sex acts" during the course of a performance, violated First Amendment free speech protections; ordinance restricted in sweeping terms the ability of erotic dancers to convey their intended erotic message. U.S.C.A. Const.Amend. 1.

[37] Federal Courts 18
170Bk18 Most Cited Cases
District court did not abuse its discretion when it declined to exercise supplemental jurisdiction over state law challenges to county adult entertainment ordinance, district court had decided each and every First Amendment claim over which it had original jurisdiction, and remaining state law claims, concerning issues of the balance of power between state and local authorities in Arizona, involved delicate issues of state law. U.S.C.A. Const.Amend. 1; 28 U.S.C.A. § 1367.

[38] Statutes 64(1)
361k64(1) Most Cited Cases
An entire statute need not be declared unconstitutional if constitutional portions can be severed.

[39] Statutes 64(1)
361k64(1) Most Cited Cases

[39] Statutes 188
361k188 Most Cited Cases
Under Arizona law, the test for severability of a statute's unconstitutional provisions requires ascertaining legislative intent; the most reliable evidence of that intent is the language of the statute.

[40] Counties 55
104k55 Most Cited Cases
Unconstitutional portions of county's adult entertainment ordinance, permitting disclosure of personal information about erotic dancers and prohibiting specified sexual activity, were severable from remainder of the ordinance; county board has clearly expressed its intent that unconstitutional provisions were severable, and vast majority of the provisions in the ordinance, including licensing scheme, and multiple operating restrictions, withstood constitutional scrutiny.
***995** G. Randall Garrou, Weston, Garrou & DeWitt, Los Angeles, CA, argued the cause and filed briefs for appellant Dream Palace, et al. John H. Weston was on the briefs.

Scott E. Boehm, Copple, Chamberlin, Boehm & Murphy, P.C., Phoenix, AZ, argued the cause and filed briefs for appellee Maricopa County. Terry E. Eckhart, Office of Maricopa County Attorney, was on the briefs.

Appeal from the United States District Court for the District of Arizona; Stephen M. McNamee, District Judge, Presiding. D.C. No. CV-97-02357-SMM.

Before: CANBY, O'SCANNLAIN, and W. FLETCHER, Circuit Judges.

Opinion by Judge O'SCANNLAIN; Concurrence by Judge CANBY.

***996** O'SCANNLAIN, Circuit Judge.

We must decide whether a local ordinance imposing certain licensing requirements and operating restrictions on adult entertainment establishments violates the First Amendment.

I
A
In 1996, the Arizona legislature amended § 11-821 of the Arizona Revised Statutes, to authorize counties to enact zoning ordinances with respect to adult entertainment establishments. *See* Ariz.Rev.Stat. § 11-821. Acting on its new authority, the Maricopa County Board of Supervisors asked its Planning and Development Department to research and to prepare a draft of what would eventually become Ordinance P-10, at issue in this case.

At the behest of the county board, the planning department prepared a four-page report for board members, addressing the negative effects associated with adult-oriented businesses. In addition to discussing

the Supreme Court's decisions in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), the report cited seventeen studies documenting the negative secondary effects associated with adult-oriented establishments. Summarizing the findings of these studies, the report concluded that adult-oriented businesses were associated with "unlawful and unhealthy activities" and generally lead to illicit sexual behavior, crime, unsanitary conditions, and the spread of sexually-transmitted diseases if not properly regulated. Board members were provided with copies of studies from Phoenix and Los Angeles documenting such negative secondary effects, as well as a fourteen-page summary of eleven other studies.

Public hearings were held with respect to the proposed ordinance on April 23, 1997. Two people spoke against the ordinance at those hearings, a local bookstore owner and John Weston, the attorney for the plaintiffs in this case. Others spoke in favor, including state senator David Peterson and state representatives Marilyn Jarrett and Karen Johnson. Most of the testimony pro and con focused on the legality of the proposed ordinance and the need for regulation in light of the perceived secondary effects associated with adult-oriented businesses. The county planning director, Ms. Herberg-Kusy, also addressed the board at these hearings, urging that the studies provided the necessary empirical data to conclude that adult-oriented businesses have a negative secondary impact on surrounding communities. The board voted unanimously to adopt the ordinance, and it became effective on May 27, 1997.

B

Ordinance P-10 is a comprehensive scheme for the licensing and regulation of businesses which come within its purview: that is, adult entertainment businesses. *See* Ordinance § 2. [FN1] Businesses, managers and employees that come within the ordinance's sweep are each required to obtain a license or permit prior to operating, or working at, an adult entertainment business. Certain procedural safeguards, at issue in this case, are in place with respect to the county's handling of applications for ***997** licenses and permits. In addition, the ordinance contains numerous operating restrictions on adult-oriented businesses, certain of which are also at issue in this litigation.

> FN1. Adult-oriented business means "adult arcades, adult bookstores or adult video stores, cabarets, adult live entertainment establishments, adult motion picture theaters, adult theaters, [and] massage establishments that offer adult service or nude model studios." Ordinance § 2. Each of these terms are in turn defined under the ordinance.

The plaintiffs in this action are Dream Palace, a live adult nude dancing establishment in Maricopa County, and certain of its managers and employees (collectively "Dream Palace"). [FN2] When Ordinance P-10 became effective, Dream Palace and its managers and employees did not apply for a business license or for work permits, as required by the ordinance. Instead, on November 13, 1997, they filed suit in federal district court challenging the ordinance on First Amendment grounds, as well as certain state law grounds.

> FN2. Dream Palace is a "live nude entertainment establishment" within the meaning of the Ordinance. *See* Ordinance § 2.

In 1998, apparently at the instigation of Maricopa County, the Arizona legislature enacted Arizona Revised Statute § 11-821(B). Section 11- 821(B) expressly provided Arizona counties with the authority to license and to regulate new *or* existing adult-oriented business, and to impose work permit requirements on nude dancers and business managers. [FN3]

> FN3. In pertinent part, § 11-821(B) provides:
> [T]he county plan ... [m]ay provide for the regulation and use of business licenses, adult oriented business manager permits and adult service provider permits in conjunction with the establishment or operation of adult oriented businesses and facilities, including

> adult arcades, adult bookstores or video stores, cabarets, theaters, massage establishments and nude model studios.

While the state was amending the relevant statute, the county was in the process of amending Ordinance P-10. The proposed amendments were in the nature of minor clarifications; the substance of the ordinance remained unchanged. At a June 17, 1998 board meeting to discuss the amendments, a total of eight further secondary effects studies were made available to board members. On September 2, 1998, the board unanimously voted to approve the amendments. *See* Maricopa County, Az., Ordinance P-10 (Sept. 2, 1998) (Attached as Appendix to this Opinion).

In the wake of the adopted amendments, Dream Palace filed an amended complaint in district court, renewing Dream Palace's frontal assault on several provisions in the ordinance on First Amendment and state law grounds. Dream Palace simultaneously filed eight separate motions for partial summary judgment. The county filed a single cross-motion for summary judgment on all issues. On September 30, 1999, the district court granted summary judgment in favor of the county on all issues save two. Specifically, with respect to the requirement that an adult entertainment business must obtain a license to operate, the district court held that the procedural safeguards in place were insufficient with respect to pre-existing businesses like Dream Palace, because there was no guarantee that a pre-existing business could continue to operate pending the outcome of an appeals process. The district court also held that the requirement that nude and semi-nude dancers wear identification cards was invalid under *Renton.* The county has not appealed from either of these two rulings. The district court abstained from addressing the state law claims of preemption and ultra vires.

Dream Palace subsequently filed a motion to alter or to amend the judgment, and asked the district court to explain its decision to abstain from addressing the state law claims. The district court denied the motion. In doing so, it explained that it did not address the state law claims because "the various motions for summary ***998** judgment have resolved all of Plaintiffs' federal constitutional claims," and that the "remaining state law claims raise delicate issues involving the interpretation and application of Arizona law." Dream Palace timely appeals.

II

The Supreme Court has ruled that nude dancing of the type performed at Dream Palace is "expressive conduct" which falls "within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). Therefore, the ordinance must be analyzed to ensure it does not unduly impair the exercise of First Amendment rights. The specific First Amendment tests that may apply, and the determination as to the proper level of scrutiny, depends for the most part on the nature of the provision that Dream Palace seeks to challenge.

[1] Here, Dream Palace challenges several provisions in the ordinance as invalid prior restraints. Those provisions will be upheld only if they provide for a prompt decision during which the status quo is maintained, and there is the opportunity for a prompt judicial decision. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). Dream Palace also challenges several of the ordinance's operating restrictions. We assess the constitutionality of those provisions under the "secondary effects" test enunciated by the Supreme Court in *Renton*, 475 U.S. at 47-54, 106 S.Ct. 925.

III

Dream Palace first challenges the requirement that adult entertainment businesses obtain a license prior to conducting business in Maricopa County.

A

The district court in this case drew a distinction between pre-existing businesses on the one hand, and new businesses on the other. Specifically, with respect to pre-existing businesses, it found that "there is no guarantee in the ordinance that existing businesses or persons working as managers or adult service providers will be able to continue operating beyond the 180 day period," [FN4] and for that reason, the licensing scheme was invalid. The district court found, however, that the remaining provisions were valid. Specifically, the district court found that "the County

may regulate and license new businesses and does so in this case in as expeditious a manner as possible given administrative realities." The district court held that, with respect to new businesses, the fact that the ordinance "does not provide for a deadline for judicial decisions" did not render the licensing scheme unconstitutional because "the County has no authority to require an absolute time period in which the state court process has to occur."

> FN4. The 180 day period the district court refers to is to be found in section 24, which states that pre-existing businesses "shall be in full compliance with this ordinance, including receipt of any required license or permit, within one hundred eighty days after the effective date" of the ordinance.

B

Before reaching the merits, we must consider the county's argument that Dream Palace, a previously existing business, lacks standing to appeal the district court's decision that the ordinance's licensing requirements can constitutionally be applied to new businesses.

***999** 1

[2][3] The doctrine of standing addresses the question whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). At an "irreducible minimum," Article III of the United States Constitution requires a litigant invoking the authority of a federal court to demonstrate: (1) "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (2) "that the injury fairly can be traced to the challenged action," and (3) that the injury is "likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (internal quotation marks and citations omitted).

[4][5][6] Here, Dream Palace asserts an overbreadth challenge to the business license requirements. Under the overbreadth doctrine, a plaintiff may challenge government action by showing that it may inhibit the First Amendment rights of parties not before the court. *See Young v. City of Simi Valley*, 216 F.3d 807, 815 (9th Cir.2000); *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1111 (9th Cir.1999). The overbreadth doctrine functions as an exception to "the general prohibition on a litigant's raising another person's legal rights," *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), and is based on the idea that "the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). However, the overbreadth doctrine "does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction." *4805 Convoy, Inc.*, 183 F.3d at 1112 (quoting *Bordell v. General Elec. Co.*, 922 F.2d 1057, 1061 (2d Cir.1991)); *see also Bigelow v. Virginia*, 421 U.S. 809, 816-17, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) (to have overbreadth standing, "[t]here must be a claim of specific present objective harm or a threat of specific future harm.") (internal quotation marks omitted). Thus, Dream Palace must still satisfy the injury-in-fact requirement to raise a challenge to the ordinance.

2

[7] At the outset of these proceedings, we think there is no dispute that Dream Palace had the necessary standing to challenge the overall licensing requirements. By its express terms, the ordinance applied to *both* preexisting businesses and new businesses, and Dream Palace's refusal to apply for the necessary permit therefore placed it in danger of sustaining a direct injury; that is, prosecution for noncompliance with the ordinance. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). Only when the district court ruled that the license requirements were invalid with respect to one class of businesses, but valid with respect to another, did a serious question with respect to Dream Palace's standing arise. The issue is therefore more properly characterized as one of mootness on appeal. Dream Palace's challenge to the business license scheme will be moot, and hence not justiciable, if intervening

events have caused it completely to lose "its character as a present, live controversy of the kind that must exist if [a court is] to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969) (per curiam); *see also Pap's A.M.*, 529 U.S. at 287, 120 S.Ct. 1382 ("[A] case is moot when the issues presented are no ***1000** longer 'live' or the parties lack a legally cognizable interest in the outcome." (modification in original)).

[8][9][10] The issues of mootness and standing are closely related, *see United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), though circumstances that would not support standing as an initial matter may nevertheless be sufficient to defeat a mootness challenge on appeal. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189-92, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *Jacobus v. Alaska*, 338 F.3d 1095, 1103 (9th Cir.2003) ("The Supreme Court has emphasized that the doctrine of mootness is more flexible than other strands of justiciability doctrine."). The question of mootness "focuses upon whether we can still grant relief between the parties. If an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal is moot and must be dismissed.... However, while a court may not be able to return the parties to the status quo ante ..., an appeal is not moot if the court can fashion some form of meaningful relief...." *In re Pattullo*, 271 F.3d 898, 901 (9th Cir.2001) (quoting *United States v. Arkison*, 34 F.3d 756, 759 (9th Cir.1994) (modifications in original) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992))). We must examine whether relief against the ordinance's provisions could meaningfully improve Dream Palace's position; if it could not, then Dream Palace has no continuing stake in the outcome sufficient to survive a mootness challenge.

3

[11] The problem for Dream Palace is obvious: it is a *pre-existing* business, and the district court has previously ruled that the business license requirement cannot be applied to such businesses. That ruling has not been appealed. Since Dream Palace cannot be subject to the ordinance as it stands, it may at first be difficult to see how it has a "present, live controversy," *Hall*, 396 U.S. at 48, 90 S.Ct. 200, sufficient to go forward with its claim that the ordinance is also invalid with respect to *new* businesses.

However, the county has conceded in its brief and at oral argument that rather than challenging the district court's ruling with respect to pre-existing businesses like Dream Palace, it is in the process of amending those provisions so that the challenged restrictions will apply to pre-existing businesses. At such time, the provisions Dream Palace now seeks to challenge can and will apply to Dream Palace and its employees. It therefore appears that Dream Palace is indeed "immediately in danger of sustaining some direct injury" as a result of the official conduct it seeks to challenge. *Id.*

In *Erie*, the owners of the plaintiff nude dancing club filed a motion to dismiss the case as moot, because the club had ceased to operate in Erie County after the Supreme Court had granted certiorari. 529 U.S. at 287, 120 S.Ct. 1382. The Supreme Court held that "[s]imply closing [the club] is not sufficient to render th[e] case moot" because of the possibility that the club owners "could again decide to operate a nude dancing establishment in Erie," in which case, the owners would once again be subject to the city ordinance. *Id.* Similarly, in *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir.2001), we considered a situation where an owner's license to operate an adult cabaret had expired after the district court had rendered a decision in the city's favor, and the owner had not sought renewal. *Id.* at 1011. We nonetheless held that the case was not moot ***1001** because of the plaintiff's "stated intention ... to return to business." *Id.* at 1012. Given the county's expressed intention to amend the ordinance so as to have it apply to Dream Palace, the possibility of immediate injury to the plaintiff in this case is more likely to come to pass than either of the scenarios contemplated in *Erie* and *Clark*. Dream Palace will soon be subject to the provisions it now seeks to challenge, and consequently, there is a "live controversy." *Hall*, 396 U.S. at 48, 90 S.Ct. 200. We are satisfied, therefore, that its overbreadth challenge to the business license requirement is not moot.

C

Turning to the merits, Dream Palace asserts that the procedural safeguards with respect to the county's decision on a license application are insufficient to protect First Amendment rights.

[12][13][14] A prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials. *Near v. Minnesota*, 283 U.S. 697, 711-13, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Since Ordinance P-10 requires all businesses which come within its purview to apply for and to obtain a license before engaging in business, [FN5] the licensing scheme is quite obviously a prior restraint, and properly analyzed as such. Prior restraints are not unconstitutional per se, however. *FW/PBS*, 493 U.S. at 225, 110 S.Ct. 596. The Supreme Court has said that to pass constitutional muster, a licensing scheme that regulates adult entertainment businesses must contain two procedural safeguards: First, "the licensor must make the decision whether to issue the license within a specified and reasonable period during which the status quo is maintained." *Id.* at 228, 110 S.Ct. 596. Second, "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.* [FN6]

FN5. Section 5 provides that "a person or enterprise may not conduct an adult oriented business without first obtaining an adult oriented business license...."

FN6. These two requirements were first set forth by the Supreme Court in *Freedman v. Maryland*, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). *Freedman* also held that the government bore the burden of going to court in order to justify the licensing scheme. *Id.* at 59-60, 85 S.Ct. 734. Justice O'Connor's three-judge plurality opinion in *FW/PBS* dispensed with this third procedural safeguard in the context of adult business licensing schemes. *FW/PBS*, 493 U.S. at 229-30, 110 S.Ct. 596. In *Baby Tam & Co., Inc. v. City of Las Vegas*, 247 F.3d 1003 (9th Cir.2001) ("*Baby Tam III* "), we followed the plurality opinion in *FW/PBS* and held that "placing the burden of instituting proceedings on the state does not apply to licensing schemes such as the one challenged here." *Id.* at 1008 (citing *FW/PBS*, 493 U.S. at 228-30, 110 S.Ct. 596).

1

[15] First, Dream Palace claims that the ordinance is invalid because it places the burden of proof in the administrative appeals process on the applicant. *See* Ordinance P-10 § 18 ("Respondent shall have the burden of proving by a preponderance of the evidence that the denial ... was arbitrary or capricious and an abuse of discretion."). The fact the burden is on the applicant during these administrative proceedings is of no consequence, at least from the standpoint of the First Amendment. In *FW/PBS*, the Supreme Court rejected the argument that, in the event of *judicial* review, the regulator must bear the burden of proof once in court. *Id.* at 230, 110 S.Ct. 596. The Court reasoned that under the ordinance, "the city does not exercise discretion by passing judgment on the content of any protected speech," but merely engages in "a ministerial act that is not presumptively invalid." ***1002** *Id.* at 229, 110 S.Ct. 596. Furthermore, the applicant has a great deal at stake when a license application is denied, and as such "there is every incentive for the applicant to pursue a license denial through court." *Id.* at 230, 110 S.Ct. 596. For these reasons, the Court concluded that "the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." *Id.*

Precisely the same circumstances arise here. In deciding whether to issue a license, the licensor "does not exercise discretion by passing judgment on the content of any protected speech." *Id.* at 229, 110 S.Ct. 596. Moreover, "[b]ecause the license is the key to the applicant's obtaining and maintaining a business," *id.* at 229-30, 110 S.Ct. 596, Dream Palace has an incentive vigorously to pursue administrative review of an adverse decision. We fail to see why the First Amendment would require the county to bear the burden in administrative review proceedings, but not in court. Requiring the applicant to bear the burden of proof in administrative proceedings is, therefore, valid under the First Amendment.

2

Second, Dream Palace argues that the ordinance fails to comply with the second of the *FW/PBS* requirements: that there be "the possibility of prompt judicial review." *FW/PBS*, 493 U.S. at 228, 110 S.Ct. 596.

a

Dream Palace originally rested this argument on our holding in *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir.1998) ("*Baby Tam I* "), that an adult business could not be subjected to a content-based licensing regime where "[t]here is no provision that a judicial hearing must be had or a decision must be rendered within a prescribed period of time." *Id.* at 1101. *Baby Tam I*, however, is no longer good law after the Supreme Court's decision in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, ---U.S. ----, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004). That case, decided after the parties' initial briefing in this case, now provides the framework for analyzing the judicial-review provision of Ordinance P-10. [FN7]

> FN7. The parties have filed supplemental briefs on the effect of *City of Littleton.* Dream Palace, in its brief, acknowledges that its original argument relying on *Baby Tam I* is now without merit.

[16] The Supreme Court's opinion in *City of Littleton* makes clear that the *FW/PBS* requirement of "prompt judicial review" must be read "as encompassing a prompt judicial decision." *Id.* at 2224. In other words, the First Amendment requires that an adult business subject to a licensing scheme not only have prompt *access* to the courts in the event the license is denied, but also receive a prompt *decision* from the courts on the legitimacy of such a denial. This follows, the Court explains, from two principles: first, that "the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech," *FW/PBS*, 493 U.S. at 228, 110 S.Ct. 596; and second, that "[a] delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being issued within a reasonable period of time." *City of Littleton*, 124 S.Ct. at 2224 (internal quotation marks omitted).

[17] Our task, then, is to determine whether Ordinance P-10, read in its proper context within Arizona law, provides for a sufficiently prompt judicial determination ***1003** of the legitimacy of a license denial. *City of Littleton* provides the starting point for that determination. At issue in that case was a licensing ordinance enacted by the city of Littleton, Colorado. Like Ordinance P-10, the Littleton ordinance required adult businesses to obtain a license in order to operate; also like Ordinance P-10, it set out a list of objective circumstances that, if present, required the city to deny the license application. *City of Littleton*, 124 S.Ct. at 2222 (citing Littleton City Code §§ 3-14-2, 3-14-3, 3-14-5, 3-14-7, 3-14-8). The Littleton ordinance provided that the city's final licensing decision could be "appealed to the [state] district court pursuant to Colorado rules of civil procedure." *Id.* (citing Littleton City Code § 3-14-8(B)(3)).

The Supreme Court held that by providing for judicial review through the ordinary process of Colorado state courts, the ordinance "offer[ed] adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming." *Id.* at 2224. In so holding, the Court explicitly accepted the argument that "the First Amendment does not require special 'adult business' judicial review rules." *Id.* Rather, the Court held, the regular judicial process of the Colorado state courts was sufficient "as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly." *Id.*

In effect, the Court in *City of Littleton* established a presumption that state courts function quickly enough, and with enough solicitude for the First Amendment rights of license applicants, to avoid the unconstitutional suppression of speech that arises from undue delay in judicial review. [FN8] The Court provided several reasons why ordinary state-court procedures suffice. First, state courts have tools at their disposal to expedite proceedings when necessary. *Id.* at 2224-25. Second, there is no reason to doubt that state judges are willing to use those procedures when necessary to keep justice delayed from

becoming justice denied; moreover, if some state court should fail in its duties, "federal remedies would provide an additional safety valve." *Id.* at 2225 (citing 42 U.S.C. § 1983). Third, the potential harm to First Amendment values is attenuated when the licensing decision depends on reasonably objective criteria, both because the use of objective criteria is "unlikely in practice to suppress totally the presence" of a certain form of protected expression, and because the use of objective criteria typically lends itself to "simple, hence expeditious" judicial review. *Id.* Fourth and finally, local governments often lack the legal authority to impose deadlines on state courts; thus, it is reasonable for them to depend on state-law procedural safeguards against undue delay. *Id.*

> FN8. This presumption applies to facial challenges to licensing ordinances. *City of Littleton*, 124 S.Ct. at 2226. License applicants may still bring an as-applied challenge to argue that a state is failing to provide adequate judicial review.

City of Littleton's presumption that regular state-court review is adequate applies equally to this facial challenge to Ordinance P-10. Each of the rationales for that presumption set out by the Court in *City of Littleton* applies here. First, the Arizona courts have procedural tools available should it be necessary to expedite the review of a license denial. *See* Ariz. R. Civ. P. 6(d) ("A judge of the superior court ... may issue an order requiring a party to show cause why the party applying for the order should not have the relief therein requested, and may make the order returnable at such time as the judge designates."); Ariz. R.P. Spec. Act. 4(c) ("[A] special action may be instituted with or ***1004** without an application for an order to show cause why the requested relief should not be granted. ... If a show cause procedure is used, the court shall set a speedy return date."); Ariz. R.P. Spec. Act. 4(c) (state bar committee's note) ("Special actions which require urgent disposition may be expedited under the show cause procedure established by the Rule, with complete flexibility in the Court to control timing."); *see also Green v. Superior Court*, 132 Ariz. 468, 470, 647 P.2d 166 (1982) ("[B]y virtue of" Rule 4(c), "matters ... may be determined as expeditiously as is necessary"). The ordinance ensures an applicant maximum judicial flexibility by requiring the county to "consent to expedited hearing and disposition" in state court.

Second, there is no reason to doubt--and Dream Palace has not disputed--that Arizona courts will be solicitous of the First Amendment rights of license applicants. Moreover, as the Supreme Court noted, federal remedies under 42 U.S.C. § 1983 are available should county and state procedures fail to suffice.

Third, as in *City of Littleton*, the licensing decision under Ordinance P-10 depends on a set of reasonably objective factors. Section 10(d) provides that the director of the county planning department "shall grant the license" unless any of several conditions is met, and these conditions (for example, that the applicant is not underage and has complied with applicable zoning ordinances) are reasonably objective. State courts should therefore have little difficulty in ensuring that county officials do not wrongfully deny license applications that meet the ordinance's requirements.

[18] Fourth, Maricopa County has no legal authority to impose deadlines on Arizona state courts. This fact, of course, would not ameliorate an otherwise unconstitutional prior restraint. When the First Amendment requires certain safeguards before a system of prior restraint may be enforced, a local government cannot evade that requirement by pointing to its lack of legal authority to ensure such safeguards exist. Nevertheless, nothing prevents a county from relying on state law procedures to ensure that First Amendment interests are adequately protected. *City of Littleton*, 124 S.Ct. at 2225; *cf. Graff v. City of Chicago*, 9 F.3d 1309, 1324 (7th Cir.1993) (en banc) (holding that it was constitutionally sufficient that review of licensing decisions was available by Illinois' common-law writ of certiorari). As long as those state procedures are themselves constitutionally adequate, the county will have satisfied the First Amendment's requirements.

In short, the ordinance in this case is similar in every relevant aspect to the ordinance upheld by the Supreme Court in *City of Littleton.* Moreover, Arizona's

rules of procedure "provide for a flexible system of review in which judges can reach a decision promptly in the ordinary case, while using their judicial power to prevent significant harm to First Amendment interests where circumstances require," *City of Littleton*, 124 S.Ct. at 2226. Such rules of procedure satisfy the First Amendment.

b

[19] In its supplemental briefing, Dream Palace advances two additional arguments for its claim that the ordinance does not provide constitutionally sufficient judicial review. First, it argues that under the "special action" procedure authorized by the ordinance, any review is purely at the court's discretion and hence not sufficiently guaranteed. Second, it argues that review in an Arizona special action is under an abuse-of-discretion standard, and that only *de novo* review is constitutionally adequate.

***1005** Dream Palace did not raise these arguments before the district court. Ordinarily, we decline to consider arguments raised for the first time on appeal. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 888 n. 4 (9th Cir.2002); *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir.1978). This rule serves to ensure that legal arguments are considered with the benefit of a fully developed factual record, offers appellate courts the benefit of the district court's prior analysis, and prevents parties from sandbagging their opponents with new arguments on appeal. We have, however, laid out several narrow exceptions to the rule--among them, the case in which "the issue is purely one of law, does not affect or rely upon the factual record developed by the parties, and will not prejudice the party against whom it is raised." *Janes*, 279 F.3d at 888 n. 4; *see also Patrin*, 575 F.2d at 712. That exception applies here. Dream Palace's new arguments are based entirely in law and do not rely on the factual record. Maricopa County will not be prejudiced by Dream Palace's failure to advance the arguments below; it has had, and has taken advantage of, a full opportunity to brief its response to the new arguments.

Even when a case falls into one of the exceptions to the rule against considering new arguments on appeal, we must still decide whether the particular circumstances of the case overcome our presumption against hearing new arguments. In this case, a decision of this Court bearing directly on the issue of judicial review of adult-business licensing decisions--*Baby Tam I*-- was displaced by a Supreme Court decision after the proceedings in the district court were complete. Thus, Dream Palace made its decision to rely below on *Baby Tam I* within a very different legal landscape from the one that now obtains. For that reason, we exercise our discretion to consider the new arguments advanced by Dream Palace.

i

[20] First, Dream Palace argues that the "special action" review provided for by the ordinance is inadequate because, under Arizona law, the exercise of jurisdiction in a special action is purely at the court's discretion. Thus, it contends, there is no guarantee that a court will hear the merits of a denied license applicant's claim.

The Supreme Court's holding that a "prompt judicial determination must be available," *FW/PBS*, 493 U.S. at 239, 110 S.Ct. 596, would be drained of its force if it did not mean that a would-be licensee whose application is denied must have access to a court that is required to review the license denial on its merits. We must therefore determine whether Arizona law so provides.

Ordinance P-10 provides that a final denial of a license application may be appealed to the Superior Court (the state trial court) "by special action or other available procedure." As the Supreme Court emphasized in *City of Littleton*, nothing requires a state or local government to write the details of judicial review procedures into the licensing ordinance. *See* 124 S.Ct. at 2226. Thus, if there is any procedural route by which an applicant may obtain full review on the merits, we must reject Dream Palace's argument.

The parties vigorously dispute whether the "special action" proceeding is constitutionally sufficient. The special action is a proceeding under Arizona law, created by rule in 1970, that takes the place of the old common law writs of certiorari, mandamus, and prohibition. A special action may be instituted in Superi-

or Court or in the appellate courts, *see* Ariz. R.P. Spec. Act. 4(a), but Ordinance P-10 authorizes appeal to the Superior Court and so it is that procedure that concerns us here.

When a plaintiff seeks special action review in the Superior Court, "the judge ***1006** must first exercise his discretion and decide whether to consider the case on its merits." *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92, 607 P.2d 965, 969 (1979). Were this discretion unbounded, the special action would, of course, provide no guarantee of judicial review on the merits. If, on the other hand, the judge's "discretion" does not include the ability to dismiss a petition where it is the only route by which the petitioner can bring a constitutional challenge, then the mere use of the term "discretion" will not prevent the review from being constitutionally sufficient. Arizona law in this area is not entirely pellucid. The Arizona Supreme Court has noted that "[t]he decision to accept jurisdiction of a special action petition is highly discretionary with the court in which the petition is filed." *Gockley v. Ariz. Dept. of Corrections*, 151 Ariz. 74, 75, 725 P.2d 1108, 1109 (1986). This statement seems, on its face, to suggest that a court could dismiss a petition for reasons unrelated to the constitutional merits of the claim, leaving a petitioner without remedy. The Court of Appeals' decision in *Bilagody*, however, suggests that a Superior Court would be abusing its discretion--and hence subject to reversal--if it were the only available venue for, and yet refused to hear, a claim that a license denial violated the First Amendment. In *Bilagody*, the Arizona Court of Appeals considered a Superior Court judge's decision to decline jurisdiction over a special action in which the plaintiff challenged, on due process grounds, the state's suspension of his driver's license. *See* 125 Ariz. at 89-92, 607 P.2d at 966-69. The court affirmed the dismissal "on the basis that the appellant had available an adequate remedy by appeal," 125 Ariz. at 92, 607 P.2d at 969, but added:

> Were we to conclude, however, that the due process issue could not subsequently be raised, it would be necessary to reconsider the scope of the trial court's discretion to refuse to decide the issue in a special action. As Justice Holmes once observed in another context: "(I)t is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to Courts otherwise competent."

125 Ariz. at 92 n. 4, 607 P.2d at 969 n. 4 (quoting *Kenney v. Supreme Lodge of the World, Order of Moose*, 252 U.S. 411, 415, 40 S.Ct. 371, 64 L.Ed. 638 (1920)). The court's language here strongly suggests that it is not within the Superior Court's discretion to refuse to consider the merits of that claim unless some other avenue is open for the petitioner's challenge. [FN9]

> FN9. If, for example, as we suggest below, an ordinary lawsuit or declaratory action would lie to contest a license denial, then a Superior Court might have discretion to dismiss a special action on that ground--but then (by hypothesis) the plaintiff would have constitutionally adequate judicial review through one of those procedural routes.

Arguing otherwise, Dream Palace points us to language in *State ex rel. Dean v. City Court of City of Tucson*, 123 Ariz. 189, 598 P.2d 1008 (1979), where the Court of Appeals noted that "[t]he denial of special action relief is a discretionary decision which will be upheld for any valid reason disclosed by the record." 123 Ariz. at 192, 598 P.2d at 1011. We have no reason to think, however, that the Arizona courts would find any "reason" to be "valid" that would deny a license applicant the review on the merits that the Constitution requires. *Cf. City of Littleton*, 124 S.Ct. at 2225 (finding "no reason to doubt" that Colorado state judges would exercise their powers so as to avoid First Amendment harms). *Dean* itself did not deal with a constitutional claim; it merely upheld a Superior Court's decision not to review the City of Tucson's challenge to a municipal ***1007** court's erroneous acquittal of a woman charged with a traffic violation, because double jeopardy principles would bar any further proceedings against her even if the City's claim were successful. At most, then, *Dean* held that denial of review in a special action proceeding is appropriate where a holding for the plaintiff would have no real effect. Thus, our reading of Arizona law inclines us to the view that the Superior Court does not have the kind of "discretion" over special action review that would render the process con-

stitutionally insufficient. *Cf.* *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir.1993) (en banc).

In any event, we need not delve deeper into the vagaries of Arizona civil procedure law, because the special action is not the only procedure available to contest a license denial. Ordinance P-10 authorizes appeal from a denial not only by special action, but also by any "other available procedure." [FN10] That would include, for example, a regular lawsuit seeking an injunction against the enforcement of the ordinance after a contested license denial. It would also include a suit under Arizona's declaratory judgment statute, A.R.S. § 12-1831 *et seq.*, which provides that

> [a]ny person ... whose rights, status or other legal relations are affected by a ... municipal ordinance ... may have determined any question of construction or validity arising under the ... ordinance ... and obtain a declaration of rights, status or other legal relations thereunder.

A.R.S. § 12-1832. Dream Palace argues that this language authorizes a declaratory action only to determine the constitutionality or meaning of an ordinance, not to contest the denial of a license application. But the statute permits a plaintiff to "obtain a declaration of rights" under an ordinance, and Ordinance P-10 gives a qualified applicant the right to a license. *See* Ordinance P-10, § 10(d) ("The Director *shall grant* the license ... to an applicant who has completed all requirements for application, unless the Director finds any of the following conditions ...." (emphasis added)). We see no reason why a declaratory action would not lie under these circumstances. Because these procedural routes--a suit for an injunction and a declaratory action--are open to an applicant whose license is denied, we need not conclusively resolve the parties' debate over the sufficiency of the special action proceeding.

ii

Dream Palace also argues that review in an Arizona special action is inadequate because it is under a deferential abuse-of-discretion standard. We disagree with that characterization of Arizona law. A court in a special action considers not only whether the defendant has abused his discretion, but also "[w]hether the defendant has failed ... to perform a duty required by law as to which he has no discretion." [FN11] Ariz. Rules of Procedure for Special Actions 3(a). Ordinance P-10 imposes a duty ***1008** on the county planning director to issue a license unless certain disqualifying conditions obtain; it gives the director no discretion to deny a qualified application. A reviewing court will thus have no reason to defer to the director's decision.

Dream Palace, however, argues that a special action court will defer to the county's determination of whether the facts establish a disqualifying condition. Again, we do not think this contention accurately reflects Arizona law. It is true that the Arizona Court of Appeals has held, in a case not involving the First Amendment, that a court hearing a special action challenge to an administrative decision "may not weigh the evidence on which the decision was based." *Ariz. Dep't of Public Safety v. Dowd*, 117 Ariz. 423, 426, 573 P.2d 497, 500 (Ariz.Ct.App.1977). But the Arizona Supreme Court has held that "appellate courts must engage in independent review of 'constitutional facts' in order to safeguard first amendment protections." *Dombey v. Phoenix News-*

FN10. The fact that a denied applicant can seek review other than through a discretionary writ distinguishes this case from *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville & Davidson County, Tenn.*, 274 F.3d 377 (6th Cir.2001). In *Deja Vu*, the Sixth Circuit held that a licensing ordinance that *required* an applicant to seek judicial review, if at all, via a discretionary writ unconstitutionally failed to guarantee a final judicial adjudication on the merits. *Id.* at 402-03.

FN11. Special action review also extends to the questions (1) "[w]hether the defendant has failed to exercise discretion which he has a duty to exercise"; (2) "[w]hether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority"; and (3) "[w]hether a determination was arbitrary and capricious or an abuse of discretion." Ariz. R.P. Spec. Act. 3.

papers, Inc., 150 Ariz. 476, 482, 724 P.2d 562, 568 (1986) (citing *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 512, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)). We have no reason to think that Arizona courts will not assiduously carry out their duty to ensure that meaningful judicial review is not evaded through biased factfinding.

Finally, as discussed above, a special action is not the only judicial procedure available to a denied license applicant, who may also obtain review through a suit for an injunction or declaratory relief. Neither of those procedures calls for any heightened deference on the part of the state court.

c

In light of *City of Littleton*, and having rejected both of Dream Palace's new arguments for its unconstitutionality, we are satisfied that Ordinance P-10 provides the opportunity for both access to judicial review and a prompt judicial decision, as the First Amendment requires. Of course, if some undiscovered quirk of state procedure were to prevent an applicant from receiving meaningful judicial review, a challenge to the ordinance as applied would lie in federal court. *See City of Littleton*, 124 S.Ct. at 2225 (citing 42 U.S.C. § 1983); *see also id.* at 2228 (Souter, J., concurring in part and in the judgment) ("If there is evidence of foot-dragging, immediate judicial intervention will be required, and judicial oversight or review at any stage of the proceedings must be expeditious.").

IV

Dream Palace also contests the adequacy of the procedural safeguards in the ordinance to sustain the validity of the prior restraints involved in the manager and dancer work permit requirements.

A

Sections 7 and 8 of the ordinance provide that adult-oriented business managers [FN12] and adult service providers [FN13] may ***1009** not work in an adult entertainment establishment unless they first secure permits. Ordinance § 7, 8. Application for said permits "shall be made in the same manner as application for an adult business license...." *Id.* The upshot is that all of the procedural safeguards with respect to the issuance of *business licenses*--the requirement of a speedy decision, and the provisions for administrative appeals and judicial review--apply equally to applications for work permits. Permit applicants are provided with an additional safeguard: upon receipt of a properly filed application, the county is required to issue a temporary permit to the applicant, *see id.* § 10(b), and in the event of an adverse decision on the application, the temporary permit remains in place until the exhaustion of the administrative and judicial review of that decision. *See id.* §§ 18, 19.

FN12. An adult-oriented business manager is "a person on the premises of an adult oriented business who is authorized to exercise overall operational control of the business." *See* Ordinance P-10 § 2.

FN13. An adult service provider is "any person who provides an adult service." *Id.* An adult service is "dancing, serving food or beverages, modeling, posing, wrestling, singing, reading, talking, listening or other performances or activities conducted for any consideration in an adult oriented business by a person who is nude or seminude during all or part of the time that the person is providing the service." *Id.*

B

1

[21] First, Dream Palace renews its argument that placing the burden of proof on managers and dancers in the administrative proceedings violates their First Amendment rights. For the reasons we previously stated, we reject this argument. *See supra* section III.C.1. Because the county "does not exercise discretion by passing judgment on the content of any protected speech," *FW/PBS*, 493 U.S. at 229, 110 S.Ct. 596, and because permit applicants have every incentive vigorously to pursue an administrative remedy in the event of an adverse decision on an application, requiring permit applicants to bear the burden of proof is valid under the First Amendment.

2

[22] Second, Dream Palace argues that requiring managers and dancers to exhaust their administrative

remedies prior to seeking judicial review constitutes a prior restraint. We reject this argument: we read nothing in the Supreme Court's decision in *FW/PBS* that signals disapproval with the common requirement that an applicant exhaust administrative remedies prior to seeking judicial review. We reiterate that the critical issues with respect to the applicant's First Amendment rights are "a specified and reasonable period during which the status quo is maintained," and the "possibility of prompt judicial review." *Id.* at 228, 110 S.Ct. 596.

Requiring administrative exhaustion implicates neither of these two constitutional prerequisites. The ordinance guarantees a "specified and reasonable time" within which an administrative decision must be made, and the applicant, temporary permit in hand, may continue to work pending the outcome of administrative and judicial review. *See* Ordinance P-10 § 10(b), 18, 19. *FW/PBS's* requirements are therefore satisfied. In *4805 Convoy,* we held that "*[o]nce administrative remedies have been exhausted,* a party whose license has been suspended or revoked may seek judicial review." 183 F.3d at 1114 (emphasis added). We make explicit now what was implicit in our decision in *4805 Convoy:* requiring applicants to exhaust administrative remedies prior to seeking judicial review does not violate the First Amendment, so long as an administrative decision is rendered within a specified, reasonable time, "during which time the status quo is maintained." *FW/PBS,* 493 U.S. at 228, 110 S.Ct. 596.

3

[23] Finally, Dream Palace's argument that placing the burden of seeking judicial review on managers and dancers constitutes a prior restraint is foreclosed by our decision in *Baby Tam III. See infra* n. 6. In *Baby Tam III,* we held that "placing the burden of instituting proceedings on the state does not apply to licensing ***1010** schemes such as the one challenged here." 247 F.3d at 1008.

V

Dream Palace's next challenge is to the disclosure requirements with respect to manager and employee work permit applications. Section 6 of the ordinance specifies the process applicants must follow in applying for a work permit, pursuant to which permit applicants are required to submit information regarding their full true names, including "aliases or stage names" previously used, as well their current residential address and telephone numbers. Section 9 in turn provides that any information a permit applicant submits to the county "shall be maintained in confidence ... subject only to the public record laws of the State of Arizona." Dream Palace's argument proceeds in two steps: First, it argues that requiring such disclosure *by itself* is invalid under the First Amendment. Second, and in the alternative, it asks for injunctive relief against disclosure of said information to the public. We take each step in turn.

A

[24] Dream Palace's assertion that requiring disclosure of information regarding names, addresses, and telephone numbers to the county violates the First Amendment is essentially foreclosed by our decision in *Kev, Inc. v. Kitsap County,* 793 F.2d 1053 (9th Cir.1986). In *Kev,* we considered a challenge to a city ordinance requiring nude dancers applying for a work permit to provide to the city their name, phone number, birth date, and aliases, past and present. *Id.* at 1059. We found that requiring disclosure of such information would not "discourage ... a prospective dancer from performing. None of the information required by the County unreasonably diminishes the inclination to seek a license." *Id.* Because the required disclosure did not "inhibit[ ] the ability or the inclination to engage in the protected expression," it was a valid licensing requirement. *Id.* at 1060. The required disclosures under the ordinance at issue in this case, and the city ordinance at issue in *Kev,* are indistinguishable, and *Kev* therefore controls. [FN14]

> FN14. We note that several other courts have struck down remarkably similar provisions to the one at issue in *Kev* and at issue in this case. *See, e.g., LLEH, Inc. v. Wichita County,* 289 F.3d 358, 370 (5th Cir.2002) (disclosure of "current residential address and telephone number" was not narrowly tailored); *Schultz v. City of Cumberland,* 228 F.3d 831, 852 (7th Cir.2000) (invalidating provision requiring disclosure of residential address and other information).

B

[25][26] Dream Palace urges in the alternative that, even if we find the required disclosures to the County valid, we should grant injunctive relief to prevent the county from disclosing that information to the public. The requirements for the issuance of a permanent injunction are (1) the likelihood of substantial and immediate irreparable injury; and (2) the inadequacy of remedies at law. *G.C. & K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1107 (9th Cir.2003). The district court's refusal to grant a permanent injunction is reviewed for an abuse of discretion. *Id.*

[27] The potential First Amendment problem here arises from the interplay between county and state law. While Section 9 of the ordinance provides that "information provided by an applicant in connection with the applicant for a license or permit under this ordinance shall be maintained in confidence by the Director," that confidentiality protection is "subject ... to the public record laws of the State of Arizona." Arizona law in turn provides that "[p]ublic records and other matters in ***1011** the custody of *any* officer *shall* be open to inspection by *any person* at *all times* during office hours." Az.Rev.Stat. § 39-121 (emphasis added). The county does not dispute that applicant information provided to the county is a "public record" within the meaning of this provision, and that those records are "presumed open to the public for inspection as public records." *Carlson v. Pima County*, 141 Ariz. 487, 490, 687 P.2d 1242 (1984). The public right of inspection may be overcome in the interest of "confidentiality, privacy, or the best interests of the state." *Id.* The State, however, "has the burden of overcoming the legal presumption favoring disclosure." *Scottsdale Unified School District No. 48 of Maricopa County v. KPNX Broadcasting Co.*, 191 Ariz. 297, 300, 955 P.2d 534 (1998) (quoting *Cox Az. Pubs., Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194 (1993)).

The potentially dangerous consequences that the interplay of these rules poses to permit applicants is obvious. Should an erotic dancer, say, wish to apply for a work permit, as required by the ordinance, he or she must provide information regarding true name, including aliases or other names used in the past five years, as well as current home address and telephone number. Under Arizona law, that information is *presumptively* available to anybody who pleases to ask for it, and the county, though it *may* refuse to provide such information to the public, has the burden in subsequent proceedings of overcoming the statutory presumption in favor of disclosure. The "confidentiality" provision included in the ordinance is essentially a nullity, because that provision is made "subject ... to the public record laws of the State of Arizona." Ordinance P-10 § 6. The exception therefore swallows the rule.

The Sixth Circuit confronted a similar problem in *Deja Vu of Nashville, Inc. v. The Metropolitan Gov. of Nashville & Davidson County, TN.*, 274 F.3d 377 (6th Cir.2001). The Nashville ordinance at issue in that case required permit applicants to divulge certain personal information about themselves, including their current and former residential addresses. *Id.* at 393. That information was presumptively available to the public pursuant to the Tennessee Open Records Act. *See id.* at 394. The court found there was "significant evidence that the requirement that applicants submit their names and past and current addresses to a public forum poses serious risks to their personal security." *Id.* at 394. The court concluded that "permit applicants' names and current and past residential addresses constitute[s] protected private information" and therefore it was "exempted from Tennessee's Open Records Act." *Id.* at 395.

In *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162 (5th Cir.2003), the Fifth Circuit reasoned similarly in reversing a Texas district court's injunction against a Houston ordinance that required employees and managers of adult entertainment businesses to divulge information regarding phone numbers and addresses to the city when applying for a permit. *Id.* at 195. The court held that state law already rendered the information confidential and unavailable to the public; thus, it reasoned, requiring applicants to supply the information did not infringe their First Amendment rights. *Id.* The Fifth Circuit panel therefore reversed the Texas district court's injunction. It did not disagree that where there is no guarantee of confidentiality, "concerns about public disclosure ... are not inconsequential." *N.W. Enters. v. City of Houston*, 27 F.Supp.2d 754, 842 (S.D.Tex.1998), *rev'd in*

part, 352 F.3d at 198. As the district court in *N.W. Enterprises* reasoned:

> Adult entertainers may anonymously (or through stage names) put their bodies ***1012** on display in front of strangers, but these actions do not imply a willingness to publicize the entertainers' personal information through which customers or other private persons may trace the entertainers to their homes or otherwise invade their privacy without permission. The fact that an entertainer is willing to dance publicly or a manager is willing to be employed in a sexually oriented business that deals with the public, or the fact that a determined harasser or stalker might conceivably follow an entertainer home after she leaves work, does not mean that adult entertainers and managers have voluntarily sacrificed all privacy rights and need for safety protections.

Id. at 842-43.

In *Clark*, we ourselves recognized the potential danger from public disclosure of information provided to the government in the course of applying for a work permit posed for nude dancers, albeit in the course of deciding whether or not an owner-operator of a nude dancing club had overbreadth standing to raise the rights of his managers and employees. *See* *Clark*, 259 F.3d at 1010. We recognized in that case the possibility "that cabaret patrons could obtain such personal information and harass the entertainers at their homes, or worse." *Id.* at 1010. Because of the potential danger, we concluded that "there is a risk cabaret employees will engage in self-censorship and avoid participating in protected activity ...." *Id.*

[28] We agree with this analysis. The First Amendment does not permit the county to put employees of adult entertainment establishments to the choice of either applying for a permit to engage in protected expression in circumstances where they expose themselves to "unwelcome harassment from aggressive suitors and overzealous opponents" of such activity, *N.W. Enters.*, 27 F.Supp.2d at 842, or of choosing *not* to engage in such activity out of concern for their personal safety. The chilling effect on those wishing to engage in First Amendment activity is obvious. Given the choice with which they are faced, we think it likely that those willing to engage in such activity will decline to do so, and Dream Palace has introduced affidavit testimony to that effect.

Because the interplay of county and state law on this point "inhibits the ability or the inclination to engage in ... protected expression," *Kev*, 793 F.2d at 1060 (citing *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945)), we must conclude that the district court abused its discretion in refusing to enjoin the county from disclosing to members of the public information provided to it from permit applicants. Upon remand, the district court shall grant an appropriate injunction in accordance with this opinion.

VI

A

We turn now to Dream Palace's challenges to certain operating restrictions contained in the ordinance, the first of which is to the prohibition on the provision of adult services between the hours of 1:00 a.m. and 8:00 a.m. on Monday through Saturday or between the hours of 1:00 a.m. and 12:00 noon on Sunday. *See* Ordinance P-10 § 13(f). Our consideration of Dream Palace's challenge is largely controlled by our recent decision in *Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir.2003). In that case, we joined six other circuits [FN15] in holding that ***1013** hours of operation restrictions on adult entertainment businesses were constitutional under the secondary effects test so long as the "predominate concerns" motivating the ordinance were "the secondary effects" of adult speech. *See* *id.* at 1160. Of course, that we have established the *general* proposition that hours of operation restrictions may pass muster under the First Amendment does not relieve us of our duty to put the county to its proof in *this* case. *Compare* *DiMa Corp.*, 185 F.3d at 826 (Seventh Circuit holds town ordinance regulating hours of operation valid under *Renton*), *with* *Schultz*, 228 F.3d at 846 (Seventh Circuit evaluates anew whether city has met its evidentiary burden under *Renton*).

> FN15. *See* *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir.1999); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir.1998); *Richland Bookmart*,

Inc. v. Nichols, 137 F.3d 435 (6th Cir.1998); *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir.1995); *Mitchell v. Comm'n on Adult Enter. Est. of the State of Delaware*, 10 F.3d 123 (3d Cir.1993); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir.1986).

The familiar three-part analytical framework established in *Renton* applies. [FN16] First, we must determine whether the regulation is a complete ban on protected expression. *Renton*, 475 U.S. at 46, 106 S.Ct. 925. Second, we must determine whether the county's purpose in enacting the provision is the amelioration of secondary effects. *Id.* at 47. If so, it is subject to intermediate scrutiny, and we must ask whether the provision is designed to serve a substantial government interest, and whether reasonable alternative avenues of communication remain available. *Id.*

FN16. In *Fair Public Policy*, we rejected the contention that Justice Kennedy's separate concurrence in *Alameda Books* signaled a departure from the traditional *Renton* analysis. *Id.* at 1162-63. As we explained, the argument that Justice Kennedy meant to require heightened scrutiny of restrictions of the type at issue here "cannot be squared with his insistence that 'the central holding of *Renton* remains sound.' " *Id.* at 1162 (quoting *Alameda Books*, 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring)). Nor is the proposition that a new and different approach is required in the wake of his concurrence consistent with the weight of authority in the wake of that decision. *See id.* at 1163. (citing *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 721 (7th Cir.2003), *Z.J. Gifts D-4, LLC v. City of Littleton*, 311 F.3d 1220, 1239 n. 15 (10th Cir.2002), and *World Wide Video of Wash., Inc. v. City of Spokane*, 227 F.Supp.2d 1143, 1149 (E.D.Wash.2002)).

B

1

Our first task is to determine whether § 13(f) amounts to a complete ban on protected expressive activity. *Renton*, 475 U.S. at 46, 106 S.Ct. 925; *Alameda Books*, 535 U.S. at 434, 122 S.Ct. 1728 (plurality opinion); *Fair Public Policy*, 336 F.3d at 1164. Section 13(f) is obviously not a complete ban, prohibiting as it does the provision of adult services during certain nighttime hours and until noon on Sundays. "The ordinance is therefore properly analyzed as a time, place, and manner regulation." *Renton*, 475 U.S. at 46, 106 S.Ct. 925.

2

[29] Second, we must determine whether section 13(f) is designed to combat the secondary effects of adult entertainment establishments on the surrounding community, "namely at crime rates, property values, and the quality of the city's neighborhoods." *Alameda Books*, 535 U.S. at 434, 122 S.Ct. 1728 (plurality opinion). We look to the full record to determine whether the purpose of the statute is to curb secondary effects. *Fair Public Policy*, 336 F.3d at 1165 (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 552 (9th Cir.1998)). In doing so, we will "rely on all objective indicators of intent, including the face of the statute, the effect ***1014** of the statute, comparison to prior law, facts surrounding enactment, the stated purpose, and the record of proceedings." *Colacurcio*, 163 F.3d at 551 (internal quotation omitted).

All objective indicators are that, in prohibiting the provision of adult service during nighttime hours, the county's predominant concern was with the amelioration of secondary effects. As with the statute at issue in *Fair Public Policy*, section 13(f) here applies to establishments protected by the First Amendment--adult movie theaters, book stores and video stores--and establishments that enjoy no such protection: massage parlors. *See* Ordinance P-10 § 2. *Fair Public Policy*, 336 F.3d at 1165. Justice Kennedy in *Alameda Books* found it significant that the ordinance at issue in that case was "not limited to expressive activities. It also extends ... to massage parlors, which the city has found to cause similar secondary effects." 535 U.S. at 447, 122 S.Ct. 1728 (Kennedy, J., concurring).

Section 1 of the ordinance, moreover, amounts to a

declaration of purpose, wherein the county board acknowledges that "adult oriented businesses may and do generate secondary effects that are detrimental to the public health, safety and welfare." Specifically, those secondary effects include prostitution, drug abuse, health risks associated with HIV/AIDS, and infiltration and proliferation of organized crime for the purpose of drug and sex related business activities. *Id.* Specifically, for our purposes, section 1 states that the "Board of Supervisors finds that the harmful secondary effects of adult oriented businesses are more pronounced when conducted continuously or during late night hours." The "stated purpose" is yet another objective indicator of the board's intent. *See Colacurcio*, 163 F.3d at 552.

Finally, all of the pre-enactment evidence before the board deals with the secondary effects associated with adult entertainment establishments. Board members were presented with a memo summarizing some seventeen secondary effects studies, and were provided with copies of secondary effects studies from Phoenix and Los Angeles. The board also held public hearings at which they heard testimony with respect to the need for reasonable regulation of adult-oriented establishments so as to curb the secondary effects associated with said establishments. *See Fair Public Policy*, 336 F.3d at 1167 (noting all documentary and testimonial evidence presented to Arizona legislature dealt with secondary effects). In short, an examination of the record in this case leads ineluctably to the conclusion that, in seeking to regulate the hours of operation of adult-oriented establishments, the county's predominant purpose was the amelioration of secondary effects. *Colacurcio*, 163 F.3d at 552; *Fair Public Policy*, 336 F.3d at 1165-66.

3

Since the county's purpose was to target secondary effects, the hours of operation restriction will be upheld if it is designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication. *Renton*, 475 U.S. at 50, 106 S.Ct. 925; *Fair Public Policy*, 336 F.3d at 1166.

a

[30][31] The county has a substantial interest in curbing the secondary effects associated with adult entertainment establishments. *See Young*, 427 U.S. at 71, 96 S.Ct. 2440 (finding city's "interest in attempting to preserve the quality of urban life is one that must be accorded high ***1015** respect."). We recognized in *Fair Public Policy* that the specific interest in reducing secondary effects associated with late night operations is a substantial one. 336 F.3d at 1166; *see also National Amusements*, 43 F.3d at 741 (city has a substantial interest in preserving peace and tranquility for citizens during late evening hours); *Richland Bookmart*, 137 F.3d at 440-41 (deterring "prostitution in the neighborhood at night or the creation of 'drug corners' on the surrounding streets" is a substantial interest).

Under *Renton*, of course, the critical issue is whether or not the state has come forward with evidence demonstrating a connection between the speech regulated and the secondary effects that motivated the adoption of the ordinance. *Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728 (plurality opinion) (discussing *Renton* test). The evidentiary burden is not high: the county will prevail as long as it can demonstrate that it relied on evidence that is "reasonably believed to be relevant for demonstrating a connection between speech and a substantial independent government interest." *Id.*

The pre-enactment evidence before the Maricopa County Board consists of certain documentary evidence. Board members were provided with four-page and fourteen-page reports summarizing the findings of secondary effects studies conducted in various other cities and counties. Board members were also provided with copies of secondary effects studies conducted in Phoenix, Arizona, and Los Angeles, California. The board also heard limited testimonial evidence concerning the need for regulation to curb secondary effects on surrounding neighborhoods.

All of this evidence fairly supports the rationale behind § 13(f): namely, prohibiting adult entertainment establishments from operating during late night hours will lead to a reduction in secondary effects. The record in this case compares favorably to the record found to pass muster in *Fair Public Policy*, 336 F.3d at 1168. In that case, we characterized the pre-

enactment record as "a slim one." *Id.* at 1167. It consisted of letters on the record documenting the problems associated with adult entertainment businesses, as well as testimonial evidence regarding the late night effects of such establishments. *Id.* The evidence before the Maricopa County Board also compares favorably to the record in *Mitchell*, where lawmakers "received no documents or any sworn testimony in support of the bill." 10 F.3d at 133. Yet the Third Circuit in *Mitchell* held that the state had met its evidentiary burden under *Renton.* In *Ben Rich Trading*, all that the city relied on was evidence presented to the state legislature two-years previously. 126 F.3d at 161. In that case, too, the city had met its burden under *Renton. See id.*

The question is whether the county board relied on evidence "reasonably believed to be relevant" in demonstrating a connection between its rationale and the protected speech, and it has done that here. The answer is that the county board considered comprehensive summaries detailing findings from other jurisdictions, examined two full studies from Los Angeles and Phoenix, and heard limited testimonial evidence concerning the need for reasonable regulation. All of the evidence it considered is both "reasonable and relevant, and compares favorably with the evidence presented in other cases." *Fair Public Policy*, 336 F.3d at 1168. Since Dream Palace has failed to cast doubt on the state's theory, or on the evidence the state relied on in support of that theory, our precedent "commands that [we] should not stray from a deferential standard in these contexts, even when First Amendment rights are implicated through secondary effects." ***1016***Charter Comm's, Inc. v. County of Santa Cruz*, 304 F.3d 927, 932 (9th Cir.2002). We are satisfied that the County has met its burden under *Renton.*

b

The narrow tailoring requirement is satisfied so long as the government's asserted interest "would be achieved less effectively absent the regulation." *Colacurcio*, 163 F.3d at 553 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Plainly, the government's interest in curbing the secondary effects associated with late night operation of adult entertainment businesses would be achieved less effectively in the absence of § 13(f). [FN17] We conclude that the ordinance's hours of operation provision satisfies the narrow tailoring requirement.

> FN17. Dream Palace argues that section 13(f) is overly-broad because it prohibits the provision of "sexually related activities" prior to noon on Sundays, but we rejected this argument in *Fair Public Policy.* This argument "confuses the requirement that a regulation serve a substantial government interest with the requirement that it be narrowly tailored to that end." *Id.* at 1169 (quoting *Lady J. Lingerie*, 176 F.3d at 1365). The sort of line-drawing Dream Palace urges us to engage in "is inconsistent with a narrow tailoring requirement that only prohibits regulations that are substantially broader than necessary." *Id.* (internal quotation marks omitted).

c

[32] Finally, the ordinance must "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. As with the statute at issue in *Fair Public Policy*, 336 F.3d at 1170, section 13(f) permits the businesses that come within its purview to operate seventeen hours per day Monday through Saturday, and thirteen hours on Sunday, or approximately 5,980 hour per year. It therefore leaves open ample alternative channels for communication. The hours of operation restriction is therefore valid under the First Amendment. [FN18]

> FN18. We note also that there is no merit to Dream Palace's contention that the hours of operation restriction is unconstitutionally "underinclusive" because it singles out adult entertainment establishments for "special treatment." Dream Palace repeats this "underinclusiveness" argument with respect to several other provisions in the ordinance. We rejected precisely the same argument in *Fair Public Policy*, and we do so again. Simply put, the *Renton* framework is *all about* singling out adult and erotic entertainment, so long as the government does so for the

right reasons. "[T]he State may legitimately use the content of these materials as the basis for placing them in a different classification...." *Young*, 427 U.S. at 70-71, 96 S.Ct. 2440. *See also Isbell v. City of San Diego*, 258 F.3d 1108, 1116 (9th Cir.2001) (the state "may choose to treat adult businesses differently from other businesses").

VII

[33] Dream Palace next challenges the requirement that managers must wear an identification card during work hours. Pursuant to section 12 of the ordinance, managers are provided with a "work identification card," which contains a photograph, a permit number, and the date of expiration of the permit. Section 13(i) in turn provides that a manager "shall wear his or her identification" at all times during work hours. The card must be affixed to the front of the manager's clothing, so that the picture and permit numbers are clearly visible. Ordinance P-10 § 13(h).

At oral argument, Dream Palace conceded that its primary concern with respect to this requirement was the possibility that an unsatisfied customer, armed with a manager's permit number from the manager's identification card, may proceed to the county offices and make a request pursuant to Arizona's Public Records Act for the manager's home address and telephone number. It further conceded that ***1017** should we grant relief with respect to the disclosure requirements, it no longer objects to section 13(i)'s identification requirement. Since we are instructing the district court to enter an injunction prohibiting public disclosure of that information pursuant to such a request, *see supra* section V.B, the basis for Dream Palace's challenge vanishes. Hence, we conclude that this portion of Dream Palace's challenge is moot.

VIII

[34] Dream Palace also challenges the requirement that managers obtain work permits in the first place, claiming there is no evidence in the legislative record to support the county's position that licensing managers aids in its efforts to combat secondary effects, and that therefore the requirement is invalid under *Renton*. Like any other restraint upon nude dancing, the manager permit requirement can be imposed only if it is a reasonable time, place, and manner restriction. *See Clark*, 259 F.3d at 1005; *United States v. Baugh*, 187 F.3d 1037, 1042 (9th Cir.1999).

The legislative record in this case indicates that adult businesses are associated with a variety of secondary effects, such as the presence of organized crime and money laundering, which directly involve employees in management positions. It is reasonable for the county to suppose that it can combat these negative secondary effects by the permit process, which screens out potential managers with a criminal history. The other secondary effects associated with adult clubs--sex and drug offenses, health risks, and the like--can all be controlled to some extent by management-level employees. The record therefore contains ample evidence to support the requirement that a manager first obtain a license. The county has met its burden of demonstrating a connection between the burden it imposes on speech and a substantial government interest. *Alameda Books*, 535 U.S. at 441-42, 122 S.Ct. 1728 (plurality opinion).

IX

Dream Palace's challenge to the ban on "specific sexual activity" presents a much more difficult question. The prohibition has to be understood in the context of several other provisions in the ordinance, starting with the proposition that the ordinance regulates "adult oriented businesses." Those businesses are "adult arcades, adult bookstores or adult video stores, cabarets, adult live entertainment establishments, adult motion picture theaters, adult theaters, [and] massage establishments that offer adult service or nude model studies." Ordinance P-10 § 2. Each of these terms is in turn defined under the ordinance. An "adult live entertainment establishment," of which Dream Palace is one, is an establishment that features "persons who appear in a state of nudity" or "live performances that are characterized by the exposure of specific anatomical areas or specific sexual activities." *Id.* Each of the business definitions incorporates the term "specific sexual activity."

"Specific sexual activity," in turn, means any of the following: (1) "human genitals in a state of sexual stimulation or arousal"; (2) "sex acts, normal or perverted, actual or simulated, including acts of human

masturbation, sexual intercourse, oral copulation or sodomy"; (3) "fondling or other erotic touching of the human genitals, pubic region, buttocks, anus or female breast"; and (4) "excretory functions as part of or in connection with any of the activities" listed above. *Id.*

Section 13(e), the challenged provision, provides that an "adult service provider, in the course of providing an adult service, may not perform a specific sexual activity." An adult service is, among other things, ***1018** "dancing, ... modeling, posing, ... singing, reading, talking, listening or other performances or activities ... by a person who is nude or seminude." *Id.* § 2. Nude, nudity or a "state of nudity" means "[t]he appearance of a human anus, or female breast below a point immediately above the top of the areola" or "[a] state of undress which fails to opaquely cover a human anus, genitals or female breast below a point immediately above the top of the areola." *Id.* Seminude means "a state of dress in which clothing covers no more than the genitals, pubic region and female breast below a point immediately above the top of the areola, as well as portions of the body that are covered by supporting straps or devices."

A

Section 13(e) proscribes activity that comes within the First Amendment's protections. In prohibiting dancers from engaging in "simulated sex acts," whatever they may be, the county appears to have proscribed the particular movements and gestures that a dancer may make during the course of a performance. One is left to speculate as to what movements, precisely, a dancer may incorporate in a performance without running afoul of section 13(e), and yet still effectively convey an essentially adult, erotic, message to the audience. The prohibition applies even if the dancer is at least partially clothed. If Elvis' gyrating hips can fairly be understood to constitute a "simulated sex act," one can fully appreciate the potential scope of the restrictions placed on erotic dancers in Maricopa County.

The problem lies in the circularity of the ordinance's logic: Section 13(e) forbids certain expressive activity--simulated sex acts--*only* within adult-oriented businesses but not elsewhere. But the ordinance defines adult-oriented businesses as those that feature performances "characterized by the exposure of specific anatomical areas or specified sexual activities." The ordinance defines adult entertainment businesses by reference to the presentation of adult live entertainment, then forbids that presentation. To wit, Dream Palace is an adult entertainment business because it features nude and semi-nude dancers engaging in "specific sexual activity," and as a result, it is prohibited from featuring nude or semi-nude "specific sexual activity." Dream Palace therefore finds itself in a catch-22: there is no way for it to comply with the ordinance, unless it simply ceases to engage in protected expression entirely, and hence falls outside of the scope of the ordinance altogether.

B

[35] This is a total ban on nude and semi-nude dancing in everything but name, and indeed the county concedes as much, arguing that it is empowered to effect such a ban on the specific movements a dancer may, or more precisely may not, make, pursuant to its general police power. It relies on *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), for this proposition.

In *LaRue*, the Supreme Court upheld a facial challenge to California regulations enacted in response to live sex shows and sexual contact between nude performers and patrons in establishments licensed to sell liquor. 409 U.S. at 111, 93 S.Ct. 390. The record in that case was "a sordid one," and consisted of testimony regarding customers engaging in oral copulation with dancers, public masturbation, and numerous other contacts between male customers and female performers. *Id.* The Court concluded that the regulation was permissible because of the "critical fact ... that California has *not* forbidden these performances across the board. It has merely***1019** proscribed such performances in establishments it licenses to sell liquor by the drink." *Id.* at 118, 93 S.Ct. 390 (emphasis added). The Court stated that the Twenty-First Amendment required an "added presumption in favor of the validity of state regulation in this area." *Id.* The Court later disowned its reliance on the Twenty-first Amendment in *44 Liquormart*, 517 U.S. at 514-16,

116 S.Ct. 1495, stating that "the States' inherent police powers provide ample authority to restrict the kind of 'bacchanalian revelries' described in the *LaRue* opinion regardless of whether alcoholic beverages are involved .... *see, e.g., Young* [and] *Barnes* ...." *Id.* at 515, 116 S.Ct. 1495.

LaRue and *44 Liquormart* do not support the county's proposition. *LaRue* rested squarely on the "critical fact" that California had not enacted an "across the board" ban, but rather prohibited such performances in establishments it licenses to sell alcohol. That is not the case here; the Maricopa County ban on "specified sexual activities" is sweeping in its scope, and is not limited to establishments holding a liquor license. More important, the record before the legislature in *LaRue* spoke more to a "gross sexuality than of communication," 409 U.S. at 118, 93 S.Ct. 390, and contained a litany of recorded incidents of open copulation between the dancers and patrons, as well as public masturbation, prostitution, and the like.

The ordinance, however, strictly prohibits *any* contact between patrons and performers. *See* Ordinance P-10 § 13(j). Further, the stage on which performances take place must be elevated, patrons must stay at least three feet away from performers, and are separated from them by a barrier or a railing, over which neither a patron nor a performer may extend "any part of his or her body." *Id.* § 13(d). All performances must take place within a manager's sight line, *id.* § 13(g), and patrons are prohibited from tipping performers while the performer is "nude or seminude." *Id.* § 13(*l*). The county has taken reasonable steps to guard against the kind of "gross sexual conduct" or "bacchanalian revelries" that were the target of the regulation in *LaRue.*

After the ordinance takes those steps, however, it goes further, and restricts the *particular* movements and gestures a dancer may or may not make during the course of a performance. *44 Liquormart* did not suggest, as the county contends, that the government may, pursuant to its "general police power," restrict constitutionally protected expression. The Court's citations to *Young* and *Barnes* immediately after the passage on which the county relies, both cases that apply First Amendment scrutiny to ordinances regulating adult entertainment businesses, make this amply clear. Whatever the scope of the county's asserted police power, it "must be exercised within constitutional limits." *Moore v. East Cleveland,* 431 U.S. 494, 514, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (Stevens, J., concurring).

C

[36] The county's fallback argument is that section 13(e) is valid under *Renton.* While the county is on firmer ground here, we remain unconvinced of the soundness of its position. *Renton* and its progeny do not give carte blanche to the government to proscribe absolutely certain types of adult entertainment. Rather, *Renton* effects a common-sense balance between the government's undoubted interest in curbing the effects such businesses have on surrounding communities on the one hand, and the enjoyment of, and practice in, protected expression on the other. Its rationale is that content-discriminatory time, place, and manner regulations receive intermediate scrutiny *only* when the ***1020** government avoids a total ban on protected expression, and when its predominant interest, supported by an evidentiary record, is in the amelioration of secondary effects. 475 U.S. at 54, 106 S.Ct. 925.

The county's bid for intermediate scrutiny fails to clear the first hurdle, because section 13(e) effects a *total* ban on a particular kind of erotic expression at *all times* and in *every part* of the county. The argument that section 13(e) is really just a plain old time, place and manner restriction because it prohibits only certain expressive activity in certain *types* of establishments but not elsewhere does not work because, for reasons explained earlier, the only way an establishment fits within the ordinance in the first place is if it engages in that which the ordinance prohibits.

The prohibition Maricopa County has put in place is quite different from any of the regulations the Supreme Court has considered in the *Renton* line. The *Renton* ordinance itself was a classic content-discriminatory time, place, and manner regulation. While it targeted adult entertainment on the basis of its content, the ordinance did "not ban adult theaters altogether." 475 U.S. at 46, 106 S.Ct. 925. Instead, it imposed restrictions on where such establishments

could operate in order to protect residential neighborhoods. *Id.* Consequently, it was subject to intermediate instead of strict scrutiny. *Id.* The same is true of the *Young* ordinance, which imposed geographic zoning restrictions on adult entertainment. 427 U.S. at 62, 96 S.Ct. 2440. So long as an establishment complied with the regulation, it was free to provide adult entertainment "essentially unrestrained." *Id.* The Court specifically noted in that case that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 71 n. 35, 96 S.Ct. 2440; *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 71, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("The Court [in *Young*] did not imply that a municipality could ban all adult theaters--much less all live entertainment or all nude dancing--from its commercial districts citywide.").

Other cases in the *Renton* line have drawn intermediate scrutiny because, even though they incidentally burdened expression, they were facially content-neutral laws of general applicability. In *Barnes*, the Court dealt with a state statute prohibiting nudity in public places "across the board" in a facially content-neutral manner. 501 U.S. at 566, 111 S.Ct. 2456. The statute on its face was "not at all inherently related to expression," *id.* at 585, 111 S.Ct. 2456 (Souter, J., concurring), and was therefore subject to intermediate scrutiny. The city ordinance in *Erie* was also a content-neutral proscription of public nudity. In upholding the ordinance, the Court explained that "[b]eing 'in a state of nudity' is not an inherently expressive condition.... By its terms, the ordinance regulates conduct alone. *It does not target nudity that contains an erotic message;* rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity." 529 U.S. at 289-90, 120 S.Ct. 1382 (emphasis added). The prohibition at issue in this case is of a different order. It is not a content-discriminatory time, place and manner regulation, so it is not like the ordinances at issue in *Renton* and *Young.* Nor is it a facially-neutral law of general applicability, so it is not like the ordinances in *Barnes* and *Erie.* Section 13(e) "does not ... simply ban or restrict certain conduct, irrespective of any message that the conduct may be intended to convey; instead, by its own terms the Ordinance is directed to activity that conveys eroticism or sexuality." *Brownell*, 190 F.Supp.2d at 489.

***1021** The Seventh Circuit considered the same prohibition on "specific sexual activity" in *Schultz*, 228 F.3d at 846-48, and struck it down as an unconstitutional infringement on protected expression.

> By restricting the particular movements and gestures of the erotic dancer ... the Ordinance unconstitutionally burdens the protected expression. The dominant theme of nude dance is an emotional one; it is one of eroticism and sensuality. [The Ordinance] deprives the performer of a repertoire of expressive elements with which to craft an erotic, sensual performance and thereby interferes substantially with the dancer's ability to communicate her erotic message. It interdicts the two key tools of expression in this context that imbue erotic dance with its sexual and erotic character--sexually explicit dance movements and nudity....

Id. at 847 (internal citations and quotation marks omitted).

The Seventh Circuit further explained that the government could not hide behind *Renton* because "a secondary-effects rationale by itself does not bestow upon the government free license to suppress specific content of a specific message ...." *Id.* at 845. "[S]uch a regime would permit the government to single out a message expressly, formulate a regulation that prohibits it, then draw content-neutral treatment nonetheless simply by producing a secondary effects rationale as pretextual justification." *Id.* at 844; *see also Brownell*, 190 F.Supp.2d at 484-93 (following *Schultz* and striking prohibition on "specified sexual activities").

We are inclined to agree with the Seventh Circuit. Maricopa County cannot avoid the constitutional prohibition on proscribing non-obscene speech "by regulating nude dancing with such stringent restrictions that the dance no longer conveys eroticism nor resembles adult entertainment." *Schultz*, 228 F.3d at 844. Section 13(e), in preventing erotic dancers from practicing a protected form of expression, does precisely that.

We therefore apply strict scrutiny to section 13(e). To survive strict scrutiny, the provision must be tailored to "serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991). Section 13(e) is not necessary to serve Maricopa County's unquestioned significant interest in ameliorating secondary effects. The county can, and does, utilize a variety of less restrictive and more direct means to fight those effects. Nor has the county explained how the restriction will in fact further its interest in curbing secondary effects. Therefore, we must conclude that section 13(e) is an unconstitutional burden on the enjoyment of protected expression.

Our decision today does not necessarily imply that none of the activities listed in section 13(e) may be proscribed, consistent with the Constitution, through a well-crafted ordinance. *Cf. Brownell*, 190 F.Supp.2d at 492. Section 13(e) is far too broad, however, and restricts in sweeping terms the ability of erotic dancers to convey their intended erotic message. In defining establishments by reference to that which it prohibits, it amounts to an absolute ban on such activity in Maricopa County. For these reasons, section 13(e) is unconstitutional.

X

[37] In addition to the various First Amendment challenges to Ordinance P-10, Dream Palace sought invalidation of certain of its provisions on state law grounds. Specifically, Dream Palace sought summary judgment with respect to certain operating restrictions on the basis ***1022** that state law has preempted county law; it also sought invalidation of certain penalty provisions as ultra vires. The district court declined to reach these issues, and dismissed the claims, explaining that "the remaining state-law claims raise delicate issues involving the interpretation and application of Arizona law and the balance of powers within Arizona between state and local government." We review that decision for an abuse of discretion. *See Bryant v. Adventist Health Sys./West*, 289 F.3d 1162, 1165 (9th Cir.2002).

28 U.S.C. § 1367 affords district courts the discretion to decline to exercise jurisdiction over supplemental state law claims if, among other reasons, "the claim raises a novel or complex issue of State law," or "the district court has dismissed all claims over which it had original jurisdiction." Such is the case here: the district court had decided each and every claim over which it had original jurisdiction, and the remaining state law claims, concerning as they do issues of the balance of power between state and local authorities in Arizona, involved delicate issues of state law. While the district court had the *discretion* to reach and to decide these state law issues, we cannot say that its refusal to do so constituted an abuse of discretion. *See* 28 U.S.C. § 1367.

XI

[38][39] Finally, because we have declared Ordinance P-10 constitutionally invalid for some purposes but not for others, we must determine whether the valid portions can be severed from the invalid ones. "An entire statute need not be declared unconstitutional if constitutional portions can be severed." *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 151, 800 P.2d 1251 (1990). Under Arizona law, the test for severability requires ascertaining legislative intent. *Id.* "[T]he most reliable evidence of that intent is the language of the statute." *State v. Prentiss*, 163 Ariz. 81, 86, 786 P.2d 932 (1989). The Arizona Supreme Court has held that where "the valid parts of a statute are effective and enforceable standing alone and independent of those portions declared unconstitutional," a court should not disturb the valid part "if the valid and invalid portions are not so intimately connected as to raise the presumption the legislature would not have enacted one without the other, and the invalid portion was not the inducement of the act." *Selective Life Ins. Co. v. Equitable Life Assurance Soc'y*, 101 Ariz. 594, 599, 422 P.2d 710 (1967).

[40] Ordinance P-10 contains a robust severability clause: "Each section and each provision or requirement of any section of this ordinance shall be deemed severable and the invalidity of any portion of this ordinance shall not affect the validity or enforceability of any other portion." Ordinance § 25. Given that the county board has clearly expressed its intent with respect to severability, we think the invalid portions of the ordinance are easily severable. We hold unconstitutional the prohibition on specified sexual activity,

and have instructed the district court to enjoin the disclosure to the public of information provided by permit applicants. The vast majority of the provisions in the ordinance, including the licensing scheme, and multiple operating restrictions, withstand scrutiny. The invalid portions are, therefore, severable from the remainder, and the remaining valid portions may remain in force.

AFFIRMED in part, REVERSED in part, and REMANDED with instructions. Each party shall bear its own costs.

CANBY, Circuit Judge, concurring:

I concur in Judge O'Scannlain's well-written opinion. Were I writing on a blank slate, however, I would dissent from Section VI, which upholds the prohibition ***1023** against operation of adult-oriented businesses between the hours of 1:00 a.m. and 8:00 a.m. on Monday through Saturday, and 1:00 a.m. and 12:00 noon on Sunday. As Judge O'Scannlain's opinion recognizes, the result reached in Section VI is largely controlled by *Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir.2003). I dissented in that case because I was convinced, as I still am, that the hours restriction violated the holding of a majority of the Supreme Court (per Justice Kennedy) in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). The record in the present case is not sufficiently different from that in *Fair Public Policy* to lead me to a different conclusion. I recognize, however, that my view did not prevail in *Fair Public Policy*, and I am bound by that decision. I therefore concur fully in Judge O'Scannlain's opinion today.

APPENDIX

ORDINANCE NO. P-10

ADOPTED April 23, 1997

AMENDED July 23, 1997

AMENDED July 17, 1998

ADOPTED as AMENDED September 2, 1998

MARICOPA COUNTY ORDINANCE NO. 10

ADULT ORIENTED BUSINESSES AND ADULT SERVICE PROVIDERS

SECTION 1. FINDINGS

Based on public testimony and other evidence before it, including information, studies and court decisions from other jurisdictions, and in accordance with A.R.S. 11-821, the Maricopa County Board of Supervisors makes the following legislative findings and statement of purpose:

The Board of Supervisors recognizes that some activities which occur in connection with adult oriented businesses are protected as expression under the First Amendment to the United States Constitution. The Board of Supervisors further recognizes that First Amendment rights are among our most precious and highly protected rights, and wishes to act consistently with full protection of those rights. The Board is aware, however, that adult oriented businesses may and do generate secondary effects which are detrimental to the public health, safety and welfare. Among those secondary effects are (a) prostitution and other sex related offenses (b) drug use and dealing (c) health risks through the spread of AIDS and other sexually transmitted diseases and (d) infiltration by organized crime for the purpose of drug and sex related business activities, laundering of money and other illicit conduct. This ordinance is not intended to interfere with legitimate expression but to avoid and mitigate the secondary effects enumerated above. Specifically, the Board of Supervisors finds the licensing of persons who operate and manage adult oriented businesses and persons who provide adult services will further the goals of the ordinance by enabling the County to ascertain if an applicant is underage or has engaged in criminal or other behavior of the sort the ordinance is designed to limit. This information will enable the County to allocate law enforcement resources effectively and otherwise protect the community. The Board of Supervisors finds that limiting proximity and contact between adult service providers and patrons promotes the goal of reducing prostitution and other casual sexual conduct and the attendant risk of sexually transmitted diseases. The Board of Supervisors finds the foregoing to be true with respect to places where alcohol is served and

where it is not. The Board of Supervisors finds that individual and interactive sexual activities in adult video facilities pose a risk of sexually transmitted disease, especially AIDS, and ***1024** that the booth configuration options of the ordinance will reduce that risk. The Board of Supervisors finds that the harmful secondary effects of adult oriented businesses are more pronounced when conducted continuously or during late night hours. The fees established for licenses and permits in this ordinance are based on the estimated cost of implementation, administration and enforcement of the licensing program.

SECTION 2. DEFINITIONS

The following words, terms and phrases when used in this ordinance shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Adult Arcade means any place to which the public is permitted or invited and in which coin-operated or slug-operated or electronically, electrically or mechanically controlled still or motion picture machines, projectors or other image-producing devices are maintained to show images involving specific sexual activities or specific anatomical areas to persons in booths or viewing rooms.

Adult Bookstore or **Adult Video Store** means a commercial establishment that offers for sale or rent any of the following as one of its principal business purposes:

(1) Books, magazines, periodicals or other printed matter, photographs, films, motion pictures, video cassettes or video reproductions or slides or other visual representations that depict or describe specific sexual activities or specific anatomical areas; or

(2) Instruments, devices or paraphernalia that are designed for use in connection with specific sexual activities.

Adult Live Entertainment Establishment means an establishment that features either:

(1) Persons who appear in a state of nudity; or

(2) Live performances that are characterized by the exposure of specific anatomical areas or specific sexual activities.

Adult Motion Picture Theater means a commercial establishment in which for any form of consideration films, motion pictures, video cassettes, slides or other similar photographic reproductions that are characterized by the depiction or description of specific sexual activities or specific anatomical areas are predominantly shown.

Adult oriented business means adult arcades, adult bookstores or adult video stores, cabarets, adult live entertainment establishments, adult motion picture theaters, adult theaters, massage establishments that offer adult service or nude model studios.

Adult oriented business manager or **"manager"** means a person on the premises of an adult oriented business who is authorized to exercise overall operational control of the business.

Adult service means dancing, serving food or beverages, modeling, posing, wrestling, singing, reading, talking, listening or other performances or activities conducted for any consideration in an adult oriented business by a person who is nude or seminude during all or part of the time that the person is providing the service.

Adult service business means a business establishment or premises where any adult service is provided to patrons in the regular course of business.

Adult service provider or **"provider"** means any person who provides an adult service.

Adult theater means a theater, concert hall, auditorium or similar commercial establishment that predominantly features ***1025** persons who appear in a state of nudity or who engage in live performances that are characterized by the exposure of specific anatomical areas or specific sexual activities.

Booth means a partitioned area, in which coin or token operated video machines, projectors or other electronically or mechanically controlled devices are used in the regular course of business to produce still or moving picture images characterized by depiction of specific sexual activities or specific anatomical areas.

Cabaret means an adult oriented business licensed to provide alcoholic beverages pursuant to A.R.S. Title 4, Chapter 2, Article 1.

County Sheriff means the elected County Sheriff or the Sheriff's designee.

Director means the director of Maricopa County Planning and Development Department or the Director's designee.

Employee means any person hired, engaged or authorized to perform any service on the premises of an adult service business, including an adult service provider, whether denominated as an employee, independent contractor or otherwise.

Enterprise means a corporation, association, labor union or other legal entity, as provided in A.R.S. 13-105.

License means the license required by this ordinance as a condition to conducting an adult oriented business.

Licensee means a person or enterprise holding an adult oriented business license issued under this ordinance, including those persons required to provide information under section 6 of this ordinance.

Manager's station means a permanently designated area marked accordingly within an adult oriented business where an adult oriented business manager is located in the normal course of operations.

Massage Establishment means an establishment in which A person, firm, association or corporation engages in or permits massage activities, including any method of pressure on, friction against, stroking, kneading, rubbing, tapping, pounding, vibrating or stimulating of external soft parts of the body with the hands or with the aid of any mechanical apparatus or electrical apparatus or appliance. This definition shall not apply to:

(1) Physicians licensed pursuant to A.R.S. Title 32, Chapter 7, 8, 13, 14 or 17;

(2) Registered nurses, licensed practical nurses or technicians who are acting under the supervision of a physician licensed pursuant to A.R.S. Title 32, Chapter 13 or 17;

(3) Persons employed or acting as trainers for any bona fide amateur, semiprofessional or professional athlete or athletic team;

(4) Persons who are licensed pursuant to A.R.S. TITLE 32, Chapter 3 or 5, if the activity is limited to the head, face or neck.

Nude Model Studio means a place in which a person who appears in a state of nudity or who displays specific anatomical areas is observed, sketched, drawn, painted, sculptured, photographed or otherwise depicted by other persons who pay money or other consideration. Nude model studio does not include a proprietary school that is licensed by the State of Arizona or a college, community college or university that is supported entirely or in part by taxation, a private college or university that maintains or operates educational programs in which credits are transferable to a college, community college or university supported entirely or partly by taxation, or a structure to which the following apply:

***1026** (1) A sign is not visible from the exterior of the structure and no other advertising appears indicating that a nude person is available for viewing; and

(2) A student must enroll at least three days in advance of the class in order to participate; and

(3) No more than one nude or seminude model is on the premises at any time.

Nude, Nudity or **state of nudity** means any of the following:

a) The appearance of a human anus, or female breast below a point immediately above the top of the areola.

b) A state of dress which fails to opaquely cover a human anus, genitals or female breast below a point immediately above the top of the areola.

Patron means a person invited or permitted to enter and remain upon the premises of an adult oriented business, whether or not for consideration.

Permit means the permit required by this ordinance to engage in the activities of an adult service provider or an adult oriented business manager.

Principal business purposes means that a commercial establishment derives fifty percent or more of its gross income from the sale or rental of items listed in

subparagraphs (1) and (2) of the definitions in this section of adult bookstore or adult video store.

Seminude means a state of dress in which clothing covers no more than the genitals, pubic region and female breast below a point immediately above the top of the areola, as well as portions of the body that are covered by supporting straps or devices.

Specific anatomical areas means any of the following:

a) A human anus, genitals, pubic region or a female breast below a point immediately above the top of the areola that is less than completely and opaquely covered.

b) Male genitals in a discernible turgid state even if completely and opaquely covered.

Specific sexual activities means any of the following:

a) Human genitals in a state of sexual stimulation or arousal.

b) Sex acts, normal or perverted, actual or simulated, including acts of human masturbation, sexual intercourse, oral copulation or sodomy.

c) Fondling or other erotic touching of the human genitals, pubic region, buttocks, anus or female breast.

d) Excretory functions as part of or in connection with any of the activities under subdivision a), b) or c) of this definition of specific sexual activities.

SECTION 3. PURPOSE

The principal purpose of this ordinance is to establish licensing procedures and regulations for adult oriented businesses and facilities, and their employees, within the unincorporated areas of Maricopa County. The procedures and regulations contained herein are designed to accommodate these types of businesses and facilities while still recognizing the need to promote the public health, safety and general welfare of the citizens of Maricopa County.

SECTION 4. ADMINISTRATION

a) The administration of this ordinance, including the duty of prescribing forms, is vested in the Director, except as otherwise specifically provided. The County Sheriff shall render such assistance in the administration and enforcement of this ordinance as may be requested by the Director.

***1027** b) License or permit applications made pursuant to this ordinance shall be submitted to the Director who shall grant, deny, suspend or revoke licenses or permits in accordance with the provisions of this ordinance.

c) Licenses issued pursuant to this ordinance shall be valid for a period of one year from date of issuance.

d) Permits issued pursuant to this ordinance shall be valid for a period of three years from the date of issuance.

SECTION 5. ADULT ORIENTED FACILITIES BUSINESS LICENSE REQUIRED

a) A person or enterprise may not conduct an adult oriented business without first obtaining an adult oriented business license pursuant to this ordinance. The license shall state the name of the license holder, the name, address and phone number of the licensed premises, and the dates of issuance and expiration of the license.

b) An adult oriented business for which a license has been issued pursuant to this ordinance may conduct business only under the name or designation specified in the license.

c) A licensee shall conduct business only at the address shown on the license. Each additional place of business shall require a separate license.

d) An adult oriented business license shall be displayed on the premises in such a manner as to be readily visible to patrons.

SECTION 6. APPLICATION FOR ADULT ORIENTED BUSINESS LICENSE

a) An applicant for an adult oriented business license shall file at the office of the Director an application, signed under oath by the applicant and notarized, accompanied by the fee required under section 21. An applicant or other person whose fingerprints and photograph are required under paragraph C may, at his option, be photographed and fingerprinted at the office of the Sheriff or other law enforcement agency. An application shall be deemed complete when the Director has received the required fees, all information required in paragraph C, fingerprints of the applicant and a photo-

graph of the applicant's face, and, in the case of a corporation or other business organization, A photograph and fingerprints of all persons for whom information is required under paragraph C of this section. The purpose for obtaining these fingerprints and photographs is to obtain a state and federal records check. The Sheriff's Office and the Department of Public Safety are authorized to exchange this information with the Federal Bureau of Investigation.

b) Fingerprints and photograph, if not taken at the office of the Sheriff, shall be taken by a law enforcement agency and accompanied by a notarized verification by that agency. If the applicant requests that fingerprints and photograph be taken by the office of the sheriff, such fingerprints and photograph shall be completed by the office of the sheriff within ten working days of the request. Any such fingerprints or photograph not completed by the office of the sheriff within ten working days of the request shall be deemed to have been completed and received by the director for purposes of the application.

c) The application shall include the information called for in subparagraphs 1 through 10. If the applicant is an enterprise, it shall designate an officer ***1028** or partner as applicant. In such case, in addition to the information required in subparagraphs 1 through 10 for the applicant, the application shall include the State and date of formation of the organization and the information called for in subparagraphs 2 through 7 of this section with respect to each officer, director, general partner, and all other persons with authority to participate directly and regularly in management of the business, provided that, such information need not be provided with respect to attorneys, accountants and other persons whose primary function is to provide professional advice and assistance to the licensee.

1) The name, business location, business mailing address and phone number of the proposed adult oriented business establishment.

2) The applicant's full true name and other names, aliases or stage names used in the preceding five years.

3) The applicant's current residential mailing address and telephone number.

4) Written proof of age of the applicant, in the form of a birth certificate, current driver's license with picture, or other picture identification document issued by a governmental agency.

5) The issuing jurisdiction and the effective dates of any license or permit relating to an adult oriented business or adult service, whether any such license or permit has been revoked or suspended within the past two years, and, if so, the reason or reasons therefor.

6) All criminal charges, complaints or indictments in the preceding three years which resulted in a conviction or a plea of guilty or no contest for an "organized crime and fraud" offense under A.R.S. title 13, chapter 23, a "prostitution" offense under A.R.S. title 13, chapter 32, a "drug offense" under A.R.S. title 13, chapter 34, or a "sexual offense" under A.R.S. title 13, sections 1401 through 1406 or under section 1412, or for conduct in another jurisdiction which if carried out in Arizona would constitute an offense under one of the statutory provisions enumerated in this subparagraph.

7) The applicant's fingerprints and a photograph of the applicant's face.

8) The name and address of the statutory agent or other agent authorized to receive service of process.

9) The names of the adult oriented business manager(s) who will have actual supervisory authority over the operations of the business.

10) An accurate, to scale, but not necessarily professionally drawn, site plan and floor plan of the business premises and, in an application for an adult service business license, also clearly indicating the location of one or more manager's stations.

d) The information provided pursuant to subparagraphs 5 and 6 of paragraph C of this section shall be supplemented in writing by certified mail to the Director within ten working days of a change of circumstances which would render the information originally submitted false or incomplete.

e) As requested by the director, the Sheriff shall investigate and confirm information supplied by the applicant.

SECTION 7. ADULT ORIENTED BUSINESS MANAGER PERMIT

a) A person may not serve as an adult oriented business manager unless the person has first secured an adult oriented ***1029** business manager permit under this section.
b) Application for an adult oriented business manager permit shall be made in the same manner as application for an adult business license, except that the applicant need provide only the information called for in subparagraphs 2 through 7 of section 6(c).
c) The purpose for obtaining the applicant's fingerprints and a photograph of the applicant's face is to obtain a state and federal records check. The sheriff's office and the department of public safety are authorized to exchange this information with the federal bureau of investigation.

SECTION 8. ADULT SERVICE PROVIDER PERMIT

a) A person may not work as an adult service provider unless the person has first obtained an adult service provider permit under this section.
b) Application for an adult service provider permit shall be made in the same manner as an application for an adult oriented business license, except that the applicant need provide only the information called for in subparagraphs 2 through 7 of section 6(c).
c) The purpose for obtaining the applicant's fingerprints and a photograph of the applicant's face is to obtain a state and federal records check. The sheriff's office and the department of public safety are authorized to exchange this information with the federal bureau of investigation.

SECTION 9. CONFIDENTIALITY

The information provided by an applicant in connection with the application for a license or permit under this ordinance shall be maintained in confidence by the Director, subject only to the public record laws of the State of Arizona.

SECTION 10. GRANT OR DENIAL OF LICENSE OR PERMIT

a) Within forty five days after receipt of a complete application for an adult oriented business license, the Director shall mail to the applicant a license or a notice of intent to deny. If the Director fails to do so, the license shall be deemed granted.
b) Upon receipt of an application for an adult oriented business manager permit or an adult service provider permit, including all information required by sections 7(b) and 8(b), payment of the required fees and completion of photograph and fingerprinting requirements of section 6, the Director shall issue to the applicant a temporary permit. Within thirty days after issuance of a temporary permit, the Director shall mail to the applicant a regular permit or a notice of intent to deny. If the Director fails to do so, the permit shall be deemed granted.
c) The issuance of any license, permit or temporary permit does not waive any right of County to revoke, deny or suspend for any defect, omission or misrepresentation in the application.
d) The Director shall grant the license or permanent permit to an applicant who has completed all requirements for application, unless the Director finds any of the following conditions noted below. For purposes of this paragraph, a person required to submit information pursuant to section 6(c) shall be deemed an applicant.
1) The application is incomplete or contains a misrepresentation, false statement or omission.
2) The applicant has failed to comply with applicable zoning or other land ***1030** use ordinances of the County relating to the business or activity to be carried out under the license or permit.
3) The applicant is delinquent in payment of any county taxes, fees or other payments due in connection with the business or activity to be carried out under the license or permit.
4) The applicant is not at least eighteen years of age.
5) The applicant, or other person required to provide information under section 6(c), in the past three years has been convicted, or plead guilty or no contest with respect to a felony violation or two misdemeanor violations of one or more offenses in the categories stated in section 6(c).
6) Within the past two years, a license or permit under this article held by an applicant, or other person required to provide information pursuant to section 6(c), has been revoked, or a similar license in another jurisdiction has been revoked on the

basis of conduct which would be a ground for revocation of a license or permit issued under this section if committed in the county.

SECTION 11. NON-TRANSFERABILITY

Licenses and permits issued under this article are nontransferable.

SECTION 12. ADULT SERVICE PROVIDER OR MANAGER WORK IDENTIFICATION CARD

The Director shall provide a work identification card to all adult service providers and adult oriented business managers. The card shall contain a photograph of the permittee, the number of the permit issued to that permittee and the date of expiration of the permit.

SECTION 13. ADULT SERVICE BUSINESS; OPERATING REQUIREMENTS

a) A person employed or acting as an adult service provider or manager shall have a valid permit issued pursuant to the provisions of this ordinance. A permit or a certified copy thereof for each manager or provider shall be maintained on the premises in the custody of the manager at all times during which a person is serving as a provider or manager on the premises. Such permits shall be produced by the manager for inspection upon request by a law enforcement officer or other authorized county official.

b) An adult service business shall maintain a daily log of all persons providing adult services on the premises. The log shall cover the preceding twelve month period and shall be available for inspection upon request by a law enforcement officer or other authorized county official during regular business hours.

c) A person below the age of eighteen years may not observe or provide an adult service.

d) A person may not provide an adult service in an adult service business except upon a stage elevated at least eighteen inches above floor level. All parts of the stage, or a clearly designated area thereof within which the adult service is provided, shall be a distance of at least three feet from all parts of a clearly designated area in which patrons may be present. The stage or designated area thereof shall be separated from the area in which patrons may be located by a barrier or railing the top of which is at least three feet above floor level. A provider ***1031** or patron may not extend any part of his or her body over or beyond the barrier or railing.

e) An adult service provider, in the course of providing an adult service, may not perform a specific sexual activity.

f) Adult services may not be provided between the hours of 1:00 a.m. and 8:00 a.m. on Monday through Saturday or between the hours of 1:00 a.m. and 12:00 noon on Sunday.

g) An adult service may not be provided in any location which is not visible by direct line of sight at all times from a manager's station located in a portion of the premises which is accessible to patrons of the adult service business.

h) An adult service provider shall wear his or her adult service provider work identification card at all times while on the premises except while providing an adult service. The card shall be affixed to clothing on the front of the person and above waist level so that the picture and permit number are clearly visible to patrons.

i) An adult oriented business manager shall be on the premises of an adult service business at all times during which any adult service is provided on the premises. The manager shall wear his or her identification card in the manner described in paragraph h above.

j) An employee may not knowingly or intentionally touch the breast, buttocks or genitals of a patron, nor may a patron knowingly or intentionally touch the breast, buttocks or genitals of an employee.

k) A sign, in a form to be prescribed by the Director summarizing the provisions of subparagraphs c, d, j, and l of this section, shall be posted near the entrance of an adult service business in such a manner as to be clearly visible to patrons upon entry.

l) A patron may not place any money on the person or in or on the costume of an adult service provider while the adult service provider is nude or seminude.

m) A manager or licensee may not knowingly permit or tolerate a violation of any provision of this

section.

n) With respect to a cabaret, the requirements of this section shall apply to the extent that they are not in conflict with specific statutory or valid regulatory requirements applicable to persons licensed to dispense alcoholic beverages.

SECTION 14. ADULT ARCADES; OPERATING REQUIREMENTS

a) An adult arcade shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one footcandle, as measured at the floor level.

b) Each booth or viewing room shall either: (a) be configured in such a way that allows persons patrolling the area outside the booth or viewing room to observe from outside the booth or viewing room the activities of any occupant in the interior of the booth or viewing room, or (b) if not so configured, be equipped with a mirror or other device which allows persons patrolling the area outside the booth or viewing room to observe from outside the booth or viewing room the activities of any occupant in the interior of the booth or viewing room.

c) An adult oriented business manager shall be on the premises of an adult arcade at all times that the arcade is open for business. The manager shall ***1032** wear his or her identification card in the manner described in section 13(h) above.

d) A patron may not engage in specific sexual activities on the premises of an adult arcade.

e) A booth or viewing room shall not have any hole or aperture in any wall separating that booth or viewing room from another.

f) A manager or licensee may not knowingly permit or tolerate a violation of any provision of this section.

SECTION 15. INSPECTION OF PREMISES AND RECORDS

The manager shall permit law enforcement officers or other authorized county officials to inspect the premises upon request during regular business hours.

SECTION 16. SUSPENSION OF LICENSE OR PERMIT

The Director shall suspend a license or permit for a period of ten days if the licensee or permittee is convicted of violating a provision of this ordinance.

SECTION 17. REVOCATION OF LICENSE OR PERMIT

The Director shall revoke a license or permit issued pursuant to this ordinance if the licensee or permittee:

a) Is convicted of three or more violations of this ordinance in any twelve month period.

b) Is convicted or pleads guilty or no contest to an offense stated in section 6(c).

c) Is determined to have filed inaccurate information required under section 10(d) of this ordinance.

SECTION 18. PROCEDURES FOR DENIAL, REVOCATION, NONRENEWAL OR SUSPENSION; APPEAL

If the Director determines that grounds exist for denial, suspension or revocation of a license or permit under this ordinance, he/she shall notify the applicant, licensee or permittee (respondent) in writing of his/her intent to deny, suspend or revoke, including a summary of the grounds therefor. The notification shall be by certified mail to the address on file with the Director. Within ten working days of receipt of such notice, the respondent may provide to the Director in writing a response which shall include a statement of reasons why the license or permit should not be denied, suspended or revoked and may include a request for a hearing. If a response is not received by the Director in the time stated, the notification shall be the final administrative action of denial, suspension or revocation and notice of such will be sent to the permittee or licensee within five working days after the expiration of the period for submitting a response. Within five working days after receipt of a response, the Director shall either withdraw the intent to deny, suspend or revoke, and send notification of the withdrawal to the respondent in writing by certified mail, or shall schedule a hearing before a hearing officer and send notification to the respondent in writing by certified mail of the date, time and place of the hearing. If the Director fails to send a timely notification either withdrawing the intent or scheduling a hearing, the intent to deny, suspend or revoke

shall be deemed withdrawn. The hearing, if requested, shall be scheduled not less than fifteen nor more than thirty working days after receipt by the Director of the request for a hearing. The hearing shall be conducted in an informal manner. The respondent may be represented by counsel. If respondent is represented ***1033** by counsel, attorneys' fees shall be at the expense of respondent. The rules of evidence shall not apply. Respondent shall have the burden of proving by a preponderance of the evidence that the denial, suspension or revocation was arbitrary or capricious and an abuse of discretion. The hearing officer shall render a written decision within five working days after completion of the hearing and shall mail a copy of the decision by certified mail to the address of the respondent on file with the Director. If more than forty five days elapse between receipt by the Director of a request for a hearing and mailing by the hearing officer of a final decision to the respondent, a decision in favor of the applicant, licensee or permittee shall be deemed to have been rendered. In the case of an intent to revoke, suspend or non-renew a license or permit, or to deny a regular permit, the permittee or licensee may continue to function under the license or permit pending receipt of the final decision of the hearing officer. The decision shall be final at the end of five working days after it is mailed and shall constitute final administrative action.

SECTION 19. JUDICIAL APPEAL

Final administrative action to deny, revoke or non-renew a license or permit may be appealed to the Superior Court by special action or other available procedure within thirty five days after receipt of written notice of the decision. The County shall consent to expedited hearing and disposition. If a permittee or licensee pursues a judicial appeal from a final administrative action, that permittee or licensee may continue to function under the license or permit pending completion of judicial review.

SECTION 20. LICENSE AND PERMIT RENEWAL

a) A license or permit may be renewed by filing an application for renewal in writing with the Director. The application shall contain the information required to be submitted with an original application, including fingerprints and a photograph, provided that, a renewal application need not contain any other information that has been provided in a previous application and has not changed since the time of the most recent application. An application for license renewal shall be received by the Director not less than forty five days before the expiration of the license. An application for permit renewal shall be received by the Director before expiration of the permit.

b) The Director may deny an application for renewal for the reasons and in accordance with the procedures set forth in Section 10.

SECTION 21. FEES

a) An original application for an adult oriented business license shall be accompanied by a non-refundable application fee in the amount of five hundred dollars ($500) and by a license fee in the amount of five hundred dollars ($500). The license fee will be refunded if the license is denied. An application for renewal shall be accompanied by the amount of the license fee.

b) An application for issuance or renewal of an adult service provider permit shall be accompanied by a non-refundable fee of one hundred dollars ($100).

c) An application for issuance or renewal of an adult oriented business manager permit shall be accompanied by a non-refundable fee of one hundred and fifty dollars ($150).

d) A duplicate or certified copy of a license, permit or identification card shall be issued by the Director upon payment of a fee of ten dollars ($10).

***1034** e) An applicant also shall be required to pay, to the law enforcement agency which provides the applicant with fingerprinting or photography services, the standard fee, if any, charged by that agency for each set of fingerprints and the photograph required to be provided under section 6.

SECTION 22. OTHER REGULATIONS

A license or permit required by this ordinance is in addition to any other licenses or permits required by the County or the State to engage in the business or occupation. Persons engaging in activities described in this ordinance shall comply with all other ordin-

ances and laws, including the County Zoning Ordinance, as may be required, to engage in a business or profession.

SECTION 23. PENALTY

a) Violation of any requirement or prohibition stated in this ordinance is a Class 2 Misdemeanor, punishable upon conviction by a fine of not more than seven hundred and fifty dollars ($750) or by imprisonment for not more than four months. With respect to a violation that is continuous in nature, each day that the violation continues shall constitute a separate offense.

b) In addition to other penalties, an adult oriented business which operates without a valid license shall constitute a public nuisance which may be abated in a manner provided by law.

SECTION 24. APPLICABILITY

This ordinance shall apply to all persons engaging in the activities described herein, whether or not such activities were commenced prior to the effective date of this ordinance. Persons so engaged as of the effective date of this ordinance shall be in full compliance with this ordinance, including receipt of any required license or permit, within one hundred eighty days after the effective date of this ordinance.

SECTION 25. SEVERABILITY

Each section and each provision or requirement of any section of this ordinance shall be deemed severable and the invalidity of any portion of this ordinance shall not affect the validity or enforceability of any other portion.

ADOPTED April 23, 1997

AMENDED July 12, 1997

AMENDED July 17, 1998

ADOPTED as Amended this 2nd day of September, 1998.

384 F.3d 990, 04 Cal. Daily Op. Serv. 8784, 2004 Daily Journal D.A.R. 12,034

Briefs and Other Related Documents **(Back to top)**

• 2004 WL 2085103 (Appellate Brief) Appellants' Supplemental Reply Brief on Impact of City of Littleton v. Z.J. Gifts on Disposition of this Appeal (Aug. 20, 2004)Original Image of this Document with Appendix (PDF)

• 2004 WL 1948899 (Appellate Brief) Appellants' Initial Supplemental Brief on Impact of City of Littleton v. Z.J. Gifts on Disposition of this Appeal (Jul. 20, 2004)Original Image of this Document (PDF)

• 2004 WL 1816509 (Appellate Brief) Appellee's Second Supplemental Answering Brief (Jul. 01, 2004)Original Image of this Document (PDF)

• 2002 WL 32302158 (Appellate Brief) Appellee's Supplemental Answering Brief (Aug. 12, 2002)Original Image of this Document (PDF)

• 00-16531 (Docket) (Aug. 17, 2000)

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Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.
WORLD WIDE VIDEO OF WASHINGTON, INC.,
Plaintiff-Appellant,
v.
CITY OF SPOKANE, Defendant-Appellee.
No. 02-35936.

Argued and Submitted Jan. 7, 2004.
Filed May 27, 2004.
As Amended on Denial of Rehearing and Rehearing En Banc July 12, 2004.

Background: Adult-oriented retail business brought § 1983 suit against city, challenging constitutionality of zoning ordinance preventing their location in close proximity to certain land use categories and reasonableness of amount of time allowed for relocation. The United States District Court for the Eastern District of Washington, 227 F.Supp.2d 1143, Alan A. McDonald, Senior District Judge, entered summary judgment for city, and adult-oriented business appealed.

Holdings: The Court of Appeals, Tallman, Circuit Judge, held that:
(1) ordinance was subject to intermediate scrutiny;
(2) ordinance was narrowly tailored to promote significant government interest in reducing undesirable secondary effects of adult stores;
(3) ordinance was not facially overbroad; and
(4) amortization provision in ordinance requiring relocation within one year was constitutional.
Affirmed.

West Headnotes

[1] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
Laws aimed at controlling the secondary effects of adult businesses are deemed content neutral, thus meriting intermediate scrutiny in determining their constitutionality under First Amendment. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90(3)
92k90(3) Most Cited Cases
An ordinance aimed at combating the secondary effects of a particular type of speech survives intermediate scrutiny if it is designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases

[3] Zoning and Planning 76
414k76 Most Cited Cases
Zoning ordinances prohibiting adult-oriented businesses from operating near certain land use categories and allowing one year for relocation were narrowly tailored to serve city's substantial interest in reducing the undesirable secondary effects of adult stores, and thus survived intermediate scrutiny under First Amendment; ordinance provided adequate alternative locations and thus did not substantially reduce speech by forcing stores to close. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases

[4] Zoning and Planning 76
414k76 Most Cited Cases
Evidence of pornographic litter and public lewdness, and fact that these secondary effects were inexorably intertwined with protected speech, standing alone, were sufficient to show that zoning ordinance that prohibited operation of adult-oriented businesses near certain land uses promoted substantial government interest in eliminating secondary effects of adult-oriented businesses. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 90(3)
92k90(3) Most Cited Cases
A law is narrowly tailored, for purposes of First Amendment intermediate scrutiny, if it promotes a substantial government interest that would be achieved less effectively absent the regulation.

U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
[6] Zoning and Planning 76
414k76 Most Cited Cases
Adult-oriented business's claim that citizen complaints were biased and unscientific was insufficient to cast direct doubt on testimonial evidence of secondary effects caused by proximity to adult-oriented retail stores, including litter, harassment of female employees, vandalism, and decreased business, and thus to challenge conclusion that city's enactment of ordinance prohibiting such stores near certain land uses was narrowly tailored to substantial government interest in eliminating those effects. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases

[7] Zoning and Planning 76
414k76 Most Cited Cases
Zoning ordinance imposing restrictions on location of adult-oriented businesses was not unconstitutionally facially overbroad by reason of its definition of adult retail establishment as one devoting "significant or substantial" portion its stock to adult-oriented merchandise. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases

[8] Zoning and Planning 76
414k76 Most Cited Cases
Amortization provision in zoning ordinance prohibiting adult retail stores near certain other uses, which required non-conforming adult-oriented businesses to relocate within one year, was not violative of First Amendment because there were sufficient relocation sites in city, and thus adequate alternative avenues of communication. U.S.C.A. Const.Amend. 1.

[9] Zoning and Planning 321
414k321 Most Cited Cases
Municipalities may, consistent with federal constitution, require non-conforming uses to close, change their business, or relocate within a reasonable time period.

***1188** Gilbert H. Levy, Seattle, WA, on behalf of the plaintiff-appellant.

Stephen A. Smith, Todd L. Nunn, Preston Gates & Ellis, LLP, Seattle, WA, on behalf of the defendant-appellee.

Appeal from the United States District Court for the Eastern District of Washington; Alan A. McDonald, District Judge, Presiding. D.C. No. CV-02-00074-AAM.

Before GRABER, TALLMAN, and CLIFTON, Circuit Judges.

TALLMAN, Circuit Judge.

This appeal raises two questions. First, whether the City of Spokane's ordinances regulating the location of adult-oriented retail businesses ("adult stores") are constitutional. Second, whether an amortization period is required in this context and, if so, whether a reasonable amount of time was allotted for World Wide Video of Washington, Inc. ("World Wide"), to either relocate its stores or change the nature of its retail operations. Because the record reveals no genuine issue of material fact regarding either of these issues, we affirm the district court's summary judgment for Spokane.

I

In the late 1990s, city leaders in Spokane grew concerned with the opening of several adult stores in residential areas. To develop a legislative response to this situation, the City compiled information--specifically, studies from other municipalities, relevant court decisions, and police records--documenting the adverse secondary effects of adult stores.

On November 29, 2000, Spokane's Plan Commission held a public hearing to consider amending the Municipal Code to combat these documented secondary effects. At this hearing, the City Attorney's office presented the legislative record and gave the Commission an overview of the effect of adult stores on the community. Although a number of citizens testified in favor of amending the Code, World Wide presented no evidence, testimonial or otherwise, at this hearing.

On December 13, 2000, after considering public comments and the legislative record, the Plan Commission voted unanimously to recommend that the City Council amend the Code. Before the vote at this meeting, two individuals testified against the proposed amendment. Once again, however, World Wide did not participate.

On January 29, 2001, the Spokane City Council heeded the Plan Commission's recommendation and unanimously passed Ordinance C-32778. [FN1] Under Ordinance C-32778, adult stores are subject to Spokane's set-back requirements, which prevent ***1189** them from opening in close proximity to certain land use categories. [FN2] Ordinance C-32778 also amended the Code to provide adult stores with an amortization period of one year either to relocate or change the nature of their operations. *See* SMC § 11.19.395. A procedure was included whereby the owner of a business could seek an extension of this deadline. *See id.*

> FN1. The Code as amended by Ordinance C-32778 reads:
> A. An "adult retail use establishment" is an enclosed building, or any portion thereof which, for money or any other form of consideration, devotes a significant or substantial portion of stock in trade, to the sale, exchange, rental, loan, trade, transfer, or viewing of "adult oriented merchandise".
> B. Adult oriented merchandise means any goods, products, commodities, or other ware, including but not limited to, videos, CD Roms, DVDs, computer disks or other storage devices, magazines, books, pamphlets, posters, cards, periodicals or non-clothing novelties which depict, describe or simulate specified anatomical area, as defined in Section 11.19.0355, or specified sexual activities, as defined in Section 11.19.0356.
> Spokane Mun.Code ("SMC") § 11.19.03023.
>
> FN2. Specifically, the Spokane Municipal Code provides: 1. An adult retail use establishment [or] an adult entertainment establishment may not be located or maintained within seven hundred fifty feet, measured from the nearest building of the adult retail use establishment or of the adult entertainment establishment to the nearest building of any of the following pre-existing uses:
> a. public library,
> b. public playground or park,
> c. public or private school and its grounds, from kindergarten to twelfth grade,
> d. nursery school, mini-day care center, or day care center,
> e. church, convent, monastery, synagogue, or other place of religious worship,
> f. another adult retail use establishment or an adult entertainment establishment, subject to the provisions of this section.
> 2. An adult retail use establishment or an adult entertainment establishment may not be located within seven hundred fifty feet of any of the following zones:
> a. agricultural,
> b. country residential,
> c. residential suburban,
> d. one-family residence, e. two-family residence,
> f. multifamily residence (R3 and R4),
> g. residence-office.
> SMC § 11.19.143(D).

Subsequently, Spokane determined that it needed to establish more sites for the relocation of adult stores. Following four Plan Commission meetings on the issue, on March 18, 2002, Spokane enacted Ordinance C-33001, which increased the number of land use categories permitted to accommodate the operation of adult stores.

Because Ordinance C-32778 became effective on March 10, 2001, all non-conforming uses were required to terminate by March 10, 2002. World Wide applied to Spokane's Planning Director for an extension of the amortization period and was granted an additional six months. World Wide appealed this decision to the city's Hearing Examiner, arguing that a six-month extension was insufficient. The Hearing Examiner affirmed the extension, but held that it would run from the date of his May 15, 2002, de-

cision. World Wide was therefore required to close or change the nature of its businesses by November 15, 2002. [FN3] Although we were informed at oral argument that the configuration of World Wide's retail services has changed somewhat, the businesses remain open in their original locations.

> FN3. World Wide appealed the Hearing Examiner's ruling to Spokane County Superior Court under Washington's Land Use Petition Act, RCW 36.70C.005, *et seq.*

On February 27, 2002, World Wide filed a § 1983 civil rights action in the United States District Court for the Eastern District of Washington alleging, *inter alia*, that Ordinances C-32778 and C-33001 (hereinafter, "the Ordinances") violate the ***1190** First Amendment. At the close of discovery, Spokane moved for summary judgment. In support of its motion, the City tendered

(1) more than 1,500 pages of legislative record related to the Ordinances, including studies from other municipalities concerning the adverse secondary effects associated with adult businesses, [FN4] police reports, relevant court decisions, and evidence submitted by Spokane residents;

> FN4. Spokane relied on studies from New York City (1994); Garden Grove, California (1991); a coalition of several municipalities in Minnesota (1989); St. Paul, Minnesota (1987); Austin, Texas (1986); Indianapolis, Indiana (1984); Amarillo, Texas (1977); and Los Angeles (1977).

(2) the minutes of the Plan Commission and City Council meetings concerning the Ordinances;

(3) a report from a real estate appraiser stating that hundreds of parcels of land zoned for adult retail remained available; [FN5] and

> FN5. When Ordinance C-32778 went into effect, there were a total of seven affected adult stores, six of which were required to relocate. By the time Spokane moved for summary judgment, one affected business had already reopened at a new site. Spokane's appraiser found that 326 properties were available for relocation of adult stores; that 161 of the 326 were best suited for commercial uses; and that 63 of the 161 were actively listed for sale or lease. Applying the set-back requirements of the Ordinances, Spokane determined that 32 of these 63 sites were particularly well-suited to accommodate adult stores.

(4) the declarations of several citizens detailing the secondary effects of the existing adult stores. [FN6]

> FN6. Specifically, these declarants stated that they had witnessed various criminal acts in and around World Wide's stores, including prostitution, drug transactions, public lewdness, harassment of citizens by World Wide's clientele, and pervasive litter, including used condoms, empty liquor bottles, and video packaging featuring graphic depictions of sexual acts.

In opposition to Spokane's motion for summary judgment, World Wide offered

(1) the declaration of land use planner Bruce McLaughlin, who opined that the studies relied on by Spokane provided no valid basis for the Ordinances because none dealt exclusively with secondary effects produced by retail-only uses and concluded that adult stores in Spokane neither contributed to the depreciation of property values nor resulted in increased calls for police service;

(2) police reports and call summaries intended to corroborate McLaughlin's conclusion;

(3) the report of a private investigator containing interviews of citizens who claimed that there were no problems related to the adult stores in their neighborhoods; [FN7]

> FN7. We note that World Wide's investigator indicated in his deposition that he was instructed not to include information in his report that was unhelpful to his client's legal position.

(4) the declaration of a real estate broker stating that there were only 26 available properties and

only one was a plausible relocation site for an adult store; [FN8] and

> FN8. Spokane tendered a supplemental declaration from its appraiser with its summary judgment reply, asserting that World Wide's broker ignored 92 qualifying parcels, which were sufficient to allow simultaneous operation of 18 adult stores, and that, even accepting the data contained in World Wide's broker's report, there were sufficient locations to operate 14 adult stores.
> Moreover, although World Wide hired a second land use expert, it declined to submit his opinion to the court. World Wide's second expert concluded that there were more than enough possible relocation sites (*i.e.*, 60) for the six stores that needed to move.

***1191** (5) evidence that two of World Wide's stores were subject to long-term leases that their landlord was unwilling to dissolve.

Additionally, World Wide suggested in its statement of facts that the citizens who provided declarations in support of Spokane's motion were motivated by their disagreement with the content of World Wide's speech rather than by a desire to combat secondary effects.

On September 11, 2002, the district court granted Spokane's motion for summary judgment. World Wide timely appealed.

II

We review de novo the district court's grant of summary judgment. *See* *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir.2003). Viewing the evidence in the light most favorable to World Wide, we must decide whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.*

A

[1] To determine whether Spokane's Ordinances violate the First Amendment, we must first answer the threshold question of whether they are content based, thus meriting strict scrutiny, or content neutral, thus meriting intermediate scrutiny. Under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), laws aimed at controlling the secondary effects of adult businesses are deemed content neutral. *See* *id.* at 48-49, 106 S.Ct. 925. [FN9]

> FN9. It merits noting that in the Supreme Court's most recent foray into the law of the First Amendment and secondary effects, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), Justice Kennedy assailed this categorization as a "fiction," asserting that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Id.* at 448, 122 S.Ct. 1728 (Kennedy, J., concurring). Nevertheless, Justice Kennedy ultimately agreed that a "zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny," reasoning that "the zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional." *Id.* at 448-49, 122 S.Ct. 1728; *accord* *G.M. Enters., Inc. v. Town of St. Joseph*, 350 F.3d 631, 637 (7th Cir.2003) ("In light of [*Alameda Books*], we need not decide whether the ordinances are content based or content neutral, so long as we first conclude that they target not 'the activity, but ... its side effects,' and then apply intermediate scrutiny.' ") (citation omitted).

Here, the challenged Ordinances are explicitly intended to combat the secondary effects of adult stores' speech, not to suppress the speech itself. The district court ruled that the purpose of the Ordinances is to regulate the harmful secondary effects associated with sexually oriented businesses. *World Wide Video of Washington, Inc. v. City of Spokane*, 227 F.Supp.2d 1143, 1150-51 (E.D.Wash.2002). The summary judgment record permits no other conclusion as to the purpose of the Ordinances. *See e.g.*, Or-

dinance C-33001, Preamble/Findings, (4)(k) ("It is not the intent of the proposed zoning provisions to suppress any speech activities protected by the First Amendment ..., but to propose content neutral legislation which addresses the negative secondary impacts of adult retail use and entertainment establishments [.]"). Accordingly, we apply intermediate ***1192** scrutiny. *See* *Renton*, 475 U.S. at 49, 106 S.Ct. 925.

B

[2] An ordinance aimed at combating the secondary effects of a particular type of speech survives intermediate scrutiny "if it is designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication." *Center for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1166 (9th Cir.2003) (citing *Renton*, 475 U.S. at 50, 106 S.Ct. 925 and *Colacurcio v. City of Kent*, 163 F.3d 545, 551 (9th Cir.1998)), *cert. denied*, 124 S.Ct. 1879 (2004). World Wide does not appeal the district court's determination that the Ordinances leave open adequate alternative avenues of communication. The issue before us is thus limited to whether the Ordinances are narrowly tailored to serve a substantial government interest.

In *Alameda Books*, the Supreme Court "clarif[ied] the [*Renton*] standard for determining whether an [adult-use] ordinance serves a substantial government interest." 535 U.S. at 433, 122 S.Ct. 1728 (plurality opinion). Thus, the proper starting point for evaluating World Wide's appeal is close consideration of *Renton* and *Alameda Books*. Our analysis is also informed by *Maricopa County*, this court's sole interpretation and application of the *Renton* /*Alameda Books* standard to date.

1

The challenged ordinance in *Renton* prohibited adult movie theaters from locating within 1,000 feet of various zones, such as those intended for schools and churches. An adult theater owner sued, arguing, *inter alia*, that because the City of Renton improperly relied on another city's experiences with the secondary effects of adult theaters rather than undertaking its own study, the city had failed to establish that its ordinance served a substantial government interest. *Renton*, 475 U.S. at 50, 106 S.Ct. 925.

We agreed and held in favor of the theater owner, but the Supreme Court reversed. Noting that "a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect," the Court concluded that we had imposed "an unnecessarily rigid burden of proof." *Id.* (internal quotation marks omitted). The Court held that "[t]he 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 the city addresses." *Id.* at 51-52, 106 S.Ct. 925.

2

Like *Renton*, *Alameda Books* originated in this circuit. In 1977, the City of Los Angeles conducted a study to assess the secondary effects of adult land uses. *See* *Alameda Books*, 535 U.S. at 430, 122 S.Ct. 1728. Because that study discovered increased crime in areas with high concentrations of adult businesses, Los Angeles enacted an ordinance regulating their locations. *See id.*

It soon came to light, however, that there was a loophole in the law: multiple adult businesses could congregate in a single building. *See* *id.* at 431, 122 S.Ct. 1728. Accordingly, Los Angeles amended its ordinance to prohibit more than one adult business from operating under the same roof. *See id.* Two bookstores sued, alleging that the ordinance violated the First Amendment. *See* *id.* at 432, 122 S.Ct. 1728.

The district court granted summary judgment in favor of the stores. *See* *id.* at 433, 122 S.Ct. 1728. We affirmed, concluding that Los Angeles "failed to present ***1193** 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." *Id.* (internal quotation marks omitted).

In the Supreme Court, *Alameda Books* produced four opinions: a plurality opinion by Justice O'Connor (joined by the Chief Justice, Justice Scalia, and

Justice Thomas), a brief concurring statement by Justice Scalia, a concurrence in the judgment by Justice Kennedy, and a dissent by Justice Souter (joined by Justices Stevens and Ginsburg and joined in part by Justice Breyer). A five justice majority--the plurality plus Justice Kennedy--reversed our decision.

Given the fractured nature of the Court's disposition, it is difficult to glean a precise holding from *Alameda Books*. However, under *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), since Justice Kennedy's concurrence was the narrowest opinion joining the Court's judgment, it controls. *See Maricopa County*, 336 F.3d at 1161; *see also Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1310 n. 19 (11th Cir.2003); *Ben's Bar, Inc. v. Vill. of Somerset*, 316 F.3d 702, 722 (7th Cir.2003). Thus, we are bound by the plurality opinion, but only insofar as its conclusions do not expand beyond Justice Kennedy's concurrence.

All five Justices in the *Alameda Books* majority affirmed *Renton's* core principle that local governments are not required to conduct their own studies in order to justify an ordinance designed to combat the secondary effects of adult businesses. *See Alameda Books*, 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion); *id.* at 451, 122 S.Ct. 1728 (Kennedy, J., concurring). Further, the majority of the Court stressed the paramount role of local experimentation in developing legislative responses to secondary effects, given local governments' superior understanding of their own problems. *See id.* at 440, 122 S.Ct. 1728 (plurality opinion) ("[W]e must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems."); *id.* at 451-52, 122 S.Ct. 1728 (Kennedy, J., concurring) ("The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion.") (citations omitted).

Most importantly, Justice Kennedy did not disagree with the key innovation announced by the *Alameda Books* plurality. To wit:

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

Id. at 438-39, 122 S.Ct. 1728 (plurality opinion). Announcement of this burden shifting approach fulfilled the *Alameda Books* Court's stated intention in granting certiorari: it "clarif[ied] the standard for determining whether an ordinance serves a substantial government interest." *Id.* at 433, 122 S.Ct. 1728.

At its heart, the limiting principle that Justice Kennedy's concurrence imposes on the plurality opinion concerns the importance of determining and evaluating a ***1194** city's "rationale" behind a particular ordinance. While Justice Kennedy did not dispute the plurality's burden-shifting gloss on *Renton*, he stressed that a city's rationale for passing an ordinance aimed at controlling the secondary effects of adult stores "cannot be that when [the ordinance] requires businesses to disperse (or to concentrate), it will force the closure of a number of those businesses, thereby reducing the quantity of protected speech." *Maricopa County*, 336 F.3d at 1163. Justice Kennedy thus concurred with the *Alameda Books* plurality with the following cautionary caveat: "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." 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring). A secondary-effects ordinance must be designed to leave "the quantity of speech ... substantially undiminished, and [the] total secondary effects ... significantly reduced." *Id.* at 451, 122 S.Ct. 1728.

3

Our recent decision in *Maricopa County* differs slightly from the case before us in that it concerned the constitutionality of a "time" rather than a "place" restriction on adult businesses. *See* 336 F.3d at 1159.

In *Maricopa County*, operators of a variety of adult businesses, including "sellers of sexually-related magazines and paraphernalia," *id.* at 1158, challenged an Arizona statute that prohibited them from operating in the early morning hours. The district court upheld the statute and the businesses appealed. Applying *Alameda Books*--which we described as "reaffirm[ing] the *Renton* framework," *id.* at 1159--a divided panel of this court affirmed. [FN10]

> FN10. In dissent, Judge Canby opined that Arizona's statute could not survive Justice Kennedy's requirement that the quantity of speech remain undiminished because it required adult businesses to close down during certain parts of the day--*i.e.*, it *stopped* speech--unlike a "dispersal" regulation, which merely *moves* speech. *Maricopa County*, 336 F.3d at 1172 (Canby, J., dissenting). Spokane's Ordinances are dispersal ordinances; consequently, Judge Canby's concern does not arise here.

As in the instant case, the legislative record in *Maricopa County* included both documentary and testimonial evidence. *See id.* at 1157. For example, the Arizona legislature heard testimony describing problems with pornographic litter and prostitution related to the operation of adult businesses adjacent to a residential area. *Id.* at 1157-58. The *Maricopa County* legislative record also included letters discussing reports detailing similar problems in Denver and Minnesota. *Id.* at 1158. We concluded that the state provided a sufficient basis for the challenged statute, noting that the evidence was "hardly overwhelming, but it does not have to be." *Id.* at 1168. Because the Arizona legislature relied on evidence "reasonably believed to be relevant" to the targeted problem, we determined that the statute was presumptively constitutional. *Id.*

Having made this determination, we continued: "Under *Alameda Books*, the burden now shifts to [the businesses] to cast direct doubt on [the state's] rationale, either by demonstrating that the [state's] evidence does not support its rationale or by furnishing evidence that disputes the[state's] factual findings." *Id.* (internal quotation marks omitted; first alteration added). Essentially, the *Maricopa County* businesses argued that "the evidence before the Arizona legislature consisted of 'irrelevant anecdotes' and 'isolated' incidents, and that testimonial evidence is not 'real' evidence." *Id.* Rejecting this contention as explicitly foreclosed by *Alameda Books*, we concluded that the businesses had "failed to cast doubt on the state's ***1195** theory, or on the evidence the state relied on in support of that theory," and affirmed the district court's decision upholding the statute. *Id.*

C

[3] Like the statute challenged in *Maricopa County*, Spokane's Ordinances satisfy the *Renton* standard as clarified in *Alameda Books*. We hold that the Ordinances are narrowly tailored to serve Spokane's substantial interest in reducing the undesirable secondary effects of adult stores.

1

Turning first to the substantial interest issue, per Justice Kennedy's *Alameda Books* concurrence, the initial question is "how speech will fare" under the Ordinances. 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring); *see also R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 408 (7th Cir.2004) (noting that under Justice Kennedy's *Alameda Books* concurrence "[i]t is essential ... to consider the impact or effect that the ordinance will have on speech"). Conceptually, this question dovetails with the requirement that an ordinance must leave open adequate alternative avenues of communication. Again, World Wide does not appeal the district court's conclusion that the Ordinances left open sufficient relocation sites. Given that each of the six remaining affected stores has the opportunity to relocate, it is likely that the Ordinances will reduce secondary effects--by moving the stores from sensitive areas--without substantially reducing speech by forcing stores to close. *See Alameda Books*, 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring).

The next step is to determine whether the Ordinances survive the burden-shifting regime announced by the *Alameda Books* plurality. They do. World Wide does not contend that Spokane failed to satisfy its initial burden of producing evidence that "fairly supports" the Ordinances. Rather, World Wide argues that when it provided contrary evidence the burden shif-

ted back to Spokane, and the City failed to supplement the record.

However, in order to shift the burden back to Spokane, World Wide was required to *succeed* in "cast[ing] direct doubt" on the rationale behind the Ordinances, either by showing that the City's evidence does not support it or by supplying its own contrary "*actual and convincing* evidence." *Id.* at 438-39, 122 S.Ct. 1728 (plurality opinion) (emphasis added). Like the businesses in *Maricopa County*, World Wide failed to satisfy this requirement. World Wide's arguments and evidence against the Ordinances were insufficient to trigger the burden shifting contemplated in *Alameda Books.*

[4] We reach this conclusion primarily because World Wide did not effectively controvert much of Spokane's evidence through McLaughlin's report or otherwise. In holding that the Ordinances promoted a substantial governmental interest, the district court stressed that Spokane only needed " 'some' evidence to support its Ordinances," and correctly concluded that the "elimination of pornographic litter, by itself, represents a substantial governmental interest, especially as concerns protection of minors." *World Wide Video*, 227 F.Supp.2d at 1157-58. The citizen testimony concerning pornographic litter and public lewdness, standing alone, was sufficient to satisfy the "very little" evidence standard of *Alameda Books*, 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring) (citing *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925). *Accord Maricopa County*, 336 F.3d at 1168; *cf. Stringfellow's of N.Y., Ltd. v. City of New York*, 91 N.Y.2d 382, 400, 671 N.Y.S.2d 406, 694 N.E.2d 407, 417 (N.Y.1998) ("[A]necdotal evidence and reported experience can be as telling as statistical ***1196** data and can serve as a legitimate basis for finding negative secondary effects...."). [FN11]

> FN11. In *Tollis Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir.1987), San Bernardino County determined that a single showing of an adult movie was sufficient to subject a theater to regulation under an adult-use zoning ordinance. *Id.* at 1331. Because the County "presented *no* evidence that a single showing of an adult movie would have any harmful secondary effects on the community," *id.* at 1333 (emphasis added), we affirmed an injunction against enforcement of the ordinance. Although *Tollis* predates *Alameda Books*, the decisions are consistent; the principle remains that a local government must reasonably rely on at least *some* evidence. Here, Spokane clearly satisfied this requirement.

The relevant question is "whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728 (plurality opinion). Here, the protected speech and the secondary effects described in the citizen testimony are inexorably intertwined: the sexual images in the magazines and on the packaging of the videos sold by adult stores may be protected, but if the stores' products are consistently discarded on public ground, municipal regulation may be--and, in this case, is--justified.

Our conclusion concerning the nature of the post-*Alameda Books* evidentiary burden is in line with the weight of federal authority. For example, in *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir.), *cert. denied*, 540 U.S. 820, 124 S.Ct. 104, 157 L.Ed.2d 38 (2003), the Eighth Circuit noted that the adult business's evidence in opposition to Benton County's zoning regulations

> addressed only two adverse secondary effects, property values and crime in the vicinity of an adult entertainment establishment.... [The challenged ordinance], on the other hand, may address other adverse secondary effects, such as the likelihood that an establishment whose dancers and customers routinely violate long-established standards of public decency will foster illegal activity such as drug use, prostitution, tax evasion, and fraud.

Id. at 863. Just so here. Granted, the evidence tendered by World Wide in opposition to Spokane's motion for summary judgment purported to contradict some of the City's secondary effects evidence. Again, however, World Wide failed to present an effective rebuttal to an entire category of evidence: the public testimony. World Wide attempted to counter

the citizens' stories by charging bias. However, this tactic is insufficient to defeat summary judgment. *See Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir.1983). This failure to cast doubt on Spokane's justification for the Ordinances dooms World Wide's challenge.

2

[5] We also conclude that the Ordinances are narrowly tailored. A law is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." ***1197** *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985); *accord Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Here, as in *Maricopa County*, it is self-evident that Spokane's asserted interest would be achieved less effectively absent the Ordinances. *See* 336 F.3d at 1169.

The crux of World Wide's argument is that, because Spokane's studies do not deal exclusively with retail-only stores, the City impermissibly relied on "shoddy data[and] reasoning" to justify the Ordinances. *Alameda Books*, 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion). World Wide relies principally on *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir.) (per curiam), *cert. denied*, 540 U.S. 982, 124 S.Ct. 466, 157 L.Ed.2d 372 (2003), to support its argument. The *Encore Videos* court, noting that "[a] time, place, and manner regulation meets the narrow tailoring standard if it 'targets and eliminates no more than the exact source of the evil it seeks to remedy,' " *id.* at 293 (quoting *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)), found San Antonio's re-zoning of adult stores unconstitutional because the studies on which the city relied "either entirely exclude[d] establishments that provide only take-home videos and books ... or include[d] them but [did] not differentiate the data collected from such businesses from evidence collected from enterprises that provide on-site adult entertainment," *id.* at 294-95. [FN12] Hoping to repeat Encore Videos' success, World Wide presented the district court with an extensive study concluding that problems with increased crime rates and decreased property value were limited to the neighborhood around a store that has preview booths for on-site viewing.

> FN12. The Fifth Circuit recently clarified its *Encore Videos* opinion, stating that "the ordinance at issue was found not to be narrowly tailored because of both its failure to make an on-site/off-site distinction *and* its low 20% inventory requirement [*i.e.*, the fact that it covered all stores with at least 20% 'adult' merchandise]." *Encore Videos, Inc. v. City of San Antonio*, 352 F.3d 938, 939 (5th Cir.2003) (emphasis added).

[6] Notwithstanding its proffer, World Wide's reliance on *Encore Videos* is misplaced. In *Encore Videos*, San Antonio apparently relied *only* on other cities' studies to justify its ordinance. *See id.* at 295. Here, Spokane relied on a wide variety of evidence, including studies, police records, and citizen testimony. Further, in this case we can assume, but need not decide, that the distinction between retail-only stores and stores with preview booths is constitutionally relevant. The Ordinances still survive World Wide's challenge because much of the citizen testimony concerned retail-only stores. To take just one example, a pedodontist working in a building less than a block away from a retail-only store complained of pornographic litter, harassment of female employees, vandalism, and decreased business, all resulting from his proximity to the retail-only store. As *Maricopa County* teaches, World Wide's claim that citizen complaints such as these are biased and unscientific is insufficient to cast direct doubt on the Spokane's testimonial evidence. *Maricopa County*, 336 F.3d at 1168 (rejecting the plaintiffs argument "that testimonial evidence is not 'real' evidence").

Among the secondary effects that Spokane sought to curb by enacting the Ordinances are the "economic and aesthetic impacts upon neighboring properties and the community as a whole." Ordinance C-33001, pmbl. at 3. Through testimonial evidence, Spokane has shown that retail-only stores generate these secondary effects and therefore that its interests in enacting ***1198** the Ordinances "would be achieved less effectively absent the regulation." *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897. World Wide has offered no evidence that meaningfully challenges that conclu-

sion. We thus conclude that the Ordinances are narrowly tailored.

D

In sum, *Alameda Books* "does not affect [a municipality's] ability to rely on secondary effects studies and certainly does not mandate a trial in every case where a municipality does so." *Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery County*, 256 F.Supp.2d 385, 393-94 (D.Md.2003). The evidence relied on by Spokane "is both reasonable and relevant," *Maricopa County*, 336 F.3d at 1168, and the City's regulatory regime "is likely to cause a significant decrease in secondary effects" at the cost of "a trivial decrease in the quantity of speech," *Alameda Books*, 535 U.S. at 445, 122 S.Ct. 1728 (Kennedy, J., concurring). Therefore, we hold that Spokane's reliance on this evidence was proper and that the Ordinances are narrowly tailored to address the City's legitimate concerns.

III

[7] We must next decide whether the amended Code--specifically, the language added by Ordinance C-32778--is overbroad. [FN13] Because "the First Amendment needs breathing space ... [,] statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Nonetheless, the Supreme Court has "repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Osborne v. Ohio*, 495 U.S. 103, 112, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (internal quotation marks omitted); *see also United States v. Adams*, 343 F.3d 1024, 1034 (9th Cir.2003), *cert. denied*, --- U.S. ----, 124 S.Ct. 2871, 159 L.Ed.2d 779 (2004) (No. 03-9072).

> FN13. World Wide waived its claim that Ordinance C-32778's definition of "adult retail establishment" is unconstitutionally vague by failing to present it to the district court. *See United States v. Flores-Payon*, 942 F.2d 556, 558 (9th Cir.1991). This is not a purely legal issue. Had World Wide raised it below, Spokane could have presented evidence in support of its position that the definition is sufficiently precise. *Cf. id.* (noting that an argument not presented to the district court can still be raised on appeal under certain limited circumstances, including when "the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court") (internal quotation marks omitted).

Spokane defines an "adult retail establishment" as

> an enclosed building, or any portion thereof which, for money or any other form of consideration, devotes a significant or substantial portion of its stock in trade, to the sale, exchange, rental, loan, trade, transfer, or viewing of "adult oriented merchandise".

SMC § 11.19.03023(A). World Wide claims that this definition is unconstitutional on its face. We disagree.

Cases directly addressing the phrase "significant or substantial" in this context have upheld its validity. *See, e.g., Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 53 n. 5, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Alameda Books*, 535 U.S. at 431, 122 S.Ct. 1728. Moreover, this phrase is readily ***1199** susceptible to a narrowing construction. "[L]anguage similar to the 'significant or substantial' language used in this ordinance has been interpreted previously by state courts in a sufficiently narrow manner to avoid constitutional problems." *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220, 1229 (10th Cir.2002) (collecting cases), *cert. granted in part*, 540 U.S. 944, 124 S.Ct. 383, 157 L.Ed.2d 274 (2003). We agree and hold that the inclusion of this phrase in Ordinance C-32778 does not render it unconstitutionally overbroad.

World Wide also takes issue with Spokane's "any portion thereof" wording, arguing that as a result of its inclusion the ordinance covers any store with a "portion" that is "significantly" or "substantially"

comprised of adult materials. For example, under World Wide's interpretation, a store with a rack of postcards comprising 1% of its stock, 5% of which qualifies as adult material, would fall under the purview of Ordinance C-32778. We read this ordinance differently. The "any portion thereof" clause plainly means that the ordinance is intended to cover stores that occupy only a portion of an enclosed building--*e.g.*, one store in a shopping mall--as distinct from the entire building. This language has nothing to do with the determination whether adult material constitutes a "significant or substantial" portion of a store's stock. [FN14]

> FN14. World Wide relies on *Executive Arts Studio, Inc. v. City of Grand Rapids*, 227 F.Supp.2d 731 (W.D.Mich.2002), where the court found overbroad an ordinance that encompassed stores with a "section or segment" of sexually-explicit magazines. *See id.* at 748. However, that holding was based on a state court's refusal to adopt a limiting construction. *See id.* No Washington state court has so construed Ordinance C-32778.

Accordingly, mindful that the facial overbreadth doctrine is "strong medicine" that should be employed "sparingly and only as a last resort," *Broadrick*, 413 U.S. at 613, 93 S.Ct. 2908, we affirm the district court's rejection of World Wide's claim that Ordinance C-32778 is overbroad.

IV

[8] The final issue before us is the adequacy of the amortization provision. This provision reads, in pertinent part: "Any adult retail use establishment located within the City of Spokane on the date this provision becomes effective, which is made a nonconforming use by this provision, shall be terminated within twelve (12) months of the date this provision becomes effective." SMC § 11.19.395. The Ordinance allows for the extension of a business's termination date "upon the approval of a written application filed with the Planning Director no later than [one] (1) month prior to the end of such twelve (12) month amortization period." *Id.*

Although World Wide applied for and was granted a six-month extension, and received an extra two months via administrative grace, it claims that we should remand for trial because there remains a question of fact whether its hardship outweighs the benefit to the public to be gained from termination of the non-conforming use. *See Ebel v. City of Corona*, 767 F.2d 635, 639 (9th Cir.1985) (per curiam) (adopting the balancing test set out in *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153, 1159-60 (Wash.1978)). Given the length of its leases and various other alleged impediments to relocation-- *e.g.*, restrictive covenants, the unwillingness of landlords to rent or sell to an adult store, and the prohibitive cost--World Wide claims that it can prevail under *Ebel's* balancing test.

[9] We are not convinced. Nothing in the Constitution forbids municipalities from requiring nonconforming uses to close, change their business, or relocate ***1200** within a reasonable time period. Here, as in *Baby Tam & Co. v. City of Las Vegas*, 247 F.3d 1003 (9th Cir.2001), World Wide "furnishes no authority for the proposition that a zoning ordinance may not prohibit a use in existence before its enactment," *id.* at 1006. As a general matter, an amortization period is insufficient only if it puts a business in an impossible position due to a shortage of relocation sites. This issue is conceptually indistinguishable from the First Amendment requirement of alternative avenues of communication. *See Jake's, Ltd. v. City of Coates*, 284 F.3d 884, 889 (8th Cir.) (holding that application of an amortization provision is constitutional as long as it complies with *Renton*), *cert. denied*, 537 U.S. 948, 123 S.Ct. 413, 154 L.Ed.2d 292 (2002). Because the district court held that there are sufficient relocation sites in Spokane and World Wide does not appeal that factual determination, we hold that the amortization provision is not unconstitutional.

Finally, in attempting to extend its right to operate at its present locations, World Wide was afforded--and has availed itself of--the full panoply of due process rights. World Wide requested an extension and received eight months; it appealed this decision to Spokane's Hearing Examiner, claiming the extension was too short, and lost. World Wide then filed a land use action in Spokane County Superior Court chal-

lenging the denial of its amortization appeal. We conclude that World Wide received all the process it was due.

V

As conceded by World Wide, municipalities are allowed to "keep the pig out of the parlor" by devising regulations that target the adverse secondary effects of sexually-oriented adult businesses. This is precisely what Spokane did when it enacted the Ordinances. The district court properly entered summary judgment upholding them.

AFFIRMED.

368 F.3d 1186, 04 Cal. Daily Op. Serv. 4570, 2004 Daily Journal D.A.R. 8411

Briefs and Other Related Documents **(Back to top)**

• 2003 WL 22593818 (Appellate Brief) Appellant's Reply Brief (Apr. 03, 2003)Original Image of this Document (PDF)

• 2003 WL 22593817 (Appellate Brief) Brief of Appellee (Mar. 20, 2003)Original Image of this Document (PDF)

• 2003 WL 22593816 (Appellate Brief) Appellant's Opening Brief (Feb. 04, 2003)Original Image of this Document with Appendix (PDF)

• 02-35936 (Docket) (Oct. 09, 2002)

END OF DOCUMENT

H

Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.
CENTER FOR FAIR PUBLIC POLICY, an Arizona non-profit corporation; Dream Palace, a dba of Liberty Entertainment Group, L.L.C., an Arizona Limited Liability Company; Castle Superstore Corporation, an Arizona corporation,
Plaintiffs-Appellants,
and
L.J. Concepts, Inc., Plaintiff,
v.
MARICOPA COUNTY, ARIZONA; Richard M. Romley, in his official capacity as Maricopa County Attorney; City of Phoenix, a municipal corporation,
Defendants-Appellees,
State of Arizona, Intervenor-Appellee,
and
City of Glendale, Defendant.
LJ Concepts, Inc., an Arizona corporation; Stummer LLC, Inc., an Arizona corporation; Mid-City Enterprises, Inc., an Arizona corporation; B.C. Books, Inc., a Delaware corporation; Michael J. Ahearn,
Plaintiffs-Appellants,
State of Arizona, Intervenor-Appellee,
and
Center for Fair Public Policy, an Arizona non-profit corporation; Dream Palace, an Arizona Limited Liability Company dba Liberty Entertainment Group, L.L.C.; Castle Superstore Corporation, an Arizona corporation; Daniel Ray Golladay, Plaintiffs,
v.
City of Phoenix, a municipal corporation; Maricopa County, Arizona; Richard Romley, in his official capacity as Maricopa County Attorney; City of Phoenix, a municipal corporation; City of Glendale, an Arizona municipal corporation, Defendants-Appellees.
Nos. 00-16858, 00-16905.

Argued and Submitted Feb. 11, 2003.
Filed July 28, 2003.

Owners and operators of sexually-oriented businesses brought civil rights action against city, county, and state, asserting that state statute prohibiting sexually-oriented businesses from operating during late night hours violated the First Amendment, and seeking declaratory and injunctive relief. The United States District Court for the District of Arizona, Earl H. Carroll, J., entered judgment for defendants, and plaintiffs appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that the statute did not violate the First Amendment.

Affirmed.

Canby, Circuit Judge, filed dissenting opinion.

West Headnotes

[1] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
State statute prohibiting sexually-oriented businesses from operating during late night hours and until noon on Sundays would be properly analyzed under the First Amendment as a time, place, and manner regulation. U.S.C.A. Const.Amend. 1; A.R.S. § 13-1422.

[2] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases

[2] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k2 Theaters and Shows)
For purpose of First Amendment analysis, state statute prohibiting sexually-oriented businesses from operating during late night hours and until noon on Sundays was content based rather than content neutral. U.S.C.A. Const.Amend. 1; A.R.S. § 13-1422.

[3] Constitutional Law 90(3)
92k90(3) Most Cited Cases

Whether a statute challenged as a violation of the First Amendment free speech clause is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
A regulation of sexually-oriented businesses, even though content based, is subject to intermediate scrutiny under the First Amendment free speech clause if the regulation is designed to combat the secondary effects of such establishments on the surrounding community, namely crime rates, property values, and the quality of the city's neighborhoods. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases

[5] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k2 Theaters and Shows)
The Court of Appeals, in considering free speech challenge to state statute prohibiting sexually-oriented businesses from operating during late night hours and until noon on Sundays, would look to the full record to determine whether the purpose of the statute was to ameliorate the secondary effects of sexually-oriented businesses on the community, and in so doing, would rely on all objective indicators of intent, including the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment, the stated purpose, and the record of proceedings. U.S.C.A. Const.Amend. 1; A.R.S. § 13-1422.

[6] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
Predominant purpose in enacting state statute prohibiting sexually-oriented businesses from operating during late night hours and until noon on Sundays was to ameliorate the secondary effects associated with the regulated establishments, and thus, intermediate scrutiny applied under the First Amendment free speech clause, where the statute regulated both establishments protected by the First Amendment and businesses that had no such protection, such as escort agencies, the regulation was passed as an amendment to a broader bill authorizing counties to develop comprehensive land-use regulations, and majority of comments made by legislators when the bill was under consideration focused on the secondary effects associated with sexually-oriented businesses. U.S.C.A. Const.Amend. 1; A.R.S. § 13-1422.

[7] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
The "predominant purpose" inquiry, in regard to a free speech challenge to a regulation of sexually-oriented businesses that is designed to combat the secondary effects of such establishments on the surrounding community, is separate and independent from the inquiry into whether the regulation is designed to serve a substantial government interest; only with respect to the latter inquiry must courts examine evidence concerning regulated speech and secondary effects. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
Under intermediate scrutiny under First Amendment free speech clause, state statute, prohibiting sexually-oriented businesses from operating during late night hours and until noon on Sundays, predominant purpose of which was to ameliorate the secondary effects associated with the regulated establishments, would be upheld if it was designed to serve a substantial government interest, was narrowly tailored to serve that interest, and did not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1; A.R.S. § 13-1422.

[9] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
For purpose of analysis under the First Amendment free speech clause, a state's interest in curbing the secondary effects associated with adult entertainment establishments is substantial. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases

[10] Public Amusement and Entertainment

9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k2 Theaters and Shows)
Arizona legislature, in enacting statute prohibiting sexually-oriented businesses from operating during late night hours and until noon on Sundays, relied on evidence reasonably believed to be relevant in demonstrating a connection between the protected speech and its stated rationale of reducing the secondary effects associated with late night operations of sexually-oriented businesses, as required under intermediate scrutiny under First Amendment free speech clause, where the legislature held public hearings at which lawmakers heard citizen testimony concerning the late night operation of sexually-oriented businesses, and were briefed on several studies documenting secondary effects, and two of those studies were specific to late night operations. U.S.C.A. Const.Amend. 1; A.R.S. § 13-1422.

[11] Civil Rights 1406
78k1406 Most Cited Cases
(Formerly 78k240(1))
Once state met its burden, under First Amendment intermediate scrutiny analysis of state statute prohibiting sexually-oriented businesses from operating during late night hours and until noon on Sundays, of showing that it relied on evidence reasonably believed to be relevant in demonstrating a connection between its stated rationale and the protected speech, the burden shifted to those challenging the statute to cast direct doubt on the state's rationale, either by demonstrating that the state's evidence did not support its rationale or by furnishing evidence that disputed the state's factual findings. U.S.C.A. Const.Amend. 1; A.R.S. § 13-1422.

[12] States 34
360k34 Most Cited Cases
Legislative committees are not judicial tribunals, and are not bound by rules of evidence, and thus, may rely on anecdotal testimony.

[13] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
[13] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k2 Theaters and Shows)
State was not required to come forward with empirical data in support of its rationale for state statute, challenged under the First Amendment free speech clause, prohibiting sexually-oriented businesses from operating during late night hours and until noon on Sundays, of reducing the secondary effects associated with late night operations of sexually-oriented businesses. U.S.C.A. Const.Amend. 1; A.R.S. § 13-1422.

[14] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
[14] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k2 Theaters and Shows)
State statute prohibiting sexually-oriented businesses from operating during late night hours and until noon on Sundays was narrowly tailored, as required under First Amendment free speech clause intermediate scrutiny analysis, in that the government's asserted interest in the amelioration of secondary effects associated with late night operation of sexually-oriented businesses, including prostitution, drug use, and littering, would be achieved less effectively in the absence of the statute. U.S.C.A. Const.Amend. 1; A.R.S. § 13-1422.

[15] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
[15] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k2 Theaters and Shows)
State statute prohibiting sexually-oriented businesses from operating during late night hours and until noon on Sundays left open ample alternative channels for communication, as required under First Amendment free speech clause intermediate scrutiny analysis, in that the statute permitted the businesses within its purview to operate seventeen hours per day Monday through Saturday, and thirteen hours on Sunday. U.S.C.A. Const.Amend. 1; A.R.S. § 13- 1422.
[16] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
Fact that state statute prohibited sexually-oriented

businesses from operating during late night hours and until noon on Sundays but did not prohibit other types of business from operating at those hours did not render the statute underinclusive so as to subject it to strict scrutiny under the First Amendment free speech clause; state could legitimately single out sexually-oriented businesses to regulate their hours of operation. U.S.C.A. Const.Amend. 1; A.R.S. § 13-1422.

***1156** G. Randall Garrou, Weston, Garrou & DeWitt, Los Angeles, CA, argued the cause and filed briefs for appellant Center for Fair Public Policy, et al. John H. Weston was on the briefs.

Richard J. Hertzberg, Phoenix, AZ, argued the cause and filed briefs for appellants L.J. Concepts, et al.

Scott E. Boehm, Copple, Chamberlin, Boehm & Murphy, P.C., Phoenix, AZ, argued the cause and filed briefs for the defendants. Janet A. Napolitano, Arizona Attorney General, and Thomas J. Dennis, Assistant Arizona Attorney General, Phoenix, AZ, were on the briefs. James H. Hays, Assistant City Attorney for the City of Phoenix, and James M. Flenner, Assistant City Attorney for the City of Glendale, were also on the briefs.

Appeal from the United States District Court for the District of Arizona; Earl H. Carroll, District Judge, Presiding. D.C. Nos. CV-98-01583-EHC, CV-98-01584-EHC.

***1157** Before CANBY, O'SCANNLAIN, and W. FLETCHER, Circuit Judges.

Opinion by Judge O'SCANNLAIN; Dissent by Judge CANBY.

OPINION

O'SCANNLAIN, Circuit Judge.

We must decide whether a state statute prohibiting sexually-oriented businesses from operating during late night hours passes muster under the First Amendment.

I

The Arizona statute at issue here requires all sexually-oriented businesses [FN1] to close "between the hours of 1.00 a.m. and 8:00 a.m. on Monday through Saturday and between the hours of 1:00 a.m. and 12:00 noon on Sunday." Ariz.Rev.Stat. § 13-1422(A). A sexually-oriented business is an "adult arcade, adult bookstore or video store, adult cabaret, adult motion picture theater, adult theater, escort agency or nude model studio...." *Id.* Violation of § 13-1422(A) is a class one misdemeanor. *Id.* § 13-1422(B).

FN1. We adopt the nomenclature used in the statute for the sake of convenience.

Section 13-1422 was originally proposed to the Arizona legislature in 1998 as Senate Bill 1367. The bill was assigned to the House of Representatives' Government Reform and States' Rights Committee and to the Senate Family Services Committee, and public hearings were held in both bodies. While the original bill passed in the Senate, it was voted down in the Arizona House Rules Committee.

At the same time, Senate Bill 1162, a bill authorizing Arizona counties to develop land-use regulations within their respective jurisdictions, and which included an authorization to license and to regulate sexually-oriented businesses operating within unincorporated areas, was winding its way through the legislature. When original Senate Bill 1367 failed in the House Rules Committee, its provisions were added verbatim as an amendment to the more comprehensive Senate Bill 1162. Amended Senate Bill 1162 passed both the House and the Senate, and was signed into law on June 1, 1998, and became effective on August 21, 1998.

The record before the Arizona legislature prior to § 13-1422's enactment consisted of testimonial evidence from several individuals, as well as some limited documentary evidence with respect to the need for restricting sexually-oriented businesses' hours of operation.

Russell Smolden and Jane Lewis both testified before House and Senate committees. These individuals worked for mixed-use real estate parks located in Tempe and Phoenix, and both testified that nearby sexually-oriented businesses were disruptive of their

attempts to attract new employers to the parks, and prospective employers expressed concern for their employees who worked night-shifts. They testified that limiting the hours of operation of the nearby sexually-oriented businesses would aid in their efforts to attract employers to the parks.

Scott Bergthold, the executive director and general counsel to the National Family Legal Foundation ("NFLF"), testified that similar hours of operation restrictions had been upheld as constitutional by federal courts. He also testified that approximately fifteen studies had been conducted concerning the negative secondary effects associated with sexually-oriented businesses. Those studies documented increased crime, prostitution, public sexual indecency and health risks associated with HIV and AIDS transmission.

Donna Neil, co-founder of a group known as the Neighborhood Activist Interlinked ***1158** Empowerment Movement ("Nail'em"), testified that, each weekend, parents in her neighborhood cleared up litter emanating from neighborhood sexually-oriented businesses. She also testified that the local school's playground was fenced and closed to neighborhood children on weekends due to incidents of prostitution on school grounds. She stated that the neighborhood had experienced an increase in crime--specifically drug arrests and assaults--associated with sexually-oriented businesses. Finally, Bridget Mannock, a neighborhood legislative liaison for the City of Phoenix testified that a state-level hours of operation regulation was necessary due to the limited nature of the local municipalities' authority.

Some documentary evidence was presented to the Arizona legislature. First, there is a letter from the NFLF addressed to the House Government Reform and States' Rights Committee. The letter discussed the acute problems associated with sexually-oriented businesses as documented in a report from the Denver Metropolitan Police Department, which concluded that sexually-oriented businesses "disproportionately deplete police time and resources during the overnight hours." The Denver report itself was not presented to the Committee. The letter also discussed the fact that the proposed regulation was constitutional because it was a reasonable time, place and manner restriction on speech. Second, there is a letter from the NFLF to House members, discussing ostensibly the same themes raised in the letter to the House Committee. Finally, there is a "fact sheet" prepared by the NFLF, which noted that every study conducted established the negative secondary effects associated with sexually-oriented businesses. In particular, the fact sheet noted a 1989 report prepared by the Minnesota Attorney General's office which concluded that surrounding communities are negatively impacted by 24-hour-a-day or late night operation of sexually-oriented businesses. None of the reports discussed in the fact sheet were presented to the legislature. The fact sheet also contained a discussion of the constitutionality of the proposed restrictions.

The plaintiffs in this action are owners and operators of sexually-oriented businesses in Arizona. They include nude-dancer clubs, x-rated video arcades and sellers of sexually-related magazines and paraphernalia. Some of these businesses were open 24-hours a day prior to enactment of § 13-1422. Two separate groups of plaintiffs--the L.J. Concepts, Inc. plaintiffs and the Center for Fair Public Policy plaintiffs (collectively "Fair Public Policy")-- filed suit on September 1, 1998 in federal district court, alleging that § 13-1422 violates the First Amendment, and seeking declaratory and injunctive relief. The cases were consolidated and assigned to Judge Carroll, and a briefing schedule with respect to the propriety of issuing a preliminary injunction was agreed upon.

While the parties were briefing the preliminary injunction issue, the state defendants placed in the district court record copies of fourteen studies on the negative secondary effects associated with adult-oriented businesses. Fair Public Policy objected because these studies were not before the legislature prior to § 13-1422's enactment.

On September 30, 1999, Judge Carroll denied Fair Public Policy's application for a preliminary injunction. The district court found that the statute was constitutional under the Supreme Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and that there was

sufficient pre-enactment evidence, without regard to the studies introduced during the litigation, to support the statute's enactment. The plaintiff groups filed notices of appeal from ***1159** Judge Carroll's decision, and those appeals were duly consolidated by this court. We affirmed the district court's decision not to issue a preliminary injunction. *See L.J. Concepts v. City of Phoenix*, No. 99-17270, 2000 U.S.App. LEXIS 5906, at *3 (9th Cir. March 30, 2000). On September 13, 1999, the district court denied the plaintiffs' request for a permanent injunction and declaratory relief, and entered judgment for the defendants. Plaintiffs timely appealed.

II

While the constitutionality of hours of operation restrictions on sexually-oriented businesses is an issue of first impression in this circuit, six other circuits have had occasion to consider similar restrictions, and all have found such restrictions to be constitutional under the "secondary effects" test first enunciated by the Supreme Court in *Renton*. *See* *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir.1999); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir.1999); *Richland Bookmart Inc. v. Nichols*, 137 F.3d 435 (6th Cir.1998); *Nat'l Amusements Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir.1995); *Mitchell v. Comm'n on Adult Enter. Est. of the State of Delaware*, 10 F.3d 123(3d Cir.1993); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir.1986).

In *Renton*, the Supreme Court considered a constitutional challenge to a zoning ordinance prohibiting adult movie theaters from locating within 1,000 feet of any residential zone. 475 U.S. at 43, 106 S.Ct. 925. Citing its decision in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Court established a now familiar three-part analytical framework for evaluating the constitutionality of sexually-oriented business regulations, or what Professor Tribe has described rather aptly as "erogenous zoning laws." Laurence H. Tribe, American Constitutional Law 934 (2d ed.1988). First, the Court asked whether the ordinance was a complete ban on adult theaters. *Id.* at 46, 106 S.Ct. 925. Because the ordinance was not a total ban, it was properly analyzed as a time, place and manner regulation. *Id.* Second, the Court considered whether the ordinance was content neutral or content based. The Court held that, because the ordinance at issue was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects such theaters have on the surrounding community, it was properly classified as content neutral. *Id.* at 47, 106 S.Ct. 925. Third, given this finding, the final step is to ask whether the ordinance is designed to serve a substantial government interest and that reasonable alternative avenues of communication remain available. *Id.* at 50, 106 S.Ct. 925. With respect to the burden of proof at this stage, the Court held that the First Amendment "does not require a city ... 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." *Id.* at 51- 52, 106 S.Ct. 925.

A

The Supreme Court recently reaffirmed the *Renton* framework in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). At issue in that case was a Los Angeles ordinance prohibiting multiple adult entertainment businesses from operating in the same building. In enacting this ordinance, the city primarily relied on a 1977 study conducted by the city's planning department, which indicated that between 1965 and 1975, crime had grown at a much higher rate in Hollywood, which had the largest concentration of adult establishments in the city, than in the city as a whole. ***1160***Id.* at 435, 122 S.Ct. 1728 (plurality opinion). Under the third prong of the *Renton* analysis, we had found that the 1977 study did not reasonably support the inference that a concentration of adult operations in the same building produced higher crime rates. *See* *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719, 725 (9th Cir.2000). This was so, we held, because the study focused on the effect of a concentration of establishments on a given *area*, not on the effect of a concentration of establishments within a single building. *Id.* It was therefore unreasonable, we opined, for the city to infer that absent its regulation, a combination of establishments within a single building would have harmful secondary effects on the

surrounding community. *Id.*

The Supreme Court reversed. Writing for a four-judge plurality, Justice O'Connor wrote that we had erred in requiring the city to "prove that its theory about a concentration of adult operations ... is a *necessary consequence* of the 1977 study." 535 U.S. at 437, 122 S.Ct. 1728 (emphasis added). Justice O'Connor explained,

> In *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that 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. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies the ordinance.

Id. at 438-39, 122 S.Ct. 1728 (internal citation and quotation omitted).

The plurality made two other points of clarification with respect to the evidentiary burden under *Renton.* First, it rejected the notion that the state is required to come forward with empirical data in support of its ordinance. "Such a requirement," wrote Justice O'Connor, "would go too far in undermining our settled position that municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech." *Id.* at 439, 122 S.Ct. 1728.

Second, the plurality made it clear that "the inquiry into whether a [sexually-oriented business regulation] is content neutral" and the "inquiry into whether it is designed to serve a substantial government interest" are separate and distinct. *Id.* at 440, 122 S.Ct. 1728 (quotation and internal citation omitted). Justice O'Connor explained,

> The former requires courts to verify that the "predominate concerns" motivating the ordinance "were with the secondary effects of adult [speech], and not with the content of adult [speech]." The latter inquiry goes one step further and asks whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. Only at this stage did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects.

***1161** *Id.* at 440-41, 122 S.Ct. 1728 (quoting *Renton*, 475 U.S. at 47, 106 S.Ct. 925) (alterations in original).

1

Writing separately, Justice Kennedy concurred in the judgment. Because his concurrence is the narrowest opinion joining in the judgment of the Court, Justice Kennedy's concurrence may be regarded as the controlling opinion. *See Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1976) ("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 judgment on the narrowest grounds.") (citation and internal quotation omitted).

In his separate concurrence, Justice Kennedy agreed with the plurality that "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring). Justice Kennedy wrote separately, he explained, for two distinct reasons.

First, he agreed with the four dissenting justices that sexually-oriented business regulations should no longer be designated as "content neutral" when they were clearly not. Whether a statute is content based or content neutral, he explained, "is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Id.*

Classifying regulations of the type at issue in *Renton* and *Alameda Books* as content neutral, explained Justice Kennedy, was an unhelpful legal fiction which only leads to doctrinal incoherence; these types of ordinances "are content based and we should call them so." *Id.*

Second, while Justice Kennedy agreed with the plurality that *Renton* remained sound, he wrote separately because in his view, the plurality's application of *Renton* "might constitute a subtle expansion" of *Renton* 's principles with which he did not agree. *Id.* at 445, 122 S.Ct. 1728. He explained that, in his view, the question presented--whether or not the city could rely on judicially approved statutory precedent from other jurisdictions in support of the regulation--"is actually two questions." 535 U.S. at 449, 122 S.Ct. 1728.

> First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition? The plurality skips to the second question and gives the correct answer; but in my view more attention must be given to the first.

Id. With regard to the first question--the proposition that the city needs to advance--Justice Kennedy wrote that "a city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* The analysis has to address "how speech will fare under the ... ordinance." *Id.* at 450, 122 S.Ct. 1728. Because of this, "it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects." *Id.* The rationale, therefore, has to be that a proposed secondary-effects ordinance will leave "the quantity of speech ... substantially undiminished, and that total secondary effects will be significantly reduced." *Id.* at 451, 122 S.Ct. 1728. To illustrate this proportionality requirement, Justice Kennedy took the facts of the case under consideration,

> 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 ***1162** the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionally. But ... a promised proportional reduction does not suffice.... The premise ... must be that businesses ... will for the most part disperse rather than shut down.

Id. at 451, 122 S.Ct. 1728.

Only *after* identifying "the proposition to be proved" can a court seek to answer "the second part of the question presented; is there sufficient evidence to support the proposition?" *Id.* As to the state's evidentiary burden, Justice Kennedy agreed fully with the plurality that "very little evidence is required." *Id.* The "reasonable reliance" standard is necessary, he wrote, because "[a]s a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." *Id.*

2

Going straight for the jugular, Fair Public Policy pounces on Justice Kennedy's concurrence in *Alameda Books* and argues that there is no way to reconcile the statute at issue here with his "proportionality" requirement. It argues that sexually-oriented businesses draw a fair amount of their patronage in the evening and late night hours--nude dancing establishments are hardly doing a roaring trade after dawn. The ordinance shuts these establishments down during the late night hours, and therefore it cannot be, as Justice Kennedy would require, that "the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced." *Id.* This is precisely the scenario Justice Kennedy warned against, Fair Public Policy argues, because it is *only* by reducing the enjoyment of protected expression that the state reduces secondary effects. Because the statute cannot be squared with Justice Kennedy's proportionality analysis, and because his is the controlling opinion under *Marks*, it urges that the statute must be invalid under the First Amendment.

a

Fair Public Policy's argument is a forceful one, but there are several reasons that lead us to conclude that Justice Kennedy never intended a heightened proportionality requirement to apply in this particular context. First and foremost, the argument that Justice Kennedy meant to invalidate an hours of operation restriction of the type at issue here cannot be squared with his insistence that "the central holding of *Renton*

remains sound." *Id.* at 448, 122 S.Ct. 1728. Limiting the negative externalities associated with certain land uses, as a properly crafted secondary effects ordinance is designed to do, is a "prima facie legitimate purpose," and for this reason "such laws do not automatically raise the specter of impermissible content discrimination." *Id.* at 449, 122 S.Ct. 1728. Justice Kennedy quite clearly agreed with the plurality that laws "designed to decrease secondary effects ... should be subject to intermediate rather than strict scrutiny." *Id.* at 449, 122 S.Ct. 1728. He wrote separately to guard against "a subtle expansion" of *Renton*, and *not*, as Fair Public Policy would have it, to signal a fundamental shift in the *Renton* 10229 framework. Given his emphatic reaffirmance of *Renton*, we are not persuaded that Justice Kennedy meant to precipitate a sea change in this particular corner of First Amendment law. This is especially so given that the circuit courts have thus far been unanimous in upholding similar or even more severe hours of operation restrictions under *Renton*. *See DiMa Corp.*, 185 F.3d 823; *Lady J. Lingerie, Inc.*, 176 F.3d at 1358; *Richland Bookmart Inc.*, 137 F.3d at 435; *Nat'l Amusements Inc.*, 43 F.3d at 731; *Mitchell*, 10 F.3d at 123; *Star Satellite, Inc.*, 779 F.2d at 1074. We ***1163** read nothing in Justice Kennedy's separate opinion signaling disapproval with these results.

b

Justice Kennedy's proportionality analysis also needs to be understood in light of the particular species of secondary effects law that the Court was considering. The ordinance at issue in *Alameda Books* was a classic erogenous zoning ordinance whereby the city was restricting certain land uses. It was a "place" restriction, and Justice Kennedy's proportionality analysis is easy enough to understand and to apply to such a typical zoning ordinance. The city's rationale cannot be that when it requires businesses to disperse (or to concentrate), it will force the closure of a number of those businesses, thereby reducing the quantity of protected speech. In contrast, we are faced with a quite different species of secondary effects law--a "time" restriction that forces the closure of *all* adult entertainment establishments for a limited time. We accept the proposition that such establishments tend to be patronized in the evening and late at night. Given this, the application of Justice Kennedy's proportionality analysis to this particular type of secondary effects law would invalidate *all* such laws, and we are satisfied that he never intended such a result. His proportionality requirement was simply not designed with this particular type of restriction in mind.

c

Finally, Fair Public Policy's argument that Justice Kennedy's *Alameda Books* opinion presents a new and different approach to the constitutional analysis of secondary effects law is inconsistent with the weight of authority in the wake of that decision. Courts have routinely upheld properly crafted secondary effects ordinances supported by a proper record in the wake of *Alameda Books*, and have explicitly stated that Justice Kennedy's separate decision did little, if indeed anything, to the traditional *Renton* framework. *See Z.J. Gifts D-4, LLC v. City of Littleton*, 311 F.3d 1220, 1239 n. 15 (10th Cir.2002) (seeing "nothing in ... *Alameda Books* that requires reconsideration" of the traditional *Renton* framework); *World Wide Video of Wash., Inc. v. City of Spokane*, 227 F.Supp.2d 1143, ---- (E.D.Wash.2002) ("While *Alameda Books* may clarify existing precedent, this court is not persuaded that it fundamentally alters the legal landscape regarding adult entertainment zoning ordinances."). As the Seventh Circuit explained, "[t]he differences between Justice Kennedy's concurrence and the plurality opinion are ... quite subtle." *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 721(7th Cir.2003).

> Justice Kennedy's position is not that a municipality must *prove* the efficacy of its rationale for reducing secondary effects *prior to* implementation, as Justice Souter and the other dissenters would require, *see generally Alameda Books*, 122 S.Ct. at 1744-51; but that a municipality's *rationale* must be *premised* on the theory that it "*may* reduce the costs of secondary effects without substantially reducing speech."

Id. (emphasis in original) (quoting *Alameda Books*, 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring)). Indeed, the plurality in *Alameda Books* considered Justice Kennedy's proportionality analysis "unobjectionable," and "simply a reformulation of the requirement that an ordinance warrants intermediate

scrutiny only if it is a time, place, and manner regulation and not a ban." 535 U.S. at 443, 122 S.Ct. 1728 (plurality opinion).

d

In any event, to the extent Justice Kennedy's concurrence worked any change in the traditional *Renton* framework, we are satisfied that his proportionality analysis ***1164** does not apply to the particular type of regulation that we deal with here, and we reject Fair Public Policy's argument that the statute must be invalidated on the basis of his opinion. Because five members of the Supreme Court agreed that "the central holding of *Renton* is sound" we apply the traditional three-part test in order to determine the constitutionality of § 13-1422.

B

Our first task under *Renton*, then, is to determine whether the statute amounts to a complete ban on protected expressive activity. *Renton*, 475 U.S. at 46, 106 S.Ct. 925; *Alameda Books*, 535 U.S. at 434, 122 S.Ct. 1728 (plurality opinion).

1

[1] The statute at issue here is obviously not a complete ban. It is a classic time, place or manner restriction, prohibiting sexually-oriented businesses from operating during certain nighttime hours, and until noon on Sundays. The businesses may remain open the remainder of the time, 115 hours in a 168 hour week, or approximately 5,980 hours in a calendar year. "The ordinance is therefore properly analyzed as a time, place, and manner regulation." *Renton*, 475 U.S. at 46, 106 S.Ct. 925.

2

Next, we must determine what level of scrutiny to apply. Traditionally, the Court has invoked the content based/content neutral distinction as the basis for determining which level of scrutiny to apply. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) ("Our precedents ... apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.... In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny.").

[2][3] A regulation restricting the hours of operation of a sexually-oriented business is quite obviously content based. "[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Alameda Books*, 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring). The Arizona statute is content based on its face because whether an establishment falls within its parameters, and is therefore subject to sanction for violating the prohibition against operating during nighttime hours, can only be determined by reference to the content of the expression inside it. *See Schultz v. City of Cumberland*, 228 F.3d 831, 843-44 (7th Cir.2000) ("[A]n ordinance that regulates only adult-entertainment businesses singles out adult-oriented establishments for different treatment based on the content of the materials they sell or display.") (internal quotation omitted). Because the statute is content based, Fair Public Policy argues that strict scrutiny should apply. Such argument is misplaced.

[4] The Supreme Court has clearly carved out sexual and pornographic speech as one type of speech than can be subject to reasonable restriction. "Generally, the government has no power to restrict speech based on content, but there are exceptions to this rule." *Alameda Books*, 535 U.S. at 448, 122 S.Ct. 1728(Kennedy, J., concurring). The speech and expressive activity at issue here is one such exception; the content based/content neutral distinction simply does not fit in this context. In fine, so long as the regulation is designed to combat the secondary effects of such establishments on the surrounding community, "namely at crime rates, property values, and the quality of the city's neighborhoods," ***1165***Alameda Books*, 535 U.S. at 434, 122 S.Ct. 1728 (plurality opinion), then it is subject to intermediate scrutiny. *See also Colacurcio v. City of Kent*, 163 F.3d 545, 551(9th Cir.1998) (explaining that if "the predominant purpose" of an ordinance is ameliorating secondary effects associated with sexually-oriented businesses, then it is subject to intermediate scrutiny).

[5] "We will look to the full record" to determine whether the purpose of the statute is to ameliorate

secondary effects. *Id.* at 552. "In so doing, we will rely on all 'objective indicators of intent,' including the 'face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment, the stated purpose, and the record of proceedings.' " *Id.* (quoting *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297(9th Cir.1984)).

a

[6] In this context, the first thing to note about § 13-1422 is that it regulates both establishments protected by the First Amendment--adult bookstores, video stores, cabarets, motion picture theaters and theaters--and businesses that have no such protection--escort agencies, [FN2] for example, suggesting that the state's purpose in enacting the statute was unrelated to the suppression of expression. In *Alameda Books*, Justice Kennedy noted the fact that the ordinance at issue was "not limited to expressive activities. It also extends ... to massage parlors, which the city has found to cause similar secondary effects." 535 U.S. at 447, 122 S.Ct. 1728 (Kennedy, J., concurring).

> FN2. An "escort agency" is "a person or business association that furnishes, offers to furnish or advertises the furnishing of escorts as one of its primary business purposes for any fee, tip or other consideration." Ariz.Rev.Stat. § 13-1422(D)(7). An "escort" is "a person who for consideration agrees or offers to act as a companion, guide or date for another person or who agrees or offers to privately model lingerie or to privately perform a striptease for another person." *Id.* § 13-1422(D)(6).

Furthermore, the hours regulation was passed as an amendment to Senate Bill 1162, a broader bill authorizing counties to develop comprehensive land-use regulations within their respective jurisdictions, and to promote the social value of the land as a whole. *See* Ariz.Rev.Stat. § 11-821 ("The county plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the area of jurisdiction."). This is yet another objective indicator that the purpose of the statute was to combat the negative secondary effects associated with sexually-oriented businesses. *See Alameda Books*, 535 U.S. at 447, 122 S.Ct. 1728 (Kennedy, J., concurring) (fact that the ordinance at issue was "one part of an elaborate web of land-use regulations .... suggests that the ordinance is more in the nature of a typical land-use restriction and less in the nature of a law suppressing speech").

There are other "objective indicators of intent" on this record. *Foley*, 747 F.2d at 1297. For example, the "fact sheet" prepared by the NFLF stated that a statewide hours regulation was necessary to curb the problems associated with sexually-oriented business, which "according to law enforcement, include noise, traffic, unlawful public sexual activity, prostitution and drug trafficking." Moreover, the majority of comments made by legislators when the bill was under consideration focused on the secondary effects associated with sexually-oriented businesses. In short, our examination of the record as a whole, *see Colacurcio*, 163 F.3d at 552, indicates that the predominant purpose in enacting this provision was to ameliorate the secondary effects associated with the regulated establishments.

***1166** b

[7] Fair Public Policy argues that there is no pre-enactment evidence on which the legislature could rely to support its conclusion that the restrictions are warranted. But this argument confuses two separate issues which the Supreme Court has made clear need to be carefully distinguished. The 'predominant purpose' inquiry is separate and independent from the inquiry into whether the statute is designed to serve a substantial government interest. Only with respect to the latter inquiry "did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects." *Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728 (plurality opinion). In short, Fair Public Policy's argument is one that was specifically considered and rejected by the Supreme Court in *Alameda Books*. Because our examination of the record as a whole indicates that, in enacting the hours of operation restriction, the Arizona legislature was concerned with curbing the negative secondary effects associated with such businesses, intermediate scrutiny applies.

3

[8] The statute will be upheld if it is designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication. *Renton*, 475 U.S. at 50, 106 S.Ct. 925; *Colacurcio*, 163 F.3d at 551.

a

[9] It is beyond peradventure at this point in the development of the doctrine that a state's interest in curbing the secondary effects associated with adult entertainment establishments is substantial. *See Young*, 427 U.S. at 71, 96 S.Ct. 2440 (city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect"); *Renton*, 475 U.S. at 50, 106 S.Ct. 925 (noting the "vital government interests at stake"); *Alameda Books*, 535 U.S. at 435, 122 S.Ct. 1728 ("reducing crime is a substantial government interest").

Here, Arizona's specific interest is in reducing the secondary effects associated with late night operations of sexually-oriented businesses, which include noise, traffic, unlawful public sexual activity, prostitution and drug trafficking. Each of our sister circuits to have considered similar prohibitions has recognized that such an interest is a substantial one. *See, e.g.*, *National Amusements, Inc.*, 43 F.3d at 741(city has a substantial interest in preserving peace and tranquility for citizens during late evening hours); *Mitchell*, 10 F.3d at 133 (state's interest in preserving character and preventing deterioration of neighborhoods substantial); *Richland Bookmart, Inc.*, 137 F.3d at 440-41 (deterring "prostitution in the neighborhood at night or the creation of 'drug corners' on the surrounding streets" a substantial government interest).

The critical issue, of course, is whether the state has met its burden under *Renton* of coming forward with evidence that "demonstrate[s] a connection between the speech regulated ... and the secondary effects that motivated the adoption of the ordinance." *Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728(plurality opinion). [FN3]

FN3. The parties argue at great length over whether or not we may consider the contents of the studies that document the secondary effects associated with sexually-oriented businesses, and that were placed in the district court record during the course of these proceedings. While the Arizona legislature was briefed on these studies, the actual studies themselves were not before the legislature prior to § 13-1422's enactment, and it is therefore so-called post-enactment evidence. However, in *Alameda Books* the Supreme Court specifically contemplated that the state could indeed rely on post-enactment evidence in support of its position, *but only* if the plaintiffs succeed in casting doubt on the state's rationale. *See Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728(if "the burden shifts back" to the state, then state can "*supplement* the record with evidence renewing support for a theory that justifies the ordinance" (emphasis added)); *see also Mitchell*, 10 F.3d at 136 (examining "pre-enactment and post-enactment evidence" in determining whether state met its burden); *DiMa Corp.*, 185 F.3d at 829-30 (holding that "a municipality may make a record for summary judgment or at trial with evidence that it may not have had when it enacted the ordinance"); *Ben Rich Trading Inc. v. City of Vineland*, 126 F.3d 155, 161 (3d Cir.1997) (discussing city's burden of production and noting that "a record could be established in the court after legislation is passed and challenged").

***1167** The pre-enactment record is a slim one, and consists of certain letters from NFLF documenting in a general sense the "acute problems" associated with sexually-oriented businesses, and discussing a Denver, Colorado study, which concluded that such establishments disproportionately deplete police time and resources during overnight hours. A "fact sheet" distributed to legislatures cited fourteen studies that documented the secondary-effects associated with adult entertainment establishments, and in particular it noted a Minnesota study establishing specific secondary effects associated with sexually-oriented busi-

nesses during overnight hours. The Arizona legislature also held public hearings and considered certain testimonial evidence, including evidence that prospective employers were concerned for the safety of their night-shift employees, and testimony from a neighborhood activist concerning the litter, prostitution, and drug use in her neighborhood.

All of the evidence the Arizona legislature considered fairly supports its rationale that prohibiting sexually-oriented businesses from operating in the late night hours will lead to a reduction in secondary effects, and generally enhance the quality of life for Arizona citizens. A comparison of the record before the Arizona legislature to the record amassed in prior cases that have been the subject of judicial scrutiny may be helpful in determining whether the state has carried its burden in this case. The quantum and quality of evidence here compares unfavorably to two of the circuit court cases to have considered similar restrictions. The city ordinance upheld by the Fifth Circuit was "adopted after extensive study" by the city. *Star Satellite, Inc.*, 779 F.2d at 1077-78. No such study was done here. Instead, Arizona relied on the experiences of other communities in support of its rationale. *But see* *Renton*, 475 U.S. at 50, 106 S.Ct. 925(rejecting the argument that it was necessary for a city to conduct its own studies). The ordinance at issue in *Schultz v. City of Cumberland*, 228 F.3d 831, 846 (7th Cir.2000) was adopted after the city "collected and reviewed a host of studies," and here, while the legislature was *briefed* with respect to certain studies, no studies were put before the legislature prior to enactment.

The record compares favorably to the evidence considered in several other cases, however. In *Mitchell*, lawmakers "received no documents or any sworn testimony in support of the bill" and "the General Assembly did not conduct public hearings." 10 F.3d at 133. Nonetheless the Third Circuit held that the state had met its evidentiary burden under *Renton*. *See also* *DiMa Corp.*, 185 F.3d at 830-31 (city relied on factual record supporting another city's ordinance); *Ben Rich Trading Inc.*, 126 F.3d at 161 (only thing city relied on was evidence presented to state legislature two years previously).

***1168** [10] The record here is hardly overwhelming, but it does not have to be. *See* *Alameda Books*, 535 U.S. at 451, 122 S.Ct. 1728,(Kennedy, J., concurring) ("very little evidence is required" to justify a secondary effects ordinance). The question is whether the Arizona legislature relied on evidence "reasonably believed to be relevant" in demonstrating a connection between its stated rationale and the protected speech, and we hold that it has done that here. The Arizona Senate and House held public hearings at which lawmakers heard citizen testimony concerning the late night operation of sexually-oriented businesses, and were briefed on several studies documenting secondary effects, and two of those studies were specific to late night operations. *See* *Renton*, 475 U.S. at 50, 106 S.Ct. 925(reasonable for regulators to rely on experiences and studies of other cities, as well as legal decisions upholding similar regulations). That evidence is both reasonable and relevant, and compares favorably with the evidence presented in other cases.

i

[11][12] Under *Alameda Books*, the burden now shifts to Fair Public Policy to "cast direct doubt on [the state's] rationale, either by demonstrating that the [state's] evidence does not support its rationale or by furnishing evidence that disputes the [state's] factual findings." 535 U.S. at 441, 122 S.Ct. 1728 (plurality opinion). Fair Public Policy's primary argument on appeal is that the evidence before the Arizona legislature consisted of "irrelevant anecdotes" and "isolated" incidents, and that testimonial evidence is not "real" evidence. If Fair Public Policy means to argue that such evidence is improper, its argument is erroneous, and simply misconstrues the nature of the legislative process. Legislative committees are not judicial tribunals, and they are not bound by rules of evidence. As the First Circuit explained when confronted with a similar argument,

> A legislative body can act without first acquiring irrefutable proof. In other words, lawmakers need not bury each piece of described trash before acting to combat litter, or confirm each honking horn before acting to abate noise levels. Instead, a legislative body, acting in furtherance of the public interest, is entitled to rely on whatever evidence it

> reasonably believes to be relevant to the problem at hand.

National Amusements, Inc., 43 F.3d at 742(internal quotation and citations omitted); *see also* *World Wide Video of Wash.*, 227 F.Supp.2d 1143 ("[A]necdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects.") (quoting *Stringfellow's of N.Y., Ltd. v. City of New York*, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407, 417 (1998)).

[13] To the extent Fair Public Policy argues that the state needs to come forward with empirical data in support of its rationale, that argument was specifically rejected in *Alameda Books*. 535 U.S. at 439, 122 S.Ct. 1728 (plurality opinion) ("Such a requirement would go too far in undermining our settled position that municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech.") (internal quotation omitted); *see also* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (Souter, J., concurring) ("legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects").

[12] Fair Public Policy has failed to cast doubt on the state's theory, or on the evidence the state relied on in support of that theory. "Precedent ... commands ***1169** that courts should not stray from a deferential standard in these contexts, even when First Amendment rights are implicated through secondary effects." *Charter Comm's, Inc. v. County of Santa Cruz*, 304 F.3d 927, 932 (9th Cir.2002). Since the state relied on evidence that is "reasonably believed to be relevant," *Renton*, 475 U.S. at 52, 106 S.Ct. 925, we are satisfied that it has met its evidentiary burden.

b

[14] The narrow tailoring requirement is satisfied so long as the government's asserted interest "would be achieved less effectively absent the regulation." *Colacurcio*, 163 F.3d at 553 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

It appears self-evident that the government's asserted interest--the amelioration of secondary effects associated with late night operation of sexually-oriented businesses, including prostitution, drug use and littering-- would be achieved less effectively in the absence of the statute. Fair Public Policy argues that the Arizona legislators did not consider any evidence particular to late night hours, but this assertion is belied by the record. Testimonial evidence was introduced specific to the late night operation of such businesses, and the legislature was briefed on two studies specific to problems associated with nighttime operation of sexually oriented businesses. *See* *National Amusements, Inc.*, 43 F.3d at 744 ("It is within a government's purview to conclude that such secondary effects as late-night noise and traffic are likely to adhere to all [adult] entertainment.").

Nor does the fact that the statute does not permit such establishments to operate prior to noon on Sundays render it overly-broad. The Eleventh Circuit considered and rejected precisely the same argument in *Lady J. Lingerie:*

> [T]he plaintiffs would have us look at the City's reasons for this rule on an hour by hour basis. There is no evidence, they submit, of a substantial government interest to justify requiring adult businesses to close from 10:00 a.m. until noon. This is a clever argument, but it confuses the requirement that a regulation serve a substantial government interest with the requirement that it be narrowly tailored to that end.... If we were to side with the plaintiffs here, the next litigants would argue whether evidence of secondary effects at 6:15 in the morning justifies requiring adult businesses to close at 9:30, or whether evidence from 9:30 justifies requiring them to close at 10:45. That sort of line-drawing is inconsistent with a narrow tailoring requirement that only prohibits regulations that are "substantially broader than necessary."

176 F.3d at 1365 (quoting *Ward*, 491 U.S. at 800, 109 S.Ct. 2746).

Furthermore, all six circuits to have considered hours of operation restrictions such as the one at issue here were confronted with regulations containing special provisions for Sunday closing. Indeed, four circuits have upheld regulations that prohibit Sunday hours altogether. *See* *Ben Rich Trading*, 126 F.3d at 158; *Schultz*, 228 F.3d at 837; *Star Satellite*, 779 F.2d at

1079; *Richland Bookmart, Inc.*, 137 F.3d at 438. Two other circuits have upheld regulations prohibiting sexually-oriented businesses from operating before noon on Sunday, as here. *See* *Mitchell*, 10 F.3d at 128; *Lady J. Lingerie*, 176 F.3d at 1365. In short, because Arizona's interest in ameliorating secondary effects "would be achieved less effectively absent the regulation," *Colacurcio*, 163 F.3d at 553 (quotation omitted), it satisfies the narrow tailoring requirement.

***1170** C

[15] Finally, the statute must "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. "The Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." *Colacurcio*, 163 F.3d at 554.

The statute permits the businesses that come within its purview to operate seventeen hours per day Monday through Saturday, and thirteen hours on Sunday, a total of approximately 5,980 hours per year. In *Mitchell*, the Third Circuit found that a similar restriction "allows those who choose to hear, view, or participate publically in sexually explicit expressive activity more than thirty-six hundred hours per year to do so. We think the Constitution requires no more." 10 F.3d at 139. We find that the statute leaves open "ample alternative channels for communication." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746.

III

[16] As an alternative ground for finding the statute unconstitutional, Fair Public Policy argues that it is unconstitutionally underinclusive. The argument is that the state's decision to close sexually-oriented businesses during late night hours must be assessed in light of other types of business which the state permits to operate at night. According to Fair Public Policy, the state must demonstrate that *greater* late night problems are posed by sexually-oriented businesses than by non-regulated businesses, and if it does not, the statute is underinclusive and is therefore subject to strict scrutiny.

Fair Public Policy's first major problem is that this argument runs straight into the Supreme Court's decision in *Renton*. The adult theater plaintiffs in that case argued that the ordinance at issue was underinclusive because it failed to regulate other kinds of adult businesses that are just as likely to produce secondary effects similar to those produced by adult theaters. *Renton*, 475 U.S. at 52, 106 S.Ct. 925. The Court rejected this argument, holding that simply because the city "chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has 'singled out' adult theaters for discriminatory treatment." *Id.* at 53, 106 S.Ct. 925.

Fair Public Policy gamely attempts to distinguish *Renton* by pointing out that the Court in *Renton* dealt with a comparison of *one kind* of adult entertainment business with *other kinds* of adult entertainment businesses, whereas their argument here is that the state may not single out the *entire industry* of adult entertainment. As we have previously explained, however, the Supreme Court has consistently stated that so long as the legislature's motive is the amelioration of secondary effects, sexually-oriented businesses may indeed be singled out. As the Supreme Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), explained,

> [T]he First Amendment imposes not an "underinclusiveness" limitation but a "content discrimination" limitation upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content.... Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated ***1171** with particular secondary effects of the speech, so that the regulation is *justified* without reference to the content of the speech.

Id. at 387, 389, 112 S.Ct. 2538 (emphasis in original) (citations and quotations omitted).

The State "may choose to treat adult businesses differently from other businesses...." *Isbell, G and B*

Emporia, Inc., 258 F.3d 1108, 1116 (9th Cir.2001); *see also Young*, 427 U.S. at 70-71, 96 S.Ct. 2440 ("[T]he State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."). If this is true as a general proposition, then it must also be true as to the specific proposition that a state may single out sexually-oriented businesses to regulate their hours of operation. *See Ben Rich Trading, Inc.*, 126 F.3d at 163 ("[A] municipality may regulate hours of adult businesses differently than other businesses without raising a strong inference of discrimination based on content.").

IV

In short, we reject Fair Public Policy's argument that we need to assess the regulation in light of how other classes of businesses are treated under Arizona law. [FN4] The State may choose to treat adult businesses differently from other businesses so long as it does so for the right reasons, and it has done that here. It need do no more.

> FN4. Though we reject Fair Public Policy's argument that the statute needs to be assessed in light of how other classes of business are treated, we note in passing that Arizona law does indeed provide for restrictions on the nighttime operation of other classes of business. *See, e.g.*, Ariz.Rev.Stat. § 44-1632 ("A city or town may adopt an ordinance prohibiting the operation of pawnshops from 12:00 a.m. to 6:00 a.m."); Ariz.Rev.Stat. § 4-244(15) ("It is unlawful .... to sell, dispose of, deliver or give spiritous liquor to a person between the hours of 1:00 a.m. and 6:00 a.m. on weekdays, and 1:00 a.m. and 10:00 a.m. on Sundays.").

The judgment of the district court is **AFFIRMED.**

CANBY, Circuit Judge, dissenting:

I dissent from the majority opinion because I conclude that it is inconsistent with *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). As the majority here recognizes, the focus of our examination of *Alameda Books* is the opinion of Justice Kennedy, because there was no majority opinion and Justice Kennedy's concurring opinion was the one that supported the Court's judgment on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

Like the four dissenters in *Alameda Books*, Justice Kennedy viewed the regulation of adult entertainment businesses to be content-related, because the businesses to be regulated are identified by the content of their speech. *Alameda Books*, 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring). Yet Justice Kennedy agreed with *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), that a regulation that is "designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Alameda Books*, 535 U.S. at 448, 122 S.Ct. 1728.

Justice Kennedy, however, imposed important conditions as part of this intermediate scrutiny. The question in issue in *Alameda Books* was whether the city's ordinance was invalid because the city did not study the secondary effects of the precise use being regulated, but relied on judicially approved precedent from other ***1172** jurisdictions. Justice Kennedy stated that this issue involved two questions:

> First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition?

Id. at 449, 122 S.Ct. 1728. Unlike the plurality opinion, Justice Kennedy focused on the first question, and imposed requirements that are crucial to the present case. He elaborated:

> [A] city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. *A city may not assert that it will reduce secondary effects by reducing speech in the same proportion.*

Id. (emphasis added).

Applying this reasoning to the Los Angeles ordinance

that prohibited two or more adult entertainment businesses from operating in the same building, Justice Kennedy made his point once again:

> 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.
>
> The analysis requires a few more steps. If two adult businesses are under the same roof, an ordinance requiring them to separate will have one of two results: One business will either move elsewhere or close. *The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional reduction does not suffice* .....
>
> .... The claim, therefore, must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced.

Id. at 450-51, 122 S.Ct. 1728 (emphasis added). Having thus answered his first sub-question, Justice Kennedy then agreed with the plurality with regard to his second: There was sufficient evidence to support the proposition that forced dispersal of two such businesses was reasonably likely to reduce secondary effects at little cost to speech. *Id.* at 452-53, 122 S.Ct. 1728.

The closing-hours statute in issue here, however, proceeds on precisely the theory that Justice Kennedy found insupportable under the First Amendment. The theory is that adult entertainment establishments [FN1] create adverse secondary effects when they are in operation. If operation is prohibited for several hours each day, the undesirable secondary effects will be reduced accordingly. Unlike a dispersal regulation, the state's instrument is not to move speech, but to stop it. And Justice Kennedy has informed us that "a city may not attack secondary effects indirectly by attacking speech." *Id.* at 450, 122 S.Ct. 1728. A government similarly may not proceed on a theory that "it will reduce secondary effects by reducing speech in the same proportion." *Id.* at 449, 122 S.Ct. 1728. It would be hard to find a more exact description than this of Arizona's closing hour regulation of adult entertainment establishments.

> FN1. I use the term "adult entertainment establishments" to refer to expressive activities such as those conducted by the plaintiffs. As the majority opinion points out, the statutory term "sexually-oriented businesses" includes escort services that presumably are not engaged in First Amendment-protected activity. My discussion does not relate to them.

***1173** The record in the present case cannot sustain any other theory than the impermissible one. The majority opinion candidly characterizes the pre-enactment support for the statute as "slim." Indeed, it is so slim that I have grave doubts that it suffices under *Renton* without the gloss of *Alameda Books.* I need not address that point, however, because the record clearly fails to support a permissible theory of regulation under Justice Kennedy's test in *Alameda Books.* The evidence in both the legislature and the district court was almost entirely concerned with secondary effects that are unrelated to the hours of occurrence. Studies of the effects of adult entertainment businesses on the crime rate were mentioned in legislative hearings, but none were put into the legislative record. A Minnesota study was said to have reported adverse effects from 24-hour operation of adult establishments, but the study was not produced to the legislature. A study by the city of Phoenix, Arizona, was briefly referred to as having explored the effect of nighttime operation of adult establishments but was said to be "inconclusive"; it also was not produced. Another reference was made to a study by Fulton County, Georgia (also not produced for the legislature), but its conclusions tended to show no disproportionate adverse effect on crime rate because of operation of adult entertainment businesses. *See Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976, 979 (11th Cir.2001) (describing Fulton County study). The focus of secondary effects in the record was on those effects generally, not on secondary effects caused by late-night operations, and certainly not on *disproportionate* secondary effects of late-night operations. Finally, there is a total absence of evidence anywhere in the record to support the existence of disproportionate secondary effects from operation on Sunday mornings before noon. (Indeed,

the required closing on Sunday mornings might suggest to a reasonable observer that something other than the mere regulation of secondary effects was going on in the legislature, but I need not pursue that question here.)

As for the effect of the statute on speech, there is no question that speech is simply stopped during the hours of forced closure. Several affidavits filed in district court asserted that many customers of adult establishments held two jobs and could not patronize the establishments except during hours subject to the closure. Another stated that closure during the targeted hours caused a twenty-five percent decline in gross revenues of an adult establishment. All in all, the record overwhelmingly establishes that the closure, *at best*, achieves a one-for-one elimination of speech and secondary effects--a formula that fails to meet the requirements of the First Amendment as Justice Kennedy has stated them.

The majority opinion here addresses Justice Kennedy's concurrence, but concludes that he did not mean his statements to apply to the present situation. The majority holds that Justice Kennedy meant no change in the *Renton* analysis because he said "the central holding of *Renton* is sound." *Id.* at 448, 122 S.Ct. 1728. But that statement came after Justice Kennedy departed from *Renton* 's assumption that regulation of adult entertainment establishments to limit secondary effects was not content-based. Justice Kennedy stated that this fiction was not useful, and that it was better to admit that such regulations *were* content-based. Such an admission would normally call for review under a strict scrutiny, but Justice Kennedy did not accept that consequence. It is with regard only to the standard of review that he then said: "[T]he central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be ***1174** subject to intermediate rather than strict scrutiny." *Id.* To read this statement as a wholesale endorsement of an unmodified *Renton* analysis is to ignore context. [FN2]

> FN2. The majority opinion quotes the Tenth Circuit opinion in *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220, 1239 n. 15 (10th Cir.2002), for the proposition that "'nothing in ... *Alameda Books* requires reconsideration' of the traditional *Renton* framework." The Tenth Circuit's statement, however, was that "nothing in ... *Alameda Books* requires reconsideration of our conclusion as to the applicable standard of review." *Id.* The Tenth Circuit was merely in agreement with Justice Kennedy that intermediate review was appropriate, not strict scrutiny as Z.J. Gifts was arguing. The Tenth Circuit said nothing about leaving the *Renton* "framework" intact.
> Nor is the Seventh Circuit's description of Justice Kennedy's opinion, *see Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 721 (7th Cir.2003), inconsistent with my reading of it.

The majority opinion also refers to Justice Kennedy's statement that he feared the plurality opinion's "application of *Renton* might constitute a subtle expansion, with which I do not concur." *Id.* at 445, 122 S.Ct. 1728. Here again, it over-reads Justice Kennedy's statement to accept it as an endorsement of *Renton* without the gloss Justice Kennedy adds to the analysis in his opinion. If Justice Kennedy thought that the *Renton* analysis was correct, except for its denomination of the ordinance as content-neutral, he could have stated that minor disagreement and joined all the rest of the plurality opinion. His major reason for writing was to establish that the plurality's analysis was deficient because it did "not address how speech will fare under the city's ordinance." *Id.* at 450, 122 S.Ct. 1728. He then spends nearly all of the remainder of his opinion explaining his rule that a government cannot reduce secondary effects by reducing speech on a one-for-one basis. That is what Arizona has done here. I would take Justice Kennedy at his word and on this record would hold Arizona's statute to be in violation of the First Amendment.

336 F.3d 1153, 121 A.L.R.5th 733, 03 Cal. Daily Op. Serv. 6603, 2003 Daily Journal D.A.R. 8308

Briefs and Other Related Documents (Back to top)

• 2002 WL 32144911 (Appellate Brief) Supplemental Brief of Appellants Center for Fair Public Policy, et

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• 2002 WL 32144912 (Appellate Brief) Appellees' Supplemental Brief (Oct. 04, 2002)Original Image of this Document with Appendix (PDF)

• 2002 WL 32144910 (Appellate Brief) Supplemental Brief of Appellants L.J. Concepts, et al (Appellants in #00-16905 and Plaintiffs in District Court Case No. CIV-98-1583-PHX-EHC) (Oct. 03, 2002)Original Image of this Document with Appendix (PDF)

• (Appellate Brief) Reply Brief of Appellants Center for Fair Public Policy, et al. (Appellants in Ninth Circuit Case No. 00-16858) (Jun. 12, 2001)Original Image of this Document with Appendix (PDF)

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• (Appellate Brief) Appellees' Answering Brief (May. 03, 2001)Original Image of this Document with Appendix (PDF)

• 2001 WL 34128000 (Appellate Brief) Opening Brief of Appellants Center for Fair Public Policy, et al. (Appellants in Ninth Circuit Case No. 00-16858) (Mar. 05, 2001)Original Image of this Document with Appendix (PDF)

• (Appellate Brief) Opening Brief of Appellants L.J. Concepts, et al (Appellants in #00-16905 and Plaintiffs in District Court Case No. CIV-98-1583-PHX-EHC) (Feb. 02, 2001)Original Image of this Document with Appendix (PDF)

• 00-16905 (Docket) (Oct. 12, 2000)

• 00-16858 (Docket) (Oct. 04, 2000)

END OF DOCUMENT

Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.
TALK OF THE TOWN; Video Treasures, Inc.; Video Treasures, Ltd.; Raymond Pistol, President, Secretary and Treasurer, Plaintiffs-Appellants,
v.
DEPARTMENT OF FINANCE AND BUSINESS SERVICES, on behalf of CITY OF LAS VEGAS, Defendant-Appellee.
Talk of the Town; Video Treasures, Inc.; Video Treasures, Ltd.; Raymond Pistol, President, Secretary and Treasurer, Plaintiffs-Appellees,
v.
Department of Finance and Business Services, on behalf of City of Las Vegas, Defendant-Appellant.
Nos. 01-15303, 01-16390.

Argued and Submitted Feb. 11, 2003.
Filed Sept. 10, 2003.

Erotic dancing establishment brought action in state court seeking declaratory and injunctive relief from enforcement of ordinance prohibiting consumption of alcoholic beverages on premises of any establishment that lacked valid liquor license, and injunction issued. City removed action on federal question grounds. The United States District Court for the District of Nevada, Lloyd D. George, J., granted summary judgment in part for city and in part for establishment, and appeal was taken. The Court of Appeals, O'Scannlain, Circuit Judge, held that: (1) ordinance did not regulate conduct containing element of protected expression; (2) ordinance did not place disproportionate burden on those engaged in expressive conduct; (3) enforcement procedure was generally applicable to any establishment that violated the ordinance; and (4) three week suspension did not violate First Amendment free speech rights of establishment.

Reversed and remanded.

Canby, Circuit Judge, filed a dissenting opinion.

West Headnotes

[1] Constitutional Law 90(3)
92k90(3) Most Cited Cases
A government regulation is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[2] Intoxicating Liquors 15
223k15 Most Cited Cases
Las Vegas municipal code, which prohibited consumption of alcohol in establishments that lacked valid liquor licenses, did not violate First Amendment free speech rights of erotic dancing establishment, since ordinance did not regulate conduct containing element of protected expression. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[3] Intoxicating Liquors 15
223k15 Most Cited Cases
Las Vegas municipal code, that required businesses to obtain valid liquor license before they were permitted to serve alcohol on their premises, did not violate First Amendment free speech rights of erotic dancing establishment; ordinance did not place disproportionate burden on those engaged in expressive conduct since requirement applied to all businesses. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[4] Intoxicating Liquors 112
223k112 Most Cited Cases
Procedures employed by city in enforcement of generally applicable ordinance, which prohibited consumption of alcohol in establishment that lacked valid liquor license, did not violate First Amendment free speech rights of erotic dancing establishment, since procedure was generally applicable to any establishment that violated the ordinance; burdening of expressive conduct was merely incidental result of city's clear authority to enforce its generally applicable liquor license requirement. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 90(3)
92k90(3) Most Cited Cases
The identity of the body imposing a sanction is irrelevant when the conduct that gives rise to the sanction manifests absolutely no element of protected expression under the First Amendment. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[6] Public Amusement and Entertainment 46
315Tk46 Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
Three week suspension of erotic dancing establishment's license, for violation of ordinance which prohibited consumption of alcohol in establishments that lacked valid liquor licenses, did not violate First Amendment free speech rights of erotic dancing establishment; by imposing relatively brief suspension to punish its unlawful nonexpressive activity, city properly sought to protect the environment of the community by directing the sanction at premises knowingly used for lawless activities, and there was absolutely no evidence that suspension imposed was pretext for suppression of protected expression. U.S.C.A. Const.Amend. 1.

***1064** Allen Lichtenstein, Las Vegas, NV, argued the cause for Talk of the Town and submitted briefs.

***1065** Peter M. Angulo, Rawlings, Olson, Cannon, Gormley & Desruisseaux, Las Vegas, NV, argued the cause for the City of Las Vegas and filed briefs. Thomas D. Dillard, Jr., also was on the briefs.

Appeal from the United States District Court for the District of Nevada; Lloyd D. George, District Judge, Presiding. D.C. No. CV-98-00910-LDG/ RJJ.

Before CANBY, JR., O'SCANNLAIN, and W. FLETCHER, Circuit Judges.

Opinion by Judge O'SCANNLAIN; Dissent by Judge CANBY

OPINION

O'SCANNLAIN, Circuit Judge.

We must decide whether the First Amendment is implicated by the suspension of an establishment's erotic dancing license for violations of a city's alcohol licensing laws.

I

In January and early February 1998, officers of the City of Las Vegas' Business License Department conducted some six overt and covert site investigations at Talk of the Town ("TOT"), a business licensed to present erotic dancing. [FN1] During the course of these investigations, inspectors themselves were allowed to bring onto the premises and consume alcoholic beverages, and witnessed other patrons doing the same, even though TOT did not possess a valid liquor license. On several occasions, upon inquiring of TOT employees about the availability of alcohol, the investigating officers were directed to a nearby liquor store. [FN2] On February 6, 1998, TOT was issued a "Notice to Cease & Desist." The notice informed TOT that it was in violation of Las Vegas Municipal Code ("LVMC") § 6.50.170, which forbids the sale or consumption of alcoholic beverages in any establishment lacking a valid alcoholic beverage license.

FN1. Las Vegas Municipal Code ("LVMC") § 6.35.100(A) states that "[n]o person, firm, partnership, corporation or other entity shall advertise, or cause to be advertised, as an erotic dance establishment without a valid erotic dance establishment license...." TOT's premises also includes a bookstore, but the erotic dance area of the business was the subject of the investigation that triggered the instant litigation.

FN2. On one occasion, TOT's doorman, having pointed the way to the nearby liquor store, allegedly informed the undercover agents that, when it came to consumption of alcohol on the premises, "I'm blind in one eye and can't see out of the other."

On March 10, 1998, the Las Vegas Department of Finance and Business Services drafted and served on TOT a "Complaint for Disciplinary Action" pursuant to the nuisance provisions of the LVMC, §§ 6.02.330(H) [FN3] and 6.02.370, [FN4] which subject those who operate without the appropriate license to "disciplinary action by the City Council for good cause." The "good cause" alleged in TOT's case was the numerous violations of the City's general liquor license provision, LVMC § 6.50.170, as well as § 6.35.100(F), which forbids the purchase, sale, or consumption of alcohol ***1066** in any erotic dancing establishment that does not also possess a valid liquor license. The Department further requested that the City Council "[a]pprove the Complaint for Disciplinary Action and order a disciplinary hearing at which the Respondents shall appear and show cause why the licenses [FN5] that are the subject of this Complaint should not be suspended or revoked, or other disciplinary action taken...."

FN3. This provision provides: "The licensee may be subject to disciplinary action by the City Council for good cause, which may, without limitation, include: ... The actual business activity constitutes a public or private nuisance, or has been or is being conducted in an unlawful, illegal, or impermissible manner."

FN4. This section provides:
The doing of any act for which a license is required or the violation of any provision of this Title is declared to be unlawful and harmful to the safety, welfare, health, peace and morals of the residents and taxpayers of the City and constitutes a public nuisance per se, unless such act is done by a person who is authorized to do so by a license issued pursuant to this Title.

FN5. In addition to TOT's "Erotic Dance Establishment License," the complaint noted that TOT also possessed a "Coin Operated Amusement License" and a "Video Viewing License." The suspension of the latter two licenses was not challenged in the district court and neither party discusses them on appeal.

TOT's answer to the complaint denied the allegations and offered three affirmative defenses: "[1] Petitioner's Complaint is barred by insufficiency of process. [¶][2] The City of Las Vegas failed to provide the Petitioners adequate notice that the City considered the Respondents to be in violation of City ordinances. [3] The acts of the Respondents were neither willful, wanton, intentionally improper, nor taken in reckless disregard of the ordinances of the City of Las Vegas." In an order dated March 23, 1998, the mayor and City Council informed TOT that the complaint had been approved and that a hearing on the complaint would be held on May 20, 1998.

At the May 20 hearing, TOT was represented by counsel while the City was represented by the deputy city attorney. The proceedings were transcribed verbatim and the witnesses who appeared testified under oath and were subject to cross-examination. TOT was given the opportunity to present its own witnesses but chose not to do so. The City presented as witnesses the licensing officers who investigated the violations at TOT, and, on the basis of their testimony, the council concluded that there was substantial evidence to support the allegations in the complaint. On May 29, 1998, the council issued findings of fact, conclusions of law, and an order imposing a three-week suspension of TOT's license to run an erotic dance establishment. [FN6] The order stated that "substantial evidence exists that TALK OF THE TOWN was in violation of Law Vegas Municipal Code §§ 6.50.170 and/or 6.35.100(F) and/or 6.02.330(H)." The order also stated that suspension of the erotic dancing license would go into effect fourteen days after service upon TOT. Service was made on the same day, but before the fourteen days ran, TOT filed suit in Nevada district court seeking declaratory and injunctive relief. TOT also moved for a stay of the suspension of their license. The stay was granted and the

City subsequently removed the case to the federal district court.

> FN6. TOT's coin operated amusement and video viewing licenses were also suspended for three weeks.

Both parties filed motions for summary judgment. TOT's motion alleged that (1) the City's procedures in reaching the decision to suspend its license (i.e., its procedure of providing notice and a hearing before the City Council) violated its First and Fourteenth Amendment rights, and (2) the enforcement of the City's suspension of its license violated the First Amendment by failing to follow "well established procedural guidelines set forth by the federal courts for licensing decisions concerning [adult] businesses." With respect to the latter claim, TOT raised both a facial and as-applied challenge to § 6.35.140(D), [FN7] the provision of the LVMC ***1067** that allows for judicial review of any suspension or revocation of a nude dancing license, on the grounds that it "fails to provide for prompt judicial review of a decision to suspend an erotic dance license during which time the status quo must be maintained." The City's opposition and counter-motion for summary judgment asserted that (1) TOT's First Amendment rights were not at issue, and (2) the procedures available were constitutionally adequate.

> FN7. This section provides:
> In the event the erotic dance license is suspended or revoked, the license suspension or revocation shall be stayed for fourteen days from the date of the written notice to the licensee for the licensee to seek judicial review. The licensee may waive the stay provision in writing, or the City may seek sooner to enforce the suspension or revocation by filing in the district court a petition for judicial review as provided by NRS 43.100 or by seeking alternative relief pursuant to Chapter 34 of NRS.

In due course, the federal district court rejected TOT's constitutional challenge to the procedures the City used in reaching the conclusion that TOT violated the alcohol ordinance. [FN8] With respect to TOT's challenge to the constitutionality of LVMC § 6.35.140(D), the district court found the provision lacked "safeguards regarding suspension or revocation of [an erotic dancing] license," and therefore concluded that it "is unconstitutional on its face." In the judgment accompanying its final order, the district court stayed the enforcement of the erotic dance license suspension, giving both parties a fourteen-day window within which to seek judicial review of the City's decision to suspend TOT's license and further held that if either party did seek judicial review, the stay would remain in place "until there is a final determination or decision by a judicial officer." If, however, neither party sought judicial review within that time, the court ordered that the stay would be automatically lifted.

> FN8. The district court noted that TOT "fail[ed] to offer any argument or cite any law suggesting that the procedure up to and including the City's decision [to suspend its license] violated either Due Process or the First Amendment." In its opening brief before this court, TOT makes no reference to this claim. *See Officers for Justice v. Civil Service Commission*, 979 F.2d 721, 727 (9th Cir.1992) ("We will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief.").

Fourteen days later, on April 27, 2001, TOT filed and served on opposing counsel a "Motion to Amend and Emergency Motion for a Stay Pending Judicial Resolution." TOT contended that, because the district court had declared LVMC § 6.35.140(D) facially unconstitutional, and because that provision could not be severed from the rest of the City's license suspension/revocation scheme, the entire scheme was void. Because of the constitutional infirmity of § 6.35.140(D), TOT contended, the City *never* had the authority to suspend its license and could not now enforce its decision to do so, regardless of the district court's subsequent ruling and award of injunctive relief.

On April 28, 2001, the day after TOT filed its motion but before the district court ruled on it, the City

moved to close the business pursuant to the 1998 decision by the City Council to suspend its erotic dance establishment license. TOT remained closed for three days, until May 1, 2001, when the district court granted the emergency stay and ordered oral argument for May 15, 2001, on the motion to amend.

On June 1, the district court denied the motion to amend judgment. The court entered a stay once again to allow TOT to appeal the court's determination. [FN9]

> FN9. The district court also rejected the City's cross motion to revise its judgment in light of a new version of § 6.35.140(D) that had been passed in 2000.

TOT, having substantially prevailed in the district court, timely appeals that court's remedy, urging reversal insofar as the ruling allows for any future enforcement ***1068** of the May 20, 1998, decision by the Las Vegas City Council to suspend Talk of the Town's license. The City cross-appeals, challenging the district court's determination that the First Amendment is implicated in this case.

II

We note at the outset that this case implicates two distinct lines of First Amendment jurisprudence. The first, or *O'Brien* line--named after the Supreme Court's decision in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) [FN10]--teaches that "generally applicable regulations of conduct implicate the First Amendment only if they (1) impose a disproportionate burden on those engaged in First Amendment activities; or (2) constitute governmental regulation of conduct with an expressive element." *Nunez v. City of San Diego*, 114 F.3d 935, 950 (9th Cir.1997). The second line of cases concerns "prior restraints" on speech that arise "when the enjoyment of protected expression is contingent upon the approval of government officials." *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir.1998). The many cases that stand for the proposition that prior restraints on speech are presumptively unconstitutional, *see, e.g.*, *Southeastern Promotions v. Conrad*, 420 U.S. 546, 558, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) ("Any system of prior restraint ... comes to this Court bearing a heavy presumption against its constitutional validity.") (internal quotations omitted), recognize as the source of this presumption the "principle that the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

> FN10. *O'Brien* "considered the First Amendment ramifications of a statute which imposed criminal sanctions on one who 'knowingly destroys, knowingly mutilates, or in any manner changes' a draft registration certificate." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 702, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986). The individual raising the constitutional challenge had burned his draft card to show his opposition to the Vietnam War.

The question, of course, is the extent to which these traditional "bulwarks" are necessary for the protection of TOT's constitutionally protected expression [FN11] when that expression is burdened solely as a result of TOT's violation of a generally applicable liquor license law. The City relies on the *O'Brien* line of cases to argue that no such protections are required, while TOT relies on the prior restraint line of cases to argue the contrary position. To resolve this issue, we must examine more closely the relevant authority from these two lines of cases.

> FN11. There is no dispute that erotic dance establishments like TOT are venues for constitutionally protected expression. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000).

III

In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), the Supreme Court was faced with a constitutional challenge arising from the closure of an adult bookstore. An investigation by the authorities revealed that the bookstore was being used for, among other illicit purposes, the solicitation of prostitution. This discovery "formed the basis of a civil complaint against [the bookstore and its owners] seeking closure of the

premises" under a state law that declared buildings used in the solicitation of prostitution to be nuisances. *Id.* at 699, 106 S.Ct. 3172. The bookstore challenged the imposition of the closure remedy as an infringement of its constitutionally protected bookselling activities.

[1] In evaluating the bookstore's First Amendment claim, the Court noted its earlier ***1069** holding in *O'Brien* 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 freedoms." *O'Brien*, 391 U.S. at 376, 88 S.Ct. 1673. The Court nevertheless concluded that *O'Brien's* test [FN12] for evaluating the validity of the government's interest in imposing incidental limitations on expression simply was not implicated by the closure of the bookstore:

> FN12. "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 376-77, 88 S.Ct. 1673.

> [W]e have not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star [& Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581, 103 S.Ct. 1365, 75 L.Ed.2d 295 (striking down a tax imposed on the sale of newsprint because the tax fell disproportionately on the shoulders of newspapers).]. This case involves neither situation, and we conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books.

Arcara, 478 U.S. at 706-07, 106 S.Ct. 3172. The Court concluded: "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises." *Id.* at 707, 106 S.Ct. 3172.

Arcara makes clear that a sanction imposed pursuant to a generally applicable law does not trigger First Amendment scrutiny, even where the sanction results in a burden on expression. [FN13] Before the First Amendment protections against generally applicable regulations set forth in *O'Brien* can be invoked, therefore, a court must determine that the government is either (1) regulating conduct with an expressive component, or (2) imposing a disproportionate burden on those engaged in expressive conduct. *See Nunez*, 114 F.3d at 950 (citing *Arcara*, 478 U.S. at 703-04, 106 S.Ct. 3172).

> FN13. The Court did take pains to note that "[w]ere [the bookstore] able to establish the existence of ... a speech suppressive motivation or policy on the part of the District Attorney, they might have a claim of selective prosecution." *Arcara*, 478 U.S. at 707 n. 4, 106 S.Ct. 3172. The Court found no evidence of such intent in the record, and the bookstore did not assert the existence of such intent before the trial court.

[2][3] Here, the section of the Las Vegas Municipal Code that bars the consumption of alcohol in establishments that lack valid liquor licenses, LVMC § 6.50.170, in no way can be said to regulate conduct containing an element of protected expression. [FN14] Nor can it be said ***1070** that the City's requirement that businesses obtain a valid liquor license before they are permitted to serve alcohol on their premises places a disproportionate burden on those engaged in expressive conduct: The requirement applies to all businesses, whether they be book-

stores or bars.

> FN14. We recognize that the sections of the LVMC that regulate nude dancing establishments include a provision barring such businesses from serving or allowing the consumption of alcohol without a valid liquor license. *See* LVMC § 6.35.100(F) ("No erotic dance establishment licensee shall serve, sell, distribute, or suffer the consumption or possession of any intoxicating liquor, or any beverage represented as containing any alcohol upon the premises of the licensee without a valid liquor license."). The mere existence of such a redundant provision, however, cannot be said disproportionately to burden expressive conduct given that the provision reiterates--albeit in slightly different terms--the generally applicable requirement that alcohol may not be served or consumed without a valid license.

Thus, were the dispute in this case limited to whether the City possessed the authority to punish TOT for its violations of the generally applicable liquor laws--even to the point of burdening TOT's expressive conduct--we could end our analysis here. For *Arcara* makes clear that TOT may not "use the First Amendment as a cloak for obviously unlawful" conduct. *Arcara*, 478 U.S. at 705, 106 S.Ct. 3172. TOT contends, however, that because the City sought as sanction the suspension of its erotic dancing license, the "prior restraint" line or First Amendment jurisprudence entitles TOT to certain procedural safeguards that were not provided here. We turn to this claim now.

IV

The Supreme Court has long recognized that requiring an individual or a business to receive the permission of some governing authority before engaging in expressive conduct implicates the First Amendment. In *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), for example, the Supreme Court entertained a challenge to a Maryland law that created a State Board of Censors charged with, among other things, " 'approv[ing] and licens[ing] such films or views which are moral and proper, and ... disapprov[ing] such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes.' " *Id.* at 52 n. 2, 85 S.Ct. 734 (quoting Md. Ann.Code, 1957, Art. 66A, § 6(a)). The broad discretion accorded to the Board, in the Court's view, created the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *Id.* at 57, 85 S.Ct. 734 (internal quotation marks omitted). To check this broad discretion--and to ensure that it would not improperly bar protected expression--the court held that a "noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58, 85 S.Ct. 734. The procedural safeguards, in the Court's view, were essential to cabin the censors's otherwise largely unfettered discretion to determine what constitutes suitable, non-obscene expression and what does not. The Supreme Court recognized that, unless such determinations--bound up as they are with the necessarily *legal* determination of whether a particular film is entitled to First Amendment protection--were subjected to prompt judicial review "to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.* at 59, 85 S.Ct. 734.

A

More recently, the Supreme Court applied *Freedman's* reasoning in the context of licensing schemes for sexually oriented businesses like TOT. In ***1071***FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), the Court was faced with a challenge to an ordinance that "regulate[d] sexually oriented businesses through a scheme incorporating zoning, licensing, and inspections." *Id.* at 220-21, 110 S.Ct. 596. The licensing portion of the scheme required the chief of police to approve the issuance of a sexually oriented business license to an applicant within thirty days of the receipt of the application. This thirty-day time limit, the Court noted, was qualified by a requirement that no license could be issued to a sexually oriented business "if the premises to be used [by the business] ... have not been approved by the health department, fire department, and the building official as being in compliance

with applicable laws and ordinances." *Id.* at 227, 110 S.Ct. 596 (internal quotation marks omitted). Because there was no requirement that the necessary inspections be conducted within the thirty-day time period--or indeed, within any time period at all-- the Court concluded that the scheme ran afoul of the "core policy underlying *Freedman*," namely, "that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." *Id.* at 228, 110 S.Ct. 596. The Court nevertheless recognized that "[t]he licensing scheme we examine today is significantly different from the censorship scheme examined in *Freedman.* In *Freedman*, the censor engaged in direct censorship of expressive material. ... Under the Dallas ordinance, the City does not exercise discretion by passing judgment on the content of any protected speech." *Id.* at 229, 110 S.Ct. 596. The Court accordingly stopped short of imposing the same procedural requirements it required in *Freedman*, instead concluding that the danger of allowing officials indefinitely to delay the granting of licenses for expressive conduct would be adequately checked by providing a "[l]imitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review." *Id.* at 230, 110 S.Ct. 596.

B

Our court first applied *FW/PBS's* "prompt judicial review" requirement to the denial of a sexually oriented business license in *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir.1998) (striking down a different licensing statute because it failed to provide for prompt judicial review of the denial of a license). Soon after our holding in *Baby Tam*, we were presented with a challenge not to the procedures governing the *issuance* of sexually oriented business licenses, but rather to their revocation or suspension.

In *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir.1999), a nude dancing establishment had its license suspended for two weeks after an inspection revealed that the club had violated regulations that required that "nude dancers be licensed and that they stay at least six feet away from patrons." *Id.* at 1110. [FN15] Convoy alleged that the procedures for suspending and revoking licenses "were unenforceable because they unconstitutionally restrained speech by failing to provide adequate procedural safeguards." *Id.* Relying on the principles announced by the Supreme Court in *FW/PBS*--which in turn relied upon the principles announced by the Court in *Freedman*--we held that the procedures for revoking or suspending a nude dancing license must either (1) "provide for prompt hearing and decision by a ***1072** judicial officer," or (2) maintain the status quo (i.e., prohibit the enforcement of the suspension or revocation) until there has been a judicial decision on the merits. *Convoy*, 183 F.3d at 1116. Because the scheme at issue provided for only *discretionary* mandamus review of the license suspension decision, we declared it constitutionally insufficient and enjoined the enforcement of the suspension "so long as the City's ordinance and the ... statutory scheme fail to provide for a prompt hearing and decision by a judicial officer, or for the maintenance of the status quo pending a judicial decision on the merits." *Id.*

> FN15. Following an administrative appeal, it was determined that Convoy had violated the prohibition against unlicensed dancers but not the six-foot rule. The suspension accordingly was reduced from fourteen to seven days.

C

Here, the district court relied on *Convoy* in support of its conclusion that

> [LVMC] § 6.35.140(D) provides erotic dance establishment licensees the opportunity to *initiate* adequate judicial review of the City's suspension or revocation decision, but is unconstitutional in that it fails to provide either (1) a mechanism by which such review and determination will be prompt and adequate, or (2) a mechanism by which the status quo is preserved pending judicial review and determination.

But *Convoy* does not address the issue we face here: the burdening of expressive conduct as a result of the speaker's violation of a generally applicable provision barring the sale or consumption of alcohol in an establishment lacking a valid liquor license. In short, the burdening of expressive conduct here is merely the incidental result of the City's clear authority to enforce its generally applicable liquor license require-

ment. As Justice White noted in his partial concurrence in *FW/PBS*, "the predicate identified in *Freedman* for imposing its procedural requirements is absent in [such] cases." *FW/PBS*, 493 U.S. at 245, 110 S.Ct. 596 (White, J., concurring in part and dissenting in part). Instead, we are faced with a situation in which " 'nonspeech' conduct subject to a general regulation bears absolutely no connection to any expressive activity," *Arcara*, 478 U.S. at 706 n. 3, 106 S.Ct. 3172--save only the mere happenstance that the nonspeech conduct took place in the same location as that expressive conduct and led to the imposition of a penalty that burdened it. *Arcara*, however, makes clear that the presence of protected expressive conduct alongside unprotected, illicit conduct in the same establishment does not bar enforcement of a generally applicable law. *Id.* at 707, 106 S.Ct. 3172.

1

[4] TOT attempts to distinguish *Arcara*. First, TOT notes that the closure remedy affirmed by the Court in *Arcara* was the result of a generally applicable nuisance abatement statute, whereas the license suspension in the instant case was achieved by way of LVMC § 6.35.140, a provision that specifically applies to nude dancing establishments. The City, according to TOT, could have proceeded under generally applicable nuisance abatement procedures like those employed in *Arcara*, but chose not to do so. TOT, however, misreads the record. The City *did* proceed under a generally applicable procedure. Indeed, the "Complaint for Disciplinary Action" never mentions LVMC § 6.35.140 and instead relies upon the generally applicable LVMC § 6.02.330(H), which provides: "The licensee may be subject to disciplinary action by the City Council for good cause, which may, without limitation, include: [¶] ... The actual business activity constitutes a public or private nuisance, or has been or is being conducted in an unlawful, illegal or impermissible manner." Thus, the procedures employed by the City in this case--just like the liquor laws that triggered their application--are laws of general applicability. Indeed, a review of the reporter's transcript ***1073** of the hearing before the City Council indicates that the procedures of LVMC § 6.35.140 were raised not by the Council, which according to the initial complaint was proceeding under its general authority to discipline *any* licensee "for good cause" pursuant to LVMC § 6.02.330(H), but rather by counsel for TOT, who invoked the provision to stay the imposition of the suspension for fourteen days. When the issue of when the three-week suspension of TOT's license would commence, TOT's counsel interjected:

> Just a moment. I think, you know, one of the problems we have here is that you have entered this finding and you are entering this penalty and this complaint was drafted raising several different sections of the code. Now, one of those sections, 6.35.100[sic], I believe, has an automatic fourteen day stay. And if you made the finding with respect to that section here, and I assume that you have ... [t]hen there's an automatic fourteen day stay that goes in because of that. So ... what I would ask is that ... it commence when the findings in [sic] fact and conclusions of law are submitted, but that's when the fourteen day stay kicks in, because there's absolutely no reason to the contrary.

Thus, the Council allowed TOT *greater* procedural protections even though, by the terms of LVMC § 6.03.330, it was not required to do so.

2

[5] TOT's second asserted distinction between this case and *Arcara*, namely that the nuisance abatement proceedings in *Arcara* took place before a judge, is similarly unavailing. For while TOT is correct that the closure of the business in *Arcara* was imposed following a civil action tried before a judge, the Supreme Court most certainly did not hold that *any* sanction pursuant to generally applicable regulations must first be subjected to judicial scrutiny if it happens to burden expressive conduct. Indeed, the Court indicated that precisely the opposite was true: "If the city imposed closure penalties for demonstrated Fire Code violations or health hazards from inadequate sewage treatment, the First Amendment would not aid the owner of premises who had knowingly allowed such violations to persist." *Arcara*, 478 U.S. at 705, 106 S.Ct. 3172. The Court's reference to violations of the fire and health codes--determinations made at least as often by *administrative* bodies as judicial ones--indicates that the identity of the body imposing the sanction is irrelevant when the conduct

that gives rise to the sanction "manifests absolutely no element of protected expression." *Id.* at 705, 106 S.Ct. 3172. Indeed, it is *precisely because* the conduct at issue in *Arcara* was not protected, that no special procedural safeguards--such as prompt determination by a judicial officer--were necessary. *See FW/PBS*, 493 U.S. at 245, 110 S.Ct. 596 (White, J., concurring in part and dissenting in part). ("[T]he predicate identified in *Freedman* for imposing its procedural requirements is absent in [such] case[s].").

3

[6] TOT's third argument in favor of distinguishing *Arcara* is that, unlike the bookstore in that case, TOT is not "free to carry on its [protected expression] at another location." *Arcara*, 478 U.S. at 706 n. 2, 106 S.Ct. 3172. That is, because its license would be suspended for three weeks, and because one must have a license to exhibit nude dancing in Las Vegas, TOT contends that its First Amendment rights will be completely suppressed for the duration of the suspension because the relocation option available to the bookstore in *Arcara* is not open to TOT. It is clear from the Court's opinion in *Arcara*, however, that, while salient, the bookstore's ability to reopen in another location ***1074** was not dispositive. Two facts in the record convince us that, like the closure remedy approved by the Court in *Arcara*, "[t]he severity of th[e] burden [imposed on TOT] is dubious at best." *Arcara*, 478 U.S. at 705, 106 S.Ct. 3172. First, the closure of the bookstore in *Arcara* was to last for a period of one year, significantly longer than the three-week suspension at issue here. By imposing a relatively brief suspension to punish its unlawful nonexpressive activity, the City "properly sought to protect the environment of the community by directing the sanction at premises knowingly used for lawless activities." *Arcara*, 478 U.S. at 707, 106 S.Ct. 3172. And second, as with the action taken in *Arcara*, there is absolutely no evidence that the suspension imposed here was a pretext for the suppression of protected expression. *See Arcara*, 478 U.S. at 707 n. 4, 106 S.Ct. 3172 ("Were respondents able to establish the existence of such a speech suppressive motivation or policy on the part of the District Attorney, they might have a claim of selective prosecution."); *id.* at 708, 106 S.Ct. 3172 (O'Connor, J., concurring) ("If, however, a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books ... the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review."). [FN16]

> FN16. Because it relies upon an assumption that First Amendment scrutiny is required in this case, we also reject TOT's due process challenge to LVMC § 6.35.140(D).

V

Because *Arcara* compels the conclusion that the City's sanctioning of TOT for repeated violations of the liquor license requirement does not implicate the First Amendment, the district court erred in concluding that the procedural requirements identified by our *Convoy* decision are applicable here. Accordingly, we must reverse that portion of the district court's order according TOT *Convoy's* procedural safeguards and remand to that court for further proceedings not inconsistent with this opinion. In light of our resolution of the First Amendment issue, TOT's appeal of the remedy is moot.

REVERSED and REMANDED.

CANBY, Circuit Judge, dissenting.

I respectfully dissent from the majority opinion because of a narrow but important point on which we differ. The majority relies on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), in which the Supreme Court held that the First Amendment was not implicated when a county instituted nuisance proceedings and closed a building used by an adult bookstore because it was serving as a place of prostitution. The majority here holds that *Arcara* applies because the City of Las Vegas proceeded against Talk of the Town under its general nuisance ordinance (although it also proceeded under a similar clause in the ordinance regulating erotic dancing establishments). The City is therefore merely enforcing a generally applicable law directed at nonspeech activity, according to the majority.

The analogy to *Arcara* fails, in my opinion, because the City here did not merely shut down Talk of the

Town's premises for two weeks because it permitted alcoholic beverages to be consumed there. Instead, it suspended Talk of the Town's permit to present erotic dances. This remedy is clearly directed at expressive activity. During the suspension, Talk of the Town may still use its building for other purposes, even though it has been the scene of liquor violations. What it may not do is engage in the expressive activity of presenting erotic dances, on the existing ***1075** premises or anywhere else in Las Vegas. Because the suspension is directed at expression, the First Amendment is necessarily implicated.

In that situation, the precedent that should govern our decision is *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir.1999). In *Convoy*, the City suspended a nude entertainment license because of the use of unlicensed dancers. We held that such a suspension was subject to the First Amendment requirements of either a speedy judicial review or a stay of enforcement until the completion of judicial review. *See id.* at 1114-16 (relying on *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), and *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir.1998)). Because the City of San Diego's scheme for suspending nude entertainment licenses did not meet these requirements, we enjoined enforcement of any license suspension or revocation until completion of judicial review. *See id.* at 1116.

The district court in the present case properly concluded that the Las Vegas ordinance authorizing suspension of erotic dancing licenses failed to meet the First Amendment requirement of speedy judicial review or a stay of enforcement until completion of judicial review. It therefore followed *Convoy* and enjoined any suspension or revocation of erotic dancing licenses prior to completion of judicial review. In so ruling, the district court honored the First Amendment limitations on prior restraint of expression. *See Freedman v. Maryland*, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). I would affirm the district court's judgment. [FN1]

> FN1. Talk of the Town contends that the district court, having found the ordinance unconstitutional, should have enjoined further enforcement totally because the portions of the ordinance relating to prompt judicial review (or its absence) were not severable. I do not discuss the severability argument because the majority did not reach it. It suffices to say that I conclude that the district court was correct.

343 F.3d 1063, 03 Cal. Daily Op. Serv. 8240, 2003 Daily Journal D.A.R. 10,321, 2003 Daily Journal D.A.R. 13,950

Briefs and Other Related Documents (Back to top)

• 2002 WL 32171417 (Appellate Brief) Reply Brief of Appellees/Cross Appellants (Jul. 11, 2002)Original Image of this Document (PDF)

• 2002 WL 32171418 (Appellate Brief) Plaintiffs-Appellants'/Cross Appellees' Answering/Reply Brief (Jun. 07, 2002)Original Image of this Document (PDF)

• 2002 WL 32171416 (Appellate Brief) Answering Brief and Cross-Appeal Opening Brief of Appellees/ Cross Appellants (Apr. 25, 2002)Original Image of this Document (PDF)

• 2002 WL 32171415 (Appellate Brief) Plaintiffs-Appellants' Opening Brief (Feb. 28, 2002)Original Image of this Document (PDF)

• 01-16390 (Docket) (Jul. 19, 2001)

• 01-16303 (Docket) (Jul. 12, 2001)

END OF DOCUMENT

Briefs and Other Related Documents

United States Court of Appeals,
Seventh Circuit.
BEN'S BAR, INC., Plaintiff-Appellant,
v.
VILLAGE OF SOMERSET, Defendant-Appellee.
No. 01-4351.

Argued May 30, 2002.
Decided Jan. 17, 2003.

Tavern and two of its nude dancers brought § 1983 action against city, seeking declaratory and injunctive relief against enforcement of ordinance that prohibited sale, use, or consumption of alcohol on premises of "Sexually Oriented Businesses," alleging violation of their right to freedom of expression under First and Fourteenth Amendments. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Chief Judge, granted judgment for city. Plaintiffs appealed. The Court of Appeals, Manion, Circuit Judge, held that municipal ordinance was reasonable attempt to reduce or eliminate undesirable "secondary effects" associated with barroom adult entertainment.

Affirmed.

West Headnotes

[1] Constitutional Law 90(3)
92k90(3) Most Cited Cases
A governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
A time, place, and manner regulation of adult entertainment will be upheld under the First Amendment if it is designed to serve a substantial government interest and reasonable alternative avenues of communication remain available; additionally, a time, place, and manner regulation must be justified without reference to the content of the regulated speech and narrowly tailored to serve the government's interest. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
The analytical frameworks and standards utilized in evaluating adult entertainment regulations under the First Amendment, be they zoning ordinances or public indecency statutes, are virtually indistinguishable. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases
A liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments does not violate the First Amendment if: (1) the state is regulating pursuant to a legitimate governmental power; (2) the regulation does not completely prohibit adult entertainment; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by
adult entertainment establishments; and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available, or, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[5] Intoxicating Liquors 15
223k15 Most Cited Cases
Municipal ordinance, that restricted sale or consump-

tion of alcohol on premises of businesses that served as venues for adult entertainment, was reasonable attempt to reduce or eliminate undesirable "secondary effects" associated with barroom adult entertainment, in § 1983 lawsuit under free speech clause of First Amendment; regulation of alcohol was within city's general police powers, regulation did not have any impact on tavern's ability to offer nude or semi-nude dancing to its patrons, and liquor prohibition was no greater than was essential to further city's substantial interest in combating secondary effects resulting from combination of nude and semi-nude dancing and alcohol. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

[6] Constitutional Law ⚖90.4(3)
92k90.4(3) Most Cited Cases
The level of First Amendment scrutiny a court uses to determine whether a regulation of adult entertainment is constitutional depends on the purpose for which the regulation was adopted; if the regulation was enacted to restrict certain viewpoints or modes of expression, it is presumptively invalid and subject to strict scrutiny, if, on the other hand, the regulation was adopted for a purpose unrelated to the suppression of expression, e.g., to regulate nonexpressive conduct or the time, place, and manner of expressive conduct, a court must apply a less demanding intermediate scrutiny. U.S.C.A. Const.Amend. 1.

[7] Administrative Law and Procedure ⚖412.1
15Ak412.1 Most Cited Cases

[7] Municipal Corporations ⚖120
268k120 Most Cited Cases
[7] Statutes ⚖184
361k184 Most Cited Cases
Federal courts evaluating the "predominant concerns" behind the enactment of a statute, ordinance, regulation, or the like, may do so by examining a wide variety of materials including, but not limited to, the text of the regulation or ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware.

[8] Constitutional Law ⚖90.4(3)
92k90.4(3) Most Cited Cases
Regulations of adult entertainment receive intermediate scrutiny under the First Amendment if they are designed not to suppress the "content" of erotic expression, but rather to address the negative secondary effects caused by such expression. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law ⚖90.4(5)
92k90.4(5) Most Cited Cases
Regulations that prohibit nude dancing where alcohol is served or consumed are independent of expressive or communicative elements of conduct, and, therefore, are treated as if they were content-neutral under the First Amendment. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law ⚖90.4(5)
92k90.4(5) Most Cited Cases
In the context of the First Amendment, whether an adult entertainment liquor regulation is treated as a time, place, and manner regulation, or as a regulation of expressive conduct, a court is required to ask whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law ⚖90(3)
92k90(3) Most Cited Cases
In order to justify a content-based time, place, and manner restriction under the First Amendment, or a content-based regulation of expressive conduct, a municipality must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact; the regulation may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside, and, furthermore, a municipality may not assert that it will reduce secondary effects by reducing speech in the same proportion.
U.S.C.A. Const.Amend. 1.

[12] Constitutional Law ⚖90.4(5)
92k90.4(5) Most Cited Cases
The First Amendment does not entitle a tavern, its dancers, or its patrons, to have alcohol available during a "presentation" of nude or semi-nude dancing; even though the First Amendment does require that

such establishments be given a reasonable opportunity to disseminate the speech at issue, a "reasonable opportunity" does not include a concern for economic considerations. U.S.C.A. Const.Amend. 1.

***704** Matthew A. Biegert (argued), Doar, Drill & Skow, New Richmond, WI, for Plaintiff-Appellant.

Ted Waskowski, Meg Vergeront (argued), Stafford Rosenbaum, Madison, WI, for Defendant-Appellee.

Before FLAUM, Chief Judge, and WOOD, Jr. and MANION, Circuit Judges.

MANION, Circuit Judge.

Ben's Bar, Inc. operates a tavern in the Village of Somerset, Wisconsin, that formerly served as a venue for nude and semi-nude dancing. After the Village enacted an ordinance that, in part, prohibited the sale, use, or consumption of alcohol on the premises of "Sexually Oriented Businesses," Ben's Bar and two of its dancers filed suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the enforcement of the ordinance. The plaintiffs' complaint alleged, among other things, that the ordinance's alcohol prohibition violated their right to freedom of expression under the First and Fourteenth Amendments to the United States Constitution. Shortly thereafter, plaintiffs filed a motion for a preliminary injunction, which the district court denied. The Village then filed a motion for summary judgment, which the district court granted. Ben's Bar appeals this decision. Because we conclude that the record sufficiently supports the Village's claim that the liquor prohibition is a reasonable attempt to reduce or eliminate the undesirable "secondary effects" associated with barroom adult entertainment, rather than an attempt to regulate the expressive content of nude dancing, we affirm the district court's judgment.

I.

On October 24, 2000, the Village of Somerset, a municipal corporation located in St. Croix County, Wisconsin ("Village"), enacted Ordinance A-472, entitled "Sexually ***705** Oriented Business Ordinance" ("Ordinance"), for the purpose of regulating "Sexually Oriented Businesses and related activities to promote the health, safety, and general welfare of the citizens of the Village of Somerset, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of Sexually Oriented Businesses within the Village of Somerset." The Ordinance regulates hours of operation, location, distance between patrons and performers, and other aspects concerning the operations of Sexually Oriented Businesses.

In the legislative findings section of the Ordinance, the Village noted that:

> Based on evidence concerning the adverse secondary effects of Sexually Oriented Businesses on the community in reports made available to the Village Board, and on the holdings and findings in [numerous Supreme Court, federal appellate, and state appellate judicial decisions], as well as studies and summaries of studies conducted in other cities ... and findings reported in the Regulation of Adult Entertainment Establishments in St. Croix County, Wisconsin; and the Report of the Attorney General's Working Group of Sexually Oriented Businesses ... the Village Board finds that:
>
> (a) Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located.
>
> (b) Studies of the relationship between sexually oriented businesses and neighborhood property values have found a negative impact on both residential and commercial property values.
>
> (c) Sexually oriented businesses may contribute to an increased public health risk through the spread of sexually transmitted diseases.
>
> (d) There is an increase in the potential for infiltration by organized crime for the purpose of unlawful conduct.
>
> (e) *The consumption of alcoholic beverages on the premises of a Sexually Oriented Business exacerbates the deleterious secondary effects of such businesses on the community.*

(Emphasis added.)

On February 2, 2001, two months before the Ordinance's effective date of April 1, 2001, Ben's Bar, Inc. ("Ben's Bar"), a tavern in the Village featuring nude and semi-nude barroom dance, [FN1] and two of its dancers, Shannen Richards and Jamie Sleight, filed a

four-count complaint against the Village, pursuant to 42 U.S.C. § 1983 and Wis. Stat. § 806.04 (the State's "Uniform Declaratory Judgments Act"), in the United States District Court for the Western District of Wisconsin. The plaintiffs' complaint alleged that portions of the Ordinance were unconstitutional and preempted by Wisconsin law, sought a declaratory judgment resolving those issues, and requested permanent injunctive relief. Specifically, the plaintiffs argued that the Ordinance: (1) violated their right of free expression under the First and Fourteenth Amendments to the United States Constitution and Article I, § 3 of the Wisconsin Constitution; [FN2] (2) violated their right to ***706** equal protection under the Fourteenth Amendment to the United States Constitution and Article 1, § 1 of the Wisconsin Constitution; [FN3] (3) was an illegal "policy or custom" of the Village within the meaning of *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and *Owen v. City of Independence, Missouri*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); and (4) was an *ultra vires* legislative act in violation of Wis. Stat. § 66.0107(3). [FN4]

FN1. Ben's Bar holds a liquor license issued by the Village.

FN2. Article 1, § 3 of the Wisconsin Constitution provides, *inter alia*, that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press." Wis. Const., art. I, § 3.

FN3. Article 1, § 1 of the Wisconsin Constitution provides that "[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const., art. I, § 1.

FN4. Wis. Stat. § 66.0107(3) provides that "[t]he board or council of a city, village or town may not, by ordinance, prohibit conduct which is the same as or similar to conduct prohibited by § 944.21 [i.e., the state's obscenity statute]."

On March 19, 2001, the plaintiffs moved for a preliminary injunction against the enforcement of Sections 5(a) and (b) of the Ordinance. Section 5(a) provides that "[i]t shall be a violation of this ordinance for any Person to knowingly and intentionally appear in a state of Nudity in a Sexually Oriented Business." [FN5] Section 5(b) of the Ordinance provides that "[t]he sale, use, or consumption of alcoholic beverages on the Premises of a Sexually Oriented Business is prohibited." Plaintiffs argued that under § 66.0107(3) the Village was prohibited from enacting these regulations of adult entertainment because such conduct is already covered by the state's obscenity statute--i.e., Wis. Stat. § 944.21. They also contended that, notwithstanding § 66.0107, Sections 5(a) and (b) violated their right to free expression under the First and Fourteenth Amendments.

FN5. Under Section 3(*o*) of the Ordinance, "Nudity" or "state of nudity" is defined as "the appearance of the human bare anus, anal cleft or cleavage, pubic area, male genitals, female genitals, or the nipple or areola of the female breast, with less than a fully opaque covering; or showing of the covered male genitals in a discernibly turgid state."

On April 17, 2001, the district court denied plaintiffs' motion for preliminary injunctive relief, holding that they did not have a reasonable chance of succeeding on the merits of their complaint. The district court, utilizing the test established by this circuit in *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir.2000), held that Section 5(a)'s complete prohibition of full nudity in Sexually Oriented Businesses was constitutional under the First Amendment because " 'limiting erotic dancing to semi-nudity [i.e., pasties and G-strings] represents a *de minimis* restriction that does not unconstitutionally abridge expression.' " (quoting *Schultz*, 228 F.3d at 847). The district court also concluded that Section 5(b) passed constitutional muster under *Schultz* because it: (1) was justified without reference to the content of the regulated speech; (2)

was narrowly tailored to serve a significant government interest in curbing adverse secondary effects; and (3) left open ample alternative channels for communication. Finally, the district court ruled that the Ordinance was not subject to preemption under Wis. Stat. § 66.0107(3) because the plaintiffs had conceded that: (1) the Ordinance only regulates non-obscene conduct; and (2) they were seeking only to provide non-obscene barroom dancing.

Following unsuccessful attempts at settlement, on August 20, 2001, the Village moved for summary judgment of plaintiffs' complaint. On November 23, 2001, the district court granted the Village's motion, concluding that the Ordinance was constitutional for the reasons expressed in its ***707** April 17, 2001 order. The court also addressed plaintiffs' equal protection claim, noting that they had waived the argument by failing to develop it in their briefs. A judgment in conformity with that order was entered on November 26, 2001. Ben's Bar appeals the district court's decision granting summary judgment, [FN6] arguing that the court erred in concluding that Section 5(b) does not constitute an unconstitutional restriction on nude dancing under the First Amendment. *See DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 827 n. 2 (7th Cir.1999) (holding that corporations may assert First Amendment challenges). We review the district court's grant of summary judgment *de novo*, construing all facts in favor of Ben's Bar, the non-moving party. *Commercial Underwriters Ins. Co. v. Aires Envtl. Services, Ltd.*, 259 F.3d 792, 795 (7th Cir.2001).

FN6. Plaintiffs Shannen Richards and Jamie Sleight did not appeal the district court's judgment.

II.

The First Amendment provides, in part, that "Congress shall make no law ... abridging the freedom of speech ...." U.S. Const. amend. I. The First Amendment's Free Speech Clause has been held by the Supreme Court to apply to the states through the Fourteenth Amendment's due process clause. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *DiMa Corp.*, 185 F.3d at 826 (acknowledging the applicability of the Supreme Court's "incorporation doctrine" in the First Amendment context). The Supreme Court has further held that "nude dancing ... is expressive conduct *within the outer perimeters of the First Amendment*, though we view it as only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion) (emphasis added). *See also Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir.2001) (noting that "[t]he impairment of First Amendment values is slight to the point of being risible since the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a modest social value ...."). Thus, while few would argue "that erotic dancing ... represents high artistic expression," *Schultz v. City of Cumberland*, 228 F.3d 831, 839 (7th Cir.2000), the Supreme Court has, nevertheless, afforded such expression a diminished form of protection under the First Amendment. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 294, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion) (holding that " 'even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, *it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate* ....' ") (citation omitted) (emphasis added).

This case requires us to determine whether a municipality may restrict the sale or consumption of alcohol on the premises of businesses that serve as venues for adult entertainment without violating the First Amendment. On appeal, Ben's Bar's primary argument is that Section 5(b) is unconstitutional because the regulation has the "effect" of requiring its dancers to wear more attire than simply pasties and G-strings. [FN7] This argument ***708** may be summed up as follows: (1) Section 5(b) prohibits the sale, use, or consumption of alcohol on the premises of Sexually Oriented Businesses; [FN8] (2) Ben's Bar is an "Adult cabaret," a sub-category of a Sexually Oriented Business under the Ordinance, [FN9] if it features nude or semi-nude dancers; (3) Section 3(*o*) of the Ordinance defines "seminude or semi-nudity" as "the exposure of a bare male or female buttocks or the female breast below a horizontal line across the top of the areola at its highest point with less than a complete and opaque

covering"; and (4) Ben's Bar's dancers must wear more attire than that required by the Ordinance's definition of "semi-nude or semi-nudity" in order for the tavern to be able to sell alcohol during their performances and comply with Section 5(b)--i.e., more than pasties and G-strings. Ben's Bar contends that Section 5(b) significantly impairs the conveyance of an erotic message by the tavern's dancers [FN10] and is not narrowly tailored to meet the Village's stated goal of reducing the adverse secondary effects associated with adult entertainment. [FN11]

FN7. The Supreme Court has, on two separate occasions, held that requiring nude dancers to wear pasties and G-strings does not violate the First Amendment. *Pap's A.M.*, 529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion), *id.* at 307-10, 120 S.Ct. 1382 (Scalia, J., concurring); *Barnes*, 501 U.S. at 571-72, 111 S.Ct. 2456 (plurality opinion), *id.* at 582, 111 S.Ct. 2456 (Souter, J., concurring).

FN8. Section 3(w) of the Ordinance defines "Sexually Oriented Business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency or sexual encounter center."

FN9. Section 3(c) of the Ordinance is the definition for "Adult cabaret," which "means a nightclub, dance hall, *bar*, restaurant, or similar commercial establishment that regularly features: (1) persons who appear in a state of Nudity or Semi-nudity; or (2) live performances that are characterized by 'specified sexual activities'; or (3) films, motion pictures, video cassettes, slides, or other photographic reproductions that are characterized by the depiction or description of 'specified sexual activities' or Nudity or 'specified anatomical areas.' " (Emphasis added.)

FN10. According to Ben's Bar, Section 5(b) goes far beyond the pasties and G-strings regulation upheld by the Supreme Court in *Barnes* and *Pap's A.M.*, prohibiting "any display of the buttocks or of breast below the top of the areola"--i.e., "conservative two piece swimsuits, moderately low-cut blouses, short shorts, sheer fabrics and many other types of clothing that are regularly worn in the community and are in mainstream fashion."

FN11. It is not entirely clear whether Ben's Bar is arguing that Section 5(b) is facially unconstitutional or merely unconstitutional as applied. To the extent Ben's Bar seeks to bring a facial challenge, it faces an uphill battle. Ben's Bar does not argue that the regulation is vague or overbroad, and therefore may only prevail if it can demonstrate "that no set of circumstances exists under which the [regulation] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). *See also Horton v. City of St. Augustine, Florida*, 272 F.3d 1318, 1331 (11th Cir.2001) (noting exception to the *Salerno* rule; that, in the limited context of the First Amendment, a plaintiff may also bring a facial challenge for overbreadth and/or vagueness).

The central fallacy in Ben's Bar's argument, however, is that Section 5(b) restricts the sale and consumption of alcoholic beverages in establishments that serve as venues for adult entertainment, not the attire of nude dancers. In the absence of alcohol, Ben's Bar's dancers are free to express themselves all the way down to their pasties and G-strings. The question then is not whether the Village can require nude dancers to wear more attire than pasties and G-strings, but whether it can prohibit Sexually Oriented Businesses like Ben's Bar from selling alcoholic beverages in order to prevent the deleterious secondary effects arising from the explosive combination of nude dancing and alcohol consumption.

While the question presented is rather straightforward, the issue is significantly complicated by a long series of Supreme Court decisions involving the application of the First Amendment in the adult entertainment***709** context. Because these decisions establish the analytical framework under which we must

operate, our analysis necessarily begins with a comprehensive summary of the Supreme Court's jurisprudence in this area.

A. *California v. LaRue*

Initially, we note that the Supreme Court addressed the precise issue before us in *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), when it considered the constitutionality of regulations promulgated by California's Department of Alcoholic Beverages ("Department") that prohibited bars and nightclubs from featuring varying degrees of adult entertainment. [FN12] The Department enacted the regulations, after holding public hearings, because it concluded that the consumption of alcohol in adult entertainment establishments resulted in a number of adverse secondary effects--e.g., acts of public indecency and sex-related crimes. As in this case, adult entertainment businesses filed suit alleging that the regulations violated the First Amendment. *Id.* at 110, 93 S.Ct. 390.

> FN12. The regulations at issue in *LaRue* prohibited: (a) The performance of acts, or simulated acts, of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;
> (b) The actual or simulated touching, caressing or fondling on the breast, buttocks, anus or genitals;
> (c) The actual or simulated displaying of the pubic hair, anus, vulva or genitals;
> (d) The permitting by a licensee of any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus; and, by a companion section;
> (e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above.
> 409 U.S. at 411-12.

The Supreme Court began its analysis in *LaRue* by stressing that "[t]he state regulations here challenged come to us, not in the context of a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink." 409 U.S. at 114, 93 S.Ct. 390. For this reason, the vast majority of the Court's opinion addressed the States' power to regulate "intoxicating liquors" under the Twenty-first Amendment. [FN13] *See generally id.* at 115-19, 93 S.Ct. 390. Specifically, the *LaRue* Court concluded that:

> FN13. The second section of the Twenty-first Amendment provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

> While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.

409 U.S. at 114, 93 S.Ct. 390.

In doing so, the *LaRue* Court rejected the plaintiffs' contention that the state's regulatory authority over "intoxicating beverages" was limited, as applied to adult entertainment establishments, to "either dealing with the problem it confronted within the limits of our decisions as to obscenity [i.e., *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) and its progeny] or in accordance with the limits prescribed for dealing with some forms of communicative conduct in [*United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)]," 409 U.S. at 116, 93 S.Ct. 390, reasoning " '[w]e ***710** cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.' " *Id.* at 117- 18, 93 S.Ct. 390 (citation omitted). The Court found that "the substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of

communication." *Id.* at 118, 93 S.Ct. 390. The Court also concluded that although "at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board ... [but] has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *Id.* The *LaRue* Court ended its analysis by noting that "[t]he Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one," and that "[g]iven the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution." *Id.* at 118-19, 93 S.Ct. 390. [FN14]

> FN14. *See also City of Newport v. Iacobucci*, 479 U.S. 92, 95, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986) (upholding the constitutionality of a city ordinance prohibiting nude or nearly nude dancing in local establishments licensed to sell liquor for consumption on the premises); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 717, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (holding that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs"); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (noting that under *LaRue* states may ban nude dancing as part of their liquor licensing programs); *City of Kenosha v. Bruno*, 412 U.S. 507, 515, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973) (noting that "regulations prohibiting the sale of liquor by the drink on premises where there were nude but not necessarily obscene performances [are] facially constitutional").

B. *44 Liquormart, Inc. v. Rhode Island*

After the Supreme Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), however, the precedential value of the reasoning anchoring the Court's holding in *LaRue* was severely diminished. In *44 Liquormart*, the Court held that Rhode Island's statutory prohibition against advertisements providing the public with accurate information about retail prices of alcoholic beverages was "an abridgement of speech protected by the First Amendment and that is not shielded from constitutional scrutiny by the Twenty-first Amendment." *Id.* at 489, 116 S.Ct. 1495. In reaching this conclusion, the Court noted:

> Rhode Island argues, and the Court of Appeals agreed, that in this case the Twenty-first Amendment tilts the First Amendment analysis in the State's favor [of the advertising ban] .... [T]he Court of Appeals relied on our decision in *California v. LaRue* ... [where] five Members of the Court relied on the Twenty-first Amendment *to* buttress the conclusion that the First Amendment did not invalidate California's prohibition of certain grossly sexual exhibitions in premises licensed to serve alcoholic beverages. Specifically, the opinion stated that the Twenty-first Amendment required that the prohibition be given an added presumption in favor of its validity. ***711** *We are now persuaded that the Court's analysis in* LaRue *would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment. Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases, the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of "bacchanalian revelries" described in the* LaRue *opinion regardless of whether alcoholic beverages are involved.... See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). As we recently noted: "*LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." *Rubin v. Coors Brewing Co.*, 514 U.S., at 483, n. 2, 115 S.Ct. 1585. Without questioning the holding of *LaRue*, we now disavow its

> reasoning insofar as it relied on the Twenty-first Amendment.

Id. at 515-16, 116 S.Ct. 1495 (emphasis added).

The foregoing makes clear that *LaRue*'s holding remains valid after *44 Liquormart*, but for a different reason. The *44 Liquormart* Court concluded that "the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment," 517 U.S. at 515, 116 S.Ct. 1495 because "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *Id.* In making this assertion, the *44 Liquormart* Court relied on the *LaRue* Court's conclusion that: "the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power ... [i.e.,] the normal state authority over public health, welfare, and morals." 409 U.S. at 114, 93 S.Ct. 390. But in recent years, the Supreme Court has held, on a number of occasions, that "non-obscene" adult entertainment is entitled to a minimal degree of protection under the First Amendment, even in relation to laws enacted pursuant to a State's general police powers. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 1739, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring) (noting that "if a city can decrease the crime and blight associated with [adult entertainment] speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of speech substantially undiminished, there is no First Amendment objection"); *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) (holding that city's public indecency ordinance, enacted to "protect public health and safety," must be analyzed as a content-neutral regulation of expressive conduct); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

Given the foregoing, it is difficult to ascertain exactly what "analysis" the *44 Liquormart* Court was referring to as having persuaded it that the *LaRue* Court would have reached the same result even without the "added presumption" of the Twenty-first Amendment. We find noteworthy, however, the *44 Liquormart* Court's citation of the post-*LaRue* decisions of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), in support of its assertion that "the States' inherent police powers provide ample authority to restrict the kind of 'bacchanalian revelries' ***712** described in the *LaRue* opinion regardless of whether alcoholic beverages are involved." *44 Liquormart*, 517 U.S. at 515, 116 S.Ct. 1495. In *American Mini Theatres* and *Barnes*, the Supreme Court held that the adult entertainment regulations at issue were subject to intermediate scrutiny for purposes of determining their constitutionality under the First Amendment. *American Mini Theatres*, 427 U.S. at 79, 96 S.Ct. 2440 (Powell, J., concurring) ("it is appropriate to analyze the permissibility of Detroit's action [zoning ordinance separating adult theaters from residential neighborhoods and churches] under the four-part test of *United States v. O'Brien* ...."); *Barnes*, 501 U.S. at 582, 111 S.Ct. 2456 (Souter, J., concurring) ("I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in *United States v. O'Brien* ....").

Like the Fourth and Eleventh Circuits, we conclude that after *44 Liquormart* state regulations prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments must be analyzed in light of *American Mini Theatres* and *Barnes*, as modified by their respective progeny. *See Giovani Carandola Ltd. v. Bason*, 303 F.3d 507, 513 n. 2 & 519 (4th Cir.2002) (noting the *44 Liquormart* Court's reliance on *American Mini Theatres* and *Barnes* and holding that "the result reached in *LaRue* remains sound not because a state enjoys any special authority when it burdens speech by restricting the sale of alcohol, but rather because the regulation in *LaRue* complied with the First Amendment"); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996 (11th Cir.1998) (holding that "the Supreme Court [in *44 Liquormart*] ... reaffirmed the precedential value of *LaRue* and the *Barnes*-O'Brien *test .... [and] reaffirmed that the* Barnes-*O'Brien* intermediate level of review applies to [adult entertainment liquor regulations]"). *But see BZAPS, Inc. v. City of Mankato*, 268

F.3d 603, 608 (8th Cir.2001) (upholding the constitutionality of an adult entertainment liquor regulation solely on the basis of *LaRue*'s holding).

We reach this conclusion notwithstanding the fact that in *LaRue* the Supreme Court upheld the constitutionality of the adult entertainment liquor regulations using the rational basis test, *see* 409 U.S. at 115-16, 93 S.Ct. 390, and explicitly refused to subject the regulations to *O'Brien*'s intermediate scrutiny test. *Id.* at 116, 93 S.Ct. 390 ("We do not believe that the state regulatory authority in this case was limited to ... dealing with the problem it confronted ... in accordance with the limits prescribed for dealing with some forms of communicative conduct in [*O'Brien*]"). We do so because the *44 Liquormart* Court's reference to *American Mini Theatres* and *Barnes* makes clear that the Court is of the opinion that adult entertainment liquor regulations, like the ones at issue in *LaRue*, will pass constitutional muster even under the heightened intermediate scrutiny tests outlined in those cases.

In making this determination, we are by no means suggesting that the Supreme Court's decisions in *American Mini Theatres* and *Barnes* are of greater precedential value than *LaRue*. On the contrary, as noted *infra*, our decision in this case is largely dictated by *LaRue*'s holding. At the time *LaRue* was decided, however, the Supreme Court had not yet established a framework for analyzing the constitutionality of adult entertainment regulations. This changed with the Court's subsequent decisions in *American Mini Theatres* and *Barnes*, cases that serve as a point of origin for two distinct, yet overlapping, lines of jurisprudence that address the degree of First Amendment ***713** protection afforded to adult entertainment. Given the significant development of the law in this area since *LaRue*, as well as the Court's refashioning of *LaRue*'s reasoning in *44 Liquormart*, we conclude that it is necessary to apply *LaRue*'s holding in the context of this precedent.

C. The *44 Liquormart* "road map"

The *44 Liquormart* decision established a road map of sorts for analyzing the constitutionality of adult entertainment liquor regulations, i.e., the Supreme Court's decisions in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), providing two separate but similar routes. [FN15] First, the *American Mini Theatres* decision, as modified by the Court's subsequent decisions in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), delineates the standards for evaluating the constitutionality of *adult entertainment zoning ordinances.* Second, the *Barnes* decision, as modified by the Court's recent decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), provides guidelines for analyzing the constitutionality of *public indecency statutes.*

> FN15. *See J & B Social Club No. 1, Inc. v. City of Mobile*, 966 F.Supp. 1131, 1136 (S.D.Ala.1996) (Hand, J.).

[1] The analytical frameworks utilized in both lines of jurisprudence can be traced back to the four-part test enunciated by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), where the Court held that a statute prohibiting the destruction or mutilation of draft cards was a content-neutral regulation of expressive conduct. *American Mini Theatres*, 427 U.S. at 79, 96 S.Ct. 2440 (Powell, J., concurring) (applying *O'Brien* test); *Barnes*, 501 U.S. at 582, 111 S.Ct. 2456 (Souter, J., concurring) (same). Under the *O'Brien* test, a governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673.

[2] While the *O'Brien* test is still utilized by the Supreme Court in analyzing the constitutionality of public indecency statutes, *see Pap's A.M.*, 529 U.S. at

289, 120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part), the Court currently evaluates adult entertainment zoning ordinances as time, place, and manner regulations. *Alameda Books*, 122 S.Ct. at 1733 (plurality opinion); *id.* at 1741 (Kennedy, J., concurring); *Renton*, 475 U.S. at 46-47, 106 S.Ct. 925. A time, place, and manner regulation of adult entertainment will be upheld if it is "designed to serve a substantial government interest and ... reasonable alternative avenues of communication remain[ ] available." *Alameda Books*, 122 S.Ct. at 1734. Additionally, a time, place, and manner regulation must be justified without reference to the content of the regulated speech and narrowly tailored to serve the government's ***714** interest. *Schultz*, 228 F.3d at 845. [FN16]

FN16. In *Renton*, the Supreme Court created some confusion as to the appropriate test for analyzing time, place, and manner regulations by asserting that "time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." 475 U.S. at 47, 106 S.Ct. 925. However, as we emphasized in *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir.1986), "[t]he Supreme Court does not always spell out the 'narrowly tailored' step as part of its standard for evaluating time, place, and manner restrictions." *Id.* at 1553. Moreover, a close examination of *Renton* reveals that the Court did consider whether the zoning ordinance at issue was narrowly tailored. 475 U.S. at 52, 106 S.Ct. 925 ("[t]he Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects ...."). In any event, both the Supreme Court and this circuit have continued to apply the "narrowly tailored" step to time, place, and manner regulations. *See Ward v. Rock Against Racism*, 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988); *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1000 (7th Cir.2002).

[3] In this case, however, we are not dealing with a zoning ordinance or a public indecency statute. Instead, we are called upon to evaluate the constitutionality of an adult entertainment liquor regulation. Therefore, it is not entirely clear whether Section 5(b) should be analyzed as a time, place, and manner restriction or as a regulation of expressive conduct under *O'Brien*'s four-part test; or for that matter whether the tests are entirely interchangeable. *See LLEH, Inc. v. Wichita County, Texas*, 289 F.3d 358, 365 (5th Cir.), *cert. denied*, 537 U.S. 1045, 123 S.Ct. 621, 154 L.Ed.2d 517 (2002) (noting uncertainty as to which test courts should use in analyzing the constitutionality of adult entertainment regulations: "the test for time, place, or manner regulations, described in *Renton* ... or the four-part test for incidental limitations on First Amendment freedoms, established in *O'Brien* ...."). For all practical purposes, however, the distinction is irrelevant because the Supreme Court has held that the time, place, and manner test embodies much of the same standards as those set forth in *United States v. O'Brien*. *Barnes*, 501 U.S. at 566, 111 S.Ct. 2456 (plurality opinion) (relying on *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298- 99, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)); *LLEH*, 289 F.3d at 365-66 (same). [FN17] Moreover, as explained *infra*, two of the Supreme Court's post-*44 *Liquormart* decisions--*Pap's A.M.* and *Alameda Books*--make it abundantly clear that the analytical frameworks and standards utilized by the Court in evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable. We, therefore, conclude that it is appropriate to analyze the constitutionality of Section 5(b) using the standards articulated by the Supreme Court in the five decisions comprising the *American Mini Theatres* and *Barnes* lines of jurisprudence. Thus, before proceeding to the merits of Ben's Bar's argument, we begin our analysis by summarizing the reasoning and holdings of these decisions.

FN17. *But see Alameda Books*, 122 S.Ct at 1745 n. 2 (Souter, J., dissenting) (joined by

> Stevens, J. and Ginsburg, J.) (noting that "[b]ecause *Renton* called its secondary-effects ordinance a mere, time, place, or manner restriction and thereby glossed over the role of content in secondary-effects zoning ... I believe the soft focus of its statement of the middle-tier test should be rejected in favor of the ... [*O'Brien*] formulation ... a closer relative of secondary effects zoning than mere time, place, and manner regulations, as the Court ... implicitly recognized [in *Pap's A.M.*].").

715 (1) *Young v. American Mini Theatres, Inc.

In *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Supreme Court addressed, *inter alia*, whether a zoning ordinance enacted by the City of Detroit violated the First Amendment. [FN18] *Id.* at 58, 96 S.Ct. 2440. The "dispersal" ordinance at issue prohibited the operation of any adult entertainment movie theater within 1,000 feet of any two other "regulated uses" (e.g., adult bookstores, bars, hotels, pawnshops), or within 500 feet of a residential area. *Id.* at 52, 96 S.Ct. 2440. A majority of the Court upheld the constitutionality of the ordinance, but in doing so did not agree on a single rationale for the decision. *Id.* at 62-63, 96 S.Ct. 2440 (plurality opinion); *id.* at 84, 96 S.Ct. 2440 (Powell, J. concurring). The plurality concluded that "apart from the fact that the ordinance treats adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in respective theaters, *the regulation of the place where such films may be exhibited does not offend the First Amendment.*" *Id.* at 63, 96 S.Ct. 2440 (emphasis added). In reaching this conclusion, the plurality emphasized that "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Id.* at 70, 96 S.Ct. 2440. The plurality also found that the city's zoning ordinance was justified by its interest in "preserving the character of its neighborhoods," *id.* at 71, 96 S.Ct. 2440, and therefore "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* The plurality concluded its analysis by noting that "what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited ...." *Id.* [FN19]

> FN18. The Court also concluded that the zoning ordinance did not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, *American Mini Theatres*, 427 U.S. at 61, 72-73, 96 S.Ct. 2440; *see generally id.* at 73-84, 96 S.Ct. 2440 (Powell, J., concurring), issues that are not before us on appeal.

> FN19. The *American Mini Theatres* plurality also noted, in a footnote, that the city had enacted the zoning ordinance because of its determination that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, *effects* which are not attributable to theaters showing other types of films," 427 U.S. at 71 n. 34, 96 S.Ct. 2440 (emphasis added), noting "[i]t is this *secondary effect* which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech." *Id.* (emphasis added).

Justice Powell concurred in the judgment of the Court, agreeing with the plurality that the zoning ordinance "is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content." *Id.* at 78-79, 96 S.Ct. 2440. He disagreed, however, with the plurality's determination that "nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." *Id.* at 73 n. 1, 96 S.Ct. 2440. Instead, Justice Powell concluded that it was appropriate to analyze and uphold the constitutionality of the zoning ordinance under the four-part test enunciated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *Id.* at 79, 96 S.Ct. 2440. [FN20]

> FN20. Under *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260

(1977), Justice Powell's concurrence is the controlling opinion in *American Mini Theatres*, as the most narrow opinion joining four other Justices in the judgment of the Court. *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 504 (7th Cir.1980).

716 (2) *City of Renton v. Playtime Theatres, Inc.

The Supreme Court's decision in *American Mini Theatres* laid the groundwork for the Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). [FN21] In *Renton*, the Court considered the validity of an adult entertainment zoning ordinance virtually indistinguishable from the one at issue in *American Mini Theatres*. *Id.* at 46, 106 S.Ct. 925. Unlike the *American Mini Theatres* plurality, however, the *Renton* Court outlined an analytical framework for evaluating the constitutionality of these ordinances. The Court's analysis proceeded in three steps. First, the Court found that the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations. *Id.* Next, the Court considered whether the ordinance was content-neutral or content-based. If an ordinance is content-based, it is presumptively invalid and subject to strict scrutiny. *Id.* at 46-47, 106 S.Ct. 925. On the other hand, if an ordinance is aimed not at the content of the films shown at adult theaters, but rather at combating the secondary effects of such theaters on the surrounding community (e.g., increased crime rates, diminished property values), it will be treated as a content-neutral regulation. *Id.* In *Renton*, the Court held that the zoning ordinance was a "content neutral" regulation of speech because while "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters .... [it] is aimed not at the *content* of the films shown ... but rather at the *secondary effects* of such theaters on the surrounding community." 475 U.S. at 47, 106 S.Ct. 925. Finally, given this finding, the *Renton* Court found that the zoning ordinance would be upheld as a valid time, place and manner regulation, *id.* at 46, 106 S.Ct. 925, if it "was designed to serve a substantial governmental interest and [did] not unreasonably limit alternative avenues of communication." *Id.* at 47, 106 S.Ct. 925. The Court concluded that the zoning ordinance met this test, noting that a " 'city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *id.* at 50, 106 S.Ct. 925 (quoting *American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. 2440), [FN22] and that the ordinance allowed for reasonable alternative avenues of communication because there was "ample, accessible real estate" open for use as adult theater sites. *Id.* at 53, 96 S.Ct. 2440.

FN21. Falling in between *American Mini Theatres* and *Renton* is the Supreme Court's decision in *Schad v. Borough Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), where the Court struck down, on First Amendment grounds, a zoning ordinance that did not--like the ordinance in *American Mini Theatres*--require the dispersal of adult theaters, but instead prohibited them altogether. *Id.* at 71-72, 96 S.Ct. 2440 (plurality opinion); *id.* at 77, 96 S.Ct. 2440 (Blackmun, J., concurring); *id.* at 79, 96 S.Ct. 2440 (Powell, J., concurring). The only significance of *Schad*, for purpose of our analysis, is that the holding of that case serves as the basis for the first step in the *Renton* framework--i.e., does the ordinance completely prohibit the expressive conduct at issue? *See Alameda Books*, 122 S.Ct. at 1733 (noting that the first step in the *Renton* framework was the Court's determination that "the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations"); *Renton*, 475 U.S. at 46, 106 S.Ct. 925.

FN22. *See also American Mini Theatres*, 427 U.S. at 80, 96 S.Ct. 2440 (Powell, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial").

The Supreme Court's decision in *Renton* is also notable because in addition to upholding the constitutionality of the zoning ordinance, the Court also held that the ***717** First Amendment did not require muni-

cipalities, before enacting such ordinances, to conduct new studies or produce evidence independent of that already generated by other cities (whether summarized in judicial decisions or not), *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925, so long as "whatever evidence [a] city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.*

(3) *Barnes v. Glen Theatre, Inc.*

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), the Supreme Court was called upon to address the constitutionality of Indiana's public indecency statute. In a splintered decision, a narrow majority of the Court held that the statute--which prohibited nudity in public places--could be enforced against establishments featuring nude dancing, i.e., by requiring dancers to wear pasties and G-strings during their performances, without violating the First Amendment's right of free expression. *Id.* at 565, 111 S.Ct. 2456 (plurality opinion); *id.* at 572, 111 S.Ct. 2456 (Scalia, J. concurring); *id.* at 582, 585, 111 S.Ct. 2456 (Souter, J. concurring). Of that majority, however, only three Justices agreed on a single rationale.

The plurality--Chief Justice Rehnquist and Justices O'Connor and Kennedy-- began its analysis by emphasizing that while "nude dancing ... is expressive conduct within the outer perimeters of the First Amendment .... [w]e must [still] determine the level of protection to be afforded to the expressive conduct at issue, and ... whether the Indiana statute is an impermissible infringement of that protected activity." *Barnes*, 501 U.S. at 566, 111 S.Ct. 2456. The plurality noted that the public indecency statute did not "ban [ ] nude dancing, as such, but ... proscribed public nudity across the board," *id.*, and that "the Supreme Court of Indiana has construed the Indiana statute to preclude nudity in what are essentially places of public accommodation." *Id.* Next, the plurality concluded that the public indecency statute should be analyzed under *O'Brien*'s four-part test for evaluating regulations of expressive conduct protected by the First Amendment. [FN23] Applying this test, the plurality found "that Indiana's public indecency statute [was] justified despite its incidental limitations on some expressive activity," *id.* at 567, 111 S.Ct. 2456, because: (1) the statute was "clearly within the constitutional power of the State and furthers substantial governmental interests [i.e., protecting societal order and morality]," *id.* at 568, 111 S.Ct. 2456; (2) the state's interest in protecting societal order and morality by enforcing the statute to prohibit nude dancing was "unrelated to the suppression of free expression" because "the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic [and] [t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity," *id.* at 570-71, 111 S.Ct. 2456; (3) the incidental restriction on First Amendment freedom placed on nude dancing by the statute was no greater than essential to the furtherance of the governmental interest because "[t]he statutory prohibition is not a means to some greater end, but an end in itself," *id.* at 571-72, 111 S.Ct. 2456; and (4) the public indecency statute was narrowly tailored because "Indiana's requirement that the dancers wear pasties and G-strings is modest, and the *bare minimum necessary* ****718** to achieve the State's purpose.*" *Id.* at 572, 111 S.Ct. 2456 (emphasis added).

> FN23. In doing so, the *Barnes* plurality noted that the *O'Brien* test and the time, place, and manner test utilized by the Court in *Renton* have "been interpreted to embody much the same standards ...." 501 U.S. at 566, 111 S.Ct. 2456.

Justice Scalia concurred in the judgment of the Court, but in doing so expressed his opinion that "the challenged regulation must be upheld not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." *Id.* at 572, 111 S.Ct. 2456. Justice Souter also concurred in the judgment of the Court, agreeing with the plurality that "the appropriate analysis to determine the actual protection required by the First Amendment is the four-part inquiry described in *United States v. O'Brien.*" *Id.* at 582, 111 S.Ct. 2456. He wrote separately, however, to rest his concurrence in the judgment, "not on the possible sufficiency of society's

moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments ...." *Id.* [FN24] In doing so, Justice Souter relied heavily on the Court's decision in *Renton*. *Id.* at 583-87, 111 S.Ct. 2456.

> FN24. Under *Marks*, 430 U.S. at 193, 97 S.Ct. 990, Justice Souter's concurrence is the controlling opinion in *Barnes*, as the most narrow opinion joining the judgment of the Court. *Schultz*, 228 F.3d at 842 n. 2; *DiMa Corp.*, 185 F.3d at 830.

(4) *City of Erie v. Pap's A.M.*

The Supreme Court revisited the *Barnes* holding in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), where a majority of the Court upheld the constitutionality of a public indecency ordinance "strikingly similar" to the one at issue in *Barnes*. *Id.* at 283, 120 S.Ct. 1382. Unlike *Barnes*, however, in *Pap's A.M.* five justices agreed that the proper framework for analyzing public indecency statutes was *O'Brien*'s four-part test. *Id.* at 289, 120 S.Ct. 1382 (plurality opinion) ("We now clarify that government restrictions on public nudity ... should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech"); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part) (agreeing with the "analytical approach that the plurality employs in deciding this case [i.e., the *O'Brien* test]"). *See also Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1278 (11th Cir.2001) (holding that "[a]lthough no opinion in [*Pap's A.M.*] was joined by more than four Justices, a majority of the Court basically agreed on how these kinds of statutes should be analyzed [i.e., *O'Brien*'s four-part test]"). A majority of the Justices also agreed that combating the adverse secondary effects of nude dancing was within the city's constitutional powers and unrelated to the suppression of free expression, *Pap's A.M.*, 529 U.S. at 296, 301, 120 S.Ct. 1382 (plurality opinion) ("Erie's efforts to protect public health and safety are clearly within the city's police powers .... [and] [t]he ordinance is unrelated to the suppression of free expression ...."); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part) ("Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression ...."), thus satisfying the first and third prongs of the *O'Brien* test.

A majority of the Justices in *Pap's A.M.* could not, however, agree on whether the public indecency statute furthered an important or substantial interest of the city (second prong of *O'Brien*), and if so whether the incidental restriction on nude dancing was no greater than that essential to the furtherance of this interest (fourth prong). The plurality--Chief Justice Rehnquist and Justices O'Connor, Kennedy, ***719** and Breyer--concluded that Erie's public indecency ordinance furthered an important or substantial government interest under *O'Brien* because "[t]he asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing [e.g., the increased crime generated by such establishments] are undeniably important." *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382. [FN25] The *Pap's A.M.* plurality also found that Erie's public indecency statute was no greater than that essential to furthering the city's interest in combating the harmful secondary effects of nude dancing because:

> FN25. The *Pap's A.M.* plurality's reliance on *Renton*'s secondary effects doctrine is significant because it marks a departure from the *Barnes* plurality's determination that a public indecency ordinance may be justified by a State's interest in protecting societal order and morality, *Barnes*, 501 U.S. at 568, 111 S.Ct. 2456, and an adoption of the approach advocated by Justice Souter in his concurrence in that case. *Id.* at 582, 111 S.Ct. 2456.

> The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.* The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.

529 U.S. at 301, 120 S.Ct. 1382.

Justice Scalia, joined by Justice Thomas, agreed with the plurality that the ordinance should be upheld, but wrote separately to emphasize that " 'as a general law regulating conduct and not specifically directed at expression, [the city's public indecency ordinance] is not subject to First Amendment scrutiny at all,' " *Pap's A.M.*, 529 U.S. at 307-08, 120 S.Ct. 1382 (quoting *Barnes*, 501 U.S. at 572, 111 S.Ct. 2456 (Scalia, J., concurring)), and that "[t]he traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment." *Id.* at 310, 120 S.Ct. 1382. Justice Souter concurred in part and dissented in part, stressing his belief that "the current record [does not] allow us to say that the city has made a sufficient evidentiary showing to sustain its regulation ...." *Id.* at 310-11, 120 S.Ct. 1382. Justice Stevens, joined by Justice Ginsburg, dissented, asserting that the ordinance was a "patently invalid" content-based ban on nude dancing that censored protected speech. *Id.* at 331-32, 120 S.Ct. 1382. Because the plurality's decision offers the narrowest ground for the Supreme Court's holding in *Pap's A.M.*, we find the reasoning of that opinion to be controlling. *Marks*, 430 U.S. at 193, 97 S.Ct. 990.

(5) *City of Los Angeles v. Alameda Books, Inc.*

This past term in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), the Supreme Court upheld, at the summary judgment stage, an ordinance prohibiting multiple adult entertainment businesses from operating in the same building. *Id.* at 1733. The Court reached this conclusion despite the fact that the city had not, prior to the enactment of the ordinance, conducted or relied upon studies (or other evidence) specifically demonstrating that forbidding multiple adult entertainment businesses from operating under one roof reduces secondary effects. *Id.* at 1736 (plurality opinion); *id.* at 1744 (Kennedy, J., concurring). Once again, however, a majority of the Court could not agree on a single rationale for this decision.

***720** The primary issue in *Alameda Books* was the appropriate standard "for determining whether an ordinance serves a substantial government interest under *Renton*." 122 S.Ct. at 1733. The plurality--written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Scalia and Thomas--concluded that whether a municipal ordinance is " 'designed to serve a substantial government interest and does not unreasonably limit alternative avenues of communication' ... requires [courts to] ... ask[ ] whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Id.* at 1737. According to the plurality, this requirement is met if the evidence upon which the municipality enacted the regulation " 'is reasonably believed to be relevant' for demonstrating a connection between [secondary effects producing] speech and a substantial, independent government interest." *Id.* at 1736. The plurality stressed that once a municipality presents a rational basis for addressing the secondary effects of adult entertainment through evidence that "fairly support[s] the municipality's rationale for its ordinance," *id.*, the plaintiff challenging the constitutionality of the ordinance must "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings." *Id.* If a plaintiff fails to cast doubt on the municipality's rationale, the inquiry is over and "the municipality meets the standard set forth in *Renton*." *Id.* If, however, a plaintiff succeeds "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." *Id.* Because the plurality concluded that the city, for purposes of summary judgment, had complied with the evidentiary requirement outlined in *Renton*, *id.*, it remanded the case for further proceedings. *Id.* at 1738.

Justice Scalia, in addition to joining the plurality opinion, wrote separately to emphasize that while the plurality's opinion "represents a correct application of our jurisprudence concerning the regulation of the 'secondary effects' of pornographic speech .... our First Amendment traditions make 'secondary effects' analysis quite unnecessary. The Constitution does not

prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex." *Alameda Books*, 122 S.Ct. at 1738-39.

Justice Kennedy concurred in the judgment of the Court, but writing separately because he concluded, *inter alia*, that "the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur." *Id.* at 1739. He began, however, by expressing his agreement with the plurality that the secondary effects resulting from "high concentrations of adult businesses can damage the value and integrity of a neighborhood," *id.*, stressing "[t]he damage is measurable; it is all too real." *Id.* He also agreed with the plurality that "[t]he 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," *id.*, emphasizing that "[a] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *Id.* (quoting *American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. 2440). In Justice Kennedy's opinion, if a municipality ameliorates the secondary effects of adult entertainment through "the traditional exercise of its zoning power, and at the same time leaves the quantity and accessibility of the speech ***721** substantially undiminished, there is no First Amendment objection .... even if the measure identifies the problem outside by reference to the speech inside--that is, even if the measure is in that sense content based." [FN26] *Id.* Like the plurality, he concluded that "[a] zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it." *Id.* at 1740. He also expressed his belief that zoning regulations "do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use ... [and that] [t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional." *Id.* at 1741.

> FN26. The plurality in *Alameda Books* characterized the second step of the *Renton* framework as follows: "[w]e next consider[ ] whether the ordinance [is] content neutral or content based." 122 S.Ct. at 1734. In his concurrence, Justice Kennedy joined the four dissenters, *id.* at 1744-45, in jettisoning the "content neutral" label, noting that the "fiction" of adult entertainment zoning ordinances being "content neutral ... is perhaps more confusing than helpful .... These ordinances are content based and we should call them so." *Id.* at 1741. In reaching this conclusion, Justice Kennedy emphasized that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Id.* Justice Kennedy concluded, however, that an adult entertainment zoning ordinance is not subject to strict scrutiny simply because it "identifies the problem outside by reference to the speech inside," *id.* at 1740, and, as such, "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.* at 1741. Thus, while the label has changed, the substance of *Renton*'s second step remains the same.

Based on the foregoing principles, Justice Kennedy believes that two questions must be asked by a court seeking to determine whether a zoning ordinance regulating adult entertainment is designed to meet a substantial government interest: (1) "what proposition does a city need to advance in order to sustain a secondary-effects ordinance?", *Alameda Books*, 122 S.Ct at 1741; and (2) "how much evidence is required to support the proposition?" *Id.* According to Justice Kennedy, the plurality skipped the second question, giving the correct answer, but neglected to give sufficient "attention" to the first question, *id.*, i.e., "the claim a city must make to justify a content-based ordinance." *Id.* at 1742. In his view, "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact," *id.*, and "[t]he rationale of the ordinance must be that it will suppress secondary effects ... not ... speech." *Id.* Justice Kennedy's primary

area of disagreement with the plurality's analysis was that, in his opinion, it failed to "address how speech [would] fare under the city's ordinance." *Id.*

The differences between Justice Kennedy's concurrence and the plurality's opinion are, however, quite subtle. Justice Kennedy's position is not that a municipality must *prove* the efficacy of its rationale for reducing secondary effects *prior to* implementation, as Justice Souter and the other dissenters would require, *see generally* *Alameda Books*, 122 S.Ct. at 1744-51; but that a municipality's *rationale* must be *premised* on the theory that it "*may* reduce the costs of secondary effects without substantially reducing speech." *Id.* at 1742 (emphasis added). Significantly, while Justice Kennedy believed that the plurality did not adequately address this aspect of the city's rationale, he agreed ***722** 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 is slight, noting:

> As to this, we have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required .... As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; *and if its inferences appear reasonable*, we should not say there is no basis for its conclusion.

Id. at 1742-43 (emphasis added).

The dissenting opinion of Justice Souter, joined by Justices Stevens and Ginsburg in full and by Justice Breyer with respect to part II, asserted that the Court should have struck down the ordinance. *Alameda Books*, 122 S.Ct. at 1747 (Souter, J., dissenting).

Because Justice Kennedy's concurrence is the narrowest opinion joining the judgment of the Court in *Alameda Books*, we conclude that it is the controlling opinion. *Marks*, 430 U.S. at 193, 97 S.Ct. 990.

D. Does Section 5(b)'s prohibition of alcohol on the premises of Sexually Oriented Businesses violate the First Amendment?

[4] Based on the road map provided by the Supreme Court in *44 Liquormart*, as described *supra*, we conclude that a liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments is constitutional if: (1) the State is regulating pursuant to a legitimate governmental power, *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673; (2) the regulation does not completely prohibit adult entertainment, *Renton*, 475 U.S. at 46, 106 S.Ct. 925; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments, *Pap's A.M.*, 529 U.S. at 289-91, 120 S.Ct. 1382; [FN27] and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available, *see* *Alameda Books*, 122 S.Ct. at 1734 (plurality opinion); *id.* at 1739- 44 (Kennedy, J. concurring); *or*, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. *Pap's A.M.*, 529 U.S. at 296, 301 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

> FN27. This prong is, for all practical purposes, identical to the *Alameda Books* plurality's inquiry into whether the zoning ordinance "was content neutral or content based." 122 S.Ct. at 1733-34. Although a majority of the Justices no longer employ the content neutral label when evaluating the constitutionality of a "secondary effects" ordinance, the ultimate inquiry remains the same. *See supra* n. 26.

[5] Applying the foregoing analytical framework here, we conclude that Section 5(b) does not violate the First Amendment. To begin with, the Village's regulation of alcohol sales and consumption in "inappropriate locations" is clearly within its general police powers. *44 Liquormart*, 517 U.S. at 515, 116 S.Ct. 1495; *LaRue*, 409 U.S. at 114, 93 S.Ct. 390. As such, the Village enacted Section 5(b) "within the constitutional power of the Government." *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382 (holding that a municipality's efforts to protect the public's health and

safety through its ***723** general police powers satisfies this requirement); *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673 (same).

[6] The next two prongs of our test concern the level of constitutional scrutiny that must be applied to Section 5(b). The level of First Amendment scrutiny a court uses to determine whether a regulation of adult entertainment is constitutional depends on the purpose for which the regulation was adopted. If the regulation was enacted to restrict certain viewpoints or modes of expression, it is presumptively invalid and subject to strict scrutiny. *Texas v. Johnson*, 491 U.S. 397, 403, 411-12, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Renton*, 475 U.S. at 46-47, 106 S.Ct. 925. If, on the other hand, the regulation was adopted for a purpose unrelated to the suppression of expression--e.g., to regulate nonexpressive conduct or the time, place, and manner of expressive conduct--a court must apply a less demanding intermediate scrutiny. 491 U.S. at 406-07, 109 S.Ct. 2533; *Pap's A.M.*, 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

[7][8] The Supreme Court has held that regulations of adult entertainment receive intermediate scrutiny if they are designed not to suppress the "content" of erotic expression, but rather to address the negative secondary effects caused by such expression. *Alameda Books*, 122 S.Ct. at 1733-34 (plurality opinion), *id.* at 1741 (Kennedy, J., concurring); *Renton*, 475 U.S. at 48, 106 S.Ct. 925. Here, Section 5(b), like the liquor regulations at issue in *LaRue*, 409 U.S. at 118, 93 S.Ct. 390, does not completely prohibit Ben's Bar's dancers from conveying an erotic message; it merely prohibits alcohol from being sold or consumed on the premises of adult entertainment establishments. *See, e.g.*, *Wise Enterprises, Inc. v. Unified Gov't of Athens-Clarke County, Georgia*, 217 F.3d 1360, 1365 (11th Cir.2000) (holding that "[t]he ordinance does not prohibit all nude dancing, but only restricts nude dancing in those locations where the unwanted secondary effects arise"); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 998 (11th Cir.1998) (holding that ordinance prohibiting alcohol on the premises of adult entertainment establishments did not ban nude dancing, but merely restricted "the place or manner of nude dancing without regulating any particular message it might convey"). Moreover, it is clear that the "predominant concerns" motivating the Village's enactment of Section 5(b) " 'were with the secondary effects of adult [speech], and not with the content of adult [speech].' " *Alameda Books*, 122 S.Ct. at 1737 (plurality opinion) (quoting *Renton*, 475 U.S. at 47, 106 S.Ct. 925); *id.* at 1739-41 (Kennedy, J., concurring). [FN28] The Village enacted the Ordinance because it believed "there is convincing documented evidence that Sexually Oriented Businesses have a deleterious effect on both existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values." Specifically, the Village concluded that "the consumption of alcoholic beverages on the premises of a Sexually Oriented Business exacerbates the deleterious secondary effects of such businesses on the community." Additionally, in passing the Ordinance, the Village emphasized (in the text of the Ordinance) that its intention was not ***724** "to suppress any speech activities protected by the First Amendment, but to enact a[n] ... ordinance which addresses the secondary effects of Sexually Oriented Businesses," and that it was not attempting to "restrict or deny access by adults to sexually oriented-materials protected by the First Amendment ...."

> FN28. Federal courts evaluating the "predominant concerns" behind the enactment of a statute, ordinance, regulation, or the like, may do so by examining a wide variety of materials including, but not limited to, the text of the regulation or ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware. *Ranch House*, 238 F.3d at 1280.

[9] For all of the foregoing reasons, Section 5(b) is properly analyzed as a content-based time, place, and manner restriction, or as a content-based regulation of expressive conduct, and therefore is subject only to intermediate scrutiny. *Alameda Books*, 122 S.Ct. at 1733-36 (plurality opinion), *id.* at 1741 (Kennedy, J. concurring); *Pap's A.M.*, 529 U.S. at 294-96, 120 S.Ct. 1382 (plurality opinion), *id.* at 310, 120 S.Ct.

1382 (Souter, J., concurring in part and dissenting in part). [FN29] *See also Artistic Entm't, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1308-09 (11th Cir.2000) (holding that "a prohibition on the sale of alcohol at adult entertainment venues ... [is] content-neutral and subject to the *O'Brien* test"); *Wise Enterprises*, 217 F.3d at 1364 (holding that "[i]t is clear from these [legislative] statements the County's ordinance is aimed at the secondary effects of nude dancing combined with the consumption of alcoholic beverages, not at the message conveyed by nude dancing .... [T]he district court was [therefore] correct in [applying] ... intermediate scrutiny ...."). Regulations that prohibit nude dancing where alcohol is served or consumed are independent of expressive or communicative elements of conduct, and therefore are treated as if they were content-neutral. *Wise Enterprises*, 217 F.3d at 1363.

> FN29. *Compare G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark, Missouri*, 83 S.W.3d 98, 103 (2002) (holding that because the city presented no evidence that its purpose in enacting an ordinance restricting nudity in establishments where alcoholic beverages are sold "was to prevent the negative secondary effects associated with erotic dancing establishments, and, thus, that the ordinance was unrelated to the suppression of expression, the City had the heavy burden of justifying the ordinance under the strict scrutiny standard").

[10] This brings us to the heart of our analysis: whether Section 5(b) is designed to serve a substantial government interest, narrowly tailored, and does not unreasonably limit alternative avenues of communication, *or*, alternatively, furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. As previously noted, it is not entirely clear whether an adult entertainment liquor regulation is to be treated as a time, place, and manner regulation, or instead as a regulation of expressive conduct under *O'Brien*. *See, e.g., LLEH, Inc.*, 289 F.3d at 365. But in either case, we are required to ask "whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Alameda Books*, 122 S.Ct. at 1737 (plurality opinion). At this stage, courts must "examine evidence concerning regulated speech and secondary effects." *Id.* In conducting this inquiry, we are required, as previously noted, to answer two questions: (1) "what proposition does a city need to advance in order to sustain a secondary-effects ordinance?"; and (2) "how much evidence is required to support the proposition?" *Id.* at 1741 (Kennedy, J. concurring). [FN30]

> FN30. As noted *supra*, under *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), Justice Kennedy's concurrence is the controlling opinion, as the most narrow opinion joining the judgment of the Court.

***725** [11] At the outset, we note that in order to justify a content-based time, place, and manner restriction or a content-based regulation of expressive conduct, a municipality "must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects [i.e., is designed to serve, or furthers, a substantial or important governmental interest], while leaving the quantity and accessibility of speech substantially intact [i.e., that the regulation is narrowly tailored and does not unreasonably limit alternative avenues of communication, or, alternatively, that the restriction on expressive conduct is no greater than is essential in furtherance of that interest]." [FN31] *Alameda Books*, 122 S.Ct. at 1741 (Kennedy, J. concurring). The regulation may identify the speech based on content, "but only as a shorthand for identifying the secondary effects outside." *Id.* A municipality "may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* Thus, the rationale behind the enactment of Section 5(b) must be that it will suppress secondary effects, not speech. *Id.*

> FN31. In this case, it is unnecessary to conclusively resolve which of these two standards is applicable. As explained *infra*, Section 5(b)' s alcohol prohibition is, as a practical matter, the least restrictive means of furthering the Village's interest in combating

> the secondary effects resulting from the combination of adult entertainment and alcohol consumption, and therefore satisfies either standard.

The Village's rationale in support of Section 5(b) is that the liquor prohibition will significantly reduce the secondary effects that naturally result from combining adult entertainment with the consumption of alcoholic beverages without substantially diminishing the availability of adult entertainment, in this case nude and semi-nude dancing. In enacting the Ordinance, the Village Board relied on numerous judicial decisions, studies from 11 different cities, and "findings reported in the Regulation of Adult Entertainment Establishments of St. Croix, Wisconsin; and the Report of the Attorney General's Working Group of Sexually Oriented Businesses (June 6, 1989, State of Minnesota)," to support its conclusion that adult entertainment produces adverse secondary effects.

Ben's Bar argues that the Village may not rely on prior judicial decisions or the experiences of other municipalities, but must instead conduct its own studies, at the local level, to determine whether adverse secondary effects result when liquor is served on the premises of adult entertainment establishments. This view, however, has been expressly (and repeatedly) rejected by the Supreme Court. *Alameda Books*, 122 S.Ct. at 1743 (Kennedy, J. concurring) (holding that " '[t]he First Amendment does not require a city, before enacting ... an [adult entertainment secondary effects] 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.' ") (quoting *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925); *Barnes*, 501 U.S. at 584, 111 S.Ct. 2456 (Souter, J. concurring) (same).

Ben's Bar also contends that the Village failed to meet its burden of demonstrating the constitutionality of Section 5(b) because "the Village's evidentiary record did not include any written reports relating specifically to the effects of serving alcohol in establishments offering nude and semi-nude dancing." In *LaRue*, however, the Supreme Court explicitly held that a State's conclusion that "certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational ***726** one." 409 U.S. at 118, 93 S.Ct. 390. Because the adult entertainment at issue in this case is of the same character as that at issue in *LaRue*, 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. *Alameda Books*, 122 S.Ct. at 1736-37 (plurality opinion) (adopting view of plurality in *Pap's A.M.* as to the evidentiary requirement for adult entertainment cases), *id.* at 1741 (Kennedy, J., concurring) (agreeing with the plurality on this point, as a fifth vote); *Pap's A.M.*, 529 U.S. at 296-97, 120 S.Ct. 1382 (plurality opinion) (same); *Giovani*, 303 F.3d at 516 (same). In fact, 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." *Bellanca*, 452 U.S. at 718, 101 S.Ct. 2599. *See also* *Blue Canary*, 251 F.3d at 1124 (noting that "[l]iquor and sex are an explosive combination"); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. of California*, 99 Cal.App.4th 880, 121 Cal.Rptr.2d 729, 737 (2002) (same). For these reasons, we conclude that the evidentiary record fairly supports the Village's proffered rationale for Section 5(b), and that Ben's Bar has failed "to cast direct doubt on this rationale either by demonstrating the [Village's] evidence does not support its rationale or by furnishing evidence that disputes the [Village's] factual findings ...." *Alameda Books*, 122 S.Ct. at 1736.

Ben's Bar also contends that Section 5(b) is not narrowly tailored because the Village offered no evidence that "the incidental restrictions placed on Ben's [Bar], over and above the pasties and G-strings requirement, ameliorate any purported negative secondary effects." This argument, however, is problematic for several reasons, two of which we will address briefly.

[12] First, as previously noted, Section 5(b) does not impose any restrictions whatsoever on a dancer's ability to convey an erotic message. Instead, the regulation prohibits Sexually Oriented Businesses like Ben's Bar from serving alcoholic beverages to its pat-

rons during a dancer's performance. This is not a restriction on erotic expression, but a prohibition of nonexpressive conduct (i.e., serving and consuming alcohol) during the presentation of expressive conduct. The First Amendment does not entitle Ben's Bar, its dancers, or its patrons, to have alcohol available during a "presentation" of nude or semi-nude dancing. *See* *Gary v. City of Warner Robins, Georgia*, 311 F.3d 1334, 1340 (11th Cir.2002) (holding that ordinance prohibiting persons under the age of 21 from entering or working at "any establishment ... which sells alcohol by the drink for consumption on premises" did not violate an underage nude dancer's First Amendment right to free expression because she "remains free to observe and engage in nude dancing, but she simply cannot do so ... in establishments that primarily derive their sales from alcoholic beverages consumed on the premises"); *Sammy's of Mobile*, 140 F.3d at 999 (holding that while nude dancing is entitled to a degree of protection under the Supreme Court's First Amendment jurisprudence, "we are unaware of any constitutional right to drink while watching nude dancing"); *Dept. of Alcoholic Beverage Control*, 99 Cal.App.4th at 895, 121 Cal.Rptr.2d 729 (noting that "[t]he State ... has not prohibited dancers from performing with the utmost level of erotic expression. They are simply forbidden to do so in establishments which serve alcohol, and the Constitution is thereby not offended"). What the First Amendment does require is that establishments like Ben's Bar be given "a ***727** 'reasonable opportunity' to disseminate the speech at issue." *North Ave. Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 445 (7th Cir.1996). A "reasonable opportunity," however, does not include a concern for economic considerations. *Renton*, 475 U.S. at 54, 106 S.Ct. 925. [FN32]

> FN32. In an affidavit filed with the district court, Barry Breault, part-owner of Ben's Bar, stated that:
> The bulk of Ben's Bar's revenues are derived from beverage sales and associated food sales. Revenues from adult entertainment ... account for only about one-third of Ben's revenues. *Ben's Bar cannot operate at a profit without the revenue from the sale of alcoholic beverages, and the business such sales bring in.*
> (Emphasis added.)

Second, Section 5(b)'s alcohol prohibition, like the one in *LaRue*, is limited to adult entertainment establishments, and does not apply to:

> [T]heaters, performing arts centers, civic centers, and dinner theaters where live dance, ballet, music, and dramatic performances of serious artistic merit are offered on a regular basis; and in which the predominant business or attraction is not the offering of entertainment which is intended for the sexual interests or titillation of customers; and where the establishment is not distinguished by an emphasis on or the advertising or promotion of nude or semi-nude performances. [FN33]
>
> > FN33. This section of the Ordinance also emphasizes that "[w]hile expressive live nudity may occur within these establishments [those noted in section (6)], this ordinance seeks only to minimize and prevent the secondary effects of Sexually Oriented Businesses on the community. Negative secondary effects have not been associated with these establishments."

Ordinance A-472(6). *Compare* *Giovani*, 303 F.3d at 515 (noting that lack of evidentiary support for adult entertainment liquor regulations "might not pose a problem if the challenged restrictions applied only to bars and clubs that present nude or topless dancing").

Finally, we note that Section 5(b)'s liquor prohibition is no greater than is essential to further the Village's substantial interest in combating the secondary effects resulting from the combination of nude and semi-nude dancing and alcohol consumption because, as a practical matter, a complete ban of alcohol on the premises of adult entertainment establishments is the *only* way the Village can advance that interest. As the Supreme Court recognized in *LaRue*,

> Nothing in the record before us or in common experience compels the conclusion that either self-discipline on the part of the customer or self-regulation on the part of the bartender could have been relied upon by the Department to secure compliance with ... [the] regulation[s]. The Depart-

> ment's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one ....

409 U.S. at 116, 93 S.Ct. 390. *See also* *Wise Enterprises, Inc. v. Unified Government of Athens-Clarke County, Georgia*, 217 F.3d 1360, 1364-65 (11th Cir.2000) (holding that ordinance prohibiting alcohol on the premises of adult entertainment establishments satisfied *O'Brien*'s requirement that restriction on First Amendment rights be no greater than necessary to the furtherance of the government's interest because "[t]here is no less restrictive alternative"). Indeed, unlike the zoning ordinance at issue in *Alameda Books*, there is no need to speculate as to whether Section 5(b) will achieve its stated purpose. Prohibiting alcohol on the premises of adult entertainment establishments will unquestionably reduce the enhanced secondary ***728** effects resulting from the explosive combination of alcohol consumption and nude or semi-nude dancing.

Given the foregoing, we conclude that Section 5(b) does not violate the First Amendment. The regulation has no impact whatsoever on the tavern's ability to offer nude or semi-nude dancing to its patrons; it seeks to regulate alcohol and nude or semi-nude dancing without prohibiting either. The citizens of the Village of Somerset may still buy a drink and watch nude or semi-nude dancing. They are not, however, constitutionally entitled to do both at the same time and in the same place. *Gary*, 311 F.3d at 1338 (holding that there is no generalized right to associate with other adults in alcohol-purveying establishments with other adults). The deprivation of alcohol does not prevent the observer from witnessing nude or semi-nude dancing, or the dancer from conveying an erotic message. Perhaps a sober patron will find the performance less tantalizing, and the dancer might therefore feel less appreciated (not necessarily from the reduction in ogling and cat calls, but certainly from any decrease in the amount of tips she might otherwise receive). And we do not doubt Ben's Bar's assertion that its profit margin will suffer if it is unable to serve alcohol to its patrons. But the First Amendment rights of each are not offended when the show goes on without liquor.

III.

For the reasons expressed in this opinion, Section 5(b)'s prohibition of alcohol on the premises of adult entertainment establishments does not violate the First Amendment. We, therefore, affirm the district court's decision granting the Village's motion for summary judgment.

316 F.3d 702

Briefs and Other Related Documents **(Back to top)**

• 01-4351 (Docket) (Dec. 31, 2001)

END OF DOCUMENT

SUZY DAVIS, EDWARD SMART, CECIL SNYDER, aka CECIL CINDER, individually and on behalf of all others situated; and BEACHFRONT USA, INC., unincorporated and incorporated associations, Plaintiffs-Appellants, v. DARYL F. GATES, Chief of Police of the City of Los Angeles; the City of Los Angeles; and the County of Los Angeles, Defendants-Appellees.

No. 91-56174

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1992 U.S. App. LEXIS 22417

July 7, 1992, ** Submitted, Pasadena, California

**** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.**

September 14, 1992, Filed

NOTICE:
[*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

PRIOR HISTORY:
Appeal from the United States District Court for the Southern District of California. D.C. No. CV-90-2660-RSWL. Ronald S.W. Lew, District Judge, Presiding

DISPOSITION:
AFFIRMED.

JUDGES:
Before: FLETCHER, O'SCANNLAIN and KLEINFELD, Circuit Judges.

OPINION:

MEMORANDUM

Plaintiffs, organizations and individuals who believe in benefits of public nudity, appeal the grant of summary judgment in favor of the City of Los Angeles and other defendants, denying injunctive and declaratory relief from a city ordinance that prohibits inter alia nude sunbathing. We affirm.

FACTS

Plaintiffs are organizations and individuals who are members of various national organizations of persons who believe in the mental, spiritual and physical benefits of public nudity, nude sunbathing and nude swimming.

The city of Los Angeles manages and controls Venice Beach. City Ordinance 63.44 B (20) (the "ordinance") prohibits nudity in public areas including public beaches and parks. Plaintiffs allege that they have been prohibited from bathing in the nude, assembling, announcing and promulgating **[*2]** the nudist philosophy at Venice Beach because of the enforcement of the ordinance. Specifically, plaintiff Suzy Davis alleges that in 1986, she was cited and prosecuted under the ordinance. Plaintiff Edward Smart alleges he was arrested and prosecuted for "'buttocks' exposure." Plaintiffs allege that enforcement of the ordinance violates plaintiffs' rights under the Constitution and deprives them of their rights to freedom of expression, freedom of association, privacy, due process and equal protection of the law. Plaintiffs also claim that the existence of the ordinance has a chilling effect on their exercise of their First Amendment and other constitutional rights.

Plaintiffs brought suit in May, 1990, seeking declaratory and injunctive relief under the First, Fourth, Fifth and Ninth Amendments and *42 U.S.C. § 1983.*

After the district court granted defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), plaintiffs filed a second amended complaint in November, 1990. The parties filed cross motions for summary judgment, and the district court granted the defendants' motion on August 2, 1991. The court denied plaintiffs' motion for reconsideration in an order **[*3]** dated September 30, 1991.

STANDARD OF REVIEW

"A grant of summary judgment is reviewed de novo to determine whether, viewing the evidence in a light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court applied the relevant substantive law." *Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989).*

DISCUSSION

A. Jurisdiction

Defendants challenge this court's jurisdiction claiming that plaintiffs lack standing. They also contend that relief based on the incidents alleged in the complaint is barred by the statute of limitations.

"Courts require a plaintiff to have a personal stake in the outcome of a case to warrant [his or her] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *EMI Ltd. v. Bennett, 738 F.2d 994, 996* (9th Cir.) (citation omitted), cert. denied, *469 U.S. 1073 (1984).* The plaintiff must allege a "distinct and palpable injury to himself" that is "likely to be redressed by a favorable decision." *Id. at 996.*

Plaintiffs Suzy Davis and Edward **[*4]** Smart allege that they have been arrested for violating the ordinance in the past, that they desire to bathe nude in the future and that the ordinance has a chilling effect on the exercise of their First Amendment right of expression due to threat of prosecution. We find they have standing because they have sufficiently alleged specific injury from the challenged ordinance, and shown that a decision in their favor would redress that injury.

We also reject defendants' statute of limitations argument. The fact that Suzy Davis alleges that she was last cited and prosecuted under the ordinance in 1986 does not preclude relief here. The basis of the plaintiffs' claims in this case is the continuous chilling effect of the ordinance prohibiting plaintiffs from bathing nude.

B. Basis for District Court's Decision

Plaintiffs first contend the district court granted defendants summary judgment based on procedural default rather than on the merits. This argument is without merit. In its September 30, 1991, order, the court made clear that "in granting Defendants' summary judgment motion, the court ruled on the merits."

Plaintiffs claim that the district court erroneously ruled against **[*5]** them because they failed to file an opposition brief to defendants' summary judgment motion; this ruling, they contend, was "based upon an alleged violation of Local Rule 7.9. ..." Local Rule 7.9 permits the court to grant a motion when the nonmoving party does not oppose. However, as the district court pointed out in ruling on the plaintiffs' motion for reconsideration, Rule 7.9 implicitly requires the court to look at the underlying paperwork to determine whether or not summary judgment should be granted on the merits. The district court did this, and ruled in defendants' favor on the merits.

C. Summary Judgment was Proper

Plaintiffs contend that the ordinance infringes their rights to freedom of expression and freedom of association. However, a recent Supreme Court decision upholding Indiana's public nudity statute is fatal to their claims.

When 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest can justify incidental limitations on First Amendment freedoms. ... [A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers **[*6]** an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2461 (1991) (quoting *United States v. O'Brien, 391 U.S. 367, 376-77 (1968).*

At issue in Barnes was the application of Indiana's statute banning public nudity to a nude dancing establishment. Applying the O'Brien test to the statute, the Court found it to be a constitutionally permissible regulation. The statute furthered "a substantial government interest in protecting order and morality" that was "unrelated to the suppression of free expression." *Glen Theatre, 111 S. Ct. at 2462.* The Court specifically rejected the notion that "restricting nudity on moral grounds [is] necessarily related to expression," Id.: "We cannot accept the view that an apparently limitless

variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Id. **[*7]** (quoting *O'Brien, 391 U.S. at 376).* Finally, the state's requirement that dancers "wear at least pasties and a G-String" was "the bare minimum necessary to achieve the state's purpose." *Glen Theatre, 111 S. Ct. at 2463.*

Barnes clearly governs this case. The ordinance is the same kind of public morals statute the Supreme Court upheld. Specifically, the statute is constitutionally sound despite its "incidental limitations" on plaintiffs' rights to free expression and association. The ordinance targets public nudity, not whatever message plaintiffs express by being nude in public. "Public nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity." Id.

We thus affirm the decision of the district court.

AFFIRMED.

C

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

United States Court of Appeals,
Ninth Circuit.
DEJA VU-EVERETT-FEDERAL WAY, INC., a Washington Corporation, Plaintiff--Appellant,
v.
CITY OF FEDERAL WAY, Defendant--Appellee.
No. 01-35533.
D.C. No. CV-00-01217-MJP.

Argued and Submitted Aug. 9, 2002. [FN*]
FN* This panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

Decided Aug. 20, 2002.

Adult cabaret operator brought § 1983 action against municipality alleging zoning ordinance violated its constitutional rights. The United States District Court for the Western District of Washington, Marsha J. Pechman, J., granted summary judgment for municipality. Operator appealed. The Court of Appeals held that: (1) city government could safely rely on experiences and studies of other cities in regulation of adult cabaret; (2) mechanism in city's amortization provision was not prior restraint on First Amendment speech; (3) ordinance did not effect taking of adult cabaret operator's property; and (4) ordinance did not violate operator's substantive due process rights under Fourteenth Amendment.

Affirmed.

West Headnotes

[1] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[1] Zoning and Planning 76
414k76 Most Cited Cases

[1] Zoning and Planning 167.1
414k167.1 Most Cited Cases
City government could safely rely on experiences and studies of other cities to regulate adult entertainment, even though city was modifying existing regulations, not initiating regulations, in context of §1983 lawsuit brought by adult cabaret operator alleging that zoning ordinance violated its First Amendment free speech rights. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[2] Zoning and Planning 76
414k76 Most Cited Cases
Mechanism in adult entertainment ordinance, that vested discretion in city official as to whether to grant adult use an extension to one year amortization period and as to how long extension would be granted, was not prior restraint on adult cabaret operator's First Amendment speech, since mechanism provided sufficient guidelines for city officials to decide whether to grant extension. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[3] Zoning and Planning 322
414k322 Most Cited Cases
Adult cabaret operator did not have First Amendment free speech interest in maintaining non-conforming use to valid zoning ordinance after city gave operator a year to relocate or to bring its location into conformance with zoning regulations. U.S.C.A. Const.Amend. 1.

[4] Eminent Domain 2.10(1)
148k2.10(1) Most Cited Cases
(Formerly 148k2(1.2))
City ordinance that regulated adult entertainment did not effect taking of adult cabaret operator's property in violation of Fifth Amendment, since regulations

did not prevent all economically viable uses of operator's property and they advanced not just legitimate state interest, but significant one under First Amendment. U.S.C.A. Const.Amends. 1, 5.

[5] Constitutional Law 296(1)
92k296(1) Most Cited Cases

[5] Zoning and Planning 76
414k76 Most Cited Cases
City ordinance that regulated adult entertainment did not violate operator's substantive due process rights under Fourteenth Amendment; regulations were not irrational or arbitrary action in violation of substantive due process since they passed muster under First Amendment in light of substantial and legitimate state interests they advanced. U.S.C.A. Const.Amends. 1, 14.

***410** Appeal from the United States District Court for the Western District of Washington Marsha J. Pechman, District Judge, Presiding.

Before NOONAN, HAWKINS and GOULD, Circuit Judges.

MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Deja Vu-Everett-Federal Way, Inc. ("Deja Vu") operated an adult cabaret in the City of Federal Way, Washington ("Federal Way"). In 1999, Federal Way enacted a zoning ordinance regulating adult uses, which rendered Deja Vu's business a non-conforming use. This would require Deja Vu to shut down, change, or move its operation. Deja Vu sued Federal Way for violations of constitutional rights. The district court rejected Deja Vu's claims, and Deja Vu appeals the district court's grant of summary judgment in favor of Federal Way.

[1] Deja Vu first claims that the 1999 regulations violated its First Amendment rights because Federal Way had not shown that the then-existing zoning regulations had proven ineffective at curbing the secondary effects of adult uses. The Supreme Court has granted flexibility to city governments to protect their communities from the secondary effects of protected adult speech. *See, e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). City governments may safely rely on the experiences and studies of other cities when regulating adult uses. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). Nonetheless, Deja Vu argues this principle is inapplicable because here Federal Way was modifying existing regulations, not initiating regulations. Deja Vu argues that to modify regulations, a city should be required to conduct its own study to show why the existing regulations need to be modified.

We find no support for Deja Vu's argument and conclude that under the Supreme Court's precedents, the asserted distinction makes no difference. In the most recent Supreme Court opinion on the subject, 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. ***411** *See City of Los Angeles v. Alameda Books*, 535 U.S. 425, ----, 122 S.Ct. 1728, 1731, 152 L.Ed.2d 670 (2002) (plurality opinion).

The 1999 regulations are properly considered a "content neutral" time, place, and manner restriction on protected speech. *See Alameda Books*, 535 U.S. at ----, 122 S.Ct. at 1741 (Kennedy, J., concurring). The regulations were based on the studies, experiences, and police records of many cities. The evidence relied on by Federal Way was "reasonably believed to be relevant to the problem that the city addresse[d]." *Renton*, 475 U.S. at 51-52. The regulations were thus "narrowly tailored" to serve a significant government interest, *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *Colacurcio v. City of Kent*, 163 F.3d 545, 551 (9th Cir.1998), and were designed to serve a substantial government interest of reducing crime and lessening other secondary effects of adult uses. *See Alameda Books*, 535 U.S. at ----, 122 S.Ct. at 1734 (plurality opinion).

Deja Vu argues that we should apply what it describes as a new test from Justice Kennedy's *Alameda Books* concurrence: whether the city has "advance [d]

some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Alameda Books*, 535 U.S. at ----, 122 S.Ct. at 1742 (Kennedy, J., concurring). Federal Way has satisfied Justice Kennedy's "test," as well as that of the plurality opinion of Justice O'Connor.

[2][3] Deja Vu next claims that the city's amortization provision acts as a prior restraint on speech, arguing that the provision vests impermissible discretion in a city official as to whether to grant an adult use an extension to the one-year amortization period and as to how long an extension should be granted. Deja Vu does not challenge the amortization period itself; it challenges the mechanism for extending that period. But the amortization provision provides sufficient guidelines for city officials to decide whether to grant an extension. Underlying Deja Vu's argument is a contention that it has a First Amendment right to conduct adult-oriented business in an area that prohibits such uses, after the city has given Deja Vu a year to relocate or to bring its location into conformance with zoning regulations. This is not a prior restraint against protected speech. No First Amendment interest is implicated in maintaining a nonconforming use if the zoning ordinance is valid.

[4][5] Finally, Deja Vu argues that the 1999 regulations effect a taking in violation of its Fifth Amendment rights and that the regulations also violate Deja Vu's substantive due process rights under the Fourteenth Amendment. The regulations did not prevent all economically viable uses of Deja Vu's property, and they advanced not just a "legitimate" state interest, but a "significant" one under the First Amendment. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Because the regulations pass muster under the First Amendment in light of the substantial and legitimate state interests they advance, we conclude that they are not irrational or arbitrary action in violation of substantive due process.

AFFIRMED.

46 Fed.Appx. 409

Briefs and Other Related Documents (Back to top)

• 2001 WL 34105387 (Appellate Brief) Reply Brief of Appellant (Nov. 17, 2001)Original Image of this Document (PDF)

• 2001 WL 34105386 (Appellate Brief) Opening Brief of Appellant (Sep. 18, 2001)Original Image of this Document with Appendix (PDF)

• 01-35533 (Docket) (Jun. 06, 2001)

END OF DOCUMENT

Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.
Frank COLACURCIO, Jr., dba DDF & S Investment Co.; David Ebert, dba DDF & S Investment Co.; Steve Fueston, dba DDF & S Investment Co., Plaintiffs-Appellants,
v.
CITY OF KENT, Defendant-Appellee.
No. 96-36197.

Argued and Submitted April 10, 1998.
Decided Dec. 8, 1998.

Operators seeking to open adult nightclub challenged constitutionality of city ordinance requiring exotic dancers to perform at least ten feet from patrons, seeking declaratory relief and damages under § 1983. City moved for summary judgment. The United States District Court for the Western District of Washington, Thomas S. Zilly, J., 944 F.Supp. 1470, granted motion. Operators appealed. The Court of Appeals, Hug, Chief Judge, held that: (1) ordinance was not facially content-based; (2) ordinance satisfied content-neutrality requirement for permissible time, place, and manner restrictions on protected speech; (3) ordinance was narrowly tailored to achieve city's objectives in controlling drug transactions and prostitution; and (4) ordinance left open ample alternative channels for communication.

Affirmed.

Reinhardt, Circuit Judge, dissented and filed a separate opinion.

West Headnotes

[1] Federal Civil Procedure 2470.2
170Ak2470.2 Most Cited Cases
When a mixed question of fact and law involves undisputed underlying facts, summary judgment may be appropriate.

[2] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Nude dancing is a form of expressive conduct protected, to some degree, by the First Amendment. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Municipalities may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels for communication of the information. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 90.1(1)
92k90.1(1) Most Cited Cases
Regulation of symbolic expression is sufficiently justified if it (a) is within the constitutional power of government, (b) furthers an important or substantial governmental interest unrelated to the suppression of expression, and (c) the incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 90(3)
92k90(3) Most Cited Cases
In determining whether an ordinance is content-neutral, for First Amendment purposes, principal inquiry is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Content-neutrality requirement for municipal ordinance imposing time, place, or manner restriction on protected speech is met if the involved ordinance is aimed to control secondary effects resulting from the protected expression, such as threats to public health or safety, rather than at inhibiting the
protected expression itself. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 90(3)
92k90(3) Most Cited Cases
City may establish its interest in a regulation burdening protected speech by relying upon evidence reasonably believed to be relevant to the problem that the city addresses. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
In evaluating the secondary effects of adult entertainment for purposes of ordinance restricting such activities, city is permitted, under First Amendment's free speech protections, to rely on experiences of other jurisdictions. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Under First Amendment, regulation is "content-neutral" if it is justified without reference to the content of the regulated speech. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Finding that the restriction of First Amendment speech was a motivating factor in enacting an ordinance is not of itself sufficient to hold the regulation presumptively invalid. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[11] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
City ordinance that required exotic dancers to perform at least ten feet from patrons was not facially content-based, for free speech purposes, despite claim that ordinance essentially banned table dancing; ordinance did not distinguish between table dancing and other exotic dance forms, nor did its stated purposes mention ills of table dancing or goals of restricting offensive conduct. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[12] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
In determining whether purpose of ordinance requiring exotic dancers to perform at least ten feet from patrons was content-neutral, for free speech purposes, Court of Appeals would rely on all objective indicators of intent, including the face of ordinance, the effect of ordinance, comparison to prior law, facts surrounding enactment, the stated purpose, and the record of proceedings. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[13] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
City ordinance requiring exotic dancers to perform at least ten feet from patrons was justified without reference to speech, and thus satisfied content-neutrality requirement for permissible time, place, and manner restrictions on protected speech, even though it allegedly resulted in complete ban of table dancing; the record did not reflect unusual procedural maneuvering on part of city officials or illicit purposes behind ordinance's enactment, ordinance was based on comprehensive study concerning secondary impacts of adult entertainment businesses, and police affidavits documented connection between table dancing and illegal sexual activity. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[14] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
City ordinance requiring exotic dancers to perform at least ten feet from patrons was narrowly tailored to achieve city's objectives in controlling drug transactions and prostitution, notwithstanding claims that less burdensome alternatives existed. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 90(3)
92k90(3) Most Cited Cases

Regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests, but it need not be the least restrictive or the least intrusive means of doing so; rather, requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Validity of a time, place, or manner regulation of protected speech does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests. U.S.C.A. Const.Amend. 1.

[18] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Time, place, or manner restrictions on protected speech will not violate the First Amendment simply because there is some imaginable alternative that might be less burdensome on speech. U.S.C.A. Const.Amend. 1.

[19] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[19] Obscenity 6
281k6 Most Cited Cases
(Formerly 376k3.50)
Nude table dancing, even if unique form of protected expression due to use of multisensory perception to communicate message, was not sufficiently unique to merit special protection under First Amendment. U.S.C.A. Const.Amend. 1.

[20] Constitutional Law 90.1(4)
92k90.1(4) Most Cited Cases
For First Amendment purpose, "traditional public forums" are places which by long tradition or government fiat have been devoted to assembly and debate. U.S.C.A. Const.Amend. 1.

[21] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[21] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
City ordinance that required exotic dancers to perform at least ten feet from patrons left open ample alternative channels for communication, notwithstanding potential nightclub operators' claims that ordinance essentially banned table dancing; distance requirement did not rob dancers of their forum or their entire audience. U.S.C.A. Const.Amend. 1.

[22] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[22] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
Claim that economic impact of ordinance requiring exotic dancers to perform at least ten feet from patrons foreclosed entire medium of expression offered by table dancing did not preclude determination that ordinance left open ample alternative channels of communication, for First Amendment purposes, given absence of evidence that ordinance's distance requirement served as absolute bar to market entry. U.S.C.A. Const.Amend. 1.

[23] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Test for determining whether governmental action will foreclose entire medium of expression, for First Amendment purposes, is whether a business could operate under the regulations at issue, not whether a particular business will be able to compete successfully within the market. U.S.C.A. Const.Amend. 1.
***548** Gilbert H. Levy, Levy & Hamilton, Seattle, WA, for plaintiffs-appellants.

William P. Schoel and Jayne L. Freeman, Keating, Bucklin & McCormack, Seattle, WA, Roger A. Lubovich, City Attorney, Laurie A. Evezich, Assistant

City Attorney, Kent, WA, for defendant-appellee.

Appeal from the United States District Court for the Western District of Washington; Thomas S. Zilly, District Judge, Presiding. D.C. No. CV-95-01176-TSZ.

Before: HUG, Chief Judge, and REINHARDT and WIGGINS, Circuit Judges.

Opinion by Chief Judge HUG; Dissent by Judge REINHARDT.

HUG, Chief Judge:

In this case we examine whether the district court was correct in concluding as a matter of law that the City of Kent's ordinance, which requires nude dancers to perform at least ten feet from patrons, does not violate the First Amendment of the United States Constitution. Appellants, who planned to open a nightclub featuring nude dancing on stage and personalized table dancing, argue that the ten-foot distance requirement amounts to a complete ban on table dancing, which they allege is a unique form of expression entitled to separate First Amendment analysis. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

I.

Factual Background

Appellants desire to open a non-alcoholic adult nightclub in the City of Kent, Washington, featuring nude dancing on stage and personalized table dances. Appellants located a site in Kent and applied for a building permit.

The City of Kent has examined issues related to adult entertainment for several years. In 1982, the City's planning department published a study on the effects of adult entertainment on surrounding communities, including a discussion of various regulatory alternatives. Kent's initial regulatory effort involved a zoning ordinance, which Appellants challenged in 1994. The district court found that the zoning ordinance failed to designate a sufficient number of sites for the location of adult businesses. Pursuant to a settlement agreement, the City agreed to treat Appellants' proposed business as a lawful non-conforming use under the zoning law.

***549** In March 1995, the Kent City Council adopted Adult Entertainment Ordinance 3214, establishing new standards for the licensing and operation of adult uses in Kent. In April 1995, that ordinance was amended by Ordinance 3221, in an effort to conform the legislation to the King County Superior Court's ruling on a similar ordinance in Bellevue, Washington. Ordinance 3221, which has been codified as Kent City Code § 5.10.010 *et seq.*, provides, in relevant part:

> The portion of the exotic dance studio premises in which dancing and adult entertainment by an entertainer is performed shall be a stage or platform at least twenty-four (24) inches in elevation above the level of the patron seating areas. KCC § 5.10.110(A).
>
> No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron. KCC § 5.10.120(A)(3).

The code also specifies minimum lighting requirements and prohibits dancers from soliciting or receiving tips from patrons. Shortly after enactment of the ordinance, Appellants brought this action for declaratory relief and damages pursuant to 42 U.S.C. § 1983.

Appellants contend that the ten-foot rule would effectively eliminate table dancing, which they argue is a unique form of expression entitled to separate First Amendment analysis. Unlike nude dancing performed on stage, table dancing is performed in close proximity to patrons. Appellants have submitted declarations of a cultural anthropologist and a communications expert attesting to the uniqueness of table dancing and the potentially detrimental effects of the ten-foot rule on the dancers' erotic messages. Appellants also argue that table dancing is the primary source of income for exotic dancers, and that the Kent ordinance would make it uneconomical and therefore impossible for exotic dance studios to open or operate in Kent.

The City filed a motion for summary judgment, which the district court granted in November 1996. The district court ruled as a matter of law that (1) the

ordinance was a content-neutral time, place and manner regulation; and (2) the ten-foot distance requirement was narrowly tailored and left open ample alternative avenues for communication of protected artistic expression. Appellants filed a timely notice of appeal.

II.

Standard of Review

[1] A grant of summary judgment is reviewed *de novo*. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir.1997). We must determine, viewing the evidence in the light most favorable to Appellants, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* We do not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue of material fact for trial. *Id.* When a mixed question of fact and law involves undisputed underlying facts, summary judgment may be appropriate. *Han v. Mobil Oil Corp.*, 73 F.3d 872, 875 (9th Cir.1995).

III.

Level of Protection for Nude Dancing

[2] The parties and the district court correctly acknowledge that nude dancing is a form of expressive conduct protected, to some degree, by the First Amendment. [FN1] There is understandable confusion, however, about the level of such protection. The district court cited a plurality opinion of the Supreme Court indicating that nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though ... only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Appellants cite to pre-*Barnes* Ninth Circuit precedent which accorded nude dancing full First ***550** Amendment protection. *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir.1986).

> FN1. The Supreme Court has determined that conduct is expressive when the following two factors are present: (1) intent to convey a particularized message; and (2) a substantial likelihood that the message will be understood by those receiving it. *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974).

The fragmented nature of Supreme Court opinions dealing with nude dancing in particular and sexually explicit but non-obscene conduct in general has resulted in a lack of clear guidance on the level of First Amendment protection afforded to this type of expression. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), which involved a zoning ordinance governing the location of adult theaters, a plurality of the Court agreed that adult entertainment should be regarded as "low value" speech: "[F]ew 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." *Id.* at 70, 96 S.Ct. 2440. However, five Justices in *Young*, one concurring and four dissenting, argued that First Amendment protection should not vary with the social value ascribed to speech by the courts. *See id.* at 73 n. 1, 96 S.Ct. 2440 (Powell, J., concurring); *Id.* at 85-87, 96 S.Ct. 2440 (Stewart, J., dissenting). Writing for our court in 1986, Judge Pregerson in *Kev* alluded to the voting tally in *Young* when he ascribed full First Amendment protection to nude dancing. *Kev*, 793 F.2d at 1058.

Fifteen years after *Young*, a plurality of the Supreme Court including Justices Rehnquist, O'Connor, and Kennedy, reiterated that nude dancing enjoys only marginal First Amendment protection. *Barnes*, 501 U.S. at 565-66, 111 S.Ct. 2456. [FN2] Two Justices concurred in *Barnes*, with four dissenters advocating full First Amendment protection. Because one concurrence did not reach the issue, *Barnes* represents a four-four split on the matter. [FN3]

> FN2. *See also Schad v. Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (stating that "nude dancing is not without its First Amendment protections"); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (noting that nude barroom dancing may involve only the "barest minimum of protected expression" which "might be entitled to First and Fourteenth Amendment protection "under some circumstances.").

FN3. Justice Scalia, concurring, determined that because the statute did not regulate nude dancing in particular but instead regulated public nudity in general, the law was not specifically directed at expression and therefore was not subject to First Amendment scrutiny at all. *Barnes*, 501 U.S. at 572, 111 S.Ct. 2456 (Scalia, J., concurring). Justice Souter, concurring, accorded a low-level of First Amendment protection to nude dancing, noting that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Barnes*, 501 U.S. at 584, 111 S.Ct. 2456 (Souter, J., concurring) (citing *Young*, 427 U.S. at 70, 96 S.Ct. 2440)). Dissenting Justice White, joined by Justices Marshall, Blackmun, and Stevens, argued for full First Amendment protection for nude dancing. *Barnes*, 501 U.S. at 593, 111 S.Ct. 2456 (White, J., dissenting).

Scholars have grappled with the problem of the uncertain status of nude dancing and adult entertainment under the First Amendment. Professor Lawrence Tribe noted that "no Court has yet squarely held that sexually explicit but non-obscene speech enjoys less than full First Amendment protection." Tribe, *American Constitutional Law* §§ 12-18, p. 938 (2d Ed.1988). Although his comment was made prior to *Barnes*, the observation continues to be accurate today. Professor Erwin Chemerinsky views Supreme Court precedent as according sexually explicit expression "low-value" status. Chemerinsky, *Constitutional Law* § 11..3.4.4, p. 836-41 (1st Ed.1997). Professors Gerald Gunther and Kathleen Sullivan suggest that even in cases where courts do not explicitly treat sexual expression as lower-value speech, the decisions have implicitly treated such speech as a "subordinate species" in their tolerance of content-specific regulation. Gunther and Sullivan, *Constitutional Law* § 5(D), p. 1155-56 (13th Ed.1997).

IV.

Content Neutrality

Appellants contend that the district court erred in determining that the Kent Ordinance is content-neutral as a matter of law. Appellants argue that the ordinance is content-based on its face, and that the record shows that the City's predominant intent in passing the Ordinance was to ban adult entertainment in Kent. This contention is based ***551** on statements made by the mayor and other city officials, in addition to Kent's alleged pattern of adopting restrictive ordinances in response to proposals to build exotic dance studios.

[3][4] Municipalities may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The Supreme Court has determined that this test is similar or identical to the *O'Brien* test generally applied to regulations affecting symbolic speech. [FN4]

FN4. "[V]alidating a regulation of expressive conduct ... in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). Under the standard set out in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), a regulation of symbolic expression is sufficiently justified if it: (a) is within the constitutional power of government; (b) furthers an important or substantial governmental interest unrelated to the suppression of expression; and (c) the incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest. *Id.* at 377, 88 S.Ct. 1673. The Ninth Circuit frequently cites both tests when analyzing regulations of adult entertainment. *See, e.g.*, *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1334-35 (9th Cir.1986)("*Walnut I*"); *Kev*, 793 F.2d at 1058-59 & n. 3 (9th Cir.1986).

[5][6] In determining whether an ordinance is con-

tent-neutral, our principal inquiry is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. The content-neutrality requirement is met if the involved ordinance is " 'aimed to control secondary effects resulting from the protected expression,' rather than at inhibiting the protected expression itself." *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1332 (9th Cir.1987)(quoting *Int'l Food and Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir.1986)). *See also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29. Secondary effects may include, but are not limited to, threats to public health or safety. Building upon the Supreme Court's reasoning in *Renton*, we outlined the appropriate test in *Tollis:*

> If the ordinance is predominantly aimed at the suppression of First Amendment rights, then it is content-based and presumptively violates the First Amendment. If, on the other hand, the predominant purpose of the ordinance is the amelioration of secondary effects in the surrounding community, the ordinance is content-neutral, and the court must then determine whether it passes constitutional muster as a content-neutral time, place and manner regulation.

827 F.2d at 1332 (internal citation omitted).

[7][8][9][10] A city may establish its interest in a regulation by relying upon evidence "reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925. In evaluating the secondary effects of adult entertainment, the city is also permitted to rely on experiences of other jurisdictions. *Id.* A regulation is content-neutral if it is "justified without reference to the content of the regulated speech." *Id.* at 48, 106 S.Ct. 925 (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)). A finding that the restriction of First Amendment speech is a "motivating factor" in enacting an ordinance is not of itself sufficient to hold the regulation presumptively invalid. *Id.* at 46- 49, 106 S.Ct. 925.

The case law has not clarified when secondary effects warrant restriction of speech and how much proof there must be of these effects. [FN5] Similarly, precedent provides no standards for determining when an illicit but inconsequential "motivating factor" might develop into an illicit and controlling "predominant purpose." Precedent suggests that government defendants generally will prevail on ***552** the issue of content neutrality if evidence shows that the enactment can be "justified without reference to ... speech." *See Kev*, 793 F.2d. at 1058-59 (internal quotations and citations omitted). This is a difficult standard to overcome, unless the challenger can show that the statute is speech-discriminatory on its face. *See, e.g., BSA, Inc. v. King County*, 804 F.2d 1104, 1108-09 (9th Cir.1986) (holding unconstitutional county ordinances which specifically exempted bar-room nude dancing from their definitions of "expressive dance," thus effecting complete bans on nude dancing).

> FN5. Chemerinsky, *Constitutional Law*, § 11.3.4.4., p. 840 (1997).

[11] Contrary to Appellants' contention, the Kent ordinance is not content-based on its face. The ordinance does not distinguish between table dancing and other exotic dance forms. Nor do the stated purposes mention the ills of table dancing or the goals of restricting offensive conduct. The ten-foot distance requirement applies to all forms of dancing within exotic dance studios.

[12][13] We will look to the full record to determine whether evidence indicates that the purpose of the ordinance is to suppress speech or ameliorate secondary effects. In so doing, we will rely on all "objective indicators of intent," including the "face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment, the stated purpose, and the record of proceedings." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir.1984). The district court was correct in rejecting the City's claim that the court need only look to the stated purposes of the ordinance to find a permissible purpose.

Appellants cite to statements by city officials and others allegedly revealing the City's underlying speech-suppressive purposes. For example, Appellants quote the following statement by the City Attor-

ney at a Planning Commission meeting:

> Since we cannot zone these type[s] of businesses out of the City, the licensing was looked at that was in place for this type of facility ... As indicated, these uses cannot be prohibited, but they can be regulated.

Appellants also cite the following statement from the Planning Committee Chairman:

> With all the regulations we have adopted and stuff, I'm not too concerned that someone's going to come and try to open something up. Because we've made it a little bit difficult for them to make money in the traditional way they make money.

In determining the extent to which comments such as these should inform our analysis of predominant intent, we look to our decision in *Foley*. In *Foley*, we noted that individual statements by city leaders were admissible if they "showed the chain of events from which intent may be inferred, rather than merely the subjective intent of individual legislators." *Id.* at 1298. Put another way, the subjective statements cited by Appellants are relevant if they show objective manifestations of an illicit purpose, such as a departure from normal procedures or a sudden change in policy. [FN6] In the present case, the record does not indicate unusual procedural maneuvering on the part of the Kent Planning Committee, Planning Commission, City Attorney, or other City governing bodies. The enactment of the Kent Ordinance was consistent with the City's comprehensive planning policy, and reflects no procedural lapses that might suggest unjust treatment. Objective indicators of illicit purpose are not present here.

> FN6. Equal protection cases may provide some guidance in this regard. *See, e.g,* *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 267-68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (allowing courts to consider "contemporary statements by members of the decisionmaking body" as evidence of sudden changes in policy or departure from normal procedures).

Appellants disagree, contending that Kent's history reflects a clear pattern of adopting "the most restrictive regulations possible" in response to proposals to build nude dance studios in the City. This contention is rebutted by the record. The record indicates that Kent's approach has grown more lenient over time. Evidence suggests that after the failed zoning attempt, City leaders learned that unduly restrictive regulations would not survive judicial review. The City Attorney's comments at a 1995 Planning Commission meeting reflect this ***553** awareness: "These uses cannot be prohibited but they can be regulated ... the question is where do we put this type of business and how many sites do we allow." The record indicates that the City devoted considerable resources to developing an ordinance that would be constitutionally sound. Kent's distance requirements were modeled after regulations upheld in Kitsap County, Bellevue, King County, and Kelso. [FN7]

> FN7. Kent's 1982 study also indicates an intent to assimilate rather than eliminate adult uses: "The City of Kent seeks to assimilate adult uses into the overall urban fabric with the least adverse impact to the business and residential environments." City of Kent Planning Dept., Adult Use Zoning Study 41 (1982). "A secondary objective is to discuss the ability of the City to provide services--primarily protective services-- based on alternative locational requirements for adult uses." *Id.*

Even if we were to accord substantial weight to the mixed motivations of certain City officials, the record indicates that the City's documentation of permissible purposes satisfies *Virginia Pharmacy Board* and *Renton*. Kent's ordinance was based on a comprehensive study of adult entertainment businesses and their secondary impacts. In formulating the ordinance, the City relied on the study, concluding that regulation of adult uses was an important factor in controlling prostitution, drug dealing, and other criminal activity. *See e.g.*, *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1258 (5th Cir.1992) (treating reliance on formal studies as evidence of permissible purpose). The record also includes affidavits and statements by police officers and vice detectives documenting the connection between table dancing and illegal sexual activity.

We find, therefore, that the Kent Ordinance is justified without reference to speech.

V.

Narrow Tailoring

[14] Appellants argue that the ten-foot distance requirement fails the narrow tailoring requirement because there are less-speech-restrictive means of achieving the same results. Appellants contend that summary judgment was improper because the district court failed to consider less burdensome alternatives such as a "no touch" ordinance and a one-foot distance requirement.

[15][16] A regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests, but it need not be the least restrictive or the least intrusive means of doing so. *Ward*, 491 U.S. at 798-99, 109 S.Ct. 2746. "Rather, the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Id.* at 799, 109 S.Ct. 2746 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). This standard does not mean that a time, place or manner regulation may burden substantially more speech than necessary to further the government's interests. "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799, 109 S.Ct. 2746.

[17][18] The validity of a time, place, or manner regulation "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897 (citing *Clark*, 468 U.S. at 299, 104 S.Ct. 3065). Such restrictions will not violate the First Amendment "simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897.

The district court was correct in concluding that the ten-foot setback is narrowly tailored to achieve Kent's objectives. The courts have emphasized that judges should not supplant the legislature's role in developing the most appropriate methods for achieving government purposes. *See, e.g.*, *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir.1997) (upholding a six-foot distance requirement, the court stated that "it is not for us to say that a seven-foot zone or a five-foot zone would strike a better balance.")

***554** As to whether the ordinance burdens substantially more expression than necessary, the district court was correct in concluding that this argument is foreclosed by our earlier decision in *Kev*, which upheld a similar ten-foot distance requirement. *Kev*, 793 F.2d at 1061. Appellants argue that because *Kev* was decided prior to the Supreme Court's decision in *Ward*, the *Kev* court did not have occasion to apply the *Ward* test, which protects speech from unnecessary burdens. *See* *Ward*, 491 U.S. at 798, 109 S.Ct. 2746.

This argument fails for two reasons. First, we need not reach the issue, as we leave the fine-tuning of the distance requirement to the legislative body. Second, at the time *Kev* was decided, Supreme Court precedent included speech-protective language similar or identical to that in *Ward*. *See, e.g*, *Clark*, 468 U.S. at 297, 104 S.Ct. 3065 (same); *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673 (requiring the incidental restrictions on First Amendment freedoms to be "no greater than is essential to the furtherance" of the asserted governmental interests).

Several courts have upheld distance requirements as a narrowly tailored means of controlling illegal sexual contact and narcotics transactions. In *BSA Inc.*, we upheld a six-foot distance requirement while prohibiting a total ban on nude barroom dancing, stating that the distance requirement "imposes at most a very minimal restriction on First Amendment activity." 804 F.2d at 1112. The four dissenting Justices in *Barnes*, arguing against the statewide ban on public nudity, supported distance requirements as a less-restrictive means of furthering the government's interest in protecting public health and safety. *Barnes*, 501 U.S. at 594, 111 S.Ct. 2456. *See also*, *DLS, Inc. v. Chattanooga*, 107 F.3d 403 (6th Cir.1997) (six-foot distance requirement); *City of Colorado*

Springs v. 2354, Inc., 896 P.2d 272 (Colo.1995) (en banc) (three-foot); *Zanganeh v. Hymes*, 844 F.Supp. 1087 (D.Md.1994) (six-foot); *T-Marc, Inc. v. Pinellas County*, 804 F.Supp. 1500 (M.D.Fla.1992) (three-foot); *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 937 P.2d 154 (Wa.1997) (en banc) (four-foot).

Furthermore, the less-restrictive alternatives presented by Appellants arguably are not "reasonable" alternatives as they would not serve the City's purposes of controlling drug transactions and prostitution. The one-foot and "no-touch" ordinances would be unenforceable, as both would fail to provide sufficient line-of-vision for law enforcement personnel. An earlier "no-touch" ordinance in Kent failed for this reason. In addition, both of these options would permit verbal communication between dancers and patrons, thereby failing to curtail propositions for drugs or sex. [FN8] It is unclear from the record whether Appellants would support a four-foot distance requirement. While claiming at one point that such a regulation would be narrowly tailored, Appellants state elsewhere in the record that a four-foot requirement put them out of business in Bellevue. Although a four-foot distance requirement would keep patrons and dancers just out of arm's reach, a ten-foot requirement covers two arm spans and keeps patrons out of earshot. Appellants have failed to present evidence showing that a ten-foot rule burdens substantially more expression than necessary to achieve its purpose. We find, therefore, that summary judgment was proper on the issue of content-neutrality.

> FN8. We note that, according to Appellants' own evidence, an ordinance imposing a distance requirement any greater than six inches would effectively ban table dancing. The declaration of Appellants' expert cultural anthropologist defines table dancing as a dance performed in front of an audience at a distance of one to six inches.

VI.

Alternative Channels of Communication

[19] The final attribute of a valid time, place and manner regulation is that it must "leave open ample alternative channels for communication of the information." ***555***Ward*, 491 U.S. at 791, 109 S.Ct. 2746. What makes this case unusual is Appellants' claim that table dancing is a unique form of protected expression that is qualitatively different from nude stage dancing and entitled to separate First Amendment analysis. Appellants contend that the Kent ordinance fails to leave open ample alternatives, as a ten-foot distance requirement would eliminate table dancing altogether, an essential element of which is close proximity between dancers and patrons. Appellants argue that, unlike stage dancing, table dancing uses "not just vision but multi-sensory perception to communicate its message though the sounds, smells, and movements of the dancer within the [patron's] intimate perimeter." Therefore, the district court misapplied the law by failing to acknowledge the uniqueness of table dancing and instead holding that the ordinance "merely diminishes to a limited degree the effectiveness of the erotic message conveyed by the dance." Appellants support their theory with declarations of a cultural anthropologist and a communications expert attesting to the uniqueness of table dancing and the detrimental effect of the ten-foot rule on the dancer's message.

The Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 525-27, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (Brennan, J., concurring). The Court has been particularly hesitant to close off channels of communication which provide individuals with inexpensive means of disseminating core political messages. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 54-56, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (ordinance banning residential signs almost completely foreclosed "a venerable means of communication that is both unique and important" and for which there is no adequate substitute, particularly for persons of modest means); [FN9] *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 146, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people.").

> FN9. The *Ladue* Court noted, "[r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate." *Ladue*, 512 U.S. at 57, 114 S.Ct. 2038. The Court also noted that "Ladue's ordinance covers even such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war." *Id.* at 54, 114 S.Ct. 2038 (internal citations omitted).

Assuming arguendo that table dancing is a unique form of expression, precedent indicates that uniqueness, alone, is insufficient to trigger separate First Amendment protection. We recently emphasized this point in *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009 (9th Cir.1996). Acknowledging that a ban on wearing message-bearing T-shirts would raise serious constitutional questions, the same was not true for selling T-shirts: "[W]e do not believe the *sale* of message-bearing T-shirts is so 'uniquely valuable or important [a] mode of communication' as to be without effective substitute." *Id.* at 1015 (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (emphasis added)). [FN10]

> FN10. The court elaborated on this point: "While selling T-shirts is a unique form of expression in the sense that serving message-bearing raviolis or preaching on street corners in a Donald Duck voice would be unique, it does nothing to make the message uniquely significant or effective." *One World*, 76 F.3d at 1015.

[20] Appellants' argument misses a central point--in assessing a First Amendment challenge, we look not only at the private claims asserted in the complaint, but into the governmental interests protected by the enactment. As the Supreme Court noted in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be ***556** associated with ... 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the ... speech.' " *Id.* at 389, 112 S.Ct. 2538 (quoting *Renton*, 475 U.S. at 48, 106 S.Ct. 925). Using this reasoning, we upheld an ordinance prohibiting "tagging," the practice of distributing flyers and soliciting funds from automobile passengers while stopped at red lights. *Acorn v. City of Phoenix*, 798 F.2d 1260 (9th Cir.1986). Although the appellants, a non-profit group, had argued that tagging was a "uniquely effective method of fundraising," *id.* at 1271, we determined that the ordinance was justified for traffic control and public safety purposes. *Id.* at 1268-70. *See also* *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 117 S.Ct. 855, 866, 137 L.Ed.2d 1 (1997) (holding that public safety interests justified fifteen-foot "fixed buffer zone" separating abortion protestors from abortion clinics). The prohibitions in *Acorn* and *Schenck* were upheld despite the fact that they were analyzed under the rigorous standards applied to speech regulation in traditional public forums, where "the government's ability to permissibly restrict expressive activity is very limited." *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). [FN11] We conclude that table dancing in private nightclubs, with documented links to prostitution and drug dealing, is a highly unlikely candidate for special protection under the First Amendment.

> FN11. Traditional public forums are "places which by long tradition or government fiat have been devoted to assembly and debate." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Although in *Acorn*, we did not decide whether traffic-filled intersections should be considered public forums, we nevertheless applied public forum analysis to the case. *Acorn*, 798 F.2d at 1267.

[21] In support of their claim that the Kent ordinance effects a complete ban on a unique mode of expression, Appellants borrow from public forum analysis to argue that the applicable "forum" for a table dance is not the whole cabaret, but merely the area required for performing the table dance. According to this argument, the ten-foot distance requirement fails to leave open ample alternative avenues of expression within that forum.

Although the time, place and manner test applied to regulations affecting adult entertainment was initially developed for speech in public forums, Appellants are incorrect in attempting to extend all aspects of the public forum principle to private nightclubs. Even assuming the forum concept were applicable here, Appellants' argument fails due to the incongruity of its potential results. Following Appellants' logic, we would be required to provide separate First Amendment protection to so-called "lap dancing," arguably another unique form of expressive conduct in which the nude or semi-nude dancer performs in the patron's lap. Any distance requirement, even a one-foot setback, would amount to a flat ban on communication within that "forum."

Appellants' fluid definition of relevant forums, if carried to its logical conclusion, would require courts to subdivide audiences to the extent that any speech-restrictive regulation would necessarily fail. Again, Appellant's theory would lead to the ironic result that forms of expressive conduct with documented connections to criminal activity would enjoy special constitutional protection. The district court was correct in rejecting this proposition. If forum analysis is relevant here, the appropriate forum is the entire cabaret. Even assuming that the audiences for table dancing and stage dancing are distinguishable, there is undoubtedly a high degree of overlap. The ten-foot distance requirement does not rob dancers of their forum or their entire audience.

[22] Appellants also provide an economic argument to support their claim that a ten-foot distance requirement would foreclose an entire medium of expression. Appellants contend that the distance requirement and prohibition on tipping would prevent exotic dancers from making a living in Kent, and would make it uneconomical and therefore impossible for adult clubs to open and operate in the city. Appellants allege that income from table dances is the main source of revenue for Appellants' entertainers, who are not compensated for stage dances. Table ***557** dancers in Appellants' establishments are independent contractors who pay rental fees to the dance studios. These fees are a primary source of revenue for the enterprise. Appellants allege that the four-foot distance requirement imposed in Bellevue caused profits to drop at their Bellevue establishment, requiring it to close. [FN12]

> FN12. Appellants allege that, after a four-foot setback requirement was effectuated in Bellevue, the average number of dancers per week dropped from fifty to twelve, and thirty-eight dancers quit their jobs. Appellants also noted that "few if any" patrons purchased table dances.

[23] We recognize that determining whether a governmental action will foreclose an entire medium of expression can be a difficult undertaking. In some cases, as in *Ladue* (signs) or *Struthers* (handbills), a ban will be evident from the face of the ordinance. In other instances, as in the case at bar, it is not. The test for determining whether an adult business' First Amendment rights are threatened is whether a the government has "effectively den[ied]" the business "a reasonable opportunity to open and operate" within the city or area in question. *Renton*, 475 U.S. at 54, 106 S.Ct. 925. We elaborated on this test in *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663 (9th Cir.1996). The test is whether a business *could* operate under the regulations at issue, not whether a particular business will be able to compete successfully within the market. *Id.* at 666. [FN13] "[I]n the absence of any absolute bar to the market ... it is irrelevant whether '[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business'." *Id.* (quoting *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1531 (9th Cir.1993)).

> FN13. In other words, *Spokane Arcade* clarified that the scope of permissible economic analysis is whether one is permitted to enter

> or participate in the market in the first instance. *Id.* "Even if the costs of compliance were so great that [appellants] would be forced out of business, the ordinance[ ] do[es] not pose any intrinsic limitation on the operation of the [business]." *Id.* at 667.

The market access test has been applied to adult zoning cases, where total foreclosure of the market can be ascertained by calculating available locational sites. We have held unduly restrictive adult zoning ordinances to be unconstitutional on this basis. *See, e.g., Walnut Properties, Inc. v. City of Whittier (Walnut Properties II), 861 F.2d 1102, 1110 (9th Cir.1988)* (holding that zoning ordinance's acute restriction on available acreage would deny adult theaters a reasonable opportunity to operate in the city, and would force closure of all existing adult businesses).

The analysis may be even more complicated when, as here, distance requirements are involved. However, Appellants have not presented economic evidence sufficient to show that the ten-foot distance requirement would serve as an absolute bar to market entry, as required under *Spokane Arcade.* Rather, Appellants have merely shown a potential loss in profits, which arguably could be remedied by restructuring the way they do business. The fact that Appellants hire their dancers on an independent contractor basis, refuse to pay their dancers for dancing on stage, require their dancers to pay rental fees, and limit their dancers' remuneration to tips from patrons, appears to us to be an effort to maximize profits while minimizing dancers' economic security.

As to Appellants' contention that table dancing is a unique form of expression entitled to separate First Amendment analysis, this issue is not outcome determinative, because uniqueness, alone, is insufficient to trigger special protection.

VII.

For the reasons described herein, we determine that the district court was correct in ruling as a matter of law that the Kent ordinance is content neutral, and that the ten-foot distance requirement is narrowly tailored and leaves open ample alternative avenues for communication of protected expression. The judgment of the district court is

AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

I respectfully dissent. I believe that the district court erred in granting summary ***558** judgment. By requiring nude dancers to perform on a raised platform and to remain at least ten feet away from customers, the City of Kent effectively outlawed table-dancing. The issue before us is whether table dancing constitutes a separate form of expressive communication from other types of nude dancing-that is, whether table dancers communicate a message different in content than that communicated by nude stage dancers, and other nude dancers who perform at a distance of more than ten feet from their customers. The appellants presented sufficient evidence to establish a triable issue of fact on that question. By doing so, they have precluded a judicial determination that the ordinance is content-neutral as a matter of law. Because the district court reached that very conclusion, I would reverse and remand for trial.

As an initial matter, I disagree with Section III of the majority opinion, which resolves no legal issues, but seeks to leave the impression that nude dancing may merely be "low-value" speech entitled to "only marginal First Amendment protection." The panel admits that erotic dancing is constitutionally protected but claims that the extent of that protection is unclear, thus implying that it is unnecessary to look too closely at the restrictions on speech at issue in this case. I disagree. In this Circuit, it *is* clear that nude erotic dancers are entitled to full First Amendment protection for the expressive messages conveyed in their dancing. *Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1058 (9th Cir.1986)*.

I also disagree with the majority that the ten foot setback at issue in this case is content-neutral as a matter of law. A regulation on constitutionally protected speech is content-neutral only if it is justified without reference to the content of the regulated speech. *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)*. Kent's

ordinance requires that all entertainers perform on a stage at least two feet above the patron seating area, and that no performer may dance any closer than ten (10) feet from any patron. The majority concludes that this law is content-neutral because it is not content-based "on its face."

This determination obviously begs the question at issue here: what is the content of the message communicated by the table dancer, as opposed to the stage dancer? If it is the same message--only magnified by proximity--then the majority is correct. If, however, stage dancers and table dancers communicate different expressive content in their respective messages, then summary judgment was improper. Appellants argue that the ordinance on its face bans certain forms of communication because it bars close physical proximity between dancers and patrons. They assert that proximity itself--the distance, or lack thereof, between the dancer and the patron--is integral to the message conveyed by table dancing. This message is entirely different, they contend, than the message conveyed by stage dancers.

In support of this contention, appellants proffered the testimony of cultural anthropologist Judith Hanna, a Senior Research Scholar at the University of Maryland. Hanna is the author of four books and approximately 80 scholarly articles on the anthropology of dance as non-verbal communication. She has conducted extensive fieldwork in exotic dance establishments as well as interviews with dancers and patrons. Hanna asserts that table dancers seek to send a message that is entirely different from that sent by stage dancers:

> The message of the table dancer is personal interest in and understanding of the customer.... The entertainer creates an illusion of concern and availability for the customer and seeks to effect a transformation in the patron's feelings. Some customers get the personal attention of an attractive female who would not otherwise related to them or "give them the time of day;" some customers are reminded of what is to be desired.

Hanna concluded that close proximity between the dancer and the patron is an integral and essential part of the message itself. This is so, according to Hanna, not only because of the message of personal interest sent by the dancer's physical presence but also by other nonverbal communication that is only possible in close quarters. Specifically, Hanna testified that "proximity permits ***559** eye contact and awareness of indicators of attraction and satisfaction such as the mouth position, eye brightness, pupil dilation and expansion, facial color, breath, perfume, and body odors."

Appellants also introduced the declaration of Dr. Edward Donnerstein, the chair of the University of California-Santa Barbara Department of Communications who has studied the impact of distance on audience perceptions of erotic dance performances. Dr. Donnerstein, who was the lead social scientist called to give expert testimony before former United States Attorney General Edwin Meese's Commission on Pornography, concluded that proximity is not merely an incidental component of erotic dance but is integral to the message itself. He concluded that

> The relational and erotic communication sought to be communicated by erotic dance performance is significantly and substantially effected (sic), reduced, and degraded by the requirement that performers be separated from their intended audience by a minimum distance of ten (10) feet.

Both Hanna and Donnerstein contrasted the message sent by physical closeness with that sent by the distance imposed by stage dancing, which, Hanna testified, transmits an entirely different signal: "coldness and impersonality." Appellants contend, with the support of their experts' declarations, that stage dancing communicates "the remoteness of the 'unreachable' object of desire" through its use of distance. Appellants, by producing these declarations, have created a material question of fact regarding whether table dancing is, as the district court and the majority conclude, merely stage dancing at a "louder volume," or whether it is an altogether different form of expression that depends upon proximity, and communicates a different and particular content.

To the extent that a reasonable trier of fact might conclude that table dancing and stage dancing are qualitatively distinct forms of expression, the ordinance is itself facially content-based. Moreover, evidence was adduced by appellants that Kent banned

proximity precisely because it wants to constrain dancers from doing the very things that according to appellants' experts are essential to the message-chiefly getting close enough to the patrons so that they can communicate the message in the form that only table dancing permits.

Given the circumstances set forth above, the factual issue created by appellants' expert testimony is one for a jury. It was not appropriate for the district court or this court to substitute its own views regarding the purpose and effect of table dancing and decide as a factual matter the content of the message conveyed by that form of expressive communication. Accordingly, I would reverse the district court's grant of summary judgment.

163 F.3d 545, 98 Cal. Daily Op. Serv. 8965, 98 Daily Journal D.A.R. 12,449

Briefs and Other Related Documents **(Back to top)**

• 1997 WL 33574577 (Appellate Brief) Brief of Appellee (Apr. 14, 1997)Original Image of this Document with Appendix (PDF)

• 1997 WL 33574578 (Appellate Brief) Brief of Appellant (Mar. 11, 1997)Original Image of this Document with Appendix (PDF)

END OF DOCUMENT

United States Court of Appeals,
Ninth Circuit.
KEV, INC., Plaintiff-Appellant,
v.
KITSAP COUNTY and the Honorable Ray Aardal and John Horsley, County Commissioners of Kitsap, etc., et al., Defendants-Appellees.
No. 84-4088.

Argued and Submitted Aug. 8, 1985.
Decided July 7, 1986.

Operator of erotic dance facility challenged constitutionality of county ordinance regulating nonalcoholic topless dancing establishments. The United States District Court for the Western District of Washington, Barbara J. Rothstein, J., denied operator's motion for injunctive and declaratory relief, and operator appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) provisions of ordinance defining erotic dance and prohibiting dancers from fondling and caressing any patron were not unconstitutionally vague; (2) county could license operators and dancers; (3) five-day delay period between dancer's filing for application for license and grant of license unconstitutionally burdened the dancer's First Amendment rights; (4) requirements of ordinance that operators of erotic dance studios maintain business records and complete list of all dancers, for inspection by court, withstood constitutional challenge; and (5) regulation of manner in which dancing could be exhibited imposed reasonable time, place, and manner restrictions and did not violate First Amendment.

Affirmed in part, reversed in part.

West Headnotes

[1] Federal Courts 13
170Bk13 Most Cited Cases
Dissolution as corporation of operator of live entertainment facility due to its failure to comply with state corporate licensing regulations did not divest district court of jurisdiction on ground of mootness of operator's challenge to county's exotic dancing regulations, where operator was reinstated as corporation following cure of its problems with state authorities, and certificate of reinstatement provided for back date of reinstatement to date of dissolution.

[2] Constitutional Law 258(2)
92k258(2) Most Cited Cases
Fundamental requirement of due process is that statute clearly delineate conduct its proscribes. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 258(2)
92k258(2) Most Cited Cases
To avoid discriminatory or arbitrary enforcement, due process requires that law set forth reasonably precise standards for law enforcement officials and triers of fact to follow. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 82(3)
92k82(3) Most Cited Cases
Where First Amendment freedoms are at stake, greater degree of specificity and clarity of laws is required than would otherwise be needed. U.S.C.A. Const.Amends. 1, 14.

[5] Obscenity 2.5
281k2.5 Most Cited Cases
County regulation which defined erotic dance studio as fixed place of business which emphasized and sought, through one or more dancers, to arouse or excite patron's sexual desires, provided adequate standard for enforcement and gave fair warning to business it targeted, and therefore, was not void for vagueness; one who exhibits erotic dancing with intent to arouse sexual desires of his patrons would know that his business fell within purview of ordinance. U.S.C.A. Const.Amends. 1, 14.

[6] Obscenity 2.5
281k2.5 Most Cited Cases
Fact that under county's definition of erotic dance studio as place of business which emphasized and sought, through one or more dancers, to arouse or excite patron's sexual desires, prosecutor alleging violation of ordinance would be required to prove intent of

operator of business, did not by itself render ordinance void for vagueness. U.S.C.A. Const.Amends. 1, 14.

[7] Obscenity 2.5
281k2.5 Most Cited Cases
Provision of county erotic dance regulations stating that no dancer shall fondle or caress any patron and no patron shall fondle or caress any dancer was not void for vagueness; provision was easily understood to prohibit sexual conduct between dancers and patrons whom dancers intended to arouse sexually while dancers were acting in scope of their employment at erotic dance studio, and to find violation of prohibition against caressing and fondling, prosecutors would be required to prove dancer or patron engaged in specified act, fondling or caressing, with intent to sexually arouse or excite. U.S.C.A. Const.Amends. 1, 14.

[8] Constitutional Law 90(1)
92k90(1) Most Cited Cases
Degree of protection First Amendment affords speech does not vary with social value ascribed to that speech by courts. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Topless dancing is protected expression under First Amendment. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Although First Amendment coverage extends to topless dancing, it does not guarantee right to engage in protected expression at all times and places or in any manner that may be desired. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Governmental entity, when acting to further legitimate ends of community, may impose incidental burdens on free speech. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 90(3)
92k90(3) Most Cited Cases
While regulations that restrain speech on basis of content presumptively violate First Amendment, content neutral time, place, and manner regulations are acceptable so long as they are designed to serve substantial governmental interest and do not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 90(1)
92k90(1) Most Cited Cases
Regulation is content neutral for First Amendment purposes if it is justified without reference to content of regulated speech. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
County's erotic dance ordinance aimed at alleviating undesirable social problems that accompany erotic dance studios, including drug dealing and prostitution, was "content neutral" for First Amendment purposes. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 90.1(4)
92k90.1(4) Most Cited Cases
Licensing requirement raises First Amendment concerns when it inhibits ability or inclination to engage in protected expression. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 90.1(4)
92k90.1(4) Most Cited Cases
To avoid violating First Amendment protections, licensing requirement must provide narrow, objective, and definite standard to guide licensing authority. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
County could within ambits of First Amendment require operators of exotic dance studios and erotic dancers to obtain licenses. U.S.C.A. Const.Amend. 1.

[18] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
County erotic dance licensing regulation which required operators and dancers to supply county with various data, including name, address, phone number, and principal occupation, aliases, past and present, of dancers, and business name and address where dancer intended to dance, did not infringe upon any First Amendment rights; none of information required by county unreasonably diminished inclination to seek

license, and county had no discretion in issuing licenses. U.S.C.A. Const.Amend. 1.

[19] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Although county could require exotic dancers to be licensed, county could not impose five-day delay period between dancer's filing of application and county's granting of license; delay unreasonably prevented dancer from exercising First Amendment rights while application was pending. U.S.C.A. Const.Amend. 1.

[20] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Five-day delay in granting license to operator of erotic dance studio did not burden operator's First Amendment rights; delay was justified on ground that topless dancing establishments were likely to require significant reallocation of law enforcement resources. U.S.C.A. Const.Amend. 1.

[21] Counties 55
104k55 Most Cited Cases
Under Washington law, lack of severability clause in erotic dance ordinance of county did not require that entire ordinance be declared unconstitutional by virtue of unconstitutional provision establishing five-day delay between erotic dancer's filing of application for license and county's granting of license, where effectiveness of ordinance did not depend on five-day delay period.

[22] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
County ordinance requiring operators of erotic dance studios to maintain business records and complete list of all dancers, for inspection by county, although imposing limited burden on operators of erotic dance studios, withstood constitutional challenge; burden on dance studios was significantly outweighed by advancement of county's interest in preventing infiltration of organized crime into studios. U.S.C.A. Const.Amend. 1.

[23] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
County erotic dance ordinance which prohibited dancers and patrons from fondling and caressing each other, required that all dancing take place at least ten feet from patrons and on stage raised at least two feet from floor, and prohibited patrons from tipping dancers did not significantly burden First Amendment rights, and did advance purpose of preventing patrons and dancers from negotiating for narcotics transfers or sexual favors on premises of erotic dance studios, and thus, ordinance was reasonable time, place, and manner restrictions allowable under First Amendment. U.S.C.A. Const.Amend. 1.

***1055** Jack R. Burns, Burns & Meyer, Bellevue, Wash., for plaintiff-appellant.

Ronald A. Franz, Deputy Pros. Atty., Port Orchard, Wash., for defendants-appellees.

An Appeal From United States District Court For the Western District of Washington.

Before PREGERSON and WIGGINS, Circuit Judges, and SCHNACKE, District Judge. [FN*]

FN* The Honorable Robert H. Schnacke, United States District Judge, Northern District of California, sitting by designation.

PREGERSON, Circuit Judge.

Kev, Inc. challenges the constitutionality of a Kitsap County ordinance regulating non-alcoholic topless dancing establishments and appeals from the district court's order denying its motion for injunctive and declaratory relief. We affirm in part and reverse in part.

BACKGROUND

Appellant, Kev, Inc., ("Kev"), a Washington corporation, leased premises in Kitsap County ("the County") to operate a live entertainment facility called "Fantasies," which was to feature topless dancing and sell non-alcoholic beverages to adults for consumption on the premises. In early 1983, Kev secured the appropriate business licenses and began remodeling the premises to commence business operations.

On January 24, 1983, the Kitsap County Board of Commissioners proposed Ordinance No. 92, entitled "An Ordinance Regarding Erotic Dance Studios," to regulate adult entertainment facilities. The stated

purpose of the proposed ordinance was to regulate topless dancing to minimize perceived ***1056** side effects, such as illegal drug dealing, fights, and prostitution, which would purportedly threaten the community's well-being. On February 7, 1983, the County held a public hearing on the proposed ordinance. Law enforcement officials from Kitsap and surrounding counties testified that "soft drink, topless dancing" establishments in adjacent counties were the sites of crime problems such as prostitution and drug dealing. The County Board of Commissioners passed the proposed ordinance that same day.

On February 14, 1983, Kev filed suit, pursuant to 42 U.S.C. § 1983, in the United States District Court for the Western District of Washington, seeking a preliminary and permanent injunction and a declaratory judgment finding Ordinance No. 92 unconstitutional. Three weeks later, the County Board of Commissioners passed Ordinance No. 92-A as an amendment to Ordinance No. 92. Kev then filed an amended complaint challenging, on constitutional grounds, the provisions of Ordinance No. 92 as amended by Ordinance No. 92-A ("the ordinance"). Primarily, Kev alleges that topless dancing is entitled to first amendment protection and that the ordinance unduly restricts the exercise of that protected right.

The ordinance defines an "erotic dance studio" as "a fixed place of business which emphasizes and seeks, through one or more dancers, to arouse or excite the patrons' sexual desires." Sections 2c and 3a. The ordinance regulates erotic dance studios in various ways. It requires licensing of erotic dance studios and their dancers. Sections 3-6. It also requires that dancers and patrons be at least eighteen years of age; that dancing occur on a raised platform at least ten feet from patrons; and that all books and records of erotic dance studios be open to official inspection. Sections 9d, e, i, j, and Section 10. The ordinance also proscribes the sale or possession of intoxicating liquor and controlled substances, Section 9g; fondling or caressing between dancers and patrons, Section 9k; and the payment or receipt of gratuities, Sections 9l and m.

On June 9, 1983, Kev opened the business to the public. On January 14, 1984, Kev was administratively dissolved for failure to comply with state corporate licensing regulations. But, after curing the deficiencies, Kev was reinstated as a corporation on April 24, 1984. The certificate of reinstatement was backdated to and took effect as of the January 14, 1984 dissolution date.

After a hearing on Kev's motion for a preliminary injunction, the district court held the closing hour provision of the ordinance unconstitutional, but refused to enjoin enforcement of other provisions of the ordinance pending a hearing on the merits. On July 19, 1984, following a hearing on the merits, the district court found the ordinance constitutional in its entirety. [FN1] Kev timely appealed.

> FN1. On March 21, 1985, however, the district court ordered that its judgment be corrected to include its earlier holding that the closing hour provision of the ordinance, section 9f, was unconstitutional. The County does not challenge this holding on appeal.

DISCUSSION

I. *Jurisdiction*

[1] The County contends that the district court did not have jurisdiction when it entered judgment on July 19, 1984. The County argues that because Kev was dissolved on January 14, 1984, there were no adverse parties and, therefore, no case or controversy when the district court entered judgment on July 19, 1984. For the same reasons, the County argues that this court does not have jurisdiction in the present appeal. We disagree.

Although Kev was "administratively dissolved" on January 14, 1984 for failure to comply with state corporate licensing regulations, it was reinstated as a corporation on April 24, 1984 after curing its problems with the state authorities. The certificate of reinstatement provided that Kev's reinstatement dated back to and took effect as of the January 14, 1984 dissolution. For ***1057** this reason, we find the County's motion to dismiss for mootness itself to be moot. We, therefore, have jurisdiction to hear the present appeal.

II. *Standard of Review*

This case presents questions of law, which we review *de novo.* *See* United States v. McConney, 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

III. *Merits*

A. *Due Process*

Kev contends that ordinance section 2e (defining erotic dance studios) and section 9k (prohibiting dancers from "fondling" or "caressing" any patron) are unconstitutionally vague and thus violate due process requirements. We disagree.

[2][3][4] A fundamental requirement of due process is that a statute must clearly delineate the conduct it proscribes. *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). Vague laws are offensive because they may entrap the innocent by not giving fair warning of what conduct is prohibited. *Id.; Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972). Further, to avoid discriminatory or arbitrary enforcement, due process requires that laws set forth reasonably precise standards for law enforcement officials and triers of fact to follow. *Smith v. Goguen,* 415 U.S. 566, 572-73, 94 S.Ct. 1242, 1246-47, 39 L.Ed.2d 605 (1974); *Grayned,* 408 U.S. at 108-09, 92 S.Ct. at 2298-99. Moreover, where first amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required. *Grayned,* 408 U.S. at 108-09, 92 S.Ct. at 2298-99; *see also Erznoznik v. City of Jacksonville,* 422 U.S. 205, 217-218, 95 S.Ct. 2268, 2276-2277, 45 L.Ed.2d 125 (1975); *Goguen,* 415 U.S. at 573, 94 S.Ct. at 1247; *Ashton v. Kentucky,* 384 U.S. 195, 200, 86 S.Ct. 1407, 1410, 16 L.Ed.2d 469 (1966).

[5][6] Section 2e defines an erotic dance studio as as "a fixed place of business which emphasizes and seeks, through one or more dancers, to arouse or excite the patron's sexual desires." The ordinance classifies erotic dance studios according to the manifest intent of the operator of the studio. Thus, one who exhibits erotic dancing with an intent to arouse the sexual desires of his patrons would know that his business falls within the purview of the ordinance. The fact that the prosecutor must prove the intent of the operator of the business does not by itself render the statute void for vagueness. *See Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 342, 72 S.Ct. 329, 331, 96 L.Ed. 367 (1952) (statute requiring drivers transporting explosives to avoid crowded thoroughfares, "so far as practicable," not void for vagueness since statute requires a knowing violation); *United States v. Doyle,* 786 F.2d 1440, 1443 (9th Cir.1986) (presence of scienter requirement in statute prohibiting sale, transportation, or receiving of wildlife without a permit issued by the state enables law to withstand vagueness challenge). Thus, section 2e provides an adequate standard for enforcement and gives fair warning to the business it targets.

[7] Section 9k provides that: "No dancer shall fondle or caress any patron and no patron shall fondle or caress any dancer." "Caressing" and "fondling" are ordinary, commonly used terms. Both words describe forms of affectionate touching and are not limited in meaning to affectionate touching that is sexual. *See Webster's Third New International Dictionary* 339, 883 (1971). However, in the context of the other definitions provided in the ordinance, *e.g.,* § 2c ("[d]ancer--a person who dances or otherwise performs for an erotic dance studio *and who seeks to arouse or excite the patrons' sexual desires*" (emphasis added)), section 9k is easily understood to prohibit sexual conduct between dancers and patrons whom the dancers intend to arouse sexually while the dancers are acting in the scope of their employment at the erotic dance studio.

Further, to find a violation of the prohibition against "caressing" and "fondling," prosecutors must prove that a dancer or ***1058** patron engaged in a specified act, i.e., fondling or caressing with the intention to sexually arouse or excite. Section 9k thus provides an adequate standard for law enforcement officers. *Cf. Kolender v. Lawson,* 461 U.S. 352, 358, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) (ordinance requiring persons who loiter or wander the streets to provide "credible and reliable" identification and account for their presence held unconstitutional for failing to provide adequate law enforcement standards and to give fair warning of proscribed conduct). Since sections 2e and 9k provide adequate law enforcement standards and give fair warning of the pro-

scribed conduct, the appellant's vagueness argument fails.

B. *First Amendment Violations*

Courts have considered topless dancing to be expression, subject to constitutional protection within the free speech and press guarantees of the first [FN2] and fourteenth amendments. *See* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65, 101 S.Ct. 2176, 2180, 68 L.Ed.2d 671 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33, 95 S.Ct. 2561, 2568-69, 45 L.Ed.2d 648 (1975); *Chase v. Davelaar*, 645 F.2d 735, 737 (9th Cir.1981).

> FN2. The first amendment to the United States Constitution provides in relevant part: "Congress shall make no law ... abridging the freedom of speech, or of the press...." This Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963).

[8] The County erroneously asserts that even if topless dancing were protected by the first amendment, it is not entitled to the same degree of protection afforded speech clearly at the core of first amendment values. In support of its assertion, the County relies on Justice Stevens's statement in the plurality opinion in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), that "society's interest in protecting [erotic expression] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate...." 427 U.S. at 70, 96 S.Ct. at 2452. However, only three other justices (Chief Justice Burger, Justices White and Rehnquist) concurred in that statement. The County fails to recognize that five other justices in *Young* concluded that the degree of protection the first amendment affords speech does not vary with the social value ascribed to that speech by the courts. *Id.* at 73 n. 1 (Powell, J., concurring), 84-85, 96 S.Ct. at 2453 n. 1, 2459-2460 (Stewart, J., dissenting, joined by Brennan, J., Marshall, J., and Blackmun J.). This view continues to govern. Several circuits that have considered this question have adopted the position ascribed to the five justices in *Young*. *See* *United States v. Guarino*, 729 F.2d 864, 868 n. 6 (1st Cir.1984) (en banc); *Avalon Cinema Corporation v. Thompson*, 667 F.2d 659, 663 n. 10 (8th Cir.1981) (en banc); *Hart Bookstores, Inc. v. Edmisten*, 612 F.2d 821, 826-28 (4th Cir.1979), *cert. denied*, 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980).

[9][10][11][12][13] However, determining that topless dancing is protected expression does not end our inquiry. Although first amendment coverage extends to topless dancing, it "does not guarantee the right to [engage in the protected expression] at all times and places or in any manner that may be desired." *See* *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981). A governmental entity, when acting to further legitimate ends of the community, may impose incidental burdens on free speech. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 928-29, 89 L.Ed.2d 29 (1986). While regulations that restrain speech on the basis of content presumptively violate the first amendment, " 'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* 106 S.Ct. at 928. A regulation is "content-neutral" if it is "*justified* without reference to the content of the regulated ***1059** speech." *Id.* at 929 (emphasis in original) (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976)). [FN3]

> FN3. *See also* *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968) (holding that a content neutral regulation that imposes an incidental burden on speech is sufficiently justified if: [1] it is within the constitutional power of the government; [2] it furthers an important or substantial governmental interest; [3] the governmental interest is unrelated to the suppression of free expression; and [4] the incidental restriction on first amendment freedoms is no greater than is essential to the furtherance of that interest). In *United*

> *States v. Albertini*, 472 U.S. 675, 105 S.Ct. 2897, 2907, 86 L.Ed.2d 536 (1985), the Supreme Court clarified the fourth *O'Brien* factor, noting that "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

[14] The stated purpose of the County's ordinance is to alleviate undesirable social problems that accompany erotic dance studios, not to curtail the protected expression--namely, the dancing. [FN4] At a hearing on the proposed ordinance, the County presented evidence that drug dealing, prostitution, and other social ills accompany topless dancing establishments. *See California v. LaRue*, 409 U.S. 109, 111, 93 S.Ct. 390, 393, 34 L.Ed.2d 342 (1972). Law enforcement officials from Kitsap and neighboring counties testified that these problems had been associated with erotic dance studios in other counties. The Supervisor of the Vice Control Department of Kings County testified that close contact between dancers and patrons facilitates prostitution. The County has a legitimate and substantial interest in preventing social problems that accompany erotic dance studios and threaten the well-being of the community. *See Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1246 (9th Cir.1982) (upholding regulation requiring "open booths" in adult film arcades). Thus, we conclude that the ordinance is content-neutral because it is justified without "reference to the content of the regulated speech." *See Renton*, 106 S.Ct. at 929; *Virginia Pharmacy*, 425 U.S. at 771, 96 S.Ct. at 1830.

> FN4. Section 1 of the ordinance states:
> *Purpose.* The purpose of this ordinance is to regulate erotic dance studios to the end that the many types of criminal activities frequently engendered by such studios will be curtailed. However it is recognized that such regulation cannot de facto approach prohibition. Otherwise a protected form of expression would vanish. This ordinance represents a balancing of competing interests: reduced criminal activity through the regulation of erotic dance studios versus the protected rights of erotic dancers and their patrons.

Kev contends that the ordinance violates the first amendment because: (a) it limits the location where dancers may perform; (b) it burdens a dancer's performance by requiring a license, prohibiting the acceptance of gratuities, restraining erotic dancers from exercising their first amendment rights until they are licensed, and prohibiting erotic dancers, in exercising their first amendment rights, from mingling with patrons; and (c) it places a reporting and inspection burden upon a business based solely on its first amendment activities.

a. *License Requirements*

The ordinance requires that all operators of erotic dance studios and all erotic dancers obtain licenses from the County. To obtain a license, a prospective operator must supply the County with various data including: his or her name, address, phone number, and principal occupation; similar information for all partners in the venture; and descriptions of the proposed establishment, the nature of the proposed business, and the magnitude thereof. A dancer applying for a license must provide the County: his or her name, address, phone number, birth date, "aliases (past and present)," and the business name and address where the dancer intends to dance.

[15][16] It is well established that the government may, under its police power, require licensing of various activities involving conduct protected by the first amendment. *See, e.g., American Mini Theatres*, 427 U.S. at 62, 96 S.Ct. at 2448; ***1060** *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938-39, 22 L.Ed.2d 162 (1969); *Tyson & Brother--United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 430, 47 S.Ct. 426, 428, 71 L.Ed. 718 (1927) ("The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power...."); *see also Genusa v. City of Peoria*, 619 F.2d 1203, 1212-13 (7th Cir.1980) (court relied on *American Mini Theatres* in upholding simple license requirement for operators of adult bookstores). A licensing requirement raises first

amendment concerns when it inhibits the ability or the inclination to engage in the protected expression. *See Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945) (requirement that union organizers register with state unconstitutionally inhibits free expression). Further, a licensing requirement must provide "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*, 394 U.S. at 150-51, 89 S.Ct. at 938-39.

Here, there is no suggestion that the licenses required either to operate, or to perform in, a topless facility would be difficult to obtain or would for some other reason discourage either a prospective operator from exhibiting dancing, or a prospective dancer from performing. None of the information required by the County unreasonably diminishes the inclination to seek a license. [FN5] Moreover, the County has no discretion in issuing the licenses. Sections 4 and 7 provide that both licenses would be issued automatically by the County within five days.

> FN5. Kev argues that requiring the dancer to provide a list of "aliases (past and present)" unjustifiably invades the dancer's privacy. In *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir.1980), the Seventh Circuit invalidated a similar requirement for operators of adult book stores, noting that the "alias disclosure requirement involves an invasion of privacy not justified by the zoning interest and is not otherwise justified." *Id.* at 1216.
> In the instant case, the alias disclosure requirement for dancers is justified by the County's substantial interest in preventing prostitution in erotic dance studios. The requirement will enable the County to monitor more effectively dance studios employing known prostitutes.

[17][18] Further, both license requirements serve valid governmental purposes. By monitoring erotic dancers and erotic dance studios, the County can allocate law enforcement resources to ensure compliance with the ordinance. Thus, we conclude that the County may require operators of erotic dance studios and erotic dancers to obtain licenses.

[19][20][21] However, although the County may require dancers to be licensed, the County has failed to demonstrate a need for section 7d's five-day delay period between the dancer's filing of an application and the County's granting of a license. The ordinance unreasonably prevents a dancer from exercising first amendment rights while an application is pending. Because the County has not justified the five-day delay permitted by the statute with respect to the dancer's license application, this provision is unconstitutional. [FN6] Thus, we hold section 7d of the ordinance unconstitutional. [FN7]

> FN6. Kev also asserts that the five-day delay in granting the license to operate an erotic dance studio burdens the operators first amendment rights. We conclude, however, that the County presented a sufficiently compelling justification for this delay.
> The County contends that topless dancing establishments are likely to require a significant reallocation of law enforcement resources. As the district court concluded, "[b]ecause such resources in Kitsap County are limited, five days to adjust is reasonable. There is no reason for a new studio operator not to apply for a license one week before he plans to open his facility." Thus, there seems to be an important justification for the five-day waiting period in licensing dance establishments.

> FN7. In striking down section 7d, we note that the Kitsap ordinance contains a severability clause. Under Washington law, a statute is not to be declared unconstitutional in its entirety unless the remainder of the act is incapable of achieving the legislative purposes. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 2803, 86 L.Ed.2d 394 (1985). Because the effectiveness of this ordinance does not depend on the five-day period between the filing of an application for a license and its mandatory granting by the County, we need not strike down the ordinance in its entirety.

***1061** b. *Business Records Requirement*

[22] Sections 9b and 9c of the ordinance require operators of erotic dance studios to maintain business records and complete lists of all dancers, for inspection by the County. [FN8]

> FN8. Section 9b requires that:
> No later than March 1 of each year an erotic dance studio licensee shall file a verified report with the Auditor showing the licensee's gross receipts and amounts paid to dancers for the preceding calendar year.
> Section 9c provides:
> An erotic dance studio licensee shall maintain and retain for a period of two (2) years the names, addresses, and ages of all persons employed as dancers by the licensee.

Although the business records requirements may impose a limited burden on operators of erotic dance studios, the burden is significantly outweighed by the advancement of the County's interest in preventing the infiltration of organized crime into erotic dance studios. The business records requirements are no more burdensome than the requirements placed on a myriad of other businesses and substantially further the County's interest. Thus, these regulations do not violate the first amendment.

c. *Regulations Affecting Dancing*

[23] The ordinance also regulates the manner in which dancing may be exhibited. The ordinance: (1) prohibits dancers and patrons from fondling and caressing each other; (2) requires that all dancing take place at least ten feet from the patrons and on a stage raised at least two feet from the floor; and (3) prohibits patrons from tipping dancers. [FN9]

> FN9. Section 9i provides:
> All dancing shall occur on a platform intended for that purpose which is raised at least two feet (2') from the level of the floor.
> Section 9j provides:
> No dancing shall occur closer than ten feet (10') to any patron.
> Section 9k provides: No dancer shall fondle or caress any patron and no patron shall fondle or caress any dancer.
> Sections 9l and 9m provide:
> No patron shall directly pay or give any gratuity to any dancer [and n]o dancer shall solicit any pay or gratuity from any patron."

The alleged purpose of these requirements is to prevent patrons and dancers from negotiating for narcotics transfers and sexual favors on the premises of an erotic dance studio. Separating dancers from patrons would reduce the opportunity for prostitution and narcotics transactions. [FN10] Similarly, prohibiting dancers and patrons from engaging in sexual fondling and caressing in an erotic dance studio would probably deter prostitution. [FN11] Preventing the exchange of money between dancers and patrons would also appear to reduce the likelihood of drug and sex transactions occurring on regulated premises.

> FN10. The County presented testimony that close contact between dancers and patrons facilitated these transactions.

> FN11. As we construe section 9k to prohibit only sexual fondling and caressing occurring in an erotic dance studio, we reject Kev's argument that the ordinance is overbroad.
> Our holding today does not address the dancers' and the patrons' right of privacy to associate freely with each other under other circumstances. We hold simply that because of the County's legitimate and substantial interest in preventing the demonstrated likelihood of prostitution occurring in erotic dance studios, the County may prevent dancers and patrons from sexually touching each other while the dancers are acting in the scope of their employment.

Further, these regulations do not significantly burden first amendment rights. While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired. [FN12] Erotic dancers still have reasonable access to their market. *See Ellwest Stereo Theatres*, 681 F.2d at 1246 (open booths regulation ***1062** did not affect access to adult films). Similarly, while the tipping prohibition may deny the patron one means of expressing pleasure with the

dancer's performance, sufficient alternative methods of communication exist for the patron to convey the same message. Thus, the regulations are reasonable time, place, and manner restrictions that only slightly burden speech.

> FN12. In *International Society for Krishna Consciousness*, 452 U.S. at 650-51, 101 S.Ct. at 2565-66, the Supreme Court noted that "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in the light of the characteristic nature and function of the particular forum involved." Given the characteristics of erotic dance studios, the ordinance does not impair the dancer's ability to display her art.

IV. *Conclusion*

Except for the five-day delay between the dancer's filing of an application for a license and the mandatory granting of the license by the County, Kitsap County's regulations of erotic dance studios are reasonable time, place, and manner restrictions, justified without reference to the content of the protected expression. Thus, we REVERSE as to the provision permitting the five day delay in granting the dancer's license and AFFIRM the other provisions. Each side to bear its own costs.

793 F.2d 1053

END OF DOCUMENT

C

Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.
SPOKANE ARCADE, INC.; and World Wide Video of Washington, Inc., Plaintiffs-Appellants,
v.
CITY OF SPOKANE, Defendant-Appellee.
No. 94-35931.

Argued and Submitted Dec. 7, 1995.
Decided Jan. 24, 1996.

Adult entertainment businesses brought action against city, alleging that city ordinances which required that interior of adult video arcade booths be visible to employees in adjacent public room and that at least one employee be situated in that room whenever customer was present were invalid restrictions on manner in which protected speech could be expressed. The United States District Court for the Eastern District of Washington, Wm. Fremming Nielsen, Chief Judge, rejected claim that ordinances were unconstitutional. Businesses appealed. The Court of Appeals, D.W. Nelson, Circuit Judge, held that ordinances were constitutional since they did not prohibit adult entertainment businesses from engaging in that protected speech which would allow them to compete in adult entertainment market, but merely provided that costs of doing so might increase.

Affirmed.

West Headnotes

[1] Federal Courts 844
170Bk844 Most Cited Cases

[1] Federal Courts 850.1
170Bk850.1 Most Cited Cases
Following bench trial, judge's findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given opportunity of trial court to judge credibility of witnesses.

[2] Federal Courts 776
170Bk776 Most Cited Cases
District court's conclusions of law are reviewed de novo.

[3] Constitutional Law 90.4(4)
92k90.4(4) Most Cited Cases
Adverse economic impact caused to adult entertainment business as result of complying with city ordinances, which required that interior of adult video arcade booths be visible to employees in adjacent public room and that at least one employee be situated in that room whenever customer was present, was irrelevant in determining whether ordinances were invalid restrictions on manner in which protected speech could be expressed but, rather, issue was whether challenged ordinances prohibited entry into adult entertainment market. U.S.C.A. Const.Amend. 1; Spokane, Wash., Code §§ 10.08.100(D), 10.08.110(A).

[4] Constitutional Law 90.4(4)
92k90.4(4) Most Cited Cases
City ordinances, which required that interior of adult video arcade booths be visible to employees in adjacent public room and that at least one employee be situated in that room whenever customer was present, did not unconstitutionally prohibit adult entertainment business from engaging in that protected speech which would allow it to compete in adult entertainment market, but merely provided that costs of doing so might increase. U.S.C.A. Const.Amend. 1; Spokane, Wash., Code §§ 10.08.100(D), 10.08.110(A).

***664** Gilbert H. Levy, Seattle, Washington, for plaintiffs-appellants Spokane Arcade and World Wide Video.

Patricia Connolly Walker, Assistant City Attorney, Spokane, Washington, for defendant-appellee City of Spokane.

Appeal from the United States District Court for the

Eastern District of Washington.

Before: D.W. NELSON and JOHN T. NOONAN, Jr., Circuit Judges, and TANNER, District Judge [FN*].

FN* The Honorable Jack E. Tanner, Senior District Judge for the Western District of Washington, sitting by designation.

D.W. NELSON, Circuit Judge:

Appellants Spokane Arcade and World-Wide Video ("World Video") brought this action against Appellee City of Spokane, alleging that ordinances promulgated by the city which regulated adult arcades were invalid restrictions on the manner in which protected speech may be expressed. World Video maintains that in order to comply with the ordinances it will have to hire more employees, thus increasing its payroll expenses and decreasing its profits; it contends that because of this alleged inability to make an adequate profit, it will in effect be denied access to the adult entertainment market. The district court, however, rejected its claim, and held that in determining whether the First Amendment had been violated, the relevant inquiry turned on whether the plaintiffs were free to engage in their protected speech and not on whether the regulation at issue resulted in decreased profits. We affirm.

BACKGROUND

Appellants Spokane Arcades and World Wide Video ("World Video") operate adult arcades in the City of Spokane. In the arcades, patrons enter booths and insert tokens or coins to watch sexually explicit videos. World Video also sells sexually explicit books, videotapes, magazines and novelties; these materials are located in a retail room off the entrance of the stores, while the viewing booths are in a video viewing room in the back. There is only one clerk on duty at a time, and s/he is stationed in the retail room.

In the spring of 1993, the Mayor of Spokane appointed a task force to study the problems associated with adult arcades, some of which included drug usage and sexual conduct between patrons in the video booths. These problems were compounded by the fact that police officers were unable to conduct walk-through inspections due to safety concerns. The Task Force presented evidence to the City Council that the configuration of the arcades and the lack of adequate ***665** staffing "creat[ed] the risk of officers encountering in progress criminal activity." Moreover, the Task Force maintained that "due to the maze-type design currently in place, it would be difficult for officers to tactically retreat should the need arise."

The Task Force suggested that a clear view into the arcades and doorways that opened into an adjacent public room would reduce the potential for crime. Accordingly, the city promulgated ordinances which provided, *inter alia*, that all arcade booths be "open to an adjacent public room so that the area inside is visible by direct line of sight to persons in the adjacent public room," and that "[t]here must be at least one employee on duty and situated in the public room adjacent to the adult arcade stations or booths at all times that any patron ... is present inside the premises." S.M.C. §§ 10.08.100(D), 10.08.110(A).

World Video challenged the ordinances in the district court, alleging that under the test enunciated by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), *reh'g denied*, 475 U.S. 1132, 106 S.Ct. 1663, 90 L.Ed.2d 205 (1986), they were invalid restrictions on the manner in which speech may be expressed. The challenge relevant to this appeal centered on those sections of the ordinances which required that the interior of the booths be visible to employees in an adjacent public room and that at least one employee be situated in that room whenever a customer was present. World Video maintained that it would have to hire additional employees in order to ensure that the booths were visible to employees in the adjacent room, and argued that because of the revenue that would be lost as a result of the open booth requirement, the additional payroll expense would severely decrease the arcades' profitability and would unduly restrict World Video's ability to engage in protected expression. The district court disagreed, effectively dismissing World Video's economic impact arguments as it held that the ordinances did not deny World Video reasonable alternative avenues of communication.

STANDARD OF REVIEW

[1][2] Following a bench trial, the judge's findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of the witnesses. Fed.R.Civ.P. 52(a). *See Price v. United States Navy*, 39 F.3d 1011, 1021 (9th Cir.1994); *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 384 (9th Cir.1994). The district court's conclusions of law are reviewed de novo. *Price*, 39 F.3d at 1021.

DISCUSSION

As an initial matter, we take note of the fact that World Video's contention that additional employees would have to be hired in order to comply with the ordinances is not well-supported by the record. Except for the requirement that "[t]here must be at least one employee on duty and situated in the public room adjacent to the adult arcade stations or booths at all times that any patron ... is present," S.M.C. § 10.08.110(A), the ordinances do not regulate the number of employees that must be present in an establishment. In addition, the city presented evidence that there were design options available to World Video which would permit it to conduct retail sales and arcade viewing in the same room.

[3] Even if World Video demonstrated that the hiring of additional employees was unavoidable, the adverse economic impact it posits is irrelevant to First Amendment analysis. Addressing the constitutionality of a municipal zoning ordinance which strictly regulated the establishment of adult businesses, this court in *Topanga Press Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir.1993), *cert. denied*, 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190 (1994), discussed the extent to which economic considerations could inform the analysis of time, place and manner restrictions. The appellants in *Topanga*, a group of adult businesses, argued that the city provided an insufficient number of sites for the businesses and that enforcement of the ordinance would thus cause irreparable ***666** injury. We held that the relevant inquiry was whether the government denied the businesses the opportunity to open and operate their establishments, and suggested that in order to so determine, it was appropriate "to consider economics when evaluating whether a particular relocation site is in fact part of the real estate market." *Id.* at 1530. However, we emphasized that a "question of purely economic injury is not relevant to the issue of whether a moving party faces hardship if a restrictive zoning ordinance is enforced." *Id.* at 1528. We thus made the important distinction between "consideration of economic impact *within* an actual business real estate market and consideration of cost to determine whether a specific relocation site *is part* of the relevant market," *id.*, noting that only the latter was permissible in the examination of alleged First Amendment violations.

[4] Accordingly, the *Topanga* test requires an examination of whether a challenged provision prohibits entry into a market where the aggrieved party might exercise her rights, and distinguishes this inquiry from any examination of success within the market at issue. A review of the restrictions in this matter demonstrates that they do not serve as such an absolute bar to market entry. The ordinances do not prohibit World Video from engaging in that protected speech which will allow it to compete in the adult entertainment market, but merely provide that the costs of doing so may increase. This type of "injury," however, should not inform First Amendment analysis: in *Topanga*, we cautioned against inquiring into the costs of continued market participation, and limited the scope of permissible economic analysis to an examination of whether one is permitted to enter or participate in the market in the first instance.

World Video attempts to distinguish the instant matter from this court's holding in *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1061 (9th Cir.1985), where we held that an ordinance which required that exotic dancers perform at least 10 feet away from patrons, and on a stage raised at least 2 feet from the floor, did not deny the dancers "reasonable access to their market." *Id.* at 1061. Unlike the ordinance there at issue, World Video contends that the contested provisions in this case will deny it access to the adult entertainment market "by making it totally unprofitable for them to operate their businesses."

Not only does this argument erroneously assume that the only determinant of profitability is payroll costs,

an assumption we will not indulge, but it also reflects a deep misunderstanding of the market access/market success distinction articulated in *Topanga.* In *Topanga,* we maintained that in the absence of any absolute bar to the market (in that case, relocation to a site that would deny a business the opportunity to open and operate), it is irrelevant whether "[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business." 989 F.2d at 1531. *See also Walnut Properties v. City of Whittier,* 861 F.2d 1102, 1109 (9th Cir.1988), *cert. denied,* 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 157 (1989), (distinguishing between intrinsic limitations and limitations resulting from the imposition of market forces). Thus, an absolute bar in this matter would be a regulation that prohibited arcade owners from engaging in their protected speech, and not one that merely prohibited them from realizing the profits to which they were accustomed.

Furthermore, World Video attempts to rely upon the Supreme Court's recent opinion in *United States v. National Treasury Employees Union,* 513U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) in support of its economic impact argument. In *Treasury Employees,* the Court held that § 501(b) of the Ethics in Government Act of 1978, which prohibited the receipt of honoraria by government employees, violated the First Amendment. The court held that the prohibition on compensation unduly burdened "expressive activity": "Publishers compensate authors because compensation provides a significant incentive toward more expression. By denying respondents that incentive, the honoraria ban induces them to curtail their expression if they wish to continue working ***667** for the government." *Id.* at ----, 115 S.Ct. at 1014.

Treasury Employees, however, is entirely consistent with the test articulated by this court in *Topanga* and can be distinguished easily from the instant matter. The prohibition at issue in *Treasury Employees* had the effect of not merely reducing the value of the employees' speech, but rather of barring them from the market in which that speech might be expressed. That they could have engaged in such acts of expression without compensation was irrelevant; *Treasury Employees* suggests that they must not be denied *the opportunity* to enter into a market where they might be compensated for such expression. *See also Topanga,* 989 F.2d at 1529 ("The test for determining whether the Adult Businesses' First Amendment rights are threatened is whether a local government has 'effectively den[ied] [them] a reasonable opportunity to open and operate.' ")

The ordinances promulgated by the city in this case do not deny World Video the opportunity to operate its establishments, but merely (or rather, allegedly) increase the costs of its doing so. Even if the costs of compliance were so great that World Video would be forced out of business, the ordinances do not pose any intrinsic limitation on the operation of the arcades, but merely increase World Video's vulnerability to such market forces as the increased costs of labor and the decreased or stagnant demand for pornography. Accordingly, we hold that the ordinances constitute valid manner restrictions.

The judgement of the district court is AFFIRMED.

75 F.3d 663, 24 Media L. Rep. 1475, 96 Cal. Daily Op. Serv. 490, 96 Daily Journal D.A.R. 797

Briefs and Other Related Documents (Back to top)

• 1995 WL 17077062 (Appellate Brief) Brief of Appellee (May. 04, 1995)Original Image of this Document (PDF)

• 1995 WL 17077061 (Appellate Brief) Brief of Appellant (Apr. 30, 1995)Original Image of this Document (PDF)

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C

United States Court of Appeals,
Ninth Circuit.
ELLWEST STEREO THEATRES, INC., a corporation, Plaintiff-Appellant,
v.
Paul WENNER, Individually and as the treasurer of the City of Phoenix, Lawrence Wetzel, individually and as the chief of police of the City of Phoenix,
Defendants-Appellees.
No. 80-5732.

Argued and Submitted Jan. 8, 1982.
Decided July 23, 1982.

Theater operating movie arcade in which members of public paid to view sexually explicit films in booths brought action challenging constitutionality of city ordinance requiring that viewing areas of booths in which coin-operated viewing devices are located be visible from continuous main aisle. The United States District Court for the District of Arizona, C. A. Muecke, Chief Judge, held that ordinance was reasonable regulation of operation of theaters not based upon content of films shown. Appeal was taken. The Court of Appeals, Schroeder, Circuit Judge, held that city ordinance was not violative on its face of free speech or privacy clauses of Constitution.

Affirmed.

West Headnotes

[1] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
(Formerly 92k90.1(1))
Obscene materials are not protected speech within meaning of First Amendment as applied to states through Fourteenth Amendment. U.S.C.A.Const.Amends. 1, 14.

[2] Constitutional Law 90(1)
92k90(1) Most Cited Cases
Regulations of time, place, or manner of protected speech will be upheld if necessary to further significant governmental interests, and requiring such a showing insures that expression protected by First Amendment will not be unduly inhibited by regulation of its form. U.S.C.A.Const.Amend. 1.

[3] Constitutional Law 90.4(4)
92k90.4(4) Most Cited Cases
(Formerly 92k90.1(6))
City ordinance requiring that viewing areas of booths in which coin operated viewing devices are located be visible from a continuous aisle is not unconstitutional on its face as violative of free speech provision of Constitution in that ordinance is aimed at curtailing public sexual criminal offenses and as such clearly seeks to further significant state interests. U.S.C.A.Const.Amends. 1, 14.

[4] Constitutional Law 90.4(4)
92k90.4(4) Most Cited Cases
(Formerly 92k90.1(6))
City ordinance requiring that viewing areas of booth in which coin-operated viewing devices are located be visible from continuous main aisle is reasonable regulation of manner in which films may be viewed as well as shown. U.S.C.A.Const.Amends. 1, 14.

[5] Constitutional Law 82(10)
92k82(10) Most Cited Cases
The "right" to unobserved masturbation in a public theater is not "fundamental" or "implicit in the concept of ordered liberty." U.S.C.A.Const.Amends. 1, 14.

[6] Constitutional Law 82(7)
92k82(7) Most Cited Cases
City ordinance requiring that viewing areas of booths in which coin-operated viewing devices are located be visible from continuous main aisle is not unconstitutional on its face as violative of privacy provisions of Constitution. U.S.C.A.Const.Amends. 1, 14.

[7] Constitutional Law 42.2(1)
92k42.2(1) Most Cited Cases
Theater challenging city ordinance requiring that viewing areas of booths in which coin-operated viewing devices are located be visible from continuous main aisle did not have standing to assert Fourth

Amendment rights of its customers which might arise from police surveillance of open booths in arcades that have complied with ordinance. U.S.C.A.Const.Amend. 4.

***1244** Richard J. Hertzberg, Phoenix, Ariz., for plaintiff-appellant.

Sandra K. McGee, Phoenix, Ariz., for defendants-appellees.

Appeal from the United States District Court for the District of Arizona.

Before CHAMBERS, KENNEDY and SCHROEDER, Circuit Judges.

SCHROEDER, Circuit Judge.

Appellant Ellwest Stereo Theatres ("Ellwest") operates a Phoenix, Arizona movie arcade in which members of the public pay to view sexually explicit films in booths. Ellwest brought suit challenging the constitutionality of a City of Phoenix ordinance requiring that the viewing areas of booths in which coin operated viewing devices are located be visible from a continuous main aisle. On the basis of stipulated facts, the district court held that the ordinance was a reasonable regulation of the operation of theaters not based upon the content of the films shown, and entered judgment in favor of the City. We affirm.

Chapter VII of the Phoenix City Code requires, inter alia, that anyone engaged in running a "video center" obtain a license from the city. Section 7-3(a) (a) defines a "video center" as "(a)ny establishment open to the public wherein are operated any film or videotape viewing device (sic)." Section 7-30(a)(6) provides as follows:

> (6) Position of film or video viewing device in video center.
>
> ***1245** (a) Definition for purposes of this section.
>
> (1) Viewing area-area where patron or customer would ordinarily be positioned while watching a film or video viewing device.
>
> (b) All viewing areas must be visible from a continuous main aisle and must not be obscured by any curtain, door, wall, or other enclosure.
>
> (c) All persons regulated pursuant to this Chapter must comply with Section 7-30(a)(6) within 30 days of the effective date of the ordinance.

Ellwest is a "video center" within the meaning of the ordinance and thus is required to obtain a license. Ellwest applied for a license without complying with s 7-30(a)(6) as set forth above. The application was denied on the ground that the viewing areas of the booths were not visible from a continuous main aisle.

The City alleges that the ordinance was passed as a response to complaints that the display of adult films in the arcades was causing sex-related criminal activity. The parties stipulated that "(s)ome customers in the booths viewing the films will, on occasion, take the opportunity to fondle themselves or masturbate." The parties further stipulated that in the two years preceding this lawsuit, "(t)here were 783 sex-related arrests in the eleven business establishments located in the City of Phoenix which have video viewing devices such as Plaintiff's displaying 'adult' films. Sex-related offenses include public sex indecency, public sexual activity, indecent exposure, and lewd and lascivious conduct." [FN1]

> FN1. Ellwest does not challenge the state's power to criminalize public sexual activity. The stipulated facts amply support the City's contention that such activity occurs with great frequency in arcades where movies are exhibited in enclosed booths.

The sole issue presented, as framed by Ellwest in its appellate brief, is whether the ordinance "requiring open booths in motion picture arcades is unconstitutional on its face as violative of the Free Speech and Privacy provisions of the United States Constitution."

First, Ellwest argues that its own exercise of first amendment rights is limited by the ordinance. Second, Ellwest asserts infringement of the constitutional rights of its customers under the first and fourteenth amendments. Each of these contentions will be analyzed in turn.

CLAIMED INFRINGEMENT OF ELLWEST'S CONSTITUTIONAL RIGHTS

(1) We begin with the proposition that Ellwest has a constitutional right to exhibit its films. It is settled that obscene materials are not protected speech with-

in the meaning of the first amendment, as applied to the states through the fourteenth amendment. Ginsberg v. New York, 390 U.S. 629, 635, 88 S.Ct. 1274, 1278, 20 L.Ed.2d 195 (1968); Smith v. California, 361 U.S. 147, 152, 80 S.Ct. 215, 218, 4 L.Ed.2d 205 (1959); Roth v. United States, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957). The City does not contend, however, that the films are obscene, or that their content is undeserving of first amendment protection for any other reason. See New York v. Ferber, 458 U.S. 747, ----, 102 S.Ct. 3348, 3358, 72 L.Ed.2d ---- (1982). Thus, we must assume their dissemination by Ellwest is protected by the first amendment. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02, 72 S.Ct. 777, 780, 96 L.Ed. 1098 (1952).

Ellwest does not nor could it successfully contend that the Phoenix ordinance regulates speech on the basis of content.[FN2] The ordinance does not prohibit the showing of any film whatever. Ellwest may still exhibit any film it wishes, and its discretion in selecting those films is unbridled by the ordinance. "There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare." ***1246**Young v. American Mini Theatres, Inc., 427 U.S. 50, 62, 96 S.Ct. 2440, 2448, 49 L.Ed.2d 310 (1976). This is not an ordinance which prohibits the showing of any constitutionally protected film. We thus are not faced with the considerations which recently led us to hold that a prohibition on all topless entertainment was unconstitutional on its face as overbroad. Chase v. Davelaar, 645 F.2d 735 (9th Cir. 1981). See also Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

> FN2. The ordinance by its terms applies to all enclosed video viewing booths regardless of the type of film shown. Its reach is not limited to booths in which "adult" films are displayed. Nor does Ellwest make a claim of discriminatory enforcement.

(2) The ordinance does regulate the manner in which films chosen by Ellwest may be shown. Regulations of the time, place, or manner of protected speech will be upheld if necessary to further significant governmental interests. Requiring such a showing insures that expression protected by the first amendment will not be unduly inhibited by regulation of its form.

> Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment. See, e.g., Kovacs v. Cooper, 336 U.S. 77 (69 S.Ct. 448, 93 L.Ed. 513) (limitation on use of sound trucks); Cox v. Louisiana, 379 U.S. 559 (85 S.Ct. 476, 13 L.Ed.2d 487) (ban on demonstrations in or near a courthouse with the intent to obstruct justice); Grayned v. City of Rockford, 408 U.S. 104 (92 S.Ct. 2294, 33 L.Ed.2d 222) (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of the school session).

Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 n.18, 96 S.Ct. 2440, 2448 n.18, 49 L.Ed.2d 310 (1976).

(3) Ellwest contends that the ordinance is not justified as a reasonable regulation of the time, place, and manner of protected speech. It needs no extended discussion, however, to uphold the open booth requirement against this line of attack. The ordinance, as the parties have stipulated, is aimed at curtailing public sexual criminal offenses and as such it clearly seeks to further significant state interests.[FN3] In this respect we agree with the conclusion of the California court of appeal upholding the ordinance upon which the Phoenix City Council patterned its own enactment. That court explained the problem giving rise to the prohibition of enclosed booths and concluded that the ordinance furthered significant interests of the city.

> FN3. In Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Court observed that a zoning regulation requiring geographic dispersion of licensed theaters
> does not, in itself, create an impermissible restraint on protected communication. The city's interest in planning and regulating the use of property for commercial purposes is

> clearly adequate to support that kind of restriction applicable to all theaters within the city limits. In short, ... the regulation of the place where such films may be exhibited does not offend the First Amendment.
> Id. at 62-3, 96 S.Ct. at 2448 (footnote omitted).

"A picture arcade is a business, carried on in a place which the public generally is invited to enter and use. Since it is a place of entertainment, its patrons are not expected to enter with the solemnity of a business visitor at a mercantile establishment. Ordinarily those entering a picture arcade are seeking amusement, relaxation or excitement, possibly sexual stimulation or gratification depending on the taste or mood of the individual and the kind of pictures exhibited. Among such visitors it is foreseeable that some will be predisposed to conduct which is offensive, dangerous to others and even unlawful. The potential for misuse of the premises, for law violations, and for bodily harm to law-abiding patrons, is obvious, as is the concomitant need for (deterring such conduct)."
The City has a substantial interest in preventing the kind of dangerous or unlawful conduct, as well as the health and safety problems, which may be anticipated in a picture arcade where the booths are concealed or enclosed. The prohibition of such booths furthers the City's interest in deterring and detecting the use of the premises for such unlawful activity.

***1247**EWAP, Inc. v. City of Los Angeles, 97 Cal.App.3d 179, 189-90, 158 Cal.Rptr. 579, 585 (1979), quoting People v. Perrine, 47 Cal.App.3d 252, 258, 120 Cal.Rptr. 640, 643-44 (1975). See also DeMott v. Board of Police Comm'rs, 122 Cal.App.3d 296, 175 Cal.Rptr. 879 (1981).

We similarly hold that the ordinance does not impermissibly infringe upon Ellwest's first amendment rights.

CLAIMED INFRINGEMENT OF CUSTOMERS' CONSTITUTIONAL RIGHTS

Ellwest argues alternatively that the ordinance impermissibly impinges upon the first amendment and privacy rights of the patrons of its establishment.

We observe initially that the Supreme Court has never held that an owner of a theater has standing to assert the constitutional rights of its customers. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65, 93 S.Ct. 2628, 2639, 37 L.Ed.2d 446 (1973), the Court assumed for purposes of argument that the owner had such vicarious standing, and we do the same here.

(4) The considerations discussed with respect to the owner's right to exhibit the films apply with equal force to the alleged interference with the first amendment rights of patrons to view the films. The ordinance is a reasonable regulation of the manner in which films may be viewed as well as shown. See Young v. American Mini Theatres, Inc., 427 U.S. 50, 79-80, 96 S.Ct. 2440, 2456-57, 49 L.Ed.2d 310 (1976) (Powell, J., concurring); United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968); EWAP, Inc. v. City of Los Angeles, 97 Cal.App.3d 179, 189-90, 158 Cal.Rptr. 579, 585-86 (1979).

Ellwest also contends that the open booth requirement has a chilling effect on the exercise by potential customers of the constitutionally protected right to view the exhibited films. Citing NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), Ellwest urges that a law that exposes to public view the identities of persons engaged in unpopular but nevertheless protected activity impermissibly chills the right by subjecting those who would exercise it to the possibility of vilification or recrimination.

We are not authorized, however, to determine the validity or invalidity of a statute or ordinance in the abstract. There is nothing in the record that supports the suggestion that, because of the open booth requirement, potential viewers forego their right to watch films of their choice. By Ellwest's own admission, its customers must enter the establishment from a busy public street. We presume that those who enter are just as easily identified at the time they enter as they would be while in an open booth watching a movie. There is no basis to conclude that potential viewers are more intimidated by the prospect of being identified once inside than they are by that of

being seen upon entering the arcade in the first place. If that is Ellwest's contention, the record should so demonstrate. Some factual support is required before a federal court will pass upon the constitutionality of a law that allegedly chills the exercise of first amendment rights. See Laird v. Tatum, 408 U.S. 1, 12-16, 92 S.Ct. 2318, 2325-27, 33 L.Ed.2d 154 (1972).

Ellwest's major concern is not with its patrons' first amendment rights to view the films, but rather with an alleged infringement of their right to privacy. The essence of the argument is that the customers have a constitutional right to fondle themselves; therefore, argues Ellwest, the City may not constitutionally require that the theater open the booths and thus chill the patrons' exercise of the right to masturbate.

We assume with a fair degree of confidence that the activities Ellwest seeks to protect may be enjoyed without governmental interference in the sanctity of the customers' homes. Ellwest must establish, however, that there is a constitutional right to engage in such activities in a public place. That issue has been decided against Ellwest in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-67, 93 S.Ct. 2628, 2639-40, 37 L.Ed.2d 446 (1973). The Court there held that the constitutionally protected right to watch obscene movies in the privacy of one's own home did not import a similar right to watch the same movies in a public place. The court reasoned that while ***1248** viewing obscene movies in one's home, Stanley v. Georgia, 394 U.S. 557, 568, 89 S.Ct. 1243, 1249, 22 L.Ed.2d 542 (1969), and engaging in sexual intercourse in the marital bedroom, Griswold v. Connecticut, 381 U.S. 479, 485-86, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965), are both protected by the constitutional right to privacy, that protection ceases when the locus of the conduct shifts to a place of public accommodation such as a theater. The Court "declined to equate the privacy of the home relied on in Stanley with a 'zone' of 'privacy' that follows a distributor or a consumer ... wherever he goes. The idea of a 'privacy' right and a place of public accommodation are, in this context, mutually exclusive." Paris Adult Theatre, supra, 413 U.S. at 66, 93 S.Ct. at 2639 (citations omitted). In defining the limits of the constitutional right to privacy, the Court invoked Justice Cardozo: "(o)ur prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included 'only personal rights that can be deemed "fundamental" or " implicit in the concept of ordered liberty." ' " Id. at 65, 93 S.Ct. at 2639, quoting, inter alia, Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 151, 82 L.Ed. 288 (1937).

(5) While we certainly agree with Ellwest that its customers have a constitutional right to view its films, we cannot agree that the interest in simultaneously engaging in sexual activity is similarly protected. We decline to hold that the "right" to unobserved masturbation in a public theater is "fundamental" or "implicit in the concept of ordered liberty."

(6)(7) Ellwest also cites a number of cases which deal not with the right to privacy but with the fourth amendment right to be free from unreasonable searches and seizures. See, e.g., Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Ellwest seems to equate the ordinance requiring open video booths with police use of peep holes in public toilets. See, e.g., People v. Triggs, 8 Cal.3d 884, 106 Cal.Rptr. 408, 506 P.2d 232 (1973); Bielicki v. Superior Court, 57 Cal.2d 602, 21 Cal.Rptr. 552, 371 P.2d 288 (1962); 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment s 2.4(c) (1978). The record here does not indicate, however, either the nature or extent of police surveillance of open booths in arcades that have complied with the ordinance. Moreover, any threat of "dragnet searches" or "spying" is not a threat to Ellwest's fourth amendment interests, but to the interests of its patrons. "Fourth amendment rights are personal rights ... which may not be vicariously asserted." Rakas v. Illinois, 439 U.S. 128, 133-34, 99 S.Ct. 421, 424-25, 58 L.Ed.2d 387 (1978), quoting Alderman v. United States, 394 U.S. 165, 174, 89 S.Ct. 961, 966, 22 L.Ed.2d 176 (1969). See also United States v. Payner, 447 U.S. 727, 731-37, 100 S.Ct. 2439, 2443-47, 65 L.Ed.2d 468 (1980). Thus Ellwest has no standing to assert the fourth amendment rights of its customers. Such a claim is premature in any event, in the absence of a showing that such searches have indeed been conducted.[FN4]

FN4. On the prematurity point, see the discussion in California Bankers Ass'n v.

> Shultz, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974) (passim). Cf. Laird v. Tatum, 408 U.S. 1, 11, 92 S.Ct. 2318, 2324, 33 L.Ed.2d 154 (1972) (mere fear of future detrimental action by government insufficient to state justiciable claim under first amendment).

Accordingly, we hold that the open booth ordinance is not facially unconstitutional. The judgment of the district court is affirmed.

681 F.2d 1243

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Briefs and Other Related Documents

United States Court of Appeals,
Seventh Circuit.
G.M. ENTERPRISES, INC., Plaintiff-Appellant,
v.
TOWN OF ST. JOSEPH, WISCONSIN, Defendant-Appellee.
No. 03-1428.

Argued Sept. 16, 2003.
Decided Nov. 25, 2003.
Rehearing and Rehearing En Banc Denied Feb. 09, 2004.

Owner of adult-oriented business sued town pursuant to § 1983, challenging constitutionality of town ordinances that regulated manner in which nude dancers performed in any "sexually oriented business" and prohibited establishments licensed to sell alcoholic beverages from permitting nude dancing on the premises. The United States District Court for the Western District of Wisconsin, John C. Shabaz, J., granted summary judgment for town. Owner appealed. The Court of Appeals, Flaum, Chief Judge, held that: (1) challenged ordinances did not regulate constitutionally protected activity; (2) as an issue of first impression, ordinance prohibiting physical contact between nude dancers and patrons did not violate First Amendment; (3) challenged ordinances were subject to intermediate scrutiny under First Amendment; (4) business failed to undermine validity of town ordinances; and (5) town was not required to establish that studies upon which it relied in enacting ordinances were of sufficient methodological rigor to satisfy *Daubert* test.

Affirmed.

West Headnotes

[1] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Nude dancing is expressive conduct within the outer ambit of the First Amendment's protection. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[2] Intoxicating Liquors 15
223k15 Most Cited Cases
Town ordinances that barred establishment from selling alcoholic beverages if dancer performing on premises exposed any "specified anatomical area," and also required that such dancer perform on stage at least 18 inches above and five feet away from patrons, did not regulate activity protected under First Amendment. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
In the First Amendment context, requirement that dancers wear pasties and G-strings has only a de minimis effect on the expression conveyed by nude dancing. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases
First Amendment does not entitle either dancers or patrons to have alcohol available during a presentation of nude or semi-nude dancing. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[5] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
Town ordinance prohibiting physical contact between nude dancers and their patrons did not violate First Amendment, inasmuch as physical contact was beyond the scope of protected expressive activity of nude dancing. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases
Town ordinances that barred establishment from selling alcoholic beverages if dancer performing on premises exposed any "specified anatomical area,"

and required that such dancer perform on stage at least 18 inches above and five feet away from patrons, had incidental effect on protected expression and thus had to meet First Amendment standards to be valid. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
In addressing First Amendment challenge to regulation of adult-oriented business, court must first verify that predominate concerns motivating regulation were with secondary effects of adult speech, rather than content of adult speech, and, if so, court then applies intermediate scrutiny to regulation. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
To survive step of First Amendment analysis requiring that ordinance regulating adult-oriented business be targeted at secondary effects of adult speech to be subject to intermediate scrutiny, rationale of ordinance must be that it will suppress secondary effects, and will do so by means other than by suppressing speech. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases
Town ordinances barring establishment from selling alcoholic beverages if dancer performing on premises exposed any "specified anatomical area," and requiring that such dancer perform on stage at least 18 inches above and five feet away from patrons, were motivated by interest in reducing secondary effects associated with adult speech, rather than interest in suppressing speech, and thus were subject to intermediate scrutiny under First Amendment, in that ordinances did not prohibit nude dancing, but rather sought to minimize factors that town board believed would heighten probability that adverse secondary effects would result from nude dancing, and restrictions were not triggered if all dancers chose to wear de minimis clothing necessary to cover all "specified anatomical parts." U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
Zoning regulations of adult businesses aimed at suppressing secondary effects of adult speech are constitutional so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 90.4(2)
92k90.4(2) Most Cited Cases
Regulations of public nudity aimed at suppressing secondary effects of such speech are analyzed under *O'Brien* intermediate scrutiny test, which asks (1) whether regulating body had power to enact regulation, (2) whether regulation furthers important or substantial governmental interest, (3) whether that interest is unrelated to suppression of free expression, and (4) whether regulation's incidental impact on expressive conduct is no greater than is essential to the furtherance of that interest. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 90.4(5)
92k90.4(5) Most Cited Cases

[12] Intoxicating Liquors 15
223k15 Most Cited Cases
Adult-oriented business failed to undermine validity, under First Amendment, of town ordinances barring establishment from selling alcoholic beverages if dancer performing on premises exposed any "specified anatomical area," and requiring that such dancer perform on stage at least 18 inches above and five feet away from patrons, despite offering evidence that arguably undermined town's inference of correlation between adult entertainment and adverse secondary effects, including study questioning methodology employed in numerous studies relied upon by town board, evidence of increased property values near business, and evidence that most police calls involving business did not occur when semi-nude dancing was being performed; such evidence showed only that board could have reached different and equally reasonable conclusion. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 82(10)
92k82(10) Most Cited Cases
In reviewing regulation of adult-oriented business under intermediate scrutiny standard for First Amendment claims, court is not required to re-weigh the

evidence considered by a legislative body, nor is it empowered to substitute its judgment as to whether a regulation will best serve a community, so long as regulatory body has satisfied requirement that it consider evidence reasonably believed to be relevant to the problem addressed. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
[14] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k2 Theaters and Shows)
To defeat First Amendment challenge to ordinances regulating adult-oriented businesses, town was not required to establish that studies upon which it relied in enacting ordinances were of sufficient methodological rigor to satisfy *Daubert* test for admissibility of specialized expert testimony, but rather only had to show that it relied on some evidence in reaching reasonable conclusion as to secondary effects of adult-oriented businesses targeted by ordinances. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
For ordinance targeting secondary effects of adult-oriented speech to withstand intermediate scrutiny under First Amendment, municipality need not prove efficacy of its rationale for reducing secondary effects prior to implementation. U.S.C.A. Const.Amend. 1.
***633** Randall D.B. Tigue (argued), Minneapolis, MN, for Plaintiff-Appellant.

Richard M. Burnham (argued), Lafollette, Godfrey & Kahn, Madison, WI, for Defendant-Appellee.

Before FLAUM, Chief Judge, and DIANE P. WOOD and WILLIAMS, Circuit Judges.

FLAUM, Chief Judge.

G.M. Enterprises, Inc., owner of the Cajun Club of the Town of St. Joseph, Wisconsin, appeals the District Court's grant of summary judgment to the Town upholding the constitutionality of two town ordinances. G.M. argues that Ordinance 2001-02, which regulates the manner in which nude dancers perform in any "sexually oriented business," and Ordinance 2001-03, which prohibits establishments licensed to sell alcoholic beverages from permitting nude dancing on the premises, violate the First and Fourteenth Amendments. We conclude that the record supports the Town's claim that the ordinances are not an attempt to regulate the expressive content of nude dancing, but that the Town had a reasonable basis for believing that the ordinances will reduce the undesirable "secondary effects" associated with sexually oriented businesses, and therefore, we affirm.

I. Background

In 1999, the Town Board ("Board") of the Town of St. Joseph ("Town"), an unincorporated town in Wisconsin, began to consider whether to regulate sexually oriented businesses located within its borders. The Board collected sixteen studies regarding the relationships between sexually oriented businesses and property values, crime statistics, public health risks, illegal sexual activities such as prostitution, and organized crime. These studies, undertaken in various communities throughout the country, demonstrated a correlation between sexually oriented businesses ***634** and negative secondary effects. The Board also consulted a number of judicial opinions from other jurisdictions that address adverse secondary effects associated with sexually oriented businesses. Further, the Board considered police reports of calls made in regards to each licensed liquor establishment in St. Joseph for the period of 1989 through 1999, furnished by the St. Croix County Sheriff's Department. The sheriff informed the Board that the sheriff department had "received far more calls regarding the Cajun Club [the Town's sole sexually oriented business licensed to sell alcoholic beverages] than we have for the other liquor establishment in the Town of St. Joseph that do[es] not offer sexually oriented entertainment such as nude dancing." The studies, judicial opinions, and police reports were available to members of the Board for their consideration.

In June 2001, the Board adopted Ordinance 2001-02, which was codified under the town code, Chapter 153, entitled "Sexually Oriented Businesses." "Sexually oriented businesses," as defined by § 153-4, include "business[es] featuring adult entertainment." "Adult entertainment," as defined by § 153-4, is any

"live performance, display or dance of any type which has as a significant or substantial portion ... characterized by an emphasis on ... viewing of specified anatomical areas." § 153-4. According to § 153-4, "[s]pecified anatomical areas" include:

> A. The human male genitals in a discernible turgid state, even if fully and opaquely covered; or
>
> B. Less than completely and opaquely covered human genitals, pubic region, anus, anal cleft or cleavage; or
>
> C. Less than completely and opaquely covered nipples or areolas of the human female breast.

Ordinance 2001-02, published in Section 153-3(A), prohibits sexually oriented businesses from allowing any:

> person, employee, entertainer or patron ... to have any physical contact with any entertainer on the premises of a sexually oriented business during any performance ... all performances shall occur on a stage or table that is elevated at least 18 inches above the immediate floor level and shall not be less than 5 feet from any area occupied by any patron.

Further, § 153-5(B) prohibits the "sale, use or consumption of alcoholic beverages on the premises of a sexually oriented business."

The Board stated in § 153-1 that its motivation for passing this ordinance was that it:

> finds that sexually oriented businesses are frequently used for unlawful sexual activities ... and ... concern over sexually transmitted diseases is a legitimate health concern of the Town Board ... there is convincing documented evidence that sexually oriented businesses have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values; and, whereas, the Town Board desires to minimize and control these adverse secondary effects... and, whereas it is not the intent of this chapter to suppress any speech activities protected by the First Amendment, but to ... address[ ] the negative secondary effects of sexually oriented businesses.

Concurrent with the adoption of Ordinance No.2001-02, the Board adopted Ordinance No.2001-03, codified under Chapter 114, Article VI of the town code, entitled "Nude Dancing in Licensed Establishments Prohibited." Ordinance ***635** No.2001-03 applies to "[a]ny establishment licensed by the Town Board ... to sell alcohol beverages." § 114-19. Under Ordinance No.2001-03,

> [i]t is unlawful for any person to perform or engage in ... any live act, demonstration, dance or exhibition on the premises of a licensed establishment which:
>
> A. Shows his/her genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering.
>
> B. Shows the female breast with less than a fully opaque covering of any part of the nipple and areola.
>
> C. Shows the human male genitals in a discernibly turgid state, even if fully and opaquely covered.

§ 114-17. The Board expressed its intent in regards to Ordinance 2001-03 by stating in Section 114-16 that:

> the Town Board is aware, based on the experiences of other communities, that bars and taverns, in which live, totally nude, non-obscene, erotic dancing occurs may and do generate secondary effects which the Town Board believes are detrimental to the public health, safety and welfare ... the Town Board desires to minimize, prevent and control these adverse effects ... the Town Board has determined that the enactment of an ordinance prohibiting live, totally nude, non-obscene, erotic dancing in bars and taverns licensed to serve alcoholic beverages promotes the goal of minimizing, preventing and controlling the negative secondary effects associated with such activity.

The plaintiff in this action, G.M. Enterprises, operates the Cajun Club ("Club") of St. Joseph. The Club enjoys a St. Joseph liquor license and, for 16 years, has served alcohol and offered semi-nude, topless dance entertainment. It is uncontested that G.M. is a "sexually oriented business" subject to Ordinances Nos.2001-02 and 2001-03, as its dancers expose "specified anatomical areas." G.M. filed a complaint in the United States District Court, Western District of Wisconsin, pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief and alleging that the

ordinances are unconstitutional. The complaint alleged that the Board did not rely on adequate evidence to demonstrate the necessity of the ordinances to combat adverse secondary effects; that the ordinances prohibit more expression than is necessary to combat any adverse secondary effects that might be caused by adult entertainment; and further that Ordinance No.2001-03 expressly conditions the grant of a liquor license, a government benefit, on the surrender of the constitutional right to freedom of expression.

The Town moved for summary judgment, arguing that the Board relied on an adequate evidentiary foundation to reasonably believe that the ordinances would reduce adverse secondary effects. In support of its motion, the Town submitted an affidavit by the city clerk attesting to the Board's access to the studies, cases, and police reports relied upon in its deliberations, and further that every member of the Board "spent time reviewing the materials." The Town also submitted an affidavit by the county sheriff attesting to the fact that more police calls were made in regards to the Club than any other liquor establishment in the Town.

In its opposition to the Town's motion, G.M. questioned the Board's conclusion that the ordinances would have the effect of minimizing adverse secondary effects. G.M. argued that the Board did not actually review or rely on the studies and cases that it gathered. G.M. presented a study by Bryant Paul, Daniel Linz & Bradley ***636** Shafer that finds the majority of the studies the Board collected "fundamentally unsound," and methodologically flawed, and also submitted an affidavit of Daniel Linz that discusses the study. G.M. further argued that the Board's findings are contrary to the locality's actual experience, and, in support, referred to a 1993 study of the county where the Club is located that states that "St. Croix county has not experienced any major problems with adult entertainment establishments." In addition, G.M. submitted an affidavit stating that the property values near the Club have increased over time. G.M. contested the Town's inference that the Club's entertainment generates secondary effects by submitting an affidavit of the president of G.M. Enterprises which stated that the majority of calls to the police regarding incidents at the Club were generated during the hours when no nude or semi-nude dancing entertainment was offered. G.M. also submitted a statement by the sheriff that the volume of police calls generated by the Club were unrelated to nude dancing.

The district court entered judgment in favor of the Town, finding that the ordinances do not impermissibly infringe on G.M.'s constitutional rights, and further that G.M.'s challenge to the Town's secondary effects rationale did not raise an issue of material fact to allow the case to proceed to trial. G.M. now appeals.

II. Discussion

We review the District Court's grant of summary judgment *de novo*, construing the facts in the record in favor of G.M., the non-moving party. *Ben's Bar v. Village of Somerset*, 316 F.3d 702, 707 (7th Cir.2003).

[1][2] Nude dancing is expressive conduct "within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). The ordinances at issue regulate nude dancing in two ways. If a dancer exposes any "specified anatomical area," then the establishment where he or she performs must (1) not sell any alcoholic beverages, § 153-3(B), § 114-17, and (2) require that he or she perform on a stage at least eighteen inches above and five feet away from patrons, as required by § 153-3(A). However, neither requirement is implicated if dancers cover all "specified anatomical areas" during performances, and neither ordinance prohibits nude dancing outright.

[3][4][5][6] Still, plaintiff argues that Ordinances Nos.2001- 02 and 2001-03 regulate constitutionally protected activity. We disagree. The requirement that dancers wear pasties and G-strings has only a "*de minimis* " effect on the expression conveyed by nude dancing. *Pap's A.M.*, 529 U.S. at 294, 120 S.Ct. 1382; *Ben's Bar*, 316 F.3d at 708. Further, the "First Amendment does not entitle ... dancers, or ... patrons, to have alcohol available during a 'presentation' of nude or semi-nude dancing." *Ben's Bar*, 316 F.3d at 726. And, while the constitutionality of a restriction prohibiting physical contact between nude dancers

and their patrons is an issue of first impression in this circuit, the Fifth Circuit has twice had the occasion to consider similar restrictions and has found them to be constitutional on the grounds that physical contact is beyond the scope of the protected expressive activity of nude dancing. *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir.1995); *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 484 (5th Cir.2002). Yet, as these regulations do have an incidental effect on protected expression, they must meet constitutional standards to be upheld.

The parties submit that, in order to determine the correct constitutional analysis ***637** to apply to the ordinances at issue, this Court must first decide whether the ordinances intend to regulate the expressive element of nude dancing, or whether they are neutral as to content. In the Town's view, the ordinances seek to regulate only the adverse secondary effects associated with nude dancing, and are thus content neutral. In support, the Town cites *City of Renton v. Playtime Theatres*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). In *Renton*, the Supreme Court held that an adult entertainment zoning ordinance was a " 'content-neutral' regulation of speech because while 'the ordinance treats theaters that specialize in adult films differently from other kinds of theaters ....[it] is aimed not at the *content* of the films shown ... but rather at the *secondary effects* of such theaters on the surrounding community.' " *Ben's Bar*, 316 F.3d at 716 (quoting *Renton*, 475 U.S. at 47, 106 S.Ct. 925) (emphasis in original). In contrast, the plaintiff argues that the secondary effects rationale of *Renton* is no longer good law, and further that the ordinances are content based and therefore subject to strict scrutiny.

[7] In light of the Supreme Court's divided ruling in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), we need not decide whether the ordinances are content based or content neutral, so long as we first conclude that they target not "the activity, but ... its side effects," *see Alameda Books*, 535 U.S. at 447, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment), and then apply intermediate scrutiny. In *Alameda Books*, the plurality upheld at summary judgment a Los Angeles ordinance that prohibited multiple adult entertainment businesses from operating in the same building. The plurality assumed the ordinance to be content neutral, but did not consider the issue directly due to the fact that the Ninth Circuit had not addressed it below. *Alameda Books*, 535 U.S. at 434, 441, 122 S.Ct. 1728. However, the plurality reaffirmed that the first step of the *Renton* analysis is to verify that the "predominate concerns motivating the ordinance were with the secondary effects of adult speech, and not with the content of the adult speech." *Alameda Books*, 535 U.S. at 440- 41, 122 S.Ct. 1728 (internal quotations omitted). In his concurring opinion, Justice Kennedy agreed that the *Renton* test provided the appropriate level of scrutiny for a regulation that is "targeted not at the activity, but at its side effects." *Alameda Books*, 535 U.S. at 447, 122 S.Ct. 1728. And, employing an approach similar to the plurality's, Justice Kennedy insisted that a municipality first "advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact," before a court applies intermediate scrutiny. *Id.* at 449, 122 S.Ct. 1728. Although, unlike the plurality, Justice Kennedy wrote that zoning ordinances of adult businesses are "content based," *see id.*, he agreed with the plurality that "[n]evertheless, ... the central holding of *Renton* is sound: A zoning ordinance that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.* at 448, 122 S.Ct. 1728. As Justice Kennedy's concurrence is the narrowest opinion joining the judgment of the Court, it is the controlling authority under *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). *Ben's Bar*, 316 F.3d at 722.

[8][9] Under the first step of the analysis set forth by both Justice Kennedy and the plurality, we must first determine whether the ordinances at issue are motivated by an interest in reducing the secondary ***638** effects associated with the speech, rather than an interest in reducing the speech itself, before turning to *Renton*. *See Alameda Books*, 535 U.S. at 440-41, 450, 122 S.Ct. 1728. To survive this step of the analysis, "the rationale of the ordinance must be that it will suppress secondary effects--and not by suppressing speech." *Id.* at 450, 122 S.Ct. 1728. The Town has

met this burden. Neither of the ordinances prohibit nude dancing; rather, they merely seek to minimize the factors that the Board believed would heighten the probability that adverse secondary effects would result from nude dancing: physical proximity between the dancers and patrons, and the consumption of alcohol by patrons. Requiring that adult entertainment establishments maintain a minimal physical buffer between patrons and dancers does not reduce the availability of nude dance entertainment. And, "alcohol prohibition is, as a practical matter, the least restrictive means of furthering the ... interest in combating the secondary effects resulting from the combination of adult entertainment and alcohol consumption." *Ben's Bar*, 316 F.3d at 725. Further, if all dancers choose to wear the *de minimus* clothing necessary to cover all "specified anatomical parts," then neither the physical proximity nor alcohol prohibition requirements are implicated. Thus, as the ordinances will leave the availability of nude dance entertainment substantially the same, under Justice Kennedy's test of "how speech will fare under the city's ordinance[s]," *Alameda Books*, 535 U.S. at 450, 122 S.Ct. 1728, the Town has demonstrated that its goal is to minimize secondary effects, rather than the speech itself.

[10][11] Therefore, we move to the second step of the *Renton* analysis. In *Renton*, the Court set forth the intermediate scrutiny test for zoning regulations of adult businesses aimed at suppressing secondary effects. Such regulations are constitutional "so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47, 106 S.Ct. 925, *reaffirmed in* *Alameda Books*, 535 U.S. at 434, 122 S.Ct. 1728. Regulations of public nudity, however, are analyzed under the intermediate scrutiny test of *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *Pap's A.M.*, 529 U.S. at 289, 120 S.Ct. 1382. The *O'Brien* test asks (1) whether the regulating body had the power to enact the regulation; (2) whether the regulation furthers an important or substantial governmental interest; (3) whether that interest is unrelated to the suppression of free expression; and (4) whether the regulation's incidental impact on expressive conduct is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673.

Ordinances Nos. 2001-02 and 2001-03 are neither public indecency nor zoning regulations. They regulate the manner in which patrons view nude dancing; specifically, the patron's physical proximity to the nude dancer and the patron's access to alcoholic beverages in establishments where nude dancing is provided. Because this case concerns only the "substantial government interest" prong that is found in both the *O'Brien* and *Renton* tests, we need not decide which test of intermediate scrutiny provides the correct analytical framework for these ordinances. Indeed, this Court has held that the constitutional standard for "evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable." *Ben's Bar*, 316 F.3d at 714.

[12] The issue before this Court is what quality and quantum of evidence a ***639** regulating body must consider in order to demonstrate that it has a reasonable basis for believing that the regulated activity generates adverse secondary effects, the reduction of which is a "substantial government interest" under the *Renton* or *O'Brien* tests. This issue was most recently before the Supreme Court in *Alameda Books;* in the plurality's words, the case required the court to "clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton*." *Alameda Books*, 535 U.S. at 433, 122 S.Ct. 1728. In *Alameda Books*, the plurality reaffirmed that "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." *Alameda Books* at 438, 122 S.Ct. 1728, (quoting *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925). The plurality upheld an ordinance that prohibited the operation of multiple adult entertainment business in the same building, even though the regulating body did not rely upon a study that specifically addressed whether the concentration of such establishments in a single building would result in a higher incidence of adverse secondary effects. *Id.* at 437, 122 S.Ct. 1728. According to the plurality, it was reasonable for the regulating body to infer--from a somewhat dated study that con-

cluded that the concentrated growth of adult entertainment establishments in a particular neighborhood led to increased crime there--that the concentration of adult establishments in a single building would lead to a similar increase in crime. *Id.* at 435-38, 122 S.Ct. 1728. The plurality did not require that a regulating body rely on research that targeted the exact activity it wished to regulate, so long as the research it relied upon reasonably linked the regulated activity to adverse secondary effects.

However, the plurality cautioned that:

> a municipality's evidence must fairly support the municipality's rationale .... If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standards 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.

Id. at 438-39, 122 S.Ct. 1728. Plaintiff argues that it has "substantially challenged the validity of the town's determination that its regulation was justified by the need to combat adverse secondary effects of adult entertainment," and has therefore precluded summary judgment by shifting the burden back to the Town to supplement the record. We disagree. Plaintiff submitted some evidence that might arguably undermine the Town's inference of the correlation of adult entertainment and adverse secondary effects, including a study that questions the methodology employed in the numerous studies relied upon by the Board; evidence of an increase of property values near the Club; and evidence that the majority of police calls in regards to the Club originated during periods of time when no semi-nude dancing occurred. Although this evidence shows that the Board might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the Board's legislative process.

[13] *Alameda Books* does not require a court to reweigh the evidence considered by a legislative body, nor does it empower ***640** a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence "reasonably believed to be relevant to the problem" addressed. *See* *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925, *see also* *Alameda Books*, 535 U.S. at 445, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) ("in my view, the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur."). Wrote Justice Kennedy, "as a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners ... the Los Angeles City Council knows the streets of Los Angeles better than we do." *Alameda Books*, 535 U.S. at 451, 122 S.Ct. 1728. The plurality expressed similar support for judicial deference to local lawmakers: "we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems." *Id.* at 440, 122 S.Ct. 1728.

[14][15] Plaintiff argues that its complaint must survive summary judgment because the evidence relied upon by the Board does not meet the standards of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under the plaintiff's view, the Town cannot demonstrate a reasonable belief in a causal relationship between the activity regulated and secondary effects, as required by *Alameda Books* and *Renton*, unless the studies it relied upon are of sufficient methodological rigor to be admissible under *Daubert.* This argument is completely unfounded. The plurality in *Alameda Books* bluntly rejected Justice Souter's suggestion that the municipality be required to present empirical data in support of its contention: "such a requirement would go too far in undermining our settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Alameda Books*, 535 U.S. at 439, 122 S.Ct. 1728. Further, the purpose of the evidentiary requirement of *Alameda Books* is to require municipalities to demonstrate reliance on some evidence in reaching a reasonable conclusion about the secondary effects. The municipality need

not "prove the efficacy of its rationale for reducing secondary effects prior to implementation." *Ben's Bar*, 316 F.3d at 720. A requirement of *Daubert*-quality evidence would impose an unreasonable burden on the legislative process, and further would be logical only if *Alameda Books* required a regulating body to prove that its regulation would--undeniably--reduce adverse secondary effects. *Alameda Books* clearly did not impose such a requirement.

III. Conclusion

For the reasons discussed, the judgment of the district court is AFFIRMED.

350 F.3d 631, 62 Fed. R. Evid. Serv. 1656

Briefs and Other Related Documents (Back to top)

• 2003 WL 22734115 (Appellate Brief) Appellant's Reply Brief (May. 22, 2003)Original Image of this Document (PDF)

• 2003 WL 22734114 (Appellate Brief) Brief of Defendant-Appellee Town of St. Joseph (May. 01, 2003)Original Image of this Document (PDF)

• 2003 WL 22734113 (Appellate Brief) Appellant's Brief (Mar. 31, 2003)Original Image of this Document (PDF)

END OF DOCUMENT

Briefs and Other Related Documents

United States Court of Appeals,
Eighth Circuit.
SOB, INC., et al., Plaintiffs--Appellants/Cross Appellees,
v.
COUNTY OF BENTON, Defendant--Appellee/Cross Appellant.
Nos. 01-3928, 01-4022.

Submitted: Oct. 10, 2002.
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Rehearing and Rehearing En Banc Denied: Feb. 27, 2003.

Owner of nude dancing establishment brought action against county, seeking permanent injunction both to prohibit enforcement of county's public indecency ordinance and to prohibit county from enforcing ordinance by means of custodial arrest of nude dancers. The United States District Court for the District of Minnesota, Alsop, Senior District Judge, 171 F.Supp.2d 978, granted injunction in part, and denied it in part. Both parties appealed. The Court of Appeals, Loken, Circuit Judge, held that: (1) county had sufficient basis for concluding that ordinance was needed to further substantial government interest in combating harmful secondary effects; (2) ordinance was not overbroad in violation of First Amendment free speech clause; and (3) owner failed to demonstrate that exceptional circumstances required an injunction against enforcing ordinance by means of custodial arrest.

Affirmed in part; reversed and remanded in part.

West Headnotes

[1] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
Non-obscene erotic and sexually explicit speech are entitled to some First Amendment free speech protection, but businesses that market sexually explicit speech and expressive conduct may be regulated to the extent their activities are perceived as having adverse social and economic effects on society. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
Sexually oriented businesses may be subjected to reasonable time, place, and manner restrictions based upon the nature of the products or services they sell, even though those products and services include an expressive content protected by the First Amendment. U.S.C.A. Const.Amend. 1.

[3] Zoning and Planning 76
414k76 Most Cited Cases
State and local governments may use diverse zoning strategies such as dispersal or concentration, to regulate adverse secondary effects of sexually oriented businesses, such as crime, prostitution, and economic blight.

[4] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
Regulation limiting zoning for sexually oriented businesses must be content neutral to avoid strict scrutiny under First Amendment free speech clause; "content-neutral" in this context means simply that the regulation is justified by the legitimate government purpose of reducing or eliminating adverse secondary effects. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
If a zoning regulation restricting location of sexually oriented businesses is content-neutral in that it is justified by legitimate government purpose of reducing or eliminating adverse secondary effects, it will withstand constitutional free speech scrutiny so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses and the regulation allows for reasonable alternative avenues for communication. U.S.C.A. Const.Amend.1.

[6] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

A ban on live nude dancing is a content-neutral regulation of speech if its purpose is to combat harmful secondary effects, even though the ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch of clothing is dropped. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 90.4(2)
92k90.4(2) Most Cited Cases
County ordinance making it a misdemeanor to knowingly or intentionally appear in a state of nudity, or fondle genitals of oneself or of another, in a public place, was content-neutral regulation of speech, subject to intermediate First Amendment scrutiny under four-part test for judging government action restricting conduct that includes both speech and non-speech elements; stated purpose was to prohibit public indecency in order to deter criminal activity, to promote societal order and public health, and to protect children. U.S.C.A. Const.Amend. 1.

[8] Courts 90(2)
106k90(2) Most Cited Cases
When a fragmented Supreme 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 judgment on the narrowest grounds.

[9] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases

[9] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[9] Obscenity 2.5
281k2.5 Most Cited Cases
Under intermediate First Amendment scrutiny, county had sufficient basis for concluding that ordinance prohibiting public indecency, and in effect banning live nude dancing, was needed to further substantial government interest in combating harmful secondary effects, although owner of nude dancing establishment presented evidence that two adult entertainment businesses in the county had neither caused higher crime rates nor depressed property values; owner's local evidence addressed only two adverse effects, both relating to zoning, and county had evidence from studies of other counties of secondary effects associated with adult entertainment businesses. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Zoning restrictions typically impact a broad range of adult entertainment businesses, whereas a ban on live nude dancing imposes a de minimis restriction on expressive conduct, while otherwise leaving the quantity and accessibility of speech substantially intact. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 42(1)
92k42(1) Most Cited Cases

[11] Constitutional Law 42.2(1)
92k42.2(1) Most Cited Cases
Ordinarily, a party may not facially challenge a law on the ground that it would be unconstitutional if applied to someone else; an exception to that general rule is the First Amendment overbreadth doctrine governing free speech. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 42.2(1)
92k42.2(1) Most Cited Cases
To prevent the chilling of protected First Amendment free speech interests, the "overbreadth doctrine" permits an individual whose own speech or conduct may be prohibited to challenge a statute on its face because it also threatens others not before the court, or those who desire to engage in legally protected expression but who may refrain from doing so. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional under First Amendment free speech protections unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[14] Obscenity 2.5
281k2.5 Most Cited Cases
County ordinance prohibiting public fondling of genitals was not overbroad in violation of free speech clause, although ordinance did not appear to except legitimate theatrical performances from fondling prohibition; county had no theatres, and county attorney represented that county had no intention of enforcing ordinance's provisions on any theatrical production which had serious artistic merit. U.S.C.A. Const.Amend. 1.

[15] Federal Courts 386
170Bk386 Most Cited Cases
In evaluating a facial challenge to a state law, a federal court must consider any limiting construction that a state court or enforcement agency has proffered.

[16] Constitutional Law 82(10)
92k82(10) Most Cited Cases

[16] Constitutional Law 225.1
92k225.1 Most Cited Cases

[16] Obscenity 2.5
281k2.5 Most Cited Cases
County ordinance that prohibited nudity and the fondling of genitals in a public setting or place, including hotels and motels but excluding enclosed "single sex motel rooms" or "hotel rooms designed for sleeping accommodations," did not violate rights to marital and sexual privacy or equal protection rights of married couple who allegedly feared prosecution under the ordinance, absent evidence of likelihood that ordinance would be enforced against them if they engaged in normal marital activities within such a motel or hotel room. U.S.C.A. Const.Amend. 5; M.S.A. § 645.17(1, 3).

[17] Constitutional Law 46(1)
92k46(1) Most Cited Cases
As a general rule, a federal court should refrain from entertaining a pre-enforcement constitutional challenge to a state criminal statute in the absence of a realistic fear of prosecution.

[18] Injunction 85(1)
212k85(1) Most Cited Cases
Owner of nude dancing establishment failed to demonstrate that exceptional circumstances required a pre-enforcement injunction against enforcing county ordinance prohibiting live nude dancing by means of custodial arrest; risk that dancers at nude dancing establishment would be subject to custodial arrest was minimal, enforcing officers were required by state law to proceed by citation rather than custodial arrest unless necessary to prevent bodily harm or further criminal conduct, and there was little risk that a custodial arrest would restrain a dancer's protected expressive conduct in later performances that same night, in violation of prior restraint doctrine. U.S.C.A. Const.Amends. 1, 14; M.S.A. § 609.02, subd. 3; 49 M.S.A., Rules Crim.Proc., Rule 6.01, subd. 1(1)(a).

[19] Injunction 85(2)
212k85(2) Most Cited Cases
Ordinarily, a federal court will not enjoin enforcement of a state criminal law, even though unconstitutional; to justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights.

[20] Constitutional Law 90(3)
92k90(3) Most Cited Cases
The doctrine of prior restraint recognizes the time-honored distinction between barring speech in the future and penalizing past speech. U.S.C.A. Const.Amend. 1.

***858** Randall D.B. Tigue, argued, Minneapolis, MN, for appellant/cross-appellee.

Scott T. Anderson, argued, Minneapolis, MN (Amy E. Mace, on the brief), for appellee/cross-appellant.

Before LOKEN, BEAM, and MELLOY, Circuit Judges.

LOKEN, Circuit Judge.

The primary issue in this case is whether Benton County, Minnesota, violated ***859** the First Amendment by enacting an ordinance prohibiting live nude dancing entertainment when there was evidence presented to the County Commissioners suggesting that existing adult entertainment establishments had not adversely affected nearby property values or

crime rates. The issue is surprisingly complex because it lies at the intersection of two related but distinct lines of Supreme Court First Amendment decisions.

After SOB, Inc. opened Sugar Daddy's, an alcohol-free cabaret featuring live nude dancing, the Benton County Board of Commissioners enacted Ordinance 332 ("the Ordinance") generally prohibiting "public indecency":

> *Public Indecency Prohibited.* A person, who knowingly or intentionally in a public setting or place:
> A. appears in a state of nudity;
> B. fondles the genitals of himself or herself, or
> C. fondles the genitals of another person;
> commits public indecency and is guilty of a misdemeanor under Minnesota law and upon conviction thereof, shall be punished by a fine of up to $1,000 or by imprisonment for up to 90 days, or both.

The Ordinance compelled Sugar Daddy's female dancers to cover their breasts and genitals with pasties and G-strings while performing. SOB, Inc. and three dancers (collectively, "Sugar Daddy's") commenced this action to declare the Ordinance overbroad and contrary to their protected First Amendment interests in live nude dancing and to enjoin its enforcement. Sugar Daddy's manager, Mark Van Gelder, and his wife joined as plaintiffs and asserted a claim that another aspect of the Ordinance violates their due process, equal protection, and privacy rights.

After consolidating plaintiffs' motion for a preliminary injunction with the trial on the merits, the district court held that the Ordinance is constitutional, but the court enjoined the County from enforcing it "by means of custodial arrest." *S.O.B., Inc. v. County of Benton*, 171 F.Supp.2d 978 (D.Minn.2001). Both sides appeal this final order. We affirm the district court's decision except we vacate the injunction against custodial arrest.

I. The Public Nudity Prohibition.

[1] Non-obscene erotic and sexually explicit speech are entitled to some First Amendment protection. But businesses that market sexually explicit speech and expressive conduct may be regulated to the extent their activities are perceived as having adverse social and economic effects on society. For example, a law prohibiting the sale of sexually oriented materials to minors was upheld against a First Amendment challenge in *Ginsberg v. New York*, 390 U.S. 629, 634, 640-42, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). More recently, the Supreme Court has considered First Amendment challenges to two different kinds of regulatory action taken by local governments to attack the perceived negative effects of non-obscene adult entertainment: the use of traditional urban zoning strategies to restrict the time, place, and manner in which adult entertainment may be marketed, and the use of traditional public indecency statutes to prohibit certain types of sexually expressive conduct. These recent decisions govern our resolution of this appeal.

[2][3][4][5] Zoning issues reached the Supreme Court first. It is now well-established that sexually oriented businesses may be subjected to reasonable time, place, and manner restrictions based upon the nature of the products or services they sell, even though those products and services include an expressive content protected by the First Amendment. *See* ***860*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62- 63, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). Under *Renton*, state and local governments may use diverse zoning strategies (for example, either dispersal or concentration) to regulate adverse secondary effects of such businesses such as crime, prostitution, and economic blight. The regulation must be "content neutral" to avoid strict First Amendment scrutiny. But content-neutral in this context means simply that the regulation is *justified* by the legitimate government purpose of reducing or eliminating adverse secondary effects. 475 U.S. at 47-50, 106 S.Ct. 925. If a zoning regulation is content-neutral in this sense, it will withstand First Amendment scrutiny "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses" and the regulation allows for reasonable alternative avenues for communication. *Id.* at 51-52, 106 S.Ct. 925.

This case involves the second type of regulation, use of a public indecency ordinance to totally prohibit live nude dancing. Public indecency, including nudity, was a crime at common law, and public inde-

cency statutes are clearly within the police power of state and local governments. A First Amendment challenge to this type of regulation first reached the Supreme Court in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). The Court upheld the application of Indiana's long-standing public indecency statute to prohibit live nude dancing as entertainment, but no five Justices agreed on a single rationale for that conclusion. Noting that nude dancing is expressive conduct, not pure speech, four Justices applied the four-part test in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), for judging government action restricting conduct that includes both speech and non-speech elements:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Applying this test, the Chief Justice, Justice O'Connor, and Justice Kennedy considered Indiana's prohibition of live nude dancing sufficiently justified by the traditional police power to protect morals and public order. *Barnes*, 501 U.S. at 569, 111 S.Ct. 2456. Justice Souter, on the other hand, applied the *O'Brien* test but looked to *Renton* for relevant precedent and concluded that the prohibition was justified by "the State's substantial interest in combating the secondary effects of adult entertainment establishments." *Id.* at 582, 111 S.Ct. 2456. (Justice Scalia, the fifth member of the *Barnes* majority, concluded that live nude dancing is conduct unprotected by the First Amendment. The four dissenters concluded that the prohibition was the suppression of protected erotic dancing and could not survive First Amendment strict scrutiny.)

The Court again took up this issue in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). A larger majority again upheld application of an ordinance generally prohibiting public nudity to ban live nude dancing. A four-Justice plurality (Justice O'Connor, joined by the Chief Justice, Justice Kennedy, and Justice Breyer), now agreeing with Justice Souter that the adverse secondary effects analysis of *Renton* was the proper analytical framework, concluded that the government ***861** had a sufficient interest in regulating this sexually explicit conduct because:

> there is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity--nude erotic dancing--is particularly problematic because it produces harmful secondary effects.

529 U.S. at 295, 120 S.Ct. 1382. The plurality then concluded that the City of Erie ordinance passed muster under the four-part *O'Brien* test because:

> [t]he ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.* The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.

Id. at 301, 120 S.Ct. 1382. Justice Souter dissented in part, agreeing with the plurality's analytical approach but voting to remand because the City of Erie had not made an evidentiary record supporting its claim of adverse secondary effects. (Justice Scalia, joined by Justice Thomas, concurred, adhering to his approach in *Barnes:* "The traditional power of government to foster good morals[,] ... and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment." 529 U.S. at 310, 120 S.Ct. 1382. Justice Stevens and Justice Ginsburg dissented, adhering to the position of the dissenters in *Barnes* and criticizing the majority for extending *Renton* 's adverse secondary effects analysis to the absolute prohibition of live nude dancing.)

The final relevant Supreme Court precedent is another zoning case, the Court's very recent decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). *Alameda Books* probed the evidentiary parameters of the *Renton* test, considering whether Los Angeles had presented sufficient evidence of adverse secondary

effects to avoid summary judgment invalidating an amendment to its zoning ordinance that prohibited more than one adult entertainment business from operating in the same building. Once again, *Alameda Books* produced no majority opinion. A four-Justice plurality (Justice O'Connor, joined by the Chief Justice, Justice Scalia, and Justice Thomas), in concluding that the City had made a sufficient showing to survive summary judgment, granted substantial but not total deference to the City's legislative judgment about how to combat adverse secondary effects:

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

122 S.Ct. at 1736. Justice Kennedy concurred but cautioned that, to justify a zoning ordinance under *Renton,* "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, *while leaving the quantity and accessibility of speech substantially intact.*" *Id.* at 1742 (emphasis ***862** added). Justice Souter for the four dissenters concluded that the City's earlier studies regarding adverse secondary effects totally failed to support this amendment *and therefore* the amendment was impermissible content-based regulation.

[6][7] Applying these Supreme Court precedents to this case, we can quickly isolate the critical inquiry. A ban on live nude dancing is content-neutral if its purpose is to combat harmful secondary effects, even though the ban "has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch [of clothing] is dropped." *Pap's*, 529 U.S. at 294, 120 S.Ct. 1382; *see ILQ Invs., Inc. v. City of Rochester*, 25 F.3d 1413, 1416 (8th Cir.1994). Here, the Ordinance states that its purpose is to "prohibit public indecency in order to deter criminal activity, to promote societal order and public health and to protect children," and it includes express findings that public indecency can increase criminal activity, including prostitution, disorderly conduct and sexual assault; expose children to an unhealthy and nurtureless environment; foster social disorder by disrupting the orderly operation of public events and public accommodations; and present health concerns in places of public accommodation and other public settings. Sugar Daddy's argues these findings are unsupported and suggests the Ordinance's stated purpose is pretextual. But Sugar Daddy's virtually concedes, and we conclude, that the Ordinance is content-neutral within the meaning of *Pap's* and therefore subject to intermediate First Amendment scrutiny under the four-part *O'Brien* test.

[8] Likewise, Sugar Daddy's does not argue that the Ordinance fails the fourth part of the *O'Brien* test, that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [the substantial governmental] interest." In *Pap's*, 529 U.S. at 289, 120 S.Ct. 1382, the plurality declared that live nude dancing is a form of expressive conduct that "falls only within the outer ambit of the First Amendment's protection." The plurality then concluded that an absolute prohibition on such conduct meets the *O'Brien* test because "[t]he requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message." *Id.* at 301, 120 S.Ct. 1382 (plurality opinion). [FN1]

> FN1. "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 judgment on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). Applying this test, Justice O'Connor's opinion for the four-Justice plurality in *Pap's* stated the holding of the Court. *See Nightclub Mgmt., Ltd. v. City of Cannon Falls*, 95 F.Supp.2d 1027, 1040-41

(D.Minn.2000). On the other hand, Justice Kennedy's more narrow concurrence in *Alameda Books* stated the holding of the Court in that case.

[9] Thus, the fighting issue in this case, as it was in *Alameda Books*, is whether the County had sufficient evidence of adverse secondary effects to justify enacting the Ordinance. Before enactment, the County Commissioners gathered studies by other municipalities and other evidence of the adverse secondary effects associated with adult entertainment businesses. At the public hearing, concerned citizens spoke in favor of the Ordinance. Mark Van Gelder presented evidence suggesting that Sugar Daddy's and the King's Inn, a Benton County adult entertainment establishment that had been in business ***863** for nearly eight years, had neither caused higher crime rates nor depressed the value of nearby properties in the time they had been operating. [FN2] Sugar Daddy's also submitted an article criticizing the methodologies of the secondary effects studies relied upon by other municipalities, Bryant Paul, et al., *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL. 355 (2001). Sugar Daddy's argues that, on this record, the County had an insufficient basis for concluding that the Ordinance is needed to further the substantial government interest in combating harmful secondary effects.

FN2. Van Gelder presented statistics showing fewer police calls to Sugar Daddy's in the prior year than to a local gas station, and a report suggesting that the value of properties near Sugar Daddy's and the King's Inn increased more from 1994 to 2001 than the value of properties near two businesses that do not feature nude dancing. The record before the Commissioners included contrary evidence and argument submitted by proponents of the Ordinance.

[10] Though neither *Pap's* nor *Alameda Books* squarely resolves the issue, we conclude that Sugar Daddy's theory is unsound. Its local evidence 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. A ban on live nude dancing, on the other hand, may address other adverse secondary effects, such as the likelihood that an establishment whose dancers and customers routinely violate long-established standards of public decency will foster illegal activity such as drug use, prostitution, tax evasion, and fraud. [FN3] Moreover, zoning restrictions typically impact a broad range of adult entertainment businesses, whereas a ban on live nude dancing imposes a *de minimis* restriction on expressive conduct, while otherwise "leaving the quantity and accessibility of speech substantially intact." *Alameda Books*, 122 S.Ct. at 1742 (Kennedy, J., concurring).

FN3. The record before the County Commissioners included testimony presented by a former strip-club manager to the Michigan Legislature in the year 2000 describing how such establishments promote these kinds of illegal activities.

Justice O'Connor, writing for the four-justice plurality in *Pap's*, afforded substantial deference to legislative judgments regarding secondary-effects:

> [I]n terms of demonstrating that such secondary effects pose a threat, the city need not conduct new studies or produce evidence independent of that already generated by other cities to demonstrate the problem of secondary effects, so long as whatever evidence the city relies upon is *reasonably believed to be relevant to the problem that the city addresses.*

529 U.S. at 296, 120 S.Ct. 1382 (emphasis added, quotations omitted); *see Jake's, Ltd., Inc. v. City of Coates*, 284 F.3d 884, 886 (8th Cir.), *cert. denied*, 537 U.S. 948, 123 S.Ct. 413, 154 L.Ed.2d 292 (2002). The plurality squarely rejected the dissent's view that the City must come forward with evidence showing that pasties and G-strings reduce crime:

> To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but [the four-part *O'Brien* test] requires only that the regulation further the interest in combating such effects.... [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion) (quotation omitted). The four-Justice plurality in *Alameda Books* was equally deferential in reviewing a zoning ***864** ordinance which had a broader impact on protected First Amendment interests. Justice Kennedy's concurring opinion in *Alameda Books* was somewhat less deferential than the plurality to local legislative judgments as to the adverse secondary effects purportedly addressed by zoning regulations. But Justice Kennedy joined the plurality opinions in *Barnes* as well as *Pap's*, and he did not even cite those cases in his *Alameda Books* concurrence, which means there is nothing to suggest that he has retreated from his votes in *Barnes* and *Pap's*. In these circumstances, we conclude that the Court's holding in *Pap's* is still controlling regarding the deference to be afforded local governments that decide to ban live nude dancing. Therefore, Sugar Daddy's failed to cast sufficient doubt on the County's rationale for the Ordinance, and the district court's decision that the ban on live nude dancing is constitutional must be affirmed. [FN4]

> FN4. In its cross-appeal, Benton County argues that two of the district court's findings of fact are clearly erroneous. Neither finding affects our conclusion that the County's ban on live nude dancing survives First Amendment intermediate scrutiny. Accordingly, we need not address these fact-finding issues.

II. Claims That the Ordinance Is Overbroad.

[11][12][13] Ordinarily, a party may not facially challenge a law on the ground that it would be unconstitutional if applied to someone else. *See New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). An exception to that general rule is the First Amendment overbreadth doctrine. To prevent the chilling of protected First Amendment interests, this doctrine permits "an individual whose own speech or conduct may be prohibited ... to challenge a statute on its face because it also threatens others not before the court--those who desire to engage in legally protected expression but who may refrain from doing so." *Ways v. City of Lincoln*, 274 F.3d 514, 518 (8th Cir.2001) (quotation omitted). A judicial declaration that a law is unconstitutionally overbroad "is, manifestly, strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Therefore, "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Osborne v. Ohio*, 495 U.S. 103, 112, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (quotation omitted).

[14] **A. Does the Ordinance Chill Legitimate Theater?** Sugar Daddy's argues that, even if the Ordinance is constitutional as applied to live nude dancing, it is unconstitutionally overbroad because its prohibition against the public fondling of genitals chills constitutionally protected conduct. For example, Sugar Daddy's warns that an actor playing the role of the manager in a local production of *Damn Yankees* could be subject to criminal penalties for adjusting his athletic protector.

In *Farkas v. Miller*, 151 F.3d 900, 905 (8th Cir.1998), we upheld application of a public nudity statute to prohibit live nude dancing, rejecting an overbreadth argument because the statute included an exception for "a theater, concert hall, art center, museum, or similar establishment ... primarily devoted to the arts or theatrical performances." On the other hand, in *Ways*, 274 F.3d at 519, in striking down an ordinance more broadly prohibiting sexual contact in entertainment businesses, we noted that among other flaws the ordinance lacked an exception for artistic venues. In this case, the Ordinance has an exemption for "any theatrical production performed in a theater by a professional or amateur theatrical or musical company ***865** which has serious artistic merit." But unlike the exemption in *Farkas*, this exemption is inexplicably limited to the Ordinance's public-nudity prohibition, so it does not appear to limit the public-genital-fondling prohibition.

[15] An uncontradicted affidavit by the County Attorney avers that there are no theaters in Benton County. Moreover, the County Attorney represents that "it is not the intent of the prosecutorial authority for Benton County to now or in the future enforce the provisions of Ordinance 332 on any theatrical production ... which has serious artistic merit." "In evalu-

ating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). Thus, the record does not support an inference that protected theatrical activity is presently being chilled, or that the County will ever enforce the genital-fondling prohibition against the cast of a theatrical production. On this record, we agree with the district court that the Ordinance is not substantially overbroad, judged in relation to its plainly legitimate sweep. *Accord J & B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 366-67 (5th Cir.1998).

[16] **B. The Van Gelders' Right to Privacy Claim.** The Ordinance prohibits nudity and the fondling of genitals "in a public setting or place." The definition of public place includes hotels and motels but specifically excludes "enclosed single sex motel rooms and hotel rooms designed and intended for sleeping accommodations." Limiting the exclusion to "single sex" hotel rooms seems like a dreadful example of bad drafting. [FN5] Reading the limitation literally, Mark Van Gelder and his wife seek to enjoin enforcement of the Ordinance, to the extent it "criminalizes marital sexual relations within hotel rooms within Benton County," because it infringes their alleged constitutional right to marital and sexual privacy. Pressing literalism to an unreasonable extreme, the Van Gelders further assert that the Ordinance violates their right to equal protection because the single sex limitation permits homosexuals but not heterosexuals to engage in sexual relations in hotel rooms.

> FN5. The same linguistic nonsense infected the City of Cannon Falls ordinance upheld against other challenges in *Nightclub Mgmt.*, 95 F.Supp.2d 1027.

The complaint alleges that Mr. Van Gelder "fears that ... he and his wife could be subject to criminal prosecution if they engaged in normal marital activities within such a motel or hotel room." But the Van Gelders have presented no evidence of any likelihood that the Ordinance will be enforced against them if they engage in such activity. Indeed, the Benton County Attorney has publicly declared "that Ordinance 332 does not prohibit nudity, genital touching, or any other sexual activity in private hotel and motel rooms." That declaration finds support in the Minnesota canons of statutory construction, which codify presumptions that "[t]he legislature does not intend a result that is absurd, impossible of execution, or unreasonable [and] ... does not intend to violate the constitution of the United States or of this state." minn. Stat. § 645.17, subd. (1), (3). Thus, the alleged fear is both without support and patently unreasonable.

[17] As a general rule, a federal court should refrain from entertaining a pre-enforcement constitutional challenge to a state criminal statute in the absence of "a realistic fear of prosecution." *Poe v. Ullman*, 367 U.S. 497, 508, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961); *see* ***866***Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). The Van Gelders' claim does not raise First Amendment issues, and "the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Younger v. Harris*, 401 U.S. 37, 51, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *see Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). On this record, the district court properly dismissed this claim without reaching the merits of the issues.

III. The Custodial Arrest Issue.

[18] In addition to asserting that the Ordinance is unconstitutional on its face, Sugar Daddy's complaint sought an order "declar[ing] the practice of enforcing the ordinance by custodial arrest to be an unlawful prior restraint on First and Fourteenth Amendment rights." Noting that the Ordinance's theatrical exemption requires arresting officers to determine that a live nude dancing performance lacks "serious artistic merit," the district court permanently enjoined enforcement of the Ordinance by means of custodial arrest because "arresting the performer necessarily places a prior restraint on later performances." Benton County appeals that ruling.

[19] Ordinarily, a federal court will not enjoin enforcement of a state criminal law, even though unconstitutional. "To justify such interference there must be exceptional circumstances and a clear show-

ing that an injunction is necessary in order to afford adequate protection of constitutional rights." *Wooley v. Maynard*, 430 U.S. 705, 712, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (quotation omitted). We conclude that Sugar Daddy's has failed to demonstrate that exceptional circumstances require an injunction against enforcing the constitutional prohibition of live nude dancing by means of custodial arrest.

In the first place, the risk that Sugar Daddy's dancers will be subject to custodial arrest seems minimal. A violation of the Ordinance is a misdemeanor. *See* minn. Stat. § 609.02, Subd. 3. The Minnesota Rules of Criminal Procedure require police officers to proceed against misdemeanor offenders by citation rather than custodial arrest, "unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation." minn. R. Crim. P. 6.01, Subd. 1(1)(a). Sugar Daddy's has presented no evidence that the County has threatened custodial arrests or will not comply with this rule of criminal procedure.

[20] In the second place, the doctrine of prior restraint is only marginally involved here. The doctrine recognizes "the time-honored distinction between barring speech in the future and penalizing past speech." *Alexander v. United States*, 509 U.S. 544, 554, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993). Any custodial arrest will come after a dancer has engaged in live nude dancing (nothing in the record suggests that the county will conduct pre-dance arrests, which would raise more serious First Amendment issues). The district court concluded that a post-dance arrest "places a prior restraint on later performances." But in the absence of proof that a dancer's arrest would be followed by extended custody, the only later performances likely to be restrained are additional live nude dances that night. *See Kew v. Senter*, 416 F.Supp. 1101, 1106 (N.D.Tex.1976) ("Nor are future performances prevented, for the performer may post bail and resume her 'expression' as quickly as logistics permit.").

***867** We conclude there is little risk that a custodial arrest will restrain a dancer's *protected* expressive conduct in later performances that same night. In obscenity cases, the Supreme Court has cautioned that police officers may not seize allegedly obscene materials without some prior judicial evaluation of the obscenity issue. *See Roaden v. Kentucky*, 413 U.S. 496, 505-06, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973). This is a prior restraint concern that led the court to deny a motion to dismiss a suit to enjoin the arrest of exotic dancers under an obscenity ordinance in *Admiral Theatre v. City of Chicago*, 832 F.Supp. 1195 (N.D.Ill.1993). The district court relied on *Admiral Theatre*, noting that arresting officers must assess whether a performance has "serious artistic merit" to determine whether the Ordinance's theatrical exception applies. We disagree. While "serious artistic merit" is a component of obscenity jurisprudence, *see Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the Ordinance is not obscenity-based. The Ordinance's exception applies only to a "theatrical production performed in a theater by a professional or amateur theatrical or musical company." Thus, an arresting officer will know to a virtual certainty whether a particular live nude performance at Sugar Daddy's falls within the exception. If not, the Ordinance has been violated, and any similar performances later that evening would also violate the Ordinance.

In these circumstances, we see no exceptional circumstances warranting pre-enforcement intrusion by a federal court of equity. Any prior restraint issues that may arise should the County elect to enforce the Ordinance through custodial arrest are better left for the state courts to resolve on a specific factual record.

The judgment of the district court is reversed, and the case is remanded with directions to vacate the permanent injunction against "using custodial arrest as a means of enforcing Benton County Ordinance 332 against Plaintiffs or any other person." 171 F.Supp.2d at 985. In all other respects, the judgment of the district court is affirmed.

317 F.3d 856

Briefs and Other Related Documents (Back to top)

- 2002 WL 32181447 (Appellate Brief) Cross-

Appellant's Reply Brief (May. 07, 2002)Original Image of this Document (PDF)

• 01-4022 (Docket) (Dec. 31, 2001)

• 01-3928 (Docket) (Dec. 17, 2001)

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Briefs and Other Related Documents

United States Court of Appeals,
Eighth Circuit.
JAKE'S, LTD., INC.; Richard J. Jacobson, Plaintiffs--Appellants,
v.
CITY OF COATES, Defendant--Appellee.
No. 01-1869.

Submitted: Nov. 12, 2001.
Filed: March 26, 2002.

Following city's amendment of zoning ordinance which had been declared unconstitutional, adult entertainment facility brought action in state court challenging amended ordinance and licensing ordinance. City removed, and parties cross-moved for summary judgment. The United States District Court for the District of Minnesota, Donovan W. Frank, J., 176 F.Supp.2d 899 and 169 F.Supp.2d 1014, upheld the ordinance, and entertainment facility appealed. The Court of Appeals, Loken, Circuit Judge, held that: (1) zoning ordinance was constitutional as applied to adult entertainment facility; (2) Minnesota amortization statute was not unconstitutional; (3) ordinance authorizing suspension of business license did not confer unbridled discretion on any government official or agency; (4) adult entertainment facility lacked standing to challenge provision denying license to persons convicted of sex offenses; and (5) licensing restrictions were reasonable.

Affirmed as modified.

West Headnotes

[1] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Nude dancing is expressive conduct protected by the First Amendment, though only marginally so. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Regulation of time, place, and manner in which a sexually oriented business may present live nude dancing to its customers is permissible under First Amendment provided ordinance is justified without reference to content of the regulated speech, is designed to promote a substantial government interest, and allows reasonable alternate avenues for communication. U.S.C.A. Const.Amend. 1.

[3] Zoning and Planning 76
414k76 Most Cited Cases
A city's interest in preserving the quality of urban life and the character of its neighborhoods justifies zoning restrictions intended to minimize adverse secondary effects of adult entertainment enterprises.

[4] Zoning and Planning 76
414k76 Most Cited Cases
Zoning ordinance, intended to reduce adverse secondary effects of proximity to adult entertainment facility, was constitutional as applied to particular facility; city reasonably relied on studies from other communities showing that proximity to sexually oriented businesses results in adverse secondary effects.

[5] Zoning and Planning 131
414k131 Most Cited Cases
A city need not conduct its own studies to demonstrate that a proposed ordinance will serve to reduce adverse secondary effects, so long as whatever evidence city relies upon is reasonably believed to be relevant to problem that city addresses.

[6] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases

[6] Zoning and Planning 8
414k8 Most Cited Cases
Minnesota statute permitting municipalities to use amortization as a means of eliminating nonconforming adult businesses did not violate First Amendment; statute merely authorized municipalities to amortize nonconforming sexually oriented businesses, and statute was valid under deferential rational-basis review. U.S.C.A. Const.Amend. 1; M.S.A. § 462.357, subd. 1c.

[7] Constitutional Law 90.1(4)
92k90.1(4) Most Cited Cases
In the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship, in violation of the First Amendment. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 90.1(4)
92k90.1(4) Most Cited Cases

[8] Licenses 7(1)
238k7(1) Most Cited Cases
City ordinance authorizing suspension or revocation of a business license, if licensee was a menace to the health, safety, or general welfare of the community, did not confer unbridled discretion on a government official or agency, as would constitute prior restraint on free expression in violation of First Amendment; language referring to "menace to the health, safety, or general welfare of the community" constituted a specific discretion-limiting standard. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 42.1(6)
92k42.1(6) Most Cited Cases
Adult entertainment facility lacked standing to contest constitutionality of city ordinance providing that business license could not issue to any person convicted of sex offenses, obscenity offenses, or adult uses in past five years; facility made no showing that restriction would disable its owners from obtaining a license.

[10] Constitutional Law 90.1(4)
92k90.1(4) Most Cited Cases
When core First Amendment freedoms are made subject to licensing, only revenue-neutral licensing fees may be imposed so that government is not charging for privilege of exercising this constitutional right. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[11] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
(Formerly 376k3 Theaters and Shows)
Adult entertainment facility failed to establish that city ordinance which imposed a license fee of $2,500 was constitutionally unreasonable, in violation of First Amendment; no evidence showed that fee was so large or so discriminatory as to demonstrate that ordinance was not content neutral. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[12] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
(Formerly 376k3.50 Theaters and Shows)
Restrictions in ordinance licensing adult entertainment facility, requiring that live exotic dancing be conducted on a platform raised at least two feet above floor and located at least six feet from any patron, and prohibiting gratuities for dancers, were reasonable, content-neutral time, place, and manner restrictions, and therefore did not violate First Amendment; restrictions reasonably furthered government interest in preventing crime, and facility, which was required to relocate, would have reasonable opportunity to open and operate. U.S.C.A. Const.Amend. 1.

[13] Licenses 7(1)
238k7(1) Most Cited Cases
A court's inquiry into constitutionality of city's licensing provisions for a business is not concerned with the economic impact of restrictions on a particular business, but with the economic effects of the ordinance in the aggregate, rather than at the individual level.

***886** Randall D.B. Tigue, Minneapolis, MN, argued, for Plaintiffs-Appellants.

James J. Thompson, Minneapolis, MN, argued, for Defendant-Appellee.

Before LOKEN, LAY, and HEANEY, Circuit Judges.

LOKEN, Circuit Judge.

Jake's Bar in Coates, Minnesota, has featured live nude dancing since early 1992. Coates is a town of 182 people located fifteen miles southeast of St. Paul. The Coates City Council enacted a zoning ordinance

in 1994 that strictly limited the location of sexually oriented businesses. Jake's sued, and the district court declared that the ordinance unconstitutionally infringed the First Amendment protection afforded to nude dancing as a form of expressive conduct. The City then enacted an amended zoning ordinance and a restrictive licensing ordinance. Jake's sued again. Ruling on cross motions for summary judgment, the district judge upheld the current ordinances. Jake's appeals. We modify one portion of the judgment and affirm.

I. Background.

[1][2] Nude dancing is expressive conduct protected by the First Amendment, "though ... only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion). The Supreme Court has held that state and local laws prohibiting public nudity may constitutionally be applied to businesses such as Jake's, despite the limited First Amendment protection afforded totally nude dancing. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-302, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion); *Barnes*, 501 U.S. at 567-72, 111 S.Ct. 2456 (plurality opinion). But the City of Coates elected to proceed differently. Rather than ban public nudity altogether, its 1994 ordinance regulated the time, place, and manner in which Jake's as a sexually oriented business may present live nude dancing to its customers. It is now well-established that this type of regulation is permissible under the First Amendment *provided* the ordinance is justified without reference to the content of the regulated speech, is designed to promote a substantial government interest, and allows reasonable alternate avenues for communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). We have applied this test in numerous cases in which various adult entertainment businesses challenged local zoning and licensing ordinances. *See BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 605 (8th Cir.2001) (nude dancing); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1416 (8th Cir.) (adult bookstore), *cert. denied*, 513 U.S. 1017, 115 S.Ct. 578, 130 L.Ed.2d 493 (1994); *Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 861-63 (8th Cir.) (adult bookstore), *cert. denied*, 513 U.S. 867, 115 S.Ct. 186, 130 L.Ed.2d 120 (1994); *Holmberg v. City of Ramsey*, 12 F.3d 140, 142 (8th Cir.1993) (adult bookstore and novelty shop), *cert denied*, 513 U.S. 810, 115 S.Ct. 59, 130 L.Ed.2d 17 (1994); *Alexander v. City of Minneapolis*, 928 F.2d 278, 283-84 (8th Cir.1991) (adult theater).

The 1994 zoning ordinance provided that sexually oriented businesses must be located within an agricultural zone and must be at least 750 feet from specified uses, including other sexually oriented businesses, single- or multi-family dwellings, churches, schools, bars, and public parks. The ordinance also required all nonconforming sexually oriented businesses to cease operations by December 31, 1996. This type of delayed prohibition is known as an amortization ***887** provision because it justifies the removal of a nonconforming use by giving the owner a period of time to recoup (amortize) its investment before it must relocate. Jake's present location did not comply with the 1994 ordinance because it is not in an agricultural zone and is less than 750 feet from a residence. Thus, the amortization provision if valid would force Jake's to relocate.

Jake's filed a lawsuit in state court challenging the 1994 ordinance in late 1996. After the City removed, the district court declared the ordinance unconstitutional because the requirement that a portion of any new subdivision of agriculturally zoned land be donated as parkland did not leave any site to which Jake's could lawfully relocate (as the ordinance prohibited Jake's from locating near a public park). However, Judge Richard H. Kyle's opinion further stated:

> [I]f Coates' requirement for land dedication for subdivision were altered either to allow some *non-discretionary* alternative (equivalent fee in lieu of the land dedication) or to limit the land dedication requirement to certain types of subdivision (i.e., subdivisions over a certain size), much of the land in the four quadrants [containing possible relocation sites] would be rendered available for a sexually oriented business. The Court sees the discretionary aspect of the waiver of the land dedication requirement to be the only obstacle to Coates' zoning ordinance passing constitutional muster.

Rather than appeal Judge Kyle's decision, the City amended its zoning ordinance to correct this constitutional deficiency by making the parkland dedication requirement nondiscretionary and permitting a developer to make a "cash park dedication" in lieu of dedicating land. The City also enacted a licensing ordinance imposing numerous restrictions on sexually oriented businesses. As relevant to this appeal, the ordinance restricted persons with a criminal history for sex related offenses from obtaining a license, imposed license and investigation fees, required that dancers and patrons be at least six feet apart at all times, and prohibited dancers from soliciting and customers from offering gratuities.

Jake's commenced this action in state court challenging the new zoning and licensing ordinances. The City again removed, and the case was assigned to Judge Donovan W. Frank. On cross-motions for summary judgment, Judge Frank upheld the challenged ordinances but stayed his order pending appeal, thereby permitting Jake's to remain open. *Jake's, Ltd. v. City of Coates*, 176 F.Supp.2d 899, 905-11, and 169 F.Supp.2d 1014, 1017-19 (D.Minn.2001). Jake's appeals, renewing its challenges to the current zoning and licensing ordinances.

II. Zoning Issues.

City of Renton requires that an ordinance restricting adult entertainment be content-neutral, promote a substantial government interest, and allow reasonable alternate avenues for communication. 475 U.S. at 48-50, 106 S.Ct. 925. Two of those requirements are not at issue in this case. Jake's concedes the ordinances at issue are content neutral. *See also ILQ*, 25 F.3d at 1416 (even if an ordinance regulates only sexually oriented businesses, it is content-neutral "if its purpose is to lessen undesirable secondary effects attributable to those businesses"). And the final aspect of the *City of Renton* test--whether the zoning ordinance allows reasonable alternative avenues for communication--is no longer an issue because Judge Kyle's initial decision told the City how to amend the ordinance to cure a prior defect, the City amended ***888** the ordinance accordingly, and Jake's does not argue it has no reasonable alternative site where it may now relocate.

[3] Jake's argues that the Coates ordinance fails the *City of Renton* test because the City had an insufficient evidentiary basis to conclude that its zoning restrictions further a substantial government interest. The ordinance is intended to reduce criminal activity, prevent the deterioration of residential neighborhoods, and eliminate the "dehumanizing influence" that sexually oriented businesses may have on churchgoers, park users, and daycare clients. These are commonly known as the adverse "secondary effects" of adult entertainment enterprises. It is well-settled that a city's interest in preserving the quality of urban life and the character of its neighborhoods justifies zoning restrictions intended to minimize such effects. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion).

[4] In making its secondary effects findings, the City relied on previous studies by Phoenix, Seattle, Indianapolis, Rochester (Minnesota), St. Paul, and the Minnesota Attorney General. The City also relied on a 1999 memorandum by the City Attorney reviewing these studies and reporting that 17 of 38 crimes prosecuted by the City since December 1993 were "Jake's related." Jake's countered with an expert's study opining that the City Attorney erred in attributing many of the 17 crimes to Jake's. Relying on this study, Jake's argues that the police activity due to Jake's is on a par with that at The House of Coates, a local bar that does not have nude dancing, and therefore the City's crime statistics do not support regulating Jake's on the basis of this secondary effect. In addition, pointing to evidence that property values near Jake's have increased in recent years, Jake's argues the City has no evidence that sexually oriented businesses contribute to economic blight. Therefore, Jake's concludes, the City Council had no evidence supporting its conclusion that the zoning ordinance would reduce adverse secondary effects. We disagree.

[5] Leaving aside whether the record is adequate to show the adverse secondary effects of crime and economic blight, Jake's argument is flawed because it ignores the City's reliance on studies showing that proximity to sexually oriented businesses results in adverse secondary effects on residential neighbor-

hoods, churches, schools, and other land uses that would be lessened by an ordinance imposing distance restrictions as great or greater than the 750 foot restriction in the Coates ordinance. The appropriate location of various land users is a prime objective of municipal zoning. And a city need not conduct its own studies to demonstrate that a proposed ordinance will serve to reduce adverse secondary effects, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton*, 475 U.S. at 51-52, 106 S.Ct. 925. *See City of Erie*, 529 U.S. at 297, 120 S.Ct. 1382; *Young*, 427 U.S. at 55, 96 S.Ct. 2440. We have repeatedly upheld as reasonable the reliance on secondary effects studies from other communities to justify distance restrictions of this type. *See ILQ*, 25 F.3d at 1417-18; *Ambassador Books*, 20 F.3d at 860; *Holmberg*, 12 F.3d at 142.

Jake's argues that this case is like *Flanigan's Enter., Inc. of Ga. v. Fulton County*, 242 F.3d 976 (11th Cir.2001), *petition for cert. filed*, 70 U.S.L.W. 3091 (July 23, 2001) (No. 01-144), where the court reversed a grant of summary judgment because the County had not reasonably relied on studies from other communities. ***889** But *Flanigan's* is distinguishable in two critical respects. First, it involved a total ban on nude dancing in establishments that serve liquor, not a locational zoning restriction. 242 F.3d at 974. Thus, the adverse secondary effects from proximity to churches, schools, and other specific land uses were not at issue. Second, in *Flanigan's*, the County's own studies refuted the presence of the secondary effects on which it relied. 242 F.3d at 986. Here, though Jake's attacks the City's secondary effects findings, the City contends they are supported by the secondary effects evidence, including the City Attorney's 1999 report. Like the district court, we conclude the City relied upon secondary effects evidence it "reasonably believed to be relevant to the problem" it addressed in the zoning ordinance. *City of Renton*, 475 U.S. at 51-52, 106 S.Ct. 925.

[6] Having no viable challenge to the City's zoning restrictions under *City of Renton*, Jake's attacks the amortization provision in the zoning ordinance. Jake's first argues that the state statute permitting municipalities to use amortization as a means of eliminating nonconforming adult businesses is unconstitutional. *See* Minn.Stat. § 462.357, subd. lc. (2000). This argument is without merit. We have repeatedly upheld amortization provisions requiring nonconforming adult entertainment businesses to relocate as part of a municipality's valid time, place, and manner regulation of such businesses. *See Ambassador Books*, 20 F.3d at 865; *Holmberg*, 12 F.3d at 142, 144; *Alexander*, 928 F.2d at 283-84. Here, the state statute merely authorizes municipalities to amortize nonconforming sexually oriented businesses. The relevant question is whether a municipality's use of that authority complies with the *City of Renton* standards. The State of Minnesota was under no constitutional obligation to study secondary effects in the abstract before granting this authority to local governmental bodies.

Jake's further argues that Coates may not invoke the statutory exception and impose amortization on Jake's because it does not qualify as a "similar adults-only business" under state law. The argument is contrary to the plain language of the statute, [FN1] but Jake's attempts to avoid this issue of statutory construction by arguing there is no "constitutional basis" for classifying Jake's as similar to an adults-only business, and the statutory language is in any event unconstitutionally vague. At this point, the argument becomes a jumble of federal and state law concepts. The simple and complete answer is that the Coates zoning ordinance as applied to Jake's passes muster under *City of Renton*, and the state statute permitting amortization of "adults-only" businesses is valid under deferential rational-basis review. Therefore, we affirm the district court's decision that the Coates zoning ordinances regulating sexually oriented businesses (found in Coates Ordinances Nos. 40 and 41) are constitutional.

> FN1. After prohibiting municipalities from using amortization to eliminate nonconforming uses, Minn.Stat. § 462.537, subd. lc, provides that this restriction "does not apply to adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by ordinance." The Coates zoning ordinance defines a sexually oriented busi-

> ness as "an adult book store, adult body painting studio, adult companionship establishment, adult motion picture theater, adult entertainment facility, adult modeling studio, adult mini motion picture theater, or adult sauna" and includes definitions of each type of adult business.

III. Licensing Issues.

[7] A. Jake's first argues that the licensing provisions in Coates Ordinance No. 36 constitute an unconstitutional prior restraint on free expression. "[I]n the ***890** area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). Jake's does not challenge the provisions in Ordinance 36 governing issuance of an initial license, which impose time constraints on the approval process, require the use of objectively verifiable criteria, and provide for prompt judicial review, the constitutional requirements enumerated in the various opinions in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224-27, 239, 246, 249, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). Instead, Jake's argues that Ordinance 36 confers unbridled discretion in authorizing the City to *suspend* licenses if a sexually oriented business is conducted "in such a manner as ... to constitute a menace to the health, safety, or general welfare of the community."

[8] Jake's cites no authority for the proposition that the prior restraint standards of *City of Lakewood* and *FW/PBS* apply equally to license suspensions and revocations. The proposition is inherently suspect, because license revocation is necessarily less of a *prior* restraint than the initial licensing process. But in any event, we reject as frivolous the contention that an ordinance authorizing revocation if the licensee is "a menace to the health, safety, or general welfare of the community" confers unbridled discretion. This is a specific discretion-limiting standard not unlike the definition of a public nuisance long known to the law. *See, e.g.*, Minn.Stat. § 609.74(1) (defining public nuisance as a condition which "endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public").

Jake's further objects that the license renewal provision does not provide for a stay pending appeal if renewal is denied. Jake's did not raise this issue in the district court, and we decline to consider it.

[9] **B.** Jake's next argues that Ordinance 36 unconstitutionally provides that a license may not issue to any person who "has had a conviction of a felony or a gross misdemeanor or misdemeanor relating to sex offenses, obscenity offenses, or adult uses in the past five (5) years." A similar restriction was upheld in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 414 (6th Cir.1997). However, Jake's lacks standing to raise the issue because it made no showing that the restriction will disable its owners from obtaining a license. Therefore, the district court lacked jurisdiction to consider the issue, and we must vacate the grant of summary judgment upholding this provision in the ordinance. *See FW/PBS*, 493 U.S. at 234-35, 110 S.Ct. 596.

[10] **C.** Jake's next argues that Ordinance 36 imposes a $2,500 fee that is constitutionally unreasonable. When core First Amendment freedoms are made subject to licensing, only revenue-neutral licensing fees may be imposed so that government is not charging for the privilege of exercising this constitutional right. *See Murdock v. Pennsylvania*, 319 U.S. 105, 115-16, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); *Cox v. New Hampshire*, 312 U.S. 569, 576-77, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). Jake's argues that this principle extends to the licensing of sexually oriented businesses, citing three district court decisions that referred to such fees as implicating "fundamental" rights. *See AAK, Inc. v. City of Woonsocket*, 830 F.Supp. 99, 105 (D.R.I.1993); *Wendling v. City of Duluth*, 495 F.Supp. 1380, 1384-85 (D.Minn.1980); *Bayside Enter., Inc. v. Carson*, 450 F.Supp. 696, 704 (M.D.Fla.1978). In our view, the analogy to *Murdock* and *Cox* ***891** does not withstand close analysis in light of the Supreme Court's declaration that nude dancing is "only marginally" protected by the First Amendment.

[11] We recognize that an adult entertainment license fee may be so large or so discriminatory as to demonstrate that it is not content neutral. But in other contexts, the prospective licensee has the burden of es-

tablishing that a license fee is unreasonable. *See LCM Enter., Inc. v. Town of Dartmouth*, 14 F.3d 675, 680 (1st Cir.1994). Jake's offered no evidence on this issue, instead simply arguing that the City had the burden to prove its fee is revenue neutral. On this record, we conclude the district court's grant of summary judgment was proper.

[12] **D.** Finally, Jake's challenges the provisions in Ordinance 36 requiring that live exotic dancing be conducted on a platform raised at least two feet from the floor and located no less than six feet from any patron, and prohibiting the solicitation or offering of gratuities for the dancers. Several circuits have upheld similar requirements as reasonable, content-neutral time, place, and manner restrictions. *See Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377, 396-98 (6th Cir.2001) (three feet); *DLS*, 107 F.3d at 408-13 (six feet); *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir.1998), *cert. denied*, 529 U.S. 1053, 120 S.Ct. 1553, 146 L.Ed.2d 459 (2000) (ten feet); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1061-62 (9th Cir.1986) (ten feet and no tipping).

Jake's argues that these restrictions are not needed to combat adverse secondary effects in Coates, pointing to the lack of arrests for sex crimes at its establishment. Jake's also contends that distance requirements destroy "individual patron-focused dancing, a separate and distinct medium of communication," relying on expert testimony it presented to that effect. Like our sister circuits, we conclude these restrictions reasonably further the government interest in preventing crime. As the Ninth Circuit observed in *Kev*, 793 F.2d at 1061:

> Separating dancers from patrons would reduce the opportunity for prostitution and narcotics transactions.... Preventing the exchange of money between dancers and patrons would also appear to reduce the likelihood of drug and sex transactions occurring on regulated premises.... While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired. (footnotes omitted)

[13] Jake's further argues these provisions would have a disastrous effect on its ability to operate because the six-foot requirement would eliminate two-thirds of the seating capacity of 120 patrons, eliminate customer access to the women's restroom, and require further capacity reductions to permit access to the men's restroom. Under the *City of Renton* standard, Ordinance 36 must afford Jake's a "reasonable opportunity to open and operate." 475 U.S. at 54, 106 S.Ct. 925. The inquiry is not concerned with the economic impact of restrictions on a particular business; instead, "we consider the economic effects of the ordinance in the aggregate, not at the individual level." *DLS*, 107 F.3d at 413. Here, the Coates zoning ordinance is constitutional, so Jake's must relocate. Jake's presented no evidence that it could not design a viable new facility that would satisfy the six-foot requirement. It presented evidence that the no-tipping restriction would reduce profits and adversely affect the income of the dancers, but that evidence fell far short of establishing that Ordinance 36 does not provide a reasonable***892** opportunity to open and operate. Thus, while the short-term financial impact of these restrictions might affect implementation of the zoning ordinance's amortization provision--an issue we do not consider--it does not affect the validity of Ordinance 36.

IV. Conclusion.

The judgment of the district court is affirmed except the portion that declared section 508.10(5) of Coates Ordinance No. 36 constitutional. We modify the judgment to provide that plaintiffs' challenge to section 508.10(5) is dismissed for lack of jurisdiction.

284 F.3d 884

Briefs and Other Related Documents (Back to top)

• 01-1869 (Docket) (Apr. 16, 2001)

• 2001 WL 34108187 (Appellate Brief) Appellee's Brief (2001)Original Image of this Document (PDF)

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Motions, Pleadings and Filings

United States District Court,
S.D. California.
FANTASYLAND VIDEO, INC., Plaintiff,
v.
COUNTY OF SAN DIEGO, Defendant.
Tollis, Inc. and 1560 N. Magnolia Ave., LLC, Plaintiffs,
v.
County of San Diego, Defendant.
Nos. CIV. 02CV1909-LABRBB, CIV. 02CV2023-LABRBB.

June 14, 2005.

Background: Operators of adult entertainment businesses brought action against county, alleging certain amendments to county ordinances regulating adult entertainment businesses violated their rights under the federal and California constitutions. Parties filed cross-motions for summary judgment.

Holdings: The District Court, Burns, J., held that:
(1) hours-of-operation restriction did not violate First Amendment;
(2) open-peep show booth requirement did not violate First Amendment;
(3) amended ordinance prohibiting live nude entertainment, but which permitted semi-nude dancing which required de minimis coverage, did not violate free speech provisions of First Amendment or California Constitution;
(4) zoning amendment requiring adult entertainment establishments to be located in industrial zones met the intermediate scrutiny standard of First Amendment; and
(5) permit application process for adult entertainment businesses was unconstitutional to the extent that it failed to impose reasonable time limits on the decisionmaker to act on administrative permit applications.
Motions granted in part and denied in part.

West Headnotes

[1] Constitutional Law 90(1)
92k90(1) Most Cited Cases
Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
Sexually-oriented speech enjoys some protection under the free speech provisions of the First Amendment. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 90(1)
92k90(1) Most Cited Cases

[3] Constitutional Law 90(3)
92k90(3) Most Cited Cases
If a law is designed to have a direct impact by restricting sexually-oriented speech because of the content of the speech and because of the effect the speech may have on its listeners, the law is referred to as a content-based restriction, and the government bears an especially heavy burden to overcome a First Amendment challenge; content-based speech restriction can survive a First Amendment challenge only if it satisfies strict scrutiny, which requires the government not only to identify and establish a compelling interest but also to explain why a less restrictive provision would not be as effective. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
If a law is content-neutral, and its restrictions on sexually-oriented speech are primarily justified, not by the concern for the effect of the subject matter on listeners, but by reducing negative secondary effects associated with
the speech, it is subject to the intermediate level of scrutiny under First Amendment, which is highly deferential to the government. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Content-neutral time, place, and manner restrictions are constitutional under First Amendment intermedi-

ate scrutiny even if they restrain speech, so long as they meet three requirements: restriction must (1) be content-neutral, (2) be narrowly tailored to serve a substantial government interest, and (3) allow for reasonable alternative avenues of communication. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 90(3)
92k90(3) Most Cited Cases
Under intermediate level of scrutiny, government is not required to meet an unnecessarily rigid burden of proof to justify a restriction on speech under First Amendment, and may rely on general experiences, findings, and studies completed by other local governments, including those reflected in judicial opinions; party challenging restriction must effectively controvert much, if not all, of government's evidence, leaving less than "some evidence" on which the government could reasonably rely for the restriction. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[7] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
Hours-of-operation restriction in amendments to county ordinances regulating adult entertainment businesses did not violate free speech provision of First Amendment under intermediate level of scrutiny; operators of adult entertainment businesses failed to rebut more than just some of the categories of permissible evidence relied upon by the county with respect to targeted negative secondary effects associated with the speech. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[8] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
Hours-of-operation restriction in amendments to county ordinances regulating adult entertainment businesses, which met federal constitutional standards, did not violate free speech provision of California Constitution under intermediate level of scrutiny. West's Ann.Cal. Const. Art. 1, § 2.

[9] Constitutional Law 90.4(4)
92k90.4(4) Most Cited Cases

[9] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
Open-peep show booth requirement in county ordinance regulating adult entertainment businesses was a valid restriction on speech under First Amendment; restriction was imposed to prevent unlawful sexual activities between patrons and the resulting spread of sexually-transmitted diseases, was supported by the evidence relied on by county, and was narrowly tailored to further that legitimate governmental interest. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 90.4(1)
92k90.4(1) Most Cited Cases
As long as there is no absolute bar to the market, it is irrelevant to First Amendment analysis whether a time, place, and manner restriction on speech will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 90(3)
92k90(3) Most Cited Cases
In seeking to uphold a restriction on speech under First Amendment intermediate level of scrutiny analysis, government may rely on findings in relevant case law, as well as the experiences of other local governments, and is not required to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence it relies upon is reasonably believed to be relevant to the problem it addresses. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 90(3)
92k90(3) Most Cited Cases
A time, place, and manner restriction is considered narrowly tailored for First Amendment purposes if the government shows its chosen means serves a substantial government interest, and affects only that category of businesses shown to produce the unwanted

secondary effects; under intermediate scrutiny, the government is not required to establish the means it has chosen is the least restrictive or the most effective for addressing a particular problem nor is the government required to show the chosen means will be effective in combating the negative secondary effects. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[13] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
Amended ordinance prohibiting live nude entertainment, but which permitted semi-nude dancing which required de minimis coverage, did not violate free speech provisions of First Amendment or California Constitution; county relied on the legislative record including numerous studies from other jurisdictions, experiences of other municipalities as reported in case law, and local public testimony regarding secondary effects such as prostitution, public sexual activity, and narcotics trafficking, ordinance was narrowly tailored to further legitimate governmental interests, and there was no evidence showing how county's new requirement would affect the dancers' erotic message. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 2.

[14] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
Nude dancing is expressive conduct within the outer perimeters of the First Amendment. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[15] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
Proximity limit and staging requirement of amended adult entertainment ordinance, which required semi-nude entertainers to perform at least six feet from the nearest area occupied by patrons and on a stage elevated at least eighteen inches from the floor, did not violate free speech provision of First Amendment; county's interest in reducing the opportunity for prostitution and narcotics transactions between entertainers and patrons was a legitimate justification for the ordinance, and requirements were reasonably linked to the secondary effects that the county identified as its purpose in enacting the requirements. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[16] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
No-direct-tipping provision of amended adult entertainment ordinance did not violate free speech provision of First Amendment; county's interest in reducing the opportunity for prostitution and narcotics transactions between entertainers and patrons was a legitimate justification for the ordinance, and prohibition was reasonably linked to the secondary effects that the county identified as its purpose in enacting the prohibition. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 296(1)
92k296(1) Most Cited Cases

[17] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
Phrase "regularly appears in a state of semi-nudity," as used in no-direct-tipping provision of the amended adult entertainment ordinance was not impermissibly vague in violation of Due Process Clause simply because it did not specify the frequency required to establish regularity. U.S.C.A. Const.Amend. 14.

[18] Constitutional Law 251.4
92k251.4 Most Cited Cases
A statute or ordinance is not unconstitutionally vague in violation of due process simply because it includes a flexible standard or provides some discretion for enforcement officials. U.S.C.A. Const.Amend. 14.

[19] Constitutional Law 82(1)
92k82(1) Most Cited Cases

[19] Constitutional Law 252.5
92k252.5 Most Cited Cases

Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing those claims. U.S.C.A. Const.Amend. 14.

[20] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[20] Public Amusement and Entertainment 9(2)
315Tk9(2) Most Cited Cases
Provision of county's amended adult entertainment ordinance prohibiting the touching of semi-nude performers did not offend free speech provision of First Amendment; ordinance targeted conduct likely to lead to the unwanted secondary effects of prostitution, pandering and drug trafficking, and was narrowly tailored. U.S.C.A. Const.Amend. 1.

[21] Zoning and Planning 167.1
414k167.1 Most Cited Cases
Operator of adult entertainment business failed to show that zoning amendment requiring adult entertainment establishments to be located in industrial zones was inconsistent with the general plan. West's Ann.Cal.Gov.Code § 65860.

[22] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[22] Zoning and Planning 167.1
414k167.1 Most Cited Cases
Zoning amendment requiring adult entertainment establishments to be located in industrial zones met the intermediate scrutiny standard of First Amendment because it was supported by evidence showing that it would advance a substantial government interest in reducing negative secondary effects, was narrowly tailored, and left open reasonable alternative means of communication. U.S.C.A. Const.Amend. 1.

[23] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[23] Zoning and Planning 167.1
414k167.1 Most Cited Cases
Given the history of scant demand for adult entertainment licenses, the lack of evidence showing others wished to open an adult entertainment business in the unincorporated area of county, the number of potentially available sites and their acreage, and the total industrial and commercial acreage and population in the unincorporated area, county showed that the number of sites available to adult entertainment businesses under the amended zoning ordinance was sufficient to provide reasonable alternative avenues of communication, as required by First Amendment. U.S.C.A. Const.Amend. 1.

[24] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
For purposes of First Amendment challenge to zoning ordinance governing adult entertainment use, factors for consideration in determining whether a site is reasonably within the business real estate market so as to constitute a reasonable alternative avenue of communication are: (1) a relocation site is not part of the market if it is unreasonable to believe that it would ever become available to any commercial enterprise; (2) a relocation site in a manufacturing or industrial zone that is reasonably accessible to the general public may also be part of the market; (3) a site in a manufacturing zone that has proper infrastructure may be included in the market; (4) a site must be reasonable for some generic commercial enterprise, although not every particular enterprise, before it can be considered part of the market; (5) a site that is commercially zoned is part of the relevant market; and (6) site must satisfy the conditions of the zoning ordinance in question. U.S.C.A. Const.Amend. 1.

[25] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases
For purposes of First Amendment challenge to zoning ordinance governing adult entertainment use, relocation sites in industrial zones are considered available so as to constitute a reasonable alternative avenue of communication, if they are reasonably accessible to the public and have the appropriate infrastructure; whether the infrastructure provided is adequate depends on whether it is reasonably necessary for any generic commercial enterprise, and as long as it is a part of an actual business real estate market for generic commercial enterprises, whether a site is economically or physically suited for adult entertainment

use is irrelevant, as are current occupancy and restrictive lease terms prohibiting adult uses. U.S.C.A. Const.Amend. 1.

[26] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[26] Zoning and Planning 76
414k76 Most Cited Cases
Mere presence of hazardous waste, without any evidence as to its extent or showing it is prohibitive to any generic commercial enterprise, was insufficient to render a relocation site for adult entertainment use unavailable for purposes of reasonable alternative avenues of communication prong of First Amendment analysis under intermediate level of scrutiny. U.S.C.A. Const.Amend. 1.

[27] Constitutional Law 82(10)
92k82(10) Most Cited Cases
With respect to First Amendment analysis of zoning ordinance, supply and demand should be only one of several factors that a court considers when determining whether an adult business has a reasonable opportunity to open and operate in a particular city; court should also look to a variety of other factors including, but not limited to, the percentage of available acreage theoretically available to adult businesses, the number of sites potentially available in relation to the population, community needs, the incidence of adult businesses in other comparable communities, and the goals of the city plan. U.S.C.A. Const.Amend. 1.

[28] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[28] Zoning and Planning 167.1
414k167.1 Most Cited Cases
In determining whether number of sites available to adult entertainment businesses under the amended zoning ordinance was sufficient to provide reasonable alternative avenues of communication for First Amendment purposes, focus was on the actual business real estate market where a generic commercial enterprise could potentially operate. U.S.C.A. Const.Amend. 1.

[29] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
Permit application process for adult entertainment businesses, which gave county seventy days to make the decision on a permit application plus sixty days to consider an appeal, was unconstitutional to the extent that it failed to impose reasonable time limits on the decisionmaker to act on administrative permit applications; the only factor in the permit decision could be quickly verified by county's GIS system, which measured the distance between two points.

[30] Zoning and Planning 86
414k86 Most Cited Cases
Unconstitutional permit application process for adult entertainment businesses was severable from remaining substantive zoning provisions since remaining provisions were sufficiently complete in themselves, and county likely would have adopted the amended zoning ordinance, even if it had foreseen some of its procedural provisions would be invalidated.

[31] Zoning and Planning 167.1
414k167.1 Most Cited Cases
Although business had been affected disproportionately because it was the only adult entertainment business which had to change its location as result of zoning ordinance, business failed to establish its spot zoning claim under California law; the only reasonable interpretation of ordinance was that county intended the zoning ordinance as amended to apply to all adult entertainment businesses. U.S.C.A. Const.Amend. 14.

[32] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[32] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
For First Amendment free speech purposes, licensing and registration requirements for adult entertainment establishments and their owners, managers, performers, and employees were narrowly tailored except to the extent that they required each officer, director, general partner, or other person who would manage or participate directly in the decisions relating to management and control of the business to ap-

pear in person at the Sheriff's office to file the establishment license application, and to the extent that it required the same category of individuals to also apply for an employee license, if they were employees as the term was defined in the ordinance; remaining licensing requirements were narrowly tailored to serve a substantial government interests in preventing minors and those who had recently been convicted of certain crimes from working on the premises, facilitating the identification of potential witnesses or suspects, and curtailing the spread of sexually-transmitted diseases. U.S.C.A. Const.Amend. 1.

[33] Constitutional Law 90.4(3)
92k90.4(3) Most Cited Cases

[33] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
Adult entertainment establishment licensing provision requiring applicants to disclose information regarding their names, and business addresses, to the county did not have a "chilling effect" on speech protected by First Amendment. U.S.C.A. Const.Amend. 1.

[34] Public Amusement and Entertainment 9(1)
315Tk9(1) Most Cited Cases
Licensing provisions applicable to adult entertainment establishments satisfied the required procedural safeguards; provisions, which authorized denial based only on objective criteria, did not place unbridled discretion in the hands of a government official or agency, licensor had to make the decision whether to issue the license within thirty days during which the status quo was maintained, and there was the possibility of immediate judicial review in the event that the license was erroneously denied.
***1100** Clyde F De Witt, Weston Garrou and DeWitt, Los Angeles, CA, for Fantasyland Video, Inc., plaintiff.

Thomas Dale Bunton, County of San Diego Office of County Counsel, San Diego, CA, for County of San Diego, defendant.

A Dale Manicom, Law Office of A Dale Manicom, San Diego, CA, for Tollis Inc, movant.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT; INJUNCTION; and ORDER TO SHOW CAUSE
BURNS, District Judge.

In their respective complaints, plaintiffs allege certain amendments to San Diego County ordinances regulating adult entertainment businesses violate their rights under the federal and California constitutions. Before the Court are plaintiffs' Joint Motion for Summary Judgment and defendant's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment. The parties also filed opposing and reply papers, as well as a joint statement of undisputed facts, almost 2,000 pages of legislative record, and over 700 pages of declarations and exhibits. Defendant also filed evidentiary objections. [FN1] Although the parties requested oral argument, the Court finds the issues in both motions appropriate for decision on the papers and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons discussed below, plaintiffs' Joint Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**, and defendant's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment is **GRANTED IN PART AND DENIED IN PART**. As specified more fully below, the Court finds ***1101** unconstitutional certain procedural provisions of the ordinance amendments pertaining to licensing and zoning regulations.

FN1. To the extent the objections are not addressed below, they are overruled.

Background
In June 2002, the San Diego County Board of Supervisors passed Local Ordinance No. 9469, entitled "An Ordinance Amending the San Diego County Zoning Ordinance Relating to Adult Entertainment Establish-

ments;" and Local Ordinance No. 9479, entitled "An Ordinance Amending the San Diego County Code of Regulatory Ordinances Relating to the Licensing and Regulation of Adult Entertainment Establishments." (Legislative Record ("LR"), at 15-32, 139-75.) Both of these ordinances were effective in July 2002.

Plaintiffs filed two separate complaints against San Diego County ("County") which have been consolidated. (Order filed Aug. 5, 2004, at 2, 5.) Plaintiff Tollis, Inc. owns property at 1560 N. Magnolia Avenue in the Pepper Drive/Bostonia area of San Diego County, which it leases to plaintiff 1560 N. Magnolia Ave., LLC. At this location, plaintiff 1560 N. Magnolia Ave., LLC operates a business called Deja Vu, which sells sexually explicit books, magazines, and novelties. Deja Vu also wants to offer live nude dancing at this location. It acquired its present location before the amendments went into effect, after obtaining the operating permit, and on the contingency it could offer nude entertainment. Hereafter, these plaintiffs will be referred to collectively as Deja Vu. Plaintiff Fantasyland Video, Inc. ("Fantasyland") operates a business at 1157 Sweetwater Road in the Spring Valley area of San Diego County, which includes an "Adult Arcade/Peep Show," an "Adult Bookstore," an "Adult Novelty Store," and an "Adult Video Store." (Jt. Stmnt of Facts, 4.)

In their complaints, plaintiffs seek a declaration the amendments to local ordinances which affect either the location or the activities conducted by their businesses violate their right to free speech provisions of the First Amendment. In addition, they seek an injunction prohibiting the enforcement of the amendments against them. Deja Vu also argues the amendments violate the California Constitution, and seeks damages arising out of the County's threat to enforce the amendments.

Although they filed a Joint Motion for Summary Judgment, each of the plaintiffs challenges only those portions of the amendments affecting their particular businesses. Plaintiffs' Joint Motion seeks summary judgment "in the form of an order enjoining the County from enforcing" the ordinances as amended because they are unconstitutional. The County's Motion seeks summary judgment in its favor on the ground all amendments to the ordinances are constitutional and enforceable against plaintiffs.

Discussion

I. Summary Judgment Standards

Federal Rule of Civil Procedure 56(c) empowers the court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir.2001). ***1102** The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. *Id.* at 248, 106 S.Ct. 2505. A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

"When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case. Once the moving party comes forward with sufficient evidence, the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense." *C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir.2000) (citations omitted).

In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of

evidence from the nonmoving party. The moving party need not disprove the other party's case. *See Celotex*, 477 U.S. at 325, 106 S.Ct. 2548; *see also Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir.1998).

If the movant meets his burden, the burden shifts to the nonmovant to show summary adjudication is not appropriate. *Celotex*, 477 U.S. at 317, 324, 106 S.Ct. 2548. The nonmovant does not meet this burden by showing "some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The "mere scintilla of evidence in support of the nonmoving party's position is not sufficient." *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505. Accordingly, the nonmoving party cannot oppose a properly supported summary adjudication motion by "rest[ing] on mere allegations or denials in his pleadings." *Id.* at 256, 106 S.Ct. 2505. The nonmovant must go beyond the pleadings to designate specific facts showing there are genuine factual issues which "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250, 106 S.Ct. 2505.

In considering the motion, the nonmovant's evidence is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505. Determinations regarding credibility, the weighing of evidence, and the drawing of legitimate inferences are jury functions, and are not appropriate for resolution by the court on a summary judgment motion. *Id.*

In this case, the parties filed cross-motions regarding some of the same causes of action. As discussed below, the County bears the burden of proof at trial with respect to some issues raised by the cross-motions; with respect to other issues, the burden is on plaintiffs. The mere fact the parties filed cross-motions "does not necessarily mean there are no disputed issues of material fact and does not necessarily permit the judge to render judgment in favor of one side or the other." *Starsky v. Williams*, 512 F.2d 109, 112 (9th Cir.1975). "[E]ach motion must be considered on its own merits." *Fair Hous. Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir.2001).

When proper grounds for granting summary judgment have not been established, "[s]ummary adjudication may be appropriate on clearly defined, distinct issues." ***1103** *FMC Corp. v. Vendo Co.*, 196 F.Supp.2d 1023, 1029 (E.D.Cal.2002) (citing *Robi v. Five Platters, Inc.*, 918 F.2d 1439 (9th Cir.1990)). "An order under Rule 56(d) narrows the issues and enables the parties to recognize more fully their rights, yet it permits the court to retain full power to completely adjudicate all aspects of the case when the proper time arrives." *FMC Corp.*, 196 F.Supp.2d at 1029-30 (citing 10B Wright & Miller, Federal Practice and Procedure (3d ed.1998), § 2737 at 316-18). Specifically, Rule 56(d) empowers the court to "ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted" and to "mak[e] an order specifying the facts that appear without substantial controversy, and direct[ ] such further proceedings in the action as are just."

II. Summary of Applicable First Amendment Principles and Burdens of Proof

The parties dispute the legal standard and burdens of proof applicable to time, place, and manner restrictions regulating adult entertainment businesses after *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). Since this standard applies to many issues raised by the cross-motions, the Court addresses it in detail below.

[1][2] The general rule is "[l]aws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *United States v. Playboy Entm't Group*, 529 U.S. 803, 812, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). "In general, where a plaintiff claims suppression of speech under the First Amendment, the plaintiff bears the initial burden of proving that speech was restricted by the governmental action in question." *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 n. 4 (9th Cir.2000). It is beyond question sexually-oriented speech enjoys some protection under the free speech provisions of the First Amendment. *Playboy*, 529 U.S. at 812-17, 120 S.Ct. 1878. Al-

though neither party expressly discusses the issue whether the County's amendments restrict protected speech; the undisputed underlying premise of their motions is that they do.

"The burden then shifts to the defendant governmental entity to prove that the restriction in question is constitutional." *Lim*, 217 F.3d at 1054 n. 4. The government cannot ban sexually-oriented speech altogether but can place restrictions on it so long as the restrictions satisfy one of two standards. The purpose or justification behind the law in question is the key to determining which of the two standards applies.

[3] If the law is designed to have a direct impact by restricting speech because of the content of the speech and because of the effect the speech may have on its listeners, the law is referred to as a content-based restriction, and the government bears an especially heavy burden to overcome a First Amendment challenge. *Playboy*, 529 U.S. at 812-17, 120 S.Ct. 1878. A content-based speech restriction can survive a First Amendment challenge only if "it satisfies strict scrutiny," which requires the government not only to identify and establish a compelling interest but also to explain why a less restrictive provision would not be as effective. *Id.* at 813, 817, 120 S.Ct. 1878.

[4] On the other hand, if the law is content-neutral, and its restrictions on sexually-oriented speech are primarily justified not by the concern for the effect of the subject matter on listeners, but by reducing negative secondary effects associated with the speech, it is subject to the intermediate level of scrutiny, which is highly deferential to the government. ***1104***City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The parties in this case do not dispute the intermediate scrutiny, rather than strict scrutiny, applies.

[5] Content-neutral time, place, and manner restrictions are constitutional under intermediate scrutiny even if they restrain speech, so long as they meet three requirements. First, the restriction must be "content-neutral." This means the restriction can be justified without reference to the content of the speech. A restriction can be justified without reference to the content of the speech if the "predominate intent" behind the restriction is not to suppress the speech but to "serve a substantial government interest," such as preventing crime or combating "the undesirable secondary effects" of businesses which "purvey sexually explicit materials." *Renton*, 475 U.S. at 48-49, 106 S.Ct. 925. If so justified, restrictions which specifically target or treat adult businesses differently from other types of businesses can be content-neural. *Id.* at 47-48, 106 S.Ct. 925.

Second, the restriction must be "narrowly tailored" to "serve a substantial government interest." *Renton*, 475 U.S. at 50-52, 106 S.Ct. 925. In *Renton*, for example, a zoning ordinance, which required adult movie theaters to be located at least 1,000 feet from residential zones, churches, parks, and schools, was held narrowly tailored and constitutional. *Id.* at 43, 106 S.Ct. 925. The ordinance was considered "narrowly tailored" because it did not apply to all theaters but was designed "to affect only that category of theaters shown to produce the unwanted secondary effects." *Id.* at 52, 106 S.Ct. 925. And this form of selectivity is constitutionally permissible; a time, place, and manner restriction affecting protected speech can be "under-inclusive." *Id.* In other words, the government does not have to attempt to address all of its interests at one time. *Id.* at 52-53, 106 S.Ct. 925. The location restriction in *Renton* only applied to adult theaters and not to other types of adult businesses. This was and is permissible because the government "must be allowed a reasonable opportunity to experiment with solutions" and can, for example, choose to single out and place limitations on "one particular kind of adult business." *Id.* (internal quotation marks and citation omitted). Furthermore, the government has broad discretion in selecting a method "to further its substantial interests." *Id.* at 52, 106 S.Ct. 925. It may, for example, "regulate adult theaters by dispersing them" or "by effectively concentrating them" in the same area. *Id.*

Third, the restriction must allow "for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50, 52, 106 S.Ct. 925. The "overriding concern is that a city cannot 'effectively deny adult businesses a reasonable opportunity to open and operate within the city.' " *Diamond v. City of Taft*, 215 F.3d

1052, 1056 (9th Cir.2000) (quoting *Renton*, 475 U.S. at 54, 106 S.Ct. 925) (internal alterations omitted). An adult business is given a reasonable opportunity to relocate, if the potential relocation sites "may be considered part of an actual business real estate market," and if "there are an adequate number of potential relocation sites for already existing businesses." *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1530 (9th Cir.1993). "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Renton*, 475 U.S. at 54, 106 S.Ct. 925.

[6] Although the burden of proof with respect to these requirements is on the government, the burden is not difficult to meet. *See, e.g.*, ***1105***World Wide Video, Inc. v. City of Spokane*, 368 F.3d 1186, 1196 (9th Cir.2004), 2004 U.S.App.Lexis 10443, 2005 WL 1429810, 2004 U.S.App. LEXIS 14381 and 2005 WL 1429810, 2004 U.S.App. LEXIS 18927 (referring to the standard set forth in *Renton* and *Alameda Books* as "very little evidence standard"). The government is not required to meet "an unnecessarily rigid burden of proof" to justify the restriction and may rely on general experiences, findings, and studies completed by other local governments, including those reflected in judicial opinions:

> [The government] was entitled to rely on the experiences of ... other cities, and in particular on the "detailed findings" summarized in [a judicial] opinion, in enacting its adult theater zoning ordinance. 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.

Renton, 475 U.S. at 50, 51-52, 106 S.Ct. 925; *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (reliance on judicial opinions discussing secondary effects of similar activities or establishments is reasonable).

Plaintiffs believe the highly deferential standard set forth in *Renton* was modified in their favor by *Alameda Books*. They argue the government is no longer entitled to the "extreme deference" articulated in *Renton*.

Plaintiffs' argument is based on a misreading of Justice Kennedy's concurring opinion in *Alameda Books*. Although Justice Kennedy's concurrence "may be regarded as the controlling opinion," because there was no majority opinion, it did not work a fundamental shift in the *Renton* analysis. *See Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1161-62 (9th Cir.2003) (citing *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("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 judgment on the narrowest grounds.")). Justice Kennedy disavowed any interpretation which would fundamentally change the *Renton* standard. *Alameda Books*, 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring) ("the central holding of *Renton* is sound"). He agreed with the plurality laws "designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.* The plurality considered his opinion "simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban." *Id.* at 443, 122 S.Ct. 1728. Accordingly, Justice Kennedy's concurring opinion was not "meant to precipitate a sea change in this particular comer of First Amendment law," as suggested by plaintiffs. *See Ctr. for Fair Pub. Policy*, 336 F.3d at 1162.

In *Alameda Books*, the Supreme Court granted *certiorari* to "clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton*." *Alameda Books*, 535 U.S. at 433, 122 S.Ct. 1728. The plurality opinion noted the *Renton* standard is not intended to mean a government "can get away with shoddy data or reasoning." *Id.* at 438, 122 S.Ct. 1728. The focus of many of plaintiffs' arguments in this case is the reference to "shoddy data"--they argue the reports and other evidence relied on by the County in amending its ordinances are "shoddy" and do not support the County's ***1106** rationale for the new restrictions on their businesses. In addition, *Alameda Books* set forth a shifting burden

of proof:

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

Id. at 438-39, 122 S.Ct. 1728. In this regard, plaintiffs argue their evidence is at the very least sufficient to "cast direct doubt" on the County's rationale for the amendments, thereby shifting the burden to the County to supplement the record.

Plaintiffs interpretation of *Alameda Books* as raising the government's evidentiary bar is unsupported by its holding, and was expressly rejected by the plurality and Justice Kennedy's concurrence, which noted "very little evidence is required" for the government to meet its burden. *Alameda Books*, 535 U.S. at 451, 122 S.Ct. 1728. Given the low level of evidence required for the government to properly support a content-neutral ordinance, and the high level of deference it is afforded, the plaintiff's burden to "cast direct doubt" on the government's rationale is very high. *See World Wide Video*, 368 F.3d at 1195-96; *Ctr. for Fair Pub. Policy*, 336 F.3d at 1168.

III. Hours-of-Operation Restriction

A. The First Amendment Claim

[7] In their respective operative complaints, all plaintiffs challenge on First Amendment grounds the new hours-of-operation restriction, which states as follows:

> It shall be unlawful for any owner, operator, manager or employee of an adult entertainment establishment to allow such establishment to remain open for business between the hours of 2:00 a.m. and 6:00 a.m. of any day excepting herefrom an adult hotel/motel.

(LR, at 154 [Ordinance No. 9479, § 21.1809].) The County moves for summary judgment on plaintiffs' hours-of-operation claim, and all plaintiffs cross-move for summary judgment on this claim.

It is undisputed intermediate scrutiny applies to the hours-of-operation provision. Accordingly,

> [t]he familiar three-part analytical framework established in *Renton* applies. First, we must determine whether the regulation is a complete ban on protected expression. Second, we must determine whether the county's purpose in enacting the provision is the amelioration of secondary effects. If so, it is subject to intermediate scrutiny, and we must ask whether the provision is designed to serve a substantial government interest, and whether reasonable alternative avenues of communication remain available.

Dream Palace v. County of Maricopa, 384 F.3d 990, 1013 (9th Cir.2004) (internal citations omitted). Plaintiffs do not dispute the hours-of-operation restriction is content-neutral. Instead, they challenge whether the concerns the County aims to address constitute a substantial government interest, and whether the restriction leaves open reasonable alternative avenues of communication. Plaintiffs contend the County's evidence is insufficient to demonstrate a connection between the new provision and amelioration of negative secondary effects of adult entertainment businesses.

***1107** The County maintains the hours-of-operation restriction was intended to reduce negative secondary effects of excessive noise, traffic, disorderly conduct and crime during late night hours. In enacting the restriction, the County relied on evidence including twenty-eight studies from other jurisdictions regarding secondary effects of adult entertainment businesses, such as prostitution, public sexual activity, noise and unclean conditions (LR, at 443-1718, 1752-1833); experiences of other municipalities as reported in several judicial opinions (LR, at 6-17, 141-42, 1719-47); and local public testimony by fifteen witnesses (LR, at 1906 *et seq.*). [FN2] This record "compares favorably to the record found to pass muster" in *Center for Fair Public Policy and Dream Palace. See Dream Palace*, 384 F.3d at 1015. The type of evidence considered by the County has been held "reasonable and relevant" in other cases. *Id.*

(quoting *Ctr. for Fair Public Policy*, 336 F.3d at 1168).

> FN2. The County also indicated a willingness to supply the Court with additional studies and expert declarations, if the Court finds plaintiffs cast direct doubt on the County's rationale. (Def.'s Opp'n, at 7.)

Furthermore, the County argues *Center for Fair Public Policy* bars plaintiffs' claim as a matter of law because it rejected a First Amendment challenge to a similar hours-of-operation restriction. Although *Center for Fair Public Policy* established a general proposition hours-of-operation restrictions may pass muster under the First Amendment, this does not relieve the Court of the duty to put the County to its proof in this case. *See Dream Palace*, 384 F.3d at 1012.

Plaintiffs do not contend the County failed to satisfy its initial burden of producing evidence which fairly supports the amendments. Instead, they argue their contrary evidence "cast[s] ample doubt on the County's proffered justification for its legislation," shifts the burden to the County to supplement the record with further justification, and raises a genuine issue of material fact sufficient to preclude summary judgment for the County. (Pls.' Joint Mot., at 1-3.) By presenting their own evidence, plaintiffs attempt to distinguish this case from *Center for Fair Public Policy*.

Specifically, plaintiffs mount a two-pronged attack on the County's evidence. First, they attempt to demonstrate the County's evidence does not support its rationale by pointing to the testimony of the County's own expert, Dr. Richard McCleary. *See Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728 (plurality opinion). Second, plaintiffs furnish evidence, a report and empirical studies of their expert Dr. Daniel Linz, which they contend disputes the County's evidence. *See id.* As discussed below, neither prong is sufficient as a matter of law to cast direct doubt on the County's evidence, raise a genuine issue of material fact in opposition to the County's summary judgment motion, or meet plaintiffs' burden as the moving parties on their own cross-motion.

Dr. McCleary testified "late-night crime is independent of adult entertainment businesses and rather derives from alcoholic beverage establishments and their patrons." (Pls.' Joint Reply, at 2.) Plaintiffs argue Dr. McCleary conceded there is no connection between late night crime and adult entertainment businesses or their patrons. (*Id.*) The Court has reviewed the entirety of Dr. McCleary's testimony submitted by both sides (Bunton Reply Decl., Ex. 18; Manicom Opp'n Decl., Ex. 3), and finds it does not support plaintiffs' argument. Furthermore, in the context of all the secondary effects the County sought to address, plaintiffs' argument, even if believed, is insufficient as a matter of law.

***1108** Dr. McCleary testified there would still be an increase in crime "independent of any adult businesses" and even if all businesses were closed from 2:00 a.m. to 6:00 a.m. because "[c]riminals often operate during late night, early morning hours when witnesses and police are less likely to be present." (Bunton Reply Decl., Ex. 18, at 46-47.) However, he also testified businesses open between 2:00 a.m. and 6:00 a.m. are a "focus point for noise" because bar patrons tend to look for another place to go after the bars close at 1:00 a.m., and bar patrons who have consumed alcoholic beverages have been known to congregate outside adult businesses, resulting in noise complaints. (*Id.* at 33-34.) He indicated the hours restriction is justifiable because police resources are very strained during these hours, which results in added risks to public safety. (*Id.* at 41 *et seq.*) Furthermore, if fewer people are "out and about" during the late night hours because businesses are closed, it will be more difficult for "predatory criminals" to find victims, resulting in a reduction in crime. (*Id.* at 46-47.)

Even if the Court accepted plaintiffs' interpretation of Dr. McCleary's testimony to suggest late night crime is independent of adult entertainment businesses, it is insufficient to cast direct doubt on the County's evidence. To raise a genuine issue of material fact on summary judgment, a fact is material if it could affect the outcome of the suit under the governing substantive law. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. Under Ninth Circuit law interpreting and applying the burden-shifting standard articulated in *Alameda*

Books, plaintiffs must effectively controvert much, if not all, of the County's evidence, leaving less than "some evidence" on which the County could reasonably rely for the ordinance. *World Wide Video*, 368 F.3d at 1195-96 (affirming order granting the government's motion for summary judgment). As in *World Wide Video*, plaintiffs' argument here does not effectively controvert much of the County's evidence because the County relied on a voluminous legislative record, including numerous studies conducted by other municipalities, judicial opinions discussing similar secondary effects and public testimony, which plaintiffs do not address. Furthermore, plaintiffs' argument is targeted only toward evidentiary support addressing late night crime, and does not address the other targeted secondary effects such as late night noise, traffic and disorderly conduct. The County only needs "some evidence" to support its ordinance. *Id.* Accordingly, plaintiffs' first argument fails as a matter of law to cast direct doubt on the County's evidence.

Plaintiffs' second argument is based on Dr. Linz' report. Dr. Linz opined the reports cited by the County on the negative secondary effects of sexually-oriented businesses are unreliable because their methodology and empirical assumptions are flawed. He participated in a number of other relevant studies, which he claims do not suffer from "methodological flaws," and show sexually-oriented businesses are not causally related to crime. (Linz Decl., at 9.) In addition, Dr. Linz conducted "an empirical study" which examined "whether there is a greater incidence of crime in the vicinity of peep show establishments than in comparable control areas, and whether any secondary crime effects of peep show establishments in San Diego are disproportionately greater between the hours of 2 a.m. and 6 a.m." (*Id.* at 11.) He also completed "an empirical study of criminal activity surrounding adult businesses in San Diego County." (*Id.* at 12.) Based on his own studies, Dr. Linz opined there is "no evidence that the adult businesses examined in the study are associated in any way with the clustering of crimes against persons...." (*Id.*)

***1109** Plaintiffs point out Dr. Linz' approach was accepted by other courts in cases involving successful challenges to municipal ordinances. *See Ramos v. Town of Vernon*, 353 F.3d 171 (2nd Cir.2003); *Hodgkins v. Peterson*, 2004 U.S. Dist. LEXIS 16359 (S.D.Ind.); *J.L. Spoons, Inc. v. Morckel*, 314 F.Supp.2d 746 (N.D.Ohio 2004). These cases, however, are distinguishable. *Ramos* and *Hodgkins* did not involve adult entertainment businesses. They addressed juvenile curfew ordinances, and were analyzed under a different legal standard. *Ramos*, 353 F.3d at 176-84 (applying equal protection intermediate scrutiny to a curfew restriction on to minors' right to intrastate travel); *Hodgkins*, 2004 U.S. Dist. LEXIS 16359 (applying strict scrutiny to parental rights issue). Although *J.L. Spoons* involved an adult entertainment ordinance, the plaintiffs presented a facial overbreadth challenge, and the court did not apply *Alameda Books* but *Triplett Grille v. City of Akron*, 40 F.3d 129, 132 (6th Cir.1994). None of these cases is therefore helpful in analyzing whether plaintiffs cast direct doubt on the County's evidence following *Alameda Books.*

On the other hand, Dr. Linz' approach was unsuccessful in pertinent cases. *See Pap's*, 529 U.S. at 300, 120 S.Ct. 1382; *Alameda Books*, 535 U.S. at 439, 122 S.Ct. 1728 (plurality opinion); *Nite Moves Entm't. Inc. v. City of Boise*, 153 F.Supp.2d 1198, 1208-09 (D.Idaho 2001). In *Pap's*, *amicus curiae* relied on Dr. Linz' study, and apparently suggested when secondary effects are amenable to empirical treatment, the government's non-empirical evidence should be discounted, and an empirical analysis should be required. 529 U.S. at 314-15 n. 3, 120 S.Ct. 1382 (Souter, J., dissenting). The majority opinion rejected this idea. *Id.* at 300, 120 S.Ct. 1382. As in this case, in *Alameda Books*, *amicus curiae* criticized the studies relied upon by the City of Los Angeles, 535 U.S. at 453-54 n. 1, 122 S.Ct. 1728 (Souter, J., dissenting). Again, the plurality rejected the idea and noted the governments have never been required to demonstrate with empirical data their ordinances will successfully lower crime. *Id.* at 439, 122 S.Ct. 1728.

Plaintiffs' argument is similar to the one considered and rejected by the Seventh Circuit in *G.M. Enterprises v. Town of St. Joseph*, 350 F.3d 631 (7th Cir.2003). Along with other evidence contrary to the government's position, those challenging the ordinance submitted a study and declaration by Dr. Linz

that attacked the methodology employed in the studies relied upon by the government. *Id.* at 635-36. The Seventh Circuit concluded this was just "some evidence that might arguably undermine the [government's] inference of the correlation of adult entertainment and adverse secondary effects...." *Id.* at 639. It concluded "some evidence" was not enough:

> Although this evidence shows that the [government] might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the [government's] legislative process. [¶] *Alameda Books* does not require a court to re-weigh the evidence considered by a legislative body, nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence "reasonably believed to be relevant to the problem" addressed.

Id. at 639-40 (quoting *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925); *see also Alameda Books*, 535 U.S. at 440, 122 S.Ct. 1728 (plurality opinion) (acknowledging the local ***1110** legislative body "is in a better position than the Judiciary to gather and evaluate data on local problems"), 445 (Kennedy, J., concurring) ("as a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners.... [t]he [local legislative body] knows the streets of [the city] better than we do").

The Seventh Circuit's analysis in *G.M. Enterprises* is consistent with the Ninth Circuit's analysis in *World Wide Video.* As discussed above, to successfully cast direct doubt on the County's evidence, plaintiffs bear a heavy burden of effectively rebutting more than just some of the categories of permissible evidence relied upon by the County with respect to each targeted secondary effects. *See World Wide Video*, 368 F.3d at 1195-96. So long as some evidence remains upon which the County reasonably relied, plaintiffs fail to cast direct doubt. *See id.* Although Dr. Linz' study and opinion purport to contradict some of the County's secondary effect evidence, plaintiffs' argument in this regard suffers from some of the same fatal infirmities as their first argument based on Dr. McCleary's testimony. It addresses only the reports from other municipalities, but does not address the judicial opinions and public testimony which the County also considered. In addition, it is directed only toward late night crime, and does not address the remaining secondary effects the County targeted.

As plaintiffs' evidence is insufficient as a matter of law to cast direct doubt on the County's evidence, plaintiffs fall short of meeting their burden to raise a genuine issue of material fact in opposition to the County's summary judgment motion with respect to the new hours-of-operation restriction. *A fortiori*, plaintiffs also fail to meet their burden as the moving parties on their cross-motion. Therefore, the County's motion for summary judgment of this issue is granted, and plaintiff's cross-motion is denied.

B. The California Constitution Claim

[8] Plaintiffs move for summary judgment of their hours-of-operation restriction claim to the extent it is based on the California Constitution, and the County counters on the same claim. Relying on the California Supreme Court's decision in *People v. Glaze*, 27 Cal.3d 841, 166 Cal.Rptr. 859, 614 P.2d 291 (1980), plaintiffs argue the new hours-of-operation restriction violates Article I, Section 2, of the California Constitution. The County argues the pertinent portion of *Glaze* is no longer good law, and the ordinance at issue therein is distinguishable in several material respects. A review of the cases cited by the parties reveals the County is correct.

In *People v. Glaze*, the California Supreme Court held invalid under the California Constitution an ordinance which required picture arcades to be closed between 2:00 a.m. and 9:00 a.m. 27 Cal.3d at 843-44, 849, 166 Cal.Rptr. 859, 614 P.2d 291 (1980). The purpose of the hours-of-operation restriction was to "prevent masturbation during those hours when law enforcement problems are greatest." *Id.* at 847, 166 Cal.Rptr. 859, 614 P.2d 291. The court found:

> [C]rime in the streets could be reduced by prohibiting all persons from going out in public. However, when fundamental liberties are at stake, the test in a free society is whether there are "less drastic means" available to accomplish the government's

> purpose .... The government may deal directly with masturbation in public picture arcades by persons who know or should know of the presence of others who may be offended by such conduct by arresting and prosecuting ***1111** them .... The record before this court fails to show either that criminal activity is particularly acute at picture arcades or that it is prevalent between the hours of 2 a.m. and 9 a.m.

Id. at 847-48, 166 Cal.Rptr. 859, 614 P.2d 291.

The *Glaze* ordinance is distinguishable. First, preventing masturbation was the only reason for the hours-of-operation restriction, while here the County has different and multiple reasons for its restriction. Second, the *Glaze* ordinance applied to all arcades and not just to those where masturbation was likely to be a problem, while the County's ordinance applies only to adult entertainment businesses. Last, the *Glaze* ordinance required arcades to be closed three more hours per day than the County's ordinance.

More importantly, however, *Glaze* is not controlling because it applied a higher standard than necessary: strict, rather than intermediate, scrutiny. *Id.* at 848-49, 166 Cal.Rptr. 859, 614 P.2d 291. As already noted, the United States Supreme Court established in *Renton* that intermediate level of scrutiny should be applied when analyzing restrictions on sexually-oriented speech. 475 U.S. at 46-49, 106 S.Ct. 925. Following *Renton*, the California Supreme Court held the time, place, and manner test under the free speech provisions of the California Constitution are analyzed under federal constitutional standards:

> [O]ur formulation of the time, place, and manner test was fashioned from a long line of United States Supreme Court cases, and ... analysis of speech regulation under article I, section 2(a), employs time, place, and manner restrictions measured by federal constitutional standards. The high court continues to employ the same formulation set out above in its time, place, and manner inquiry.

Los Angeles Alliance for Survival v. City of Los Angeles, 22 Cal.4th 352, 364 n. 7, 93 Cal.Rptr.2d 1, 993 P.2d 334 (2000) (internal quotation marks, citations and alterations omitted). Given these developments in California law, and the Court's finding the County's hours-of-operation restriction meets federal constitutional standards, plaintiffs' summary judgment motion as to the same claim under the California Constitution is denied, and the County's cross-motion is granted.

IV. Interior Configuration (Open-Booth) Requirement

Plaintiff Fantasyland operates an "adult bookstore and arcade." (Andrus Decl., at 2.) The rear portion of the store contains peep show booths (*i.e.*, "small, private viewing areas, each of which has a currency-operated device that facilitates the viewing of adult motion pictures"). (*Id.* at 3.) The peep show booths are "designed to accommodate only one customer at a time" and currently have "lockable doors on them." (*Id.* at 5.)

[9] Fantasyland's complaint challenges two specific requirements of the amended ordinance, which apply to the peep show booths. In pertinent part, the amendment prohibits any "door, curtain, or obstruction of any kind [to] be installed within the entrance to a peep show booth." (LR, at 157 [Ordinance No. 9479, § 21.1816(2)].) Another challenged portion of the amendment states as follows:

> No person shall operate a peep show unless a manager is on duty to ensure its lawful operation and is located at a manager's station which has an unobstructed view of the entrance to each peep show booth.

(*Id.* at 158 [§ 21.1819].) The County moves for summary judgment on Fantasyland's First Amendment claim that these provisions, referred to jointly as "open-booth ***1112** requirement," violate the First Amendment. Fantasyland cross-moves for summary judgment on the same claims.

Fantasyland acknowledges "regulations comparable to this one have been upheld in this circuit." (Pls.' Joint Mot., at 10.) However, it argues these decisions are not necessarily controlling because of the Supreme Court's more recent decision in *Alameda Books*. Based in large part on *Alameda Books*, Fantasyland contends it is entitled to summary judgment in its favor on this issue for three main reasons. First, it argues the open-booth requirement unconstitutionally reduces the secondary effects by reducing or chilling

protected speech. Second, it contends the County relied on "shoddy" evidence to support its rationale for the open-booth requirement, and Fantasyland's evidence casts direct doubt on this rationale. Third, Fantasyland claims the open-booth requirement is not narrowly tailored.

A. Rationale for the Amendment

Fantasyland argues the open-booth requirement will address the secondary effects targeted by the County's amendment by significantly and impermissibly reducing or chilling speech because most customers will not want to view adult movies inside the booths when they no longer offer privacy. (Andrus Decl., at 5.) Fantasyland relies on Justice Kennedy's comment in his concurring opinion in *Alameda Books:* "Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy." 535 U.S. at 445, 122 S.Ct. 1728.

Justice Kennedy concurred in the judgment but filed a separate opinion in pertinent part because "the plurality's application of *Renton* [to the facts of *Alameda Books*] might constitute a subtle expansion, with which [he did] not concur." *Id.* (Kennedy, J., concurring). He was concerned the analysis did not sufficiently take into account the effect of the challenged ordinance on speech, *i.e.*, the proportionality. At the outset, the government should advance some rationale or basis for a belief "that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 449, 122 S.Ct. 1728.

As discussed above, to the extent Fantasyland interprets the concurring opinion as working a fundamental shift in the *Renton* analysis, it is mistaken. *See Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring); *Ctr. for Fair Pub. Policy,* 336 F.3d at 1162. In *Center for Fair Public Policy*, the Ninth Circuit rejected an argument similar to the one Fantasyland makes here. The plaintiffs argued an hours-of-operation restriction reduced the secondary effects simply by reducing speech because the patrons prefer to frequent adult entertainment businesses during late night hours, and the ordinance prohibited their operation at that time. *Ctr. for Fair Pub. Policy,* 336 F.3d at 1162. The court disagreed because accepting the plaintiff's argument "cannot be squared with [Justice Kennedy's] insistence that the central holding of *Renton* remains sound." *Id.* (internal quotation marks and citations omitted).

This is apparent from the example Justice Kennedy offered to clarify his point:

> If two adult businesses are under the same roof, and ordinance requiring them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionally. But ... a promised proportional reduction does not suffice.... [¶] The premise ... must be that businesses ... will for the ***1113** most part disperse rather than shut down.

Alameda Books, 535 U.S. at 451, 122 S.Ct. 1728. Accordingly, the proportionality inquiry goes to the government's premise or rationale for the ordinance, which cannot be to reduce secondary effects by reducing speech. *Id.* at 449, 122 S.Ct. 1728 ("what proposition does a city need to advance in order to sustain a secondary-effects ordinance"), 451 ("[o]nly after identifying the proposition to be proved can we ask the second part of the question presented: is there sufficient evidence to support the proposition?"). Whether there is sufficient evidence to support the rationale is a separate inquiry. *Id.* at 451, 122 S.Ct. 1728.

In the amended ordinance, the County stated its purpose as:

> It is the purpose of this ordinance to regulate adult entertainment establishments in order to promote health, safety and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious effects of adult entertainment establishments within the County. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials.

(LR, at 140-41 [Ordinance No. 9479, § 21.1801(A)].) With the open-booth requirement specifically, the

County sought to prevent unlawful sexual activities between patrons and the resulting spread of sexually-transmitted diseases. (LR, at 499-503, 1277-78, 1310, 1313, 1316-17, 1541.) Nothing in the record, including Fantasyland's evidence, suggests the premise was to preclude patrons from viewing peep shows.

Fantasyland relies on the declaration of William H. Andrus, Vice President of Fantasyland and its parent company, who has been closely involved with the development and operation of at least fifty similar businesses in the United States. Mr. Andrus offered his observations based on extensive experience that a change from private to open viewing areas causes an immediate drop in the amount of viewing "typically to roughly 40% of what it was prior to the change," because "most customers disfavor viewing sexually oriented motion pictures in an open setting." (Andrus Decl., at 5.) Fantasyland argues Mr. Andrus' declaration proves the open-booth requirement will significantly reduce speech. As discussed above, this is not the relevant inquiry. The relevant inquiry is whether reducing speech was the premise for the open-booth requirement. Mr. Andrus' declaration does not speak to this inquiry.

In any event, an open-booth requirement does not reduce speech because it does not limit what movies can be shown, and does not preclude anyone from using the booths as a means for viewing movies--patrons can continue to watch whatever movies they want in the open booths. *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1247 (9th Cir.1982). Other circuits have also found open-booth requirements to be constitutional time, place, and manner restrictions which do not substantially reduce speech. *See, e.g., Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, (7th Cir.2002); *Matney v. County of Kenosha*, 86 F.3d 692, (7th Cir.1996); *Bamon Corp. v. City of Dayton*, 923 F.2d 470, 473 (6th Cir.1991); *Doe v. City of Minneapolis*, 898 F.2d 612, 617 (8th Cir.1990).

[10] To the extent Fantasyland's argument is based on the economic effect the open-booth requirement will have on its business, it is not constitutionally cognizable. *See Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663, 665 (9th Cir.1996). As long as there is no "absolute bar to the ***1114** market ..., it is irrelevant whether '[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business.' " *Id.* at 666 (alteration in the original) (quoting *Walnut Properties v. City of Whittier*, 861 F.2d 1102, 1109 (9th Cir.1988)); *see also Matney*, 86 F.3d at 700. Accordingly, Mr. Andrus' declaration is insufficient to raise a material issue of fact. *See Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. Based on the foregoing, Fantasyland's argument is unsupported by relevant evidence and fails as a matter of law.

B. Evidentiary Support for the Amendment

Fantasyland next argues the County lacks sufficient evidence in support of its open-booth requirement. The main purpose for the requirement is to prevent unlawful sexual activities between patrons on the premises of adult arcades, and to prevent the resulting spread of sexually-transmitted diseases. To support its rationale for the open-booth requirement, the County cites to a number of studies and reports in the Legislative Record demonstrating the prevalence of unlawful sexual activities between patrons inside the closed booths and "glory holes" [FN3] between the booths. (LR, at 499-503, 1277- 78, 1310, 1313, 1316-17, 1541.) According to the County, these studies show unprotected sex is common in adult entertainment establishments, which promotes the spread of sexually-transmitted diseases. (Def.'s Mot., at 22 n. 15.) Fantasyland argues the County's evidence is shoddy because the proposition sexually-transmitted diseases could be transmitted by the semen left in the booths is not scientifically supported, and the County cited to no evidence criminal activity actually takes place in Fantasyland's booths.

> FN3. A "glory hole" is a hole between two adjoining booths used to promote anonymous sex. (LR, at 1310.)

Fantasyland believes the County's rationale for the open-booth requirement is "the transmission of disease with respect to residue from masturbation." (Pls.' Joint Mot., at 10.) Dr. John M. Goldenring, Fantasyland's expert in public health and the transmission of diseases, including sexually-transmitted diseases, re-

viewed the relevant portions of the Legislative Record, and was not able "to find any support for the proposition that any sexually transmitted disease could be transmitted absent sexual contact." (Goldenring Decl., at 7- 8.) According to Dr. Goldenring, absent direct sexual contact between the genitals of one person and the genitals, anus or mouth of another, "the likelihood of a [sexually transmitted disease] being transmitted by bodily fluids, such as semen, urine or saliva existing on surfaces is minute, nearly zero." (*Id.* at 5.) "Other contagious diseases, such as influenza, the common cold, and other viruses and bacterial infections are transmitted through saliva, but not semen or urine." (*Id.*)

Dr. Goldenring's declaration is insufficient as a matter of law to show the County relied on shoddy evidence. *See* *World Wide Video*, 368 F.3d at 1195- 96. Contrary to Fantasyland's assumption, the record indicates the open-booth requirement is not intended to prevent the transmission of communicable diseases through bodily fluids, such as semen, which could be left by patrons on surfaces inside the booths. Rather, the rationale is based on the finding "[s]exual acts, including masturbation and oral and anal sex, occur at unregulated adult entertainment establishments, especially those which provide private or semi-private booths or cubicles for ***1115** viewing films or videos or live striptease and sex shows." (LR, at 142 [Ordinance No. 9479, § 21.1801(B)(3)].) Furthermore, the open-booth requirement was intended to "reduce criminal activity, including illegal public sexual activity and prostitution/pandering" as well as "the spread of sexually transmitted diseases and other communicable diseases" which result from illegal sexual contact. (DeWitt Decl., Ex. B, at 3; LR, at 142-43.) Fantasyland's first argument is therefore based on an erroneous premise.

[11] In addition, Fantasyland claims the County has not cited any direct or specific evidence in the Legislative Record to substantiate its assumption criminal activity is actually taking place at Fantasyland or as a result of Fantasyland's business. However, the County is not required to do so. It may rely on findings in relevant case law, as well as the experiences of other local governments, and is not required "to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence [it] relies upon is reasonably believed to be relevant to the problem [it] addresses." *See* *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925. In other words, the County was and is entitled to rely on the studies and reports of others which are included in the record before the Court, as well as on judicial opinions, such as *Spokane Arcade and Ellwest Stereo*. *Spokane Arcade* and *Ellwest Stereo* reference and rely upon evidence collected by other local governments on the secondary effects associated with closed peep show or arcade booths. *See, e.g.*, *Spokane Arcade*, 75 F.3d at 664-65 (drug usage and sexual conduct between patrons in the video booths, concluding open booths "would reduce the potential for crime"); *Ellwest Stereo*, 681 F.2d at 1245 n. 1 ("[sex-related criminal activity] occurs with great frequency in arcades where movies are exhibited in enclosed booths"). The type of evidence considered by the County in enacting the open-booth requirement has been held "reasonable and relevant" in other cases. *See, e.g.*, *Dream Palace*, 384 F.3d at 1015. In sum, Fantasyland's evidence is insufficient as a matter of law to cast direct doubt on the evidence supporting the County's rationale for the open-booth requirement.

C. Narrowly Tailored

Last, Fantasyland argues the open-booth requirement is not narrowly tailored because there are more effective and less drastic means to accomplish the County's purported objectives. Fantasyland relies on Mr. Andrus' declaration, which outlines a number of ways to "combat sexual contacts between customers in the viewing areas." (Andrus Decl., at 5.) For example, Mr. Andrus suggests it would be effective to reduce the size of viewing areas so that only one person could fit in a booth and to modify the doors so that they do not reach the floor. He also opined open booths have "considerable drawbacks from the standpoint of avoiding sexual contact between customers" because open booths

> encourage[ ] interaction amongst customers who are viewing motion pictures. When viewing areas are enclosed, customers are insulated from each other. When the viewing areas are open, the combination of sexually explicit motion pictures and an

> open atmosphere can create a phenomenon, sometimes known as "cruising," where homosexual males meet, culminating in relatively anonymous sexual encounters after they leave the business. That results in sexual activity in the neighborhood surrounding the business over which the business has no control.

(Andrus Decl., at 6.)

[12] Fantasyland's argument--the County's chosen means is not the best--is ***1116** to no avail, however. Under intermediate scrutiny, the government is not required to establish the means it has chosen is the least restrictive or the most effective for addressing a particular problem. A time, place, and manner restriction is considered narrowly tailored if the government shows its chosen means "serve[s] a substantial government interest," and affects only that category of businesses shown to produce the unwanted secondary effects. *Renton*, 475 U.S. at 50-52, 106 S.Ct. 925. Nor is the County required to show the open-booth requirement will be effective in combating the negative secondary effects. Local governments "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 52, 106 S.Ct. 925.

The uncontradicted evidence in this case shows the open-booth requirement is aimed at reducing unlawful sexual activities and in preventing the resulting spread of sexually transmitted diseases. Fantasyland does not dispute these are substantial government interests. Furthermore, the County's regulation directly targets only that part of adult entertainment business which is known to "produce the unwanted secondary effects." *See Renton*, 475 U.S. at 52, 106 S.Ct. 925. Fantasyland does not dispute this. Although Mr. Andrus' declaration suggests the County could have chosen to address its substantial interests through other means, this is not material under the controlling law.

V. Performance Restrictions

A. Nudity Ban

In its complaint, Deja Vu alleges it had planned to offer nude dancing, and had obtained the appropriate permit from the County, when it acquired its present premises. Subsequently, the County amended the adult entertainment ordinance to prohibit live nude entertainment. (LR, at 155 [Ordinance No. 9479, § 21.1812(a) ("It shall be a violation of this chapter for a patron, employee or any other person in an adult entertainment establishment, to knowingly or intentionally appear in a state of nudity regardless of whether such public nudity is expressive in nature.")].) The amended ordinance does not prohibit live semi-nude entertainment under conditions specified therein. (*Id.* [§ 21.1812(b)].) Deja Vu claims prior to the amendment, female performers did not have to wear anything more than "pasties and a G-string." (Pls.' Joint Mot., at 12.) After the amendment, they must wear more opaque clothing while performing, which Deja Vu refers to as "pasties and a G-string plus." (*Id.*)

1. The First Amendment Claim

[13] Deja Vu alleges the ordinance as amended violates the First Amendment because it is unjustified based on the factual record and relevant Supreme Court case law. The County moves for summary judgment on Deja Vu's First Amendment claim regarding the nudity ban, and Deja Vu cross-moves on the same claim. Specifically, Deja Vu contends the County lacked sufficient evidence in support of this amendment, and the amendment is not narrowly tailored.

a. Evidentiary Support for the Amendment

Deja Vu argues the evidence the County relied on in amending the ordinance is insufficient because no evidence in the record addresses "secondary effects attributable to non-nude dancing" (*i.e.*, the secondary effects associated with pasties and a G-string plus, rather than just pasties and a G-string). (Pls.' Opp'n, at 14.) The County relied on the Legislative Record described above, which includes numerous studies from other jurisdictions, experiences of other municipalities as reported in ***1117** case law, and local public testimony regarding secondary effects such as prostitution, public sexual activity, and narcotics trafficking. (*See, e.g.*, LR, at 499-500, 1278, 1310, 1312, 1488-531, 1634-40.) Furthermore, the ordinance it-

self cites relevant Supreme Court and Ninth Circuit cases which discuss the secondary effects associated with nude dancing. (*See* LR, at 141 [Ordinance No. 9479, § 21.1801].)

Deja Vu does not offer any evidence of its own to cast direct doubt on the County's evidence, but relies exclusively on Dr. Linz' observation "[n]o study specifically deals with adverse secondary effects related to the presence of pasties and G-string establishments." (Linz Decl., at 5.) Essentially, Deja Vu argues the absence of this evidence in the record is sufficient to show the County's evidence is shoddy. Deja Vu's argument was rejected in *Gammoh v. City of La Habra*, where the plaintiffs argued the government's evidence was irrelevant to the ordinance imposing a minimal distance between patrons and erotic dancers because "it does not measure the secondary effects of *clothed* performances." 395 F.3d 1114, 1127 (9th Cir.2005). "No precedent requires the [government] to obtain research targeting the exact activity that it wishes to regulate: the [government] is only required to rely on evidence 'reasonably believed to be relevant' to the problem being addressed." *Id.* (quoting *Alameda Books*, 535 U.S. at 438, 122 S.Ct. 1728.) The type of evidence considered by the County has been held "reasonable and relevant" in other cases. *See Dream Palace*, 384 F.3d at 1015. Dr. Linz' observation is therefore insufficient as a matter of law to cast doubt on the County's evidence or raise a genuine issue of material fact in opposition to the County's motion.

b. Narrowly Tailored

Deja Vu next argues the amendment goes too far because under the Supreme Court precedent, pasties and a G-string is the maximum amount of clothing a government can require exotic dancers to wear "without running afoul of the federal right to freedom of expression." (Pls.' Joint Mot., at 13.) However, the Court does not interpret the pertinent case law as Deja Vu does.

[14] Nude dancing is "expressive conduct within the outer perimeters of the First Amendment." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *see also Pap's*, 529 U.S. at 289, 120 S.Ct. 1382. "[G]overnment restrictions on public nudity ... should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech." *Pap's*, 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion). The *Renton* factors applicable to time, place, and manner restrictions and the *O'Brien* framework are "similar or identical." *Colacurcio v. City of Kent*, 163 F.3d 545, 551 (9th Cir.1998) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). *United States v. O'Brien* held:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Deja Vu argues the ordinance at issue is unconstitutional because it does not satisfy the narrow tailoring requirement of the *O'Brien* framework.

Contrary to Deja Vu's argument, case law finding pasties and a G-string to satisfy ***1118** narrow tailoring does not suggest any additional coverage requirement, no matter how slim, would be unconstitutional:

> [T]he requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. ... [¶] ... [T]he governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose.

Barnes, 501 U.S. at 571-72, 111 S.Ct. 2456. Similarly, the holding in *Pap's* does not support Deja Vu's argument:

> The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.* The requirement that dancers

> wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.

Pap's, 529 U.S. at 301, 120 S.Ct. 1382.

The relevant Supreme Court cases do not stand for the proposition pasties and a G-string is the maximum amount of clothing a government can require exotic dancers to wear without offending the First Amendment. Rather, these cases establish the government has a legitimate interest in placing restrictions on public nudity (*i.e.*, the conduct element of nude dancing), so long as those restrictions have only a *de minimis* or minimal effect on a dancer's erotic message. In sum, under *Barnes* and *Pap's*, the issue is whether the County's new requirement is still an incidental or "minimal restriction," which "leaves ample capacity to convey the dancer's erotic message." *See* *Pap's*, 529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion).

Deja Vu contends the amended ordinance imposes more than a minimal restriction on speech because it requires entertainers to wear in addition to pasties also "a swimsuit bottom or shorts to opaquely cover her 'anal cleft or cleavage.' " (Pls.' Joint Opp'n, at 13.) Although this attire would not violate the amended ordinance, it is not required by it. Specifically, the amended ordinance prohibits nudity, which is defined as

> showing of the human male or female genitals, pubic area, vulva, penis, anal cleft or cleavage with less than a fully opaque covering or the showing of the female breast with less than a fully opaque covering of any part of the nipple.

(LR, at 147 [Ordinance No. 9479, § 21.1802(G)].)

The Ninth Circuit has not addressed whether this regulation falls short of *O'Brien;* however, other circuits have considered similar regulations. [FN4] Deja Vu relies ***1119** on *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir.2003), where the Court of Appeals reversed and remanded an order granting the government's summary judgment motion. The ordinance at issue prohibited nudity, which was defined more expansively than in *Pap's* "to encompass wearing any clothing covering less than one-third of the buttocks or one-fourth of the female breast," and expressly prohibited "the wearing of G-string, T-backs, dental floss, and thongs." *Id.* at 1273; *see also id.* at 1254 n. 2. Before remanding for consideration whether this definition proscribes too much expression, the court found "it difficult to conclude ... that preventing erotic dancers from wearing G-strings, thongs, pasties and the like has only a 'de minimis' effect on the expressive component of erotic dancing." *Id.* at 1274. Since *Peek-A-Boo* involved a much more restrictive definition of nudity than the definition at issue in this case, it is not helpful in answering the question whether the County's new definition is still an incidental or "minimal restriction," which "leaves ample capacity to convey the dancer's erotic message."

> FN4. Since it does not appear Deja Vu intends to offer alcohol in addition to nude entertainment, the Court excludes from consideration the circuit court decisions cited by the County which are based on the combination of nudity and alcohol. *See, e.g.*, *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 706 n. 5, 727-28 (7th Cir.2003) ("[p]rohibiting alcohol on the premises of adult entertainment establishments will unquestionably reduce the enhanced secondary effects resulting from the explosive combination of alcohol consumption and nude or semi-nude dancing"); *Geaneas v. Willets*, 911 F.2d 579, 582-83 (11th Cir.1990) (district court did not err in analyzing a nudity ban "in establishments dealing in alcohol" under the Twenty-First Amendment, which gives the states the broad authority to regulate alcohol sales, rather than the First Amendment, because of Supreme Court precedent that the states' powers under the Twenty-First Amendment "outweigh any first amendment interest in nude dancing"); *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 944, 946-51 (11th Cir.1982) (affirming the connection between nude and semi-nude entertainment, alcohol consumption, and criminal activity "justified the incidental burdens on First Amendment rights

created by the regulation of nude entertainment").

Heideman v. South Salt Lake City, 348 F.3d 1182 (10th Cir.2003), evaluated the constitutionality of a nudity ban similar to the one at issue here. *Id.* at 1186 n. 4, 1199-1200. The ordinance in *Heideman* prohibited "showing of the human male or female genitals, pubic area, vulva, anus, or anal cleft with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple." *Id.* at 1186 n. 4. *Heideman* found this nudity ban was indistinguishable from that upheld by the Supreme Court in *Pap's.* 348 F.3d at 1185, 1200. Specifically, *Heideman* found the provision was narrowly tailored:

> [T]he district court did not abuse its discretion in concluding that the Ordinance satisfies the fourth and final *O'Brien* factor-that the restriction is no greater than is essential to the furtherance of the government interest-for the same reason that factor was satisfied in *Pap's:* the requirement that dancers wear "g-strings" and "pasties" has a "*de minimis* " effect on their ability to communicate their message.

Id. at 1200.

The Court finds the definition of nudity in *Heideman* is not distinguishable in a constitutionally-meaningful way from the County's new definition. Although *Heideman* referred to the "G-strings and pasties" rather than "G-strings and pasties plus," the actual language of the ordinance, which requires opaque covering of the anal cleft, parallels the County's language here, which requires opaque covering of the anal cleft or cleavage.

Based on the foregoing, and in the absence of any evidence how the County's new requirement would affect the dancers' erotic message, the Court finds Deja Vu has failed to raise a genuine issue of material fact in opposition to the County's summary judgment motion. *A fortiori,* it has failed to meet its burden as the moving party on its cross-motion.

2. The California Constitution Claim

In addition to the First Amendment challenge to the nudity ban, Deja Vu also contends it violates Article I, Section 2 of the California Constitution. While Deja ***1120** Vu seeks summary adjudication of this issue in its favor, which the County opposes, the County does not raise this issue in its own cross-motion for summary judgment.

Deja Vu contends totally nude dancing is protected under California Constitution, except in establishments serving alcohol. However, Deja Vu's authority, *Morris v. Municipal Court*, 32 Cal.3d 553, 186 Cal.Rptr. 494, 652 P.2d 51 (1982), is distinguishable and no longer supports this proposition.

Morris held a county ordinance was unconstitutionally overboard, and issued a writ of prohibition in favor of a nude dancer who was "arrested for having exposed her buttocks during a performance" in violation of the ordinance. *Id.* at 556, 569, 186 Cal.Rptr. 494, 652 P.2d 51. The ordinance was ultimately found unconstitutional because the only government interest it was intended to serve was the "promotion of public morals," which the court found constitutionally insufficient. *Id.* at 566-69, 186 Cal.Rptr. 494, 652 P.2d 51. As discussed above, unlike in *Morris,* the County's aim here is otherwise.

More importantly, *Morris* is no longer good law. The majority's analysis relied extensively on United States Supreme Court authority for the holding. *Id., passim.* Since *Morris* predates *Barnes* and *Pap's,* it is no longer valid to the extent it prohibited restrictions on nudity which were later approved in *Barnes. See Tily B., Inc. v. City of Newport Beach*, 69 Cal.App.4th 1, 18, 81 Cal.Rptr.2d 6 (1998) ("*Morris* was a state court interpretation of federal constitutional law since foreclosed by *Barnes.*"). Furthermore, the decision in *Morris* is in part based on the proposition the *O'Brien* test does not apply to the regulation of nudity. *Morris*, 32 Cal.3d at 559, 186 Cal.Rptr. 494, 652 P.2d 51. This proposition was negated in *Pap's. See* 529 U.S. at 289, 120 S.Ct. 1382.

Deja Vu also argues the nudity ban is unconstitutional under California law because the free speech provisions of the California Constitution are "more definitive and inclusive than the First Amendment."

See Spiritual Psychic Sci. Church v. City of Azusa, 39 Cal.3d 501, 519, 217 Cal.Rptr. 225, 703 P.2d 1119 (1985), *overruled in part by Kasky v. Nike, Inc.*, 27 Cal.4th 939, 968, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002) (quoting *Wilson v. Sup.Ct.*, 13 Cal.3d 652, 658, 119 Cal.Rptr. 468, 532 P.2d 116 (1975)). Deja Vu likens this case to *Pap's* on remand to Pennsylvania Supreme Court, which concluded a similar anti-nudity ordinance violated the Pennsylvania Constitution, although the United States Supreme Court concluded it did not violate the First Amendment. *Pap's A.M. v. City of Erie*, 571 Pa. 375, 812 A.2d 591, 593 (2002). It is beyond question

> the California Constitution is an independent document and its constitutional protections are separate from and not dependent upon the federal Constitution, even when the language of the two charters is the same. (Cal. Const., art. I, § 24.) In this instance, the language of the relevant California constitutional provision differs from, and in some respects is broader than, the federal Constitution.

Los Angeles Alliance for Survival, 22 Cal.4th at 365, 93 Cal.Rptr.2d 1, 993 P.2d 334.

Nevertheless, current California law does not support Deja Vu's argument the California Constitution mandates a different result than the First Amendment in this instance. Without reference to *Morris*, subsequent California Supreme Court opinions have applied the time, place, and manner test "fashioned from a long line of United States Supreme Court cases." *Id.* at 367 n. 7, 93 Cal.Rptr.2d 1, 993 P.2d 334; *see also* ***1121***Raven v. Deukmejian*, 52 Cal.3d 336, 353, 276 Cal.Rptr. 326, 801 P.2d 1077 (1990) ("cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution."). Accordingly, the same intermediate scrutiny of reasonable time, place, and manner restrictions, applied above to Deja Vu's First Amendment argument, applies to its California Constitution argument. [FN5]

> FN5. Although California courts rely primarily on California--rather than federal--law to analyze the issue whether a regulation is content-based, *Los Angeles Alliance for Survival*, 22 Cal.4th at 365, 367-78, 93 Cal.Rptr.2d 1, 993 P.2d 334, Deja Vu does not contend the nudity ban is content-based, and does not challenge the applicability of the intermediate scrutiny standard.

Based on the foregoing, Deja Vu has not established the County's new nudity ban violates the California Constitution. Accordingly, Deja Vu's summary judgment motion as to the nudity ban claim under California Constitution is denied for the same reasons its motion with respect to the nudity ban under the First Amendment was denied.

B. Proximity Limit and Staging Requirement

[15] Deja Vu's complaint challenges on First Amendment grounds the proximity limit and staging requirement of the amended ordinance, which requires semi-nude entertainers to perform "at least six (6) feet from the nearest area occupied by patrons and on a stage elevated at least eighteen (18) inches from the floor." (LR, at 155 [Ordinance No. 9479, § 21.1812(b)].) The County moves for summary judgment on this claim, and Deja Vu cross-moves on the same claim. Deja Vu contends that when considered together with the nudity ban, the County lacks sufficient evidence in support of the new distance and staging requirements, and these requirements are not narrowly tailored when considered together with the nudity ban.

The purpose of the proximity limit and staging requirement is to reduce the opportunity for prostitution and narcotics transactions between entertainers and patrons. To support these new requirements, the County relied on the Legislative Record, which, as discussed above, compares favorably to the evidence relied on in other cases to support similar regulations, and which has been found to be "reasonable and relevant" in other cases.

As with the nudity ban, for its argument the County had insufficient evidentiary support, Deja Vu offers no evidence of its own, but relies on Dr. Linz' observation, "[n]o study specifically deals with adverse secondary effects related to the presence of pasties and G-string establishments." (Linz Decl., at 5.) As

discussed above, this is insufficient as a matter of law to cast doubt on the County's evidence or raise a genuine issue of material fact in opposition to the County's motion.

Deja Vu also argues the staging requirement and proximity limit are not narrowly tailored when viewed in combination with the nudity ban. Specifically, it contends "nude dance entertainment is totally precluded" or "totally forbidden" and "[d]ancers clothed under the County's [new restriction on nudity] no longer pose the risk of purported adverse secondary effects relied on to justify the elevated stage and proximity limit." (Pls.' Joint Opp'n, at 16-17.) This is an overstatement. As discussed above, in conjunction with the proximity and staging restrictions, the amended ordinance permits semi-nude dancing which requires *de minimis* coverage.

***1122** In addition, Deja Vu's unsupported premise--that semi-nude entertainers who perform in close proximity to patrons no longer pose any risk of engaging in prostitution, pandering, or drug trafficking--has been rejected by the Ninth Circuit. *Gammoh v. City of La Habra* considered the constitutionality of an ordinance prohibiting contact between patrons and dancers, and requiring dancers to perform at least two feet away from patrons. 395 F.3d at 1118-19. The court found the "two-foot rule and the no-touching rule are reasonably linked to the secondary effects that the [government] identifies as its purpose in enacting the Ordinance"--combating "secondary effects, such as solicitation of prostitution and drug transactions." *Id.* at 1125-26. The opinion rejects the argument there is no legitimate justification for the distance requirement in conjunction with the minimal clothing requirement:

> The presence or absence of minimal clothing is not relevant to whether separation requirements fulfill the stated purpose of the Ordinance. This circuit recognizes that municipalities may reasonably find that separation requirements serve the interest of reducing the secondary effects of adult establishments. "Buffers" between patrons and performers prevent the exchange of money for prostitution or drug transactions and allow enforcement of "no touching" provisions, which would otherwise be virtually unenforceable.... There is no reason to believe that minimal clothing obviates the need for these measures when the atmosphere is equally charged-money exchanges and touching are no more difficult if the dancer is wearing minimal clothing than if she is partially or fully nude.

Id. at 1127. The proximity and no-touching restrictions were found to be constitutional time, place, and manner restrictions even when considered in combination with the clothing requirement. *Id.* at 1128.

Similar staging and distance requirements in combination with other regulations were upheld as constitutional. *Colacurcio v. City of Kent* held constitutional an ordinance requiring dancers perform on a platform at least twenty-four inches high and ten feet from the patrons in combination with minimum-lighting and no-tipping provisions. 163 F.3d at 548-49. The plaintiffs had previously offered table dancing, which was prohibited by the new staging and distance requirements, and offered "declarations of a cultural anthropologist and a communications expert attesting to the uniqueness of table dancing and the detrimental effect of the ten-foot rule on the dancer's message." *Id.* at 555. Regardless, the Ninth Circuit concluded "table dancing in private nightclubs, with documented links to prostitution and drug dealing, is a highly unlikely candidate for special protection under the First Amendment." *Id.* at 556. Accordingly, the distance requirement was upheld as a matter of law. *Id.* at 556-57 (the staging requirement was not challenged).

Kev, Inc. v. Kitsap County upheld an ordinance which required "dancing occur on a raised platform at least ten feet from patrons" in combination with a prohibition of certain touching between patrons and dancers, and the prohibition of direct payment or receipt of gratuities, among other things. 793 F.2d 1053, 1056 (9th Cir.1986). The court reasoned:

> Separating dancers from patrons would reduce the opportunity for prostitution and narcotics transactions. Similarly, prohibiting dancers and patrons from engaging in sexual fondling and caressing in an erotic dance studio would probably deter prostitution. Preventing the exchange of money between dancers and patrons would also appear to reduce the likelihood of drug and sex transactions occurring on regulated premises.

***1123** *Id.* at 1061. It further concluded the staging and distance requirements did not unduly burden protected speech:

> [T]hese regulations do not significantly burden first amendment rights. While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market.

Id. Based on the foregoing case law, and in the absence of any evidence, Deja Vu's opposition to the County's summary judgment motion with respect to the staging requirement and proximity limit fails as a matter of law, as does Deja Vu's cross-motion on the same claim.

C. No Direct Tipping

Deja Vu's complaint challenges on First Amendment grounds the provision prohibiting direct tipping. The amended ordinance provides:

> It shall be a violation of this chapter for an employee, who regularly appears in a state of semi-nudity in the adult entertainment establishment, to knowingly or intentionally receive any pay or gratuity directly from any patron, or for any patron to knowingly or intentionally pay or give any gratuity directly to any employee who appears in a state of semi-nudity in the adult entertainment establishment.

(LR, at 155 [Ordinance No. 9479, § 21.1812(c)].) The County moves for summary judgment on Deja Vu's First Amendment claim, and Deja Vu cross-moves on the same claim. In addition, Deja Vu moves for summary judgment on the theory the no-direct-tipping provision violates the Due Process Clause of the Fourteenth Amendment.

1. The First Amendment Claim

[16] The no-direct-tipping provision is intended to work in conjunction with the staging requirement and proximity limit to reduce the opportunity for dancers and patrons to engage in prostitution, pandering, and narcotics transactions. The evidentiary record supporting this provision is the same as that referred to above in support of other performance regulations. For the reasons outlined above, this record is sufficient for the County to meet its initial burden of producing relevant evidence which fairly supports the no-direct-tipping provision. As to the direct-tipping prohibition, Deja Vu does not contend to the contrary.

Deja Vu recognizes the Ninth Circuit previously rejected a First Amendment challenge to a prohibition on direct tipping. *See* *Kev*, 793 F.2d 1053. It attempts to distinguish the County's amendment by arguing the provision is "overly broad" and chilling of protected expression.

A First Amendment challenge to a no-direct-tipping regulation was rejected in *Kev.* 793 F.2d at 1061-62. Similarly to the County's amendment in this case, the ordinance in *Kev* provided: "No patron shall directly pay or give any gratuity to any dancer [and] no dancer shall solicit any pay or gratuity from any patron." *Id.* at 1061. In finding the provision a constitutional time, place, and manner restriction, the court reasoned "[p]reventing the exchange of money between dancers and patrons would ... appear to reduce the likelihood of drug and sex transactions occurring on regulated premises." *Id.*

Deja Vu attempts to distinguish *Kev* by arguing its direct-tipping prohibition was more precise because it applied only to dancers, whereas the County's provision is overly broad [FN6] because it applies to every ***1124** employee who "regularly appears in a state of semi-nudity," and is not limited to "during a performance" or to "while in a state of semi-nudity." (Pls.' Joint Mot., at 18.) As discussed above, under intermediate scrutiny, the County is not required to establish the means it has chosen is the least restrictive for addressing a particular problem. A time, place, and manner restriction is considered narrowly tailored if the government shows its chosen means "serve a substantial government interest," and affects only that category of businesses shown to produce the unwanted secondary effects. *Renton*, 475 U.S. at 50-52, 106 S.Ct. 925. Moreover, if the County were to implement Deja Vu's suggestions, the amendment would no longer serve the purpose of reducing the opportunity for dancers and patrons to engage in prostitution, pandering, and narcotics transactions, as "drug and sex transactions between employees and

patrons would merely be delayed until after the performance, but would still take place on the premises. The same is true if an employee could solicit and accept tips by merely putting on additional clothes immediately following the completion of a performance." (Def.'s Opp'n, at 18.)

> FN6. Although Deja Vu states the direct tipping prohibition is "overbroad" (Pls.' Joint Mot., at 18; Pls.' Joint Opp'n, at 19), it does not argue the First Amendment overbreadth doctrine. Overbreadth is an "exception to the prudential limits on standing." *Young v. City of Simi Valley*, 216 F.3d 807, 815 (9th Cir.2000). Specifically, "[u]nder the overbreadth doctrine, a plaintiff may challenge government action by showing that it may inhibit the First Amendment rights of parties not before the court[, and] is based on the idea that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *Dream Palace*, 384 F.3d at 999 (internal citations and quotations omitted). However, Deja Vu does not cite to any authority addressing the overbreadth doctrine. Furthermore, standing is not an issue because Deja Vu is an existing adult entertainment business directly affected by the amendment. *See id.* The Court therefore construes Deja Vu's references to overbreadth as an argument the direct-tipping prohibition is not narrowly tailored. To the extent Deja Vu intended to assert the First Amendment rights of its performers, the substantive First Amendment analysis of the direct-tipping prohibition is the same.

Deja Vu next argues the direct-tipping prohibition violates the First Amendment because it imposes a financial disincentive which discourages participation in protected speech. It contends tips are "an important source of income for many service employees," and claims California legislature has determined tipping "warrants special statutory protection." (Pls.' Joint Mot., at 19 [citing Cal. Lab Code § 351]. [FN7]) In essence, Deja Vu is arguing the direct-tipping prohibition violates the First Amendment because of its potential adverse economic impact. Fantasyland made the same economic argument to challenge the open-booth requirement. Deja Vu's economic argument lacks merit for the same reasons Fantasyland's does. As discussed above, as long as there is no "absolute bar to the market ..., it is irrelevant whether '[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business.' " *Spokane Arcade*, 75 F.3d at 666 (alteration in the original) (quoting *Walnut Properties*, 861 F.2d at 1109); *see also Matney*, 86 F.3d at 698 ***1125** ("an incidental financial effect on adult entertainment speakers" is of no constitutional significance). Deja Vu presented no evidence from which the trier of fact could infer the County's direct-tipping prohibition represents a complete bar to the market. Furthermore, Deja Vu's argument overstates the implication of the provision. The County's amended ordinance does not prohibit all tipping, and does not preclude entertainers from receiving tips indirectly through the use of a "tip jar." (*See* Def.'s Opp'n, at 18.)

> FN7. In opposition to Deja Vu's summary judgment motion, the County assumes Deja Vu's reference to California Labor Code Section 351 is an attempt by Deja Vu to raise a separate claim under California law for a violation of section 351, and argues the Court should deny any such claim. To the extent Deja Vu intended to allege this claim, it is not included in its operative complaint, and Deja Vu does not seek to amend it. The claim is therefore not included in this action. Furthermore, a review of Deja Vu's briefing on cross-motions for summary judgment indicates the references to section 351 are made to support the argument tipping deserves special protection under the First Amendment rather than in an attempt to raise a new claim.

Based on the foregoing, as a matter of law, none of Deja Vu's arguments in support of its First Amendment challenge to the direct-tipping prohibition is sufficient to successfully oppose the County's summary judgment motion, or to prevail on Deja Vu's cross-motion.

2. The Due Process Claim

Deja Vu also claims the direct-tipping prohibition violates due process because it is impermissible vague, and because it violates the liberty interest in working for a living in the common occupations of the community, and the provision "interferes with occupational liberty interests." (Pls.' Joint Mot., at 20.) Neither argument is sufficient to find the direct-tipping prohibition unconstitutional.

[17] First, Deja Vu argues the phrase "regularly appears in a state of semi-nudity" is impermissibly vague because "regularly" is not defined, and it is unclear whether it means semiannually, daily, monthly, throughout a shift, or "only a couple of times per night." (Pls.' Joint Mot., at 18.) "A fundamental requirement of due process is that a statute must clearly delineate the conduct it proscribes." *Kev*, 793 F.2d at 1057 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). "[T]he void-for-vagueness doctrine requires a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). For example, a statute which required people on the street "to provide a 'credible and reliable' identification" to a police officer when requested to do so was held unconstitutionally vague because it contained "no standard for determining what a suspect has to do to satisfy the requirement," and thus vested "virtually complete discretion in the hands of the police to determine whether the suspect [had] satisfied the statute." *Id.* at 353-54, 358, 103 S.Ct. 1855.

[18] However, a statute or ordinance is not unconstitutionally vague simply because it includes a flexible standard or provides some discretion for enforcement officials. For example, an ordinance prohibiting "the making of any noise or diversion which disturbs or tends to disturb the peace or good order" is not unconstitutionally vague. *Grayned*, 408 U.S. at 107-08, 92 S.Ct. 2294. This language is marked by "flexibility and reasonable breadth, rather than meticulous specificity." *Id.* at 110, 92 S.Ct. 2294. Nevertheless, the ordinance was found sufficiently specific because it "clearly delineate[d] its reach in words of common understanding." *Id.* at 112, 92 S.Ct. 2294 (internal quotations omitted); *see also Kev*, 793 F.2d at 1057-58 (" 'Caressing' and 'fondling' are ordinary, commonly used terms," easily understood when read in the context of other ordinance provisions). "[W]here first amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required." *Kev*, 793 F.2d at 1057.

Likewise, "regularly" is a word of common understanding and of sufficient definiteness that ordinary people can understand. ***1126** The dictionary definition of "regular" is "recurring, attending, or functioning at fixed or uniform intervals." Merriam-Webster's Collegiate Dictionary, 986 (10th Ed.1998). Deja Vu argues the term is vague because there is nothing to indicate precisely how many times an employee must appear in a state of semi-nudity to have "regularly" done so. For example, could penalties be imposed against an employee hired as a waitress who collects tips during her shift and then occasionally appears as a dancer in a state of a semi-nudity? The answer is yes, based on the dictionary definition and common sense meaning of the word. "[E]ven a low frequency of occurrence can establish regularity," and the term "regularly" is not vague simply because it does not specify the frequency. *City of Cleveland v. Daher*, No. 98-CVH-12396, 2000 WL 1844739, **4-6, 2000 Ohio App. LEXIS 5937, at *15-17 (Ohio Ct.App.2000). "[S]ome imprecision is unavoidable." *Id.; see also Grayned*, 408 U.S. at 110, 92 S.Ct. 2294 ("we can never expect mathematical certainty from our language").

Although a constitutional vagueness challenge to the use of the word "regular" or "regularly" in the context of an adult entertainment ordinance has not been considered by the Ninth Circuit, similar challenges have been rejected by other courts based on the reasons discussed above. *See 511 Detroit St., Inc. v. Kelley*, 807 F.2d 1293, 1295-97 (6th Cir.1986) (anti-obscenity law imposing criminal penalties for dissemination of obscene materials as a "predominant and regular part" of a business found not unconstitutionally vague, reasoning a statute is not unconstitutional just because "there are cases near the margin

where it is difficult to draw the line"); *Britt v. State of Florida*, 775 So.2d 415, 416-17 (Fla.Ct.App.2001) (parole condition forbidding those convicted of sexual crimes against children from working, volunteering, or living near any "school, daycare center, park, playground, or other place where children regularly congregate" was "sufficiently precise," and not unconstitutionally vague); *Haviland Hotels, Inc. v. Oregon Liquor Control Comm'n*, 20 Or.App. 115, 530 P.2d 1261, 1262-63 (1975) (local regulation requiring certain businesses to provide "regular meals during the usual hours when such meals are regularly served" not void for vagueness because "regular meals" has "a clear, grassroots connotation"); *Daher*, 2000 WL 1844739, * 4, **4-6, 2000 Ohio App. LEXIS 5937, at *13, 15-17 (zoning law restricting location of adult cabarets which "regularly" feature topless dancers held not unconstitutionally vague because the term "regularly" was not so imprecise that it could not be understood by ordinary persons without a statement by the government setting forth "a distinct frequency below which topless entertainment is not subject to the zoning ordinance"). Accordingly, the Court finds the term "regularly" as used in the no-direct-tipping provision of the amended ordinance is not impermissibly vague.

[19] In its second due process argument, that the direct-tipping prohibition interferes with occupational liberty interests, Deja Vu restates its First Amendment claim as a substantive due process claim. However, "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.' " *Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

***1127** Based on the foregoing, Deja Vu's summary judgment motion is denied with respect to the due process challenges to the direct-tipping prohibition. Furthermore, since this challenge fails as a matter of law, the due process claim is dismissed.

D. No Touching

[20] Deja Vu's complaint challenges on the First Amendment grounds the no-touching provision of the County's amended ordinance, which provides in pertinent part:

> It shall be a violation of this chapter for an employee who regularly appears in a state of semi-nudity in an adult entertainment establishment, to knowingly or intentionally touch a customer or the clothing of a customer while on the premises of the establishment.

(LR, at 155 [Ordinance No. 9479, § 21.1812(d)].) The County moves for summary judgment on this claim, and Deja Vu cross-moves on the same claim.

The no-touching provision is intended to work in conjunction with the other performance restrictions discussed above to reduce the opportunity for dancers and patrons to engage in prostitution, pandering, and narcotics transactions. The legislative record supporting the no-touching provision is the same as that discussed above, and is sufficient to meet the County's initial burden of producing relevant evidence which fairly supports the no-touching provision.

A First Amendment challenge to a no-touching provision has been rejected by the Ninth Circuit. *Kev*, 793 F.2d at 1061-62. As with the direct-tipping prohibition, Deja Vu attempts to distinguish the County's amendment by arguing it is not narrowly tailored [FN8] because it is not limited to "sexual touching," it is redundant when considered together with the staging requirement and proximity limitation, interferes with an individual's right to associate, and because it is directed only to the employees and not the patrons. (Pls.' Joint Mot., at 21; Pls' Joint Reply, at 12.)

> FN8. Although Deja Vu again refers to terms such as "overly broad," it does not argue the overbreadth doctrine.

The County's amendment differs from the ordinance in *Kev* because is not limited to sexual touching, and it focuses on employee--rather than patron-- conduct. Deja Vu argues a patron could grope or grab an "employee who regularly appears in a state of semi-nudity" but the employee would not be free to push the patron away. These distinctions, however, are without a difference. As discussed above, a time,

place, and manner restriction is considered narrowly tailored if the government shows its chosen means "serve a substantial government interest," and affects only that category of businesses shown to produce the unwanted secondary effects. *Renton*, 475 U.S. at 50-52, 106 S.Ct. 925. Intermediate scrutiny does not require the government to establish the means it has chosen to address the secondary effects is the least restrictive. *Id.* Furthermore, the chosen means may discriminate or be under-inclusive without offending the First Amendment, because the government does not have to attempt to address all of its interests at one time. In *Renton*, for example, the location restriction only applied to adult theaters and not to other types of adult businesses. This is permissible because the government "must be allowed a reasonable opportunity to experiment with solutions" and may choose to single out and place limitations on "one particular kind of adult business." *Id.* at 52-53, 106 S.Ct. 925. In addition, the government has broad discretion in selecting a method "to further its substantial interests." *Id.* ***1128** at 52, 106 S.Ct. 925. It is therefore of no constitutional significance that the County directed the no-touching provision to the employees' conduct, not the patrons.'

Deja Vu further argues the no-touching provision is not narrowly tailored because the proximity limit and the staging requirement already make touching between patrons and performers "impossible." (Pls.' Joint Mot., at 21.) Deja Vu is mistaken in light of the express language of the performance restrictions. The proximity limit and staging requirement do not make touching impossible because they only apply while the employee is "in a state of semi-nudity." (LR, at 155 [Ordinance No. 9479, § 21.1812(b)].) In contrast, the no-touching provision applies at all times "while on the premises of the establishment" to employees who regularly appear in a state of semi-nudity. The provisions are therefore not redundant but complementary. Furthermore, they target conduct likely to lead to the unwanted secondary effects of prostitution, pandering and drug trafficking.

Last, Deja Vu contends the touching ban is not narrowly tailored because it "runs from shaking the hand of a regular customer to hugging a relative or close friend, even when the entertainer is fully clothed." (Pls.' Joint Mot., at 21.) Deja Vu's argument is an overstatement; employees who regularly appear in the state of semi-nudity on the business premises are free to associate with whomever they choose when not on the premises.

Based on the foregoing, Deja Vu's arguments are insufficient as a matter or law to successfully oppose the County's summary judgment motion. *A fortiori*, they are insufficient to entitle Deja Vu to summary judgment on its cross-motion.

VI. Zoning Restrictions

In its complaint Deja Vu challenges the amended zoning ordinance. [FN9] Prior to amendment, the ordinance permitted adult entertainment businesses to be located in commercial zones, provided they were at least 500 feet from residential zones, 600 feet from any church, school, public playground, park or recreational area, and 1,000 feet from any other adult entertainment business. While the amendment retains the distance and separation requirements, it requires adult entertainment businesses to locate in industrial, rather than commercial, zones. (*See* LR, at 25 [Ordinance No. 9469, § 6930(b)(2)].) Businesses such as Deja Vu, which had obtained a permit to operate in a commercial zone prior to the amendment, must relocate to an industrial zone within three years.

> FN9. As discussed below, as a practical matter, this provision affects only Deja Vu.

The zoning ordinance was amended to reduce the negative secondary effects, specifically the blight, noise, traffic, and crimes such as robbery, property theft, assault and battery, which affect neighboring businesses and their patrons in commercially zoned areas. In addition, the amendment was intended to ameliorate decreased property values in commercially zoned areas.

Deja Vu alleges the zoning amendment violates "the adult public's right to freedom of speech, press and expression protected by the First and Fourteenth Amendments to the United States Constitution, and Article 1, § 2 of the California Constitution." (First Am. Compl., at 20; *see also id.* at 14 & 23.) The County moves for summary adjudication on Deja

Vu's claim, and Deja Vu cross-moves on the same claim. The County contends the amended zoning ordinance meets the First Amendment intermediate scrutiny. Deja ***1129** Vu does not dispute intermediate scrutiny applies to the zoning amendment, however, it contends the amendment fails to meet its requirements. In addition, Deja Vu argues the procedural safeguards of the zoning amendment are not constitutionally sufficient, the amendment is void because it violates the County's General Plan, and constitutes unlawful spot zoning.

A. The General Plan

Deja Vu contends the zoning ordinance amendment is invalid because it is inconsistent with the County's General Plan. [FN10] *See* Cal. Gov't Code § 65860. It seeks a finding that the amendment is unlawful on this basis, or in the alternative, contends the County's motion for summary adjudication of the constitutionality of the amendment be denied on this basis.

> FN10. California Government Code Section 65860(a) states in part: "County or city zoning ordinances shall be consistent with the general plan of the county or city...." Section 65860(b) states in part: "Any resident or property owner within a city or a county, as the case may be, may bring an action or proceeding in the superior court to enforce compliance with subdivision (a). Any such action or proceeding shall be governed by Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure. No action or proceeding shall be maintained pursuant to this section by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days of the enactment of any new zoning ordinance or the amendment of any existing zoning ordinance."

The General Plan claim is not raised in Deja Vu's operative complaint, and Deja Vu does not explain how its General Plan argument relates to the freedom of speech claims raised in the complaint. As the General Plan claim is not alleged in the complaint, and Deja Vu does not seek to amend it, its motion for summary judgment is denied to the extent it is based on this claim.

[21] In the alternative, Deja Vu's motion as to the General Plan claim is denied because it has failed to show the zoning amendment is inconsistent with the General Plan. "Once [a municipality] has adopted a general plan, all zoning ordinances must be consistent with that plan, and to be consistent must be 'compatible with the objectives, policies, general land uses, and programs specified in such a plan.' " *Lesher Communications, Inc. v. City of Walnut Creek*, 52 Cal.3d 531, 536, 277 Cal.Rptr. 1, 802 P.2d 317 (1990) (quoting Cal. Gov't Code § 65860(a)(ii)). [A] finding of consistency requires only that the proposed project be *compatible* with the objectives, policies, general land uses, and programs specified in the applicable plan. The courts have interpreted this provision as requiring that a project be in agreement or harmony with the terms of the applicable plan, not in rigid conformity with every detail thereof. *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco*, 102 Cal.App.4th 656, 678, 125 Cal.Rptr.2d 745 (2002) (internal quotation marks and citations omitted). "A zoning ordinance inconsistent with the general plan at the time of its enactment is invalid when passed." *deBottari v. City Council of the City of Norco*, 171 Cal.App.3d 1204, 1212, 217 Cal.Rptr. 790 (1985) (internal quotation marks and citations omitted).

Deja Vu relies on the declaration of R. Bruce McLaughlin, its land use planning and development expert. (McLaughlin Decl., at 18-25 & Ex. A.) Mr. McLaughlin opined the General Plan permits commercial uses in industrial zones so long as those commercial uses provide essential support services to manufacturing plants and their personnel. Deja Vu submits adult entertainment is not an essential support service to manufacturing plants and their personnel.

***1130** On the other hand, the County offers the opinion of David Hulse, the Land Use Chief for the County, in support of its argument that the amendment is consistent with the General Plan. (Hulse Supplemental Decl., at 1.) Mr. Hulse was "primarily re-

sponsible for drafting the amendment to the County's zoning ordinance that requires adult entertainment establishments to be located in industrial zones." (*Id.* at 1-2.) The General Plan states: "The Industrial Designations provide locations for manufacturing, industrial, wholesaling, and warehousing uses based on the potential nuisance characteristics or impacts of use." According to Mr. Hulse, the County's Department of Planning and Land Use "determined that the zoning ordinance amendment is consistent with the County's General Plan .... Specifically, the Department concluded adult entertainment establishments exhibit greater 'nuisance characteristics or impacts' than do most typical commercial establishments. Because the nuisance characteristics or impacts associated with adult entertainment establishments are closer to those exhibited by most industrial uses, the County determined it was more appropriate to require adult businesses to be located in industrial zones, where they will be more compatible with neighboring uses." (*Id.* at 2.) Deja Vu does not oppose or in any way address the County's evidence or argument that the amendment is consistent with the General Plan.

Since Deja Vu would bear the burden of proof at trial as to its General Plan claim, it has a higher burden on summary judgment. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence ... establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage*, 213 F.3d at 480 (internal quotation marks and citations omitted). In other words, it "must make a 'showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party,' " and "must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in [its] favor." *Pecarovich v. Allstate Ins. Co.*, 272 F.Supp.2d 981, 985 (C.D.Cal.2003) (internal citations omitted) (citing *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir.1986) and quoting Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 487-88 (1984)).

Based on the language of the General Plan and expert opinions offered by each side, the Court cannot conclude Deja Vu made a showing sufficient to hold no reasonable trier of fact could find other than in Deja Vu's favor. Accordingly, even if Deja Vu had amended its complaint to include the General Plan claim, its summary judgment motion would be denied for failure to rebut the County's evidence.

Furthermore, since the General Plan argument is not responsive to the constitutional issues raised in the County's summary adjudication motion, issues of fact pertaining to the General Plan argument are not material. *See* *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505 (a fact is material if it could affect the outcome of the suit under the governing substantive law). To the extent Deja Vu relies on the General Plan argument to oppose the County's summary judgment motion, it is legally insufficient.

B. Reasonable Time, Place, and Manner Regulation

[22] Deja Vu contends the zoning amendment does not meet the intermediate scrutiny standard because is not supported by evidence showing it would advance a substantial government interest, is not narrowly tailored, and does not leave ***1131** open reasonable alternative means of communication.

1. Rationale for the Amendment

Deja Vu argues the amendment is unconstitutional because it is aimed at reducing secondary effects by reducing speech. "[T]he necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects." *Alameda Books*, 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring).

Deja Vu first argues the distance and dispersal provisions of the zoning ordinance before amendment achieved the same purpose of reducing secondary effects as after amendment, but without burdening the speech as much. This argument is unsupported by any evidence, and is therefore insufficient to raise a genuine issue of material fact. *See* *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505 ("there is no issue for trial unless there is sufficient evidence favoring the

nonmoving party for a jury to return a verdict for that party").

In the alternative, based on the County's responses to interrogatories, Deja Vu argues the zoning ordinance was amended to relocate adult entertainment businesses to industrial zones because this would reduce the number of adult entertainment patrons. If this were the County's reasoning for the amendment, it may well be impermissible; however, when the County's response to interrogatories is considered in context, Deja Vu's argument is not based on a fair reading of the County's rationale. The pertinent portion of the County's response was:

> The County believes that requiring adult entertainment establishments to be located in the industrial zones will reduce the negative secondary effects associated with adult entertainment establishments. Particularly, the County believes that blight, noise, traffic, and certain crimes including robbery, property theft, assault and battery will be reduced. The industrial zones are generally located further from residential areas than are the industrial *[sic]* zones. Thus, requiring adult entertainment establishments to be located in industrial areas will reduce noise, traffic, and crime that effect *[sic]* residential property owners. In addition, decreased residential property values will be ameliorated by requiring adult entertainment establishments to be located in industrial zones. Further, most commercial establishments rely on customers to visit their premises. Many industrial facilities ship their products to middlemen and therefore fewer customers tend to visit their premises. Thus, requiring adult entertainment establishments to be located in industrial areas will reduce noise, traffic, and crime that effect *[sic]* commercial property owners and their patrons. In addition, decreased commercial property values will be ameliorated by requiring adult entertainment establishments to be located in industrial zones. Finally, fewer citizens tend to frequent industrial zones as compared to commercial zones, particularly at night. Thus, the zoning change should reduce crimes such as assault, battery, robbery, and property theft by reducing the number of potential victims.

(Manicom Opp'n Decl., Ex. 1, at 5-6.) Deja Vu's argument is based entirely on the last two sentences of the response, ignoring the preceding text.

The response, when considered in its entirety, does not support the conclusion the County amended the ordinance to reduce the number of customers by making it more inconvenient to patronize adult ***1132** entertainment businesses. Instead, the focus was on the patrons of the neighboring businesses. Furthermore, many industrial businesses are closed at night when adult entertainment businesses are busiest. The neighboring industrial businesses and their patrons would therefore not be as affected by secondary effects such as noise, traffic and crime, as are commercial businesses, which are often open at night. The reference in the response to reducing the number of potential crime victims therefore referred to the patrons of the neighboring businesses, rather than to adult entertainment patrons. Based on the foregoing, Deja Vu's argument regarding the rationale for the amendment is not supported by evidence from which a rational trier of fact could infer the County's aim was to reduce the number of adult entertainment patrons rather than to reduce the secondary effects.

2. Evidentiary Support for Amendment

Deja Vu next argues the zoning amendment was enacted without evidentiary support. As outlined more fully above, Deja Vu relies on the declaration of Dr. Linz, who concluded the studies relied on by the County in enacting the amendments are unreliable. However, for the reasons discussed above, Dr. Linz' declaration is insufficient as a matter of law to cast direct doubt on the County's evidence, because it addresses only the studies and not other categories of evidence on which the County relied, and because it targets only some of the numerous secondary effects the amendment was intended to ameliorate. *See* *World Wide Video*, 368 F.3d at 1195-96. Dr. Linz' declaration is therefore insufficient to support Deja Vu's summary judgment motion, or to raise a genuine issue of material fact in opposition to the County's cross-motion.

3. Alternative Avenues of Communication

Zoning restrictions on adult entertainment businesses

must allow "for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50, 52, 106 S.Ct. 925. "[T]he First Amendment requires only that [the government] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the [municipality]." *Id.* at 54, 106 S.Ct. 925. The "reasonable alternative avenues of communication" inquiry consists of two steps. "[W]e first have to determine how many alternative sites are available, and then determine whether that number is sufficient to afford adult establishments a reasonable opportunity to locate." *Isbell v. City of San Diego*, 258 F.3d 1108, 1112 (9th Cir.2001) (internal citation omitted).

[23] In its motion for summary judgment, the County contends the zoning amendment leaves 76 sites available for Deja Vu's relocation. In its cross-motion and in opposition to the County's motion, Deja Vu argues many of the sites identified by the County are not "available" as that term is defined for purposes of intermediate scrutiny, and the remaining sites are too few to constitute reasonable alternative avenues of communication.

a. Availability of Alternative Sites

The burden of persuasion is on the County to demonstrate its amendment provides reasonable alternative avenues of communication. *See Isbell*, 258 F.3d at 1112. The County "cannot merely point to a random assortment of properties and simply assert that they are reasonably available to adult businesses." *See Lim*, 217 F.3d at 1055. If the County provides "a good faith and reasonable list of potentially available properties," the burden shifts to Deja Vu "to show that certain ***1133** sites would not reasonably become available." *See Isbell*, 258 F.3d at 1113 n. 5 (internal quotation marks and citation omitted). On the other hand, if Deja Vu can show the County's attempt "is not in fact in good faith or reasonable, by, for example, showing that a representative sample of properties are on their face unavailable, then the [County] will be required to put forth more detailed evidence." *See Lim*, 217 F.3d at 1055.

The County contends it has met its burden by identifying a total of 76 potentially available sites in the relevant real estate market, located in industrial zones and within the distance and separation requirements of the amended ordinance. (Hulse Decl., at 2.) These sites are located in eight different areas: Borrego Springs, Ramona, San Dieguito/Rancho Bemardo, Lakeside, Alpine, Pepper Drive-Bostonia, El Cajon, and Spring Valley. (*Id.* at 2; *see also* Nevin Decl.) In addition, the County used its Geographic Information System ("GIS"), which measures the distance between two points, and determined "that twelve adult entertainment establishments could operate simultaneously on the 76 sites identified by the County and still comply with the 1,000 feet separation requirement between adult entertainment establishments." (Hulse Decl., at 2.)

[24] "For sites to be available, they must be in the 'actual business real estate market.' " *Isbell*, 258 F.3d at 1112-13 (quoting *Lim*, 217 F.3d at 1055). The following factors are relevant to the consideration whether a site is reasonably within the business real estate market:

> (1) a relocation site is not part of the market if it is unreasonable to believe that it would ever become available to any commercial enterprise; (2) a relocation site in a manufacturing or industrial zone that is reasonably accessible to the general public may also be part of the market; (3) a site in a manufacturing zone that has proper infrastructure may be included in the market; (4) a site must be reasonable for some generic commercial enterprise, although not every particular enterprise, before it can be considered part of the market; and (5) a site that is commercially zoned is part of the relevant market.... In addition, a site must obviously satisfy the conditions of the zoning ordinance in question.

Id. at 1113 n. 3 (quoting *Lim*, 217 F.3d at 1055).

Deja Vu contends "there are no sites available anywhere in unincorporated San Diego County for Adult Use," because all of the sites identified by the County are located in industrial zones which are not suitable for generic commercial land uses. (McLaughlin Decl., at 7.) Deja Vu claims this unsuitability is evidenced by "the absence of existing commercial uses" in these industrial zones, as well as the fact the only commercial uses permitted in industrial zones are adult entertainment establishments and essential or

compatible support services to manufacturing plants and their personnel. (*Id.* at 9, 16.) Specifically, Deja Vu points out several sites do not have sidewalks and lighting.

[25] The mere fact a site is located in an industrial zone does not make it unavailable. Relocation sites in industrial zones are considered available, if they are reasonably accessible to the public and have the appropriate infrastructure. *Topanga Press*, 989 F.2d at 1531. Whether the infrastructure provided is adequate depends on whether it is reasonably necessary for any generic commercial enterprise. *Diamond*, 215 F.3d at 1056. Roads, lighting and sidewalks are not required for every industrially-zoned site, "rather these are examples of what may constitute proper infrastructure." *Id.* Sites located along highways or main driving***1134** thoroughfares where it is unlikely people would walk along a sidewalk to reach the business, might not need sidewalks and street lighting, especially if the sites have other examples of infrastructure which may support a commercial enterprise, such as power, water, and access to a main road. *Id.*

The County's unrefuted evidence shows the sites lacking sidewalks and street lighting are located near major highways or major secondary roads. (Nevin Decl., at 3.) Based on *Diamond*, sidewalks and street lighting are unnecessary because the patrons would drive and not walk to the business. All the sites have access to power, are served by piped water or wells, or could be served by wells, and either have access to telephone service or could require the telephone company to install lines. (*Id.*) Deja Vu's argument that the sites are unavailable because they are located in industrial zones and lack streetlights and sidewalks fails as a matter of law.

In addition, Deja Vu argues many of the sites are unavailable because they are not suitable for an adult entertainment business due to low traffic, lack of visibility, current occupancy, unwillingness to lease to adult entertainment businesses, or unsuitability of existing premises for an adult entertainment use. (Luster Opp'n Decl.) This argument, which raises business and economic factors, is irrelevant under the governing law.

As long as it is a part of an actual business real estate market for generic commercial enterprises, whether a site is economically or physically suited for adult entertainment use is irrelevant. *Isbell*, 258 F.3d at 1113; *see also Topanga Press*, 989 F.2d. at 1531 ("[I]t is constitutionally irrelevant whether relocation sites located in industrial or manufacturing zones suit the *particular* needs of an adult business."). "[T]he possible economic impact upon a business is not a factor to be considered by the courts when determining whether a [municipality] has provided a business with a reasonable alternate location." *Topanga Press*, 989 F.2d at 1529. If it is a part of an actual real estate market for generic commercial enterprises, "it is not relevant whether a relocation site will result in lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business." *Id.* at 1531. Furthermore, current occupancy and restrictive lease terms prohibiting adult uses are irrelevant. *Lim*, 217 F.3d at 1055 (restrictive leases banning adult entertainment and current occupancy); *Diamond*, 215 F.3d at 1056 (current occupancy); *Renton*, 475 U.S. at 53-54, 106 S.Ct. 925 (current occupancy).

The County concedes three of the 76 sites are occupied by single-use buildings such as warehouses and factories, which are over 65,000 square feet. (Nevin Decl., at 3.) This type of large single-use buildings "may arguably be outside [the] commercial real estate market." *See Lim*, 217 F.3d at 1055. Accordingly, the Court will not consider these sites in the analysis. [FN11]

> FN11. The County does not identify the three sites. Based on a detailed review of the exhibits attached to Mr. Nevin's declaration, the Court excludes sites no. 8 and 11 in Area 4 (parcels no. 326-050-12 and 326-060-18) and site no. 12 in Area 7 (parcel no. 483-071-11).

Excluding the three large single-use sites, the Court finds the County met its burden to come forward with a good faith and reasonable list of potentially available sites. The County provided pertinent, specific and detailed information about each site. *See Lim*, 217 F.3d at 1055. Sites such as swamps, sewage treatment plants, airstrips for airports, sports stadi-

ums, and land under the ocean are generally ***1135** considered unavailable. *Topanga Press*, 989 F.2d at 1531, 1532. The County's list does not contain properties which on their face appear to be unavailable. *See Lim*, 217 F.3d at 1055- 56. The burden therefore shifts to Deja Vu to show certain sites would not reasonably become available. *Id.*

(i) Separation and Distance Requirements

Deja Vu challenges specific sites based on the argument they do not meet the distance and separation requirements of the amended ordinance. To be available, the site must meet the requirements of the zoning ordinance in question. *Isbell*, 258 F.3d at 1113 n. 3 (quoting *Lim*, 217 F.3d at 1055). The burden is on Deja Vu to show certain sites would not reasonably become available. *See id.* at 1113 n. 5.

Based on the opinion of its expert, Bruce R. McLaughlin, Deja Vu argues three sites in Area 7 may not meet the segregation requirements, because it appears several parcels may have been merged into one. (McLaughlin Decl., at 12.) In his subsequent deposition, however, Mr. McLaughlin withdrew this opinion. Deja Vu's argument therefore remains without evidentiary support. In the absence of any evidence, Deja Vu failed to make a sufficient showing in support of its summary judgment motion, or raise a genuine issue of material fact in opposition to the County's motion, on the issue whether the sites in Area 7 are unavailable due to the separation requirements.

Deja Vu next argues the two sites in Area 5 are not available because they violate the distance requirement of the amended ordinance. The ordinance prohibits adult entertainment establishments from being located "within 600 feet of any ... public playground or park." (LR, at 25 [Ordinance No. 9469, § 6930(b)(2)].) Deja Vu contends the Veterans of Foreign Wars Facility, which includes the Tom C. Dyke Veterans Park, is located within 600 feet of two sites. (McLaughlin Decl., at 12.)

The term "park" is not defined in the amended ordinance, although other portions of the zoning code contain definitions. The County contends the Tom C. Dyke Veterans Park is not a public park as defined in one of the zoning code sections, which defines "Public Active Park/Playground/Recreational Area" as: "An outdoor area, along with its incidental buildings and structures, owned and/or operated by a public agency or a non-profit organization, which is designed, developed and intended to provide one or more recreational opportunities to the general public." (Def.'s Ex. 9 [San Diego County Zoning Ordinance § 1110].) A supporting declaration by the County's Land Use Chief states as follows:

> 4. In September 2004, I visited the VFW facility located in the Alpine area. The facility has a sign stating "Tom C. Dyke Veterans Park." There is no indication that this site is being used as a park. There are no recreational facilities of any type (picnic tables, trails, play equipment, etc.) on this site. In fact, the site is located on a fairly steep slope. There is no indication that the site is open to the public and I saw no members of the public at the site during my visit. Attached to the County of San Diego's Exhibits In Support Of Its Opposition To Plaintiffs' Motion For Summary Judgment as Exhibit 10 are true and correct copies of the photographs that I took during my visit to the VFW facility.
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> 5. The County has determined that the "Tom C. Dyke Veterans Park" is not a park within the meaning of section ***1136** 6930(b)(2) of the County's zoning ordinance, and is committed to that determination.

(Supplemental Hulse Decl., at 2.)

It is undisputed a park is located within 600 feet of two of the proposed sites. The parties disagree whether the park fits the meaning of the undefined term as used in the amended ordinance. The County does not provide any argument why section 1110, as opposed to some other definition of the term "park" in the zoning ordinance applies to interpret the amendment. Assuming section 1110 controls, the Court finds the County's evidence is insufficient to show the park does not meet the definition of that section. While neither side presented sufficient evidence to prevail on their respective cross-motions, the Court finds each side presented sufficient evidence to successfully oppose the other's summary judgment motion.

Accordingly, a disputed issue of fact remains whether the two sites comprising Area 5 are unavailable for failure to meet the distance requirement.

(ii) Long-Term Leases

Deja Vu contends some of the sites are unavailable because they are occupied by tenants with long-term leases. "[A] long-term lease may exclude a site from the commercial market." *Isbell*, 258 F.3d at 1113. Deja Vu's evidence consists of Mr. Luster's declaration regarding sites in Areas 3 and 6. (Luster Opp'n Decl., at 4.) The County objected to these portions of the declaration on the grounds of lack of personal knowledge, lack of foundation and hearsay. The Court agrees the pertinent statements are not admissible evidence. Only admissible evidence may be considered in deciding a motion for summary judgment. Fed.R.Civ.P. 56(e); *Beyene v. Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181-82 (9th Cir.1988). Deja Vu's argument based on long-term leases therefore lacks evidentiary support. Accordingly, Deja Vu failed to meet its burden on its summary judgment motion, or to raise a genuine issue of material fact in opposition to the County's motion, on the issue whether any sites in Areas 3 and 6 are unavailable due to long-term leases.

(iii) Physical Impediments to Use

Deja Vu next contends "[o]ne parcel in Area 2 is vacant land located in a river bed." (McLaughlin Decl., at 14.) The County maintains the parcel is almost three acres and at least a portion of it "would be suitable for construction of structures" even if part of it is located within a floodway. (Def.'s Opp'n, at 31-32.) The County's argument is weakened by Mr. Nevin's declaration, however, which asserts the site is "mostly located in the river bed." (Nevin Decl., Ex. A, Tab 2 (emphasis added).) On the other hand, Deja Vu's expert, Mr. McLaughlin, does not categorically state the site is in a floodway or on a flood plain, or could not be developed for some other reason.

It is undisputed the site is mostly located in the riverbed. The parties disagree whether it can be developed for a generic commercial enterprise. While neither side presented sufficient evidence to prevail on their respective cross-motions, the Court finds each side presented sufficient evidence to successfully oppose the other's summary judgment motion. Accordingly, a disputed issue of fact remains whether one site in Area 2 (parcel no. 281-182- 14) could be developed.

Deja Vu next contends "Area 4 has one parcel (326-050-11) located on a steep hillside, which could not be developed, and many of the parcels have steep slopes which are often an impediment to urban development." (McLaughlin Decl., at 14.) The County argues the site is available because of its large size (53.34 acres) and an existing business on it. However, the ***1137** County's argument does not address the parcel identified by Mr. McLaughlin. While Mr. McLaughlin was referring to parcel no. 326-050-11, the County was referring to parcel no. 326-050-19. (*Cf.* McLaughlin Decl., at 14 and Def.'s Opp'n, at 31.) The exhibit to Mr. Nevin's declaration pertaining to parcel no. 326-050-11 shows the size of the parcel is 7.53 acres, states it has no buildings, notes "very steep lot," and contains a photograph of a steep undeveloped slope without even a billboard. (Nevin Decl., Ex. A, at 4-4.)

The Court therefore finds the County failed to raise a genuine issue of material fact in opposition to Deja Vu's summary judgment motion, and failed to meet the burden as the moving party on its motion with respect to parcel no. 326-050-11. Accordingly, the Court finds parcel no. 326-050-11 in Area 4 is unavailable. As to the remaining unidentified steep sites mentioned by Mr. McLaughlin, the Court finds Deja Vu failed to raise a genuine issue of material fact in opposition to the County's summary judgment motion, and failed to meet the burden as the moving party on its own summary judgment motion.

(iv) Toxic Waste

[26] Deja Vu argues portions of some of the areas are unavailable because of toxic waste. The only evidence offered in support of this argument is Mr. McLaughlin's declaration:

> It appears that hazardous wastes may be present on or around the sites in Areas 4 and 6, and Area 4 has warning signs posted that there are carcinogens present in the area. Hazardous wastes are also

> likely to be present in Areas 2, 3 and 7. These sites must be considered unavailable as alternative avenues of communication for Adult Use.

(McLaughlin Decl., at 15.)

However, the County points to Mr. McLaughlin's deposition testimony, arguing his opinion about unavailability due to the presence of hazardous wastes lacks foundation and proper basis. With respect to Areas 3 and 7, Mr. McLaughlin testified he did not observe anything or take any pictures indicating hazardous waste was present. (Def.'s Ex. 12 [McLaughlin Depo., at 107].) The Court therefore finds Deja Vu's argument lacks evidentiary support with respect to hazardous waste on any sites in Areas 3 and 7. However, as to Areas 4 and 6, Mr. McLaughlin testified he observed barrels and storage of derelict vehicles, which in his experience often generate hazardous waste. (*Id.* at 97-103, 105- 07.) As to Area 2, he testified he based his opinion on the observation one site in Area 2 was used as a service station. (*Id.* at 107.) The Court notes exhibits to Mr. Nevin's declaration show several sites in Areas 2, 4 and 6 are occupied by various automotive businesses and junk yards. Mr. McLaughlin further testified he observed carcinogen signs on one site in Area 4. (*Id.* at 97-99.) The Court finds Mr. McLaughlin's deposition testimony provided sufficient basis for his opinions. This evidence is therefore admissible. The Court further finds it is sufficient to raise a genuine issue of fact regarding contamination of some of the sites in Areas 2, 4 and 6.

This issue of fact, however, is not material because, without any information regarding the extent of contamination, hazardous waste mitigation is generally a matter of the expense of developing a relocation site. The Ninth Circuit has not yet addressed the issue whether contamination could render a site unavailable; however, other courts have. *See, e.g.*, *Centerfold Club. Inc. v. City of St. Petersburg*, 969 F.Supp. 1288, 1302 (M.D.Fla.1997) (irrelevant whether environmental contamination would make property more expensive to purchase, lease, or develop). Specifically, the Eleventh Circuit, following *Renton* and ***1138** relying in part on *Topanga Press*, held having to clean up hazardous waste generally is not an impediment to relocation of "constitutional magnitude" for purposes of reasonable alternative avenues of communication. *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1334-35 (11th Cir.2000) (hazardous waste generated by a car repair business). As in *David Vincent*, there is not enough evidence in this case to support an inference the hazardous waste would be a prohibitive obstacle to relocation. *See id.* at 1335. This conclusion is reinforced by Mr. McLaughlin's own testimony, indicating hazardous waste contamination issues pervade the commercial real estate market, and environmental assessments are a normal part of commercial real estate transactions:

> Q. Isn't it fair to say, Mr. McLaughlin, that with respect to--if you are going to buy land these days, you're going to do--before you do that--a little due diligence on the environmental nature of the land?
> A. One would hope so.
> Q. Make sure there hasn't been--there isn't a hazardous waste problem?
> A. One would hope so.

(Def.'s Ex. 12 [McLaughlin Depo., at 107-08; *see also id.* at 105].) Since hazardous waste is essentially an economic issue inherent in the commercial real estate market, it cannot be considered for purposes of reasonable alternative avenues of communication. *See Topanga Press*, 989 F.2d at 1530. The mere presence of hazardous waste, without any evidence as to its extent or showing it is prohibitive to any generic commercial enterprise, is insufficient as a matter of law to render a site unavailable. Deja Vu therefore has failed to present sufficient evidence to raise a genuine issue of material fact in opposition to the County's summary judgment motion or to prevail on its own summary judgment motion as to this issue.

(v) Accessibility

Deja Vu contends a number of sites are not sufficiently accessible because they are landlocked, not accessible by roads serving commercial traffic, or lack public transportation. Although the Ninth Circuit has not yet considered whether a site with any of these characteristics is available, it has established a site must be reasonably accessible to the general public. *See Isbell*, 258 F.3d at 1113; *Lim*, 217 F.3d at 1055.

Deja Vu contends a number of sites in Areas 1, 7 and

8 are landlocked. A truly landlocked site is presumably not available because it would not be accessible to the general public. On the map, all the sites identified by Deja Vu appear landlocked. However, the County's evidence suggests the sites are accessible. As to sites in Area 1 (parcels no. 141-210-23 and 141-210-09), its photographs show they are accessible by a dirt road. (Nevin Decl., at 2 & Ex. A, Tab 1.) As to sites in Area 7 (parcels no. 483-022-35, 483-071-05, 483-071- 09), the photographs show cars, existing businesses and structures. (*Id.* Tab 7.) Although the County's evidence is circumstantial, it is more substantial than a mere "scintilla of evidence" raising "some metaphysical doubt as to material facts." *See* *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505; *Matsushita*, 475 U.S. at 586, 106 S.Ct. 1348. Reasonable inferences which can be drawn from it support the County's claim the sites are not landlocked. Deja Vu does not address this evidence. As the burden is on Deja Vu to show a site would not reasonably become available, the Court finds it failed to present sufficient evidence to prevail on its summary judgment motion or to raise a genuine issue of material fact in opposition to the County's motion with respect to sites in Areas 1 and 7.

As to the sole site in Area 8, the County makes no argument and points to no evidence suggesting it is accessible. The ***1139** photograph of the site does not show the presence of any road, vehicle or functional structure, and it is not clear from the map of the area whether the site abuts a road. (Nevin Decl., Ex. A, Tab 8). Neither side presented any evidence regarding the existence of easements, which may render an apparently landlocked parcel accessible or inaccessible. With respect to the sole site in Area 8, the Court therefore finds neither side presented sufficient evidence in support of its respective summary judgment motion.

Deja Vu next contends Areas 3 and 5 are only accessible by roads which do not serve commercial traffic. (McLaughlin Decl., at 15.) Deja Vu does not contend these areas are not accessible by a road. The County's evidence shows Area 3 as a developed office park near Rancho Bernardo. The photographs show roads, parking lots and cars. (Nevin Decl., Ex. A, Tab 3.) The aerial photograph of the two sites comprising Area 5 shows them abutting Tavern Road. (*Id.* Tab 5.) Deja Vu does not attempt to rebut the County's evidence or explain why these areas are not accessible to the public in general, or commercial traffic in particular. As the burden is on Deja Vu to show a site would not reasonably become available, the Court finds it failed to present sufficient evidence to prevail on its summary judgment motion or to raise a genuine issue of material fact in opposition to the County's motion with respect to accessibility of the sites in Areas 3 and 5.

Deja Vu next contends Areas 3, 6, and 7, or portions thereof, are unsuitable for commercial use because adequate parking is not available. (McLaughlin Decl., at 13.) A site must comply with the zoning ordinance in question to be available. *Isbell*, 258 F.3d at 1113 n. 3; *Lim*, 217 F.3d at 1055. Deja Vu's argument is undercut by its expert's deposition testimony. Mr. McLaughlin admitted, at least as to some of the sites, parking garages could be built above the surface parking lots, underground parking structures could be built below the buildings, or a commercial business could use a nearby parcel to provide parking for the site. (Def.'s Opp'n, at 34 (citing Ex. 12, at 51-52, 55, 57-60; Ex. 13 [Zoning Ordinance § 6785(a)]).) With respect to these sites, the parking issue does not go to the availability of the site, but to the economic impact of relocation on the site, an issue which cannot be considered in this analysis. *Topanga Press*, 989 F.2d at 1529. Deja Vu does not address Mr. McLaughlin's testimony in its papers. Furthermore, the photographs of many of the sites in these areas show vacant surface parking. (Def.'s Opp'n, at 34 (citing Nevin Decl., Ex. A, Tabs 3, 6 & 7).) Deja Vu does not address this evidence. As the burden is on Deja Vu to show a site would not reasonably become available, the Court finds it failed to present sufficient evidence to prevail on its summary judgment motion or to raise a genuine issue of material fact in opposition to the County's motion with respect to parking for the sites in Areas 3, 6 and 7.

Last, Mr. McLaughlin makes a cryptic remark in his declaration that "[n]o public transit is apparent in any of the Areas." (McLaughlin Decl., at 15.) Deja Vu does not elaborate on this in its points and authorities, and offers no case law to suggest public transporta-

tion is necessary before a site is considered accessible. The Court's own research has revealed no authority necessitating access by public transportation. Since Deja Vu does not argue public transit is necessary, this issue is waived for purposes of this motion. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir.2003).

(vi) Other

Mr. McLaughlin also opined one site in Area 7 is not available because the building ***1140** on the site straddles parcel lines "in a way that disqualifies most of the structure and a portion, if not all, of the one storefront that might otherwise qualify as an Adult Use site." (McLaughlin Decl., at 13-14.) This is another point Deja Vu does not elaborate on in its points and authorities. Since Deja Vu does not present any argument or legal authority to show why this site is unavailable, this issue is waived for purposes of this motion. *See Indep. Towers of Wash.*, 350 F.3d at 929.

Based on the foregoing, three of the thirteen sites in Area 4 (parcels no. 326-050-11, 326-050-12 and 326-060-18) and one of the fourteen sites in Area 7 (parcel no. 483-071-11) have been disqualified. In addition, issues of fact exist as to one of the eighteen sites in Area 2 (parcel no. 281-182-14), both sites comprising Area 5, and the sole site in Area 8.

b. Sufficiency of the Available Sites

"Once the areas that are not part of the market are excluded, the question becomes whether the remaining acreage provides the Adult Businesses with a reasonable opportunity to relocate." *Topanga Press*, 989 F.2d at 1532. "There is no constitutional requirement that [the government] make available a certain number of sites." *Diamond*, 215 F.3d at 1056.

The parties disagree as to the method the Court should apply to address this issue. The four Ninth Circuit decisions applying the *Renton* standard have addressed two types of cases. In *Walnut. Properties* and *Topanga Press*, the Ninth Circuit addressed the situation where numerous adult entertainment businesses were competing for a relatively small number of available relocation sites. In *Walnut Properties*, thirteen existing businesses were presented with a "small handful" of available sites which could operate simultaneously in light of the 1,000-foot separation requirement. 861 F.2d at 1103, 1108. The court held this did not allow for reasonable alternative avenues of communication. *Id.* at 1110. Similarly in *Topanga Press*, at least 102 adult entertainment businesses were competing for approximately 120 available sites, which could not operate simultaneously due to the 1,000-foot separation requirement. 989 F.2d at 1533. The court again found this was not sufficient. *Id.*

On the other hand, in *Young v. City of Simi Valley* and *Diamond*, the court was faced with a situation where the first adult entertainment applicant sought a permit under a new zoning ordinance. In *Young*, four available sites, which could operate simultaneously, were held sufficient as a matter of law for the location of the sole applicant in the absence of any evidence the ordinance otherwise had a chilling effect. 216 F.3d 807, 811, 818 n. 10, 822-23 (9th Cir.2000). In *Diamond*, the court held the separation requirement was irrelevant in determining the number of sites because there was only one applicant, and held a total of seven available sites was constitutionally sufficient. 215 F.3d at 1056-57.

It is undisputed only Deja Vu is in need of a relocation site. Three adult entertainment businesses have ever operated in the unincorporated San Diego County: Fantasyland, Deja Vu, and Innspot East, which was annexed into the City of Lemon Grove in 1981. All three businesses are still in existence. There have never been any other adult entertainment businesses in the unincorporated San Diego County. Only Innspot East and Deja Vu applied for an adult entertainment license in the last 25 years. Fantasyland was exempt from this requirement pursuant to a settlement with the County. (*See* Pelowitz Decl., at 1-2.) At the time the ordinance was amended, only Fantasyland and Deja Vu were operating in the unincorporated San ***1141** Diego County. (Joint Stmnt of Undisputed Facts, at 5.) It is undisputed Fantasyland is exempt from the requirements of the amended zoning ordinance pursuant to the settlement, which leaves only Deja Vu in need of a relocation site. (*See* Pls.' Joint Opp'n, at 26 n. 24.)

Neither side presented any evidence of additional businesses or individuals interested in operating an adult entertainment business in the unincorporated area of the San Diego County. Given the small number of businesses ever to apply for an adult entertainment license, the Court finds the fact Deja Vu is not the first business ever to apply, but is the sole business required to relocate after the amendment, is a distinction without a difference. Accordingly, the instant case is factually more akin to *Young* and *Diamond* than to *Topanga Press* and *Walnut Properties.* [FN12]

> FN12. *Diamond* and *Young* each approached differently the issue which number of sites is relevant when only one business seeks a location. In *Diamond*, the court applied the total number of available sites, and in *Young* it applied the number which can operate simultaneously under the separation requirements of the zoning ordinance. Although the two approaches result in a vastly different number of sites in this case, the Court finds the difference is not relevant. For purposes of this analysis, the Court will follow the approach taken in *Young*, as the more recent of the two cases.

After the four excluded sites are accounted for, 72 of the 76 sites remain available. If the four additional sites as to which there is an issue of fact are also excluded for purposes of the analysis, 68 sites remain available in six areas: 1, 2, 3, 4, 6 and 7. It is undisputed due to the 1,000-foot separation requirement between adult entertainment businesses, Areas 1, 3 and 6 can simultaneously support only one adult entertainment business each. (McLaughlin Decl., at 15; Hulse Decl., at 3.) It is also undisputed Area 4 is large enough for two businesses to operate simultaneously, provided they are located at opposite ends of the area. (*Id.*) However, if an adult entertainment business were to locate in the center of Area 4, then only one business could operate in that area. (McLaughlin Decl., at 15.) The parties disagree on how many adult entertainment businesses could operate simultaneously in Areas 2 and 7. The County's evidence shows up to three businesses could operate simultaneously in Area 3, while Deja Vu's evidence shows only up to two could operate simultaneously. (*Cf.* Supplemental Hulse Decl., at 2; Def.'s Ex. 14 *and* McLaughlin Decl. at 15.) As to Area 7, the County's evidence shows it could support up to two businesses simultaneously, while Deja Vu's evidence shows it could support only one. (*Cf.* Supplemental Hulse Decl., at 2; Def.'s Ex. 15 *and* McLaughlin Decl., at 15.) Accordingly, if Deja Vu's evidence is believed, at most eight adult entertainment businesses can operate simultaneously on the total 68 sites. Deja Vu does not contend Fantasyland's present location further diminishes the number of sites which can operate simultaneously. If the County's evidence is believed, the largest possible number of simultaneously occupied sites is ten. Since only Deja Vu seeks a relocation site, it can choose among all the available sites. No matter which party's evidence is believed, the number of sites which could be simultaneously occupied by adult entertainment businesses in this case is greater than the number found sufficient in *Diamond* and *Young.*

[27] However, "[d]ata regarding the number of sites available for adult use is meaningless without a contextual basis for determining whether that number is sufficient for that particular locale." *Young*, 216 F.3d at 822. Supply and demand, therefore "should be only one of several factors that a court considers when determining ***1142** whether an adult business has a 'reasonable opportunity to open and operate' in a particular city." *Id.* (quoting *Topanga Press*, 989 F.2d at 1529). "A court should also look to a variety of other factors including, but not limited to, the percentage of available acreage theoretically available to adult businesses, the number of sites potentially available in relation to the population, community needs, the incidence of [adult businesses] in other comparable communities, [and] the goals of the city plan." *Young*, 216 F.3d at 822 (internal quotations omitted).

[28] The parties presented evidence of the percentage of the available acreage and the number of potentially available sites in relation to the population in the unincorporated San Diego County. The parties agree the unincorporated area encompasses 2,286,059 acres, with 2,318.66 acres zoned for industrial use. In addition, the County offers, and Deja Vu does not dispute, 2,764.86 acres are zoned for commercial use.

After the four disqualified sites are accounted for, the 72 remaining sites amount to a total of 235.16 acres available for adult entertainment use. If the additional four sites as to which there are questions of fact are also excluded, the remaining acreage is 227.03. The parties disagree whether the relevant comparison is between the available sites and the total acreage of the unincorporated area, or the total acreage which could potentially be available to adult entertainment businesses if it were not for the amended zoning ordinance. While *Young* states the pertinent factor is "the percentage of available acreage theoretically available to adult businesses," 216 F.3d at 822, it does not expressly answer this issue. Furthermore, in *Walnut Properties*, the court relied on the acreage of the entire municipality. *See* 861 F.2d at 1108; *see also* *Renton*, 475 U.S. at 53, 106 S.Ct. 925. The issue presented here, however, was not addressed in either case, and the choice was made without discussion. The purpose of the comparison ultimately is to determine whether an adult business has a "reasonable opportunity to locate," and the focus is on the "actual business real estate market" where a generic commercial enterprise could potentially operate. *See* *Isbell*, 258 F.3d at 1112-13. The Court therefore finds the areas which would not be available to a generic business should be excluded. In this case, the relevant comparison is therefore made between the acreage of the available sites and the total industrially- and commercially-zoned acreage in the unincorporated area, which totals 5,083.52 acres. Based on this comparison, Deja Vu will be able to consider sites located on 4.46% of the total industrially and commercially zoned acreage.

In comparing the acreage available to adult entertainment businesses to the population, the parties disagree about the population of the unincorporated area. Deja Vu bases its comparison on 674,440 people, taken from a population summary chart on the County's website. (*See* McLaughlin Decl., at 5.) The County, relying on the estimate of the California Department of Finance, contends the population is 470,000 as of January 1, 2004. (Def.'s Opp'n, at 36 (citing Manicom Decl., at 3 & Ex. 1; Def.'s Ex. 16).) However, when the population summary chart on the County's website is examined, it shows an existing population of 446,080 based on the 2000 census, and a population of 674,440 under the heading of "April 2004 Working Copy." (Def.'s Ex. 17.) The County explains this heading refers to "the maximum population (674,440) the unincorporated area of the County will be able to accommodate if the Proposed General Plan is enacted by the Board of Supervisors." (Supplemental Hulse Decl., at 3.) Deja Vu does not address the County's explanation, and does not offer any explanation why it chose this population number. It is plain the pertinent population number is the existing ***1143** population, most recently estimated at 470,000. Based on the actual population, the 227.03 acres of potentially available sites amounts to approximately 4.83 acres per 10,000 persons. [FN13]

> FN13. Deja Vu's calculation, based on a population of 674,440 and available adult entertainment acreage of 233.4 acres, appears to be in error, even if the Court were to accept its underlying premises. Deja Vu contends these numbers yield 0.35 acres per 10,000 persons. (Pls.' Joint Mot., at 30.) The correct calculation is: 233.4 acres divided by 674,440 persons, multiplied by 10,000 persons, which yields 3.46 acres per 10,000 persons.

In its opposition to the County's motion, Deja Vu offers a comparison chart comparing the acreage and population statistics of this case to those of *Walnut Properties* and *Renton*. The comparison, however, is irrelevant as a matter of law because each case must be examined on its own facts. *See* *Young*, 216 F.3d at 821, 822 ("*Renton* requires a case by case analysis;" the inquiry is "whether that number is sufficient for that particular locale"). Furthermore, neither in *Renton* nor in *Walnut Properties* were the circumstances analogous to the unincorporated County. In *Walnut Properties* thirteen businesses were vying for "a small handful" of sites, with supply apparently not meeting the demand. 861 F.2d at 1104, 1108. On the other hand, in *Renton* the supply was far greater than the demand. 475 U.S. at 52-53, 106 S.Ct. 925. For all of the above reasons, the statistics which can be derived from these two cases cannot be viewed as defining the scope of what constitutes reasonable alternative avenues of communication in this case.

Given the evidence presented by the parties, including the history of scant demand for adult entertainment licenses, the lack of evidence showing others wish to open an adult entertainment business in the unincorporated County, the number of potentially available sites and their acreage, the total industrial and commercial acreage and population in the unincorporated area, the Court finds the County met its burden in opposition to Deja Vu's summary judgment motion and in support of its own summary judgment motion to show the number of sites available to adult entertainment businesses under the amended ordinance is sufficient to provide reasonable alternative avenues of communication. [FN14]

> FN14. For purposes of reaching this conclusion, the Court assumed Deja Vu could disqualify at trial the four sites as to which it raised an issue of fact. Accordingly, the factual issues pertaining to those sites are not material, because they could not affect the outcome of this case. *See* *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

C. Procedural Safeguards

[29] The amended ordinance requires an administrative permit to establish, operate, enlarge, or transfer ownership or control of an adult entertainment establishment. A permit application must be approved if the adult entertainment business location meets the distance and separation requirements of the amended ordinance. Deja Vu challenges the provision of the amended ordinance, which outlines the applicable administrative permit procedure, claiming it fails to provide for a "timely decision" on an application and precludes prompt access to the courts. (Pls.' Joint Mot., at 26.) The County maintains the ordinance requires it to act on a permit application within a reasonable time, and the time allowed for the County to consider an appeal is also reasonable. The County moves for summary judgment and a finding the permit application process of the amended ordinance is constitutional. Deja Vu cross-moves for a finding it is an unconstitutional prior restraint on speech.

***1144** In *FW/PBS, Inc. v. City of Dallas*, the plaintiffs challenged a licensing ordinance for adult entertainment businesses. 493 U.S. 215, 220, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). "A scheme that fails to set reasonable time limits on the decision-maker creates the risk of indefinitely suppressing permissible speech." *Id.* at 227, 110 S.Ct. 596. Two essential procedural safeguards are required for a valid licensing scheme. *Id.* First, "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained." *Id.* at 228, 110 S.Ct. 596. Second, "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.; see also* *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 781-82, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004).

Under the licensing scheme in *FW/PBS*, licenses were to be issued within thirty days following the receipt of an application, and after the premises were inspected and approved by the health, fire, and building officials. There was no time limit for completing the inspections, and applicants had no way to ensure the inspections would occur within the thirty-day period. *FW/PBS*, 493 U.S. at 227, 110 S.Ct. 596. As a result, a license could be postponed indefinitely. *Id.* at 229, 110 S.Ct. 596. The ordinance was found unconstitutional because it did not "provide for an effective limitation on the time within which the licensor's decision must be made," and because it failed "to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial." *Id.*

The principles discussed in *FW/PBS* were applied by the Ninth Circuit in *Kev, Inc. v. Kitsap County*. The ordinance in *Kev* required erotic dancers and operators of erotic dance studios to obtain licenses, but there was a five-day waiting period to obtain licenses after filing applications. 793 F.2d at 1060. Because the government "failed to demonstrate a need" for curtailing the dancers' First Amendment rights for five days while an application was pending, the court declared the five-day waiting period for dancers unconstitutional. *Id.* The five-day waiting period for the operators was found constitutional because the government "presented a sufficiently compelling justification." *Id.* at 1060 n. 6. The government anticipated topless dancing establishments were likely to require

a "significant reallocation of law enforcement resources," and five days was a reasonable time for the government to make adjustments given its limited resources. *Id.* The court also noted there was "no reason for a new studio operator not to apply for a license one week before he plans to open his facility." *Id.* Accordingly, *Kev* places the burden on the government to explain the time period it needs to decide whether to grant or deny a license application. *Kev*, 793 F.2d at 1060.

In this case, the parties do not agree what period of time is allowed under the amended ordinance to make a licensing decision. Deja Vu contends the County has eighty days to act on an application plus another sixty days to consider an appeal, for a total of 140 days. The County maintains it has seventy days to make the decision on a permit application plus sixty days to consider an appeal, for a total of 130 days. This factual dispute is not material. Even if the Court assumes the County is correct, and the applicable period is 130 days, [FN15] the County presented no ***1145** evidence to show why it needs so much time and why this period is reasonable.

> FN15. The parties' respective calculations of the time period are as follows: The amended zoning ordinance states in pertinent part, a permit application "shall be acted upon by the Director following a public hearing within forty (40) days following receipt of the complete application pursuant to Section 65943 of the Government Code .... The director shall make his ruling within ten (10) days following the hearing." (LR, at 24 [Ordinance No. 9469, § 6930(b)(1)].) In pertinent part, California Government Code Section 65943(a) states:
>
> Not later than 30 calendar days after any public agency has received an application for a development project, the agency shall determine in writing whether the application is complete and shall immediately transmit the determination to the applicant for the development project. If the written determination is not made within 30 days after receipt of the application, ... the application shall be deemed complete ....
>
> The time limit for the County to act on a permit application begins to run when the application is "accepted as complete." *Ni Orsi v. City Council of the City of Salinas*, 219 Cal.App.3d 1576, 1585, 268 Cal.Rptr. 912 (1990).
>
> Although the Director can act sooner, he or she can wait thirty days until the permit application is deemed complete by operation of law. At that time, the forty days in which the Director must hold a public hearing begins to run. Assuming the Director holds the hearing on the fortieth day, the Director must make a ruling within ten days following the hearing. Thus, the County can take as many as eighty days (*i.e.*, 30 + 40 + 10) to make a decision on a permit application. If an administrative permit is denied, the County then has another sixty days to make a determination on an appeal, which means an applicant could potentially be unable to seek judicial review for 140 days (*i.e.*, 30 + 40 + 10 + 60). The County's interpretation of these two sections results in a maximum 130-day period because the County contends the ten-day period for issuing a decision "is not tacked on to the earlier 40-day period." (Def.'s Opp'n, at 24.)

Because permit issuance is conditioned solely on a finding of compliance with nondiscretionary distance criteria, *i.e.*, the distance and separation from specified land uses, Deja Vu argues the time to rule on the permit application "exceeds the brief, reasonable period contemplated by *FW/PBS* for a permit decision." (Pls.' Joint Mot., at 26.) On the other hand, the County contends thirty days to determine whether a permit application is complete is not "subject to the *FW/PBS* time limitation," and the forty days to make a decision meets the reasonableness standard based on subsequent case law, which found longer time periods constitutional. The County cites no relevant authority to support its argument the thirty days to determine whether an application is complete should not be counted for purposes of the reasonableness inquiry under *FW/PBS*. The standard set forth in *FW/PBS* requires the procedure "provide for an effective

limitation on the time within which the licensor's decision must be made" and "provide for prompt judicial review," which suggests it would be relevant to consider all applicable time periods from the submission of the application until judicial review becomes available to the applicant. 493 U.S. at 229, 110 S.Ct. 596.

The County also cites three cases to support its argument: *Redner v. Dean*, 29 F.3d 1495 (11th Cir.1994); *TK's Video v. Denton County, Tex.*, 24 F.3d 705 (5th Cir.1994); *Wolff v. City of Monticello*, 803 F.Supp. 1568 (D.Minn.1992). None of these cases supports the County's position.

The ordinance at issue in *Redner* placed a 45-day time limit on the government's decision to grant or deny an application, which was found constitutionally reasonable. [FN16] 29 F.3d at 1497-98, 1501. In the 45 days, the government was to determine whether the adult entertainment business ***1146** complies with the building, fire, health and zoning regulations. *Id.* at 1497. The *Redner* ordinance is distinguishable because all the County has to do before deciding whether to issue a permit in this case, is to determine whether the business meets the distance and separation requirements of the zoning ordinance. (*See* LR, at 25 [Ordinance No. 9469, § 6930(b)(2)].)

> FN16. The court found the ordinance unconstitutional because of two other provisions which created the risk expressive activity could be suppressed for an indefinite period of time: the ordinance only provided the applicant "may be permitted" to begin operating if the government did not make a decision within 45 days, and the ordinance only provided for an appeal to be heard "*as soon as the Board's calendar will allow*." *Id.* at 1501.

TK's Video is distinguishable for the same reasons as *Redner*. The licensing ordinance in *TK's Video* provided the government sixty days following receipt of an application to issue an operating license, unless certain disqualifying factors were found. 24 F.3d at 708. This did not place an undue burden on speech because "[l]icensing entails reviewing applications, performing background checks, making identification cards, and policing design, layout, and zoning arrangements." *Id.* This case is distinguishable because the County's application review entails only the determination if the distance and separation requirements are met, and does not include the kind of checks which justified a longer time frame in *TK's Video.*

In *Wolff,* the operator of an adult video store challenged an ordinance which allowed the government ninety days to grant or deny a license. 803 F.Supp. at 1570, 1574. The district court noted "[t]he ninety-day time period prescribed in the ordinance does not appear to be unreasonable per se." *Id.* at 1574. However, it nevertheless found the ordinance unconstitutional because it made "no provision for the continued operation of an existing adult use pending the completion of the application process." *Id.* at 1575.

The County's cases do not reach the heart of the issue raised by Deja Vu: the reasonableness of the delay to issue permits under the circumstances of this case. Compliance with the distance and separation requirements, the only factor in the permit decision, can be quickly verified through the County's GIS system, which measures the distance between two points. (*See, e.g.*, Supplemental Hulse Decl., at 2.) In addition, Deja Vu submitted a copy of a Final Decision of the Zoning Administrator dated August 9, 2001, which indicates on one occasion the Director made a final determination on an administrative permit application only nine days after it was received for processing. (Manicom Reply Decl., Ex. 5.) Deja Vu also points to the San Diego Municipal Code Section 123.0306, which requires the City Manager to approve or deny an application for a Zoning Use Certificate for an adult entertainment establishment in only fifteen business days after receipt.

On the other hand, the County has offered no evidence to show why it needs 130 days for the entire process. The only explanation it presented for the lengthy time frame is the unsupported statement the sixty days allowed to consider an appeal is reasonable "given the fact an appeal to the County's elected Board is involved."

The Court therefore finds the County presented no evidence to show the time period for issuing a permit pursuant to the amended ordinance is reasonable, an issue as to which it bears the burden at trial. Due to the lack of evidence on this point, the County failed to meet its burden as the moving party on summary judgment, and has also failed to raise a genuine issue of material fact in opposition to Deja Vu's cross-motion. The Court finds Ordinance No. 9469, Sections 6930(b)(1) and 7064, unconstitutional, to the extent it fails to impose reasonable time limits on the decisionmaker to act on administrative permit applications, as required by *FW/PBS*.

[30] Neither party addresses whether invalidating the time periods specified in sections 6930(b) and 7064 results in striking the entire ordinance or severing the ***1147** unconstitutional provisions. The Legislative Record provided by the County does not include a severability clause applicable to Ordinance No. 9469. However, its absence does not automatically preclude severance. *See* *Barlow v. Davis*, 72 Cal.App.4th 1258, 1264, 85 Cal.Rptr.2d 752 (1999). The severability "determination depends on whether the remainder is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute." *Id.* (internal quotation marks, citations and alterations omitted). Based on the Legislative Record, and review of the affected ordinance, the Court finds the unconstitutional procedural provisions severable. Specifically, the remainder of the ordinance (the substantive zoning provisions) is sufficiently complete in itself, and the County likely would have adopted the amended zoning ordinance, even if it had foreseen some of its procedural provisions would be invalidated.

D. Spot Zoning

Deja Vu alleges the County enacted the zoning amendments "solely for the illegitimate purpose of forcing Plaintiffs to cease their authorized use of the Property, rather than for any legitimate governmental purpose." (First Am. Compl., at 15.) Deja Vu moves for summary adjudication of this claim, and argues the County's zoning ordinance amendments are a clear case of "invalid spot zoning," which should be enjoined from enforcement. (Pls.' Joint Mot., at 31.) The motion is based on comments made by legislators before enacting the amendment, and on the fact Deja Vu is the only adult entertainment business which must relocate as a result of the amendment. Deja Vu acknowledges courts will not generally look to the motives of legislators in enacting an ordinance, but argues an exception applies "in cases involving spot zoning or discrimination against an individual or a particular land parcel." (*Id.*) In opposition, the County points to Deja Vu's evidence to argue the County did not have any particular adult entertainment business in mind when it enacted the amendment. The County presented no evidence of its own.

Deja Vu relies on California law, which recognizes a claim for discrimination against a particular parcel of property. *See, e.g.,* *G & D Holland Constr. Co. v. City of Marysville*, 12 Cal.App.3d 989, 994, 91 Cal.Rptr. 227 (1970) ("The principle limiting judicial inquiry into the legislative body's police power objectives does not bar scrutiny of a quite different issue, that of discrimination against a particular parcel of property" and "the courts will give weight to evidence disclosing a purpose other than that appearing upon the face of the regulation" "where 'spot zoning' or other restriction upon a particular property evinces a discriminatory design against the property user"). However, Deja Vu does not allege a California spot zoning claim in its complaint. Instead, it alleges the amendment violates the freedom of speech provisions of the federal and California constitution. (First Am. Compl., at 20-21, 23.) As the spot zoning under California common law is not alleged in the complaint, and Deja Vu does not seek to amend it, its motion for summary judgment is denied to the extent it is based on this claim.

[31] In the alternative, even if Deja Vu alleged a spot zoning claim under California law, the evidence it presented is insufficient to meet its burden as the moving party on summary judgment. Since Deja Vu would bear the burden of proof at trial as to its spot zoning claim, it "must make a showing sufficient for the Court to hold that no reasonable trier of fact could find other than for the moving party," and "must establish beyond peradventure all of the essential elements of the claim ... to ***1148** warrant judgment in its favor." *Pecarovich*, 272 F.Supp.2d at 985 (internal

quotation marks, alterations and citations omitted); *see also* *C.A.R. Transp. Brokerage*, 213 F.3d at 480.

Deja Vu relies on two pieces of evidence in support of its spot zoning claim. First, it relies on a memorandum to the Board of Supervisors from two members wishing to add an item to an agenda "Getting Tough on Adult Entertainment Establishments." (Manicom Decl., Ex. 2, at 1.) The memorandum expresses dissatisfaction with the "current process" for "the citing of Adult Entertainment Establishments" because there is no provision for "public input and notification." (*Id.* at 2.) The last paragraph states:

> The County must protect its citizens by creating the most restrictive ordinance possible within the boundaries of the law. While the Major Use Permit will allow for public input, the County must do everything within its authority to minimize the adverse impacts caused by Adult Entertainment Establishments. Rewriting the current ordinance will further protect unincorporated citizens.

(*Id.*) Deja Vu also cites comments by Supervisor Jacob during a meeting of the County Board of Supervisors on June 12, 2002:

> A few months ago it came to our attention that we had a defective ordinance in regards to adult entertainment establishments and that's why in March, the Board of Supervisors unanimously directed our staff and our legal counsel to come back with the toughest, the strictest ordinance and regulations for adult entertainment businesses that we could possibly have that would be upheld if challenged in a court of law....
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> * * * * * *
>
> These establishments, first of all, are not wanted in any of the communities and I think that is a foregone conclusion. But the courts have ruled that we must allow them in certain areas and we do know that we had a zoning ordinance that was invalid and therefore what that created is that every piece of property in every zone, whether it be residential, commercial, industrial, was fair game for the establishment of an adult entertainment business. So, with what we have before us, in my view does meet the test of being the toughest, the most restrictive ordinance and regulations that we can have that have been court tested. I think that it is critical that our regulations stay within the boundaries of the law. They must be defensible. Otherwise the County is not able to enforce and to, bottom line, to protect our children and our communities. This will, I think, within the constitutional rights that are guaranteed by the courts, will protect our communities as much as possible. I think that the next most important thing is ... to have aggressive enforcement....

(LR, at 1931-38.)

Contrary to Deja Vu's assertion, these statements are not susceptible to an interpretation that would yield a scintilla of evidence or a reasonable inference the County was discriminating against it. *See* *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505. To the contrary, the only reasonable interpretation is the County intended the zoning ordinance as amended to apply to all adult entertainment businesses. Although it appears Deja Vu has been affected disproportionately because it is the only business which must change its location, all adult entertainment businesses are subject to the same restrictions, and there is nothing to suggest Deja Vu was singled out. Consequently, Deja Vu has failed to meet its burden as the moving party on summary judgment with respect to a spot zoning claim under California law.

***1149** To the extent Deja Vu intended to base its motion consistently with its complaint on a spot zoning claim under the free speech provision of the First Amendment, *Renton* rejected a similar argument. The Supreme Court reversed a Ninth Circuit finding that the predominate concern with secondary effects of adult entertainment businesses was not enough to sustain the ordinance:

> According to the Court of Appeals, if "a *motivating factor* " in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision. This view of the law was rejected in *United States v. O'Brien*, the very case that the Court of Appeals said it was applying:
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> "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 le-

gislative motive...."

. . . . .

"... 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 us to eschew guesswork."

Renton, 475 U.S. at 47-48, 106 S.Ct. 925 (internal citations omitted) (quoting *O'Brien*, 391 U.S. at 383-84, 88 S.Ct. 1673). For the foregoing reasons, Deja Vu's motion for summary judgment on the spot zoning claim is denied.

VII. Licensing and Registration Requirements

In their respective operative complaints, all plaintiffs challenge on its face the constitutionality of those sections of the amended ordinance, which require all adult entertainment establishments and their owners, managers, performers, and employees to obtain a license, and which additionally require each entertainer and each manager to complete a registration form before starting work. [FN17] Plaintiffs contend these requirements constitute an unconstitutional restriction on the time, place, and manner of protected speech, and fail to provide for constitutionally-required procedural safeguards under the freedom of speech, press and expression provisions of the federal and California constitutions. The County moves for summary judgment of plaintiffs' challenges, and all plaintiffs cross-move for summary judgment of this claim.

FN17. According to plaintiffs, a "stay of enforcement" has been in effect as to the licensing requirements since the outset of this litigation. As a result, the licensing requirements have not actually been applied to them. Plaintiffs reserve the right to bring "as applied" challenges should a controversy arise in the future. (Pls.' Joint Mot., at 7 n. 4.)

Licensing requirements, such as the licensing provisions of the amended ordinance in this case, are considered prior restraints on speech, and are presumptively unconstitutional:

A licensing scheme regulating [adult entertainment] is considered a prior restraint because the enjoyment of protected expression is contingent upon the approval of government officials. While prior restraints are not unconstitutional per se, any system of prior restraint comes to the courts bearing a heavy presumption against its constitutional validity. Like other regulations upon [adult entertainment], prior restraints can be imposed only if they are reasonable time, place and manner restrictions. In addition, an adult entertainment licensing ***1150** scheme must contain at least two procedural safeguards. First, a decision to issue or deny a license must be made within a brief, specified and reasonably prompt period of time. Second, there must be prompt judicial review in the event a license is denied.

Clark v. City of Lakewood, 259 F.3d 996, 1005 (9th Cir.2001) (internal citations omitted). The instant cross-motions raise three issues pertaining to the licensing requirements: (1) whether plaintiffs have standing to challenge some of the provisions; (2) whether the licensing requirements constitute reasonable time, place, and manner restrictions; and (3) whether they provide sufficient procedural safeguards.

A. Standing

The County contends all plaintiffs lack standing to the extent they challenge the licensing provisions, which prohibit issuing a license to any minor or to any "officer, director, general partner or other person who will manage or participate directly in the decisions relating to management and control of the business" and who has been convicted of specified crimes. Any plaintiff challenging the licensing provisions on these grounds would have to show he or she was either a minor or convicted of a specified crime. *See* *FW/PBS*, 493 U.S. at 233-34, 110 S.Ct. 596. None of the plaintiffs made a showing along these lines. However, upon review of plaintiffs' papers, it is apparent they do not challenge the licensing provisions on these grounds. The County's standing argument is therefore inapplicable in this case.

B. Reasonable Time, Place, and Manner Restriction

Plaintiffs contend the licensing provisions are uncon-

stitutional for three reasons: (1) they are unnecessarily burdensome and redundant; (2) they require disclosure of personal information which could potentially be made publicly available under California law; and (3) obtaining and maintaining a license depends on compliance with the hours-of-operation, interior configuration and zoning provisions, which plaintiffs maintain are unconstitutional. As to the last argument, the Court has determined above the hours-of-operation, interior configuration and substantive zoning provisions are constitutional, and therefore rejects plaintiffs' challenge to the licensing and registration requirements to the extent it is based on those provisions.

1. Narrowly Tailored--Burdensome and Redundant

[32] Plaintiffs argue the licensing requirements are broader and more onerous than justified by the significant governmental interests the County intended to address. The dispute is therefore focused on the issue whether the County's licensing requirements are "narrowly tailored" to "serve a substantial government interest" under *Renton*, 475 U.S. at 50-52, 106 S.Ct. 925.

The purpose of the amended licensing provisions in large part is to ensure no minors or individuals convicted of certain crimes, such as drug dealing, prostitution, rape, or pandering, work in adult entertainment establishments, to facilitate identification of witnesses and suspects connected to criminal activity found to be associated with adult entertainment businesses, and to curtail the spread of sexually-transmitted diseases. (*See* LR, at 142-45 [Ordinance No. 9479, § 21.1801(B)(1)-(25)].)

Plaintiffs first contend the requirements are unduly burdensome because each corporate officer, director, general partner or other person involved in management directly participating in management decisions or control of the business must personally ***1151** appear at the Sheriff's office to file the establishment license application. The County's opposing argument is although these individuals must each sign the application, only one must personally appear at the Sheriff's office. While this would be a sensible approach, it does not find support in the language of the ordinance:

> (F) ... If a person who wishes to operate an adult entertainment establishment is other than an individual, each officer, director, general partner or other person who will manage or participate directly in the decisions relating to management and control of the business shall sign the application for a license as applicant. Each applicant must be qualified under Section 21.1804 and each applicant shall be considered a licensee if a license is granted.

(LR, at 149, 151 [Ordinance No. 9479, § 21.1803].) The definition of the term "licensee" includes "the individual or individuals listed as an applicant on the application for a[n] adult entertainment establishment license." (*Id.* at 147 [§ 21.1802(F)].) These provisions, read together, clearly indicate each officer, director, general partner or manager is an "applicant." Under subsection (C), each applicant must file the application in person:

> An applicant for an adult entertainment establishment license ... shall file in person at the office of the County Sheriff a completed application made on a form provided by the County Sheriff. The application shall be signed by the applicant.

(*Id.* at 149 [§ 21.1803(C)].)

The Ninth Circuit has not yet addressed the issue whether the requirement for each officer, director, general partner or manager to appear in person is unconstitutionally burdensome. Plaintiffs rely on two Seventh Circuit decisions, neither of which directly addresses the issue at hand. *Schultz v. City of Cumberland* invalidated certain portions of adult entertainment licensing provisions pertaining to employee and owner disclosures, because the court found them "redundant and unnecessary for Cumberland's stated purposes." 228 F.3d 831, 852 (7th Cir.2000). In addition, *Genusa v. City of Peoria* invalidated a licensing provision which required each person with an ownership interest in an adult entertainment business to file a separate license application. 619 F.2d 1203, 1216-17 (7th Cir.1980). The court found the purpose of the ordinance, enforcement of zoning provisions, did not support this requirement, and the purpose could be accomplished by one application filed on behalf of the business entity. *Id.* In this case, the or-

dinance does not require business owners to file separate applications, unless they also fall within the definition of "employee." It expressly provides for filing of one establishment application signed by all the owners. The issue is whether it is constitutionally permissible to require all the owners to appear in person at the Sheriff's office to file the establishment application.

As with any time, place, and manner restriction, it must be narrowly tailored to serve a substantial government interest. *Renton*, 475 U.S. at 50-52, 106 S.Ct. 925; *see also* *Kev*, 793 F.2d at 1060 (finding the license requirements served valid governmental purposes). In addition to the governmental interests the County intended to address, preventing minors and those who have recently been convicted of certain crimes from working on the premises, facilitating the identification of potential witnesses or suspects, and curtailing the spread of sexually-transmitted diseases (*see* LR, 142-45 [Ordinance No. 9479, § 21.1801(B)(1)-(25)]), the County also stated the purpose for the licensing provision itself:

> ***1152** Adult Entertainment Establishments have operational characteristics that should be reasonably regulated in order to protect ... substantial governmental concerns, A reasonable licensing procedure is an appropriate mechanism to place the burden of that reasonable regulation on the owners and the operators of the adult entertainment establishments. Further, such a licensing procedure will give an incentive on [*sic*] the operators to see that the adult entertainment establishment is run in a manner consistent with the health, safety and welfare of its patrons and employees, as well as the citizens of the County. It is appropriate to require reasonable assurances that the licensee is the actual operator of the adult entertainment establishment, in ultimate possession and control if the premises and activities occurring therein.

(*Id.* at 144 [§ 21.1801(B)(17) & (18)].)

It is not clear how the requirement that each officer, director, general partner or manager appear in person to file the application advances the stated substantial government interests. The County offered no explanation. Since prior restraints are presumptively unconstitutional, *Clark*, 259 F.3d at 1005, the Court finds the County failed to present sufficient evidence to meet its burden in opposition to plaintiffs' summary judgment motion or in support of its own cross-motion with respect to this issue.

As to each officer, director, general partner or manager who falls under the definition of "employee," plaintiffs also contend it is unduly burdensome and redundant to require each to apply for an employee license, as well as collectively for an establishment license. The County contends plaintiffs' interpretation of the ordinance is not supported by a fair reading of the ordinance because the eligibility requirements for the two licenses are identical, and each officer, director, general partner or manager listed on the establishment license application is considered a "licensee."

While the employee license application does not call for any additional type of information than the establishment license application (*see* LR, at 144 [Ordinance No. 9479, § 21.1803(D)]), the amended ordinance clearly requires all persons falling within the definition of "employee" to obtain an employee license:

> It shall be unlawful for any person to be an employee as defined in this Chapter, [*sic*] of an adult entertainment establishment in the County of San Diego without a valid adult entertainment establishment employee license.

(*Id.* at 149 [§ 21.1803(B)].) The fact an officer, director, general partner or manager is considered a "licensee" when an establishment license is issued to the business entity provides no relief, because the definition of "licensee" distinguishes between establishment and employee licensees:

> "Licensee" shall mean ... the individual or individuals listed as an applicant on the application for a[n] adult entertainment establishment license. In case of an "employee," it shall mean the person in whose name the adult entertainment establishment employee license has been issued.

(*Id.* at 147 [§ 21.1802(F)] (emphasis added).)

Based on the express language of the ordinance, when the adult entertainment establishment is a business entity, each of its officers, directors, general partners or managers who falls within the definition

of "employee" is required to sign the establishment application and submit a separate employee application. Since an employee license application calls for less information than an establishment license application (***1153** *see* LR, at 150 [Ordinance No. 9479, § 21.1803(D)]), the requirement to file an employee application is redundant. In addition, it provides another avenue to require each officer, director, general partner or manager who is an employee to appear in person at the Sheriff's office. (*Id.* at 149 [§ 21.1803(C)].) As discussed above, the stated purposes for the licensing provisions do not support this requirement.

Plaintiffs next contend the amended ordinance is not narrowly tailored because it "indiscriminately" requires every employee, whether they be a bartender, waitress, door host, parking valet, janitor or accounting clerk, to be licensed. The ordinance, however, is not "indiscriminate." It exempts from the licensing requirement persons who do not perform services on the premises and "person[s] exclusively on the premises for repair or maintenance of the premises or for the delivery of goods to the premises." (LR, at 146 [Ordinance No. 9479, § 21.1802(C)].) Requiring the remaining employees, who "perform [ ] any service on the premises of an adult entertainment establishment" (*id.*), to obtain a license is substantially related to the governmental interests the County intended to address. (*See* LR, at 142-45 [Ordinance No. 9479, § 21.1801(B)(1)-(25)].) Furthermore, the County is not required to establish the means it has chosen to address the secondary effects is the least restrictive or the most effective. A time, place, and manner regulation is considered narrowly tailored if the government shows it "serve[s] a substantial government interest," and affects that category of businesses which produce the secondary effects. *Renton*, 475 U.S. at 50-52, 106 S.Ct. 925. Based on the foregoing, plaintiffs' argument fails as a matter of law because it is contradicted by the plain language of the ordinance.

Last, plaintiffs argue the licensing provisions are unduly burdensome because, in addition to the employee license, the amended ordinance requires each manager working on the premises and each performer to file a registration form with the Sheriff's office before beginning work. (LR, at 170-71 [Ordinance No. 9479, §§ 21.284.9, 21.285.1, 21.285.3].) According to plaintiffs, as a part of the registration process, the employees also provide their photographs and fingerprints. Requiring fingerprints and photographs is reasonably related to the substantial governmental interest of preventing crime. *See* *Deja Vu of Nashville v. Metro. Gov't of Nashville*, 274 F.3d 377, 393-95 (6th Cir.2001). This is one of the stated purposes of the amended ordinance. (LR, at 142 [Ordinance No. 9479, § 21.1802(B)(5), (21)-(24)].) Furthermore, the County made specific findings pertaining to performers and on-site managers which support the registration requirement:

> Certain employees of unregulated adult entertainment establishments defined in this ordinance as adult cabarets engage in higher incidence of certain types of illicit sexual behavior than employees of other establishments.
>
> * * * * * *
>
> The disclosure of certain information by those persons ultimately responsible for day-to-day operation and maintenance of the adult entertainment establishment, where such information is substantially related to the significant governmental interest in the operation of such uses, will aid in preventing the spread of sexually transmitted [*sic*] diseases and will prevent the further secondary effects of crime, blight, and dissemination of illegal obscenity, child pornography, and to minors, materials harmful to them.

(*Id.* at 145 [§ 21.1801(B)(2) & (21)].) The registration requirement is therefore permissible ***1154** on its face. As to the burden of filing a registration and an employee license application, nothing precludes the performers and on-site managers from filing both at the same time. (*See id.* at 149, 170-71 [§§ 21.1803, 21.284.9, 21.285.1].) Since the requirement is narrowly tailored to advance a substantial government interest, and the burden is *de minimis*, the Court finds the requirement of filing a license application and registration would not make it more difficult to obtain a license so as to unreasonably diminish the inclination to apply. *See* *Kev*, 793 F.2d at 1060. The Court therefore finds plaintiffs failed to meet their burden as the moving party for summary judgment and in opposi-

tion to the County's cross-motion with respect to this issue.

In sum, the Court finds the licensing and registration requirements are narrowly tailored with the following two exceptions: (1) subsection (C) and (F) of section 21.1803 are not narrowly tailored to the extent they require each "officer, director, general partner, or other person who will manage or participate directly in the decisions relating to management and control of the business" to appear in person at the Sheriff's office to file the establishment license application; and (2) subsection (B) of section 21.1803 is not narrowly tailored to the extent it requires the same category of individuals to also apply for an employee license, if they are employees as the term is defined in the ordinance.

None of the parties addresses severability of the offending provisions. Ordinance No. 9479 contains a severability clause. (LR, at 165 [§ 21.1826].) In addition, based on the Legislative Record and review of the affected ordinance, the Court finds the remainder of the ordinance, including the extensive substantive provisions and the non-offending licensing and registration provisions, is sufficiently complete in itself, and the County likely would have adopted the amended ordinance, even if it had foreseen some of its license application provisions would be invalidated. *See* *Barlow*, 72 Cal.App.4th at 1264, 85 Cal.Rptr.2d 752; *see also* *Kev*, 793 F.2d at 1060 n. 7. The Court therefore finds the unconstitutional portions of the licensing provision are severable, and therefore does not strike the ordinance in its entirety.

2. Narrowly Tailored--Disclosure of Personal Information

[33] In addition, plaintiffs argue the County's new licensing requirements are unconstitutional because they require applicants to reveal certain personal information which may potentially be available to the public under California law, and therefore have a "chilling effect" on protected speech. The ordinance requires license applicants to disclose the following:

> 1. The applicant's full true name and any other names or aliases used in the preceding five (5) years.
> 2. Current business address or another mailing address of the applicant.
> 3. Written proof of age, in the form of a birth certificate or driver's license or other picture identification document issued by a governmental agency.
> 4. If the application is for an adult entertainment establishment license, the establishment name, location, legal description, mailing address and telephone number (if one currently exists) of the proposed adult entertainment establishment.
> 5. If the application is for an adult entertainment establishment license, the name and address of the statutory agent or other agent authorized to receive service of process.
> 6. A statement whether the applicant has been convicted or has pled guilty or nolo contendere to a specified ***1155** criminal activity as defined in this ordinance, and, if so, the specified criminal activity involved, the date, place, and jurisdiction of each.

(LR, at 150 [Ordinance No. 9479, § 21.1803(D)].)

Plaintiffs' "assertion that requiring disclosure of information regarding names, addresses, and telephone numbers to the county violates the First Amendment is essentially foreclosed by [the] decision in *Kev*." *See* *Dream Palace*, 384 F.3d at 1010. *Kev* upheld a licensing provision requiring entertainers to provide their name, address, phone number, birth date, and aliases, past and present, and business name and address where they intended to perform. 793 F.2d at 1059. The court found the required disclosures would not "discourage ... a prospective dancer from performing" and did not "inhibit [ ] the ability or the inclination to engage in the protected expression." *Id.* at 1060; *see also* *Dream Palace*, 384 F.3d at 1010 (upholding licensing provision requiring disclosure of full true name, stage names, current residential address, and telephone number). [FN18]

> FN18. Plaintiffs rely largely on *Schultz*, where the Seventh Circuit invalidated that portion of licensing requirements which called for disclosure of a residential address, recent color photograph, Social Security number, fingerprints, tax-identification number and driver's license information. 228 F.3d at 852. The Ninth Circuit, however, does not follow *Schultz* in this regard. In

> finding a similar licensing provision constitutional, *Dream Palace* acknowledged the Seventh Circuit's decision in *Schultz* was to the contrary. *See* 384 F.3d at 1010 n. 14. The Court therefore declines plaintiffs' invitation to follow *Schultz*.

However, *Dream Palace* granted the plaintiff's request for an injunction prohibiting the government from disclosing to the public pursuant to the state public record laws personal information such as residential addresses and telephone numbers because such information could be used by "aggressive suitors and overzealous opponents" to trace entertainers to their homes, causing them to choose not to apply for a permit or to engage in protected speech out of concern for their personal safety. 384 F.3d at 1012. The Ninth Circuit noted "[t]he chilling effect on those wishing to engage in First Amendment activity is obvious." *Id.*

The instant case, however, differs in a significant respect from *Dream Palace.* Nothing in the ordinance requires applicants to disclose their home address or telephone number, thus precluding the risk of aggressive suitors or overzealous opponents tracing them to their homes. Plaintiffs point to no other risk which could dissuade individuals from applying for a license.

With respect to the required disclosure of certain personal information to obtain a license, the Court finds plaintiffs failed to meet their burden in opposition to the County's summary judgment or in support of their cross-motion. Based on the foregoing, the Court does not reach the issue whether licensing information is available to the public under California law.

C. Procedural Safeguards

[34] In its summary judgment motion the County contends the licensing provisions of the amended ordinance provide the procedural safeguards required by *FW/PBS.* To be constitutional, licensing provisions may not place "unbridled discretion in the hands of a government official or agency," "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained," and "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.* at ***1156** 225, 228, 110 S.Ct. 596. Although plaintiffs acknowledge this standard in their opposition to the County's motion and in support of their cross-motion, they do not contend the licensing provisions fail to satisfy it. [FN19]

> FN19. To the extent plaintiffs intended this motion to challenge the procedural safeguards in their papers, they have waived this issue by failing to discuss it. *See Indep. Towers,* 350 F.3d at 929.

Under the County's licensing scheme, a license application may be denied based only on objective criteria: if an applicant is less than eighteen years of age, fails to provide certain information or falsely answers a question, has not paid the fee, was convicted of certain specified crimes, or the adult entertainment premises fail to meet interior configuration or zoning requirements of the ordinance. (LR, at 151-52 [Ordinance 9479, § 21.1804(A)(1)-(5)].) These requirements do not provide much discretion for denial of the license. Upon receipt of the application, a temporary license is immediately issued until the application is granted or denied. (*Id.* at 151.) This ensures the *status quo* remains pending the decision. The decision must be made within thirty days, at which time the applicant can immediately seek judicial review or appeal the decision to the County Hearing Officer. (*Id.* at 152, 163 [§§ 21.1804(B), 21.1824].) While review is pending, the applicant may continue to operate with a provisional license. (*Id.* at 164 [§ 21.1824].) Based on the review of the pertinent licensing provisions and lack of opposition from plaintiffs, the Court finds the County met its burden as the moving party for summary judgment with respect to this issue.

Conclusion

Based on the foregoing, plaintiffs' Joint Motion for Summary Judgement is **GRANTED IN PART AND DENIED IN PART**, and defendant's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment is **GRANTED IN PART AND DENIED IN PART** as specified below.

As to Fantasyland Video, Inc. v. County of San Diego, case no. 02cv1909 LAB (RBB):

1. Fantasyland's motion for summary judgment with respect to its First Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "Licensing Requirement" of Ordinance No. 9479 (as amended) is **GRANTED** to the extent the Court finds unconstitutional certain licensing and registration provisions of section 21.1803(B), (C) and (F).

Specifically, the Court finds: (1) subsections (C) and (F) are not narrowly tailored to the extent they require each "officer, director, general partner, or other person who will manage or participate directly in the decisions relating to management and control of the business" to appear in person at the Sheriff's office to file an adult entertainment establishment license application; and (2) subsection (B) is not narrowly tailored to the extent it requires the same category of individuals to also apply for an adult entertainment establishment employee license, if they are employees as the term is defined in the ordinance. The Court further finds these provisions severable from the remainder of the ordinance.

Accordingly, the County is **ENJOINED** from requiring each "officer, director, general partner, or other person who will manage or participate directly in the decisions relating to management and control of the business" to appear in person at the Sheriff's office to file an adult entertainment establishment license application. The County is further **ENJOINED** from requiring the same category of individuals ***1157** to also apply for an adult entertainment establishment employee license, if they are employees as the term is defined in the ordinance.

In all other respects, Fantasyland's summary judgment motion with respect to its First Claim for Relief is **DENIED**, and the County's summary judgment motion with respect to the same claim is **GRANTED**.

2. Fantasyland's motion for summary judgment with respect to its Second Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "Hours of Operation Requirement" of Ordinance No. 9479 (as amended) is **DENIED**, and the County's summary judgment motion on the same claim is **GRANTED**.

3. Fantasyland's motion for summary judgment with respect to its Third Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "Interior Configuration Regulations" of the Ordinance No. 9479 (as amended) is **DENIED**, and the County's summary judgment motion on the same claim is **GRANTED**.

4. Judgment has been entered on December 6, 2002 as to all remaining claims in this case. Clerk of Court is therefore directed to **ENTER FINAL JUDGMENT** in case no. 02cv1909 LAB (RBB).

As to Tollis, Inc. et al. v. County of San Diego, case no. 02cv2023 LAB (RBB)

1. Deja Vu's motion for summary judgment with respect to its First Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "License Requirements" of Ordinance No. 9479 (as amended) is **GRANTED** to the extent the Court finds unconstitutional certain licensing and registration provisions of section 21.1803(B), (C) and (F).

Specifically, the Court finds: (1) subsections (C) and (F) are not narrowly tailored to the extent they require each "officer, director, general partner, or other person who will manage or participate directly in the decisions relating to management and control of the business" to appear in person at the Sheriff's office to file an adult entertainment establishment license application; and (2) subsection (B) is not narrowly tailored to the extent it requires the same category of individuals to also apply for an adult entertainment establishment employee license, if they are employees as the term is defined in the ordinance. The Court further finds these provisions severable from the remainder of the ordinance.

Accordingly, the County is **ENJOINED** from requiring each "officer, director, general partner, or other person who will manage or participate directly in the decisions relating to management and control of the business" to appear in person at the Sheriff's office to file an adult entertainment establishment license ap-

plication. The County is further **ENJOINED** from requiring the same category of individuals to also apply for an adult entertainment establishment employee license, if they are employees as the term is defined in the ordinance.

In all other respects, Deja Vu's summary judgment motion with respect to its First Claim for Relief is **DENIED**, and the County's summary judgment motion with respect to the same claim is **GRANTED**.

2. Deja Vu's motion for summary judgment with respect to its Second Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "Hours of Operation Requirement" of Ordinance No. 9479 (as amended) is **DENIED**, and the County's summary judgment motion on the same claim is **GRANTED**.

3. Deja Vu's motion for summary judgment with respect to its Third Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "Performance Restrictions" of Ordinance No. 9479 ***1158** (as amended) is **DENIED**, and the County's summary judgment motion on the same claim is.

4. Deja Vu's motion for summary judgment with respect to its Fourth Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "Zoning Amendment" of Ordinance No. 9469 (as amended) is **GRANTED** to the extent the Court finds unconstitutional certain procedural provisions of sections 6930(b)(1) and 7064.

Specifically, the Court finds sections 6930(b)(1) and 7064 fail to provide for procedural safeguards required by the First Amendment to the extent they allow for excessive time to make a decision whether to grant an administrative permit application. The Court further finds these provisions severable from the remainder of the ordinance.

In all other respects, Deja Vu's summary judgment motion with respect to its Fourth Claim for Relief is **DENIED,** and the County's summary judgment motion with respect to the same claim is **GRANTED**.

5. In its Fifth Claim Alternative Relief for declaratory and injunctive relief to prevent enforcement of the "Zoning Amendment" Deja Vu alleges Ordinance No. 9469 (as amended) constitutes regulatory taking on the grounds it does not substantially advance legitimate state interests. Deja Vu is hereby **ORDERED TO SHOW CAUSE** why its Fifth Claim Alternative Relief should not be adjudicated in the same manner as its Fourth Claim for Relief. No later than ***July 5, 2005***, Deja Vu shall file a memorandum of points and authorities not to exceed five pages in length and supporting evidence, if any, in response to this order to show cause. The County shall file a responsive memorandum of points and authorities no more than five pages in length and any supporting evidence no later than *July 18, 2005*. Upon filing of the foregoing, the parties shall await further order of the Court.

IT IS SO ORDERED.

373 F.Supp.2d 1094

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