No. 00-799

IN THE

Supreme Court of the United States

THE CITY OF LOS ANGELES,
Petitioner,
v.
ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENTS

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MISCELLANEOUS

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INTEREST OF *AMICUS CURIAE*[1]

The DKT Liberty Project was founded in 1997 to defend individual liberties against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties that threaten the reservation of power to the citizenry that underlies our constitutional system. The

[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

DKT Liberty Project is particularly involved in defending the right to freedom of speech, one of the most profound individual liberties.

The Los Angeles ordinance at issue here forbids selling books and previewing videos – items protected by the First Amendment – in the same store. Moreover, the ordinance does so without a shred of evidence that a store selling books and videos causes greater secondary effects than a store selling either item standing alone. Because of The DKT Liberty Project's strong interest in free speech and in the protection of citizens from such government overreaching, it is well situated to provide this Court with additional insight into the issues presented in this case.

SUMMARY OF ARGUMENT

The First Amendment protects citizens against government infringements on speech. Consequently, this Court has held that all restrictions of speech, both burdens and bans, must survive careful scrutiny. The sexually oriented literature and videos carried at plaintiffs' bookstores are unquestionably protected speech under the First Amendment. Because the Los Angeles ordinance prohibits plaintiffs from distributing more than one form of protected expression in their stores, it unconstitutionally burdens that expression. Specifically:

1. The ordinance restricts distribution of nonobscene, sexually oriented literature and videos. Such restrictions can only be justified as content-neutral regulations if they are designed not to restrict access to constitutionally protected expression, but to deter identified adverse secondary effects that stem from the business.

2. There is substantial evidence that adult businesses *do not* cause negative secondary effects on neighborhoods where they are located. Therefore, a city cannot presume, assume, or infer such effects, but must rely on evidence of secondary effects reasonably relevant to the problem the city addresses. Here, to justify the prohibition against selling two forms of sexually oriented speech in one store, the evidence must demonstrate that one store selling both products creates negative secondary effects like those created by two stores close together selling one product each. In so doing, the city may not point to evidence it did not actually consider.

3. Los Angeles has no evidence to justify the ban. The study on which the city relied does not even address the issue, and studies from other cities provide no evidence that selling two items in a store creates additional secondary effects. In the absence of such evidence, the regulation is not an acceptable "time, place, and manner" regulation and is instead an unconstitutional content-based restriction on speech.

ARGUMENT

I. THE LOS ANGELES ORDINANCE RESTRICTS PLAINTIFFS' ABILITY TO ENGAGE IN PROTECTED SPEECH AND MUST BE SUBJECTED TO HEIGHTENED SCRUTINY.

"[T]he free publication and dissemination of books and other forms of the printed word furnish very familiar applications of [First Amendment] constitutionally protected freedoms." *Smith v. California*, 361 U.S. 147, 150 (1959). This Court has long recognized that the sale of books is at the heart of the activities protected by the First Amendment's proscription against abridgements of the freedom of speech and the press. *See, e.g., id.*; *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Kaplan v. California*, 413 U.S. 115, 119 & n.3 (1973); *Bantam*

Books, Inc. v. Sullivan, 372 U.S. 58, 70-71 (1963). Given the retail bookseller's critical role in the dissemination of books to the public, governmental restrictions on a bookseller's ability to distribute books must be closely examined to ensure that the First Amendment rights of the bookseller (and of the members of the public that may wish to read the books at issue) are not infringed. *See Smith*, 361 U.S. at 154; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76-77 (1976).

Motion pictures are also "a significant medium for the communication of ideas." *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 501 (1952). Thus, like books, films and motion pictures merit the full protection of the First Amendment. *See id.* at 502; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Young*, 427 U.S. at 76-77 (Powell, J., concurring); *Vance v. Universal Amusements Co.*, 445 U.S. 308, 316 (1980). Theater owners, like booksellers, are often uniquely positioned to defend those rights. *See Young*, 427 U.S. at 77.

The sexually oriented nature of the books and movies sold by plaintiffs does not vitiate the constitutional protection. "Nudity alone does not place otherwise protected material outside the mantle of the First Amendment," *Schad*, 452 U.S. at 66 (internal quotations and citation omitted), and this Court has therefore repeatedly acknowledged that nonobscene sexually explicit books, magazines, and films retain their protected status. *See, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) ("[N]onobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment"); *United States v. Playboy Entertainment Group Inc.*, 529 U.S. 803, 811 (2000) (recognizing that sexually explicit cable programming was protected speech); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (adult entertainment industry members affected by zoning ordinance had valid First Amendment interest); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S.

41, 54 (1986) (describing adult theaters as a "speech-related business"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975) (ordinance preventing drive-in theaters from showing films containing nudity violated First Amendment).

The fact that some people might find such speech "highly offensive" or indecent does not remove the constitutional protection. *Playboy*, 529 U.S. at 811. To the contrary, unpopular or controversial speech requires the most vigilant protection under the First Amendment, because that speech is particularly likely to be targeted by the government. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed . . . that consequence is a reason for according it constitutional protection.") (internal quotations and citations omitted); *see also Lawson v. Murray*, 515 U.S. 1110, 1114 (1995) (Scalia, J., concurring in denial of certiorari); *Young*, 427 U.S. at 87 ("[I]t is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height.") (Stewart, J., dissenting). Indeed, the very purpose of the First Amendment is to prevent governmental bodies from restricting speech on the basis of "esthetic and moral judgments about art and literature." *Playboy*, 529 U.S. at 818. "What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *Id.*

Consequently, where cities restrict adult businesses purportedly to combat secondary effects resulting from those businesses, this Court has mandated close First Amendment scrutiny. It has recognized that the regulated businesses are engaged in protected speech, and that the restrictions "do[] not appear to fit neatly into either the 'content-based' or the 'content-neutral' category." *Renton*, 475 U.S. at 47; *see also*

Young, 427 U.S. at 63 & n.18. Accordingly, only when the ordinance is in fact content-neutral, and is truly aimed at reducing secondary effects, rather than suppressing speech, will the Court apply the "time, place, and manner" review. Under that standard, the Court will uphold restrictions if they "are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton,* 475 U.S. at 47.

The argument that location ordinances target secondary effects, and not the speech distributed by adult businesses, was first accepted in *Young*. But even while accepting that argument, the *Young* court signaled its concern with the efficacy of such restrictions: "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 427 U.S. at 71. Over the quarter of a century since *Young*, numerous cities have restricted the location of adult businesses. Some cities have dispersed adult businesses, and some have concentrated them in one area. Other cities have tried limitations on operating hours and other forms of regulation of the businesses. In short, the location and operation of adult oriented businesses have been significantly regulated for twenty-five years. Those regulations have substantially affected the practices and effects of such businesses. The period of "reasonable" experimentation the plurality allowed in *Young* has run its course, and there is now a long record of regulatory efforts which can be evaluated. *Cf. Hart Book Stores, Inc. v. Edmisten,* 612 F.2d 821, 832 (4th Cir. 1979) (noting in 1979 that "the lack of a long record of regulatory efforts underscores the need for a chance for reasonable experimentation"). Therefore, new and ever more burdensome restrictions on adult businesses engaged in First Amendment speech must be, in fact, designed to ameliorate identified secondary effects, and not simply attempts to regulate disfavored speech out of existence. Because plaintiffs' bookselling and video-showing activities squarely fit the

definition of protected speech, the Los Angeles ordinance cannot survive unless it truly targets identified secondary effects that flow from combining those activities in one store.

II. IF THE ORDINANCE IS AIMED AT "SECONDARY EFFECTS" ATTRIBUTABLE TO COMBINED BOOKSTORE/VIDEO ARCADES, THERE MUST BE EVIDENCE OF THOSE EFFECTS.

Seeking to justify its ordinance as a time, place, and manner restriction aimed at deterring the secondary effects that accompany a concentration of adult businesses, Los Angeles claims that the ordinance is comparable to those upheld by this Court in *Young v. American Mini Theatres, Inc*, and *Renton v. Playtime Theatres, Inc.* But this defense fails for two reasons. First, the Los Angeles ordinance challenged in this case goes well beyond the ordinances upheld in those cases and restricts not only the *location* of an adult business, but the *materials* it can sell. The ordinance does not merely prevent an adult bookstore from being located adjacent to a video arcade, it prohibits the plaintiffs from engaging in additional protected speech activities within their legally located bookstores.

Second, the Los Angeles ordinance is not supported by relevant evidence of secondary effects. Los Angeles officials did not examine whether selling books and showing videos in the same store generates the secondary effects that result from a concentration of separate adult businesses. Nor did they review any evidence or studies from other cities or any judicial opinions that addressed that question. The city had no basis to conclude that a combined bookstore/video arcade would cause more secondary effects than a separate bookstore or arcade. Thus, the ordinance fails the *Renton* test.

A. Secondary Effects Cannot be Presumed.

This Court has recognized repeatedly that "mere conjecture" is "[in]adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000); *see also, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must . . . demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way."). This is so even though a legislature is permitted to base other non-speech regulations on conjecture or even a "gut feeling" about both the existence of a problem and the ability of the regulation to address the problem. *See, e.g., United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (under rational basis review it is "constitutionally irrelevant" whether the legislature actually relied on the proffered justification). Where speech is at issue, the critical requirement of actual evidence helps to ensure that the asserted governmental interests in fact are substantially advanced by the challenged law, and are not mere pretexts used to justify restrictions of unpopular speech. Thus, under the First Amendment, a city must rely on evidence reasonably relevant to the problem it addresses. *Renton*, 475 U.S. at 51-52. Indeed, "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." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 311 (2000) (Souter, J., concurring and dissenting in part).

Applying these principles in cases involving regulation of adult businesses, this Court has consistently required *evidence* of the secondary effects the government is trying to reduce. In *Young*, for example, "[t]he record disclosed a factual basis" for the city's conclusion that concentrations of adult businesses

would increase crime and negatively impact the neighborhoods, and supported the city's claim that the restrictions were justified by the city's interest in preserving the character of its neighborhoods. 427 U.S. at 71 (plurality opinion). Specifically, the city reviewed "reports and affidavits from sociologists and urban planning experts. . . 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 [adult] establishments." *Id.* at 82 & n.4 (Powell, J., concurring). The evidence indicated that the threat was caused by the concentration of adult theaters, as opposed to a concentration of other types of theaters. *See id.* Moreover, the Court indicated that the evidence was essential to surviving constitutional scrutiny – as Justice Powell observed, "[t]he case would have presented a different situation" if Detroit had attempted to restrict "types of theaters that had not been shown to contribute to the deterioration of surrounding areas." *Id.* at 82.

Similarly, in *Renton,* the Court did not allow a city to *assume* that adult businesses created negative secondary effects. To the contrary, the Court held that while a city need not always conduct its own study, it must rely on "*evidence* . . . reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52 (emphasis added). Renton met that requirement. The preamble to the regulations recited the evidence on which Renton relied: studies produced by, and the experience of, the nearby city of Seattle, a report from the city attorney's office, and the Washington Supreme Court's "detailed findings" regarding Seattle's evidence of adverse secondary effects. *See id.* at 44, 51-52. The Court concluded that Renton had relied on sufficient evidence to meet the requirements of the secondary effects test, and that the ordinance affected "only that category of theaters *shown to produce the unwanted secondary effects.*" *Id.* at 51-52 (emphasis added).

These precedents, which are firmly grounded in basic principles of First Amendment jurisprudence, preclude acceptance of Petitioner's suggestion that there should be some sort of presumption that adult businesses create secondary effects as a matter of law, fact, or "common sense." First, there is significant evidence that many adult businesses *in fact do not* create more secondary effects than other businesses. In Fulton County, Georgia, for example, the locations of various adult businesses were analyzed for crime incidence and property value, but the city "found no evidence of the secondary effects with which the Board was purportedly concerned." *Flanigan's Enters., Inc. v. Fulton County*, 242 F.3d 976, 986 (11th Cir. 2001). Specifically, "[l]ocal studies, including those commissioned by the county itself, revealed that the [adult] Clubs had less, up to half, the incidence of crime than establishments that did not offer nude dancing, property values had increased in the Clubs' surrounding neighborhoods, and the physical maintenance of surrounding buildings showed no quantifiable blight." *Id.* Recently conducted studies of the neighborhoods surrounding adult dance clubs in Charlotte, North Carolina yielded similar results. Researchers concluded that areas within close proximity (500 or 1000 feet) of the Charlotte clubs experienced fewer reported crime incidents than the comparable areas surrounding the study's control sites. *See* Kenneth C. Land, Jay R. Williams, & Michael E. Ezell, *Are Adult Dance Clubs Associated With Increases In Crime In Surrounding Areas?, A Secondary Crime Effects Study in Charlotte, North Carolina* (July 6, 2001) (unpublished manuscript on file with Jenner & Block, LLC).[2] A case study of the perceptions of residents and business operators within a 1000 foot radius of the city's clubs revealed that the clubs'

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[2] The authors of this study provided a draft to counsel for *amicus curiae* to be used in connection with this brief. Counsel will shortly lodge a copy of the final study with this Court.

resident and business neighbors did not believe that the clubs had adversely affected their neighborhoods. *See* Judith Lynne Hanna, Ph.D, *Reality & Myth, What Neighbors Say About Exotic Dance Clubs, A Case Study in Charlotte, North Carolina* (August 3, 2001) (unpublished manuscript on file with Jenner & Block, LLC).[3]

Moreover, even the various studies relied on by municipalities and counties to demonstrate secondary effects candidly admit there is significant evidence that areas with adult businesses do not show secondary effects, and that even when neighborhood deterioration is present, their studies do not establish a relationship between the deterioration and the adult businesses. Indeed, in the Los Angeles study cited by Los Angeles to support *this* ordinance, the authors concluded that they found "*insufficient evidence* to support the contention that concentrations of sex-oriented businesses" caused or could explain the patterns of change in the assessed valuations. Dep't of City Planning, City of Los Angeles, *Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles* at 25 (1977) (emphasis added) ("LA Study"). The same report also admitted that the planners found no significant difference in crime rates between the census tracts encompassing adult businesses and tracts that did not. *Id.* at 48-50.

These studies are not alone. A study conducted a year later in St. Paul, Minnesota found absolutely no relationship between sexually oriented businesses and neighborhood deterioration, as measured by crime counts and housing values. *See* Bryant Paul, Daniel Linz, and Bradley J. Shafer, *Government Regulation of "Adult" Businesses Through Zoning*

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[3] The author of this study provided a draft to counsel for *amicus curiae* to be used in connection with this brief. Counsel will shortly lodge a copy of the final study with this Court.

and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 Comm. Law and Policy 355, 376-77 (Spring 2001) (citing City of St. Paul, Minnesota, *Neighborhood Deterioration & the Location of Adult Entertainment Establishments in St. Paul* (1978)). And an Indianapolis study in 1984 actually found lower major crime rates in a 1000 foot radius from all adult businesses than a similar radius in control areas where adult businesses were not located. *See* Dep't of Metro. Dev., Div. Of Planning, *Adult Entertainment Businesses in Indianapolis – An Analysis* at 22-24 (1984). Even the infamous study of Times Square in New York City contained evidence that the property value of particular blocks *with* adult establishments increased at a rate higher than those blocks *without* adult establishments. City of New York, Dep't of City Planning, *Adult Entertainment Study* at 41 (1994).

In more general terms, the City of Bellevue, Washington study concluded that the adult businesses in that city did not create any negative secondary effects. City of Bellevue, Wash., Planning Dep't, *A Study on the Need to Regulate the Location of Adult Entertainment Uses* at 56 (1988) ("Bellevue Study"). Planners in El Paso, Texas concluded that their analysis did "not in itself establish an effectual relationship between adult entertainment businesses and crime rates." Dep't of Planning, Research and Dev., City of El Paso, Texas, *Effects of Adult Entertainment Businesses on Residential Neighborhoods* at 25 (1986). And many of the studies which purport to find a causal relationship between adult businesses and secondary effects are significantly flawed. Indeed, in a review of the ten studies cited most often by cities to support restrictive zoning laws, three scientists concluded that only one of them was sufficiently sound as scientific evidence to be admissible evidence. *See* Paul, Linz, and Shafer, *supra*. In the face of this evidence, neither cities nor courts can simply assume that adult

businesses create sufficient secondary effects to justify restrictions that apply solely to them.

Our point is not that these studies could never support a city ordinance limiting the location of adult businesses. Rather, the studies themselves demonstrate that there is substantial evidence on both sides of the issue. Thus, the question of whether and when adult businesses cause secondary effects is one of fact that cannot be resolved by assumptions or presumptions, or without reference to any evidence.

Additionally, even if cities could have reasonably assumed, prior to any zoning regulation, that the concentration of adult businesses created more adverse secondary effects than non-adult businesses, that assumption loses any force as a justification for further regulation after a quarter-century of regulating the location of those adult businesses. The Los Angeles ordinance requiring dispersal of such businesses has been in effect since 1978. Presumably that dispersal has ameliorated the secondary effects that concerned the city in the first place. In short, without some evaluation of whether the ordinances in effect for the last twenty-three years have had some effect, Los Angeles cannot look to information collected twenty-five years ago to justify creating increasingly narrow niches for the expression of sexually oriented speech.

In addition to the effect of these legal restrictions, the nature of adult businesses has changed dramatically over the past twenty-five years. In contrast to the seedy strip joints of previous decades, many shops and clubs are now upscale. A well-run "gentleman's club" can generate annual revenues of $5 million. Eric Schlosser, *The Business of Pornography*, U.S. News & World Rep., Feb. 10, 1997, at 42. And Americans now spend more money at these exotic dance clubs than at Broadway, off-Broadway, regional and non-profit theaters, opera, ballet, jazz, and classical music performances combined.

See id. Due to city and state ordinances, many of these clubs serve only juices and sodas–no alcohol–thus reducing further the likelihood of secondary effects attributable to bars. These changes, both legal and social, must be considered when a city seeks to impose more restrictions. Thus, without some evidence that additional secondary effects now require additional restrictions, including limiting the kind of speech an owner can make available in one store, the First Amendment forbids additional restrictions.

Moreover, as we discuss in the next section, the evidence must be compared with the particular form of regulation sought to be justified. A study supporting dispersal of adult businesses cannot be assumed to provide equally strong support for a law restricting the operations of *a single* business. Various *amici* suggest that the Los Angeles ordinance is justified because it is "logical" to conclude that combinations of adult uses would attract a larger number of customers than solitary uses. *See* Brief of *Amici Curiae* American Planning Association and Community Defense Counsel in Support of the City of Los Angeles at 13.[4] But this conclusion would also justify ordinances allowing bookstores to sell only books by certain authors, or books whose titles begin with certain letters, or even only 25 books at a time on the theory that the fewer the books, the fewer the customers, and the fewer the secondary effects. The First Amendment requires that a city restricting speech because the speech causes negative secondary effects have a factual basis to connect the rationale to the regulation – the evidence must be relevant to the problem the city addresses. *Renton,* 475 U.S. at 51-52. Any lesser requirement, or any

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[4] *See also, e.g.*, Brief of Capitol Resource Institute & Campaign for California Families as *Amicus Curiae* In Support of Petitioner, at 6 (suggesting that a city's finding of secondary effects may be based on "various unprovable assumptions"); Brief *Amicus Curiae* of Morality in Media, Inc. In Support of Petitioner, at 10 (asserting that municipalities may rely on their "collective common sense").

presumption of such effects, would impermissibly allow cities to restrict sexually oriented speech for any reason at all.

B. The City Must Actually Have Relied Upon the Evidence it Identifies.

Petitioner asserts that the law permits cities to defend their ordinances with post-hoc rationalizations presented by counsel, as opposed to the evidence on which the city actually relied. That argument is groundless. This Court has never upheld a zoning restriction affecting protected speech simply because some secondary effects evidence existed somewhere that a city hypothetically *could* have found relevant. Instead, the Court looks at evidence on which the city *did* rely. *See, e.g.*, *Renton*, 475 U.S. at 50-52 (discussing evidence Renton "relie[d] upon"); *Young*, 427 U.S. at 80-81 (noting that the purposes of the ordinance were established before it was applied to adult businesses) (Powell, J., concurring). And in *Renton* the preamble to the ordinance stated that the relevant factors were considered *at the time the city drafted the ordinance.*[5]

Indeed, the rule could not be otherwise, unless, contrary to this Court's precedent, mere conjecture *is* sufficient to carry First Amendment burdens. Allowing cities to rely solely on post-hoc discoveries of counsel as the evidentiary justification for an ordinance restricting adult businesses would eviscerate the purposes of the secondary effects test. These ordinances single out sexually oriented businesses for disparate and burdensome treatment. Such restrictions are presumptively invalid content-based restrictions on speech unless they are in fact designed to address actual secondary effects of such

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[5] Thus, although the evidence that the City of Renton reviewed was not incorporated into the record until after litigation began, the preamble established that the evidence was considered when the ordinance was enacted.

businesses. Requiring a city to show that it in fact reasonably expected negative secondary effects to flow from unregulated locations of adult businesses, and that it relied on these secondary effects when it drafted the ordinance, prevents a city from targeting these businesses based on their content, and then hoping that creative lawyers can supply a hypothetical content-neutral justification for their actions.

III. THERE IS NO EVIDENCE THAT SHOWING VIDEOS IN A BOOKSTORE RESULTS IN ADDITIONAL SECONDARY EFFECTS THAT COULD JUSTIFY THE ORDINANCE.

A. Evidence of The Secondary Effects of Multiple Separate Adult Businesses in Close Proximity Cannot Justify the Los Angeles Ordinance.

If a city aims to reduce secondary effects, the secondary effects evidence on which the city relies must be tied to the activity that the city seeks to restrict. *See Renton*, 475 U.S. at 51-52. But the Los Angeles ordinance goes far beyond traditional zoning ordinances that regulate concentration or dispersal of multiple adult businesses, and instead regulates the material that can be sold within a *single* adult business. Petitioner claims that the city had adequate evidence that a concentration of adult businesses can cause adverse secondary effects. *See* Petitioner's Br. at 27-28. But even if that were true, which *amicus* does not concede, that evidence is not relevant because it does not demonstrate any link between the secondary effects of concentration and the effects of a single business that sells books and shows videos.

The relevant secondary effects here are different than those at issue in *Young* and *Renton*. In those cases, the relevant question was whether the location of multiple adult businesses caused *any* secondary effects, and if so, whether ordinances

restricting their concentration would further the city's interest in preventing those effects. The constitutional validity of this ordinance turns on a different question: Does evidence show that an adult bookstore that also contains video viewing booths generates more secondary effects than a separate bookstore or arcade?

This type of particularized finding is especially important where, as here, a city prohibiting the sale of two forms of expression in one store is regulating against the backdrop of longstanding zoning laws that already restrict the location of adult businesses. Los Angeles has already significantly burdened the availability of sexually oriented speech based on its view that concentrations of multiple adult businesses have adverse secondary effects on neighborhoods. To justify the additional significant burdens it proposes now, it must point to some evidence supporting its belief that imposing the additional restrictions will materially advance either the substantial interest to which the existing restrictions were directed, or another government interest. As set forth below, Los Angeles has failed to do this.

B. The Los Angeles Study Does Not Address Whether a Single Adult Bookstore that Also Sells or Shows Videos is Likely to Create Secondary Effects Similar to Those Created by Multiple Adult Businesses.

Both the district court and Ninth Circuit concluded that "[t]he *only* evidence relied upon by Los Angeles to justify the 1983 amendments to section 12.70(c) is the 1977 study (the 'Study'), which was used as the basis for the enactment of the original regulations." *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719, 724 (9th Cir. 2000) (emphasis added). As the city did not rely on any other evidence, this Court's analysis of the constitutionality of the ordinance should begin and end with a review of that study. Although Petitioner

asserts that this study supports the ordinance, *see* Petitioner's Br. at 27-28, the study never even *considers* whether a combined bookstore/video arcade causes the secondary effects that accompany a concentration of separate adult businesses, let alone presents any evidence related to that question.

The 1977 LA Study examined whether the concentration of multiple sexually oriented businesses caused blight or deterioration in the areas where they were located. It compared the crime rates and property values of five areas with multiple adult businesses to areas of the city without adult businesses. The city sampled public opinion from realtors and residents, as well as more objective public information regarding property assessments and the incidence of crime. In addition, the study noted the experiences of, and ordinances enacted by, other cities restricting the location of adult businesses.

The LA Study "addressed the secondary impact not of single adult business establishments, but of concentrations of separate, individual adult businesses." *Alameda Books*, 222 F.3d at 724. Indeed, for purposes of describing the single businesses then existing, the study identified "massage parlors," "bookstores/arcades," "theaters," and "adult motels." LA Study at 22-a, 22-b. Obviously, bookstore/arcades were single businesses selling several products – indeed, the very facades of those businesses pictured in the study said as much.[6] Despite this knowledge, the authors evaluated only the effects of concentration of those individual stores with regard to *other separate businesses*. The study did not purport to determine whether a single bookstore/arcade created any secondary effects, let alone whether such secondary effects would be comparable to those resulting from two separate businesses.

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[6] One sign advertises an "Adult Bookstore" "Adult theatre" "films, marital aids, mag[azine]s." Another offers a "25 ¢ movie arcade" "books magazines marital aids film." LA Study at 6(a) - 6(b).

Notwithstanding the utter lack of any evidence pertaining to the effects of a combined bookstore/arcade, the city of Los Angeles now asserts that the LA Study supports the ban on bookstores showing or selling videos. According to Petitioner, the city (and this Court) could simply assume that combined bookstore/arcades are functionally equivalent to two separate businesses within close proximity to each other, and the LA Study is relevant because it addresses the effects of multiple separate establishments. That assumption, however, is the very conclusion for which the city needs evidence. The requirement of evidence cannot be "assumed" away.

C. Studies Conducted By Other Cities Do Not Provide Evidence That A Bookstore Showing Videos Creates The Secondary Effects of Multiple Adult Businesses.

Nor can Los Angeles rely on studies done by other cities. First, as discussed above, the city cannot rely on studies it did not consider. *See* Part II. B *supra*. Second, Los Angeles cites no other such studies to support its position. This is not surprising, since none of the major studies even purport to address the issue of whether a single bookstore showing movies creates more secondary effects than a single bookstore or arcade. We have reviewed 30 such studies, available in a packet that the National Law Center for Children and Families regularly makes available to city governments.[7] Of these studies, 8 are among those that have been identified as the ten most commonly cited secondary effects studies. *See* Paul,

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[7] The National Law Center offers information to assist cities in drafting ordinances that restrict sexually oriented businesses. Among other things, the organization's website provides summaries of secondary effects studies, identifies "crucial considerations for a constitutional and effective sexually oriented business ordinance," and provides a fact sheet with excerpts from the organization's "Legal Manual on How to Enact Sexually Oriented Business Ordinances." *See* http://www.nationallawcenter.org.

Linz, & Shafer *supra* at 367-68 (listing most frequently cited studies and cities that relied on them). None of the studies could provide a sufficient evidentiary basis to support the ordinance.

Like the 1977 LA Study, most of the other studies focus on whether there are secondary effects attributable to adult businesses generally, or to the concentration of multiple businesses within a specified geographic area. Several studies conclude that dispersal laws would further the city's interest in preventing the creation of a "skid row" area with high crime and low property values. *See, e.g.*, Marlys McPherson & Glenn Silloway, Minnesota Crime Prevention Center, Inc., *An Analysis of the Relationship Between Adult Entertainment Establishments, Crime, and Housing Values* (1980). But these studies generally group "adult businesses" together and do not consider whether a single business that sells more than one type of item creates similar secondary effects to multiple stores selling one type each. *See, e.g.*, Peter Malin, *An Analysis of the Effects of SOBs on the Surrounding Neighborhoods in Dallas, Texas* (1997); Houston City Council, Comm. on the Proposed Regulation of Sexually Oriented Businesses, *Legislative Report on an Ordinance Amending Section 28-73 of the Code of Ordinances of the City of Houston, Texas; Providing for the Regulation of Sexually Oriented Commercial Enterprises, Adult Bookstores, Adult Movie Theatres and Massage Establishments; and Making Various Provisions and Findings Relating to the Subject* (1983); Planning Dep't, City of Phoenix, *Adult Business Study* (1979); St. Croix County Planning Dep't, *Regulation of Adult Entertainment Establishments in St. Croix County Wisconsin* (1993); Robert W. Thorpe, R.W. Thorpe & Assoc., Inc., *Des Moines Adult Use Study* (1984).

Also like the LA Study, several studies indicate that their authors were plainly aware that adult bookstores often sell and

preview videos or contain other adult uses. For example, a 1977 Amarillo, Texas report on zoning identified seven adult businesses within the city, three of which were adult theaters that also carried books, magazines, and adult novelties, and four of which were adult bookstores with space for other adult materials. *See* Planning Dep't, City of Amarillo, Texas, *A Report on Zoning and Other Methods of Regulating Adult Entertainment in Amarillo* at 11 (1977). Similarly, in 1986, Austin, Texas recognized that many adult bookstores also sell novelty items, other adult materials, and contain peep shows, but classified these businesses simply as adult bookstores, not multiple businesses. *See* Office of Land Dev. Servs., *Report on Adult Oriented Businesses in Austin* at 6 (1986). In 1988, the city of Bellevue, Washington recognized that the adult bookstores in Seattle often contained peep shows, and noted that two of the three adult retail stores within Bellevue also offered video cassettes for rental or on-premise peep shows. *See* Bellevue Study at 18, 43. Similarly, a 1977 Cleveland Police Department report describing police experience with adult businesses notes that the city contains 26 adult businesses, eighteen of which are "bookstores with peep shows." *See* Captain Carl I. Delau, *Smut Shop Outlets, Contribution of these Outlets to the Increased Crime Rate in the Census Tract Areas of the Smut Shops* at 1 (1977). Like Los Angeles, however, these cities analyzed each mixed-use business as a single business and examined the concentration of multiple single businesses, not the concentration of product lines in a single store.

None of these studies identify any heightened secondary effects attributable to a combined bookstore/video arcade or indeed to any combination of adult businesses in one store. To the contrary, to the extent they comment at all on the secondary effects of bookstores and arcades, they often conclude that such businesses are the least troublesome among the various types of adult businesses. *See, e.g.*, Newport News Dep't of Planning

and Dev., *Adult Use Study* at 8 (1996) (noting that among adult entertainment businesses, bookstores, adult merchandise, and video stores had the fewest police calls).[6] Thus, the secondary effects studies of other cities simply provide no evidence that could justify the Los Angeles ordinance.

D. The Fourth Circuit's *Hart* Decision Does Not Provide Evidence of Secondary Effects Justifying the Ordinance.

Like the studies conducted by Los Angeles and other cities, the judicial opinion in *Hart Book Stores, Inc. v. Edmisten* also fails to provide Los Angeles with sufficient evidence. At the outset, although Petitioner repeatedly suggests in its brief that Los Angeles relied on *Hart*, both the district court and the Ninth Circuit made the factual finding that the city relied only on the LA Study. As discussed above, Petitioner's statement that the opinion *existed* at the time the City considered the amendments to section 12.70, *see* Petitioner's Br. at 7, is not enough; the only relevant evidence is that which the city actually considered. *See* Part II. B *supra*. However, even if the city had considered *Hart* when enacting the ordinance, that case would not provide evidence to justify the ordinance.

Hart, a pre-*Renton* case, involved a challenge to a North

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[6] Out of the thirty studies, only one even arguably approached the question of whether a combined-use adult business created additional secondary effects. But even if that study had been before the Los Angeles Council – and it was not – the study simply opines, with no objective basis for doing so, that "a single *large* adult entertainment complex . . . *could* create the same conditions" as those created by the four currently existing adult businesses at a particular location. *See* Adult Entm't Planning Div., Saint Paul Minnesota, *Adult Entertainment, Supplement to the 1987 Zoning Study* at 6 (1988) (emphasis added). Such a conclusion is not evidence, nor does it have any bearing on whether a single bookstore/arcade would create more secondary effects than a bookstore or arcade standing alone.

Carolina statute that prohibited two "adult establishments" from being in one building.[7] Plaintiffs challenged the statute on First Amendment grounds. Although the legislative history and the trial record contained no evidence of studies or judicial opinions identifying any secondary effects, the Fourth Circuit concluded that the legislature *could* have reasonably concluded that combined-use businesses "tended to produce secondary effects destructive of the general quality of life in the neighborhood." 612 F.2d at 828.

Despite the facial similarity in the provisions, the *Hart* opinion cannot provide the evidence necessary to support the Los Angeles ordinance. First, although this Court has recognized that a city could rely on a judicial opinion as a source of secondary effects evidence, it has not held that a judicial opinion alone would be sufficient to justify a zoning restriction applicable to adult businesses. *See Renton*, 474 U.S. at 52 (approving Renton's reliance on a Washington Supreme Court opinion in addition to studies conducted by Seattle and other cities).

Moreover, even if an opinion alone could be adequate evidence, the *Hart* opinion does not include the type of "detailed findings" apparent in the Washington Supreme Court opinion approved in *Renton*. That opinion recounted the "extensive testimony regarding the history and purposes of these ordinances. . . expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts . . . [and] detailed findings . . . that the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight." *Renton*, 475 U.S. at 51 (quoting *Northend Cinema, Inc. v.*

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[7] The regulations did not prevent adult businesses from concentrating in close proximity to each other or near a school, residential area, or other special use.

Seattle, 90 Wash. 2d 709, 713, 585 P.2d 1153, 1156 (1978)). In marked contrast, the opinion in *Hart* showed only that the senator sponsoring the bill read a report recounting one county's single health inspection of five businesses containing video arcades. *See* 612 F.2d at 828-29 & n.9. The report contained no evidence or even conclusions about any secondary effects since it reported only on the interior condition of the stores. Nevertheless, despite the lack of *any* evidence relating to secondary effects, or any legislative findings of secondary effects, the Fourth Circuit hypothesized that the "legislature *could* reasonably have determined that the development of [multi-use adult businesses] tended to produce secondary effects . . . ." *Id.* at 828-29 (emphasis added). While such deference may have been acceptable before *Renton*, it cannot suffice under current standards. Accordingly, even if Los Angeles had relied on *Hart*, that case provides no evidentiary basis for its conclusion that prohibiting bookstores from showing videos will lessen the secondary effects attributed to a concentration of separate adult businesses.

CONCLUSION

Because the City of Los Angeles had no evidence that selling two products in a single business created secondary effects comparable to the secondary effects of multiple adult businesses concentrated together, section 12.70(c) cannot constitutionally be applied to prevent plaintiffs from disseminating two protected forms of speech. Despite the pleas of *amici curiae* that the Court simply "presume" the existence of such secondary effects, both the First Amendment and this Court's precedent require that Los Angeles rely on evidence relevant to the secondary effects its ordinance purports to combat. In light of Los Angeles' failure to do so, the amended ordinance cannot withstand constitutional scrutiny, and the Ninth Circuit's opinion should be affirmed.

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