No. 00-799

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IN THE
SUPREME COURT OF THE UNITED STATES

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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

RESPONDENTS' BRIEF ON THE MERITS

John H. Weston*
G. Randall Garrou
Weston, Garrou & DeWitt
12121 Wilshire Blvd.
Suite 900
Los Angeles CA 90025-1176
(310) 442-0072

Attorneys for Respondents

Cathy Crosson
Of Counsel

* *Counsel of Record*

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QUESTION PRESENTED

Is Los Angeles' prohibition of "multiple use" adult businesses facially unconstitutional to the extent it prohibits traditional adult bookstores from having within them any video viewing machines in which one may view any of the videos for sale or rent in such stores?

CORPORATE DISCLOSURE STATEMENT

Respondents Alameda Books, Inc. and Highland Books, Inc, are California corporations, and have no parent or publicly held company owning 10% or more of their stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATEMENT OF THE CASE

Petitioner City of Los Angeles has divided its Statement of the Case into three discrete components. Part A discusses the legislative record, Part B discusses the facts pertaining to respondents (hereinafter simply "Alameda"), and Part C describes the procedural history of the case.

A. Legislative History.

Much of the City's description of the legislative record is either inaccurate or incomplete. The City's 1977 Study ("the Study") did *not* demonstrate any negative impact of adult businesses on property values but, on the contrary, fairly tended to prove that there was *no* such impact.[1]

Far more significant is what the Study did *not* examine. Most importantly, the Study made no attempt to determine whether a combination of two adult "uses"

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[1] The Legislative Record does summarize subjective "opinions" of realtors that clustering of numerous adult businesses in an area may tend to lower property values. However, the objective evidence refuted these opinions. Basically, the City established five geographical parts of the city for the self-described "empirical" portion of its Study (*see* JA 76), each including an area with a concentration of separate adult businesses, and each also including a comparable "control" area with no adult businesses. JA 79-80. The Study found that property values in *all five* "adult" areas *increased*. JA 86. Moreover, the Study found that in two of the five areas, the amount of the increase was actually *greater* in the "adult" portions than the portions containing the corresponding control. JA 44-45. As a result, the Study itself states:

> "On the basis of the foregoing it cannot be concluded that adult entertainment businesses have *directly* influenced changes in the assessed value of commercial and residential properties in the areas analyzed." JA 45.

within a *single* business caused greater secondary effects than the "sum" of the secondary effects if such "uses" had operated in two separate locations.[2]

Neither did the Study demonstrate, nor even examine, whether *individual* adult businesses cause an increase in crime.[3] Significantly, the Study did not identify the existence of any stand-alone adult arcade uses.[4]

Also, there was absolutely *no* evidence in the legislative record of any secondary effects occurring *within* a combined adult bookstore / video arcade, nor *within* any other type of adult business studied. Specifically, the 1977 Study evaluated whether the clustering of multiple unrelated adult businesses in one part of Los Angeles (i.e.,

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[2] For convenience, the term "uses" shall be used throughout to describe each of the different types of business activities which, if present, would cause the City to characterize such activity as a separate adult business use, even if such use does not in fact exist as a separate use anywhere but in the City's imagination. The uncontroverted evidence of record demonstrated that the "use" described as an "adult arcade" does not in fact exist anywhere in Los Angeles as a "stand alone" use independent of some other primary use such as a bookstore selling adult materials. *See, e.g.*, JA 229-230. Moreover, in discovery, the City was asked to identify all free-standing adult arcade uses in the City of which it was aware; it identified none.

[3] On the contrary, the Study includes comments by the City's Planning Department stating:

> "Several respondents commented that the adverse effects are related to the *degree* of concentration **and that one free-standing business may have no effect.**" JA 109. (Emphasis added).

Also, and as noted by the District Court in n. 6 of its opinion (Pet. App. 39), it is clear from the face of the Planning Department's study that it did *not* consider any secondary effects attributable to a single adult business. As the District Court noted, two of the five control areas used by the Planning Department in fact *contained* single adult businesses. JA 81.

[4] As noted by the Court of Appeals, the City's 1977 Study "treated a bookstore / arcade combination as a single business or unit of adult entertainment whose secondary effects arise from its proximity to several other units of adult entertainment." Pet. App. 12.

Hollywood) generally increased crime in the overall Hollywood area.[5] It made no attempt to determine the extent of, or even the existence of, any secondary effects occurring *within* (or on the property of) any adult entertainment businesses.

B. Facts of This Case.

Alameda adopts Part B of the City's Statement of the Case except to the extent specifically noted below:

1. Both Highland Books and Alameda Books are relatively small retail stores. The area open to the general public in the two businesses is approximately 2,500 and 3,000 square feet, respectively. JA 224-225.

2. Both Alameda Books and Highland Books sell and rent sexually oriented products, including videotapes, and both stores provide video viewing booths in which, for a small fee, customers can view or preview the many thousands of different videotapes that are available for sale and/or rental in the store. JA 225.

3. The method of operation of the two stores is virtually identical. During most of the hours of operation, a single employee works at the store, a counter clerk who "rings up" retail sales and rentals and takes money for and supervises operation of the store's video viewing booths. That employee also checks identification to ensure that no minors enter the premises. *Id.*

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[5] The scope of crimes studied makes clear that the City was not studying whether crimes occurred *within* adult businesses. For example, the record shows that the crimes studied included, e.g., homicide, rape, aggravated assault, robbery, burglary, larceny, auto theft, street robberies, purse snatches, forgery, counterfeiting, embezzlement and fraud, in addition to those noted in the City's Brief. JA 126. They also even apparently included suicide. JA 116. *None* of these crimes was shown or even alleged to have occurred on the premises of any adult businesses.

4. The video viewing booths and retail sales areas of each store are located in a single commercial space within a single building. *Id.*

5. Each store has only one public entrance, the only access from the outside to either the video booths or the retail sales areas of the store. Customers may freely walk about the premises, entering and exiting the video viewing booths and browsing through the store. JA 225-226.

6. Both Highland Books, Inc. and Alameda Books, Inc., are the sole owners of the entirety of each respective business, including both the retail sales and video rental aspects of the stores and the on-premises video arcade portion of the store. JA 226.

7. Alameda Books has 15 video viewing booths. Highland Books has 19 video viewing booths. JA 227.

8. All of the videos exhibited in the viewing booths are available in the store for purchase or rental. JA 227.

9. Both Alameda Books and Highland Books carry approximately 6,500 different titles of sexually oriented videotapes for rental or retail sale. Both stores allow customers to view or preview *any* of these thousands of video tapes in the store's video preview booths. A customer interested in a particular videotape may bring it directly to the counter clerk and request to preview it. After paying a small fee to the counter clerk, the customer is then directed to one of the video preview booths, and the clerk activates that videotape. After viewing the tape in the preview booth, the customer may purchase or rent it for subsequent home viewing. JA 228.

10. Previewing adult videotapes in the store where they are available for purchase or rental is the best source of consumer information regarding the content of such videos. JA 243.

11. At all relevant times, both Highland Books and Alameda Books have maintained a prominently displayed sign which, in pertinent part, states:

> "ALL VIDEOS IN THIS STORE ARE AVAILABLE FOR RENT, PREVIEW, AND/OR SALE." JA 228-229.

12. In both stores, customers regularly rent or purchase videotapes after having previewed those tapes in one of the video viewing booths. JA 229.

13. The uncontroverted record tended to show that no "adult arcade business" exists anywhere, independent of some other primary business, such as an adult bookstore. JA 229-230.[6]

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[6] The City is correct in noting that the record reflects that both Alameda Books and Highland Books initially operated as adult video arcade uses and not as "adult bookstores" (as that term was then understood by Alameda). This is not, however, an inconsistency. L.A.M.C. § 12.70B (2) has at all times defined an "adult bookstore" to include any business which carries adult items as a "substantial portion of its stock-in-trade." However, until the California Supreme Court's decision in *People v. Superior Court (Lucero)*, 49 Cal.3d 14, 28, n.10, 259 Cal.Rptr. 740, 748, n.10, 774 P.2d 769 (1989), California's courts held that an "adult bookstore" definition like Los Angeles', using the "substantial-portion-of-the-stock-in-trade" language, must be interpreted by the "preponderance test," whereby a bookstore was considered "non-adult" even if as much as 49% of its inventory was adult. *See, e.g., Kuhns v. Santa Cruz County Board of Supervisors*, 128 Cal.App.3d 369, 181 Cal.Rptr. 1 (1982).

The record also reflects that throughout the initial period of operation of these two businesses, both in fact sold adult materials, though less than a *preponderance*. JA 19. Accordingly, this was entirely consistent with Mr. Wiener's statement (at JA 229-230) that in his 15 years of experience in the industry, he has "never heard of a business which maintained or operated motion picture or video viewing booths as a primary use except in conjunction with retail sales of related media materials, such as adult books, magazines, films or video tapes."

Today, such a method of operation would not allow such uses to escape characterization as a "multiple use" adult bookstore and "adult arcade." The record reflects that the City, but for judicial compulsion, would not gratuitously provide a "preponderance test" safe harbor. *See, e.g.* Respondents' Appendix (hereafter "RA")

(continued...)

14. If the City is allowed to enforce its multiple-use restriction, it will eliminate all practical opportunities for members of the public to preview sexually oriented videotapes prior to making an on-site decision to purchase or rent such videotapes. JA 242-243.

15. After its 1983 enactment of the multiple-use ban, the City added further limits on the permissible sites for adult businesses. Currently, L.A.M.C. § 12.70C prohibits adult businesses, including adult arcades, from operating within 500 feet of "a religious institution, school, or public park within the City of Los Angeles," within 1,000 feet of any other adult business, within 500 feet of "any lot in an 'A' [agricultural] or 'R' [residential] zone," or "within the 'CR', 'C1', or 'C1.5' [limited commercial] zones in the City of Los Angeles." RA 25. These limitations on "adult" businesses are superimposed on a general zoning scheme with which adult businesses must also comply.

16. Both of respondents' businesses are lawfully situated in appropriate commercial zones and comply with all of the locational restrictions of L.A.M.C § 12.70C other than the one challenged herein. Neither business is within 500 feet of any church, school, park or residential or agricultural zone, nor within 1,000 feet of any other adult entertainment business. JA 224.

C. The Proceedings Below.

(...continued)
4-5. Instead, even adult inventory of as little as 1-2% of the total inventory could provide the basis for a characterization that the use in question is an "adult bookstore" under LAMC § 12.70. *See* p. 63 of the Transcript of the Deposition of James Carney (the City's Chief Inspector for its building department) at RA 16, pp. 90-93 of the deposition transcript of City Building Inspector Roger Mepham (RA 11-12), and *see* ¶ 35 of the Garrou Declaration (RA 7).

Regarding the procedural history of the case, respondents add the following:

1. **The District Court's Ruling.** In its initial ruling *denying* summary judgment to Alameda, the District Court noted that there was "a genuine issue as to whether the [1983 multi-use] ordinance serves a substantial government interest under the secondary effects doctrine." JA 302. *See also* JA 292 and JA 305. However, in seeking reconsideration, Alameda argued that under *Celotex v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), whichever party has the burden of proof at trial on a particular issue also has the burden of proof at the time of summary judgment. Alameda further argued that the burden of justifying the ordinance was on the City, and that if the City had not produced sufficient evidence to meet that burden by the time of summary judgment, it was not entitled to defer meeting its burden until trial. Agreeing, the District Court reversed itself and awarded summary judgment to Alameda. Pet. App. 28-30.

Moreover, in contrast to the "narrow tailoring" time, place and manner rationale utilized by the Court of Appeals, the District Court appears to have concluded, as a threshold matter, that the ordinance was not content-neutral.[7] It reached this conclusion because the only evidence submitted in the record on summary judgment by the City was its 1977 Study and related non-Study material, none of which, the

[7] Portions of the District Court's ruling appear to have been based on time, place and manner analysis, but it ultimately resolved the case based on the conclusion that the ordinance was content based and therefore subject to strict scrutiny. Pet. App. 51. *See also* Pet. App. 54-55.

District Court concluded, demonstrated a content-neutral justification for the 1983 ordinance. Pet. App. 51.[8]

2. **The Court of Appeals' Ruling.** In contrast to the District Court's rationale, the Court of Appeals expressly declined to analyze whether the ordinance was content-neutral (Pet. App. 10), as it concluded that in any event the ordinance could not withstand analysis under the less strenuous time, place and manner test.[9] Pet. App. 8 and 10. Specifically, the Court of Appeals found that the ordinance was not *narrowly tailored* to serve a substantial governmental interest because, even assuming, *arguendo*, the existence of any secondary effects caused by an adult bookstore containing video viewing booths, there was no evidence suggesting that the total amount of any such secondary effects would be diminished if such "businesses" were, instead, operating at two separate locations as two separate types of uses. Pet. App. 20-21:

> "Prohibiting arcades and adult bookstores from being located in the same building would not prevent the type of unhealthy conditions in the booth that the Fourth Circuit [in *Hart*] cited as the only evidence produced by North Carolina to justify its statute. There is nothing in the case to indicate that the same type of behavior that occurs in viewing booths in combination bookstore/arcades would not occur in an establishment that only furnishes an arcade. Therefore, any inference that the statute could have an ameliorating impact on the identified harmful secondary effects would be unreasonable." *Id*.

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[8] Moreover, none of the materials submitted by the City on summary judgment evidenced any City Council reliance on *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), the only published opinion prior to that in the present case to have addressed a similar type of ordinance scheme.

[9] In so ruling, the Court of Appeals stated that it was expressing no disapproval of the alternative basis upon which the district court had premised its ruling, calling it a "perfectly reasonable" approach. *Id.*

SUMMARY OF ARGUMENT

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court stated that adult zoning restrictions should be "analyzed as a form of time, place, and manner regulation" (*id.* at 46), and that a city must rely upon "evidence" which "is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51. This Court also made clear that the justifications for the ordinance must have been presented "in enacting" the challenged ordinance. *Id.*

The City and its amici have significantly misread *Renton* as eliminating any requirement of actual reliance on content-neutral secondary effects by the enacting body. Instead, they essentially argue that this particular time, place and manner restriction need be subjected only to rational basis review, and may be supported solely by unchallengeable *post-hoc* justifications never considered by the enacting body.

Under the City's syllogism, all adult businesses (no matter how defined) are presumed to have "secondary effects," and such secondary effects automatically justify any restrictions on such businesses short of a total ban, regardless of whether there is a reasonable fit between the particular secondary effects offered as justification and the scope of the challenged restrictions. In essence, the City asks this Court to jettison a modest, effective requirement it has imposed in *all* other intermediate scrutiny cases, e.g., that government 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. *See Turner Broadcasting System v. F.C.C. (Turner I)*, 512 U.S. 622, 664 (1994), and *Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180, 195 (1997).

Moreover, this Court's decisions repeatedly warn against the danger of pretextual laws masquerading as content-neutral regulations and the need for safeguards to prevent such abuses. Given that legislation may apparently no longer be challenged on the ground of improper legislative motive, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000), the only remaining safeguard against unbridled censorship masquerading under the pretext of content-neutral regulation is intermediate scrutiny's objective requirement that in enacting legislation, the governmental body must have had a reasonable content-neutral basis before it. While urging the removal of any such objective requirement, the City offers no alternative remedy to protect against the rampant pretextual abuses that its proposed solution would so clearly invite.

The Ninth Circuit correctly concluded that the City failed to establish that it had a reasonable basis for concluding that the ordinance would reduce any secondary effects. The court correctly noted that the City's 1977 Study (the sole secondary effects study actually before the City Council) examined only secondary effects caused by a *clustering* of *unrelated* adult businesses, but did not examine whether a ban on so-called multiple adult uses within a single business would ameliorate the types of secondary effects identified in the Study.

In short, the Ninth Circuit based its ruling on the fact that the City established absolutely no reasonable basis for concluding that the secondary effects of a traditional combined adult bookstore / arcade would be greater than any secondary effects which would be generated by an arcade standing alone. Neither did the legislative record suggest that any secondary effects from a traditional combined adult bookstore / arcade would be greater than the *sum* of any secondary effects which would be

generated if the existing business split into two separately-located businesses. Indeed, logically, it seems that there would be *greater* secondary effects in the latter circumstance.

Unlike the Court of Appeals, which analyzed the ordinance as a time, place and manner restriction, the District Court first addressed the question of whether it was content-neutral. The District Court correctly concluded that the City had not established any evidence, either in its legislative record or by the time of summary judgment, to demonstrate a reasonable basis for the challenged ordinance.

The ordinance is also invalid, however, for at least two additional reasons which were raised in, but not addressed by, both courts below. First, the ordinance effectively prohibits consumers from previewing videotapes they are considering purchasing or renting, even though the record shows that consumers have no other adequate avenue for obtaining truthful information about the contents of individual videotapes, to assist them in deciding which ones to purchase or rent for home viewing. The ordinance constitutes a total ban on the operation of preview booths and fails to provide an adequate or ample alternative channel by which customers can obtain comparable information.

Second, the ordinance unconstitutionally mandates the parsing of Alameda's expressive business into more narrowly defined types of businesses where fewer types of expression may be offered, i.e., an "adult arcade" and an "adult bookstore." The uncontroverted record shows that *no* "adult arcades" — other than those operating within stores selling adult oriented materials — have ever existed in Los Angeles or anywhere else. Consequently, the ordinance requires this medium to convert to an

untested format — one which the City failed to show will reasonably permit it to survive. Because the City failed to demonstrate that the ordinance leaves open ample alternative public access to adult arcades, it is subject to strict judicial scrutiny, which it cannot meet.

Alternatively, however, even if this Court concludes that the City met its burden to demonstrate that the ordinance is not a *de facto* ban on adult arcades, this requirement would fail in any event under a test of intermediate scrutiny, because it burdens substantially more expression than is necessary for the amelioration of any secondary effects offered in justification of the ordinance.

ARGUMENT

I

RESPONDENTS URGE THIS COURT TO REJECT THE CITY'S SUGGESTION TO CONFER ABSOLUTE TALISMANIC IMMUNITY ON ALL ADULT BUSINESS REGULATIONS

Not content with a standard of judicial review which is already exceedingly deferential, the City and its amici have now gone to the ultimate step of essentially asking this Court to abandon and foreclose *all* judicial inquiry into the validity of every conceivable adult entertainment regulation, so long as the City simply recites the mantra of "secondary effects." The City's argument is essentially this: "all adult businesses have secondary effects; cities are entitled to 'a reasonable opportunity to experiment with solutions to admittedly serious problems,' and, accordingly, it is improper for any court to meddle into the province of the legislative branch when cities enact restrictions of adult entertainment businesses." Its argument continues: "*Any* secondary effects justify *any* restrictions on adult businesses, and a city need not establish a reasonable fit between the observed secondary effects and the nature and scope of the regulation." For a host of reasons, this Court is urged to resist the concerted efforts by the City and its amici to insulate their actions from any meaningful First Amendment scrutiny whatsoever.

Perhaps the most important reason why the suggested abandonment of judicial scrutiny should be rejected is that its adoption would unquestionably open the floodgates to pretextual laws masquerading as content-neutral regulations but which, in fact, are designed simply to eliminate, or severely burden, a type of expression found objectionable by government officials.

In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), this Court held that the First Amendment did not preclude the closing of an adult bookstore under generally-applicable anti-prostitution laws. However, concurring in the judgment, Justice O'Connor warned of the need for judicial scrutiny to insure that the targets of such nuisance abatement actions were not singled out because of the nature of the books they sold "or because of the perceived secondary effects of having a purveyor of such books in the neighborhood." 478 U.S. at 708. Justice O'Connor stated that if a city were to use a nuisance statute as a "pretext" for achieving such alternative purposes, "the case would clearly implicate First Amendment concerns and require [First Amendment] analysis."[10] *Id.*

However, if this Court were to adopt the further relaxation of judicial scrutiny the City seeks, there will simply no longer *be* any mechanism for demonstrating such pretextual abuses. Given that the subjective motivations of an enacting body may

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[10] To the same effect were Justice Powell's remarks in providing the critical fifth vote needed in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), this Court's first adult zoning case:

> "[C]ourts must be alert to the possibility of [a] 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." *Id.* at 84 (emphasis added).

apparently no longer be used to demonstrate that a challenged law is content-based, *see, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000), the *only* way of demonstrating whether a legislature's purposes were truly content-neutral or, alternatively, pretextual, is to determine whether the legislative body *in fact* had before it at the time of enactment an adequate content-neutral evidentiary basis to support a *reasonable* belief that the challenged law would ameliorate clearly established secondary effects.[11] Such a requirement brings the only element of objective scrutiny to the analysis and constitutes the only remaining bulwark against pretextual abuses.

Indeed, this Court has imposed this requirement (that an enacting body had before it an objective basis for legislation) in a variety of contexts where legislative motivation was suspect under a test of intermediate scrutiny. *See, e.g., Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180, 211 (1997),[12] and *United States v. Virginia*, 518 U.S. 515, 533 (1996).

More recently, Justice O'Connor again warned of the danger of pretextual abuses — albeit in a Fourth Amendment context — in *Atwater v. City of Lago Vista*,

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[11] Of course, as *Renton* instructs, the evidence need not be created, in the first instance, by the city whose enactment is challenged. If that city council in fact relied on evidence provided from some other source, it may elect to adopt and use that evidence. (Here though, there is no evidence that the Los Angeles City Council in 1983 relied on an adequate evidentiary basis from any other city or from any court opinions.) Nor is it required that a legislative body "make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broadcasting System v. F.C.C. (Turner I)*, 512 U.S. 622, 666 (1994). However, there must at least be *some* minimally adequate quantum of evidence in the legislative record to show that enactment of the law was not pretextual but, instead, was a *reasonable* legislative response to a real problem.

[12] "The question is not whether Congress, as an objective matter, was correct to determine must-carry is necessary to prevent a substantial number of broadcast stations from losing cable carriage and suffering significant financial hardship. Rather, the question is whether the legislative conclusion was reasonable *and supported by substantial evidence in the record before Congress*." *Id.* (Emphasis added.)

___ U.S. ___, 121 S.Ct. 1536 (2001), where this Court upheld the authority of peace officers to make warrantless arrests for misdemeanors as minor as seatbelt violations. Justice O'Connor's dissent for four members of the Court was based simply on the fact that giving officers such unbridled discretion to arrest leaves the victim of an unreasonable search with no effective method by which to prevent pretextual arrests:

> "[U]nbounded discretion carries with it grave potential for abuse. . . . [A] relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, . . . [a]n officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop." ___ U.S. at ___, 121 S.Ct. at 1567.

The First Amendment analogy is even more compelling. This Court's jurisprudence is filled with examples of governmental attempts to suppress controversial expression under the pretextual guise of enforcing content-neutral restrictions. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *NAACP v. Alabama*, 377 U.S. 288 (1964); *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

Under the standard the City urges, there will be no protection against governmental abuse, and the First Amendment protections so carefully crafted by this Court over decades of jurisprudence will literally vanish.[13] In *Roth v. United States*, 354

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[13] This Court's decisions have repeatedly clarified that regulations of non-obscene sexually-oriented expression, not involving either child pornography or speech mixed

(continued...)

U.S. 476 (1957), this Court allowed governmental prohibition of materials found to be legally "obscene" but warned that

> "[c]easeless vigilance is the watchword to prevent . . . erosion [of 'the fundamental freedoms of speech and press'] by Congress or by the States. The 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 interests." 354 U.S. at 488.

The *de facto* abandonment of judicial review of adult business regulations advocated by the City would constitute the utter and final rejection of these critical cautionary words uttered in *Roth*. If the City need not demonstrate even a "reasonable fit" between a challenged ordinance and the amelioration of the secondary effects which assertedly justify that ordinance, then talismanically-proclaimed "content-neutral" (though in fact pretextual) restrictions will ensure the elimination of any and all targeted adult entertainment businesses.[14]

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[13](...continued)
with conduct, are subject to full First Amendment protection. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), where a majority of the Court rejected the plurality's assertion that non-obscene sexually-oriented expression is entitled to less than full First Amendment protection (*see* concurring opinion of J. Powell for majority of the Court, 427 U.S. at 73, n.1); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72-73 (1994); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 67 (1989); *Smith v. California*, 361 U.S. 147, 152 (1959). Indeed, many of this Court's most significant tests for First Amendment protection were crafted out of the crucible of litigation involving adult entertainment businesses. *See, e.g., Freedman v. Maryland,* 380 U.S. 51 (1965) (any legislative scheme for licensing expressive activity must conform to strict procedural safeguards to protect against censorship by delay); *Smith v. California*, 361 U.S. 147 (1959) (First Amendment forbids booksellers from being held strictly liable for the media materials they sell).

[14] In *Turner Broadcasting System v. F.C.C. (Turner I)*, 512 U.S. 622 (1994), a majority of this Court concluded that a First Amendment test of "intermediate scrutiny" should apply and a plurality consisting of Justices Kennedy, Rehnquist, Blackmun and Souter stated that the appropriate test, in such a case, is that the government "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." 512 U.S. at 664 (continued...)

The abandonment of any meaningful judicial scrutiny, as advocated by the City, is also inconsistent with this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), where this Court squarely rejected virtually the same argument the City and its amici reassert here:

> "The City claims that no . . . trial of the issues is required, because the City need not 'generate a legislative record' in enacting ordinances which would grant one franchise for each area of the City." 476 U.S. at 495.
>
> "The flaw in the City's argument is that [the cases upon which the City relies] involved Fifth Amendment equal protection challenges to legislation, rather than challenges under the First Amendment. Where a law is subjected to a colorable First Amendment challenge, *the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force*. [Citation omitted.] This Court 'may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.'" 476 U.S. at 496 (emphasis added).

Likewise here, and unlike in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), where there was speech mixed with conduct, the only businesses before the Court are those engaged in pure expression (e.g. books, magazines, videotapes, etc.), not conduct. In such a case, this Court has advised the lower courts that they "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity." *Preferred Communications*, 476 U.S. at 496.[15] The

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[14](...continued)
(emphases added). In *Turner II*, a full *majority* of this Court adopted and applied the plurality's articulation of this intermediate scrutiny standard of review. See 520 U.S. at 195.

[15] As Justice Thomas recently noted in his concurring opinion in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000):

> "'Reviewing speech regulations under fairly strict categorical rules keeps
>
> (continued...)

Court of Appeals below merely applied this Court's dictates, and properly refused to simply *assume* that the ordinance necessarily advanced the asserted municipal interests.

II

APPLYING TRADITIONAL TIME, PLACE AND MANNER ANALYSIS, THE NINTH CIRCUIT PROPERLY FOUND THAT THE ORDINANCE WAS NOT NARROWLY TAILORED TO FURTHER A SIGNIFICANT GOVERNMENTAL PURPOSE BECAUSE THERE WAS NO REASONABLE BASIS FOR CONCLUDING THAT A COMBINATION ADULT BOOKSTORE/ARCADE WOULD HAVE GREATER SECONDARY EFFECTS THAN THE SUM OF THE SECONDARY EFFECTS IF SUCH USES OPERATED SEPARATELY

The Court of Appeals determined that the City failed to establish a reasonable basis for concluding that its ordinance was narrowly tailored to serve a significant and legitimate governmental purpose.

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[15](...continued)

> the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.'" (Quoting from Justice Souter's concurring opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 774 (1996).)

The primary defect the Court of Appeals found in the City's ordinance appears in the portion of its opinion rejecting the City's attempted reliance on *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979). Pet. App. 20-21. Even though *Hart* is not referenced anywhere in the legislative record (and therefore must be considered as being offered entirely *post-hoc* solely for litigation purposes), the Court of Appeals nonetheless examined the justifications advanced in *Hart* to determine whether they could sustain the Los Angeles ordinance.[16] However, it found that the only evidence in *Hart* was that *arcade booths* of the type there at issue were often the site of adverse secondary effects.[17] The North Carolina report referenced in *Hart* did not provide any evidence suggesting that these problems would likely decrease if the video arcades operated as free-standing facilities. The Court of Appeals below logically assessed the significance of this fact:

> "There is nothing in [*Hart*] to indicate that the same type of behavior that occurs in viewing booths in combination bookstore/arcades would not occur in an establishment that only furnishes an arcade. Therefore, any inference that the statute could have an ameliorating impact on the identified harmful secondary effects would be unreasonable." Pet. App. 20-21.

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[16] Consideration of *post-hoc* materials in a time, place and manner analysis is, of course appropriate, after the basic issue of content-neutrality has been established by justifications actually appearing at the time of enactment. *See, e.g. Turner I* (finding sufficient evidence in the legislative record to conclude statute was content-neutral, and then remanding for further *post-hoc* evidence to show that statute was narrowly tailored to further a substantial purpose).

[17] It is also relevant that the types of arcades analyzed by *Hart* in North Carolina in 1979 were not shown to be the same as those in Los Angeles. Pursuant to L.A.M.C. § 103.101 (enacted in November of 1977), video booths in Los Angeles may not have doors on them, must have minimum levels of illumination, and their interiors must be visible from the entrance to the premises. *See* RA 37. (By comparison, Los Angeles completed its 1977 Study in June of that year, before enactment of any of these ameliorative provisions. *See* JA 35.)

Although the Court of Appeals was undoubtedly correct in this analysis, the case against reliance on *Hart* is even *stronger* than articulated by the Ninth Circuit.[18] As noted by the Court of Appeals above, *Hart* provided no evidence that there would be *greater* secondary effects from a *combined* bookstore/arcade than an arcade operating alone. It follows, a fortiori, that *Hart* provided no evidence to suggest that the secondary effects from an existing combination bookstore/arcade would be greater than the *sum* of any secondary effects generated if the combined two uses were re-established in two separate locations. Nothing in logic suggests that this would be the case. Indeed, it is probably the case that separating such businesses into two distinct locations would actually *increase* the total of any secondary effects because of the problems caused by the proliferation of numerous new separately located adult entertainment businesses.[19]

Therefore, the Court of Appeals was clearly correct in concluding that there was simply not a reasonable basis for a conclusion that the challenged ordinance was narrowly tailored to "in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664.

The second basis for the Court of Appeals' ruling was its conclusion that the City's 1977 Study was designed solely to examine the effects of the *clustering* of

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[18] A city may, of course, adopt *evidence* found in published judicial decisions. However, *stare decisis* aside, a judicial approval of legislation on the basis of that evidence does not preclude other courts in other cases from finding that evidence inadequate to justify other legislation.

[19] Given that the record reflects that every video arcade in Los Angeles operates in some type of adult bookstore, implementation of the ordinance would require the City to absorb large numbers of new, separately located adult businesses. It is not intuitively obvious that this would be in the best interests of anyone.

separate adult entertainment businesses and not to examine or evaluate whether the secondary effects observed there might also have been generated by a single business consisting of a traditional adult bookstore with video viewing booths. As noted in the Statement of the Case, the legislative record is absolutely clear that the 1977 Study made no attempt to analyze this issue.

Accordingly, for both of the reasons above, the Court of Appeals properly found that the challenged ordinance was not narrowly tailored to further a significant governmental purpose, because there was no reasonable basis for concluding that "the recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I,* 512 U.S. at 664. In short, no "reasonable fit" was shown.

The City's criticisms of the Court of Appeals ignore the two fundamental points noted above. Instead, the City *mischaracterizes* the standard adopted by the Court of Appeals in hopes that this Court, in knocking down this straw man, will remove all vestiges of judicial review in this area.

Specifically, at p. 14 of its Brief, the City states that the Ninth Circuit "stumbled over" the proper application of the time, place and manner test by requiring the City to "prove" that a combination of adult uses within one business contributes to the harmful secondary effects identified in the City's 1977 Study. This statement is inaccurate. The Ninth Circuit did not require the City to *prove* that a combination of adult uses in a single business causes greater secondary effects than if each of the component businesses were to operate at separate locations. Rather, following *Renton*, the Ninth Circuit required the City to demonstrate only that it had a "reasonable

basis" for believing that to be the case. The Court of Appeals faulted the City for failing to even establish a "reasonable basis" for that legislation, not for failing to "prove" anything.

For example, in *Young*, the City of Detroit did not definitively *prove* that clustering of adult businesses caused the noted secondary effects. It simply established enough evidence of a correlation that one could "reasonably believe" that the harms recited were real and caused by the clustering of the adult businesses. As a matter of constitutional law, if a city introduces sufficient evidence to establish a "reasonable belief" that the harms recited are real and that the enacted ordinance will remedy those harms, then it creates a rebuttable presumption of validity. In this case, the Court need go no further to resolve this matter, because the City never met this threshold test.[20]

[20] However, in other cases not presently before this Court, a further corollary is necessary. A city's showing of a "reasonable basis" should establish a *rebuttable* — not an *irrebuttable* — presumption of validity, subject to the challenger's having the opportunity to provide evidence definitively showing that the city's beliefs, though reasonable, are in fact incorrect. *See, e.g., Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001). *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000), faulting a nude dancing establishment for failing "to contest the council's findings about secondary effects." Presumably this criticism means that the Court intends that the presumption of validity which arises when a city demonstrates a "reasonable basis" may then be overcome if the challenger adequately "cast[s] . . . specific doubt on the validity of those findings." *Id*.

III

THE DISTRICT COURT PROPERLY CONCLUDED THAT THE CITY HAD NOT ESTABLISHED A CONTENT-NEUTRAL JUSTIFICATION IN THE LEGISLATIVE RECORD, AND PROPERLY APPLIED *CELOTEX v. CATRETT* IN GRANTING SUMMARY JUDGMENT, THEREBY PRECLUDING THE CITY FROM OFFERING ANY *POST-HOC* OR OTHER JUSTIFICATIONS NOT OFFERED BY THE TIME OF THE SUMMARY JUDGMENT RULING

The District Court analyzed the challenged ordinance slightly differently than the Court of Appeals, though arriving at the same ultimate conclusion. The District Court concluded that the ordinance was content-based, thereby pretermitting the need to analyze whether the ordinance met the applicable tests for time, place and manner restrictions. This Court's decisions make clear that it was certainly not improper for the District Court to adopt this approach,[21] and in fact it may be the preferred manner of proceeding.[22]

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[21] See the numerous cases Justice O'Connor cited in her concurrence in *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994).

[22] In *Ladue*, this Court invalidated the city's residential sign ordinance after applying a time, place and manner test, but before addressing the question of whether it was content-neutral. In her concurring opinion, Justice O'Connor noted the unusual

(continued...)

The District Court concluded that, under applicable precedent, content neutrality must be determined based upon the legislative record and cannot be demonstrated by *post-hoc* justifications. (*See, e.g.*, JA 33-34.) This was entirely consistent with both the facts and holding in *Renton* and with the reality that there is simply no other workable and objective way to expose those ordinances which are merely pretextual.

In *Renton*, this Court stated the applicable test as follows:

> "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." 475 U.S. at 51-52. (Emphasis added.)

The City reads the above quoted language from *Renton* out of context, concluding that the phrase "whatever evidence the city relies upon" refers to *post-hoc* justifications offered for the first time in litigation, even if those justifications were never presented to the enacting city council. This interpretation grossly misreads *Renton*.

First, the evidence which this Court found to justify Renton's "reasonable reliance," was the evidence in the Washington Supreme Court's opinion in *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978), which this Court

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[22](...continued)
order in which the Court had approached its analysis:

> "The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny." 512 U.S. at 59.

specifically found "was before the Renton City Council when it enacted the ordinance in question here." 475 U.S. at 50-51.

Second, earlier in the same paragraph quoted above, this Court specifically articulated that the reliance it was discussing was that which occurred "in enacting" the challenged ordinance. 475 U.S. at 51. Specifically, this Court stated:

> "We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and . . . on the 'detailed findings' summarized in the . . . *Northend Cinema* opinion, ***in enacting*** its adult theater zoning ordinance." *Id*. (emphasis added).

In the language quoted immediately above, this Court precisely articulated the point in time to which this reliance on other studies should refer, and it stated that the reliance should occur "in enacting" the ordinance, not at some later point in time when conjuring up *post-hoc* justifications for a reviewing court.

Accordingly, a reasonable reading of *Renton* suggests that the justification for the ordinance must have been before the legislative body at the time of the enactment and cannot be added later as a *post-hoc* justification by creative lawyers. If the primary purpose of the "reasonable basis" test is to provide an objective mechanism (indeed the *only* mechanism) for detecting and preventing pretextual content-based legislation, then this is the *only* fair reading of *Renton*.

Subsequent to *Renton*, this Court further clarified its position on this issue in two significant cases: *Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180 (1997),

and *United States v. Virginia*, 518 U.S. 515, 533 (1996), both of which involved judicial review of legislation under a test of intermediate scrutiny.[23]

In *Turner II*, this Court applied "intermediate First Amendment scrutiny under *United States v. O'Brien*" in analyzing the asserted content-neutral justifications the Government offered in support of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act. 520 U.S. at 185. The parties challenging that law had asserted that "the must-carry law is not necessary to assure the economic viability of the broadcast system as a whole." 520 U.S. at 211. This Court rejected that contention, stating that it was irrelevant whether Congress was in fact *correct* in determining the necessity for the Act, so long as it *in fact* considered substantial evidence from which it could reasonably conclude the need for the Act:

> "This assertion misapprehends the relevant inquiry. The question is not whether Congress, as an objective matter, was correct to determine must-carry is necessary. . . . Rather, the question is whether the legislative conclusion was [1] reasonable and [2] supported by *substantial evidence in the record before Congress*." 520 U.S. at 211 (emphasis added.)

While *Turner II* reaffirmed that "deference must be accorded to [legislative] findings," 520 U.S. at 196, it nonetheless reiterated that a minimum threshold amount

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[23] In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), this Court noted that the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions." *Id.* at 798. In *Turner II*, this Court held that a test of "intermediate First Amendment scrutiny" applies to all content-neutral restrictions of speech under the *O'Brien* test. 520 U.S. at 185. Consequently, to the extent the time, place and manner and *O'Brien* tests involve common elements (e.g., narrow tailoring and proof of a substantial governmental purpose), they are presumably analyzed under the same test of intermediate First Amendment scrutiny.

of evidence must appear in the record to support a "reasonable basis" for the legislation:

> "Our sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences *based on substantial evidence*.'" *Id.* at 195, quoting from *Turner Broadcasting System v. F.C.C. (Turner I)*, 512 U.S. 622 (1994). (Emphasis added.)

While both *Turner I* and *Turner II* clarified that *post-hoc* evidence is permissible for determining (in the context of a time, place and manner analysis) whether a content-neutral law is narrowly tailored to serve a substantial governmental purpose, the cases stand for the proposition that before one even examines a law for narrow tailoring or a substantial purpose, the *initial* determination of whether the law is in fact *content-neutral* must be established by virtue of evidence *in fact* considered by the enacting body.

In *United States v. Virginia*, 518 U.S. 515 (1996), another case involving an intermediate level of scrutiny, this Court, in the context of an asserted gender-based equal protection violation, reiterated even more forcefully the inappropriateness of allowing *post-hoc* justifications as the *sole* basis of support for allegedly unconstitutional action:[24]

> "The justification must be genuine, not hypothesized or invented *post-hoc* in response to litigation." *Id.* at 533.

While *United States v. Virginia* arose in an equal protection context, the reasons for its rule are no less applicable here. Specifically, this Court was sensitive to the fact

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[24] Although the Court's opinion does not use the express term "intermediate scrutiny," it is clear that the standard of review was intermediate scrutiny in that it was less demanding than strict scrutiny but more rigorous than rational basis scrutiny.

that there was a significant danger of pretextual discrimination against a particular category of persons. It recognized that where there is a significant likelihood of pretextual legislation, it is critical to have an objective test rather than one which allows justifications to be presented *post-hoc.* That is certainly no less true in the area of adult entertainment regulations where, as noted above, this Court has repeatedly warned of the danger of pretextual regulations. *See, e.g.,* Powell, J. in *Young,* 427 U.S. at 84, and O'Connor, J. in *Arcara,* 478 U.S. at 708.

Finally, as noted above, this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.* also expressly *rejected* the suggestion that "the City need not 'generate a legislative record' in enacting ordinances" challenged under the First Amendment. 476 U.S. at 495.

Given the unequivocal precedent above, the District Court did not err in limiting its review to the materials and arguments which were in fact before the City Council at the time of enactment of the challenged ordinance.

Moreover, because the legislative record did not even *purport* to rely on the *studies* of any other cities,[25] nor any studies described in any other judicial opinions,[26]

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[25] It *is* clear that the City's 1977 Study *did* look at the *ordinances* enacted by a number of other cities. *See, e.g.,* JA 61-64. However, it does *not* appear that the City examined any secondary effects *studies* related to any of these ordinances. The only oblique reference to any secondary effects from other cities appears to pertain exclusively to Boston and Detroit. With respect to Boston, the 1977 Study noted that the concentration-style adult ordinance enacted there produced an undesirable "combat zone" and, for this reason, was not followed by the City of Los Angeles. JA 42 and 55-57.

While the Study also references the Detroit approach (JA 57), it does not come close to articulating or describing any Detroit studies which would provide justification for the current multiple-use prohibition. Instead, it simply reports that the Detroit approach has apparently been "an effective tool" because, "[t]o date, 18 adult bookstores and six adult theatres have been closed." (JA 57.)

(continued...)

the District Court was correct in concluding that the content-neutrality of the ordinance must stand or fall on the basis of the City's 1977 Study. However, as noted above, nothing in that Study demonstrated a reasonable basis for believing that separating traditional adult bookstores into a separate adult arcade use and a separate adult bookstore use would in fact ameliorate the net total of any perceived secondary effects emanating from such new businesses. Accordingly, the District Court was correct in holding that the ordinance was content-based and that there was no objective evidence of a content-neutral purpose in the record.

Alternatively, the District Court's conclusion would be no less correct even if this Court were to conclude that content-neutrality may be demonstrated solely by *post-hoc* justifications. Under *Celotex v. Catrett*, 477 U.S. 317 (1986), the City is certainly limited to whatever arguments and/or evidence it presented below at the time of summary judgment. In essence, the only proffered justification in the City's summary judgment papers of any consequence that was not in the legislative record was its assertion that its ordinance was justified by the secondary effects in arcades noted in *Hart*. For the reasons articulated by the Court of Appeals below, the secondary effects

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[25](...continued)

Moreover, while the Study makes a brief reference to this Court's decision in *Young*, it does not describe the study reported in *Young*, much less rely on that study. Los Angeles, instead, chose to do its own secondary effects study and placed its reliance solely on that study. (As a practical matter though, the Detroit study was similar to the Los Angeles Study in that neither demonstrated that the sum of the secondary effects emanating from two separate adult businesses such as an adult bookstore and adult arcade would be less than the secondary effects emanating from a single combined adult bookstore/arcade.)

[26] The legislative record is devoid of any reference to — or reliance upon — *Hart v. Edmisten*, *supra*.

described in *Hart* do not establish a reasonable basis for the current ordinance. (Pet. App. 20-21.)

Accordingly, even if this Court were to conclude that blatantly pretextual legislation is permissible if in subsequent judicial proceedings a City's lawyers can conjure up evidence or theories which — had they been considered initially — could establish a reasonable basis for the legislation, the City submitted no such evidence or theories by the time of summary judgment. The District Court properly concluded that the City was not entitled to establish such justifications at trial because, under *Celotex*, it had the burden of establishing any such justifications by the time of the court's summary judgment ruling.[27]

For all the reasons above, the District Court was clearly correct in its ruling invalidating the ordinance as a content-based restriction.

[27] If *Celotex* means anything in this context, it means that the City cannot establish a new evidentiary "reasonable basis" once a case is already on appeal. The City's case for content-neutrality must stand or fall based upon the record it presented at the time of summary judgment.

IV

THE ORDINANCE IS ALSO INVALID IF ANALYZED AS A TIME, PLACE AND MANNER RESTRICTION, BECAUSE IT FAILS TO PROVIDE ADEQUATE ALTERNATIVE CHANNELS OF COMMUNICATION FOR THE PUBLIC TO OBTAIN TRUTHFUL AND USEFUL INFORMATION TO UTILIZE IN DECIDING WHICH SEXUALLY ORIENTED VIDEOTAPES TO RENT OR PURCHASE

One of the key features of this ordinance which *both* lower courts found it unnecessary to address (but which Alameda challenged at all levels below[28]), is that the ordinance prohibits customers from previewing before purchasing a type of film for which — unlike a major studio film — there is virtually no information available to consumers before they make a decision whether to rent or purchase it.

The record reflects that each of these stores carries approximately 6,500 different sexually oriented videotapes for rental and retail sale. (JA 228.) Unlike general release films which have substantial advance promotion, and which are extensively reviewed in both the electronic and print media, there is virtually no

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[28] Of course, Alameda is entitled to maintain this ground of challenge here. As this Court noted in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634, n. 8 (1980): "As a respondent, CBE is entitled to urge its position although the Court of Appeals did not reach it."

information available to the public about the vast majority of sexually oriented videotapes adequate to meaningfully assist the customer in making an informed selection. (JA 242-243, ¶¶ 12-13.) This is significant because, just as is true in the wider general release market, there are enormous differences in the scope, variety and content of these types of videos, all of which are meaningful to the consumer considering a purchase or rental of such a video.

Consequently, it is quite common for adult bookstore businesses, like respondents', to allow customers the opportunity, for a small fee, to preview any of the videotapes in the store which they offer for sale or rental. Whether this information is characterized as "commercial expression" or "non-commercial expression," it is unquestionably a type of truthful and useful information to which the public has a right of access under the First Amendment.[29]

The City offered three responses to this argument below, but did not address them in its opening brief herein. Because the City will undoubtedly include them in its reply brief, Alameda will anticipatorily discuss them here.

The City's first response to this argument is that the ordinance does not prohibit a preview system so long as the bookstore allows free previewing of all videotapes. However, it is a practical impossibility for a store to allow free viewing of sexually oriented videotapes. For the same reasons that medical plans always require a small co-payment to reduce freeloaders and overuse of the system, free video

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[29] Regardless of whether this material is characterized as "commercial" or "non-commercial" expression, *Alameda* duly argued at all levels below that this restriction fails under a time, place and manner analysis because, *inter alia*, it fails to provide adequate alternative avenues for communication of information about the contents of the thousands of videotapes offered by Alameda.

previews would destroy any such business with a host of freeloaders and others who would monopolize the store with the free previewing of sexually oriented films. (Moreover, the non-paying "customers" could not be charged a fee if they later elected not to rent the films, because such a charge would then violate the multiple use restriction.)

The City's argument is akin to a suggestion that content-defined expression may be given away, but not sold. Such a concept is anathema to the First Amendment because, absent adequate economic incentive, the marketplace simply will not bear the great cost of producing "free" speech. This is no less true for adult bookstores than for Barnes and Noble or United Artist Theatres. Moreover, as far back as *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952), this Court emphatically rejected the idea "that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit." *Id*. at 501.

It is no more of an answer for Los Angeles to say that Alameda's customers may view all the sexually oriented videotapes of their choice for free than it would be to suggest that America's nationwide theatre chains may exhibit their films as long as they do not charge admission.

The City's second response to this challenge is that customers may glean whatever information they need from the videotape box cover. This argument is equally spurious. Through no fault of retailers such as Alameda, the packaging of these low budget videotapes unfortunately often contains either "puffery" or outright inaccuracies concerning the content (including the cast) of the film. More to the point

though, even if a consumer is lucky enough to find a video box which accurately depicts one or more of the actors in the enclosed video, merely knowing the identity or appearance of one or more of the cast is a far cry from the type of detailed information one could obtain from actually previewing the videotape. Entire genres of sexually oriented films are based on the development of storylines which significantly affect whether the customer will enjoy their viewing of the film.

Undeniably, many other sexually oriented films make no pretense of a storyline whatsoever. However, the discriminating customer has no basis for distinguishing between these two types of films simply from a box cover.[30]

The City's third response to this argument is that stand-alone arcades will provide an adequate alternative for customers to gain truthful information about the videos which they are considering purchasing or renting from other unrelated stores which sell and rent such videos. This argument is also without merit. The record shows that the two small bookstores owned by respondents each carry approximately 6,500 *different* titles of sexually oriented videos. However, no more than a tiny portion of those videos would ever be available in a stand-alone video arcade,[31] (assuming such

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[30] Because of their generally low budgets, adult videotapes potentially vary widely in quality. Some may be highly scripted and rehearsed, with significant production values; others may be totally impromptu, marked by bad lighting and poor direction. But like movie newspaper ads, all adult video box covers make the advertised film appear world class. In the adult marketplace, there is no substitute for actually previewing the film itself in order to exercise one's consumer rights intelligently.

[31] The record indicates that respondents' video booths are of two different types. The majority feature a multi-channel viewing capability which permits patrons to choose from as many as 60 different videos at a time, which videos are selected in advance by the store. The other booths, known as "preview booths," allow a customer to view any of the 6,500 videos on the store's shelves. All videos exhibited

(continued...)

could even survive *at all*).[32] There would be no financial motivation for a stand-alone video arcade to exhibit the many *thousands* of different videos that would be available for sale or rental in a typical adult bookstore. As a result, only a small fraction of the videos available for sale or rental in a stand-alone adult bookstore would ever be viewable in a theoretical stand-alone adult arcade. Consequently, the City's response does not offer an adequate alternative avenue of communication.

Nor would it make any difference if a stand-alone adult arcade operated inside of a non-adult retail bookstore which also sold a small quantity of adult videos. Los Angeles no longer applies a "preponderance test" for determining whether bookstores are "adult." *See* n. 6, *supra*. Consequently, any stand-alone adult arcade which attempted to carry something on the order of 6,500 different sexually oriented videotapes — or any tangible number of them — for sale or rental would unquestionably be deemed an "adult bookstore" as well as an "adult arcade" and, consequently would violate the ordinance.

To the extent the City wanted to make *any* of these arguments, the burden of proof was on the City to demonstrate in the District Court that the suggested

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[31](...continued)
in both types of booths are available for rental or purchase. JA 227. Because a stand-alone adult arcade would have no retail inventory, it would have no reason to exhibit more than 60 or so different videos at any point in time.

[32] Because of a prior agreement in this case, Alameda will make no attempt to prove or argue affirmatively that adult video arcades *could not* survive as independent uses. The stipulation was *not*, however, an agreement that the record could reflect that adult arcades *could* independently so exist. Alameda is free to note that the *City* has not affirmatively demonstrated that adult arcades *could* exist independent of a related store which sold adult retail materials. The record is also clear that, regardless of whether it is *possible* for adult arcades to survive independently, none has done so in the city of Los Angeles, nor is there any evidence in this record that they have done so anywhere else.

alternative avenues of communication were either ample or adequate. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994),[33] and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981).[34] It made no such effort.

In *Ladue*, this Court also provided substantial guidance in determining the "adequacy" of an alternative channel of communication in striking down, under a time, place and manner analysis, an ordinance prohibiting most types of residential signs. The City argued that there were numerous "adequate" alternatives to the information conveyed by these residential signs, including "hand-held signs, 'letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.'" 512 U.S. at 56. However, this Court concluded that those proffered "alternatives" did not constitute "*adequate* substitutes . . . for the . . . medium of speech that Ladue has closed off." *Id.* (emphasis added).

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[33] *Ladue* imposed the burden of proving ample alternatives on the governmental entity. This Court *rejected* Ladue's assertions that various alternative channels of speech existed to save the ordinance from invalidation. It did not require the individual *challenging* the ordinance to prove the *in*adequacy of the asserted alternatives. This Court ruled: "[W]e are not persuaded that adequate substitutes exist for the . . . medium of speech that Ladue has closed off." 512 U.S. at 56. By holding that it was "not persuaded that adequate substitutes exist," this Court clearly imposed the burden of proof to demonstrate the adequacy of those substitutes on the city of Ladue. Likewise here, while the City made a number of assertions below concerning substitutes it contends are "adequate," it has failed to carry its burden to demonstrate the adequacy of those substitutes.

[34] *Schad* also put the burden on government to demonstrate the adequacy of alternative channels because it invalidated Mount Ephraim's zoning restriction only after it pointed out that Mount Ephraim had failed to persuade the Court that sites for adult businesses in surrounding communities constituted an adequate alternative channel of communication. 452 U.S. at 76-77.

Obviously, this Court, in *Ladue*, made clear that when looking at the adequacy of so-called "ample alternative avenues of communication," 512 U.S. at 56, the alternatives must be as efficacious as the methods foreclosed by the ordinance; otherwise the ordinance cannot stand. *Id*. *None* of the alternatives suggested by the City here was shown to be even remotely as efficacious as the method for obtaining information about a film which the City's ordinance forecloses. Accordingly, under the clearly articulated guidelines of *Ladue*, the City's multiple use restriction fails as a time, place and manner restriction, because it does not allow either ample or adequate alternative channels for this information.

V

TO THE EXTENT THE ORDINANCE COMPELS THE PARSING OF ALAMEDA'S EXISTING EXPRESSIVE BUSINESS INTO MORE NARROWLY DEFINED TYPES OF BUSINESSES WHERE FEWER TYPES OF EXPRESSION MAY BE OFFERED, AND WHICH HAVE NOT BEEN SHOWN TO BE CAPABLE OF INDEPENDENT EXISTENCE, IT VIOLATES THE FIRST AMENDMENT

Initially, Alameda acknowledges that it is precluded by stipulation from arguing affirmatively that adult arcades *cannot* exist as stand-alone businesses. However, it may and does argue that the *City* has the burden to demonstrate that adult arcades *can* exist as stand-alone businesses, and the City has failed to meet that burden.

A. The City had the burden to demonstrate that its novel "multi-use" prohibition did not constitute a *de facto* ban on adult arcade businesses; its failure to have met this burden compels application of strict scrutiny.

In addition to its many other flaws, this ordinance constitutes a radical, novel, and unique threat to First Amendment freedoms, because it presages the destruction of expressive businesses by the mechanism of forcing them into progressively more narrowly defined types of businesses, some of which may be incapable of independent existence. Under this precedent, if approved, a single adult business could be legislatively required to offer fewer and fewer types of expression to the public. No

prior decisions of this Court have analyzed the unique potential of this type of novel ordinance to pretextually destroy rights of expression. However, the issue is squarely framed by the present case. The ordinance dictates that if an adult arcade is to operate at all in the City, it must operate as a stand-alone business not related to any other type of adult business.

Yet the City offered *no* evidence below that a stand-alone adult arcade business has ever existed in Los Angeles other than within a store selling adult media materials. Indeed, the uncontroverted evidence establishes that no such stand-alone businesses have ever existed in Los Angeles, nor, apparently, anywhere else. While this is not proof that an adult arcade business *could not* survive as an independent use, it is surely evidence that none has done so to date.

Where, as here, the record establishes that a city has legislatively relegated a form of expression to a format in which it has never been shown to exist previously, the third part of the First Amendment's time, place and manner test necessarily establishes a rebuttable presumption that such a restriction is a direct and absolute ban on expression. The City may overcome this presumption either by fairly proving that such independent businesses exist, or by establishing that such businesses could reasonably be expected to survive in such a format.[35] The City has not met its burden

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[35] This presumption inheres in the third prong of this Court's traditional "time, place and manner" test which affirmatively requires cities to prove that a challenged ordinance will "leave open ample alternative channels for communication." *Ladue*, 512 U.S. at 56. As discussed in notes 33 and 34, *supra*, cities bear the burden of proof with respect to this part of the time, place and manner test. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) "When First Amendment compliance is the point to be proved, the risk of non-persuasion — operative in all trials — must rest with the Government." Of course, if a city fails to meet its burden of proving that ample alternatives remain, the ordinance fails the time, place and

(continued...)

to demonstrate that stand-alone adult arcades *do* exist, or, alternatively, that they could reasonably be expected to exist as independent uses in the future. Absent such a demonstration, it must be presumed the ordinance imposes a *de facto* ban on a medium of expression.[36] Because the City has not rebutted this presumption that its restriction denies ample and adequate alternatives for adult arcade businesses, the ordinance should be subjected to strict, rather than intermediate, scrutiny.

The need for such a rule is compelling. If government were free to mandate the parsing of existing expressive businesses into progressively narrower types of business, the potential would exist for *enormous* abuse, not only in the area of adult media but in connection with any other type of expression disfavored by government officials. Absent imposition of the rebuttable presumption urged by Alameda, cities will be free to justify further devastation of adult media businesses by, for example, separately defining — and then requiring the separation of — "adult *magazine* stores," "adult *book*stores," "adult *greeting card* stores," "adult *videotape* stores," "adult *digital video disc* stores," "adult *newspaper* stores," "adult *male homosexual* bookstores," "adult *lesbian* bookstores," etc. Absent recognition of this constitutional presumption, a city need only state that "all adult businesses have secondary effects; each of the parsed

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[35](...continued)
manner test and is subjected to strict scrutiny.

[36] Moreover, the City has defined "adult arcades" as a distinct medium of expression. *Ladue* precludes banning such a medium: "Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression." 512 U.S. at 55. *Cf. Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977) ("That the proscription applies only to one mode of communication . . . does not transform this into a 'time, place, or manner' case.").

businesses described above is an 'adult business,' and, therefore, they may be compelled to operate at separate locations in order to reduce the 'secondary effects' which occur when they are combined in one location."

The only safeguard which can protect against such an inevitable result is a First Amendment-based rule that cities may not legislatively limit expression to a form in which it has never been shown to exist without demonstrating the likelihood that, once relegated to such a form, such expressive businesses would likely continue to be available to the public. Even if the ordinance does not *expressly* ban such uses, if its practical effect is to make such expression unavailable to consumers, there is a constitutionally cognizable injury *to the public* (as well as the adult business owners) requiring remedy.

This principle is not limited to the adult entertainment context. Hypothetically, assume a city council were vigorously opposed to even first trimester abortions. Under the lax scrutiny urged by Los Angeles, that council could define as separate "uses" and require the separation of: 1) a facility providing abortion counseling (clearly an expressive activity); 2) a facility providing diagnostic tests in connection with abortion pre-operative procedures; and, 3) a facility which actually provides first trimester abortions. As a practical matter, the dramatically increased costs of separate facilities would severely burden providers of abortion-related services, forcing the closure of many existing clinics. The public would be enormously burdened as well. Under the rational basis standard of scrutiny sought by the City, such a *de facto* burden on abortion clinics could easily masquerade under the pretext of being a content-neutral ordinance designed to reduce the secondary effects caused by anti-abortion

demonstrators. *De jure* zoning separations would effect a *de facto* prohibition, all under the talismanic shield of secondary effects zoning concerns.

In short, the constitutional presumption that Alameda advocates is necessary to prevent a city from independently defining (and requiring the separation of) each of the separate adult uses noted above (and doubtless numerous others which motivated foes of erotic expression could conjure up) in the hopes that, by such parsing, adult uses would definitionally be deprived of their ability to survive as independent businesses.

Indeed, that is precisely what appears to have happened here. In its 1977 Study, the City did not identify a single business operated as an "adult arcade" that was not located within a store selling adult materials.[37] Then, in 1983, as a pretextual way of eliminating the medium of video viewing booths, the City presumed to define a new type of independent business (which had never before existed), calling it an "adult arcade," and prohibited such use from operating within an adult bookstore (apparently based on the totally unsupported theory that adult arcades would have fewer presumed secondary effects if operated as stand alone businesses than if operated within an adult bookstore).

The only reasonable solution to this threat of "destruction by parsing" is to enforce the "ample alternatives" prong of the time, place and manner test and require that, unless a particular expressive business has been shown to have successfully *existed*

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[37] *See* the District Court's detailed discussion of this point at Pet. App. 37-39. Additionally, the City was asked in discovery to admit that it was aware of no adult arcades other than those within adult bookstores. The City answered that it lacked "sufficient information to respond," even though the request sought information only about the extent of the City's own knowledge. (RA 39-40.)

in the real world as a stand alone business, or absent a demonstration that such survival would be at least reasonably likely, any municipal zoning ordinance which requires such a business to exist in a form in which it has not been shown to exist, is presumptively a total ban rather than a time, place and manner restriction and, accordingly, must be justified under a test of strict scrutiny.

B. Even if the ordinance were found to be a content-neutral regulation which merely *burdened* but did not *ban* adult arcades, it would nevertheless fall under a test of intermediate First Amendment scrutiny.

1. By requiring the parsing of existing adult bookstores into their component parts, the City has enacted a restriction which burdens substantially more speech than necessary for accomplishing any legitimate purpose underlying its ordinance.

Even if this Court were to conclude that the City met its burden to show its ordinance is not an absolute ban on adult arcades, the ordinance would still be invalid under an *intermediate* standard of First Amendment scrutiny as one which "*burden[s]* substantially more speech than necessary to further [the asserted governmental] interests." *Turner II*, 520 U.S. at 185.[38] As will be shown below, the ordinance fails this test.

a. This ordinance substantially burdens expression.

The record clearly establishes that all adult arcade uses in Los Angeles exist within adult bookstores, and that most adult bookstores include the type of movie or

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[38] *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000), stating:

> "It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree."

video viewing machines defined under the city's ordinance as "adult arcades." JA 241-242 and 229-231. Even if the current ordinance does not constitute a de facto *ban* of adult arcades, it unquestionably imposes a significant *burden* on the continued existence of such businesses. If this Court were to uphold the ordinance, existing adult arcade uses would be required to relocate to a new address at least 1,000 feet away. Obviously, forced relocation would impose a *very significant* burden on adult arcades.

First, many owners may simply lack the funds to locate, secure, adapt and move to a new location to operate two separated uses. Moreover, the City has adduced no evidence suggesting that the component uses of a traditional adult bookstore *could* operate successfully if split into two locations.

Even assuming that the *economic* burdens could be overcome, the next obstacle facing such a relocating owner would be to find a feasible site that is not in violation of the city's extensive adult zoning restrictions. As noted by the Court of Appeals 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), there is at least a reasonable likelihood that Los Angeles' adult zoning scheme fails to provide adequate alternative sites for such businesses to allow them a "reasonable opportunity" to relocate.[39]

Next, even if the relocation of a traditional adult bookstore into two separate sites were economically feasible, and a viable site could be found and secured, the site would also have to comply with all applicable city off-street parking requirements, a

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[39] Alameda's complaint challenged the *entirety* of § 12.70C based on this lack of a constitutionally adequate number of relocation sites. However, because the Court granted summary judgment on an alternate ground, the parties never litigated the question of whether the ordinance provides a sufficient number of such sites.

very significant obstacle in a city legendary for its traffic congestion and which refuses to "grandfather" off-street parking requirements when an existing use is changed to an adult entertainment use.

Finally, as noted above, the ordinance severely burdens, if not eliminates, the public's access to meaningful information as to the contents of adult videotapes to allow meaningful decision-making when selecting sexually oriented videotapes to purchase or rent. This burden on the public's access is severe.

b. There are many far more effective alternatives which burden substantially less expression than the City's ban on all multi-use adult businesses.

To the extent that any adverse secondary effects are generated by a traditional adult bookstore with video viewing booths, *numerous* alternative remedies are available to the City, many of which it has in fact — presumably successfully — already employed. These alternatives are far more effective than the multi-use restriction in ameliorating any claimed secondary effects and burden substantially less expression.

The most significant alternative remedy is present in other zoning restrictions contained in the very section of the municipal code before the Court, i.e., L.A.M.C. § 12.70C.[40] In 1984, and again in 1986, the locational restrictions of § 12.70C were made far more rigid than they were in 1983 when the "multiple use" restriction was adopted. Specifically, the City amended § 12.70C by prohibiting adult businesses from locating within 500 feet of any residential or agricultural zone or any property within

[40] Although the City has not provided this Court a copy of the current provisions of L.A.M.C. § 12.70C, it is set forth accurately at RA 25-26 and was judicially noticed by the District Court pursuant to the request of Alameda.

the CR, C1 or C1.5 zones. By further separating adult businesses from "sensitive uses," these new restrictions provided far more protection against any asserted "secondary effects" than existed in 1983 when the pretextual provision before this Court was adopted. Moreover, the record reflects that both of respondents' businesses are in full compliance with these provisions and are also in compliance with the pre-existing requirements that they be located more than 500 feet from any church, school or park and more than 1,000 feet from any other unrelated adult entertainment business.

The City also has other very substantial alternative remedies to supplement the stringent new provisions of the balance of § 12.70C. Specifically, subsequent to the City's 1977 Study which attempted to demonstrate secondary effects related to adult businesses, the City enacted a comprehensive ordinance regulating and restricting the operation of adult arcade businesses (alternatively defined under the code as "picture arcades"). (A copy of that ordinance was the subject of a judicial notice request in the District Court and is reproduced at RA 33-37.) Specifically, in November of 1977, and five months *after* the completion of the City's adult zoning Study, the City enacted L.A.M.C. § 103.101, which: (1) requires the removal of doors from the video viewing booths; (2) requires that their entire interior be visible upon entrance to the premises; (3) imposes a minimal lighting requirement; and (4) provides for revocation or suspension of an arcade permit if the permittee knowingly allows the arcade to be used as a place where any sexual acts openly occur. This is another more effective and significantly less restrictive alternative than the excessively burdensome ordinance challenged here.

Of course, in addition to the latter two ordinance provisions, the City is armed with the full panoply of city and state public nuisance and red light abatement laws to prevent any prostitution-related or other unlawful activity. *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

For each of the reasons above, this ordinance clearly imposes a very substantial burden on expression (if not an outright ban) and there are numerous highly effective remedies available to the City which would have a far less burdensome impact on expression. Accordingly, under a test of intermediate scrutiny as well, the ordinance is unconstitutional.

CONCLUSION

For all the reasons above, the judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

JOHN H. WESTON*
G. RANDALL GARROU
WESTON, GARROU & DeWITT
12121 Wilshire Blvd.
Suite 900
Los Angeles CA 90025-1176
(310) 442-0072

Attorneys for Respondents

Cathy Crosson
Of Counsel

** Counsel of Record*