

12-1-2008

Is a Strip Club More Harmful Than a Dirty Bookstore? Navigating a Circuit Split in Municipal Regulation of Sexually Oriented Businesses

Brigman L. Harman

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Sexuality and the Law Commons](#)

Recommended Citation

Brigman L. Harman, *Is a Strip Club More Harmful Than a Dirty Bookstore? Navigating a Circuit Split in Municipal Regulation of Sexually Oriented Businesses*, 2008 BYU L. Rev. 1603 (2008).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2008/iss5/6>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Is a Strip Club More Harmful Than a Dirty Bookstore? Navigating a Circuit Split in Municipal Regulation of Sexually Oriented Businesses

I. INTRODUCTION

While millions of Americans indulge in pornography,¹ most people do not want it sold in their neighborhood. As a result, most cities have passed zoning regulations that govern where sexually oriented businesses may operate. Given First Amendment rights that protect sexually explicit “speech,” cities must justify their regulations by pointing to studies that link the targeted businesses to a variety of societal and economic ills.² In light of recent federal court decisions, however, there is now an open question as to whether those studies, some of which cities have relied upon for decades, are good enough to survive heightened scrutiny. The continued validity of municipal regulations across the country depends on the answer.

In *City of Los Angeles v. Alameda Books, Inc.*,³ the Supreme Court—in upholding a city’s regulation of sexually oriented businesses—admonished that, while municipalities must not meet “a high bar,”⁴ they “[cannot] get away with shoddy data or reasoning.”⁵ Instead, the evidence a city relies upon to meet its initial burden of showing a substantial interest in the regulation “must fairly support the municipality’s rationale for its ordinance.”⁶ The Supreme Court’s admonishment does not purport to suddenly

1. See Jerry Ropelato, Internet Pornography Statistics, Top Ten Reviews, <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html#anchor6> (last visited Oct. 28, 2008).

2. That is, cities must justify regulations in terms of preventing the negative secondary effects that have been linked to sexually oriented businesses. For further discussion of secondary effects, see *infra* Part II.B.

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

4. *Id.* at 438 (plurality opinion); see also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986) (“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.”).

5. *Alameda Books*, 535 U.S. at 438.

6. *Id.*

subject a city's evidence to scrutiny under the framework found in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*;⁷ instead, a more accurate reading might be that a city planner's observations scribbled on the back of a napkin should be rejected. But in the wake of the *Alameda Books* decision, a split has emerged between the Fifth⁸ and the Tenth⁹ Circuits as to whether the overwhelming majority of existing studies constitute "shoddy data or reasoning" when used to justify broad zoning ordinances affecting every type of adult business. This divide is likely to widen even further as other federal circuits inevitably encounter the same question as cities across the country rush to drive purveyors of pornography to their fringes and beyond.

The Tenth Circuit has held that on-site and off-site adult businesses¹⁰ are "reasonably similar businesses," that will have reasonably similar effects, and under the Supreme Court's standard, it is up to the ordinance's opponent to show otherwise.¹¹ But the Fifth Circuit took a decidedly different view, holding that cities cannot rely on studies that do not differentiate between on-site sexually oriented businesses and off-site sexually oriented businesses.¹² The Fifth Circuit reasoned that it is not reasonable to assume these businesses carry the same negative secondary effects.¹³

7. 509 U.S. 579 (1993). The *Daubert* decision established the current evidentiary standard for scientific evidence admitted under the Federal Rules of Evidence. Under this standard all scientific evidence must "not only [be] relevant, but reliable. *Id.* at 589. Thus, before admitting scientific evidence a judge will be required to make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. In making this determination the judge must consider, in addition to other factors: whether a theory or technique "can be tested"; whether it has been "subjected to peer review and publication"; whether there is a "known or potential rate of error"; and whether the evidence has been "generally accepted." *Id.* at 594.

8. See *H & A Land Corp. v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003).

9. See *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150 (10th Cir. 2006).

10. At their core, the difference between these businesses is where patrons consume the adult materials for sale—either by viewing the materials "on-site," as in the case of an adult movie theatre, or by purchasing adult products for use "off-site," as in the case of an adult bookstore. For a more thorough explanation of the differences between these two businesses see *infra* Part II.B.

11. *Doctor John's*, 465 F.3d at 1167-68.

12. *Encore Videos*, 330 F.3d at 295.

13. See *id.* at 294-95.

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

As a result, under what is now the controlling precedent in the Fifth Circuit, a city seeking to regulate off-site sexually oriented businesses must undertake the great expense of commissioning an entirely new study to prove the seemingly obvious: that an adult bookstore wedged between an elementary school and homes in a suburban neighborhood may result in negative secondary effects on the surrounding area, such as decreased property value. This is not the law as envisioned by the Supreme Court in *Alameda Books*.

This Comment argues that the Tenth Circuit's approach properly interprets the Supreme Court by providing deference to cities at the initial stages of litigation while still ensuring that cities are ultimately not relying on "shoddy data or reasoning."¹⁴ The Fifth Circuit has improperly interpreted the initial evidentiary burden a city must meet when proving secondary effects by forcing municipalities to differentiate between on- and off-site businesses. Although a city cannot rely on shoddy evidence in zoning adult businesses, the Supreme Court never meant to create such a high bar for cities to overcome in meeting their initial burdens.¹⁵ While the First Amendment rights of those owning and operating sexually oriented businesses are well established, the protection of those rights does not require an evidentiary burden so high that cities are unable to address potentially serious problems that may affect their citizens.¹⁶

Part II.A of this Comment briefly outlines pornography's rise in popularity and its current position within the American marketplace. Part II.B addresses how cities have used studies of adult businesses in zoning regulations and explains the differences between on- and off-site sexually oriented businesses. Part III.A discusses the standard established by the Supreme Court in cases where zoning ordinances affect sexually oriented businesses, including the Court's latest

14. *Doctor John's*, 465 F.3d at 1165 (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion)); *see also id.* at 1168–69.

15. *See Alameda Books*, 535 U.S. at 438 (specifically refusing to set a high bar for cities "that want to address merely the secondary effects of protected speech"); *see also id.* at 451 (Kennedy, J., concurring) ("[W]e have consistently held that a city must have latitude to experiment, at least at the outset, and . . . very little evidence is required.").

16. *See id.* at 445 ("If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of speech substantially undiminished, there is no First Amendment objection.").

decision in *City of Los Angeles v. Alameda Books, Inc.*¹⁷ Part III.B focuses on how this standard has been interpreted by the Tenth and Fifth circuits with regard to zoning ordinances regulating on- and off-site sexually oriented businesses. Part IV argues that the Tenth Circuit's interpretation of the Supreme Court jurisprudence is correct because (A) the initial burden established by the Supreme Court is not exacting, (B) it allows for an appropriate level of deference to cities enacting ordinances, and (C) it allows for the consideration of the differences between different adult businesses at later stages of litigation. Part V offers a brief conclusion.

II. THE RISE OF PORNOGRAPHY AND CITIES' EFFORTS TO POLICE IT

A. The Increased Popularity of Pornography

The camera was invented in 1839 and within two years (and possibly sooner), it was used to take nude pictures in France.¹⁸ The creation and distribution of these pictures quickly became a commercial endeavor.¹⁹ Following a rough start in the United States where these images were largely outlawed during the nineteenth and early half of the twentieth centuries, pornography has continued to grow in popularity to its present status.²⁰ Its phenomenal growth has encouraged the proliferation of distribution outlets, and thousands of eager entrepreneurs have stepped forward to meet the increasing demand for pornography.²¹

Based on numbers alone, it seems Americans have a love affair with pornography.²² Steven Hirsch, one of the founding partners of

17. 535 U.S. 425.

18. See FREDERICK S. LANE III, *OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE* 41–46 (2001).

19. *Id.*

20. *Id.*

21. Indeed, the demand for pornography has even produced guidebooks to help eager consumers wade through the mountains of material and distribution outlets on the market today. See, e.g., J.P. DANKO, *LIVE NUDE GIRLS: THE TOP 100 STRIP CLUBS IN NORTH AMERICA* (1998); see also LANE, *supra* note 18, at 186–87 (discussing different guides available for sexually oriented businesses).

22. But not necessarily in High Definition. See Matt Ritchel, *In Raw World of Sex Movies, High Definition Could Be a View Too Real*, N.Y. TIMES, Jan. 22, 2007, available at http://www.nytimes.com/2007/01/22/business/media/22porn.html?_r=1&oref=slogin (discussing the difficulties adult film makers encounter when filming in High Definition).

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

Vivid Entertainment, reported revenues in excess of \$100 million last year based on sales of its adult videos, X-rated comic books, and a set of official Vivid Entertainment custom car wheels.²³ And that is only the beginning. The pornography industry, once associated primarily with lonely trench coat-wearing customers looking both ways before ducking into an adult bookstore, has increasingly encroached into suburbia and now grosses nearly \$14 billion annually,²⁴ making it bigger than “professional football, basketball and baseball put together.”²⁵ Not surprisingly, increased scrutiny and criticism²⁶ have accompanied pornography’s foray into the lucrative mainstream, and cities have rushed to assure their residents that they will not have to worry about one of *those establishments* opening in *their* neighborhood.²⁷ However, like political campaigning or religious proselytizing, pornography is constitutionally protected speech (although to a lesser extent).²⁸ As a result, cities and municipalities across the nation now find themselves at a difficult crossroad, trying to appease their citizens’ cries that they run sexually oriented businesses out of town—or at least to the seedier fringes of town, far

23. Seth Lubove, *Obscene Profits*, FORBES, Dec. 12, 2005, at 99. In addition to films, Vivid lends its name out to “a vodka line, videogames, a Las Vegas night club, virility-enhancement concoctions, X-rated comic books and even a set of custom car wheels.” *Id.* at 100.

24. Frank Rich, *Naked Capitalists*, N.Y. TIMES, May 20, 2001, at 51, available at <http://query.nytimes.com/gst/fullpage.html?res=9D04E0DD173AF933A15756C0A9679C8B63>.

25. *Id.*

26. See, e.g., Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985) (arguing that pornography is one method used to maintain gender inequality). “What Pornography *does* goes beyond its content: It eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission sex. Inequality is its central dynamic; the illusion of freedom coming together with the reality of force is central to its working.” *Id.* at 18 (emphasis in original). See also Gordon B. Hinckley, *A Tragic Evil Among Us*, LIAHONA, Nov. 2004 at 59–62 (leader of the Church of Jesus Christ of Latter-day Saints exhorting members to avoid pornography):

Now brethren, the time has come for any one of us who is so involved to pull himself out of the mire, to stand above this evil thing, to “look to God and live.”

We do not have to view salacious magazines. We do not have to read books laden with smut . . . we can do better than this.

Id. at 62.

27. See, e.g., David M. Halbfinger, *Adult Bookstore Roils Lindenhurst*, N.Y. TIMES, July 19, 1987, at A13; Mike Charbonneau, *Tarboro Residents in Battle to Ban Adult Bookstore*, Feb. 12, 2008, <http://www.wral.com/news/local/story/2428655/>.

28. See *Sable Comm. of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (“Sexual expression which is indecent but not obscene is protected by the First Amendment.”).

from schools, churches, and Costco—without running afoul of the First Amendment.

B. The “Secondary Effects” Approach and the Studies That Drive It

The erosion of society’s moral values and the debasement of women are not permissible grounds for a city to regulate pornography under the First Amendment. However, many cities and municipalities have successfully regulated sexually oriented businesses through zoning ordinances based on studies showing the presence of negative secondary effects in communities where adult businesses have chosen to locate.²⁹ Some of the secondary effects recognized by the courts have included higher crime rates, a decline in real estate values, and overall neighborhood decline.³⁰

The Supreme Court has historically shown considerable deference to cities that make this determination, generally upholding ordinances that restrict the locations of sexually oriented businesses based on secondary effects so long as the municipality’s studies make an initial showing of a substantial government interest in regulation.³¹ In cases such as these, the Supreme Court employs a burden-shifting scheme whereby cities enacting zoning regulations affecting adult businesses must meet an initial evidentiary burden showing a substantial government interest in regulation of these businesses.³² The burden then shifts to the opponent of the regulation to “cast direct doubt on this rationale, either by demonstrating that the municipality’s evidence does not support its rationale or by furnishing evidence that disputes the municipality’s

29. See, e.g., LOS ANGELES, CAL., MUN. CODE ch. I, art. 2, § 12.70 (2007); BROWARD COUNTY, FLA., CODE OF BROWARD COUNTY ch. 20, art. XVI (1993); BROOKLYN PARK, MINN., CODE OF ORDINANCES § 152.343 (2007); FALCON HEIGHTS, MINN., CITY CODE § 113; KANSAS CITY, MO., CODE OF ORDINANCES ch. 12, art. II (1998); OKLAHOMA CITY, OKLA., MUN. CODE §30-407 (2008); DALLAS, TEX., CODE § 41A-13 (2007); NEWPORT NEWS, VA., CODE OF ORDINANCES § 45-524 (2007); LYNNWOOD, WASH., MUN. CODE § 21.46.120 (2000); SEATTLE, WASH., MUN. CODE § 23.49.030 (2007).

30. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 430 (2002) (plurality opinion) (citing a study which indicated higher crime rates); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 44 (1986) (discussing a statute which was enacted based on a concern about the “severe” effect of sexually oriented businesses on “surrounding businesses and residencies”); *H & A Land Corp. v. City of Kennedale*, 480 F.3d 336, 339–40 (5th Cir. 2007) (examining a survey of real estate appraisers).

31. See *Alameda Books*, 535 U.S. at 438–39; *Playtime Theatres*, 475 U.S. at 51–52; *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).

32. *Alameda Books*, 535 U.S. at 438–39.

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

factual findings.”³³ If the opponent succeeds in casting doubt through either method, the burden then shifts back to the municipality to “supplement the record with evidence renewing support for a theory that justifies its ordinance.”³⁴ A critical part of this analysis is the city’s burden to show that sexually oriented businesses cause harmful secondary effects. Problematically, in some jurisdictions such studies must now survive a more rigorous standard of evidence.

Therein lies the potential problem.

Most studies undertaken to date—upon which cities across the country have relied to support regulations of sexually oriented businesses—treated sexually oriented businesses as one indistinguishable group.³⁵ However, some jurisdictions now recognize a distinction between on- and off-site sexually oriented businesses.

This distinction is based largely on where customers consume the adult products these businesses offer.³⁶ On-site adult establishments

33. *Id.*

34. *Id.*

35. *See, e.g.*, CITY OF AMARILLO, TEX., REPORT ON ZONING AND OTHER METHODS OF REGULATING ADULT ENTERTAINMENT IN AMARILLO (1977); CITY OF AUSTIN, TEX., REPORT ON ADULT ORIENTED BUSINESSES IN AUSTIN (1986); CITY OF DETROIT, MICH., DETROIT’S APPROACH TO REGULATING “ADULT” USES (1972); CITY OF KENT, WASH., CITY OF KENT ADULT USE ZONING STUDY (1982); CITY OF L.A., CAL., STUDY OF THE EFFECTS OF THE CONCENTRATION OF ADULT ENTERTAINMENT ESTABLISHMENTS IN THE CITY OF LOS ANGELES (1977); CITY OF PHOENIX, ARIZ., RELATION OF CRIMINAL ACTIVITY AND ADULT BUSINESSES (1979).

36. *Doctor John’s, Inc. v. City of Roy*, 465 F.3d 1150, 1166 (10th Cir. 2006). Another distinction courts must consider in this context, besides the classification of on-site or off-site, is whether an off-site business can be fairly classified as a sexually oriented business for purposes of zoning regulations. *See, e.g., id.* at 1154. It is relatively easy to say that the regulations should apply to a store that carries only adult videos and novelties; however, it is less clear for a shop that carries only a few novelty items on one of its shelves. *Id.* at 1158. The danger is that zoning regulations could apply to “[a] garden-variety book or music store[] with restricted adult sections,” such as a Barnes and Noble or a neighborhood magazine shop. *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 294 n.7 (5th Cir. 2003). In addressing this problem, courts have consistently rejected ordinances that have classified stores with ten or twenty percent of their inventory dedicated to adult products as sexually oriented businesses. *See, e.g., Encore Videos, Inc. v. City of San Antonio*, 352 F.3d 938, 939 (5th Cir. 2003) (clarifying the Fifth Circuit’s earlier decision, *Encore Videos*, 330 F.3d 288, to include that the statute in question was not narrowly tailored because of “its low 20% inventory requirement”); *World Wide Video v. City of Tukwila*, 816 P.2d 18, 21 (Wash. 1991) (invalidating an ordinance which regulated business devoting ten percent or more of their inventory to adult materials). Instead, only stores with “a significant or substantial portion of their stock or floor space” devoted to adult materials should be subject to these types of regulations. *See Doctor*

include businesses that allow patrons to view or experience the sexually oriented materials “on-site”—for example, strip clubs, pornographic theaters, or any adult business offering live entertainment or viewing booths.³⁷ In contrast, off-site sexually oriented businesses, or “take home” adult businesses, sell sexually oriented “video tapes, DVD’s, magazines, and other print materials,” but do not allow the materials to be “viewed or consumed on the premises”—they must be taken “off-site.”³⁸ The operative question now faced by courts across the country is whether this distinction matters when considering a city’s evidence under the standard set forth in *Alameda Books*.³⁹

John’s, 465 F.3d at 1154 (internal quotations omitted). For a discussion of the constitutionality of the above-quoted language, see *id.* at 1157–61. Limiting classification to only those businesses with a larger stock of adult materials is consistent with the very purpose behind adult business zoning regulations—curtailing negative secondary effects. See *Playtime Theatres*, 475 U.S. at 47. To meet constitutional scrutiny, zoning ordinances must be directed toward the secondary effects of sexually oriented businesses, and, thus, must be limited to those businesses that can be reasonably expected to produce these secondary effects.

37. *H & A Land Corp. v. City of Kennedale*, 480 F.3d 336, 338–39 (5th Cir. 2007). A viewing booth is commonly understood as a booth or small room provided by an adult business in which patrons may view pornographic videos or materials.

38. *Id.* at 338.

39. Bryant Paul, Daniel Linz, and Bradley Shafer argue that many of the studies used by cities in meeting their initial burden have not been required to adhere to “a set of methodological criteria or minimum standards” and, as such, cities may be “relying on flawed databases.” Bryant Paul, Daniel Linz & Bradley Shafer, *Government Regulation of “Adult” Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL’Y 355, 366 (2001). Paul, Linz, and Shafer argue that any studies used by cities should conform to the factors listed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which dealt with determining the reliability of expert testimony, including “the notion of falsifiability, peer review and publication, error rate and adherence to professional standards.” Paul et al., *supra*. While this is an interesting argument, *Alameda Books* and its related cases have never required this type of evidence—evidence to meet a city’s initial burden need only be “reasonably believed to be relevant” and “fairly support the municipalities’ rationale.” *Alameda Books*, 535 U.S. at 438 (quoting *Playtime Theatres*, 475 U.S. at 51–52). Moreover, cities have successfully relied on such evidence, ranging from professional studies to citizen testimony. See, e.g., *World Wide Video, Inc. v. City of Spokane*, 368 F.3d 1186, 1197 (9th Cir. 2004); *Playtime Theatres*, 475 U.S. at 44. Neither is it proper or necessary for the Court to adopt such a requirement in the future. As the case law stands now, the burden of casting doubt on a city’s reasoning rests on the plaintiff, who can point these problems out to the judge. *Alameda Books*, 535 U.S. at 439. Requiring cities to use only studies complying with the *Daubert* standard would only serve to increase the cost of conducting studies and decrease a city’s flexibility to address problems reasonably linked to adult businesses. See *Abilene Retail #30, Inc. v. Bd. of Comm’rs*, 492 F.3d 1164, 1174 (10th Cir. 2007) (“Nor is there a constitutional requirement that the studies relied upon be empirical or satisfy any particular methodological or scientific standards—

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

III. “SHODDY EVIDENCE?”: THE *ALAMEDA BOOKS* STANDARD AND ITS INTERPRETATION

A. *Content-Neutral Regulation and Alameda Books*

As a preliminary matter, in order to comply with the First Amendment, zoning ordinances aimed at regulating adult businesses must be “time, place, and manner regulations,” meaning that they are not aimed at the content of the speech but rather at the secondary effects of adult businesses on the surrounding community.⁴⁰ In examining these “content-neutral”⁴¹ regulations, courts employ a standard of intermediate scrutiny through a burden-shifting analysis.⁴² Under this analysis, cities have the initial burden of showing that a regulation is “designed to serve a substantial governmental interest and [does] not unreasonably limit alternative avenues of communication.”⁴³ This section will address the three main cases the Supreme Court has considered that deal with zoning ordinances regulating sexually oriented businesses: *Young v. American Mini Theaters, Inc.*;⁴⁴ *City of Renton v. Playtime Theatres, Inc.*;⁴⁵ and *City of Los Angeles v. Alameda Books, Inc.*⁴⁶ The overarching theme of these cases, consistent with the Supreme Court’s lower standard of review, is the low initial burden of proof placed upon municipalities, along with the deference afforded to cities enacting these ordinances.⁴⁷

legislators are free to consider anecdotal evidence, statistical data, prior cases, and their common sense.”).

40. *Playtime Theatres*, 475 U.S. at 47.

41. *Id.*

42. *Alameda Books*, 535 U.S. at 439–40. This is a lower standard than strict scrutiny. In order for an ordinance to survive strict scrutiny the government must show “a compelling governmental interest in limiting speech, and the regulation must be narrowly drawn to achieve that interest.” 16B C.J.S. *Constitutional Law* § 827 (2005). In addition, “the government must choose the least restrictive means to further the articulated interest.” *Id.* (internal citations omitted).

43. *Playtime Theatres*, 475 U.S. at 47.

44. 427 U.S. 50 (1976).

45. 475 U.S. 41.

46. 535 U.S. 425.

47. *Id.* at 440 (“There is less reason to be concerned that municipalities will use these ordinances to discriminate against unpopular speech.”); *see also id.* at 449 (Kennedy, J., concurring) (“As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that

1. Pre-Alameda Books cases

The Supreme Court first addressed the constitutionality of zoning ordinances aimed at sexually oriented businesses in *Young v. American Mini Theatres, Inc.*⁴⁸ In 1972, the city of Detroit enacted a zoning ordinance prohibiting adult theaters from locating “within 1,000 feet of any two other ‘regulated uses’ or within 500 feet of a residential area.”⁴⁹ The city heard evidence regarding the secondary effects of sexually oriented business and passed the ordinance in an effort to reduce these negative effects on the community.⁵⁰ Two adult theaters in violation of the ordinance brought suit claiming that the regulation violated their First and Fourteenth Amendment rights.⁵¹ Noting that “the city’s interest in attempting to preserve the quality of urban life is one that must be accorded high respect,”⁵² a majority of the Court held that the ordinance was a constitutional, content-neutral regulation because the evidence presented by the city—which demonstrated negative secondary effects—established a substantial government interest.⁵³

Ten years later, in *City of Renton v. Playtime Theatres, Inc.*,⁵⁴ the Court once again considered a zoning ordinance directed at sexually oriented businesses. Renton’s ordinance was similar to the zoning restrictions in *Young* in that it focused on regulating the location of adult theaters.⁵⁵ The city originally considered the ordinance at the

content-based restrictions are unconstitutional.”); *Playtime Theaters*, 475 U.S. at 52 (“It is not our function to appraise the wisdom of the city’s decision [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” (internal citations omitted)).

48. 427 U.S. 50.

49. *Id.* at 52. Within the term “regulated use” the ordinance also included “10 different kinds of establishments in addition to adult theaters,” including “mini” theaters, adult bookstores, cabarets, bars, hotels and motels, pawnshops, pool halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls. *Id.* at 52 n.3.

50. *Id.*; see also *id.* at 81 n.4 (Powell, J., concurring) (“That evidence consisted of reports and affidavits from sociologists and urban planning experts, as well as some laymen, on the cycle of decay that had been started in areas of other cities, and that could be expected in Detroit, from the influx and concentration of such establishments.”).

51. *Id.* at 55.

52. *Id.* at 71 (plurality opinion); see also *id.* at 80 (Powell, J., concurring) (“[There is no] doubt that the interests furthered by this ordinance are both important and substantial.”).

53. *Id.* at 72–73 (plurality opinion); *id.* at 82–84 (Powell, J., concurring).

54. 475 U.S. 41 (1986).

55. *Id.* at 44. An adult theater was defined as “an enclosed building used for presenting motion picture films, video cassettes, cable television, or any such visual media, distinguished

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

urging of the mayor of Renton, and enacted the regulation in 1981.⁵⁶ The city council reviewed a number of studies concerning the secondary effects of sexually oriented businesses on surrounding communities in making its decision to enact the regulation.⁵⁷

Unlike *Young*, however, at the time Renton enacted its zoning ordinance there were no restricted businesses located within the city,⁵⁸ and the city did not conduct any studies of its own. Instead, the municipality relied heavily on studies conducted in other municipalities.⁵⁹ Two adult theater owners challenged the ordinance on constitutional grounds.⁶⁰ Although the ordinance was upheld by the district court, upon review, the Court of Appeals for the Ninth Circuit reversed.⁶¹ The appellate court reasoned that Renton had “improperly relied upon the experiences of other cities in lieu of evidence about the effects of adult theaters on Renton,” and, thus

or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas . . . for observation by patrons therein.” *Id.* (internal quotations omitted).

56. *Id.*

57. *Id.* The ordinance was “designed to prevent crime, protect the city’s retail trade, maintain property values, and generally protect and preserve the quality of the city’s neighborhoods, commercial districts, and the quality of urban life.” *Id.* at 48 (internal quotations omitted).

58. Compare *id.* at 44 (illustrating the lack of such restricted businesses in the city) with *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 54–55 & n.8 (1976) (explaining that adult theaters and bookstores were added to the ordinance in response to a report concerning “the significant growth in the number of such establishments,” from two in 1967 to twenty-five in 1972).

59. *Playtime Theatres*, 475 U.S. at 50–51. In particular, the City of Renton relied on studies produced by the City of Seattle, Washington, where, “as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one [adult] theater in a given neighborhood.” *Id.* at 50. In discussing the study, the Supreme Court quoted parts of a Washington State Supreme Court decision upholding the zoning ordinances based on these studies:

“The amendments to the City’s zoning code which are at issue here are the culmination of a long period of study and discussion of the problems of adult movie theatres in residential areas of the City [T]he City’s Department of Community Development made a study of the need for zoning controls of adult theatres The study analyzed the City’s zoning scheme, comprehensive plan, and land uses around existing adult motion picture theatres”

Id. at 50–51 (quoting *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153, 1154–55 (Wash. 1978)).

60. *Id.* at 45.

61. *Id.* at 43.

had failed to show the presence of a substantial government interest.⁶²

The Supreme Court reversed the Ninth Circuit's ruling, holding that Renton had provided sufficient evidence to prove a substantial government interest.⁶³ The Court stated that the Ninth Circuit had imposed "an unnecessarily rigid burden of proof" upon the city in requiring it to present studies "specifically relating to the particular problems or needs of Renton."⁶⁴ Instead, the Court held that "[t]he First Amendment does not require a city . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as . . . [the] evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."⁶⁵ In justifying its ruling, the Court cited its earlier decision in *Young* holding that cities should have a "reasonable opportunity to experiment with solutions to admittedly serious problems."⁶⁶

2. Alameda Books: *A more rigorous standard?*

Despite the Court's holding in *Renton*, the standard for proving a government interest remained unclear. Thus, in *City of Los Angeles v. Alameda Books, Inc.*,⁶⁷ the Court expressly granted certiorari in order to "clarify the standard for determining whether an ordinance serves a substantial government interest" as established in *Renton* and *Young*.⁶⁸ The ordinance at issue in *Alameda Books* was originally passed in 1978, based on a 1977 study conducted by the City of Los Angeles showing that "concentrations of adult businesses" were linked to higher crime rates in the surrounding communities.⁶⁹ In an

62. *Id.* at 46.

63. *Id.* at 54–55 ("In sum, we find that the Renton ordinance represents a valid governmental response to the 'admittedly serious problems' created by adult theaters. Renton has not used 'the power to zone as a pretext for suppressing expression,' but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large. . . . This, after all, is the essence of zoning.") (internal citations omitted).

64. *Id.* at 50 (internal quotations omitted).

65. *Id.* at 51–52.

66. *Id.* at 52 (citing *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion)).

67. 535 U.S. 425 (2002).

68. *Id.* at 433 (plurality opinion).

69. *Id.* at 430–31. Specifically, the study showed an increase in "prostitution, robbery, assaults, and thefts in surrounding communities." *Id.* at 430.

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

effort to disperse these businesses and decrease the cited negative secondary effects, the ordinance, like those at issue in *Young* and *Renton*, prohibited adult business from locating within a certain distance of residential areas or other sexually oriented businesses.⁷⁰ Shortly after passing the ordinance, however, the city realized that it contained “a loophole permitting the concentration of multiple adult enterprises in a single structure.”⁷¹ The city subsequently amended the ordinance in 1983, to prohibit “the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof.”⁷²

Two adult establishments—an adult bookstore and an adult arcade, both providing on-site entertainment⁷³ and operating within the same commercial space—brought suit, challenging the ordinance’s constitutionality under the First Amendment.⁷⁴ The district court granted summary judgment for the adult businesses and the Ninth Circuit affirmed, holding that the city had not presented evidence “upon which it could reasonably rely to demonstrate a link between multiple-use adult establishments and negative secondary effects.”⁷⁵

70. *Id.*

71. *Id.* at 431. The actual language of the Code provided that “the distance between any two adult entertainment businesses shall be measured in a straight line . . . from the closest exterior structural wall of each business.” *Id.* (quoting LOS ANGELES, CAL., MUN. CODE § 12.70(D) (1978)). This language prevented two separately housed adult businesses from locating within the prohibited 1000 feet of one another. However, the language did not prevent two or more separate adult establishments from locating within the same building. Thus, under the language in effect in the original ordinance, adult businesses could group together in a sort of mini-mall or “department store” of adult businesses, which is exactly what happened in this case. *Id.* at 431–33.

72. *Id.* at 431 (citing LOS ANGELES, CAL., MUN. CODE § 12.70(C) (1983)).

73. Both businesses are properly classified as on-site sexually oriented businesses despite one being labeled an “adult bookstore” because both businesses allowed on-site consumption of adult materials by providing “booths where patrons [could] view videocassettes [on-site] for a fee.” *See id.* at 432.

74. *Id.* The Los Angeles ordinance defined an adult bookstore as “an operation that ‘has as a substantial portion of its stock-in-trade and offers for sale’ printed matter and videocassettes that emphasize the depiction of specified sexual activities.” *Id.* at 431 (citing LOS ANGELES, CAL., MUN. CODE § 12.70(B)(2)(a) (1983)). An adult arcade is defined as “an operation where, ‘for any form of consideration,’ five or fewer patrons together may view films or videocassettes that emphasize the depiction of specified sexual activities.” *Id.* at 431–32 (citing LOS ANGELES, CAL., MUN. CODE § 12.70(B)(1)).

75. *Id.* at 429–30.

Upon review, the Supreme Court reversed the Ninth Circuit,⁷⁶ finding that a city is not required to prove that its approach is the only valid response to the demonstrated secondary effects.⁷⁷ The Court specifically “refused to set such a high bar for municipalities” attempting to meet their initial burdens by showing a substantial government interest.⁷⁸ Instead the Court stated that, in meeting its initial burden, a city “may rely on any evidence that is ‘reasonably believed to be relevant’ for demonstrating a connection between speech and a substantial, independent government interest.”⁷⁹ In providing this evidence, however, the Court cautioned that a city may not rely on “shoddy data or reasoning”; rather, the city’s evidence “must fairly support the municipality’s rationale for its ordinance.”⁸⁰ Under the Court’s analysis, once the government proves a substantial government interest, the burden then shifts to the plaintiff to “cast direct doubt on this rationale,” by proving either the evidence does not support the city’s conclusions, or through evidence “[disputing] the municipality’s factual findings.”⁸¹ If a plaintiff is successful in meeting this burden, the city must then “supplement the record with evidence renewing support for a theory that justifies its ordinance.”⁸²

Finally, the Court reiterated the maxim set down in *Young* and *Renton* that a city “must be given a ‘reasonable opportunity to experiment with solutions’ to address the secondary effects of protected speech.”⁸³ The Court explained that, in some instances, a city may implement “an innovative solution,” and in such a situation a municipality would have no evidence to show the reliability of its proposed solution because it had never been implemented before.⁸⁴

76. *Id.* at 430.

77. *Id.* at 438.

78. *Id.*; *see also id.* at 451–52 (Kennedy, J., concurring) (“[A] city must have latitude to experiment, at least at the outset. . . . [I]f its inferences appear reasonable, we should not say there is no basis for its conclusion.”).

79. *Id.* at 438 (plurality opinion) (citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51–52 (1986)).

80. *Id.*

81. *Id.* at 438–39.

82. *Id.* at 439.

83. *Id.* (quoting *Playtime Theaters*, 475 U.S. at 52).

84. *Id.* at 439–40.

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

In many cases, this would leave the city with “no means to address the secondary effects with which it is concerned.”⁸⁵

The consistent emphasis in *Alameda Books* and the cases preceding it is that the initial burden of proof placed on cities addressing negative secondary effects incident to adult businesses is not exacting. Indeed, the Court in its most recent decision took care to clarify that the initial bar is not high:⁸⁶ cities can rely on evidence that is “reasonably believed to be relevant”⁸⁷ as long as it is not “shoddy,” meaning it “fairly support[s] the municipality’s rationale for its ordinance.”⁸⁸ This evidence can include studies conducted in other cities reasonably analogized to the current city’s situation.⁸⁹

B. Applying Alameda Books: Confusion Among the Circuits

In the wake of the *Alameda Books* decision, the question currently vexing the Fifth and Tenth Circuits is whether a study that does not distinguish between different classes of sexually oriented businesses “fairly support[s] the [city’s] rationale for [an] ordinance” affecting off-site sexually oriented businesses.⁹⁰ This section will

85. *Id.* at 440.

86. *Id.* at 438.

87. *Playtime Theaters*, 475 U.S. at 51.

88. *Alameda Books*, 535 U.S. at 438.

89. *See id.* at 439–40; *see also Playtime Theaters*, 475 U.S. at 51–52.

90. *Alameda Books*, 535 U.S. at 438. Although the Eight Circuit, in *ILQ Inv., Inc. v. City of Rochester*, addressed this same question and held that the ordinance in question sufficiently showed a substantial government interest, this case was decided before *Alameda Books* and its admonition against shoddy evidence. *ILQ Invs., Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994) (“So long as [an ordinance] affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, [a city] must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976))). This question has also been considered by the Ninth Circuit in *World Wide Video, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004). However, there the court chose not to decide whether an on- and off-site distinction was constitutionally relevant because the city provided sufficient evidence, including “studies, police records, and citizen testimony,” concerning the negative secondary effects associated with both on- and off-site sexually oriented businesses. *Id.* at 1197 (“[I]n this case we can assume, but need not decide, that the distinction between retail-only stores and stores with preview booths is constitutionally relevant.”). Because this decision only addresses the on- and off-site distinction in dicta it will not be addressed in this Comment. However, it is interesting to note that this court seems to hold the city to an even lower burden than the Tenth Circuit—specifically, the court uses the opinion of a pedodontist working near an off-site sexually oriented business concerning his own subjective observations. *Id.* Surely, if this evidence can be seen as reasonably relevant and fairly supporting a city’s

examine how each of these two circuits has interpreted the Supreme Court's decisions and the reasoning behind each circuit's interpretation.

1. *The Fifth Circuit*

The decision in *Encore Videos, Inc. v. City of San Antonio*⁹¹ is the governing case law on this issue for the Fifth Circuit. *Encore Videos* examined a city ordinance passed by San Antonio in 1995, which prohibited “sexually oriented businesses from locating within 1,000 feet of residential areas.”⁹² The city based its decision on evidence of negative secondary effects.⁹³ The plaintiff—an owner of a sexually oriented retail video store that fell within the city's definition of a sexually oriented business—brought suit under the First Amendment.⁹⁴

The district court granted summary judgment for San Antonio and the plaintiff appealed.⁹⁵ On appeal, the Fifth Circuit analyzed the ordinance under the standard set forth in *Renton*.⁹⁶ The court agreed with the district court that the ordinance was content-neutral and served a substantial government interest.⁹⁷ However, the Fifth Circuit reversed the district court as to the issue of whether the

rationale, a properly conducted study that does not distinguish between different adult businesses will as well, absent evidence presented to the contrary.

91. 330 F.3d 288 (5th Cir. 2003).

92. *Id.* at 290.

93. *Id.* at 294. The ordinance was enacted to “reduce the adverse secondary effects (such as increased crime and the reduction of property values) of sexually oriented businesses.” *Id.*

94. *Id.* at 290. The ordinance “[prohibited] sexually oriented businesses from being within 1000 feet of other sexually oriented businesses or residential areas, churches, schools, or parks.” *Id.* at 294.

95. *Id.* at 290.

96. *Id.* at 292. The court adds an additional prong, holding that the ordinance must be “narrowly tailored to serve a significant government interest.” *Id.* at 291 (quoting *Frisby v. Schultz*, 487 U.S. 474, 481 (1988)). Although this is not specifically listed as a requirement in *Renton*, which stated that a regulation is acceptable if “designed to serve a substantial government interest,” the Court did expressly find that “the *Renton* ordinance is ‘narrowly tailored’ to affect only that category of theatres shown to produce the unwanted . . . effects.” *Id.* (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)). Other decisions have supported the view that a time, place, and manner ordinance must be narrowly tailored. See *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989); *Frisby*, 487 U.S. at 481; *Doctor John's Inc. v. City of Roy*, 465 F.3d 1150, 1164 (10th Cir. 2006); *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 688 (10th Cir. 1998).

97. *Encore Videos*, 330 F.3d at 292–93.

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

ordinance was narrowly tailored, holding that “in order to demonstrate that the ordinance is narrowly tailored,” the city had to show that the ordinance addressed the secondary effects at which it was aimed.⁹⁸

The court reasoned that San Antonio’s ordinance was not narrowly tailored to address a substantial government interest for two reasons.⁹⁹ First, the municipality had defined “sexually oriented business” too broadly to be justified by the evidence it offered in support of its actions.¹⁰⁰ Second—and more importantly for our purposes—the ordinance applied equally to both on- and off-site sexually oriented businesses, but the studies that the ordinance relied upon for its evidentiary basis either “entirely excluded” off-site businesses or did “not differentiate the data collected” from that of their on-site counterparts.¹⁰¹ Reasoning that off-site sexually oriented businesses differed from on-site businesses because the customers “are less likely to linger in the area and engage in public alcohol consumption and other undesirable activities,” the court held that a city is required to present “at least some substantial evidence of the secondary effects” stemming from off-site sexually oriented businesses.¹⁰² The court stated that ruling otherwise may subject “even ordinary bookstores and video stores with adult sections” to regulation without evidence of secondary effects.¹⁰³ In reaching this decision, the court argued that its holding was not contrary to the standard set forth in *Alameda Books* because, in that case, the city had presented more compelling evidence in the form of its own study supporting the ordinance at issue.¹⁰⁴

98. *Id.* at 294.

99. A few months after its decision in *Encore Videos*, the court issued a clarifying opinion stating, in relevant part, that “the ordinance at issue was found not to be narrowly tailored because of both its failure to make an on-site/off-site distinction and its low 20% inventory requirement.” *Encore Videos, Inc. v. City of San Antonio*, 352 F.3d 938, 939 (5th Cir. 2003).

100. *Encore Videos*, 330 F.3d at 294. The ordinance applied to “any bookstore, novelty store, or video store that devotes over 20% of its inventory or floor space to sexually explicit materials.” *Id.* The court feared that this definition was so broad that it could apply “to many garden-variety book or music stores with restricted adult sections.” *Id.* at n.7.

101. *Id.* at 294–95. San Antonio relied on three studies of secondary effects: “one in Seattle, Washington, in 1989, another in Austin, Texas, in 1986, and the third in Garden Grove, California, in 1991.” *Id.* at 294.

102. *Id.* at 295.

103. *Id.* at 295–96.

104. *Id.* at 295 n.10.

2. *The Tenth Circuit*

In *Doctor John's, Inc. v. City of Roy*¹⁰⁵ the Tenth Circuit considered this issue in light of the Supreme Court's decision in *Alameda Books*.¹⁰⁶ In May 2001, the city of Roy, Utah, enacted an ordinance regulating sexually oriented businesses in an effort to address negative secondary effects.¹⁰⁷ As evidence of these effects, the city included findings based on "case law, Congressional testimony, research papers, and various studies from other areas."¹⁰⁸ In response, Doctor John's, a retail store that "stocks a variety of 'adult' products,"¹⁰⁹ filed suit, alleging, among other things, that the ordinance was "not narrowly tailored to regulate only businesses that produce adverse 'secondary effects.'"¹¹⁰ Specifically, Dr. John's argued that "the studies cited in support of the Roy City ordinance do not consider businesses . . . that sell materials only for off-site consumption."¹¹¹

In considering the ordinance, the court first held that, under *Alameda Books*, the city bears the initial "burden of providing

105. 465 F.3d 1150 (10th Cir. 2006).

106. It should be noted that the Tenth Circuit, in *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, had previously considered the issue of whether a city must provide independent evidence of the secondary effects of off-site businesses to justify a zoning ordinance affecting these businesses. 136 F.3d 683, 687-90 (10th Cir. 1998). The court held that even if an off-site sexually oriented business is "a new type of adult business, it may not avoid time, place and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses." *Id.* at 690 (quoting *ILQ Invs., Inc., v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994)). Because this case was decided before *Alameda Books*, this Comment will not consider its rulings except as incorporated by the Tenth Circuit in *Doctor John's*.

107. *See Doctor John's, Inc. v. City of Roy*, 333 F. Supp. 2d 1168, 1170-71 (D. Utah 2004).

108. *Doctor John's*, 465 F.3d at 1154.

109. *Id.* at 1153. Dr. John's stocks a variety of goods ranging from "lingerie, swimwear, lotions, oils, games, roses, [and] stuffed animals" to "'marital aids' and 'adult toys' including 'vibrators,' 'dildos,' and other masturbation toys, as well as videotapes, DVDs, magazines, and books . . . some explicitly sexual in nature." *Doctor John's*, 333 F. Supp. 2d at 1170 (internal citations omitted). The owner, John K. Coil, decided to open a store in Utah "based on the perceived need for pornography" in that state. *Id.* John recalls:

I was in Los Angeles and I read the newspaper on a Sunday morning, and there was an article in there that said that the State of Utah had appointed an anti-porn czar. And I had never been to Utah before. I had no knowledge that Utah existed except seeing it on a map, but I thought to myself and said out loud to those people around me, "There's some uptight people. They need a porn store."

Id. (quoting Deposition of John K. Coil at 19-20).

110. *Doctor John's*, 465 F.3d at 1156.

111. *Id.* at 1164.

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

evidence of secondary effects.”¹¹² The court explained that in meeting that burden “cities are entitled to rely, in part, on [an] ‘appeal to common sense,’ rather than ‘empirical data,’ at least where there is no ‘actual and convincing evidence from plaintiffs to the contrary.’”¹¹³ However, the municipality could not use “shoddy data or reasoning”—it “must fairly support the municipality’s rationale for its ordinance.”¹¹⁴ The court then turned its attention to Doctor John’s contention that the city’s evidence must specifically show a link between off-site sexually oriented businesses and the cited secondary effects.¹¹⁵

The court began by noting its previous decision in *Z.J. Gifts D-2 v. City of Aurora*, where the Tenth Circuit had previously “rejected the on-site/off-site distinction as a basis for striking down an adult business ordinance.”¹¹⁶ In *Z.J. Gifts*, the court concluded that a sexually oriented business providing only off-site adult material was still subject to regulations “‘justified by studies of the secondary effects of reasonably similar businesses.’”¹¹⁷ The court reasoned that under this precedent, “the mere fact that the ordinance reaches off-site as well as on-site businesses is insufficient” to hold the ordinance unconstitutional.¹¹⁸ However, Dr. John’s argued that *Z.J. Gifts* needed to be re-examined after *Alameda Books*, which increased “the *initial* burden that [a] City must meet to justify [an] ordinance.”¹¹⁹

The court declined to adopt this view; instead, it reasoned that, under *Alameda Books*, “a city does not face a ‘high bar’ in meeting its initial obligation to show an ordinance is narrowly tailored,” and the standard requires only that the “[city’s] evidence ‘fairly supports’ its rationale.”¹²⁰ Thus, the court interpreted *Alameda Books* as

112. *Id.* (quoting *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1197 n.8 (10th Cir. 2003)).

113. *Id.* at 1165 (quoting *Heideman*, 348 F.3d at 1199).

114. *Id.* (internal quotations omitted).

115. *Id.* at 1166–68.

116. *Id.* at 1167 (citing *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998)); *see supra* note 106 (discussing *Z.J. Gifts* and its on-site/off-site distinction).

117. *Id.* (citing *Z.J. Gifts*, 136 F.3d at 690).

118. *Id.* at 1167.

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

120. *Id.* at 1167–68 (quoting *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 438 (2002) (plurality opinion)). The court also cited Justice Kennedy’s concurring opinion in *Alameda Books* stating, “‘very little evidence is required’ to justify a secondary effects ordinance.” *Id.* at 1168 (quoting *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring)).

allowing cities to rely on studies showing the “secondary effects of reasonably similar businesses.”¹²¹ However, the court did not go so far as to treat the on- and off-site distinction as irrelevant. Instead, the court ruled that

although a city need not initially come forward with specific evidence of a connection between negative secondary effects and each precise type of business regulated under its ordinance, a plaintiff may be able to challenge a city’s rationale for its ordinance by pointing to evidence that its type of adult business (*e.g.*, “off-site”) is relevantly different than those types of businesses analyzed in the studies supporting the ordinance (*e.g.*, “on-site”).¹²²

The court qualified this statement with the admonition that the party opposing the government would need to do more than “[s]imply stat[e] that off-site businesses are different from on-site businesses” to shift the burden of proof to the municipality.¹²³ The court then remanded to the district court for a determination of whether Doctor John’s had presented evidence sufficient to cast doubt on the city’s evidence.¹²⁴

IV. MEETING THE INITIAL BURDEN: FOLLOWING THE TENTH CIRCUIT

This section argues that the Tenth Circuit’s approach has correctly interpreted the Supreme Court’s jurisprudence. Under the Tenth Circuit’s standard, cities are not relying on “shoddy data or reasoning”¹²⁵ when their ordinances are supported by studies showing the negative effects of “reasonably similar businesses.”¹²⁶ The distinction between different adult businesses should not be

121. *Id.* at 1167 (quoting *Z.J. Gifts*, 136 F.3d at 690).

122. *Id.* at 1168. Indeed, this is the very position that this Comment takes. Although the differences between these types of businesses should be taken into account, the differences should not determine a city’s ability to meet its initial burden in support of its ordinance. *See infra* Part IV.

123. *Id.* In the opinion, the court indicates that Dr. John’s had presented no evidence “showing that off-site [sexually oriented businesses] have materially different secondary effects that would call into question the studies relied upon by Roy City.” *Id.*

124. *Id.* at 1173. Upon remand the district found that Doctor John’s evidence was insufficient “to cast doubt on the City’s rationale or the factual basis behind the city of Roy’s sexually-oriented business ordinance.” *Doctor John’s, Inc. v. City of Roy*, No. 1:03-cv-00081, 2007 WL 1302757, slip opinion at *1 (D. Utah May 2, 2007).

125. *Alameda Books*, 535 U.S. at 438.

126. *Doctor John’s*, 465 F.3d at 1167.

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

ignored; nevertheless, the burden to demonstrate the relevance of a distinction between different adult businesses should rest on the business that is challenging the act in the litigation process, rather than as part of a city's initial burden. This approach will preserve the deference that the Supreme Court has shown to cities.

Part A of this section will explain why the Tenth Circuit's practice of allowing cities to rely on data gathered from reasonably similar adult businesses, instead of requiring separate evidence for each new type of adult business, is the correct interpretation of *Alameda Books*. Part B will show how this standard provides cities with the correct level of deference in dealing with the secondary effects attributable to various adult businesses, while still ensuring that a city's initial burden does not constitute a rubber stamp. Finally, Part C will address when courts should consider the differences between different types of sexually oriented businesses.

A. Showing a Substantial Government Interest: A City's Initial Burden

The Tenth Circuit's standard, which allows cities to meet their initial burden by relying on studies of "reasonably similar businesses,"¹²⁷ does not constitute *Alameda Books*' prohibited reliance on "shoddy data or reasoning."¹²⁸ Rather, looking to "reasonably similar businesses" satisfies the initial burden set forth by the Supreme Court in *Alameda Books* and its predecessors. In its earlier decision in *Renton*, the Supreme Court held that, in meeting their initial burden, cities are not required to "produce evidence independent of that already generated by other cities, so long as [the] evidence the city relies upon *is reasonably believed to be relevant to the problem that the city addresses.*"¹²⁹ Repeating this standard, the *Alameda Books* Court specifically refused to raise the initial burden a city faces any higher than in *Renton*, adding only that the evidence must "fairly support the municipality's rationale for its ordinance"¹³⁰—a very low initial burden to meet.

127. *Id.*

128. *Alameda Books*, 535 U.S. at 438.

129. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986) (emphasis added).

130. *Alameda Books*, 535 U.S. at 438. Although this is a plurality opinion, Justice Kennedy agreed that the plurality gave "the correct answer" to the amount of evidence needed to meet a city's initial burden in justifying an ordinance affecting sexually oriented businesses

The Court does not even require that a study actually be relevant, just that the city “reasonably believe[s]” that it is.¹³¹ Relevance only requires that the evidence have “*any tendency* to make the existence of *any fact* that is of consequence . . . more probable or less probable than it would be without the evidence.”¹³² A study showing negative effects of a similar adult business is certainly a *relevant* fact, or at the very least, a city can reasonably believe it to be relevant. Additionally, evidence of secondary effects incident to one type of adult business fairly supports an inference by cities that similar businesses may produce similar effects. The Tenth Circuit’s allowance of reasonable reliance by cities properly complies with the standard set forth by the Supreme Court.

The facts of prior Supreme Court decisions support the view that the Tenth Circuit’s standard does not constitute a reliance on “shoddy data or reasoning,” as prohibited by *Alameda Books*. Although the Supreme Court has never expressly used the language “reasonably similar businesses,” its decisions up to this point have nevertheless applied such a standard. For example, in *Barnes v. Glen Theatre, Inc.*¹³³ the Court allowed a municipality to rely on evidence showing a correlation between adult theaters and harmful secondary effects “to support its claim that nude dancing,” a reasonably similar business, was “likely to produce the same effects” as an adult theater.¹³⁴ Similarly, the Court’s decision in *Renton*, allowing a city to rely on studies conducted in other cities, supports the Tenth Circuit’s doctrine. The Court allowed the city of Renton to make the reasonable inference, based on studies of adult business in other cities, that similar adult businesses in its own city would produce similar secondary effects.¹³⁵

The Court’s decision to reverse the Ninth Circuit in *Alameda Books* is another example where the Court allowed a municipality to rely on studies of reasonably similar businesses without actually stating it was doing so. The Ninth Circuit originally invalidated the ordinance at issue in *Alameda Books* because it found that the city

and also stated himself that “at least at the outset, . . . very little evidence is required.” *Id.* at 449, 451 (Kennedy, J., concurring).

131. *Id.* at 438.

132. FED. R. EVID. 401 (emphasis added).

133. 501 U.S. 560 (1991).

134. *Alameda Books*, 535 U.S. at 438 (explaining *Barnes*).

135. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986).

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

could not reasonably rely on a study showing the secondary effects of a concentration of separately housed adult businesses but not the effects of “a concentration of adult operations within a single adult establishment,” to justify an ordinance regulating such establishments.¹³⁶ In essence, the Ninth Circuit invalidated the ordinance because it regulated one type of adult business based on a study showing the negative secondary effects associated with similar adult businesses. The Supreme Court overruled this decision, effectively holding that it is reasonable for cities to draw inferences from studies concerning reasonably similar adult businesses.¹³⁷ While cities cannot “get away with shoddy data or reasoning,” a municipality’s evidence must simply “fairly support [its] rationale.”¹³⁸ Thus, although the Supreme Court has not expressly stated that cities can rely on studies of “reasonably similar businesses,” the Tenth Circuit’s standard, which allows such reliance, is the correct interpretation of *Alameda Books*.

Like the reversed Ninth Circuit decision in *Alameda Books*, the Fifth Circuit’s decision in *Encore Videos, Inc. v. City of San Antonio*¹³⁹ sets the initial burden a city must meet too high by requiring direct evidence of the negative secondary effects of the specific type of adult businesses being regulated. The Fifth Circuit invalidated the ordinance at issue in *Encore Videos* because the studies used to justify the ordinance either did not include off-site businesses or failed to differentiate the data collected from on-site businesses.¹⁴⁰ It justified this decision by reasoning that “[i]f consumers of pornography cannot view the materials at the sexually oriented establishment, they [will be] less likely to linger in the area and engage in public alcohol

136. *Alameda Books*, 535 U.S. at 436; *see also* *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719, 725 (9th Cir. 2000) (“Los Angeles has presented no evidence that a combination adult bookstore/arcade produces any of the harmful secondary effects identified in the Study. . . . [T]he 1977 study [] contains no findings that an individual combination bookstore/arcade produces any of the increased crime the Study found resulting from a concentration of adult businesses. Therefore, it is unreasonable for the City to infer that absent its regulations, a bookstore/arcade combination would have harmful secondary effects.”).

137. *Alameda Books*, 535 U.S. at 436 (holding that it was reasonable “for Los Angeles to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity”).

138. *Id.* at 438.

139. *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003).

140. *Id.* at 294–95.

consumption and other undesirable activities.”¹⁴¹ Thus, their argument was that off-site sexually oriented businesses are “less likely to create harmful secondary effects,” so zoning ordinances regulating them cannot be justified absent direct evidence of these effects.¹⁴²

While the Fifth Circuit’s argument is reasonable, it is simply not a proper consideration for cities in meeting their initial burden under *Alameda Books*, which requires only that a city’s evidence “fairly support [its] rationale for its ordinance[s]” by evidence “reasonably believed to be relevant.”¹⁴³ Even if these secondary effects are less, it is reasonable, absent evidence to the contrary, to believe that off-site businesses have enough effects in common with on-site businesses to create a substantial government interest in regulating them.¹⁴⁴ Although the Fifth Circuit attempted to argue that their decision was not contrary to *Alameda Books*,¹⁴⁵ the city in *Alameda Books* did not provide direct evidence in support of its ordinance but instead relied upon reasonable inferences that the city’s evidence would support its regulation. *Encore Videos* should have been no different. A city may make reasonable inferences between similar businesses in meeting its initial burden.

Under the Tenth Circuit’s standard, which allows reliance upon studies of “reasonably similar businesses” in meeting a city’s initial burden,¹⁴⁶ the outcome of *Encore Videos* likely would have been different. The ordinance at issue in the Fifth Circuit’s decision in

141. *Id.* at 295.

142. *Id.*

143. *Alameda Books*, 535 U.S. at 438 (citation omitted).

144. See *H & A Land Corp. v. City of Kennedale*, 480 F.3d 336, 340 (5th Cir. 2007), for a recent example. In this case, the court found that some negative effects relating to real estate value accompanied adult businesses equally, regardless of an on- or off-site classification:

[T]he Indianapolis survey also asked respondents to explain their prediction that an adult bookstore would negatively impact property value: 29% believed such an establishment would attract ‘undesirables’ to the neighborhood, 14% felt it would create a bad image of the area, and 15% felt that it offended prevailing community attitudes. *These reasons are equally applicable to an on-site or off-site establishment, and are distinguishable from the problems we have found to be unique to on-site businesses.*

Id. (emphasis added).

145. *Encore Videos*, 330 F.3d at 295–96 n.10 (“The Supreme Court’s decision in *Alameda Books* is not to the contrary. . . . Clearly, that study, unlike the studies presented in this case, directly supported the specific regulation at issue in [that case].”).

146. *Doctor John’s, Inc. v. City of Roy*, 465 F.3d 1150, 1166 (10th Cir. 2006) (citing *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 690 (10th Cir. 1998)).

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

Encore Videos relied on three studies from other cities: Seattle, Washington; Austin, Texas; and Garden Grove, California.¹⁴⁷ The court did not mention any flaws with the studies themselves or state that the studies did not adequately show a correlation between on-site sexually oriented businesses and negative secondary effects. The court gave only one reason for why these studies were insufficient: one did not include off-site adult businesses and the other two did not differentiate between data collected from on-site businesses and their off-site cousins—even though the Austin study included information from two adult bookstores.¹⁴⁸ Given that “very little evidence is required”¹⁴⁹ to meet its initial burden, it would seem reasonable for a city to believe, based on these studies, that businesses selling the same sorts of material and dealing with the same subject matter as their on-site counterparts would generate some of the same secondary effects. In the absence of evidence

147. *Encore Videos*, 330 F.3d at 294.

148. *Id.* at 294–95, 295 n.9. Opponents of zoning ordinances often contend that studies, which at first blush appear to include off-site businesses, do not actually support a city’s initial burden because—within the “adult industry”—the terms used in these studies are understood as applying to on-site instead of off-site establishments. See *H & A Land Corp.*, 480 F.3d at 340 (“[B]ookstore . . . is a term of art and does not sufficiently specify off-site premises. . . . [I]nstead . . . adult bookstores often include peep shows, arcades, and other forms of on-site entertainment, rendering them on-site establishments.”); *Z.J. Gifts*, 136 F.3d at 687 (“Z.J. Gifts argues and attempts to prove that all other adult bookstores provide some form of on-premises viewing of sexually explicit materials.”); *ILQ Invs., Inc. v. City of Rochester*, 25 F.3d 1413, 1418 n.5 (8th Cir. 1994) (quoting the owner of a sexually oriented business stating that “on-premise viewing booths” were “an absolute essential component of the 70 adult bookstores in 25 states that he [had] personally visited.” (internal quotation marks omitted)). Grappling with this issue while still abiding by its precedent, the Fifth Circuit recently rejected the argument that “adult bookstore” is a term of art implying an on-site business, and upheld a zoning ordinance affecting off-site adult businesses because it was based on studies, which “included surveys of real estate appraisers that focused strictly on ‘adult bookstores.’” *H & A Land Corp.*, 480 F.3d at 339–40 (emphasis added). The Court reasoned that whether the survey included off-site establishments or was limited to consideration of on-site businesses depended largely on how the real estate agents would understand the term “adult bookstore.” *Id.* Then, pointing to the common dictionary definition of “bookstore,” instead of the specialized definition offered by sexually oriented businesses, the court concluded it was “reasonable for [the city] to believe” that those participating in the survey “understood the term ‘adult bookstore’ to mean off-site businesses.” *Id.* at 340. Thus, while the Fifth Circuit has set the city’s initial burden higher than the Supreme Court contemplated for cities, it has correctly refused to adopt the specialized definition of “adult bookstore” in connection to secondary effect studies.

149. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 451 (2002) (Kennedy, J., concurring).

showing otherwise, it is likely that these studies “fairly support the municipality’s rationale.”¹⁵⁰

B. Deference: Dealing with a “New Type” of Adult Business

The hypothetical outcome in *Encore Videos* discussed above would also have been entirely consistent with the level of deference cities receive in meeting their initial burden under the Supreme Court’s standard. Throughout its opinions on this issue, the Supreme Court has emphasized that “a city’s ‘interest in attempting to preserve the quality of urban life is one that must be accorded high respect.’”¹⁵¹ The Court provides a high level of deference to allow cities to use their “zoning power in a reasonable way to ameliorate [secondary effects] without suppressing speech.”¹⁵² However, the Fifth Circuit’s requirement that a city provide “some substantial evidence of secondary effects specific to” each type of regulated adult business in meeting its initial burden, does not take into account the deference that the Supreme Court has attempted to provide cities.¹⁵³ As a result, if followed, the Fifth Circuit’s standard will substantially limit a city’s ability to deal with new types of adult businesses in the future.

In light of the Fifth Circuit’s current standard, there is no doubt that cities are now attempting to find or conduct studies that include off-site businesses to support their ordinances, and some already have found such studies.¹⁵⁴ However, the Fifth Circuit’s holding has the potential to stretch beyond its current application to off-site businesses by allowing an adult business, wishing to dispute an otherwise valid zoning ordinance, to claim that it is simply a “‘different kind’ of adult business” not covered in the existing studies justifying the ordinance.¹⁵⁵ It is unlikely that for each “different kind of adult business” there will be sufficient differentiated evidence readily available for cities to cite. A city will

150. *Id.* at 438 (plurality opinion).

151. *City of Renton v. Playtime Theaters, Inc.* 475 U.S. 41, 50 (1986) (quoting *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion)); *see also Alameda Books*, 535 U.S. at 444 (Kennedy, J., concurring).

152. *Alameda Books*, 535 U.S. at 444.

153. *Encore Videos*, 330 F.3d at 295.

154. *See, e.g., H & A Land Corp., v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007).

155. *Doctor John’s v. City of Roy*, 465 F.3d 1150, 1165 (10th Cir. 2006) (citing *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1199 (10th Cir. 2003)).

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

therefore have to conduct its own study or simply wait to address potentially serious problems until another city conducts a study upon which it can rely. The sheer cost of conducting these studies will effectively prevent smaller cities like Kennedale, Texas, with an estimated population of 6450 people,¹⁵⁶ or Roy, Utah—population 35,100¹⁵⁷—from enacting ordinances to address secondary effects. Even larger cities like Los Angeles, which boasts a modest estimate of 9,948,081 residents,¹⁵⁸ will encounter difficulties paying for new studies for each “new type” of adult business.¹⁵⁹ It is for this very reason that the Supreme Court has maintained such a low initial burden allowing a municipality to rely on the experiences of other cities “if its inferences appear reasonable.”¹⁶⁰

Additionally, even if a city could afford to conduct one or two studies to address new types of adult businesses, the Fifth Circuit’s standard imposes no limit to the distinctions that an adult business can employ to claim it is a “new type” of adult business. Once enough cities have conducted research showing the negative secondary effects of off-site businesses, the controversy will not end. Instead, adult-business owners will likely attempt to distinguish their businesses in other ways in order to escape legitimate zoning ordinances. For example, a strip club or topless bar that caters only to high-class customers or business types will not attract the seedier customers, and thus the owner could claim that the secondary effects are fewer than another adult establishment. An adult bookstore

156. City of Kennedale, Texas Web site, About Kennedale, <http://www.gokennedale.com/admin/contentx/default.cfm?PageId=8505> (last visited Oct. 28, 2008).

157. U.S. Census Bureau, Roy (city) QuickFacts, <http://quickfacts.census.gov/qfd/states/49/4965110.html> (last visited Oct. 28, 2008).

158. U.S. Census Bureau, Los Angeles County QuickFacts, <http://quickfacts.census.gov/qfd/states/06/06037.html> (last visited Oct. 28, 2008).

159. Just a few short years ago, California faced major budget crises that ultimately resulted in a recall election in which Arnold Schwarzenegger was elected. *See, e.g.*, Charlie LeDuff, *The California Recall: The Governor-elect; A Sudden, Decisive Victory for a Newcomer to Politics*, N.Y. TIMES, Oct. 8, 2003, at A26; Hal R. Varian, *Economic Scene; California’s Long-term Economic Problems Need Long-term Solutions*, N.Y. TIMES, Sept. 25, 2003, at C2. However, even the power of “the Terminator” (Schwarzenegger) has not been able to fend off continuing crises with California’s budget. *See, e.g.*, Matthew Yi, *Budget Bombshell: Governor Boosts Deficit Forecast to \$20 Billion as He Bids to Change State’s Spending System*, S.F. CHRON., Apr. 30, 2008, at A1.

160. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 452 (2002) (Kennedy, J., concurring).

owner who only deals in soft-core pornography could argue that the bookstore creates fewer secondary effects than bookstores carrying hard-core pornography. A strictly gay adult bookstore might claim different secondary effects than a store offering a wider variety of products. Or the owner of a topless bar where pasties are worn might contend that the business is responsible for fewer secondary effects than a fully nude strip club. The distinctions can be almost endless for a creative mind, and under the Fifth Circuit's standard, a city will have to find "at least some substantial evidence of the secondary effects" specific to these new establishments before their regulations can apply.¹⁶¹ The Tenth Circuit's interpretation of *Alameda Books*, allowing cities to rely on studies of "reasonably similar businesses" in meeting their initial burden, makes more sense for cities, especially in light of the Supreme Court's efforts to give deference to cities' ability to zone and regulate adult businesses.

The Tenth Circuit's interpretation of the *Alameda Books* standard maintains a lower bar for cities attempting to meet their initial burden of evidence; however, it does not constitute a rubber stamp but ensures that cities are not relying on "shoddy data or reasoning."¹⁶² In *Abilene Retail #30, Inc. v. Board of Commissioners*,¹⁶³ the Tenth Circuit reversed a district court's ruling in favor of a rural county because there was a genuine issue of material fact as to whether it met its initial burden when it enacted a zoning ordinance affecting an adult bookstore.¹⁶⁴ However, this decision was not based on the sufficiency of studies relied on by the city, but rather because city officials changed the required distance between sexually oriented businesses and private residences from 750 feet to 1200 feet after discovering in a public meeting that 750 feet would not force the only sexually oriented business in town to move.¹⁶⁵ The court stated that the "[o]rdinance plainly contemplates the closure of [the adult business] in its existing location, a location that a common sense reading of the Board's studies suggests would best limit any secondary effects."¹⁶⁶ Under these facts the court was

161. *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 295 (5th Cir. 2003).

162. *Alameda Books*, 535 U.S. at 438.

163. 492 F.3d 1164 (10th Cir. 2007).

164. *Id.* at 1167.

165. *Id.* at 1169. The adult business (The Lion's Den) was actually 1150 feet from the nearest home, next to the interstate.

166. *Id.* at 1177.

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

concerned that city officials had not “reasonably relied on studies analyzing the secondary effects of adult businesses.”¹⁶⁷ A city can rely on studies of reasonably similar businesses, but the studies must “fairly support[]’ its rationale.”¹⁶⁸

C. A Different Kind of Adult Business: Proper Consideration of the Off-Site Distinction

Finally, while the city’s initial burden of proof does not require consideration of the distinction between on- and off-site businesses, this does not mean that the distinction should—or even can—be ignored. Under the Tenth Circuit’s interpretation of *Alameda Books*, the on- and off-site distinction is properly considered once a city has met its initial burden of support for its ordinance and the burden has passed to the plaintiff.¹⁶⁹ Specifically, the Tenth Circuit maintained that an opponent of a zoning ordinance can come forward with evidence showing that a “type of adult business (*e.g.*, ‘off-site’) is relevantly different than those types of businesses analyzed in the studies supporting the ordinance (*e.g.*, ‘on-site’).”¹⁷⁰ However, unlike the Fifth Circuit’s standard, an opponent’s naked assertion “that off-site businesses are different from on-site businesses is not sufficient to shift the burden back to the city.”¹⁷¹ Rather, opponents must present evidence supporting their claims. Once a plaintiff has presented evidence that casts direct doubt on a city’s rationale, the burden will shift back to the city to provide further substantial evidence that off-site businesses cause the negative secondary effects at issue.¹⁷²

Considering the distinction between on- and off-site sexually oriented businesses later in the burden-shifting scheme is consistent with *Alameda Books* and its policies. While the *Alameda Books* Court has cautioned that cities cannot rely on “shoddy” evidence in justifying an ordinance, the Court never meant to raise the initial bar that a city must meet. The Tenth Circuit’s practice of putting the

167. *Id.* at 1167.

168. *Doctor John’s, Inc. v. City of Roy*, 465 F.3d 1150, 1167–68 (10th Cir. 2006) (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality decision)).

169. *Id.* at 1168.

170. *Id.*

171. *Id.*

172. *Alameda Books*, 535 U.S. at 439.

burden on opponents to “cast doubt on [a municipality’s] evidence and rationale”¹⁷³ is consistent with the Supreme Court’s policy of “deference to the evidence presented by the city” and its acknowledgement that “cities are ‘in a better position than the Judiciary to gather and evaluate data on local problems.’”¹⁷⁴ As such, the burden of proving that a study relied upon by a city improperly attributed on-site secondary effects to off-site businesses should rest on the sexually oriented business challenging the ordinance.

The Supreme Court’s admonition against “shoddy” evidence does not mean that it is necessary for a city, when meeting its initial burden of proof by showing a substantial government interest, to provide studies specifically addressing the secondary effects of off-site sexually oriented business or any other type of new adult business for that matter. Rather, as the Tenth Circuit stated in *Doctor John’s*, a city can rely on evidence, which, while not directly supporting the rationale behind the city’s ordinance, is nevertheless based on studies concerning reasonably similar businesses.¹⁷⁵ Requiring otherwise is inconsistent with the Supreme Court’s decision in *Alameda Books* and will unnecessarily impede good faith efforts by city councils, as well as undermine a municipality’s latitude to “experiment with solutions to admittedly serious problems,” in addressing the secondary effects of different types of sexually oriented businesses.¹⁷⁶ Proper consideration of the differences between reasonably similar adult businesses should not be ignored, but it must not become part of a city’s initial burden of proving a substantial government interest.

V. CONCLUSION

Like it or not, the adult entertainment industry is here to stay. While the owners and operators of establishments catering to the demands generated by this business have legitimate rights under the First Amendment, municipalities must also be free to respond to negative secondary effects that are incident to these types of operations. The Supreme Court has recognized this need and protected a city’s ability to enact content-neutral zoning ordinances

173. *Doctor John’s*, 465 F.3d at 1169.

174. *Id.* at 1168 (quoting *Alameda Books*, 535 U.S. at 440).

175. *Id.* at 1150.

176. *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring) (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976)).

1603] *Is a Strip Club More Harmful Than a Dirty Bookstore?*

aimed at reducing these secondary effects. Nevertheless, the Fifth Circuit has improperly interpreted the initial evidentiary burden that a city must meet in justifying these ordinances. Although a city cannot rely on “shoddy” evidence when enacting such ordinances, the Supreme Court’s standard does not require municipalities, in meeting their initial burden, to find or conduct new studies each time an affected adult business claims that it is a new or different kind of sexually oriented business. Rather, as the Tenth Circuit holds, cities must be allowed to rely on “studies of the secondary effects of reasonably similar businesses.”¹⁷⁷ While distinctions between different adult businesses are important considerations, they are properly considered *after* the city has met its initial burden of proof and the plaintiff has provided evidence that casts doubt upon the city’s rationale. Accordingly, the Tenth Circuit’s approach, which defers consideration of the on- and off-site distinction until later stages of litigation, properly interprets the Supreme Court’s standard by providing initial deference to cities while still ensuring that they are not ultimately relying on “shoddy data or reasoning.”¹⁷⁸

*Brigman L. Harman**

177. *Doctor John’s*, 465 F.3d at 1167 (quoting *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 690 (10th Cir. 1998)).

178. *Alameda Books*, 535 U.S. 425, 438 (2002) (plurality decision).

* Thanks are due to Professor Margaret Tarkington for her advice and encouragement throughout this process; Richard Salgado and Edward Thomas for their invaluable input and suggestions; and my wife Amy, who surely did not envision late night discussions about zoning adult businesses when she agreed to marry me.

