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First Amendment - Alameda Books v. City of Los Angeles

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CASE SUMMARIES

FIRST AMENDMENT

ALAMEDA BOOKS v. CITY OF LOS ANGELES

222 F.3D 719 (9TH CIR. 2000)

I. INTRODUCTION

The First Amendment to the United States Constitution protects freedom of speech.[1] Courts categorize government restrictions of speech as either content based or content neutral.[2] Content-based regulations restrict speech because of the specific idea or message conveyed.[3] Because content-based regulations greatly restrain a person's right to free speech, they must serve a compelling government interest and be nar-

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[1] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." *See* U.S. CONST. amend I.

[2] *See generally*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 12.1.2 (1997).

[3] This standard is known as strict scrutiny. *See* Turner Broadcasting Sys., Inc. v. FCC, 512 US 622-643 (1994). "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Id.* In *Turner*, the United States Supreme Court found that a federal law requiring cable companies to carry local broadcast stations was content neutral because the companies were required to include all stations regardless of their programming. *See id.* at 643-644.

rowly tailored to accomplish that interest.[4] Content-neutral regulations, on the other hand, regulate conduct that indirectly impacts speech.[5] In order to pass muster, content-neutral regulations must advance a significant state interest unrelated to the suppression of speech and not substantially burden more speech than necessary to further that interest.[6] Content-neutral restrictions often regulate the time, place, and manner of protected speech.[7] Zoning ordinances enacted to limit the time, place, and manner for certain categories of speech are therefore generally characterized as content-neutral restrictions.[8] In determining the validity of zoning regulations that restrict adult entertainment, the courts apply the intermediate scrutiny standard.[9] In *Alameda Books v. City of Los Angeles*,[10] (hereinafter, "City") the Ninth Circuit addressed the issue of whether a Los Angeles zoning ordinance regulating adult businesses constituted a legitimate content-neutral regulation.[11]

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[4] *See id.* at 642-643. The standard that requires a law to be narrowly tailored to achieve a compelling government interest is known as strict scrutiny. *See id.* Courts use the terms "significant" or "important" state interest interchangeably. *See generally*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 12.1.2.

[5] *See Turner,* 512 US at 642-643.

[6] This standard is known as intermediate scrutiny. *See id.*

[7] *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989). In *Ward*, the United States Supreme Court ruled that a New York City ordinance imposing volume restrictions on rock concerts to be performed on Central Park was a content-neutral zoning regulation unrelated to the suppression of speech. *See id.* at 791.

[8] A zoning regulation is a legislation dividing a city or county into areas for the purpose of limiting the use to which the land may be put, minimum size of lots, building types, etc. *See* BLACK'S LAW DICTIONARY (7th ed. 1999).

[9] *See* United States v. O' Brien, 319 U.S. 367, (1968), Clark v. Community for Creative Non Violence, 468 U.S. 288, (1984), Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[10] 222 F.3d 719 (9th Cir. 2000). The appeal from the United State District Court for the Central District of California was argued and submitted on February 8, 2000 before Circuit Judge Robert Boochever, Circuit Judge Michael Daly Hawkins, and Circuit Judge Sidney R. Thomas. *See id.* The decision was filed on July 27, 2000. Circuit Court Judge Michael Daly Hawkins authored the opinion. *See id.* A motion for rehearing was denied on August 28, 2000. *See id.*

[11] *See id.* at 720.

II. FACTS AND PROCEDURAL HISTORY

In *Alameda Books v. City of Los Angeles*,[12] the City of Los Angeles (hereinafter "City") enacted Los Angeles Municipal Code Section 12.70 on July 28, 1978, to ban adult businesses located within 1,000 feet of another adult business or within 500 feet of a church, school, or public park in the city of Los Angeles.[13] The City adopted Section 12.70 after a comprehensive study[14] conducted in 1977 revealed a positive correlation between concentrations of adult businesses and increases in crime.[15]

In 1983, the City amended section 12.70(C) to ban so-called "multiple use" adult businesses,[16] as defined by Section 12.70(B).[17] As amended, section 12.70(C) outlawed two or more adult businesses located in the same building.[18] In addition, the amendments modified the definition of "adult entertainment business" to specifically categorize an "adult

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[12] 222 F.3d 719 (9th Cir. 2000).

[13] *See id.* at 720. Section 12.70(C) provides that "No person shall cause or permit the establishment, substantial enlargement or transfer of ownership on an Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Adult Theater, Massage Parlor or Sexual Encounter Establishment within 1,000 feet of another such business or within 500 feet of any religious institution, school, or public park, within the City of Los Angeles." *See* L.A.M.C. § 12.70(C) (1977).

[14] In June, 1977, the City's Planning Department Commissions conducted a comprehensive study entitled "Study of the Effect of Adult Entertainment Establishments in the City of Los Angeles" to assess the negative secondary effects of adult businesses on the surrounding community. *See* Appellant's Opening Brief at 7, *Alameda Books*, 222 F.3d 719 (No. 98-56200).

[15] *See Alameda Books,* 222 F.3d at 720. The study revealed increases in prostitution, robberies, assaults and thefts. *See id.* The Study also indicated that, although there was "some basis to conclude" that adult businesses adversely impacted property values in the surrounding neighborhoods, the concentration of adult businesses was not the primary cause of this phenomenon. *See id.* n.1.

[16] The amended version provides that "NO person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure, or portion thereof, [. . .]" *See* L.A.M.C. § 12.70(C) (1983).

[17] L.A.M.C. § 12.70 (B), as amended, stated: "'Adult Entertainment Business'- Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Adult Theater, Massage Parlor, or Sexual Encounter Establishment, . . . , and each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." *See id.*

[18] *See id.*

bookstore"[19] and an "adult arcade"[20] as separate adult entertainment businesses, even if operated together or in conjunction with another adult entertainment business at the same location.[21]

Appellees Alameda Books, Inc. (hereinafter, "Alameda") and Highland Books, Inc., (hereinafter, "Highland"), operated adult businesses within the City of Los Angeles.[22] Neither business was located within 1,000 feet of another adult business or within 500 feet of any religious institution, school, or public park.[23] Both Alameda and Highland rented and sold sexually explicit products.[24] Additionally, both establishments offered two types of booths for videotape viewing.[25] Each store had only one entrance door and one employee supervising the entire location.[26] Furthermore, appellees were the sole owners of their respective businesses, and bookstore revenue was not distinguished from video booth revenue except for internal accounting purposes.[27]

On March 15, 1995, a City building inspector alleged that Alameda operated both an adult bookstore and an adult

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[19] Section 12.70(B)(2) defines an adult bookstore as: "An establishment which has a substantial portion of its-stock-in-trade and offers for sale for any form of consideration any or more of the following: (a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representation which are characterized by an emphasis of "specified sexual activities" or "specified anatomical areas"; or (b) Instruments, devices, paraphernalia which are deigned for use in connection with "specified anatomical areas." *See* L.A.M.C. § 12.70(B)(2).

[20] Section 12.70(B)(1) defines an "adult arcade" as: "An establishment where, for any form of consideration, one or more motion pictures, slide projectors or similar machines, for viewing by five or fewer persons each, are used to show films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas." *See* L.A.M.C.§ 12.70(B)(1) (1983).

[21] *See* L.A.M.C. § 12.70(C).

[22] *See Alameda Books*, 222 F.3d at 720.

[23] *See id.* at 721.

[24] *See id.*

[25] *See id.* Customers used preview booths to watch tapes that could be rented or purchased in the store. *See id.* Multi-channel viewing booths allowed patrons to watch movies on the premises. *See id.* The bookstores and the two types of booths were located in the same commercial space within the same building. *See Alameda Books*, 222 F.3d at 721.

[26] *See id.*

[27] *See id.*

arcade in the same building in violation of Section 12.70(c).[28] Alameda, joined by Highland, brought suit against the City seeking a declaratory judgment that Section 12.70(C) was unconstitutional, and an injunction to enjoin its enforcement under 42 U.S.C. 1983.[29] Both the City and the bookstores moved for summary judgment[30] on First Amendment grounds.[31] The City maintained that the ordinance was constitutional because it served the important government interest of preventing the negative secondary effects associated with adult businesses.[32] Alameda and Highland argued that the zoning regulation violated the First Amendment because it restricted their freedom of speech.[33]

The District Court for the Central District of California initially denied both summary judgment motions on the First Amendment issue because the court determined that the appellants stated "a genuine issue of fact as to whether appel-

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[28] *See id.*

[29] 42 U.S.C. 1983 provides that

"[e]very person who, under the color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the person injured in an action at law, suit in equity or other proper proceeding for redress, except in any other action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Id.

[30] A motion for summary judgment will be granted when "there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law." *See* FED. R. CIV. PROC. 56.

[31] *See supra* note 1 and accompanying text. Alameda and Highland argued that the ordinance, as applied to them, infringed upon their First Amendment right to free speech because Los Angeles failed to demonstrate that the ordinance served the important government interest of curbing the negative secondary effects caused by adult businesses. *See Alameda Books*, 222 F.3d at 721. In contrast, the City claimed that the enforcement of the regulation against the plaintiffs did not violate the Constitution because it was serving the important governmental interest of combating the deleterious secondary effects associated with adult businesses. *See id.*

[32] *See id* at 721.

[33] *See id.*

lees' bookstore and arcade components were separate businesses" for purposes of the Los Angeles ordinance.[34] Alameda and Highland subsequently filed a motion for reconsideration of the First Amendment portion of the District Court's order denying summary judgment.[35] On June 2, 1998, the court vacated its prior order and granted summary judgment in favor of Alameda and Highland finding that the ordinance was unconstitutional.[36] The court then issued a permanent injunction enjoining the City's enforcement of the ordinance against Alameda and Highland.[37] The City appealed to the United States Court of Appeals for the Ninth Circuit.[38]

III. NINTH CIRCUIT'S ANALYSIS

A. DE NOVO REVIEW[39] OF SUMMARY JUDGMENT

In reviewing the lower court's grant of summary judgment in favor of Alameda and Highland, the Ninth Circuit in *Alameda Books v. City of Los Angeles*[40] addressed whether there a genuine issue of material fact existed and whether the district court correctly applied the substantive law.[41] Although the court acknowledged that Los Angeles had an important interest in curbing the harmful secondary effects associated with a "concentration of adult businesses," it affirmed the district court's grant of summary judgment.[42] The court reasoned that the City did not meet its burden to show that it reasonably relied on conclusive evidence in support of the enactment of the zoning ordinance.[43]

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[34] *See id. See supra* note 30 and accompanying text.

[35] *See Alameda Books*, 222 F.3d at 721.

[36] *See id.*

[37] *See id.*

[38] *See id.*

[39] De novo review is an appeal in which the appellate court uses the trial court's record, but does not give deference to the lower court's rulings and reasoning. *See* BLACK'S LAW DICTIONARY (7th ed. 1999).

[40] 222 F.3d 719 (9th Cir. 2000).

[41] *See id.* at 722. In affirming summary judgment in favor of Alameda and Highland, the Ninth Circuit noted that although the district court analyzed the Los Angeles ordinance in a slightly different manner, the lower court ruling was nonetheless correct. *See id.*

[42] *See id.* at 724.

[43] *See id.*

B. THE *COLACURCIO* STANDARD CONTROLS

The Ninth Circuit recognized that two different formulations of the *Renton* standard have evolved from *Tollis v. City and County of San Bernardino*[44] and *Colacurcio v. City of Kent.*[45] In an attempt to dispel the confusion created by these two different tests, the court preferred the *Colacurcio* approach to analyze content-neutral regulations of speech.[46]

The Ninth Circuit first determined that Section 12.70(C) constituted a time, place, and manner regulation affecting adult establishments.[47] The court then summarily dismissed *Colacurcio*'s first inquiry into the purpose of the ordinance, stating that even if it were content neutral, it would fail to satisfy the second *Colacurcio* requirement that the regulation

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[44] *See* 827 F.2d 1329 (9th Cir. 1987).

[45] *See Alameda Books*, 222 F.3d at 720, 722-725. Under *Colacurcio*, a city might impose reasonable time, place, and manner restrictions, provided that the restrictions are: (1) content neutral; 2) narrowly tailored to serve an important interest; and (3) leave open ample alternative channels for communication. See *Colacurcio*, 163 F.3d 545, 551. Under *Tollis*, a court must inquire: (1) whether an ordinance is a time, place, and manner regulation; (2) if so, whether it is content-neutral or content-based; and (3) if content-neutral, whether it is designed to serve a significant state interest and does not unreasonably limit alternative avenues of communication. *See Tollis*, 827 F.2d at 1332.

[46] *See Alameda Books,* 222 F.3d at 722-723. The court noted that the two tests have no substantive difference since they yield the same result. *See id.* Nonetheless, the Ninth Circuit favored *Colacurcio*. "Colacurcio, however, better formulates the test. First, the third step of Tollis incorporates two distinct inquiries, which are more properly separated for both conceptual and practical reasons in Colacurcio. Additionally, Tollis needlessly establishes the time, place or manner inquiry as a distinct step. Time, place or manner is an objective description of a regulation (or one proffered by the enacting legislative body); it is not a talismanic incantation affording the ordinance a lesser degree of judicial scrutiny. To the contrary, the question the courts must ask is whether the time, place or manner regulation is content-neutral. The Supreme Court recognized as much in Ward when it excluded a time, place or manner analysis, which it had included in Renton, from its discussion. For the sake of clarity and consistency in future opinions, and because we believe the Colacurcio formulation is more aptly constructed, we will utilize it here." *Id.* The Ninth Circuit also noted that in *Colacurcio* the court held that the regulation must serve a "significant" state interest. *See Alameda Books*, 222 F.3d 723 n.3. *See also Colacurcio*, 163 F.3d at 551. In addition, the Ninth Circuit pointed out that *Tollis* did not explicitly include the narrow tailoring requirement as part of its third step. *See Alameda* Books, 222 F.3d at 723 n.4. *See also Tollis*, 827 F.2d at 1333.

[47] *See supra* note 45 and accompanying text.

must promote a significant state interest.[48]

Colacurcio's second prong required the government to show that the zoning ordinance furthers a significant state interest.[49] The court acknowledged that while the City had a substantial interest in reducing crime, the evidence addressed the concentration of adult businesses and indicated no correlation between a single adult business, such as Alameda and Highland, and increased crime.[50]

Although the City conceded that the 1977 study at assessed the deleterious secondary effects of a "concentration" of adult businesses, it nonetheless asserted that the study supported its inclusion of the combination arcade/bookstore under section 12.70(C).[51] Citing *Tollis* and *Renton*, the Ninth Circuit reiterated that the government must show that it relied on evidence permitting a reasonable inference that without the regulation adult businesses would produce harmful secondary effects.[52] The court found that the facts in this case were anal-

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[48] *See Alameda Books*, 222 F.3d at 723. The second step considers whether a substantial governmental interest exists. *See id. See also* Acorn Investments, Inc. v. City of Seattle, 997 F.2d 219, 222 (9th Cir. 1989) (holding unconstitutional under *Renton* a city licensing fee for specific types of adult theaters because the City failed to prove that these theaters were responsible for fostering the alleged negative secondary effects); and Turner Broadcasting Sys., Inc. v. FCC ("Turner II"), 520 U.S. 180, 211 (1997) (holding that in reviewing content-neutral regulations burdening speech under an intermediate scrutiny standard, the question for the courts is "whether the legislative inclusion was reasonable and supported by substantial evidence before the legislative body.").

[49] *See Alameda Books*, 222 F.3d at 723. *See also Colacurcio*, 163 F.3d at 551.

[50] *See Alameda Books*, 222 F.3d at 724-726. Therefore, the court found that Section 12.70(C) did not serve this significant state interest. *See id.* The 1977 study, which the city relied on as the basis for the regulation, assessed the negative secondary effects of a concentration of adult businesses, not the impact of a single adult establishment, such as Alameda or Highland. *See id.* The study treated an establishment containing both an arcade and a bookstore as a single business. *See id.* According to the study, negative secondary effects arise when an adult business is in close proximity to other adult businesses. *See id.* Los Angeles produced no evidence that a single adult establishment causes the same harmful secondary effects caused by a "concentration" of adult businesses, even if the establishment contains several different forms of adult entertainment under one roof. *See Alameda Books*, 222 F.3d at 724-726.

[51] See *id* at 724-725. Los Angeles asserted that the 1977 study provided a sufficient basis to allow it constitutionally proscribe the combination adult arcade/bookstore under Section 12.70(C). *See id.*

[52] *See id.* at 725.

ogous to *Tollis*.[53] The City of Los Angeles failed to present any findings that a combination bookstore/arcade produces the same negatives effects, namely increased crime, as a "concentration" of adult businesses.[54]

Los Angeles then argued that, since Renton allowed the city to rely on studies conducted by other cities or counties that linked adult businesses to increased crime in the neighborhood, the 1977 study merited similar deference.[55] The Ninth Circuit emphasized the City still retained the burden to prove that its own 1977 study was pertinent to the enactment of the code amendment.[56] Therefore, since the 1977 study only addressed the effects of a "concentration" of adult businesses on the surrounding community rather than those of a single adult business, the Ninth Circuit held that Los Angeles could not show that the ordinance was designed to accomplish the government's goals of reducing crime and preserving the quality of the neighborhoods.[57]

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[53] *See Alameda Books*, 222 F.3d at 725. In *Tollis,* an adult business offering both movies and live entertainment challenged the constitutionality of a zoning ordinance banning adult businesses within 1,000 feet from residential areas, churches, schools, parks or playgrounds. *See Tollis*, 827 F.2d at 1331, 1332. The Ninth Circuit upheld the regulation because the County failed to introduce any evidence that adult businesses caused the harmful secondary effects the regulation sought to prevent. See id. at 1333.

[54] *See Alameda Books*, 222 F.3d at 726. *Compare* Renton v. Playtime Theaters, Inc., 475 U.S. 41, 51-52 (1985) where the United States Supreme Court held that a city need not conduct new studies or produce evidence independent of that already gathered by other cities, as long as the evidence relied upon is reasonably believed to be relevant to problem the City is seeking to address. *See id.*

[55] *See Alameda Books*, 222 F.3d at 725. Although the Ninth Circuit acknowledged that courts should refrain from second-guessing the decisions of legislative bodies, such deference is not unbounded. *See id.* at 725. *Compare Renton*, 475 U.S. at 52 *quoting* Young v. American Mini Theaters, 427 U.S. 50, 71 (1976) (plurality opinion) "Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.*

[56] *See Alameda Books,* 222 F.3d at 725-726. A city can rely on foreign studies; however, this does not relieve the city from the obligation of demonstrating that the study must be reasonably believed to be relevant the problem the city seeks to address. *See Colacurcio*, 163 F.3d at 551 (quoting *Renton*, 475 U.S. at 51-52).

[57] *See Alameda Books*, 222 F.3d at 724. The court further explained that Los Angeles could not rely on the United States Supreme Court's decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). *See id.* at 726 n.7. In *City of Erie*, the Court upheld a ban on nude dancing because nude dancing at the establishment in question was of same character as adult entertainment at issue in prior Supreme Court's opinions.

C. DECISIONS IN OTHER CIRCUITS

The Ninth Circuit drew distinctions between similar cases in other circuits.[58] The Ninth Circuit first distinguished *Alameda Books* from *ILQ Investments, Inc. v. City of Rochester*,[59] where the Eighth Circuit upheld the constitutionality of an adult business zoning ordinance prohibiting on-premise viewing of adult movies or tapes.[60] There, the City of Rochester relied on foreign studies as evidence of negative secondary effects produced by adult businesses.[61] Nevertheless, the Ninth Circuit determined that the Los Angeles' ordinance would still fail under the Eighth Circuit analysis because Los Angeles 1977 study did not examine the effects of single adult businesses; rather, it focused only on a "concentration" of adult businesses.[62]

The Ninth Circuit then distinguished *Alameda Books* from *Mitchell v. Comm'n on Adult Entertainment Est.*,[63] where the Third Circuit held that the state need only show that adult businesses were a "class cause"[64] of harmful secondary

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See id. at 296. Thus, it was reasonable for the city to conclude that such nude dancing was likely to produce same secondary effects. *See id.* at 296. To justify ordinance regulating nude dancing, the city could reasonably rely on the evidentiary foundation set forth in previous Supreme Court opinions to effect that secondary effects were caused by the presence of even one adult entertainment establishment in a given neighborhood. *See id.* at 297. The Court thus ruled that the city was, therefore, not required to develop specific evidentiary record supporting ordinance. *See id.*

[58] *See Alameda Books*, 222 F.3d at 727-728.

[59] *See* 25 F.3d 1413, 1419 (8th Cir. 1994) (where the Eighth Circuit upheld the constitutionality of an adult business zoning ordinance based on foreign studies).

[60] *See id.* at 1419.

[61] *See id.* at 1417. The Eighth Circuit ruled that the city need not prove that the adult business in question would have caused the same harmful effects on its neighborhoods as the adult businesses examined in other jurisdictions. *See id.* at 1418. The court held that as long as the city ordinance affected only those categories of businesses reasonably believed to produce some of the deleterious secondary, the City of Rochester had to be afforded a reasonable opportunity to experiment with solutions to this problem. *See id.*

[62] *See Alameda Books*, 222 F.3d at 727.

[63] 10 F.3d 123, 138 (3d Cir 1993).

[64] It should be noted that the Third Circuit did not defined the terms "a class cause". However, this author opines that the court's terminology entails that a municipality need not prove that a particular adult business caused the negative secondary effects on the surrounding neighborhood. Rather, the Third Circuit seems to indicate that a single business by virtue of belonging to the category of adult

effects in residential neighborhoods.[65] The Third Circuit did not find that the state needed to prove the operation of its businesses directly contributed to the negative secondary effects in order to impose these regulations.[66]

Los Angeles attempted to analogize *Mitchell* to justify the application of Section 12.70(C) against Alameda and Highland.[67] The Ninth Circuit, however, interpreted the *Mitchell* holding to address the issue of whether the regulation was narrowly tailored, not whether the evidence produced could reasonably justify the regulation as serving an important governmental interest.[68] The court then indicated that merely requiring a showing that adult businesses were a "class cause" of harmful effects would not even meet the *Tollis* requirement that the regulation be based upon evidence permitting a reasonable inference that, absent such restrictions, adult businesses would produce harmful secondary effects.[69]

The City also argued that the Fourth Circuit in *Hart Book Stores*[70] upheld an ordinance substantially similar to Section 12.70(C).[71] The Ninth Circuit noted that *Hart* had been decided before *Renton*.[72] Consequently, *Hart* would not

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entertainment is presumed to produce negative secondary effects.

[65] *See Mitchell*, 10 F.3d. at 138. The adult bookstore challenging the restrictions, which included limited hours of operation and a ban on closed viewing booths, argued that, since it was not located near residential areas, it could not produce the same deleterious effects on the surrounding neighborhoods as other adult businesses in urban settings. *See id.* at 127-129. Adult Books pointed out that the business was located two miles away from any residential area on three sides and was separated from the residential area on its fourth side by an eight-lane freeway with no pedestrian crosswalks. *See id.*

[66] See *Alameda Books,* 222 F.3d at 727. Los Angeles urged the court to follow and rule that since Alameda and Highland were adult businesses likely to produce harmful secondary effects, they were subject to Section 12.70(C). *See id.*

[67] *See Alameda Books*, 222 F.3d at 726.

[68] *See id.*

[69] *See Alameda Books*, 222 F.3d at 727.

[70] *See* 612 F.2d 821 at 828.

[71] *See Alameda Books*, 222 F.3d at 727. The North Carolina law in *Hart* prohibited two or more adult businesses from occupying the same building. Adult bookstores and adult arcades where defined as separate establishments in the statute. *See Hart*, 612 F.2d at 823. In contrast, the Los Angeles ordinance did not define bookstores and arcades as separate businesses at the time of the 1977 study. *See* L.A.M.C. 12.70(C)

[72] *See Alameda Books*, 222 F.3d at 727-728.

likely withstand constitutional scrutiny today.[73] Furthermore, since the City ordinance only addressed the harmful secondary effects on the neighborhoods outside a "concentration" of adult businesses, and not inside or within its walls, the Ninth Circuit found the comparison with *Hart* inapplicable to *Alameda Books*.[74] Therefore, the Ninth Circuit held that Section 12.70(c) was unconstitutional as applied to Alameda and Highland, and affirmed the district court's injunction against enforcement of the ordinance.[75]

IV. IMPLICATIONS OF THE DECISION

The United States Supreme Court *in Renton v. Playtime Theaters*, Inc.,[76] established an attainable burden on a municipality for the enactment of zoning ordinances that regulate adult businesses.[77] The Ninth Circuit requirement that the City of Los Angeles produce a new study to demonstrate harmful secondary effects from an adult arcade and an adult bookstore housed under one roof appears contrary to *Renton*, as it raises the necessary evidence threshold for the enactment of adult zoning regulations.[78] Most courts tend to grant considerable deference to legislative bodies, especially in the presence of a significant state interest.[79] In contrast, the Ninth Circuit was unduly technical in requiring Los Angeles

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[73] *See id.* at 728. Moreover, the evidence relied upon in *Hart* consisted of a report on health conditions inside video viewing booths. *See Hart,* 612 F.2d at 828-829 n.9. Furthermore, *Hart* did not require proof that adult bookstores containing movie-viewing booths produced greater harmful secondary effects as compared to the combined secondary effects of two separate stores. *See id.* The only evidence of deleterious secondary effects mentioned in *Hart* was a brief reference to an inspection on some arcade booths within certain adult bookstores that revealed unsanitary conditions. *See id.* The Ninth Circuit then pointed out that such evidence would be insufficient to meet *Tollis'* reasonable inference requirement because the report pertained only to the conditions inside the adult establishments, not to its effects on its surrounding areas. *See Alameda Books*, 222 F.3d at 728.

[74] *See id.*

[75] *See id.* at 727.

[76] 475 U.S. 41 (1986).

[77] *See* text accompanying note 56.

[78] *See* Alameda Books v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000).

[79] *See id.* at 724. The Ninth Circuit acknowledged the fact that the City of Los Angeles had a significant state interest in curtailing the harmful secondary effects adult businesses produced. *See id.*

to present a particularized report detailing the deleterious secondary effects that an adult arcade/bookstore combination may cause on the surrounding areas.[80]

Other circuits that addressed the same issue have refused to support the proposition that the municipalities must conduct specific studies in support of the enactment of adult zoning regulations.[81] Therefore, the Ninth Circuit's ruling in *Alameda Books* seemingly deviates from the intermediate scrutiny standard that the *Renton* Court proscribed and that most circuit courts follow.

Municipalities, however, may circumvent the *Alameda* evidentiary requirement by presenting specific evidence assessing the particular problem an ordinance attempts to solve. Thus, the Ninth Circuit decision in *Alameda Books* cannot be regarded as a victory for adult expression in general. The existing municipal code section can be applied against those adult businesses in Los Angeles that constitute a "concentration" of adult businesses as assessed by the 1977 study.

*Katia Lazzara**

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[80] *See* generally ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir. 1994), Mitchell v. Comm'n on Adult Entertainment Est., 10 F.3d 123 (3d Cir. 1993), Hart Book Stores v. Edminsten, 612 F.2d 828 (4th Cir. 1979).

[81] The Tenth Circuit in *Z.J. Gifts v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998), upheld a zoning ordinance which had been challenged by an adult bookstore owner on the ground that the evidence relied upon by the City Council did not conclusively prove that the plaintiff's business contributed to the deleterious secondary effects. *See id.* at 685. The Tenth Circuit ruled that the evidence had to support only the City's purpose in enacting the ordinance and that the regulation affected only those businesses that caused unwanted secondary effects. *See id.* at 689. In addition, the Second Circuit consistently upheld New a York City's adult business ordinance in *Buzzetti v. City of New York*, 140 F.3d 134, 135 (2d Cir. 1998) and *Hickerson v. City of New York*, 146 F.3d 99 (2d Cir. 1998). The Second Circuit ruled that, since the City had established a correlation between adult businesses and the negative secondary effects they produce, the ordinance met the evidentiary standard set forth by the United States Supreme Court in *Renton*. *See Hickerson,* 146 F.3d at 105-106.

* J.D. candidate 2002.