

No. 09-1027

**In the
Supreme Court of the United States**

CITY OF NEW ALBANY, INDIANA,

Petitioner,

v.

NEW ALBANY DVD, LLC,

Respondent.

*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit*

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF AND BRIEF OF THE INTERNATIONAL
MUNICIPAL LAWYERS ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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**INTEREST OF *AMICUS CURIAE* AND MOTION
FOR LEAVE TO FILE BRIEF AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

The International Municipal Lawyers Association (“IMLA”) urges this Court to grant it leave to appear in this case as *amicus curiae* in support of Petitioner, the City of New Albany, Indiana.¹ At stake in this case is the essential right of all municipalities to zone sexually oriented businesses to locations that are away from houses of worship, parks, schools, residences, and other sexually oriented businesses.

IMLA is a nonprofit, professional organization of over 3,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA’s mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court,

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no part of this brief was authored by counsel for either party. No person other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties received notice at least 10 days before the due date of this brief. The City’s written consent to the filing of this brief is filed with the Clerk’s office. DVD objects to the filing of this brief, and therefore, *amicus curiae* files this motion for leave to appear in this case.

in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA's local government members are the entities most-affected by federal appellate court decisions involving the regulation of sexually oriented businesses and their secondary effects. Local governments are the entities charged with the duty of responsibly governing the communities within which sexually oriented businesses are located, and they are responsible for addressing the adverse secondary effects that these businesses create. Thus, IMLA has a compelling interest in the development of the law governing the regulation of sexually oriented businesses. The subject of this case -- the evidentiary burden that a local government must meet in order to enact an ordinance that zones sexually oriented business uses -- is, therefore, of the utmost importance to IMLA and its members.

When adopting its zoning regulations prohibiting sexually oriented businesses from operating within certain distances from each other and from houses of worship, parks, schools, and residences, the City relied upon numerous studies, reports, testimony, judicial decisions, eyewitness observation, and other evidence regarding the adverse secondary effects of sexually oriented businesses. Despite the plethora of evidence that the City relied upon, the Seventh Circuit concluded that the City failed to adequately support its regulations because it did not rely upon evidence of adverse secondary effects caused by the *specific type* of sexually oriented business that Respondent, New Albany DVD ("DVD"), desired to operate. In essence, the Seventh Circuit mandated that when adopting zoning regulations, local governments must find and

rely upon evidence of adverse secondary effects caused by each and every conceivable type of sexually oriented business; and if a local government fails to introduce evidence of adverse secondary effects of any specific type of sexually oriented business, the local government cannot regulate, through its zoning power, that specific type of sexually oriented business. The Seventh Circuit's holding significantly impedes the exercise of reasonable legislative predictive judgment and local governments' efforts and ability to balance the needs of providing ample area for sexually oriented businesses to locate on the one hand and for protecting citizens from secondary effects on the other hand. Additionally, the holding undermines and conflicts with precedent established by this Court.

These effects impact municipalities nationwide, and therefore, *amicus curiae*, the International Municipal Lawyers Association, requests leave to appear. The following brief is filed in support of the City's plea to this Court to accept jurisdiction over this case.

**BRIEF OF THE INTERNATIONAL
MUNICIPAL LAWYERS ASSOCIATION AS
AMICUS CURIAE IN SUPPORT
OF PETITIONER**

**BACKGROUND AND SUMMARY OF
THE ARGUMENT**

This case involves the constitutionality of two traditionally-designed *zoning* ordinances (hereinafter collectively referred to as “ordinance”) adopted by Petitioner, the City of New Albany (“City”), as applied to an adult bookstore (“DVD”). Like most traditionally-designed zoning schemes utilized around the country, the City has chosen to permit particular land uses by zoning category. The ordinance at issue here provides that sexually oriented businesses, as a category of commercial business, are a permitted use in several zoning categories including: C-2 (General Business), C-3 (Regional Shopping Center), I-1a (Light Industrial), I-1b (Light Industrial Park), and I-2 (Heavy Industrial). The ordinance further provides that a sexually oriented business must not be located 1,000 feet from any house of worship, day care center, public or private elementary or secondary school, residential district, and any other sexually oriented business. The ordinance also prohibits a sexually oriented business from locating within 500 feet of any dwelling.

The City recognized that the known adverse secondary effects of sexually oriented businesses include “crime, blight, litter, and the downgrading of property values.” The City sought to combat these negative secondary effects and to “preserve the quality

of life and the urban setting . . . and character of surrounding neighborhoods” in its community, by adopting zoning regulations that govern where sexually oriented businesses may operate. In passing its zoning regulations, the City relied upon numerous studies, reports, and materials detailing the negative secondary effects of sexually oriented businesses. The City also relied upon numerous judicial decisions upholding regulations pertaining to sexually oriented businesses, including decisions rendered by this Court. Specifically, the City relied upon this Court’s decisions in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) for the important *zoning* proposition that local governments have a substantial interest in regulating the location of sexually oriented businesses.

The City denied DVD’s zoning permit application to operate a sexually oriented business for the sole reason that its location does not comply with the ordinance because it is within: (1) 175 feet of a church, (2) 115 feet of a residential district, and (3) adjacent to a dwelling. In an effort to circumvent the City’s zoning regulations, DVD challenged the ordinance and sought a preliminary injunction. DVD claimed the ordinance violated its First Amendment rights because the ordinance is based on the books’ and videos’ content or subject matter and because the City did not justify that it had a substantial government interest in regulating adult bookstores that do not have peep show booths. Importantly, DVD did *not* contend that the City’s zoning scheme infringes upon its First Amendment rights because it offers an insufficient number of available sites to operate. To the contrary, as noted by the Seventh Circuit in its decision, DVD did not challenge the City’s contention that “more land

is available for adult establishments than is put off limits by this ordinance.” *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556, 559 (7th Cir. 2009).

The district court held an evidentiary hearing and found that the City’s evidence identified adverse secondary effects and demonstrated that the City had a substantial government interest in remedying those secondary effects. The district court also found that the studies the City relied upon in enacting the ordinance are relevant to the regulation of secondary effects, including crime. Further, the district court found that DVD’s evidence did not, under the shifting burden test set forth in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (plurality opinion), cast “direct doubt” on the City’s rationale for the ordinance. Nevertheless, the district court granted the injunction, finding that the ordinance was not narrowly tailored to prevent the harms identified in the City’s evidence. The district court concluded that the ordinance was not narrowly tailored because: (1) the ordinance broadly restricts adult businesses from locating near dwellings, but not specifically occupied dwellings; and (2) rather than imposing distance requirements from houses of worship, the ordinance could restrict the adult businesses’ hours of operation to exclude Sundays or times when the houses of worship are in service.

DVD appealed the district court’s decision to the Seventh Circuit. The Seventh Circuit started its analysis by essentially rejecting the district court’s narrowly tailored rationale, opining that the narrowly tailored standard “does not mean that the ordinance must be the least restrictive possible regulation.” *New Albany*, 581 F.3d at 559. The Seventh Circuit also

indicated that “[w]hen some regulation is justified, a city has considerable discretion on matters of detail. The sort of zoning rule that New Albany enacted has been too widely used, and too often sustained, to be upset as ‘not narrowly tailored.’” *Id.* at 559. Despite those conclusions, the Seventh Circuit upheld the injunction and prevented the City from enforcing the location requirement in the ordinance.

Relying on and incorporating its recent decision in *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009), the Seventh Circuit found that the City had not introduced any evidence demonstrating that adult book stores without peepshow booths cause adverse secondary effects. *Annex Books* holds that under intermediate scrutiny, “to prevail, the City needs evidence that the restrictions actually have a public benefit great enough to justify any curtailment of speech.” *Id.* at 462. In order to reach this conclusion, the Seventh Circuit ignored all of the evidence that the City reasonably relied upon in adopting the ordinance, including evidence that sexually oriented businesses, as a category of commercial business, cause “crime, blight, litter, and the downgrading of property values.”

The Seventh Circuit’s heightened evidentiary standard conflicts with the “reasonably believed to be relevant” standard announced in *Renton* and reiterated in *Alameda Books*. Additionally, this heightened evidentiary standard -- coupled with the court’s acknowledgment that New Albany has “more land . . . available for adult establishments than is put off limits by this ordinance” -- impedes the implementation of traditional zoning ordinances

regulating sexually oriented businesses, such as those upheld by this Court in *Young* and *Renton*.

The City of New Albany's petition should be granted for three independent reasons. First, the Seventh Circuit added an interpretive heightened evidentiary burden to the "reasonably believed to be relevant" standard used to justify sexually oriented business zoning ordinances. It held that in order for a city "to prevail, the city needs evidence that the restrictions actually have a public benefit great enough to justify any curtailment of speech." *See New Albany*, 581 F.3d at 560 (citing *Annex Books*, 581 F.3d 460). This holding is contrary to *Renton* and its progeny. Second, by increasing the evidentiary burden, the Seventh Circuit's decision requires citizens to suffer secondary effects of sexually oriented businesses before a legislative body can take action to ameliorate such effects. This defies common sense, reason, and this Court's precedent. It also threatens cities' long-established use of traditional "Euclidean-style" zoning regulations as a means of preventing the adverse secondary effects of sexually oriented businesses by dispersing those businesses away from houses of worship, parks, schools, residences, and other sexually oriented businesses. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (decision of this Court upholding the early zoning concept of separating incompatible land uses; this type of zoning thereafter became known as "Euclidean-style" zoning). Third, the Seventh Circuit's decision diverges from this Court's precedents and exacerbates the split amongst the circuit courts of appeal over the requirements of *Alameda*.

ARGUMENT**I. THE SEVENTH CIRCUIT’S RULING MISTAKENLY INCREASED THE EVIDENTIARY BURDEN THAT GOVERNMENTS MUST SATISFY WHEN ENACTING SEXUALLY ORIENTED BUSINESS ZONING REGULATIONS SO THAT THOSE REGULATIONS DO NOT INFRINGE UPON RIGHTS PROTECTED BY THE FIRST AMENDMENT.**

While a municipality cannot use a zoning regulation as a pretext to ban or suppress speech, the Court has recognized that a municipality’s use of its zoning power “to preserve the quality of urban life is one that must be accorded high respect.” *See Renton*, 475 U.S. at 50 (quoting *Young*, 427 U.S. at 71). In this context, the Court has analyzed zoning ordinances regulating the location of sexually oriented businesses as a time, place, and manner regulation. *Id.* at 46. This Court has applied intermediate scrutiny and has upheld “content neutral” zoning ordinances that are aimed at the secondary effects of such businesses, when it is demonstrated that the ordinances serve a substantial government interest and allow for reasonable alternative avenues of communication. *Renton*, 475 U.S. at 47.

In *Renton*, this Court reversed the Ninth Circuit and declared valid a zoning ordinance that prohibited an adult motion picture theater from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school. The Ninth Circuit had invalidated the zoning ordinance because the city failed to produce empirical evidence

specifically relating to “the particular problems or needs of Renton.” *Id.* at 50. This Court found that the Ninth Circuit “imposed on the city an unnecessarily rigid burden of proof,” and concluded that the city’s reliance upon only a single opinion of the state supreme court in which the related experiences of the city of Seattle with adult theaters was thoroughly discussed was sufficient to demonstrate Renton’s substantial government interest in regulating adult theaters. *Id.* at 50-51.

This Court held:

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.

Id. at 51-52.

After *Renton*, this Court has on several occasions refused to impose a stringent evidentiary burden on cities attempting to mitigate against the secondary effects of sexually oriented businesses, and has maintained that a city “may rely on any evidence that is ‘reasonably believed to be relevant’ for demonstrating a connection between the speech and a substantial, independent government interest.” See *Alameda Books*, 535 U.S. at 439 (reliance on one 1977 study by city’s planning department); *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (reliance on two Supreme Court cases and over a century of city council findings); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560

(1991) (no legislative record, but reliance on judicial opinions during litigation).

Furthermore, in *Alameda Books*, the plurality opinion, authored by Justice O'Connor, clearly rejected the argument made by the dissent that empirical evidence was required in order to demonstrate that the government had a substantial governmental interest in regulating a particular form of adult entertainment. *Alameda Books*, 535 U.S. at 438-42. Also, the Court rejected the notion that the government must prove that its theory about the evidence of secondary effects is the only plausible explanation for the evidence. *Id.* In his concurring opinion, Justice Kennedy also refused to require a municipality to present empirical evidence to support its regulation. Although Justice Kennedy emphasized that “[a] city may not assert that it will reduce secondary effects by reducing speech in the same proportion,” *Id.* at 449 (Kennedy, J. concurring), he also stated that the Court has consistently opined that “a city must have latitude to experiment, at least at the outset, and that very little evidence is required.” *Id.* at 451 (Kennedy, J., concurring) (citing *Renton*, 475 U.S. at 51-52). In addition, Justice Kennedy concluded “[a]s a general matter, courts should not be in the business of second-guessing fact bound empirical assessments of city planners,” and that cities are “entitled to rely on that knowledge” and reasonable inferences from that knowledge in adopting adult entertainment regulations. *Id.* at 451-52 (Kennedy, J., concurring).

While the Court in *Alameda Books* outlined a burden-shifting *procedural* framework for analyzing whether *Renton's* minimal burden is met, and stated that a legislative body cannot rely on “shoddy data or

reasoning,” the Court did not increase the “reasonably believed to be relevant” evidentiary standard enunciated in *Renton*.

Even though this Court has consistently upheld the “reasonably believed to be relevant” evidentiary standard enunciated in *Renton*, the Seventh Circuit found in this case that the City’s extensive record of adverse secondary effects of sexually oriented businesses was not sufficient to sustain the constitutionality of the City’s zoning ordinance that mandated that a sexually oriented adult bookstore be separated from houses of worship, parks, schools, residences, and other sexually oriented businesses. In fact, the Seventh Circuit did not even mention the “reasonably believed to be relevant” standard in its decision in this case, and imposed an additional evidentiary burden that requires the City to produce evidence that its zoning ordinance “actually” has “a public benefit great enough to justify any curtailment of speech.” In essence, the Seventh Circuit is asking the City to demonstrate with certainty the exact outcome and consequences the zoning ordinance will have; that task is virtually impossible in the legislative arena, especially during the process of enacting a new law. This heightened evidentiary burden has no judicial anchor in any of the Court’s precedents, and threatens to dramatically misdirect future secondary-effects cases away from the procedural and substantive requirements set forth in *Renton* and *Alameda Books*. Accordingly, the Seventh Circuit’s decision should be reviewed and reversed.

II. THE SEVENTH CIRCUIT CAST ASIDE THE FUNDAMENTAL PRINCIPLE THAT LEGISLATIVE BODIES CAN ACT BASED ON REASONABLE PREDICTIVE LEGISLATIVE JUDGMENTS. AS A RESULT, THE SEVENTH CIRCUIT'S DECISION CAUSES CITIZENS TO SUFFER THE SECONDARY EFFECTS OF SEXUALLY ORIENTED BUSINESSES BEFORE LEGISLATIVE BODIES CAN TAKE ACTION TO AMELIORATE THOSE EFFECTS THROUGH THE USE OF ZONING.

The Seventh Circuit's decision threatens one of the most essential and critical tools that cities have to mitigate against the secondary effects of sexually oriented businesses: the ability, through their police power, to enact local zoning ordinances that regulate the *location* of sexually oriented businesses, before the public is forced to suffer the harm of those secondary effects.

When ruling that municipal police power justifies the enactment of zoning ordinances, courts have pointed to the need to prevent congestion, to secure quiet residential districts, and to procure an orderly segregation of industrial, commercial, and dwelling areas brought about by the constantly increasing density of urban populations, the multiplying forms of industry, and the growing complexities of civilization. 1 Rathkopf's *The Law of Zoning and Planning* § 1:2 (4th ed.). As early as 1926 in *Village of Euclid v. Ambler Realty Co.*, this Court recognized, as a valid exercise of municipal police power, a municipality's right to adopt a zoning ordinance classifying general land uses in a particular area in specific enumerated zoning categories. *Euclid*, 272 U.S. 365 (1926). In *Euclid*,

this Court found that the village had “substantial” and “sufficient” justifications for adoption of the zoning ordinance, including:

promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops and factories.

Id. at 391-93.

Over the years, this basic zoning principle of prescribing by ordinance definite zoning district categories (such as residential, commercial, and industrial), and classes and subclasses of land uses allowed within such categories – which was upheld by this Court in *Euclid* -- became known as “Euclidean Zoning.” *See, e.g.*, 1 Rathkopf’s *The Law of Zoning and Planning* § 10:2 (4th ed.). Euclidean Zoning is a very prominent and indispensable planning tool that is used throughout the country, including in the City of New Albany, to establish an appropriate place for all kinds of uses.

In Village of Belle Terre v. Borras, this Court reaffirmed the validity of Euclidean Zoning, stating: “[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay

out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.” *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Further, this Court opined that “[a] zoning ordinance usually has an impact on the value of property which it regulates. *Id.* at 9.

Over the past 40 years or so, municipalities have extensively relied on the principles of Euclidean Zoning to pro-actively regulate the location of sexually oriented businesses in order to combat by preemptive strike the secondary effects of such businesses on the community. This effort has generated an extraordinary amount of litigation in state and federal courts. Indeed, this Court has on several occasions addressed the location of sexually oriented businesses in the context of municipal zoning powers. With the exception of *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), which involved a city’s failure to justify a *total ban* on live entertainment, this Court has consistently upheld cities’ exercise of their zoning power to assign sexually oriented businesses to certain areas.

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), two adult motion picture theaters brought an action challenging a zoning ordinance adopted by the City of Detroit that applied to theaters that presented materials emphasizing specified sexual activities and anatomical areas. The zoning ordinance prohibited such theaters from locating within 1,000 feet of certain regulated uses and 500 feet from residential areas. Recognizing “the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems” and that “the city’s interest in attempting to preserve the

quality of urban life is one that must be accorded high respect,” this Court held that the City “may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.” *Id.* at 70-71.

The Court reviewed another zoning ordinance that imposed locational requirements on adult motion picture theaters in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *Renton*, the Court upheld a zoning ordinance that prohibited adult theaters from locating within 1,000 feet of any residential zone, park, or school. While *Renton* is often cited for the “reasonably believed to be relevant” evidentiary standard regarding secondary effects, *Renton* is also an example of the legislative deference that the Court has given to cities to make difficult zoning decisions regarding the “admittedly serious problems” occasioned by the location of sexually oriented businesses when there are “reasonable alternative avenues of communication.” *Id.* at 53-55 (“It is not our function to appraise the wisdom of [the city’s] decision to require adult theaters to be separated rather than concentrated in the same area . . .”).

Lastly in *City of Los Angeles v. Alameda Books, Inc.*, an adult bookstore/video arcade challenged a zoning ordinance that required adult entertainment establishments from being within 1,000 feet from other such establishments or within 500 feet of religious institutions, schools, or public parks. After the city closed a loophole that allowed multiple businesses to operate under one roof, the ordinance also had the effect of forbidding the combination of more than one adult use from being located in a single building. Consequently, the adult businesses were required to

split the two kinds of businesses and operate them at different locations. Again, this Court deferred to the city's local zoning judgment and upheld the dispersal requirement. *Alameda Books*, 535 U.S. at 440 (acknowledging "that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on a local problem").

This Court has repeatedly recognized the importance of local zoning power to preserve the quality of life. And, this Court has preserved the "essence" of this power in cases where a city has attempted to ameliorate the secondary effects of sexually oriented businesses by pro-actively "[making] some areas available for [sexually oriented businesses] and their patrons, while at the same time preserving the quality of life in the community at large by preventing the businesses from operating in other areas." *See City of Renton*, 475 U.S. at 54. The Court has also looked favorably upon a city's substantial interest in choosing between two zoning strategies for the location of sexually oriented businesses; the Court has opined that the city can either "concentrate businesses for a concentrated regulatory strategy, or disperse them in order to spread out its regulatory efforts." *See Alameda Books*, 535 U.S. at 465 (Souter, J., dissenting) (recognizing that the Court held in *Renton* and *Young* that municipalities can concentrate adult entertainment businesses or disperse them).

Here, the Seventh Circuit, faced with reviewing a zoning ordinance that is "widely used" and "often sustained," found that the City's evidence of secondary effects failed to justify the use of traditional zoning principles to require that retail-only sexually oriented businesses be located away from houses of worship,

schools, parks, and residences. The Seventh Circuit commented negatively about the City's evidence regarding "litter" and "theft," but did not address in any fashion whatsoever the City's other evidence that justifies the zoning location restrictions imposed as a means of preserving "the quality of life and the urban setting; preserve the property values and character of surrounding neighborhoods and deter the spread of urban blight." For example, the Seventh Circuit disregarded the testimony of reknown secondary effects expert Dr. Richard McCleary, who testified that the data imported into the ordinance established an adequate factual predicate for the law.² (Petitioner's Brief, App. B, p.23a). And, the Seventh Circuit discounted the City's reliance upon *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004). *World Wide Video* also involved the zoning of a retail-only adult store. In *World Wide Video*, the Ninth Circuit found that the city, through testimonial evidence, demonstrated that retail-only sexually oriented stores had negative "economic and aesthetic impacts upon neighboring properties and the community as a whole." *Id.* at 1197-98. The City's reliance upon Dr. McCleary's testimony and *World*

² After the hearing in the district court and prior to Seventh Circuit's decision, Dr. McCleary published two articles corroborating the criminological theoretical expectation that off-site/retail sexually oriented businesses generate the same crime-related secondary effects expected for on-site sexually oriented businesses. Richard McCleary, *Crime Related Secondary Effects, Secondary Effects of "Off-Site" Sexually Oriented Businesses* (June 2008) (printed as Part II of Report of the Texas City Attorneys Ass'n); Richard McCleary and Alan C. Weinstein, *Do "Off-Site" Adult Businesses Have Secondary Effects? Legal Doctrine, Social Theory, and Empirical Evidence*, 31 Law & Policy No. 2 (Apr. 2009).

Wide Video should have provided a sufficient basis for the Seventh Circuit to rule in favor of the City in this case. See *Alameda Books*, 535 U.S. at 465 (Souter, J., dissenting) (“The limitations on location required no further support than the factual basis tying location to secondary effects.”). The Seventh Circuit should have considered “all” of the evidence the City relied upon to adopt the ordinance, including the City’s reliance upon Dr. McCleary’s testimony and *World Wide Video*. Further, rather than substitute its judgment for that of the City’s legislative body, the Seventh Circuit should have given the City’s “inferences” and findings regarding this evidence more deference because of the City’s right to pro-actively exercise its legislative judgment to address secondary effects by use of its zoning power.

This Court has long recognized the power of legislative bodies to base regulatory decisions on predictive judgments. “A fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it.” *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997). This principle is even more applicable in the context of a time, place, and manner zoning regulation because content neutral regulations “do not impose the same ‘inherent dangers to free expression’ that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution.” *Id.* at 213 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994)).

Not surprisingly, when the Seventh Circuit cast aside this fundamental principle, it prevented the City

from making predictive legislative judgments on the basis of reasonably relevant evidence of secondary effects. This holding puts cities in a “catch-22”; if the sex industry creates a new subclass of sexually oriented business, cities will not have any actual evidence upon which to rely to regulate the new subclass because the evidence is non-existent until that subclass operates. Under the Seventh Circuit’s reasoning, a city will have to wait for the secondary effects to occur before it can attempt to classify the use, like it does for other sexually oriented businesses in its zoning scheme. By then, the secondary effects will have already adversely affected the city and its citizens. The Seventh Circuit would have the city and its citizens first suffer the secondary effects, and thereafter attempt to regulate the business and reverse the secondary effects.

The practical land-planning problem with this rigid rule, from a zoning perspective, is that a city will have to suffer an avoidable harm and then either permanently live with the harm, or force the sexually oriented business to relocate to another location in order to prevent the harm from occurring. Of course, the latter approach would create many additional complicated legal issues that could expose a city to tremendous liability. Many cities do not have the resources to engage such a battle, and therefore, would be forced to endure the secondary effects rather than face the legal consequences of trying to ameliorate them. This judicially created “catch-22” can be avoided if the city’s ability to make predictive legislative zoning judgments is not saddled with a rigid evidentiary rule like the one imposed by the Seventh Circuit. There is no basis in law, reason, or common sense for this illogical rule.

Many cities across the country – like the City of New Albany in this case – have, throughout the years, exercised reasonable legislative judgment and employed Euclidian Zoning principles to adopt *Renton* and *Young*-type locational standards for sexually oriented businesses as a class of commercial use. *See, e.g.*, Municode.com (containing electronic copies of hundreds of city and county zoning codes across the United States). Many of these cities have diligently relied on the deferential “reasonably believed to be relevant” evidentiary standard in good faith to locate sexually oriented businesses within their respective communities.

If it is not reversed, the Seventh Circuit’s decision will erode, if not destroy, this Court’s long history of respecting local governments’ predictive legislative judgment to find solutions to difficult problems. This Court should overturn the Seventh Circuit’s ruling and reiterate the long-standing principle that local governments may pro-actively exercise their legislative judgment to address the secondary effects of sexually oriented businesses by using their zoning power to require that sexually oriented businesses be located in specific areas.

III. THE SEVENTH CIRCUIT’S DECISION EXACERBATES A GROWING CONFLICT IN THE CIRCUIT COURTS OF APPEAL REGARDING THE INTERPRETATION OF THIS COURT’S DECISION IN CITY OF LOS ANGELES V. ALAMEDA BOOKS.

Admittedly, the Seventh Circuit has recognized that “appellate decisions have struggled to understand and apply *Alameda Books*.” *See Annex Books*, 581 F.3d

at 466. This struggle has caused conflict at the circuit court level, especially with respect to applying the *Renton* evidentiary standard to the regulation of “specific kinds” of sexually oriented businesses, like adult retail bookstores. This conflict supports the City’s request that the Court hear this case.

In an approach similar to the one used by the Seventh Circuit in this case, the Fifth Circuit placed an increased burden on the city of San Antonio in *Encore Videos v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003), *cert. denied*, 540 U.S. 982 (2003). In *Encore*, a sexually oriented retail video store challenged the city’s zoning provision that prohibited sexually oriented businesses from operating within 1,000 feet of residential areas, churches, schools, and parks. The Fifth Circuit struck down the ordinance on the basis that the city did not produce “some substantial evidence of the secondary effects of establishments that sell products solely for off-site consumption.” *Id.* at 295. Interestingly, the Fifth Circuit reached a contrary conclusion several years later on a similar zoning ordinance in *H and A Land Corp. v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007) (finding it was reasonable for the city to rely on real estate appraiser surveys to predict that the presence of an adult bookstore would negatively affect real estate value in surrounding area), *cert. denied*, 552 U.S. 825 (2007).

On the other hand, other circuit courts have more faithfully applied the “reasonably believed to be relevant” evidentiary standard under *Renton* and *Alameda Books*. For example, in *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512 (6th Cir. 2009), the Sixth Circuit upheld a county’s sexually oriented

business regulations against an attack made by two sexually oriented businesses that sell and rent books, magazines, and videos to adults for “off-site consumption” or “retail only.” Interpreting *Alameda Books*, the Sixth Circuit stated that “[r]equiring local governments to produce evidence of secondary effects for all categories created by every articulable distinction is a misapprehension of the Supreme Court’s holding that governments may rely on any evidence ‘reasonably believed to be relevant.’” *Id.* at 526. In addition, in another sexually oriented business “retail” case, the Ninth Circuit upheld a zoning ordinance similar to the one struck down by the Seventh Circuit in this case. *See World Wide Video*, 368 F.3d at 1195 (“The citizen testimony concerning pornographic litter and public lewdness, standing alone, was sufficient to satisfy the ‘very little’ evidence standard of *Alameda Books*.”). The Eleventh Circuit has also upheld a sexually oriented business zoning ordinance and public nudity ordinance from evidentiary attack in *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (2007), *cert. denied*, 128 S. Ct. 1246 (2008). In that case, the Eleventh Circuit expressly rejected the claim that *Alameda Books* “raises the evidentiary bar or requires a city to justify its ordinances with empirical evidence or scientific studies.” *Id.* at 880; *see also Flanigan’s Enterprises, Inc. v. Fulton County*, No. 08-17035, 2010 WL 520542 (11th Cir. Feb. 16, 2010).

These conflicts necessitate that the Court clarify the evidentiary standard required by *Renton* and *Alameda Books*.

CONCLUSION

For the foregoing reasons, the Court should grant the City's Petition for Writ of Certiorari.

Respectfully submitted,

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