West Reporter Image (PDF)

63 USLW 2313, 1994 Fed.App. 0386P

Exhibit 9

United States Court of Appeals,
Sixth Circuit.
TRIPLETT GRILLE, INC., d/b/a The Back Door, Plaintiff-Appellee,
v.
CITY OF AKRON, Defendant-Appellant.
No. 93-3418.
Argued May 2, 1994.
Decided Nov. 14, 1994.

Operator of club brought action against city, challenging constitutionality of public indecency ordinance. The United States District Court for the Northern District of Ohio, Sam H. Bell, J., 816 F.Supp. 1249, held that ordinance was substantially overbroad and violated First Amendment. City appealed. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that: (1) indecency ordinance did not violate First Amendment as applied to prohibit nude dancing at club, despite claim that ordinance was not enacted to combat secondary effects of adult entertainment, but (2) ordinance, facially banning all nudity in public places, was facially unconstitutional under First Amendment overbreadth doctrine, as city had failed to demonstrate link between nudity in nonadult entertainment and secondary effects.
Affirmed.

Ed's ordinance

West Headnotes

[1] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

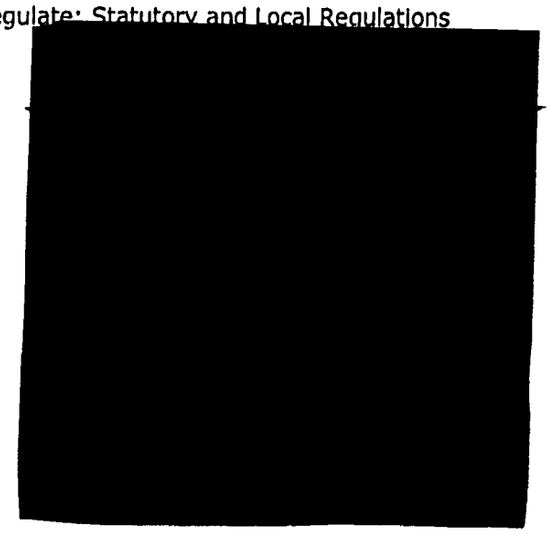
281 Obscenity
281k2 Power to Regulate; Statutory and Local Regulations
281k2.5 k. Particular Regulations. Most Cited Cases

City's public indecency ordinance, facially banning all nudity in public places, did not violate First Amendment as applied to prohibit nude dancing at club, despite claim that ordinance was not enacted to combat secondary effects of adult entertainment; in requiring evidence of secondary effects motivation, district court imposed burden on city which governing Supreme Court precedent appeared designed to avoid, ordinance was virtually identical to statute upheld by Supreme Court and, moreover, evidence suggested that number of city councilmen actually supported ordinance in part because they wished to prevent occurrence of harmful secondary effects. U.S.C.A. Const.Amend. 1; Akron, Ohio, City Code § 133.06.

[2] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(2) k. Sex and Nudity in General. Most Cited Cases

281 Obscenity
281k2 Power to Regulate; Statutory and Local Regulations



⚖281k2.5 k. Particular Regulations. Most Cited Cases

City ordinance facially banning all nudity in public places was facially unconstitutional under First Amendment overbreadth doctrine, as city had failed to demonstrate link between nudity in nonadult entertainment and secondary effects; no evidence linked expressive nudity in "high-culture" entertainment to harmful secondary effects, and court was unable to supply limiting construction for regulation. U.S.C.A. Const.Amend. 1; Akron, Ohio, City Code § 133.06.

***130** J. Michael Murray (argued and briefed), Steven D. Shafron, Berkman, Gordon, Murray, Palda & DeVan, Cleveland, OH, Lawrence J. Whitney, Sr., and Burdon & Merlitti, Akron, OH, for plaintiff-appellee.

David A. Muntean, Director of Law, and Deborah M. Forfia (argued and briefed), City of Akron Law Dept., Akron, OH, for defendant-appellant.

Spencer Neth (briefed), Cleveland, OH, for amicus curiae.

Before: MARTIN, NORRIS, and DAUGHTREY, Circuit Judges.

BOYCE F. MARTIN, Jr., Circuit Judge.

Concluding that the First Amendment's guarantee of freedom of expression prevents the City of Akron from enforcing its public indecency ordinance, the district court granted Triplett Grille's prayer for a permanent injunction. The City now appeals.

I

Triplett Grille, Inc. operates a club called The Back Door on Triplett Boulevard in Akron, Ohio. At 4:00 p.m. on October 12, 1992, The Back Door began to present entertainment that included nude dancing. Just over an hour later, the Akron Police Department's vice squad, accompanied by City Councilman John Otterman, raided the bar. The officers immediately shut down The Back Door pursuant to Akron City Code Section 111.579, which provides in pertinent part:

The Police Chief or the Fire Chief, or their designated officers, shall without written notice cause the immediate cessation of any activity described in § 111.570 which is being conducted without benefit of a city license as required in § 111.570 for the reason of improper and illegal operation.

Section 111.570 details Akron's theatrical licensing scheme, which requires all individuals and organizations to obtain a license from the Mayor before presenting "entertainment ... for which money or other reward is in any manner demanded or received." The ***131** performance was not illegal under the public indecency law then in effect. [FN1]

FN1. Section 133.06 of the Akron City Code provided:

(A) No person shall recklessly do any of the following, under circumstances in which his or her conduct is likely to be viewed by and affront others, not members of his or her household:

(1) Expose his or her private parts, or engage in masturbation;

(2) Engage in sexual conduct;

(3) Engage in conduct which to an ordinary observer would appear to be sexual conduct or masturbation.

Over the next few weeks, the club's doors stayed shut as its managers endeavored to obtain the necessary theatrical license. The City's lawmakers, meanwhile, reacted to the public outcry over the presentation of nude dancing at The Back Door. During a citizens' meeting called to discuss the situation, various Councilmen and the City Prosecutor addressed community concerns regarding nude dancing in Akron. Meanwhile, Councilman Otterman explored, with the assistance of the City's law department, possible legal avenues for outlawing nude dancing.

Shortly thereafter, the City Council supplanted the long-standing public indecency ordinance with an Otterman-sponsored ordinance, which on its face bans all nudity in public places. Nudity is broadly defined as "the showing of the human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state." A.C.C. § 133.06(B). [FN2] Adopted as an emergency measure, the ordinance took effect immediately after the Mayor signed it on October 21. The provision clearly prohibits nude dancing at The Back Door.

FN2. Akron's public indecency ordinance now provides:

(A) No person shall knowingly or intentionally, in a public place:

(1) Engage in sexual intercourse;

(2) Engage in deviant sexual conduct;

(3) Appear in a state of nudity; or

(4) Fondle the genitals of himself or another person.

(B) For the purpose of this section only, the following definitions shall apply:

"*Nudity* " means the showing of the human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

"*Public Place* " means any street, sidewalk, right of way and any public or private building or place where the general public is invited.

A.C.C. § 133.06.

II

On November 23, Triplett Grille filed suit in federal district court seeking to enjoin the City from enforcing its revised public indecency ordinance to prevent the performance of nude dancing at The Back Door. The plaintiff claimed that Akron's ordinance was facially unconstitutional and, as applied to nude dancing, improperly infringed on expression protected by the First Amendment. Triplett Grille also challenged the constitutionality of the City's theater licensing scheme.

Triplett Grille's First Amendment claims were tried by the district court on February 10 and March 4, 1993. During the two-day trial, Triplett Grille presented testimony from each member of the City Council and from the Mayor regarding the passage of the public indecency ordinance. The lawmakers explained that they had enacted the provision because a block of constituents voiced moral opposition to The Back Door's nude dancing presentation and also testified that the ordinance was designed to eliminate all public nudity in Akron, including theatrical performances and barroom dancing. None of the witnesses cited the prevention of prostitution or other criminal activity as one of the ordinance's goals, and none was able to specify any problems with public nudity in Akron under the previous public indecency ordinance. Succinctly summing up the City's intent, the Mayor testified that the City Council enacted the ordinance to establish "a community standard."

In a carefully detailed opinion dated March 17, the district court concluded that Akron's public

indecency ordinance violated the First Amendment. 816 F.Supp. 1249. While acknowledging that the Supreme Court recently ***132** upheld an Indiana statute with virtually identical language in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), the court determined that the fractured nature of the Court's decision made necessary an analysis of the Akron ordinance as applied to The Back Door. As the district court noted, three opinions make up the majority in *Barnes:* Chief Justice Rehnquist wrote for Justices O'Connor and Kennedy, while Justices Souter and Scalia each concurred separately, taking pains to disavow at least portions of the Rehnquist opinion. The Chief Justice's opinion, which upholds the Indiana public indecency statute, is built around the four-part test developed by the Court in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968): "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest". Although Justice Souter agreed with the plurality that nude dancing enjoys First Amendment protection, and also agreed that the statute should be analyzed under the *O'Brien* test, he disagreed as to the interest justifying restriction of First Amendment rights of expression. Justice Scalia, on the other hand, rejected altogether the contention that nude dancing is entitled to First Amendment protection.

In light of the Supreme Court's instruction that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,' " *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923 n. 15, 49 L.Ed.2d 859 (1976)), the district court closely examined the three opinions making up the *Barnes* majority. After reviewing the holding of each, and the legal context in which each opinion's analysis is grounded, the court concluded that Justice Souter ruled on the narrowest grounds. As the district court summarized:

Justice Scalia very broadly denies all First Amendment protection to nude dancing. The plurality dramatically expands the scope of the *O'Brien* test by allowing morality concerns to justify local legislation. Justice Souter, in contrast, bases his application of the *O'Brien* test on assumptions previously upheld in *Renton.*

The court thus reviewed the Akron ordinance under Justice Souter's analytical framework. In doing so, the district court reasoned that the Akron ordinance could survive scrutiny only if it was designed to prevent the occurrence of harmful secondary effects associated with adult entertainment, including crime and prostitution. *See Barnes*, 501 U.S. at 582-86, 111 S.Ct. at 2469-70 (Souter, J., concurring) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). As the City's lawmakers claimed during trial that they were moved to enact the ordinance only by morality concerns and failed to dwell on an interest in combatting secondary effects, the district court concluded that the ordinance is constitutionally deficient as applied to prohibit nude dancing. While acknowledging that Justice Souter simply assumed that members of the Indiana legislature considered secondary effects when enacting the statute at issue in *Barnes*, the district court found such a presumption inapplicable here because "every Akron law maker testified concerning Council's deliberation before enacting the new public indecency law. There are no anonymous law makers to whom the court can attribute a secondary effects concern." In reaching this conclusion, the district court rejected the City's objections to the use of the lawmakers' testimony, finding instead that the testimony was properly considered for the purpose of determining what evidence was before the City Council when the Akron ordinance was adopted. The district court went on to find that the Akron ordinance was facially invalid. As the district court recognized, there was no overbreadth claim before the Supreme Court in *Barnes* because the Seventh Circuit had earlier ***133** held that the Indiana public indecency statute at issue had been sufficiently limited by judicial construction. *See Glen Theatre, Inc. v. Pearson*, 802 F.2d 287, 288 (7th Cir.1986) (concluding that "Indiana Supreme Court adequately narrowed the statute"). Nevertheless, the district court found it necessary to look to *Barnes* to determine whether the Akron ordinance regulated expression protected under the First Amendment. Relying again on Justice Souter's secondary effects analysis, the district court concluded that because "[t]he broad range of expressive conduct which is potentially prohibited by Akron's ordinance has not been shown to be harmful," the public indecency provision "goes significantly beyond its only legitimate sweep, combatting the secondary effects of adult entertainment." To hold otherwise, the district court observed, would give the City the right to ban live performances with serious literary, artistic, or political value. As the City could point to no link between nudity in non-adult entertainment and secondary effects, the district court found that the Akron ordinance necessarily proscribed protected expression and was thus overbroad.

Having concluded that the Akron ordinance violates the First Amendment, the district court enjoined the City from enforcing its public indecency statute. This timely appeal followed.

III

At the outset, we are presented with the vexing task of divining which of the varied standards enunciated in *Barnes* is the law of the land. As noted earlier, *Barnes* engendered four separate opinions, none of which commanded a majority of the Justices. *See Barnes*, 501 U.S. at 561-63, 111 S.Ct. at 2458 (opinion of Rehnquist, C.J.) (joined by O'Connor and Kennedy, JJ.); *id.* at 571-72, 111 S.Ct. at 2463 (Scalia, J., concurring); *id.* at 580- 82, 111 S.Ct. at 2468 (Souter, J., concurring); *id.* at 587, 111 S.Ct. at 2471 (White, J., dissenting) (joined by Marshall, Blackmun, and Stevens, JJ.). Chief Justice Rehnquist's attempt to win acceptance for the proposition that the enforcement of morality is a proper basis for limiting the freedom of speech did not win majority support: only Justices O'Connor and Kennedy joined the Rehnquist opinion. *Barnes*, 501 U.S. at 561-63, 111 S.Ct. at 2458. While Justice Souter agreed with the Chief Justice that the Indiana statute was properly analyzed under the four-part *O'Brien* test, he identified material harms, not moral concerns, as the basis for restricting First Amendment protection for expressive conduct. *Id.* at 582, 111 S.Ct. at 2468-69 ("I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments."). Justice Scalia, the fifth Justice concurring in the result, concluded that nude dancing is not inherently expressive activity entitled to First Amendment protection. *Id.* at 561, 111 S.Ct. at 2458 (concluding that "[m]oral opposition to nudity supplies a rational basis for its prohibition, and since the First Amendment has no application to this case no more than that is needed"). Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented. Although binding on this Court, this splintered decision provides little clear guidance for resolving the question of whether the Akron ordinance at issue here impermissibly infringes expressive conduct protected by the First Amendment.

Well aware of the difficulties created by fractured decisions, the Supreme Court counseled in *Marks* that, when the Court issues such a decision, the opinion of the Justice concurring in the judgment on the "narrowest grounds" should be regarded as the Court's holding. *Marks*, 430 U.S. at 193, 97 S.Ct. at 993 (citation omitted). As the Third Circuit has cogently observed:

The principal objective of this *Marks* rule is to promote predictability in the law by ensuring lower court adherence to Supreme Court precedent. This objective requires that, whenever possible, there be a single legal standard for the lower courts to apply in similar cases and that this standard, when properly applied, produce results with which a majority of the Justices in the case articulating the standard ***134** would agree.... [W]here no single rationale 'enjoys the assent of five Justices,' the situation becomes more complex, but the controlling principle is the same. Where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land.

Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682, 693 (3d Cir.1991) (citation omitted), *aff'd in part and rev'd in part*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *see also Lundblad v. Celeste*, 874 F.2d 1097, 1101-02 & n. 4 (6th Cir.1989) (following Justice Stewart's concurring opinion in *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)), *modified on other grounds*, 924 F.2d 627 (1991). Admittedly, the *Marks* rule is less useful where, as here, no opinion, however narrowly construed, may be said to embody a position that enjoys the support of at least five Justices who concurred in the judgment. Nevertheless, our obligation to follow the Supreme Court's decision coupled with the fact that *Marks* remains the Court's only guidance on how lower courts should comply with this duty leads us to rely upon the rule for instruction in reading the tea leaves of *Barnes*.

Applying the *Marks* rule, the district court correctly concluded that Justice Souter's concurring opinion resolved the question before the Supreme Court on the narrowest grounds. Justice Souter's opinion, which was necessary to uphold the Indiana statute, set forth as its standard a coherent subset of the principles articulated in the plurality opinion. As a logical consequence of their approval of morality justifications for regulations of speech, Chief Justice Rehnquist, Justice O'Connor and Justice Kennedy implicitly agreed with Justice Souter that governmental efforts to control the harmful secondary effects associated with adult entertainment can serve as a basis for restricting activities that enjoy First Amendment protection. In fact, the Chief Justice's opinion specifically detailed material harms as one of the legitimate governmental interests justifying the regulation of speech:

This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.... Thus, the public indecency

statute furthers a substantial government interest in protecting order and morality. *Barnes*, 501 U.S. at 569, 111 S.Ct. at 2462 (citations omitted). Because Justice Souter's opinion articulates a common underlying approach, it may be said to decide the question presented to the Court in *Barnes* on the "narrowest grounds."

Given this conclusion and the lower court's obligation to adhere to the Supreme Court's decision, the district court did not err in regarding Justice Souter's opinion in *Barnes* as binding precedent. *See International Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157, 1160-61 (11th Cir.1991) (concluding, based on Souter opinion, that "in order to uphold a statute regulating nude dancing, it is still necessary after *Barnes* that the statute meet the secondary effects test of *Renton* "), *cert. denied*, 503 U.S. 920, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992); *see also Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.) ("Despite the inarguable fact that only *four* justices in *Price Waterhouse* [*v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)] would have imposed a 'direct evidence' requirement for 'mixed-motives' cases, most circuits have engrafted this requirement into caselaw."), *cert. denied*, --- U.S. ----, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). While "there is some awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered, it is the usual practice when that is the determinative opinion." *Blum v. Witco Chemical Corp.*, 888 F.2d 975, 981 (3d Cir.1989) (following Justice O'Connor's concurring opinion in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987)). The unique approach taken by Justice Scalia does not, in this singular situation, alter our conclusion. In light of the Supreme Court's failure to agree upon a rationale for the ***135** result in *Barnes*, the badly splintered nature of the Court's decision, and the lack of prior controlling precedent from this Court, we agree with the district court that Justice Souter's opinion may properly be regarded as providing the proper framework for addressing the question presented here.

[1] The district court's reliance on Justice Souter's opinion to strike down the Akron ordinance as applied to nude dancing at the Triplett Grille is, however, misplaced. By requiring affirmative evidence of a secondary effects motivation, the district court imposes a burden on the City that Justice Souter's opinion seems designed to avoid. As Justice Souter observed:

> In light of Renton's recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's "bookstore" furthers its interest in preventing prostitution, sexual assault, and associated crimes.... I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case.

Barnes, 501 U.S. at 584-85, 111 S.Ct. at 2470. Moreover, there is evidence in the record suggesting that a number of Akron City Councilmen actually supported the public indecency ordinance in part because they wished to prevent the occurrence of harmful secondary effects. *See* Joint Appendix at 156 (Councilman Sommerville testified ordinance was passed because constituents were concerned that "nude dancing brought a certain element to the neighborhood"); J.A. at 182 (Councilman Bolden testified that he supported ordinance because constituents felt there were "problems in neighborhoods and they asked for help"). Finally, because the Akron public indecency ordinance is virtually identical to the Indiana statute considered in *Barnes*, the district court was bound to adhere to the specific result of that case, even though the Supreme Court failed to agree on governing standards. *See Casey*, 947 F.2d at 691-92 ("As a lower court, we are bound by both the Supreme Court's choice of legal standard or test and by the result it reaches under that standard or test."). Given the language of Justice Souter's opinion, the evidence presented at trial, and the requirement of judicial fealty to the result reached by the Supreme Court in *Barnes*, the district court erred in concluding that the Akron ordinance was unconstitutional as applied because it was not enacted to combat the secondary effects of adult entertainment.

[2] Because the City has failed to demonstrate a link between nudity in non-adult entertainment and secondary effects, we do agree with the district court that the Akron ordinance must be struck down as facially unconstitutional under the First Amendment overbreadth doctrine. As this Court has recognized, the "overbreadth doctrine constitutes an exception to traditional rules of standing and is applicable only in First Amendment cases in order to ensure that an overbroad statute does not act to 'chill' the exercise of rights guaranteed protection." *Leonardson v. City of East Lansing*, 896 F.2d 190, 195 (6th Cir.1990) (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963)). Under the doctrine, "an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court--those who desire to engage in legally protected expression but who

may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.' " *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S.Ct. 2568, 2572, 96 L.Ed.2d 500 (1987) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985)). While the overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort," *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973), a plaintiff may prevail on a facial attack by demonstrating there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984).

***136** The Akron public indecency ordinance at issue here prohibits all public nudity, including live performances with serious literary, artistic, or political value. The ordinance makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions. Instead, Akron's wide ban on public nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes. As Justice Souter acknowledged in *Barnes:*

It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of Renton-type adult entertainment was correlated with such secondary effects. *Barnes*, 501 U.S. at 585 n. 2, 111 S.Ct. at 2470 n. 2. [FN3] Because the City failed to present evidence linking expressive nudity in "high-culture" entertainment to harmful secondary effects, we conclude that the ordinance infringes speech protected by the First Amendment.

FN3. As noted earlier, the Supreme Court did not confront a First Amendment overbreadth challenge in *Barnes* because the Indiana Supreme Court supplied a limiting construction for the particular statute at issue. *See Glen Theatre, Inc.*, 802 F.2d at 289-90 (concluding that "Indiana Supreme Court adequately narrowed the statute").

While loath to find that the Akron public indecency ordinance violates the First Amendment, this Court is unable to supply a limiting construction for the regulation. It is well recognized that federal "courts do not rewrite statutes to create constitutionality." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir.1991). As this Court recently emphasized:

A federal court must always be aware of the federalism concerns that arise whenever it deals with state statutes. 'The principles of federalism forbid a federal appellate court to arrogate the power to rewrite a municipal ordinance.'

Id. at 1125 (citation omitted). It would therefore be improper for this Court to supply limiting language for Akron's public indecency ordinance in order to preserve its constitutionality.

IV

As the Akron public indecency ordinance is substantially overbroad, and is not fairly subject to a saving construction, we conclude that the ordinance violates the First Amendment. The judgment of the district court is affirmed.

C.A.6 (Ohio),1994.

Triplett Grille, Inc. v. City of Akron

40 F.3d 129, 63 USLW 2313, 1994 Fed.App. 0386P

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United States Court of Appeals,
Seventh Circuit.
BEN'S BAR, INC., Plaintiff-Appellant,
v.
VILLAGE OF SOMERSET, Defendant-Appellee.
No. 01-4351.
Argued May 30, 2002.
Decided Jan. 17, 2003.

Tavern and two of its nude dancers brought § 1983 action against city, seeking declaratory and injunctive relief against enforcement of ordinance that prohibited sale, use, or consumption of alcohol on premises of "Sexually Oriented Businesses," alleging violation of their right to freedom of expression under First and Fourteenth Amendments. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Chief Judge, granted judgment for city. Plaintiffs appealed. The Court of Appeals, Manion, Circuit Judge, held that municipal ordinance was reasonable attempt to reduce or eliminate undesirable "secondary effects" associated with barroom adult entertainment.
Affirmed.

West Headnotes

[1] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90(3) k. Limitations on Doctrine in General. Most Cited Cases

A governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. U.S.C.A. Const.Amend. 1.

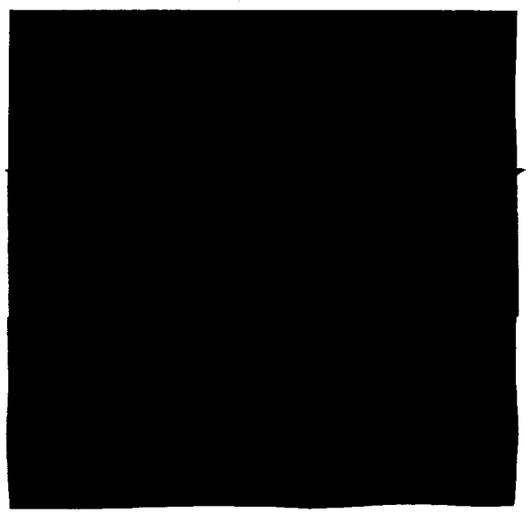
[2] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

A time, place, and manner regulation of adult entertainment will be upheld under the First Amendment if it is designed to serve a substantial government interest and reasonable alternative avenues of communication remain available; additionally, a time, place, and manner regulation must be justified without reference to the content of the regulated speech and narrowly tailored to serve the government's interest. U.S.C.A. Const.Amend. 1.

[3] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights



92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

The analytical frameworks and standards utilized in evaluating adult entertainment regulations under the First Amendment, be they zoning ordinances or public indecency statutes, are virtually indistinguishable. U.S.C.A. Const.Amend. 1.

[4] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

A liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments does not violate the First Amendment if: (1) the state is regulating pursuant to a legitimate governmental power; (2) the regulation does not completely prohibit adult entertainment; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments; and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available, or, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. U.S.C.A. Const.Amend. 1.

[5] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

223 Intoxicating Liquors
223II Constitutionality of Acts and Ordinances
223k15 k. Licensing and Regulation. Most Cited Cases

Municipal ordinance, that restricted sale or consumption of alcohol on premises of businesses that served as venues for adult entertainment, was reasonable attempt to reduce or eliminate undesirable "secondary effects" associated with barroom adult entertainment, in § 1983 lawsuit under free speech clause of First Amendment; regulation of alcohol was within city's general police powers, regulation did not have any impact on tavern's ability to offer nude or semi- nude dancing to its patrons, and liquor prohibition was no greater than was essential to further city's substantial interest in combating secondary effects resulting from combination of nude and semi-nude dancing and alcohol. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

[6] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

The level of First Amendment scrutiny a court uses to determine whether a regulation of adult

entertainment is constitutional depends on the purpose for which the regulation was adopted; if the regulation was enacted to restrict certain viewpoints or modes of expression, it is presumptively invalid and subject to strict scrutiny, if, on the other hand, the regulation was adopted for a purpose unrelated to the suppression of expression, e.g., to regulate nonexpressive conduct or the time, place, and manner of expressive conduct, a court must apply a less demanding intermediate scrutiny. U.S.C.A. Const.Amend. 1.

[7] KeyCite Notes

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak412 Construction
15Ak412.1 k. In General. Most Cited Cases

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k120 k. Construction and Operation. Most Cited Cases

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases

Federal courts evaluating the "predominant concerns" behind the enactment of a statute, ordinance, regulation, or the like, may do so by examining a wide variety of materials including, but not limited to, the text of the regulation or ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware.

[8] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

Regulations of adult entertainment receive intermediate scrutiny under the First Amendment if they are designed not to suppress the "content" of erotic expression, but rather to address the negative secondary effects caused by such expression. U.S.C.A. Const.Amend. 1.

[9] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

Regulations that prohibit nude dancing where alcohol is served or consumed are independent of expressive or communicative elements of conduct, and, therefore, are treated as if they were content-neutral under the First Amendment. U.S.C.A. Const.Amend. 1.

[10] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

In the context of the First Amendment, whether an adult entertainment liquor regulation is treated as a time, place, and manner regulation, or as a regulation of expressive conduct, a court is required to ask whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. U.S.C.A. Const.Amend. 1.

[11] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90(3) k. Limitations on Doctrine in General. Most Cited Cases

In order to justify a content-based time, place, and manner restriction under the First Amendment, or a content-based regulation of expressive conduct, a municipality must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact; the regulation may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside, and, furthermore, a municipality may not assert that it will reduce secondary effects by reducing speech in the same proportion. U.S.C.A. Const.Amend. 1.

[12] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

The First Amendment does not entitle a tavern, its dancers, or its patrons, to have alcohol available during a "presentation" of nude or semi-nude dancing; even though the First Amendment does require that such establishments be given a reasonable opportunity to disseminate the speech at issue, a "reasonable opportunity" does not include a concern for economic considerations. U.S.C.A. Const.Amend. 1.

***704** Matthew A. Biegert (argued), Doar, Drill & Skow, New Richmond, WI, for Plaintiff-Appellant.
Ted Waskowski, Meg Vergeront (argued), Stafford Rosenbaum, Madison, WI, for Defendant-Appellee.

Before FLAUM, Chief Judge, and WOOD, Jr. and MANION, Circuit Judges.

MANION, Circuit Judge.
Ben's Bar, Inc. operates a tavern in the Village of Somerset, Wisconsin, that formerly served as a venue for nude and semi-nude dancing. After the Village enacted an ordinance that, in part, prohibited the sale, use, or consumption of alcohol on the premises of "Sexually Oriented Businesses," Ben's Bar and two of its dancers filed suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the enforcement of the ordinance. The plaintiffs' complaint alleged, among other things, that the ordinance's alcohol prohibition violated their right to freedom of expression under the First and Fourteenth Amendments to the United States Constitution. Shortly

thereafter, plaintiffs filed a motion for a preliminary injunction, which the district court denied. The Village then filed a motion for summary judgment, which the district court granted. Ben's Bar appeals this decision. Because we conclude that the record sufficiently supports the Village's claim that the liquor prohibition is a reasonable attempt to reduce or eliminate the undesirable "secondary effects" associated with barroom adult entertainment, rather than an attempt to regulate the expressive content of nude dancing, we affirm the district court's judgment.

I.

On October 24, 2000, the Village of Somerset, a municipal corporation located in St. Croix County, Wisconsin ("Village"), enacted Ordinance A-472, entitled "Sexually ***705*** Oriented Business Ordinance" ("Ordinance"), for the purpose of regulating "Sexually Oriented Businesses and related activities to promote the health, safety, and general welfare of the citizens of the Village of Somerset, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of Sexually Oriented Businesses within the Village of Somerset." The Ordinance regulates hours of operation, location, distance between patrons and performers, and other aspects concerning the operations of Sexually Oriented Businesses.

In the legislative findings section of the Ordinance, the Village noted that:

Based on evidence concerning the adverse secondary effects of Sexually Oriented Businesses on the community in reports made available to the Village Board, and on the holdings and findings in [numerous Supreme Court, federal appellate, and state appellate judicial decisions], as well as studies and summaries of studies conducted in other cities ... and findings reported in the Regulation of Adult Entertainment Establishments in St. Croix County, Wisconsin; and the Report of the Attorney General's Working Group of Sexually Oriented Businesses ... the Village Board finds that:

(a) Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located.

(b) Studies of the relationship between sexually oriented businesses and neighborhood property values have found a negative impact on both residential and commercial property values.

(c) Sexually oriented businesses may contribute to an increased public health risk through the spread of sexually transmitted diseases.

(d) There is an increase in the potential for infiltration by organized crime for the purpose of unlawful conduct.

(e) *The consumption of alcoholic beverages on the premises of a Sexually Oriented Business exacerbates the deleterious secondary effects of such businesses on the community.*

(Emphasis added.)

On February 2, 2001, two months before the Ordinance's effective date of April 1, 2001, Ben's Bar, Inc. ("Ben's Bar"), a tavern in the Village featuring nude and semi-nude barroom dance, [FN1] and two of its dancers, Shannen Richards and Jamie Sleight, filed a four-count complaint against the Village, pursuant to 42 U.S.C. § 1983 and Wis. Stat. § 806.04 (the State's "Uniform Declaratory Judgments Act"), in the United States District Court for the Western District of Wisconsin. The plaintiffs' complaint alleged that portions of the Ordinance were unconstitutional and preempted by Wisconsin law, sought a declaratory judgment resolving those issues, and requested permanent injunctive relief. Specifically, the plaintiffs argued that the Ordinance: (1) violated their right of free expression under the First and Fourteenth Amendments to the United States Constitution and Article I, § 3 of the Wisconsin Constitution; [FN2] (2) violated their right to ***706*** equal protection under the Fourteenth Amendment to the United States Constitution and Article 1, § 1 of the Wisconsin Constitution; [FN3] (3) was an illegal "policy or custom" of the Village within the meaning of *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and *Owen v. City of Independence, Missouri*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); and (4) was an *ultra vires* legislative act in violation of Wis. Stat. § 66.0107(3). [FN4]

FN1. Ben's Bar holds a liquor license issued by the Village.

FN2. Article 1, § 3 of the Wisconsin Constitution provides, *inter alia*, that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press." Wis. Const., art. I, § 3.

FN3. Article 1, § 1 of the Wisconsin Constitution provides that "[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const., art. I, § 1.

FN4. Wis. Stat. § 66.0107(3) provides that "[t]he board or council of a city, village or town may not, by ordinance, prohibit conduct which is the same as or similar to conduct prohibited by § 944.21 [i.e., the state's obscenity statute]."

On March 19, 2001, the plaintiffs moved for a preliminary injunction against the enforcement of Sections 5(a) and (b) of the Ordinance. Section 5(a) provides that "[i]t shall be a violation of this ordinance for any Person to knowingly and intentionally appear in a state of Nudity in a Sexually Oriented Business." [FN5] Section 5(b) of the Ordinance provides that "[t]he sale, use, or consumption of alcoholic beverages on the Premises of a Sexually Oriented Business is prohibited." Plaintiffs argued that under § 66.0107(3) the Village was prohibited from enacting these regulations of adult entertainment because such conduct is already covered by the state's obscenity statute--i.e., Wis. Stat. § 944.21. They also contended that, notwithstanding § 66.0107, Sections 5(a) and (b) violated their right to free expression under the First and Fourteenth Amendments.

FN5. Under Section 3(*o*) of the Ordinance, "Nudity" or "state of nudity" is defined as "the appearance of the human bare anus, anal cleft or cleavage, pubic area, male genitals, female genitals, or the nipple or areola of the female breast, with less than a fully opaque covering; or showing of the covered male genitals in a discernibly turgid state."

On April 17, 2001, the district court denied plaintiffs' motion for preliminary injunctive relief, holding that they did not have a reasonable chance of succeeding on the merits of their complaint. The district court, utilizing the test established by this circuit in *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir.2000), held that Section 5(a)'s complete prohibition of full nudity in Sexually Oriented Businesses was constitutional under the First Amendment because " 'limiting erotic dancing to semi-nudity [i.e., pasties and G-strings] represents a *de minimis* restriction that does not unconstitutionally abridge expression.' " (quoting *Schultz*, 228 F.3d at 847). The district court also concluded that Section 5(b) passed constitutional muster under *Schultz* because it: (1) was justified without reference to the content of the regulated speech; (2) was narrowly tailored to serve a significant government interest in curbing adverse secondary effects; and (3) left open ample alternative channels for communication. Finally, the district court ruled that the Ordinance was not subject to preemption under Wis. Stat. § 66.0107(3) because the plaintiffs had conceded that: (1) the Ordinance only regulates non-obscene conduct; and (2) they were seeking only to provide non-obscene barroom dancing.

Following unsuccessful attempts at settlement, on August 20, 2001, the Village moved for summary judgment of plaintiffs' complaint. On November 23, 2001, the district court granted the Village's motion, concluding that the Ordinance was constitutional for the reasons expressed in its ***707** April 17, 2001 order. The court also addressed plaintiffs' equal protection claim, noting that they had waived the argument by failing to develop it in their briefs. A judgment in conformity with that order was entered on November 26, 2001. Ben's Bar appeals the district court's decision granting summary judgment, [FN6] arguing that the court erred in concluding that Section 5(b) does not constitute an unconstitutional restriction on nude dancing under the First Amendment. *See DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 827 n. 2 (7th Cir.1999) (holding that corporations may assert First Amendment challenges). We review the district court's grant of summary judgment *de novo*, construing all facts in favor of Ben's Bar, the non-moving party. *Commercial Underwriters Ins. Co. v. Aires Envtl. Services, Ltd.*, 259 F.3d 792, 795 (7th Cir.2001).

FN6. Plaintiffs Shannen Richards and Jamie Sleight did not appeal the district court's judgment.

II.

The First Amendment provides, in part, that "Congress shall make no law ... abridging the freedom of speech ...." U.S. Const. amend. I. The First Amendment's Free Speech Clause has been held by the Supreme Court to apply to the states through the Fourteenth Amendment's due process clause. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *DiMa Corp.*, 185 F.3d at 826 (acknowledging the applicability of the Supreme Court's "incorporation doctrine" in the First Amendment context). The Supreme Court has further held that "nude dancing ... is expressive conduct *within the outer perimeters of the First Amendment,* though we view it as only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion) (emphasis added). *See also Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir.2001) (noting that "[t]he impairment of First Amendment values is slight to the point of being risible since the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a modest social value ...."). Thus, while few would argue "that erotic dancing ... represents high artistic expression," *Schultz v. City of Cumberland*, 228 F.3d 831, 839 (7th Cir.2000), the Supreme Court has, nevertheless, afforded such expression a diminished form of protection under the First Amendment. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 294, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion) (holding that " 'even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, *it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate* ....' ") (citation omitted) (emphasis added).

This case requires us to determine whether a municipality may restrict the sale or consumption of alcohol on the premises of businesses that serve as venues for adult entertainment without violating the First Amendment. On appeal, Ben's Bar's primary argument is that Section 5(b) is unconstitutional because the regulation has the "effect" of requiring its dancers to wear more attire than simply pasties and G-strings. [FN7] This argument ***708** may be summed up as follows: (1) Section 5(b) prohibits the sale, use, or consumption of alcohol on the premises of Sexually Oriented Businesses; [FN8] (2) Ben's Bar is an "Adult cabaret," a sub-category of a Sexually Oriented Business under the Ordinance, [FN9] if it features nude or semi-nude dancers; (3) Section 3(*o*) of the Ordinance defines "seminude or semi-nudity" as "the exposure of a bare male or female buttocks or the female breast below a horizontal line across the top of the areola at its highest point with less than a complete and opaque covering"; and (4) Ben's Bar's dancers must wear more attire than that required by the Ordinance's definition of "semi-nude or semi-nudity" in order for the tavern to be able to sell alcohol during their performances and comply with Section 5(b)--i.e., more than pasties and G-strings. Ben's Bar contends that Section 5(b) significantly impairs the conveyance of an erotic message by the tavern's dancers [FN10] and is not narrowly tailored to meet the Village's stated goal of reducing the adverse secondary effects associated with adult entertainment. [FN11]

FN7. The Supreme Court has, on two separate occasions, held that requiring nude dancers to wear pasties and G-strings does not violate the First Amendment. *Pap's A.M.*, 529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion), *id.* at 307-10, 120 S.Ct. 1382 (Scalia, J., concurring); *Barnes*, 501 U.S. at 571-72, 111 S.Ct. 2456 (plurality opinion), *id.* at 582, 111 S.Ct. 2456 (Souter, J., concurring).

FN8. Section 3(w) of the Ordinance defines "Sexually Oriented Business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency or sexual encounter center."

FN9. Section 3(c) of the Ordinance is the definition for "Adult cabaret," which "means a nightclub, dance hall, *bar,* restaurant, or similar commercial establishment that regularly features: (1) persons who appear in a state of Nudity or Semi-nudity; or (2)

live performances that are characterized by 'specified sexual activities'; or (3) films, motion pictures, video cassettes, slides, or other photographic reproductions that are characterized by the depiction or description of 'specified sexual activities' or Nudity or 'specified anatomical areas.' " (Emphasis added.)

FN10. According to Ben's Bar, Section 5(b) goes far beyond the pasties and G-strings regulation upheld by the Supreme Court in *Barnes* and *Pap's A.M.*, prohibiting "any display of the buttocks or of breast

below the top of the areola"--i.e., "conservative two piece swimsuits, moderately low-cut blouses, short shorts, sheer fabrics and many other types of clothing that are regularly worn in the community and are in mainstream fashion."

FN11. It is not entirely clear whether Ben's Bar is arguing that Section 5(b) is facially unconstitutional or merely unconstitutional as applied. To the extent Ben's Bar seeks to bring a facial challenge, it faces an uphill battle. Ben's Bar does not argue that the regulation is vague or overbroad, and therefore may only prevail if it can demonstrate "that no set of circumstances exists under which the [regulation] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). *See also Horton v. City of St. Augustine, Florida*, 272 F.3d 1318, 1331 (11th Cir.2001) (noting exception to the *Salerno* rule; that, in the limited context of the First Amendment, a plaintiff may also bring a facial challenge for overbreadth and/or vagueness).

The central fallacy in Ben's Bar's argument, however, is that Section 5(b) restricts the sale and consumption of alcoholic beverages in establishments that serve as venues for adult entertainment, not the attire of nude dancers. In the absence of alcohol, Ben's Bar's dancers are free to express themselves all the way down to their pasties and G-strings. The question then is not whether the Village can require nude dancers to wear more attire than pasties and G-strings, but whether it can prohibit Sexually Oriented Businesses like Ben's Bar from selling alcoholic beverages in order to prevent the deleterious secondary effects arising from the explosive combination of nude dancing and alcohol consumption.

While the question presented is rather straightforward, the issue is significantly complicated by a long series of Supreme Court decisions involving the application of the First Amendment in the adult entertainment***709*** context. Because these decisions establish the analytical framework under which we must operate, our analysis necessarily begins with a comprehensive summary of the Supreme Court's jurisprudence in this area.

A. *California v. LaRue*

Initially, we note that the Supreme Court addressed the precise issue before us in *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), when it considered the constitutionality of regulations promulgated by California's Department of Alcoholic Beverages ("Department") that prohibited bars and nightclubs from featuring varying degrees of adult entertainment. [FN12] The Department enacted the regulations, after holding public hearings, because it concluded that the consumption of alcohol in adult entertainment establishments resulted in a number of adverse secondary effects--e.g., acts of public indecency and sex-related crimes. As in this case, adult entertainment businesses filed suit alleging that the regulations violated the First Amendment. *Id.* at 110, 93 S.Ct. 390.

FN12. The regulations at issue in *LaRue* prohibited:

(a) The performance of acts, or simulated acts, of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(b) The actual or simulated touching, caressing or fondling on the breast, buttocks, anus or genitals;

(c) The actual or simulated displaying of the pubic hair, anus, vulva or genitals;

(d) The permitting by a licensee of any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus; and, by a companion section;

(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above.

409 U.S. at 411-12.

The Supreme Court began its analysis in *LaRue* by stressing that "[t]he state regulations here challenged come to us, not in the context of a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink." 409 U.S. at 114, 93 S.Ct. 390. For this reason, the vast majority of the Court's opinion addressed the States' power to regulate "intoxicating liquors" under the Twenty-first Amendment. [FN13] *See generally id.* at 115-19, 93 S.Ct. 390. Specifically, the *LaRue* Court concluded that:

FN13. The second section of the Twenty-first Amendment provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. 409 U.S. at 114, 93 S.Ct. 390.
In doing so, the *LaRue* Court rejected the plaintiffs' contention that the state's regulatory authority over "intoxicating beverages" was limited, as applied to adult entertainment establishments, to "either dealing with the problem it confronted within the limits of our decisions as to obscenity [i.e., *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) and its progeny] or in accordance with the limits prescribed for dealing with some forms of communicative conduct in [*United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)]," 409 U.S. at 116, 93 S.Ct. 390, reasoning " '[w]e ***710** cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.' " *Id.* at 117- 18, 93 S.Ct. 390 (citation omitted). The Court found that "the substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication." *Id.* at 118, 93 S.Ct. 390. The Court also concluded that although "at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board ... [but] has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *Id.* The *LaRue* Court ended its analysis by noting that "[t]he Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one," and that "[g]iven the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that

the regulations on their face violate the Federal Constitution." *Id.* at 118-19, 93 S.Ct. 390. [FN14]

> FN14. *See also* *City of Newport v. Iacobucci*, 479 U.S. 92, 95, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986) (upholding the constitutionality of a city ordinance prohibiting nude or nearly nude dancing in local establishments licensed to sell liquor for consumption on the premises); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 717, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (holding that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs"); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (noting that under *LaRue* states may ban nude dancing as part of their liquor licensing programs); *City of Kenosha v. Bruno*, 412 U.S. 507, 515, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973) (noting that "regulations prohibiting the sale of liquor by the drink on premises where there were nude but not necessarily obscene performances [are] facially constitutional").

B. *44 Liquormart, Inc. v. Rhode Island*

After the Supreme Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), however, the precedential value of the reasoning anchoring the Court's holding in *LaRue* was severely diminished. In *44 Liquormart*, the Court held that Rhode Island's statutory prohibition against advertisements providing the public with accurate information about retail prices of alcoholic beverages was "an abridgement of speech protected by the First Amendment and that is not shielded from constitutional scrutiny by the Twenty-first Amendment." *Id.* at 489, 116 S.Ct. 1495. In reaching this conclusion, the Court noted:

Rhode Island argues, and the Court of Appeals agreed, that in this case the Twenty-first Amendment tilts the First Amendment analysis in the State's favor [of the advertising ban] .... [T]he Court of Appeals relied on our decision in *California v. LaRue* ... [where] five Members of the Court relied on the Twenty-first Amendment *to* buttress the conclusion that the First Amendment did not invalidate California's prohibition of certain grossly sexual exhibitions in premises licensed to serve alcoholic beverages. Specifically, the opinion stated that the Twenty-first Amendment required that the prohibition be given an added presumption in favor of its validity. ***711** *We are now persuaded that the Court's analysis in* LaRue *would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment. Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases, the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of "bacchanalian revelries" described in the* LaRue *opinion regardless of whether alcoholic beverages are involved.... See, e.g.,* *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). As we recently noted: "*LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." *Rubin v. Coors Brewing Co.*, 514 U.S., at 483, n. 2, 115 S.Ct. 1585. Without questioning the holding of *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment.

Id. at 515-16, 116 S.Ct. 1495 (emphasis added).

The foregoing makes clear that *LaRue's* holding remains valid after *44 Liquormart*, but for a different reason. The *44 Liquormart* Court concluded that "the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment," 517 U.S. at 515, 116 S.Ct. 1495 because "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *Id.* In making this assertion, the *44 Liquormart* Court relied on the *LaRue* Court's conclusion that: "the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power ... [i.e.,] the normal state authority over public health, welfare, and morals." 409 U.S. at 114, 93 S.Ct. 390. But in recent years, the Supreme Court has held, on a number of occasions, that "non-obscene" adult entertainment is entitled to a minimal degree of protection under the First Amendment, even in relation to laws enacted pursuant to a State's general police powers. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 1739, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring) (noting that "if a city can decrease the crime and blight associated with [adult entertainment] 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"); *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) (holding that city's public indecency ordinance, enacted to "protect public health and safety," must be analyzed as a content-neutral regulation of expressive conduct); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

Given the foregoing, it is difficult to ascertain exactly what "analysis" the *44 Liquormart* Court was referring to as having persuaded it that the *LaRue* Court would have reached the same result even without the "added presumption" of the Twenty-first Amendment. We find noteworthy, however, the *44 Liquormart* Court's citation of the post-*LaRue* decisions of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), in support of its assertion that "the States' inherent police powers provide ample authority to restrict the kind of 'bacchanalian revelries' ***712** described in the *LaRue* opinion regardless of whether alcoholic beverages are involved." *44 Liquormart*, 517 U.S. at 515, 116 S.Ct. 1495. In *American Mini Theatres* and *Barnes*, the Supreme Court held that the adult entertainment regulations at issue were subject to intermediate scrutiny for purposes of determining their constitutionality under the First Amendment. *American Mini Theatres*, 427 U.S. at 79, 96 S.Ct. 2440 (Powell, J., concurring) ("it is appropriate to analyze the permissibility of Detroit's action [zoning ordinance separating adult theaters from residential neighborhoods and churches] under the four-part test of *United States v. O'Brien* ...."); *Barnes*, 501 U.S. at 582, 111 S.Ct. 2456 (Souter, J., concurring) ("I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four- part enquiry described in *United States v. O'Brien* ....").

Like the Fourth and Eleventh Circuits, we conclude that after *44 Liquormart* state regulations prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments must be analyzed in light of *American Mini Theatres* and *Barnes*, as modified by their respective progeny. *See Giovani Carandola Ltd. v. Bason*, 303 F.3d 507, 513 n. 2 & 519 (4th Cir.2002) (noting the *44 Liquormart* Court's reliance on *American Mini Theatres* and *Barnes* and holding that "the result reached in *LaRue* remains sound not because a state enjoys any special authority when it burdens speech by restricting the sale of alcohol, but rather because the regulation in *LaRue* complied with the First Amendment"); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996 (11th Cir.1998) (holding that "the Supreme Court [in *44 Liquormart*] ... reaffirmed the precedential value of *LaRue* and the *Barnes*-O'Brien *test .... [and] reaffirmed that the* Barnes- *O'Brien* intermediate level of review applies to [adult entertainment liquor regulations]"). *But see BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 608 (8th Cir.2001) (upholding the constitutionality of an adult entertainment liquor regulation solely on the basis of *LaRue's* holding).

We reach this conclusion notwithstanding the fact that in *LaRue* the Supreme Court upheld the constitutionality of the adult entertainment liquor regulations using the rational basis test, *see* 409 U.S. at 115-16, 93 S.Ct. 390, and explicitly refused to subject the regulations to *O'Brien's* intermediate scrutiny test. *Id.* at 116, 93 S.Ct. 390 ("We do not believe that the state regulatory authority in this case was limited to ... dealing with the problem it confronted ... in accordance with the limits prescribed for dealing with some forms of communicative conduct in [*O'Brien*]"). We do so because the *44 Liquormart* Court's reference to *American Mini Theatres* and *Barnes* makes clear that the Court is of the opinion that adult entertainment liquor regulations, like the ones at issue in *LaRue*, will pass constitutional muster even under the heightened intermediate scrutiny tests outlined in those cases.

In making this determination, we are by no means suggesting that the Supreme Court's decisions in *American Mini Theatres* and *Barnes* are of greater precedential value than *LaRue*. On the contrary, as noted *infra*, our decision in this case is largely dictated by *LaRue's* holding. At the time *LaRue* was decided, however, the Supreme Court had not yet established a framework for analyzing the constitutionality of adult entertainment regulations. This changed with the Court's subsequent decisions in *American Mini Theatres* and *Barnes*, cases that serve as a point of origin for two distinct, yet overlapping, lines of jurisprudence that address the degree of First Amendment ***713** protection afforded to adult entertainment. Given the significant development of the law in this area since *LaRue*, as well as the Court's refashioning of *LaRue's* reasoning in *44 Liquormart*, we conclude that it is necessary to apply *LaRue's* holding in the context of this precedent.

C. The *44 Liquormart* "road map"

The *44 Liquormart* decision established a road map of sorts for analyzing the constitutionality of adult entertainment liquor regulations, i.e., the Supreme Court's decisions in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), providing two separate but similar routes. [FN15] First, the *American Mini Theatres* decision, as modified by the Court's subsequent decisions in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d

670 (2002), delineates the standards for evaluating the constitutionality of *adult entertainment zoning ordinances*. Second, the *Barnes* decision, as modified by the Court's recent decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), provides guidelines for analyzing the constitutionality of *public indecency statutes*.

FN15. *See J & B Social Club No. 1, Inc. v. City of Mobile*, 966 F.Supp. 1131, 1136 (S.D.Ala.1996) (Hand, J.).

[1] The analytical frameworks utilized in both lines of jurisprudence can be traced back to the four-part test enunciated by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), where the Court held that a statute prohibiting the destruction or mutilation of draft cards was a content-neutral regulation of expressive conduct. *American Mini Theatres*, 427 U.S. at 79, 96 S.Ct. 2440 (Powell, J., concurring) (applying *O'Brien* test); *Barnes*, 501 U.S. at 582, 111 S.Ct. 2456 (Souter, J., concurring) (same). Under the *O'Brien* test, a governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673.

[2] While the *O'Brien* test is still utilized by the Supreme Court in analyzing the constitutionality of public indecency statutes, *see Pap's A.M.*, 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part), the Court currently evaluates adult entertainment zoning ordinances as time, place, and manner regulations. *Alameda Books*, 122 S.Ct. at 1733 (plurality opinion); *id.* at 1741 (Kennedy, J., concurring); *Renton*, 475 U.S. at 46-47, 106 S.Ct. 925. A time, place, and manner regulation of adult entertainment will be upheld if it is "designed to serve a substantial government interest and ... reasonable alternative avenues of communication remain[ ] available." *Alameda Books*, 122 S.Ct. at 1734. Additionally, a time, place, and manner regulation must be justified without reference to the content of the regulated speech and narrowly tailored to serve the government's ***714** interest. *Schultz*, 228 F.3d at 845. [FN16]

FN16. In *Renton*, the Supreme Court created some confusion as to the appropriate test for analyzing time, place, and manner regulations by asserting that "time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." 475 U.S. at 47, 106 S.Ct. 925. However, as we emphasized in *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir.1986), "[t]he Supreme Court does not always spell out the 'narrowly tailored' step as part of its standard for evaluating time, place, and manner restrictions." *Id.* at 1553. Moreover, a close examination of *Renton*

reveals that the Court did consider whether the zoning ordinance at issue was narrowly tailored. 475 U.S. at 52, 106 S.Ct. 925 ("[t]he Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects ...."). In any event, both the Supreme Court and this circuit have continued to apply the "narrowly tailored" step to time, place, and manner regulations. *See Ward v. Rock Against Racism*, 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988); *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1000 (7th Cir.2002).

[3] In this case, however, we are not dealing with a zoning ordinance or a public indecency statute. Instead, we are called upon to evaluate the constitutionality of an adult entertainment liquor

regulation. Therefore, it is not entirely clear whether Section 5(b) should be analyzed as a time, place, and manner restriction or as a regulation of expressive conduct under *O'Brien*'s four-part test; or for that matter whether the tests are entirely interchangeable. *See LLEH, Inc. v. Wichita County, Texas*, 289 F.3d 358, 365 (5th Cir.), *cert. denied*, --- U.S. ----, 123 S.Ct. 621, 154 L.Ed.2d 517 (2002) (noting uncertainty as to which test courts should use in analyzing the constitutionality of adult entertainment regulations: "the test for time, place, or manner regulations, described in *Renton* ... or the four-part test for incidental limitations on First Amendment freedoms, established in *O'Brien* ...."). For all practical purposes, however, the distinction is irrelevant because the Supreme Court has held that the time, place, and manner test embodies much of the same standards as those set forth in *United States v. O'Brien*. *Barnes*, 501 U.S. at 566, 111 S.Ct. 2456 (plurality opinion) (relying on *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298- 99, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)); *LLEH*, 289 F.3d at 365-66 (same). [FN17] Moreover, as explained *infra*, two of the Supreme Court's post-*44 Liquormart* decisions--*Pap's A.M.* and *Alameda Books*--make it abundantly clear that the analytical frameworks and standards utilized by the Court in evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable. We, therefore, conclude that it is appropriate to analyze the constitutionality of Section 5(b) using the standards articulated by the Supreme Court in the five decisions comprising the *American Mini Theatres* and *Barnes* lines of jurisprudence. Thus, before proceeding to the merits of Ben's Bar's argument, we begin our analysis by summarizing the reasoning and holdings of these decisions.

FN17. *But see Alameda Books*, 122 S.Ct at 1745 n. 2 (Souter, J., dissenting) (joined by Stevens, J. and Ginsburg, J.) (noting that

"[b]ecause *Renton* called its secondary-effects ordinance a mere, time, place, or manner restriction and thereby glossed over the role of content in secondary-effects zoning ... I believe the soft focus of its statement of the middle-tier test should be rejected in favor of the ... [*O'Brien*] formulation ... a closer relative of secondary effects zoning than mere time, place, and manner regulations, as the Court ... implicitly recognized [in *Pap's A.M.*]").

715 (1) *Young v. American Mini Theatres, Inc.

In *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Supreme Court addressed, *inter alia*, whether a zoning ordinance enacted by the City of Detroit violated the First Amendment. [FN18] *Id.* at 58, 96 S.Ct. 2440. The "dispersal" ordinance at issue prohibited the operation of any adult entertainment movie theater within 1,000 feet of any two other "regulated uses" (e.g., adult bookstores, bars, hotels, pawnshops), or within 500 feet of a residential area. *Id.* at 52, 96 S.Ct. 2440. A majority of the Court upheld the constitutionality of the ordinance, but in doing so did not agree on a single rationale for the decision. *Id.* at 62-63, 96 S.Ct. 2440 (plurality opinion); *id.* at 84, 96 S.Ct. 2440 (Powell, J. concurring). The plurality concluded that "apart from the fact that the ordinance treats adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in respective theaters, *the regulation of the place where such films may be exhibited does not offend the First Amendment.*" *Id.* at 63, 96 S.Ct. 2440 (emphasis added). In reaching this conclusion, the plurality emphasized that "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Id.* at 70, 96 S.Ct. 2440. The plurality also found that the city's zoning ordinance was justified by its interest in "preserving the character of its neighborhoods," *id.* at 71, 96 S.Ct. 2440, and therefore "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* The plurality concluded its analysis by noting that "what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited ...." *Id.* [FN19]

FN18. The Court also concluded that the zoning ordinance did not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, *American Mini Theatres*, 427 U.S. at 61, 72-73, 96 S.Ct. 2440; *see generally id.* at 73-84, 96 S.Ct. 2440 (Powell, J., concurring), issues that are not before us on appeal.

FN19. The *American Mini Theatres* plurality also noted, in a footnote, that the city had enacted the zoning ordinance because of its determination that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, *effects* which are not attributable to theaters showing other types of films," 427 U.S. at 71 n. 34, 96 S.Ct. 2440 (emphasis added), noting "[i]t is this *secondary effect* which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech." *Id.* (emphasis added).

Justice Powell concurred in the judgment of the Court, agreeing with the plurality that the zoning ordinance "is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content." *Id.* at 78-79, 96 S.Ct. 2440. He disagreed, however, with the plurality's determination that "nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." *Id.* at 73 n. 1, 96 S.Ct. 2440. Instead, Justice Powell concluded that it was appropriate to analyze and uphold the constitutionality of the zoning ordinance under the four-part test enunciated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *Id.* at 79, 96 S.Ct. 2440. [FN20]

FN20. Under *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), Justice Powell's concurrence is the controlling opinion in *American Mini Theatres*, as the most narrow opinion joining four other Justices in the judgment of the Court. *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 504 (7th Cir.1980).

716 (2) City of Renton v. Playtime Theatres, Inc.

The Supreme Court's decision in *American Mini Theatres* laid the groundwork for the Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). [FN21] In *Renton*, the Court considered the validity of an adult entertainment zoning ordinance virtually indistinguishable from the one at issue in *American Mini Theatres*. *Id.* at 46, 106 S.Ct. 925. Unlike the *American Mini Theatres* plurality, however, the *Renton* Court outlined an analytical framework for evaluating the constitutionality of these ordinances. The Court's analysis proceeded in three steps. First, the Court found that the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations. *Id.* Next, the Court considered whether the ordinance was content-neutral or content-based. If an ordinance is content-based, it is presumptively invalid and subject to strict scrutiny. *Id.* at 46-47, 106 S.Ct. 925. On the other hand, if an ordinance is aimed not at the content of the films shown at adult theaters, but rather at combating the secondary effects of such theaters on the surrounding community (e.g., increased crime rates, diminished property values), it will be treated as a content-neutral regulation. *Id.* In *Renton*, the Court held that the zoning ordinance was a "content neutral" regulation of speech because while "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters .... [it] is aimed not at the *content* of the films shown ... but rather at the *secondary effects* of such theaters on the surrounding community." 475 U.S. at 47, 106 S.Ct. 925. Finally, given this finding, the *Renton* Court found that the zoning ordinance would be upheld as a valid time, place and manner regulation, *id.* at 46, 106 S.Ct. 925, if it "was designed to serve a substantial governmental interest and [did] not unreasonably limit alternative avenues of communication." *Id.* at 47, 106 S.Ct. 925. The Court concluded that the zoning ordinance met this test, noting that a " 'city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *Id.* at 50, 106 S.Ct. 925 (quoting *American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. 2440), [FN22] and that the ordinance allowed for reasonable alternative avenues of communication because there was "ample, accessible real estate" open for use as adult theater sites. *Id.* at 53, 96 S.Ct. 2440.

FN21. Falling in between *American Mini Theatres* and *Renton* is the Supreme Court's decision in *Schad v. Borough Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), where the Court struck down, on First Amendment grounds, a zoning ordinance that did not--like the ordinance in *American Mini Theatres*--require the

dispersal of adult theaters, but instead prohibited them altogether. *Id.* at 71-72, 96 S.Ct. 2440 (plurality opinion); *id.* at 77, 96 S.Ct. 2440 (Blackmun, J., concurring); *id.* at 79, 96 S.Ct. 2440 (Powell, J., concurring). The only significance of *Schad,* for purpose of our analysis, is that the holding of that case serves as the basis for the first step in the *Renton* framework--i.e., does the ordinance completely prohibit the expressive conduct at issue? *See Alameda Books,* 122 S.Ct. at 1733 (noting that the first step in the *Renton* framework was the Court's determination that "the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations"); *Renton,* 475 U.S. at 46, 106 S.Ct. 925.

FN22. *See also American Mini Theatres,* 427 U.S. at 80, 96 S.Ct. 2440 (Powell, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial").

The Supreme Court's decision in *Renton* is also notable because in addition to upholding the constitutionality of the zoning ordinance, the Court also held that the ***717** First Amendment did not require municipalities, before enacting such ordinances, to conduct new studies or produce evidence independent of that already generated by other cities (whether summarized in judicial decisions or not), *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925, so long as "whatever evidence [a] city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.*

(3) *Barnes v. Glen Theatre, Inc.*

In *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), the Supreme Court was called upon to address the constitutionality of Indiana's public indecency statute. In a splintered decision, a narrow majority of the Court held that the statute--which prohibited nudity in public places--could be enforced against establishments featuring nude dancing, i.e., by requiring dancers to wear pasties and G-strings during their performances, without violating the First Amendment's right of free expression. *Id.* at 565, 111 S.Ct. 2456 (plurality opinion); *id.* at 572, 111 S.Ct. 2456 (Scalia, J. concurring); *id.* at 582, 585, 111 S.Ct. 2456 (Souter, J. concurring). Of that majority, however, only three Justices agreed on a single rationale.

The plurality--Chief Justice Rehnquist and Justices O'Connor and Kennedy-- began its analysis by emphasizing that while "nude dancing ... is expressive conduct within the outer perimeters of the First Amendment .... [w]e must [still] determine the level of protection to be afforded to the expressive conduct at issue, and ... whether the Indiana statute is an impermissible infringement of that protected activity." *Barnes,* 501 U.S. at 566, 111 S.Ct. 2456. The plurality noted that the public indecency statute did not "ban [ ] nude dancing, as such, but ... proscribed public nudity across the board," *id.,* and that "the Supreme Court of Indiana has construed the Indiana statute to preclude nudity in what are essentially places of public accommodation." *Id.* Next, the plurality concluded that the public indecency statute should be analyzed under *O'Brien's* four-part test for evaluating regulations of expressive conduct protected by the First Amendment. [FN23] Applying this test, the plurality found "that Indiana's public indecency statute [was] justified despite its incidental limitations on some expressive activity," *id.* at 567, 111 S.Ct. 2456, because: (1) the statute was "clearly within the constitutional power of the State and furthers substantial governmental interests [i.e., protecting societal order and morality]," *id.* at 568, 111 S.Ct. 2456; (2) the state's interest in protecting societal order and morality by enforcing the statute to prohibit nude dancing was "unrelated to the suppression of free expression" because "the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic [and] [t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity," *id.* at 570-71, 111 S.Ct. 2456; (3) the incidental restriction on First Amendment freedom placed on nude dancing by the statute was no greater than essential to the furtherance of the governmental interest because "[t]he statutory prohibition is not a means to some greater end, but an end in itself," *id.* at 571-72, 111 S.Ct. 2456; and (4) the public indecency statute was narrowly tailored because "Indiana's requirement that the dancers wear pasties and G-strings is modest, and the *bare minimum necessary* ***718** *to achieve the State's purpose.*" *Id.* at 572, 111 S.Ct. 2456 (emphasis added).

FN23. In doing so, the *Barnes* plurality noted that the *O'Brien* test and the time, place, and manner test utilized by the Court in *Renton* have "been interpreted to embody

much the same standards ...." 501 U.S. at 566, 111 S.Ct. 2456.

Justice Scalia concurred in the judgment of the Court, but in doing so expressed his opinion that "the challenged regulation must be upheld not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." *Id.* at 572, 111 S.Ct. 2456. Justice Souter also concurred in the judgment of the Court, agreeing with the plurality that "the appropriate analysis to determine the actual protection required by the First Amendment is the four-part inquiry described in *United States v. O'Brien.*" *Id.* at 582, 111 S.Ct. 2456. He wrote separately, however, to rest his concurrence in the judgment, "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments ...." *Id.* [FN24] In doing so, Justice Souter relied heavily on the Court's decision in *Renton.* *Id.* at 583-87, 111 S.Ct. 2456.

FN24. Under *Marks*, 430 U.S. at 193, 97 S.Ct. 990, Justice Souter's concurrence is the controlling opinion in *Barnes*, as the most narrow opinion joining the judgment of the Court. *Schultz*, 228 F.3d at 842 n. 2; *DiMa Corp.*, 185 F.3d at 830.

(4) *City of Erie v. Pap's A.M.*

The Supreme Court revisited the *Barnes* holding in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), where a majority of the Court upheld the constitutionality of a public indecency ordinance "strikingly similar" to the one at issue in *Barnes*. *Id.* at 283, 120 S.Ct. 1382. Unlike *Barnes*, however, in *Pap's A.M.* five justices agreed that the proper framework for analyzing public indecency statutes was *O'Brien's* four-part test. *Id.* at 289, 120 S.Ct. 1382 (plurality opinion) ("We now clarify that government restrictions on public nudity ... should be evaluated under the framework set forth in *O'Brien* for content- neutral restrictions on symbolic speech"); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part) (agreeing with the "analytical approach that the plurality employs in deciding this case [i.e., the *O'Brien* test]"). *See also Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1278 (11th Cir.2001) (holding that "[a]lthough no opinion in [*Pap's A.M.*] was joined by more than four Justices, a majority of the Court basically agreed on how these kinds of statutes should be analyzed [i.e., *O'Brien's* four-part test]"). A majority of the Justices also agreed that combating the adverse secondary effects of nude dancing was within the city's constitutional powers and unrelated to the suppression of free expression, *Pap's A.M.*, 529 U.S. at 296, 301, 120 S.Ct. 1382 (plurality opinion) ("Erie's efforts to protect public health and safety are clearly within the city's police powers .... [and] [t]he ordinance is unrelated to the suppression of free expression ...."); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part) ("Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression ...."), thus satisfying the first and third prongs of the *O'Brien* test.

A majority of the Justices in *Pap's A.M.* could not, however, agree on whether the public indecency statute furthered an important or substantial interest of the city (second prong of *O'Brien*), and if so whether the incidental restriction on nude dancing was no greater than that essential to the furtherance of this interest (fourth prong). The plurality--Chief Justice Rehnquist and Justices O'Connor, Kennedy, ***719** and Breyer--concluded that Erie's public indecency ordinance furthered an important or substantial government interest under *O'Brien* because "[t]he asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing [e.g., the increased crime generated by such establishments] are undeniably important." *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382. [FN25] The *Pap's A.M.* plurality also found that Erie's public indecency statute was no greater than that essential to furthering the city's interest in combating the harmful secondary effects of nude dancing because:

FN25. The *Pap's A.M.* plurality's reliance on *Renton's* secondary effects doctrine is significant because it marks a departure from the

Barnes plurality's determination that a public indecency ordinance may be justified by a State's interest in protecting societal order and morality, *Barnes*, 501 U.S. at 568, 111 S.Ct. 2456, and an adoption of the approach advocated by Justice Barrett in his

concurrence in that case. *Id.* at 582, 111 S.Ct. 2456.

The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.* The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.
529 U.S. at 301, 120 S.Ct. 1382.
Justice Scalia, joined by Justice Thomas, agreed with the plurality that the ordinance should be upheld, but wrote separately to emphasize that " 'as a general law regulating conduct and not specifically directed at expression, [the city's public indecency ordinance] is not subject to First Amendment scrutiny at all,' " *Pap's A.M.*, 529 U.S. at 307-08, 120 S.Ct. 1382 (quoting *Barnes*, 501 U.S. at 572, 111 S.Ct. 2456 (Scalia, J., concurring)), and that "[t]he traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment." *Id.* at 310, 120 S.Ct. 1382. Justice Souter concurred in part and dissented in part, stressing his belief that "the current record [does not] allow us to say that the city has made a sufficient evidentiary showing to sustain its regulation ...." *Id.* at 310-11, 120 S.Ct. 1382. Justice Stevens, joined by Justice Ginsburg, dissented, asserting that the ordinance was a "patently invalid" content-based ban on nude dancing that censored protected speech. *Id.* at 331-32, 120 S.Ct. 1382.
Because the plurality's decision offers the narrowest ground for the Supreme Court's holding in *Pap's A.M.*, we find the reasoning of that opinion to be controlling. *Marks*, 430 U.S. at 193, 97 S.Ct. 990.
(5) *City of Los Angeles v. Alameda Books, Inc.*
This past term in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), the Supreme Court upheld, at the summary judgment stage, an ordinance prohibiting multiple adult entertainment businesses from operating in the same building. *Id.* at 1733. The Court reached this conclusion despite the fact that the city had not, prior to the enactment of the ordinance, conducted or relied upon studies (or other evidence) specifically demonstrating that forbidding multiple adult entertainment businesses from operating under one roof reduces secondary effects. *Id.* at 1736 (plurality opinion); *id.* at 1744 (Kennedy, J., concurring). Once again, however, a majority of the Court could not agree on a single rationale for this decision.
***720** The primary issue in *Alameda Books* was the appropriate standard "for determining whether an ordinance serves a substantial government interest under *Renton*." 122 S.Ct. at 1733. The plurality--written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Scalia and Thomas--concluded that whether a municipal ordinance is " 'designed to serve a substantial government interest and does not unreasonably limit alternative avenues of communication' ... requires [courts to] ... ask[ ] whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Id.* at 1737. According to the plurality, this requirement is met if the evidence upon which the municipality enacted the regulation " 'is reasonably believed to be relevant' for demonstrating a connection between [secondary effects producing] speech and a substantial, independent government interest." *Id.* at 1736. The plurality stressed that once a municipality presents a rational basis for addressing the secondary effects of adult entertainment through evidence that "fairly support[s] the municipality's rationale for its ordinance," *id.*, the plaintiff challenging the constitutionality of the ordinance must "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 factual findings." *Id.* If a plaintiff fails to cast doubt on the municipality's rationale, the inquiry is over and "the municipality meets the standard set forth in *Renton*." *Id.* If, however, a plaintiff succeeds "in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* Because the plurality concluded that the city, for purposes of summary judgment, had complied with the evidentiary requirement outlined in *Renton*, *id.*, it remanded the case for further proceedings. *Id.* at 1738.
Justice Scalia, in addition to joining the plurality opinion, wrote separately to emphasize that while the plurality's opinion "represents a correct application of our jurisprudence concerning the regulation of the 'secondary effects' of pornographic speech .... our First Amendment traditions make 'secondary effects' analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex." *Alameda Books*, 122 S.Ct. at 1738-39.
Justice Kennedy concurred in the judgment of the Court, but writing separately because he

concluded, *inter alia,* that "the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur." *Id.* at 1739. He began, however, by expressing his agreement with the plurality that the secondary effects resulting from "high concentrations of adult businesses can damage the value and integrity of a neighborhood," *id.,* stressing "[t]he damage is measurable; it is all too real." *Id.* He also agreed with the plurality that "[t]he law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech," *id.,* emphasizing that "[a] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *Id.* (quoting *American Mini Theatres,* 427 U.S. at 71, 96 S.Ct. 2440). In Justice Kennedy's opinion, if a municipality ameliorates the secondary effects of adult entertainment through "the traditional exercise of its zoning power, and at the same time leaves the quantity and accessibility of the speech ***721** substantially undiminished, there is no First Amendment objection .... even if the measure identifies the problem outside by reference to the speech inside--that is, even if the measure is in that sense content based." [FN26] *Id.* Like the plurality, he concluded that "[a] zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it." *Id.* at 1740. He also expressed his belief that zoning regulations "do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use ... [and that] [t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional." *Id.* at 1741.

FN26. The plurality in *Alameda Books* characterized the second step of the *Renton* framework as follows: "[w]e next consider[ ] whether the ordinance [is] content neutral or content based." 122 S.Ct. at 1734. In his concurrence, Justice Kennedy joined the four dissenters, *id.* at 1744-45, in jettisoning the "content neutral" label, noting that the "fiction" of adult entertainment zoning ordinances being "content neutral ... is perhaps more confusing than helpful .... These ordinances are content based and we should call them so." *Id.* at 1741. In reaching this conclusion, Justice Kennedy emphasized that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Id.* Justice Kennedy concluded, however, that an adult entertainment zoning ordinance is not subject to strict scrutiny simply because it "identifies the problem outside by reference to the speech inside," *id.* at 1740, and, as such, "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather

than strict scrutiny." *Id.* at 1741. Thus, while the label has changed, the substance of *Renton*'s second step remains the same.

Based on the foregoing principles, Justice Kennedy believes that two questions must be asked by a court seeking to determine whether a zoning ordinance regulating adult entertainment is designed to meet a substantial government interest: (1) "what proposition does a city need to advance in order to sustain a secondary-effects ordinance?", *Alameda Books,* 122 S.Ct at 1741; and (2) "how much evidence is required to support the proposition?" *Id.* According to Justice Kennedy, the plurality skipped the second question, giving the correct answer, but neglected to give sufficient "attention" to the first question, *id.,* i.e., "the claim a city must make to justify a content- based ordinance." *Id.* at 1742. In his view, "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact," *Id.,* and "[t]he rationale of the ordinance must be that it will suppress secondary effects ... not ... speech." *Id.* Justice Kennedy's primary area of disagreement with the plurality's analysis was that, in his opinion, it failed to "address how speech [would] fare under the city's ordinance." *Id.*

The differences between Justice Kennedy's concurrence and the plurality's opinion are, however, quite subtle. Justice Kennedy's position is not that a municipality must *prove* the efficacy of its rationale for reducing secondary effects *prior to* implementation, as Justice Souter and the other dissenters would require, *see generally Alameda Books,* 122 S.Ct. at 1744-51; but that a municipality's *rationale* must be *premised* on the theory that it "*may* reduce the costs of secondary effects without substantially reducing speech." *Id.* at 1742 (emphasis added). Significantly, while Justice Kennedy believed that the plurality did not adequately address this aspect of the city's

rationale, he agreed ***722** with the plurality's overall conclusion that a municipality's initial burden of demonstrating a substantial government interest in regulating the adverse secondary effects associated with adult entertainment is slight, noting:

As to this, we have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required .... As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; *and if its inferences appear reasonable,* we should not say there is no basis for its conclusion.

Id. at 1742-43 (emphasis added).

The dissenting opinion of Justice Souter, joined by Justices Stevens and Ginsburg in full and by Justice Breyer with respect to part II, asserted that the Court should have struck down the ordinance. *Alameda Books,* 122 S.Ct. at 1747 (Souter, J., dissenting).

Because Justice Kennedy's concurrence is the narrowest opinion joining the judgment of the Court in *Alameda Books,* we conclude that it is the controlling opinion. *Marks,* 430 U.S. at 193, 97 S.Ct. 990.

D. Does Section 5(b)'s prohibition of alcohol on the premises of Sexually Oriented Businesses violate the First Amendment?

[4] Based on the road map provided by the Supreme Court in *44 Liquormart,* as described *supra,* we conclude that a liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments is constitutional if: (1) the State is regulating pursuant to a legitimate governmental power, *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673; (2) the regulation does not completely prohibit adult entertainment, *Renton,* 475 U.S. at 46, 106 S.Ct. 925; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments, *Pap's A.M.,* 529 U.S. at 289-91, 120 S.Ct. 1382; [FN27] and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available, *see Alameda Books,* 122 S.Ct. at 1734 (plurality opinion); *id.* at 1739- 44 (Kennedy, J. concurring); *or,* alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. *Pap's A.M.,* 529 U.S. at 296, 301 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

> FN27. This prong is, for all practical purposes, identical to the *Alameda Books* plurality's inquiry into whether the zoning ordinance "was content neutral or content based." 122 S.Ct. at 1733-34. Although a majority of the Justices no longer employ the content neutral label when evaluating the constitutionality of a "secondary effects" ordinance, the ultimate inquiry remains the same. *See supra* n. 26.

[5] Applying the foregoing analytical framework here, we conclude that Section 5(b) does not violate the First Amendment. To begin with, the Village's regulation of alcohol sales and consumption in "inappropriate locations" is clearly within its general police powers. *44 Liquormart,* 517 U.S. at 515, 116 S.Ct. 1495; *LaRue,* 409 U.S. at 114, 93 S.Ct. 390. As such, the Village enacted Section 5 (b) "within the constitutional power of the Government." *Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382 (holding that a municipality's efforts to protect the public's health and safety through its ***723** general police powers satisfies this requirement); *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673 (same).

[6] The next two prongs of our test concern the level of constitutional scrutiny that must be applied to Section 5(b). The level of First Amendment scrutiny a court uses to determine whether a regulation of adult entertainment is constitutional depends on the purpose for which the regulation was adopted. If the regulation was enacted to restrict certain viewpoints or modes of expression, it is presumptively invalid and subject to strict scrutiny. *Texas v. Johnson,* 491 U.S. 397, 403, 411-12, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Renton,* 475 U.S. at 46-47, 106 S.Ct. 925. If, on the other hand, the regulation was adopted for a purpose unrelated to the suppression of expression--e.g., to regulate nonexpressive conduct or the time, place, and manner of expressive conduct--a court must apply a less demanding intermediate scrutiny. 491 U.S. at 406-07, 109 S.Ct. 2533; *Pap's A.M.,* 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in

part and dissenting in part).

[7] [8] The Supreme Court has held that regulations of adult entertainment receive intermediate scrutiny if they are designed not to suppress the "content" of erotic expression, but rather to address the negative secondary effects caused by such expression. *Alameda Books*, 122 S.Ct. at 1733-34 (plurality opinion), *id.* at 1741 (Kennedy, J., concurring); *Renton*, 475 U.S. at 48, 106 S.Ct. 925. Here, Section 5(b), like the liquor regulations at issue in *LaRue*, 409 U.S. at 118, 93 S.Ct. 390, does not completely prohibit Ben's Bar's dancers from conveying an erotic message; it merely prohibits alcohol from being sold or consumed on the premises of adult entertainment establishments. *See, e.g.*, *Wise Enterprises, Inc. v. Unified Gov't of Athens-Clarke County, Georgia*, 217 F.3d 1360, 1365 (11th Cir.2000) (holding that "[t]he ordinance does not prohibit all nude dancing, but only restricts nude dancing in those locations where the unwanted secondary effects arise"); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 998 (11th Cir.1998) (holding that ordinance prohibiting alcohol on the premises of adult entertainment establishments did not ban nude dancing, but merely restricted "the place or manner of nude dancing without regulating any particular message it might convey"). Moreover, it is clear that the "predominant concerns" motivating the Village's enactment of Section 5(b) " 'were with the secondary effects of adult [speech], and not with the content of adult [speech].' " *Alameda Books*, 122 S.Ct. at 1737 (plurality opinion) (quoting *Renton*, 475 U.S. at 47, 106 S.Ct. 925); *id.* at 1739-41 (Kennedy, J., concurring). [FN28] The Village enacted the Ordinance because it believed "there is convincing documented evidence that Sexually Oriented Businesses have a deleterious effect on both existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values." Specifically, the Village concluded that "the consumption of alcoholic beverages on the premises of a Sexually Oriented Business exacerbates the deleterious secondary effects of such businesses on the community." Additionally, in passing the Ordinance, the Village emphasized (in the text of the Ordinance) that its intention was not ***724** "to suppress any speech activities protected by the First Amendment, but to enact a[n] ... ordinance which addresses the secondary effects of Sexually Oriented Businesses," and that it was not attempting to "restrict or deny access by adults to sexually oriented-materials protected by the First Amendment ...."

> FN28. Federal courts evaluating the "predominant concerns" behind the enactment of a statute, ordinance, regulation, or the like, may do so by examining a wide variety of materials including, but not limited to, the text of the regulation or ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware. *Ranch House*, 238 F.3d at 1280.

[9] For all of the foregoing reasons, Section 5(b) is properly analyzed as a content-based time, place, and manner restriction, or as a content-based regulation of expressive conduct, and therefore is subject only to intermediate scrutiny. *Alameda Books*, 122 S.Ct. at 1733-36 (plurality opinion), *id.* at 1741 (Kennedy, J. concurring); *Pap's A.M.*, 529 U.S. at 294-96, 120 S.Ct. 1382 (plurality opinion), *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part). [FN29] *See also* *Artistic Entm't, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1308-09 (11th Cir.2000) (holding that "a prohibition on the sale of alcohol at adult entertainment venues ... [is] content-neutral and subject to the *O'Brien* test"); *Wise Enterprises*, 217 F.3d at 1364 (holding that "[i]t is clear from these [legislative] statements the County's ordinance is aimed at the secondary effects of nude dancing combined with the consumption of alcoholic beverages, not at the message conveyed by nude dancing .... [T]he district court was [therefore] correct in [applying] ... intermediate scrutiny ...."). Regulations that prohibit nude dancing where alcohol is served or consumed are independent of expressive or communicative elements of conduct, and therefore are treated as if they were content-neutral. *Wise Enterprises*, 217 F.3d at 1363.

> FN29. *Compare* *G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark, Missouri*, 83 S.W.3d 98, 103 (2002) (holding that because the city presented no evidence that its purpose in enacting an ordinance restricting nudity in establishments where alcoholic beverages are sold "was to prevent the negative secondary effects associated with erotic dancing

establishments, and, thus, that the ordinance was unrelated to the suppression of expression, the City had the heavy burden of justifying the ordinance under the strict scrutiny standard").

[10] This brings us to the heart of our analysis: whether Section 5(b) is designed to serve a substantial government interest, narrowly tailored, and does not unreasonably limit alternative avenues of communication, *or,* alternatively, furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. As previously noted, it is not entirely clear whether an adult entertainment liquor regulation is to be treated as a time, place, and manner regulation, or instead as a regulation of expressive conduct under *O'Brien. See, e.g., LLEH, Inc.,* 289 F.3d at 365. But in either case, we are required to ask "whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Alameda Books,* 122 S.Ct. at 1737 (plurality opinion). At this stage, courts must "examine evidence concerning regulated speech and secondary effects." *Id.* In conducting this inquiry, we are required, as previously noted, to answer two questions: (1) "what proposition does a city need to advance in order to sustain a secondary-effects ordinance?"; and (2) "how much evidence is required to support the proposition?" *Id.* at 1741 (Kennedy, J. concurring). [FN30]

FN30. As noted *supra,* under *Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), Justice Kennedy's concurrence is the controlling opinion, as the most narrow opinion joining the judgment of the Court.

***725** [11] At the outset, we note that in order to justify a content- based time, place, and manner restriction or a content-based regulation of expressive conduct, a municipality "must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects [i.e., is designed to serve, or furthers, a substantial or important governmental interest], while leaving the quantity and accessibility of speech substantially intact [i.e., that the regulation is narrowly tailored and does not unreasonably limit alternative avenues of communication, or, alternatively, that the restriction on expressive conduct is no greater than is essential in furtherance of that interest]." [FN31] *Alameda Books,* 122 S.Ct. at 1741 (Kennedy, J. concurring). The regulation may identify the speech based on content, "but only as a shorthand for identifying the secondary effects outside." *Id.* A municipality "may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* Thus, the rationale behind the enactment of Section 5 (b) must be that it will suppress secondary effects, not speech. *Id.*

FN31. In this case, it is unnecessary to conclusively resolve which of these two standards is applicable. As explained *infra,* Section 5(b)'s alcohol prohibition is, as a practical matter, the least restrictive means of furthering the Village's interest in combating the secondary effects resulting from the combination of adult entertainment and alcohol consumption, and therefore satisfies either standard.

The Village's rationale in support of Section 5(b) is that the liquor prohibition will significantly reduce the secondary effects that naturally result from combining adult entertainment with the consumption of alcoholic beverages without substantially diminishing the availability of adult entertainment, in this case nude and semi-nude dancing. In enacting the Ordinance, the Village Board relied on numerous judicial decisions, studies from 11 different cities, and "findings reported in the Regulation of Adult Entertainment Establishments of St. Croix, Wisconsin; and the Report of the Attorney General's Working Group of Sexually Oriented Businesses (June 6, 1989, State of Minnesota)," to support its conclusion that adult entertainment produces adverse secondary effects.
Ben's Bar argues that the Village may not rely on prior judicial decisions or the experiences of other municipalities, but must instead conduct its own studies, at the local level, to determine whether

adverse secondary effects result when liquor is served on the premises of adult entertainment establishments. This view, however, has been expressly (and repeatedly) rejected by the Supreme Court. *Alameda Books,* 122 S.Ct. at 1743 (Kennedy, J. concurring) (holding that " '[t]he First Amendment does not require a city, before enacting ... an [adult entertainment secondary effects] 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.' ") (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925); *Barnes,* 501 U.S. at 584, 111 S.Ct. 2456 (Souter, J. concurring) (same).

Ben's Bar also contends that the Village failed to meet its burden of demonstrating the constitutionality of Section 5(b) because "the Village's evidentiary record did not include any written reports relating specifically to the effects of serving alcohol in establishments offering nude and semi-nude dancing." In *LaRue,* however, the Supreme Court explicitly held that a State's conclusion that "certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational ***726** one." 409 U.S. at 118, 93 S.Ct. 390. Because the adult entertainment at issue in this case is of the same character as that at issue in *LaRue,* it was entirely reasonable for the Village to conclude that barroom nude dancing was likely to produce adverse secondary effects at the local level, even in the absence of specific studies on the matter. *Alameda Books,* 122 S.Ct. at 1736-37 (plurality opinion) (adopting view of plurality in *Pap's A.M.* as to the evidentiary requirement for adult entertainment cases), *id.* at 1741 (Kennedy, J., concurring) (agreeing with the plurality on this point, as a fifth vote); *Pap's A.M.,* 529 U.S. at 296-97, 120 S.Ct. 1382 (plurality opinion) (same); *Giovani,* 303 F.3d at 516 (same). In fact, the Supreme Court has gone so far as to assert that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Bellanca,* 452 U.S. at 718, 101 S.Ct. 2599. *See also Blue Canary,* 251 F.3d at 1124 (noting that "[l]iquor and sex are an explosive combination"); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. of California,* 99 Cal.App.4th 880, 121 Cal.Rptr.2d 729, 737 (2002) (same). For these reasons, we conclude that the evidentiary record fairly supports the Village's proffered rationale for Section 5(b), and that Ben's Bar has failed "to cast direct doubt on this rationale either by demonstrating the [Village's] evidence does not support its rationale or by furnishing evidence that disputes the [Village's] factual findings ...." *Alameda Books,* 122 S.Ct. at 1736.

Ben's Bar also contends that Section 5(b) is not narrowly tailored because the Village offered no evidence that "the incidental restrictions placed on Ben's [Bar], over and above the pasties and G-strings requirement, ameliorate any purported negative secondary effects." This argument, however, is problematic for several reasons, two of which we will address briefly.

[12] First, as previously noted, Section 5(b) does not impose any restrictions whatsoever on a dancer's ability to convey an erotic message. Instead, the regulation prohibits Sexually Oriented Businesses like Ben's Bar from serving alcoholic beverages to its patrons during a dancer's performance. This is not a restriction on erotic expression, but a prohibition of nonexpressive conduct (i.e., serving and consuming alcohol) during the presentation of expressive conduct. The First Amendment does not entitle Ben's Bar, its dancers, or its patrons, to have alcohol available during a "presentation" of nude or semi-nude dancing. *See Gary v. City of Warner Robins, Georgia,* 311 F.3d 1334, 1340 (11th Cir.2002) (holding that ordinance prohibiting persons under the age of 21 from entering or working at "any establishment ... which sells alcohol by the drink for consumption on premises" did not violate an underage nude dancer's First Amendment right to free expression because she "remains free to observe and engage in nude dancing, but she simply cannot do so ... in establishments that primarily derive their sales from alcoholic beverages consumed on the premises"); *Sammy's of Mobile,* 140 F.3d at 999 (holding that while nude dancing is entitled to a degree of protection under the Supreme Court's First Amendment jurisprudence, "we are unaware of any constitutional right to drink while watching nude dancing"); *Dept. of Alcoholic Beverage Control,* 99 Cal.App.4th at 895, 121 Cal.Rptr.2d 729 (noting that "[t]he State ... has not prohibited dancers from performing with the utmost level of erotic expression. They are simply forbidden to do so in establishments which serve alcohol, and the Constitution is thereby not offended"). What the First Amendment does require is that establishments like Ben's Bar be given "a ***727** 'reasonable opportunity' to disseminate the speech at issue." *North Ave. Novelties, Inc. v. City of Chicago,* 88 F.3d 441, 445 (7th Cir.1996). A "reasonable opportunity," however, does not include a concern for economic considerations. *Renton,* 475 U.S. at 54, 106 S.Ct. 925. [FN32]

FN32. In an affidavit filed with the district court, Barry Breault, part-owner of Ben's Bar, stated that:

> The bulk of Ben's Bar's revenues are derived from beverage sales and associated food sales. Revenues from adult entertainment ... account for only about one-third of Ben's revenues. *Ben's Bar cannot operate at a profit without the revenue from the sale of alcoholic beverages, and the*
>
> *business such sales bring in.*
>
> (Emphasis added.)

Second, Section 5(b)'s alcohol prohibition, like the one in *LaRue,* is limited to adult entertainment establishments, and does not apply to:

[T]heaters, performing arts centers, civic centers, and dinner theaters where live dance, ballet, music, and dramatic performances of serious artistic merit are offered on a regular basis; and in which the predominant business or attraction is not the offering of entertainment which is intended for the sexual interests or titillation of customers; and where the establishment is not distinguished by an emphasis on or the advertising or promotion of nude or semi-nude performances. [FN33]

> FN33. This section of the Ordinance also emphasizes that "[w]hile expressive live nudity may occur within these establishments [those noted in section (6)], this ordinance seeks only to minimize and prevent the secondary effects of Sexually Oriented Businesses on the community. Negative secondary effects have not been associated with these establishments."

Ordinance A-472(6). *Compare Giovani,* 303 F.3d at 515 (noting that lack of evidentiary support for adult entertainment liquor regulations "might not pose a problem if the challenged restrictions applied only to bars and clubs that present nude or topless dancing").

Finally, we note that Section 5(b)'s liquor prohibition is no greater than is essential to further the Village's substantial interest in combating the secondary effects resulting from the combination of nude and semi-nude dancing and alcohol consumption because, as a practical matter, a complete ban of alcohol on the premises of adult entertainment establishments is the *only* way the Village can advance that interest. As the Supreme Court recognized in *LaRue,*

Nothing in the record before us or in common experience compels the conclusion that either self-discipline on the part of the customer or self- regulation on the part of the bartender could have been relied upon by the Department to secure compliance with ... [the] regulation[s]. The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one ....

409 U.S. at 116, 93 S.Ct. 390. *See also Wise Enterprises, Inc. v. Unified Government of Athens-Clarke County, Georgia,* 217 F.3d 1360, 1364-65 (11th Cir.2000) (holding that ordinance prohibiting alcohol on the premises of adult entertainment establishments satisfied *O'Brien's* requirement that restriction on First Amendment rights be no greater than necessary to the furtherance of the government's interest because "[t]here is no less restrictive alternative"). Indeed, unlike the zoning ordinance at issue in *Alameda Books,* there is no need to speculate as to whether Section 5(b) will achieve its stated purpose. Prohibiting alcohol on the premises of adult entertainment establishments will unquestionably reduce the enhanced secondary ***728** effects resulting from the explosive combination of alcohol consumption and nude or semi-nude dancing.

Given the foregoing, we conclude that Section 5(b) does not violate the First Amendment. The regulation has no impact whatsoever on the tavern's ability to offer nude or semi-nude dancing to its patrons; it seeks to regulate alcohol and nude or semi-nude dancing without prohibiting either. The citizens of the Village of Somerset may still buy a drink and watch nude or semi-nude dancing. They are not, however, constitutionally entitled to do both at the same time and in the same place. *Gary,* 311 F.3d at 1338 (holding that there is no generalized right to associate with other adults in alcohol-purveying establishments with other adults). The deprivation of alcohol does not prevent the observer from witnessing nude or semi-nude dancing, or the dancer from conveying an erotic message. Perhaps a sober patron will find the performance less tantalizing, and the dancer might

therefore feel less appreciated (not necessarily from the reduction in ogling and cat calls, but certainly from any decrease in the amount of tips she might otherwise receive). And we do not doubt Ben's Bar's assertion that its profit margin will suffer if it is unable to serve alcohol to its patrons. But the First Amendment rights of each are not offended when the show goes on without liquor.

III.

For the reasons expressed in this opinion, Section 5(b)'s prohibition of alcohol on the premises of adult entertainment establishments does not violate the First Amendment. We, therefore, affirm the district court's decision granting the Village's motion for summary judgment.

C.A.7 (Wis.),2003.

Ben's Bar, Inc. v. Village of Somerset

316 F.3d 702

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West Reporter Image (PDF)

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Exhibit 11

United States Court of Appeals,
Seventh Circuit.
R.V.S., L.L.C., Plaintiff-Appellant,
v.
CITY OF ROCKFORD, Defendant-Appellee.
No. 03-2772.
Argued Dec. 9, 2003.
Decided March 17, 2004.

Background: Company that sought to operate business that arguably was an "exotic dancing nightclub" sought to enjoin enforcement of city ordinance requiring such non-nude and non-semi-nude nightclubs to obtain special use permits, and precluding issuance of permits to clubs located within 1000 feet of churches, schools, residential districts or other such nightclubs. Following bench trial, the United States District Court for the Northern District of Illinois, 266 F.Supp.2d 798, Philip G. Reinhard, J., entered judgment for city. Company appealed.

Holdings: The Court of Appeals, Flaum, Chief Judge, held that:
(1) ordinance was subject to intermediate rather than strict scrutiny;
(2) insufficient nexus was shown between exotic dancing nightclubs and undesirable secondary effects used to justify ordinance; and
(3) ordinance was not narrowly tailored.

Reversed and remanded.

West Headnotes

[1] KeyCite Notes

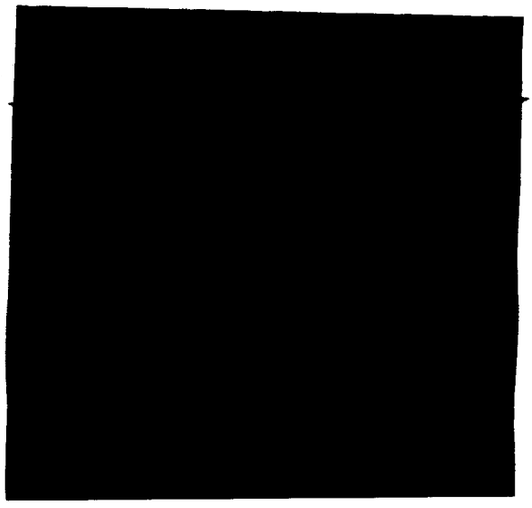
⇦92 Constitutional Law
⇦92V Personal, Civil and Political Rights
⇦92k90 Freedom of Speech and of the Press
⇦92k90.4 Obscenity and Pornography
⇦92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

Court reviewing regulation of adult entertainment establishments considers: (1) whether regulation constitutes invalid total ban or merely time, place and manner regulation; (2) whether regulation is content-based or content-neutral, and accordingly, whether strict or intermediate scrutiny is to be applied; and (3) if content-neutral, whether regulation is designed to serve substantial government interest and allows for reasonable alternative channels of communication. U.S.C.A. Const.Amend. 1.

[2] KeyCite Notes

⇦92 Constitutional Law
⇦92V Personal, Civil and Political Rights
⇦92k90 Freedom of Speech and of the Press
⇦92k90.4 Obscenity and Pornography
⇦92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

On judicial review of ordinance regulating adult entertainment establishment, inquiry into "content-based" or "content-neutral" nature of ordinance, which determines whether strict or intermediate constitutional scrutiny is applied, is inquiry into purpose behind ordinance rather than evaluation of ordinance's form, i.e. whether ordinance was predominantly concerned with secondary effects of adult speech. U.S.C.A. Const.Amend. 1.



[3] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90(3) k. Limitations on Doctrine in General. Most Cited Cases

92 Constitutional Law KeyCite Notes
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

In order to justify content-based time, place and manner restriction, e.g. zoning ordinance regulating adult entertainment establishments, municipality must advance some basis to show that its regulation has purpose and effect of suppressing undesirable secondary effects, and leaves quantity and accessibility of speech substantially intact. U.S.C.A. Const.Amend. 1.

[4] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

City zoning ordinance requiring "exotic dancing nightclubs" to obtain special use permits and restricting such permits to nonresidential areas was predominantly concerned with combating undesirable secondary effects such as prostitution and crime, and thus subject to intermediate rather than strict scrutiny; aldermen who helped pass ordinance testified that their intent was to combat negative effects produced by adult-oriented businesses. U.S.C.A. Const.Amend. 1.

[5] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

414 Zoning and Planning KeyCite Notes
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k86 k. Permits and Certificates. Most Cited Cases

Insufficient nexus was shown between "exotic dancing nightclubs," not featuring nude or semi-nude dancing, and undesirable secondary effects including prostitution cited as justification for city zoning ordinance requiring such clubs to obtain special use permits and tightly restricting geographic areas for such permits, and thus ordinance violated club owners' free speech rights; city proffered evidence of higher-than-average incidence of prostitution in area supposedly housing existing exotic dancing nightclubs, with no further causal connection and no supporting studies but only conclusory assumptions. U.S.C.A. Const.Amend. 1.

[6] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

414 Zoning and Planning KeyCite Notes
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k86 k. Permits and Certificates. Most Cited Cases

City zoning ordinance requiring "exotic dancing nightclubs," not featuring nude or semi-nude dancing, to obtain special use permits, and tightly restricting geographic areas for such permits, was not narrowly tailored and violated First Amendment; ordinance had effect of, e.g., regulating all female persons performing erotic dance in equivalent of short shorts and opaque bra, potentially affecting mainstream performances, without offering justification for such broad regulation. U.S.C.A. Const.Amend. 1.

***404** Allan S. Rubin (argued), Southfield, MI, Wayne B. Giampietro, Stitt, Klein, Daday, Aretos & Giampietro, Arlington Heights, IL, for Plaintiff- Appellant.

Kathleen Elliott (argued), City of Rockford, Law Department, Rockford, IL, for Defendant-Appellee.

Before FLAUM, Chief Judge, and BAUER and ROVNER, Circuit Judges.

FLAUM, Chief Judge.

Plaintiff R.V.S., L.L.C. ("RVS") filed suit against the City of Rockford ("Rockford") seeking a temporary restraining order and to preliminarily and permanently enjoin Rockford from enforcing an ordinance regulating "Exotic Dancing Nightclubs." Rockford Ordinance 2002-308-0 ("the Ordinance") prohibits the operation of those businesses within 1000 feet of churches, schools, residences and other Exotic Dancing Nightclubs, and in addition, requires the issuance of a special use permit before such businesses may operate in nonproscribed locations. RVS argues that the Ordinance violates its rights under the First Amendment to the United States Constitution and appeals the district court's judgment in favor of Rockford. For the reasons stated herein, we reverse the judgment of the district court and remand the case for entry of judgment consistent with this opinion.

I. Background

A. The Ordinance

RVS leases commercial property on Auburn Street in Rockford, Illinois. RVS was preparing to open a business at the Auburn Street location called Moulin Rouge. According to RVS's owner, James Roddy, Moulin Rouge planned to be an "upscale" facility serving food along with "theme dancing" and "artistic performances." On December 12, 2002, in response to an application for a liquor license, RVS received a letter from the Rockford City Attorney explaining that a new ordinance enacted the previous day would prevent RVS from opening Moulin Rouge.

This newly passed ordinance defined, for the first time, a category of businesses known as Exotic Dancing Nightclubs and required that such businesses apply for a special use permit. By definition, the Ordinance only applies to dancers who are clothed--nude and semi-nude dancers are regulated by a separate Rockford ordinance that deals with "Sexually Oriented Businesses." It is undisputed that the business RVS planned to operate could fall within the Exotic Dancing Nightclub definition but not the Sexually Oriented Business definition. Under the Ordinance, an Exotic Dancing Nightclub is defined as:

A business establishment at which one or more exotic dancers perform or provide entertainment to a patron or patrons. Exotic dancer means any person, whether compensated or not, who dances, performs, or entertains by doing a "striptease" or performs an erotic dance or other movements which include the performer touching their breasts or pubic area, or performing any movements simulating sexual activity while wearing fully opaque clothing covering over primarily the genitalia, pubic region, buttocks and if the person is female, ***405** the portions of the breast below the top of the areola.

The Ordinance provides that Exotic Dancing Nightclubs are prevented from operating within 1000 feet "of a church, school, residential district or another exotic dancing nightclub." The Auburn Street property is positioned within 1000 feet of a residential area. Furthermore, even in those areas that are not within 1000 feet of the designated locations, an Exotic Dancing Nightclub must obtain a special use permit specifically allowing its operation at the location it has selected. [FN1]

> FN1. One seeking such a permit must apply to the Zoning Board of Appeals ("ZBA"), which is required to hold at least one public hearing on the application. ROCKFORD, ILL., ZONING ORDINANCE § 1603.3 (2002). In order to recommend to the City Council the granting of a special use permit, the ZBA must find, among other things, that the establishment of "the special use permit will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare." Once the hearing is
>
> held, the ZBA must transmit its decision to the Zoning Administrator who then transmits the ZBA's recommendation to the City Council. If the ZBA recommends the issuance of a special use permit, a majority of the City Council is required to approve the permit. If the ZBA has recommended denial of the permit, a super-majority (10 of 14 members) of the City Council is required for approval. ROCKFORD, ILL., ZONING ORDINANCE § 1603.6 (2002).

In August 2002, the Ordinance was first proposed at a meeting of the Rockford City Council. Alderman ("Ald.") Douglas Mark suggested the adoption of a resolution amending Rockford's Zoning Ordinance to add business establishments featuring exotic dancers to the existing land uses that require a special use permit. The matter was referred to the Council's codes and regulations committee. On September 30, 2002, the City Council adopted the codes and regulations committee's report recommending that Rockford file text amendments to the Zoning Ordinance regarding Exotic Dancing Nightclubs. Accordingly, the text amendments were filed with Rockford's zoning officer and a hearing was held on the proposed text amendments by the Zoning Board of Appeals ("ZBA"). On November 19, 2002, after hearing testimony on the matter from City Attorney Kathleen Elliott and Ald. Mark, the ZBA recommended approval of the text amendments. On November 27, 2002, the codes and regulations committee of the City Council voted to recommend sustaining the ZBA's decision to approve the text amendments. On December 9, 2002, the City Council approved the Ordinance.

In considering whether to pass the Ordinance, it is undisputed that the City Council did not rely on any studies from other towns or conduct any of their own studies regarding the relationship between Exotic Dancing Nightclubs and undesirable "secondary effects," such as decreased property values and higher incidence of crime, public health risks, and illegal sexual activities such as prostitution. The Ordinance does not contain any preamble or legislative findings and the journal of proceedings for the City Council meeting at which it was adopted does not state any findings. In fact, the legislative record reflects that the only evidence to support the Ordinance was the testimony offered by City Attorney Elliot and Ald. Mark at the November 19, 2002 ZBA meeting. The minutes from that meeting contain the following passage:

It is the City's experience that [Exotic Dancing Nightclubs] in a concentrated area or near residential uses attract[ ] prostitution and other problems that are part of this atmosphere. Alderman Mark stated there have been incidents where liquor sales were procured with the intent of establishing dancing clubs. The proposed text amendments would ***406** allow the City more control over the location of these type of clubs to prevent adverse effects on adjoining neighborhoods.

Additionally, the minutes of the Council's codes and regulations meeting for November 27, 2002 contain the following statement: "Although they are not considered sexually oriented business[sic], strip clubs have similar secondary effects in the neighborhood as sexually oriented businesses."

B. Trial

In response to the action filed by RVS against Rockford, the district court denied RVS's request for a temporary restraining order and subsequently conducted a bench trial combining the preliminary and permanent injunction hearings. At trial, Ald. Mark testified that he drafted the Ordinance with the intent of creating three different categories of behavior that would fall within the definition of "exotic dancing." According to Ald. Mark, fully clothed individuals are considered "exotic dancers" if they (1) dance, perform, or entertain by doing a striptease, or (2) perform an erotic dance or other movements which include touching their breasts or pubic area. Under the third category, Ald. Mark testified, individuals are "exotic dancers" if they perform any movements simulating sexual activity

while wearing the specified limited clothing. Wayne Dust, Rockford's zoning manager, testified after Ald. Mark. He disagreed with Ald. Mark's interpretation of the Ordinance. Dust testified that he understands the clothing limitation to modify all three categories of conduct.

Rockford also introduced evidence to attempt to show that adverse secondary effects result from the operation of Exotic Dancing Nightclubs. Rockford police officer David Dominguez, who performs crime analysis for the police department, presented reports summarizing calls relating to prostitution for the years 2001 and 2002. The summaries showed that many calls originated from an area of Rockford known as 7th Street and Broadway. [FN2] Ald. Jeffrey Holt, whose ward includes the 7th Street and Broadway area, provided testimony pertaining to the conditions of his ward. He testified that the area is comprised of a commercial district in close proximity to a lower-income residential area. The neighborhood contains a community center, a homeless outreach center, a lower-income outpatient clinic, restaurants, furniture stores, rental properties, and adult establishments, including massage parlors, lingerie modeling shops, and dancing clubs. Ald. Holt testified that he received complaints from residents concerning sexually oriented businesses located in the area, relating to their advertising and signage, hours of operation, and density. In Ald. Holt's opinion, the presence of sexually oriented businesses in the 7th Street and Broadway area contributes to lower property values, deteriorated properties, difficulty in attracting development, and prostitution.

FN2. RVS's Auburn Street location is not in the 7th Street and Broadway area.

Ald. Nancy Johnson, whose ward is adjacent to Holt's, testified that she received calls from residents, complaining about noise, traffic, and litter caused by Bigfoot, an Exotic Dancing Nightclub in her ward. In her opinion, sexually oriented businesses create unattractive appearances due to neon lights, gaudy window displays, and unsavory clientele.

To refute the evidence presented by Rockford, RVS presented expert evidence from Dr. Daniel Linz. Linz testified that studies show that no adverse secondary effects are associated with establishments ***407** featuring nude or semi-nude dancing. Additionally, Linz found no studies concerning the secondary effects of establishments where performers wear clothing. RVS also presented testimony from Dr. Judith Hanna, an anthropologist who has conducted studies of dance and dancers. In Hanna's expert opinion, the definitions of "exotic dance" in the Ordinance are insufficient to define conduct in any meaningful way. She explained that it is common in many forms of mainstream dancing to touch parts of the body, including the breasts and pelvic area. It was also her opinion that the Ordinance's clothing definition encompasses a wide range of dance costumes, uniforms, and practice attire.

At the conclusion of the hearing, the district court issued an opinion finding in favor of Rockford, denying the injunction requests and dismissing the entire case with prejudice. The district court found that the Ordinance was not an unconstitutional prior restraint. Furthermore, the court found that the Ordinance was a proper time, place, and manner restriction because Rockford was entitled to rely on its experience that Exotic Dancing Nightclubs cause undesirable secondary effects. The district court also found that the Ordinance was not unconstitutionally vague or overbroad. RVS appeals the district court's decision with respect to its determination that the Ordinance is not a prior restraint and that sufficient evidence exists to uphold the Ordinance on a secondary effects rationale.

II. Discussion

A. Legal Framework

[1] In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Supreme Court applied a three-step analysis in reviewing the First Amendment validity of a municipal zoning ordinance that regulated adult movie theaters. The *Renton* analysis instructs courts reviewing regulations of adult entertainment establishments to consider: (1) whether the regulation constitutes an invalid total ban or merely a time, place, and manner regulation, (2) whether the regulation is content-based or content-neutral, and accordingly, whether strict or intermediate scrutiny is to be applied, and (3) if content-neutral, whether the regulation is designed to serve a substantial government interest and allows for reasonable alternative channels of communication.

[2] In upholding a ban on multiple-use adult establishments, the plurality opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), adhered to the *Renton* framework. However, in his concurrence, Justice Kennedy joined the four dissenters, *id.*

at 455-56, 122 S.Ct. 1728, in eschewing the content-neutral "fiction" of adult entertainment zoning ordinances. *Id.* at 448, 122 S.Ct. 1728 ("These ordinances are content based and we should call them so."); *see also G.M. Enterprises v. Town of St. Joseph*, 350 F.3d 631, 637 (7th Cir.2003) (explaining that the content-based versus content-neutral inquiry is unnecessary). Generally, content based restrictions on speech are analyzed with the strictest scrutiny, but Justice Kennedy explained that content based zoning regulations can be exceptions to that rule. In so concluding, he agreed with the plurality that "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Alameda Books*, 535 U.S. at 448, 122 S.Ct. 1728. Whatever the label, *Renton*'s second step is best conceived as an inquiry into the purpose behind an ordinance rather than an evaluation of an ordinance's form. *See Alameda Books*, 535 U.S. at 440-41, 122 S.Ct. 1728 (plurality opinion) (explaining *Renton*'s second step "requires courts to ***408** verify that the *predominant concerns motivating* the ordinance were with the secondary effects of adult [speech]") (emphasis added) (internal quotations omitted); *Ben's Bar v. Village of Somerset*, 316 F.3d 702, 723 (7th Cir.2003) ("regulations of adult entertainment receive intermediate scrutiny if they are *designed* not to suppress the 'content' of erotic expression, but rather to address the negative secondary effects caused by such expression") (emphasis added); *G.M. Enterprises*, 350 F.3d at 637-38 (noting that courts "must first determine whether the ordinances at issue are *motivated* by an interest in reducing the secondary effects associated with the speech, rather than an interest in reducing speech itself," before applying intermediate scrutiny) (emphasis added). [FN3] As we noted in *Ben's Bar*, "while the label has changed, the substance of *Renton*'s second step remains the same." 316 F.3d at 702, 721 n. 26.

FN3. Justice Kennedy does not discuss the "predominant concerns" inquiry in his *Alameda Books* concurrence. As he notes that "zoning regulations ... have a prima facie legitimate purpose: to limit the negative externalities of land use," 535 U.S. at 449, 122 S.Ct. 1728, it is possible that he believes this inquiry to be unnecessary, as long as an ordinance may be characterized as a zoning regulation. However, as Justice Kennedy does not explicitly repudiate the "predominant concerns" inquiry and our cases subsequent to *Alameda Books* have continued to employ it, we will include it in our analysis.

[3] Accordingly, only after confirming that a zoning ordinance's purpose is to combat the secondary effects of speech do we employ *Renton*'s intermediate scrutiny test. Under this test, zoning regulations are constitutional "so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47, 106 S.Ct. 925; *see also Alameda Books*, 535 U.S. at 434, 122 S.Ct. 1728. At this stage, courts are "required to ask 'whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.' " *Ben's Bar*, 316 F.3d at 724 (quoting *Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728). In other words, simply stating that an ordinance is designed to combat secondary effects is insufficient to survive intermediate scrutiny. The governmental interest of regulating secondary effects may only be upheld as substantial if a connection can be made between the negative effects and the regulated speech. In evaluating the sufficiency of this connection, courts must "examine evidence concerning regulated speech and secondary effects." *Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728. According to the *Alameda Books* plurality, the evidentiary requirement is met if the evidence upon which the municipality enacted the regulation "is reasonably believed to be relevant for demonstrating a connection between [secondary effects producing] speech and a substantial, independent government interest." 535 U.S. at 438, 122 S.Ct. 1728 (internal quotations omitted). However, Justice Kennedy clarified that simply evaluating the strength of the connection is insufficient to pass intermediate scrutiny. It is essential, he explained, to consider the impact or effect that the ordinance will have on speech. That is, not only must the regulation have the "purpose and effect of suppressing secondary effects," it must also leave the "quantity and accessibility of speech substantially intact." *Alameda Books*, 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring). This approach requires that two questions be asked and answered to resolve whether a content-based zoning ordinance is justified: (1) "what proposition does a city need to advance in order to sustain a secondary-***409** effects ordinance?"; and (2) "how much evidence is required to support the proposition?" *Id.*; *see also Ben's Bar*, 316 F.3d at 724. As Justice

Kennedy explained, "the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances ... may reduce the costs of secondary effects without substantially reducing speech." *Alameda Books*, 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring). Accordingly, only once a "cost effective" rationale has been identified to justify a regulation can the sufficiency of the evidence supporting that rationale be evaluated. [FN4]

> FN4. The *Alameda Books* plurality characterized Justice Kennedy's concurrence as "a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban." 535 U.S. at 443, 122 S.Ct. 1728. It appears to us that Justice Kennedy's contentions were not so limited. We will follow our Court's practice in cases applying *Alameda Books* and treat Justice Kennedy's concurrence as more demanding of the third step of the *Renton* analysis and not merely a restatement of the first step.

In sum, *Alameda* 's plurality opinion along with Justice Kennedy's concurrence establish that in order to justify a content-based time, place, and manner restriction, a municipality must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, (i.e., is designed to serve or furthers a substantial or important government interest), while leaving the quantity and accessibility of speech substantially intact (i.e., the regulation is narrowly tailored and does not unreasonably limit alternative avenues of communication). *Ben's Bar*, 316 F.3d at 725.

B. Application of *Renton/Alameda Books* to the Ordinance

1. Strict or Intermediate Scrutiny: Complete Ban or Time Place and Manner Regulation?

First, we note that the Ordinance is not a complete ban on Exotic Dancing Nightclubs, but a zoning regulation, which *Renton* and *Alameda Books* instruct us to consider as a time, place, and manner regulation. Rather than acting as an outright prohibition on "exotic dancing," the Ordinance regulates the locations where that activity may occur. However, the special use permit scheme does create the potential of substantially restricting, or even preventing, the establishment of new Exotic Dancing Nightclubs. Nevertheless, the record does not support the conclusion that the Ordinance amounts to a total ban on protected activity--especially considering that existing Exotic Dancing Nightclubs are unaffected by the Ordinance.

2. Strict or Intermediate Scrutiny: Were the Secondary Effects of Speech the "Predominant Concerns" Motivating Enactment of the Ordinance?

[4] Next, we must examine whether the Ordinance was designed to suppress the content of erotic expression or to address the negative secondary effects caused by such expression. *Ben's Bar*, 316 F.3d at 723. In other words, we must determine whether the "predominant concerns" motivating Rockford's enactment of the Ordinance "were the secondary effects of adult [speech], and not ... the content of adult [speech]." *Id.* [FN5] Rockford claims to have enacted the Ordinance to combat the negative secondary effects allegedly created by Exotic Dancing Nightclubs, including ***410** prostitution, crime, and decreased property values. To support this claim, Rockford points to testimony from Ald. Mark and City Attorney Elliott given at the ZBA meeting explaining that the purpose of the Ordinance was to ameliorate the negative secondary effects of Exotic Dancing Nightclubs. In addition, Ald. Holt and Ald. Johnson offered testimony at trial relating to the negative effects produced by adult-oriented businesses.

> FN5. "Federal courts evaluating the 'predominant concerns' behind the enactment of a statute, ordinance, regulation, or the like, may do so by examining a wide variety of materials including, but not limited to, the text of the regulation or ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware." *Ben's Bar*, 316 F.3d at 723, n. 28 (citing *Ranch House Inc. v. Amerson*, 238 F.3d 1273, 1280 (7th Cir.2001)).

However, observations made by Ald. Mark during trial somewhat complicate this inquiry. In response to questions relating to the purpose of the Ordinance, Ald. Mark stated that while Rockford had experienced no problems with the Exotic Dancing Nightclubs currently in operation, "there were some concerns that some people just don't like this type of entertainment." Combating the adverse

secondary effects caused by sexually explicit speech is a permissible purpose for a regulation; open and explicit hostility toward and disapproval of the speech itself is not. Certainly, such a direct acknowledgment from the official responsible for introducing the Ordinance makes us sensitive to the possibility that the Ordinance might be a pretextual use of the power to zone as a means of suppressing expression. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 84, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (Powell, J., concurring). Nonetheless, what motivates one legislator to support a statute is not necessarily what motivates others to enact it. *See Renton*, 475 U.S. at 48, 106 S.Ct. 925 (citing *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)); *see also DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 828-29 (7th Cir.1999) (rejecting an argument that legislators' improper motive can invalidate an otherwise constitutional ordinance). Accordingly, on balance, it seems that the predominant concerns motivating enactment of the Ordinance related to combating prostitution, crime, and other negative externalities.

3. Intermediate Scrutiny: Substantial Government Interest, Narrowly Tailored, and Reasonable Alternate Channels of Communication

Even accepting that the "predominant concerns" motivating Rockford's adoption of the Ordinance were the alleged secondary effects caused by Exotic Dancing Nightclubs, we are compelled to reverse the decision of the district court because the Ordinance cannot survive *Renton/Alameda Books* intermediate scrutiny (i.e., designed to serve a substantial government interest, narrowly tailored and does not unreasonably limit alternate avenues of communication). *See Ben's Bar*, 316 F.3d at 724.

a. Substantial Government Interest

As previously noted, our inquiry requires us to answer two questions: (1) "what proposition does a city need to advance in order to sustain a secondary- effects ordinance?"; and (2) "how much evidence is required to support the proposition?" *Alameda Books*, 535 U.S. at 449, 122 S.Ct. 1728 (Kennedy, J., concurring). Justice Kennedy put forth a proportionality principle to guide courts in answering the first question. He explained that, "a city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* Following this guideline, Justice Kennedy concluded that the rationale of a dispersal statute must be ***411** that the targeted businesses will disperse rather than shut down. *Id.* at 451, 122 S.Ct. 1728.

[5] Accordingly, Rockford's premise in support of the Ordinance must be that locating Exotic Dancing Nightclubs away from churches, schools, and residential neighborhoods, and separating Exotic Dancing Nightclubs from one another will significantly reduce negative secondary effects that occur when there is a concentration of adult uses in an area without substantially diminishing the availability of speech.

As we move to the second question, we are confronted with a critical deficiency of the Ordinance--the lack of evidence to support this premise. The record is devoid of evidence connecting Exotic Dancing Nightclubs and the secondary effects that allegedly motivated the Ordinance's adoption. While it seems apparent that the Ordinance will have the effect of reducing the availability of speech, evidence is lacking to support the proposition that secondary effects will be reduced by the same degree, if at all.

The Supreme Court has consistently held, "a city must have latitude to experiment, at least at the outset, and ... very little evidence is required [to support an ordinance's proposition]." *Id.* As previously noted, "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books*, 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion) (quoting *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925). However, Rockford has produced little evidence of harmful secondary effects connected to Exotic Dancing Nightclubs beyond the assumption that such effects exist. While it is true that common experience may be relied upon to bolster a claim that a regulation serves a current governmental interest, the experience in this case falls short of satisfying the minimal evidentiary showing required by *Alameda Books*. Indeed, while courts may credit a municipality's experience, such consideration cannot amount to an acceptance of an "if they say so" standard.

Rockford does not identify any studies, judicial opinions, or experience-based testimony that it considered in adopting the Ordinance. Furthermore, the evidence presented at trial represented only a limited showing, consisting of: evidence of a higher than average incidence of prostitution in the 7th Street and Broadway area, testimony from two local officials that police action had not been effective to curb prostitution activity, and testimony from Ald. Johnson that based on her personal observations strip clubs have negative secondary effects on adjoining residential properties. [FN6]

FN6. While the Supreme Court has not definitively addressed the issue, our Court has

permitted municipalities to make a record for trial with evidence that it may not have considered when it enacted its ordinance. *See* DiMa Corp., 185 F.3d at 829-30.

Even if we were dealing with a typical adult entertainment zoning ordinance, it is questionable whether this modest amount of support would be sufficient under the albeit permissive guidelines set by the Supreme Court and this Court's previous cases. While "reasonably believed to be relevant" is not a particularly demanding evidentiary standard, neither the Supreme Court nor this Court has found it satisfied by a similarly limited proffer of evidence. *Compare* Alameda Books, 535 U.S. at 425, 122 S.Ct. 1728 (city relied on study it conducted a number of years prior to enacting ordinance); Renton, 475 U.S. at 44, 106 S.Ct. 925 (planning committee conducted ***412** extensive studies and hearings); G.M. Enterprises, 350 F.3d at 631 (town board collected 16 studies and consulted judicial opinions and police reports); Ben's Bar, 316 F.3d at 725 (village board relied on numerous judicial decisions, studies from 11 different cities, and findings in a report from the state's attorney general); Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir.2000) (city collected and reviewed studies and conducted legislative research); DiMa Corp., 185 F.3d at 830-31 (town "minimally" met its evidentiary burden by relying on the factual record supporting the experience of another community as reported in a judicial opinion).

We reiterate that "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." G.M. Enterprises, 350 F.3d at 640 (quoting Alameda Books, 535 U.S.at 451, 122 S.Ct. 1728). However, in a situation like the one before us, where Rockford has not adequately engaged in such an assessment, to conclude that the "reasonably believed to be relevant" requirement has been satisfied would be to permit a municipality to employ an unacceptably low level of justification, as proscribed by the Alameda Books plurality. *See* 535 U.S. at 438, 122 S.Ct. 1728.

Nonetheless, the requirement that municipalities be allowed a reasonable opportunity to experiment with solutions to an admittedly serious problem might render the offered evidence sufficient if the Ordinance applied only to bars and clubs that present nude or semi-nude dancing. "Such entertainment has a long history of spawning deleterious effects, including prostitution and the criminal abuse and exploitation of young women, and in most cases a city or state need only carry a minimal burden to demonstrate its interest in regulation of such activity." Giovani Carandola, Limited v. Bason, 303 F.3d 507, 516 (4th Cir.2002) (internal citations omitted). In contrast, the regulation in this case targets clothed dancers who convey an erotic message through their movements. Within the confines of this record evidence does not exist to support a connection between establishments offering dancing by entertainers who are clothed and adverse secondary effects. While it may have been reasonable for Rockford to believe that the evidence presented at trial was relevant to demonstrate a connection between adverse secondary effects and nude or topless dancing, we conclude that it falls short of being relevant to establishing a meaningful connection between negative secondary effects and the type of entertainment to which the Ordinance applies.

Most of Rockford's evidence, at least as presented to date, does not appear to be directly relevant to the type of entertainment that Rockford seeks to regulate. At trial, Rockford focused on the problems afflicting the 7th Street and Broadway area. Indeed, Officer Dominguez's incidence reports reflect that many prostitution calls originated from this general vicinity in 2001 and 2002. However, Rockford did not present to the Court any examples of businesses in this area that fall within the definition of the Ordinance. While the members of the City Council indicated in their testimony that such establishments exist, they did not provide any examples. Their general statements alone may have been sufficient were it not for the repeated overlap of terminology at trial. Witnesses and Rockford's attorney continuously used the terms Sexually Oriented Business and Exotic Dancing Nightclub interchangeably. As a result of this lack of distinction, we cannot presume that the businesses operating in the 7th Street and Broadway area are Exotic Dancing ***413** Nightclubs as opposed to Sexually Oriented Businesses.

Notably, Ald. Mark testified that five Exotic Dancing Nightclubs currently exist within Rockford. Indeed, five specific business establishments (The Flag, State Street Station, Hideaway, Surf Lounge, and Bigfoot) were mentioned by various witnesses at trial as examples of Exotic Dancing Nightclubs. However, our search of the public record indicates that none of these businesses are actually located in the 7th Street and Broadway area. Accordingly, it is difficult to conclude that the incidence reports and testimony regarding 7th Street and Broadway reasonably support the premise that a concentration of Exotic Dancing Nightclubs result in adverse secondary effects. In effect, the only evidence we are left with supporting Rockford's rationale behind the Ordinance are the conclusory statements in the ZBA and codes and regulations minutes and the testimony of one local

official that in her personal experience Exotic Dancing Nightclubs have a negative impact on the surrounding community. If Rockford had presented more convincing evidence to show that some businesses featuring clothed entertainers produce adverse secondary effects, a different result might ensue.

b. Narrowly Tailored and Reasonable Alternate Channels of Communication

[6] Additionally, the Ordinance does not appear to be narrowly tailored to affect a category of business establishments shown to produce unwanted secondary effects--or even establishments that could conceivably produce them. *See* Ben's Bar, 316 F.3d at 725 (explaining that a regulation must leave the quantity and accessibility of speech substantially intact). Under a narrow reading, the Ordinance regulates all persons performing an erotic dance (or other specified movements) at a business establishment while wearing more or less the equivalent of short shorts and, if female, an opaque bra. [FN7] While understandably aimed at entertainers of a more "adult" persuasion, there exists the potential that mainstream performances could fall under the purview of the Ordinance. Simply, Rockford has not presented justification why it is essential to regulate such a wide universe of dance. *Cf.* Pleasureland Museum, Inc. v. Beutter, 288 F.3d 988 (7th Cir.2002) (holding that an ordinance prohibiting a sexually oriented business' signage from displaying anything other than the business name was not narrowly tailored to reduce secondary effects where municipality could not articulate a single reason why such a rule was necessary).

> FN7. This interpretation is similar to the one advanced by Wayne Dust, Rockford's zoning manager, at trial (i.e., the clothing clause is read to modify all three categories of conduct). While we believe Ald. Mark's interpretation (i.e., the clothing clause applies only to the last category) is the more structurally natural reading; the outcome produces an irrational result that we will not employ. We will treat the clothing clause as modifying all three categories of conduct.

Certainly, as a direct restriction on erotic expression, speech fares worse under the Ordinance than it did under the laws at issue in similar cases. In Ben's Bar, the ordinance did not restrict erotic expression, but rather prohibited sexually oriented businesses from serving alcohol during a dancer's performance. 316 F.3d at 726. Similarly, in G.M. Enterprises, the availability of speech was left substantially intact because the ordinances merely sought to minimize the factors that "heighten[ed] the probability that adverse secondary effects would result from nude dancing: physical proximity between the dancers ***414*** and patrons, and the consumption of alcohol by patrons." 350 F.3d at 638. Under the regulation at issue in G.M., if dancers chose to wear *de minimus* clothing the ordinance's restrictions could be avoided entirely. *Id.; see also* Alameda Books, 535 U.S. at 447, 122 S.Ct. 1728 (Kennedy, J., concurring) (noting that the ordinance extended to non-expressive activities, like massage parlors); DiMa Corp., 185 F.3d at 823 (ordinance regulated book-store's hours of operation).

In contrast, the Ordinance here is focused on expressive conduct. Rather than targeting a non-expressive aspect of Exotic Dancing Nightclubs, like neon signs, the Ordinance targets the speech itself. As a zoning regulation we view the Ordinance as less restrictive than an outright ban; however, it is still the case that to avoid the Ordinance dancers must not convey an erotic message through their movements (or they must wear significantly more clothing than the amount we have considered to be *de minimus* in past cases). Like the regulation this Court struck down in Schultz v. City of Cumberland, the Ordinance "deprives the performer of a repertoire of expressive elements with which to craft an erotic, sensual performance and thereby interferes substantially with the dancer's ability to communicate an erotic message." 228 F.3d 831, 847 (7th Cir.2000) (invalidating regulation that banned the performance of specified sexually explicit movements within sexually oriented businesses finding that "[b]y restricting particular erotic movements and gestures of the erotic dancer ... [the regulation] unconstitutionally burdens protected expression.").

As we have determined that the Ordinance is not appropriately designed to serve a substantial government interest and is not narrowly tailored, it is unnecessary for us to separately analyze whether the Ordinance leaves open reasonable alternate channels of communication.

C. Applying Renton/Alameda Books Beyond Sexually Explicit Speech

As a final matter, we observe that challenging questions are raised by the Ordinance's expansiveness. While we applied the Renton/Alameda Books framework in reviewing the constitutionality of the Ordinance, it is unclear how "sexual" in nature regulated speech must be to warrant the Renton/ Alameda Books analysis. Even under our narrow reading of "exotic dancing," a

number of expressive activities may fall within Rockford's definition that are not ordinarily regulated under a secondary effects theory. It is important to keep in mind that the Ordinance does not apply to nude dancing or other forms of nude entertainment. A survey of the laws challenged on secondary effects grounds in leading Supreme Court and Seventh Circuit cases illustrates the unusual breadth of the Ordinance. *See Alameda Books,* 535 U.S. at 425, 122 S.Ct. 1728 (prohibiting "Adult Entertainment Businesses" [FN8] from operating in the same building); *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (restricting public nudity); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (same); *Renton,* 475 U.S. at 41, 106 S.Ct. 925 (regulating the location of adult motion picture theaters); *G.M. Enterprises,* 350 F.3d at 631 (regulating nude dancing); *Ben's Bar,* 316 F.3d at 702 (prohibiting the sale, use, and consumption ***415** of alcohol on the premises of "Sexually Oriented Businesses" [FN9]).

FN8. The city defined "Adult Entertainment Business" as an "adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters." 535 U.S. at 431, 122 S.Ct. 1728.

FN9. The ordinance at issue in *Ben's Bar* defined "Sexually Oriented Business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency or sexual encounter center." 316 F.3d at 708, n. 8. As it regularly featured nude and semi-nude persons, Ben's Bar fell under the sub-category of "adult cabaret." *Id.* at 708. The ordinance further defined semi-nudity as "the exposure of a bare male or female buttocks or the female breast below a horizontal line across the top of the areola at its highest point with less than complete and opaque covering." *Id.*

As these cases demonstrate, courts have upheld a number of restrictions on sexually explicit expression that falls short of obscenity. [FN10] However, what constitutes sexually explicit but non-obscene expression can be difficult to define. Previously, regulating nudity or semi-nudity has served as a common link in the laws enacted by municipalities pertaining to sexually explicit expression. The uniqueness of the Ordinance is that it removes nudity from the calculus and seeks to regulate clothed individuals. The challenge attendant to this legislative leap may be that it cuts a broader swath across expression and attempts to apply the "secondary effects" reasoning of *Renton* to laws not confined to regulating "sexually explicit" speech. Recently, the Eighth Circuit noted that First Amendment issues may be raised by classifying live entertainment by clothed dancers as sexual expression. *Jake's, Ltd., Inc. v. City of Coates,* 356 F.3d 896, 903 (8th Cir.2004). Indeed, it remains questionable how and if the *Renton/Alameda Books* analysis would apply in a case with even more tangential of a relationship to businesses purveying sexually explicit materials and entertainment. *See Boos v. Barry,* 485 U.S. 312, 334-35, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (Brennan, J., concurring) (objecting to implication that content-based regulations could ever be subject to "secondary effects" analysis outside the area of sexually explicit speech).

FN10. Obscenity is a constitutionally unprotected category of speech.

See Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (holding that governments may regulate speech as obscene if it (a) under community standards, appeals to the prurient interest, (b) taken as a whole, is a patently offensive depiction or description of sexual conduct, and (c) lacks serious literary, artistic, political, or scientific value).

III. Conclusion

We do not conclude that Rockford may not permissibly use its zoning power to regulate any type of clothed dancing. As we have previously noted of other zoning ordinances regulating dancing: "the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a

modest social value and is anyway not suppressed but merely shoved off to another part of town, where it remains easily accessible to anyone who wants to patronize that kind of establishment." *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir.2001) (upholding denial of liquor license to club whose dancers performed in pasties and bikini bottoms). It is arguable that at least some forms of clothed entertainment may initiate adverse secondary effects similar to the ones caused by establishments featuring nude and semi-nude entertainment. However, a municipality must offer sufficient evidence in support of this proposition. Without further direction from the Supreme Court, we cannot constitutionally lower the already modest evidentiary hurdle for justifying regulations of sexually explicit but non-obscene speech on secondary effects grounds, especially in ***416** a case where mainstream speech is affected.

For the foregoing reasons, the Ordinance as presently drafted violates the First Amendment. As this determination is sufficient to permanently enjoin enforcement of the Ordinance, we offer no opinion regarding RVS's prior restraint arguments. We REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

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