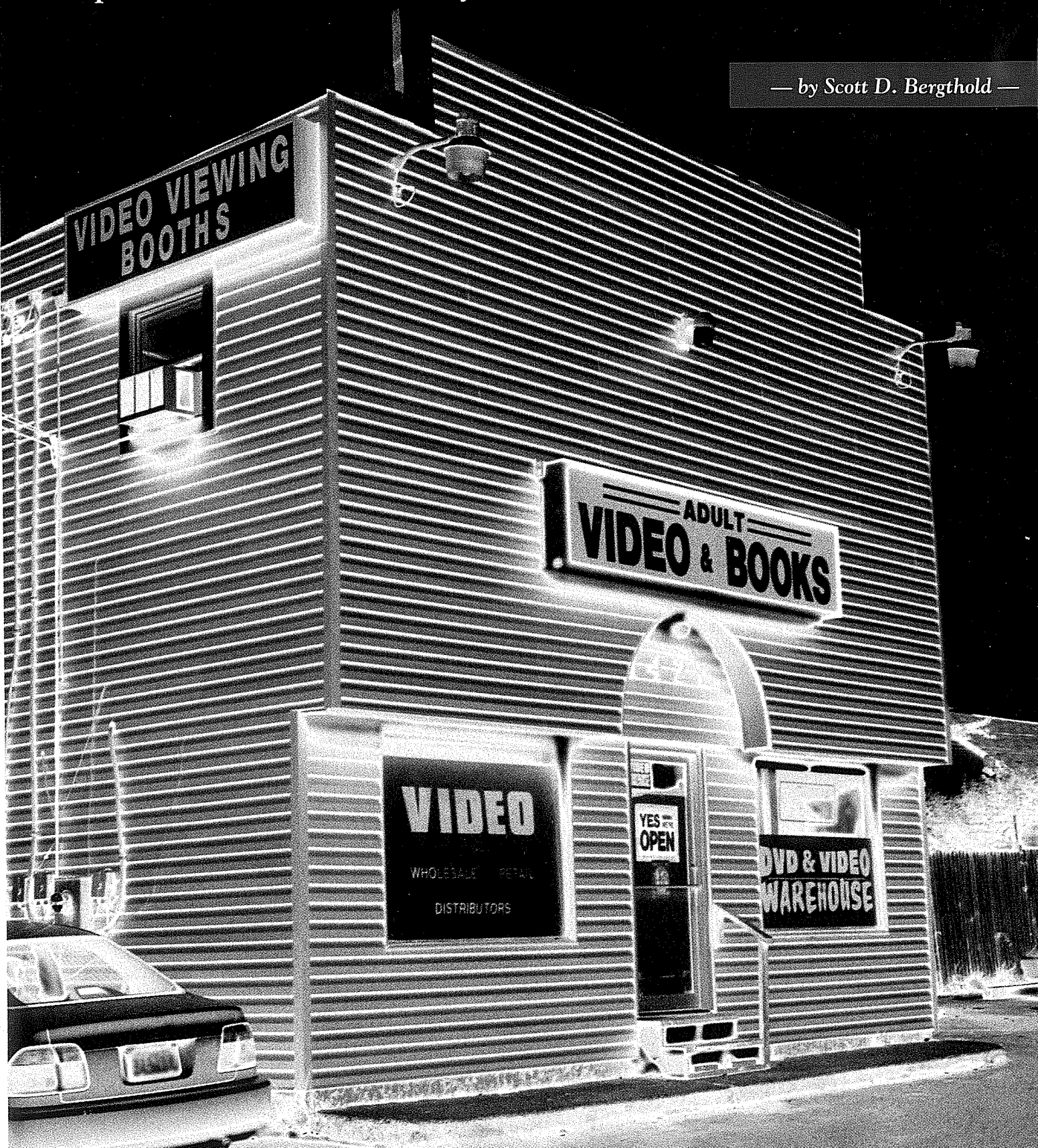


Alameda Reaffirms Renton's Differential Standard

Impact Evidence "Reasonably Believed to Be Relevant" is Sufficient

— by Scott D. Bergthold —



In *City of Los Angeles v. Alameda Books, Inc., et al.*,¹ the United States Supreme Court reaffirmed that cities have substantial latitude when zoning to control the adverse impacts of sexually oriented businesses, and that the evidence upon which municipalities rely need only be “reasonably believed to be relevant to the problem the city addresses.”² The Court remanded the case for trial on whether the City of Los Angeles’ secondary effects evidence supported its unique prohibition on “multiple use” adult businesses (those that combined retail and peep show booth uses under one roof). Despite the Court’s affirmation of *City of Renton v. Playtime Theatres, Inc.*³ and its refusal to impose an “empirical proof” requirement for adult business regulations, some adult business operators view the case as a win, and intend to use it to challenge regulations far afield from the specific prohibition at issue in the case.⁴ The extent to which such challenges are successful will likely turn on the ability of cities to discern what *Alameda Books* does and does not stand for, and to distinguish the arguments advanced in that case from the arguments advanced in defense of their own local ordinances.

Background

In 1995, two adult bookstores whose businesses combined retail and peep show booth uses challenged a portion of the City’s zoning code. Section 12.70(C), amended in 1983, prohibited more than one adult use from operating in the same building. Defending the ordinance at summary judgment, the City relied *solely* on its 1977 study demonstrating a correlation between geographic concentrations of separate adult businesses, and increases in crimes such as robbery and prostitution. The district court ruled that the study did not support an inference that multiple use adult businesses would produce secondary effects similar to those associated with concentrations of separate adult businesses in a neighborhood. Finding the City’s content-neutral justification lacking, the court invalidated the ordinance as a content-based regulation that failed strict scrutiny.

In 1995, two adult bookstores whose businesses combined retail and peep show booth uses challenged a portion of the City’s zoning code. Section 12.70(C), amended in 1983, prohibited more than one adult use from operating in the same building. Defending the ordinance at summary judgment, the City relied *solely* on its 1977 study demonstrating a correlation between geographic concentrations of separate adult businesses, and increases in crimes such as robbery and prostitution.

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed on different grounds, holding that the ordinance was more properly analyzed as a time, place, and manner regulation because it “[did] not ban adult entertainment establishments altogether.”⁵ However, the appellate panel concluded that even if the ordinance was content-neutral, the City’s study failed to provide evidence that the multiple use prohibition was “designed to serve” the City’s substantial interest in abating secondary effects. Critical to the Ninth Circuit’s holding was the perceived attribution of secondary effects not to *individual* adult businesses, but only to the *concentration* of separate adult uses in a given vicinity. On this point, the Court of Appeals found that, “Los Angeles has presented no evidence that a combination adult bookstore/arcade produces any of the harmful secondary effects identified in the Study.”⁶ Although the City’s local experience included evidence of secondary effects from such combination businesses,⁷ the issue was not specifically addressed in the 1977 study, and the panel concluded that “the pertinent findings of the Study focus *solely* on the concentration of separate adult business entities.”⁸ There-

fore, the Ninth Circuit invalidated the City’s regulation.

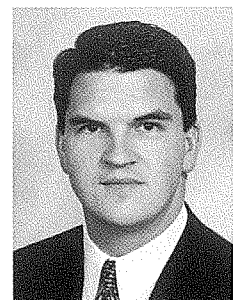
“Empirical Proof” Requirement for Secondary Effects Ordinances Rejected

The United States Supreme Court reversed in favor of the City and remanded the case for further proceedings. The plurality opinion, authored by Justice O’Connor, concluded that “Los Angeles may reasonably rely on a study it conducted some years before enacting the present version of the § 12.70(C) to demonstrate that its ban on multiple-use adult establishments serves its interest in reducing crime.”⁹ The plurality first explained that the lower court had misapplied *Renton*’s “reasonably believed to be relevant” standard for secondary effects evidence, and then specifically rejected the dissent’s position that such evidence must empirically prove that the regulation will be effective.¹⁰

While local governments must be “allowed to experiment with solutions to admittedly serious problems,” the plurality cautioned against “shoddy data or reasoning,” and held that secondary effects evidence must “fairly support the municipality’s rationale for its

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Scott D. Bergthold is a private practitioner whose national practice focuses on the drafting and defense of local adult use regulations. He is co-author of *Protecting Freedom of Speech and Expression: The First Amendment and Land Use Law* (ABA Publishing, 2001). For complimentary resources on developing effective and constitutionally sound adult use ordinances, e-mail Scott at sbergthold@adultbusinesslaw.com.



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ordinance.”¹¹ If it does, then the plaintiffs bear the burden to “cast direct doubt on this rationale” before the burden will shift back to the municipality to supplement the record with renewed support “for a theory that justifies its ordinance.”¹² The plurality reiterated that, on balance, cities’ legislative judgments are entitled to deference because “[m]unicipalities will, in general, have greater experience with and understanding of the secondary effects” that flow from sexually oriented businesses.¹³

Kennedy’s Concurrence and the Secondary Effects Standard for a Zoning Ordinance

Justice Kennedy concurred in the judgment and provided the fifth vote to reverse the lower court’s ruling. Reaffirming the common sense rationale for typical adult use dispersal ordinances, Justice Kennedy explained that “high concentrations of adult businesses can damage the value and the integrity of a neighborhood. The damage is measurable; it is all too real.”¹⁴ The lower court, therefore, erred in granting summary judgment against Los Angeles because it was reasonable for the City to conclude that “knocking down the wall between adult businesses does not ameliorate any undesirable secondary effects of their proximity to one another.”¹⁵ Accordingly, while the plaintiffs should have an opportunity at trial to prove that the City’s conclusion was unsound, the City should not be foreclosed by summary judgment from exercising its zoning authority through the regulation.

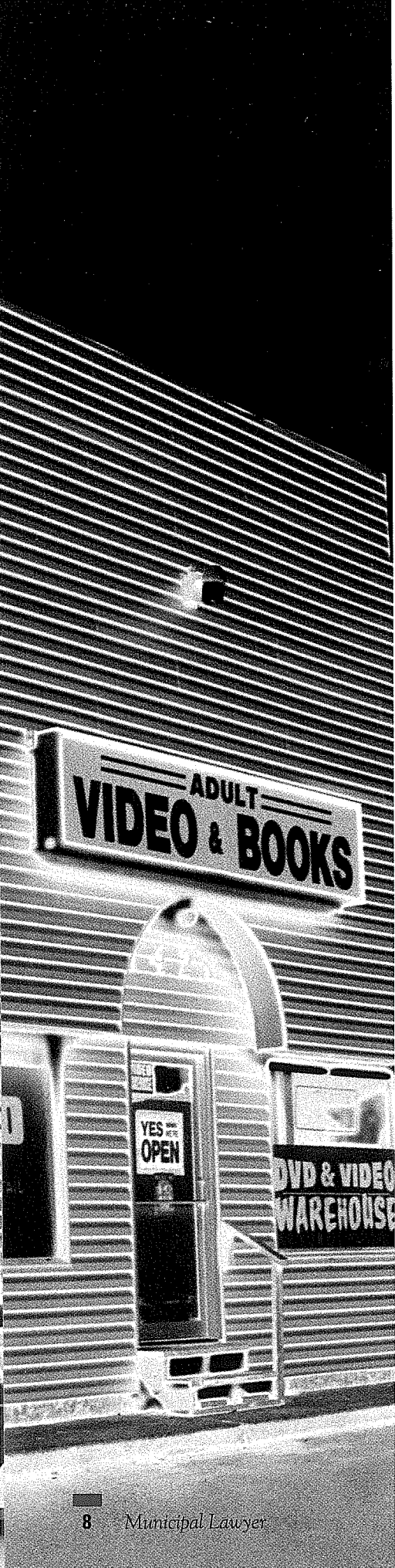
Justice Kennedy noted that ordinances directed specifically at the secondary effects of adult uses were technically “content based,”¹⁶ but explained that such a label in no way determined the law’s constitutionality. “This sort of singling out is not impermissible content discrimination; it is sensible urban planning.”¹⁷ Thus, he explained, “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.”¹⁸

Next, Justice Kennedy cautioned against potential expansion of the *Renton* doctrine to justify a zoning ordinance which had a secondary effects rationale based on decreasing the number of sexually oriented businesses. Rather, “a city must advance some basis to show that its regulation has the purpose and effects of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact.”¹⁹ Adult business attorneys have opined that this language renders some non-zoning restrictions, such as hours of operation regulations in typical adult entertainment ordinances, presumptively unconstitutional.²⁰ Justice Kennedy’s opinion, however, does not claim to address adult business regulations outside the zoning context,²¹ and merely establishes that adult use zoning regulations cannot be premised on the elimination of adult businesses. “If two adult businesses are under the same roof, an ordinance requiring them to separate will have one of two results: One business will either move elsewhere or will close. The city’s premise cannot be the latter.”²² Thus, the City could not implement a regulation intended to eliminate or ban one or more adult businesses from the community and claim that result as the basis for its secondary effects rationale. “It is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional reduction does not suffice.”²³

The plurality foresaw the potential confusion that could flow from interpretations of Justice Kennedy’s concurrence, and specifically addressed this issue at the end of its opinion. The businesses had argued that the multiple use prohibition was effectively a ban on peep show booths and should be subject to strict scrutiny. The plurality rejected this contention and noted:

This also appears to be the theme of Justice Kennedy’s concurrence. He contends that “[a] city may not assert that it will reduce secondary effects by reducing speech in



the same proportion.' *Post*, at 7 (opinion concurring in the judgment). We consider that unobjectionable proposition as simply 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. The Court of Appeals held, however, that the city's prohibition on the combination of adult bookstores and arcades is not a ban and respondents did not petition for review of that determination.²⁴

The detrimental impact of this clarification on the adult businesses' position is evidenced by their extraordinary act of asking the Supreme Court to eliminate this paragraph from the plurality opinion. That motion was denied.²⁵ The court of appeals clearly held that the regulation was not a ban,²⁶ and neither that opinion nor the Supreme Court's opinion supported the underlying premise of the businesses' "ban" argument—that the constitutionality of an adult business regulation turned on the economic impact it may have on a particular business.²⁷

Conclusion

Several aspects of *Alameda Books* stand out. First, each Justice reaffirmed the central holding in *Renton* as sound, although several were concerned about its application to the case due to the perceived lack of evidence and argument about secondary effects caused by individual adult businesses.²⁸ Thus, cities should demonstrate, from secondary effects reports and factual findings in adult business cases, that their ordinances are, as *Renton* stated, "aimed at preventing the secondary effects caused by the presence of even one such [sexually oriented business] in the neighborhood."²⁹ Second, while plaintiffs may assert that the secondary effects doctrine has been undermined, both the plurality opinion and Justice Kennedy's concurrence rejected an empirical evidentiary requirement and reaffirmed that the government's legislative judgment was entitled to substantial deference under *Renton*. Moreover, none of the opinions suggest that the results in *Young* or

Renton would be changed by the Court's analysis of the Los Angeles multiple use prohibition. Finally, *Alameda Books* did not fundamentally alter lower courts' analysis of typical regulations directed at the secondary effects of adult businesses,³⁰ which should be upheld provided that they are adequately supported by secondary effects evidence and are not designed to eliminate sexually oriented businesses from the community.

Notes

1. 122 S. Ct. 1728 (2002).
2. *Id.* at 1743 (Kennedy, J., concurring in judgment).
3. 475 U.S. 41 (1986).
4. *Attorneys Hopeful After Supreme Court's Opinion in Alameda Books*, ADULT VIDEO NEWS, July 2002, at 204-205.
5. *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719, 723 (2000).
6. *Id.* at 725.
7. See, e.g., *E.W.A.P., Inc. v. City of Los Angeles*, 65 Cal. Rptr. 2d 325, 328 (Cal. Ct. App. 1997) ("[D]uring the last two and one-half years, one hundred seventeen arrests have been made which are directly attributable to the presence of Le Sex Shoppe."); *DeMott v. Bd. of Police Comm'rs of the City of Los Angeles*, 175 Cal. Rptr. 879 (Cal. Ct. App. 1981) (citing unsanitary acts in bookstore/peep show businesses).
8. 222 F.3d at 725.
9. 122 S. Ct. 1728, 1731 (2002) (plurality opinion).
10. *Id.* at 1736 (citations omitted).
11. *Id.*
12. *Id.*
13. *Id.* at 1738.
14. *Id.*
15. *Id.* at 1743.
16. *Id.* at 1741. The dissent opined that adult business ordinances targeting secondary effects were neither categorically content based nor categorically content neutral, but should be labeled "content-correlated." *Id.* at 1746.
17. *Id.* at 1740.
18. *Id.* at 1741. Justice Kennedy failed to ac-

knowledge that *Renton*'s "narrow tailoring" analysis requires secondary effects ordinances to be technically "content based" in his sense of that term. There, the Court held that "the *Renton* ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects...." 475 U.S. at 52.

19. *Id.* at 1742.
20. *Attorneys Hopeful*, *supra* note 5, at 204.
21. See, e.g., *Young v. American Mini Theatres*, 427 U.S. 50, 65 (1976) (cautioning against reading a broad legal principle "literally and without regard for the facts of the case in which it was made."); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) ("It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned.").
22. 122 S. Ct. at 1742.
23. *Id.*
24. *Id.* at 1738.
25. *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 2585 (June 17, 2002).
26. *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719, 723 (2000).
27. The converse proposition is well settled. See *Renton*, 475 U.S. at 54 ("The inquiry for First Amendment purposes is not concerned with economic impact").
28. 122 S. Ct. at 1747 ("In this case, however, the government has not shown that bookstores containing viewing booths, isolated from other adult establishments, increase crime or produce other negative secondary effects..."). This appears to be a key premise of the dissenting opinion, where it repeatedly surfaces in footnotes 4, 5, 6, and 9.
29. 475 U.S. at 50.
30. See, e.g., *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 2002 U.S. App. LEXIS 12202, *22 (5th Cir. June 20, 2002); *Ky. Restaurant Concepts, Inc., et al. v. City of Louisville, et al.*, 2002 U.S. Dist. LEXIS 11011, *16 (W.D. Ky. June 14, 2002) (citing *Alameda Books* for the proposition that cities "are entitled to rely upon the studies of their choice and to experiment with their own regulation of secondary effects..."). **M.**

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