INTO THE NIGHT

Effective Regulation of the Hours of Operation of Adult Businesses

— by Scott D. Bergthold —

It is well-established that a local government cannot ban sexually oriented businesses, but may regulate the time, place, and manner of their operations in order to prevent the negative secondary effects associated with such enterprises. The first facet of regulation—time regulation—is often overlooked, but can be one of the most effective methods of preventing problems during the nighttime hours, when police resources are often thin and darkness makes law enforcement more dangerous. Although the U.S. Supreme Court has not specifically ruled on hours of operation limitations targeting secondary effects, such laws have been upheld by every federal court of appeals to consider them.[1] Several state courts have also upheld time restrictions for adult businesses.[2] That being said, there are certain constitutional arguments that local governments should be prepared to address, and potential state law preemption problems that local governments should take care to avoid, when drafting hours regulations.

Constitutional Framework

Under *City of Renton v. Playtime Theatres, Inc.*,[3] courts conduct a three-part inquiry when evaluating adult business regulations. First, the court must determine whether the regulation constitutes a total ban on adult entertainment, or is merely a regulation of the time, place, and manner of adult business operations. Second, if the regulation is a time, place, or manner regulation, the court will review it to determine whether it is content-neutral, i.e., adopted for a content-neutral purpose, such as controlling negative secondary effects. Assuming that the local government has made this purpose clear, the court will then apply intermediate scrutiny, which asks whether the regulation is designed to serve a substantial government interest, is narrowly tailored (not substantially broader than necessary) to do so, and leaves open adequate alternative avenues of communication.[4]

The first two steps in this analysis are seldom problematic. Most municipalities are fully aware that a ban on adult entertainment will not stand, and are equally aware that disagreement with the message of sexually explicit entertainment is not a legally sound basis for regulation. Thus, municipalities are generally careful to specify that the purpose of their ordinance is to control the adverse impacts of adult businesses and, in doing so, avoid the strict judicial scrutiny that is reserved for regulations aimed at the content of speech.[5]

The central issue in most adult business litigation, including litigation over hours of operation regulations, is the application of intermediate scrutiny: whether the regulation is narrowly tailored to serve a substantial government interest while leaving open adequate channels of communication.

Substantial Government Interest

It is beyond dispute that prevention of secondary effects is a substantial government interest.[6] Adult businesses, therefore, often argue that the legislative body "did not have an adequate factual basis to support its conclusion that the asserted undesirable secondary effects it seeks to regulate resulted from the protected activity, or, if it did, that the closing-hours amendment would reduce them."[7] In an early case, the plaintiffs challenged a statewide hours of operation regulation on the grounds that the legislative body did not conduct a public hearing, or receive any documents or sworn testimony, before enacting the law. The federal district court allowed the government to submit supplemental post-enactment evidence on the secondary effects question, and the appellate court—citing the U.S. Supreme Court's decision in *Barnes v. Glen Theatre, Inc.*, which upheld a regulation on secondary effects grounds in the absence of any legislative record—affirmed.[8] However, several courts in recent years have concluded that pre-enactment secondary effects evidence

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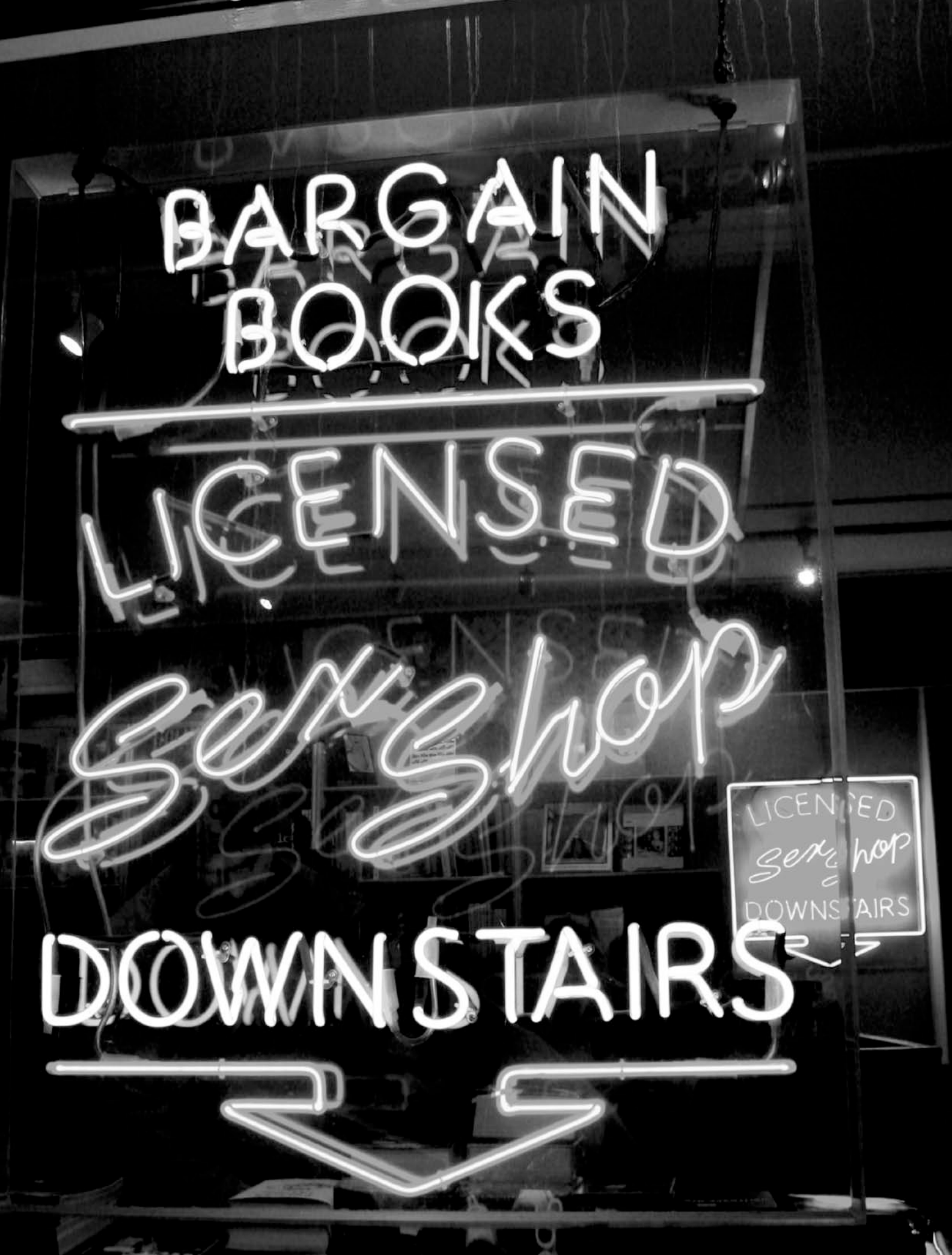
Scott D. Bergthold's national practice focuses on the drafting and defense of adult business ordinances in state and federal courts. He is a frequent lecturer on adult business regulation and is co-author of *Local Regulation of Adult Businesses,* 2008 Ed. (Thomson West). He recently served as appellate counsel for the City in *Daytona Grand, Inc. v. City of Daytona Beach,* 490 F. 3d 860 (11th Cir. 2007). For complimentary resources on adult business regulation, e-mail Scott at sbergthold@sdblawfirm.com.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is required,[9] and it is imperative that a local government develop a significant body of secondary effects evidence for its ordinance.

Of course, having a substantial legislative record does not necessarily preclude an adult business plaintiff from bringing a secondary effects challenge based on the plurality opinion in *City of Los Angeles v. Alameda Books, Inc*.[10] While a majority of appellate courts have rejected such challenges,[11] at least one court has found such a challenge sufficient for the claim to survive summary judgment.[12] The result is that almost every adult business case, including those over previously upheld hours regulations, involves a challenge to the legislative basis for the regulation.

There is typically a fundamental flaw in the proposition that underlies these challenges. First, plaintiffs often hire experts who begin with the presumption that, in order to have a valid secondary effects rationale, a local government must show that adult businesses have more secondary effects than non-adult businesses. Of course, this has never been the law;[13] nor does logic require such an evidentiary showing. As one federal court explained:

> Plaintiffs also offer their own compilation of data suggesting that police service calls are placed less often from their establishments than from certain other Louisville-area establishments which do not feature adult entertainment. Even if true, this does not disprove that the enactment of buffer zone regulations may reduce criminal activity and further an important governmental interest.[14]

In litigating hours of operation provisions, plaintiffs often raise a variation of this argument. An adult business may attempt to show that more crime occurs during the late afternoon and evening hours than during the overnight hours that are regulated by the municipality's ordinance. Even if true, this proposition—which ignores important elements relevant to measuring crime *risks*—does not undermine the rationale that the hours of operation regulation clearly serves the interest of preventing secondary effects during the nighttime hours. In other words, a municipality does not bear the burden of showing that adult businesses are the worst land uses in the city, or even, that adult businesses generate more secondary effects than, say, a biker bar or another "problem" establishment in the municipality. Rather, to justify an ordinance regulating sexually oriented businesses, a municipality need only advance some basis to show that its regulation "may reduce the costs of

secondary effects without substantially reducing speech."[15] And lower courts have generally been faithful in requiring adult businesses to challenge "*the City's* rationale,"[16] not some alternative rationale proffered by the witnesses hired by adult entertainment establishments.[17]

Narrow Tailoring

Adult businesses have also seized upon language in *Alameda Books*—specifically, that in Justice Kennedy's concurrence—to argue that hours of operation provisions are *per se* invalid. In *Center for Fair Public Policy v. Maricopa County*,

> [Plaintiff] argues that sexually-oriented businesses draw a fair amount of their patronage in the evening and late night hours—nude dancing establishments are hardly doing a roaring trade after dawn. The ordinance shuts these establishments down during the late night hours, and therefore it cannot be, as Justice Kennedy would require, that "the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced."[18]

The U.S. Court of Appeals for the Ninth Circuit rejected this argument on multiple grounds. First, the court observed that "Justice Kennedy never intended a heightened proportionality requirement to apply" to hours regulations because he emphatically reaffirmed *Renton*'s core principle that regulations targeting secondary effects are entitled to the relaxed scrutiny laid out in that seminal case. Under *Renton*, the Ninth Circuit noted, the federal courts of appeal have unanimously upheld "time" regulations for adult businesses.[19]

Second, as the *Fair Public Policy* court explained, Justice Kennedy's concurrence dealt with a unique claim advanced in *Alameda Books:* that the Los Angeles "break-up" policy would force the closure of a number of existing adult businesses. Justice Kennedy emphasized that a municipality cannot advance the rationale that it will obtain a reduction in secondary effects by eliminating adult businesses. An hours of operation regulation does not force the closure, or elimination, of existing adult businesses. Moreover, the Ninth Circuit observed, "the application of Justice Kennedy's proportionality analysis," as suggested by the plaintiffs, "would invalidate all such laws, and we are satisfied that he never intended such a result."[20]

Finally, the Ninth Circuit surveyed numerous cases decided in the wake of *Alameda Books* and concluded that the weight of authority demonstrated that Justice Kennedy's concurrence did not substantially alter the *Renton* framework for adjudicating adult businesses cases. Under that framework, a regulation is narrowly tailored so long as the governmental interest at stake "would

be achieved less effectively absent the regulation."[21] Because the regulation in question met that deferential standard, the Ninth Circuit ruled that it was constitutional under the First Amendment.

Alternative Avenues of Communication

A time, place, and manner regulation must "leave open ample alternative channels for communication."[22] The cases that uphold hours of operation regulations for adult businesses involve several different closing times, including 10:00 P.M.,[23] 11:00 P.M.,[24] midnight,[25] 1:00 A.M.,[26] and 3:00 A.M.[27] Local governments should first evaluate the case law from their state and federal appellate courts, keeping in mind that the more restrictive the regulation, the more difficult it may be to prevail in any litigation that ensues. Provided that the municipality has a substantial legislative record, however, courts are likely to approve reasonable restrictions on adult businesses' hours of operation.[28]

Potential Preemption Issue

Because some adult businesses hold liquor licenses and are, therefore, regulated by state closing hours, municipalities should implement adult business hours of operation provisions only after reviewing potential conflicts with state liquor laws. There are relatively few published cases on this issue, and those cases take differing views.[29]

In *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*,[30] the U.S. Court of Appeals for the Sixth Circuit evaluated a regulation that required adult cabarets without liquor licenses to close at midnight, while permitting liquor-licensed cabarets to stay open later, pursuant to the terms of their liquor licenses. The court rejected both First Amendment and Equal Protection challenges to the statute. The court observed that the disparate treatment caused by the regulation was not based on any invidious discrimination; rather, it was based on the fact that state law prevented the more restrictive closing time from being applied to both classes of cabaret.[31] Additionally, the court observed, the township "relied upon research suggesting that the patrons of alcohol-free adult cabarets are often more unruly because these cabarets are frequently patronized later in the evening by customers who have become intoxicated at other establishments."[32] Because the regulation was a reasonable approach to preventing secondary effects without unreasonably limiting alternative avenues of communication, the court upheld it as constitutional.[33]

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Conclusion

A reasonable hours of operation regulation is a constitutionally sound method of controlling the negative secondary effects of adult businesses during the overnight hours. Before adopting such regulations, municipalities should review the decisional law on this issue from their state and federal appellate courts. Additionally, local governments should evaluate the impact, if any, that state liquor regulations may have on this aspect of their adult business ordinance. Finally, if litigation ensues, the municipality should educate the court about the relevant regulatory rationale and demonstrate how the hours of operation regulation serves the community's interest in preventing secondary effects during the overnight hours.

Notes

1. *See, e.g.*, Ctr. for Fair Public Policy v. Maricopa County, 336 F. 3d 1153 (9th Cir. 2003); Star Satellite, Inc. v. City of Biloxi, 779 F.2d 1074 (5th Cir. 1986); Mitchell v. Comm'n on Adult Entm't Establishments, 10 F. 3d 123 (3d Cir. 1993); Andy's Rest. & Lounge, Inc. v. City of Gary, 466 F. 3d 550 (7th Cir. 2006); Richland Bookmart v. Nichols, 137 F. 3d 435 (6th Cir. 1998); Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F. 3d 1358 (11th Cir. 1999); Nat'l Amusements, Inc. v. Town of Dedham, 43 F. 3d 731 (1st Cir. 1995).
2. *See, e.g.*, CAM I, Inc. v. Louisville/Jefferson County Metro. Gov't, Nos. 2005-CA-000085-MR, 2005-CA-000090-MR, 2005-CA-000091-MR, 2005-CA-000092-MR, 2005-CA-000100-MR, 2005-CA-000113-MR, 2005-CA-000176-MR, 2007 WL 2893435 (Ky. Ct. App. Oct. 5, 2007); City of Colorado Springs v. 2354, Inc., 896 P.2d 272, 297 (Colo. 1995); Moody v. Board of County Comm'rs, 697 P.2d 1310 (Kan. 1985).
3. 475 U.S. 41 (1986).
4. *Renton*, 475 U.S. at 51-4; Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasizing that "narrow tailoring" does not require the "least restrictive means" of regulation); United States v. O'Brien, 391 U.S. 367, 377 (1968) (stating test in slightly different language).
5. 729, Inc. v. Kenton County Fiscal Court, No. 06-6390, 2008 WL 313054, *2 (6th Cir., Feb. 6, 2008) ("Although the plaintiffs contend that this provision should be subjected to strict scrutiny, it is well-settled that laws targeting the 'secondary effects' of adult-entertainment establishments are subject to intermediate scrutiny."). While the federal courts are generally faithful in applying intermediate, instead of strict, scrutiny in this context, some older state court decisions have caused confusion about the level of scrutiny applicable under the state constitution. In *Fantasyland Video, Inc. v. County of San Diego*, 496 F. 3d 1040 (9th Cir. 2007), the Ninth Circuit Court of Appeals confronted such a problem in the decisional law from the California courts. Thus, it asked the California Supreme Court to decide whether, pursuant to the state constitution, a court should review the constitutionality of an ordinance that sets closing times for adult entertainment establishments under strict scrutiny, intermediate scrutiny, or some other standard.
6. City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000) (describing the interest as "undeniably important").
7. Mitchell v. Comm'n on Adult Entm't Establishments, 10 F. 3d 123, 132 (3d Cir. 1993).
8. *Id.* at 136 (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584-85 (1991) (Souter, J., concurring in judgment)).
9. Illusions-Dallas Private Club, Inc. v. Steen, 482 F.3d 299 (5th Cir. 2007); White River

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In addition to making construction law and code enforcement part of our annual programs, we are moving forward on offering programs on employment law, real property law for the local government practitioner, and other topics of interest to our members.

loyalty to the organization. I wish I could take the credit for all of it, but the truth is that the IMLA staff deserve the credit. Veronica Kleffner has directed these changes with efficiency, a firm hand, and quiet aplomb. Sophia Stadnyk, in addition to working her magic on the newsletters and this magazine, has created a terrific Canadian program. Devala Janardan, in addition to fielding innumerable research requests and doing the "grunt work" for my presentations, has worked tirelessly on producing a first-rate web presence. Mary Vlach and Trina Shropshire-Paschal have both worked through a myriad of problems in our new software system to get us ready, with great dedication and hard work. Lee Ross-Clark and Rhonda Jackson have each dedicated themselves to making our operations appear seamless (despite behind-the-scenes system "hiccups"), and are fulfilling their responsibilities with quiet vigor. **M.**

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Amusement Pub, Inc. v. Town of Hartford, 481 F. 3d 163 (2d Cir. 2007); Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla., 337 F. 3d 1251 (11th Cir. 2003).

10. 535 U.S. 425, 438-39 (2002) (plurality opinion) (describing evidentiary burden-shifting procedure).

11. *See, e.g.*, Daytona Grand, Inc. v. City of Daytona Beach, 490 F. 3d 860 (11th Cir. 2007); Gammoh v. City of La Habra, 395 F. 3d 1114 (9th Cir. 2005); G.M. Enters., Inc. v. Town of St. Joseph, Wis., 350 F. 3d 631 (7th Cir. 2003); SOB, Inc. v. County of Benton, 317 F. 3d 856 (8th Cir. 2003); Commonwealth v. Jameson, 215 S.W.3d 9 (Ky. 2006); City of Elko v. Abed, 677 N.W.2d 455 (Ct. App. Minn. 2004).

12. Abilene Retail #30, Inc. v. Bd. of Comm'rs of Dickinson County, 492 F. 3d 1164 (10th Cir. 2007); *but see*, Abilene Retail #30, Inc. v. Bd. of Comm'rs of Dickinson County, 508 F. 3d 958 (10th Cir. 2007) (Gorsuch, J., dissenting from order denying rehearing *en banc*) ("Legally, the significance of this case is illustrated by the fact that it opens not one, but two, splits with our sister circuits on important questions of law concerning the amount of judicial deference due legislative judgments.").

13. *See, e.g.*, Ctr. for Fair Public Policy v. Maricopa County, 336 F. 3d 1153, 1170 (9th Cir. 2003) (observing that plaintiffs' argument that "the state must demonstrate that *greater* late night problems are posed by sexually-oriented businesses than by non-regulated businesses" is contrary to *Renton*); Schultz v. City of Cumberland, 26 F. Supp.2d 1128, 1143 (W.D. Wis. 1998) ("Contrary to plaintiffs' assertion, these findings need not be measured against the law enforcement problems associated with non-sexually oriented businesses in Cumberland. Nothing in *Renton* or any of the three opinions written by the *Barnes* majority would require defendant to engage in this type of rigorous, comparative analysis.").

14. Kentucky Restaurant Concepts, Inc. v. City of Louisville, 209 F. Supp.2d 672, 680 (W.D. Ky. 2002).

15. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 450 (2002) (Kennedy, J., concurring in judgment).

16. *Daytona Grand*, 490 F.3d at 882 (emphasis in original); *see also*, *City of Los Angeles*, 535 U.S. at 438-39 (plurality opinion) (emphasizing that plaintiffs must address "the municipality's rationale" when challenging the secondary effects basis for ordinance).

17. *See, e.g.*, Ctr. for Fair Public Policy v. Maricopa County, 336 F. 3d 1153, 1168 (9th Cir. 2003) ("To the extent Fair Public Policy argues that the state needs to come forward with empirical data in support of its rationale, that argument was specifically rejected in *Alameda Books*."); G.M. Enters., Inc. v. Town of St. Joseph, 350 F. 3d 631, 640 (7th Cir. 2003) (rejecting the plaintiffs' claim that the studies on which the town relied must be "of sufficient methodological rigor to be admissible under *Daubert*," and concluding that "[t]his argument is completely unfounded").

18. *Ctr. for Fair Public Policy*, 336 F. 3d at 1162.

19. *Id.*

20. *Id.* at 1163.

21. *Id.* at 1169 (quoting *Colacurcio v. City of Kent*, 163 F. 3d 545, 553 (9th Cir. 1998) (internal citations omitted)).

22. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

23. Mitchell v. Comm'n on Adult Entm't Establishments, 10 F. 3d 123 (3d Cir. 1993).

24. Andy's Rest. & Lounge, Inc. v. City of Gary, 466 F.3d 550 (7th Cir. 2006).

25. Richland Bookmart, Inc. v. Nichols, 137 F. 3d 435 (6th Cir. 1998).

26. Ctr. for Fair Public Policy v. Maricopa County, 336 F. 3d 1153, 1168 (9th Cir. 2003).

27. Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F. 3d 1358 (11th Cir. 1999).

28. *Andy's Rest. & Lounge*, 466 F. 3d at 555 ("The evidence relied upon by the City is more than adequate to establish the secondary effects regulated by the Ordinance. The record contains numerous studies evidencing [secondary effects]. Moreover, we have previously affirmed the only two portions of the Ordinance plaintiffs specifically attack—the hour regulation and open-booth requirement.").

29. *See, e.g.*, City of Colorado Springs v. 2354, Inc., 896 P.2d 272, 297 (Colo. 1995) (closing hours ordinance was not preempted by a less restrictive state law affecting hours of operation for nude dancing bars); *but cf.*, J.L. Spoons, Inc. v. City of Brunswick, 49 F. Supp.2d 1032 (N.D. Ohio 1999) (determining that local closing hours were preempted by state law).

30. 411 F. 3d 777 (6th Cir. 2005) (*en banc*).

31. *Id.* at 790.

32. *Id.*

33. *Id.* at 791. **M.**