

No. 11-245

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

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THE CITY OF LOS ANGELES,  
*Petitioner,*

v.

ALAMEDA BOOKS, INC. and HIGHLAND BOOKS, INC.,  
*Respondents.*

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

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**REPLY TO BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

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November 7, 2011

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## INTRODUCTION

This case concerns review of the constitutionality under the First Amendment of a municipal dispersal ordinance enacted by Petitioner City of Los Angeles (City) which prohibits the operation of more than one Adult Entertainment Business at a single location, including the operation of an Adult Arcade within an Adult Bookstore. The Ninth Circuit declined to grant summary judgment upholding the regulation, notwithstanding its finding that Respondents Alameda Books, Inc. and Highland Books, Inc. (Alameda Books and Highland Books) failed to produce “actual and convincing” evidence casting “direct doubt” on the City’s rationale for the regulation as required by this Court’s prior plurality opinion in this case, *Alameda Books et al. v. City of Los Angeles*, 535 U.S. 425 (2002).

The City filed a Petition For Writ of Certiorari (Petition) No. 11-245 on August 23, 2011. Alameda Books and Highland Books opposed the Petition and filed a Conditional Cross-Petition For Writ of Certiorari (Cross-Petition) No. 11-379 on September 22, 2011. The City filed its Brief In Opposition (Brief In Opposition) to the Cross-Petition on October 26, 2011, with Appendices 1 through 5 supplemental to the Appendices attached to its Petition. If granted, the Cross-Petition would be briefed and heard concurrently with the Petition. Rather than repeat the Appendices attached to its Brief In Opposition, the City respectfully incorporates its supplemental Appendices into this Reply.

**ARGUMENT****1. Review By This Court Is Necessary To Resolve A Circuit Conflict Regarding Application of the *Alameda Books* Burden Shifting Framework At The Summary Judgment Stage****A. Respondents' Contention That the Circuit Conflict Applies Only To The "Secondary Effects" Inquiry and Not To the "How Speech Will Fare" Inquiry Is Wrong**

Petitioner and Respondents agree that there exists a Circuit conflict regarding whether the *Alameda Books* burden shifting framework requires upholding a governmental regulation where those challenging the regulation fail to submit "actual and convincing evidence" casting "direct doubt" upon the rationale for the regulation at the summary judgment stage. As cited in the City's petition, the Fifth, Seventh, and Eleventh Circuits interpret *Alameda Books* as requiring summary judgment upholding the regulation under such circumstances. The Circuit opinion here and the Tenth Circuit conflict with these other Circuits by reaching the opposite conclusion and remanding for trial instead.

Respondents however contend that the Circuit conflict applies only to the "secondary effects" inquiry under the *Alameda Books*' plurality, and not to the "how speech will fare" inquiry under Justice Kennedy's concurrence, and is not at issue because the Ninth Circuit based its opinion below solely upon the "how speech will fare" inquiry. Respondents' contention about application of the Circuit conflict is wrong.

The *Alameda Books* burden shifting framework applies equally to both inquiries. *Alameda Books* does not require the City to meet a higher burden regarding how speech will fare than regarding secondary effects. While these are separate inquiries, they are part of the same intermediate scrutiny test and the same burden shifting framework applies to both inquiries. A contrary conclusion, applying a higher burden to the “how speech will fare” inquiry than to the “secondary effects inquiry” would nullify *Alameda Books* and longstanding jurisprudence regarding the burden upon government to uphold a regulation by effectively allowing a judge or jury to “veto” legislation whenever she, he or it concludes, by a preponderance of the evidence, that the legislature’s chosen path is erroneous. The City’s legislative enactments are entitled to deference as those of a separate branch of government and are not be subject to potential judicial veto without “actual and convincing evidence” casting “direct doubt” upon the rationale for the regulation.

The *Alameda Books* plurality and Justice Kennedy’s concurrence thus both found that the City’s 1977 Study properly supported the City’s ordinance, the City complied with *Renton*<sup>1</sup> and the ordinance is

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<sup>1</sup> In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court reversed the Ninth Circuit and reinstated the District Court summary judgment upholding a municipal zoning ordinance restricting adult theaters from locating within 1,000 feet of specified sensitive uses. This Court rejected plaintiff’s contention that it could not locate a commercially viable site for its adult theater, reasoning that the ordinance did not ban adult theaters altogether but merely provided where such theaters could locate and was therefore a form of time, place, and manner regulation. *Renton* at 54.

facially valid. The plurality concluded “that the city, at th[at] stage of the litigation, ha[d] complied with the evidentiary requirement in *Renton*.” *Alameda Books* at 439 (plurality). Justice Kennedy likewise concluded that “this ordinance is not invalid on its face.” *Alameda Books* at 453 (Kennedy, J., concurring). The plurality and concurrence both concluded that the 1977 Study satisfies the City’s burden because the City is not required to prove the correctness of its theory nor provide evidence that rules out every theory inconsistent with its own. Rather, the City may rely upon evidence “reasonably believed to be relevant” and which fairly support the rationale for its ordinance. *Alameda Books* at 438. The Court then remanded the matter, placing the burden upon plaintiffs to submit “actual and convincing evidence” casting “direct doubt” upon the rationale for the ordinance. *Alameda Books* at 438, 439 (Plurality) and 451 (Kennedy, J., concurring).

Respondents’ contention, beginning at page 4 of their Brief In Opposition, that *Alameda Books* amended *Renton*, is wrong. *Alameda Books* did not amend, but rather clarified *Renton*. The *Alameda Books* plurality thus stated, “none of the parties request the Court to depart from the *Renton* framework. Nor is the proposal fairly encompassed in the question presented, which focuses on the sorts of evidence upon which the city may rely to demonstrate that its ordinance is designed to serve a substantial governmental interest.” *Alameda Books* at 441. Justice Kennedy similarly confirmed 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* at 448.



*Alameda Books* clarified that the City’s premise must be that the quantity of speech will be substantially undiminished and that total secondary effects will be significantly reduced, and provided plaintiffs an opportunity to challenge a regulation concerning speech by submitting “actual and convincing” evidence casting “direct doubt” upon the premise for the regulation. *Alameda Books* did not amend *Renton*’s evidentiary requirement that a regulation must be upheld at the summary judgment stage if the premise for the regulation can be reasonably inferred from the evidence presented. Consequently, the *Alameda Books* burden shifting framework applies to the “secondary effects” and “how speech will fare” inquiries equally and application of that framework at the summary judgment stage is squarely at issue here.

**B. The Ninth Circuit Opinion Squarely Frames The Issue of Whether *Alameda Books* Requires Upholding a Regulation Where the Court Finds Plaintiffs Have Failed To Produce “Actual and Convincing” Evidence Casting “Direct Doubt” On the Regulation At the Summary Judgment Stage**

The Ninth Circuit found that the testimony that a hypothetical stand-alone Adult Arcade could not exist, was not “actual and convincing” enough to invalidate the regulation under *Alameda Books*. App. 20a -22a.<sup>2</sup> Despite this finding, the Ninth Circuit remanded the

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<sup>2</sup> References to App. 20a-22a refer to the Appendices attached to the City’s Petition.

case for trial regarding the validity of the ordinance. App. 22a. The opinion thereby directly conflicts with other Circuits, above, interpreting *Alameda Books* as requiring summary judgment upholding a regulation under such circumstances. The opinion thus squarely frames the issue of whether *Alameda Books* requires summary judgment upholding a regulation at the summary judgment stage in the absence of “actual and convincing” evidence casting “direct doubt” on the regulation.

By remanding the matter based solely upon testimony by Alameda Books and Highland Books that a hypothetical stand-alone Adult Arcade could not exist, the opinion also conflicts with this Court’s 2002 ruling in this case. This Court then rejected Respondents’ same contention that a hypothetical stand-alone Adult Arcade could not exist, as insufficient to cast requisite doubt on the City’s ordinance.

Respondents contend that there are no adult video arcades in Los Angeles County that operate independently of adult bookstores. See Brief for Respondents 41. . . .

\* \* \*

[R]espondents explain, the prohibition on multiuse adult establishments is effectively a ban on adult video arcades because no such business exists independently of an adult bookstore. Brief for Respondents 12-13. . . . 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.

*Alameda Books* at 441 and 443.

The *Alameda Books* plurality and Justice Kennedy's concurrence both rejected this testimony and found the City's ordinance facially valid, subject to an opportunity for Respondents to produce "actual and convincing" evidence casting "direct doubt" on the regulation. *Alameda Books* at 439 (plurality); and 453 (Kennedy, J., concurring). In the 16 years since this case was filed in 1995, Respondents have failed to marshal additional evidence to challenge the premise that the regulation leaves the quantity and accessibility of speech intact.

### **C. Respondents' Opposition Misstates Facts**

Respondents' Opposition states that the record shows that the City's ordinance would eliminate Adult Arcades, and that the only evidence regarding the prospective survival of a hypothetical stand-alone Adult Arcades was the second declaration of the City's expert, Vanita Spaulding, App. 2, excluded by the District Court and "in no way raised [by the City] on appeal." (Opposition at page 9, footnote 7.) These statements misstate facts.

There is no possible conclusion that the ordinance eliminates Adult Arcades. The ordinance does not ban Adult Arcades. Rather, it regulates their distance vis-à-vis sensitive uses and other Adult Entertainment Businesses. Moreover, an Adult Arcade is not a distinct medium of expression for which no adequate substitute exists under *Ladue v. Gilleo*, 512 U.S. 43

(1994). App. 106a-108a. Respondents do not and cannot contend otherwise.

It is also undisputed that Respondents are free to open new Adult Arcades using a business model other than at the same location as another Adult Entertainment Business. App. H and I. It is also undisputed that the regulation does not ban adult film media. Respondents are free to distribute, and consumers are free to obtain, adult film media via the VCR, DVD player, cable television, satellite television, and the internet. Adult oriented movies can also be distributed and are available at home, internet cafés, libraries, hotels, movie theaters, computers, video on demand services, video rentals and instant downloads, all at a cost comparable to or less than the cost of such services as provided at an adult arcade. App. 64a-65a; App 6b-9b, 13b-44b and 45b-46b.<sup>3</sup> Respondents did not and cannot dispute any of this evidence.

Ms. Spaulding's second declaration, stricken by the lower courts, also includes further substantial testimony about the profitability of Adult Arcades when operated in conjunction with Adult Bookstores. App. 2. The Ninth Circuit recognized that Ms. Spaulding's testimony establishes that the arcade components of Respondents' businesses "as presently operated are quite profitable, accounting for approximately one-half of the revenues of the combined businesses and the majority of the stores' net income." App. 11a. The Ninth Circuit nonetheless affirmed the District Court's Order striking her

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<sup>3</sup> References to App. 6b-9b, 13b-44b and 45b-46b refer to the supplemental Appendices attached hereto.

testimony because it concerned the profitability of Adult Arcades only when combined with an Adult Bookstore, and not the profitability of Adult Arcades in isolation. App. 17a-18a.<sup>4</sup> The City raised the issue of the admissibility of Ms. Spaulding's testimony in its Opening Brief on appeal to the Ninth Circuit and again by Motion For Reconsideration. App. 78b-82b; and 108b-112b.

The ruling striking Ms. Spaulding's second declaration directly violates the holding in *Alameda Books*, 535 U.S. 425, regarding the type of evidence which may be relied upon to support legislation. "In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). *Alameda Books* held that the City reasonably relied upon its 1977 Study treating the combination Adult Bookstore/Arcades as single establishments, to support a reasonable inference about the effect of separate-standing Adult Bookstores and Arcades. *Alameda Books*, 535 U.S. at 436. As explained in the City's Brief In Opposition, the same reasoning applies to Ms. Spaulding's testimony. The City may reasonably rely upon Ms. Spaulding's analysis regarding the profitability of an Adult Arcade when combined with an Adult Bookstore to support an inference about the

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<sup>4</sup> The City is entitled to judgment upholding its legislation even without the additional testimony by Ms. Spaulding. Legislation must be upheld without "actual and convincing" evidence casting "direct doubt" upon every governmental findings and premise for the legislation. *World Wide Video v. City of Spokane*, 368 F.3d 1186, 1195-96 (2004).

viability of stand alone Adult Arcades. Her testimony is admissible and relevant.

The contention by Alameda Books and Highland Books at page 4 of the Cross-Petition that their businesses were “complaint with the original zoning provisions” is also misleading to the extent it infers they opened in conformity with existing regulations. Alameda Books and Highland Books opened for business in 1991 and 1993, eight and ten years respectively after the effective date of the amended Ordinance. From the day they began operating as combined adult retail and arcade establishments, both businesses operated in violation of LAMC Section 12.70. App. 5a.

## **2. The Ninth Circuit Opinion Decides Important Questions of Federal Law That Have Not Been, But Should Be, Settled By This Court**

### **A. Whether The *Alameda Books* Burden Shifting Framework Is Triggered At The Summary Judgment Stage**

As stated above, the issue of whether the *Alameda Books* burden shifting framework should be fully triggered at the summary judgment stage has been decided differently by different Circuits. The issue has never been decided by this Court.

This Court held in 2002, that at that stage of the litigation, the City had complied with the evidentiary requirement in *Renton*. *Alameda Books* at 439 and 453, above. In *Renton*, this Court reversed the Ninth Circuit, held the City had met its evidentiary burden and reinstated summary judgment for the City.

*Renton* at 50-52. This Court nonetheless remanded the matter in 2002 based upon the then early stage of the proceedings.

Now, 16 years after the case was filed, the record remains the same. The only evidence marshaled by Respondent's is anecdotal *ipse dixit* by that a hypothetical stand-alone Adult Arcade cannot exist. App. 59a-62a. The Ninth Circuit remand under these facts thus raises an important question of federal law that has not been, but should be settled by this Court, of whether the burden upon an adult business to challenge legislation by "actual and convincing evidence" should be fully triggered at the summary judgment stage.

**B. Whether Justice Kennedy's Concurrence Requires Municipalities To Litigate the Potential Economic Viability of Each Speculative Business Model**

The Ninth Circuit applied Justice Kennedy's proportionality requirement and remanded the matter for trial on the issue of how speech will fare. It notes: "The Spaulding analysis showed the arcades to be profitable in their present forms, a relevant step in a more in-depth examination of their performance in isolation." App. 21a-22a.

This ruling puts before this Court the issue of whether Justice Kennedy's concurrence requires municipalities to litigate the economic potential viability of each business model impacted by adult zoning regulations. This is an important question of federal law that has not been, but should be settled by this Court. Respondents have not contend otherwise.

### **3. The Petition Does Not Seek An Advisory Opinion**

Respondents' Opposition argues that the procedural posture should prevent this Court from reviewing the case because three claims remain to be litigated, in addition to how speech will fare: (1) whether the City's studies are comprised of "shoddy data"; (2) whether the ordinance would increase rather than decrease negative secondary effects; and (3) the adequacy of alternative sites for adult businesses in the City. Respondents argue even if the Court were to conclude that the City should prevail on "how speech will fare" that Plaintiffs may still prevail on other legal theories and therefore be remanded rather than reviewed.

Respondents are again wrong. Plaintiffs' purported alternative legal theories are themselves insufficient to preclude summary judgment upholding the regulation. This Court rejected Plaintiffs' first proposition that the 1977 Study constitutes "shoddy data" in *Alameda Books*, concluding that the City reasonably relied upon the study.

Respondents' second proposition, that the regulation will increase adverse secondary effects is based upon speculation that the regulation will double the number of adult businesses, increase the number of such establishments located near businesses serving alcohol and cause customers to drive a triangle from home, to an arcade, and then to a bookstore, thereby increasing crime, traffic and blight and reducing property values. Respondents submit no evidence in support any of these assertions. They submit no crime reports, traffic studies, customer preference surveys or other data regarding adult businesses actually existing



in the City. Respondents' contentions here are also insufficient to overcome summary judgment for the City. *Alameda Books* at 438-39.

Respondents' last proposition regarding the adequacy of alternative sites for adult businesses is not relevant based upon existing law providing that the City is not obligated to guarantee Plaintiffs' first choice avenue of communication.

#### **4. Conclusion**

For the forgoing reasons, the City respectfully submits that review by this Court is necessary to resolve a Circuit conflict regarding application of the standards in *Alameda Books* at the summary judgment stage and to settle important questions of federal law that have not been but should be settled by this Court. These issues and the Circuit conflicts go to the essence of this Court's jurisprudence permitting local government to effectively regulate the adverse secondary impacts of sexually explicit businesses through zoning.

Respectfully submitted,

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