No. 11-_____

In The
Supreme Court of the United States

ALAMEDA BOOKS, INC.
and HIGHLAND BOOKS, INC.,

Cross-Petitioners,

v.

CITY OF LOS ANGELES, CALIFORNIA,

Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION

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QUESTIONS PRESENTED FOR REVIEW

1) Whether, under the doctrine formulated in this Court's earlier decision in this case, the City bears the burden of proving that its challenged ordinance would not simply cause the affected movie arcades to close.

2) Whether, in a First Amendment challenge to an adult zoning ordinance, a plaintiff should prevail on summary judgment where the uncontroverted evidence establishes that the ordinance would operate to eliminate the affected movie arcade venues.

CORPORATE DISCLOSURE STATEMENT

Cross-Petitioners Alameda Books, Inc. and Highland Books, Inc. have now been combined as a single corporate entity, Beverly Books, Inc.,[1] which has no parent corporation, nor any publicly held company owning 10% or more of its stock.

[1] In 2002, shortly after remand from this Court, the two original Plaintiffs in the case, Alameda Books, Inc. and Highland Books, Inc. (both California corporations), were merged into Beverly Books, Inc. (also a California corporation). Pursuant to FED. R. CIV. PROC. 25(c), the action has continued in the name of the original Plaintiffs, as the federal courts have held is appropriate. *See, e.g., Sun-Maid Raisin Grow. of Cal. v. California Pack. Corp.*, 273 F.2d 282 (9th Cir. 1959).

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Corporate Disclosure Statement	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Ordinances Involved	1
Statement of the Case	2
Background of the Los Angeles adult-zoning amendments	4
Litigation culminating in this Court's 2002 decision	5
Current round of litigation	8
Reasons for Granting the Writ	10
I. The Ninth Circuit opinion below contravenes this Court's express instructions in this case, that the courts must first determine "how speech will fare," and that the municipality bears the burden of proof in that regard	15
II. The opinion below also directly conflicts with decisions of the Seventh Circuit, and of the Ninth Circuit itself in prior cases, correctly acknowledging the threshold burden a municipality must shoulder to establish that a zoning restriction is efficacious and not censorial	23
Conclusion	27

TABLE OF AUTHORITIES

Page

FEDERAL CASES

729, Inc. v. Kenton County Fiscal Court,
515 F.3d 485 (6th Cir. 2008) 16

Abilene Retail No. 30, Inc. v. Board of Comm'rs of Dickinson County, Kan.,
508 F.3d 958 (10th Cir. 2007) 12

Alameda Books, Inc. v. City of Los Angeles,
631 F.3d 1031 (9th Cir. 2011).....*passim*

Alameda Books, Inc. v. City of Los Angeles,
222 F.3d 719 (9th Cir. 2000) 4, 5, 7

Anderson v. Liberty Lobby,
477 U.S. 242 (1986).....26

Annex Books, Inc. v. City of Indianapolis,
581 F.3d 460 (7th Cir. 2009) 12, 13, 16

Ben's Bar, Inc. v. Village of Somerset,
316 F.3d 702 (7th Cir. 2003) 16

Board of Trustees of State Univ. of N.Y. v. Fox,
492 U.S. 469 (1989).....22

Celotex Corp. v. Catrett,
477 U.S. 317 (1986).....26

Center For Fair Public Policy v. Maricopa County, Arizona,
336 F.3d 1153 (9th Cir. 2003).....12, 16, 18, 24

Citizens United v. Federal Election Comm'n,
___ U.S. ___, 130 S. Ct. 876 (2010).....13

TABLE OF AUTHORITIES – Continued

Page

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002).....*passim*

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986).....6, 15, 17, 23, 25

Comite de Jornaleros v. Redondo Beach,
2011 WL 4336667 (September 16, 2011).....25, 26

Davis v. Federal Election Comm'n,
554 U.S. 724 (2008).....13

Edenfield v. Fane,
507 U.S. 761 (1993).....22

Fantasyland Video, Inc. v. County of San Diego,
505 F.3d 996 (9th Cir. 2007) 13

Fly Fish, Inc. v. City of Cocoa Beach,
337 F.3d 1301 (11th Cir. 2003).....16

G.M. Enterprises, Inc. v. Town of St. Joseph, Wis.,
350 F.3d 631 (7th Cir. 2003) 23, 24

Greater New Orleans Broadcasting Assn., Inc. v. United States,
527 U.S. 173 (1999).....22

Marks v. United States,
430 U.S. 188 (1977).....7, 15

Nevada Comm'n on Ethics v. Carrigan,
___ U.S. ___, 131 S. Ct. 2343 (2011) 13

New Albany DVD, LLC v. City of New Albany, Ind.,
581 F.3d 556 (7th Cir. 2009) 24

TABLE OF AUTHORITIES – Continued

Page

Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla., 337 F.3d 1251 (11th Cir. 2003).....16

Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009).....13

R.A.V. v. St. Paul, 505 U.S. 377 (1992).....22

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).....22

Snyder v. Phelps, ___ U.S. ___, 131 S. Ct. 1207 (2011).....13

Sun-Maid Raisin Grow. of Cal. v. California Pack. Corp., 273 F.2d 282 (9th Cir. 1959).....ii

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).....22

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).....26

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).....14, 21, 25

World Wide Video of Washington, Inc. v. City of Spokane, 368 F.3d 1186 (9th Cir. 2004).....16, 25

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

United States Constitution
First Amendment ..... *passim*
Fourteenth Amendment ..... *passim*

FEDERAL STATUTES AND RULES

United States Code
28 U.S.C. § 1254(1) 1
42 U.S.C. § 1983 5
Federal Rules of Civil Procedure
Rule 25(c) ii
Rules of the Supreme Court
Rule 10(a) 26
Rule 12.5 1
Rule 13.1 1

ORDINANCES

Los Angeles Municipal Code
§ 12.70 ..... *passim*
§ 12.70(B)(17) ..... *passim*
§ 12.70(C) ..... *passim*

OPINIONS BELOW

The opinions subsequent to this Court's remand of this case in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), are reproduced in the Petitioner's Appendix. The decisions below are *Alameda Books, Inc. v. City of Los Angeles,* 631 F.3d 1031 (9th Cir. 2011) (Appendix A) and *Alameda Books, Inc. v. City of Los Angeles*, unpublished order (C.D. Cal., July 16, 2007) (Appendix C).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied cross-petitions for rehearing on May 25, 2011. The City of Los Angeles' petition and this conditional cross-petition are therefore timely filed, pursuant to this Court's Rule 12.5 and Rule 13.1. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

United States Constitution

Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press.

Amendment XIV

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Los Angeles Municipal Code

The relevant provisions of the Los Angeles Municipal Code, including § 12.70(B)(17) and § 12.70(C), are reproduced in the Petitioner's Appendix H and I.

STATEMENT OF THE CASE

Already the subject of a 2002 decision by this Court, this lawsuit commenced on November 15, 1995, when Plaintiffs sought to enjoin threatened enforcement of the City of Los Angeles' ordinance prohibiting any single adult business from including two statutory categories of adult uses, including the standard business model involved in this case – a combined adult bookstore and movie arcade.

This Court held in 2002 that summary judgment for the Plaintiffs was prematurely granted on the record, particularly as its decision supplemented and refined the First Amendment standards governing adult zoning ordinances. The Court therefore remanded for further proceedings consistent with that decision, prominently including Justice Kennedy's

controlling opinion, which instructed that "[t]he [City's] claim . . . must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished." 535 U.S. at 451. On remand, the district court examined precisely that question, and held the ordinance unconstitutional on uncontroverted evidence establishing that the arcade portions of the businesses would indeed close, rather than relocate and operate separately.

The Ninth Circuit reversed, based on its puzzling conclusion that the Plaintiffs' experts were "biased" – an issue the City had in no way raised on appeal. Even more baffling was the Ninth Circuit's implicit holding that the *Plaintiffs*, rather than the City, had the burden of establishing that the movie arcades would close rather than relocate. Such a holding is precisely the opposite of what Justice Kennedy's controlling opinion required – that the City must establish that the ordinance would not cause the affected media outlets to close.

In the event that review is granted, the bookstore/arcades urge this Court to address the fundamental errors that led the court below to reverse the judgment for the Plaintiffs, whose evidence of the ordinance's censorial impact was uncontroverted. Under the two-faceted analysis this Court announced in *Alameda Books*, and on this record, the district court correctly held that this decades-long litigation must conclude in Plaintiffs' favor. Without this Court's clarification of the essential *Alameda*

Books principles, courts in the Ninth Circuit and elsewhere will continue to flounder regarding this key First Amendment criterion of "how speech will fare."

Background of the Los Angeles adult-zoning amendments

This case arises under Los Angeles Municipal Code § 12.70, the City's adult-business zoning ordinance, first enacted in 1978. The ordinance originally imposed distance requirements between any two adult businesses and between such businesses and designated "sensitive uses," such as schools and parks.

As the Court of Appeals noted in its first decision in this case, *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719, 720-21 (9th Cir. 2000), the Plaintiffs' businesses were compliant with the original adult zoning provisions, and each bookstore/arcade operated as one integrated business, selling and renting erotic media materials including videotapes, which could be previewed in the arcade viewing booths. The two components of each business occupied a unified commercial space in one building; the corporate owners operated each as one store, with only internal accounting distinctions between the revenue from video viewing booths and other sales and rentals of media materials.

With no evidence that its adult-zoning distance requirements had failed to ameliorate secondary effects, Los Angeles enacted this further prohibition

against "multiple uses." Two 1983 amendments added a prohibition against multi-media adult businesses operating as one establishment, § 12.70(C), and specifically defined the components of the combined bookstore/arcade as "separate adult entertainment businesses even if operated in conjunction with another adult [] business at the same establishment," § 12.70(B)(17).

Litigation culminating in this Court's 2002 decision

In 1995, after the City threatened to cite Highland Books for violating § 12.70(C), the two bookstore/arcade Plaintiffs jointly sued for declaratory and injunctive relief under 42 U.S.C. § 1983. In the first round of litigation before the district court, Plaintiffs obtained a temporary restraining order, then a preliminary injunction and, finally, summary judgment and a permanent injunction, forestalling the City's planned enforcement of the ordinance. The district court concluded that § 12.70(C) was a content-based regulation of speech that failed strict scrutiny and therefore violated the First Amendment.

The Court of Appeals affirmed, *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), concluding that the City had failed to present sufficient evidence upon which it could reasonably rely to demonstrate a link between so-called multiple-use adult establishments and negative secondary effects; the court therefore held that the law was

invalid under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

The City successfully sought certiorari, resulting in this Court's landmark opinion, *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 434 (2002). Acknowledging that the field could not be so tilted against First Amendment interests as to insulate adult business regulations from fair challenges, this Court undertook to clarify the standards for constitutionality of such time, place or manner regulations.

Justice O'Connor's plurality opinion stressed "that a municipality can[not] get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." 535 U.S. at 438-39. Although the Court reversed the grant of summary judgment as premature on the record, the plurality so held on the narrow grounds that *in the first instance,* the City need only adduce some evidence upon which it has relied, and need not "prove that its theory is the only one that can plausibly explain the data." 535 U.S. at 437. However, the plurality emphasized that if the challengers then "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," then "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id*. at 438-39.

Justice Kennedy concurred, endorsing the plurality's burden-shifting analysis, and also announcing the rule centrally at issue here.[2] He stipulated that the courts must *first* consider "how speech will fare" in assessing the constitutionality of such restrictions. *Id.* at 450. His opinion made clear for the first time that an ordinance reducing secondary effects simply by reducing the amount of speech "is not a permissible strategy. . . . A city may not assert that it will reduce secondary effects by reducing speech in the same proportion." 535 U.S. at 445-46. Referencing the facts of this very case, Justice Kennedy specified that the City must establish "*that this ordinance will cause two businesses to split rather than one to close,* that the quantity of speech will be substantially undiminished, *and* that total secondary effects will be significantly reduced." 535 U.S. at 451 (emphasis added).

This Court remanded for further proceedings consistent with its opinions. The Court of Appeals, in turn, remanded the case to the district court. 295 F.3d 1024 (9th Cir. 2002).

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[2] As further elaborated below, the lower courts, including the Ninth Circuit, have unanimously acknowledged that Justice Kennedy's concurrence represents the rule of the case under the doctrine of *Marks v. United States*, 430 U.S. 188 (1977).

Current round of litigation

On remand, the parties undertook discovery and then brought cross-motions for summary judgment. The Plaintiffs' experts proffered evidence establishing several propositions potentially fatal to the City's defense of its ordinance – most importantly, that any reduction in secondary effects would be achieved by the constitutionally impermissible means of reducing the quantity of speech.[3] Based upon the declarations of Plaintiffs' two industry experts that the ordinance's essential effect would be to close the arcades, the trial court agreed that the ordinance failed First Amendment scrutiny.

Consisting solely of Plaintiffs' two experts' declarations, the evidence admitted before the trial court was uncontroverted in establishing that the effect of the ordinance would be to eliminate secondary effects by eliminating the adult arcades. The court found Plaintiffs' experts qualified and admitted their declarations in evidence, over the City's objections. They testified that arcades could not survive as stand-alone businesses, for numerous reasons, prominently

[3] The Plaintiffs supported their summary judgment motion with three discrete theories, the other two relating to the empirical battle regarding the City's justifications. Their experts' declarations also established that the studies upon which the City relied comprised "shoddy data," and that even taking the City's own evidence, theories, and logic at face value, the record established that this ordinance would tend to increase secondary effects, not reduce them.

including the marketing synergy of the bookstores and arcades. No other admissible evidence was presented by either side.[4]

On that record, the district court concluded that the ordinance failed under the "proportionality" test articulated in Justice Kennedy's controlling concurring opinion, *i.e.*, "how speech will fare," concluding:

> First, the City could not have reasonably assumed that "this ordinance will cause two businesses to split rather than one to close" because the undisputed evidence shows that stand-alone arcades have never existed and are not economically viable. Second, by forcing the arcades to close, the quantity of speech will be "substantially" diminished. Third, "total secondary effects [may] be significantly reduced, but only by unconstitutionally reducing speech in the same proportion."

(Appendix C at 69, citation omitted.) Accordingly, the trial court granted Plaintiffs' motion for summary judgment and denied the City's.

The City appealed, contending that it had no burden to establish either the efficacy or the noncensorial nature of its ordinance, and that even if the ordinance operated to eliminate all arcades, that result would be constitutionally permissible. On appeal,

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[4] The district court found that the City's proffered expert had no relevant expertise, and struck her declaration as inadmissible, *inter alia*, for lack of foundation.

the City did not contest the admission of Plaintiffs' experts' testimony, and effectively conceded that its ordinance would operate to eliminate the arcade venues.

The Court of Appeals reversed, erroneously assigning to Plaintiffs an effectively insuperable burden of establishing "how speech will fare" by "actual and convincing evidence," while suggesting that industry insiders – the only experts with direct knowledge of the pertinent realities – would inherently be too "biased" to support a plaintiff's theory that an ordinance would operate censorially. 631 F.3d 1031, 1042-43 (9th Cir. 2011) (Appendix A at 20-22).

Both the Plaintiffs and the City petitioned for rehearing. The Ninth Circuit denied both rehearing petitions on May 25, 2011. (Appendix G.)

REASONS FOR GRANTING THE WRIT

Given the posture of this case, the City's petition does not merit this Court's review, as detailed in the Brief in Opposition. Because other dispositive issues remain to be decided by the lower courts, the City cannot possibly prevail now on the theory it asks this Court to address. This case does, however, raise important doctrinal issues, as the City has averted summary judgment only because the Ninth Circuit has misinterpreted this Court's *Alameda Books* decision. This conditional petition is therefore submitted

to frame the issues properly before this Court, should review be granted.

As opposed to the City's premature claim to summary judgment, Cross-Petitioners pose a justiciable question that would conclude this litigation: whether the district court correctly invalidated the City's "multiple uses" ordinance, on uncontroverted evidence that it would operate to close the affected movie arcade businesses. At some point, the central errors the Ninth Circuit has injected into the analysis should be rectified – and if this Court grants review, Cross-Petitioners urge this Court to clarify that 1) "how speech will fare" is a discrete, threshold inquiry into censorial impact, and 2) a municipality has some burden to establish that its ordinance does not simply curtail speech as a shortcut means of addressing perceived secondary effects. At a minimum, as here, a plaintiff should prevail on uncontroverted evidence that a zoning ordinance operates censorially and forces a substantial number of regulated businesses to close.

The importance of the Court's earlier decision in this case, refining and clarifying the First Amendment standards that govern time, place, and manner restrictions of speech, can hardly be overstated. The *Alameda Books* opinions have been cited in scores of state and federal decisions, and have been the subject

of extensive scholarly commentary.[5] The federal and state courts have indeed struggled with – and diverged over – numerous questions that have emerged in the trenches of post-*Alameda Books* litigation.[6]

In all likelihood, this Court eventually will revisit the issues that have arisen in the wake of its *Alameda Books* decision, the nuances of which have created splits of authority on a number of points. For example, the Ninth Circuit has held that Justice Kennedy's "proportionality principle" applies only in cases involving zoning or "place" restrictions, but not to "time" restrictions, *Center For Fair Public Policy v. Maricopa County, Arizona*, 336 F.3d 1153 (9th Cir. 2003), whereas the Seventh Circuit has disagreed, applying that principle to invalidate an "hours of operation" ordinance in *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009). The *Annex Books* court noted "the problems of interpretation and application created by the fractured decision in *Alameda Books*," and "the dozens of appellate

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[5] A Westlaw search reveals 100 citing references in reported decisions to date, and 213 law review articles that reference the case.

[6] *See, e.g., Abilene Retail #30, Inc. v. Board of Comm'rs of Dickinson County, Kan.*, 508 F.3d 958, 959 (10th Cir. 2007) (*en banc*), in which the dissent noted: "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."

decisions that have struggled to understand and apply" the decision. 581 F.3d at 466.

The Ninth Circuit has also held the *Alameda Books* principles inapplicable to "manner" restrictions, in *Fantasyland Video, Inc. v. County of San Diego,* 505 F.3d 996, 1005 (9th Cir. 2007), notwithstanding the classical application of the same tests to "time, place and manner" regulations of speech.[7]

None of those issues is more important than the one posed by the Ninth Circuit's decision reversing summary judgment for the Plaintiffs in this case: whether a municipality must sustain any burden whatsoever in defending its challenged ordinance against a contention that it would reduce secondary effects only by eliminating the affected businesses or otherwise substantially reducing speech. As demonstrated by the litigation of this case following remand, and the daunting if not insuperable roadblock

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[7] This Court has uniformly analyzed "time, place, and manner" restrictions on speech under a unified intermediate scrutiny test. *See, e.g.*, *Nevada Comm'n on Ethics v. Carrigan*, ___ U.S. ___, 131 S. Ct. 2343 (2011); *Snyder v. Phelps*, ___ U.S. ___, 131 S. Ct. 1207 (2011); *Citizens United v. Federal Election Comm'n*, ___ U.S. ___, 130 S. Ct. 876 (2010); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009); and *Davis v. Federal Election Comm'n*, 554 U.S. 724, 750 (2008). Respondents are unaware of any decisions, other than those of the Ninth Circuit, differentiating the constitutional analysis of time, place, and manner restrictions.

the Ninth Circuit has now placed in the path of any First Amendment challenger relying upon Justice Kennedy's "proportionality" rule, this question has enormous practical consequences.

This issue necessarily implicates constitutional principles far broader than the immediate adult zoning context, particularly that "[w]hen First Amendment compliance is the point to be proved, the risk of nonpersuasion . . . must rest with the Government, not with the citizen," *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 818 (2000).

As this case has been remanded for trial, with other potentially dispositive issues not yet addressed by the lower courts, this Court's review would be premature. Both procedurally and substantively, the City's petition for certiorari patently lacks merit. As discussed in Respondents' Brief in Opposition, the City misreads this Court's prior decision in every relevant particular, invokes a divide among the federal circuits in decisions addressing an entirely different issue, and essentially seeks an advisory opinion on one of several theories to be litigated on remand.

However, with regard to the analysis of and burden regarding "how speech will fare," the Ninth Circuit's opinion does directly conflict with this Court's previous decision herein, with numerous other decisions of this Court, and with other federal circuit court decisions. Respondents therefore file this

Conditional Cross-Petition to frame the issue properly, if the City's petition should be granted.

I. The Ninth Circuit opinion below contravenes this Court's express instructions in this case, that the courts must first determine "how speech will fare," and that the municipality bears the burden of proof in that regard.

When this Court earlier reviewed this case, it took the occasion to re-evaluate the analysis it had prescribed in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), in the light of the intervening 15 years of litigation experience. Rightly perceiving that the scales had been unduly tipped in favor of localities' restrictions of erotic expression, the Court thoughtfully sought a new balance between allowing municipalities to address secondary effects, while allowing plaintiffs a fair opportunity to establish that such a law is irrational, or unduly censorial.

A two-faceted amendment to *Renton*'s overly deferential approach emerged from this Court's deliberations: the plurality's burden-shifting rule, to the effect that asserted justifications should be subject to meaningful scrutiny, and Justice Kennedy's insistence in his controlling concurring opinion that the courts must *first* determine "how speech will fare."[8]

[8] As the federal courts have unanimously acknowledged, Justice Kennedy's opinion is controlling, under the rule of *Marks*

(Continued on following page)

The federal courts have since termed Justice Kennedy's contribution the "proportionality test," and it is widely regarded as the more important aspect of the *Alameda Books* decision. *See, e.g., Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.,* 337 F.3d 1251, 1263 (11th Cir. 2003) (observing that "how speech will fare" is "the key issue" under the analytical approach clarified in *Alameda Books*).

On remand, the district court precisely followed this Court's instructions, striking down the ordinance under the proportionality test, and therefore never reaching the question of the City's justifications. In contrast, the Ninth Circuit's opinion completely recasts this Court's two-step analysis, merging the proportionality analysis with the burden-shifting inquiry into the locality's rationale as a single, blurred test, and assigning a heightened burden of proof regarding "how speech will fare" to the Plaintiffs.

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v. United States, 430 U.S. 188 (1977). The Seventh Circuit observed recently in *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 465 (7th Cir. 2009): "It is possible to be a little more concrete, . . . thanks to Justice Kennedy's opinion in *Alameda Books*. Because the other Justices divided 4 to 4, and Justice Kennedy was in the middle, his views establish the holding." *See also Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 722 (7th Cir. 2003); *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 491 (6th Cir. 2008); *Center For Fair Public Policy v. Maricopa County*, *Arizona,* 336 F.3d 1153, 1161 (9th Cir. 2003); *World Wide Video of Washington, Inc. v. City of Spokane,* 368 F.3d 1186, 1193 (9th Cir. 2004); *Fly Fish, Inc. v. City of Cocoa Beach,* 337 F.3d 1301, 1310 n. 19 (11th Cir. 2003).

Justice Kennedy's concern that the plurality's *Renton*-based analysis did not adequately address the question of "how speech will fare" informed his controlling concurrence, holding centrally that if an adult zoning law operates to reduce secondary effects by substantially reducing speech, it violates the First Amendment. 535 U.S. at 449-51. Applying that rule to the specific facts of this case, Justice Kennedy took pains to note that the ordinance challenged here is constitutional *only if* it operates to separate the components of the bookstore/arcades, rather than eliminating one of them. *Id.* at 451.

Most importantly, Justice Kennedy repeatedly stated that the issue of "how speech will fare" must be addressed *first,* and that the burden of demonstrating "how speech will fare" must be on the City:

> *At the outset*, we must identify the claim a *city* must make in order to justify a content-based zoning ordinance. . . . [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. . . . A city may not assert that it will reduce secondary effects by reducing speech in the same proportion.

Id. at 449 (emphasis added).

* * *

> The [City's] claim, therefore, must be that this ordinance will cause two businesses to split rather than one to close, that the

> quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced.

Id. at 451.

And, as the Ninth Circuit stressed in distinguishing hours-of-operation restrictions from adult zoning in *Center For Fair Public Policy v. Maricopa County*, *Arizona,* 336 F.3d 1153, 1161-62 (9th Cir. 2003): "To illustrate this proportionality requirement, Justice Kennedy took the facts of the case under consideration," quoting the passage of the concurrence elaborating that:

> 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 close. The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionally. But . . . a promised proportional reduction does not suffice. . . . The premise . . . must be that the businesses . . . will for the most part disperse rather than shut down.

535 U.S. at 451.

The opinion below turns Justice Kennedy's rule on its head. The court essentially conflated the first step of the analysis ("how speech will fare") with the second (evidence of secondary effects and the ordinance's efficacy in addressing them). The court then put the burden on the challengers to establish "by actual and convincing evidence" that speech would fare badly, while tying their hands by declaring their

experts inveterately "biased." (App. A at 13-14, 20.) Indeed, under the strictures the Ninth Circuit has imposed in this decision, it is unlikely that any challenger could ever prevail on proportionality grounds.

The court began its analysis by miscasting the inquiry into "how speech will fare" as "the second step of the Supreme Court's *Alameda Books* burden-shifting framework." (App. A at 14.) Acknowledging that the City's only proffered evidence on this issue had rightly been excluded,[9] the court not only erroneously assigned the burden to the Plaintiffs, but moreover held them to a heightened standard never suggested in Justice Kennedy's opinion: "We are not satisfied that the plaintiffs' evidence in this case was 'actual and convincing' enough to justify summary judgment." (App. A at 20.)

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[9] Before the district court, the City's only evidence regarding the prospective survival of the arcades was the declaration of a business valuation consultant who analyzed the profitability of the bookstore/arcades as they now operate. The district court excluded her declaration, essentially on grounds that her conclusion from this data that the arcades could survive independently lacked foundation. (App. C at 52-55.) The Court of Appeals did not disturb this ruling. (App. A at 17-18.) Thus, when the court below posited that without this declaration, "there remained little with which the City could rebut the plaintiffs' evidence that the ordinance ran afoul of Justice Kennedy's concurrence" (App. A at 14), in fact the record contained no evidence whatsoever that the ordinance would operate to split the two components of the business rather than simply to close the arcades. Moreover, the City in no way raised this issue on appeal, but rather conceded the point, arguing instead that the closure of the arcades would be of no constitutional significance.

On this basis, the Ninth Circuit reversed on issues the City had in no way raised on appeal. The City had not challenged the Plaintiffs' industry experts for "bias" before the district court, and did not contest the admission of their declarations in any manner on appeal. In fact, the City did not attempt to maintain that the arcades could relocate instead of closing, effectively conceding before both lower courts that they might close, but arguing strenuously that their closure would be of no constitutional import. Nevertheless, the appellate court perceived "facial bias" in the declarations of Plaintiffs' experts, because they were adult entertainment industry insiders. (App. A at 20-22.) The court did not hold that the district court should have excluded these declarations, but simply re-weighed the evidence to conclude that the Plaintiffs had not satisfied a heightened standard of proof, regardless of the City's having adduced no evidence at all to the contrary.

Thus, in the face of Justice Kennedy's clear language, and contrary to earlier Ninth Circuit decisions, all recognizing "how speech will fare" as a distinct, threshold question, the court below collapsed it into the plurality's burden-shifting analysis and held Plaintiffs to a goalpost-moving burden of proof.

Justice Kennedy's opinion also clearly instructs that the City bears the burden on that issue. Ignoring both principles, the Ninth Circuit opinion illustrates the necessity of both treating the "proportionality" question separately, and assigning the burden to the municipality: otherwise, cities may in many instances

get away with the censorial shortcut of addressing secondary effects by reducing speech. As the opinion below notes regarding the numerous cases arising since *Alameda Books*, "we have yet to hold that a plaintiff has succeeded in 'casting doubt' on the city's evidence or rationale." (App. A at 19.) Even a cursory survey of the post-*Alameda Books* litigation reveals that the Ninth Circuit particularly has remained extremely deferential when assessing localities' justifications, and begrudging towards their challengers. As the court noted below, "a plaintiff must do more than point to a municipality's lack of empirical evidence, . . . or challenge the methodology of the municipality's evidence." (*Id*., citations omitted.)

Whatever deference the courts may afford local governments with regard to their *justifications* for such ordinances, no such deference is necessary or appropriate when the question is the entirely different one posed by Justice Kennedy's injunction that secondary effects may not be addressed by reducing speech concomitantly. Whenever a municipality appears to have resorted to that unconstitutional method, the First Amendment mandates that it shoulder a burden to show that it is not hiding behind a "secondary effects" rationale solely for the purpose of engaging in censorship.

Embedded in that conflict, of course, is one of the most bedrock First Amendment principles: the government *always* has the burden of justifying speech-suppressive laws. As this Court noted in *Playboy Entertainment Group*: "When the Government

restricts speech, [it] bears the burden of proving the constitutionality of its actions," 529 U.S. at 816-17, citing this Court's decisions so holding in a wide variety of contexts: *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 183 (1999) (commercial speech); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 879 (1997) (provisions of Communications Decency Act held overbroad: "The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA."); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (ban on public accountants' in-person solicitation violated First Amendment); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (hate speech ordinance invalid for viewpoint discrimination); *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480 (1989) (commercial speech); *Tinker v. Des Moines Independent Community School Dist*., 393 U.S. 503, 509 (1969) (school's prohibition against students wearing black armbands). No less than this core precept of First Amendment protection is ultimately at stake, in light of the Ninth Circuit's treatment of these issues.

II. The opinion below also directly conflicts with decisions of the Seventh Circuit, and of the Ninth Circuit itself in prior cases, correctly acknowledging the threshold burden a municipality must shoulder to establish that a zoning restriction is efficacious and not censorial.

The Ninth Circuit's decision below also directly conflicts with a number of decisions of the Seventh Circuit and of the Ninth Circuit itself, both circuits previously having acknowledged that "proportionality" is a separate, threshold test, and that the municipality bears the burden on this issue. If left standing, the opinion below is certain to sow confusion regarding the governing First Amendment doctrine on these points.

In the immediate aftermath of *Alameda Books,* both the Seventh and the Ninth Circuits recognized the primacy of the inquiry into "how speech will fare," and the municipality's burden in that regard. In *G.M. Enterprises, Inc. v. Town of St. Joseph, Wis.*, 350 F.3d 631, 637 (7th Cir. 2003), the court concluded, "Justice Kennedy insisted that a municipality *first* '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,' *before a court applies intermediate scrutiny*." (Emphasis added.) The *G.M. Enterprises* court repeatedly acknowledged that "under [*Alameda Books*'] *first step*," the court must address "how speech will fare" "*before* turning to *Renton*. . . . The

Town has *met this burden*." 350 F.3d at 637-38 (emphasis added).

The Seventh Circuit more recently invoked Justice Kennedy's "proportionality" principle in *New Albany DVD, LLC v. City of New Albany, Ind.*, 581 F.3d 556, 559-60 (7th Cir. 2009), upholding an injunction against zoning restrictions on grounds that the city had not adequately established that the affected retail-only stores caused adverse secondary effects. In response to the plaintiff's challenge to its rationale, the city had proffered "anecdotal justifications," citing "testimony in some earlier cases by people complaining about pornographic litter near adult bookstores." *Id.* at 561. The Seventh Circuit critically weighed the city's argument in light of Justice Kennedy's rule that the reduction in secondary effects may not be achieved by curtailing speech: "New Albany's 'litter' justification comes perilously close to this, because the amount of pornographic litter may depend linearly on the volume of adult materials sold. The only way to cut litter by 10% may be to reduce sales by 10%, and such a justification would fail under Justice Kennedy's approach." *Id.* Most significantly, the court squarely placed the burden on the city to demonstrate otherwise. *Id.*

In its earlier cases, the Ninth Circuit itself had repeatedly recognized the threshold proportionality test and the municipality's burden. Shortly after this Court's decision, in *Center For Fair Public Policy v. Maricopa County*, *Arizona,* 336 F.3d 1153, 1161-62 (9th Cir. 2003), the court emphatically acknowledged

both that the proportionality test is the first step in the analysis, and that the municipality bears the burden on that issue: "With regard to the *first question – the proposition that the city needs to advance* – Justice Kennedy wrote that 'a city may not assert that it will reduce secondary effects by reducing speech in the same proportion.' The analysis has to address 'how speech will fare under the . . . ordinance.'" (Emphasis added; citations omitted.) The court went on to stress that "[o]nly *after*" resolving the proportionality issue should the analysis proceed to the municipality's justification of the law, under the *Renton* approach. *Id.* at 1162 (emphasis in original).

Again in *World Wide Video of Washington, Inc. v. City of Spokane,* 368 F.3d 1186, 1195 (9th Cir. 2004), the court noted: "per Justice Kennedy's *Alameda Books* concurrence, the *initial question* is 'how speech will fare' under the Ordinances." (Emphasis added.) In light of these cases, the opinion below renders the law in the Ninth Circuit incoherent on this point.

Compounding the doctrinal conundrum, the federal courts, including the Ninth Circuit, uniformly recognize that the burden is on the government in *every other* time, place, or manner case. The Ninth Circuit en banc has just reiterated, in *Comite de Jornaleros v. Redondo Beach*, ___ F.3d ___, 2011 WL 4336667, *4 (September 16, 2011), quoting *Playboy Entertainment Group*, 529 U.S. at 618: "'When the Government restricts speech, [it] bears the burden of

proving the constitutionality of its actions.'" With regard to the narrow tailoring requirement, closely akin to Justice Kennedy's "how speech will fare" inquiry, the court reiterated that "'the Government . . . bears the burden of showing that the remedy it has adopted does not burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* at *7, quoting *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 655 (1994) (internal quotes omitted). In light of this oft-stated principle of First Amendment review, the Ninth Circuit's opinion below is fatally flawed.

Accordingly, this Court's review would be warranted, to clarify an important First Amendment issue with regard to which the federal circuits' decisions are in disarray.[10]

[10] As should be apparent, the opinion below also conflicts with this Court's decisions establishing the fundamental principles of summary judgment, further supporting review pursuant to this Court's Rule 10(a). The Court of Appeals below has reversed summary judgment for the First Amendment plaintiffs, despite uncontroverted evidence on a dispositive issue: the only admissible evidence established that the City's ordinance would address secondary effects, if at all, only by eliminating the arcade portion of the affected businesses. Especially because the burden regarding "how speech will fare" was the City's, and the City introduced *no* admissible evidence to satisfy its burden, the Plaintiffs were entitled to summary judgment. On this record, the Ninth Circuit's reversal of the judgment clearly conflicts with this Court's decisions in *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

CONCLUSION

For all the foregoing reasons, Cross-Petitioners respectfully urge this Court to issue a writ of certiorari, to reverse the decision below, and to remand with instructions that judgment be entered for the Plaintiffs.

Respectfully submitted,

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