No. 11-245

In The Supreme Court of the United States

CITY OF LOS ANGELES, CALIFORNIA,

Petitioner,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

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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

Respondents 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).

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REASONS FOR DENYING THE WRIT

In the proceedings below, the district court correctly granted summary judgment for the Plaintiffs under the clear mandate of this Court's earlier decision in this case, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). Not content that the Ninth Circuit spared it from an adverse summary judgment, on a record containing nothing to sustain its specific burden to show "that this ordinance will cause two businesses to split rather than one to close," 535 U.S. at 451 (2002) (Kennedy, J., concurring), the City maintains that the courts below should have awarded summary judgment in its favor. For both doctrinal and procedural reasons, the City's petition is frivolous, particularly as it asks this Court to render an advisory opinion.

At the doctrinal level, the City's petition relies on a complete misreading of this Court's *Alameda Books* decision. It misconstrues that decision in every relevant particular, most centrally by conflating the plurality's burden-shifting analysis with Justice Kennedy's threshold "how speech will fare" inquiry into the ordinance's censorial impact. Relatedly, the City's position also necessarily requires a misreading of *Alameda Books* to require that plaintiffs challenging such zoning restrictions must shoulder the burden of proof – indeed, a heightened burden – regarding the ordinance's censorial impact.[2]

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[2] Respondents' Conditional Cross-Petition raises the fundamental errors on the part of both the Ninth Circuit and the City: conflating this Court's two-step analysis in this case into

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Although the City correctly notes a conflict among the circuits with regard to the *Alameda Books* plurality's burden-shifting inquiry into an ordinance's rationale, that conflict does not involve the only material issue here – "how speech will fare." The issue addressed in those decisions is the aspect of this case that neither the district court nor the Ninth Circuit reached in deciding the summary judgment motions below. Thus, the conflict the City asserts in its petition, however important, is immaterial here.

Even more fundamentally, as a procedural matter, the City's plea for summary judgment is premature, because multiple dispositive issues raised in the Plaintiffs' summary judgment motion remain to be decided by the lower courts. The City fails to mention that three additional aspects of the Plaintiffs' First Amendment challenge remain unaddressed; the City must prevail on those three issues as well as "how

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one, and assigning to the Plaintiffs a burden of proof regarding "how speech will fare" that is properly the City's. Read together, Justice O'Connor's plurality opinion and Justice Kennedy's controlling, concurring opinion require that courts *first* evaluate "how speech will fare," i.e., here, whether the bookstore and arcade components would separate or one would close, and then evaluate the city's justifications for the ordinance based upon the burden-shifting test articulated in Justice O'Connor's plurality opinion. Justice Kennedy's "proportionality" analysis also clearly requires that the municipality must bear the burden – as in any other time, place, or manner case – to establish that its zoning ordinance would not reduce secondary effects by reducing speech. To the extent review is warranted in this case, as further explained in the Conditional Cross-Petition, it should be granted to reaffirm and clarify those principles from *Alameda Books*.

speech will fare," or its ordinance must be held unconstitutional.[3]

Thus, even if the Court were to conclude that the City should prevail on the issue of "how speech will fare" (on a record comprised solely of evidence that it would fare very badly), the plaintiffs might still prevail on any of the legal theories and attendant factual disputes remaining for trial. Given the posture of this litigation, and on an inadequate factual record, the City cannot possibly attain the relief it seeks, and therefore is requesting that this Court issue an advisory opinion.

I. The City dramatically misinterprets this Court's earlier *Alameda Books* decision.

The City's petition is based entirely upon three related and insupportable propositions: 1) that the question of "how speech will fare" is an indistinguishable part of the *Alameda Books* plurality's *Renton*-based test; 2) that the *plaintiff* bears a *heightened* burden of proof under that test regarding "how speech will fare," and 3) that, because this Court concluded that summary

[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 other experts' declarations further 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, this ordinance would tend to increase secondary effects, not reduce them. In addition, the Plaintiffs had moved to bifurcate yet another potentially dispositive issue – the adequacy of alternative sites, in the event the ordinance otherwise survived constitutional challenge.

judgment was prematurely granted for the Plaintiffs when it decided this case in 2002, the City is *ipso facto* entitled to summary judgment now because this Court recognized that it had adduced "some evidence" to justify the ordinance. The first two propositions rest upon an erroneous reading of this Court's decision; the third is simply a *non sequitur*.

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, and affording plaintiffs a fair opportunity to challenge such a law as 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."[4] The federal

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

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courts have since termed Justice Kennedy's contribution the "proportionality test," *see, e.g., Center For Fair Public Policy v. Maricopa County, Arizona*, 336 F.3d 1153, 1162 (9th Cir. 2003), 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*).

Justice Kennedy's concern that the plurality's *Renton*-based analysis did not adequately address the question of "how speech will fare" informed his 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 this 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

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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).

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).
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> "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 central error of the opinion below, which the City now urges upon this Court as a necessary predicate for its position, is to collapse the distinct, threshold test regarding "how speech will fare" into the *Renton*-based inquiry into the justifications for and efficacy of the challenged law, as modified by the plurality opinion. The City then goes further to assert that it was entitled to summary judgment, despite uncontroverted evidence establishing that its ordinance would operate to eliminate the arcade venues. (Petition at 21-22.) Given that evidentiary record, the Court could hold for the City here only by also agreeing that under *Alameda Books*, the Plaintiffs must bear not only the burden of proof on the question of "how speech will fare," but a heightened burden at that. None of these propositions can be squared with this Court's opinions in this very case.

A. The City conflates the threshold test addressing "how speech will fare," with the next step of the analysis, evaluating the municipality's justifications for restricting expression under the plurality's burden-shifting formula.

At its core, the City's petition echoes and amplifies the central errors the City invited below, most fundamentally conflating Justice Kennedy's separate,

threshold inquiry with the plurality's burden-shifting clarification of the *Renton* inquiry into a municipality's asserted justifications. Flowing from that error is the Ninth Circuit's implicit holding that the Plaintiffs, rather than the City, had the burden of proof regarding "how speech will fare."[5] Both of these errors are necessary predicates to the City's argument that it was entitled to summary judgment.

Clearly, the rule that emerges from *Alameda Books*, as noted above, is a test with two basic, distinct components. Justice Kennedy could hardly have stated more plainly that the analysis of "how speech will fare" is a threshold concern, and quite distinct from the traditional *Renton*-style analysis. It stands to reason that his "proportionality test" should be the first line of inquiry, as First Amendment rights would be severely compromised if government could address any perceived or alleged problems attending speech simply by eliminating the speech, or a broad swath of it.

In the summary judgment proceedings below, the district court precisely followed this Court's instructions, striking down the ordinance under Justice Kennedy's proportionality test, and therefore never reaching the burden-shifting assessment of the City's rationale. In contrast, the Ninth Circuit's opinion completely recasts this Court's two-step analysis, merging the proportionality

[5] Indeed, on the evidentiary record before it, the Ninth Circuit could not have reversed summary judgment for the Plaintiffs without additionally holding them to a *heightened* burden of proof, as their evidence of the ordinance's censorial impact was undisputed.

analysis with the inquiry into the locality's rationale, and assigning a heightened burden of proof regarding "how speech will fare" to the Plaintiffs. Indeed, under the strictures the Ninth Circuit has imposed in this decision, tying the Plaintiffs' hands by declaring their industry experts inveterately "biased" (App. A at 13-14, 20), it is unlikely that any challenger could ever prevail on proportionality grounds.

The court began its analysis by miscasting the independent, threshold inquiry into "how speech will fare" as "the second step of the Supreme Court's *Alameda Books* burden-shifting framework." (App. A at 14.)[6] Acknowledging that the City's only proffered evidence on this issue had rightly been excluded,[7] the court not only erroneously assigned the burden to the Plaintiffs, but moreover held them to a heightened

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[6] All appendix references are to Petitioner's Appendix.

[7] 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 eradicate 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.

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.)

Thus, in the face of Justice Kennedy's clear language, and contrary to earlier Ninth Circuit decisions,[8] 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. The City necessarily relies upon these errors, which it urged on the panel below, to argue further that it should prevail on summary judgment despite having introduced *no* countervailing evidence on this dispositive issue, Justice Kennedy's required "premise . . . that the businesses . . . will for the most part disperse rather than shut down."

B. Because this case has turned on the question of "how speech will fare," rather than on the issue of whether the City's prohibition of the bookstore/arcade combination is empirically justified, the opinion below does not conflict with other circuits' decisions as the City suggests.

The split of authority upon which the City primarily relies is irrelevant to this petition. Although

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[8] *See Center For Fair Public Policy v. Maricopa County, Arizona,* 336 F.3d 1153, 1161-62 (9th Cir. 2003); *World Wide Video of Washington, Inc. v. City of Spokane,* 368 F.3d 1186, 1195 (9th Cir. 2004).

the circuits may be divided on the question the City poses, it is not the question the courts below have addressed in this case. Neither the district court nor the Ninth Circuit reached the entirely distinct issue of whether City's asserted justifications for its ordinance withstand intermediate First Amendment scrutiny.[9] The decisions the City cites as conflicting with the decision below address that issue, and for the most part have nothing to do with the threshold question of "how speech will fare" under such a law. As this Court noted in a similar instance where petitioners attempted to latch onto a perceived split in circuit authority: "'the alleged conflict of authority is more apparent than real.'" *Bunting v. Mellen*, 541 U.S. 1019, 1019 (2004).

Even as to the issue the City would have this Court address, without the benefit of any lower-court determination – whether it has adequately justified its "multiple uses" ordinance under the plurality's burden-shifting test – the City misstates the weight of authority within the asserted circuit split. Numerous lower courts have correctly held that a credible empirical challenge creates a triable question of fact. As the Seventh Circuit recently interpreted *Alameda Books* in *Annex Books*, 581 F.3d at 464: "Four Justices

[9] The district court specifically acknowledged that because it concluded the ordinance violated the First Amendment on proportionality grounds, it did not reach the empirical/methodological debate regarding the City's justifications for the law. (App. C at 58-59.)

would have ruled for the plaintiff, without need for a trial. . . . The other five Justices concluded that a hearing was necessary to determine whether the evidence that Los Angeles offered was strong enough. None of the Justices [with the possible exception of Justice Scalia] thought that summary judgment could be granted in the municipality's favor when the strength of, and appropriate inferences from, the studies were contested."

Similarly, in *Abilene Retail #30, Inc. v. Board of Comm'rs of Dickinson County, Kan.*, 508 F.3d 958, 1075 (10th Cir. 2007), the court remanded for trial on grounds that in the face of a credible challenge, *Alameda Books* does not countenance "complete deference to a local government's reliance on prepackaged secondary effects studies." The Fifth Circuit likewise took a critical view in *Encore Videos, Inc. v. San Antonio*, 330 F.3d 288 (5th Cir. 2003), holding that San Antonio's 1000-foot dispersal ordinance violated the First Amendment, because the city had offered no evidence that adult video stores with no facilities for on-premises viewing create the same secondary effects as other establishments. In any event, the split of authority in this regard creates an issue for another day, as this case does not present it.

Another decision the City invokes, *G.M. Enterprises, Inc. v. Town of St. Joseph, Wis.*, 350 F.3d 631, 639-40 (7th Cir. 2003), is not fairly cited even for the proposition that in the Seventh Circuit, a municipality may prevail on summary judgment where a challenger has made a credible challenge to its

justifications for a speech-restricting law. As noted above, the Seventh Circuit has more recently analyzed *Alameda Books* to reach precisely the contrary conclusion, that the *Alameda Books* Court near-unanimously "thought that summary judgment could [not] be granted in the municipality's favor when the strength of, and appropriate inferences from, the studies were contested." *Annex Books*, 581 F.3d at 464 (7th Cir. 2009). The Seventh Circuit has also more recently upheld an injunction where the plaintiff questioned the relevance of the city's studies, and the city responded with dubious "anecdotal evidence," in *New Albany DVD v. City of New Albany, Ind.,* 581 F.3d 556, 559-61 (7th Cir. 2009).

More to the point here, *G.M. Enterprises*, 350 F.3d at 637-38, directly conflicts with the Ninth Circuit's opinion below, in a manner that supports the position of the bookstores in their Conditional Cross-Petition, recognizing that "how speech will fare" is the "first step" of the *Alameda Books* analysis, and that the municipality bears the burden.

II. The City seeks an advisory opinion, given that other potentially dispositive issues remain to be addressed by the lower courts.

Finally, perhaps the most fundamental reason the City's petition should be denied is that the City cannot possibly be granted the relief it seeks. Several potentially dispositive issues remain unaddressed by the courts below, and the City must prevail on all of

them to defeat this First Amendment challenge to its ordinance. Thus, the City cannot conceivably prevail on summary judgment at this juncture, and is therefore requesting an advisory opinion on a question far in advance of any need for this Court to reach it.

As the unanimous Court noted in *United States v. Raines*, 362 U.S. 17, 20-22 (1960), an Article III rule "to which it has rigidly adhered, [is] never to anticipate a question of constitutional law in advance of the necessity of deciding it." The "'judicial Power' is one to render dispositive judgments," not advisory opinions. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (internal quotations omitted).

Also, as this Court observed recently in *Camreta v. Greene*, ___ U.S. ___, 131 S.Ct. 2020, 2030 (2011): "As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed us to do so." Justice Kennedy elaborated:

> The rule against . . . accepting petitions for certiorari by prevailing parties is related to the Article III prohibition against issuing advisory opinions. . . . As Justice Jackson explained for the Court: '[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion. . . .' *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

131 S.Ct. at 2037-38 (dissenting opinion).

Justice Scalia likewise noted that "although the statute governing our certiorari jurisdiction permits

application by 'any party' to a case in a federal court of appeals, 28 U.S.C. § 1254(1), our practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed." *Bunting v. Mellen*, 541 U.S. at 1023 (dissenting opinion), quoting R. Stern, E. Gressman, S. Shapiro & K. Geller, SUPREME COURT PRACTICE 79 (8th ed. 2002).

Here, the City cannot possibly obtain a different result, and therefore seeks an advisory opinion – "which a federal court should never issue at all, . . . and *especially* should not issue with regard to a constitutional question." *City of Chicago v. Morales*, 527 U.S. 41, 77 (1999) (Scalia, J., dissenting) (emphasis in original). The City neglects to mention in its petition that the bookstore plaintiffs raised three distinct theories supporting their summary judgment motion before the trial court. Because the court granted summary judgment for the plaintiffs on only one of these issues, "how speech will fare," it did not reach the remaining issues. (See district court order, App. C at 58-59.) Nor did the Ninth Circuit address those issues, although they were briefed as alternative grounds supporting the judgment.

Moreover, the plaintiffs had moved to bifurcate the additional issue regarding adequate alternative sites, in the event the bookstore arcades were required to split, and one to relocate. In light of the holding, the district court saw no need to address that motion (App. C at 71), but plaintiffs' challenge on this basis remains to be addressed.

Thus, the City prevailed in the Ninth Circuit to the full extent possible. The result the City obtained on appeal – reversal of summary judgment for the plaintiffs – was the only relief the court could have granted. Quite apart from the question of "how speech will fare," the City must still prevail on at least three other issues if its ordinance is to survive constitutional challenge: two distinct "battle of the experts" questions regarding the rationale and efficacy of the "multiple uses" prohibition, and then the question of adequate alternative sites, even if the ordinance were deemed otherwise constitutional. To say the least, the City's demand for summary judgment is entirely premature.

CONCLUSION

The City propagates a fundamental misunderstanding of this Court's precedent, and on this basis requests that the Court reverse the Ninth Circuit's decision denying summary judgment to the City. Although the Ninth Circuit certainly misapplied *Alameda Books* as detailed above and in the Conditional Cross-Petition, it could not in any event have granted summary judgment for the City, as potentially dispositive issues remain to be litigated before the district court. Thus any decision by this Court would be a mere advisory opinion.

For all these reasons, the Conditional Cross-Petitioners/Respondents respectfully urge this Court

to deny the Petitioner's request for a writ of certiorari.

Respectfully submitted,

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