No. _____

In the Supreme Court of the United States

CITY OF INDIANAPOLIS,
Petitioner,

v.

ANNEX BOOKS, INC., *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court upheld as constitutional a time, place, and manner ordinance directed at the negative secondary effects of adult businesses. Under *Renton*, a city demonstrates that its ordinance is designed to serve a substantial government interest if "whatever evidence the city relies upon is reasonably believed to be relevant" to the secondary effects the city seeks to address. *Id*. at 51-52 (upholding ordinance based on city's reliance on findings summarized in judicial decision). The Court has repeatedly reaffirmed *Renton*'s deferential standard, most recently in *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion); *id*. at 451 (Kennedy, J., concurring in judgment).

After a trial at which the City of Indianapolis produced secondary effects evidence—including studies, judicial decisions, crime reports, and expert testimony—to support its adult business hours of operation regulation, the district court upheld the regulation. The Seventh Circuit reversed, enjoining the regulation based on its conclusion that the City's evidence is "weak," concerns "different kinds of businesses or different kinds of laws," and is infirm "as a statistical matter" because the "City did not use a multivariate regression to control" for other potential causes of crime. The question presented is:

Whether, to satisfy the First Amendment as applied in *Renton* and its progeny, an hours of operation regulation targeting negative secondary effects must be supported by highly specific, statistically-significant empirical evidence.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was defendant-appellee below, is the City of Indianapolis, Indiana.

Respondents, who were plaintiffs-appellants below, are Annex Books, Inc., Lafayette Video & News, Inc., Keystone Video & News, Inc., and New Flicks, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The City of Indianapolis, Indiana, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-5) is reported at 740 F.3d 1136. The order of the court of appeals denying rehearing *en banc* (App. 29-30) is unreported. The order of the district court (App. 6-26) is reported at 926 F. Supp. 2d 1039.

The district court and court of appeals each issued two other relevant decisions: a 2004 summary judgment order (App. 63-97), at 333 F. Supp. 2d 773; a 2009 decision reversing summary judgment (App. 49-62), at 581 F.3d 460; a preliminary injunction order (App. 35-48), at 673 F. Supp. 2d 750; and a 2010 decision affirming the preliminary injunction (App. 31-34), at 624 F.3d 368.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2014. The court of appeals denied the petition for rehearing *en banc* on February 24, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law … abridging the freedom of speech ….

Indianapolis City-County General Ordinance No. 87, 2003 (App. 100-125) enacted Section 807-302(d) of the Revised Code of the Consolidated City and County of Indianapolis and Marion County, which provides:

> Adult entertainment businesses shall not be open between the hours of midnight and 10:00 a.m. and shall not be open on Sundays.

STATEMENT OF THE CASE

This case involves the standard for demonstrating a substantial government interest under the third step of this Court's three-step *Renton* test. Under that test, a court first determines whether the challenged law is an invalid total ban on speech or merely a time, place, and manner regulation. 475 U.S. at 46. Second, if the latter, the court decides whether the regulation is justified by content-based interests such as disagreement with the message (warranting strict scrutiny) or content-neutral interests such as preventing secondary effects (warranting only intermediate scrutiny). *Id*. at 47. Under the third step, if intermediate scrutiny applies, the court decides whether the law is designed to serve a substantial government interest and allows for reasonable alternatives for communicating the message. *Id*.

As to the substantial government interest prong, *Renton* held that a city may rely upon any evidence that is "reasonably believed to be relevant" to the problem that the city seeks to address. *Id*. at 51-52. This Court upheld Renton's adult theater zoning ordinance because the city relied on findings of secondary effects in Seattle that were summarized in a court decision. *Id*. It did not matter that Seattle "chose a different method" of regulation than Renton; using different regulations to combat secondary effects does not undermine the "identification of those secondary effects or the relevance of Seattle's experience to Renton." *Id*. at 52. Cities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems," and Renton's ordinance, which regulated only adult theaters, was narrowly tailored to that end. *Id*.

This Court's subsequent secondary effects cases, culminating in *Alameda*, have consistently reaffirmed *Renton*'s holding that any evidence "reasonably believed to be relevant" satisfies the substantial government interest prong of intermediate scrutiny. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (1991) (Souter, J., concurring in judgment); *Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (plurality); *Alameda*, 535 U.S. at 438-39 (plurality); *id*. at 451 (Kennedy, J., concurring in judgment).

I. Factual Background

On October 6, 2003, the Indianapolis City-County Council voted 29-0 to adopt General Ordinance No. 87, 2003 (the "Ordinance," App. 100-125), which amended Chapter 807 ("Adult Entertainment Businesses") of its code. Section 807-302(d) limits adult entertainment

businesses' hours of operation to Monday through Saturday, 10 a.m. to midnight. Section 807-103 defines "adult bookstore" as a commercial establishment having at least 25% of its stock in "adult products," including genital-stimulating devices (*e.g.*, "phallic-shaped vibrators, dildos") and sexually graphic videos, magazines, *etc.* characterized by their emphasis on "specified sexual activities" or "specified anatomical areas." App. 104-105, 109-110.

In considering and adopting the Ordinance, the Council expressed its purpose of addressing negative secondary effects and explicitly relied on an extensive record documenting those effects, including 20 judicial decisions and 16 reports and studies cited in the Ordinance. App. 100-102 (§§ 807-101, 807-102). Among these were the *Renton, Alameda*, *Barnes*, and *Erie* decisions. 529 U.S. at 279-80 ("Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 [(1976)]…."). The Ordinance also relied on *Schultz v. Cumberland*, which upheld the same hours regulation based on "legislative research indicat[ing] that the hours-of-operation constraint enabled local law enforcement to concentrate its limited resources for those business hours." 228 F.3d 831, 846 (7th Cir. 2000).

The Ordinance also cited Indianapolis's 1984 study, completed by the Division of Planning and the Indiana University School of Business, Division of Research. It concluded that "adult entertainment businesses – even a relatively passive use such as an adult bookstore – have a serious negative effect on their immediate environs," and found that "where adult entertainment

is offered," there is "a substantially higher sex-related crime presence…. The same is true regarding the rate of major crimes." Ex. I-30, Bates 716, 738.

The 1997 Dallas, Texas study found that a "major" way sexually oriented businesses affect neighborhoods is by their "hours of operation and the type of people which SOBs attract." Ex. I-47, Bates 1394. "This appears to lead to higher crime in the area, loitering by unsavory people, including prostitutes …. and disturbances which often turn violent. The SOBs keep late hours which can also become a nuisance to nearby residents." *Id*. And the 1991 Garden Grove, California study concluded that adult bookstores' secondary effects could "be minimized by regulations such as limiting the hours of operation, special lighting, [*etc*.]." Ex. I-25, Bates 490.

The Council also considered local, recent evidence, including more than 40 arrests at respondent Annex Books in the preceding two years. Ex. H-1, Bates 119-184. These arrests were not a new phenomenon. *See* Ex. R, Bates 4517-4519 (1984-1985 arrests at Annex Books).

II. Summary Judgment Proceedings and *Annex Books I*

Respondents, four adult bookstores, challenged the Ordinance under 42 U.S.C. § 1983. The district court eventually granted the City summary judgment, concluding that the City's secondary effects record satisfied the *Renton-Alameda* "reasonably believed to be relevant" standard. App. 82-92. Thus, in 2005, the City began enforcing the Ordinance.

In 2009—four years after oral argument—the Seventh Circuit reversed. App. 49-62 ("*Annex Books I*"). Its opinion acknowledged that intermediate scrutiny applies, but never mentioned the *Renton-Alameda* "reasonably believed to be relevant" standard. Instead, the court required specific, empirical proof: "evidence that the restrictions *actually have public benefits great enough* to justify *any* curtailment of speech." App. 51 (emphasis added). The court of appeals disregarded the City's legislative record materials—including the City's arrest records and its 1984 study—as not concerning adult bookstores without peep shows, not specific to the City's hours regulation, and inconclusive as to direct causation. App. 53 (criticizing studies as "cross-sectional analyses that leave causation up in the air").

The Seventh Circuit preferred "a multivariate regression," stated that "pertinent data" could be found at www.secondaryeffectsresearch.com, and remanded for the City to produce empirical evidence showing actual public benefits of an hours regulation for retail-only adult bookstores. App. 53-62. The court later denied rehearing *en banc*.

III. Preliminary Injunction Proceedings and *Annex Books II*

Respondents sought a preliminary injunction on remand. The district court reviewed summary crime statistics and a published, peer-reviewed article (from www.secondaryeffectsresearch.com) documenting crime near a retail-only adult bookstore. Applying the new rule from *Annex Books I*, the court granted respondents' motion. App. 35-48. The court declined to evaluate the persuasiveness of the article, because the City's summary crime statistics showed an increase in

property crime, but only a minimal decrease in violent/person crime, during enforcement. App. 42-45.

The Seventh Circuit affirmed, rejecting the City's reliance on the published article because it analyzed the benefit of a dispersal ordinance (not an hours regulation) and because it did not use multivariate regression. App. 32-33. The court also held that the summary crime data did not prove "any measurable benefit" from the Ordinance. App. 33.

IV. Trial and the District Court's Judgment

At trial, the City's secondary effects documentation included: (1) 20 judicial decisions, (2) 43 reports and studies, (3) 6 peer-reviewed, published studies, (4) public testimony, (5) more than 1,000 police reports documenting crimes in the four 500-foot circles surrounding respondents' properties, from both before and after the Ordinance was enforced, (6) expert reports, and (7) dozens of media articles documenting crimes at adult bookstores. However, due to the limiting rule announced in *Annex Books I*, the district court and the parties focused on (5), the local crime evidence.

The district court—relying on the testimony of both parties' experts—concluded that the City "succeeded in making the necessary showing detailed in *Annex Books I* to satisfy the Constitutional requirements." App. 12. Expert testimony established that crime is particularly difficult and dangerous to police during the overnight hours, Tr. 273:18-275:1, and that evidence shows adult bookstores without booths have crime-related secondary effects. Tr. 280:12-17 (2007 Los Angeles

study); Tr. 278-79 (2008 *Criminal Justice Policy Review* article/study).

Using crime reports from before and after the Ordinance took effect, the City's crime data facilitator ranked the addresses within each 500-foot circle surrounding respondents' adult bookstores according to the number of crimes occurring at each address.[1] The district court found that before enforcement, approximately 20% of all violent/person crimes occurred at the adult bookstores (which were only 3% of the addresses in the circles), and that the 18 armed robberies at the adult bookstores constituted 46% of all armed robberies in those 500-foot circles during the pre-enforcement period. App. 14-15. The court observed that respondents' adult bookstores each ranked in the top three locations for incidence of serious crimes, and found "that adult bookstores are hotspots for serious crime, including armed robberies." App. 15; *see, e.g.,* Ex. M-2, Bates 2774, 2348, 2370, 2775, 3862-3863 (violent robberies of individuals at respondents' adult bookstores, including guns put to victims' heads, pistol-whippings, *etc.*).

The district court also found that the Ordinance was effective. "[W]hen the Ordinance was being enforced, overall violent/person crime, including the number of armed robberies, decreased at the adult bookstores, with the greatest decreases in total UCR Part I crimes (over 50%) coming during the regulated hours." App. 15. Indeed, during that time, "violent/person crime as

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[1] These four areas contained liquor stores, bars, pawn shops, and other commercial establishments against which the adult bookstores were compared. Ex. M-6.

a whole decreased approximately 44% during the overnight hours within the 500 foot circles surrounding the bookstores, while violent/person crime in the balance of the [Indianapolis Police District] rose almost 12%…." App. 16.

Evaluating how speech fared under the Ordinance, the district court found that no "book, film, video or magazine was taken off of the shelves or made unavailable to a patron as the result of the Ordinance." App. 24-25. Nor was any patron unable to access speech because of regulated hours. App. 25. And although the preliminary injunction allowed adult businesses to operate twenty-four hours a day, none did so. *Id*. "Given these facts, there is no persuasive support for a conclusion that the opportunity to purvey expressive materials of the nature sold at Plaintiffs' businesses is curtailed to a significant degree by the Ordinance." App. 25-26.

V. The Opinion Below (*Annex Books III)*

The court of appeals reversed, never mentioning the "reasonably believed to be relevant" standard or the clear error standard of review for factual findings. App. 5. Rather, it again dismissed the City's vast legislative record, and it criticized the City's evidence of crime at and around the respondents' adult bookstores as "weak as a statistical matter" for failure to use "a multivariate regression" to rule out other theories of secondary effects causation. App. 2.

Contrary to the district court's factual findings, the court rejected the view that armed robberies at adult bookstores are a serious public safety hazard. App. 2. It announced that cities may target only "the secondary

effects of [adult] businesses *on third parties*," not adult businesses and their patrons, who "knowingly accept the risk of being robbed" while on the premises. App. 1, 3 (emphasis added). The court concluded that regulating hours "is the nub of the problem," because such regulations violate Justice Kennedy's concurrence in *Alameda*. App. 5. Having dispensed with the City's interest in reducing armed robberies, the court hypothesized that "the harms to third parties caused by a newspaper likely exceed those caused by an adult bookstore," App. 4-5, and stated—with no citation to, or support within, the record—that "Indianapolis likes G-rated newspapers but not sexually oriented books, magazines, and movies." App. 5.

The court then ordered that the hours regulation be enjoined. (*Id*.)

REASONS FOR GRANTING THE PETITION

The Seventh Circuit plainly departed from this Court's settled "reasonably believed to be relevant" standard for evidence supporting a legislative judgment concerning secondary effects. Although the Seventh Circuit published three decisions on this issue, *not one* mentions that deferential standard; instead, all three call for highly-specific, empirical evidence—complete with "multivariate regression" analysis—to justify the City's secondary effects regulation. *No other case* imposes such a burdensome rule. Moreover, the Seventh Circuit is resolute; presented with the conflicts that its decisions engender, the Seventh Circuit denied rehearing after *Annex Books I* and again after *Annex Books III*.

I. The Seventh Circuit's highly-specific, empirical proof requirement directly conflicts with the post-*Alameda* decisions of several circuits and state supreme courts, which explicitly apply this Court's "reasonably believed to be relevant" standard for secondary effects evidence. *See, e.g.*, *H & A Land Corp. v. Kennedale*, 480 F.3d 336 (5th Cir. 2007) (upholding time, place, and manner regulation of retail adult bookstores on record smaller than Indianapolis's); *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512 (6th Cir. 2009) (same); *World Wide Video of Washington, Inc. v. Spokane*, 368 F.3d 1186 (9th Cir. 2004) (same). The decision below, in holding that Justice Kennedy's *Alameda* concurrence prohibits hours of operation regulations targeting secondary effects, also conflicts directly with at least three decisions holding otherwise: *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003); *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trustees*, 411 F.3d 777 (6th Cir. 2005) (*en banc*); and *Ocello v. Koster*, 354 S.W.3d 187 (Mo. 2011).

II. The Seventh Circuit's decision is squarely at odds with the "reasonably believed to be relevant" standard this Court established in *Renton* and reaffirmed in *Barnes*, *Erie*, and *Alameda*. Under that standard, the Court has explicitly rejected an "empirical data" requirement, *Erie*, 529 U.S. at 300, *Alameda*, 535 U.S. at 439 (plurality), recognizing that local governments: (1) have an "undeniably important" interest in preventing secondary effects, *Erie*, 529 U.S. at 296, (2) "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems," *Alameda*, 535 U.S. at 451 (Kennedy, J., concurring in judgment), and (3) are in a better

position than the courts to evaluate those problems. *Id*. at 452.

III. The question presented is recurring and important, and review is warranted to resolve the split below and to clarify that the *Renton* test governs hours regulations targeting secondary effects. Hundreds of local governments, relying on *Renton* and its progeny, have adopted such regulations. The Seventh Circuit's unprecedented rule threatens to increase litigation dramatically in that it imposes a much higher burden of proof on municipalities and contravenes previously-uniform circuit precedent upholding hours of operation regulations. *See Ctr. for Fair Pub. Pol'y*, 336 F.3d at 1159 (collecting cases); *see also Schultz*, 228 F.3d at 846 (upholding identical hours rule). The Seventh Circuit's rule also undermines traditional *Renton*-type zoning regulations. *New Albany DVD, LLC v. New Albany*, 581 F.3d 556 (7th Cir. 2009) (applying *Annex Books I* to enjoin adult business zoning ordinance).

IV. This case is the right vehicle for answering the question presented. Unlike *Alameda*, which was on appeal from a summary judgment, 535 U.S. at 439, this decade-old case was fully tried to the district court and includes three appellate decisions adverse to the City. There remains nothing left to litigate except respondents' multi-million dollar damages claim should this petition be denied.

Accordingly, Indianapolis respectfully requests that certiorari be granted.

I. The Decision Below Conflicts with Decisions of Several Other Federal Circuit Courts and State Supreme Courts Interpreting and Applying *Renton* and *Alameda*

The Seventh Circuit claims that "dozens of precedents, from this circuit and elsewhere," do "more to show the problems of interpretation and application created by the fractured decision in *Alameda Books* than to establish any concrete legal rule." App. 60. So the court below made up its own rule, creating conflicts with every other federal and state appellate court to address the *Renton-Alameda* standard for reviewing secondary effects evidence. The decision below also conflicts with appellate decisions applying this Court's First Amendment precedents to a classic "time" regulation targeting secondary effects.

A. The Seventh Circuit's highly-specific, empirical proof requirement conflicts with decisions of several circuits and state supreme courts that consistently follow this Court's "reasonably believed to be relevant" standard for secondary effects evidence

Numerous appellate decisions conflict with the decision below, and reveal the wide chasm between the Seventh Circuit's burdensome rule and the deferential *Renton-Alameda* standard. The difference in legal rules is outcome-determinative.

1. The onerous rule announced below conflicts with the decisions of several other federal circuit courts

The decision below conflicts with decisions from the Second, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits, all of which continue to apply the "reasonably believed to be relevant" standard established in *Renton* and reaffirmed in *Alameda*. Arguing that lower courts have "struggled to understand and apply *Alameda Books*," the Seventh Circuit attempted to distinguish the Sixth Circuit's decision in *Richland Bookmart*, 555 F.3d 512 (6th Cir. 2009), and the Fifth Circuit's decision in *H & A Land Corp.*, 480 F.3d 336 (5th Cir. 2007). App. 60. One week later, in *New Albany DVD*, 581 F.3d at 561, the Seventh Circuit rejected the Ninth Circuit's position in *World Wide Video*, 368 F.3d 1186 (9th Cir. 2004).

In *Richland Bookmart*, the county relied upon more than two dozen reported cases and "20 secondary effects reports from municipalities, including reports from Chattanooga, Tennessee, Spokane, Washington, and Garden Grove, California." 529 F. Supp. 2d 868, 877 (E.D. Tenn. 2007). Two adult bookstores without peep shows unsuccessfully challenged an ordinance limiting hours of operation from 8 a.m. to midnight Monday through Saturday. *Id*.

The Sixth Circuit affirmed. 555 F.3d 512 (6th Cir. 2009). Applying *Renton* and *Alameda*, the court rejected plaintiffs' demand for secondary effects evidence specific to adult bookstores where customers browse sexually graphic merchandise for "off-site" consumption, or adult bookstores "that just barely meet one of the 35% thresholds" of floor space, inventory, or

revenues dedicated to, or derived from, sexually graphic fare. *Id*. at 525-26.

"Requiring local governments to produce evidence of secondary effects for all categories [of adult businesses] created by every articulable distinction is a misapprehension of the Supreme Court's holding that governments may rely on any evidence 'reasonably believed to be relevant.'" *Id*. at 525-26 (quoting *Alameda*, 535 U.S. at 438-39). Because the County reasonably relied on studies, cases, and testimonial evidence concerning adult businesses' secondary effects (including the 1984 Indianapolis study and Spokane adult bookstore evidence), the regulations satisfied intermediate scrutiny. *Id*. at 525-28.

The Seventh Circuit holds that such reliance is insufficient. App. 60. Indeed, not even local evidence documenting serious crime *at respondents' businesses* will suffice; the Seventh Circuit demands direct causation proven through multivariate regression analysis that produces statistically significant results. App. 2. *Contra Entm't Prods., Inc. v. Shelby County*, 721 F.3d 729, 737 (6th Cir. 2013) ("Neither the Supreme Court nor this court has ever held that the First Amendment demands direct empirical support, let alone a specific methodology, to sustain a regulation on erotic expression.").

The decision below is also in direct conflict with the Fifth Circuit's decision in *H & A Land Corp.*, 480 F.3d 336 (5th Cir. 2007). Applying the *Renton-Alameda* "reasonably believed to be relevant" standard, the Fifth Circuit upheld Kennedale's ordinance, owing in part to the city's reliance on Indianapolis's 1984 study and the 1986 Oklahoma City study, which overwhelmingly

found that adult bookstores would have adverse impacts on surrounding land uses. *Id.* at 339-40. The court noted that the term "adult bookstore" used in the studies, though not specifically defined, was reasonably understood to include businesses that specialized in sexual explicit fare but did not have arcades, *i.e.*, peep show booths. *Id*. at 340. The Fifth Circuit concluded: "The Indianapolis survey, in particular, was drafted by experts, pretested, and administered to a large, national pool of respondents. It is not 'shoddy.' We therefore find that Kennedale has produced evidence that it could have reasonably believed was relevant, and thus could have properly relied upon." *Id*. at 341.

The Seventh Circuit's highly-specific, empirical-proof rule prohibits such reliance. Under that rule, the Seventh Circuit concluded that Indianapolis's 1984 study is insufficient because it did not specifically define "adult bookstore," did not ask appraisers "whether they thought that 25% of sales makes an establishment 'adult,'" did not study the efficacy of "hours of operation rules applicable to" adult bookstores without peep show booths, and "did not limit the survey to brokers who had experience buying or selling adult establishments, or in places near those establishments." App. 60-61.

The conflict is square. The Seventh Circuit's rule eviscerates the *Renton-Alameda* instruction that courts should grant "deference to cities with regards to the ordinances they enact" to address secondary effects. *H & A Land Corp.*, 480 F.3d at 340-41 (citing *Alameda*, 535 U.S. at 451 (Kennedy, J., concurring in judgment)); *accord N.W. Enters., Inc. v. Houston*, 352 F.3d 162, 180 (5th Cir. 2003) ("The [*Alameda*] Court added that it

would not require localities to disprove other possible implications of the legislative materials at their disposal ….").

The Seventh Circuit's decisions in this case also conflict with decisions of the Ninth Circuit regarding the governing legal standard for secondary effects evidence.

In *World Wide Video*, the Ninth Circuit reaffirmed that cities may rely upon any evidence "reasonably believed to be relevant," 368 F.3d 1186, 1192, and observed that both the *Alameda* plurality opinion and concurrence "stressed the paramount role of local experimentation in developing legislative responses to secondary effects, given local governments' superior understanding of their own problems." *Id*. at 1193.

In upholding Spokane's zoning regulation of retail-only adult bookstores, the Ninth Circuit credited the city's reliance "on a wide variety of evidence, including studies, police records, and citizen testimony." *Id*. at 1197; *id*. at 1190 (detailing voluminous legislative record, including 1984 Indianapolis study and 1991 Garden Grove study). Spokane's record included evidence of negative effects stemming from retail-only adult bookstores, including "pornographic litter, harassment of female employees, vandalism, and decreased business…." *Id*. As Spokane's evidence met the *Renton-Alameda* standard, the Ninth Circuit upheld the ordinance.

But under the new legal rule created in *Annex Books*, the significant legislative record compiled in *World Wide Video*, including the local Spokane evidence—which is in the trial record of this case, *see*

Ex. X-6—does not suffice. *See New Albany DVD, LLC v. New Albany*, 581 F.3d 556 (7th Cir. 2009) (applying new *Annex Books I* rule to enjoin adult bookstore zoning regulation that was supported by wide range of secondary effects evidence, including Spokane materials discussed in *World Wide Video*), *cert. denied*, 560 U.S. 978 (2010); *see also New Albany DVD, LLC v. New Albany*, 362 F. Supp. 2d 1015, 1020 & n.10 (S.D. Ind. 2005). As *New Albany DVD* demonstrates, the significantly stricter *Annex Books* rule for secondary effects evidence conflicts with this Court's "reasonably believed to be relevant" standard as applied by the Ninth Circuit. *Accord Gammoh v. La Habra*, 395 F.3d 1114, 1126-27 (9th Cir. 2005) ("While we do not permit legislative bodies to rely on shoddy data, we also will not specify the methodological standards to which their evidence must conform.").

Because the other circuits have, in every relevant decision, applied the *Renton-Alameda* "reasonably believed to be relevant" rule in rejecting an empirical proof requirement, their decisions necessarily stand in conflict with the contrary rule announced below. *See, e.g.*, *White River Amusement Pub, Inc. v. Hartford*, 481 F.3d 163, 171 (2d Cir. 2007); *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 744 (4th Cir. 2010); *Doctor John's v. Wahlen*, 542 F.3d 787, 791-93 (10th Cir. 2008); *Daytona Grand, Inc. v. Daytona Beach*, 490 F.3d 860, 880 (11th Cir. 2007).

This Court should therefore grant review to resolve the inter-circuit conflict.

2. The onerous rule announced below conflicts with the decisions of several state supreme courts

The Seventh Circuit's demand for empirical, scientific evidence also directly conflicts with decisions from at least seven states' highest courts.

A unanimous Missouri Supreme Court followed *Renton*, *Erie*, and *Alameda* to reject an empirical-proof requirement for a statute regulating sexually oriented businesses' hours of operation. *Ocello v. Koster*, 354 S.W.3d 187, 203, 211-12 (Mo. 2011). Likewise, the Pennsylvania Supreme Court—though noting this Court's lack of "clear majority" decisions "necessarily creates some uncertainty in this area"—applied the "reasonably believed to be relevant" test and refused to require empirical proof for a secondary effects regulation. *Purple Orchid, Inc. v. Pennsylvania State Police,* 813 A.2d 801, 811-12 (Pa. 2002).

The Kentucky Supreme Court, upholding an ordinance regulating, *inter alia*, hours of operation, also referenced a lack of "clear majority standards," but observed that a court may not "substitute its judgment" for the legislature's, so long as that body "has satisfied the *Renton* requirement" of considering evidence reasonably believed to be relevant. *Kentucky v. Jameson*, 215 S.W.3d 9, 35 (Ky. 2006). The supreme courts of Illinois, North Dakota, Maine, and New York also hew to the deferential *Renton-Alameda* standard in evaluating secondary effects evidence. *Chicago v. Pooh Bah Enterprises, Inc.* 865 N.E.2d 133, 158-60 (Ill. 2006) (rejecting requirement of statistical data or studies specific to that city); *For the People Theatres of N.Y., Inc. v. City of New York,* 843 N.E.2d 1121 (N.Y.

2005) (instructing that "formal study or a statistical analysis" was not required on remand); *McCrothers Corp. v. Mandan,* 728 N.W.2d 124, 129 (N.D. 2007); *Bangor v. Diva's, Inc.,* 830 A.2d 898 (Me. 2003).

Finally, in *Uniontown Retail No. 36, LLC v. Jackson County,* the Indiana Court of Appeals upheld a sexually oriented business ordinance, explicitly refusing to follow *Annex Books I*. 950 N.E.2d 332, 341 (Ind. Ct. App. 2011), *trans. denied*, 962 N.E.2d 651 (Ind. 2011).

Because the decision below conflicts with those of seven state supreme courts and the appellate authority in petitioner's own state, review is warranted.

B. The Seventh Circuit's holding that Justice Kennedy's *Alameda* concurrence prohibits hours of operation regulations targeting secondary effects conflicts with decisions of the Sixth and Ninth Circuits and the Missouri Supreme Court

Following *Renton*, federal circuit courts—including the Seventh Circuit—have repeatedly applied the time, place, and manner test to evaluate hours of operation regulations targeting negative secondary effects. These courts considered, and upheld, regulations that were generally uniform in nature, limiting overnight hours Monday through Saturday and either prohibiting (four circuits), or imposing additional limits (two circuits) on, Sunday hours. *Schultz v. Cumberland*, 228 F.3d 831, 837 (7th Cir. 2000) (prohibiting Sunday hours); *Ben Rich Trading, Inc. v. Vineland*, 126 F.3d 158 (3d Cir. 1997) (same); *Star Satellite, Inc. v. Biloxi*, 779 F.2d 1074, 1079 (5th Cir. 1986) (same); *Richland Bookmart,*

Inc. v. Nichols, 137 F.3d 435, 438 (6th Cir. 1998) (same); *Mitchell v. Comm'n on Adult Entm't Establishments*, 10 F.3d 123, 128 (3d Cir. 1993) (further limiting Sunday hours); *Lady J. Lingerie, Inc. v. Jacksonville*, 176 F.3d 1358, 1365 (11th Cir. 1998) (same).

The *Renton* "standard strikes a healthy balance between the citizenry's First Amendment interests and the government's legitimate interests unrelated to suppression of speech," *Schultz*, 228 F.3d at 845, by allowing the government to serve its important interest in preventing secondary effects while ensuring that "the government's means preserve legitimate opportunity for continued speech." *Id*.

The decision below conflicts with every other circuit court decision on hours regulations, both before and after *Alameda*. It cites Justice Kennedy's *Alameda* concurrence to invalidate Indianapolis's hours regulation on the theory that "[i]f that sort of benefit [decreased crime] were enough to justify closure, then a city could forbid adult bookstores altogether." App. 3.

Of course, this slippery-slope theory ignores the longstanding rule (separate from the substantial government interest requirement) that time, place, and manner regulations must "not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 46 (citing cases). More important, the decision creates a direct conflict with at least two post-*Alameda* federal circuit court decisions and one state supreme court decision.

1. The decision below directly conflicts with decisions of the Sixth and Ninth Circuits addressing hours of operation regulations targeting secondary effects

Most directly, the panel opinion conflicts with the Ninth Circuit's 2-1 decision in *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003).

There, the majority rejected challenges by sexually oriented businesses, including "sellers of sexually-related magazines and paraphernalia" like respondents, to Arizona's regulation of their operating hours. *Id*. at 1158. The plaintiffs argued that a "heightened proportionality requirement" in Justice Kennedy's *Alameda* concurrence rendered the statute invalid. *Id*. at 1162. The majority concluded, for several reasons, that "Justice Kennedy never intended a heightened proportionality requirement to apply in this particular context." *Id*.

The Ninth Circuit first observed that Justice Kennedy's concurrence held that "the central holding of *Renton* is sound," *id.* (quoting 535 U.S. at 448), and agreed "that laws 'designed to decrease secondary effects … should be subject to intermediate rather than strict scrutiny.'" *Id*. (quoting 535 U.S. at 449). Moreover, the concurrence was written "to guard against 'a subtle expansion' of *Renton*, and *not*, as [plaintiffs] would have it, to signal a fundamental shift in the *Renton* framework." *Id*. (quoting 535 U.S. at 445). "This is especially so given that the circuit courts have thus far been unanimous in upholding similar or

even more severe hours of operation restrictions under *Renton*." *Id*. at 1162.

The Ninth Circuit also explained that Justice Kennedy's concurrence must be understood in light of the zoning, *i.e.*, "place" regulation, under review. Because the "reduction of speech" contemplated in that context was the possible permanent closure of one of the two combined businesses, Justice Kennedy clarified that the city's rationale for its unique "dispersal" rule could not be that it will force the permanent "closure of a number of those protected businesses, thereby reducing the quantity of protected speech." *Id*. at 1163. In contrast, a classic "time" regulation is "a quite different species of secondary effects law" because it requires all adult businesses to close "for a limited time." *Id*. Applying Justice Kennedy's proportionality language to a limited hours regulation "would invalidate *all* such laws," and the majority was "satisfied that he never intended such a result." *Id*. The Ninth Circuit then thoroughly analyzed the statute under "the traditional three-part test," and concluded that it satisfied that test. *Id*. at 1164-70.

Judge Canby dissented, rejecting the majority's position "that Justice Kennedy meant no change in the *Renton* analysis," *id*. at 1173, and would have invalidated Arizona's statute for failing "to meet the requirements of the First Amendment as Justice Kennedy has stated them." *Id*.

In direct contrast to the *Center for Fair Public Policy* majority opinion, the Seventh Circuit held "that the City's regulation takes the form of closure is the nub of the problem. Justice Kennedy … remarked that 'a city may not regulate the secondary effects of speech

by suppressing the speech itself.... Yet that's what Indianapolis has done" in adopting the hours regulation. App. 3.

Thus, while the Ninth Circuit holds that Justice Kennedy's proportionality language does not even apply to hours of operation regulations, the Seventh Circuit holds that the same language forbids such regulations.

The Sixth Circuit has followed the Ninth. In *Deja Vu of Cincinnati, L.L.C., Inc. v. Union Twp. Bd. of Trustees*, 411 F.3d 777 (6th Cir. 2005), the *en banc* Sixth Circuit applied *Renton* and *Alameda* to uphold an hours regulation like Indianapolis's regulation. *Id*. at 791. Citing *Center for Fair Public Policy*, the Sixth Circuit applied time, place, and manner analysis and concluded that "the resolution's hours-of-operation provision, which permits [adult businesses] to be open for twelve hours a day, six days a week, passes First Amendment muster." *Id*.

The Seventh Circuit stands at odds with decisions of both the Ninth and Sixth Circuits, and this Court should grant certiorari to resolve the conflict.

2. The decision below directly conflicts with the decision of the Missouri Supreme Court addressing an hours of operation regulation targeting secondary effects

In *Ocello*, the Missouri Supreme Court upheld a statute challenged by a coalition of adult cabarets and adult bookstores (both with and without peep show booths). In adopting the statute, the Missouri legislature relied on "*Schultz v. City of Cumberland* to

support its hours-of-operation restriction." 354 S.W.3d at 209 (citation omitted). The legislature also relied on studies finding that "late-night operating hours contributed to these negative secondary effects," including a Dallas study which "found that operating late at night contributed to the crime risk by encouraging loitering, which attracted prostitutes." *Id*. at 210.

Rejecting the argument that Justice Kennedy's *Alameda* concurrence rendered the statute unconstitutional, the *Ocello* court emphasized the zoning context of *Alameda*. Citing *Center for Fair Public Policy*, it observed that "some courts have questioned whether Justice Kennedy's proportionality test has any logical application at all where, as here, the restrictions at issue do not relate to zoning," but to "activities within the business itself." *Id*. at 213.

The Missouri Supreme Court then determined that, "even if applicable," Justice Kennedy's concurrence did not prohibit the hours regulation. *Id*. at 213-14. "[T]he legislature reasonably determined that the overnight hours are a particularly troublesome time for sexually oriented businesses to operate; so, closing the businesses at night should substantially reduce negative secondary effects." *Id*. at 214. The hours regulation "will not substantially reduce the quantity and availability of sexually oriented speech because such businesses still have an ample amount of time" to convey an erotic message. *Id*. Because the hours regulation "only places a minimal burden on protected speech it is valid under Justice Kennedy's proportionality analysis." *Id.*

The Seventh Circuit holds that the proportionality language in Justice Kennedy's *Alameda* concurrence applies to, and invalidates, the City's hours of operation regulation. The Ninth and Sixth Circuits hold that the same language does not apply to such regulations, which are constitutional under *Renton*'s time, place, and manner test. And the Missouri Supreme Court holds that, even if the proportionality language applies to hours regulations, they satisfy that analysis.

This Court should therefore grant certiorari to resolve the confusion below.

II. The Decision Below Conflicts with the Settled Time, Place, and Manner Standard Applied in *Renton* and Reaffirmed in *Barnes, Erie*, and *Alameda*

This Court has repeatedly held that cities may rely upon "any evidence" that is "reasonably believed to be relevant" to their interest in preventing the negative secondary effects of adult businesses. *Alameda*, 535 U.S at 438 (plurality); *id*. at 451 (Kennedy, J., concurring in judgment). Under this deferential standard, the Court has upheld secondary-effects regulations where the government relied on: (1) a single judicial decision summarizing findings that supported a different regulation, *Renton*, 475 U.S. at 51; (2) no legislative evidence *at all*, but citation during litigation to judicial decisions, *Barnes*, 501 U.S. at 568; (3) legislative findings citing two cases, but unaccompanied by any extrinsic evidence, *Erie*, 529 U.S. at 296-97; and (4) a single study that the city *admitted* did not directly address the harm targeted by the regulation under review. *Alameda*, 535 U.S. at 436.

In each case, this Court reversed appellate decisions applying a higher standard than the deferential standard prescribed in *Renton* for legislation targeting secondary effects. The Court should do the same here.

A. *Renton* establishes, and this Court's subsequent cases reaffirm, that evidence "reasonably believed to be relevant" is sufficient to support a time, place, and manner regulation targeting secondary effects

Renton's *only* evidence supporting its interest was one state supreme court decision summarizing a trial court's findings supporting an ordinance in Seattle—a city 20 times Renton's size. But in reversing the Ninth Circuit for imposing an "unnecessarily rigid burden of proof," this Court held that Renton relied on evidence "reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 50-52. That standard was satisfied even though Renton "chose a different method of adult theater zoning than that chosen" by Seattle. *Id*. at 52 (holding it "is not our function to appraise the wisdom" of the city's regulatory approach).

Five years later, the controlling opinion in *Barnes* cited *Renton*—which involved adult theater zoning—to uphold, on secondary effects grounds, a pasties and G-string requirement. 501 U.S. 560, 584 (1991) (Souter, J., concurring in judgment). Because the entertainment in *Barnes* was "of the same character" as the adult fare in *Renton*, it is "likely to produce the same pernicious secondary effects …." The opinion then cited judicial decisions detailing prostitution *at adult businesses* as

evidencing the government's substantial interest under *Renton*. *Id*.

In *Erie*, the government again lacked *any* extrinsic secondary effects evidence. But the plurality credited the city's own legislative findings, which cited *Renton* and *Barnes*. 529 U.S. at 297. Upholding the City's regulation under intermediate scrutiny, the Court "flatly rejected" the claim that secondary effects should be subjected to "empirical analysis." *Id.* at 300.

Most recently, in *Alameda*, the Court granted certiorari to address the standard for establishing "a substantial government interest under *Renton*." 535 U.S. at 433. Los Angeles defended its unique break-up rule prohibiting the combination of adult bookstores and adult arcades under one roof by relying on a 1977 study that the city *admitted* did not evaluate the effects of "any separate-standing adult bookstore or arcade," let alone any "combination" establishments. 535 U.S. at 436 (plurality). The Ninth Circuit struck the ordinance for lack of evidence specific to "combination" stores. *Id*.

Reversing, this Court reaffirmed *Renton*'s "any evidence reasonably believed to be relevant" standard. *Id*. at 438 (plurality); *id*. at 451 (Kennedy, J., concurring in judgment). The Court held that Los Angeles could reasonably rely upon an *inference* drawn from its study. *Id*. at 437. In that context of testing an inference, the plurality introduced a burden-shifting procedure to determine whether "the municipality meets the standard set forth in *Renton*." *Id*. at 438-39. The opinion emphasized the deference in *Renton*, holding that a city: (1) does not "bear the burden of providing evidence that rules out" other theories explaining secondary effects, (2) need only have

evidence that "fairly supports" its regulatory rationale, (3) may rely on "common sense," (4) need not have "empirical data" to support its ordinance, and (5) need only support "a theory" that would justify its ordinance. *Id*. at 437-39. Critically, the plurality refused to "move the evidentiary analysis into the inquiry on content neutrality," or to "raise the evidentiary bar that a municipality must pass." *Id*. at 441.

Justice Kennedy wrote separately to avoid a "subtle expansion" of, but not to undermine, *Renton*. 535 U.S. at 445. His concurrence addressed two issues: (1) the rationale for applying intermediate scrutiny to an adult business zoning law, and (2) the evidence required to support the regulatory rationale. *Id*. at 449. He agreed with the plurality on the second issue, regarding the evidence on which cities may rely to support an ordinance aimed at secondary effects. *Id*. at 449. Thus, his treatment of the first issue did not concern a new evidentiary standard, but rather "the necessary rationale for applying intermediate scrutiny" (instead of strict scrutiny) to a zoning ordinance, namely, that the ordinance "may reduce the costs of secondary effects without substantially reducing speech." *Id.* at 450.

On the second issue, Justice Kennedy reaffirmed that any evidence "reasonably believed to be relevant" is sufficient, including reasonable inferences drawn from evidence not on-point with the harm targeted or the regulation adopted. *Id*. at 451-52. He emphasized that "very little" evidence is required under *Renton*, that cities "must be allowed to experiment with solutions" to secondary effects, that "courts should not be in the business of second-guessing" local policy

judgments, and that if the legislative body's "inferences appear reasonable, we should not say there is no basis for its conclusion." *Id*. (citing portion of *Renton* permitting reliance on prior judicial decisions).

B. The decision below directly conflicts with this Court's decisions

The decision below conflicts with the foregoing cases because the Seventh Circuit refused to employ the "reasonably believed to be relevant" standard prescribed in each of those cases.

It was sufficient that Renton relied on a single appellate decision summarizing the secondary effects findings of a trial court—in a case involving a regulation *different* from the one that Renton adopted. 475 U.S. at 51-52. Yet here, it was *in*sufficient that Indianapolis relied on multiple on-point decisions—including the Seventh Circuit's *Schultz* decision upholding the *same* regulation, which *Schultz* characterized not as a "closure ordinance," but as "a classic time, place, and manner" regulation justified by "a host of studies on secondary effects and the need for constrained operating hours." 228 F.3d 831, 846.

The Seventh Circuit's heightened-specificity requirement for legislative evidence also flouts the deference that *Renton* prescribes for judicial review of secondary effects legislation. Whereas *Renton*'s holding was *not* "affected by the fact" that Renton "chose a different method" of regulation than the city on whose experience it relied, 475 U.S. at 52, the decision below ignores the vast majority of Indianapolis's evidence because the cities experiencing those secondary effects

evaluated them when adopting "different kinds of [time, place, and manner] laws." App. 2.

Similarly, the Seventh Circuit's rule that policy evidence must be specific to the type of adult business being regulated is directly contrary to *Barnes*, where the controlling opinion permitted the government "to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects." *Alameda*, 535 U.S. at 438 (citing *Barnes*, 501 U.S. at 584).

But under the Seventh Circuit's onus, even evidence directly on point—both to the subtype of business affected and the regulation adopted—is insufficient. The court below demands empirical, statistically-significant evidence using multivariate regression analysis to scientifically control for other variables.

That onus ignores that this Court has "flatly rejected" the requirement of an empirical analysis, even for regulations that "strike closer to the core of First Amendment values." *Erie*, 529 U.S. at 297, 300 (citing *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 394 (2000)). *Alameda* specifically refused to require empirical data to support the city's regulation, as "[s]uch a requirement would go too far in undermining our settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." 535 U.S. at 439 (plurality); *see also id*. at 451 (Kennedy, J., concurring in judgment) (reaffirming *Renton* standard and holding that cities, which have superior knowledge of local conditions and needs, may rely on reasonable inferences when

addressing secondary effects). The Seventh Circuit's holding that cities must use "a multivariate regression to control" for other variables runs headlong into *Alameda*'s holding that a city "does not bear the burden of providing evidence that rules out every theory for a link" between adult businesses and secondary effects "that is inconsistent with its own." *Id*. at 437 (plurality).

Additionally, the lower court's sweeping rule that cities may regulate adult enterprises only to protect "third parties," *not* the businesses or patrons (or responding police) who "knowingly accept the risks" of victimization, is unsupported by any of this Court's relevant precedents. On the contrary, *Barnes* upheld the challenged regulation based on reported cases documenting prostitution—a so-called "victimless" crime—*on adult businesses' premises*. 501 U.S. at 584 (citing cases); *see also Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (sex acts at adult bookstore); Ex. H-1, Bates 119-184 (masturbation and drug use at Annex Books).

The Seventh Circuit also misreads Justice Kennedy's *Alameda* concurrence to characterize the City's time, place, and manner regulation as a "closure ordinance" that violates constitutional standards. App. 5. In the context of Los Angeles's break-up policy, closure referred to the intended, permanent closure of the business by zoning—not to a limited "time" regulation of operating hours. 535 U.S. at 450-51 ("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.")

(emphasis added). For this reason among others, the Ninth Circuit correctly concluded that Justice Kennedy's proportionality language "was simply not designed with [an hours] restriction in mind." *Ctr. for Fair Pub. Pol'y*, 336 F.3d at 1163.

In any event, the record demonstrates that the City's regulation is faithful to the principles in Justice Kennedy's concurrence, which emphasized that cities may address the "secondary effects of adult speech, so long as the purpose of the law is not to suppress it," 535 U.S. at 447, and explained that the "rationale for applying intermediate scrutiny" is that a regulation "may reduce the costs of secondary effects without substantially reducing speech." *Id.* at 450. Here, the City's secondary effects purpose is not in question. Accordingly, the courts below purported to apply only intermediate scrutiny, and the district court's undisturbed finding is that, in fact, the Ordinance reduced the costs of secondary effects "without an unjustified, substantial decrease in freedom of speech." App. 24.

The most recent decision below also seeks to justify its strict-scrutiny-via-secondary-effects-burden by asserting that Indianapolis had an impermissible, content-based purpose for its secondary effects regulation. App. 2, 5. Again, this recent assertion is: (1) unsupported in the record, (2) contrary to the Ordinance's express purpose and extensive legislative record, App. 100-104, and (3) contradicted by the district court's unchallenged conclusion that the ordinance is properly treated as content-neutral. App. 83.

The Seventh Circuit's demand for strict scrutiny is not strengthened by an inference that court apparently drew from the failure of the Ordinance to govern various types of liquor retailers, *e.g.*, "liquor stores, pharmacies, and convenience stores." App. 2. Under the Indiana Code, cities cannot enact any law that "in any way, directly or indirectly, regulates . . . the operation or business of the holder of a liquor retailer's permit . . . ." I.C. 7.1-3-9-6. Moreover, the theory that secondary effects are not the Ordinance's true target because it regulates "underinclusively" collides with *Renton*. 475 U.S. at 52 (rejecting similar underinclusiveness argument); *see also R.A.V. v. St. Paul*, 505 U.S. 377, 387-89 (1992) (citing *Renton* and holding First Amendment does not impose an "underinclusiveness" limitation).

The decision below simply conflates the content-neutrality prong of *Renton*'s three-step test (which looks at a law's purpose), with the separate substantial government interest prong (which looks at the evidence supporting a law's content-neutral purpose, *e.g.*, secondary effects), and then significantly raises the evidentiary bar cities must pass. The decision thus directly conflicts with *Renton* and with *Alameda*, which explicitly rejected that conflation as "unwise." 535 U.S. at 441 (plurality) (refusing to "merge these two inquiries or move the evidentiary analysis into the inquiry on content neutrality, and raise the evidentiary bar that a municipality must pass").

This Court should grant certiorari and reverse the decision below, which contravenes each of this Court's relevant decisions from *Renton* to *Alameda*.

III. The Question Presented Is Recurring and Important, and Review Is Warranted to Clarify that *Renton's* Time, Place, and Manner Test Applies to Hours Regulations Designed to Serve Cities' Undeniably Important Interest in Preventing Negative Secondary Effects

Following this Court's precedents, scores of legislative bodies across the nation—both state and local—have adopted time, place, and manner regulations to address the crime and other secondary effects of sexually oriented businesses.[2] The onerous

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[2] In the Seventh Circuit alone, numerous municipalities regulate adult bookstores' operating hours in their adult business time, place, and manner ordinances. *See, e.g.*, Waunakee, Wis., Code §22-153 (regulating same hours as Indianapolis); Mount Horeb, Wis., Code §12.095(18) (same); Cumberland, Wis., Code §12.145(XI) (same); Yorkville, Wis., Code §14-985(a) (same); Marshall, Ill., Code §22-87 (same); Collinsville, Ill., Code §5.60.170 (same); Glenview, Ill., Code §22-848; Effingham, Ill., Code §15-84; Gary, Ind., Code §10-59; Zion, Ill., Code §14-754(f); Streator, Ill., Code §5.68.130; Wabash, Ind., Code §4-219; Dayton, Wis., Code §6-21; Thiensville, Wis., Code §18-174; Whiting, Ind., Code §10-917; St. John, Ind., Code §24-247(4); Mishawaka, Ind., Code §18-676; Metropolis, Ill., Code §117.12; South Holland, Ill., Code §9-216; Merrill, Wis., Code §8-223; Peoria County, Ill., Code §6-133; Stoughton, Wis., Code §14-465(c)(7); Brown Deer, Wis., Code §14-555; East St. Louis, Ill., Code §26-1346; Somerset, Wis., Code §11-2-16(f)(7); Berlin, Wis., Code §18-446(8); New Lenox, Ill., Code §106-456; Cudahy, Wis., Code §12.35(19); Joliet, Ill., Code §18-417; Edwardsville, Ill., Code §22-60; St. Joseph, Wis., Code §153-5(F); Munster, Ind., Code §10-531; Niles, Ill., Code §22-544; Cloverdale, Ind., Code §4-57; Bourbonnais, Ill., Code §18(F); Lynwood, Ill., Code §6-105; Peshtigo, Wis., Code §4-37(a); Geneva, Ill., Code §4-17-18; South Bend, Ind., Code §4-18.5(k)(1); River Falls, Wis., Code §17.88.040; Rhinelander, Wis., Code §5.07.22(4); Racine County,

legal rule announced below undermines that body of legislation, and creates an intolerable conflict of appellate authority which threatens to increase litigation dramatically. As cities need not "await localized proof" of secondary effects, they should not be required "to undertake to litigate this issue repeatedly in every case." *Barnes*, 501 U.S. at 584-85 (Souter, J., concurring in judgment).

But the conflict created by the decision below will require cities to litigate long-established time, place, and manner regulations at great expense. The Seventh Circuit's significantly-heightened burden of proof turns the traditional deference of *Renton* on its head, requiring legislatures to produce exacting scientific evidence to justify regulations aimed only at secondary effects. "Even in cases addressing regulations that strike closer to the core of First Amendment values, [this Court has] accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing." *Erie*, 529 U.S. at 297 (citing *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393 n.6 (2000)); *see also Alameda*, 535 U.S. at 451-52 (Kennedy, J., concurring in judgment) (holding that "courts should not be in the business of second-guessing" legislative determinations regarding secondary effects.).

Wis., Code §20-638(a); Oglesby, Ill., Code §5.92.150; Strum, Wis., Code §8-63(a); Minocqua, Wis., Code §14-279; West Milwaukee, Wis., Code §18-806(a); Grayslake, Ill., Code §5.72.100(B); Westchester, Ill., Code §5.99.270; Savoy, Ill., Code §5.04.140; Park Forest, Ill., Code §10-122(6).

Moreover, the results of this additional litigation will depend on the happenstance of geography or, in Indiana and Illinois, on whether suit is filed in federal or state court. *Compare New Albany DVD*, 581 F.3d at 559-561 (applying *Annex Books I* to enjoin adult business location regulation), *with Uniontown Retail*, 950 N.E.2d at 341 (rejecting *Annex Books* and upholding identical regulation), *and Pooh Bah Enters.*, 865 N.E.2d at 159 (applying "reasonably believed to be relevant" standard and holding that "no precedent requires the City to obtain research targeting the exact activity that it wishes to regulate").

This Court should grant certiorari to provide guidance to state and local governments nationwide concerning the means by which they can constitutionally serve their substantial government interests in preventing negative secondary effects.

IV. This Case is the Proper Vehicle for Resolving the Question Presented

This case is an ideal vehicle for resolving the question of law presented. After ten years of litigation and a full trial, the record is fully developed. It includes not only an extensive legislative record (App. 100-102), but also the testimony of competing experts, law enforcement officers, crime data specialists, and city planners. The record thus dwarfs those considered in this Court's prior secondary effects cases.

This case also brings the legal rule from this Court's cases, and the competing rule employed below, into sharp focus. Both the trial court and Seventh Circuit acknowledged that only intermediate scrutiny applies. App. 9, 31-32. The district court, sitting as finder of

fact, authored a thorough decision finding that the City demonstrated a substantial government interest for its Ordinance. That decision was reversed only due to the Seventh Circuit's application of, and expansion of, the onerous rule that it announced in *Annex Books I*.

Finally, all three appellate decisions below ignore this Court's "reasonably believed to be relevant" standard while calling for highly-specific, empirical evidence subjected to rigorous scientific standards of proof. Given that the Seventh Circuit has twice denied *en banc* review, the Seventh Circuit's rule for laws targeting secondary effects cannot be dismissed as a temporary aberration. Rather, it is firmly entrenched in Seventh Circuit jurisprudence, in direct conflict with several other circuits and state supreme courts.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13-1500

[Filed January 24, 2014]

ANNEX BOOKS, INC., *et al.*, *Plaintiffs-Appellants*,

v.

CITY OF INDIANAPOLIS, INDIANA, *Defendant-Appellee*.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:03-cv-00918-SEB-TAB —
Sarah Evans Barker, *Judge*.

ARGUED JANUARY 15, 2014 —
DECIDED JANUARY 24, 2014

Before FLAUM, EASTERBROOK, and ROVNER, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. The Supreme Court has held that state and local governments may regulate adult establishments by using time, place, and manner restrictions to reduce the secondary effects of those businesses on third parties, but may not regulate them to restrict the dissemination of speech disapproved by

local residents. *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); see also, e.g., *Illinois One News, Inc. v. Marshall*, 477 F.3d 461, 463 (7th Cir. 2007).

Indianapolis requires adult bookstores to remain closed between the hours of midnight and 10 a.m. every day, and all day Sunday. Other retail businesses are not subject to these restrictions. In earlier rounds of this litigation, Indianapolis contended that closure would curtail secondary effects, but we concluded that the evidence it offered was weak, contested in material respects, or concerned different kinds of businesses or different kinds of laws, such as minimum distances between adult outlets rather than closure. See 581 F.3d 460 (7th Cir. 2009); 624 F.3d 368 (7th Cir. 2010). The district court then held a trial. Indianapolis gave a single justification: fewer armed robberies at or near adult bookstores. The district court found this adequate and entered judgment for the City. 926 F. Supp. 2d 1039 (S.D. Ind. 2013).

The current justification is weak as a statistical matter. The City did not use a multivariate regression to control for other potentially important variables, such as the presence of late-night taverns. The change in the number of armed robberies is small; the difference is not statistically significant. The data do not show that robberies are more likely at adult bookstores than at other late-night retail outlets, such as liquor stores, pharmacies, and convenience stores, that are not subject to the closing hours imposed on bookstores. And most of the harm of armed robberies falls on the bookstores (and their patrons) rather than on strangers. The secondary effects approach endorsed

by *Alameda Books* and *Playtime Theatres* permits governments to protect persons who want nothing to do with dirty books from harms created by adult businesses; the Supreme Court has not endorsed an approach under which governments can close bookstores in order to reduce crime directed against businesses that knowingly accept the risk of being robbed, or persons who voluntarily frequent their premises. As we remarked in *New Albany DVD, LLC v. New Albany*, 581 F.3d 556 (7th Cir. 2009), adults may decide for themselves what risks to run by the literature they choose, and cities must protect readers from robbers rather than reduce risks by closing bookstores. Cf. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (fear that readers will act unwisely does not justify restricting otherwise-lawful speech).

That the City's regulation takes the form of closure is the nub of the problem. Justice Kennedy, whose vote was essential to the disposition of *Alameda Books*, remarked that "a city may not regulate the secondary effects of speech by suppressing the speech itself." 535 U.S. at 445 (opinion concurring in the judgment). Yet that's what Indianapolis has done. The benefits come from closure: shuttered shops can't be robbed at gunpoint, and they lack customers who could be mugged. If that sort of benefit were enough to justify closure, then a city could forbid adult bookstores altogether.

Indianapolis observes that customers are free to patronize stores during the hours they are allowed to be open. As the City depicts things, there is no loss to speech—anyone who wants any magazine, book, or

movie can get it, eventually—and some gain in the reduction of armed robberies. With even a little gain on one side, and no loss on the other, the City maintains that it must prevail.

To test the proposition that delay in obtaining reading matter does not cause loss, we put a hypothetical at oral argument. Suppose Indianapolis were to prohibit the distribution of newspapers on Sundays. (Just newspapers: our hypothetical law differs from a general Sunday-closing statute. See *McGowan v. Maryland*, 366 U.S. 420 (1961).) Closure could achieve multiple benefits, including a reduction in the number of traffic accidents (newspapers generate lots of traffic because trucks deliver newsprint to plants and printed papers throughout the region; home delivery carriers may drive their own cars); a reduction in robberies of paper deliverers, who may be on the street when few others are awake to protect them; and a reduction in the newspaper's carbon footprint and other pollutants. All the news (and ads) now in the Sunday paper could appear in Monday's paper, so readers would retain access, and anyone who wants upto-the-minute news could get it on the Internet while avoiding accidents, robberies, and pollution. The lawyer representing Indianapolis was shocked at the idea, however; he proclaimed that the City could not do such a thing consistent with the first amendment.

What is the difference between preventing a newspaper from selling paper copies on Sunday (or before 10 a.m.) and preventing an adult bookstore from selling paper copies on Sunday (or before 10)? Not secondary effects: the harms to third parties caused by a newspaper likely exceed those caused by an adult

bookstore. The difference lies in the content of the reading material. Indianapolis likes G-rated newspapers but not sexually oriented books, magazines, and movies. Yet neither *Alameda Books* nor *Playtime Theatres* permits units of government to stop the distribution of books because their content is objectionable, unless the material is obscene. See also, e.g., *United States v. Stevens*, 559 U.S. 460 (2010) ("crush videos" cannot be suppressed); *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), affirmed summarily, 475 U.S. 1001 (1986) (material that is pornographic, but not obscene, cannot be suppressed). Indianapolis does not contend that any of the plaintiffs sells obscene material; it follows that objection to the plaintiffs' stock in trade cannot justify closure.

The judgment of the district court is reversed, and the case is remanded with instructions to enter an injunction against enforcement of the closure ordinance.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. 1:03-cv-00918-SEB-TAB

[Filed February 25, 2013]

ANNEX BOOKS, INC., NEW FLICKS, INC. d/b/a New Flicks, LAFAYETTE VIDEO & NEWS, INC. d/b/a Lafayette Video & News, KEYSTONE VIDEO & NEWSSTAND, INC d/b/a Keystone Video, SOUTHERN NIGHTS, INC.,

Plaintiffs,

vs.

CITY OF INDIANAPOLIS,

Defendant.

ORDER UPHOLDING CONSTITUTIONALITY OF CHAPTER 807 OF THE REVISED CODE OF THE CONSOLIDATED CITY AND COUNTY OF INDIANAPOLIS

This matter was tried to the Court on October 17-19, 2012, presenting the constitutional issues arising under the First and Fourteenth Amendments

relating to Chapter 807 of the Revised Code of the Consolidated City and County of Indianapolis ("City-County Code"), which ordinance governs the licensing and regulation of adult entertainment establishments. Plaintiffs, Annex Books, Inc., New Flicks, Inc. d/b/a New Flicks, Lafayette Video & News, Inc., d/b/a Lafayette Video & News, Keystone Video & Newsstand, Inc., d/b/a Keystone Video, and Southern Nights, Inc., are adult bookstores within the meaning of Ordinance 87,2003 ("the Ordinance").[1]

This is not our first encounter with these issues. Indeed, this litigation has a long history before our court as well as the Court of Appeals. When this cause of action was originally filed, Plaintiffs sought declaratory and injunctive relief prohibiting the enforcement of Chapter 807, as amended, which they contended violated their rights under the First and Fourteenth Amendments. On November 3, 2003, after a hearing, the Court preliminarily enjoined enforcement of the Ordinance pending "further order of the Court or a final resolution of the merits of the case." Docket No. 51, at 9. Defendant, the City of Indianapolis ("the City"), subsequently agreed to refrain from enforcing the Ordinance until a final decision on the merits was rendered. On April 1, 2005, the Court entered final judgment in favor of the City holding that enforcement of Chapter 807 did not violate Plaintiffs' constitutional rights.

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[1] During the period of time when the Ordinance was not being enforced, Plaintiff New Flicks ceased its business operations and has not reopened. Thus, the parties have agreed that any injunctive relief is moot as to New Flicks.

Plaintiffs appealed that ruling and, on September 3, 2009, the Seventh Circuit affirmed the Court's judgment regarding the licensing procedure set out in the Ordinance, but reversed and remanded the case for an evidentiary hearing on the First Amendment issues. The mandate from the Seventh Circuit was issued on November 3, 2009. On remand, Plaintiffs requested and were granted leave to file a second amended complaint to include a claim for damages. On November 6, 2009, Plaintiffs also filed a motion for preliminary injunction requesting that the Court enjoin the City from enforcing Chapter 807 until a final decision could be reached on the merits. On December 2, 2009, after a hearing during which both sides presented evidence and argument, the Court granted Plaintiffs' request for injunctive relief, enjoining the City from enforcing Chapter 807 until further order of the Court. That decision was affirmed by the Seventh Circuit on October 1, 2010.

The trial having now been completed, during which the Court received and considered documentary and testimonial evidence as well as heard the parties' oral arguments, we now hold that the Ordinance is valid under the First Amendment and may be enforced according to its terms.

Ordinance 87,2003 was approved by the City-County Council on October 6, 2003, and signed into law on October 14, 2003. Chapter 807 of the City-County Code regulates adult entertainment establishments, and, under the definitions set out in § 807-103, each of the plaintiffs qualifies as an "adult bookstore." Specifically, the Ordinance defines an adult bookstore as "an establishment having at least

twenty-five percent (25%) of its (1) retail floor space used for the display of adult products; or (2) stock in trade consisting of adult products; or (3) weekly revenue derived from adult products."

Among other things, the Ordinance requires that Plaintiffs be licensed and that they close their store operations between midnight and 10 a.m. six days a week and remain closed all day on Sundays. The Ordinance also requires businesses with video booths to comply with section 807-301(h), which includes booth configuration, employee monitoring, and minimum lighting requirements.[2] Each of the Plaintiffs offers adult oriented videos for sale, rental or display, as well as magazines and other materials. Annex Books is the only plaintiff that offers coin operated machines allowing its patrons to view sexually oriented videos in booths on the store's premises. The Ordinance was in effect between June 1, 2005 and December 2, 2009, prior to our issuance of the preliminary injunction.

Because the Ordinance is directed toward regulating secondary effects, it need survive only intermediate scrutiny. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J. concurring). A law satisfies the intermediate scrutiny test so long as it is "designed to serve a substantial governmental interest and [does] not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *see also Alameda Books*, 535 U.S. at 434. "Laws are designed to serve a

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[2] Plaintiffs are not challenging the provisions addressing booth configuration, employee monitoring, and lighting requirements.

substantial government interest when the 'municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.'" *Andy's Restaurant & Lounge, Inc. v. City of Gary*, 466 F.3d 550, 555 (7th Cir. 2006) (quoting *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 408 (7th Cir. 2004)). To assess the sufficiency of this connection, courts must "examine evidence concerning regulated speech and secondary effects." *Alameda Books*, 535 U.S. at 441 (citing *Renton*, 475 U.S. at 50-52). "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52.

In its decision remanding the case for an evidentiary hearing on the substantive First Amendment issues, the Seventh Circuit held that in order for the revised Ordinance to pass constitutional muster, the City must present evidence that adult book or video stores without live entertainment or private booths, open after midnight, or on Sunday, cause adverse secondary effects sufficiently severe to justify the curtailment of speech which results from the City's post-2003 system of regulation. *See Annex Books, Inc. v. City of Indianapolis, Ind.*, 581 F.3d 460, 465-67 (7th Cir. 2009) ("*Annex Books I*"). Thus, the City must establish: first, that adult entertainment businesses lacking facilities for on-premise viewing create the same secondary effects as establishments providing those services, and second, that the revised Ordinance

requiring Plaintiffs to close from midnight to 10:00 a.m. Monday through Saturday and all day on Sunday "has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 465 (quoting *Alameda Books, Inc.*, 535 U.S. at 449 (Kennedy, J., concurring)).

In determining whether the City has met its burden as elucidated by the Seventh Circuit in *Annex Books I*, we again rely heavily on the parties' respective analyses of the crime statistics in Indianapolis before and after enforcement of the revised Ordinance.[3] We relied on a portion of these same statistics in our December 2, 2009 Order granting Plaintiffs' request for a preliminary injunction. However, we made clear in that ruling that the evidence and argument presented by the parties was only preliminary and that the statistical evidence would need further development at the full evidentiary hearing. Having now had the opportunity to review and evaluate the fully developed

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[3] Much of the other evidence in the record before us, including a number of studies on which the City relied to justify the adoption of revised Chapter 807 and which it continues to cite in this litigation in support of the revised ordinance, was criticized by the Seventh Circuit in *Annex Books I*. Judge Easterbrook, writing for the panel, highlighted various deficiencies in those studies. He noted, for example, that none of the studies specifically dealt with the type of ordinance at issue here, to wit, an hours of operation restriction, nor did any of the studies assess the effects of stores that sell as little as 25% adult products, such as the businesses covered under the City's revised ordinance. Moreover, many of the studies concerned adult businesses that offer on-premise viewing booths, live shows, or both, while only one of the Plaintiffs in this lawsuit, to wit, Annex Books, offers such entertainment. Accordingly, the weight we accord these studies is greatly diminished in the Court's current analysis.

evidence, including the proffered statistical analyses, we hold for the reasons detailed below that the City has succeeded in making the necessary showing detailed in *Annex Books I* to satisfy the Constitutional requirements.

First, consistent with the first prong of the test elucidated in *Annex Books I*, we find that the City has presented sufficient evidence to establish a reasonable basis for its legislative finding that adult businesses without on-premises viewing cause secondary effects similar to those caused by adult businesses offering such activities. As noted above, in reaching this conclusion, we rely heavily on the comparative crime statistics in Indianapolis before and after the Ordinance went into effect. Both parties' experts testified regarding the advantages associated with the use of before and after studies in which crime data in the vicinity of a sexually oriented business is collected for a time period before and after some change in its operation as a method of assessing secondary effects. In such a study, the sexually oriented business serves as its own control, eliminating many of the challenges associated with finding an area sufficiently similar to the area surrounding the sexually oriented business on characteristics known to be associated with crime to act as a control.

Here, the City studied Uniform Crime Reporting Part I crimes ("UCR Part I crimes")[4] that occurred

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[4] The FBI has administered the Uniform Crime Reporting Program since 1930. There are eight crimes classified as Part I crimes within the UCR system, including the violent/person crimes of murder and nonnegligent manslaughter, forcible rape, robbery,

within 500 feet of Plaintiffs' businesses during the pre-enforcement and enforcement periods.[5] This data, collected in a 2009 study ("the 2009 data"),[6] is the same data analyzed in our December 2, 2009 Order granting Plaintiffs' request for a preliminary injunction. In that Order, while noting the early juncture at which we were making our decision, we held that the City had failed to meet its burden as explicated in *Annex Books I* because, although there was statistical evidence from that 2009 study showing that violent/person crime (as opposed to property crime) had decreased while the Ordinance was in effect, the actual numbers were too small to be considered statistically significant so as to justify the reduction in speech effected by the Ordinance. However, having now had the benefit of further development and explanation of the data by the parties' experts at the evidentiary hearing, we

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and aggravated assault, and the property crimes of burglary, larceny-theft, and motor vehicle theft. Arson was subsequently added as the eighth Part I offense category.

[5] The pre-enforcement period ran from April 2002 through May 2005 (38 months) and the enforcement period was June 2005 through March 2008 (34 months). At the evidentiary hearing, Dr. Lintz opined that the four month difference between the two time periods would likely affect no more than a few crimes and the record supports this opinion. *See* Exh. P at 2, 12 (showing that only two crimes occurred at Plaintiffs' addresses between April and July 2008, neither of which occurred during the hours regulated by the Ordinance). Accordingly, this discrepancy is not material to our analysis.

[6] Plaintiff Southern Nights was included in all of the parties' original filings and remains listed on the Court's docket as a plaintiff in this litigation. However, it is not included in the 2009 data.

understand the data more fully. The expert testimony proffered at the hearing highlighted the importance of shifting our focus from simply the raw numbers of crimes to include an analysis of the underlying nature of those crimes as a way of putting the numbers in context.

At the evidentiary hearing, the City provided substantially more detail underlying the 2009 data. Specifically, the City reviewed the police reports to identify the type of Part I crime reflected in the 2009 data as well as the specific address(es) at which each crime occurred. On this basis, the City ranked the addresses within each 500 foot circle surrounding Plaintiffs' bookstores[7] according to the number of crimes that occurred at each of the addresses within that area. The evidence shows that, in the pre-enforcement period, a total of 107 violent/person crimes occurred at all addresses within the 500-foot circles surrounding Plaintiffs' locations, 21 of which occurred *at* the five adult bookstore addresses (the four plaintiffs and another adult bookstore, Video Gallery). Thus, approximately 20% of all violent/person crimes during the pre-enforcement period occurred at the adult bookstore addresses, even though the five adult bookstores represent only 3% of the 152 total addresses within the 500 foot circles that had at least one UCR Part I crime during the period. Of those 21 violent/person crimes, 18 were armed robberies, and those 18 armed robberies at the adult bookstore

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[7] According to Dr. McCleary's testimony, the 500 foot circumference (which is tantamount to an average city block) is a commonly used distance in secondary effects studies for both practical and empirical reasons.

addresses account for 46% of the total number (39) of armed robberies that occurred during the pre-enforcement period in all of the 500-foot circles. *See* Exh. M-4; Exh. M-5; and Exh. M-6.

Both parties' experts have endorsed and employed the use of this hotspot analysis, to wit, the ranking of addresses in a particular area based on crimes occurring at them. They agree that this is a recognized method of assessing secondary effects. Here, during the pre-enforcement period, Lafayette Video & News was ranked first in its buffer area for both total UCR crimes as well as armed robberies. In its area, New Flicks Video was third for total UCR crimes and first in armed robberies. Keystone Video & Newsstand was second in its circle behind the CVS Pharmacy in both total UCR crimes and armed robberies. Plaintiff Annex Books and another adult store, Video Galley, are located within the same 500-foot circle, and within that area, Annex Books and Video Gallery were third and fifth, respectively, in total UCR crimes and ranked first and second in armed robberies. *See* Exh. M-6. These rankings are consistent with Dr. McCleary's conclusion that adult bookstores are hotspots for serious crime, including armed robberies. *See* Exh. V at 2 (McClearly 2004 expert report: "The adverse secondary effects of [sexually oriented businesses] ordinarily involve robbery, ….").

The evidence also established that, during the period of time when the Ordinance was being enforced, overall violent/person crime, including the number of armed robberies, decreased at the adult bookstores, with the greatest decreases in total UCR Part I crimes (over 50%) coming during the regulated hours. *See* Exh.

M-4; Exh. M-5; Exh. M-6. Specifically, total UCR Part I crimes at Plaintiffs' and Video Gallery's addresses decreased during the overnight hours (midnight to 10 a.m.) from 12 crimes preenforcement to 5 crimes during the enforcement period and, on Sundays, from 8 crimes pre-enforcement to 3 crimes after. Exh. M-4. Total armed robberies committed at the adult bookstores during the regulated hours (overnight hours and Sundays combined) decreased from 8 during the period before the Ordinance was enforced to 0 during enforcement. *See* Exh. M-5. During the period of enforcement, violent/person crime as a whole decreased approximately 44% during the overnight hours within the 500 foot circles surrounding the bookstores, while violent/person crime in the balance of the IPD District rose almost 12% during that same time period. *See* Exh. 7A.

To support their claims, Plaintiffs focus on the fact that, within the 500-feet circles surrounding Plaintiffs' premises, property crime and total UCR Part I crime rates as well as violent/person crime on Sundays all increased during the enforcement period. Specifically, property crime increased by: 16% overall; 32% during the overnight hours; and 20% on Sundays. Exh. 7. Overall UCR Part I crimes also increased in those areas by: 9% overall; 12% during the overnight hours; and 37% on Sundays. *Id.* Finally, Plaintiffs highlight that, although the violent/person crime rate decreased significantly in the 500-foot circles both overall as well as specifically during the overnight hours as described above, it increased from 8 to 19 crimes (138%) on Sundays during the enforcement period in the 500-foot circles surrounding Plaintiffs' locations. *Id.* Based on the overall testimony and evidence presented at trial,

however, we are not persuaded that this excerpted data support a reliable conclusion.

The trial testimony establishes that focusing on violent/person crime both in the 500-foot circles surrounding Plaintiffs' bookstores, and even more narrowly, on violent/person crime occurring at the Plaintiffs' specific addresses, as opposed to total crime or property crime in this context is, for a number of reasons, more reasonable. First, one of the main challenges related to the assessment of secondary effects identified by the experts is the difficulty associated with accurately determining the time and exact location at which individual crimes occur in order to collect reliable data. Many property crimes, for example, cannot be reported in detail because the details are unknown (*e.g.* often property crimes like break-ins occur when the victim is away from his or her home or vehicle so the victim is unable to pinpoint with precision when the crime occurred). In contrast, because violent/person crimes involve a witness, usually the victim, the details of such crimes are generally more accurately reported, including the specific act that occurred as well as the time and location of the crime. Moreover, the City's expert, Dr. Richard McCleary, testified that relying on property crime rates in assessing secondary effects can be problematic because the property crime category is overwhelmed with larceny, and yet there are very few larcenies involved in secondary effects.[8] Dr. McCleary

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[8] Consistent with Dr. McCleary's opinion, the evidence shows that a significant percentage of the property crimes reflected in the 2009 data consist of shoplifting and larcenies occurring at Menards. *See* Exh. M-6.

also testified that property crimes occur much more frequently than violent/person crime; thus, fluctuations in property crime can have a disproportionate effect on the total crime rate as well.

Plaintiffs' expert, Dr. Daniel Lintz, among other witnesses, testified that there can be inaccuracies in coding crimes to particular locations when, as is true here, the 500-foot area around a sexually oriented business includes a large retail establishment or a strip mall or shopping center. Some large businesses have multiple addresses, which can lead to police reporting errors. Retail establishments located within strip malls and shopping centers may also affect the reliability of the data because it is common for the strip mall or shopping center to have a single address while the individual establishments and stores have suite numbers. If a police officer does not know the respective suite number of a particular establishment or store, the officer may assign a crime incident to an address belonging to the entire shopping center rather than the particular store at which the crime actually occurred, which clearly might skew the data. Dr. Lintz further testified that large parking lots that adjoin such businesses might also affect data, especially property crime numbers because property crimes happen with increased frequency at such locations. Another reliability issue noted by the experts arises when, as the experts testified here, a significant number of crimes are coded to intersections rather than specific addresses because in those cases, the exact location of the crime is not always discernible. The data collecting difficulties referenced here, while carefully considered by us, have not undermined our overall conclusion, however.

We found the testimony of both parties' experts who opined that one way to minimize such potential reliability issues is to review the underlying police reports, rather than relying merely on the machine-readable data, helpful and enlightening. In his testimony, Dr. Lintz agreed that such an approach yields a more accurate assessment of the actual relationship between the adult bookstores and the offenses that occurred within the 500 foot circles.[9] In both his expert report and in his testimony, Dr. McCleary explained that he had identified numerous reliability issues associated with much of the machine-readable data he had received from Indianapolis, making it difficult to render opinions based on that data. However, he testified that manually reading a small sample of the police reports underlying the machine-readable data is a feasible way to collect reliable information. Both Lynn Phelps, the City's UCR coding specialist, and Jean Ritsema, the City's crime data facilitator, also testified regarding various difficulties inherent in crime-data collection and emphasized the importance of reading the underlying police reports in order to obtain reliable information about crime in Indianapolis.

As noted previously, the City used this method endorsed by the experts, namely, conducting a review of the underlying police reports, in order to create the detailed exhibits it submitted during the evidentiary hearing, which distinguished between the crimes committed at the bookstore addresses and the other addresses within the 500-foot circles and ranked those

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[9] Dr. Lintz himself used this method in his studies in Seattle, Richmond, and Rancho Cordova, California.

addresses within the 500-foot circles by number of crimes. The data contained in the supplemental exhibits presented by the City comprises the only evidence reflecting the underlying police reports. This more detailed and nuanced data shows that, during the period of time when the Ordinance was being enforced, the greatest decreases in total UCR Part I crimes (over 50%) occurred during the regulated hours, and overall violent/person crime, including the number of armed robberies, also decreased at the adult bookstores during the enforcement period. Moreover, although it is true as Plaintiffs point out that violent/person crime on Sundays increased significantly during the enforcement period in the 500-foot circles surrounding the adult bookstores, when the focus is turned specifically on the adult bookstore addresses, the data reveals that total UCR Part I crime decreased by over 50% (from 8 incidents pre-enforcement to 3 after) on Sundays at the adult bookstores themselves, and violent/person crime incidents at the adult bookstores on Sundays decreased from 3 incidents to 0. *See* Exh. M-4; Exh. M-5.

As a final matter, the evidence establishes that violent/person crimes occur less frequently and are generally more serious than property crimes. For example, though armed robbery is a very rare crime relative to other offenses, it is extremely dangerous, sometimes even resulting in homicide.[10] Thus, while these raw numbers as such appear small, the City nevertheless has a clear and significant interest in

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[10] In 1997, before the adoption of the ordinance, an individual was shot and killed during the commission of an armed robbery at Plaintiff Lafayette Video & News.

reducing incidences of serious crimes such as armed robbery. The testimony established that, merely because the numbers are small, they are not necessarily insignificant. For example, Dr. McCleary testified that statistically speaking a randomly chosen hypothetical person in Indianapolis would have to wait 245 years before being a victim of an armed robbery. He further testified that, if an address or intersection in Indianapolis were chosen at random, one would have to wait approximately 99.1 years before an armed robbery occurred there. However, during the approximately six year period on which the summary of 2009 data is based, 26 armed robberies at the five adult bookstores (four Plaintiffs and Video Gallery) occurred. Thus, because armed robberies on the whole occur so infrequently, it is clear that the numbers attributable to the adult bookstores are in fact quite significant. This conclusion is consistent with Dr. McCleary's view that these locations, even those without live entertainment are hotspots for armed robbery.[11]

Our conclusion is further buttressed by an examination of evidence relating to areas outside of Indianapolis. As Judge Easterbrook noted in *Annex*

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[11] Although Plaintiffs' expert, Dr. Daniel Lintz, testified that he would not consider Plaintiffs' businesses to be hotspots for crime because the raw numbers reflected in the 2009 data were de minimis, he did concede that, in determining whether a particular address was a hotspot, the type of crimes underlying the numbers would be information that would factor into his decision. He went on to testify that, even if a particular address would not be a hotspot for crime in general because the crime numbers were too small, it would still be possible for that location to be a hotspot for a particular type of crime.

Books I, the City is not required to use "local" evidence to show that adult businesses without on-premise viewing cause similar secondary effects as businesses that do offer such services. Apparently relying on that guidance, the City introduced an article co-authored by its expert, Dr. McCleary, which, based on his research, including his study conducted in Sioux City, Iowa, establishes a link between adult bookstores without live entertainment or private viewing and secondary effects crimes. Richard McCleary & Alan C. Weinstein, *Do "Off-Site" Adult Businesses Have Secondary Effects? Legal Doctrine, Social Theory, and Empirical Evidence*, 31 Law & Policy 217-35 (2009) ("McCleary Article"). In the McCleary Article, the authors theorize that: "To the extent that on-site and off-site adult bookstores attract high-value targets from wide catchment areas, both business types are expected to attract predators to their neighborhoods, thereby generating ambient victimization risk." *Id.* at 223. In support of that conclusion, the authors cited to a Sioux City case study, which showed that crime rose 190% in the area within 500 feet of a new off-site viewing adult bookstore, while crime in a comparable control area rose only 25% during the same period. *Id.* at 223-25. The study also revealed that the most significant increase in crime occurred during the store's "overnight shift" from 8:00 p.m. to 3:59 a.m. *Id.* at 227-28.

The data in the McCleary Article also address some of the concerns expressed by Judge Easterbrook regarding the evidence initially relied upon by the City in enacting the Ordinance. Unlike those studies, the Sioux City study focused on an adult bookstore without live entertainment and, although the statute at issue there was not an hours of operation ordinance, the

study did include a breakdown of crime statistics for daytime versus overnight hours. At the evidentiary hearing, Dr. McCleary testified that not only did crime increase after the adult bookstore opened in Sioux City, but the character of the crimes observed changed as well, such that, before the store opened, there were no incidences of crimes where life was at risk, but, after it opened, more serious crimes began to occur. Although this evidence is not by itself determinative of our decision here, the data from Indianapolis coupled with the Sioux City case study are highly persuasive as well as probative in establishing that adult bookstores without live entertainment cause similar secondary effects as adult businesses that do provide live viewing booths.[12]

Having concluded that the City has shown a reasonable basis for its finding that adult bookstores without live entertainment create similar secondary effects as those with such offerings, and that when the Ordinance was in effect those secondary effects were reduced to some degree, we now turn to the issue of whether the reduction in crime attributable to the

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[12] In our December 2, 2009 Order granting Plaintiffs' request for a preliminary injunction, we noted that Dr. McCleary's Sioux City study had been heavily criticized in *Dr. John's Inc. v. City of Sioux City*, 438 F. Supp. 2d 1005 (N.D. Iowa 2006), where Dr. McCleary's data was originally submitted in support of Sioux City's regulation of an adult bookstore. However, in response to the court's criticisms, Dr. McCleary supplemented the data, using larger data sets and evaluating crimes within 500 feet of the adult bookstore instead of fifty feet to address the concerns raised by the court in *Dr. John's*. Because the conclusions contained in the McCleary Article are now buttressed by the expanded data, the prior criticisms of the study carry less weight in our analysis.

Ordinance is sufficient to justify the corresponding reduction in speech. This is neither an easy nor a straightforward determination. As Judge Easterbrook recognized in *Annex Books I*: "[B]ecause crime and speech cannot be reduced to a common metric, a direct comparison (how much speech should be sacrificed to achieve how much reduction in crime?) is difficult if not impossible." 581 F.3d at 465-66. However, in an effort to make such a calculation in a way that embraces a rigorous analysis of the evidence presented by the parties, while affording the City "the benefit of the doubt," (*id.* at 466), we hold that the City has shown that the public benefits flowing from the Ordinance are sufficient to justify the regulation without an unjustified, substantial decrease in freedom of speech.

Plaintiffs attempted to correlate a decline in sales with a decline in speech, but the evidence showed that sales at the stores were declining before enforcement of the Ordinance, and, in fact the pre-enforcement declines in sales were in a number of cases greater than the declines in sales during the enforcement period. Moreover, as the Supreme Court recognized in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), although it is often commercial distributors of speech who are in a position to assert the kind of claims asserted here, the First Amendment's concern is not a seller's access to profits, but rather "the central First Amendment concern remains the need to maintain free access of the public to the expression." *Id.* at 77.

Here, no evidence was introduced showing that any book, film, video or magazine was taken off of the shelves or made unavailable to a patron as a result of

the Ordinance. Nor was there evidence that any patron was unable to access speech during the enforcement period because he or she could visit the stores only on Sundays or between the hours of midnight and 10:00 a.m. Additionally we note, and the parties have stipulated, that, although adult bookstores are currently free to operate twenty-four hours a day, seven days a week, none of Plaintiffs' stores actually do so. According to the parties' stipulation, Keystone and Annex Books are open 9:00 a.m. to 3:00 a.m., seven days a week. Lafayette is open 10:00 a.m. to midnight, Monday through Thursday as well as on Sunday. On Friday and Saturday nights, Lafayette's hours are 10:00 a.m. to 3:00 a.m. New Flicks went out of business during the time period when the Ordinance was not being enforced and it has not reopened.

Given these facts, there is no persuasive support for a conclusion that the opportunity to purvey expressive materials of the nature sold at Plaintiffs' businesses is curtailed to a significant degree by the Ordinance. We are persuaded that the remaining hours of opportunity for an unfettered dissemination of speech under the Ordinance are sufficient to satisfy the First Amendment and that the Ordinance is not "substantially broader than necessary" to further the City's legitimate interest in reducing the secondary effects described above. *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). In fact, we note, similar hours restrictions have previously been upheld by the Seventh Circuit against First Amendment challenges in other analogous cases. *See Andy's Restaurant*, 466 F.3d at 555-56 (upholding ordinance which, among other regulations, limited operating hours of sexually oriented businesses to 10:00 a.m. to 11:00 p.m., seven

days a week); *Schultz v. City of Cumberland*, 228 F.3d 831, 846 (7th Cir. 2000) (upholding a provision of an ordinance "limiting the business hours for sexually oriented businesses to be between 10 a.m. and midnight, Monday through Saturday").

For these reasons, we hold that the City has presented sufficient evidence to establish that the Ordinance satisfies the intermediate scrutiny test set out in *Alameda Books* and its progeny. Accordingly, we declare that the Ordinance 87,2003 is valid under the First Amendment and is thus enforceable by the City. Final judgment shall issue accordingly.

IT IS SO ORDERED.

Date: 02/25/2013

/s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. 1:03-cv-00918-SEB-TAB

[Filed February 25, 2013]

ANNEX BOOKS, INC., NEW FLICKS, INC. d/b/a New Flicks, LAFAYETTE VIDEO & NEWS, INC. d/b/a Lafayette Video & News, KEYSTONE VIDEO & NEWSSTAND, INC d/b/a Keystone Video, SOUTHERN NIGHTS, INC.,	)
Plaintiffs,	)
vs.	)
CITY OF INDIANAPOLIS,	)
Defendant.	)

JUDGMENT

Pursuant to the Court's ruling simultaneously entered on this date, it is adjudged that Ordinance 87,2003 is valid under the First Amendment and is thus enforceable by the City of Indianapolis. Accordingly, final judgment is hereby entered in favor of Defendant and against Plaintiff.

IT IS SO ORDERED.

Date: 02/25/2013

/s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 13-1500

[Filed February 24, 2014]

ANNEX BOOKS, INC. , *et al*., *Plaintiffs-Appellants*,	)
v.	)
CITY OF INDIANAPOLIS, INDIANA, *Defendant-Appellee*.	)

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:03-cv-00918-SEB-TAB
Sarah Evans Barker, *Judge*.

Before

JOEL M. FLAUM, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

Order

Defendant-appellee filed a petition for rehearing and rehearing en banc on February 7, 2014. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 09-4156

[October 1, 2010]

ANNEX BOOKS, INC., *et al.*,

Plaintiffs-Appellees,

v.

CITY OF INDIANAPOLIS, INDIANA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 03-CV-00918 SEB TAB—
Sarah Evans Barker, *Judge*.

ARGUED SEPTEMBER 20, 2010—DECIDED OCTOBER 1, 2010

Before EASTERBROOK, *Chief Judge*, and FLAUM and ROVNER, *Circuit Judges*.

PER CURIAM. This suit began when the City of Indianapolis required adult bookstores to be closed all day on Sunday and between midnight and 10 a.m. on other days. We held last year that the empirical support for this ordinance was too weak to satisfy the requirement of intermediate scrutiny, which applies to

such laws. 581 F.3d 460 (7th Cir. 2009), relying on *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The existing record concerned only laws affecting businesses that offered live entertainment (which plaintiffs do not) or dispersing adult businesses; the law in Indianapolis requires closure rather than dispersal and covers stores that sell only books and videos for reading or viewing at home. The City needs evidence about the effects of the sort of law it enacted. We suggested that experience in Indianapolis itself could supply the required data: Before the City's ordinance took its current form, plaintiffs had been treated like other bookstores, so it should be possible to find out whether the new closing hours reduced crime or produced other benefits. 581 F.3d at 463.

After the remand, plaintiffs asked the district court to enter a preliminary injunction. A hearing was held, at which Indianapolis offered a single piece of evidence: Richard McCleary & Alan C. Weinstein, *Do "Off-Site" Adult Businesses Have Secondary Effects? Legal Doctrine, Social Theory, and Empirical Evidence*, 31 L. & Policy 217 (2009). The authors concluded that dispersing adult stores that sell for off-site reading or viewing reduced crime in Sioux City, Iowa. Indianapolis contended that this article supports its ordinance too. The district judge was skeptical, and entitled to be so, for three reasons.

First, McCleary and Weinstein studied the effects of a dispersal ordinance rather than an hours-of-operation ordinance. McCleary and Weinstein hypothesized that several adult businesses located nearby draw people who pay with cash and thus are attractive to thieves,

but that when businesses are dispersed the critical mass of "soft targets" is missing and any given patron is less likely to be robbed. (Justice Kennedy had hypothesized much the same thing in *Alameda Books*, 535 U.S. at 452–53 (concurring opinion).) An hours-of-operation ordinance, by contrast, does not reduce the density of cash-carrying patrons and may increase it, because, when stores are open fewer hours, there may be more patrons per hour. Second, we suggested in *New Albany DVD, LLC v. New Albany*, 581 F.3d 556 (7th Cir. 2009), that readers may decide for themselves what risks to run, and that cities must protect readers from robbers rather than reduce risks by closing bookstores. Third, the McCleary & Weinstein study did not attempt to control for other variables, such as the opening (or closing) of taverns, that may account for a change in the rate of crime near adult businesses. Our opinion had observed that a multivariate regression is superior to a simple cross-tabulation of the sort that McCleary and Weinstein conducted. 581 F.3d at 464.

In response to the McCleary & Weinstein article, plaintiffs offered arrest data from Indianapolis itself. The number of arrests near plaintiffs' stores did not go down when the revised ordinance took effect, and in some areas arrests rose. Plaintiffs did not subject these numbers to statistical analysis; like the City, plaintiffs did not attempt to control for other variables, and the numbers are sufficiently small that we doubt that the standard tests of statistical significance have been satisfied. But these data do imply that the change in the plaintiffs' business hours did not produce any measurable benefit. And, as mandatory closing of bookstores curtails speech, the district court concluded that the ordinance had not been justified. The judge

entered a preliminary injunction. 673 F. Supp. 2d 750 (S.D. Ind. 2009).

Appellate review of an order granting or denying a motion for a preliminary injunction is deferential. *Ashcroft v. ACLU*, 542 U.S. 656, 664–65 (2004). The district judge did not abuse her discretion. The single article that Indianapolis offered suffers some of the shortcomings of the evidence we evaluated last year: it concerns a dispersal ordinance rather than an hours-of-operation limit, and the authors did not attempt to control for other potential causes of change in the number of arrests near adult establishments. The other new evidence, derived from experience with this ordinance in Indianapolis, appears to support the plaintiffs (though a statistical analysis might show that the support is illusory). Given the state of the record, the district court's decision is sound. The parties should devote their energies to compiling information from which a reliable final decision may be made after a trial on the merits.

AFFIRMED

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

1:03-cv-918-SEB-TAB

[Filed December 2, 2009]

ANNEX BOOKS, INC., et al.	)
	)
Plaintiff,	)
	)
vs.	)
	)
CITY OF INDIANAPOLIS,	)
	)
Defendant.	)
	)

ENTRY GRANTING A PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction [Docket No. 112], filed on November 6, 2009, pursuant to Federal Rule of Civil Procedure 65.[1] Specifically, Plaintiffs, Annex Books,

[1] The Court has interpreted Plaintiffs' motion for temporary restraining order and preliminary injunction as a motion for preliminary injunction because Plaintiffs seek relief for a time period which could last more than twenty days. A temporary restraining order that remains in force longer than twenty days must be treated as a preliminary injunction. Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd., 496 F.3d 769, 771 (7th Cir. 2007).

Inc., New Flicks, Inc., d/b/a New Flicks, Lafayette Video and News, Inc., d/b/a Lafayette Video and News, and Keystone Video and Newsstand, Inc., d/b/a Keystone Video, seek preliminary relief enjoining Defendant, the City of Indianapolis ("the City"), from enforcing against Plaintiffs Chapter 807 of the Revised Code of the Consolidated City and County of Indianapolis, Marion County ("City-County Code"), the enforcement of which Plaintiffs allege violates their rights secured by the First and Fourteenth Amendments. A hearing was held on November 25, 2009, at which the parties presented evidence and oral argument.

Having considered the parties briefing, the documentary evidence, and oral argument, for the reasons detailed below, the Court GRANTS Plaintiffs' motion.

Factual and Procedural Background

At issue in this case is the constitutionality of Chapter 807 of the City-County Code, which deals with the regulation of adult businesses. In 2003, the City revised its adult-business ordinances, expanding the definition of "adult entertainment business" to include any retail outlet that obtains at least 25% of its revenue from or devotes 25% or more of its space or inventory to adult books, magazines, films, and devices, and requiring any such business to close between the hours of midnight and 10 a.m., Monday through Saturday, as well as prohibiting them from engaging in the sale of materials at any time on Sundays. See Indianapolis Rev. Code §§ 807-103, -202(a), -301(f), -302. Plaintiffs are all businesses that fall within the

revised definition of adult entertainment business under the ordinance.

When this case originally came before the court, Plaintiffs sought declaratory and injunctive relief prohibiting the enforcement against them of Chapter 807, as amended, which they maintained violated their rights under the First and Fourteenth Amendments. On November 3, 2003, after a hearing on the merits, the Court enjoined enforcement of the ordinance pending "further order of the Court or a final resolution of the merits of the case." Docket No. 51, at 9. The City subsequently agreed to refrain from enforcing the ordinance until a final decision on the merits was rendered. On April 1, 2005, the Court entered final judgment in favor of the City, holding that enforcement of Chapter 807 did not violate Plaintiffs' constitutional rights. Plaintiffs appealed and, on September 3, 2009, the Seventh Circuit affirmed the Court's judgment regarding the licensing procedure set out in the ordinance, but reversed and remanded the case for an evidentiary hearing on the substantive First Amendment issues. The mandate from the Seventh Circuit was issued on November 3, 2009. On November 6, 2009, Plaintiffs filed the instant motion for preliminary injunction.

Legal Analysis

I. Standard of Review

The grant of injunctive relief is appropriate if the moving party is able to demonstrate: (1) a reasonable likelihood of succeeding on the merits; (2) irreparable harm if preliminary relief is denied; and (3) an inadequate remedy at law. Girl Scouts of Manitou

Council. Inc. v. Girl Scouts of the United States of America, Inc., 549 F.3d 1079, 1086 (7th Cir. 2008). If the moving party fails to demonstrate any one of these three threshold requirements, the emergency relief must be denied. Id. However, if these threshold conditions are met, the Court must then assess the balance of harm – the harm to Plaintiffs if the injunction is not issued against the harm to Defendant if it is issued – and, where appropriate, also determine what effect the granting or denying of the injunction would have on nonparties (the public interest). Id.

In determining whether to grant injunctive relief, the district court must take into account all four of these factors and then "exercise its discretion 'to arrive at a decision based on the subjective evaluation of the import of the various factors and a personal, intuitive sense about the nature of the case." Id. (quoting Lawson Products, Inc. v. Avnet, Inc., 782 F.2d 1429,1436 (7th Cir. 1986)). This process involves engaging in what is called the "sliding scale" approach, meaning that "the more likely it is the plaintiff will succeed on the merits, the less balance of irreparable harms need weigh toward its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side." Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 12 (7th Cir. 1992). The sliding scale approach "is not mathematical in nature, rather 'it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.'" Ty, Inc. v. Jones Group, Inc., 237 F.3d 891,895-96 (7th Cir. 2001) (quoting Abbott Laboratories, 971 F.2d at 12).

II. Discussion

A. Likelihood of Success on the Merits

In its ruling, the Seventh Circuit held that in order for the revised ordinance to pass constitutional muster, the City must present evidence that adult book or video stores without live entertainment or private booths, open after midnight, or on Sunday, cause adverse secondary effects sufficiently severe to justify the curtailment of speech which results from the City's post-2003 system of regulation. See Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460, 465-67 (7th Cir. 2009). Thus, in order to satisfy the burden explicated by the Seventh Circuit, the City must essentially make two showings: first, that adult entertainment businesses lacking facilities for on-premise viewing create the same secondary effects as establishments providing those services, and second, that the revised ordinance requiring Plaintiffs to close from midnight to 10:00 a.m. Monday through Saturday and all day on Sunday "has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." Id. (quoting City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 449 (2002) (Kennedy, J., concurring)). If the City is unable to produce such evidence, the revised ordinance cannot stand.

Judge Easterbrook, writing for the panel, highlighted various deficiencies in the evidence the City presented to the Seventh Circuit which called the City's justification for the revised ordinance into question. For example, none of the studies on which the City relied before crafting its revised ordinance nor those that it originally cited in support of revised

Chapter 807 in this litigation dealt with the type of ordinance at issue here (i.e., restrictions on the hours adult entertainment businesses can be open). Nor did those studies assess the effects of stores that sell as little as 25% adult products, such as the businesses covered under the City's revised ordinance. Moreover, the studies on which the City relied concerned adult businesses that offer on-premise viewing booths, live shows, or both, and three out of the four Plaintiffs in this suit do not offer such entertainment.

When the Seventh Circuit remanded the case, it had found the evidence the City had submitted up to that point in support of its revised ordinance to be deficient. Therefore, in assessing likelihood of success on the merits, we focus only on whether the new evidence the City has submitted in opposing the instant motion appears sufficient to have cured the deficiencies highlighted by the appellate court. We note that the hearing the court held on November 6, 2009 was only to address Plaintiffs' motion for preliminary injunction; the full evidentiary hearing for which the case was remanded will be held at a later date. Thus, we recognize that the evidence presented by the City at the hearing is only preliminary and that the City intends to more fully develop its statistical evidence before the evidentiary hearing. We remain mindful of that fact in light of the Seventh Circuit's recognition that "municipalities should get the benefit of the doubt" in our analysis. Annex Books, 581 F.3d at 466.

To support its conclusion that adult businesses without on-premise viewing cause the same secondary effects as adult business without such services, the City cites to an article co-authored by its expert, Dr. Richard

McCleary, which discusses a link between adult book stores without live entertainment or private viewing and secondary effects crimes. Def.'s Exh. A (Richard McCleary & Alan C. Weinstein, Do "Off-Site" Adult Businesses Have Secondary Effects? Legal Doctrine, Social Theory, and Empirical Evidence, 31 LAW & POLICY 217-35 (2009) ("McCleary Article"). In the McCleary Article, the authors theorize that: "To the extent that on-site and off-site adult bookstores attract high-value targets from wide catchment areas, both business types are expected to attract predators to their neighborhoods, thereby generating ambient victimization risk." Id. at 223. In support of that conclusion, the authors cite to a case study from Sioux City, Iowa, which showed that crime rose 190% in the area within 500 feet of a new off-site viewing adult bookstore, while crime in a comparable control area only rose 25% during the same period. Id. at 223-25. The study also revealed that the most significant increase in crime occurred during the store's "overnight shift" from 8:00 p.m. to 3:59 a.m. Id. at 227-28.

While this evidence appears to be a step in the direction required by the Seventh Circuit,[2] it is not without criticism. For example, Plaintiffs point to the Seventh Circuit's recent decision in an analogous case, New Albany DVD, LLC v. City of New Albany, 581 F.3d 556 (7th Cir. 2009), in which the court criticized the City of New Albany's justification for its adult regulation based on increased thefts as "paternalistic." Id. at 560. Plaintiffs also cite the Northern District of

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[2] Judge Easterbrook made clear in the Seventh Circuit's opinion that the City's evidence "need not be local." Annex Books, 581 F.3d at 463.

Iowa's decision in Dr. John's, Inc. v. City of Sioux City, 438 F. Supp. 2d 1005 (N.D. Iowa 2006), where Dr. McCleary's data was originally submitted in support of Sioux City's regulation of an adult bookstore. The court heavily criticized Dr. McCleary's data in that case, stating the flaws identified "cast reasonable doubt not only on the validity of Dr. McCleary's report, but on whether any municipality could reasonably have believed that his report supported the regulations at issue here." Id. at 1048-49. The City rejoins that the criticism leveled in New Albany does not apply to the McCleary Article because the authors consider all crime, not just theft. Moreover, the City asserts that, since the time that the study was criticized by the Northern District of Iowa, Dr. McCleary has refined his work, using larger data sets and evaluating crimes within 500 feet of the store instead of fifty feet to address the court's concerns.

We need not make a definitive determination on the persuasiveness of the McCleary Article at this juncture, however, because even assuming that it is sufficient to show that adult businesses without on-premise viewing cause the same secondary effects as adult businesses which do offer such services, that is not the end of our inquiry. The Seventh Circuit ruling makes clear that the City still must demonstrate that its ordinance meets Justice Kennedy's cost-benefit standard, meaning that it must advance some basis to show that its regulation "is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech." Annex Books, 581 F.3d at 465 (quoting Alameda Books, 535 U.S. at 445 (Kennedy, J., concurring)). The evidence submitted by the City up to this point does not support such a conclusion. In fact,

the statistical evidence presented by the City comparing crime rates before and after enforcement of the revised ordinance actually shows that overall crime[3] actually increased by 19% following enforcement in the areas within 500 feet of Plaintiffs' businesses, compared to an increase of 13% in the balance of the Indianapolis Police Department ("IPD") district. Def.'s Exh. B at Tbl. 1.[4]

More specifically, on Sundays, crime characterized by the City as "violent/person crime," which includes aggravated assault, forcible rape, homicide, and robbery, increased by 138% in the areas near Plaintiffs' businesses after enforcement; "property crimes," which include arson, burglary, larceny/theft, and motor vehicle theft, increased by 30% following enforcement of the revised ordinance; and overall crime increased by 46%. Id. at Tbl. 4. In comparison, on Sundays in the balance of the IPD district during that same time period, violent/person crime increased 14%, property crime increased 10%, and overall crime increased by only 11 %. Id. During the hours of midnight to 10:00 a.m., property crimes within 500 feet of Plaintiffs' locations increased by 59% and overall crime increased

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[3] "Overall crime" includes both violent/person crimes (aggravated assault, forcible rape, homicide, and robbery) and property crimes (arson, burglary, larceny/theft, and motor vehicle theft).

[4] On November 23, 2009, the City filed a motion to substitute a corrected version of its Exhibit B which contains various charts assessing Indianapolis crime statistics before and after enforcement of the revised ordinance. We hereby GRANT Defendant's Motion to Substitute Exhibit B to Defendant's Response [Docket No. 123]. All citations to "Def.'s Exh. B" in this entry refer to the corrected version of the exhibit.

by 29%. During those hours in the balance of the IPD district, property crimes increased 25% and overall crime increased 21%. Id. at Tbl. 3.

The City downplays these statistics, citing instead to a decrease in violent/person crime near Plaintiffs' businesses, both overall, and specifically during the hours of midnight and 10:00 a.m. Violent/person crime within 500 feet of Plaintiffs' businesses decreased by 10% overall and 50% between the hours of midnight and 10:00 a.m. following enforcement of the revised regulation. In comparison, violent/person crime increased 8% overall in the balance of the IPD district and increased 12% during the overnight hours. Id. at Tbls. 1, 3. However, when analyzed more closely, we find that the raw numbers are so small that they cannot justify the reduction in speech that results from the City's revised ordinance. For example, during the hours of midnight to 10 a.m., in the area near New Flicks, violent/person crime declined from one incident over the course of three years before the law was enforced to none after. Near Annex Books and Keystone Video there were two and three fewer incidents, respectively, of violent/person crime over the course of three years. Such minimal decreases in a narrow category of crime are clearly too insignificant to determine whether the decrease in violent/person crime was due to enforcement of the revised ordinance as opposed to chance, let alone to justify the significant reduction in speech resulting from the City's post-2003 regulation as required by Justice Kennedy's cost-benefit analysis.

For the foregoing reasons, we find that the evidence the City has presented, at least up to this point, is

likely insufficient to satisfy the burden set out in the Seventh Circuit's ruling so as to justify the revised ordinance. Accordingly, we find that, at this stage in the proceedings, Plaintiffs have demonstrated at least some likelihood of success on the merits.

B. Inadequate Remedy at Law/Irreparable Harm

It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976) (citations omitted). Thus, because Plaintiffs have shown that they have at least some likelihood of successfully demonstrating that enforcement of the City's ordinance results in unlawful curtailment of speech, it is clear that they have met their burden of showing the possibility of an irreparable injury (as a result of the deprivation of the claimed free speech rights) for which there is no adequate remedy at law.

C. Balance of Harms and the Public Interest

The balance of harms and public interest factor also weigh in favor of Plaintiffs. Initially, we recognize that, generally, under Seventh Circuit precedent "there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute because 'it is always in the public interest to protect First Amendment liberties.'" Joelner v. Village of Washington Park, 378 F.3d 613, 620 (7th Cir. 2004) (quoting Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998)). However, when the challenged statute regulates the adult entertainment business, conflicting public interests are frequently implicated

because "the purpose of adult entertainment regulations often is to minimize the deleterious secondary effects that may accompany adult entertainment businesses (e.g., increased crime rates, decreased property values)." Id. (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986)). The City has proffered such a purpose for its regulations here, and thus, we must weigh the relative harms to the parties stemming from a grant or denial of a preliminary injunction.

Up to this point in the proceedings, the City has failed to present convincing evidence to show that enforcement of the revised ordinance has resulted in a decrease in secondary effects – in this case, crime – compared to the period during which the previous ordinance was in effect sufficient to outweigh the potential harm to Plaintiffs' free speech rights if a preliminary injunction is not granted. In fact, as discussed above, the City's statistics show that overall crime within 500 feet of Plaintiffs' businesses has actually increased at all times measured since the ordinance change, as well as during each of the relevant time periods individually (i.e., between the hours of midnight and 10:00 a.m. Monday through Saturday, and all day on Sundays).[5] Def.'s Exh. B.

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[5] For example, overall crime for all time periods rose 19% within 500 feet of Plaintiffs' businesses following the ordinance change, while overall crime in the balance of the Indianapolis Police Department's ("IPD") district only increased by 13% during that same period. Def.'s Exh. B at Tbl. 1. During the hours of midnight and 10:00 a.m., overall crime near Plaintiffs' businesses increased 29% while overall crime in the rest of the IPD district rose 21%. Id. at Tbl. 3. On Sundays, overall crime near Plaintiffs' businesses

Moreover, on Sundays following enforcement of the revised ordinance, "violent/person crime" near Plaintiffs' businesses increased 138% and property crime increased 30%. Overall crime on Sundays within 500 feet of Plaintiffs' businesses increased 46% following enforcement of the revised ordinance.[6] Id. While the City did present evidence showing that crime categorized as "violent/person crime" decreased by 50% in the area near Plaintiffs' businesses during the hours of midnight and 10:00 a.m. during enforcement of the revised ordinance, property crimes within 500 feet of Plaintiffs' businesses increased by 59% during that same time period and overall crime increased by 29%.[7] Id. Considering the significant harm to Plaintiffs' free speech rights if the injunction is not issued, we find that the narrow segment of decreased crime during enforcement of the revised ordinance that the City has been able to demonstrate at this stage in the proceedings is insufficient to tip the balance in its

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increased by 46% in comparison to an 11% increase in the balance of the IPD district. Id. at Tbl. 4.

[6] In the balance of the IPD district during that time period, violent/person crime increased 14% and property crime increased 10%. Overall crime on Sundays increased 46% in the areas near Plaintiffs' businesses, while crime in the rest of the IPD district increased by only 11 %. Def.'s Exh. B at Tbl. 4.

[7] Violent/person crime increased by 12% and property crime increased by 25% in the rest of the IPD district during the hours of midnight to 10:00 a.m. Overall crime increased during that time period by 29% in the area surrounding Plaintiffs' businesses and increased 21 % in the balance of the IPD district. Def.'s Exh. B at Tbl. 3.

favor. Consequently, we find that the balance of harms and public interest factors weigh in favor of Plaintiffs.

III. Conclusion

For the foregoing reasons, the Court GRANTS Plaintiffs' Motion for Preliminary Injunction. Defendant, the City of Indianapolis, and its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with it who receive actual notice of this order by personal service or otherwise, are hereby PRELIMINARILY RESTRAINED from enforcing Chapter 807 of the City-County Code against Plaintiffs, their officers, agents, and employees. Such PRELIMINARY INJUNCTION is effective immediately upon the entry of this ruling on the Court's docket and shall extend until further order of the Court or, in any event, no later than a final ruling on the merits. IT IS SO ORDERED.

Date: 12/01/2009

/s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

APPENDIX F

In the United States Court of Appeals
For the Seventh Circuit

No. 05-1926

[Filed September 15, 2009]

ANNEX BOOKS, INC., *et al*.,

Plaintiffs-Appellants,

v.

CITY OF INDIANAPOLIS, INDIANA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 03-CV-00918 SEB VSS—
Sarah Evans Barker, *Judge*.

ARGUED SEPTEMBER 8, 2005—DECIDED SEPTEMBER 3, 2009

Before EASTERBROOK, *Chief Judge*, and FLAUM and ROVNER, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Indianapolis revised its adult-business ordinances in 2003. These amendments expanded the definition of "adult entertainment business" to include any retail outlet that devotes 25% or more of its space or inventory to, or obtains at least 25% of its revenue from, adult books,

magazines, films, and devices. (Adult "devices" include vibrators, dildos, and body-piercing implements.) See Indianapolis Rev. Code §807-103. Until 2003 the trigger had been 50%. Any "adult entertainment business" needs a license, must be well lit and sanitary, and may not be open on Sunday or between midnight and 10 a.m. on any other day. Indianapolis Rev. Code §§ 807-202(a), -301(f), -302.

Four firms defined as "adult entertainment businesses" under the revised ordinance filed this suit, contending that the law violates the first and fourth amendments, applied to the states by the fourteenth. The district court enjoined one portion of the amended ordinance and held that plaintiffs are entitled to notice of inspections. 333 F. Supp. 2d 773, 787–89 (S.D. Ind. 2004). Indianapolis has not appealed from that portion of the decision. The district court rejected plaintiffs' argument that the procedures for the issuance and judicial review of licenses permit the City to take too long, or afford it too much discretion. *Id*. at 778–83. Plaintiffs contest that portion of the decision, but it is supported by *Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), and *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). Indianapolis gives businesses provisional licenses while judicial review proceeds, Rev. Code §807-207(c), so its ordinance is easier to defend than the one sustained in *Littleton*. See *Andy's Restaurant & Lounge, Inc. v. Gary*, 466 F.3d 550, 556 (7th Cir. 2006). We have nothing else to add to this portion of the district court's thoughtful opinion.

That leaves plaintiffs' challenge to the definition of "adult entertainment business" and the imposition of any limits on these firms, other than whatever rules

apply to bookstores and video-rental outlets in general. Indianapolis justifies its restrictions on the ground that they reduce crime and other secondary effects associated with adult businesses. See *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Although the restrictions are not as extensive as those at issue in *Alameda Books* and *Playtime Theatres*—the City does not, for example, limit the number of adult establishments by prescribing a 1,000-foot buffer zone around each, or require them to locate in industrial zones far from pedestrian traffic—the City nonetheless concedes that its laws are subject to "intermediate" scrutiny because plaintiffs sell books. This means that, to prevail, the City needs evidence that the restrictions actually have public benefits great enough to justify any curtailment of speech.

The sort of evidence that the Justices deemed sufficient in *Alameda Books* and *Playtime Theatres* showed that crime is higher in city blocks (or census tracts) in which adult establishments are located. That could be because real estate is cheaper in high-crime areas, and that sleazy establishments tend to congregate in low-rent districts. But the fact that crime rose as adult establishments entered the area (see 535 U.S. at 435 (describing the study)) implied that the causal arrow ran from adult businesses to crime, rather than the other way. That could happen because adult establishments attract a particular kind of clientele that is emboldened by association with like-minded people, so that prostitution and public masturbation (for example) are more acceptable near a congeries of sexually oriented businesses than they would be

elsewhere. Justice Kennedy put it this way in *Alameda Books*:

> We may posit that two adult stores next door to each other attract 100 patrons per day. The two businesses split apart might attract 49 patrons each. (Two patrons, perhaps, will be discouraged by the inconvenience of the separation—a relatively small cost to speech.) On the other hand, the reduction in secondary effects might be dramatic, because secondary effects may require a critical mass. Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-dowells; yet 49 might attract none at all. If so, a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech. Indeed, the very absence of secondary effects might increase the audience for the speech; perhaps for every two people who are discouraged by the inconvenience of two-stop shopping, another two are encouraged by hospitable surroundings. In that case, secondary effects might be eliminated at no cost to speech whatsoever, and both the city and the speaker will have their interests well served.

535 U.S. at 452–53 (Kennedy, J., concurring in the judgment).

Indianapolis relies on this line of argument, as well as on a study it conducted in 1984, before adopting the original version of the challenged ordinance. This study found higher crime rates near businesses that were defined as "adult". But here the City encounters

problems, for the studies on which it relies—like Justice Kennedy's hypothetical—deal with ordinances dispersing adult businesses. The 2003 revision does not require dispersal. Instead it closes all businesses after midnight and on Sundays, and requires bright interior lights when the businesses are open. None of the studies on which the City relied before enacting the law, and none introduced in this record, concerns that kind of ordinance. Nor do the studies show that an increase in adult businesses' operating hours is associated with more crime; the studies are simple cross-sectional analyses that leave causation up in the air. (In other words, they may show no more than that adult businesses prefer high-crime districts where rents are lower.)

More importantly, the studies to which the City points concern adult businesses that offer live sex shows, private viewing booths, or both. This circuit's decisions likewise concern live entertainment. See, e.g., *R.V.S., L.L.C. v. Rockford*, 361 F.3d 402 (7th Cir. 2004) (exotic-dancing nightclubs); *G.M. Enterprises, Inc. v. St. Joseph*, 350 F.3d 631 (7th Cir. 2003) (nude dancing in bars). Three of the four plaintiffs in this suit, however, do not offer live entertainment or private viewing. They are simple book or video outlets, brought under the regulatory umbrella only because 25% or more of their sales come from sex-related materials. Until the 2003 amendments, these stores were treated the same as Barnes & Noble or Blockbuster Video. If they were associated with significant crime or disorderly conduct, it should be easy for Indianapolis to show it. But the City has not offered an iota of evidence to that effect.

The City's only evidence about the four plaintiffs is that during 2002 the police made 41 arrests for public masturbation at Annex Books, the only plaintiff that offers private booths. (The masturbation was "public" in the sense that officers could see what customers were doing inside the booths.) The district court thought this datum enough, by itself, to support the 2003 amendments. Yet it is hard to grasp how misdemeanors committed in single-person booths justify the regulation of book and video retailers that lack such booths.

Indeed, we do not know when the arrests occurred. Unless most of them were after midnight, or on Sunday, they don't justify the ordinance even with respect to establishments that supply entertainment on the premises. Nor can we tell whether 41 arrests at one business over the course of 365 days is a large or a small number. How does it compare with arrests for drunkenness or public urination in or near taverns, which in Indianapolis can be open on Sunday and well after midnight? If there is more misconduct at a bar than at an adult emporium, how would that justify greater legal restrictions on the bookstore—much of whose stock in trade is constitutionally protected in a way that beer and liquor are not.

Indianapolis has approached this case by assuming that any empirical study of morals offenses near any kind of adult establishment in any city justifies every possible kind of legal restriction in every city. That might be so if the rational-relation test governed, for then all a court need do is ask whether a sound justification of a law may be imagined. See, e.g., *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Board of*

Retirement v. Murgia, 427 U.S. 307 (1976). But because books (even of the "adult" variety) have a constitutional status different from granola and wine, and laws requiring the closure of bookstores at night and on Sunday are likely to curtail sales, the public benefits of the restrictions must be established by evidence, and not just asserted. The evidence need not be local; Indianapolis is entitled to rely on findings from Milwaukee or Memphis (provided that a suitable effort is made to control for other variables). See *Andy's Restaurant*, 466 F.3d at 554–55. But there must be *evidence*; lawyers' talk is insufficient.

Alameda Books establishes that much. Four Justices would have ruled for the plaintiff, without need for a trial, even though the empirical support for the Los Angeles ordinance was materially stronger than the data that Indianapolis proffers. 535 U.S. at 453–66 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ.). (The Los Angeles study was stronger because it implied causation and not just correlation.) 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 thought that summary judgment could be granted in the municipality's favor when the strength of, and appropriate inferences from, the studies were contested. (Well, "none" is an overstatement. Justice Scalia concluded that pandering may be prohibited without any need for evidence. 535 U.S. at 443–44 (concurring opinion). But Indianapolis does not defend its ordinance on that basis.) Justice O'Connor's plurality opinion (joined by Chief Justice Rehnquist and Justices Scalia and Thomas) was explicit (535 U.S. at 438–39):

> [A] municipality [cannot] get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to 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, the municipality meets the standard set forth in [*Playtime Theatres*]. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Instead of adducing data to support the regulation of bookstores that do not furnish on-site viewing, Indianapolis is content to belittle plaintiffs' evidence. Plaintiffs offered a study by Daniel Linz, a professor at the University of California, Santa Barbara. Linz first examined the relation between crime and adult establishments in Indianapolis, using different units than the City had done. He found little relation—and he added a time series, while the City relied on a cross-section. In other words, Linz conducted the same kind of analysis as the Los Angeles study in *Alameda Books*, asking whether crime went up in a given area when new adult establishments opened, or down when they closed. Linz concluded that these openings and closings did not materially affect crime. Linz also critiqued the methodology of studies conducted by Indianapolis and other cities.

One may doubt that Linz's work is the last word; a multivariate regression would provide a better foundation than either a time series or a geographic cross-section. See Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, Reference Manual on Scientific Evidence (2d ed.) (Federal Judicial Center 2000). Linz also disregards some sex-linked crimes, such as exposure and prostitution. That's like studying the effects of taverns while ignoring arrests for drunk driving. (Linz does consider arrests for rape and child molestation, however.) But the City, which offered only the simple cross-section, is in no position to complain. Instead the City observed that Linz compared differences between 2001 and 2003, ignoring 2002, which (apparently) was a peak year for arrests in Annex Books. Yet the City did not apply Linz's methods to the time series 2001, 2002, 2003 to see whether the omission mattered; instead it just asserted that the choice of years automatically invalidated the study, which is not a sound conclusion.

Instead of adducing a serious critique of Linz's work, or tackling the subject directly (Linz's data and methods were disclosed in his study), the City asserts that the federal judiciary has already decided that all of Linz's work must be ignored. It contends that, in *G.M. Enterprise*, 350 F.3d at 640, we called Linz's methods "completely unfounded." Not at all. What we called "completely unfounded" was counsel's assertion that a city's justifications have to satisfy the *Daubert* standard for expert testimony. (See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).) Linz had observed that some studies offered in that case were not "reliable," as Fed. R. Evid. 702 uses that word. We thought that *Alameda Books* allows municipalities

to take all kinds of evidence into account; this differs from saying that nothing Linz writes may be credited.

Counsel for Indianapolis conceded at oral argument that none of the studies that the City has offered in defense of its ordinance deals with the secondary effects of stores that lack private booths. Nor do the studies assess the effects of stores that sell as little as 25% adult products. These shortcomings, plus Linz's work, call the City's justifications into question and require an evidentiary hearing at which the City must support its ordinance under the intermediate standard of *Alameda Books*. See also *Abilene Retail #30, Inc. v. Dickinson County*, 492 F.3d 1164 (10th Cir. 2007) (reaching the same conclusion on a similar record). The Supreme Court decided *Playtime Theatres* more than 30 years ago, and since then adult-entertainment ordinances have become common. There must be some pertinent data to be gathered, if not in Indianapolis then elsewhere. (Some can be found in a bibliography at http://www.secondaryeffectsresearch.com.) But if, as is possible, there is simply no sound basis for a conclusion that book or video stores (without live entertainment or private booths) open after midnight, or on Sunday, cause adverse secondary effects, then Indianapolis must revert to its pre-2003 system of regulation.

We are conscious that "hold an evidentiary hearing and apply intermediate scrutiny" is not very helpful to the district judge, or for that matter the lawyers. It is possible to be a little more concrete, however, 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

Marks v. United States, 430 U.S. 188 (1977). He concluded that a regulation of adult bookstores "can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech." 535 U.S. at 445 (concurring opinion). "[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. Justice Kennedy insisted that the benefits (less crime) be compared with the detriments (less speech) and added that a given regulatory system is easier to justify if it works in the same way as the regulation of other, similar, businesses, for then it is harder to conclude that the government has set out to curtail speech because of its subject matter. *Id*. at 447–49.

These thoughts should give some structure to the hearing on remand—though we recognize that, because crime and speech cannot be reduced to a common metric, a direct comparison (how much speech should be sacrificed to achieve how much reduction in crime?) is difficult if not impossible. Here it matters that both Justice O'Connor's opinion for the plurality, and Justice Kennedy's concurrence, conclude that municipalities should get the benefit of the doubt. Principles of federalism support experimentation, and one aspect of freedom is the power to be different. The standards of Manhattan, New York, need not be followed in Manhattan, Kansas. See 535 U.S. at 439 (plurality opinion), 451 (Kennedy, J., concurring). See also *Illinois One News, Inc. v. Marshall*, 477 F.3d 461

(7th Cir. 2007) (ability of a small town's residents to obtain adult materials outside its borders may show that no material curtailment of expression has occurred). Cf. *National Rifle Association of America, Inc. v. Chicago*, 567 F.3d 856, 860 (7th Cir. 2009).

The parties have pressed on us dozens of precedents, from this circuit and elsewhere, that do more to show the problems of interpretation and application created by the fractured decision in *Alameda Books* than to establish any concrete legal rule. Few of these decisions offer much guidance, either to us or to the district court on remand, because few deal with hours-of-operation rules applicable to businesses that do not offer on-site viewing. It is accordingly unnecessary for us to canvass the dozens of appellate decisions that have struggled to understand and apply *Alameda Books*. For example, *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003), and *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512 (6th Cir. 2009), both sustained regulations applicable to book and video stores, but only after concluding that the plaintiffs had not undermined the justifications for the laws.[†] We refrain

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[†] *Richland Bookmart* and *H&A Land Corp. v. Kennedale*, 480 F.3d 336, 339 (5th Cir. 2007), treated the study that Indianapolis conducted in 1984 as supporting a conclusion that stores selling adult books and videos create adverse secondary effects. Yet Indianapolis does not deem its own study to support that conclusion, and our review of the 1984 study confirms the City's understanding. The 1984 study does not differentiate by type of adult business. The City did poll brokers to learn whether they thought that "adult bookstores" would depress real estate prices (most answered yes), but the study did not *define* "adult bookstore." Who knows whether brokers envisaged on-premises

from a survey, which would lengthen this opinion without edifying the reader.

But one of these decisions, in addition to *Abilene Retail* (cited above), offers a little assistance. San Antonio adopted a dispersal rule (1,000 feet between adult businesses) that applied to a set of outlets defined to include stores that did nothing but sell books, tapes, and DVDs, which customers could not watch on premises. The fifth circuit held in *Encore Videos, Inc. v. San Antonio*, 330 F.3d 288 (5th Cir. 2003), that this ordinance violated the first amendment, because San Antonio had not offered any evidence that adult video stores lacking facilities for on-premises viewing create the same secondary effects as other establishments. If Indianapolis cannot produce such evidence, satisfying Justice Kennedy's cost-benefit standard, its ordinance must meet the same fate as San Antonio's.

The judgment is affirmed to the extent that it sustained the licensing procedures but is reversed to

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entertainment, or whether they thought that 25% of sales makes an establishment "adult"? An opinion poll differs from a concrete result. (The 1984 study did not limit the survey to brokers who had experience buying or selling adult establishments, or in places near those establishments.) The authors inquired whether real estate prices are lower near adult businesses, but that part of the study lumps all adult establishments together; it does not distinguish between bookstores and topless bars or peep shows. This part of the study does contain a perfunctory time series analysis, however, in an attempt to inquire whether adult businesses seek out, rather than cause, low prices. It concludes that prices appreciate less in parts of the City where adult businesses congregate. See *Adult Entertainment Businesses in Indianapolis: An Analysis* 30–31 (1984).

the extent it concerns the coverage and substantive requirements, and the case is remanded for an evidentiary hearing consistent with this opinion.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 03-CV-00918-SEB-VSS

[Filed August 27, 2004]

ANNEX BOOKS, INC. et al,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
CITY OF INDIANAPOLIS,	)
	)
Defendant.	)
	)

ENTRY ON DEFENDANT'S AND PLAINTIFF'S CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on the parties' cross-motions for summary judgment regarding the constitutionality of Chapters 801 and 807 of the Revised Code of the Consolidated City and County of Indianapolis. Chapter 801 is the general licensing ordinance for businesses in Marion County and Chapter 807 governs the licensing and regulation of adult entertainment establishments. For the reasons that follow, we DENY Plaintiffs' Motion for Summary Judgment and GRANT in part and DENY in part Defendant's Motion for Summary Judgment.

Factual and Procedural Background

The Parties

Plaintiffs are Indianapolis retail stores which sell, rent and display adult oriented videos, magazines and other materials: Annex Books, Inc. ("Annex Books"), Keystone Video & Newsstand, Inc. ("Keystone Video"), Lafayette Video & News, Inc. "Lafayette Video"), New Flicks, Inc. ("New Flicks") and Southern Nights, Inc. ("Southern Nights"). The defendant is the City of Indianapolis ("City").

The Ordinances

Under Chapter 807 of the Revised Code of the Consolidated City and County of Indianapolis ("Revised Code"), all adult entertainment establishments,[1] including adult bookstores, must be licensed by the City Controller ("Controller"). Am. Compl. ¶¶ 6, 11; Revised Code Sec. 807-202.[2] An adult bookstore is an establishment which either (1) devotes at least 25% of its retail floor space to the display of "adult products,"[3]

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[1] Section 807-105 defines an adult entertainment business as any or all of the following: an adult bookstore, adult motion picture theater, adult mini motion picture theater, adult motion picture arcade, adult cabaret, adult drive-in theater, adult live entertainment arcade, adult motel, or adult services establishment. See also sections 807-103, 104, 106-112.

[2] Sec. 807-202 (a): It shall be unlawful for any person to maintain or operate an adult entertainment business in the city without first obtaining a license therefor from the Controller.

[3] Sec. 807-103(3): The phrase "adult products" means book, magazines, periodicals or other printed matter, or photographs,

(2) has at least 25% of its stock in trade in adult products, or (3) derives at least 25% of its weekly revenue from adult products. Each plaintiff meets the definition of an adult bookstore. Def.'s Br. at 3.

The adult entertainment business ordinance contains provisions which, *inter alia*, regulate the licensing of adult bookstores, set out premises requirements (such as floor layout, lighting configurations, hours of operation), and authorize inspections of the premises to ensure they are maintained in a sanitary condition.

The licensing procedure is straightforward. An application for an adult entertainment business license is made to the City Controller and requires certain sworn disclosures, the legality of which are not at issue in this case. Sec. 807-204. The applicant must also pay a license fee and submit a diagram of the business premises. Sections 807-203, 301. The Controller has forty-five (45) days in which to determine whether to issue a license. The applicant/business may begin operating within forty-five (45) days of submitting the

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films, motion pictures, video cassettes, slides, tapes, records or other forms of visual or audio representations which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas. For purposes of this definition, the phrase adult products also means a device designed or marketed as useful primarily for the stimulation of human genital organs, or for sadomasochistic use or abuse. Such devices shall include, but are not limited to, phallic shaped vibrators, dildos, muzzles, whips, chains, bather restraints, racks, non-medical enema kits, body piercing implements (excluding earrings or other decorative jewelry) or other tools of sadomasochistic abuse.

completing application; in the event the license is denied, a conditional license to operate must issue so long as the applicant seeks judicial review within ten (10) days of receiving notice of the Controller's adverse licensing decision. Sec. 807-204(c).

The Controller may deny a license application or renewal only if the applicant:

> (1) Where applicable, is not a corporation organized by law or authorized and qualified to do business in the state;
>
> (2) Has not fully paid the license fee;
>
> (3) Is delinquent to the city, county or state for any taxes, or is indebted to the city, county or state for any other reason unless the delinquency or indebtedness is the subject of pending litigation; or
>
> (4) Has failed to provide all information required by this article or has falsely provided such information.
>
> Sec. 807-205.

The City asserts that the general license ordinance, Chapter 801, mandates that whenever any sort of license application is denied, the Controller must provide the applicant with written notice of the denial stating the reason for the denial and informing the applicant of its right to request a Controller's hearing, as well as the right to appeal the decision to the license review board. See Sec. 801-210 (a); Def.'s Br. at 5. In addition to the right to request an administrative appeal under Chapter 801, the adult entertainment

business ordinance explicitly provides the aggrieved applicant with the right to judicial review of the licensing decision.

> Sec. 807-207. Judicial review of denial, suspension or revocation.
> (a) A denial of an application for a license or for renewal of a license under this chapter shall not be subject to administrative review under the procedures provided in Chapter 801, Article IV, Divisions 2 and 3 of this Code, but in the alternative may be appealed to the Marion Superior Court.

The "procedures" in Chapter 801 referred to in the above provision are found in the general business license ordinance and pertain to license enforcement and review, specifically the procedures which govern a Controller's hearing (Division 2) and a subsequent appeal to the license review board (Division 3). The City contends that while the adult entertainment business ordinance excludes certain procedures, they are supplanted by the procedures found in "License Regulation of the Controller of the City of Indianapolis 96-5." Def.'s Br. at 5; Def.'s Mot. for SJ, Ex. 9/B. Regulation 96-5 applies to all Controller's hearings regarding the issuance, denial, suspension or revocation of any license. Reg. 96-5, Sec. 1(a); see also Ex. 9; Aff. of Adonna White, ¶ 9. The regulation provides for an informal evidentiary hearing (Section V, Hearing Procedures) at the conclusion of which the Controller "may either announce his decision or take the matter under advisement and reach a decision at a later time." (Section VI, Decision of the Controller). It also expressly states that "[n]othing herein shall

require the Controller to conduct a hearing in any instance; unless required by the ordinance, the decision of whether to conduct a hearing remains within the discretion of the Controller." Reg. 96-5, Section 1(B).

Once a business is operating with an adult business entertainment license, it is subject to two primary operational requirements: inspections without notice and hours of operation.[4]

Sec. 807-302. Operational requirements.

> (b) An adult entertainment establishment business shall be kept in a sanitary condition at all times. As a condition of licensure under this chapter, the Controller or Controller's designee shall have the right to enter any licensed premises at any time during business hours without notice to insure compliance with this chapter, and it shall be unlawful for a person to prevent or deny any such entry. The Controller shall have the power to determine if such establishment business is in a sanitary condition. For such purpose, the Controller shall have, upon demand, the assistance of the administrator of the division of compliance of the department of metropolitan development, and the Health and Hospital Corporation of Marion County. If the Controller shall

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[4] The ordinance restricts the hours of operation for an adult entertainment business in Sec. 807-302(d): Adult entertainment businesses shall not be open between the hours of midnight and 10:00 a.m. and shall not be open on Sundays. The provision, however, is not at issue in this litigation.

> determine, after investigation by the division of development services or the Health and Hospital Corporation of Marion County, that an unsanitary condition exists within an adult entertainment establishment business, the Controller shall suspend the establishment license for such premises until such unsanitary condition is rectified.

A violation of an operational requirement may result in the suspension or revocation of an adult entertainment establishment license. Sec. 807-206 (a)(3).

The final, relevant provision of the adult entertainment business ordinance is Section 807-401, addressing the severability of any sections or subsections of Chapter 807 in the event they are found invalid.

Sec. 807-401. <u>Severability</u>.

> In the event any section, subsection, clause, phrase or portion of this chapter is for any reason held illegal, invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remainder of this chapter. It is the legislative intent of the council that this chapter would have been adopted if such illegal provision had not been included or any illegal application had not been made.

Procedural Background

This litigation began in June 2003 following Annex Books' unsuccessful attempts to obtain an adult entertainment license under the version of the ordinance then in effect. Annex applied for a license in April 2003, resubmitted the application later in the month with the proper fee, and on June 6, 2003, was notified that, rather than accepting or denying the application for a license, the Controller was initiating an investigation to determine whether Annex met the qualifications for licensure. A hearing was set for June 24, 2003. Compl. ¶¶ 8-10.

Annex Books filed in this court a Complaint and Motion for Preliminary Injunction on June 19, 2003, challenging the constitutionality of the licensing ordinances and enjoining the enforcement of Sections 801 and 807. The City was granted a stay of the proceedings until October 31, 2003, during which time the ordinances at issue were amended.[5] Def.'s Br. in Support of Mot. to Dismiss, pp. 2-4. It is the amended adult entertainment business ordinance which is before

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[5] The amendments, which were adopted by the City-County Council and went into effect on October 18, 2003, significantly revised the adult entertainment business ordinance. For instance, the Controller now has a set time period -- forty-five (45) days -- from receipt of an application in which to issue or deny a license (Sec. 807-204(c); there is a judicial review provision when previously there was none (Sec. 807-207); there are only four grounds for denial of a license application or renewal (Sec. 807-205); there are significantly fewer and less intrusive disclosure requirements (Sec. 807-204); inspectors now may enter licensed premises only during business hours whereas the previous provision allowed for inspection "at any time without notice." (Sec. 807-302).

us here and is the subject of the parties' cross-motions for summary judgment. Additional parties joined the litigation following the adoption of amended Chapter 807, claiming they now fall within the scope of the ordinance and must comply with licensing and regulatory provisions whereas previously they did not. Pls.' Mem. in Supp. of Mot. for T.R.O. at 3.

Following an evidentiary hearing on the plaintiffs' motion for temporary restraining order, we granted a TRO on October 31, 2003. In that entry, we held that because Chapter 807 did not provide the possibility of meaningful administrative and judicial review, the constitutionality of the entire ordinance was questionable based on its inability to comply with the Supreme Court's requirement for "prompt judicial review" in the context of First Amendment-related licensing schemes.[6] We found this deficiency so central to the constitutionality of the challenged ordinance that it could not be severed from the ordinance such as would allow the remaining provisions of the ordinance to survive. See Entry Granting Plaintiffs' Motion for TRO, November 3, 2003.

We now address whether the provisions of the City's adult entertainment business licensing law, as expressed in sections 801 and 807, are unconstitutional on their face and as applied under the First, Fourth and Fourteenth Amendments to the United States Constitution. Am. Compl. ¶¶ 13, 18, 20, 42.

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[6] A plurality in FW/PBS Inc. v. City of Dallas, 493 U.S. 215, 229 (1990) held that the Dallas zoning and licensing ordinance for the adult entertainment industry failed, inter alia, for want of an avenue for prompt judicial review of an adverse decision.

Discussion

The City has moved for summary judgment on the grounds that Chapter 807 of the Revised Code does not violate: (1) the First and Fourteenth Amendments, because it allows Plaintiffs to seek immediate judicial review in state courts and to do so based on an adequate administrative record; (2) the First Amendment, because it is a "content neutral" regulatory system legitimately aimed at curbing the adverse secondary effects of adult businesses; and (3) the Fourth Amendment, because the ordinance authorizes site visits only at times when the adult businesses are open to the public. Annex Books et al have moved for summary judgment only on the issue of judicial review.

We turn first to the issue of judicial review, which we consider in light of our earlier ruling that the constitutionality of that provision is central to the constitutionality of the entire ordinance and may not be severed from the ordinance as a whole in order to reach the constitutionality of the remaining provisions.

Judicial Review Analysis Under the First and Fourteenth Amendments

Since the time of our ruling granting Plaintiffs' motion for a temporary restraining order, one significant development has occurred which now influences our analysis of the plaintiffs' claim: the Supreme Court handed down its decision in City of Littleton, Colorado v. Z.J. Gifts, 124 S. Ct. 2219 (2004). That opinion resolves the judicial review issue that has split the circuits since 1990 and provides us with new

guidance in analyzing the City's ordinance, as developed more fully in the ensuing discussion.

The First Amendment is implicated whenever a city requires a bookstore, a newsstand, a theater, or an adult business to obtain a license before it can begin to operate. Until the Supreme Court's recent decision in City of Littleton, Colorado v. Z.J. Gifts, an adult business licensing ordinance would be held constitutional under the First Amendment if it provided "prompt judicial review" of an adverse administrative decision. The issue in City of Littleton was whether the requirement of "prompt judicial review" imposed by FW/PBS, Inc. v. Dallas[7] promised a prompt judicial *decision* or merely prompt *access* to the courts.

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[7] In FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990), the Supreme Court held that a municipal licensing scheme that regulates adult bookstore-type businesses in the nature of the plaintiffs's business here, where the materials are Constitutionally protected, is permissible as a prior restraint if there are safeguards adequate to minimize the possibility that the licensing procedures will be used to suppress speech. Among the requirements set out by the Supreme Court for licensing ordinances to pass Constitutional muster are that the regulatory scheme cannot place "unbridled discretion in the hands of a government official or agency." Such unbridled discretion when vested in a government official amounts to unconstitutional censorship or prior restraint upon the exercise of free speech. Other requirements for ordinances of this nature include limits on the time for a decision by the decision-maker, and the maintenance of the status quo by the applicant until a final licensing decision issues. Finally, the regulatory scheme must provide for "prompt judicial review" in the event that a license is erroneously denied.

A unanimous Supreme Court ruled in City of Littleton that the First Amendment requires a prompt judicial decision, not just prompt access to the courts, when a government denies a license for an adult entertainment business. This interpretation gives effect to the "core policy" referred to in FW/PBS, namely, that in order to avoid the unconstitutional suppression of protected speech, the government must avoid undue judicial, as well as administrative, delay in rendering decisions on adult entertainment business licenses. City of Littleton, 124 S. Ct. at 2224 (citing FW/PBS, 493 U.S. at 228).

The Supreme Court also determined that the City of Littleton's ordinance was consistent with the First Amendment by offering review in the state district court under ordinary state rules of civil procedure. Holding that not only does the First Amendment not require special "adult business" judicial review rules but there is no need for detailed review rules to be written into the ordinance itself, the Court reasoned further that "Colorado's ordinary judicial review rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming." Id. The Supreme Court observed that the process of reviewing an adverse licensing decision would likely be straightforward because the reasons for denying a license were few and "purely objective,"[8] obviating the

[8] Three of the seven grounds for denial of an adult entertainment business license in the City of Littleton's ordinance are the same as those in the City of Indianapolis' ordinance: if the applicant provides false information, is not licensed to do business in the

need for creating a sophisticated or detailed record for judicial review. Id. at 2225.

The Court's decision in City of Littleton paved the way for our conclusion that the City's provision for judicial review by the Marion County Superior Court in Sec. 807-207 satisfies the constitutional standard. Indiana's rules of civil procedure are "ordinary" in the same way the rules of Colorado are, operating to ensure justice, i.e. a prompt judicial decision, "so long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge." Id. at 2225.

In our prior order, we found that Sec. 807-207 of the adult entertainment business ordinance appeared to deny an aggrieved applicant an opportunity for administrative review, i.e. a Controller's hearing and/or appeal to the license review board, although the provision did explicitly provide for judicial review. We held that the ordinance deprived the applicant of meaningful access to judicial review because, without a "quasi-judicial" proceeding such as a hearing, no record would be produced for a trial court to review. If access to judicial review were stymied by lack of an administrative record, so would be a prompt judicial determination. At the time we entered a restraining order against enforcement of the ordinance, the Seventh Circuit was among those circuits interpreting the FW/PBS "prompt judicial review" requirement as

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State, and has not paid fines, fees or taxes in a timely way. Cf. Revised Code, Sec. 807-205 (see infra).

one for prompt access to a court rather than a prompt judicial determination. This split among the circuit courts has now been resolved with the Supreme Court ruling that the First Amendment requires a prompt judicial decision when the government denies a license for an adult entertainment business. The key remaining issue before us here is whether the City's ordinance provides for a sufficient written record to allow a reviewing court to make a fair and reasoned decision. Under City of Littleton, we find that it does, though doubts remain whether Sec. 807-207 actually guarantees a Controller's hearing.[9]

The revised licensing provision of the adult entertainment business ordinance allows the Controller to deny a license for four (4) objective and easily verifiable reasons: (1) if a license applicant is not a corporation organized by law or authorized and qualified to do business in the state; (2) if the applicant has not fully paid the license fee; (3) if the applicant is delinquent to the city, county or state for financial obligations; and (4) if the applicant has either failed to provide information or falsified information on its

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[9] The City explains that the language following "shall not be subject to" in Sec. 807- 207(a) is not meant to exclude the *right* to a hearing; only the requirement to exhaust administrative remedies. The right to a hearing flows, they contend, from Sec. 801-210. However, that provision merely provides that the aggrieved applicant has the right to *request* a hearing. If the Controller's hearing were necessary to the constitutionality of the ordinance, we believe Chapter 801 in tandem with Chapter 807 do not provide a sufficient guarantee that an aggrieved applicant will receive a hearing before the Controller because the Regulation clearly states the hearing is not mandatory but instead remains within the Controller's discretion.

application form. Sec. 807-205. No exercise of discretion in the sense of weighing competing options is required by the Controller in making these determinations. By affidavit, the Controller's office explained the ways in which it gathers the relevant information: (1) the corporate information is verified through the Indiana Secretary of State's records; (2) the payment of the license fee is recorded by the Controller's office and thus easily verifiable by them; (3) the financial information is obtained from the respective treasurers of the county, city and state; and (4) the veracity of the information on the application is only at issue if the Controller receives evidence that an applicant has provided false information. In the last instance, documentation of such evidence becomes part of the applicant's record. Def.'s Ex. 9, Aff. Adonna White, ¶¶ 5-8.

Under the requirements of the ordinance, should the Controller deny an application for an adult entertainment business license on any one of these grounds, the applicant receives written notice of the denial which states the reason or reasons. See Sec. 801-210:

> Denial of License; notification, refund of fee.
> (a) Whenever an application for a license or renewal of a license is denied, the Controller shall give an applicant or licensee written notice of the denial. The notice shall state the reason or reasons for the denial [...].

Despite the express exclusion of certain Chapter 801 procedures for judicial review as applied to adult entertainment businesses (see Sec. 807-207), there is no other basis to conclude that the general licensing

provisions of Chapter 801 are inapplicable to adult entertainment businesses. To the contrary, Chapter 807 expressly incorporates Chapter 801 procedures in detailing the grounds for the suspension or revocation of a license (see Sec. 807-206(b)). We conclude that Section 801-210 therefore applies to adult entertainment businesses and thus accept the City's interpretation that an aggrieved applicant shall always receive written notification of the reasons for the denial of a license. Def.'s Reply Br. at 3-4. Accordingly, the application for the license, the letter denying the license with stated reasons for the denial, and any documentary evidence justifying the adverse decision shall comprise the record on appeal to be compiled and transmitted by the Controller to the Marion Superior Court for judicial review.

The City contends these materials provide an adequate record for judicial review. In light of the Supreme Court's discussion involving exactly this same type of record in City of Littleton, we must agree with the City. There, the licensing scheme at issue applied several "reasonably objective, nondiscretionary criteria unrelated to the content" of the expressive materials that an adult business typically sells or displays. Similarly here, an adult business license would be denied if the applicant provided false information, if the corporation were not authorized to do business in the state, or if it had not timely paid taxes, fees, fines, or penalties. The Supreme Court noted that "[t]hese objective criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally the presence of any specific item of adult material in the Littleton community. [....] The simple objective nature of the

licensing criteria means that in the ordinary case, judicial review, too, should prove simple, hence expeditious." Id. at 2225-2226.

We next turn to a consideration of whether the intermediate layer of administrative review in the form of a Controller's hearing, viewed by us as a mandatory procedural safeguard in our earlier ruling, is still required in order for the ordinance to pass constitutional muster. Plaintiffs claim that a license decision must be made in a quasijudicial proceeding. The City responds, contending that such a requirement finds no support in Indiana law and that an Indiana court can adequately review the Controller's written findings. Def.'s Reply at 6.

As a general principle of administrative law, the purpose of a quasi-judicial proceeding by an agency, in this case, the Controller, is to flesh out the pertinent facts upon which a decision is based in order to facilitate judicial review. See State ex rel. Newton v. Board of School Trustees of Metropolitan School Dist. of Wabash County, 404 N.E.2d 47 (Ind. App. 1980); Metropolitan Board of Zoning Appeals of Marion County v. Graves, 360 N.E.2d 848 (Ind. App. 1977). One purpose of this requirement is to prevent "judicial intrusion into matters committed to administrative discretion by the legislature". Vehslage v. Rose Acre Farms, Inc. 474 N.E.2d 1029, 1031 (Ind. App. 1985).

The need for a Controller's hearing of a license denial is obviated by the fact that the four grounds for denial are objective and ministerial in nature, requiring no exercise of judgment on the part of the government, only and "up or down" decision on each

factor. Contrast these grounds for a denial to those for the suspension or revocation, for example:

> Sec. 807-26206. Grounds for suspension or revocation; Controller's hearing.
>
> (a) A license granted under this article may be suspended or revoked for any reason an application for renewal may be denied under section 807-205 of this Code, or if the licensee:
>
> (1) Conducts the business or maintains the premises in such a manner as to create a nuisance to the public;
>
> (2) Knowingly permits any illegal conduct or practice to take place on the business premises or in the conduct of the business; or
>
> (3) Violates the premises requirements or operational requirements provided in section 807-28301 or section 807-29302 of this Revised Code.
>
> (b) A suspension or revocation of a license under this chapter shall not be made without first holding a Controller's hearing under the procedures provided in Chapter 801, Article IV, Division 2 of this Code.

Obviously, with regard to suspensions and revocations, discretion and judgment are required to determine whether or not an applicant has conducted himself in such a way as to create a public nuisance or whether the applicant has knowingly permitted illegal conduct or practices of any kind to occur on the premises. Therefore, in these matters the City

mandates an administrative hearing in order, we assume, to ensure adequate procedural safeguards to avoid wrongfully suppressing a protected activity.

Nothing appears to be gained by a Controller's hearing on the limited objective grounds for denial of a license. The additional layer of administrative review would not be necessary to flesh out the pertinent facts for a reviewing court to rely upon. The ordinance appears to provide a sufficient mechanism for creating a reviewable record without requiring unnecessary administrative steps, contrary to Plaintiffs' argument.

An alternate ground for Plaintiffs' motion for summary judgment is that no judicial review can actually be undertaken by the Marion County Superior Court because the Court lacks any jurisdictional grant of power to hear and decide an appeal of a municipality's licensing decision. We do not find a statutory basis for this theory. The State statutes have granted to the Marion Superior Court concurrent and coextensive jurisdiction with the Marion Circuit Court in all cases and upon all subject matters, including civil, criminal, juvenile, probate, and statutory cases and matters, whether original or appellate. Ind. Code § 33-5.1-2-4. The Marion Circuit Court has original jurisdiction in all civil and criminal cases except where exclusive jurisdiction is conferred upon a different court in the same territorial jurisdiction. It also has "such appellate jurisdiction as may be conferred by law upon it." Ind. Code § 33-4-4-3.

Plaintiffs contend that the appeal of a license denial requires an exercise of appellate jurisdiction which has not been conferred by a specific statute. We do not share that view as to statutory construction and thus

are not so persuaded by Plaintiffs' argument. The circuit and superior courts have subject matter jurisdiction because a petition for review of a licensing decision is a civil or statutory issue (in this case, a statutory issue) emanating from the ordinance. Ind. Code § 33-5.1-2-4(1). Moreover, Indiana courts regard themselves empowered to exercise review of adverse licensing decisions based on the general principles of administrative law. See e.g. Oriental Health Spa v. City of Fort Wayne, 526 N.E.2d 1019 (Ind. Ct. App. 1988) (reviewing the city Controller's denial of a license to a massage parlor for violation of the ordinance).

For these reasons, we declare the judicial review provisions of Section 807-207 to be constitutional. Accordingly, we DENY Plaintiffs' Motion for Summary Judgment and GRANT Defendant's Motion for Summary Judgment on issues relating to judicial review under the First and Fourteenth Amendments.

The Secondary Effects Analysis under the First Amendment

The City next moves for summary judgment on Plaintiffs' challenge to the substantive validity of the adult entertainment business ordinance. The First Amendment is implicated whenever the government (here, the City) seeks to single out adult entertainment businesses and regulate them through licensing, operational and zoning laws. Such ordinances are constitutional so long as they are content-neutral regulations of speech which are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). In Renton, the Supreme

Court addressed a situation in which the City had enacted an adult theater zoning ordinance aimed at preventing the secondary effects caused by the presence of even a single theater in a given neighborhood. Id. at 50.

An ordinance is properly classified as content neutral if it does not seek to regulate the content of the expression (*e.g.*, ban the sale of adult-oriented materials altogether) but rather imposes limitations only on the location of a business or its hours of operation. Our review of the City's adult entertainment business ordinance causes us to conclude that it is a permissible time, place and manner regulation. Chapter 807 does not ban adult bookstores instead it requires adult entertainment businesses to apply for a license, to meet certain premises requirements and to limit the hours of operation. See Sections 807- 103, 202, 301, 302.

Whether the ordinance serves a substantial governmental interest again is a decision to be made in light of Supreme Court precedent and Seventh Circuit interpretations, and, again we find that the City's ordinance passes constitutional muster. Secondary effects are those harmful side effects allegedly associated with the presence of adult entertainment businesses, such as increased crime, an increase in public sexual acts, the spread of sexually transmitted diseases and declining property values. See e.g. G.M. Enter., Inc. v. Town of St. Joseph, Wisconsin, 350 F.3d 631, 633 (2003); DiMa Corp. v. Town of Hallie, 185 F.3d 823, 829 (7th Cir. 1999).

In City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002), the Supreme Court affirmed that "reducing

crime is a substantial governmental interest." In passing on the validity of a Los Angeles restriction on multiple-use adult entertainment businesses, the Supreme Court required the government to shoulder the burden of producing evidence that the adult-oriented business not only caused the asserted adverse secondary effects but that the proposed regulation was a reasonable measure to reduce those particular effects. Id. at 438. The plurality opinion in Alameda Books reasserted the Renton standard: to wit, a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. Id. at 438 (citing Renton, 475 U.S. at 51-52). In Alameda Books, the Supreme Court upheld the ordinance which relied on a single study. However, the Court cautioned that "[t]his is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to 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, the municipality meets the standard set forth in Renton." Id.

Two recent Seventh Circuit cases address the evidentiary burden of a municipality in enacting a valid content-neutral ordinance. In R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402 (7th Cir. 2004), the Court of Appeals, in reversing the district court's judgment in favor of Rockford, applied the Alameda Books standard and found the government had not carried its evidentiary burden.

Rockford had enacted a special ordinance regulating a very narrow category of adult entertainment - exotic dancing nightclubs - preventing them from operating within 1000 feet of a church, school or other like establishment. The Rockford City Council had not relied on any studies from other towns nor did it conduct any of its own studies regarding adverse secondary effects associated with exotic dancing nightclubs. The ordinance contained no preamble or legislative findings. At a bench trial on RVS's motion for preliminary and permanent injunctions, police data was introduced relating to the number of police calls made to the area where the business was located. The City's evidence was refuted, however, by expert testimony to the effect that relevant studies show no adverse secondary effects to be associated with nude dancing establishments. Id. 406-407.

In applying Renton/Alameda Books, the Seventh Circuit observed that a critical deficiency of the Ordinance was the utter lack of evidence proffered to support the premise that nude dancing clubs were associated with adverse secondary effects; simply *assuming* such effects exist does not satisfy the evidentiary standard. While the Alameda Books standard is admittedly a minimal one, the record in this case was "devoid of evidence;" Rockford had not identified "any studies, judicial opinions, or experience-based testimony that it considered in adopting the Ordinance." Id. at 411.

In G.M. Enterprises v. the Town of St. Joseph, Wisconsin, 350 F.3d 631, 633 (2003), the Seventh Circuit held that the town had carried its evidentiary burden and affirmed the lower court decision to that

effect. The Court addressed the "quality and quantum of evidence" that the government must rely upon in order to demonstrate that its regulation was justified by the need to combat adverse secondary effects of adult entertainment, finding sufficient the following: sixteen studies from various other communities around the country that demonstrated a correlation between adult entertainment businesses and negative secondary effects; judicial opinions from other jurisdictions that addressed adverse secondary effects associated with adult entertainment businesses; and police reports of calls.[10]

Our case closely resembles G.M. Enterprises in terms of quantum and quality of evidence. First, the preamble to the ordinance states that its purpose is "to regulate adult entertainment businesses and related activities, to promote the health, safety, morals, and general welfare of the citizens of Marion County, and to establish reasonable and uniform provisions to prevent the deleterious effects of adult entertainment businesses within Marion County." Sec. 807-101.

Further, the ordinance provides that it is premised on the following findings of adverse secondary effects of adult entertainment businesses on effected communities as presented in hearing(s) and reports made to the City-County Council:

> .... the findings incorporated in the cases of City of Renton v. Playtime Theatres, Inc., 475 U.S.41

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[10] G.M. Enterprises operated a topless nightclub that served liquor and the sheriff reported that he received more calls regarding this club than other clubs that serve liquor but do not have nude dancers. G.M., 350 F.3d at 634.

(1986), Young v. American Mini Theatres, 426 U.S.50 (1976), Barnes v. Glen Theatre, Inc., 501 U.S.560 (1991), Arcara v. Cloud Books, Inc., 478 U.S.697 (1986), California v. LaRue, 409 U.S.109 (1972), Iacobucci v. City of Newport, KY, 479 U.S.92 (1986), United States v. O'Brien, 391 U.S.367 (1968), City of Erie v. Pap's A.M., 120 S.Ct. 1382 (2000), City of Los Angeles v. Alameda Books, Inc., 122 S.Ct. 1728 (2002), Broadway Books, Inc. v. Roberts, 642 F. Supp. 486 (E.D. Tenn. 1986), DLS, Inc. v. City of Chattanooga, 107F.3d 403 (6th Cir. 1997), Pleasureland Museum, Inc. v. Beutter, 2002 WL 818791 (7th Cir. 2002), Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986), Hang On, Inc. v. City of Arlington, 65 F.2d 1248 (5th Cir. 1995), South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984), and Mitchell et al v. Commission on Adult Entertainment Establishments of the State of Delaware et al, 10F.3d123 (3rd Cir. 1993), Ellwest Stereo Theatre, Inc. v. Boner, 718 F. Supp. 1553 (M.D. Tenn. 1989), City of Lincoln Nebraska v. ABC Books, Inc., 470 N.W. 2d 760 (Neb. 1991), Berg v. Health & Hosp. Corp. of Marion County, 865 F.2d 797 (7th Cir. 1989), Shultz v. Cumberland, 228 F.3d 831 (7th Cir. 2000), as well as studies conducted in communities including, but not limited to Indianapolis, Indiana; Phoenix, Arizona; Minneapolis, Minnesota; Houston, Texas; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Cleveland, Ohio; and Beaumont,

Texas; findings reported in the Final Report of the Attorney General's Commission on Pornography (1986), the Report of the Attorney General's Working Group On the Regulation of Sexually Oriented Businesses (June 6, 1989, State of Minnesota); and statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, the city-county council finds:

(1) Adult entertainment businesses lend themselves to ancillary unlawful and unhealthy activities that are presently insufficiently controlled by the operators of the establishments;

(2) Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where adult entertainment businesses are located;

(3) Sexual acts. including masturbation, oral sex and anal sex, occur at adult entertainment businesses, especially those which provide booths or cubicles for viewing films, videos, or live sex shows-,

(4) Acts of prostitution commonly occur at adult entertainment businesses;

(5) Persons frequent certain adult theaters and other adult entertainment businesses for the purpose of engaging in sex within the premises;

(6) At least fifty (50) communicable diseases may be spread by activities that occur in adult

> entertainment businesses, including, but not limited to, syphilis, gonorrhea, human immunodeficiency virus infection (HIVAIDS), genital herpes, hepatitis B. Non A. salmonella infections and shigella infections
>
> (7) In the four (4) years preceding the effective date of this ordinance, the city experienced an outbreak of primary and secondary (infectious) syphilis, yielding the highest and second highest annual case rates of any city and county in the United States;
>
> (8) Prostitution, sexual assaults and other criminal activity occur at adult entertainment businesses;
>
> (9) Prostitution is connected to the spread of sexually transmitted diseases;
>
> (10) Adult entertainment businesses have operational characteristics which should be reasonably regulated in order to protect those substantial governmental concerns; and.
>
> (11) The general welfare, health, morals and safety of the citizens of the city will be promoted by the enactment of this chapter.

Sec. 807-102.

Plaintiffs have sought to rebut this evidence through the testimony of their expert, Dr. Daniel Linz, who views the studies on which the City relied as based on "shoddy data" and unsound methodology. Moreover, Dr. Linz cites in his finding that the authors themselves often admit that they do not find evidence of adverse

secondary effects associated with adult businesses. Def.'s Ex. E, Linz Report, ¶ 4. Dr. Linz instead employed two different types of analysis of crime evidence – hotspot analysis and before/after analysis – and reached the conclusion that Indianapolis adult businesses do not produce crime effects. Def.'s Ex. D, Linz Study. Hotspot analysis focuses on specific addresses within a neighborhood (census block group) in which an adult business is located. Dr. Linz analyzed police call data from January 1, 1998 to December 31, 2003 for the Indianapolis neighborhoods where Plaintiffs' businesses are located, selecting control areas from within the same neighborhoods with similar demographic characteristics known to relate to crime. He found that adult businesses do not contribute significantly[11] to the percentage of overall crime in the given neighborhood. Dr. Linz also compared incidents of criminal activity in the neighborhood before and after an adult entertainment business opened. Pls.' Opp'n Br. at 21. Based on this analysis, Dr. Linz concluded that adult video/bookstore businesses are a very insignificant source of crime within their respective neighborhoods. Def.'s Ex. E; Evaluating the Potential Secondary Effects of Adult Video/Bookstores in Indianapolis; Linz Report.

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[11] Dr. Linz appears to have adopted the reasoning of the authors of the Garden Grove, CA study, who "reasoned if the adult business accounted for 10-25 percent of crimes in a neighborhood they constituted a 'significant' source of crime events. Def. Ex. E. According to Dr. Linz's hotspot analysis, Annex Books contributed 6 percent while the other plaintiffs ranged between 0-2 percent. Id., Table 4.

At our hearing on the TRO, the City introduced evidence of *actual effects* caused by the Plaintiffs' stores. Specifically, the data revealed that the police made forty one (41) arrests at Annex Books for public masturbation between December 5, 2001 and November 5, 2002. Def.'s Br. at 24. In the before/after crime analysis Dr. Linz conducted, we note that he collected police call data for 2001 and 2003, but not for 2002. We need not delve into the intricacies of Dr. Linz's analysis in order to conclude, as we do, that the City has rebutted Plaintiffs' evidence to the contrary on adverse secondary effects. We find the data regarding the number and type of actual arrests at Annex Books for the year period compelling.

As the Seventh Circuit reasoned in G.M. Enterprises, "Alameda Books does not require a court to re-weigh the evidence considered by a legislative body, nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the Renton requirement that it consider evidence 'reasonably believed to be relevant to the problem' addressed." (citing to Renton, 475 U.S. at 51-52; Alameda Books, 535 U.S. at 445). G.M. Enter. 350 F.3d 631 at 639-640.

Accordingly, we find the City's enactment of this ordinance was premised on sufficient evidence of adverse secondary effects to uphold its validity. The City has demonstrated a reasonable basis for its finding of a causal relationship between the activity regulated and the adverse secondary effects, as required by Alameda Books and Renton. Thus, regarding the substantive validity of the adult

entertainment business ordinance as a time, place and manner regulation, we GRANT Defendant's Motion for Summary Judgment.

Site Visits Analysis under the Fourth Amendment

The City's final contention in defense of the ordinance is that the provision that allows City officials to visit adult bookstores during business hours without notice is constitutional because it does not authorize city officials to conduct unconstitutional warrantless searches, as argued by Plaintiffs. Am. Comp. at 7; Def.s' Br. at 3; Pls.' Br. at 23. Here, we disagree. This portion of the ordinance provides as follows:

> **Sec. 807-302.** Operational requirements.
>
> (a) It shall be unlawful to own or operate an adult entertainment business that is not in compliance with the requirements stated in this section.
>
> (b) An adult entertainment establishment business shall be kept in a sanitary condition at all times. As a condition of licensure under this chapter, *the Controller or Controller's designee shall have the right to enter any licensed premises at any time during business hours without notice to insure compliance with this chapter, and it shall be unlawful for a person to prevent or deny any such entry*. The Controller shall have the power to determine if such establishment business is in a sanitary condition. For such purpose, the Controller shall have, upon demand, the assistance of the administrator of the division of compliance of the department of metropolitan development,

> and the Health and Hospital Corporation of Marion County. If the Controller shall determine, after investigation by the division of development services or the Health and Hospital Corporation of Marion County, that an unsanitary condition exists within an adult entertainment establishment business, the Controller shall suspend the establishment license for such premises until such unsanitary condition is rectified. (Emphasis supplied).

The stated purpose of the authorized random visits is to assure compliance with the section's requirement to keep the business premises "in a sanitary condition." The City initially argues that the Fourth Amendment is not implicated because a business does not enjoy a reasonable expectation of privacy in the public areas of its facilities during business hours. Def.'s Br. at 32. See Katz v. United States, 389 U.S. 347 (1967) (holding a search falls within the Fourth Amendment's protections when the government intrudes into an area where a person has a reasonable and justifiable expectation of privacy). However, the ordinance does not distinguish between the areas of the business which are open to the public and those which are not. Because the Controller has the authority to make the discretionary determination of whether the entire premises is in a "sanitary condition," we see no basis to assume that his visit would necessarily be limited to only retail areas.

The City's reliance on the decision in Maryland v. Macon is insufficient. There, the Supreme Court concluded that no Fourth Amendment search occurred when an undercover police detective entered a store

and purchased an "adult" magazine, noting specifically that "wares that were intentionally exposed to all who frequent the place of business did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment." 472 U.S. 463, 469 (1985). Section 807-302 of the Indianapolis ordinance is not limited to the magazine rack or even to inventory that is publicly displayed. The City argues that the ordinance "does not purport to give any public officer greater access to the store than that available to the public." Def. Br. at 32. While it is true that authorized visits can occur only during the hours the business is open to the public, the ordinance is silent in terms of the areas subject to such a visit. It would not be farfetched for an official checking for sanitary conditions to stray beyond the magazine racks into areas in which the business owner has a legitimate expectation of privacy.

The provision in the ordinance authorizes searches which do not require consent or a warrant, which gives rise to our second constitutional concern. We are not persuaded that the ordinance's authorization falls within the general exception to the warrant requirement for administrative inspection searches. The general rule requires a government inspector who performs an administrative search, such as a municipal health and safety inspector, to have a warrant to search a commercial building. Camara v. Municipal Court, 387 U.S. 523 (1967). An exception to this warrant requirement has been made in highly regulated industries, that is, industries which have a history of substantial governmental oversight, such as

the liquor, firearms and coal mining industries,[12] but only if the following conditions are met: (1) there is a substantial governmental interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspection is necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant. New York v. Burger, 482 U.S. 691, 703 (1987).

The City's motion for summary judgment on the inspection provision rests solely on its argument that the adult entertainment businesses have no reasonable expectation of privacy in their business premises. We do not find that argument persuasive. Warrantless administrative searches of adult entertainment businesses have not been justified or validated by a finding that these are "highly-regulated" enterprises. Without specifically deciding whether the Burger conditions are met, we find that the City has not, as a matter of law, established that the inspection provision in the ordinance is not subject to Fourth Amendment protections. Accordingly, we declare Section 807-302(b) to be constitutionally invalid and DENY Defendant's Motion for Summary Judgment on Fourth Amendment grounds.

Severability

The City urges the Court to sever any part of the ordinance it finds invalid so to avoid a ruling invalidating the whole. As explained above, we have

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[12] See Marshall v. Barlow's Inc., 436 U.S. 307 (1978).,

found only the inspection provision, Sec. 807-302 (b), constitutionally deficient. Under the severability clause in Sec. 807-401, the invalid provision is to be deemed a "separate, distinct and independent provision," saving the remainder of the ordinance for enforcement. In ruling on such a request, we consider the standard in the Seventh Circuit, to wit, to give effect to "a robust severability clause," preserving the validated elements so long as the invalidated parts are not "an integral part of the statutory enactment viewed in its entirety." See Schultz v. City of Cumberland, 228 F.3d 831, 853 -854 (7th Cir. 2000) (citing Zbaraz v. Hartigan, 763 F.2d 1532, 1545 (7th Cir.1985)); see also Pleasureland Museum, Inc. v. Beutter, 288 F.3d 988, 1005 (7th Cir. 2002) (enjoining only the sections found unconstitutional and permitting the operation of the sections that either upheld or unchallenged). We find that with regard to this ordinance the inspection provision can and should be severed. The judicial review provision, along with the licensing and premises requirements, operate independently from the inspection provision and as such are not affected by our invalidation of Sec. 807-302(b).

Conclusion

In summary, for the reasons stated above, we DENY Plaintiffs' Motion for Summary Judgment and GRANT Defendant's Motion for Summary Judgment on the first and second grounds (judicial review, licensure and premises requirements) and DENY the motion on the third ground relating to the unconstitutionality of warrantless inspections.

It is so ORDERED this 27th day of August 2004.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

APPENDIX I

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

No. 13-1500

March 5, 2014

Before

FRANK H. EASTERBROOK, *Circuit Judge*

ANNEX BOOKS, INC., *et al*.,

Plaintiffs-Appellants,

v.

CITY OF INDIANAPOLIS, INDIANA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:03-cv-00918-SEB-TAB
Sarah Evans Barker, *Judge*.

Order

Indianapolis has asked for a stay of this court's mandate while it asks the Supreme Court to issue a writ of certiorari.

The City represents that it will not enforce the ordinance, unless the Supreme Court reverses our

decision, but that a stay of mandate will enable both sides to postpone potentially costly preparations for a trial on damages.

On the understanding that the City will not enforce the closing-hours ordinance unless the Supreme Court should reverse our decision, this court's mandate is stayed pending the City's application for a writ of certiorari. The stay will continue until the Supreme Court acts on the petition. If the petition is denied, the stay terminates immediately; if the petition is granted, the stay continues until the Court issues its decision on the merits.

APPENDIX I

CITY-COUNTY GENERAL ORDINANCE NO. 87, 2003 Proposal No. 484, 2003

PROPOSAL FOR A GENERAL ORDINANCE to amend the Revised Code by clarifying the provisions that govern the licensure of adult entertainment businesses, and to make certain definitions consistent with those in the city's zoning ordinances.

BE IT ORDAINED BY THE CITY-COUNTY COUNCIL OF THE CITY OF INDIANAPOLIS AND OF MARION COUNTY, INDIANA

SECTION 1. Chapter 807 of the "Revised Code of the Consolidated City and County," regarding adult entertainment businesses, hereby is amended by the deletion of the language that is stricken-through, and by the addition of the language that is underscored, to read as follows:

Chapter 807

ADULT ENTERTAINMENT BUSINESSES

ARTICLE I. PURPOSE, FINDINGS, AND DEFINITIONS

Sec. 807-101. Statement of purpose.

It is the purpose of this chapter to regulate adult entertainment businesses and related activities, to promote the health, safety, morals, and general welfare

of the citizens of Marion County, and to establish reasonable and uniform provisions to prevent the deleterious effects of adult entertainment businesses within Marion County. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Further, it is not the intent nor effect of this chapter to condone or legitimize the distribution of obscene materials. It is not the intent nor effect of this chapter to limit or restrict the lawful activities permitted under Indiana Code 7.1.

Sec. 807-102. Findings.

Based on evidence concerning the adverse secondary effects of adult entertainment businesses on the community presented in hearing(s) and in reports made available to the City-County Council, and on findings incorporated in the cases of City of Renton v. Playtime Theatres, Inc., 475 U.S.41 (1986), Young v. American Mini Theatres, 426 U.S.50 (1976), Barnes v. Glen Theatre, Inc., 501 U.S.560 (1991), Arcara v. Cloud Books, Inc., 478 U.S.697 (1986), California v. LaRue, 409 U.S.109 (1972), Iacobucci v. City of Newport, KY, 479 U.S.92 (1986), United States v. O'Brien, 391 U.S.367 (1968), City of Erie v. Pap's A.M., 120 S.Ct. 1382 (2000), City of Los Angeles v. Alameda Books, Inc., 122 S.Ct. 1728 (2002), Broadway Books, Inc. v. Roberts, 642 F. Supp. 486 (E.D. Tenn. 1986), DLS, Inc. v. City of Chattanooga, 107F.3d403 (6th Cir. 1997),

Pleasureland Museum, Inc. v. Beutter, 2002 WL 818791 (7th Cir. 2002), Kev, Inc. v. Kitsap County, 793F.2d1053 (9th Cir. 1986), Hang On, Inc. v. City of Arlington, 65F.2d1248 (5th Cir. 1995), South Florida Free Beaches, Inc. v. City of Miami, 734F.2d608 (11th Cir. 1984), and Mitchell et al v. Commission on Adult Entertainment Establishments of the State of Delaware et al, 10F.3d123 (3rd Cir. 1993), Ellwest Stereo Theatre, Inc. v. Boner, 718 F. Supp. 1553 (M.D. Tenn. 1989), City of Lincoln Nebraska v. ABC Books, Inc., 470 N.W. 2d 760 (Neb. 1991), Berg v. Health & Hosp. Corp. of Marion County, 865 F.2d 797 (7th Cir. 1989), Shultz v. Cumberland, 228 F.3d 831 (7th Cir. 2000), as well as studies conducted in communities including, but not limited to Indianapolis, Indiana; Phoenix, Arizona; Minneapolis, Minnesota; Houston, Texas; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Cleveland, Ohio; and Beaumont, Texas; findings reported in the Final Report of the Attorney General's Commission on Pornography (1986), the Report of the Attorney General's Working Group On the Regulation of Sexually Oriented Businesses (June 6, 1989, State of Minnesota); and statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, the city-county council finds:

(1) Adult entertainment businesses lend themselves to ancillary unlawful and unhealthy activities that are presently insufficiently controlled by the operators of the establishments;

(2) Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where adult entertainment businesses are located;

(3) Sexual acts, including masturbation, oral sex and anal sex, occur at adult entertainment businesses, especially those which provide booths or cubicles for viewing films, videos, or live sex shows;

(4) Acts of prostitution commonly occur at adult entertainment businesses;

(5) Persons frequent certain adult theaters and other adult entertainment businesses for the purpose of engaging in sex within the premises;

(6) At least fifty (50) communicable diseases may be spread by activities that occur in adult entertainment businesses, including, but not limited to, syphilis, gonorrhea, human immunodeficiency virus infection (HIV-AIDS), genital herpes, hepatitis B, Non A, salmonella infections and shigella infections;

(7) In the four (4) years preceding the effective date of this ordinance, the city experienced an outbreak of primary and secondary (infectious) syphilis, yielding the highest and second highest annual case rates of any city and county in the United States;

(8) Prostitution, sexual assaults and other criminal activity occur at adult entertainment businesses;

(9) Prostitution is connected to the spread of sexually transmitted diseases;

(10) Adult entertainment businesses have operational characteristics which should be reasonably regulated in order to protect those substantial governmental concerns; and.

(11) The general welfare, health, morals and safety of the citizens of the city will be promoted by the enactment of this chapter.

Sec. 807-103. Adult bookstore.

As used in this chapter, adult bookstore means and includes an establishment having at least twenty-five percent (25%) of its:

(1) Retail floor space used for the display of adult products; or

(2) Stock in trade consisting of adult products; or

(3) Weekly revenue derived from adult products.

For purposes of this definition, the phrase adult products means books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, tapes, records or other forms of visual or audio representations which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual

activities or specified anatomical areas. For purposes of this definition, the phrase adult products also means a device designed or marketed as useful primarily for the stimulation of human genital organs, or for sadomasochistic use or abuse. Such devices shall include, but are not limited to, phallic shaped vibrators, dildos, muzzles, whips, chains, bather restraints, racks, non-medical enema kits, body piercing implements (excluding earrings or other decorative jewelry) or other tools of sado-masochistic abuse.

Sec. 807-104. Adult cabaret.

As used in this chapter, adult cabaret means and includes a nightclub, bar, theater, restaurant or similar establishment that regularly features:

(1) Live performances by topless or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainers, where such performances are distinguished or characterized by an emphasis on specified sexual activities or by exposure of specified anatomical areas;

(2) Films, motion pictures, video cassettes, slides or other photographic reproductions which are distinguished or characterized by an emphasis upon the depiction or description of specified sexual activities or specified anatomical areas for observation by patrons;

(3) Persons who appear in a state of nudity or semi-nudity; or

(4) Persons who engage in erotic dancing or performances that are intended for the sexual interests or titillation of an audience or customer.

Sec. 807-105. Adult drive-in theater.

As used in this chapter, adult drive-in theater means and includes an open lot or part thereof, with appurtenant facilities, devoted primarily to the presentation of motion pictures, films, theatrical productions, and other forms of visual productions, for any form of consideration, to persons in motor vehicles or on outdoor seats in which a preponderance of the total presentation time is devoted to the showing of materials distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons.

Sec. 807-106. Adult entertainment business.

As used in this chapter, adult entertainment business means and includes an adult bookstore, adult motion picture theater, adult mini motion picture theater, adult motion picture arcade, adult cabaret, adult drive-in theater, adult live entertainment arcade, adult motel, or adult services establishment, which is not operating under a valid Indiana Alcoholic Beverage Commission permit for retail sales of wine, beer or liquor for on-premises consumption.

Sec. 807-107. Adult live entertainment arcade.

As used in this chapter, adult live entertainment arcade means and includes any building or structure which contains or is used for commercial entertainment

where the patron directly or indirectly is charged a fee to view from an enclosed or screened area or booth a series of live dance routines, strip performances or other gyrational choreography, which performances are distinguished or characterized by an emphasis on specified sexual activities or by exposure of specified anatomical areas.

Sec. 807-108. Adult mini motion picture theater.

As used in this chapter, adult mini motion picture theater means and includes an enclosed building with a capacity of more than five (5) but less than fifty (50) persons, used for presenting films, motion pictures, video cassettes, slides or similar photographic reproductions in which a preponderance of the total presentation time is devoted to the showing of materials which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas for observation by patrons therein.

Sec. 807-109. Adult motel.

As used in this chapter, adult motel means and includes a hotel, motel or similar establishment offering public accommodations for any form of consideration that offers a sleeping room for rent for a period of time that is less that ten (10) hours or allows a tenant or occupant of a sleeping room to sub-rent the room for a period of time that is less than ten (10) hours, and that provides patrons, upon request, with closed-circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions which are distinguished or characterized

by an emphasis upon the depiction or description of specified sexual activities or specified anatomical areas.

Sec. 807-110. Adult motion picture arcade.

As used in this chapter, adult motion picture arcade means and includes any place to which the public is permitted or invited wherein coin or slug-operated or electronically, electrically or mechanically controlled still or motion picture machines, projectors or other image-producing devices are maintained to show images to five (5) or fewer persons per machine at any one (1) time, and where the images so displayed are distinguished or characterized by an emphasis on matter depicting or describing specified sexual activities or specified anatomical areas.

Sec. 807-111. Adult motion picture theater.

As used in this chapter, adult motion picture theater means and includes an enclosed building with a capacity of fifty (50) or more persons used for presenting films, motion pictures, video cassettes, slides or similar photographic reproductions in which a preponderance of the total presentation time is devoted to showing of materials which are distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons therein.

Sec. 807-112. Adult service establishment.

As used in this chapter, adult service establishment means and includes any building, premises, structure or other facility, or any part thereof, under common ownership or control which provides a preponderance

of services involving specified sexual activities or display of specified anatomical areas.

Sec. 807-113. Nudity or state of nudity.

As used in this chapter, nudity or state of nudity means and includes the appearance of a human bare buttock, anus, anal cleft or cleavage, pubic area, male genitals, female genital, or vulva, with less than a fully opaque covering or a female breast with less than a fully opaque covering of any part of the nipple, or human male genitals in a discernibly turgid state even if completely and opaquely covered.

Sec. 807-114. Semi-nude or semi-nudity.

As used in this chapter, semi-nude or semi-nudity means and includes a state of dress in which clothing covers no more than the genitals, pubic region, and areola of the female breast, as well as portions of the body covered by supporting straps or devices.

Sec. 807-115. Specified anatomical areas.

As used in this chapter, specified anatomical areas means and includes any of the following:

(1) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areolae; or

(2) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

Sec. 807-116. Specified sexual activities.

As used in this chapter, specified sexual activities means and includes any of the following:

(1) Human genitals in a state of sexual stimulation or arousal;

(2) Acts of human masturbation, sexual intercourse or sodomy;

(3) Fondling or other erotic touching of human genitals, pubic regions, buttocks or female breasts;

(4) Flagellation or torture in the context of a sexual relationship;

(5) Masochism, erotic or sexually oriented torture, beating or the infliction of pain;

(6) Erotic touching, fondling or other such contact with an animal by a human being; or

(7) Human excretion, urination, menstruation, vaginal or anal irrigation as part of or in connection with any of the activities set forth in (1) through (6) above.

ARTICLE II. LICENSURE

Sec. 807-201. Applicability.

The following sections of this Code shall have no application to a license applied for or issued under this chapter: subsection (5) of section 801-201; section 801-202; subsection (b) of section 801-207; section 801-303; and, sections 801-412 through 801-415, inclusive.

Sec. 807-202. License required.

(a) It shall be unlawful for any person to maintain or operate an adult entertainment business in the city without first obtaining a license therefor from the controller.

(b) A license granted pursuant to this section shall be subject to annual renewal upon the written application of the applicant and a finding by the city that the applicant is in compliance with all of the provisions of this chapter. The renewal of the license shall be subject to the payment of the fee as set forth in section 807-203 of the Code.

Sec. 807-203. License fee.

The annual license fee shall be for the period of January first to December thirty-first and shall be seventy-five dollars ($75.00) for each business location.

Sec. 807-204. Application for license.

(a) All applications for licenses shall be made to the controller. The application for a license required by this article shall include the following information:

(1) Name and business address of the applicant;

(2) The name and address of the business;

(3) Telephone number of the applicant;

(4) The state of incorporation (where applicable);

(5) The names of partners or corporate officers (where applicable);

(6) The registered agent, his or her address, and the principal office of the corporation (where applicable);

(7) The length of time the business has been in Indianapolis;

(8) Any previous location or location change of the business within two (2) years;

(9) The applicant's citizenship;

(10) Whether or not the applicant or any partner or corporate officer for the applicant business has ever been denied a license, had a license revoked or suspended;

(11) Whether all city, county and state taxes have been paid;

(12) The seating capacity of the establishment; and

(13) The number of business locations, stages, motion picture or video screens, closed circuit televisions and motion picture or video screens, projectors or other image-producing devices.

(b) The application shall be signed and sworn to be true and correct by the applicant.

(c) Where a person seeks a license to operate an adult entertainment business, the applicant may begin operating the facility forty-five (45) days

after submitting a completed application, even in those instances when the controller denies the request to issue a license, except as otherwise set forth in this paragraph. The controller shall have forty-five (45) days in which to determine whether to issue a license. If the controller fails to act by either granting or denying the license within forty-five (45) days, the license shall be granted by operation of law. If the controller denies the request to issue a license, the controller shall issue a conditional license to operate if a timely petition for judicial review is filed within ten (10) days of receipt of notice of the controller's decision. Such a conditional license shall operate in all respects as a license until judicial review is completed by a trial court of competent jurisdiction. A conditional license shall not permit the applicant to operate in violation of any other ordinance or law. In particular, the applicant shall not operate in violation of any zoning requirement set forth in section 732-216 of the Code.

(d) During the term of a license under this chapter, a licensee shall provide the controller with written notice of any additions or changes in the information given in the license application.

Sec. 807-205. Grounds for denial.

An application for a license or for renewal of a license under this chapter may be denied if the applicant:

(1) Where applicable, is not a corporation organized by law or authorized and qualified to do business in the state;

(2) Has not fully paid the license fee;

(3) Is delinquent to the city, county or state for any taxes, or is indebted to the city, county or state for any other reason unless the delinquency or indebtedness is the subject of pending litigation; or

(4) Has failed to provide all information required by this article or has falsely provided such information.

Sec. 807-206. Grounds for suspension or revocation; license administrator's hearing.

(a) A license granted under this article may be suspended or revoked for any reason an application for renewal may be denied under section 807-205 of this Code, or if the licensee:

(1) Conducts the business or maintains the premises in such a manner as to create a nuisance to the public;

(2) Knowingly permits any illegal conduct or practice to take place on the business premises or in the conduct of the business; or

(3) Violates the premises requirements or operational requirements provided in section 807-301 or section 807-302 of this Code.

(b) A suspension or revocation of a license under this chapter shall not be made without first holding a controller's hearing under the procedures provided in Chapter 801, Article IV, Division 2 of this Code.

Sec. 807-207. Judicial review of denial, suspension or revocation.

(a) A denial of an application for a license or for renewal of a license under this chapter shall not be subject to administrative review under the procedures provided in Chapter 801, Article IV, Divisions 2 and 3 of this Code, but in the alternative may be appealed to the Marion Superior Court.

(b) A suspension or revocation of a license under this chapter shall not be subject to administrative review under the procedures provided in Chapter 801, Article IV, Division 3 of this Code, but in the alternative may be appealed to the Marion Superior Court.

(c) The appeal of a denial, suspension or revocation under this chapter shall be subject to the same rules and procedures, and shall be conducted in the same manner, as prescribed for judicial review under Indiana Code Chapter 4-21.5-5, as the same shall be amended from time to time; provided, however, that notwithstanding the provisions of those statutes, the following requirements apply to a petition for judicial review filed under this chapter:

(1) The petition must be filed within ten (10) days of the issuance of the controller's decision; and

(2) Within fourteen (14) days from the date the city was served with the petition, the controller shall prepare the city's record for the petitioner to transmit to the court.

ARTICLE III. REGULATIONS

Sec. 807-301. Premises requirements.

(a) It shall be unlawful to own or operate an adult entertainment business that is not in compliance with the requirements stated in this section, provided that adult entertainment businesses in operation on the effective date of this ordinance shall have sixty (60) days from such effective date to come into compliance with subsections (b) through (h) of this section.

(b) Upon application for an adult entertainment business license or a renewal of such a license, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations and the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed thirty-two (32) square feet of floor area. The diagram shall also designate the place at which the license will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however, each diagram should be

oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six (6) inches. The controller may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since the diagram was prepared.

(c) No alteration in the configuration or location of a manager's station may be made without the prior approval of the controller.

(d) Restrooms may not contain video reproduction equipment.

(e) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises, to ensure that no patron is permitted access to any area of the premises that has been designated as an area in which patrons will not be permitted in the application filed pursuant to subsection (b) of this section.

(f) Except for those premises identified in sections 807-105, 807-108, 807-109, and 807-111 of the Code and those premises identified in subsection (h) of this section, the premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an

illumination of not less than ten (10) foot candles as measured at the floor level. It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises, to ensure that the illumination described in this subsection is maintained at all times that any patron is present in the premises.

(g) All locational requirements of this section must be approved or denied by the license administrator within forty-five (45) days from the time the application is filed.

(h) With respect to an adult entertainment business that has individual booths:

(1) Each booth shall have a rectangular shaped entranceway of not less than two (2) feet wide and six (6) feet high;

(2) There shall be no door, curtain or other obstruction blocking or closing off such entranceway so as to obstruct the visibility of a patron;

(3) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises;

(4) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose, excluding restrooms. If the

premises has two (2) or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose, excluding restrooms, from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station. Viewing booths must be separated at least twelve (12) inches from the exterior walls of any other viewing booths by open space; and

(5) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than ten (10) foot candles as measured at the floor level. However, if a lesser level of illumination shall be necessary to enable a patron to view the adult entertainment in a booth, a lesser amount of illumination may be maintained in the booth, provided, however, at no time shall there be less than two (2) foot candles of illumination, as measured from the floor. It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises to ensure that the illumination described in this subsection is maintained at all times

that any patron is present in the premises.

(i) A person having a duty under subsections (b) through (h) of this section commits a violation if he or she knowingly fails to fulfill that duty.

Sec. 807-302. Operational requirements.

(a) It shall be unlawful to own or operate an adult entertainment business that is not in compliance with the requirements stated in this section.

(b) An adult entertainment business shall be kept in a sanitary condition at all times. As a condition of licensure under this chapter, the controller or controller's designee shall have the right to enter any licensed premises during business hours without notice to insure compliance with this chapter, and it shall be unlawful for a person to prevent or deny any such entry. The controller shall have the power to determine if such business is in a sanitary condition. For such purpose, the controller shall have, upon demand, the assistance of the administrator of the division of compliance of the department of metropolitan development, and the Health and Hospital Corporation of Marion County. If the controller shall determine, after investigation by the division of development services or the Health and Hospital Corporation of Marion County, that an unsanitary condition exists within an adult entertainment business, the controller shall suspend the license for such premises until such unsanitary condition is rectified.

(c) No licensee under this article, or his employee, shall violate any state statute or city ordinance, or allow any other person to commit such a violation, within such business or on parking areas or other property immediately adjacent to or normally used for purposes of parking for such business, which property is under the control of the business owner or owners or their lessee or lessor.

(d) Adult entertainment businesses shall not be open between the hours of midnight and 10:00 a.m. and shall not be open on Sundays.

ARTICLE IV. SEVERABILITY

Sec. 807-401. Severability.

In the event any section, subsection, clause, phrase or portion of this chapter is for any reason held illegal, invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remainder of this chapter. It is the legislative intent of the council that this chapter would have been adopted if such illegal provision had not been included or any illegal application had not been made.

SECTION 2. The expressed or implied repeal or amendment by this ordinance of any other ordinance or part of any other ordinance does not affect any rights or liabilities accrued, penalties incurred, or proceedings begun prior to the effective date of this ordinance. Those rights, liabilities, and proceedings are continued, and penalties shall be imposed and enforced under the

repealed or amended ordinance as if this ordinance had not been adopted.

SECTION 3. This ordinance shall be in effect from and after its passage by the Council and compliance with Ind. Code § 36-3-4-14.

The foregoing was passed by the City-County Council this 6th day of October, 2003, at 8:34 p.m.

ATTEST:

s/ Philip C. Borst, D.V.M.
Philip C. Borst, D.V.M.
President, City-County Council

s/ Suellen Hart
Suellen Hart, Clerk, City-County Council

Presented by me to the Mayor this 13th day of October, 2003, at 10:00 a.m.

s/ Suellen Hart
Suellen Hart, Clerk, City-County Council

Approved and signed by me this 14 day of October, 2003.

s/Bart Peterson
Bart Peterson, Mayor

STATE OF INDIANA, MARION COUNTY)
) SS:
CITY OF INDIANAPOLIS)

I, Suellen Hart, Clerk of the City-County Council, Indianapolis, Marion County, Indiana, do hereby certify the above and foregoing is a full, true and complete copy of Proposal No. 484, 2003, a Proposal for GENERAL ORDINANCE, passed by the City-County Council on the 6th day of October, 2003, by a vote of 29 YEAS and 0 NAYS, and was retitled General Ordinance No. 87, 2003, which was signed by the Mayor on the 14th day of October, 2003, and not remains on file and on record in my office.

WITNESS my hand and the official seal of the City of Indianapolis, Indiana, this 14th day of October, 2003.

s/Suellen Hart
Suellen Hart, Clerk, City-County Council

(SEAL)